Demodeling Habeas

Ann Woolhandler*

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INTRODUCTION

Federal habeas corpus is being "reformed," and its future is uncertain. Under the current habeas statute, the successor to the Habeas Corpus Act of 1867, federal and state prisoners may collaterally attack their convictions in federal court on the ground that they are being held "in violation of the Constitution." Since the Supreme Court's 1953 decision in Brown v. Allen, federal courts have interpreted the statute to permit broad review of habeas petitions. In recent years, however, the Court has narrowed drastically federal court review of both law and fact in collateral attacks on state court convictions. Further restrictions seemed imminent with the Court's grant of certiorari in Wright v. West to decide whether federal courts on habeas should continue to reassess freely a state court's application of federal law to facts, or employ a more deferential standard of review. But the surprisingly fractured and inconclusive result in West at the end of the Court's most recent Term indicated that the zeal of some of the Justices for stripping federal jurisdiction may have reached its limit. Similar ferment and lack of consensus was reflected in the political branches. In 1991, the Senate approved significant restrictions on habeas proposed by the Bush Administration. A less restrictive proposal emerged from the House, but failed to become law largely due to administration objections that the bill did not sufficiently restrict federal habeas review.

2. 344 U.S. 443 (1953).
3. See, e.g., Teague v. Lane, 489 U.S. 449 (1989), discussed at notes 377-382 infra and accompanying text; see also Sawyer v. Whiteley, 112 S. Ct. 2514 (1992) (refusing to consider defaulted or successive constitutional claims on habeas absent showing of actual innocence); Gomez v. California, 112 S. Ct. 1652 (1992) (refusing to consider claim that execution by lethal gas was cruel and unusual punishment because prisoner failed to raise issue in prior habeas petitions); Coleman v. Thompson, 111 S. Ct. 2546 (1991) (prisoner's procedural default in failing to file timely appeal in state court precluded federal review absent showing of cause and prejudice, or fundamental miscarriage of justice); McCleskey v. Zant, 111 S. Ct. 1454 (1991) (failure to raise claim in earlier federal habeas petition barred subsequent petition absen showing of cause and prejudice or fundamental miscarriage of justice); Murray v. Carrier, 477 U.S. 478 (1986) (attorney error short of ineffective assistance does not amount to cause for procedural default in state court and precludes federal habeas review).
4. See Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) (absent showing of miscarriage of justice, federal habeas petitioner seeking evidentiary hearing must show both cause for failure to develop facts adequately in state court and resulting prejudice).
5. See Wright v. West, 931 F.2d 262 (4th Cir. 1991), cert, granted, 112 S. Ct. 656 (1991), and order amended, 112 S. Ct. 672 (1991), rev'd on other grounds, 112 S. Ct. 2482 (1992). The Court amended its grant of certiorari to request that the parties address the question:
In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to a judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination de novo? Id. at 672; see also Withrow v. Williams, 112 S. Ct. 1664 (1992) (certiorari granted on issue of whether rules of Miranda v. Arizona, 384 U.S. 436 (1966), will apply on habeas).
6. Compare the opinion of Justice Thomas, for three justices, not deciding issue of standard of review of state court application of law to fact, but favoring deferential standard, 112 S. Ct. 2482, 2484 (1992) (Thomas, J., plurality opinion), with Justice O'Connor's opinion, also for three justices, favoring continuation of de novo review of application of law to fact. Id. at 2493 (O'Connor, J., concurring).
7. See S. 1241, 102d Cong., 1st Sess. § 1105 (1991) (limiting habeas review to cases in which
While a variety of political and judicial forces influenced changes in habeas, a scholarly debate over the proper scope of habeas also contributed to the continuing controversy. Two competing models of habeas corpus dominate the academic dispute. At one extreme is a "full-review" model, which was in acknowledged ascendancy from the 1953 decision in *Brown v. Allen*, until the Burger Court began to narrow the scope of habeas in the mid-1970s. Under this model, a federal trial court considering a habeas petition will review de novo all federal constitutional issues that were properly raised and preserved in state criminal proceedings. At the other extreme is an "institutional competence" model, which served as the basis for the Bush Administration proposal approved by the Senate. Under this model, federal courts considering habeas applications from state prisoners would be precluded from reconsidering most issues of federal constitutional law provided there had been a "full and fair" opportunity to address those issues in the state court. Between these two poles lie other models that would restrict habeas to something less than de novo review of constitutional error, but at the same time allow for limited review in some circumstances in the state courts failed to provide a full and fair opportunity to litigate constitutional issues; H.R. Conf. Rep. No. 3371, 102d Cong., 1st Sess. (1991) (not containing similar limitations).

Although the polar models roughly define the limits of the debate, some scholars identify additional models. See, e.g., Barry Friedman, *A Tale of Two Habeas*, 73 Minn. L. Rev. 247, 277 (1988).  


344 U.S. 443 (1953). At its broadest, the full review model would include de novo review of factual findings relevant to federal constitutional law determinations, as well as de novo review of federal constitutional law issues. This article, however, primarily addresses the standard of review of issues of federal constitutional law, and does not focus on the degree of deference accorded to the factual findings of the convicting court system.


Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). This model is also referred to as a "corrective process" model, because it assumes that federal habeas should be available only "if the state itself failed to provide adequate process to correct the constitutional violation." See Friedman, supra note 8, at 277.

The Senate bill would have amended 28 U.S.C. § 2254 by adding a new subsection (d): "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings." S. 1241, 102d Cong., 1st Sess. § 1105 (1991). The bill provided a similar standard for capital proceedings. Id. § 1112. The Senate bill also provided that "a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct." Id. § 1105. The standard for review was taken from S. 635, 102d Cong., 1st Sess. § 205(2) (1991), a Bush Administration proposal that was similar to the Reagan Administration proposal. See Larry W. Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 Iowa L. Rev. 609, 621, 629 (1983) (citing S. 2216, 97th Cong., 2d Sess. § 5 (1982)). The Reagan Administration justified the full and fair opportunity standard in part based on the argument that *Brown v. Allen* was an "arbitrary" departure from precedent, and the Administration expressly relied on Bator's habeas analysis. *Id.* at 622 & n.74.

It is unclear if the Bush Administration intended the full and fair opportunity standard to be as deferential to the convicting court system as did Bator. The Administration explained Title II of S. 635, which used the full and fair opportunity standard and which was incorporated into S. 1241, as a reasonable interpretation of law standard. See Richard Faust, Tina J. Rubenstein & Larry W. Yackle, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. Rev. L. & Soc. Change 637, 641 n.12 (1991) (discussing proffered interpretations of the full and fair opportunity standard, but questioning whether courts would use them).
which the prisoner had already received a full and fair opportunity to litigate in state court.\footnote{14} Various justifications have been offered for these polar models of habeas.\footnote{15} Those who favor full review argue that it is justified by the liberty interest at stake in habeas proceedings, by the importance of vindicating constitutional rights,\footnote{16} by the structural superiority of the federal courts in considering issues of federal constitutional law,\footnote{17} and by the importance of

\footnote{14. The most significant of these intermediate models emerged from the Supreme Court's decision in Teague v. Lane, 489 U.S. 288 (1989), which effectively adopted a reasonable interpretation of law standard for habeas review of many state court convictions. See notes 377-382 infra and accompanying text. Because one of the Court's principal rationales for adopting the reasonable interpretation of law standard was that it purportedly provided sufficient incentive for state judges to conduct their proceedings in accordance with constitutional principles, Teague has also been seen as representative of a "deterrence" model. See Teague, 489 U.S. at 306; Joseph L. Hoffmann, The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners, 1989 Sup. Ct. Rev. 165, 178. Another often discussed model is Judge Henry Friendly's innocence based model. Judge Friendly suggested that as a prerequisite to federal court consideration of underlying federal constitutional issues, the prisoner should have to make a colorable showing of innocence. Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970); see also Ellen E. Boshkoff, Note, Resolving Retroactivity After Teague v. Lane, 65 Ind. L.J. 651, 667 (1990) (arguing exception to nonretroactivity rule of Teague for factual innocence). Judge Friendly would have allowed collateral attack without a showing of innocence for cases that roughly parallel those in which the prisoner had not been accorded a full and fair opportunity to present federal constitutional issues. Friendly, supra, at 151-53.}

\footnote{15. Cognates of the "full-review" model include what others have referred to as a "liberty based" model, a "rights based" model, and an "appellate" model. See Friedman, supra note 8, at 267-69, 286-88. These three models are distinguished by what their proponents see as the primary rationale for federal court collateral review of state convictions. Advocates of a rights based model view habeas as vindicating constitutional rights and articulating constitutional norms. Id. at 267 & n.81. The related liberty based model asserts that the seriousness of a wrongful deprivation of liberty warrants extra protections. Id. at 268 & n.83; Larry W. Yackle, Explaining Habeas Corpus, 60 N.Y.U. L. Rev. 991, 992 (1985). The appellate model sees habeas as a surrogate for Supreme Court review, justified by the superiority of federal courts in deciding federal constitutional issues and the impracticality of direct Supreme Court review. Friedman, supra note 8, at 331-32. While exclusive reliance on a rights, liberty, or an appellate rationale can lead to different results on issues such as the effect of procedural default and the allowance of repetitive petitions, the differences between these three models are not significant for the purposes of this article. All three contemplate de novo review of constitutional issues and could be considered variations of the full review model.}

\footnote{16. See Yackle, supra note 14, at 1011-12 (cataloging justifications for federal collateral review); see also Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990 B.Y.U. L. Rev. 67, 78-80 (discussing arguments for and against the necessity of federal courts deciding individual liberty cases).}

\footnote{17. See, e.g., Anthony G. Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793 (1965); see also Hoffmann, supra note 14, at 178.}

\footnote{18. See, e.g., Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1036 (1977) (Court chose redundancy and indirection as remedial strategy to mediate between pragmatic perspective of criminal administration and idealistic vision of constitutional rights); Developments in the Law: Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1040-42, 1059-62 (1970) [hereinafter Developments]; Curtis R. Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 451, 464 (1960); Yackle, supra note 14, at 997, 1019, 1031 (arguing that habeas is a trade off for refusing criminal litigants access to federal courts in first instance; the institutional setting in which state courts address Fourteenth Amendment claims makes their primary focus the implementation of state substantive criminal law policies); Yackle, supra note 13, at 616 (the "current system of postconviction review reflects...historical attempts to coerce state courts into accepting federal doctrinal innovations"); Abraham D. Sofaeer, Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U. L. Rev.
federal court, appellate style review of constitutional questions given the impracticality of Supreme Court direct review. Those who would provide less than de novo review of issues of federal constitutional law on habeas argue that according finality to criminal convictions serves the substantive purposes of criminal law, preserves scarce judicial resources, and serves the ends of federalism by reducing friction between the federal and state governments. Moreover, proponents of each view support their position with different versions of the history of habeas. Paul Bator, for instance, has detailed a history of habeas supporting the institutional competence model of habeas history, while Gary Peller has provided an alternative version supporting the full review model. These two competing versions were recently echoed in the heated disagreement on habeas history between Justices Thomas and O'Connor in Wright v. West. Even though the availability of habeas is considered to be largely a matter of statute, the hist-

78 (1964) (habeas isolates constitutional issues from rest of criminal process); see also Erwin Chemerinsky, Party Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233, 317-18 (1988) (giving litigants with constitutional claims a choice between state and federal forums maximizes enforcement by reducing relitigation).

18. See, e.g., Developments, supra note 17, at 1061; Friedman, supra note 8, at 253-54; Reitz, supra note 17, at 464; J. Skelly Wright & Abraham D. Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-finding Responsibility, 75 YALE L.J. 895, 897 (1966); see also Chemerinsky & Kramer, supra note 15, at 87 (federal habeas courts serve appellate function due to distrust of state courts); Henry M. Hart, Jr., The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 HARV. L. Rev. 84, 106-07 (1959) (Brown v. Allen, 344 U.S. 443 (1953)), can perhaps best be explained as resting on principle that a state prisoner ought to have the opportunity for a hearing in a federal constitutional court). "Appellate style" review refers to review that includes de novo review of issues of federal constitutional law. The degree of review of fact could vary within an "appellate style" review framework.


20. See, e.g., Bator, supra note 12, at 451, 509-10 (questioning the wisdom of duplicating effort, because no proceeding can ever assure the ultimate truth).

21. See id. at 503. Part of the federalism argument is that federal habeas review insults state court judges and diminishes their sense of responsibility. See Teague v. Lane, 489 U.S. 288, 310 (1989); Bator, supra note 12, at 451, 505-06; see also Joseph L. Hoffmann, Retroactivity and the Great Write: How Congress Should Respond to Teague v. Lane, 1990 B.Y.U. 183, 206 (discussing Teague's impact on the role of federal and state courts); Hoffmann, supra note 14, at 167, 169 (same); James S. Liebman, More Than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane, 18 N.Y.U. Rev. L. & Soc. Change 537, 598-600 (1991) (same). Proponents of a narrow role for habeas argue that a correct result is never certain; therefore, there is no reason to believe that federal relitigation will provide a more accurate decision than the initial decision of the state court. See Bator, supra note 12, at 447-48.

22. See, e.g., Chemerinsky, supra note 17, at 293-94 (noting historical debate between Bator and Peller); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. Rev. 1733, 1805 n.407 (1991) (same); Yackle, supra note 13, at 616 n.40 (same). This is not to say that all proponents of a full review model or related models rely on history for support. See, e.g., Friedman, supra note 8, at 267 (accepting a restrictive view of habeas prior to Brown, but also advocating full review of both law and fact).


26. See id. at 2493-94 (O'Connor, J., concurring).
torical debate involves more than statutory interpretation. Because habeas is a vehicle for remedying constitutional violations, the historical debate implicates the extent to which constitutional violations require effective remedies.

While proponents of the two models of habeas review essentially the same set of precedents, they interpret them in starkly different ways. In this article, I attempt to expose gaps in both models and offer a different analysis that explains how such disparate interpretations could emerge from the same body of decisional law. In sum, difficulties in interpreting the history of habeas arise from scholars having focused too much on particular habeas corpus cases, without viewing them in the broader context of the evolving pattern of remedies against government available in the federal courts. The basis for these remedies has shifted from the common law to limitations on government originating in the Constitution. This revised version of habeas history will show that the federal habeas remedy was not uniformly available to address all constitutional wrongs arising in criminal cases in the nineteenth century. Nevertheless, the scope of habeas review reflected the Court’s gradual willingness to address ad hoc or random acts of official illegality (that is, official action not specifically authorized by legislation) as constitutional violations rather than common law violations, and to provide federal remedies for such abuses.

Viewing habeas corpus in the broader context of judicial review of official action clarifies the discussion, but does not simplify it. Unlike the tidy historical interpretations of Bator and Peller—each of which supports a current model of habeas corpus—this inquiry produces a dynamic, rather than static, model of habeas. The revised history suggests that the institutional competence model, which sees habeas as historically limited to issues of ju-

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27. The Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2. In Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), however, the Court held that a federal court’s ability to grant habeas was dependent on a congressional grant of jurisdiction. See Francis Paschal, The Constitution and Habeas Corpus, 1970 DUKE L.J. 605, 717-18; see also notes 126-132 infra and accompanying text.

28. The different historical interpretations of habeas law reflect different approaches to judicial federalism. Richard Fallon has described two models that dominate debates on the role of federal courts. Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 VA. L. REV. 1141 (1988). On one hand is what Fallon refers to as the “federalist” vision, in which “states emerge as sovereign entities against which federal courts should exercise only limited powers, and state courts, which are presumed to be as fair and competent as federal courts, stand as the ultimate guarantors of constitutional rights.” Id. at 1143-44. On the other hand, the “nationalist” model emphasizes the reordering of state and federal relationships inaugurated by the Civil War and Reconstruction. It supports the view that “state sovereignty interests must yield to the vindication of federal rights and that, because state courts should not be presumed as competent as federal courts to enforce constitutional liberties, rights to have federal issues adjudicated in a federal forum should be construed broadly.” Id. at 1144-45. This article, while taking a middle ground on the history of habeas, reflects my own somewhat “nationalist” perspective.

29. Cf. Friendly, supra note 14, at 156 (noting that Bill of Rights has become a detailed code of criminal procedure).

30. See generally LARRY ALEXANDER & PAUL HORTON, WHOM DOES THE CONSTITUTION COMMAND? (1988) (presenting schematic models for determining whether Constitution addresses only lawmakers, all government officials, or all citizens generally).
risdiction, oversimplifies a complex, evolving pattern of constitutional law and federal jurisdiction. As a consequence, the Supreme Court’s reliance on this narrow version of habeas history to justify further restrictions is misplaced. The competing claim that habeas historically demanded full review is also flawed. It fails to acknowledge that, for a time, the Court restricted federal trial court jurisdiction so as not to police the full range of potential constitutional violations, particularly those involving random illegal acts by government officials. Nevertheless, I will argue that the process of transforming common law violations into constitutional violations supports a full review model for habeas, even if claiming for it an evolutionary rather than a static pedigree.31

Finally, I show that the fate of habeas continues to be tied to that of other federal court remedies against government officials. The Supreme Court’s recent and dramatic retreat from the full review model in habeas—permitting relief primarily when the convicting court “unreasonably” interpreted federal constitutional law existing at the time of conviction32—is paralleled in other areas of the law of government accountability. The Court uses the unreasonable interpretation of law standard in the areas of the exclusionary rule,33 official immunities from damages liabil-


32. See Teague v. Lane, 489 U.S. 288 (1989); see also Butler v. McKellar, 494 U.S. 407 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989). In the guise of a decision about the retroactivity of “new” constitutional criminal procedure decisions, the Court appears to have effectively changed the federal standard of habeas review from de novo review of law to whether the state court unreasonably interpreted existing case law. A case presents new law if the outcome was not clearly dictated by prior Supreme Court precedent. Teague, 489 U.S. at 301; see also Butler, 494 U.S. at 412-14; Penry, 492 U.S. at 314. For discussions of the effect of Teague and its progeny on the standard of review on habeas, see Vivian Berger, Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus, 90 COLUM. L. REV. 1665, 1701 (1990); Fallon & Meltzer, supra note 22, at 1734; Hoffmann, supra note 21, at 210-11; Hoffmann, supra note 14, at 165; see also Faust et al., supra note 13, at 646-48 & n.32 (arguing that Teague threatens to enact the “full and fair” adjudication program by indirection); Barry Friedman, Habeas and Hubris, 45 VAND. L. REV. 797, 823 (1992) (asserting that Teague shuts down the habeas courts). The Conference version of the 1991 crime bill would have moderated Teague’s definition of new law. See H.R. CONF. REP. No. 3371, supra note 7, at § 204.

The various opinions of the Court in West indicate that disagreement among the justices as to whether the reasonable interpretation of law standard applies to all habeas cases or merely to cases that seek to apply “new” law. See note 6 supra. Virtually all members of the Court, however, see “new law” as including not only decisions announcing novel general principles, but also decisions applying prior decisions to novel settings. See Stringer v. Black, 112 S. Ct. 1130, 1135 (1992); see also West, 112 S. Ct. at 2497 (O’Connor, J., concurring) (although taking position that Teague applies only to “new law” cases, the determination of what constitutes a new rule “requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final”) (citations omitted); Butler, 494 U.S. at 415 (even a decision within the “logical compass” or “controlled” by a prior decision may nevertheless be a “new rule” under Teague). Thus while Teague’s reasonable interpretation of law standard will apply to forbid habeas relief in many cases, a majority of the Court has not held that the standard could apply if the petitioner is claiming that the state courts incorrectly applied an established rule in a nonnovel setting. See Stringer, 112 S. Ct. at 1140.

33. See, e.g., Massachusetts v. Sheppard, 468 U.S. 981, 987-88 (1984) (technical defect in warrant should not lead to exclusion of evidence where officers acted in good faith); United States v. Leon, 468 U.S. 897, 920 (1984) (allowing exception to exclusionary rule where officer, in objective...
ity, and review of decisions of law by federal agencies. The effect of the unreasonable interpretation of law standard in constitutional cases has been to deny remedies when violations occur through ad hoc official illegality, while constitutional violations occurring under statutes or through continuing policies are more readily subject to full review. In applying the unreasonable interpretation of law standard, the Supreme Court sought to reverse the evolutionary process by which random violations of constitutional rights came to be treated as on par with violations occurring under statutes. This result, though not without a historical analog, is inconsistent with my reading of the historical development of the writ.

I. TWO VERSIONS OF HABEAS HISTORY

Congress passed the predecessor to the modern habeas statute in 1867. This Act gave the federal courts the “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.” The legislative history of the 1867 Act is limited, and its terms could be considered ambiguous. Scholars have therefore looked to decisions under the Judiciary Act of 1789, which gave federal courts power to grant habeas to federal prisoners, to determine the intent of Congress when passing the 1867 Act giving the federal courts power to grant habeas to both state and

good faith, relies on warrant invalidated for lack of probable cause); see also Illinois v. Krull, 480 U.S. 340, 349 (1987) (good faith exception for warrantless search pursuant to unconstitutional statute); Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) (evidence discovered in search incident to arrest under an unconstitutional statute should not be excluded); Hoffmann, supra note 14, at 167 (noting parallel between habeas and good faith exception to exclusionary rule).

34. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 816-18 (1982) (adopting objective reasonableness standard for qualified immunity from damages); see also Fallon & Meltzer, supra note 22, at 1734-35 (drawing parallel between the Court’s habeas and immunity decisions).


37. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 190-94 (1980) (reviewing legislative history but finding it unenlightening); Bator, supra note 12, at 476; William M. Wiecek, The Reconstruction of Federal Judicial Power, 1863-1875, 13 AM. J. LEGAL HIST. 333, 344-45 (1969) (finding origin of 1867 Act in Republican concern for freedmen, but noting that revision enlarged habeas to be coextensive with judicial powers that constitutionally could be conferred on federal courts). But cf. Lewis Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. REv. 31, 36-43 (1965) (legislative history suggesting that the 1867 Act’s primary purpose was to assure that freed slaves were not held in bondage). “In violation of the constitution” could refer either to detention without a full and fair proceeding (regardless of legal or constitutional error), or detention after constitutional error occurred in the state proceeding. In short, the words of the statute are arguably compatible with either a full review model or one that defers to state court decision making.

38. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, 81-82. The Act granted federal courts power to issue writs of habeas corpus for prisoners held under color of authority of the United States. It therefore only applied to federal prisoners. Francis Paschal, however, has argued that the Framers intended habeas jurisdiction to vest automatically in state and federal superior courts, and that § 14 of the 1789 Act had a more limited purpose. Paschal, supra note 27, at 615-19, 637-41.
federal prisoners. Commentators have also examined habeas cases involving state and federal prisoners subsequent to 1867 to indicate contemporary understandings of the scope of habeas and the 1867 Act. Paul Bator and Gary Peller derive their different interpretations of the scope of federal habeas from these sources.

A. The Institutional Competence (or Jurisdiction Only) Model

Professor Paul Bator, the predominant voice in this historical debate, presents a compelling version of habeas history which supports not only the institutional competence model, but all versions of habeas that provide for anything less than full review. Bator's version of nineteenth century habeas has received widespread scholarly acceptance, and has provided courts and Congress with a seemingly secure foundation for limiting the range of issues in collateral attacks on state court convictions in federal courts. Most recently, Justice Thomas deployed Bator's interpretation to

39. See, e.g., DUKER, supra note 37, at 225-29; Bator, supra note 12, at 465-74, 477; Peller, supra note 9, at 610-18.
40. See DUKER, supra note 37, at 230-48; Bator, supra note 12, at 474-83; Peller, supra note 9, at 620-43. After 1867, federal prisoner cases could be brought under the 1879 Act or the 1867 Act. See, e.g., Ex parte Lange, 85 U.S. (18 Wall.) 163, 166 (1874) (federal prisoner case under 1879 Act); Ex parte McCord, 73 U.S. (6 Wall.) 318, 318 (1868) (federal prisoner case under 1867 Act). In 1868, however, Congress removed the Court's appellate jurisdiction under the 1867 Act to preclude it from considering the constitutionality of Reconstruction legislation. See Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44, discussed in Bator, supra note 12, at 465 n.49. In 1885, Congress restored the appellate jurisdiction originally given to the Court under the 1867 Act. See Act of Mar. 3, 1885, ch. 353, 23 Stat. 437, discussed in Bator, supra note 12, at 465 n.49. The Court generally did not distinguish which act the federal prisoner cases were brought under, except from 1868 to 1885 when Congress suspended the Court's jurisdiction under the 1867 Act. State prisoner cases during this period generally could only be brought under the 1867 Act.
41. Bator, supra note 12.
42. For example, in Teague v. Lane, 489 U.S. 288 (1989), which denies habeas if the convicting court reasonably interpreted existing precedent, the Court did not claim that history directly supports review for a reasonable interpretation of law. See note 14 supra. But the Court has cited Bator's version of history to support narrowing habeas. See McCleskey v. Zant, 111 S. Ct. 1454, 1461-62 (1991). Similarly, Judge Friendly made no claim that the availability of habeas historically was dependent on demonstrating innocence. See Friendly, supra note 14, at 151; see also JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS: PRACTICE AND PROCEDURE § 2.2, at 12-16 (1988). Judge Friendly used a version of history similar to Bator's to support restricting habeas. Friendly, supra note 14, at 151.
43. See PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1488-98 (3d ed. 1988). For discussions reflecting Bator's influence, see, for example, DUKER, supra note 37, at 3 (providing an expanded version of habeas history using an institutional competence interpretation similar to Bator's); Developments, supra note 17, at 1147-49 (presenting history of habeas similar to Bator's); Friedman, supra note 8, at 252-53 (criticizing Brown v. Allen, 344 U.S. 443 (1953), for not explaining the basis for its expanded habeas review); Friendly, supra note 14, at 151 (relying on Bator's history to justify limiting collateral attack); Hoffmann, supra note 14, at 176 & n.46 (citing Bator to support 'fair opportunity' to litigate standard); cf. Hart, supra note 18, at 103-04 (noting that black letter habeas law limited inquiry to institutional competence, but impact softened by continued expansion of jurisdictional inquiry); Mayers, supra note 37, at 56 & n.92 (citing Bator to support claim that jurisdiction was only issue on habeas).
44. See, e.g., McCleskey, 111 S. Ct. at 1461-62 (reciting Bator's version of habeas history in case limiting repetitive petitions); Stone v. Powell, 428 U.S. 465, 474-76 (1976) (using Bator's interpretation to limit Fourth Amendment challenges on habeas); Manus Cooney, An Explanation of
justify limiting the writ in *Wright v. West*.\(^{45}\)

According to Bator, the common law habeas writ was primarily a remedy for executive or military detentions that occurred without judicial process.\(^{46}\) Where detention resulted from judicial convictions, habeas was limited to questions of whether the convicting court had properly exercised jurisdiction over the defendant and the subject matter of the criminal proceeding.\(^{47}\) In this context, habeas presented a much more limited form of review than did direct review in the Supreme Court on a "writ of error." Writs of error, which we would now call "appeals," allowed for review of right for legal errors occurring in the convicting court. For Bator, however, habeas was less like direct review and more like collateral attack on a civil judgment—which did not generally permit reconsideration of the merits, but only a determination of whether the court rendering judgment had jurisdiction. Bator shows that in cases involving federal prisoners under the 1789 Act the Supreme Court did indeed purport to limit habeas to questions of jurisdiction.\(^{48}\) He then traces the Court's willingness, shortly after the enactment of the 1867 statute, to allow review of certain issues on habeas that were not truly jurisdictional, such as whether a prisoner had been convicted under an unconstitutional statute, or had been given an illegal sentence.\(^{49}\) Although these issues did not challenge the jurisdiction of the convicting court in the strict sense, the Court continued to label them "jurisdictional."\(^{50}\) According to Bator, such expansions of the concept of jurisdiction, while misguided, were limited.\(^{51}\) In particular, he argues that the Court never took the position that collateral inquiry was appropriate whenever the convicting court had ruled on an issue of constitutional law.\(^{52}\) Therefore, the Court overall limited habeas to issues of personal and subject matter jurisdiction—that is, the institutional competence of the convicting court.

