

Habeas Corpus: The Supreme Court and the Congress

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Habeas corpus is the Great Writ, and today it is the center of great controversy. At the core of the controversy are two questions: Is it desirable to permit defendants convicted of criminal offenses to attack criminal convictions collaterally based on constitutional claims that are only related distantly, if at all, to the question whether the defendants committed the charged crimes? And should federal courts offer defendants convicted of criminal offenses in state courts a forum for raising constitutional claims rejected on substantive or procedural grounds by state courts?¹

Advocates of broad collateral attack emphasize the importance of protecting constitutional rights through the writ of habeas corpus, long associated with challenges to improper detentions.² Advocates of a federal forum for state defendants are suspicious of the way in which state courts handle federal constitutional issues.³ These advocates regard habeas corpus as symbolic of a commitment to constitutional values and to the ideal that no person shall be convicted in violation of the fundamental law of the land.⁴

Those who would limit collateral attack generally and close doors to federal courts that are now open to state defendants view habeas corpus as a poor allocation of scarce judicial resources,⁵ as disruptive of rehabilitative models of incarceration,⁶ and as an undue intrusion of the federal government into state affairs.⁷ Although they would not completely eliminate collateral attack, they would reconsider why it should be permitted in an effort to limit collateral proceedings to defendants who have a special claim that their convictions are intolerable in the American criminal justice system.⁸

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1. This Article will focus more on federal review of state convictions than on collateral attack of federal convictions. Some of the same problems exist with both forms of collateral attack, but the special aspect of federal review of state convictions is that federal courts often reconsider state court rulings, and in the process, federal-state tensions may arise. Although cases brought by federal prisoners are discussed, no special attention is paid to 28 U.S.C. § 2255 (1976), which is the federal equivalent of habeas corpus. See *United States v. Hayman*, 342 U.S. 205 (1952).

This Article will analyze only the writ of habeas corpus *ad subjiciendum*, not other habeas corpus writs. See generally R. SOKOL, *FEDERAL HABEAS CORPUS* § 3, at 35 (2d ed. 1969). Throughout the Article persons seeking to avail themselves of habeas corpus relief will be referred to as defendants.

2. See, e.g., Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 667 (1982).

3. See generally *id.*

4. Although the federal statute requires a person to be in custody to bring a habeas corpus action, custody takes various forms. This Article focuses on the custody that arises because a defendant has been convicted and does not consider pretrial habeas corpus.

5. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 260 (1973) (Powell, J., concurring in the result); *Brown v. Allen*, 344 U.S. 443, 546-48 (1953) (Jackson, J., concurring in the result).

6. See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963).

7. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 263 (1973) (Powell, J., concurring in the result).

8. See, e.g., Bator, *supra* note 6; Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

As sometimes happens when a great controversy rages for a considerable time, proponents of both sides of the above questions make forceful arguments. Habeas corpus does represent a commitment to constitutional values. When the state imposes criminal sanctions on an individual, it must take the utmost care to assure that the process leading to conviction is fair and that the punishment is just. It is legitimate to define terms like "fair" and "just" by referring to standards derived from various constitutional provisions. Habeas corpus can correct constitutional mistakes and signifies that all persons, even those who have been convicted, are entitled to claim the benefits of constitutional rules.

It is also true, however, that habeas corpus can produce frivolous petitions that waste the time of judges and officials representing the government. Habeas corpus might suggest to convicted defendants that the system is a game that they can continue to play by challenging their convictions on various grounds, hoping to find one that will succeed. The opportunity to relitigate claims in habeas corpus proceedings might divert a defendant's attention from rehabilitative opportunities offered as part of incarceration.

If there is merit on both sides of the controversy, how is it to be resolved? In recent years the Supreme Court has endeavored to weigh the competing arguments and to arrive at an acceptable middle ground. The thesis of this Article is that the Court has been engaged in a balancing process that is better conducted by the Congress. Reasonable people can and do disagree about the proper role of habeas corpus in a modern criminal justice system. No single right approach to habeas corpus has emerged. Historically Congress has dictated how far the writ of habeas corpus will reach. Before the Civil War the Supreme Court respected the congressional judgment. Following the Civil War the Court too often failed to appreciate that in habeas corpus cases it was interpreting a statute. Important Supreme Court decisions, both expanding and contracting the scope of habeas corpus, have paid only lip service to the statutory framework Congress established. This Article will illustrate how the Court at times has acted as if it were writing the habeas statute, rather than interpreting it. It will conclude that the case which some commentators have criticized as an unwarranted assertion of judicial power,⁹ *Brown v. Allen*,¹⁰ actually is the Court's best effort at statutory interpretation. Finally, this Article will argue that post-*Brown* cases have not shown sufficient deference to what Congress provided in the habeas corpus statute.

I. BEFORE THE CIVIL WAR

It is well known that the writ of habeas corpus has strong roots in the common law.¹¹ Indeed, the writ was important enough to the framers of the

9. See, e.g., Bator, *supra* note 6, at 500-04.

10. 344 U.S. 443 (1953).

11. The common-law history is discussed in *Fay v. Noia*, 372 U.S. 391, 399-405 (1963). The treatment of the history is challenged by Bator, *supra* note 6, at 465-74.

Constitution that they provided in article I, section 9 that “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹² The Judiciary Act of 1789¹³ stated that the courts of the United States “shall have power to issue writs of . . . *habeas corpus*.”¹⁴ The Act also provided that the writ “shall in no case extend to prisoners in gaol, unless they are in custody, under or by colour of the authority of the United States.”¹⁵ It was not until 1867 that Congress extended the writ to state defendants.¹⁶

It is wrong to infer from this history that state court judgments were immune from federal review prior to the time that federal habeas corpus included state defendants. The Judiciary Act of 1789 provided state defendants with the right to take federal questions to the United States Supreme Court by writ of error.¹⁷ This right continued even beyond the extension of habeas corpus jurisdiction to state defendants.¹⁸ The writ of error was the equivalent of the appeal provided in current statutes defining Supreme Court jurisdiction.¹⁹ Unlike petitions for certiorari, the writ of error required the Supreme Court to decide a federal question on its merits.²⁰ Thus, prior to the Civil War most state defendants could not avail themselves of federal habeas corpus, but they could obtain review of convictions in the Supreme Court.²¹

An 1833 statute empowered federal courts to grant writs of habeas corpus “in all cases of a prisoner or prisoners, in jail . . . by any authority or law, for any act done . . . in pursuance of the law of the United States.”²² Federal courts did review state court convictions of defendants who claimed that state courts had improperly rejected claims that their actions were in pursuance of federal law.²³ Only in these cases did federal habeas corpus extend to state defendants. It did extend generally to federal defendants, however, and the scope of the writ was largely defined in cases concerning these defendants.

The Supreme Court clearly took the view that its review of federal convictions by way of habeas corpus was extremely limited. In 1822 the Court held in *Ex parte Kearney*²⁴ that it had no original habeas corpus jurisdiction to review a contempt conviction when the Circuit Court of the District of

12. U.S. CONST. art. I, § 9, cl. 2.

13. Ch. 20, 1 Stat. 73 (current version at 28 U.S.C. §§ 1-2906 (1976)).

14. *Id.* § 14, at 81.

15. *Id.* at 82.

16. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385 (current version at 28 U.S.C. §§ 2241-2255 (1976)).

17. Ch. 20, § 25, 1 Stat. 73, 85.

18. Until the Act of Sept. 6, 1916, ch. 448, 39 Stat. 726.

19. 28 U.S.C. § 1257 (1976).

20. That is, it gave a defendant a right to be heard on the merits. Cf. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 637-40 (2d ed. 1973) (discussing the differences between certiorari and appeal).

21. Review was limited, of course, according to the jurisdictional statute. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85.

22. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634. See also Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (habeas corpus for subjects or citizens of foreign states).

23. See generally Peller, *supra* note 2, at 616-18.

24. 20 U.S. (7 Wheat.) 38 (1822).

