

2014

# Federal Habeas Corpus in Capital Cases

Eric M. Freedman

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/faculty_scholarship)

---

## Recommended Citation

Eric M. Freedman, *Federal Habeas Corpus in Capital Cases* 577 (2014)

Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/631](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/631)

This Book Chapter is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

# Federal Habeas Corpus in Capital Cases

*Eric M. Freedman*

## Introduction: Federalism and Injustice

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

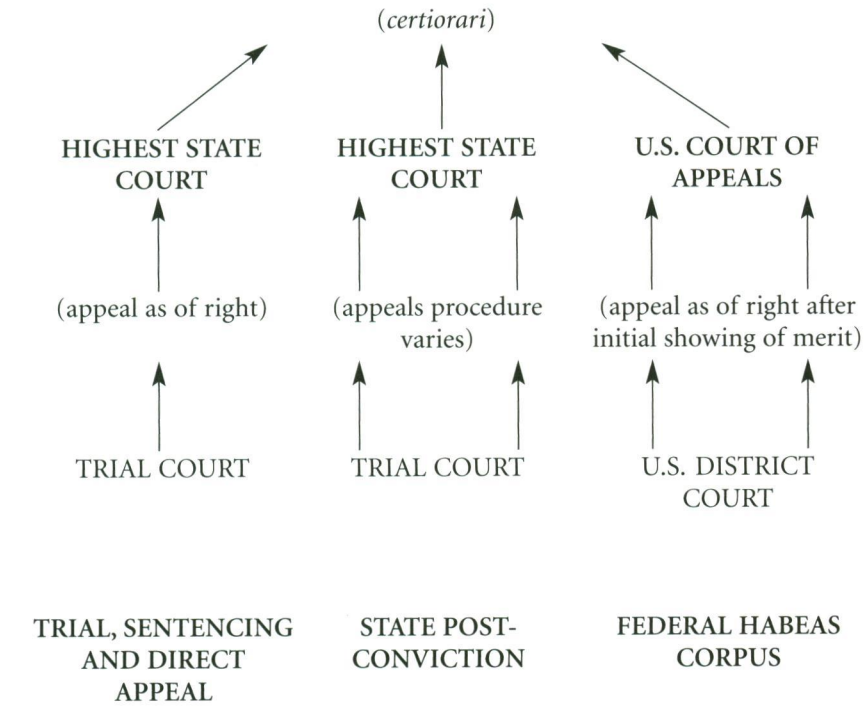
The reason is straightforward. The availability of habeas corpus means that if an individual is found to have been restrained unlawfully, the court can release him or her — thereby enforcing the rule of law and frustrating governmental oppression. Attempts to extend the range and efficacy of the writ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

The present discussion concerns the situations that arise when a state prisoner files a petition in federal court challenging his or her criminal conviction. Such a petition calls upon the federal court to decide, in the words of the federal habeas corpus statute, whether the prisoner is being held “in custody in violation of the Constitution or laws or treaties of the United States” (28 U.S.C. § 2254(a)).

Thus, federal habeas corpus is inseparably connected to the idea of federalism — sometimes in our history rightly understood as a device for insuring liberty by dispersing power, and sometimes misunderstood as an excuse for inaction in the face of injustice. For the effect of the existence of federal habeas corpus is that even though the Supremacy Clause of the Constitution (U.S. Const., Art. VI) already requires state courts to insure that state criminal defendants receive every protection afforded by the Constitution, treaties, or federal law, those defendants are also entitled to insist that a federal court review the state court proceedings in order to insure that the conviction and sentence are lawful.

Stated slightly more completely, as shown in Figure 1, a state criminal defendant has the right after conviction in a state trial court to pursue a direct appeal to one or more state appellate courts (typically in capital cases directly to the state's supreme court), and then to seek discretionary review in the United States Supreme Court by a procedure known as *certiorari*. Thereafter, most states provide for some form of state post-conviction review. Where such procedures exist defendants must ordinarily utilize them before seeking the federal habeas corpus remedy (28 U.S.C. § 2254 (b)(1)).

Figure 1 Typical State and Federal Trial and Post-Conviction Procedure  
UNITED STATES SUPREME COURT



(Association of the Bar 1996:199)

# Federal Habeas Corpus and the American Past

## Origins

However illogical such a dual system may appear in the abstract, it makes perfectly good sense when viewed in the context of American history, American government, and American reality—especially with respect to the death penalty.

The founders of this country were quite familiar with the tyrannical potential of the criminal law (Hamilton 1788a). As I have elaborated in greater detail elsewhere (Freedman 1996), one important manifestation of their concern is the Suspension Clause of the Constitution (U.S. Const., Art. I, Sec. 9, cl. 2): “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

The issue was brought to the floor of the Philadelphia Convention by Charles Pinckney of South Carolina. As James Madison’s notes of August 28, 1787 record (Farrand 1966:438):

Mr. Pinkney, urging the propriety of securing the benefits of the Habeas corpus in the most ample manner, moved ‘that it should not be suspended but

on the most urgent occasions, & then only for a limited time not exceeding twelve months’.

Mr. Rutledge was for declaring the Habeas Corpus inviolable—He did not conceive that a suspension could ever be necessary at the same time through all the States—

Mr. Govr Morris moved that ‘The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it’.

Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.

The first part of Mr. Govr. Morris’s motion, to the word ‘unless’ was agreed to nem: con:—on the remaining part; N.H. ay. Mass ay. Ct. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N.C. no. S.C. no. Geo. no. [Ayes—7; noes—3.]

Luther Martin of Maryland has left us further details of the debate on this last motion (in which he sided with the minority) (Martin 1788:434):

As the State governments have a power of suspending the habeas corpus act [in cases of rebellion or invasion], it was said there could be no good reason for giving such a power to the general government, since whenever the *State* which is invaded or in which an insurrection takes place, finds its safety requires it, *it* will make use of that power—*And* it was urged, that if we gave this power to the general government, it would be an engine of oppression in its hands, since whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be *an act of rebellion*, and suspending the habeas corpus act, may *seize* upon the persons of those *advocates of freedom*, who have had *virtue* and *resolution* enough to excite the opposition, and may *imprison* them during its pleasure in the *remotest* part of the union, so that a citizen of Georgia might be *bastiled* in the furthest part of New-Hampshire—or a citizen of New-Hampshire in the furthest extreme to the south, cut off from their family, their friends, and their every connection—These considerations induced me, Sir, to give my negative also to this clause.