Early in this century, the Court undertook what Bator saw as a salutary expansion of the concept of institutional competence by allowing federal courts to consider whether the state court system had provided a full and

\(^{45}\) 112 S. Ct. 2482, 2486-87 & n.3 (1992) (Thomas, J., plurality opinion).


\(^{47}\) *See* Bator, *supra* note 12, at 466, 471; *see also* DUKER, *supra* note 37, at 225-48 (giving a historical account of the Court's emphasis on competent jurisdiction).

\(^{48}\) *See* Bator, *supra* note 12, at 466; *see also* DUKER, *supra* note 37, at 227-28 (confirming Bator's analysis).

\(^{49}\) *See* Bator, *supra* note 12, at 467 & n.56, 471-72, 479-84; *see also* DUKER, *supra* note 37, at 230-34, 240, 247 (agreeing with Bator's observation that the Court created some limited exceptions to its strict definitions of jurisdiction).

\(^{50}\) Bator, *supra* note 12, at 483-84.

\(^{51}\) *Id.* at 476 n.55, 483-84.

\(^{52}\) *Id.* at 471-72.
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fair opportunity to litigate the federal constitutional issue. Although the full and fair formulation allows review of nonjurisdictional issues, Bator favored this expansion because it comports with his concept of institutional competence. If an unbiased court of competent jurisdiction had afforded the defendant a full and fair opportunity to litigate, then there was “reasoned probability that justice was done,” and the habeas court did not need to review the convicting court’s resolution of constitutional issues. According to Bator, questions of jurisdiction, together with the question of full and fair opportunity to litigate, exhausted the appropriate scope of collateral review of criminal convictions. In contrast, Bator asserted that the Court on direct review could consider many issues that were improper on habeas.

B. The Full Review Model

In response to Bator’s version of history, Gary Peller presents an alternative interpretation of the older case law—one that has received a smaller but nonetheless loyal following. This account has been associated with the habeas opinions of Justice Brennan, and was recently invoked by Justice O’Connor in Wright v. West to oppose further restrictions on federal habeas. After considering largely the same case law that Bator reviews, Peller concludes that the federal courts had authority to review on habeas all reversible constitutional errors in the convicting court. He concedes that the Supreme Court in the antebellum period refused to grant writs of habeas corpus where the federal prisoner could not show a lack of personal or subject matter jurisdiction. However, it was precisely because the Court saw habeas as “in the nature of a writ of error” (i.e., like an appeal) that it defined its habeas powers narrowly. Because Congress had not yet granted the Supreme Court jurisdiction to entertain writs of error in federal criminal cases, Peller argues that the Court would not allow review of convictions

53. Id. at 487 (discussing Frank v. Mangum, 237 U.S. 309 (1915)).
54. Id.
55. Id. at 455, 460-62. Bator argued that if the convicting court had colorable jurisdiction, its decision should be presumptively immune from collateral attack. Id. at 461. Questions appropriate for habeas would include allegations that the state accorded no meaningful opportunity to litigate the federal question, that the petitioner was denied counsel, that the court admitted perjured testimony, or that mob violence dominated the trial. Id. at 456-58. Even review of these issues might be unnecessary on habeas, however, if state appellate courts offered a meaningful opportunity to present the federal issue. Id. at 455-56.
56. Id. at 471-72, 475.
57. Peller, supra note 9.
58. See, e.g., Lieberman, supra note 42, § 2.2, at 6-9.
61. Peller, supra note 9, at 629.
62. Id. at 611-12 (discussing Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830)).
64. Peller, supra note 9, at 611-12.
65. Id. at 611-12 & n.175; see also note 76 infra.
on habeas. Peller claims that the lower federal courts exercised plenary review on habeas in federal prisoner cases.

Peller further contends that the state prisoner habeas cases brought under the Habeas Act of 1867 show that the Supreme Court's review on habeas was as broad as its direct review of convictions from state courts. Bator confuses the then narrow scope of constitutional criminal procedural rights with a limitation on the scope of habeas itself. According to Peller, in the late nineteenth century, virtually all that due process required was that the convicting court have personal and subject matter jurisdiction. Thus, when the Court decided in state prisoner habeas cases that the convicting court had jurisdiction, it was effectively deciding the full merits of any due process issues the prisoner had raised. When review of such due process violations is added to the issues that Bator concedes federal courts would review on habeas—that is, convictions under unconstitutional statutes and illegal sentences—habeas covered the same territory as direct review of state court decisions for constitutional error in the Supreme Court.

These different views of habeas history support competing models of the proper scope of habeas today. On the one hand, the jurisdictional view supports the contention that federal habeas should address only the institutional competence of the convicting court, and it lends support to other versions of habeas providing less than plenary review of properly preserved constitutional issues. On the other hand, the view that habeas was coextensive with direct review supports the full review model under which federal habeas courts review de novo all issues of federal constitutional law. Interestingly, the two views rest on the same nineteenth and early twentieth century habeas cases.

It is not contested that relief was denied in many of these cases because the convicting court was found to have "jurisdiction." Similarly, it is uncontested that the Court granted relief in some cases involving convictions under unconstitutional statutes, and in others not involving un-

66. Peller, supra note 9, at 611-12.
67. Peller relies on one 1861 federal case, In re McDonald, 16 F. Cas. 17 (E.D. Mo. 1861) (No. 8751), in claiming that the lower federal courts used a broader version of habeas. Peller, supra note 9, at 612. Federal circuit courts did not have power to review federal criminal convictions until 1879. See David Rossman, "Were There No Appeal" The History of Review in American Criminal Courts, 81 J. CRIM. L. & CRIMINOLOGY 518, 521 (1990). Therefore, Peller's claim that the lower federal courts had broader habeas jurisdiction than the Supreme Court seems questionable. But cf. Pay v. Noia, 372 U.S. 391, 407 (1963) (explaining that habeas jurisdiction of lower federal courts has generally been considered original), abrogated by Coleman v. Thompson, 111 S. Ct. 2546 (1991). This article does not address lower federal court decisions on the scope of habeas, nor does it address cases in which pretrial habeas was granted and in which the habeas courts thus did not have to review final judgments of another court. For discussion of pre-Civil War habeas cases in the lower courts, see Marc M. Arkin, Rethinking the Constitutional Right to a Criminal Appeal, 39 UCLA L. REV. 503, 533-42 (1992).
68. Peller, supra note 9, at 622, 628, 630-34 & n.271; see also LIEBMAN, supra note 42, § 2.2, at 12 (endorsing Peller's arguments on due process in the late nineteenth century).
69. Peller, supra note 9, at 622, 628, 630-34 & n.271.
70. See id. at 621.
71. Peller also considers other federal habeas cases as well as some due process cases that came to the Court on direct review. Id. at 628-29.
constitutional statutes. The battleground is interpretation. Did the Court consider habeas to be similar to collateral review of civil judgments, with some limited exceptions, or did it see habeas as similar to direct review, so that the denial of habeas relief resulted from the narrow scope of due process? The confusion over habeas history arises because the proponents of the two models have focused almost exclusively on habeas cases. The history becomes clearer, however, when viewed along with the more general development of federal court remedies for constitutional violations by governmental officials.

II. THE MARSHALL COURT AND THE GREAT WRIT

One major historical bone of contention between the two camps concerns the early habeas cases brought by federal prisoners under the Judiciary Act of 1789. Each has a radically different interpretation of the pivotal decision, *Ex parte Watkins*, in which Chief Justice Marshall wrote that habeas was limited to questions of jurisdiction. For Bator, Marshall's opinion in *Watkins* reflects the black letter principle that habeas was not available at common law to a prisoner convicted by a court of competent jurisdiction. Peller, predictably, presents a completely different interpretation, acknowledging that Marshall's opinion did not reach the merits of the prisoner's claims, but suggesting that this was because the Court saw the scope of direct review and the scope of habeas as coextensive. Peller points out that in *Watkins* the Court characterized habeas as "in the nature of a writ of error, to examine the legality of the commitment." Congress, however, had not yet given the Supreme Court jurisdiction to review most federal criminal convictions by writ of error. A criminal defendant in a federal prosecution got a trial and that was it. According to Peller, the *Watkins* Court reasoned that it would be anomalous for the Supreme Court to reverse a criminal conviction by granting a writ of habeas corpus when Congress had given it no jurisdiction to reverse the conviction on direct review. For Peller, *Watkins* demonstrates that the scope of direct review and habeas were similar; what could not be reviewed directly could not be reviewed collaterally.

72. 28 U.S. (3 Pet.) 193 (1830).
73. Id. at 202; see also Bator, supra note 12, at 466; Peller, supra note 9, at 611.
74. See Bator, supra note 12, at 466.
76. Congress gave the Court direct review of many federal criminal cases in 1889. See id. (citing Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656). Before that time, however, the Court considered some direct criminal appeals on certificates of division from lower federal courts. See Bator, supra note 12, at 473 n.75 (citing Act of June 1, 1872, ch. 255, § 1, 17 Stat. 196, 196 and Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159).
77. See Rossman, supra note 67, at 555-64. Rossman also discusses a number of other safeguards for criminal defendants. Id. at 559-66; see also Arkin, supra note 67, at 541.
78. Peller, supra note 9, at 611 (discussing *Watkins*, 28 U.S. (3 Pet.) at 203). "It was precisely because the Court so broadly construed the habeas writ that it faced a dilemma: as a writ of error, habeas jurisdiction granted the same power that Congress deprived the Court of by not granting it appellate jurisdiction in criminal cases." Id.
A. The Ambiguous Meaning of "Jurisdiction"

In Watkins the prisoner claimed the indictment under which he had been prosecuted charged an offense that was not punishable under federal law.79 The attorneys for both parties, however, framed the issue in terms of the convicting court's jurisdiction.80 This fact seems to reinforce Bator's contention that at common law postconviction habeas was limited to issues of jurisdiction. The issue becomes more complex, however, when one considers that there were two accepted versions of review for "want of jurisdiction" at common law.

Judicial review for want of jurisdiction was familiar to nineteenth century courts. On collateral review81 of a civil judgment from a court of general jurisdiction, a court ordinarily limited its review to whether the court rendering judgment had jurisdiction.82 For example, if one court entered a final judgment on a debt, the defendant could not successfully raise a defense that he never owed the money in a later action to enforce the debt judgment; he could challenge only the personal and subject matter jurisdiction of the first court.83 When Chief Justice Marshall limited postconviction habeas for

79. 28 U.S. (3 Pet.) at 201.
80. Id. at 197-98 (argument for petitioner that the court did not have jurisdiction over the offense due to defects in the indictment); id. at 199 (argument that there was jurisdiction). Petitioner's counsel stated that "a writ of habeas corpus may issue, so as to make its action equivalent to that of a writ of error." Id. at 197. Most of the discussion as to the scope of habeas, however, was framed in terms of jurisdiction. Id. at 197-98.
81. Collateral review occurs when the validity of a judgment is challenged outside the normal hierarchy of appellate review.
82. See United States v. Fridgeon, 153 U.S. 48, 59-60 (1894) (referring to review for personal and subject matter jurisdiction); Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 462-63 (1873) (only inquiry into personal or subject matter jurisdiction is open in action for recognition); Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 316 (1870) (only errors going to jurisdiction, or claim that judgment rendered was beyond the power of court, may be considered in collateral attack); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 406 (1855) (full faith and credit does not extend to "judgments rendered against persons not amenable to the jurisdiction rendering the judgments"); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 176 (1850) (no recognition due to judgment "when defendant had not been served with process or voluntarily made defence"); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 349-50 (1850) (allowing collateral attack in federal court on state civil judgment where state court had failed to follow state procedures); Mills v. Duryee, 11 U.S. (7 Cranch) 481, 484 (1813) (full faith and credit statute precluded relitigation by District of Columbia court where defendant had notice of prior lawsuit); cf. Pennoyer v. Neff, 95 U.S. 714, 729 (1877) (lack of "jurisdiction of the parties and of the subject-matter" are grounds not to accord full faith and credit to judgment). In an action in equity, civil judgments were subject to collateral attack on slightly broader grounds, such as fraud or certain mistakes of fact. See, e.g., United States v. Ames, 99 U.S. 35, 46-47 (1878) (holding that mistake of law is not grounds for relief in equity, and that ignorance of fact would not be grounds for relief if the information could have been obtained with reasonable diligence); Webster v. Reid, 52 U.S. (11 How.) 437, 459-60 (1850) (allowing collateral attack on a civil judgment from a territorial court in a case with overtones of fraud; citing lack of Seventh Amendment jury trial as well as lack of personal jurisdiction through service of process). See generally Ronan E. Degnan, Federalized Res Judicata, 85 Yale L.J. 741, 755-73 (1976) (discussing the effect of federal judgments in state courts).
federal prisoners in *Watkins*, he reasoned from cases in which the judgments of courts of record came into question in collateral proceedings.\(^8\)

There was another version of "want of jurisdiction" for collateral attacks on judgments: the form used when the prior judgment came from a court of "inferior" as opposed to "superior" or "general" jurisdiction. Courts of inferior jurisdiction had no power to decide cases outside a statutorily or otherwise circumscribed range, while courts of superior or general jurisdiction enjoyed broad power to adjudicate a wide range of cases.\(^8\) In suits involving collateral attacks on decisions of inferior tribunals, the concept of jurisdiction could encompass something closer to full review of the merits, on the theory that the tribunal had no "power" to act beyond the bounds of its statutory or other legal authority.\(^8\) This contrasted sharply with collateral attacks on decisions of courts of general jurisdiction, where review was more jurisdictional in the strict sense. An example of the broader version of jurisdictional review appears in another Marshall Court decision, *Wise v. Withers*.\(^8\) There, the Court reversed a lower federal court decision denying relief to the plaintiff, and held a collector of military fines personally liable for damages resulting from the enforcement of a decree issued by a military court that lacked jurisdiction.\(^8\) The military court lacked jurisdiction because, according to the Supreme Court's interpretation of the statute, it levied penalties against an individual for not responding to a call-up for militia

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and Credit Clause, U.S. Const. art. IV, § 1. *See generally* Whitten, *supra*. The Court interpreted the full faith and credit statute to require state and federal courts to give the same preclusive effects to prior state court judgments that such judgments would have in the rendering court, *Mills*, 11 U.S. (7 Cranch) at 484, but only if the rendering court had jurisdiction, *see* Whitten, *supra*, at 574-75 (discussing McElmoyle v. Cohen, 38 U.S. (13 Pet.) at 312 (1839)).

84. *See* 28 U.S. (3 Pet.) at 204-05 (discussing collateral attack on state court's condemnation of land in *Kempe's Lessee* v. Kennedy, 9 U.S. (5 Cranch) 173 (1809)). In *Kempe's Lessee*, the Court disallowed a collateral attack on a state confiscation proceeding, stating, "The judgment it gave was erroneous but it is a judgment, and until reversed, cannot be disregarded." 9 U.S. (5 Cranch) at 186.

85. Inferior courts might or might not be courts of record. Courts of general or superior jurisdiction, however, were always courts of record. The denominations of inferior and superior court as used in this discussion do not refer to the place of a court within an appellate hierarchy.

86. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 627-29 (1965). From the eighteenth century onward, common law courts used certiorari and trespass actions to test the validity of orders of inferior tribunals of "'stinted, limited jurisdiction.'" *Id.* at 628 (quoting Parish of Ricelip v. Parish of Henden, 87 Eng. Rep. 739 (K.B. 1698)). Orders from justices of the peace and sewerage commissioners, for example, were reviewed for want of jurisdiction by common law courts, and the courts frequently used an expansive concept of jurisdiction in their review. *Id.* at 624-27. In fact, "[a] random sampling of eighteenth-century [English] certiorari cases suggests that jurisdictional defect was nearly as broad as error of law, at least when error went to the question of liability as distinguished from the measure of relief or minor procedural matters." *Id.* at 629-30; *see also* J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 894-96 (discussing Court's expansion of meaning of jurisdiction to control actions of justices of the peace and other administrative tribunals); Oaks, *supra* note 46, at 456-58 (discussing broader review in England on habeas for courts of inferior jurisdiction and fact that pretrial habeas was broader than posttrial habeas because a court of record had not decided any factual issues relevant to the pretrial habeas proceeding); *cf.* DUKER, *supra* note 37, at 226-29 (discussing different scope of collateral review for superior and inferior courts; noting that Court rejected in *Ex parte Bolman*, 8 U.S. (4 Cranch) 75, 100-01 (1807), and accepted in *Watkins*, 28 U.S. (3 Pet.) at 209, the common law's different scopes of review for superior and inferior courts).

87. 7 U.S. (3 Cranch) 331 (1806).

88. *Id.* at 337.
service when that individual was statutorily exempted from service. In short, the military court had exceeded its "jurisdiction," but only in the sense that it had been wrong as a matter of law in its interpretation of a statute.

In Watkins, both Chief Justice Marshall and counsel for the prisoner referred to the expansive version of jurisdictional review employed in Wise. Chief Justice Marshall, however, distinguished Wise by noting that it involved a decree from a court of inferior jurisdiction, and was therefore subject to broader collateral attack than a decree from a superior court. He pointed out that lower federal courts, such as the convicting court in Watkins, were considered superior courts even though the scope of their jurisdiction was limited by the Constitution and by statute. Chief Justice Marshall reasoned in Watkins that the judgment of a superior court, even if erroneous, was not a "nullity" that would subject the officer enforcing the judgment to liability for false imprisonment. An officer enforcing the erroneous judgment of a court of superior jurisdiction was not liable generally for damages, because the court hearing the trespass action against the enforcing officer would not examine the validity of the prior decree other than to ascertain bare bones jurisdiction. In this respect, a habeas petition was like a damages suit; both actions could be used to collaterally attack a prior court's judgment by seeking a remedy from the custodial or enforcing officer who was acting pursuant to the prior judgment. If the erroneous (but not void) judgment of a superior court would not subject an officer to damages for enforcing it, reasoned Chief Justice Marshall, it followed that the erroneous judgment could not subject the officer holding the prisoner to habeas relief either.

B. "Jurisdictional" Review and Nonjudicial Acts

While the concept of review for want of jurisdiction seems only to address suits against officials enforcing judicial decrees, federal courts were often called upon to determine whether executive officers were acting outside of their "jurisdiction" or "discretion" in many other kinds of suits that chal-

89. The statute provided an exemption for "officers, judicial and executive, of the government of the United States." Id. at 335.
91. Id. at 208-09.
92. See id. at 203-05, 209.
93. See id. at 203, 209.
94. Id. at 203 ("If this judgment be obligatory, no court can look behind it. If it be a nullity, the officer who obeys it is guilty of false imprisonment. Would the counsel for the prisoner attempt to maintain this position?"); see also JAFFE, supra note 86, at 627-30 (in England, trespass action and certiorari were ways of attacking orders of an inferior tribunal).
95. Watkins, 28 U.S. (3 Pet.) at 203-09. By contrast, an officer enforcing an erroneous decree of an inferior court faced liability under the broader view of jurisdiction. See Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806); see also Block, supra note 86, at 892-96 (discussing The Marshalsea, 77 Eng. Rep. 1027 (Star Chamber 1612), in which Lord Coke sustained damages action against imprisoning officers when the original court lacked jurisdiction).
96. Such officials could be characterized as executive officials when they enforced judgments.
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Lenged the legality of their action. Throughout the nineteenth century and into the twentieth, the mechanism used to hold government officials accountable was a suit at common law. An executive officer who committed a trespass or other common law harm was liable to the individual injured, unless that officer had valid legal authority to justify his actions. An officer sued for a common law harm might claim as his justification that he was acting within the scope of his "jurisdiction." Much could turn on the notion of jurisdiction employed by the court.

Just as the Court used alternative meanings of jurisdiction when reviewing judicial decrees by way of collateral attack, it also used alternative meanings of jurisdiction when reviewing nonjudicial action. In the context of the review of actions of federal executive officials, inquiry into the area of the officer's jurisdiction or discretion could imply something close to the personal or subject matter jurisdiction inquiry used by Chief Justice Marshall in Watkins. For example, the Court frequently employed limited review in cases challenging the validity of federally issued patents for land, and in

97. See JAFFE, supra note 86, at 153; see also id. at 237-39 (disagreeing with Dicey's formulation of the rule of law in A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (6th ed. 1915)). Dicey had stated that "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." DICEY, supra, at 189, quoted in JAFFE, supra note 86, at 237.

98. See Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 CASE W. RES. L. REV. 396, 422-29 (1987). Individuals could also bring equity actions against government officials; these actions protected interests similar to those in common law actions, albeit prospectively. See id. at 419.

99. E.g., Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515-16 (1840) (Secretary of Navy's interpretation of statutes to deny a pension was discretionary and not subject to judicial remedies); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31-32 (1827) ("Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."); see also Gaines v. Thompson, 74 U.S. (7 Wall.) 347 (1868) (Court would not interfere with construction of law by Land Office in action for injunction); Commissioner of Patents v. Whiteley, 71 U.S. (4 Wall.) 522, 534 (1866) (denying mandamus against commissioner for invention patents; mandamus could not serve function of writ of error); United States ex rel. Goodrich v. Guthrie, 58 U.S. (17 How.) 284, 303-04 (1854) (refusing to issue mandamus to Secretary of Treasury to pay territorial judge; discussing problems of ordering payment from treasury; mandamus would not reach acts involving "judgment or discretion"); United States ex rel. Tucker v. Seaman, 58 U.S. (17 How.) 225, 230 (1854) (refusing to issue mandamus to superintendent of public printing on ground that decision required judgment); Reeside v. Walker, 52 U.S. (11 How.) 272, 290 (1850) (holding "general doings of a head of a department" discretionary and not subject to judicial remedies); Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849) (neither damages nor mandamus is available where officer has discretion over subject matter); Brashear v. Mason, 47 U.S. (6 How.) 92, 102 (1848) (holding discretionary the ascertainment of military officer's pay rate).

cases questioning valuation of goods by the Customs Office.\(^\text{101}\) In such cases, as in the habeas actions, the Court indicated that its role was not to review "error"—that is, the legal merits of the officer's challenged decision.\(^\text{102}\) Only when the action of the official was deemed "void" for lack of jurisdiction would there be any judicial relief.\(^\text{103}\) As was true for collateral attack of civil and criminal judgments of superior courts, errors in official decisions of fact and law, as well as most procedural defects, could be deemed the kind of "mere error" not subject to judicial review.\(^\text{104}\)

In many cases, however, the Court applied a broad standard, much like that in \textit{Wise}, when reviewing official action that appeared to be based on dubious legal grounds.\(^\text{105}\) This approach asked whether the officer had acted according to the dictates of applicable law; actions contrary to constitutional, statutory, or common law were frequently considered to be beyond the officer's power or discretion.\(^\text{106}\) For example, in \textit{Marbury v. Madison},\(^\text{107}\) Chief Justice Marshall held that it was beyond the Secretary of State's discretion to withhold Marbury's justice of the peace commission, because the law assigned a specific duty for the Secretary to perform.\(^\text{108}\) Similarly, in \textit{Osborn v. Bank of the United States},\(^\text{109}\) the Auditor of the State of Ohio argued that the federal courts could not issue an injunction against him to return the funds that he had seized from the bank to satisfy a state tax.