Columbia was a court of competent jurisdiction and had rendered a judgment of conviction.²⁵ Eight years later in *Ex parte Watkins*²⁶ the Court found the writ inapplicable to a claim that an indictment charged an offense not properly punishable in the Circuit Court of the District of Columbia. Since a court of general jurisdiction had rejected the claim, the Supreme Court found that it could not reconsider the claim pursuant to the filing of an original writ of habeas corpus.²⁷ The language the Court used was sweeping: "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."²⁸

In looking back on the Court's early decisions interpreting the first Judiciary Act, it is important to note that the Court was not interpreting the habeas corpus section of the Judiciary Act alone, but interpreting that section together with the section defining its appellate jurisdiction. The Judiciary Act provided no jurisdiction for the Supreme Court to review judgments in federal criminal cases.²⁹ Although thirteen years later the Congress provided for limited appellate review when a division of opinion occurred in the circuit courts,³⁰ the Supreme Court was not authorized to review the convictions of most federal criminal defendants.³¹ Thus, when the Court considered original petitions for habeas corpus, it had to discern whether Congress intended to provide by way of the writ what it had not provided by way of appellate jurisdiction. Not surprisingly, the Court reasoned that Congress had not intended the writ to be a substitute for appellate jurisdiction.³² The difference between a judgment that was a nullity, or void, and a judgment that was simply erroneous, or voidable, represented for the Court a distinction authorizing review of the former, despite the absence of appellate jurisdiction in criminal cases, but not of the latter. Essentially, the Court viewed its own ruling that a lower court was without jurisdiction not as a review of the lower court's decision but as an original proceeding. It is plain, of course, that this was a fiction. If a lower court decides that it has jurisdiction, Supreme Court consideration of the jurisdictional question looks very much like reconsideration of a decision already made by another court. Whether the distinction between void and voidable judgments was logical, by drawing it the Court was able to respect Congress' decision not to give it general appellate jurisdiction

25. *Id.* at 44-45.

26. 28 U.S. (3 Pet.) 193 (1830).

27. *Id.* at 203.

28. *Id.*

29. Convictions were not generally appealable until the late 19th century. See Bator, *supra* note 6, at 473 n.75. It is unclear why jurisdiction in criminal cases was restricted, and most discussions of the Judiciary Act fail even to ask why. See generally F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928).

30. Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159.

31. It was not until 1891 that the Court had jurisdiction by way of certiorari to review criminal convictions of federal defendants. Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827.

32. See, e.g., *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830).

while it used habeas corpus to assure that lower federal courts did not exceed their jurisdiction.³³ Given the common-law experience with habeas corpus, which did distinguish between void and voidable judgments, this interpretation is reasonable but not necessarily correct.³⁴

Other interpretations of the Judiciary Act were available to the Court. For example, the Court could have held that it had no power to review judgments in completed criminal cases and that the writ would extend only to persons complaining of deprivations of freedom prior to judgment. Indeed, the origins of the writ were in detentions not involving a judgment of a court.³⁵ When the Court found that it had habeas corpus jurisdiction to overturn judgments in federal criminal cases in which the lower courts had no jurisdiction, it was not adopting the narrowest construction available.

Thus, one can view the early cases as a narrow statement of the scope of habeas jurisdiction.³⁶ Alternatively, one can view them as extending habeas jurisdiction as far as the Court thought it could, given its interpretation of the relationship between habeas corpus legislation and the statutory restrictions on appellate jurisdiction.

Some evidence suggests that lower federal courts thought the Supreme Court's decisions on habeas corpus jurisdiction were not necessarily applicable to them. Perhaps the most extensive discussion is found in the 1861 opinion of *In re McDonald*.³⁷ *McDonald* illustrates one court's willingness to consider a due process claim on habeas corpus.³⁸ It is impossible to be certain whether that case is correct to the extent it stands for the proposition that lower federal courts could hear claims that the Supreme Court could not hear. To decide whether it is correct, one must know why the Congress denied the Supreme Court appellate jurisdiction in federal criminal cases. The background of the Judiciary Act fails to explain clearly the first Congress' jurisdictional choices.

Congress might have thought that the Court would be too busy to review all criminal cases and that it was especially important to assure that the Court would hear federal claims raised by state defendants. This review would promote uniformity of federal law and provide some assurance that states would comply with the Constitution.³⁹ Since federal judges would supervise federal criminal trials, and since Supreme Court Justices would ride circuit, trying criminal cases and even hearing some criminal appeals, Congress may not have viewed appellate jurisdiction in the Supreme Court as a wise alloca-

33. *Id.* at 209.

34. See R. SOKOL, FEDERAL HABEAS CORPUS § B, at 3-14 (2d ed. 1969).

35. See, e.g., Bator, *supra* note 6, at 464.

36. *Id.* at 466.

37. 16 F. Cas. 17 (E.D. Mo. 1891) (No. 8751).

38. *Id.* at 21.

39. See generally *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

tion of resources. Some support for this view can be found in the 1802 statute providing for review when a difference of opinion arose in the circuit courts.⁴⁰

This explanation of Congress' jurisdictional decision, if correct, would have sent mixed signals to lower federal courts. One reading of the congressional action is that Congress was only concerned with the burdens on the Supreme Court itself, so that lower courts ought not to have treated limitations on Supreme Court review as affecting them. Another reading is that Congress did not believe that it was necessary to provide for review of criminal cases tried in the lower courts and that finality of a conviction was highly prized. This attitude might have carried over from the English approach of not providing appellate review in criminal cases.⁴¹ The second reading would suggest that lower courts ought not to have exercised habeas jurisdiction when the Supreme Court would not.

Before the Civil War, then, the Supreme Court's view of the limited scope of habeas corpus jurisdiction is explained by its interpretation of congressional statutes that provided for no general Supreme Court review of federal convictions and for no review by habeas corpus of state convictions reviewable by writ of error. The status of habeas corpus review in lower federal courts is not entirely clear, and the Supreme Court's view of the appropriate scope of habeas corpus in the lower courts is unknown.

II. THE POST-CIVIL WAR STATUTE

Following the Civil War, Congress enacted the Habeas Corpus Act of 1867,⁴² which stated that

the several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States⁴³

This language is certainly more sweeping than the general language found in the first Judiciary Act. It plainly recognizes that the habeas corpus power conferred is additional power—that is, added to the power already conferred by other statutes. Moreover, it covers anyone whose liberty is restrained not only in violation of the Constitution, but also persons whose liberty is restrained in violation of the treaties and laws of the United States. A reader applying a current understanding of the way in which language is used in a statute must conclude that a person convicted in state court in violation of the

40. Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159. Prior to this statute, two Supreme Court Justices were on each circuit court. The statute reduced the number to one and correspondingly provided for review in criminal cases when a division of opinion was present in the circuit court. See generally F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 30-36 (1928).

41. See D. MEADOR, *CRIMINAL APPEALS: ENGLISH PRACTICE AND AMERICAN REFORM* 22-23 (1973).

42. Ch. 28, 14 Stat. 385 (current version at 28 U.S.C. §§ 2241-2255 (1976)).

43. *Id.* § 1.

Constitution would be entitled to relief under the Statute. But the Congress that wrote the Statute could not foresee the contemporary use of language. It is the understanding and intention of that Congress which controls the scope of the 1867 Statute.

One influential commentator argued that in 1867 the Congress would not have viewed a detention as necessarily in violation of law simply because a competent court committed error in the course of its proceedings.⁴⁴ He went on to argue that the writ of habeas corpus was designed to serve purposes different from appeal or writ of error, and, therefore, it "would . . . require rather overwhelming evidence to show that it was the purpose of the legislature to tear habeas corpus entirely out of the context of its historical meaning and scope and convert it into an ordinary writ of error with respect to all federal questions."⁴⁵ According to this view, the legislative history is insufficient to supply the evidence necessary to warrant a conclusion that the Act authorized broad federal review of state convictions through habeas corpus.⁴⁶ Another commentator reached the opposite conclusion.⁴⁷ He found that Congress was undoubtedly aware of the broad view of habeas corpus pursued by lower federal courts and consciously adopted that view in the 1867 Statute.⁴⁸

The legislative history of the Statute, as often happens, is hardly one-sided. No great debate over the Statute occurred, nor were its goals spelled out as clearly as one who later looks back to decide what was intended might wish. The language of the Statute would seem to support a broader, rather than a narrower, reading. But it would be wrong to suggest that the language is susceptible to only one interpretation.

Since the legislative history of the habeas Statute is inconclusive, one can find an important clue to the intentions of the Congress in its attitude toward the states, and particularly toward state courts, after the Civil War as reflected in other legislation. Although they are not usually cited as related to the habeas corpus Statute of 1867, the Civil Rights Act of 1866⁴⁹ and subsequent civil rights statutes offer strong evidence of Congress' feelings about the states and their officers, including judicial officers.⁵⁰

Section 1 of the 1866 Civil Rights Act declared that all persons born in the United States are citizens thereof and provided among other things that citizens "of every race and color . . . have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be

44. Bator, *supra* note 6, at 475.

45. *Id.*

46. *Id.* at 475-76.

