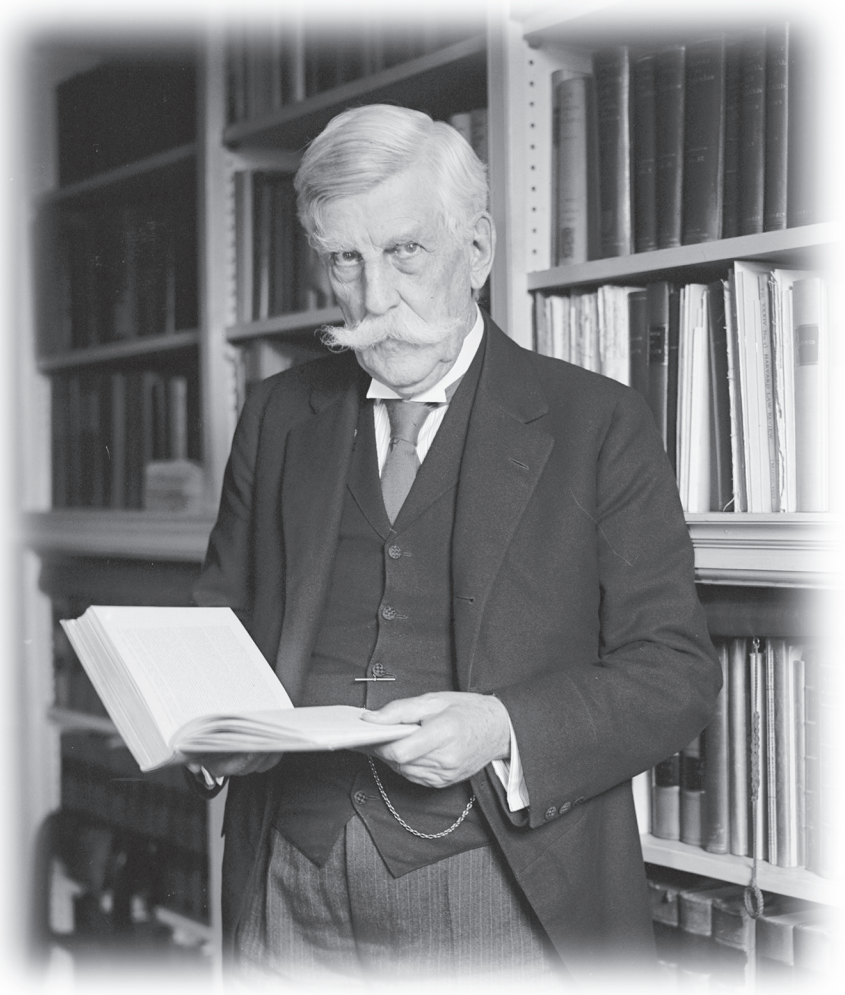
Cases that Shaped the Federal Courts

Moore v. Dempsey

1923



Justice Oliver Wendell Holmes, Jr.

Federal Judicial Center
2020

Central Question

How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

Historical Context

Federal courts have had the authority since 1867 to issue writs of habeas corpus to state officials holding prisoners in custody. This writ requires the state to defend the legal basis for the prisoner's detention. As a result, federal habeas corpus has long provided a means for prisoners to appear before a federal court and argue that their state trials violated federal law or the Constitution of the United States.

Before the mid-twentieth century, however, federal courts seldom used this power to free state prisoners who had been provided basic legal procedures like a trial before a judge and jury and an appeal in state court. Federal courts could not review state criminal cases simply because a prisoner alleged the court had made a factual or legal error, for example. This rule respected the state courts' important role in the criminal justice system, but critics alleged it led to the incarceration or execution of many innocent defendants. There was also concern that some states did not give proper weight to federal rights, particularly in cases involving unpopular minority groups.

In *Moore v. Dempsey* (1923), the Supreme Court of the United States began a long transition toward a more searching review of state criminal proceedings, ruling that federal district courts could hold hearings to determine the validity of state convictions where the prisoner alleged his or her trial had been dominated by a mob. This ruling was regarded as particularly important for racial and religious minority groups, whose members were sometimes denied a fair trial when public sentiment called for a conviction.