\(^{101}\) \text{See, e.g., Belcher v. Linn, 65 U.S. (24 How.) 508, 522 (1860); Bartlett v. Kane, 57 U.S. (16 How.) 263, 272 (1853).}

\(^{102}\) \text{See, e.g., Quinby v. Conlan, 104 U.S. 420, 425 (1881); Wilkes, 48 U.S. (7 How.) at 129; Kendall v. Stokes, 44 U.S. (3 How.) 86, 98 (1845); Decatur, 39 U.S. (14 Pet.) at 515.}

\(^{103}\) \text{See, e.g., Smelting, 104 U.S. at 641 (conclusive presumption attends land patent in cases in which the Land Office had jurisdiction); Polk's Lessee v. Wendell, 13 U.S. (9 Cranch) 87 (1815) (where prior North Carolina land patent was void, it could be attacked in action at law); see also Woolhandler, \textit{supra} note 100, at 220 n.110. Relief could also be had in equity for fraud and a narrow category of factual mistake, which were also grounds for collateral attack on judgments. See \textit{Bagnell}, 38 U.S. (13 Pet.) at 450 (mistake could be cured in equity unless issue had been previously litigated before agency).}

\(^{104}\) \text{See \textit{Smelting}, 104 U.S. at 641; Kendall, 44 U.S. (3 How.) at 98; Decatur, 39 U.S. (14 Pet.) at 515; Polk's Lessee, 13 U.S. (9 Cranch) at 98-99.}

\(^{105}\) \text{See generally Woolhandler, \textit{supra} note 98, at 414-22, 430-45.}

\(^{106}\) \text{See, e.g., Kendall v. United States \textit{ex rel.} Stokes, 37 U.S. (12 Pet.) 524, 610 (1838) (acts "subject to the control of law" were nondiscretionary); Slocum v. Mayberry, 15 U.S. (2 Wheat.) I, 9-12 (1817) (officer with no legal right to seize cargo was subject to damages); Otis v. Bacon, 11 U.S. (7 Cranch) 589, 595 (1813) (deputy customs collector liable in trover for cargo stolen after he illegally seized vessel); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162, 166 (1803) (Secretary of State "is amenable to the laws for his conduct"); violation of another's legal right subjected Secretary to mandamus). An official could not avoid liability by arguing that he operated under command from a superior or authority of an unconstitutional statute. See, e.g., Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 837, 839-40 (1824) (authority of unconstitutional statute could not insulate state officer from injunctive relief); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-79 (1804) (instructions from Secretary of Navy to seize vessels bound to or from French ports, when Nonintercourse Act only authorized seizures of vessels sailing to French ports, could not excuse captain's illegal seizure of ship sailing from French port).}

\(^{107}\) \text{5 U.S. (1 Cranch) 137 (1803).}

\(^{108}\) \text{Id. at 166. Chief Justice Marshall equated "discretionary" acts with "political acts," \textit{id.} at 166, 170, which were acts that "respect the nation, not individual rights," \textit{id.} at 166. An executive official's reasonable but incorrect interpretation of the law thus could subject him to coercive relief. \textit{Id.} at 161-62.}

\(^{109}\) \text{22 U.S. (9 Wheat.) 738 (1824).}
While Osborn claimed that a federal court injunction would interfere with his discretion in enforcing state law, the Court held that the auditor had a nondiscretionary duty to comply with state law. Therefore, an injunction restraining his enforcement of the unconstitutional state law would not interfere with his official discretion.\textsuperscript{110} Thus, the foundational decisions establishing judicial review of executive and legislative acts—\textit{Marbury} and \textit{Osborn}—were partly built upon the principle that government officials lack jurisdiction or discretion to violate the law, and are subject to judicial remedies when they do so.\textsuperscript{111} Had the Court not employed this narrower view of official jurisdiction, the judiciary's role in policing state and federal government actions would have been dramatically reduced. By defining official jurisdiction in alternative ways, the Court could state in habeas cases that it would review only for want of jurisdiction, while accommodating very different views of the proper scope of judicial inquiry.\textsuperscript{112}

C. The Import of Jurisdiction Under Watkins

Chief Justice Marshall clearly sought to limit the scope of jurisdictional review on habeas in \textit{Watkins} when he distinguished \textit{Wise} as a case involving a court of inferior jurisdiction.\textsuperscript{113} His refusal to address the merits in a habeas case may seem surprising, given his central role in establishing government accountability through judicial review. In both \textit{Marbury} and \textit{Osborn}, for example, Marshall refused to excuse government officers for improper actions simply because they acted within the general range of their jurisdiction. In these cases and others, he employed instead a standard of review that permitted courts to consider the merits.\textsuperscript{114} It was one thing, however, for Marshall to endorse judicial review of executive and legislative acts (at issue in \textit{Marbury} and \textit{Osborn}), and quite another for him to endorse collateral review of judicial acts (at issue in \textit{Watkins}). Indeed, to protect federal judicial supremacy, Marshall had to decide \textit{Watkins} in a way that

\textsuperscript{110} Id. at 839-40.


\textsuperscript{112} See \textit{Jaffe}, supra note 86, at 632-33, 635 (exceptional procedural handling of certain facts may be justified in some instances).

\textsuperscript{113} \textit{Ex parte Watkins}, 28 U.S. (3 Pet.) 193, 203-09 (1830); see id. at 208-09; text accompanying notes 90-95 supra.

\textsuperscript{114} See, e.g., \textit{Marbury} v. Madison, 5 U.S. (1 Cranch) 137, 165-67 (1803); \textit{Osborn}, 22 U.S. (9 Wheat.) at 839-40 (state auditor's enforcement of state law was ministerial and did not entail sufficient discretion to exempt official from federal injunction); \textit{Meigs v. M'Clung's Lessee}, 13 U.S. (9 Cranch) 11, 18 (1815) (upholding ejectment of federal officers from land on which government maintained garrison); \textit{Murray v. The Schooner Charming Betsy}, 6 U.S. (2 Cranch) 64, 117-26 (1804) (officer's good faith in seizing boat without probable cause did not preclude the imposition of compensatory damages).
insulated federal court judgments from merit based collateral attacks. The early Court faced considerable state resistance to federal judicial decrees, and Marshall’s concern in Watkins was that any ruling allowing broad collateral review of federal judgments would undermine federal judicial authority. To be sure, Watkins involved a federal prisoner seeking habeas in a federal court in order to obtain review of a federal court judgment. Exposing federal criminal convictions to collateral attack, however, would not necessarily have been limited to federal court relief against such convictions. Similar principles governed the preclusive effects of judgments in both state and federal courts. Therefore, if the federal courts could review federal convictions for legal error on habeas, there was at the time no obvious bar against state courts doing the same to federal judgments generally. The Court might have insulated federal criminal convictions by merely disallowing state habeas for federal prisoners, but it was not until the eve of the Civil War that it finally took this route. Prior to that time, state courts had granted habeas to federal prisoners on a number of occasions.

Limiting the issues on habeas to a narrow range of jurisdictional matters, and disallowing reconsideration of the legal merits, were critical to Chief Justice Marshall’s goal of maintaining the authority of federal judgments.

115. E.g., Osborn, 22 U.S. (9 Wheat.) at 739-43 (state treasurer’s refusal to follow federal court injunction); United States v. Peters, 9 U.S. (5 Cranch) 115, 135-36 (1809) (state legislature’s annulment of judgment of federal court); see also Wallace v. McComb, 38 U.S. (13 Pet.) 136 (1839) (stating that state court attachment proceedings could not arrest a prior suit filed in federal court). For an analysis of the struggle over judicial supremacy, see CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 76-81, 97-103 (1972) (discussing Peters and Osborn) and Charles Warren, Federal and State Court Interference, 43 HARV. L. REV. 345, 348-59 (1930) (discussing prevalence of states’ rights and nullification theories in 1830, and cases limiting state interference with federal officials and courts). Professor Degnan, however, has found that there was no widespread refusal on the part of states to recognize federal judgments. See Degnan, supra note 82, at 744-45 (first Supreme Court cases that discussed states having to give preclusive effects to federal judgments were Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130 (1874), and Embry v. Palmer, 107 U.S. 3 (1882)).

116. See Degnan, supra note 82, at 742; Warren, supra note 115, at 352, 356. The “full faith and credit” provision enacted pursuant to Article IV, section 2 generally required state and federal courts to give state court judgments the same effect that they would be given in the state where rendered. See Act of May 26, 1790, ch. 11, 1 Stat. 122, amended by Act of Mar. 27, 1804, ch. 56, 2 Stat. 298. In applying the statute, however, the courts relied on the general principle that a judgment entered without jurisdiction was not binding on other courts. Cf. Whitten, supra note 83, at 576-79. While federal judgments were not covered by the full faith and credit statute, the Court applied the principles governing state judgments to include federal judgments as well. See, e.g., Embry, 107 U.S. at 10-13; Dupasseur, 88 U.S. (21 Wall.) at 134.

117. In 1821, for example, the Court held that state courts had no power to grant mandamus against federal officials. McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 605 (1821).

118. See Ableman v. Booth, 62 U.S. (21 How.) 506, 523-24 (1858); Warren, supra note 115, at 357. Contra DUKER, supra note 37, at 126-56 (arguing that the constitutional prohibition against suspending the writ of habeas corpus prohibits Congress from suspending state court habeas for federal prisoners).

119. See Warren, supra note 115, at 357 & n.58 (states continued to grant pretrial habeas to federal prisoners until In re Tarble, 80 U.S. (13 Wall.) 397 (1872)).

120. Federal courts granted plenary review on habeas when federal officers acting under color of federal authority were charged with violating state law. See Michael G. Collins, The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings, 66 N.C. L. REV. 49, 86 (1987) (explaining this exception as a reversal of federalism interests which prompted
In *Watkins*, Marshall reiterated a point the Court had made in a case involving a collateral attack on a federal civil judgment—federal courts, although of limited jurisdiction under Article III, should not be considered "inferior" courts whose judgments are readily subject to collateral attack. In support of his argument, Marshall cited the principle, established in civil cases, that federal judgments could not be attacked collaterally for want of diversity, even though such a defect would have been grounds for dismissal of the case on direct review. By reasoning from cases disallowing collateral attacks on diversity cases, Marshall, in *Watkins*, distinguished habeas from direct review in which legal error could be fully considered. In this respect, Marshall clearly indicated that he did not intend to equate writs of habeas corpus with writs of error.

Peller, however, argues that Marshall saw writs of error and habeas corpus as coextensive, because in *Watkins* Marshall characterized habeas as "in the nature of a writ of error, to examine the legality of the commitment." Yet Peller ignores the context in which the Court originally made such statements. As others have shown, Chief Justice Marshall was concerned with reconciling his decision in *Marbury* with the Court's exercise of jurisdiction in two habeas cases in which the Court had entertained habeas petitions filed by federal prisoners directly in the Supreme Court. These exercises of first instance habeas jurisdiction could readily be characterized as federal deference to state court authority in proceedings involving private defendants. An 1833 statute gave the federal courts power to grant habeas when the prisoner was in custody, "for any act done . . . in pursuance of a law of the United States." Habeas Corpus Act of 1833, ch. 57, § 7, 4 Stat. 634, discussed in Peller, supra note 9, at 616-18.

123. *Id.* at 206.
124. *Id.* at 207; see also *McCormick*, 23 U.S. (10 Wheat.) at 199-200 (failure to show diversity of citizenship on face of record could not be grounds for collateral attack although it could be grounds for reversal on writ of error); cf. *Abercrombie v. Dupuis*, 5 U.S. (1 Cranch) 343 (1803) (dismissing case on direct review for failure to show jurisdiction on face of record); see also *Wood v. Wagnon*, 6 U.S. (2 Cranch) 9 (1804) (dismissing case on direct review for want of diversity jurisdiction); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 13-14 (1800) (discussing diversity issues on direct review); *Bingham v. Cabot*, 3 U.S. (3 Dall.) 382, 383-84 (1798) (discussing case on direct review for want of diversity jurisdiction).
125. *Id.* at 202, quoted in *Liebman*, supra note 42, § 2.2, at 7; Peller, supra note 9, at 611; see also *Liebman*, supra note 42, § 2.2, at 14 & n.51 (examining Chief Justice Marshall's characterization of habeas as "appellate" remedy).
126. See *Paschal*, supra note 27, at 605 (discussing Marshall's narrow reading of the constitutional prohibition against suspension of writ of habeas corpus in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807)). Paschal maintains that the constitutional guarantee against suspension of the writ should be read more broadly because Marshall's early narrow reading of the clause (particularly in *Bollman*) was overly influenced by his desire to protect his *Marbury* opinion. *Id.* at 626-27, 650-51.
127. *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806); United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795). Both cases are discussed in Paschal, supra note 27, at 625-27.
128. In *Hamilton*, a district judge had ruled in chambers to deny bail to the petitioner. 3 U.S. (3 Dall.) at 17. In *Burford*, which was actually decided after *Marbury* but did not address the jurisdiction issue in depth, the Court held a warrant of commitment by ten justices of the peace illegal "for want of stating some good cause certain, supported by oath." *Burford*, 7 U.S. (3 Cranch) at 448, 453.
terized as exercises of original jurisdiction. Yet Marshall had held in *Marbury* that the Supreme Court could only exercise original (as opposed to appellate) jurisdiction in cases that were within the specific and narrowly circumscribed categories laid out in Article III of the Constitution. A habeas case involving a federal prisoner ordinarily could not have found its way into the handful of contests listed as under the Supreme Court's original jurisdiction. It was in this context—in which the Court sought to validate its first instance habeas jurisdiction and yet maintain the *Marbury* proscription against congressional expansion of the Court's constitutionally limited original jurisdiction—that the Court indicated that its own habeas jurisdiction was by nature "appellate," not original. A habeas petition, although filed in the Supreme Court in the first instance, was "appellate," Marshall reasoned, because it entailed some measure of review of a lower court's decision.

Thus, the seemingly contradictory strands of *Watkins*—the assertion that habeas is limited to a narrow version of jurisdictional review, and its statement that habeas is in the nature of an appeal or writ of error—make sense in terms of the common purpose of upholding federal judicial supremacy. *Watkins* reflects concerns that federal judgments not be subject to collateral attack, and that the decision in *Marbury*, which gave the Court the last word as to the legality of executive and legislative acts, not be undermined.

III. RECONSTRUCTION AND ITS AFTERMATH

A. Competing Visions

Predictably, Bator and Peller offer different versions of the post-Civil War state and federal prisoner habeas cases in federal courts, although both acknowledge the apparently contradictory tendencies in the case law. Just as before the war, the Court frequently recited the verbal formula that habeas was not a writ of error and that it was limited to issues of jurisdiction. At the same time, however, the Court occasionally reviewed the

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   In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
   
   U.S. Const. art. III, § 2, cl. 2.
131. Paschal, *supra* note 27, at 627 (discussing *Ex partes* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807)).
132. *Id*.
133. *See DUKER, supra* note 37, at 250-55 (discussing cases in which the Court indicated that a convicting court could be deprived of jurisdiction if constitutional violations took place during trial). Judge Friendly noted that Justice Black was still "careful to kiss the jurisdictional book" when the Court, in *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938), invalidated on habeas a federal conviction of a defendant who lacked the assistance of counsel. Friendly, *supra* note 14, at 151 & n.39.
DEMODELING HABEAS

merits of constitutional issues on habeas, particularly for convictions under unconstitutional statutes, but also in a handful of cases not implicating such statutes.

Bator expresses dissatisfaction with the Court for not strictly limiting habeas to issues of personal and subject matter jurisdiction. Nonetheless, he describes deviations from the jurisdictional rule as "strictly limited," involving "a few classes of issues"—that is, the legality of sentences and unconstitutional statutes—"which were labeled jurisdictional though they did not really bear on the competence of the committing court." According to Bator, the Court occasionally reviewed the merits in federal prisoner cases, while still claiming to limit review to jurisdiction only, because it lacked direct review of most federal criminal cases and therefore relied on habeas to correct serious injustices. Yet he discredits the notion that there was historical support for review of all errors of constitutional law on habeas.

Peller, by contrast, views the postwar case law as supporting his theory that on habeas prisoners could obtain review that was as extensive as that on direct review. He attributes the Court's continued emphasis in federal prisoner habeas cases on the "jurisdictional" limits of review to the fact that the Court had no authority to directly review most federal criminal cases until 1889. Accordingly, Peller finds that the lack of direct review provided a rationale for narrowing habeas rather than for expanding it as claimed by Bator. For Peller, the Court did not want to review on habeas what Congress had denied it on direct review.

Limitations on Supreme Court direct review of federal criminal convictions prior to 1889 appear to support Peller's equation of habeas and direct review. To provide habeas corpus to a federal prisoner who could not

135. Id. at 471, 483-84.
136. Id. at 473, 484; see also Developments, supra note 17, at 1046-47; Hart, supra note 18, at 104-05.
137. Bator, supra note 12, at 471-73.
138. Peller, supra note 9, at 610-16.
139. Id. at 610-12 & nn.175-176.
140. In support of his thesis that the Court kept federal prisoner habeas narrow so as to match the scope of direct review, Peller notes that federal prisoner habeas broadened after the court was given error jurisdiction over federal criminal cases in 1889. Peller, supra note 9, at 615. He cites In re Nielsen, 131 U.S. 176 (1889), a case in which the Court found a double jeopardy violation. Peller, supra note 9, at 615. However, the result in Nielsen was consistent with a federal prisoner habeas case decided before the Court had appellate jurisdiction. See In re Snow, 120 U.S. 274 (1887); see also Ex parte Bain, 121 U.S. 1 (1887) (federal prisoner case reaching issue of constitutionality of amendment to indictment); Peller, supra note 9, at 615 n.192. In Nielsen, moreover, the Court continued to state that habeas review was more limited than direct review. 131 U.S. at 182 ("The objection to the remedy of habeas corpus, of course, would be, that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on habeas corpus."); see also United States v. Prigden, 153 U.S. 48, 63 (1894) (stating that "a writ of habeas corpus . . . cannot be made to perform the functions of a writ of error in relation to proceedings of a court within its jurisdiction").

As noted above, Bator claims that federal habeas expanded somewhat beyond strict jurisdictional limitations in part because of limitations on direct review of federal criminal cases. Bator, supra note 12, at 473, 484. In contrast to Peller, he claims that federal prisoner habeas narrowed after the Court began to exercise direct review in federal criminal cases. Id. at 473-74. The cases
appeal would arguably undermine the ban on appeals, and the unavailability of habeas in such cases could support a view that habeas was coextensive with direct review.\footnote{141} Under section 25 of the Judiciary Act of 1789, however, the Supreme Court did have jurisdiction to consider federal questions raised in state criminal cases on direct review. Thus, Peller's thesis requires a different explanation for the Court's statements that habeas review was limited to jurisdictional issues in the state prisoner habeas cases (where the Court could, and did, directly review convictions). Indeed, Peller acknowledges this and offers a separate explanation to reconcile state prisoner cases with his thesis. He argues that review for want of jurisdiction in state prisoner cases included review of the prisoner's due process claims.\footnote{142} According to Peller, the principal requirement of due process in the post-Civil War period was that the prisoner be convicted by a court of competent jurisdiction.\footnote{143} He claims that when the Court focused on jurisdictional errors, it was not referring to an inherent limitation on habeas at all. Rather, the issue of jurisdiction was "only relevant to the merits of the due process claim, not to the jurisdiction of the habeas court."\footnote{144} When the Court considered "jurisdiction," it was in fact deciding the merits.

1. Equating due process and jurisdiction.

Despite the appeal of Peller's thesis, little evidence supports his interpretation of the language in the cases relating to limitations on the scope of habeas review.\footnote{145} The Court never distinguished between the reasons for limiting the scope of habeas review in federal prisoner cases and the reasons for limiting it in state prisoner cases. In fact, examination of the state prisoner cases reveals that the Court freely cited its federal prisoner cases for the

\footnote{141}{As noted above, Peller takes the position that the lower federal courts exercised broader habeas jurisdiction than the Supreme Court in the federal prisoner cases. \textit{See note 67 supra.}}

\footnote{142}{See Peller, \textit{supra} note 9, at 622, 630-34.}

\footnote{143}{Id. at 622.}

\footnote{144}{Id. at 630.}

\footnote{145}{For federal prisoner cases in which the Court indicated that habeas review was limited to jurisdictional issues, see, for example, \textit{In re} Moran, 203 U.S. 96, 105 (1906) (refusing to consider merits of claim that being forced to walk in front of jury when identity was in issue violated the Fifth Amendment); \textit{In re} Schneider, 148 U.S. 162, 166 (1893) (refusing to consider merits of whether jury selection was impartial); \textit{Ex parte} Harding, 120 U.S. 782 (1887) (challenge to constitutionality of territorial statute allowing aliens to sit on grand juries did not go to jurisdiction of court); \textit{Ex parte} Yarbrough, 110 U.S. 651, 654 (1884) (refusing to examine the sufficiency of the indictment, but considering the constitutionality of the statute); \textit{Ex parte} Parks, 93 U.S. 18 (1876) (federal prisoner claiming that act charged was not a crime against the United States). For state prisoner cases in which the Court indicated that habeas review was limited to jurisdictional issues, see, for example, Valentina v. Mercer, 201 U.S. 131 (1906) (limiting habeas issues to questions of jurisdiction); Felts v. Murphy, 201 U.S. 123 (1906) (rejecting claim of deaf prisoner that due process was violated by his inability to hear proceedings; stating that habeas was not to serve as writ of error); \textit{In re} Frederich, 149 U.S. 70 (1893) (state court modification of conviction to second degree murder; noting potential constitutional problem but requiring prisoner to have sought review by error not habeas); \textit{In re} Wood, 140 U.S. 278 (1891) (refusing to review racial exclusion of jurors; to do so would make habeas into writ of error); \textit{see also} Duker, \textit{supra} note 37, at 243-45.}
proposition that habeas could not serve as a writ of error.\textsuperscript{146} Such cross-referencing of federal and state cases is inconsistent with the view that in state prisoner cases writs of habeas corpus and direct review were coextensive.\textsuperscript{147} In addition, the substantive issues that the Court considered on federal and state prisoner habeas were roughly equivalent, perhaps remarkably so given that at the time federal prisoner claims presented a wider range of federal statutory and constitutional violations.\textsuperscript{148}

Due process requirements, moreover, encompassed at least the rights of notice and an opportunity to be heard, as well as some notion that procedures should meet the general norms established by the common law.\textsuperscript{149}

\begin{footnotesize}
\begin{enumerate}
\item[(146)] See \textit{Valentina}, 201 U.S. at 138; \textit{Felts}, 201 U.S. at 129; \textit{Ex parte} Crouch, 112 U.S. 178, 180 (1884); see also \textit{Frederich}, 149 U.S. at 75 (citing federal cases for distinction between erroneous and void judgments).
\item[(147)] In addition, the Court spoke of the jurisdictional limitation as deriving from common law interpretations of habeas. See, \textit{e.g.}, \textit{Ex parte} Siebold, 100 U.S. 371, 375 (1880) (allowing habeas to reach issues of the constitutionality of statutes, but stating, "There are other limitations of the jurisdiction, however, arising from the nature and objects of the writ itself, as defined by the common law, from which its name and incidents are derived. [Habeas] cannot be used as a mere writ of error."). The Court noted that perhaps a court in its discretion, and to avoid delay, could order immediate relief in habeas on broader grounds than were ordinarily available in habeas, if the case would, in any event, later come before the court by a writ of error. \textit{Id}.
\item[(148)] Federal prisoner claims presented a larger potential range of constitutional violations given the direct applicability of the Bill of Rights to the federal government. Nevertheless, state and federal prisoner habeas addressed fairly similar issues. See Hart, \textit{supra} note 18, at 105 (noting slower but roughly parallel development of habeas for both state and federal prisoners).
\item[(149)] For example, the sufficiency of the indictment in federal criminal cases presented a federal question that the Court would consider on direct review. See, \textit{e.g.}, United States v. Cruikshank, 92 U.S. 542, 557-59 (1876) (holding that lack of specificity in indictment violated the Sixth Amendment); United States v. Gooding, 25 U.S. (12 Wheat.) 460, 474-77 (1827) (finding indictment defective). On direct review of state court convictions, however, the sufficiency of the indictment generally presented no federal question, in light of the Court's holding that the states were not required to use indictments at all. See Hurtado v. California, 110 U.S. 516, 538 (1884). Nevertheless, the Court refused to consider the sufficiency of most indictments in both federal and state prisoner habeas cases. See, \textit{e.g.}, Kohl v. Lehlback, 160 U.S. 293, 296 (1895); Bergemann v. Backer, 157 U.S. 655, 656 (1895); Yarbrough, 110 U.S. at 654; Parks, 93 U.S. at 20-21; \textit{Ex parte} Watkins, 28 U.S. (3 Pet.) 193, 203 (1830); see also \textit{Duker}, \textit{supra} note 37, at 245-46.
\item[(150)] In federal criminal cases on direct review, failure to comply with statutory requirements for the summoning of juries presumably would have been grounds for reversal. Cf. Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434 (1872) (reversing civil judgment on the basis of erroneous jury selection). Nevertheless, in neither federal nor state prisoner cases was failure to comply with procedural laws for drawing juries considered on habeas. See \textit{Moran}, 203 U.S. at 103-04 (concluding that it would not be a violation of the Fifth Amendment if the grand jury were not made up of electors as required by territorial law); \textit{Kohl}, 160 U.S. at 299-300 (allowing alien to sit on jury contrary to state law did not present constitutional issue); \textit{In re} Wilson, 140 U.S. 575, 579 (1891) (compliance with territorial statute was "only a matter of error, to be corrected by proceedings in error"); see also \textit{Rawlins} v. Georgia, 201 U.S. 638 (1906) (holding on direct review that compliance with local law as to drawing jurors was not a question of due process).
\item[(149)] See, \textit{e.g.}, Rogers v. Peck, 199 U.S. 425, 435 (1905); Hovey v. Elliott, 167 U.S. 409, 417 (1897) (holding that the Due Process Clause affirms the right to trial according to the process and proceedings of common law, including the right to be heard in one's own defense); \textit{Hurtado}, 110 U.S. at 535-37 (discussing various formulations of due process). Peller relies on Kennard v. Louisiana, 92 U.S. 480 (1876), in support of his claim that, in considering due process, the Supreme Court could "inquire only into the jurisdiction of the state court." Peller, \textit{supra} note 9, at 628. The \textit{Kennard} Court, however, also considered the defendant's opportunity to be heard and his opportunity for a considered decision by the original court. 92 U.S. at 483. \textit{Kennard} thus reflects a view of due process encompassing some minimal procedural protections beyond mere personal and subject.
\end{enumerate}
\end{footnotesize}
Thus, “jurisdiction” would not necessarily be shorthand for “due process.” To be sure, jurisdiction potentially covered much of the same ground as procedural due process. If a criminal court obtained jurisdiction over a criminal defendant by arrest, it is likely that notice and opportunity to be heard followed as a matter of course by virtue of the defendant’s presence. Notice and opportunity to be heard might therefore have been components of the concept of obtaining jurisdiction over the defendant. And one may assume that if there were ex parte criminal proceedings the Court would have allowed the prisoner to attack them collaterally, just as it would have allowed a civil litigant to attack collaterally a proceeding that occurred without notice and opportunity to be heard.