When the debate moved to the state ratification processes, the same set of concerns emerged. There was universal agreement that, because human nature was inherently power-seeking, any grant of authority to government officeholders must be scrutinized with extreme care since they would inevitably attempt to abuse their positions. Opponents of the Suspension Clause, who pointed out that—despite its negative phraseology—it was in fact a grant of power to the federal government, denounced it as dangerous. As the French *chargé d’affaires* wrote home in summarizing this view: “The Congress will suspend the writ of *habeas corpus* in case of rebellion; but if this rebellion was only a resistance to usurpation, who will be the Judge? the usurper” (Otto 1787:424).

The Federalists’ response was that they shared the views of their opponents—which were fully implemented by the Constitutional text. Thus, in a speech to the Maryland legislature reporting on his doings as a Convention delegate (and responding to the views of Luther Martin), James McHenry said: “Public safety may require a suspension of the Ha: Corpus in cases of necessity: when those cases do not exist, the virtuous Citizen will ever be protected in his opposition to power, ‘till corruption shall have obliterated any sense of Honor & Virtue from a Brave and free People” (McHenry 1787:283).

As subsequent developments show, it seems fairly clear that the Federalists won this debate. In ratifying the proposed Constitution, a number of states passed sets of amendments that they wished to see incorporated; James Madison collated these, and those that had achieved a reasonable degree of consensus among the states eventually became the Bill of Rights. There were explicit safeguards for numerous rights—from freedom of press and religion, to protections for the civil jury trial and a ban on cruel and unusual punishments—that the Anti-federalists had warned would be in jeopardy under the Constitution as originally proposed, and the entire project thus represented a repudiation of the Federalist position that those and other rights had already been sufficiently safeguarded. But there was not a word about the right to habeas corpus, reflecting the fact that (with one minor exception) the states had not proposed any further protection for that right.

A fair conclusion is that the ratification debates had convinced all parties that the Clause as proposed would meet the aims they agreed that they shared: to protect the liberties of those who might fall afoul of the organs of power. It follows from this premise that, were they present among us today, the debaters would reject modern formulations that see the federal writ of habeas corpus for state prisoners as an assault on state sovereignty.

Plainly, the Federalists were not worried about preserving state sovereignty—neither in the sense of the dignity of the states as against the federal government, nor in the sense of preserving the rights of state-wide majorities to act as they pleased toward their own citizens. With regard to the first, it was the over-abundance of reserved power in the states that led to the need to write the Constitution in the first place. With regard to the second, it is clear that checking the excesses of local majorities (like Rhode Island's) that might act oppressively towards local minorities (like creditors) was a major Federalist goal.

As for the Anti-federalists, their contributions to the debate over the Clause clearly show that they, unlike some modern Supreme Court Justices, were not worried about whether the states would sufficiently retain their sovereign rights to imprison or execute people, but were, rather, worried about whether the states would retain their sovereign rights to release them. In particular, they were concerned that federal power might be exerted so as to keep unpopular prisoners—rightly or wrongly branded by the authorities as criminals—from vindicating their rights to freedom. From the Anti-federalist point of view, a power in the general government to release state prisoners, as opposed to a power in the general government to forestall their release, would be an example of federalism as a preserver of liberty—an instance of the virtue of a federal, as opposed to a national, government.

Furthermore, Federalists and Anti-federalists shared an appreciation of the fact that, to the extent that the Constitution had, through such devices as life tenure and guaranteed salaries, improved on the English model in safeguarding the independence of the judicial branch from overt political pressures (Hamilton 1788b), habeas corpus proceedings could be expected to inquire impartially into executive and legislative actions.

As famously expressed by James Madison in No. 51 of *The Federalist* (Madison 1788:323), “In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allocated to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”

## The Civil War and Its Aftermath

Of course, in practice, as many of the founders had foreseen, “the rights of the people” came under unrelenting stress from the philosophical and political challenges generated by the peculiar institution of slavery:

During the period that slavery existed in a colony or state, African-Americans were usually judged and summarily punished in special courts by all-white judges or juries for alleged crimes committed against whites. Violent acts by whites against blacks were rarely defined as criminal and then only as property crimes committed against the slave’s white owner. Not only did the legal structure of slavery fail to protect blacks against the violent acts of whites, but it denied African-Americans the right to seek legal redress, or to testify as a witness against whites (Colbert 1990:13).

The 13th, 14th, and 15th Amendments, passed in the aftermath of the Civil War, were designed to end this two-tier system within the states. But the framers of those Amendments had little faith in the willingness of the state courts to discharge the responsibility of guaranteeing the rights of equal protection and due process of law to all citizens. It was in this context that Congress passed the federal habeas corpus act of 1867 (Amsterdam 1965), whose basic structure survives to this day. In the face of “the state courts’ expected systematic resistance,” the “Congress sought to assure prisoners of one full opportunity to enforce their newly given national rights in a national court” (Liebman and Hertz 2011a:55).

The Supreme Court’s initial response was to recognize that the 1867 act was written “in language as broad as could well be employed,” and to implement fully “the purpose of Congress to invest the courts of the Union ... with power upon writ of habeas corpus to restore to liberty any person ... who is held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States” (*Ex parte Royall* 1886:247–248).

But as Congress retreated from Reconstruction, so did the Court diminish in its enthusiasm for the enforcement of federal constitutional rights against state authorities. Mirroring its performance across the range of issues presented by the Civil War Amendments, the Court, ruling in a series of technically complex cases whose true underpinnings remain obscure, increasingly began to announce rules of its own devising whose effect was to limit the access of state prisoners to federal habeas corpus (Liebman and Hertz 2011a: §2.4[d][v]).