Legal Debates Before *Moore*

The appropriate scope of federal habeas corpus review of state criminal convictions was a controversial issue during Reconstruction, the period immediately following the U.S. Civil War (1861–1865). In 1867, Congress passed a statute that, for the first time, extended federal habeas corpus to state prisoners. The Republican majority in Congress argued this law was necessary to safeguard the hard-won civil rights of freed blacks in the aftermath of the war. Congress was wary of Southern state courts' ability to determine fairly the guilt or innocence of freed slaves and other African Americans. Nonetheless, the Supreme Court generally interpreted the federal courts' power to delve into the fairness of state proceedings narrowly. A line of cases restricted federal judges' review to basic procedural questions like whether the state court had jurisdiction.

Trials dominated by mobs demanding rough justice complicated this review, however. Many scholars have pointed to the infamous Leo Frank case as a turning point. Frank was a Jewish businessman accused of the murder of a young woman in Georgia. By most accounts, his trial was conducted in a hostile and anti-Semitic atmosphere, with a loud mob shouting outside the courthouse. The judge went so far as to advise Frank not to appear for the verdict, lest the courtroom descend into violence. The Supreme Court upheld the denial of habeas corpus in the case, emphasizing that the Georgia Supreme Court had evaluated the fairness of the trial away from any threat of violence and had concluded that Frank received a proper trial. Justice Oliver Wendell Holmes, Jr., wrote a famous dissent that argued federal courts had to exercise a more searching review of state proceedings to determine whether the trial had been "more than an empty shell." Although *Moore* did not overturn *Frank*, many observers have noted that the Court's opinion in the later case built on this dissent.

The Case

Moore v. Dempsey arose from the exploitative sharecropping system in Phillips County, Arkansas. Under this system, black tenant farmers purchased farming equipment on credit, often on unfair terms, and worked to repay the debt. In practice, the system left many African Americans tied to their land and beholden to white creditors and landowners.

In the aftermath of World War I, a group of black farmers formed an organization designed to combat this system. White landowners and law enforcement officers attacked the group as it met at a church. The African American farmers retaliated, killing one of the aggressors. Although the white group subsequently burned the church down to cover the scale of the assault, it seems likely they killed several blacks.

Though the African American farmers had not started the violence, word spread of a black insurrection in Phillips County. In the days that followed, large groups of white vigilantes from neighboring areas came to the county bent on racial violence. Estimates varied wildly as to the scale of the violence. Anywhere from 11 to 856 African Americans were murdered in a matter of days. Five white men also died.

After the violence had subsided, the Governor of Arkansas empowered a group of prominent local whites known as the "Committee of Seven" to investigate the incident. In October 1919, the committee released a report claiming the bloodbath was the result of a planned violent uprising by black sharecroppers. During the ensuing criminal investigation, members of the Committee of Seven ordered black witnesses repeatedly beaten and tortured until they gave incriminating evidence or confessed.

Several black men, including Frank Moore, the lead petitioner in the eventual Supreme Court case, were indicted for murder and various other offenses by a grand jury

that included at least one member of the Committee of Seven. The trial of Moore and his codefendants lasted less than an hour and took place while a crowd outside threatened to lynch the defendants unless they were found guilty. The jury returned a guilty verdict after less than five minutes' deliberation, and the judge later sentenced Moore and his fellow defendants to death. Dozens of others awaiting trial pleaded guilty to lesser crimes to avoid similar punishment.

After unsuccessful appeals in the state courts, Moore and four of his codefendants petitioned the U.S. District Court for the Eastern District of Arkansas for a writ of habeas corpus. Their petition included statements from several witnesses regarding the violence and intimidation surrounding the investigation and trial, including two men who had participated in torture and regretted their actions. Judge Jacob Trieber granted the petition, but then recused himself from the case as he had lived in Phillips County. In granting the petition, Judge Trieber had not set the prisoners free or ruled on the merits of the case. His action merely meant that the state had to defend the legality of the prisoners' detention. Judge John Cotteral, a district judge from Oklahoma appointed to hear the case in Judge Trieber's place, subsequently dismissed the case on the grounds that even if Moore's allegations of torture and intimidation were true, it was not appropriate for the federal courts to order the release of the prisoners because they had been permitted a trial and appeal in the state court system.

The Supreme Court's Ruling

Under a law then in effect, state prisoners denied habeas relief could appeal directly to the Supreme Court. Moore and his fellow prisoners took this route, arguing that their trial had been a farce. The state, on behalf of the nominal defendant E.H. Dempsey, the Keeper of the Arkansas State Penitentiary, argued that the state court system had permitted the petitioners a fair trial and that, as in *Frank*, the State Supreme Court had upheld the trial's fairness away from any mob intimidation.