Yet even if issues of “jurisdiction” covered much of the same territory as due process, the scope of due process review on habeas was not necessarily any broader than that for collateral attack on a civil judgment. To show that habeas review was indeed coextensive with direct review, Peller cites Pennoyer v. Neff as a “direct review” case in which the Court limited its due process inquiry to the question of whether the original court had jurisdiction. The due process issue in Pennoyer, however, arose by way of a collateral attack on a civil judgment—not on direct review of the original judgment. Thus, the fact that due process review in a civil case such as Pennoyer resembled due process review on habeas only shows that the Court allowed habeas to the same extent that it would entertain a collateral attack on a civil judgment—that is, only on very narrow grounds.

More importantly, however, Peller fails to account for the fact that on direct review of state court convictions, the Court addressed certain consti-

150. See, e.g., Allen v. Georgia, 166 U.S. 138 (1897) (denying due process claim on direct review for refusal to allow writ of error to prisoner who had been fugitive, while not mentioning jurisdictional limit on due process inquiry).
152. In Hopt v. Utah, 110 U.S. 574, 579 (1884), the Court found that defendant’s and his counsel’s absence from a hearing on the bias of three jurors constituted a denial of due process.
153. See Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1850); see also Hovey, 167 U.S. at 409 (collateral attack allowed on District of Columbia civil decree entered after court struck defendant’s answer as contempt sanction).
154. 95 U.S. 714 (1878).
155. Peller, supra note 9, at 628.
156. The Court was directly reviewing a lower federal court judgment in Pennoyer, but the lower court itself was collaterally reviewing a prior judicial decree. 95 U.S. at 715-16. The issue presented was whether the original court had obtained jurisdiction over the absentee defendant. The Court concluded that the Oregon court had not obtained jurisdiction over the defendant when it failed to effect personal service or an attachment of his property prior to deciding the case. Id. at 733.
tutional issues—such as jury discrimination—that it flatly refused to consider on habeas. For example, in *Neal v. Delaware* the Court on direct review addressed the merits of an equal protection claim that state officials had excluded blacks from juries. By contrast, in *In re Wood*, the Court refused to consider on habeas the merits of a similar claim of jury discrimination. Justice Harlan in *Wood* distinguished *Neal* precisely because it had come to the Court by way of writ of error rather than on habeas. Clearly, some issues reviewable upon direct review of a state court conviction were not reviewable in a habeas proceeding.

To be sure, Peller has made an important point: One cannot claim that habeas review was substantially more limited than direct review without addressing the nature of federal statutory and constitutional guarantees considered on direct review. But he has not shown that habeas review was coextensive with direct review of all constitutional issues. Peller’s error lies in his refusal to accept that when the Court stated that habeas was limited to issues of jurisdiction, it was indeed discussing a limitation on habeas rather than referring solely to the merits of a due process claim. What he has shown in his treatment of due process is that the Court would consider on habeas the same issues that it would consider on a collateral attack of a civil judgment. And that showing is as supportive of Bator’s version of habeas history as it is of his own.

157. 103 U.S. 370, 392-94 (1881); cf. *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding on direct review that state statute excluding blacks from juries was unconstitutional).

158. 140 U.S. 278 (1891).

159. *Id.* at 283-90. In both *Wood* and *Neal*, the discrimination was not authorized by statute. See *id.*; *Neal*, 103 U.S. at 393-94. Peller attempts to explain *Wood* as a case in which the Court was requiring exhaustion of state and Supreme Court remedies before seeking habeas. Peller, *supra* note 9, at 638-39. The defendant, however, had appealed directly to the highest state court, although he had not sought a writ of error in the United States Supreme Court. *Wood*, 140 U.S. at 286-87. There is some language that could be interpreted as leaving to the federal habeas court the discretion to put the defendant to a writ of error in the United States Supreme Court. See *id.* at 286, 289; see also *In re Frederich*, 149 U.S. 70, 77 (1893) (citing *Wood* for the proposition that a federal court in a state prisoner habeas case had the discretion to put the prisoner to a writ of error).

The Court, however, indicated that habeas would have been appropriate had there been an allegation of an unconstitutional statute. See *Wood*, 140 U.S. at 287, 290. That the Court did not consider the problem in *Wood* to be solely one of failure to pursue direct review in the Supreme Court is reinforced by *In re Jugiro*, 140 U.S. 291 (1891), decided the same day as *Wood*. Justice Harlan, without mentioning failure to exhaust remedies, held that the exclusion of Japanese from the grand jury was not a matter for habeas. See *id.* at 296-98. The laws of New York did not require such discrimination, “and if, as alleged, they were so administered by the state court, in appellant’s case, as to discriminate against him because of his race, the remedy for the wrong done to him was not by a writ of habeas corpus from a court of the United States.” *Id.* at 298.

2. Limiting habeas to jurisdictional review.

It is probably correct to place habeas in the context of its historical limitation to questions of jurisdiction and to recognize, as Bator did, that the scope of habeas was not coextensive with direct review. But Bator's own analysis pays insufficient attention to the alternative definitions of "jurisdiction." He understates the importance of deviations from the jurisdictional rule in two important respects. First, he mischaracterizes federal court consideration of the constitutionality of statutes on habeas as a narrow exception to the jurisdictional rule,\(^{161}\) given that constitutional litigation at that time focused almost exclusively on issues of statutory validity, even in nonhabeas actions. Second, his category of "illegal sentences" could more appropriately be labeled a category for the Court's developing Bill of Rights jurisprudence. Both points are treated below.

B. Merit Based Versions of Jurisdiction in Habeas Cases

Beginning in the 1870s, the Court resorted increasingly to the merit based version of jurisdiction alluded to in Watkins. In Ex parte Lange,\(^ {162}\) for example, Justice Miller acknowledged that the double jeopardy claim for which the Court granted relief to a federal prisoner did not present a jurisdictional question in the personal or subject matter sense.\(^ {163}\) Instead of pretending that the second judgment was void for want of jurisdiction, the Court stated that there had been no "power" to render the judgment because the conviction offended constitutional and common law principles insofar as it allowed multiple punishments for one crime.\(^ {164}\) Similarly, in Ex parte Siebold,\(^ {165}\) the Court refused to limit itself to strictly jurisdictional questions in considering the constitutionality of a statute under which the prisoner had been convicted.\(^ {166}\) A conviction under an unconstitutional statute, said the Court, "is not merely erroneous, but illegal and void, and cannot be a legal

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161. See Bator, supra note 12, at 466-84.
162. 85 U.S. (18 Wall.) 163 (1874). The statute under which the prisoner was sentenced for stealing mail provided punishment of either a fine or imprisonment, and the court had imposed both. The prisoner paid the fine, then moved for his release from jail. The trial court vacated the former judgment and entered a sentence of imprisonment only. Id. at 163-65.
163. Id. at 176 ("It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such a case."); cf. Dinsman v. Wilkes, 53 U.S. (12 How.) 390, 403 (1851) (no action would lie even if captain erred in decision that marine not entitled to discharge, but captain could be liable for bad faith in punishment or, regardless of motive, if punishment were forbidden by law or beyond his powers).
164. The Court wrote:

Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone... It was error, but it was error because the power to render any further judgment did not exist.

Lange, 85 U.S. (18 Wall.) at 176.
165. 100 U.S. 371 (1880).
166. The Court spoke of habeas as being available where there was a want of jurisdiction or where the proceedings were otherwise "void." Id. at 375.
cause of imprisonment," 167 while the Court stated repeatedly that it would not consider "mere error" on habeas, 168 it did not limit its review to strict "jurisdictional" error either. 169 The Court showed a conscious willingness to grant relief for mistakes falling somewhere between mere error and strict jurisdictional error—what it called "not a case of mere error in law, but a case of denying to a person a constitutional right." 170

During this same period, a similar rejection of narrow "jurisdictional" review took place more generally in civil suits questioning the legality of actions taken by state and federal officials. In cases involving review of the acts of federal agencies, and in cases raising federal and state sovereign immunity defenses, there was (as in habeas) case law supporting judicial review only for want of jurisdiction. 171 But there were also cases supporting broad judicial review for substantive errors of law. 172 For example, in Johnson v. Towsley, 173 decided only two years before Ex parte Lange, the Court considered limits on judicial review of federal Land Department patent grants. 174

167. Id. at 376-77. The Court added, "if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." Id. at 377.
168. Id. at 375.
169. See id. In considering a double jeopardy issue in In re Nielsen, 131 U.S. 176, 184 (1889), the Court stated that a party is entitled to habeas corpus, "not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner." Id. at 184; see also Rogers v. Peck, 199 U.S. 425, 433-34 (1905) ("It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that such interference [habeas] is warranted." (citations omitted)); Ex parte Curtis, 106 U.S. 371, 375 (1882) (considering constitutionality of federal statute on habeas); Ex parte Virginia, 100 U.S. 339, 343 (1880). In Virginia the Court observed:

when a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior Federal court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all. Id. at 343.

170. Nielsen, 131 U.S. at 184; see also Felts v. Murphy, 201 U.S. 123, 130 (1906) ("The sentence imposed in that case was held by this court to have been beyond the jurisdiction of the trial court to pronounce, because it was against the express provisions of the Constitution, which bounds and limits all jurisdiction . . . ."); In re Frederich, 149 U.S. 70, 76 (1893) (seeming to indicate that constitutional violations could be reviewed on habeas, while also stating that because habeas involved a collateral attack, it should be "limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises").

171. See, e.g., Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1867) (federal court lacked jurisdiction to interfere with executive discretion by enjoining enforcement of unconstitutional law). Chief Justice Taney authored several decisions that gave a narrow scope to judicial review of executive actions. See, e.g., Decatur v. Paulding, 39 U.S. (14 Pet.) 496, 514-16 (1840) (Secretary of Navy's interpretation of statutes so as not to pay a pension was discretionary and not subject to judicial remedies); see also Woolhandler, supra note 98, at 422-35.


173. 80 U.S. (13 Wall.) 72 (1871).

174. In Johnson, the Land Office had decided a conflicting claim for preemption. The matter had been appealed from the "register and receiver" to the Commissioner of the Land Office, and then to the Secretary of Interior. Id. at 76, 81. The losing claimant then filed an action in state court against the winner and his grantees. Id. at 76. The action appears to have been one to remove a cloud on title. See id. The claimant's action was not part of a statutory procedure for review of Land Department action, but rather could be characterized as a collateral proceeding. See id. at 77-91.
The Court acknowledged the general rule that the Department’s decisions, in matters within its jurisdiction or discretion, were binding on the courts, and this jurisdiction included agency interpretations of law.\textsuperscript{175} Nevertheless, Justice Miller, who also authored \textit{Lange}, expanded the nonjurisdictional grounds upon which a federal land patent could be attacked and, in some cases, included mistakes of law.\textsuperscript{176}

Similarly, in cases involving claims of sovereign immunity,\textsuperscript{177} the Court rejected arguments that acts taken pursuant to unconstitutional statutes were within the discretion of the officer and therefore unreviewable\textsuperscript{178} despite an earlier holding to the contrary.\textsuperscript{179} In \textit{United States v. Lee},\textsuperscript{180} a case in which federal officers were occupying land under authority of the President, the Court rejected a sovereign immunity defense when the owners sought to eject the officers. Justice Miller’s opinion in \textit{Lee} rejected the government’s argument that a formal assertion of acting under United States authority could foreclose judicial inquiry into the merits of whether such authority in fact existed.\textsuperscript{181} He drew express analogies to habeas, where, he observed, the courts provided remedies for assertions of “unlawful authority.”\textsuperscript{182} Thus, in both agency and sovereign immunity cases the Court even-

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\item \textsuperscript{175} See id. at 83. Indeed, Justice Miller, a few years before, in an action for an injunction against the Secretary of Interior and the Commissioner of Land Office, had reinforced the notion that decisions of law by the Land Office should be treated as unreviewable, at least in an action directly against the official. See \textit{Gaines v. Thompson}, 74 U.S. (7 Wall.) 347, 353 (1869) (refusing to issue injunction on the ground that decision involving interpretation of law was within official discretion).
\item \textsuperscript{176} See \textit{Johnson}, 80 U.S. (13 Wall.) at 84-88. The expansion was allowed in actions in equity. See \textit{Woolhandler}, supra note 100, at 220-21; see also \textit{Jaffe}, supra note 86, at 633-34 (discussing state court cases expanding jurisdictional review either explicitly or implicitly to cover additional issues).
\item \textsuperscript{177} The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. \textit{Constr. amend. XI. Because the amendment is framed as a limitation on federal court jurisdiction, a state officer alleging a sovereign immunity defense could argue that a matter was within his own jurisdiction, and outside of the jurisdiction of an Article III court. Similar sovereign immunity doctrines apply for both the state and federal government, although the Eleventh Amendment applies only to actions against states. See Akhil Reed Amar, \textit{Of Sovereignty and Federalism}, 96 \textit{Yale L.J.} 1425, 1484 (1987).
\item \textsuperscript{178} See \textit{Board of Liquidators v. McComb}, 92 U.S. 531, 541 (1876); \textit{Davis v. Gray}, 83 U.S. (16 Wall.) 203 (1872).
\item \textsuperscript{179} See \textit{Mississippi v. Johnson}, 71 U.S. (4 Wall.) 475, 498-501 (1866) (indicating that enforcement of an unconstitutional law could be within the unreviewable discretion of the executive).
\item \textsuperscript{180} 106 U.S. 196 (1882).
\item \textsuperscript{181} Id. at 220.
\item \textsuperscript{182} Id. (citations omitted) (“As we have already said, the writ of \textit{habeas corpus} has often been used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government.”); see also id. at 218. Justice Miller discussed the injustice of denying a remedy in such a case, as he had in \textit{Johnson} and \textit{Lange}. See id. at 220-21; \textit{Ex parte Lange}, 85 U.S. (18 Wall) 163, 176 (1873); Johnson v. Towsley 80 U.S. (13 Wall.) 72, 84 (1871); see also \textit{Ex parte Siebold}, 100 U.S. 371, 377 (1880) (Bradley, J.) (“[P]ersonal liberty is of so great moment in the eye of the law” that the court could question a final judgment where the court lacked authority.). Justice Clifford dissented in both \textit{Lange} and \textit{Johnson} on the ground that the Court had exceeded the traditional limitations of its review. See \textit{Lange}, 85 U.S. (18 Wall.) at 183, 187, 205 (Clifford, J., dissenting); \textit{Johnson}, 80 U.S. (13 Wall.) at 91 (Clifford, J., dissenting).
\end{itemize}
tually opted for broader judicial review, while rejecting arguments that illegal actions could be justified as within an official's discretion or jurisdiction.

C. Systemic Versus Random Illegality in Constitutional Litigation

The Court most consistently demonstrated its commitment to the broad version of jurisdictional review through its willingness, in both habeas and in civil actions, to consider the constitutionality of statutes that government officials were charged with enforcing. In *Ex parte Siebold*,183 for example, the Court considered the constitutionality of federal election statutes under which prisoners had been convicted by a federal court, and in *Minnesota v. Barber*,184 it upheld federal habeas relief for a state prisoner convicted under a state statute that violated the Commerce Clause. Bator describes deviations from strict jurisdictional review for unconstitutional statutes as "limited";185 they certainly did not establish "the proposition that collateral inquiry was thought appropriate whenever the committing tribunal ruled on an issue of constitutional law."186 But review of statutory constitutionality was more significant than Bator recognized. Indeed, at the time, most of the issues that the Court viewed as "constitutional" were those challenging statutes, rather than ad hoc or random official illegality. This focus on unconstitutional statutes in habeas was part of a more general pattern in suits seeking to remedy injuries inflicted by government. Today we often speak of random official illegality as "unconstitutional." We are accustomed to saying, for example, that police violate a person's constitutional rights by conducting an illegal search,187 or that a sheriff violates the constitutional rights of a deputy by firing him for his political affiliations.188 Such individual illegal actions, however, were not typically bases of constitutional litigation in the nineteenth century. Rather, constitutional issues characteristically presented themselves as attacks on the validity of statutes under which the wrongdoing official acted.

This phenomenon has a number of explanations. In part it resulted from the common law forms of action and pleading, which tended to focus on individual harms. Maintenance of a common law trespass action, for example, required a showing of a tangible or imminent invasion of person or property.189 In a suit to redress a government invasion of liberty or property, a

183. 100 U.S. 371, 376-77 (1879); see also *Ex parte Jackson*, 96 U.S. 727 (1878) (on habeas, rejecting on merits the claim that federal statutes violated Fourth Amendment); cf. *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1868) (initially taking jurisdiction in a case under the 1867 Habeas Act that questioned the constitutionality of Reconstruction statutes).
184. 136 U.S. 313, 317-29 (1890) (invalidating a law requiring that all meats sold in the state be inspected before slaughter); see also Bator, *supra* note 12, at 480 n.97 (citing cases involving unconstitutionality of state statutes).
186. *Id.* at 472.
189. *Compare* *Chaffin v. Taylor*, 114 U.S. 309 (1885) (state court trespass action lay against
citizen might bring a common law trespass action (rather than a constitutional action) against the wrongdoing individual. The officer could plead statutory authority in justification, and the citizen could reply either that the officer lacked statutory authority or that the statute on which the official relied was unconstitutional. Thus, rather than forming an ingredient of the initial complaint, constitutional issues often arose by way of defense or reply in common law actions. This aspect of common law pleading helps explain why an official’s invasion of person or property was not itself seen as creating a constitutional claim, and why an officer committing such a harm, without specific statutory authorization, would not necessarily be characterized as acting “unconstitutionally.” The trespassory invasion was actionable under common law, and was not thought to derive directly from the Constitution. If an officer sought to justify his action by statutory authority and the court found that he acted outside of that authority, it would decide the issue as a plain trespass case, rather than as an issue of constitutional law. Thus, only if the officer trespassed under statutory authority

collector for seizing property after plaintiff tendered coupons, despite state’s attempt to abrogate action) and White v. Greenhow, 114 U.S. 307 (1884) (trespass action lay for seizing property to pay taxes when official justification was under unconstitutional statute) with In re Ayers, 123 U.S. 443, 500-02 (1887) (in denying injunction against state officer’s filing suits to collect taxes after tender of coupons, distinguishing cases in which the defendant officer had committed a common law harm). See also Alfred Hill, Constitutional Remedies, 69 COLUM. L. REV. 1109, 1122-24 & n.56, 1128 (1969); Woolhandler, supra note 98, at 446-53.


190. Constitutional issues could arise in other types of actions besides tort, such as debt actions. See, e.g., Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870) (constitutionality of Congress’ making paper money legal tender presented in debt case); The Passenger Cases, 48 U.S. (7 How.) 283, 392, 409 (1849) (constitutionality of act imposing fees on passengers arose in defense of debt action and in action to recover money paid under protest); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 130-52 (1837) (debt action to recover statutory penalty, and defense that statute was unconstitutional regulation of commerce); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (suit to enforce promissory note; defense of discharge of debt under state statute; statute found unconstitutional); see also Collins, supra note 190, at 1507-09 & nn.81-91 (citing cases raising the issue of the constitutionality of statutes arising in shareholder suits).

191. See Hill, supra note 189, at 1124. In addition, because of limited judicial review of legislation in England, the common law presumably did not address the validity of statutes. Therefore, questions of the validity of statutes were uniquely constitutional, while ad hoc official illegality often presented a common law harm. See Duker, supra note 37, at 236 (discussing the difficulty of applying English common law principles to the American system where statutes could be declared void).

192. See Hill, supra note 189, at 1124. The Passenger Cases, 48 U.S. (7 How.) 283, 392, 409 (1849) (constitutionality of act imposing fees on passengers arose in defense of debt action and in action to recover money paid under protest); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 130-52 (1837) (debt action to recover statutory penalty, and defense that statute was unconstitutional regulation of commerce); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (suit to enforce promissory note; defense of discharge of debt under state statute; statute found unconstitutional); see also Collins, supra note 190, at 1507-09 & nn.81-91 (citing cases raising the issue of the constitutionality of statutes arising in shareholder suits).

193. See, e.g., Poindexter v. Greenhow, 114 U.S. 270, 273-74, 282-83, 303-06 (1883) (finding that defendant in detinue action relied on an unconstitutional state statute). In Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), the Court considered whether the Fifth Amendment Takings Clause applied to the states, and whether the city's diversion of water that deprived the plaintiffs of the value of their wharf was unlawful. The plaintiffs sued in tort for property damage, and the city claimed that it was justified by state statutes conferring a variety of general powers on the city. Id. at 243-44. The plaintiff responded that the statutes would be unconstitutional if they authorized the particular acts related to building the drainage canals that interfered with plaintiffs' wharves. Id. at 245-46. The Court held the Bill of Rights inapplicable to the states. Id. at 247-51.

194. See, e.g., Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-79 (1804) (holding that instructions from the President were inadequate as a plea in justification where the instruction went beyond the statute under which the President purported to act); Murray v. The Schooner Charming Betsy, 6
did a constitutional issue arise, and even then, only indirectly.

This practice of challenging official acts as individual trespasses was reinforced by sovereign immunity doctrines of the day. Rather than suing the government, the litigant harmed by governmental conduct had to sue the officer personally. If the officer could not justify his actions by reference to legal authority, he was stripped of his official character and held liable as an individual. But the finding of individual liability arguably undermined any finding that the officer had acted unconstitutionally, for constitutional prohibitions are directed against state actors, not "private" wrongdoers.\textsuperscript{195} Thus, the statute under which an officer sought to justify his behavior might be termed "unconstitutional" in one of these common law suits, but the acts of the official that the court found lacking legal justification would be termed trespassory.

For example, in \textit{Bates v. Clark},\textsuperscript{196} merchants sued federal military officers for trespass after the officers seized their whiskey. The officers responded that they had acted under a statute forbidding the introduction of liquor into Indian territory.\textsuperscript{197} Because the Court found that the seizure had not occurred in Indian territory, the officers' justification failed, and they were held personally liable for their trespass. The Court had no occasion to discuss the seizure as "unconstitutional" because trespass law provided both the right and the remedy for their unauthorized actions. By contrast, a constitutional issue arose in \textit{Osborn v. Bank of the United States}\textsuperscript{198} because it was necessary to determine the validity of a state statute in order to decide the sufficiency of the defendant officer's plea in justification. The Auditor of the State of Ohio had seized money from the Bank of the United States to satisfy a state tax. The Bank sued him for an injunction on the ground that he had committed trespassory acts.\textsuperscript{199} By way of defense, the officer claimed justification under state law.\textsuperscript{200} Because the Ohio statute had indeed authorized the auditor's acts, the Court had to reach the issue of whether the state statute was unconstitutional. The claimed justification failed because the statutory authority that otherwise would have supported it was invalid, and the auditor was held personally liable for his ongoing trespass.\textsuperscript{201}

The tendency to view the issue of constitutionality as specific to statutes is explained both by common law pleading and the nature of constitutional guarantees applicable to antebellum states. The Contracts Clause\textsuperscript{202} and the

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\item[195] See Hill, supra note 189, at 1129; see also Hart, supra note 190, at 522; note 330 infra and accompanying text.
\item[196] 95 U.S. 204 (1877).
\item[197] Id. at 204-05.
\item[198] 22 U.S. (9 Wheat.) 738 (1824).
\item[199] Id. at 836-37. The state conceded that the state officials would be liable for ordinary trespass if they acted under an unconstitutional statute. Id. at 839.
\item[200] Id. at 836-37.
\item[201] Id. at 868-71.
\item[202] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. I, § 10, cl. 1; see also Farmers' & Mechanics' Bank v. Smith, 19 U.S. (6 Wheat.) 131, 134
\end{footnotesize}
Ex Post Facto and Bill of Attainder Clauses were, by their own terms, clearly prohibitions on legislative action only. Claims of state interference with interstate commerce typically involved challenges to the validity of state legislation that was alleged to intrude on subjects over which Congress had plenary control. Supremacy issues frequently presented themselves as attacks on statutes as did questions of whether the federal government was acting within its enumerated powers.

In the prebureaucratic era of the early nineteenth century, moreover, legislatures made a larger proportion of governmental decisions than they did later in the century when states began increasingly to delegate decision mak-
ing to administrative agencies. Nineteenth century legislative administration was achieved through statutes granting corporate charters and monopolies, taxing specific entities, building dams and bridges, employing officers and later, setting rates. With a high percentage of government action directly commanded by statute, judicial review of statutes could reach a great deal of the arguably unconstitutional behavior of governmental officials.


211. See, e.g., Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 731-32 (1866) (challenging unsuccessfully on Commerce Clause grounds a Pennsylvania statute authorizing bridge construction); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (considering whether contracts were impaired by legislative authorization of a second bridge).