In terms of outcome, if not of doctrine, the nadir was reached in 1915 in *Frank v. Magnum*. In a famous case that drew intense national attention at the time and has been the subject of extensive historical writing (e.g., Dinnerstein 1991), Leo Frank was convicted in Georgia under circumstances of extreme anti-Semitic hostility of a murder that it is now universally agreed he did not commit. The Supreme Court, however, refused to re-examine on habeas corpus the determination of the Georgia Supreme Court that the trial jury had not been swayed by the threat of mob violence should it fail to convict.

Thus, as far as the Supreme Court was concerned, Georgia was free to execute the death sentence it had pronounced on Frank. In fact, the governor, convinced of his innocence, commuted the sentence to life imprisonment. But a vigilante committee composed of leading citizens of Georgia—including a minister, two former supreme court justices and an ex-sheriff—broke into the prison, kidnapped Frank and lynched him to much local jubilation. Although the identities of the members of the committee were well-known, “the coroner’s jury investigating the murder of Leo Frank concluded that it was unable to identify any of the perpetrators. This was typical of lynching in the

South during that era. The only difference is that this victim was not black” (Dershowitz 1991:3).

Plainly, the situation was unconscionable. And in 1923, in *Moore v. Dempsey*, the Supreme Court granted habeas corpus relief in virtually identical circumstances. The black petitioners there alleged that they had been meeting to discuss their grievances against local white landowners when they were attacked by a white mob, leading to several days of rioting that resulted in the deaths of over 200 black men, women, and children, and five white men. Moore and a number of other blacks were arrested for murdering one of the whites.

As the Court summarized their account: “Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by ... the promise of ... leading officials that if the mob would refrain, ... they would execute those found guilty in the form of law” (*Moore v. Dempsey* 1923:88–89). The officials then “made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted” (p. 89).

Within a few days:

[T]he petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a jurymen or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defense although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree.... [T]here never was a chance for the petitioners to be acquitted; no jurymen could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob (*Moore v. Dempsey* 1923:89–90).

Having been sentenced to death and denied relief by the Arkansas courts, the defendants presented a habeas corpus petition to the federal district court—which dismissed it summarily. Undeterred by the dissent’s charge that it was abandoning the rule of deference to state court processes that it had erected in *Frank*, the Supreme Court reversed, holding that the federal courts had the duty of inquiring into allegations of basic constitutional violations in state court criminal proceedings. Not surprisingly, in the wake of this ruling the prosecution soon ran out of steam, and all the defendants were released within two years (Cortner 1988).

## The Present

### The Special Problems of Capital Cases

*Moore’s* re-articulation of first principles was soundly based, and of special importance to capital cases. As other chapters in this volume show in detail, the factors that led to repeated unjust death sentences in the era of *Moore* and the Scottsboro Boys (*Powell v. Alabama* 1932) remain powerful today. The current operation of our criminal justice system is still such that—in defiance of every dictate of fundamental fairness—capital

defendants systematically receive less due process than others. Their cases are more likely than those of defendants not facing execution to have been infected by distortions arising from racism, the incompetence of defense counsel, their own mental limitations, public passion, political pressures, or jury prejudice or confusion (Bowers, et al. 2014; Bright 2014; Grosso, O'Brien, Taylor and Woodworth 2014; Lyon 2014; Sandys, Walsh, Pruss and Cunningham 2014).

Of course, the result is a dangerous increase in the risk that the system will make a fatal error (Freedman 1990–91; Gross 1996; Radelet and Bedau 2014). And whatever may be the benefits of bringing criminal proceedings to closure promptly, there is, in the words of Justice Harlan's 1971 separate opinion in *Mackey v. U.S.*: "little societal interest in permitting the criminal justice process to rest at a point where it ought properly never to repose" (1971:693).

For these reasons, the "policies favoring a meaningful federal habeas corpus remedy for state prisoners apply with particular force in capital cases" (Liebman and Hertz 2011a:108). As the Association of the Bar of the City of New York documented in a major study, time and time again only federal habeas corpus stands between death row inmates and grievous injustice. Consider some examples drawn from judicial opinions published just since 1980 (Association of the Bar 1996:177–181):

- A mentally deficient man gave the police two vastly different statements during 42 hours of uncounselled questioning. The latter of the two confessions used words beyond the defendant's capability and, unlike the first confession, distinctly recited facts which qualified defendant for the death penalty.
- The grand jury that indicted the defendant was selected in a process that systematically excluded African-Americans.
- The prosecution knowingly presented misleading evidence by using an expert witness to testify at the defendant's trial that he must have been the sole triggerman, when that same expert had previously testified at the co-defendant's trial that the co-defendant must have been the sole triggerman.
- The prosecution withheld its most crucial witness' prior statement, which corroborated evidence favorable to the defendant and would have been material in challenging the witness' trial testimony; after the federal court ordered a retrial, the charges were dropped and the defendant released.
- The prosecutor (i) deliberately withheld the fact that his chief witness had received a deal for his trial testimony, and then (ii) misled the jury by stating in his closing argument that the absence of such a deal favorably reflected upon the veracity of the witness.
- The defendant was insane at the time of the trial and thus was not competent to assist his attorney. After the federal court ordered a retrial and the defendant was restored to sanity, he was acquitted.
- The district attorney devised a secret scheme by which he got the jury commissioners to under-represent African-Americans and women.
- Massive pretrial publicity in a small town compromised nearly all jurors, many of whom had attended the victims' funeral.
- The local sheriff handpicked the jury in a case involving the murder of a police officer.
- The judge's charge to the jury unconstitutionally placed on the defendant the burden of proof on a key element of the alleged crime.