47. Peller, *supra* note 2, at 618-20.

48. *Id.*

49. Ch. 31, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981-1985 (1976)).

50. Professor Amsterdam has considered the civil rights statutes in an analysis of the implications of the 1867 habeas corpus Statute on the right of criminal defendants to remove cases from state to federal court. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965).

parties, and give evidence."⁵¹ In addition, it provided that all citizens "shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."⁵²

Section 2 of the Act made it a misdemeanor for any person under color of any law to subject or cause to be subjected any inhabitant of a state or territory to the deprivation of any right secured by the Act.⁵³ Section 3 gave the district courts of the United States exclusive jurisdiction over crimes and offenses defined in the Act and concurrent jurisdiction with United States circuit courts of civil and criminal actions "affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act."⁵⁴ This section also recognized removal power and referred to an 1863 habeas corpus statute.⁵⁵ Section 4 required federal officers to institute proceedings against all persons who violated the Act. Federal officers were required to obey and execute all warrants and precepts under the Act and were empowered by section 5 to call to their aid bystanders, the military, or the *posse comitatus* of the proper county.⁵⁶ Section 10 of the Act provided for a final appeal to the Supreme Court of any questions of law arising under the Act.⁵⁷

The fourteenth amendment was adopted in large part to remove any questions that might arise about the validity of this legislation.⁵⁸ Following ratification of the amendment in 1868, Congress passed the Civil Rights Act of 1870.⁵⁹ Section 16 stated that

all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, . . . and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.⁶⁰

Section 17 made it a misdemeanor for any person under color of law to deprive any person of rights protected under section 16.⁶¹ The Act also protected voting rights and established penalties for those persons interfering

51. Ch. 31, § 1, 14 Stat. 27, 27.

52. *Id.*

53. *Id.* § 2.

54. *Id.* § 3.

55. *Id.* See generally Amsterdam, *supra* note 50.

56. Ch. 31, §§ 4-5, 14 Stat. 27, 28.

57. *Id.* § 10, at 29.

58. See Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1325-28 (1952).

59. Ch. 114, 16 Stat. 140 (current version at 42 U.S.C. §§ 1981-1985 (1976)).

60. *Id.* § 16, at 144.

61. *Id.* § 17.

with attempts to vote.⁶² Section 22 of the Act made it a crime for any officer, including those appointed by states, to neglect or refuse to perform certain legal duties.⁶³

The Force Act of 1871⁶⁴ also protected voting rights. It made it a crime for registrars to refuse to register persons entitled to vote in federal elections or to register those not entitled to vote.⁶⁵ The Statute made it an offense for any person, even one with state or local authority, to interfere with the supervisors of elections.⁶⁶ Section 16 of the Statute established an elaborate removal procedure to have cases originally brought in state court transferred to federal circuit courts.⁶⁷ This section made it a misdemeanor for state officers to proceed with the action following removal.⁶⁸

These contemporaneous statutes indicate that the 1867 habeas corpus Statute was written at a time when Congress distrusted state officers and enacted legislation to secure federal rights, state law notwithstanding. These statutes explicitly applied to judicial proceedings and covered both judicial and other officers. The statutory penalties applied to judicial as well as to other officers. Removal provisions and the special criminal sanction for judges who continued to hear a case under the Force Act of 1871 following transfer to a federal court indicate how suspicious the Congress was of the willingness of state courts to recognize and vindicate federal rights.

The fourteenth amendment barred states from making or enforcing any law "which shall abridge the privileges or immunities of citizens of the United States."⁶⁹ It prohibited states from depriving "any person of life, liberty, or property, without due process of law."⁷⁰ It outlawed a state from denying a person "the equal protection of the laws."⁷¹ The statutes enacted by the post-Civil War Congress required that all persons regardless of race have the same right to give evidence and prohibited infliction of different pains or punishments on racial grounds. The constitutional and statutory provisions regulated not only the drafting of laws by the states, but the way state officers would enforce their laws.

To determine the intended scope of the habeas corpus Statute, it is necessary to consider whether the Congress that enacted so much law imposing federal values on the states would have been satisfied if a defendant in state court who claimed that he was treated differently from other defendants because of race was prohibited from pursuing that claim in a federal habeas corpus proceeding. Such a claim might not be easily raised by writ of error

62. *Id.* § 19.

63. *Id.* § 22, at 146.

64. Ch. 22, 17 Stat. 13 (current version at 42 U.S.C. §§ 1971-1973 (1976)).

65. *Id.* § 2, at 13-14.

66. *Id.*

67. *Id.* § 16, at 15.

68. *Id.*

69. U.S. CONST. amend. XIV, § 1.

70. *Id.*

71. *Id.*

because of the need to present evidence concerning state practices. Prior to the adoption of the fourteenth amendment, states subjected people of different races to different treatment and used the criminal law to enforce racial discrimination.⁷² Would a Congress that knew of the history of discrimination and was determined to write equality into federal constitutional and statutory law have been satisfied to leave state criminal defendants with only a writ of error to the Supreme Court to protect their federal rights? An affirmative answer is possible, but it is far more likely that the broad language of the 1867 Statute was drafted with the new federal rights in mind. It is more likely that Congress recognized that without some opportunity for habeas corpus review, states could misuse the criminal law as they had before the Civil War.

This recognition would explain why the 1867 Statute provided for habeas corpus procedures, including a hearing at which evidence could be presented if necessary to resolve a claim.⁷³ Like the civil rights statutes, the habeas corpus Statute provided that it was a misdemeanor for any person to whom a writ was directed to refuse or neglect to obey it. Like the civil rights statutes, Congress made specific provision for review of decisions by the Supreme Court.⁷⁴ The provisions of the habeas Statute, and its passage contemporaneous with the adoption of the fourteenth amendment and the enactment of the civil rights statutes, warrant reading the Statute as not simply authorizing, but requiring, federal courts to assure that state courts did not violate federal rights. It is not realistic to read this scheme as requiring a federal court to defer to any state court of competent jurisdiction whenever a defendant claimed that a state court convicted him in violation of federal law. Federal courts were expected to assure that state courts recognized federal rights.

This reading of the background of the 1867 Statute emphasizes Congress' concern with state courts, not necessarily with lower federal courts. Nevertheless, the Statute did not differentiate between persons detained pursuant to state and federal authority. Federal defendants, by writ of habeas corpus, could challenge any denial of a federally protected right to the same extent as state defendants.

The broad interpretation of the reach of the habeas corpus Statute offered here is not intended to suggest that Congress foresaw the number of rights that subsequently would be deemed to be part and parcel of due process. Rather, the argument is that Congress was aware that it had recently taken action to protect privileges and immunities, to establish a right to due process in state courts, to guarantee all persons the equal protection of the laws, and to control certain judicial matters, such as the right to give testimony. All of these rights were to be protected in part by habeas corpus. That the exact coverage of all of these rights might change over time could not have been

72. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-72 (1873).

73. The procedural innovations of the 1867 Statute are noted in *Fay v. Noia*, 372 U.S. 391, 416 & n.27 (1963).

74. Habeas Corpus Act of 1867, ch. 28, § 2, 14 Stat. 385, 386.

surprising to legislators who had seen federal courts interpret the Constitution since *Marbury v. Madison*.⁷⁵

The Supreme Court indicated in 1868 in *Ex parte McCardle*⁷⁶ that it read the habeas corpus Statute as broadly as this interpretation of the historical setting suggests it should be read.⁷⁷ *McCardle*, of course, upheld a statute⁷⁸ removing appellate jurisdiction from the Supreme Court to hear appeals in habeas cases brought under the 1867 Statute.⁷⁹ But persuasive authority exists to support a conclusion that during the period that the Court was denied appellate jurisdiction, lower federal courts viewed the 1867 Act as broad enough to require that they entertain any claim by a state defendant that he was denied liberty in violation of the Constitution.⁸⁰

Before Congress restored the Supreme Court's appellate jurisdiction in 1885,⁸¹ the Court continued to hear habeas corpus cases brought under the 1789 Statute.⁸² Not surprisingly, the Court continued to hold that the scope of that Statute was as restricted as it had stated earlier, although signs were given that the Court might be expanding the scope of habeas corpus under the 1789 legislation.⁸³ Once the Court regained appellate jurisdiction over the 1867 Act, it again had an opportunity to comment on the scope of jurisdiction. The first case, *Ex parte Royall*,⁸⁴ is better known for its creation of an exhaustion requirement for state defendants, but in its opinion the Court implied that following exhaustion the petitioner could return to federal court to maintain his claim that the statute which he allegedly violated was unconstitutional.⁸⁵

Following *Ex parte Royall*, the Court had occasion to refer to habeas corpus jurisdiction in a number of cases.⁸⁶ In *In re Wood*⁸⁷ the Court indicated that habeas corpus relief might not be available to a defendant who had an opportunity to proceed in the Supreme Court by writ of error and attempted instead to avail himself of the writ.⁸⁸ In *Ex parte Belt*⁸⁹ the Court indicated

75. 5 U.S. (1 Cranch) 137 (1803).