Justice Holmes, this time in the majority, ruled in the petitioners' favor. Holmes began with a detailed recitation of the allegations of violence and intimidation surrounding the trial. In language that echoed his dissent in *Frank*, Holmes reasoned that if "the whole proceeding is a mask [and] counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and … the State Courts failed to correct the wrong," no procedure put in place by the state could secure the prisoners' rights. Thus, the state appeals process did not relieve a federal judge of "the duty of examining the facts for himself" when a habeas petition alleged facts that would "make the trial absolutely void." Justice James McReynolds, joined by Justice George Sutherland, dissented from the Court's decision. McReynolds quoted at length from the *Frank* opinion, arguing that

the Court had needlessly abandoned the restrained approach adopted by that case. He also cast doubt on the reliability of the petition's characterization of the investigation and trial. "I cannot agree," he wrote, "that the solemn adjudications by courts of a great State … can be successfully impeached by the … affidavits made upon information and belief of ignorant convicts joined by two white men—confessedly atrocious criminals. The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system."

Aftermath and Legacy

The Court's ruling theoretically meant that the district court had to hold a hearing to determine whether the prisoners' trial was indeed merely a "mask" for mob rule. Nevertheless, the court never held this hearing. In November 1923, the Governor of Arkansas commuted the prisoners' sentences from death to twelve years. The prisoners' attorneys apparently agreed to this commutation (which rendered their clients eligible for parole since they had served a third of their sentence) rather than risk losing the federal hearing. Though they were not immediately paroled, the Governor granted the prisoners indefinite furloughs, effectively releasing them from custody, in January 1925.

The Supreme Court gradually adopted a broader understanding of federal habeas review of state criminal trials in the decades that followed. In *Brown v. Allen* (1953), the Court held that state prisoners alleging a violation of their rights in state court were entitled to a review by a federal court provided they met certain procedural criteria. The Court further extended the availability of such hearings in a series of cases in the 1960s, though more recent holdings and federal statutes have imposed some additional restrictions on state prisoners' ability to challenge the constitutionality of their trials.

Discussion Questions

- The Supreme Court did not address whether Moore and the other petitioners were innocent of the crimes for which they had been convicted. Should evidence of guilt or innocence matter in evaluating the fairness of a trial?
- Holmes's opinion did not explicitly overturn *Frank* and, indeed, cited the case as authority. Why do you think this might be? Was Justice McReynolds correct to suggest the two cases were incompatible?
- How closely should federal courts examine the fairness of state criminal trials? Are there decisions about the proper way to conduct trials that should be left to the states without any federal review?

Documents

Supreme Court of the United States, Opinion in *Frank v. Mangum*, April 12, 1915

Both the majority and dissenting opinions in Moore *referred to* Frank v. Mangum*, one of the leading precedents restricting the availability of habeas corpus. The excerpts below focus on the availability and scope of habeas review of state trials.*

[T]he petition contains a narrative of disorder, hostile manifestations, and uproar, which, if it stood alone, and were to be taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict. But to consider this as standing alone is to take a wholly superficial view. The narrative has no proper place in a petition addressed to a court of the United States except as it may tend to throw light upon the question whether the State of Georgia, having regard to the entire course of the proceedings, in the appellate as well as in the trial court, is depriving appellant of his liberty and intending to deprive him of his life without due process of law.…

We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.

But the State may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court.…

It is argued that if in fact there was disorder such as to cause a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of the [Georgia] Supreme Court. This, we think, embodies more than one error of reasoning. It regards a part only of the judicial proceedings, instead of considering the entire process of law. It also begs the question of the existence of such disorder as to cause a loss of jurisdiction in the trial court; which should not be assumed, in the face of the decision of the reviewing court, without showing some adequate ground for disregarding that decision. And these errors grow out of the initial error of treating appellant's narrative of disorder as the whole matter, instead of reading it in connection with the context. The rule of law that in ordinary cases requires a prisoner to exhaust his remedies within the State before coming to the courts of

the United States for redress would lose the greater part of its salutary force if the prisoner's mere allegations were to stand the same in law after as before the state courts had passed judgment upon them.