214. Legislatures, moreover, frequently provided criminal penalties for violations of their statutes, including economic regulatory statutes. See, e.g., Allgeyer v. Louisiana, 165 U.S. 578 (1897) (due process challenge to state insurance restrictions); see also Collins, supra note 190, at 1508. Review of state economic regulation thus often arose on review of a state criminal conviction. See, e.g., Powell v. Pennsylvania, 127 U.S. 678, 680 (1888) (upholding against an equal protection challenge a law banning oleomargarine); Presser v. Illinois, 116 U.S. 252, 253 (1886) (upholding constitutionality of a state statute requiring a license for all military organizations other than the state militia and federal troops against privileges and immunities and other challenges); Pace v. Alabama, 106 U.S. 583, 584 (1883) (rejecting an equal protection challenge to a statute that provided a heavier punishment for adultery if the parties were of different races); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874) (challenging on due process and privileges and immunities grounds a statute forbidding sale of liquor); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 420 (1871) (invalidating a sales tax on Commerce Clause grounds); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 169 (1869) (challenging unsuccessfully on Commerce Clause and privileges and immunities grounds a state statute regulating insurance); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) (invalidating a tax imposed on passengers leaving the state); The License Cases, 46 U.S. (5 How.) 504, 505, 540, 554 (1847) (reviewing state criminal convictions for selling imported liquor without a license and Upholding state statute as consistent with the Commerce Clause); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 606 (1842) (invalidating on several grounds a state law criminalizing abduction of fugitive slaves); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (invalidating a Georgia law requiring a licensee to live on an Indian reservation as violation of the exclusive federal power to regulate commerce with the Indian tribes); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 436 (1827) (invalidating a state statute imposing a license tax for the privilege of selling imported goods under Commerce Clause and Article I, § 10).

“Constitutional” challenges to federal criminal convictions often involved challenges to statutes. See, e.g., Baldwin v. Franks, 120 U.S. 678, 685 (1877) (releasing prisoner who filed a petition habeas corpus on the ground that the statute, declared unconstitutional in United States v. Harris, 106 U.S. 629 (1882), was not severable; also considering whether acts charged under other statutory provisions were made criminal by the statutes); United States v. Reece, 92 U.S. 214, 216 (1876) (invalidating a statute punishing those who deny others the right to vote because the statute was not specifically limited to unlawful race discrimination).
Despite the focus on statutes in constitutional litigation, one might have expected issues of random or ad hoc federal official illegality to be raised as constitutional questions under the Bill of Rights. With its specific guarantees of fair criminal proceedings, and its prohibitions against unreasonable searches and seizures, the Bill of Rights addresses federal official misbehavior that could easily occur even when the officer was not engaged in the enforcement of an unconstitutional statute. Before the Civil War, however, constitutional criminal procedural guarantees such as the requirement of indictment and the right to trial by jury received little Supreme Court attention. This was due in part to the limited appellate review in federal criminal cases and to the Supreme Court’s narrow construction of habeas. Also important was the then prevalent perception that the criminal procedure provisions of the Bill of Rights largely articulated preexisting common law rights of criminal defendants. When the Court had occasion to discuss what modern lawyers might consider Bill of Rights guarantees in federal criminal cases, it often failed to mention the Constitution altogether. Circumstances that lawyers today would see as involving violations of the Fourth Amendment seldom arose in criminal cases before the advent of the exclusionary rule. Instead, litigants addressed unreasonable or otherwise illegal seizures as trespassory harms in civil actions against the wrongdoing official. In the cases that came before the Court on direct review from federal criminal convictions, claims that procedural rights had been vio-

215. Of course, the Bill of Rights could also address statutes. See Boyd v. United States, 116 U.S. 616 (1886) (invalidating a statute that compelled production of papers from defendants as a violation of the Fourth and Fifth Amendments); see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press . . . . ”); Mark P. Denbeaux, The First Word of the First Amendment, 80 NW. U. L. REV. 1156 (1986) (arguing that the drafters saw the First Amendment as primarily a restraint on Congress).


217. See, e.g., Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1205-10 (1992) (viewing the Bill of Rights as declaratory of common law rights); see also Bram v. United States, 168 U.S. 532, 543 (1897) (asserting that the Fifth Amendment right against self-incrimination was “but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted”); cf. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120 (1866) (referring to the Bill of Rights: “These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime.”).

218. See, e.g., Hill, supra note 189, at 1150 & n.177 (observing that prior to the adoption of the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914), “the citizen seeking to avail himself of his rights under the fourth amendment could do little more than sue in trespass”); see also Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 73, 122 (1804) (addressing lack of probable cause in the seizure of a vessel without reference to the Constitution); cf. Ker v. Illinois, 119 U.S. 436, 440, 444 (1886) (suggesting that a prisoner could sue in trespass or for false imprisonment when imprisoned without due process); Boyd, 116 U.S. at 626 (discussing two English trespass cases, familiar to the Framers, which awarded damages for search and seizure under general warrant).

219. Although there was no appeal of right by a defendant to the Supreme Court from a federal criminal conviction until 1889, see Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656 (permitting Court review in capital cases only), review was possible on a “certificate of division” when the Circuit (trial) judges disagreed on a question of law. See Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159-61. Such review went directly from the federal trial court to the Supreme Court. See also Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827 (expanding right of appeal direct to the Supreme
lated typically occasioned common law and statutory rather than constitutional exposition. For example, the Court generally did not refer to the Fifth Amendment guarantee of indictment when it reviewed criminal cases raising questions about an indictment's sufficiency.\textsuperscript{220} Rather, the discussion addressed either technical pleading requirements at common law or whether the indictment sufficiently tracked a statute. Similarly, the Court discussed issues of double jeopardy, not with reference to the Constitution, but to common law doctrines.\textsuperscript{221}

D. Congressional Expansion of Jurisdiction and the Focus on Systemic Illegality

Despite Reconstruction, the Court continued to focus on issues of statutory validity in constitutional litigation. The Reconstruction Amendments enlarged enormously the potential role of the federal courts.\textsuperscript{222} At the substantive level, the Thirteenth, Fourteenth, and Fifteenth Amendment rights awaited definition. From a jurisdictional perspective, therefore, more federal questions than before would be presented for Supreme Court direct review of state court decisions under section 25 of the Judiciary Act of 1789 and its successor provisions. In addition, by 1875, Congress arguably had provided a federal trial forum for almost every case in which a federal question might

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{220} See, e.g., United States v. The Brig Neurea, 60 U.S. (19 How.) 92, 94-96 (1856) (treating issue of sufficiency of indictment in terms of common law and the particular statute under which defendant was charged); United States v. Mills, 32 U.S. (7 Pet.) 138, 142 (1833) (same); United States v. Gooding, 25 U.S. (12 Wheat.) 460, 477-78 (1827) (finding defect in indictment primarily with reference to whether it followed the statute); cf. United States v. Cook, 84 U.S. (17 Wall.) 168, 171-82 (1872) (rejecting a claim that an indictment was insufficient after a technical discussion of criminal pleading); United States v. Quincy, 31 U.S. (6 Pet.) 445, 456-58 (1832) (finding jury instructions faulty after statutory analysis). In Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847), the Court considered the sufficiency of an indictment under the fugitive slave law primarily as a matter of statutory interpretation. \textit{Id.} at 224-26. Only when considering the validity of the statute itself did the Court discuss the Constitution. \textit{Id.} at 224, 229.

\item \textsuperscript{221} See, e.g., United States v. Nickerson, 58 U.S. (17 How.) 204, 208-12 (1855) (discussing a double jeopardy claim without referring to the Constitution); United States v. Perez, 22 U.S. (9 Wheat.) 579, 579 (1824) (same). \textit{But cf.} Crist v. Bretz, 437 U.S. 28, 44-45 (1978) (Powell, J., dissenting) (noting that \textit{Perez} may not have been a double jeopardy case, but rather reflected a prohibition on the needless discharge of jurors). The parties and the Court were more likely to constitutionalize the issues as the century progressed. See notes 293-323 infra and accompanying text.

In Webster v. Reid, 52 U.S. (11 How.) 437 (1850), the Court allowed a collateral attack on a territorial judgment whereby commissioners, who were to adjudicate claims to certain lands that Congress had set aside for Indians, secured all the land for their fees. \textit{Id.} at 438-40. The Court invalidated the judgment for lack of notice by personal service or attachment and for lack of a jury trial as required by the Seventh Amendment. \textit{Id.} at 460. In discussing notice, the Court did not specifically refer to the Constitution or to due process. \textit{Id.} at 459-60. The Court did specifically refer to the Seventh Amendment in finding void the territorial statute denying a jury trial in the case. \textit{Id.} at 460; see also Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 274-75 (1856) (challenging the validity of a federal statute providing for distress warrants on due process grounds).

\item \textsuperscript{222} See, e.g., FELIX FRANKFURTER \\& JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 56-69 (1928); STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 143-60 (1968); Wiecek, supra note 37, at 333-34.
\end{enumerate}
\end{footnotesize}
The jurisdiction of federal courts extended to federal question jurisdiction, \footnote{223} federal question removal, \footnote{224} civil rights removal, \footnote{225} as well as habeas corpus. \footnote{226} Moreover, the Civil Rights Act of 1871, the ancestor to modern 42 U.S.C. § 1983, provided a federal cause of action against any person who “under color of [state] law” deprived another of a right “secured by the Constitution of the United States.” \footnote{228}

It is a familiar story, however, that the potential expansion of federal jurisdiction did not materialize. \footnote{229} Waning enthusiasm for Reconstruction led to narrow interpretations of the new statutes, and the ingrained habit of considering constitutional issues in terms of statutory validity tended to maintain a limited, antebellum style role for the federal courts. Of course, the provisions expanding federal trial court jurisdiction were given some effect. But in suits challenging the legality of official behavior, the Court continued for some time to interpret federal court jurisdiction as limited to questions of the constitutionality of statutes, rather than the full range of unconstitutional behavior by state officials. \footnote{230}

\footnote{223} Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. The framers of the 1875 general federal question provision may have intended to extend such jurisdiction to its full constitutional extent. \textit{See}, e.g., James H. Chadbourn & A. Leo Levin, \textit{Original Jurisdiction of Federal Questions}, 90 U. PA. L. REV. 639, 645-49 (1942); \textit{see also} Amsterdam, supra note 16, at 828 (observing that the legislature no longer held the view that state courts were the normal forum for enforcement of federal law); Zeigler, supra note 149, at 1020 (legislative history shows that Congress intended substantial federal court interference with state civil and criminal justice systems in the South). \textit{But cf.} BATOR ET AL., supra note 43, at 997 (suggesting that the 1875 grant of general federal question jurisdiction was not meant to extend to Article III limits).

The Court initially interpreted the removal provisions of the 1875 Act to provide a federal trial forum even where the federal issue arose only by way of defense. \textit{See} Michael G. Collins, \textit{The Unhappy History of Federal Question Removal}, 71 IOWA L. REV. 717, 729-34 (1986). But successor provisions in the 1887 Judiciary Act were read as only allowing removal when the federal question appeared on the face of a well pleaded complaint. \textit{See id.} at 734-38 (discussing Tennessee v. Union & Planters’ Bank, 152 U.S. 454 (1894)).

\footnote{224} Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

\footnote{225} \textit{Id.} at 470-71, amended by Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 552.

\footnote{226} Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, 27. The Act provided for removal of civil and criminal actions when a party was “denied or cannot enforce” in the state courts a right granted by federal law relating to equal civil rights. \textit{Id.} For a history and detailed analysis of the 1875 Act, see Amsterdam, supra note 16, at 842-82.

\footnote{227} Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385. Professor Mayers sees no indication that habeas legislation was related to other Reconstruction legislation. Mayers, supra note 37, at 52.

\footnote{228} Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (current version of cause of action provision at 42 U.S.C. § 1983 (1988)). The Act covers violations of federal statutes, as well as “any rights, privileges, or immunities secured by the Constitution.” \textit{Id.}


\footnote{230} \textit{Cf.} Schmidt, supra note 160, at 1441 & n.187 (asserting that the view that constitutional
For example, both litigants and lower courts apparently read the "under color of state law" language in section 1983 to require that official behavior have the sanction of a state statute, or something close to it, before it could be challenged in federal court. 231 While the Court was less than clear as to whether it subscribed to this interpretation, 232 it did not dispel it until 1961. 233 In the interim, litigants with claims of ad hoc or random official illegality were left to state court tort actions. 234 In addition, the Court explicitly limited the scope of the 1871 Civil Rights Act by interpreting "rights secured by the constitution" to mean rights originating in the Constitution, as distinguished from contract and property rights that, although protected by the Constitution, had their genesis in the common law. 235

An alternative avenue for suing government officials for injury to property or contractual rights was found in the 1875 general federal question statute. 236 Suits against state officers brought under that statute that raised constitutional questions, however, also focused largely on issues of statutory validity. 237 But bringing challenges to statutes as an original matter under

errors by state judges should be corrected only by the Supreme Court rather than lower federal courts was "deeply held in the late nineteenth century").

231. Collins, supra note 190, at 1499 & n.42; see also Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1160 n.138 (1977); cf. Lane v. Wilson, 307 U.S. 268 (1939) (reinstating damages action under 1871 Act against three county election officials who refused to register plaintiff to vote pursuant to an Oklahoma statute); Myers v. Anderson, 238 U.S. 368 (1915) (election officials liable for damages under the 1871 Act where they denied persons the right to vote pursuant to a state law that was invalid under the Fifteenth Amendment).

232. See Barney v. City of New York, 193 U.S. 430, 437-38, 441 (1904). Barney could be interpreted as merely rejecting the theory that a violation of state law would violate due process.


235. See Carter v. Greenhow, 114 U.S. 317, 322 (1885). Michael Collins has discussed cases where the Court limited the reach of several Reconstruction statutes by narrowly construing the language "rights secured by the constitution." Collins, supra note 190, at 1503 & n.62, 1510; see also Logan v. United States, 144 U.S. 263, 287-88 (1892); Strauder v. West Virginia, 100 U.S. 303, 310 (1880); United States v. Cruikshank, 92 U.S. 542, 553-55 (1876). These narrow interpretations resembled the Court's interpretation of the Fourteenth Amendment's Privileges and Immunities Clause as protecting only rights of "national" citizenship. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), discussed in Gressman, supra note 229, at 1337-38. In some instances, the Court interpreted § 1983 as only covering "civil rights." See, e.g., Holt v. Indiana Mfg. Co., 176 U.S. 68, 72 (1900), discussed in Collins, supra note 190, at 1500-01.


237. See Collins, supra note 190, at 1516 & n.124 (discussing allegations of unconstitutionality of statutes in early federal question cases); Hill, supra note 189, at 1129 (pleadings in federal question equity cases frequently alleged the unconstitutionality of statutes). This is not to say that federal question jurisdiction focused exclusively on questions of the unconstitutionality of statutes, but rather that cases claiming to arise directly under the Constitution, as distinguished from federal statutes, tended to focus on issues of statutory validity. See, e.g., New Orleans, M. & Tex. R.R. v. Mississippi, 102 U.S. 135 (1880) (finding removal proper in a suit where questions of statutory interpretation rather than validity were raised in both the complaint and in the defense). Because many federal statutes had their own jurisdictional provisions, however, the main purpose of (original) general federal question jurisdiction may have been to address constitutional violations. See Collins, supra note 190, at 1528-29.

The Court's definition of cases that arose under federal law for purposes of the 1875 statute
general federal question jurisdiction required a modification of traditional pleading conventions. As noted above, constitutional issues arose initially by way of defense or reply. Over time, however, plaintiffs suing under the general federal question statute began to raise the issue of statutory constitutionality in their complaints. Indeed, they had to in order to comply with limitations on federal court jurisdiction, such as the well pleaded complaint rule requiring federal questions to appear on the face of the plaintiff’s initial pleading. And while the Court did not explicitly limit such actions to challenges to statutes, cases alleging random official illegality were not the immediate beneficiaries of this pleading change. The inferiority of claims of random or ad hoc official illegality may have been due in part to the Court’s continued reluctance to view such random illegality as a constitutional violation at all.


238. For example, in White v. Greenhow, 114 U.S. 307 (1884), the Court entertained an action to recover personal property seized by the Treasurer of Richmond after the plaintiff had tendered state bond coupons in payment of taxes. Id. at 307-08. The Court allowed the plaintiff to plead the unconstitutionality of the statute under which the Treasurer of Richmond had refused the coupons as part of his complaint, thereby giving the federal trial court federal question jurisdiction. Id.; see also Scott v. Donald, 165 U.S. 107 (1897) (injunctive action); Scott v. Donald, 165 U.S. 58 (1897) (damages action); Carter v. Greenhow, 114 U.S. 317, 321-23 (1884) (denying federal question jurisdiction only for want of amount in controversy). While the Virginia coupon cases preceded the Court’s firming up of the well pleaded complaint rule in Metcalf, the Court’s decision in Scott came later. See Collins, supra note 190, at 1510-25; Woolhandler, supra note 98, at 446-53.

Under prior methods of pleading, the plaintiff would have alleged merely a trespass rather than a constitutional violation in his or her complaint. See notes 189-194 supra and accompanying text. An example of the older, more complicated pleading style is found in Smith v. Greenhow, 109 U.S. 669, 670 (1884), a case presenting similar facts to White. The Court held the case removable from state court at a time when federal questions were not required to be presented in the complaint for removal. Although the complaint alleged trespass, the Court found a federal question to support removal in subsequent pleadings where the validity of the statute under which the Treasurer refused the coupons came into question. Id. at 670-71.

239. See Metcalf, 128 U.S. at 586. Litigants based their suits on diversity jurisdiction when possible, thereby avoiding the uncertainties of federal question jurisdiction. Perhaps partly due to Eleventh Amendment jurisprudence, suits against state officers in diversity cases also tended to focus on issues of statutory validity. See, e.g., Truax v. Raich, 239 U.S. 33 (1915) (no Eleventh Amendment bar to enjoining enforcement of criminal laws making it illegal to employ less than 80% electors or native born Americans); Herndon v. Chicago, Rock Island & Pac. Ry., 218 U.S. 135 (1910) (enjoining enforcement of state law requiring trains to stop at all junctions); Western Union Tel. Co. v. Andrews, 216 U.S. 165 (1910) (enjoining state statute); McNeill v. Southern Ry., 202 U.S. 543, 558-63 (1906); Prout v. Starr, 188 U.S. 537 (1903) (shareholders sued directors and state official to enjoin enforcement of state law).

240. See, e.g., Cuyahoga Power Co. v. Akron, 240 U.S. 462, 463-64 (1916) (federal jurisdiction premised on reliance of defendant city on unconstitutional ordinance appropriating water rights); Ex parte Young, 209 U.S. 123, 147-48 (1908) (federal question jurisdiction in cases challenging rates and enforcement provisions as unconstitutional); Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 7 (1898) (federal question jurisdiction premised on unconstitutionality of city ordinance that impaired contractual obligations of city to plaintiff); Barry v. Edmunds, 116 U.S. 550, 552-53 (1886) (federal question jurisdiction in action for trespass on case by Virginia resident against county treasurer for seizure of property after refusal to accept coupons; treasurer was acting under unconstitutional Virginia statute).

The Court’s sovereign immunity jurisprudence complemented the pleading change by allowing
A similar focus on statutory validity characterized the federal jurisdictional provisions regarding criminal procedure. The Civil Rights Act of 1866 provided that a criminal defendant could remove his prosecution from state to federal court if he could show that he was “denied or cannot enforce” federal equal rights guarantees in state court.\(^{241}\) The language of the statute—“denied or cannot enforce”—seemed to allow removal whether or not the inability to secure federal rights was based on a state statute. Despite this apparent authorization, the Court required that the denial arise from the command of an unconstitutional statute.\(^{242}\) Thus, in *Virginia v.*

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\(^{241}\) The Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27.

\(^{242}\) See generally *Amsterdam*, supra note 115, at 106-49; *Woolhandler*, supra note 98, at 438-42.

Because an officer acting contrary to state statute or other lawful authority could also be subject to a suit as an individual, the sovereign immunity problem could be avoided in cases of random official illegality. See *Reagan*, 154 U.S. at 391 (noting that individual tortious acts of officers, in addition to acts under unconstitutional statutes, were not suits against the state under the Eleventh Amendment); note 194 supra and accompanying text. The Court, however, was struggling with the concept of whether such cases presented “constitutional” violations or trespasses. There were few cases against state officers for ad hoc illegality under either federal question or diversity jurisdiction.

In diversity, however, suits against counties on ordinary debt claims arising from nonpayment of bonds were fairly common. See, e.g., *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (denying Eleventh Amendment immunity to county sued on bonds, noting, “the records of this court for the last thirty years are full of suits against counties”); *Blair v. Cuming County*, 111 U.S. 363 (1884) (suing county to recover a bond and coupons). These cases were not necessarily seen as involving constitutional Contract Clause violations until *Walla Walla*, 172 U.S. at 1, 7-9.


242. See *Schmidt*, supra note 160, at 1433; see also *Murray v. Louisiana*, 163 U.S. 101, 105-06 (1896) (denial of removal was proper since jury discrimination was not on face of statute); *Smith v. Mississippi*, 162 U.S. 592, 600 (1896) (same); *Gibson v. Mississippi*, 162 U.S. 565, 581 (1896) (same); *Bush v. Kentucky*, 107 U.S. 110, 117-22 (1883) (removal allowed where jury discrimination statutorily mandated); *Virginia v. Rives*, 100 U.S. 313, 320-22 (1879) (finding removal improper when jury discrimination was in violation of state law); *Strauder v. West Virginia*, 100 U.S. 303, 307-12 (1879) (allowing civil rights removal where discrimination in seating blacks on petit jury was mandated by statute). See generally *Amsterdam*, supra note 16, at 814, 830 (discussing restrictions on civil rights removal and seeing in the Court's interpretation of various provisions a general reluctance to allow federal judicial involvement in state criminal proceedings until state court proceedings have concluded). As initially enacted, the Civil Rights Act of 1866 did not limit civil rights removal to
Rives, the Court held that removal of a criminal case from state court was improper under the 1866 Act, despite defendants' claim that there were no blacks on the petit or grand juries. While acknowledging that constitutional violations could occur in the course of judicial proceedings or by acts of subordinate state officers, even in the absence of explicit state statutory authorization, the Court nevertheless read the Civil Rights Act of 1866 as only making "reference to a legislative denial or an inability resulting from it." It maintained that federal jurisdiction should not be premised on the illegal acts of a subordinate officer of the state when these were manifested as judicial errors in particular cases.

The Court viewed habeas corpus similarly, allowing federal jurisdiction primarily for review of the constitutionality of statutes in both state and federal prisoner cases. For example, the Court refused to consider on habeas the merits of a claim by a black prisoner that New York officials had unconstitutionally excluded blacks from juries when the legislation under which the officials had acted was facially neutral. It did so even though it had previously held, on direct review of a state criminal conviction, that such ad hoc discrimination was indeed an equal protection violation. The Court concluded that the exclusion of blacks from the jury had not been countenanced by state statute and therefore was an inappropriate subject for federal habeas. Thus, the exclusion of jurors on the basis of race, unless expressly pretrial removal, but the provision was mangled in an 1875 revision. See Schmidt, supra note 160, at 1432-35.

243. 100 U.S. 313 (1879).
244. Id. at 320.
245. Id. at 319-22; Gibson, 162 U.S. at 581-82 (holding that denial of removal was proper where jury discrimination not commanded by statute); Neal v. Delaware, 103 U.S. 370, 387, 393 (1881) (on direct review from state court, holding that pretrial removal had been properly denied because jury discrimination was not authorized by state statutes or constitution; also finding that there had been an equal protection violation).
247. See Schmidt, supra note 160, at 1434 (citing Rives, 100 U.S. at 319); see also Amsterdam, supra note 16, at 855-56 (noting that Court's initial concern for facially unconstitutional statutes was based on probability that rights would not be enforced in state courts, but that facial unconstitutionality later became a requirement for removal based on jury exclusion claims).
248. Minnesota v. Barber, 136 U.S. 313 (1890) (on habeas, reviewing constitutionality of state meat inspection legislation); Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1868) (initially taking jurisdiction under 1867 Act of case involving pretrial military detention and challenging Reconstruction legislation); see also Bator, supra note 12, at 480 n.97 (citing cases involving unconstitutionality of state statutes); id. at 468-74 (discussing grant of habeas to review constitutionality of statutes).

Interpretations of both the 1867 and 1789 Acts allowed for review of the unconstitutionality of statutes. The Court considered some federal prisoner cases under the 1789 Act. See Ex parte Siebold, 100 U.S. 371 (1879); see also Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869) (pretrial habeas challenging Reconstruction legislation; Court took jurisdiction under 1789 provisions); DUKER, supra note 37, at 196-97 & n.108 (discussing Yerger). In Ex parte Royall, 117 U.S. 241, 248 (1886), a case under the 1867 Act, the Court concluded that jurisdiction for pretrial habeas was available if the statute under which the prisoner was being prosecuted was unconstitutional, but that the federal courts should ordinarily decline to exercise such jurisdiction until after the conclusion of the state court proceedings. Id. at 251.
249. See In re Wood, 140 U.S. 278 (1891); notes 158-160 supra and accompanying text.
250. See Neal v. Delaware, 103 U.S. 370 (1881).
251. See Wood, 140 U.S. at 283-86.
authorized by statute, could only be policed on direct review.

If the Court's review of unconstitutional statutes on habeas is read only in light of habeas history, it might understandably be seen as a narrow exception to the historical limitation of habeas to "jurisdictional" review for collateral attacks on judgments. But if such review is read against the background of suits challenging government behavior more generally,\textsuperscript{252} then developments in habeas law can be seen differently. The historical record suggests that consideration of statutory constitutionality was not an anomalous expansion of habeas as Bator argued, but rather a manifestation of the traditional link between constitutional issues and statutes, and of the Court's resistance to the Reconstruction Congress' efforts to widen federal court jurisdiction.\textsuperscript{253}

E. \textit{The Constitutionalization of Ad Hoc Official Illegality}

A number of factors gradually undermined the nineteenth century Court's nearly exclusive focus on statutes as the grist of constitutional litigation on habeas and otherwise: a growing awareness that government officials could inflict similar injuries whether or not their acts were expressly authorized by statute; a shift of power to executive officials and agencies associated with the emergence of the regulatory state; an increased willingness on the part of the Court to review the merits of economic regulation; and finally, a decline in the common law as the perceived source of actions against government. As a consequence, wrongful official acts not explicitly authorized by statute increasingly came to be referred to as "constitutional violations." As substantive constitutional law expanded, so too did federal court jurisdiction. The Court increasingly interpreted federal jurisdictional statutes so as to make available a federal trial forum in civil actions seeking injunctions and damages, as well as on habeas corpus. This increasing recognition that the Constitution addressed random illegality, moreover, signalled the displacement of the common law by the Constitution as the perceived source of causes of action against government officials.