76. 73 U.S. (6 Wall.) 318 (1868). A further disposition of the same case is found at 74 U.S. (7 Wall.) 506 (1869).

77. 73 U.S. (6 Wall.) 318, 325-26 (1868).

78. Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

79. 74 U.S. (7 Wall.) 506, 513-15 (1869). *McCardle* did not disturb the habeas jurisdiction exercised under the 1789 Statute. *Id.* at 515.

80. Peller, *supra* note 2, at 623.

81. Act of Mar. 3, 1885, ch. 353, 23 Stat. 437.

82. See, e.g., *Ex parte Siebold*, 100 U.S. 371 (1879); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

83. In *Ex parte Siebold*, 100 U.S. 371 (1879), for example, the Court stated that it would consider the constitutionality of statutes in a habeas corpus proceeding. *Id.* at 376-77. It sustained the constitutionality of civil rights statutes in this case. *Id.* at 399. *Accord Ex parte Yarbrough*, 110 U.S. 651 (1884).

84. 117 U.S. 241 (1886).

85. *Id.* at 251-54.

86. These cases are discussed in Bator, *supra* note 6, at 478-83, and in Peller, *supra* note 2, at 635-43.

87. 140 U.S. 278 (1891).

88. *Id.* at 287. As is pointed out in Peller, *supra* note 2, at 639, the Court may have been concerned that the petitioner was seeking a procedural advantage—i.e., outright release from custody rather than reversal of a conviction and retrial—that the Court was not eager to grant. It is unclear how much of a burden on states habeas relief would have been, since the state could rearrest defendants. Indeed, the Supreme Court seemed willing to accommodate rearrest. See *Medley*, 134 U.S. 160, 174 (1890). The idea of a conditional release developed shortly thereafter. *In re Bonner*, 151 U.S. 242, 259-60 (1894).

89. 159 U.S. 95 (1895).

reluctance to reconsider de novo a decision of the District of Columbia Court of Appeals concerning waiver of a jury.⁹⁰ In other cases—for example, *Ex parte Bain*⁹¹—the Court granted habeas corpus relief.

The argument has been made that when the cases are carefully read, it is clear that the Supreme Court always extended habeas corpus jurisdiction to all constitutional claims raised by state defendants and that when relief was denied it was because no due process violation was demonstrated, not because habeas corpus considered only jurisdictional claims.⁹² Although this contention may be correct, the approach that the Court took at times, both in direct review and habeas cases, suggests that the Court was not always willing to treat habeas corpus jurisdiction as extending to all federal claims that might be considered on direct review.⁹³

Consider, for example, *In re Wood*.⁹⁴ A defendant convicted in state court claimed in his habeas corpus petition that grand and petit jurors had been selected in a racially discriminatory manner. The Supreme Court recognized that exclusion of persons from a grand or petit jury because of their race would violate the fourteenth amendment,⁹⁵ but said that Wood's claim should have been raised on a writ of error.⁹⁶ This case could be viewed as an "exhaustion" case, establishing a rule that defendants must complete direct review before availing themselves of habeas corpus. The problem with that reading, however, is that it is unclear that Wood had an opportunity to adequately raise the issue in state court in a manner that would have fairly presented it on a writ of error. More significantly, the language of the Court's opinion suggests that it might have considered Wood's claim had he been challenging a statute, which the Court appeared to regard as a jurisdictional type of claim.⁹⁷ If the Court had exhaustion in mind, it would have been as appropriate to require exhaustion of an attack on a statute as on a discriminatory selection system. Yet, the Court implied that the challenge to the statute could be considered on habeas corpus whether or not a writ of error had been sought, while Wood's claim could not be.⁹⁸

Consider also *Hurtado v. California*.⁹⁹ Hurtado was convicted of a capital offense and sought a writ of error to attack the absence of an indict-

90. *Id.* at 98–100.

91. 121 U.S. 1, 3 (1887). The Court found that a federal circuit judge lacked power to amend an indictment. This case built on earlier decisions in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and *Ex parte Wilson*, 114 U.S. 417 (1885), which held that habeas corpus might lie to correct an illegality in sentencing.

92. Peller, *supra* note 2, at 642.

93. *Ex parte Royall*, 117 U.S. 241 (1886).

94. 140 U.S. 278 (1891).

95. *Id.* at 283.

96. *Id.*

97. *Id.* at 287.

98. Peller, *supra* note 2, at 639, suggested that if the statute were unconstitutional the defendant could not have been tried, so that habeas corpus and direct review both would have freed the defendant. A jury selection statute, if unconstitutional, however, does not bar a trial under a system of selection that is nondiscriminatory.

99. 110 U.S. 516 (1884). See also *Twining v. New Jersey*, 211 U.S. 78 (1908) (The defendants lost their due process claims, but those claims received full treatment on the merits, unlike the treatment given many due process claims raised in habeas corpus cases.).

ment by a grand jury in his case.¹⁰⁰ The Court was not content to reject this claim by saying that due process equalled jurisdiction and that a judgment by a court of competent jurisdiction established all the process to which a criminal defendant was due. Instead, the Court examined the importance of grand jury indictments to the protection of defendants and ultimately held that the right to grand jury indictment was not part of due process.¹⁰¹ This consideration, which occurred on direct review, is more complete than the cursory language, often using jurisdictional jargon, found in habeas corpus cases. There is reason, then, to think that the Court treated its habeas corpus jurisdiction as somewhat more limited, in terms of the issues that it would consider, than its appellate jurisdiction.

Several explanations can be offered for the Court's behavior. It may be partly attributable to the period following *McCardle* when only jurisdictional claims could be successful under the 1789 Statute. Because of the statute removing from the Court jurisdiction to hear appeals in habeas corpus cases, the Court from 1789 to 1885 considered claims under the 1789 Statute, which the Court had read as not conferring on it the appellate jurisdiction that was not directly conferred.¹⁰² Thus, almost one hundred years of habeas corpus jurisprudence contained decisions by a Court that was construing the habeas corpus Statute against a background of no general appellate jurisdiction to review federal criminal cases. State defendants generally relied on the writ of error to protect their federal claims during this period. When jurisdiction to hear appeals in habeas cases arising under the 1867 Act was restored, it was natural for litigants to frame arguments to the Court in terms of jurisdictional principles and equally natural for the Court to use the habeas corpus language with which it had become familiar. In addition, twenty years had passed since the Civil War. During this period the Court did not read the fourteenth amendment as broadly as it might have.¹⁰³ The Court was also reluctant to uphold civil rights statutes during this period.¹⁰⁴ It is not surprising that the Court was not eager to use federal habeas corpus jurisdiction as a new means of expanding protections for defendants.

To conclude that Congress intended the 1867 Statute to permit habeas corpus review of all constitutional claims properly raised by state defendants, one need not conclude that the Supreme Court unmistakably recognized this intent in the 1800s.¹⁰⁵ Nor is it necessary to predict what the Court would have

100. 110 U.S. 516, 518 (1884).

101. *Id.* at 538.

102. See *supra* text accompanying notes 29-34.

103. See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), and the description of the privileges and immunities clause as "moribund" in G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 474 (10th ed. 1980).

104. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1882); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876).

105. This is the conclusion reached by Peller, *supra* note 2. That conclusion may be correct, but the language used by the Court in habeas corpus cases is certainly narrower than one would expect if the Court was reasoning that all due process violations are jurisdictional violations that are as readily raised in collateral proceedings as on direct review. Cases cited to support the conclusion include *In re Converse*, 137 U.S. 624

said after the Civil War had it squarely confronted the language of the Statute and issued a careful and comprehensive declaration of its scope. The Court demonstrated in its reading of the privileges and immunities clause of the fourteenth amendment that it was capable of adopting the narrowest possible construction of broad language.¹⁰⁶ It could have read the Statute narrowly as well. The most significant thing about the Court's opinions before and after the turn of the century may be that they created uncertainty about the scope of the Statute.