We are very far from intimating that manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury, are matters to be lightly treated. The decisions of the Georgia courts in this and other cases show that such disorder is repressed, where practicable, by the direct intervention of the trial court and the officers under its command; and that other means familiar to the common-law practice, such as postponing the trial, changing the venue, and granting a new trial, are liberally resorted to in order to protect persons accused of crime in the right to a fair trial by an impartial jury. The argument for appellant amounts to saying that this is not enough; that by force of the "due process of law" provision of the Fourteenth Amendment, when the first attempt at a fair trial is rendered abortive through outside interference, the State, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused and refrain from further inquiry into the question of his guilt.

To establish this doctrine would, in a very practical sense, impair the power of the States to repress and punish crime; for it would render their courts powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle but is in conflict with the practice that prevails in all of the States, so far as we are aware.…

The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law.…

Document Source: *Frank v. Mangum*, 237 U.S. 309, 332–33, 335, 336–37, 338 (1915) (citations omitted).

Justice Oliver Wendell Holmes, Jr., Dissenting Opinion in *Frank v. Mangum*, April 12, 1915

Mr. Justice Hughes and I are of opinion that the judgment should be reversed.…

[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.…

Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case

where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case. The loss of jurisdiction is not general but particular, and proceeds from the control of a hostile influence.…

We have held in a civil case that it is no defence to the assertion of the Federal right in the Federal court that the State has corrective procedure of its own — that still less does such procedure draw to itself the final determination of the Federal question. We see no reason for a less liberal rule in a matter of life and death. When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. Otherwise, the right will be a barren one.…

This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere. And when we find the judgment of the expert on the spot, of the judge whose business it was to preserve not only form but substance, to have been that if one juryman yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob. Of course we are speaking only of the case made by the petition, and whether it ought to be heard. . . . But supposing the alleged facts to be true, we are of opinion that if they were before the Supreme Court it sanctioned a situation upon which the Courts of the United States should act, and if for any reason they were not before the Supreme Court, it is our duty to act upon them now and to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death.

Document Source: *Frank v. Mangum*, 237 U.S. 309, 345, 346, 347–48, 349–50 (1915) (citations omitted).

"Critics, Please Note," *Pine Bluff Daily Graphic*, November 7, 1919

The following brief editorial on the trials of the Phillips County defendants offers a defense of the trial process against criticisms of Southern justice for black suspects. Note how this account of the trials contrasts with Justice Holmes's description.

Those critics of the South and of the recent race riots in Phillips county are invited to take note of the trials now proceeding in the Phillips county court.

There 122 negroes, alleged to have participated in the race riots, are being tried. Several already have been sentenced. Six were sent to the chair. A score or more accepted short terms. The men are represented by members of the Phillips bar who are throwing around all of the barriers that the law permits. The trials in every way are proceeding in a legal and orderly fashion.

These trials disprove the charge that legal hearings are never given to negroes accused of crimes against whites in the south. Phillips county has laid aside its pistols and rifles and the court is meting out punishment. The danger of wholesale slaughter having passed, the orderly processes of the law are being permitted to take their course.

Document Source: "Critics, Please Note," *Pine Bluff Daily Graphic*, Nov. 7, 1919, p. 4.

Supreme Court of the United States, Opinion in *Moore v. Dempsey*, February 19, 1923

These excerpts from Justice Holmes's majority opinion and Justice McReynolds's dissent focus on the availability and scope of federal habeas corpus for state prisoners.

Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain, as the petition puts it, they would execute those found guilty in the form of law. The Committee's own statement was that the reason that the people refrained from mob violence was "that this Committee gave our citizens their solemn promise that the law would be carried out." According to affidavits of two white men and the colored witnesses on whose testimony the petitioners were convicted, produced by the petitioners since the last decision of the Supreme Court hereafter mentioned, the Committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. However this may be, a grand jury of white men was organized on October 27 with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks, upon it, and on the morning of the 29th the indictment was returned. On November 3 the 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 juryman or to ask for separate trials. He had no preliminary consultation with the accused, called no witnesses for the defence 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. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman 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.…

In *Frank v. Mangum* … it was recognized of course that if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by habeas corpus ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.