1. \textit{Substantive constitutional law—state action.}

Despite the Court's reading of various Reconstruction enactments as primarily addressing acts of state officials taken under unconstitutional statutes, the Court never squarely took the position that random illegality could not constitute a constitutional violation.\textsuperscript{254} Such a theory would have been diffi-
culty to sustain as to actions of federal officials because the Bill of Rights seemed, on its face, to address ad hoc official illegality. Limiting constitutional violations to legislative acts might have been more defensible as to the states because antebellum constitutional restrictions on the states primarily addressed state legislative activity. In addition, the guarantees of the Fourteenth Amendment applied only to "States," and the amendment could plausibly have been read as limited to unconstitutional state legislative action. In fact, Justice Field espoused just such a theory. Moreover, the Court was sympathetic to the vision of judicial federalism embodied in Justice Field's theory, as indicated by its decisions limiting the new federal jurisdictional statutes to issues of statutory validity. As Benno Schmidt has shown, the Court was unsympathetic even to cases of abuse of power coming its way on direct review, particularly those alleging race discrimination.

In one sense, indeed, his act was the act of the State, and was prohibited by the constitutional Amendment. But inasmuch as it was a criminal misuse of the state law, it cannot be said to have been such a 'denial or disability to enforce in the judicial tribunals of the State' the rights of colored men, as is contemplated by the removal Act.

See notes 215-221 supra and accompanying text; see also Ex parte Wilson, 114 U.S. 417, 426 (1885) (referring to the Fifth Amendment's requirement of indictment: "The purpose of the Amendment was to limit the powers of the legislature, as well as of the prosecuting officers, of the United States."); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 118-23 (1866) (holding unconstitutional a trial held before a court not established by Congress and without a jury).

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See Rives, 100 U.S. at 333-34 (Field, J., concurring), discussed in Schmidt, supra note 160, at 1441-43. The Court sometimes made statements that arguably supported Field's position. See, e.g., The Civil Rights Cases, 109 U.S. 3, 11 (1883) (stating that the Fourteenth Amendment addressed "[s]tate action" rather than an "[i]ndividual invasion of individual rights"); see also Kennard v. Louisiana ex rel. Morgan, 92 U.S. 480, 481 (1875) ("The question . . . is not whether the courts below, having jurisdiction . . . have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts."). Field would have treated the final decision of the state's highest court as state action, but even here he was reluctant to have the Court review ad hoc official illegality.


See Schmidt, supra note 160, at 1462-72; see also id. at 1441 (Field's views of Constitution largely adopted by the Court at the subconstitutional level). Schmidt discusses jury discrimination cases that came to the Court on direct review, in which the Court left standing state factual findings of nondiscrimination or procedural default. See, e.g., Murray v. Louisiana, 163 U.S. 101 (1896); Smith v. Mississippi, 162 U.S. 592 (1896); Gibson v. Mississippi, 162 U.S. 565 (1896). Neal v. Delaware, 103 U.S. 370 (1881), in which there was a state admission of discrimination, remained the primary Supreme Court finding of jury discrimination without a statute until its 1935 decision in Norris v. Alabama, 294 U.S. 587 (1935). See Neal, 103 U.S. at 393; Schmidt, supra note 160, at 1438, 1472. The Court had, however, allowed relief when state courts refused to consider the defendant's claims of jury discrimination. See Rogers v. Alabama, 192 U.S. 226 (1904) (reversing conviction where state court refused to consider a two page motion for proxility); Carter v. Texas, 177 U.S. 442 (1900) (reversing state conviction where court refused to hear evidence supporting allegation of jury discrimination); see also Schmidt, supra note 160, at 1470-71 (discussing Rogers and Carter).
Yet, the Court never wholly embraced Field's insistence that state legislative action be a prerequisite for finding a constitutional violation. In *Ex parte Virginia*, 260 decided the same day that the Court disallowed civil rights removal for ad hoc jury discrimination, 261 the Court considered whether Congress could enforce a proscription of jury discrimination against a state judge who acted without explicit statutory command to discriminate. The Court asserted that state action under the Fourteenth Amendment could occur by way of executive, legislative, or judicial action reasoning, "This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." 262

Over time the Court showed more enthusiasm for policing economic regulation than it did for policing race discrimination. This enthusiasm, in turn, increased the Court's willingness to recognize that abuses of state conferred power could produce constitutional violations. 263 State legislatures had set many of the early railroad and warehouse rates that became the subject of numerous constitutional challenges in the latter part of the nineteenth century, 264 but legislatures increasingly delegated such tasks to agencies and local governmental bodies. 265 This development led the Court to recognize that state action could occur without specific legislation. Early challenges to rates set by agencies were often framed as challenges to the background statutes authorizing the delegation to agencies. 266 In the 1890s however, the Court entertained more direct challenges to agency-set rates as unconstitutional in themselves. It reasoned that since the rates could have

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260. 100 U.S. 339 (1880).
262. Rives, 100 U.S. at 347; cf. Neal, 103 U.S. at 393, 397 (making a similar assertion under the Fifteenth Amendment).
263. Compare Smyth v. Ames, 169 U.S. 466, 533-39, 546-47 (1898) (Justice Harlan's detailed assessment of evidence of confiscatory rate; prescribing basis for calculations of fair return as fair value of property being used for convenience of the public) with Gibson, 162 U.S. at 584 (Justice Harlan's refusal to consider merits of claim of ad hoc jury discrimination because defendant had not moved to quash indictment but rather had filed petition for removal). The expansion of federal jurisdiction in the postbellum period was at least partly attributable to a desire to protect entrepreneurial interests. See, e.g., Frankfurter & Landis, supra note 222, at 64-65 & nn.31, 91-93; Ktulcr, supra note 222, at 157-58; Wieck, supra note 37, at 341. By the turn of the century, the Due Process Clause had displaced the Contracts Clause as the primary means of challenging state interference with property. See Benjamin F. Wright, The Growth of American Constitutional Law 154 (1942). The Due Process Clause more comfortably addressed ad hoc violations than did the Contracts Clause. See note 202 supra.
264. See, e.g., Smyth, 169 U.S. at 466, 547 (upholding Fourteenth Amendment challenge to statutory railroad rates); Munn v. Illinois, 94 U.S. 113, 117 (factual statement), 123 (1877) (rejecting Fourteenth Amendment challenge to statutory rates on direct review of criminal case).
265. In addition, local governments regulated local utilities, raising the issue of whether local government action should be considered "state action" if local ordinances were not authorized by state law. See Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 286-89 (1913) (rejecting claim that there was no state action, and therefore no federal question, when confiscatory rates set by city ordinance would violate state as well as federal Due Process Clauses).
266. See, e.g., Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 439-40, 457 (1890) (in mandamus action from state court to compel railroad to comply with commission-set rate, holding state statute as construed by state court was unconstitutional in not allowing for judicial review of commission-set rates); Railroad Comm'n Cases, 116 U.S. 307, 335-36 (1886) (upholding state statute setting up railroad commission against due process, equal protection, and other attacks).
been held unconstitutional had they been promulgated by statute, they could also be held unconstitutional, and subject to judicial remedies, without explicit legislative authorization. The Court's assumption in these cases seems to have been that the agency was acting within the general authority granted by the statute, so the constitutional issue was tied somewhat to the validity of the authorizing statute. The upshot of these cases was that it made no difference whether the claims involved a statute invalid on its face, or merely as applied.

267. See Home Tel. & Tel., 227 U.S. at 278, 286-89; Smyth, 169 U.S. at 526 (in a due process challenge to legislative rates noting settled principle that a "state enactment, or regulations made under the authority of a state enactment," which established rates that denied just compensation would violate Fourteenth Amendment); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 388, 399 (1894) (enjoining state attorney general and railroad commission's enforcement of commission-set rates). The Court's finding of a constitutional violation in such cases was tied to a finding that there was no sovereign immunity. In the nineteenth century, the Court generally followed the holding in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 868-71 (1824), that actions under unconstitutional statutes were not sheltered from federal judicial remedies by sovereign or discretionary immunity. An exception to this principle was Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866) (holding that the President cannot be prevented by injunction from implementing an allegedly unconstitutional act); see notes 177-182 supra and accompanying text. When litigants challenged ad hoc official illegality in federal court, the defendant officers frequently sought to distinguish cases in which the Court had rejected sovereign immunity because they involved unconstitutional statutes. The officials' argument made little sense as a matter of traditional immunity law, under which an officer acting without statutory authorization was not considered immune from liability. The officials argued that allegedly wrongful acts that were taken under constitutional statutes were immune from federal judicial scrutiny because such acts were within the discretion of the officer. Their arguments, typically rejected by the Court, were similar to the argument that the court should not review "mere error" on habeas. See notes 189-194 supra and accompanying text.

268. See Reagan, 154 U.S. at 390 (rejecting argument of immunity for acts taken under a constitutional statute: "Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the State, and so as to make such administration an illegal burden and exaction upon the individual."); see also General Oil Co. v. Crain, 209 U.S. 211, 227 (1908) (rejecting state court's reasoning that suit challenging fees for inspection of oil that was to be sold in other states was barred by sovereign immunity; state court had distinguished a prior case "by saying that plaintiff in error did not assail the inspection law for being void upon its face, but only on the ground that the oil upon which defendant was about to impose the inspection fees was in law affected with interstate commerce"); Smyth, 169 U.S. at 526 (stating principle that the "question whether [rates] are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority"); Poindexter v. Greenhow, 114 U.S. 270, 295 (1885) ("it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right"); United States v. Lee, 106 U.S. 196, 219-20 (1882) ("It is not pretended ... that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation.").


270. See General Oil, 209 U.S. at 227-28; see also Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921) (allegation of unconstitutionality of state statute as applied was within the Court's mandatory error jurisdiction rather than certiorari jurisdiction). That the Supreme Court entertained a challenge to a statute "as applied" as within its mandatory jurisdiction for cases in which state courts upheld the validity of state statutes illustrates this increasing willingness to equate random and statutorily commanded violations, as well as a willingness to accord a federal forum for all such violations. This tendency, however, had long been implicit in Supreme Court decisions.
2. The expansion of federal jurisdiction.

The increasing inclusion of ad hoc official illegality in constitutional litigation caused a ripple effect in the jurisdiction of the federal courts. The Court had interpreted the Reconstruction statutes to provide federal court remedies primarily for official acts taken under unconstitutional statutes, as opposed to those not explicitly authorized; but as a matter of substantive constitutional law, the Court did not insist that constitutional violations be explicitly authorized by statute. Despite early narrow applications, it was natural that federal jurisdictional statutes, which explicitly addressed issues arising under the Constitution, would expand to cover ad hoc violations as the Court gradually recognized constitutional challenges to such action. Admittedly, the Court remained reluctant well into this century to allow federal jurisdiction in abuse of power cases. But by 1913, in *Home Telephone & Telegraph Co. v. City of Los Angeles*, the Court had stated that a Fourteenth Amendment violation could occur, and that federal question jurisdiction would be available to redress it, in abuse of power cases—that is, cases "where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed."

The expansion of federal jurisdiction implicit in the recognition of ad hoc illegality as a constitutional violation was similarly manifest in habeas cases. The landmark equal protection decision of *Yick Wo v. Hopkins* illustrates the concurrent expansion of substantive Fourteenth Amendment law and habeas jurisdiction to address ad hoc official illegality. The Court found in the companion cases of two prisoners (one on direct review of a state court's denial of habeas, and one on review of a lower federal court's denial of habeas) that both prisoners were being held illegally and had to be discharged from custody. The two prisoners had violated a local ordinance against operating a laundry in a wooden building without permission of the Board of Supervisors, but they were able to show that the Board had denied

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See, e.g., Virginia v. Rives, 100 U.S. 313, 321 (1880); see also Amar & Widawsky, supra note 254, at 1379 & n.85.

271. See Barney v. City of New York, 193 U.S. 430, 437-38, 441 (1904); note 232 supra.

272. 227 U.S. 278, 286-89 (1913).

273. Id. at 287. The Court rejected the argument that no constitutional violation occurred until after state courts denied a remedy, stating, "[i]t is manifest that [in] necessary operation the [suggested] doctrine . . . would in substance cause the state courts to become the primary source for applying and enforcing the Constitution of the United States in all cases covered by the Fourteenth Amendment." Id. at 285. Similarly, in *Wiley v. Sinkler*, 179 U.S. 58, 58-59 (1900), the Court allowed federal question jurisdiction in the case of an ad hoc denial of the right to vote on the ground that the plaintiff had alleged a denial of a right secured by the Constitution. Id. at 62-64. Damages actions for denials of the right to vote were recognized at common law. See *Ashby v. White*, 87 Eng. Rep. 808, 813 (Q.B. 1703) (Holt, J., dissenting), rev'd 1 Eng. Rep. 417 (H.L. 1703), discussed in *Jaffe*, supra note 36, at 208-09.

274. 118 U.S. 356 (1886).

275. *Yick Wo* actually came to the Supreme Court on direct review from the California Supreme Court's denial of habeas. The consolidated case of *Wo Lee*, however, came to the Court on direct review of a lower federal court's denial of habeas. Id. at 361.

276. Id. at 374.
permits to all Chinese applicants, and had granted permits to virtually all others.\textsuperscript{277} \textit{Yick Wo} is generally read as one of the first cases in which the Court allowed an equal protection challenge to discriminatory administration of the law;\textsuperscript{278} the Court reasoned that the equal protection violation was the same whether or not the statute banning wooden laundries was facially valid.\textsuperscript{279} Still, the Court discussed at length the fact that the ordinance itself was invalid, because it allowed supervisors to arbitrarily withhold consent to operate wooden laundries.\textsuperscript{280} The Court thereby reviewed a state prisoner habeas petition in a case involving discrimination not explicitly authorized by statute, while hedging the point by holding that the statute had invited such discrimination by its delegation of unchecked power.\textsuperscript{281} Similarly, in \textit{Ex parte Nielsen},\textsuperscript{282} a posttrial habeas case in which a federal prisoner alleged a violation of the Double Jeopardy Clause, the Court remarked that the case did not involve an unconstitutional statute. It nevertheless granted relief, stating: "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional right, than an unconstitutional conviction and punishment under a valid law."\textsuperscript{283} 

\textit{Yick Wo} and \textit{Nielsen} employ the same reasoning that the Court used to expand federal question jurisdiction in the area of rate regulation—thereby allowing challenges to unconstitutional rates whether or not promulgated by state legislation. In this respect, habeas presents an instructive parallel to the regulation cases, where litigants challenged the validity of the background statutes delegating authority to the agencies. In addition, in both habeas and rate cases, the Court reasoned that because a statute could not have validly authorized the challenged official action, the acts would be "unconstitutional" even if they were not expressly authorized by statute. As with general federal question jurisdiction, the Court expanded habeas as it became more willing to address ad hoc official illegality as a constitutional

\textsuperscript{277} Id. at 359. The defendants had admitted the discriminatory administration. \textit{Id.} at 377; \textit{see also} Schmidt, \textit{supra} note 160, at 1457, 1471 (in cases where the Court found jury discrimination on direct review, there were generally admissions in the record).

\textsuperscript{278} \textit{See}, e.g., \textsc{Gerald Gunther}, \textsc{Constitutional Law} 704 (12th ed. 1991).

\textsuperscript{279} 118 U.S. at 373-74. In a famous passage, the Court stated:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibitions of the Constitution.

\textit{Id.}

\textsuperscript{280} \textit{Id.} at 374; \textit{see also} Chy Lung v. Freeman, 92 U.S. 275, 278-80 (1875) (state statute allowing imposition of bond requirement on, inter alia, lewd and debauched women, was unconstitutional for placing too much discretion with the commissioner to extort money).

\textsuperscript{281} 118 U.S. at 373-74.

\textsuperscript{282} 131 U.S. 176 (1889).

\textsuperscript{283} \textit{Id.} at 183; \textit{see also In re Converse}, 137 U.S. 624, 631 (1890) ("Conceding that an unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law, we fail to perceive that this conviction and judgment are repugnant to the constitutional provision."); \textit{Developments, supra} note 17, at 1209-11 (noting turn of the century expansion of federal habeas jurisdiction over decisions by the military courts from issues of the proper sphere of the military to issues of abuses of power).
violation.284

3. Sources of rights: the common law and the Constitution.

In civil cases, the expansion of federal jurisdiction to cover ad hoc constitutional violations was accompanied by a gradual replacement of common law pleading with pleading that identified a positive source of law (state or federal) from which the action arose. As discussed above, the Court had allowed plaintiffs to modify common law pleading in general federal question cases challenging unconstitutional statutes; in addition to the initial trespass, plaintiffs alleged the unconstitutionality of the statute that the officer would plead as justification for his trespassory act.285 Once the unconstitutionality of the statute became part of the trespass complaint, however, the allegation of trespass began to merge with the allegation of constitutional harm.286 Over time, the Court increasingly referred to the initial trespass as an “unconstitutional” occurrence rather than a tortious one; it was no longer merely the statute pursuant to which the official might have acted that was “unconstitutional” but the trespass as well. Eventually, the necessity of alleging and proving a common law trespass faded. Ex parte Young287 marked the divorce of federal question pleading from its common law moorings, eliminating the need to allege a common law trespass in federal question cases.288 The Court had come to perceive the Constitution as the source of the right of action for the official invasion of person or property, rather than as a federal ingredient to what was otherwise an ordinary trespass action.289 Of course, the increasing perception that an invasion of person or

284. Framing issues of ad hoc illegality in terms of official actions under unconstitutional statutes appears in other cases. See Rawlins v. Georgia, 201 U.S. 638, 639-40 (1906) (treating ad hoc official illegality and constitutionality of state statute as similar issues); Sherlock v. Alling, 93 U.S. 99 (1876) (rejecting on the merits a Commerce Clause challenge to application of an Indiana wrongful death statute); Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847) (“[N]either the statute in question, nor the conviction and sentence founded upon it, can be held as violating either the constitution of[r] any law of the United States in pursuance thereof.”); Barron v. Baltimore, 32 U.S. (7 Pet.) 242, 244-46, 247, 250-51 (1833) (arguing the defendant city’s diversion of water, which ruined plaintiff’s wharf, was justified under various state legislative acts); cf. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 122 (1866) (invalidating the jurisdiction of a military court over a civilian, stating: “Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise.”).


286. For example, in Scott, the Court allowed federal question jurisdiction in actions for both damages and injunctive relief for the seizure of liquor under a state statute that allegedly violated the Commerce Clause. 165 U.S. at 71-73. The unconstitutionality of the statute was pleaded as part of the complaint, as it had been in White, 114 U.S. at 307. In addition, the Court spoke of the seizure itself as a “disregard of constitutional rights.” Scott, 165 U.S. at 80.


288. See id. at 191-92 (Harlan, J., dissenting) (arguing that relief was inappropriate because there was no trespass), discussed in Jaffe, supra note 86, at 221. Jaffe reasoned that enforcement of the law would eventually lead to a trespass. Id.

289. See Woolhandler, supra note 98, at 449-50 (federal element incorporated into general common law cause of action). Compare Hart, supra note 190, at 523-24 (by imperceptible steps, source of the cause of action seen as federal rather than state) with Collins, supra note 190, at 1513-
property, and not just a statute, could be unconstitutional made it easier to plead ad hoc official illegality as a constitutional violation.290

The importance of the common law as a source of protections diminished in criminal cases as well. In the antebellum period, the Court had not carefully distinguished common law and constitutional criminal procedural guarantees, nor did it necessarily discuss random violations of such guarantees as "constitutional" violations. In the latter part of the nineteenth century, however, the Court increasingly identified some ad hoc criminal procedural violations as presenting constitutional problems. The Court addressed these violations by denomining some rights as constitutional on direct review,291 and by separating constitutional errors from other errors on habeas.292

The Court's treatment of federal prisoners' claims of irregularity in indictments illustrates the process of selectively constitutionalizing common law protections. The common law prescribed technical requirements for phrasing indictments—requirements that were the source of general dissatisfaction.293 In the antebellum period and to a great extent thereafter, when the Court granted relief on direct review in federal criminal cases for indict-

17 (early federal question cases incorporated federal element into general common law actions, not state actions).

290. See Wiley v. Sinkler, 179 U.S. 58, 58-59 (1900).

291. See Boyd v. United States, 116 U.S. 616, 630 (1886) (addressing the constitutionality of a statute in light of the Fifth and Fourth Amendments and stating that the principles "apply to all invasions on the part of government and its employees of the sanctity of a man's home and the privacies of life"); United States v. Cruikshank, 92 U.S. 542, 557-59 (1876) (holding that the indictment lacked the "certainty and precision required by the established rules of criminal pleading"); discussing the Sixth Amendment and common law; see also Ball v. United States, 163 U.S. 662, 669 (1896) (mentioning the Fifth Amendment in a double jeopardy case); Moore v. Missouri, 159 U.S. 673 (1895) (unsuccessful claim that habitual offender statute violated the double jeopardy provision); Reynolds v. United States, 98 U.S. 145, 154-57, 158, 166 (1879) (rejecting on the merits a claim that refusal to exclude a particular juror for cause violated Sixth Amendment right to an impartial jury, a claim that admission of prior testimony violated the right to confrontation, and a First Amendment challenge to antipolygamy statute under which defendant was convicted); cf. Weeks v. United States, 232 U.S. 383 (1914) (direct review of federal conviction; requiring exclusion of evidence seized in violation of the Fourth Amendment and detailing other Fourth Amendment cases); Hale v. Henkel, 201 U.S. 673 (1905) (finding that subpoena duces tecum to produce extensive records violated the Fourth Amendment).

292. See, e.g., In re Wilson, 140 U.S. 575, 579 (1891) (prisoner alleged that he was indicted by a grand jury comprised of fewer people than required by territorial statute; stating that no such statute had been passed as petitioner alleged, and even if it had, "it was only a matter of error, to be corrected by proceeding in error"); Ex parte Medley, 134 U.S. 160 (1890) (granting habeas to state prisoner on claim of ex post facto violation for a retroactive application of a statute providing that a prisoner awaiting a death sentence should be kept in solitary confinement); Ex parte Nielsen, 131 U.S. 176 (1899) (violation of double jeopardy prohibition); see also In re Moran, 203 U.S. 96 (1906) (refusing to decide whether being compelled to stand and walk before the jury was a violation of Fifth Amendment privilege against self-incrimination); Ex parte Jackson, 96 U.S. 727, 735 (1878) (on habeas, rejecting on the merits a claim that federal statutes violated the Fourth Amendment, but discussing the possibility of a Fourth Amendment violation in enforcement).

293. Such dissatisfaction was expressed in Court opinions and in legislation simplifying criminal pleading. In United States v. Gooding, 25 U.S. (12 Wheat.) 460 (1827), Justice Story, discussing whether the indictment had adequately described the offense, stated:

At the common law, in certain descriptions of offences, and especially of capital offences, great nicety and particularity are often necessary. The rules which regulate this branch of pleading were sometimes founded in considerations which no longer exist, either in our
ments that were technically flawed, it did not discuss the issue in constitutional terms. Clear, some aspects of common law indictment requirements were embodied in the Fifth Amendment provision that federal prosecutions for infamous crimes must proceed by indictment, and in the Sixth Amendment provision that the accused has a right "to be informed of the nature and cause of the accusation." But the extent to which the forms of common law criminal pleading were constitutionally required remained an open question.

In federal prisoner habeas cases, the Court was unwilling to review most issues involving the sufficiency of the indictment. The Court nevertheless granted habeas relief when the prosecutor had completely failed to obtain an indictment for a crime that the Court held to be infamous, and when a judge amended an indictment without resubmission to a grand jury. In these cases the Court referred explicitly to the Constitution, as well as common law standards to which it would have alone made reference in the antebellum period.

Paul Bator attempted to pigeonhole habeas cases raising issues of indictment as falling into his category of "illegal sentencing" cases. But the procrustean nature of this categorization did not escape his notice, much

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own or in English jurisprudence; but a rule being once established, it still prevails, although if the case were new, it might not now be incorporated into the law. Id. at 474; see also Ex parte Reggel, 114 U.S. 642, 651 (1885) (habeas case challenging extradition; noting prisoner's contention that he should be discharged for a violation of the "technical rules of criminal pleading," but finding that the indictment conformed with Pennsylvania law, and that Pennsylvania had the right to establish forms of pleading subject only to the constraints of the Constitution). 294. See note 221 supra. 295. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONSt. amend. V. 296. U.S. CONSt. amend. VI. 297. See note 221 supra. In Leeper v. Texas, 139 U.S. 462 (1891), the Court, on direct review from a state court, stated that the "sufficiency of the indictment" was a matter "the disposition of which, as exhibited by this record, we have nothing to do," thereby implying that there was no federal question. Id. at 468. The Court noted, however, that the defendant had claimed that the "indictment was so defective that it, or the statute which authorized it, contravened the Constitution." Id. 298. See, e.g., In re Coy, 127 U.S. 731, 758 (1888) (considering constitutionality of statute as applied under which the defendant was charged; refusing to consider sufficiency of indictment that would have been examinable by demurrer); Ex parte Yarbrough, 110 U.S. 651, 653-65 (1884) (refusing to consider issue of sufficiency of indictment on habeas); Ex parte Parks, 93 U.S. 18, 20 (1876) (refusing to consider on habeas whether the indictment charged a crime within the statute). 299. See United States v. DeWalt, 128 U.S. 393 (1888); Ex parte Wilson, 114 U.S. 417 (1885). 300. Ex parte Bain, 121 U.S. 1 (1887). 301. See id. at 121 (holding that it was a violation of Fifth Amendment indictment requirement when judge ordered amendment of the indictment); Wilson, 114 U.S. at 422 ("But if the crime of which the petition was accused was an infamous crime, within the meaning of the Fifth Amendment of the Constitution, no court of the United States had jurisdiction to try or punish him, except upon presentment to a grand jury."). 302. See Bator, supra note 12, at 467 & n.56. 303. Id. at 471 (usefulness of the category of sentencing error undermined when expanded to include the need for indictment).
less Peller's. Bator was able to include indictment cases in his illegal sentencing category only because the Court considered the sentences imposed in determining whether the crimes prosecuted were "infamous," and thus required indictment under the Fifth Amendment. A less strained interpretation is that the Court was willing to address ad hoc indictment issues on habeas once it recognized that the error complained of was one of constitutional magnitude, such as the total failure to indict. Other requirements, such as conformity of the indictment to the wording of a statute, raised subconstitutional issues that might be the subject of direct review of a federal conviction, but not habeas.