*Frank v. Mangum*¹⁰⁷ is an example. The Court declined to grant relief to a state defendant who alleged that his trial had been dominated by a mob. Frank claimed that the state lost jurisdiction over the case because of the mob pressure.¹⁰⁸ Today it would seem clear that a trial dominated by a mob denies a defendant due process without reference to the word "jurisdiction," but Frank's counsel obviously wanted to make a claim plainly within the scope of habeas corpus. The Court accepted Frank's theory, but reasoned that the state judicial system must be considered as a whole. Since Frank had appellate review by a court of competent jurisdiction that found no absence of jurisdiction in the trial court, Frank had no valid claim to habeas corpus relief.¹⁰⁹ Although it is arguable that the Court was recognizing that habeas corpus relief is available whenever due process is denied and was saying only

(1891), in which the Court denied relief to a state defendant who claimed that he had pleaded guilty improperly to an offense other than the one charged. The Court said that a "State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction." *Id.* at 631. If this meant that a defendant was not entitled to notice of the crime charged, it would have been inconsistent with the concept of notice as a fundamental requirement of the law. If it meant that an erroneous decision concerning notice was not subject to habeas corpus review, then it would not support the conclusion that all due process violations were thought to be jurisdictional and appropriately reviewed by way of habeas corpus. Also offered to support the conclusion is *Felts v. Murphy*, 201 U.S. 123 (1906), in which a deaf defendant claimed that he could not hear or understand the evidence offered against him or the proceedings concerning him. The Court said that "upon this writ the question for our determination is simply one of jurisdiction." *Id.* at 129. It is possible that the Court was deciding the merits exactly as it would have on direct review. Yet in both cases the idea of fair notice seemingly would have justified, perhaps even required, a more complete analysis to support a holding that the defendants received due process. It is difficult to say that the analysis was not short-circuited because the cases were habeas corpus cases. This Article does not urge that the Court rejected the conclusion offered by Peller, only that it is not at all clear that the Court embraced the theory Peller offers. Actually, the Court appears to have been operating in a rough way with not much of a theory to justify its treatment of habeas corpus cases.

Another reason exists to be concerned about the argument that the Court was essentially saying from the outset in habeas cases that due process was equivalent to jurisdiction and that all due process claims could be heard on habeas corpus. Since the due process clause is found in the fifth amendment in a Bill of Rights containing various other rights, there is no reason to think that the drafters of the first Judiciary Act, who intended to deny general appellate review of federal questions to the Supreme Court in criminal cases, had some special reason to favor due process claims over other claims. In other words, once the due process clause is listed along with other rights in a document that is the fundamental law of the land, is the due process clause special? Or are we to assume that all constitutional claims would be considered to be jurisdictional? If this were the case, then all federal constitutional claims would have been reviewable in federal criminal cases by a Court that assumed it was denied general appellate review. It is not at all clear that this reasoning is persuasive, and it is even less clear that the Court which read the habeas corpus provision of the first Judiciary Act as a limited provision, not as a broad substitute for appeal, would have embraced it.

106. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

107. 237 U.S. 309 (1915).

108. *Id.* at 324-25.

109. *Id.* at 335-36.

that no such denial occurred in that case, some jurisdictional emphasis is unmistakable in the opinion.

Eight years after *Frank*, the Court did hold in *Moore v. Dempsey*¹¹⁰ that habeas corpus relief extends to a state defendant whose trial was dominated by a mob.¹¹¹ The claim has been made that *Moore* plainly repudiated *Frank* and established beyond any doubt that habeas relief could be granted for any violation of due process.¹¹² But the *Moore* Court did suggest that the habeas judge must look to see if the trial was "absolutely void."¹¹³ This language resembles the jurisdictional language used in early Supreme Court cases.¹¹⁴

Other cases suggest that the Court did not confine habeas corpus to jurisdictional issues.¹¹⁵ But the Court did not clearly establish the full reach of habeas corpus until *Brown v. Allen*.¹¹⁶ *Brown* interpreted 28 U.S.C. sections 2241 and 2254, which use the language "in custody in violation of the Constitution or laws or treaties of the United States,"¹¹⁷ which is derived from the 1867 habeas corpus Statute. Although two petitioners who alleged jury discrimination and improper use of coerced confessions lost their claims, the Supreme Court did consider the claims on the merits.¹¹⁸ Justice Jackson concurred in the result and expressed concern about the growing scope of habeas corpus jurisdiction.¹¹⁹ He complained of the absence of careful pleading and the trivialization of the writ.¹²⁰ He suggested that the Court, through its certiorari jurisdiction, should correct serious injustice and that denial of certiorari ought to be given weight.¹²¹ He also suggested some procedural rules that the Court might adopt to control repetitive relitigation of issues.¹²²

A careful reading of the opinions in the case indicates that no Justice believed that habeas corpus jurisdiction did not attach. Disagreement did

110. 261 U.S. 86 (1923).

111. *Id.* at 91.

112. Reitz, *Federal Habeas Corpus: The Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1328-29 (1961).

113. 261 U.S. 86, 91-92 (1923).

114. *See, e.g., supra* text accompanying note 28.

115. *See, e.g.,* *House v. Mayo*, 324 U.S. 42, 46 (1945) (coerced guilty plea could be challenged in habeas proceeding); *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935) (per curiam) (knowing use of perjured testimony claim could be raised on habeas corpus). These cases indicate a willingness to reconsider claims rejected by state courts. *See also* *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) (denial of right to counsel can be challenged on habeas corpus by federal prisoner).

116. 344 U.S. 443 (1953).

117. 28 U.S.C. § 2241(c) (1976) provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States" 28 U.S.C. § 2254(a) (1976) states that

[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

These provisions were enacted when the Judicial Code was revised in 1948.

118. 344 U.S. 443, 447 (1953).

119. *Id.* at 533-34 (Jackson, J., concurring in the result).

120. *Id.* at 539-41.

121. *Id.* at 544-45.

122. *Id.* at 546-48.

arise, however, about the weight to be given prior dispositions in a case. Thus, it is *Brown v. Allen* that firmly established that all federal constitutional claims may be heard through the writ of habeas corpus. Was the decision a departure from prior holdings? The only fair answer is "no." As explained above, the Court had used narrower language in some of its opinions, but it had never explained its choice of language.

The background of the 1867 Statute suggests that federal judicial oversight of federal questions, even those litigated in state court, is consistent with the mood of the post-Civil War Congress. Although the removal of appellate jurisdiction over habeas cases brought under the 1867 Act may have created some confusion, the best reading of what Congress intended in 1867 and what Congress left untouched when it enacted 28 U.S.C. sections 2241 and 2254 is that habeas corpus jurisdiction extends to any person who claims that his custody or deprivation of freedom is in violation of the Constitution of the United States. The language undoubtedly is susceptible to more than one reading. But by focusing on the entire body of legislation passed following the Civil War, the inevitable conclusion is that Congress did not trust state courts, at least not some state courts. The 1867 habeas corpus Statute was part of the congressional reaction to its sense of distrust. The Statute required federal courts to assure that federal rights were respected by state courts. By the time *Brown v. Allen* reached the Court, the doctrine that coerced confessions could not be used by states in criminal cases had been established.¹²³ And a claim that a jury was selected in a racially discriminatory manner was exactly the type of claim that the 1867 Statute was designed to protect.¹²⁴ Thus, despite suggestions by some commentators that the case is a departure from the Court's traditional approach to habeas corpus,¹²⁵ *Brown v. Allen* appears to be a sound reading of the intent of Congress in enacting the 1867 habeas corpus Statute.

This reading of Congress' intent is not meant to suggest that the result is necessarily sound or that the mistrust of state officials that might have existed following the Civil War ought to linger today. It is only a reminder that when the Court decides the scope of habeas corpus, it is interpreting a statute. It is not free to write its own preferences into the law. Although there may be room for judicial judgment concerning the weight to be given state court decisions, this too requires analysis of what Congress intended.¹²⁶ To the extent that Supreme Court opinions prior to *Brown* intimated that some constitutional claims could not be considered in habeas corpus cases, those decisions did not explain the language or history of the habeas statutes, and it is

123. See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936).

124. It is that type of claim because it relates to the ability of all people, regardless of race, to receive equal treatment from state courts.

125. See, e.g., Bator, *supra* note 6, at 463.

126. *Sumner v. Mata*, 449 U.S. 539 (1981), illustrates how the Court may interpret the language of the statute to determine what, if any, weight should be given a state finding when a federal court entertains a habeas corpus petition.

those opinions, not *Brown*, that ought to be criticized. Now that so many constitutional rights apply against the states through the due process clause, Congress may be concerned that habeas corpus jurisdiction is too broad.¹²⁷ Unless and until Congress narrows the statute, federal courts have a duty to identify and protect persons who bring sound claims that they are in custody in violation of the Constitution. Federal defendants benefit from the 1867 Congress' distrust of state courts and its enactment of a Statute that permitted all persons, whether detained under state or federal authority, to raise similar claims on collateral attack. A case could be made that federal prisoners need fewer opportunities to attack their convictions collaterally than state prisoners, since their claims proceed initially in a federal forum.¹²⁸ The Statute passed in 1867 did not distinguish federal from state prisoners, however, and current law provides similar treatment for both.¹²⁹

III. PROCEDURAL DEFAULTS AND HABEAS CORPUS

One of the three cases heard together in *Brown v. Allen* was *Daniels v. Allen*.¹³⁰ Because Daniels had not properly perfected an appeal in state court, the state courts refused to consider his claims, including constitutional claims, on the merits.¹³¹ The Supreme Court held that Daniels could not maintain that he was "in custody in violation of the Constitution."¹³²

The approach of *Daniels* was repudiated in one of the most important and controversial decisions the Supreme Court has rendered on habeas corpus, *Fay v. Noia*.¹³³ *Fay* held that a procedural default that resulted in a state court refusal to hear a constitutional claim and that prevented the Supreme Court from hearing the claim on direct review¹³⁴ did not bar habeas corpus review unless the petitioner deliberately bypassed his chance for review in state court.¹³⁵ The Court purported to trace the history of habeas corpus from common law through its earlier decisions. It rejected the argument that habeas corpus at common law was available only to inquire into jurisdic-

127. See S. 2216, 97th Cong., 2d Sess. (1982) (proposing to limit habeas corpus claims).

128. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964).