- The prosecutor based his argument in favor of a death sentence on prior felony convictions that he knew did not exist, even though defense counsel agreed that they did.
- The defendant was sentenced to death by a jury that had been unconstitutionally instructed that it could not consider his brain damage, his full cooperation with the police, or his favorable prospect for rehabilitation as mitigating factors.
- The prosecutor inaccurately told the jury that a verdict of death would not be final because the appellate courts would correct any mistakes it made.
- The defendant's attorney failed to inform the jury that convicted and sentenced the defendant to death that the State's only witness—the admitted killer, who testified in return for a lesser sentence—did not link the defendant to the murder in his detailed confession to police.
- Defense counsel filed no pretrial motions, did not try to locate any defense witnesses, did not interview the defendant's family or the State's witnesses, did not visit the crime scene, failed to use possibly exculpatory evidence available from the State's scientific tests, and failed to seek a new trial after evidence emerged that the victims were alive after the last time that the defendant could have been in contact with them.
- Neither defense lawyer conducted any investigation seeking evidence that might persuade the jury not to impose the death sentence, because "[e]ach lawyer ... believed ... the other was responsible for preparing the penalty phase."
- Defense counsel did not investigate or otherwise prepare for the capital sentencing hearing because he was confident that he could negotiate a sentence other than death.
- Defense counsel failed to bring to the jury's attention evidence relating to the defendant's mental retardation, the fact that his I.Q. was below 41, that he was only 17 years old at the time of the crime, and was not proven to have had any intent or played any role in the homicide.
- The prosecution withheld information that three individuals, known to be associates in criminal activity, had previously been identified as being at the scene of the crime; that one of the individuals identified had confessed committing the crime to his cellmate; that the same individual was positively identified as having forged endorsements on the money orders taken during commission of the crime; and that the same individual had committed manslaughter by using a weapon of similar caliber to the one used in commission of the crime.

As improbable as it may seem at first, these examples (and numerous similar ones to be found in the Bar Association's report) are typical—not aberrational. The most reliable published data (Liebman, Fagan and West 2000) show that, notwithstanding the strong political, institutional and legal pressures on the federal courts to leave state death cases undisturbed, those courts felt compelled to grant habeas corpus relief (i.e., to overturn either the conviction or the death sentence) in 21 percent of the capital cases they reviewed between 1973 and 1995. (Emphasizing the importance of vigorous review at the state level as well, the reversal rate there is 47 percent—for an overall reversal rate of 68 percent.) These figures are astoundingly high. According to one recent study the rate of federal habeas corpus relief in non-capital cases is less than 1 percent (Hoffmann and King 2009:809).

In short, the systemic problems with the administration of capital punishment in this country that are canvassed elsewhere in this volume are real. And federal habeas corpus

proceedings have for a good part of this century served to reveal those problems and, to some extent, to ameliorate them.

## The Legal System Refuses to Confront Injustice

A real attack on the multiple sources of injustice in death penalty proceedings would require much in the way of resources and political will. Even then, it might not succeed. It is certainly more than possible that Justice Blackmun was right in his conclusion in *Callins v. Collins* that “the death penalty cannot be administered in accord with our Constitution” (1994:1157).

Moreover, any serious exploration of that issue would raise the uncomfortable prospect of discovering that the problems endemic to capital cases are widespread in non-capital ones as well. Thus, for example, in rejecting an impeccably-documented attack on the racial disparities in Georgia’s death penalty system, Justice Powell wrote in the 1987 case of *McCleskey v. Kemp* (1987:315–316): “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. . . . [I]f we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.”

Under the pressure of those considerations, both the courts and Congress over the past several decades have shown a consistent inclination to shoot the messenger: to respond to the injustices revealed in capital habeas proceedings by devising mechanisms to restrict such proceedings, rather than ones to remedy the injustices.

For an example, one need look no further than the saga of Warren McCleskey himself, which may someday come to symbolize criminal justice in the Rehnquist era. McCleskey had participated in an armed robbery in which a policeman was killed. Although he maintained that he was not the triggerman, the evidence against him at trial included a purported jailhouse confession to one Offie Evans, an inmate housed near him, in which McCleskey was said to have admitted shooting the officer.

In his original habeas corpus petition in the Georgia courts, McCleskey asserted that Evans had been deliberately sent into his cell by the government to elicit a confession. If this in fact occurred, it indisputably violated McCleskey’s Sixth Amendment right to counsel. But the state denied the allegation. The prosecuting attorney stated at a deposition that he was unaware of any prior arrangement with Evans, and a set of documents represented as containing the complete prosecutor’s file contained no supporting evidence. Counsel, who had tried but failed to gain any further substantiation, thereupon omitted the claim from the federal habeas corpus petition he filed following denial of relief by the state courts.

That federal proceeding was the one that reached the Court in 1987, and resulted in the 5–4 decision written by Justice Powell that rejected the claim that the statistical evidence of overwhelming racial disparities in the administration of Georgia’s capital punishment system was an Equal Protection violation (*McCleskey v. Kemp*).

Following the decision, McCleskey again sought habeas corpus relief on his claim concerning Evans—this time armed with a 21-page report from Evans to the government on his conversations with McCleskey, a document that had not been included when the prosecution turned over to the defense what purported to be the government’s “complete” file. McCleskey had obtained the document from the Atlanta police in the weeks following

the Court's decision only as a result of a new interpretation of the Georgia Open Records Act by the Georgia Supreme Court.

After conducting an evidentiary hearing, including the testimony of a jailer whose identity was discovered through the document, the District Court granted habeas relief, concluding that the failure to present the claim earlier was justifiable, and that, since Evans had indeed been deliberately planted by the government, McCleskey was entitled to prevail on the merits.

Without reaching the merits, the Eleventh Circuit reversed, holding that the petition should have been dismissed as an "abuse of the writ." McCleskey again sought Supreme Court review.

As of that moment, the law concerning procedural missteps by counsel during habeas corpus proceedings was divided into three categories:

1. *Procedural Default*. These cases occurred when a prisoner had failed to properly present a claim to a state court that he or she later sought to assert on federal habeas corpus, and the state court had applied its own procedural rules to deny review of the merits. As a matter of comity, the Supreme Court had held (*Wainwright v. Sykes* 1977) that federal courts would not review such claims either, unless the petitioner surmounted the difficult hurdle of showing both "cause" for the default—i.e., "some objective factor external to the defense [that] impeded counsel's effort to comply with the State's procedural rule" (*Murray v. Carrier* 1986:488)—and "prejudice" arising from it.

Since McCleskey had properly presented his claim to the Georgia courts, which had rejected it on the merits, the category seemingly had no application to his case.

2. *Abuse of the Writ*. Where a second federal petition presented a claim that had not been made previously, controlling authority required an inquiry into whether there had been subjective bad faith on the part of the petitioner, that is, whether he or she had deliberately withheld the newly asserted ground in an effort to multiply bites at the habeas corpus apple (*Fay v. Noia* 1963; *Sanders v. United States* 1963). As noted, the District Court in McCleskey's case had held that there was no deliberate withholding, and the case proceeded to the Supreme Court to review the contrary ruling of the Eleventh Circuit.