Similar recognition of ad hoc violations of the constitutional right to trial by jury and against double jeopardy occurred on habeas. Because the prisoners in these cases were complaining about multiple punishments, double jeopardy claims fit more comfortably into Bator's illegal sentencing category than cases finding violations of constitutional rights to indictment and jury trials. The Court tied its grant of relief in the double jeopardy cases, however, not so much to a claim of an illegal sentence, but rather to the fact that the prisoner had presented "a case of denying to a person a

304. See Peller, supra note 9, at 615 n.194 (noting that Bain did not involve an error of sentencing or the unconstitutionality of statutes).

305. See Bator, supra note 12, at 467 & n.56 (characterizing Wilson and Bain as cases wherein the constitutional requirement of indictment was considered because it affected the legality of the sentence). The Wilson court did state that habeas is available only where "the sentence exceeds the jurisdiction of [the] court, or there is no authority to hold him under the sentence." 114 U.S. at 421. The Bain opinion did not discuss sentencing, except to mention that the crime was an infamous one for which indictment was required. 121 U.S. at 12-13. There are, however, some cases in which the Court did seem to address the merits primarily based on an allegation that a particular sentence or form of punishment was not authorized by statute. See, e.g., In re Bonner, 151 U.S. 242, 256 (1894) (granting habeas to a federal prisoner sentenced to state penitentiary when Congress had authorized penitentiary commitment only if the sentence was longer than one year); Ex parte Karstendick, 93 U.S. 396 (1876) (rejecting on the merits a claim that conditions under a statute for sending a federal prisoner to a state prison were not met).

306. See note 298 supra and accompanying text; see also Ex parte Virginia, 100 U.S. 339, 351-54 (1880) (Field, J., dissenting) (pretrial habeas; indictment charging state judge with jury discrimination was vague, thereby violating the Sixth Amendment; in addition, holding that the defendant was charged under an unconstitutional statute).

307. See Callan v. Wilson, 127 U.S. 540, 549, 557 (1888). Callan could be characterized as an instance of the unconstitutionality of a statute, in that apparently there was congressional authorization for the nonjury trial, with a jury trial if the prisoner appealed. The Court, however, did not address the issue primarily as one of statutory validity. Id. at 546, 556; see also Ex parte Milligan, 71 U.S. (4 Wall.) 2, 119-23 (1866) (deciding that a military tribunal lacked jurisdiction and discussing deprivation of Bill of Rights guarantees including jury trial).

308. See, e.g., Ex parte Nielsen, 131 U.S. 176 (1889); Ex parte Lange, 85 U.S. (18 Wall.) 163, 170 (1873); see also Bator, supra note 12, at 467-68 & nn.57-58. In In re Snow, 120 U.S. 274 (1887), the Court granted habeas for multiple punishments for the continuous offense of cohabitation with multiple wives, without explicit reference to the Constitution. However, in Nielsen the Court described Snow as "not a case of mere error of law, but a case of denying to a person a constitutional right." 131 U.S. at 184. In a subsequent case where the Court denied habeas relief, it distinguished Nielsen on the ground that the "sentence imposed in that case was held by this court to have been beyond the jurisdiction of the trial court to pronounce, because it was against the express provisions of the Constitution, which bounds and limits all jurisdiction." Felts v. Murphy, 201 U.S. 123, 130 (1905).
constitutional right." Thus, the cases in Bator's illegal sentencing category are more accurately placed within the Court's developing Bill of Rights jurisprudence.

This new emphasis on the Bill of Rights, however, initially applied only to federal prisoners. Typically, a state prisoner raised a federal constitutional procedural issue under the Fourteenth Amendment's Due Process Clause. In defining this Clause, the Court suggested initially that state court compliance with state legislation would normally accord due process. But the logical implication of a state law based definition of due process—an implication not lost on litigants—was that the Court could police violations of state law in order to ascertain whether due process had been accorded. It is, of course, hard to imagine a less appropriate task for the federal courts than policing state compliance with state law. Eventually, the Court disassociated itself from such suggestions, noting that violations of state law were ordinarily not the stuff of a due process violation.

309. See, e.g., Nielsen, 131 U.S. at 184 (describing prior case in which court had allowed habeas on a claim of multiple punishments for a single crime). In Nielsen, the Court also distinguished Ex parte Parks, 93 U.S. 18 (1876), where the Court had denied relief, as a case involving an allegation of misconstruction of a statute rather than a constitutional right. Id. at 184; see also Lange, 85 U.S. (18 Wall.) at 170 (finding violation of constitutional double jeopardy prohibition).

310. See, e.g., Brown v. New Jersey, 175 U.S. 172, 175-76 (1899) (direct review of criminal case; implying that compliance with state law comported with due process); see also Hallinger v. Davis, 146 U.S. 314, 323 (1892) (holding that the Fourteenth Amendment refers to "the law of the land in each State"); Davidson v. New Orleans, 96 U.S. 97, 105 (1877) (civil case; "it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case"); Kennard v. Louisiana, 92 U.S. 480, 483 (1875) (rejecting claim of denial of jury trial in civil case "because the law under which the proceedings were had provided in terms that there should be no such trial").

311. The Court's suggestions to this effect were not in cases in which the defendant complained of a failure to comply with state law. See, e.g., Hurtado v. California, 110 U.S. 516 (1884). Modern proponents of a positivist formula for due process generally have in mind a similar scenario in which there is no allegation of a failure to comply with state law, but rather a violation of an alleged independent federal guarantee. Easterbrook, supra note 149, at 85; see also Currie, supra note 216, at 272 & n.268. Judge Easterbrook's main purpose in so limiting due process seemed to be the promotion of a "bitter with the sweet" approach to procedural due process. According to it, if the legislature accords a benefit, it is free to create such procedures for grant or denial of the entitlement as it sees fit. Easterbrook, supra note 149, at 85. But cf. Martin H. Redish & Lawrence C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.J. 455, 456-64 (1986) (critiquing Easterbrook's positivist interpretation of due process).

312. See, e.g., Rawlins v. Georgia, 201 U.S. 638, 639 (1906) (noting the "not uncommon misconception" that "the requirement of due process of law took up the special provisions of the state constitution and laws into the Fourteenth Amendment"); In re Duncan, 139 U.S. 449, 462 (1891) (state prisoner claim that state criminal code and criminal procedural code had not been properly enacted under state constitution; issue was question of state law, raising no federal question giving federal courts jurisdiction); In re Converse, 137 U.S. 624, 632 (1892) (finding no due process violation, stating that the Fourteenth Amendment was not designed to interfere "with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State"); see also Powell v. Alabama, 287 U.S. 45, 60 (1932) (while state statute provided for appointment of counsel in capital case, and the state court determination that the statute had been complied with was binding, the question remained whether the effective denial of counsel violated due process).


The Court's eventual rejection of state positive law as the benchmark of due process necessarily implied that the judiciary would develop due process as a separate body of federal constitutional law independent of state law. Although the Court expressed little certainty as to the contours of due process, there was consensus that it protected at least some of the common law attributes of a fair trial. Consequently, the process of giving independent federal content to Fourteenth Amendment due process would require the Court to distinguish the aspects of common law criminal procedure that were fundamental, and therefore constitutional, from those that were not. This, of course, was the same process that occurred as the Court fleshed out the meaning of the Bill of Rights in cases involving federal prisoners. It was practically inevitable, therefore, that this process would eventually yield similar guarantees in both state and federal criminal litigation. Early on, the Court refused to equate Fourteenth Amendment due process with the more explicit Bill of Rights guarantees. But by the end of the nineteenth century, the Court had begun to allow Fifth Amendment style takings claims to be brought against state and local governments under the Fourteenth Amendment. The stage was therefore being set for the eventual incorporation of Bill of Rights guarantees through the Fourteenth Amendment's Due Process Clause—a process that began in earnest in this

315. Those sharing this view nonetheless disagree about the specific attributes of a fair trial. See William Winslow Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. CHI. L. REV. 1 (1954) (the Due Process Clause was meant to incorporate Bill of Rights guarantees); Easterbrook, supra note 149, at 114 (due process meant Congress may establish law such procedures as it pleases, subject only to the constraint that it not abrogate certain long recognized judicial procedures when fundamental natural liberties are at stake); Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 STAN. L. REV. 5 (1948) (history of the Fourteenth Amendment does not support full incorporation, but the Privileges and Immunities Clause was perhaps meant to incorporate concept of ordered liberty); Louis Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1963) (selective incorporation not essentially preferable to ordered liberty approach to due process).

316. See Henkin, supra note 315, at 82-83 (arguing that selective incorporation cannot avoid the same selection process as determining the content of "ordered liberty," that the Supreme Court in deciding contents of the Bill of Rights inevitably applies notions of fairness similar to those used in Fourteenth Amendment due process analysis, and that the Court expanded rights against the federal government simultaneously with the incorporation debate); cf. Adams v. New York, 192 U.S. 585, 594 (1904) (on direct review, finding no violation of the Fourth and Fifth Amendments without deciding whether the amendments applied to the states); Moore v. Missouri, 159 U.S. 673, 675 (1895) (on direct review, unsuccessfully challenging habitual offender statute on double jeopardy grounds); Hallinger v. Davis 146 U.S. 314 (1892) (rejecting on the merits a due process challenge to a state statute allowing judge on guilty plea to determine degree of murder).

317. See Henkin, supra note 315, at 83.


319. See, e.g., Norwood v. Baker, 172 U.S. 269 (1898) (striking down local ordinance as unconstitutional taking where amount paid for condemnation was assessed to adjoining property as value of improvements); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (reversing $1000 penalty under state law prohibiting insurance of Louisiana property where insurers had not complied with Louisiana law); cf. Chicago, B. & Q. Ry. v. Chicago, 166 U.S. 226, 232-34 (1897) (finding that due process requires compensation for land taken for public use, but that jury verdict of $1 for condemned land, on particular facts, did not violate due process). Soon after World War I, the Court entertained First Amendment claims as well. See, e.g., Gitlow v. New York, 268 U.S. 652 (1925).
Some nineteenth century cases in which the Court seemed to construe narrowly state prisoner habeas merely exemplified the Court's unwillingness to review state court compliance with state law. Thus, state prisoner cases roughly paralleled federal prisoner habeas cases, where the Court declined to review issues that appeared to present only violations of statutory or common law norms, even if alleged to be constitutional violations by the petitioners. This timid approach to review of constitutional claims on habeas partly reflects the far from complete process of delineating federal constitutional law as a body of law distinct from the common law, state law, and nonconstitutional federal law.

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320. See, e.g., Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934) (no denial of due process in not allowing defendant to view crime scene with jury but presuming defendant’s right to be present at criminal trial); Powell v. Alabama, 287 U.S. 45, 67, 87 (1932) (discussing confiscation cases as precedent for finding a due process right to counsel in capital cases for defendants unable to defend themselves); Moore v. Dempsey, 261 U.S. 86 (1923) (finding due process violation in a mob domination case); Twining v. New Jersey, 211 U.S. 78, 99 (1908) (holding that the right against compulsory self-incrimination was not part of due process, but conceding the possibility that “some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action because a denial of them would be a denial of due process of law”); Adams v. New York, 192 U.S. 585, 594 (1904) (holding that otherwise competent testimony based on illegally obtained evidence was properly received, but affirming that the Fourth and Fifth Amendments guaranteed applicable to state action).

321. See Storti v. Massachusetts, 183 U.S. 138, 141-42 (1901) (noting distinction between error and habeas and that many issues raised were not questions of federal law). Because the issues involved state law, the Court would not review similar issues on direct review coming from the state courts. Compare In re Duncan, 139 U.S. 449, 462 (1891) (state prisoner habeas case; no federal question presented in deciding whether state criminal codes were properly enacted under the state constitution) with Leeper v. Texas, 139 U.S. 462, 467 (1891) (on direct review, finding no federal question on same issue); compare Caldwell v. Texas, 137 U.S. 692, 698 (1891) (on direct review, holding that sufficiency of indictment did not present an issue of federal law) with Bergemann v. Backer, 157 U.S. 655, 656 (1895) (citing Caldwell and holding that sufficiency of indictment under valid state laws law did not present a federal question). See also Brown v. Mississippi, 297 U.S. 278, 278 (1936) (on direct review, rejecting the argument that an admission of confession was “mere error,” rather than a violation of constitutional right, and also indicating that the Court could have addressed the same issue on habeas); Rogers v. Peck, 199 U.S. 425, 433-35 (1905) (holding that a claim of the legality of solitary confinement did not present issue of federal law).

322. See note 148 supra.

323. See, e.g., In re Frederich, 149 U.S. 70, 74-75 (1893) (refusing to consider due process challenge to statute supreme court to enter judgment for a lesser offense, and noting that at common law an appellate court could only cure a trial court error by reversing the judgment and discharging defendant). In Ex parte Bigelow, 113 U.S. 328, 331 (1885), the Court refused to consider on habeas the merit of a double jeopardy claim that appeared unmeritorious. The Court seemed to indicate that not every instance of constitutional error would render a judgment void, because there would be no lack of personal and subject matter jurisdiction. Id. at 330-31. The Court added, however, that “[t]here are exceptions to this rule, but when they are relied on as foundations for relief in another proceeding, they should be clearly found to exist.” Id. at 331; see also Andersen v. Treat, 172 U.S. 24, 31 (1898) (appearing to reject a Sixth Amendment right to counsel claim both on the merits and on the ground that a collateral attack was not allowed on a judgment by a court having jurisdiction); In re Belt, 159 U.S. 95 (1895) (refusing to consider on habeas the constitutionality of a District of Columbia statute that allowed for waiver of jury trial); Ex parte Harding, 120 U.S. 782 (1887) (refusing to consider claims of Fifth and Sixth Amendment violations as not going to the jurisdiction of the court).
IV. HISTORY'S LESSONS

A. Evolving Patterns of Remedies

Virtually all modern attempts to restrict habeas have relied on the reading of habeas history that limits the writ to an inquiry into jurisdiction. In light of the history of remedies against government for its constitutional violations, this reliance seems unjustified. It is unjustified, however, not because the Court traditionally viewed habeas as coextensive with direct review. Rather, this view ignores the long term patterns of change in remedies against government. To be sure, Chief Justice Marshall in *Ex parte Watkins* prescribed a narrow version of habeas limited to review for want of jurisdiction, but the nineteenth century Court readily employed a merits based version of jurisdictional review that was consistent with existing variant meanings of the term. The use of habeas to address unconstitutional statutes was one such merit based use of jurisdictional review. Rather than a narrow exception from strict jurisdictional review, review of the validity of statutes in criminal litigation covered many of the issues that were perceived to pose uniquely constitutional, as distinguished from common law, problems. The tendency to view constitutional issues as primarily addressing statutes also reflected the Court's desire to counter the Reconstruction Congress' efforts to expand federal jurisdiction.

Not only in habeas corpus, but in all areas of judicial review of government action, the Constitution gradually replaced the common law as the authority for policing ad hoc deprivations of liberty and property. This constitutionalization of the review of random official illegality was not just a product of increasing modern sensitivity to the individual;\footnote{See Developments, supra note 17, at 1040 (expansion of habeas reflects evolving judgment about protections of individual rights and place of federal judiciary in institutional scheme).} it was also a response to the waning belief in a general common law.\footnote{See text accompanying notes 285-301 supra.} The Constitution and its amendments can be read as embodying assumptions that the common law protects liberty and property. In the first century of the Republic, judges saw little need to delineate where the common law ended and the Bill of Rights began.\footnote{See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1180 (1991) (Framers contemplated that state law would supply causes of action that would enable citizens to challenge unconstitutional action by federal officials); Hill, supra note 189, at 1131-35; Gene R. Nichol, Bivens, Chilicky and Constitutional Damages Claims, 75 VA. L. REV. 1117, 1136 (1989) ("Assuming that judicial review is appropriate, the framers must have intended to vindicate constitutional rights through the institutions of the common law. What other choices did they have?").} Over time, however, the Court felt it necessary to identify the positive sources of authority for the norms it enforced and began to locate some common law protections in the Bill of Rights and Fourteenth Amendment. As constitutional law expanded to include questions of random official illegality, federal trial court jurisdiction expanded (albeit more slowly) to cover challenges to official actions taken without direct statutory sanction.

The changes that occurred in the late nineteenth and early twentieth cen-
tury were by no means complete. After the turn of the century, constitutional criminal procedure cases, both on direct review and on habeas, focused increasingly on ad hoc denials of justice. Nevertheless, it was not until the Court’s 1953 decision in Brown v. Allen that virtually all such constitutional error was reviewable on habeas. In civil litigation challenging state official action in federal courts, issues of statutory validity continued to predominate, and there was a persistent tendency in damages actions to see state tort law as the proper remedy for random official illegality. It was only with the 1961 decision in Monroe v. Pape that the Supreme Court made clear that random official illegality was actionable under section 1983. And as late as 1963, the Court rejected federal question jurisdiction for a damages action against a federal officer, stating “when it comes to suits for damages for abuse of power, federal officials are usually governed by local law.” Not until 1971, in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, did the Court recognize a constitutionally based damages action against federal officials.

327. In Twining v. New Jersey, 211 U.S. 78 (1908), counsel for the defendant, in arguing that allowing comment on the defendant’s failure to testify violated due process, apparently believed that he had to show a systematic violation of rights by the state. Id. at 83. The Court, however, had little trouble finding state action in state judicial decisions. Id. at 90-91; see also House v. Mayo, 324 U.S. 42, 45 (1945) (coercion of guilty plea without opportunity to consult retained counsel would violate due process); Mooney v. Holohan, 294 U.S. 103 (1935) (use of perjured testimony to obtain conviction would deny due process, but the petitioner should apply for state habeas); Moore v. Dempsey, 261 U.S. 86, 91 (1923) (while “mere mistakes of law” would not be reviewable, if trial had been dominated by mob, “perfection in the machinery for correction” in the state courts would not prevent the Supreme Court from securing constitutional rights of petitioners); cf. Smith v. O’Grady, 312 U.S. 329 (1941) (on certiorari from state court denial of habeas; if prisoner were tricked into guilty plea, he would be entitled to habeas relief for violation of Fourteenth Amendment rights); Powell v. Alabama, 287 U.S. 45 (1932) (on direct review, finding that state’s failure to provide counsel violated due process). The Court’s indication that it would delineate the content of due process on a case by case basis, and that a successful claim might require the defendant to show a violation “so acute and shocking that our polity will not endure it,” Palko v. Connecticut, 302 U.S. 319, 328 (1937), tended to increase the focus on ad hoc illegality.

328. 344 U.S. 443 (1953).

329. See, e.g., Duker, supra note 37, at 250-56; Bator, supra note 12, at 484-507; Peller, supra note 9, at 583, 648.

330. Henry Hart, writing in 1954, stated:

The jurisdiction of the lower federal courts to entertain any action to enjoin a state officer from violating the Fourteenth Amendment was for years challenged on the ground that if the complaint did not run afoul of the Eleventh Amendment it must necessarily fail to state a case under the Fourteenth. The challenge was buttressed by the argument that the federal government ought not prematurely to condemn a state for action which perchance the state itself did not authorize, and which, through its own constitution, it might even have prohibited.

Hart, supra note 190, at 522; see also Snowden v. Hughes, 321 U.S. 1, 11-12 (1944) (stating that the Fourteenth Amendment and Civil Rights Acts were not intended to make all matters formerly within exclusive cognizance of states into matters of national concern).


332. Id. at 184-85, 187.


335. Contrary to common belief, damages actions for constitutional violations—generally for actions under unconstitutional statutes—long predated Bivens. See Woolhandler, supra note 98, at 448-50; Collins, supra note 190, at 1517-25. The plaintiffs in these cases, therefore, brought trespass actions with a constitutional element that provided federal jurisdiction.
Arguably, the historically narrow scope of habeas before Brown v. Allen justifies current attempts to circumscribe it. But the more complex process of change in litigation against government undermines the claim that the historical norm for habeas was narrow jurisdictional review and that wide-ranging review of most constitutional issues on habeas is only a modern aberration. The history of habeas, like the history of other areas of federal jurisdiction over suits against government, reflects the long term constitutionalization of ad hoc official illegality—a process that was already under way during the latter half of the nineteenth century.

Some scholars and judges express nostalgia for a simpler period, one before the Constitution provided a detailed set of constraints upon officials. But returning to a primordial state where "constitutional" issues focused on statutes or other systemic harms would only restore the status quo ante if one could simultaneously restore the complex web of common law remedies for abuse of power that served as the backdrop for the older constitutional focus on statutes. Although restoring the general common law would be impossible in our positivist age, some see state law remedies as the natural successors to the original common law remedies against government. But both logic and experience legitimate the Court's long process of locating protections from random official illegality in the Constitution and providing remedies for such violations in the federal courts.

First, the Court repeatedly reasoned that official acts unauthorized by statute could as effectively deprive one's constitutional rights as acts that were statutorily authorized. This common sense conclusion arose from contexts as disparate as racial segregation, agency rate regulation, and military occupation of private property. The alternative theory that state action


337. In some ways the early common law protected the individual more than our current constitutionalized version of individual rights, but in some ways it provided less protection. See, e.g., California v. Acevedo, 111 S. Ct. 1982, 1993 (1991) (Scalia, J., concurring) (noting modern elimination of common law rule that reasonable, good faith belief was no defense to absolute liability for trespass); Amar, supra note 177, at 1487 (noting that sovereign immunity doctrines were offset by strict liability of individual officials in many cases); David E. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colorado L. Rev. 1, 54-55 (1972) (growth of immunities has narrowed remedies); Fallon & Meltzer, supra note 22, at 1781 (arguing that the number of cases without remedies against government or its officers has expanded); cf. Richard A. Posner, Rethinking the Fourth Amendment, 1981 Sup. Ct. Rev. 49, 72-73 (arguing that an interpretation of the Fourth Amendment that gives preference to searches pursuant to warrant may reduce protections and that the Framers were suspicious of warrants since they insulated officers from liability). See generally Rossman, supra note 67 (discussing efficacy of remedies for errors in criminal trials despite lack of regular appellate procedures); Arkin, supra note 67, at 541 (same).
constitutional violations can occur only by way of statute holds little rational appeal and has never been adopted by a majority of the Court.

In addition, recognition of the federal Constitution as a protector from ad hoc illegality implies a uniformly applied federal remedy. For example, once we see freedom from unreasonable searches and seizures as emanating from the Constitution (as distinguished from general common law or state law), reliance on state tort law for redress becomes a non sequitur. That the Court previously saw such tort remedies as adequate resulted from its conflated view of the Constitution and the common law. Only those content to have rights without systematic remedies for their enforcement will be satisfied with state law based remedies for federal constitutional rights. As Henry Monaghan put it, "If the Constitution is viewed as conferring national rights on all citizens, national courts should be open to vindicate those rights in a uniform, coherent manner."

History also explains the need for federalized individual rights and uniform remedies for their violation. The post-Civil War Supreme Court, with its narrow interpretations of federal jurisdictional statutes, for nearly one hundred years allowed the states to serve as laboratories in the protection of individual rights. Some scholars suggest that the states largely failed, both to develop state law protections of individual rights, and to enforce the existing federal protections. Some judges and scholars suggest, however, that state courts are now no less committed to constitutional protection than federal courts. Arguably, therefore, recourse to federal courts may no


339. For discussions of the extent to which the Constitution demands specific remedies, see Walter E. Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 HARV. L. REV. 1532, 1551 (1972) ("The focus should then be upon whether there are other remedies available to those in the plaintiff's position that would as fully effectuate the purposes of the constitutional guarantee as the remedy sought."); Fallon & Meltzer, supra note 22, at 1777-91 (discussing the extent to which constitutional violations require remedies); Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 24 & n.125 (1975) (particular remedies are not required as long as substitutes are adequate); Thomas S. Schrock & Robert C. Welsh, Reconsidering the Constitutional Common Law, 91 HARV. L. REV. 1117, 1136-38, 1162-64 (1978) (violation requires remedy); cf. Barry Friedman, When Rights Encounter Reality: Enforcing Federal Remedies, 65 S. CAL. L. REV. 735, 740 (1992) (Court's tolerance for channeled defiance of federal court remedial orders provides room for dialogue between courts and more majoritarian elements with regard to scope of remedies).


341. See, e.g., Monaghan, supra note 339, at 36 (linking constitutionalization of common law to states' failure to protect citizens); Yackle, supra note 13, at 616 (arguing that current system of postconviction remedies reflects historical attempts to coerce state courts into accepting federal doctrinal innovations); see also Burt Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1116 n.46 (1977).

longer be necessary for litigants claiming violations of federal rights. Rather, some might speculate, remedies for federal constitutional violations can now be entrusted to state courts, with Supreme Court review as the policing mechanism.

Whether state courts are as effective as federal courts in enforcing federal rights remains a central issue. Many scholars have discussed how, for purely structural reasons, the availability of a federal forum enhances enforcement of individual rights. In criminal prosecutions, for example, some suggest that the institutional setting naturally inclines state courts to focus on enforcement of state substantive criminal law, rather than the protection of defendants' procedural rights. In addition, the federal court system is more centralized, and therefore better positioned to provide uniform enforcement of federal rights. The selection and retention processes for federal judges make them less amenable to majoritarian pressures. Finally, quite apart from the structural superiority of federal courts, the availability of a federal forum enhances enforcement by allowing the litigant to choose the forum she perceives as more favorable to federal rights.