129. 28 U.S.C. § 2255 (1976) provides an opportunity for defendants to claim that their sentence was imposed in violation of the Constitution or laws of the United States. Although its wording is not identical to § 2254, it permits attacks on convictions in virtually the same circumstances as does § 2254.

130. 344 U.S. 443, 482-87 (1953).

131. *Id.* at 485.

132. *Id.* at 486-87.

133. 372 U.S. 391 (1963).

134. The adequate and independent state ground rule would have barred direct review. *Fay* recognizes that "[i]t is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds." *Id.* at 428.

135. *Id.* at 438. If, however, the Court was correct in saying that a petitioner was held in violation of the Constitution when he had a constitutional claim that state courts would refuse to hear on procedural grounds, the deliberate bypass language of the Court might be inconsistent with the language of the habeas corpus statute. The *Fay* Court speaks in terms of waiver, but it is arguable that a deliberate bypass would not by itself constitute a knowing and intelligent relinquishment of a right. Rather, the petitioner would have to understand that by bypassing a state remedy, he was losing the opportunity to vindicate a claim in federal court.

tion.¹³⁶ Reading its earlier decisions for all they might be said to represent,¹³⁷ the Court wrote in glowing terms of the importance of the Great Writ.¹³⁸ It attempted to explain why a procedural default might bar direct, but not collateral, review: The appellate function of the Supreme Court is confined to judgments of state courts. When a judgment rests on state law, review of federal questions that could not change the judgment is inappropriate. Habeas corpus is different since it focuses on “detention *simpliciter*.”¹³⁹ “Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him.”¹⁴⁰

The Supreme Court restricted *Fay* in *Wainwright v. Sykes*.¹⁴¹ In *Wainwright* the Court held that when a state defendant failed to comply with a rule that objections to a confession must be raised contemporaneously with the introduction of the confession at trial, federal courts would review the validity of the confession on habeas corpus only if the defendant could show cause for his failure to comply with the state rule and resulting prejudice.¹⁴² The Court rejected the *Fay* rule for several reasons: the contemporaneous objection rule serves important state interests; the rule helps to encourage finality in litigation; the *Fay* rule may encourage “sandbagging” by defense lawyers who may withhold claims in the hope of raising a collateral attack if they are unsuccessful at trial; and the enforcement of the state rule will help to make the trial the “main event.”¹⁴³ The dissent argued against enforcement of a system of forfeiture of rights and undue deference to local procedure.¹⁴⁴

The remarkable aspect of both *Fay* and *Wainwright* is that they are written as if the task of the Supreme Court were to decide how much collateral review of state convictions is desirable. Assuming that limits may be placed on habeas corpus review without violating the Constitution,¹⁴⁵ this judgment is not the Court’s to make. Congress makes this judgment when it enacts a habeas corpus statute. The question under the statute is whether a defendant is in custody in violation of the Constitution of the United States. If not, then no relief is authorized under the statute.

136. *Id.* at 404.

137. *Id.* at 407–11.

138. *Id.* at 401–02.

139. *Id.* at 430.

140. *Id.* at 430–31.

141. 433 U.S. 72 (1977).

142. *Id.* at 90–91. *Wainwright* relied on a standard developed in *Francis v. Henderson*, 425 U.S. 536 (1976), and *Davis v. United States*, 411 U.S. 233 (1973), which held that challenges to grand juries not made in compliance with state and federal rules requiring those challenges to be made before trial barred collateral attack absent a showing of cause and prejudice. *Wainwright* was extended to federal defendants in *United States v. Frady*, 456 U.S. 152 (1982).

143. 433 U.S. 72, 90 (1977).

144. *Id.* at 99–105 (Brennan, J., dissenting).

145. The history of habeas corpus suggests that this is the case. As long as defendants can seek review in the Supreme Court and can attack state convictions collaterally, it is highly unlikely that the Court would hold that availability of federal habeas corpus is constitutionally required. Were a state to provide no habeas corpus or similar collateral relief, the Supreme Court might reach the question it avoided in *Case v. Nebraska*, 381 U.S. 336 (1965)—whether a state is obliged to provide some postconviction remedy.

The background of the 1867 Statute might be thought to suggest that *Fay*, not *Wainwright*, is consistent with the distrust of state courts that has been described.¹⁴⁶ But a careful analysis suggests that neither opinion is faithful to the premises of the 1867 Statute, which forms the basis for the current habeas corpus statute. Despite its distrust of state courts, the 1867 Congress did not provide that state courts could not hear criminal cases or incarcerate defendants convicted in those cases. Nor did it provide that state courts hearing those cases would have to utilize rules of procedure drafted by Congress or federal courts.

State courts were permitted to litigate criminal cases. They were compelled, however, to respect federal rights, including the right of all persons to equal treatment in court, irrespective of their race. The statutes required that states assure all litigants equal opportunities to present evidence and to avail themselves of judicial process. It did not prescribe what evidence and procedures the state courts must use.

State courts and federal courts had to use some rules to process cases. Typical rules required timely objections to evidence and offers of proof for excluded evidence.¹⁴⁷ Since state courts and state legislatures had an interest in assuring that state law was fairly applied, the 1867 Congress had little reason to think that the procedures typically employed to process state issues would be inadequate to protect federal rights.¹⁴⁸ Indeed, nothing in the background of the 1867 Statute indicates that state courts were less free to develop reasonable procedures for handling cases than were federal courts. Thus, if a federal court was free to refuse to hear a claim that was not raised in accordance with standard procedures, a state court was free to do so also. It was free, that is, unless the state procedure discriminated against federal rights in a way that negated a fair opportunity to present them or unless the federal right for some reason required a procedure not available in state court.

In other words, reasonable procedures are part and parcel of the processing of cases in all courts. Nothing in the 1867 Statute or the civil rights

146. See *supra* text accompanying notes 49-71.

147. Wigmore points out the importance of making a record, particularly by taking exceptions, in the first edition of his multivolume treatise on evidence. 1 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 20 (1904). The failure of litigants to present federal questions properly in state court was known to bar Supreme Court consideration. Although these cases were direct review cases, they demonstrate a respect for orderly procedure and presentation of claims.

148. Nothing in the history of the 1867 habeas corpus Statute suggests that Congress was concerned about the procedures used by lower federal courts. Actually, lower federal courts tended to borrow and follow state procedure, pursuant to the direction of Congress. See *United States v. Reid*, 53 U.S. (12 How.) 361 (1851) (reading the Judiciary Act of 1789 as directing federal courts to use state rules of evidence; section relied on required federal courts to follow state jury selection procedure). See generally Orfield, *Early Federal Criminal Procedure*, 7 WAYNE L. REV. 503 (1961). A fair reading of the 1867 Act is that it expanded habeas corpus to assure that state courts followed federal law, but that it did not permit state defendants to refrain from complying with valid state laws.

Of course, any procedure can be manipulated to be unfair in a particular case. Even on direct review the Supreme Court has recognized this by requiring state procedural grounds to be adequate and fairly applied before they will bar Supreme Court scrutiny. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 544-46 (2d ed. 1973).

statutes evidences a congressional desire to scuttle reasonable state procedures. Thus, if a state procedural rule is constitutional and is enforced against a defendant, the resulting state judgment ought to be viewed as valid, and a defendant who has not complied with the rule ought to be treated as one not held in violation of the Constitution.