3. *Ends of Justice*. In cases where a claim had previously been presented and adjudicated on federal habeas corpus, existing doctrine required an inquiry into whether the "ends of justice" would be served by allowing its re-litigation. This cloudy term had not been clarified by the Supreme Court in recent years, and apparently had nothing to do with McCleskey's case, inasmuch as his Sixth Amendment claim had not been presented in his first federal petition.

In deciding McCleskey's second appeal in 1991 (*McCleskey v. Zant* 1991), the Court, without the benefit of argument from the parties, simply obliterated these distinctions (Freedman 1991). Henceforth, it announced in a 6–3 decision by Justice Kennedy, the standard to be applied in all three situations would be that least favorable to petitioners, namely the "cause and prejudice" standard of the procedural default cases.

"Cause and prejudice" is a standard that falls particularly harshly on death penalty defendants because they are especially disadvantaged with respect to both elements. Attorney ineffectiveness pervades capital cases to the point of undermining the fairness of the entire system of death penalty adjudication (Association of the Bar 1996:183–87; Lyon 2014). However, the courts do not tackle the problem "realistically and pragmatically"; rather, they view claims that defense lawyers were incompetent at trial and on direct appeal through the flatly counterfactual lens of "the strong presumptions of

attorney effectiveness mandated by *Strickland v. Washington*" (1984) (Association of the Bar 1989).

Thus, deficient attorney performance almost never qualifies as "cause." Because it does not the courts almost never find "cause" for any procedural error they discern in a capital case. And, without "cause," the court does not consider "prejudice."

But if the court does get that far, it will have a strong tendency to find that the outcome would have remained unchanged in any event. For example, in *Washington v. Murray* (1993) I served as habeas counsel in a case where the victim was raped by a stranger but defense counsel overlooked evidence in his own files that scientific testing showed the presence of semen at the scene belonging neither to her husband nor to the defendant. The reviewing court agreed that this was deficient performance but went on to hold that there had been no prejudice because of the strength of the prosecution's case—which consisted of a series of inconsistent confessions extracted under leading police questioning (Freedman 2001a). Washington was, in fact wholly unconnected to the crime. But only through a series of gubernatorial interventions rather than any protections offered by habeas corpus did he remain alive long enough to vindicate his innocence, secure his release, and win a federal civil rights action against the state officials responsible for his wrongful imprisonment (Edds 2003:xii–xiii, 196–99, 257).

"Cause and prejudice" thus repeatedly trips up capital defendants at the procedural threshold and the federal courts do not even consider the merits of their constitutional claims (Amsterdam 2004:407–11).

That is precisely what happened in McCleskey's case. Notwithstanding the State's deceptive response to his discovery requests, and a lawyer's obligation to assert only those claims for which a reasonable basis exists, the majority wrote that McCleskey's attorney was at fault for not continuing to assert his claims about Offie Evans. That, however, did not make the lawyer's performance defective under *Strickland*, because the failure took place during post-conviction proceedings, where there is no right to effective counsel.

Thus, McCleskey had failed to show "cause"; his petition had been properly dismissed; and he should be executed (as indeed he was) regardless of whether the government had in fact acted unconstitutionally. "Finality," the Court said, "has special importance in the context of a federal attack on a state conviction," because "the power of a State to pass laws means little if the State cannot enforce them" (*McCleskey v. Zant* 1991:491).

This reification of the "State" as an entity with rights independent of We the People who created it has been pervasive in the recent habeas corpus jurisprudence of the Supreme Court (and, indeed, in its constitutional jurisprudence generally), with most unfortunate results—not just for individuals like McCleskey, but for our system of justice as a whole.

The 1989 decision in *Teague v. Lane* (1989), which has been unanimously condemned by practitioners, judges, and scholars alike as "arbitrary and perverse" (Association of the Bar 1989:852; Liebman and Hertz 2011b: § 25), epitomizes the problem. The workings of *Teague* may be illuminated by the following hypothetical (drawn from, but not identical to, a famous real case). A defendant named Miranda is arrested and confesses to a crime of which he is subsequently convicted. He claims, though, that the use of the confession at his trial violated the Fifth and Sixth Amendments, because the police never warned him that it could be used against him nor that he had the right to consult with counsel before talking with the police. This claim, being unsupported by any decisional law, is rejected by every court to consider it on direct appeal, on state post-conviction review, and in federal habeas corpus—until ultimately being accepted by the Supreme Court on consideration of Miranda's federal habeas corpus petition.

Under traditional concepts of the judicial role, viz. that the Court is indeed describing what the Fifth and Sixth Amendments mean (and, implicitly, always have meant), the effect of this ruling should be that every criminal defendant in the country who did not get the required warnings is entitled (unless the error was harmless due to overwhelming other evidence) to have his or her conviction overturned as unconstitutional—through direct appeal if the case is still at that stage, state post-conviction proceedings if available, or a federal habeas corpus petition. Knowledge of this systemwide effect was, until the middle of the 20th century, thought to be a salutary restraint on judicial inclinations to read new individual rights into the Constitution. While perhaps leading to fewer pro-defendant rulings, the rule of full retroactivity meant that every defendant who had been the victim of the same governmental conduct would get relief.

But, under the impact of a number of opinions by Justice Harlan, who complained that a rule of full retroactivity imposed large costs on states that had in good faith complied with prior law, the Supreme Court began in a series of decisions to adopt a multi-factor test. This test considered such matters as the importance of the new rule and the degree to which the states could have anticipated it. The Court would then determine (usually in a case subsequent to the one announcing the rule itself) whether the rule would apply retroactively to people whose convictions had become final in state court before the Court's decision.

In *Teague*, the Court decided that this approach provided insufficient protection to the states. Henceforth, it announced, all federal courts adjudicating habeas corpus petitions were (unless one of two narrow exceptions applied) disabled from announcing any “new” rules of constitutional law, thus giving the states virtually perfect protection from the imposition of any retroactive obligations. Moreover, this would be a threshold issue in each case; a federal court must first decide whether a ruling in petitioner's favor would require it to declare a “new” rule, and, if so, stop at that point (without ruling on the merits of the petitioner's contention).