In this case a motion for a new trial on the ground alleged in this petition was overruled and upon exceptions and appeal to the [Arkansas] Supreme Court the judgment was affirmed. The [Arkansas] Supreme Court said that the complaint of discrimination against petitioners by the exclusion of colored men from the jury came too late and by way of answer to the objection that no fair trial could be had in the circumstances, stated that it could not say "that this must necessarily have been the case"; that eminent counsel was appointed to defend the petitioners, that the trial was had according to law, the jury correctly charged, and the testimony legally sufficient. On June 8, 1921, two days before the date fixed for their execution, a petition for habeas corpus was presented to the Chancellor and he issued the writ and an injunction against the execution of the petitioners; but the Supreme Court of the State held that the Chancellor had no jurisdiction under the state law whatever might be the law of the United States. The present petition perhaps was suggested by the language of the Court: "What the result would be of an application to a Federal Court we need not inquire." It was presented to the District Court on September 21. We shall not say more concerning the corrective process afforded to the petitioners than that

it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.…

Document Source: *Moore v. Dempsey*, 261 U.S. 86, 88–92 (1923).

Justice James McReynolds, Dissenting Opinion in *Moore v. Dempsey*, February 19, 1923

We are asked to overrule the judgment of the District Court discharging a writ of habeas corpus by means of which five negroes sought to escape electrocution for the murder of Clinton Lee.… The petition for the writ was supported by affidavits of these five ignorant men whose lives were at stake, the ex parte affidavits of three other negroes who had pleaded guilty and were then confined in the penitentiary under sentences for the same murder, and the affidavits of two white men—low villains according to their own admissions. It should be remembered that to narrate the allegations of the petition is but to repeat statements from these sources. Considering all the circumstances—the course of the cause in the state courts and upon application here for certiorari, etc.,—the District Court held the alleged facts insufficient prima facie to show nullity of the original judgment.

The matter is one of gravity. If every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are "true to the best of his knowledge and belief," thereby obtain as of right further review, another way has been added to a list already unfortunately long to prevent prompt punishment. The delays incident to enforcement of our criminal laws have become a national scandal and give serious alarm to those who observe. Wrongly to decide the present cause probably will produce very unfortunate consequences.

In *Frank v. Mangum*,… after great consideration a majority of this Court approved the doctrine which should be applied here. The doctrine is right and wholesome. I can not agree now to put it aside and substitute the views expressed by the minority of the Court in that cause.…

Let us consider with some detail what was presented to the court below.

There was the complete record of the cause in the state courts—trial and Supreme—showing no irregularity. After indictment the defendants were arraigned for trial and emi-

nent counsel appointed to defend them. He cross-examined the witnesses, made exceptions and evidently was careful to preserve a full and complete transcript of the proceedings. The trial was unusually short but there is nothing in the record to indicate that it was illegally hastened. November 3, 1919, the jury returned a verdict of "guilty;" November 11th the defendants were sentenced to be executed on December 27th; December 20th new counsel chosen by them or their friends moved for a new trial and supported the motion by affidavits of defendants and two other negroes who declared they testified falsely because of torture. This motion questioned the validity of the conviction upon the very grounds now advanced—torture, prejudice, mob domination, failure of counsel to protect interests, etc.…

It appears that during September, 1919, bloody conflicts took place between whites and blacks in Phillips County, Arkansas—"The Elaine Riot." Many negroes and some whites were killed. A committee of seven prominent white men was chosen to direct operations in putting down the so-called insurrection and conduct investigation with a view of discovering and punishing the guilty. This committee published a statement, certainly not intemperate, about October 7th, wherein they stated the "ignorance and superstition of a race of children" was played upon for gain by a black swindler, and told of an organization to attack the whites. It urged all persons white or black, in possession of information which might assist in discovering those responsible for the insurrection, to confer with it, upon the understanding that such action would be for the public safety and informant's identity carefully safeguarded. I find nothing in this statement which counsels lawlessness or indicates more than an honest effort by upstanding men to meet the grave situation.…

The Supreme Court of the State twice reversed the conviction of other negroes charged with committing murder during the disorders of September, 1919.… The Supreme Court, as well as the trial court, considered the claims of petitioners set forth by trusted counsel in the motion for a new trial. This Court denied a petition for certiorari wherein the facts and circumstances now relied upon were set out with great detail. Years have passed since they were convicted of an atrocious crime. Certainly they have not been rushed towards the death chair; on the contrary there has been long delay and some impatience over the result is not unnatural.…

With all those things before him, I am unable to say that the District Judge, acquainted with local conditions, erred when he held the petition for the writ of habeas corpus insufficient. His duty was to consider the whole case and decide whether there appeared to be substantial reason for further proceedings.

Under the disclosed circumstances I cannot agree that the solemn adjudications by courts of a great State, which this Court has refused to review, can be successfully impeached by the mere ex parte affidavits made upon information and belief of ignorant

convicts joined by two white men—confessedly atrocious criminals. The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system.…

Document Source: *Moore v. Dempsey*, 261 U.S. 86, 92–93, 96–97, 99, 101–02 (1923).