Indeed, it is not hard to see why the *Fay* approach is ultimately unsatisfying. Assume that a defendant charged with first degree murder in state court offers an insanity defense. It is unsuccessful, and after the trial ends defense counsel realizes that he could have used expert testimony not only to establish a complete defense, but also to negate the *mens rea* required for first degree murder. Counsel asks the trial court to grant a new trial to consider additional expert testimony on his new theory. If the theory had been raised at trial, the state court might have denied the defendant due process by refusing to consider it. Yet, when it is not raised at trial and the defendant is convicted and subsequently regrets not raising the claim, no federal court would require the state to retry the defendant unless he could establish that his counsel was ineffective in proceeding as he did. The defendant's evidence might establish innocence, at least of first degree murder. The reality of trials is that decisions are constantly made that might be made differently with the benefit of hindsight. But rules that require litigants to make claims at trial or not at all are generally enforced.¹⁴⁹ *Fay* permitted a defendant to challenge a confession or to make some other specific claim that, if properly raised in state court, might well have been correctly decided there. It is difficult to understand why a defendant should be permitted to challenge a confession for the first time on collateral attack in an effort to obtain a new trial, but should be denied the opportunity to present a theory that might establish innocence.¹⁵⁰ Rules re-

149. *United States v. Frady*, 456 U.S. 152 (1982). The failure to raise a claim on appeal may not be as threatening to orderly procedure as the failure to raise a claim at trial. A defendant who fails to raise a claim in the trial court denies that court an opportunity to resolve correctly the claim and thereby obviate the need for further proceedings. A defendant who waits until after conviction to raise a claim seeks a second trial that might have been avoided and that would burden the prosecutor, the trial court, witnesses, and jurors. If the defendant properly raises his claim at trial and loses, a retrial may be required whether the claim is raised on direct appeal or in a collateral proceeding. The Government has an interest, however, in having the claim raised on direct appeal. If the defendant wins the claim, the Government may begin a new trial without delay. This reduces the chances that witnesses will become unavailable or that memories will fade, initiates prompt punishment for those who are found guilty, and ends the psychological pressure that trials place on victims and other witnesses.

150. *Fay* would tend to favor a defendant whose theory is that a confession was improperly obtained (although perhaps reliable) over a defendant who urges that if proceedings were reopened he would be found not guilty (*i.e.*, the state could not prove a requisite element of the offense charged). This favoritism occurs because the defendant who raises a confession claim is alleging an antecedent constitutional violation, one that occurred when the confession was obtained, but the defendant who wishes to offer additional psychiatric evidence can make no such allegation. Yet it is clear that each claimant wants the same result, a new trial, and also that each had the same opportunity at trial to object to government evidence or to offer defense evidence. If one had to choose to favor one over the other, the defendant who might be not guilty of first degree murder would represent a more attractive choice for many people.

This assertion should not be taken as an argument in favor of restricting collateral attacks to "innocent" persons. See generally Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). Collateral attack may be a desirable mechanism for assuring that state courts respect constitutional rights. Collateral attack in federal district courts may be the only effective check today in view of the current workload of the Supreme Court. Before federal courts overturn state judgments, however, a

quiring litigants to raise claims in a timely fashion in accordance with state procedures are designed to prevent unnecessary retrials and to assure that necessary retrials are held as soon as possible. These rules generally are constitutional. Indeed, they are necessary if litigation is ever to end.¹⁵¹

When the Supreme Court said in *Fay* that habeas corpus focuses on detention, it missed the point of the habeas corpus Statute. Habeas corpus focuses on detention in violation of the Constitution. If the law were changed to be as once it was, and state defendants had a right to a writ of error in the Supreme Court but not to habeas corpus relief, they would find the Court refusing to hear claims not properly raised in accordance with valid state procedures. The Court would not hear them because the state court judgments would rest on state law that does not violate the Constitution. The resulting custody would be constitutionally valid. And the Statute does not authorize relief from this custody. Thus, the Court erred in *Fay* in broadly stating that procedural rules which barred direct review did not bar habeas corpus review. It erred not because its result is necessarily less appropriate than the approach of *Daniels v. Allen*, but because it adopted a view without demonstrating that it was intended by the drafters of the habeas corpus Statute.

In *Wainwright* the Court continued to assume that its role is to decide exactly how much habeas corpus review is desirable. Had it confined itself to interpreting the Statute, it could have held, quite properly, that a federal court will consider a claim despite noncompliance with a state procedural rule when

defendant should show that state courts have demonstrated some disrespect for constitutional standards. A state that has and uses a generally valid procedural rule that it applies to confession claims, claims of a defense, and the myriad other constitutional and nonconstitutional claims that can arise during the litigation of criminal charges demonstrates no disrespect for the Constitution. Thus, collateral attack may be inappropriate when a constitutional procedural rule is enforced by a state court. Unless Congress changes the language of the habeas corpus statute, federal courts ought to find that when a constitutional procedural rule is applied so that a federal claim cannot be raised in state court, a defendant is not in custody in violation of the Constitution.

The argument is made in Reitz, *Federal Habeas Corpus: The Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1352-54 (1961), that if a federal court entertains the claim, the state is not being forced to abandon its legitimate procedure and to hear a claim that it has chosen not to hear. The problem, however, is that the reason that a state does not want to hear tardy claims is not that they are burdensome to hear, but that the tardy claim might require a new trial that might have been obviated or held much earlier had the reasonable procedure been followed. This state interest is the same whether a federal court hears a tardy claim on direct review or on collateral attack. It is probably true that Congress could authorize the Supreme Court and lower federal courts to consider federal issues raised by a defendant at any time, even if they have not been properly raised in state court. The question under the 1867 Statute is whether this is the system that Congress had in mind. For the reasons stated, the conclusion this Article reaches is that Congress would have expected that the limitations on the Supreme Court's review of federal claims as a result of failures to comply with valid state procedural rules would also have bound federal habeas courts.

151. One way of testing this assertion is to ask whether a state judge violates the Constitution if she follows a state rule and refuses to hear a claim that a defendant's confession, used by the Government at trial, was coerced when that claim is not made until after judgment of conviction is entered. If so, the judge would violate article VI of the Constitution in following the state rule and ought to decline to do so. Since the Supreme Court respects these rules on direct review, it is difficult to make a case that the state rule is unconstitutional. Were the case made, any custody of a defendant whose confession claim might succeed would seem inappropriate. Assuming that the rule is not in violation of the Constitution, it is not apparent why a conviction obtained when the rule is followed results in custody in violation of the Constitution.

that rule, either on its face or as applied, is itself unconstitutional,¹⁵² or when a defendant establishes that another constitutional violation explains his procedural default—for example, when counsel was ineffective.¹⁵³ Only in these cases would a defendant be able to show that he is in custody in violation of the Constitution.¹⁵⁴ The “cause and prejudice” standard might be read in the future to reach the same result. But it would have been preferable for the Court to confine itself to interpreting the statute, rather than to write as if the political question of the proper breadth of habeas corpus review was the Court’s to answer.

It might be that in the best of all worlds some state rules, even though they may be perfectly constitutional and serve valid state interests, ought to be disregarded and federal review permitted even when the rules are ignored by state defendants. Which rules should be ignored and which should be followed are not the kind of questions that are easily answered. They are judgments on which reasonable people can and will differ, and they ought to be made by Congress.

IV. *STONE V. POWELL*, THE FOURTH AMENDMENT, AND HABEAS CORPUS

In *Wainwright* the Court emphasized that it had not disturbed *Brown v. Allen*.¹⁵⁵ This is true. The case that appears to have done so is *Stone v. Powell*.¹⁵⁶ *Stone* holds that a claim by a state defendant that evidence used against him was obtained in violation of the fourth amendment is not cognizable on habeas corpus when the defendant had a full and fair opportunity to litigate the claim in state courts.¹⁵⁷

At first the holding might appear to fly in the face of the Statute, since a state prisoner raising a valid fourth amendment claim would appear to be in custody in violation of the Constitution. The way the opinion is written, however, the result may be compatible with the Statute.

The *Stone* Court described the exclusionary rule that it had created to

152. If the rule were unconstitutional, then its enforcement to bar a federal claim would justify the conclusion that the resulting custody would be in violation of the Constitution. Although this Article is critical of the *Fay* reasoning, it recognizes that the facts of that case present an attractive setting for disregarding a state’s rule. Noia was convicted of felony murder along with two codefendants. The only evidence against each defendant was his signed confession. 372 U.S. 391, 395 (1963). The other two appealed their convictions, but Noia did not. Ultimately, the other two won reversals on the ground that their confessions were coerced. *Id.* Noia was not permitted to pursue subsequent state proceedings because of his failure to appeal, even though the State stipulated that Noia’s confession was also coerced. During a habeas corpus hearing, Noia’s trial counsel indicated that one reason Noia did not appeal was fear that if he were retried, he might get the death penalty. *Id.* at 397 n.3. Apparently, all three defendants had raised their coerced confession claims in timely fashion. Noia’s failure to appeal was the product of fear of capital punishment, not of a desire to abandon his claim. Since the State was willing to agree that given the decisions regarding the codefendant’s confessions, Noia’s claim would succeed if he were permitted to raise it, the state interest in enforcing its rule must have seemed extremely weak.