Of course, this formulation made central the issue of what constituted a “new” rule, and the Court proved entirely unable to provide a consistent answer to that question, either in *Teague* itself or subsequently. Sometimes it would hold that a rule was new only if it constituted a clear break with the past—acknowledging that an important element of retroactivity doctrine is giving the states an incentive to err in favor of, rather than against, recognizing nascent constitutional rights. At other times, in contrast, it would hold that a rule was new unless directly dictated by precedent.

More broadly, the result of *Teague*'s limitation on federal habeas corpus was that “new” rules of constitutional law, however defined, could only be created on direct appeal. Because (as a glance back at Figure 1 will show) the Supreme Court is the only federal court that hears direct appeals of state criminal cases (which it does a mere handful of times a year), the effect of *Teague* was to eliminate the lower federal courts from the development of new rules of constitutional law in the criminal context. This deprived not only prisoners, but the country and the Supreme Court itself, of the benefit of those courts' insights.

Moreover, *Teague* gave litigants, especially capital litigants, every incentive to delay. Once a defendant's case had progressed to the federal system, he or she could no longer benefit from any favorable changes in the law. So “a prisoner who has somehow managed to keep his or her case tied up in the state courts will benefit from favorable changes in the law, while his or her more diligent co-defendant, convicted on the same day of the same crime, will not” (Association of the Bar 1989:852).

Despite these criticisms and many more, the Court—determined to protect the states against the costs of complying with rules of constitutional law that the Court itself is willing to adopt—has so far been unwilling to re-evaluate *Teague*.

Nor are *McCleskey* and *Teague* atypical. Time and time again the Court has defended the elaboration of a legalistic maze of restrictions on the availability of the habeas corpus remedy by an appeal to federalism but failed to explain how the values behind that concept justified the result in the case at hand.

Another stark example of this problem came a few months after *McCleskey* in *Coleman v. Thompson* (1991). There, the Court ruled that a capital prisoner whose lawyer had filed his state habeas corpus appeals papers three days late had thereby forfeited federal habeas corpus review. This decision was premised on the explicit view that the outcome represented the appropriate “allocation of costs” between the interests of the State avoiding a federal review of its conviction that might lead to an expensive retrial and those of the prisoner in not being executed pursuant to a possibly unconstitutional judgment. In a dictum that will live in infamy, the Court began its opinion, “This is a case about federalism” (p. 726).

To reach such results in the name of federalism is untenable, both intellectually and practically. Intellectually, as already discussed (and as well elaborated by Justice Blackmun in his dissent in *Coleman*), the view of federalism that animated the framers supports careful federal review of state court criminal convictions, not deference to the sovereign rights of states to deprive citizens of Constitutionally protected liberty.

Practically, the problem is that an unrealistic reliance on the quality of justice in state judicial systems will inevitably (as in the Leo Frank case) lead to outrageous outcomes. These outcomes in turn are not only morally indefensible, but invariably will produce a backlash whose certain result will be legislative or judicial action to insure more extensive habeas corpus review (as in *Moore v. Dempsey*), and whose possible result may be to undermine public support for the death penalty itself.

Yet, apparently operating on the premise that a wrong not heard is one that does not exist, the Congress in 1995 cut off funding for the post-conviction defender organizations that had provided counsel to the death row inmates in many of the cases described above (Association of the Bar 1996:188–191, 200–205).

## AEDPA

Against this background, there was considerable concern when Congress went to work on the habeas corpus reform statute that eventually became the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub. L. 104–132; Yackle 1996:383–384). And, indeed, some of the early proposals could only be described as radical. For instance, Senator Kyl offered a provision that was designed to eliminate habeas corpus review of state convictions outright. But although Senator Lott praised this idea, on the grounds that it would solve the “problems of delay and abuse by eliminating these habeas corpus reviews of state judgments,” the Senate defeated the amendment by a vote of 61 to 38 (Yackle 1996:398–401).

Instead, Congress ultimately enacted a relatively modest set of reforms. Amid a welter of technical changes, the legislation sought to streamline habeas proceedings in two basic ways: directly, by setting time limits on various procedural steps (Liebman and Hertz 2011a:Ch.5), and indirectly, by providing that the federal courts should not grant the writ unless the state proceedings resulted in a decision on the merits that was factually or legally unreasonable (28 U.S.C. § 2254(d)).

Thus, Congress heeded some of the important lessons that history teaches about the critical role of federal habeas corpus in assuring adherence to the rule of law. It chose to accomplish its purpose of speeding up habeas litigation by rewriting the procedural rules while making no fundamental alteration in the existing role of the federal courts in inquiring into state capital convictions. As President Clinton said in signing the legislation, it was designed “to streamline Federal appeals for convicted criminals sentenced to the death penalty,” while preserving “independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary” (Liebman and Hertz 2011b:2371).

As to the Supreme Court, its jurisprudence under the statute has sent a clear message: the Court had shaped the field to its liking prior to 1996 and—regardless of what Congress may or may not have desired—it is unwilling to read AEDPA as imposing any significant additional limitations. Hence, although the lower courts have displayed the opposite predilection (Dow and Freedman 2009), the Court has consistently rejected restrictive readings proposed by the government (Freedman 2001b:177 n.8). Still, if the law at the Supreme Court level has not become significantly worse for capital prisoners seeking to vindicate claims of constitutional rights it certainly has not become better.

Moreover, law aside, the scandalous damage done by ineffective counsel in denying death row inmates a meaningful day in court remains a festering injustice (Lyon 2014; Stetler and Wendell 2013:§ VII).

## The Future

### Achieving Justice within a Federal System

The beginning of the second decade of the 21st century may turn out to be an important inflection point in the history of capital habeas corpus (Freedman 2013a:§ 3).