Thus, there are many reasons to believe that the continued availability of a federal forum will enhance constitutional protections of individual rights. Those who claim state court "parity" exists, moreover, are generally arguing that state courts are constitutionally adequate, not that the state courts will enforce individual rights guarantees as effectively as federal courts. Proponents of this "federalist" position may see any variation in the quality of enforcement of constitutional rights that results from increasing state court control as healthy manifestations, rather than unfortunate byproducts, of decentralization. Those who favor enhancement of state power, moreover, may also view with disfavor the constitutionalization of individual

343. Cf. Snowden v. Hughes, 321 U.S. 1, 16 (1944) (Frankfurter, J., concurring) ("Our question is not whether a remedy is available for such illegality, but whether it is available in the first instance in federal court.").


345. See, e.g., Chemerinsky & Kramer, supra note 15, at 78 (discussing arguments for and against the necessity of federal courts deciding individual liberty cases); Neuborne, supra note 341, at 1119.

346. See, e.g., Friedman, supra note 8, at 333-34 (1988); Yackle, supra note 14, at 997, 1031-32.

347. See, e.g., Neuborne, supra note 341, at 1124 (noting that federal courts have a closer bureaucratic relationship with the Supreme Court).


349. Chemerinsky, supra note 17, at 236-37.

350. Wells, supra note 344, at 610.

351. See Wells, supra note 348, at 319 (explaining that allocation of cases to state courts occurs because of lack of parity).
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rights, quite apart from the accompanying expansion of federal jurisdiction, given that expansion of rights entails a corresponding restriction of state government freedom of action.\textsuperscript{352} The argument for diminishing the role of federal courts in individual rights enforcement thus turns less on a claim of strict parity than it does on a claim that federalism is a constitutional value appropriately enhanced at the expense of the competing constitutional value of individual rights enforcement.\textsuperscript{353}

B. Reasonable Interpretations of Law: Back to the Future

Three related questions are generally associated with the enforcement of constitutional rights: (1) what wrongs should be considered violations of the Constitution? (2) to what extent is a remedy required once such a violation is recognized? and (3) if a remedy is required, should the federal courts be available to provide it? A Court that is unenthusiastic about a constitutional right will readily withhold a remedy for its violation.\textsuperscript{354} And willingness to eliminate remedies can translate into a willingness to deny a federal forum in which remedies may be systematically provided.\textsuperscript{355}

The history of habeas shows that the Court's uncertainty as to the constitutional status of ad hoc official illegality manifested itself in a reluctance both to require remedies for such abuse of power, and to ensure the availability of a federal forum to supply any such remedies. As the Court increasingly treated abuses of power as full-fledged constitutional violations, it also became willing to accord federal, and federal court, remedies for such violations. More recently, however, the Court has returned to its prior ambivalence about the status of some constitutional rights—particularly rights to be free from ad hoc official illegality. This ambivalence has translated into dilution of remedies available in federal courts, including relief on habeas.

This article contends that the constitutionalization of individual rights against governmental officers was generally an appropriate response to the decline in the common law as a source of rights against government. It further reflects the view that for rights to exist, remedies must be systematically available for their enforcement. But this article does not take the extreme

\textsuperscript{352} "The state's interest in pursuing its objectives free of constitutional impediments is itself a value with constitutional dimensions and is always at war with the individual's claim to hold constitutional rights against state action." Wells, supra note 348, at 327.

\textsuperscript{353} See Bator, supra note 342, at 631-35 (explaining that state judges may be more receptive than federal judges to constitutional values such as federalism and separation of powers); O'Connor, supra note 342, at 813 ("What is really being said is that federal judges are inclined to be more receptive to some constitutional claims."). But see Amar, supra note 177, at 1425 (stating that "federalism" is regularly deployed to thwart full remedies for violation of constitutional rights).

\textsuperscript{354} In modern constitutional law, denial of a remedy may occur through a process of balancing the state's interests in not enforcing a constitutional norm (e.g., federalism interests, interests in unconstrained law enforcement, and interests in protecting the official decisionmaking process from distortions caused by the fear of liability) with its interests in enforcing the constitutional norm. See T. Alexander Aleinikoff, \textit{Constitutional Law in the Age of Balancing}, 96 \textit{YALE L.J.} 943, 977 (1987).

\textsuperscript{355} See, e.g., Wells, supra note 344, at 617. See generally Fallon, supra note 28 (delineating the two dominant models of judicial federalism).
position that every violation of a constitutional right requires a remedy.\textsuperscript{356} Even those who would insist on systematic (and federal court) remediation accept some limitation on the entitlement to a remedy—routine application of statutes of limitation and principles of preclusion to previously litigated civil damage cases attests to this.\textsuperscript{357} The controverted issue is not whether there will be a gap between right and remedy, but rather, how wide that gap should be.

The current Supreme Court is intent upon enlarging the gap between constitutional right and remedy. It achieves this remedial dissonance by focusing on the reasonableness of interpretations of law by state officials.\textsuperscript{358} The Court uses this standard in a number of areas of judicial review of unconstitutional action. Under this approach, a person seeking a judicial remedy must show not merely that an official violated the law, but that the official's mistake was unreasonable. The "reasonableness" approach replicates early formulations of review for want of "jurisdiction" (which the Court sometimes used to review decisions of judicial and executive officials) by treating many errors of law by the initial decision maker as if they were final and thus unreviewable. Moreover, as discussed below, review for reasonable interpretations of law, like the older method of review for "jurisdiction," is more likely to ignore errors that occur by way of random official illegality, as opposed to those that occur by legislative action or by executive pattern and practice.

Adoption of the reasonableness standard has occurred in various contexts, including damages cases against individual officers, Fourth Amendment cases, administrative review, and habeas. In each of these areas, reasonableness has displaced other standards which focused more on the merits and insisted on de novo federal judicial determinations of law.\textsuperscript{359} In

\textsuperscript{356} See Schrock & Welsh, supra note 339, at 1136.

\textsuperscript{357} It is not seriously contested that a federal § 1983 damages case would preclude later litigation of the same claim or that failure to bring such a claim in a timely manner would result in loss of the claim. The application of ordinary preclusion doctrine in federal court § 1983 actions that follow state proceedings has been controversial. See Fallon, supra note 28, at 1175-79. Many issues concerning the fit between judicially declared rights and judicially available remedies for acts of government officials can be characterized as issues of res judicata or finality—questions about the point at which the Court is willing to allow erroneous decisions to escape judicial remediation. Review of state court cases only by direct review in the Supreme Court, given the volume of state cases, provides effective finality to most state decisions. Cf. Friedman, supra note 8, at 303-18. I believe that a high level of de novo review by the federal courts is desirable, and more in keeping with our legal traditions than more deferential standards.

\textsuperscript{358} See Kathleen Patchel, The New Habeas, 42 HASTINGS L.J. 939, 1021 (1991) (arguing that the Court's current habeas doctrine resembles the preincorporation universe). For a discussion of the advent of the reasonableness standard in judging government accountability, see Woolhandler, supra note 98, at 458-70.

\textsuperscript{359} See, e.g., Hoffmann, supra note 14, at 167 (noting parallel between habeas and good faith exception to the exclusionary rule). See generally Kit Kinports, Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law, 33 ARIZ. L. REV. 115 (1991) (drawing parallels between habeas and good faith immunity and arguing that errors of public officials in interpreting constitutional law are more readily forgiven than errors of prisoners and their attorneys).
Harlow v. Fitzgerald, 360 the Court settled on an “objective” standard of good faith immunity in damages actions against officers for their constitutional violations. Under this standard, the Court held that an officer was liable for illegal acts only if she acted according to an objectively unreasonable interpretation of law. 361 Before Harlow, a court could hold an officer liable if it determined that the officer acted illegally (as distinguished from unreasonably illegally), provided also that the officer acted “subjectively” with common law malice. 362 After Harlow, therefore, the question was no longer whether the officer had violated the Constitution, but whether she had done so unreasonably.

Analogously, in interpreting the Fourth Amendment exclusionary rule, the Court retreated from standards requiring officers to conform their behavior to the law, to standards that allowed officers to make reasonable mistakes. 363 The exclusionary rule, which requires exclusion of evidence obtained in unreasonable searches and seizures, 364 was originally based on the Court’s de novo application of the constitutionally based standard of probable cause. 365 Probable cause is a standard that already incorporates a margin for error, insofar as it validates police searches and seizures that are based on incorrect assessments of fact, so long as such assessments are—by the terms of the Fourth Amendment itself—within a range of reasonableness. 366 Nevertheless, by carving out a further good faith exception to the exclusionary rule in cases of reliance on a warrant, 367 the Court was able to dilute this Fourth Amendment reasonableness standard with an extra layer of state power. The good faith exception to the exclusionary rule now looks to “[w]hat might be called ‘reasonable grounds to believe there were reasonable grounds to believe’ that a crime had occurred (or was occurring) or that evidence of crime would be found in a particular case although there were


361. Id. at 818.


363. See United States v. Leon, 468 U.S. 897, 920 (1984); see also Woolhandler, supra note 98, at 472-73.


365. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV; see also Ker v. California, 374 U.S. 23, 33-34 (1963) (holding that a state court finding of a reasonable search will be “respected insofar as consistent with federal constitutional guarantees,” and that the Supreme Court may make an independent examination of facts, findings, and record); Amar, supra note 326, at 1179 (stating that reasonableness was classic question of fact for jury).


not really reasonable grounds to believe that this was so.\textsuperscript{368}

A similar move toward restricting review has occurred in federal administrative law. When Congress creates agencies to administer federal regulatory schemes, a question arises as to whether the federal courts owe deference to agency decisions of law that come before the courts for review. The Supreme Court had for many years indicated that sometimes deference was appropriate, while at other times de novo review was in order.\textsuperscript{369} The Administrative Procedure Act\textsuperscript{370} itself suggests that different levels of deference may be appropriate for different circumstances.\textsuperscript{371} But in \textit{Chevron USA, Inc. v. Natural Resources Defense Council, Inc.},\textsuperscript{372} the Court restricted federal court review of agency interpretations of law. So long as a statute or its legislative history does not clearly preclude an agency's interpretation and the interpretation is substantively "reasonable," the federal courts are to defer to the agency.\textsuperscript{373}

Habeas is therefore only the latest area in the law of governmental accountability to fall before the reasonableness juggernaut.\textsuperscript{374} After \textit{Brown v. Allen},\textsuperscript{375} the federal courts could review de novo nearly all properly preserved federal constitutional issues arising in state court criminal litigation.\textsuperscript{376} Under the Court's recent decision in \textit{Teague v. Lane},\textsuperscript{377} however, habeas review generally will be limited to the issue of whether the state court

\begin{itemize}
  \item \textsuperscript{370} 5 U.S.C. § 706 (1988).
  \item \textsuperscript{371} Certain provisions of the Act suggest de novo review of law ("the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions . . .") 5 U.S.C. § 706, while others suggest deference (allowing the reviewing court is to set aside agency action which is "arbitrary, capricious, an abuse of discretion," or "in excess of statutory jurisdiction, authority, or limitations") 5 U.S.C. §§ 706(2)(A) & (2)(C).
  \item \textsuperscript{372} 467 U.S. 837 (1984).
  \item \textsuperscript{373} Id. at 843-44; see also Farina, supra note 111, at 523 (arguing that \textit{Chevron} results in an overallocation of power to the executive branch); Liebman, supra note 21, at 543 & n.26 (noting parallel between habeas and administrative law cases). But cf. Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969 (1992) (arguing that the impact of \textit{Chevron} on court deference to agencies has been overestimated).
  \item \textsuperscript{374} See \textit{Teague v. Lane}, 489 U.S. 288 (1989) (plurality opinion); notes 14 & 32 supra.
  \item \textsuperscript{375} 344 U.S. 443 (1953).
  \item \textsuperscript{376} Claims of a violation of the Fourth Amendment, however, were an exception. See \textit{Stone v. Powell}, 428 U.S. 465, 482 (1976) (holding that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state
applied a reasonable interpretation of existing federal case law. In *Teague*, the Supreme Court held that in only a few categories of cases could the federal courts apply what it called "new" rules of constitutional criminal procedure on habeas. As defined by the Court, a case presents new law if the outcome was not clearly dictated by prior Supreme Court precedent. Thus, if a state court turns out to have made a mistake on a constitutional question, the decision would not present grounds for habeas relief so long as the state court's erroneous interpretation of the Constitution was not unreasonable at the time it was made.

The Court's justification for using the reasonableness standard in the areas of officer immunities, the exclusionary rule, and habeas emphasizes fairness to the state and its officials; the Court reasons that there is little need to punish or deter reasonable if incorrect decisions. In review of agency decisions, the rationale is different. In theory Congress delegates lawmaking power to the agencies, and the judiciary has a limited role in reviewing such lawmaking. The delegation rationale, however, highlights the implications of the reasonableness standard more generally. In all areas in which the Court prescribes review only for unreasonable mistakes of law, it accords finality to reasonable decisions of other governmental bodies, and therefore channels power to those branches and away from the federal courts. For example, in the area of habeas, there has been no explicit assertion that the

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378. See Butler v. McKellar, 494 U.S. 407, 412-14 (1990) (holding that "[t]he 'new rule' principle [established by Teague] therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions"); *Teague*, 489 U.S. at 301 (plurality opinion) (defining a "new rule"); see also Hoffmann, supra note 21, at 199, 211-13.
379. See 489 U.S. at 301, 311-13 (plurality opinion).
380. See id. at 301; see also Butler, 494 U.S. at 412-14; Penry v. Lynaugh, 492 U.S. 302, 314. For a discussion of these cases, see authorities cited in note 32 supra.
381. See Butler, 494 U.S. at 414. As discussed in note 13 supra, current legislative proposals for habeas may enshrine the reasonableness standard into statutory law.

Concern that it would be unfair to attach legal consequences to reasonable but incorrect decisions of law by government officials is most warranted when personal liability is at issue—for example, in officer immunity cases. See Fallon & Meltzer, supra note 22, at 1791-92. Fairness concerns weaken substantially when the remedy is prospective and nonmonetary, as in the case of habeas and the exclusionary rule. See id. at 1792 ("Concerns of reliance and moral blamelessness carry less weight when a suit seeks relief from the government rather than an individual officer."). Nevertheless, the Court has increasingly resorted to fairness to governmental entities and officers even when those officers will suffer no personal liability from a decision to exclude evidence or grant habeas. Professors Fallon and Meltzer maintain that the disruptive consequences of remedies, as well as the risk of overdeterrence, should properly be taken into account in remedies such as habeas. Remedial costs may be considerable, and government officials have incentives to avoid litigation even if they will not suffer personal liability. See id. at 1793, 1795.
power to supply the ultimate meaning of the relevant federal constitutional provisions lies in state courts. Yet for individual prisoners, a reasonable interpretation of law approach to federal habeas corpus frequently accords such final interpretive authority to the states. This anomaly also occurs in the area of officer immunities and the exclusionary rule, where final authority as to the meaning of federal law may be effectively lodged with executive officials, the police, or state judicial officers.

In the agency cases, moreover, the federal courts do not apply the reasonable interpretation of law standard when reviewing agency decisions as to questions of constitutional law. This is because Congress, itself lacking power to make final determinations of constitutional law, could not delegate such power to an agency. Such a result would be contrary to the dictates of Marbury and two hundred years of constitutional law, under which the courts, and especially the federal courts, retain final authority to interpret the Constitution. Yet with no overt theory of delegation, the federal courts in officer immunity, exclusionary rule, and habeas cases accord finality to the reasonable mistakes of constitutional law on the part of state executive and judicial officials. Absent a theory, this delegation of final constitutional decision making power is given the polite name of "federalism.

C. Delegation Doctrine and the Infliction of Random Harms

The overall effect of focusing on reasonable interpretations of law outside the agency context is to delegate power to interpret the Constitution to subordinate officers. That power, in turn, allows officials to inflict discrete random constitutional harms subject to little or no federal judicial review. As discussed below, harms inflicted pursuant to statutes, or established policies or practices, generally will not escape court awarded relief, but parties seeking a federal trial forum for random or ad hoc official illegality will meet higher standards to prove liability.

For example, in civil actions seeking injunctions against government officers, judicial remedies are granted based on a standard of legality, not reasonableness. Injunctive relief, however, is most frequently available only when the victim of the unconstitutional action is attacking legislation or an ongoing policy. The prospective nature of injunctions makes such relief ap-

383. Cf. Monaghan, supra note 111, at 6 ("In constitutional adjudication, Marbury indicates that the court's interpretational duty is that of supplying the full meaning of the relevant constitutional provisions except for 'political questions.'").

384. The possibility of direct review by the Supreme Court would be the only opportunity for de novo review of the federal constitutional issue. See Friedman, supra note 8, at 253; see also Developments, supra note 17, at 1057 & n.108 (asserting that there are right and wrong answers to questions of federal constitutional law).

385. See Monaghan, supra note 111, at 6.

386. See Amar, supra note 177, at 1425 (noting that "federalism" is "regularly deployed to thwart full remedies for violation of constitutional rights"). A final delegation of authority to state courts to interpret the Constitution may not be constitutionally prohibited, because Congress has authority to remove jurisdiction from lower federal courts, and to restrict the appellate jurisdiction of the Supreme Court. See U.S. Const. art. III.
propriate only for planned or continuing behavior. By contrast, injunctions are rarely available to address ad hoc official illegality, which results in discrete past harms where prediction of future similar acts is difficult.387 Indeed, the Court allows constitutional damages actions against federal officers because discrete acts of past official illegality cannot ordinarily be addressed through injunctive relief.388 Yet damages actions against individual officers for their past harms will generally face a standard of proof requiring not merely a showing of a violation of the Constitution, but a violation that is unreasonable.

Similarly, federal courts may grant damages as a remedy against local governmental entities based on a federal court’s de novo determination of the constitutionality of official acts. But to hold a local government liable, the plaintiff must show that the challenged action was commanded by law or was part of a policy or custom of the entity.389 This “policy” requirement effectively requires a victim of unconstitutional action to point to local legislation or its substantial equivalent before a federal court may impose damages. By contrast, victims of random official unconstitutionality (i.e., not pursuant to policy) can bring a damages action only against the individual wrongdoing official. And once again, such cases must now establish not merely a violation of the Constitution, but an unreasonable one.

Criminal defendants seeking direct review and prisoners seeking habeas are generally seeking remedies for unredressed ad hoc denials of constitutional rights, inflicted by police, prosecutors, or the state courts.390 With its decision in Teague, the Court has committed largely final determination of these random violations to the state courts, with direct review (which the Court itself controls) as the primary avenue for a federal court determination of the accuracy of the state courts’ determinations. Habeas therefore presents the most realistic opportunity for federal review of ad hoc denials of constitutional rights to prisoners.391 But as in the case of section 1983 litigation, a federal remedy is constrained by a significantly higher standard for showing a remediable violation—that is, an unreasonable interpretation of law.

390. Only relatively rarely does a criminal defendant present a colorable challenge to the constitutionality of the statute under which he was convicted, and such challenges will likely receive a federal forum on direct review or habeas. The Court has stated that it would allow habeas review if the conduct could not be penalized. See Teague, 389 U.S. at 311. Theoretically, if one commits an act that could be criminalized but that was prosecuted under a facially unconstitutional statute, habeas might not be available. The Court has held that the fruits of a search incident to arrest under a criminal statute subsequently declared to be unconstitutional will not be excluded from evidence. Illinois v. Krull, 480 U.S. 340 (1987); Michigan v. DeFillippo, 443 U.S. 31 (1979). But cf. Henry P. Monaghan, Harmless Error and the Valid Rule Requirement, 1989 Sup. Ct. Rev. 195, 195-96 (defendant in coercive action always has standing to deny the validity of a rule applied to him; harmless error analysis is inappropriate when defendant challenges the validity of a rule applied to him).
391. See note 18 supra.
Finally, a more overt attempt by the Court to limit the constitutionalization of ad hoc official illegality is presented in the line of cases associated with *Parratt v. Taylor.*\(^{392}\) *Parratt* held that some random deprivations of nonfundamental liberty or property interests cannot be remedied in federal court under section 1983, unless the state courts lack a meaningful postdeprivation remedy.\(^{393}\) As Richard Fallon has recently argued, these arbitrary deprivations at the hands of governmental officials, even of otherwise nonfundamental interests, constitute substantive deprivations that violate the Fourteenth Amendment's Due Process Clause.\(^{394}\) Presumably, if the state court provides postdeprivation process but inappropriately denies relief for such violations, the only federal court remedy for the loss is direct review in the Supreme Court, a remedy that is aleatory at best.\(^{395}\) Thus, the Court has, in effect, banished some random official illegality cases from federal court altogether, and has thrown out others by requiring the party seeking relief to show an unreasonable violation of the Constitution.

V. Conclusion

In the Supreme Court's current standards of review one can discern a set of beliefs and feelings that bear some similarity to the concerns of the post-Reconstruction Court: hostility to what the Court perceives as newly cre-

\(^{392}\) 451 U.S. 527 (1981), partially overruled by *Daniels v. Williams,* 474 U.S. 327 (1986); see also Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment,* 86 COLUM. L. REV. 979, 982-96 (1986) (*Parratt* 's holding is grounded in theory of state action at odds with *Home Telephone* and *Monroe*). The *Parratt* line of cases involves the difficult issue of when a wrong becomes a deprivation of "constitutional" due process. By contrast, the dilution of federal court remedies accomplished by the Court through decisions regarding official immunities, the exclusionary rule, and habeas corpus all involve remedies for wrongs that the Court recognizes as "constitutional." Despite their differences, both the *Parratt* line and the "reasonableness" line of cases (immunity, exclusionary rule, and habeas actions) could be seen as an extension of the Court's long term struggle with the question of the extent to which random illegality should be considered a constitutional harm. *Cf.* *Collins v. City of Harker Heights,* 112 S. Ct. 1061, 1069-70 (1992) (Due Process Clause should not be interpreted to impose duties analogous to state tort law). I am somewhat sympathetic with the Court's attempt in *Parratt* to avoid constitutionalizing all wrongs by government officials. Given the common law origins of both federal constitutional guarantees and state tort law, however, the line between constitutional wrongs and mere state torts by officials will necessarily be somewhat artificial. *See* Monaghan, *supra,* at 992 (asserting that the *Parratt* line reflects the Court's incorrect belief that a stable line exists between constitutional torts and simple state law wrongs).

\(^{393}\) 451 U.S. at 543.

\(^{394}\) *See* Richard Fallon, *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies* (Draft of Mar. 30, 1992) (unpublished manuscript, on file with the Stanford Law Review). According to Fallon, substantive due process analysis is tiered. At the top of the hierarchy are fundamental rights. In the middle are substantive due process rights that can be abridged to further noncompelling government interests but that nevertheless can be vindicated in federal courts. At the bottom is a generalized right against government arbitrariness as to nonfundamental liberty and property interests. To the extent that government deprivations in the bottom category are non-systemic, their protection may be left to the state courts under an abstention principle. *See* Monaghan, *supra* note 392, at 987 (considering an abstention explanation of *Parratt*); *see also* Leon Friedman, *Parratt v. Taylor: Opening and Closing the Door on Section 1983,* 9 HASTINGS CONST. L.Q. 545 (1982).

ated rights, and hostility to what it views as an undesirable accession of federal judicial power to enforce them. As in the post-Reconstruction era, the reaction has manifested itself not only in decisions narrowly interpreting rights as a matter of substantive constitutional law, but also in decisions that impair the efficacy of remaining rights by effectively delegating final authority to interpret and implement them to state judicial and executive officials. The old Court's methodology was to allow federal courts to address violations of constitutional rights primarily when the violation occurred under an unconstitutional statute, and to disallow a federal trial forum for random violations of constitutional rights on the ground that such violations were "mere error." The modern Court accomplishes analogous results by allowing federal trial court remedies for ad hoc official illegality only when a violation is not a "mere" violation, but an unreasonable one. Many constitutional violations are thereby left untouched.

Thus, our current remedial anomalies are not without historical analogues. On one hand, the Court recognizes that a violation of constitutional rights can occur through official acts outside of legislative authorization as well as within it. On the other hand, the Court is more reluctant to provide a sure federal remedy when officials act outside of express legislative command. As in the ad hoc jury discrimination cases of the late nineteenth century, the Court is able to say that constitutional rights exist for some purposes, while it undermines the existence of such rights by delegating final authority to determine their day to day content to unsympathetic officials. Those who find this historical tradition of federalism attractive might draw support from it for the current reign of reasonableness in governmental accountability. And to the extent that this article suggests that habeas should be viewed in the context of the development of other remedies against government, the current retrenchment of other remedies may supply an argument for limiting habeas in a similar fashion.

But I read the lessons of the history of habeas and of other areas of governmental accountability differently. While history does not necessarily dictate a particular result in the current debate as to the proper scope of habeas, it should give pause to those who would limit the writ based on a view of habeas as having been narrowly restricted to issues of jurisdiction until the decision in Brown v. Allen. The history of habeas does not provide a model of review for jurisdiction only (with narrow exceptions) as some have claimed, nor a model of review of all constitutional issues, as others would have it. Rather, habeas jurisprudence has changed over time, manifesting long-range developments in the scope of constitutional law and federal jurisdiction in both civil and criminal cases. It is the direction of those changes rather than the scope of habeas at any particular moment that provides the significance of habeas history. The constitutionalization of individual official

396. See Schmidt, supra note 160, at 1413 (arguing that discussions of racial justice after Reconstruction should focus less on issues of doctrinal correctness, and more on doctrinal efficacy).

397. 344 U.S. 443 (1953).
illegality was a legitimate response to the need to locate protections for individuals in a positive source of law when the notion of a general common law waned and the power of government increased. In addition, the Court could find no reason to say that a person who was denied equal protection or due process in an ad hoc fashion had suffered any less a constitutional harm than a person who had suffered from a more systemic deprivation. The current focus on reasonable interpretations of law effectively ignores this long-term insight by returning random official illegality to second class status for purposes of constitutional law. This second class status is accomplished by making the enforceable standard imposed upon officials in their dealings with citizens not "the law," but a reasonable interpretation of law. Instead of the rule of law, we have the rule of almost-law.