153. Ineffective assistance of counsel signifies that the defendant did not have the requisite opportunity to comply with all of the legal requirements imposed on him. *Brady v. United States*, 397 U.S. 742 (1970).

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

155. *Id.* at 81.

156. 428 U.S. 465 (1976).

157. *Id.* at 494.

enforce the provisions of the fourth amendment as a deterrent device. It observed that exclusion had been limited so that deterrence could be achieved without excessive loss of evidence.¹⁵⁸ Although the Court recognized that without habeas corpus review some fourth amendment violations might go uncorrected, it ultimately held that the amount of additional deterrence to be expected from habeas corpus review of fourth amendment claims is so low that the exclusionary rule need not be extended beyond direct review.¹⁵⁹ If *Stone* is, as it appears to be, an analysis of the necessary reach of the exclusionary rule,¹⁶⁰ not a construction of the habeas corpus Statute, then the Court essentially established that a person who has a chance to avail himself of the rule on direct review receives all the protection that the judicially created rule provides.

It might have been more helpful had the Court paid more attention to the habeas corpus Statute in its opinion.¹⁶¹ This would have been especially desirable since the author of *Stone*, Justice Powell, had written a concurring opinion three years earlier¹⁶² in which he argued that review of fourth amendment questions “goes well beyond the traditional purpose of the writ of habeas corpus.”¹⁶³ That opinion railed against habeas corpus claims generally and argued that “this Court has few more pressing responsibilities than to restore the mutual respect and the balanced sharing of responsibility between the state and federal courts which our tradition and the Constitution itself so wisely contemplate.”¹⁶⁴ This language confuses the Court’s role with that of Congress. This is not the language of *Stone*, however.

Stone, then, is not necessarily inconsistent with *Brown v. Allen*. Read as a limitation on the exclusionary rule, it may be consistent with the federal habeas corpus Statute.¹⁶⁵ Had *Stone* attended to the habeas corpus Statute, it would have had to face the question whether the drafters of the Statute would have been disturbed by the notion that a federal right is enforceable on direct review but not in habeas corpus proceedings, because enforcement in habeas corpus proceedings is not necessary to make the right meaningful. The background of the 1867 Statute, with congressional distrust of state courts so

158. *Id.* at 486–89.

159. *Id.* at 493–95.

160. The Government had argued in terms of the proper reach of the exclusionary rule in *Kaufman v. United States*, 394 U.S. 217, 225–27 (1969). The Court rejected that argument in permitting federal defendants to raise fourth amendment claims collaterally. The Government’s argument in *Kaufman* appears to represent the analysis actually used in *Stone*.

161. The Court traces some of the history of the habeas corpus Statute in *Stone*. 428 U.S. 465, 474–81 (1976). But it puts aside the habeas Statute as soon as it considers the exclusionary rule, which is the core of the decision.

162. *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring in the result).

163. *Id.* at 252.

164. *Id.* at 265.

165. When *Stone* is read this way, it may explain the Court’s hesitation to expand that decision in *Rose v. Mitchell*, 443 U.S. 545, 550–64 (1979) (permitting claim of racial discrimination in selection of grand jury to be raised on habeas corpus). In each case in which a rule is designed to deter violations of the Constitution, the Court may want to be sure that direct review offers realistic deterrence before holding that habeas corpus review is unnecessary to deter violations of the right.

readily apparent, might have caused the Court to pause before concluding that it was unnecessary to have federal review of fourth amendment claims decided by state courts. Yet, the exclusionary rule, even the one applicable in federal proceedings,¹⁶⁶ was not fashioned until well after the Statute was adopted; and it was not binding on the states until long after that.¹⁶⁷ Does the Court's belief that collateral attack is unnecessary to serve the deterrent purpose of the exclusionary rule justify a ruling that has a premise different from the one underlying the habeas corpus Statute? The answer is more difficult than the *Stone* opinion had to recognize, since *Stone* avoided the question by avoiding the Statute.

V. CONCLUSION

Legislation is now before the Congress that would modify the habeas corpus Statute.¹⁶⁸ It probably is time that Congress took another look at how much collateral attack is desirable in a country that processes so many criminal cases. Those who believe that federal review of all constitutional questions remains desirable have the chance to make their case. Those who would constrict the scope of habeas corpus have an opportunity to suggest other formulations of the Statute.

As the debate progresses, it seems likely that fear of state courts, so understandable after the Civil War, will not be the same today as it once was. Those who argue that state courts cannot be trusted to fairly dispose of federal constitutional claims will have a difficult case to make. Yet, it is just as likely that the debate will emphasize that state court judges often are elected, both in trial and appellate courts. Elected judges are susceptible to pressures that life-tenure federal judges may find less compelling. And it will not go unnoticed that the quality of state court judges may be uneven in many states with counties and cities of great diversity. These facts, together with the sheer number of criminal cases that state courts must handle, will be used to argue in favor of federal habeas corpus for state defendants.

The debate could produce reconsideration of the scope of collateral attack for federal defendants. Although federal judges are not uniformly excellent, all have life tenure, which protects them from some of the political pressures that might affect state judges in controversial cases. Moreover, the honor associated with appointment as a federal judge has produced a bench that is, for the most part, quite able. Despite the case that can be made for providing fewer opportunities for federal prisoners to relitigate claims than state prisoners, it will be surprising if any distinction is drawn. To draw a line which suggests that state courts are less dependable than federal courts in the handling of federal claims is to imply something about state courts that members of Congress, who must get elected in their home states, may find politically unsuitable. Many will privately concede that a distinction may be jus-

166. See *Weeks v. United States*, 232 U.S. 383 (1914).

167. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

168. S. 2216, 97th Cong., 2d Sess. (1982); H.R. 6050, 97th Cong., 2d Sess. (1982).

tifiable. Some members of Congress will look for an argument for making collateral attack for federal defendants identical to federal collateral attack for state defendants. Some may argue that there are always federal judges who are no more sensitive to constitutional rights than state judges. Although this is probably true, it subtly changes the rationale for insisting on federal review of state rulings on constitutional matters. Today, the argument for federal review of state convictions does not assume that state judges will be less sensitive to constitutional rights than federal judges; it assumes that elected state judges are more susceptible to pressure and that they may not be as consistently able as federal judges. Others will argue that what is good for state defendants must also be good for federal defendants. This cannot be disputed, but ignores the question whether, even if good for defendants, it is necessary. Finally, some may even argue that federal courts need to know that federal defendants may collaterally attack convictions because only then will federal judges be sympathetic to the state courts that complain about collateral review of completed cases. This argument will be shifting to the federal courts responsibility for the very judgment that Congress must make, but does not want to make: that federal courts must review constitutional issues properly raised in state criminal proceedings.

Thus, once all the complaints about collateral attacks are heard and all the proposals for reform are considered, habeas corpus review might look in the future much like it now looks, at least in terms of the defendants who can avail themselves of the remedy and the types of claims that can be heard. The changes that are made are likely to be associated with procedural aspects of habeas corpus proceedings that are viewed as abuses of process.

It will not be surprising if time limits are considered for most habeas claims so that in most cases finality will be achieved at some designated time. Nor will it be surprising if efforts are made to require habeas petitioners to bring all their claims at once. Perhaps some thought will be devoted to giving priority on the docket to those defendants incarcerated, leaving defendants challenging the collateral consequences of conviction to pursue a slower course. Easy answers to hard questions are unlikely, and the question of how much collateral review is needed to assure that criminal convictions are obtained in compliance with the Constitution of the United States is truly hard. But the debate will now proceed in the proper forum: the Congress, not the Supreme Court.¹⁶⁹

169. It may not be so easy, as many critics of collateral attack think, to fashion rules limiting the use of habeas corpus to certain constitutional rights or to special classes of defendants. Consider, for example, a focus on the innocence of a defendant. Even a defendant who is guilty of something might have been innocent of the crime for which he was convicted. Degrees of culpability are often the important matters in dispute. Does a defendant who claims to have been improperly convicted of a higher offense get the same treatment as a defendant who claims to be totally innocent? And what does it mean to be innocent? That the Government is unable to muster sufficient proof? Or that the defense has affirmative proof?

It would not be surprising if, unable to agree on which claims deserve preference or which classes of defendants should receive special consideration, reformers of habeas corpus attempt to provide for greater deference to findings made by state courts, to limit the repetition of petitions, and to devote most of their attention to procedural reforms, not to limitations on the scope of the issues properly raised in habeas corpus proceedings.