Recall from Figure 1 that federal law (28 U.S.C. § 2254(b)(1)) requires state prisoners to utilize state post-conviction procedures before pursuing federal habeas corpus. In the notorious *Coleman v. Thompson* (1991), described above, the Court held both that (a) the prisoner had no constitutional right to the effective assistance of counsel in state post-conviction proceedings and (b) such counsel could by committing a procedural default forfeit all of the client’s federal constitutional claims. In other words, “the system works only one way: A lawyer may default claims on behalf of a petitioner, but a petitioner may not attack the lawyer as ineffective for having done so” (Freedman 1991:S7).

At the same time, it has remained the undisputed, albeit woefully under-enforced, law under *Gideon v. Wainwright* (1963) that a criminal defendant is entitled to effective assistance of trial counsel.

For a quarter of a century the combination of these two doctrines gave the states an insidious method of avoiding their constitutional obligations. If they channeled ineffective assistance of trial counsel claims to post-conviction proceedings and then failed to provide effective counsel at that stage they could effectively insulate themselves from any meaningful enforcement of the duty to provide effective trial counsel because the federal courts—deferring to the states’ enforcement of a procedural rule against the defenseless prisoner—would not reach the merits of the *Gideon* claim.

In *Martinez v. Ryan* (2012) the Court, while adhering to its position that the Constitution does not require the states to provide post-conviction counsel, took a first step towards remedying this injustice. The Court held that in cases where, under state law, claims of ineffective assistance of trial counsel were to be brought in post-conviction proceedings and the state had not appointed effective counsel for those proceedings, the federal courts, exercising their equitable discretion, would not honor any resulting procedural default of the *Gideon* claim. As Justice Scalia wrote in dissent, this ruling may well be of widespread significance, a prediction vindicated by the Court's June 2013 ruling in *Trevino v. Thaler* (2013) rejecting an attempt by the Fifth Circuit to eviscerate *Martinez*.

Because the logic of *Martinez* extends both procedurally to a variety of missteps by state post-conviction counsel and substantively to the enforcement of a number of the states' most basic obligations in criminal trials (e.g. to produce exculpatory evidence, to disclose inducements offered to prosecution witnesses, not to offer perjurious testimony, not to threaten defense witnesses) the states will be under increasing pressure to appoint effective counsel in state post-conviction proceedings if they want to insure that their capital convictions will survive federal habeas corpus review (Freedman 2013b).

The Court has moreover offered the states an affirmative incentive to provide such counsel. In determining whether the ruling of a state court on the merits of a constitutional claim was "unreasonable" under AEDPA, the Court held in *Cullen v. Pinholster* (2011) that a federal habeas corpus court must consider only the record that the state court had before it when it ruled. Unless the petitioner can somehow attack that record, the federal habeas corpus court is not to conduct an independent inquiry into the facts. A claim of ineffective assistance of post-conviction counsel will in many cases be the prisoner's best method of undermining the state court record, a method that a state can render unavailable by appointing competent post-conviction counsel.

The combined effect of the prisoner's victory in *Martinez* and the state's victory in *Pinholster* is that if, but only if, the state courts have given the prisoner a full and fair post-conviction proceeding, their rulings will quite likely be upheld on federal review. And although it is possible to conceive of an unfair state post-conviction system that includes a right to counsel (e.g., one that denies discovery), it is difficult to conceive of a fair state post-conviction system that does not include a right to counsel.

The forces of federalism may thus cause the states to provide competent counsel at this key point in the system, a reform of great practical benefit that the Supreme Court remains unwilling to recognize as a requirement of the Constitution.

Looking ahead, Constitutional litigation remains a viable tool for additional reforms. As the Court has twice reiterated in recent years, the Constitution does require that any state system of post-conviction review meet basic requirements of due process. If it does not, then the entire system may be challenged in a single federal civil rights lawsuit under a statute (42 U.S.C. § 1983) that is not subject to the multiple procedural restrictions encumbering federal habeas corpus actions (*District Attorney's Office v. Osborne* 2009:69–70; *Skinner v. Switzer* 2011:1296).

## Conclusion: Federalism and Justice

Particularly in light of the growing public concern over the possibility of executing the innocent (Radelet and Bedau 2014; Dieter 2009:227) and the resulting renewed appreciation for a judicial process that looks “through the form and into the very heart and substance of the matter” (*Frank v. Magnum* 1915:332), perhaps the country is beginning to learn the clear precept for the future that emerges from the past and present of the federal writ of habeas corpus in capital cases: defending injustice on the basis of federalism disservices both federalism and justice.

## References

- Amsterdam, A.G. (1965) “Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial.” *University of Pennsylvania Law Review* 113:793–912.
- Amsterdam, A.G. (2004) “Remarks.” *Hofstra Law Review* 33:403–416.
- Association of the Bar of the City of New York (1989) “Legislative Modification of Habeas Corpus in Capital Cases.” *Record of the Association of the Bar of the City of New York* 44:848–864.
- Association of the Bar of the City of New York (1996) “The Crisis in Capital Representation.” *Record of the Association of the Bar of the City of New York* 51:169–206.
- Bowers, W.J., C.E. Kelly, R. Kleinstuber, E. Vartkessian, and M. Sandys (2014) “The Life or Death Sentencing Decision: It’s at Odds with Constitutional Standards; Is It Beyond Human Ability?” (This volume.)
- Bright, S.B. (2014) “The Politics of Capital Punishment: The Sacrifice of Fairness for Executions.” (This volume.)
- Collins v. Collins* (1994) 510 U.S. 1141.
- Colbert, D.L. (1990) “Challenging the Challenge: The Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges.” *Cornell Law Review* 76:1–128.
- Coleman v. Thompson* (1991) 501 U.S. 722.
- Cortner, R.C. (1988) *A Mob Intent on Death*. Middletown: Wesleyan University Press.
- Cullen v. Pinholster* (2011) 131 S.Ct. 1388.
- Dershowitz, A.M. (1991) “Introduction.” in *The Leo Frank Case*. Birmingham: Notable Trials Library.
- Dieter, R. (2009) “The Future of Innocence.” Pp. 225–240 in *The Future of America’s Death Penalty: An Agenda for the Next Generation of Capital Punishment Research*, edited by C. S. Lanier, W. J. Bowers, and J. R. Acker. Durham, NC: Carolina Academic Press.
- Dinnerstein, L. (1991) *The Leo Frank Case*. Birmingham: Notable Trials Library.
- District Attorney’s Office v. Osborne* (2009) 557 U.S. 52.
- Dow, D.R. and E.M. Freedman (2009) “The Effects of AEDPA on Justice.” Pp. 261–296 in *The Future of America’s Death Penalty: An Agenda for the Next Generation of Capital*

*Punishment Research*, edited by C.S. Lanier, W.J. Bowers, and J.R. Acker. Durham, NC: Carolina Academic Press.