Eric M. Freedman, *Alabama Law Review*, 2000

In this piece, legal scholar Eric Freedman analyzes the apparent differences between the Frank *and* Moore *decisions. Freedman suggests that personnel changes on the Court may have had as much impact on the decision as any change in legal doctrine, but, he argues, legal scholars and others have assigned a more principled significance to the shift over time.*

The attempt to "explain" the differing results in *Frank* and *Moore* poses concretely the issue of what we are doing in our everyday dealing with cases, and why. The tension between Frank and Moore was evident as soon as the latter case was decided, which is hardly surprising in view of Justice McReynolds' dissent. A few months later, [Harvard Law Professor and future Associate Justice] Felix Frankfurter asked Justice Brandeis how it had come about that the "Frank case was departed from." The Justice replied, "Well-Pitney was gone, the late Chief was gone, Day was gone-the Court had changed."

Without recorded pause, he continued with some general ruminations, not seemingly linked to Moore in particular:

> Pitney had a great sense of justice affected by Presbyterianism but no imagination whatever. And then he was much influenced by his experience & he had had mighty little ...
>
> The new men—P.B. [Pierce Butler] & Sanford—are still very new. It takes three or four years to find oneself easily in the movements of the [Supreme] Court. Sanford's mind gives one blurs; it does not clearly register. Taft is the worst sinner in wanting to "settle things" by deciding them when we ought not to, as a matter of jurisdiction. He says, 'we will have to decide it sooner or later & better now.' I frequently remind them of Dred Scott case—Sutherland also had to be held in check. McR. [McReynolds] cares more about jurisdictional restraints than any of them—Holmes is beginning to see it.
>
> Of course there are all sorts of considerations that affect one in dissenting-there is a limit to the frequency with which you can do it, without exasperating men; then there may not be time, e.g. Holmes shoots them down so quickly & is disturbed if you hold him up; then you may have a very

> important case of your own as to which you do not want to antagonize on a less important case etc. etc.
>
> McR. is a very extraordinary personality—what matters most to him are personal relations, the affections. He is a Naturmensch—he has very tender affections & correspondingly hates. He treated Pitney like a dog—used to say the cruelest things to him ... But no one feels more P's sufferings now—not as a matter of remorse but merely a sensitiveness to pain. He is a lonely person, has few real friends, is very dilatory in his work.

What is revealing here, of course, is the extent to which Justice Brandeis locates the influences affecting the work of the Court almost everywhere but in legal considerations.

In one sense, Brandeis' explanation—with its emphasis on the ephemeral contingencies of quotidian reality—may come closest to capturing as accurately as we can why a particular Court decision turned out as it did.

Yet the adventitious features of decisions and decisionmakers are just the factors that the rules of legal discourse prohibit from being used as explanatory factors. And these rules serve important values: They force legal argument to rest on generally accessible data and facially neutral considerations. Moreover, such a paradigm responds to the powerful instinct—shared by pigeons... and people alike, and doubtless particularly strong in legal actors—to find that the forces exercising power in one's environment are rational, predictable, and perhaps controllable.

Perhaps the way to give both the aleatory and rational factors their due is to view the matter from the perspective of the future. As time passes, the force of contingent contemporary pressures fades, and legal rules must prove their merits on other grounds. At the time it is rendered, the immediate personal and political context of any Supreme Court opinion will naturally have primacy in the understandings of contemporary actors. But the individuals involved—the litigants, the lawyers, and even the scholars—will die. And as the passions and memories of the contemporary context fade, they will have less and less influence on the opinion's survival, which will depend increasingly on its intellectual and practical power as a tool of persuasion in the context of new controversies. In short, what is left will be legal argument—although, to be sure, it will hopefully be legal argument enriched by a knowledge of history.

Thus, to say that one legal theory or another provides a more persuasive explanation for the differing outcomes of *Frank* and *Moore* is to say a good deal, even if one is thinking historically. For it is that explanation—and not the one closer to capturing the texture of the contemporary events of the past in the Brandeis sense—that is likely to have the most impact on the future.

Document Source: Eric M. Freedman, "Leo Frank Lives: Untangling the Historical Roots of Meaningful Habeas Corpus Review of State Convictions," *Alabama Law Review* 51 (2000): 1535–38 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the U.S. Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?