- Edds, M. (2003) *An Expendable Man*. New York: New York University Press.
- Ex parte Royall* (1886) 117 U.S. 241.
- Farrand, M. (1966) *The Records of the Federal Convention of 1787*. Vol. 2. Revised edition. New Haven: Yale University Press.
- Fay v. Noia* (1963) 372 U.S. 391.
- Frank v. Magnum* (1915) 237 U.S. 309.
- Freedman, E.M. (1990–91) “Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases.” *New York University Review of Law and Social Change* 18:315–324.
- Freedman, E.M. (1991) “Habeas Cases Rewrote the Doctrine.” *The National Law Journal*: Aug. 19.
- Freedman, E.M. (1996) “The Suspension Clause in the Ratification Debates.” *Buffalo Law Review* 44:451–468.
- Freedman, E.M. (2001a) “Earl Washington’s Ordeal.” *Hofstra Law Review* 29:1089–1112.
- Freedman, E.M. (2001b) *Habeas Corpus: Rethinking the Great Writ of Liberty*. New York: New York University Press.
- Freedman, E.M. (2013a) “New Frontiers in American Capital Punishment Litigation.” Pp. 203–212 in *Human Rights and Civil Liberties in the 21st Century*, edited by Y. Haeck and E. Brems. Amsterdam: Springer Verlag.
- Freedman, E.M. (2013b) “Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After *Martinez* and *Pinholster*.” *Hofstra Law Review* 41:591–602.
- Gideon v. Wainwright* (1963) 372 U.S. 335.
- Gross, S.R. (1996) “The Risks of Death: Why Erroneous Convictions are Common in Capital Cases.” *Buffalo Law Review* 44:469–500.
- Grosso, C.M., B. O’Brien, A. Taylor, and G. Woodworth (2014) “Race Discrimination and the Death Penalty: An Empirical and Legal Overview.” (This volume.)
- Hamilton, A. (1788a) “The Federalist, No. 84.” Pp. 510–520, in C. Rossiter (ed.), *The Federalist Papers*. New York: Mentor Publishing.
- Hamilton, A. (1788b) “The Federalist, No. 78.” Pp. 564–572, in C. Rossiter (ed.), *The Federalist Papers*. New York: Mentor Publishing.
- Hoffmann, J.L. and N.J. King (2009) “Rethinking the Federal Role in State Criminal Justice.” *New York University Law Review* 84:791–849.
- Liebman, J.S., J. Fagan, and V. West (2000) *A Broken System: Error Rates in Capital Cases, 1973–1995*. Retrieved June 10, 2013 from [http://www2.law.columbia.edu/instructional/services/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructional/services/liebman/liebman_final.pdf).
- Liebman, J.S. and R. Hertz (2011a) *Federal Habeas Corpus Practice and Procedure*. Vol. 1. Sixth edition. Charlottesville: The Michie Company.
- Liebman, J.S. and R. Hertz (2011b) *Federal Habeas Corpus Practice and Procedure*. Vol. 2. Sixth edition. Charlottesville: The Michie Company.
- Lyon, A.D. (2014) “Death Penalty Defense Counsel.” (This volume.)

*Mackey v. United States* (1971) 401 U.S. 667.

Madison, J. (1788) “The Federalist, No. 51.” Pp. 320–325, in C. Rossiter (ed.), *The Federalist Papers*. New York: Mentor Publishing.

Martin, L. (1788) “The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia, VIII.” Pp. 433–437, in J.P. Kaminski and G.J. Saldino (eds.), *Documentary History of the Ratification of the Constitution*. Vol. 15. Madison: Historical Society of Wisconsin.

*Martinez v. Ryan* (2012) 132 S.Ct. 1309.

*McCleskey v. Kemp* (1987) 481 U.S. 279.

*McCleskey v. Zant* (1991) 499 U.S. 467.

McHenry, J. (1787) “Speech to the Maryland House of Delegates.” Pp. 279–284, in J.P. Kaminski and G.J. Saldino (eds.), *Documentary History of the Ratification of the Constitution*. Vol. 14. Madison: Historical Society of Wisconsin.

*Moore v. Dempsey* (1923) 261 U.S. 86.

*Murray v. Carrier* (1986) 477 U.S. 478.

Otto, L.G. (1787) “Letter to Comte de Montmorin.” Pp. 422–525, in J.P. Kaminski and G.J. Saldino (eds.), *Documentary History of the Ratification of the Constitution*. Vol. 13. Madison: Historical Society of Wisconsin.

*Powell v. Alabama* (1932) 287 U.S. 45.

Public Law 104-132 (1996) Amending 28 U.S.C. §§ 2244, 2253, 2254, 2255, and adding 28 U.S.C. §§ 2261–2266 (eff. April 24).

Radelet, M.L. and H.A. Bedau (2014) “The Execution of the Innocent.” (This volume.)

*Sanders v. United States* (1963) 373 U.S. 1.

Sandys, M., S.M. Walsh, H. Pruss, and D. Cunningham (2014) “Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality.” (This volume.)

*Skinner v. Switzer* (2011) 131 S.Ct. 1289.

Stetler, R. and W.B. Wendell (2013) “The ABA Guidelines and the Norms of Capital Defense Representation.” *Hofstra Law Review* 41:635–696.

*Strickland v. Washington* (1984) 466 U.S. 668.

*Teague v. Lane* (1989) 489 U.S. 288.

*Trevino v. Thaler* (2013) 133 S.Ct. 1911.

United States Code (1994) tit. 28 § 2254.

*Wainwright v. Sykes* (1977) 433 U.S. 72.

*Washington v. Murray* (1993) 4 F.3d 1285 (4th Cir.).

Yackle, L.W. (1996) “A Primer on the New Habeas Corpus Statute.” *Buffalo Law Review* 44:381–449.