Habeas as Forum Allocation: A New Synthesis

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The scope of habeas relief for state prisoners, especially during the decades before the Supreme Court's 1953 decision in Brown v. Allen, is a famously disputed question—one of recognized significance for contemporary debates about the proper scope of habeas review. This Article provides a new answer. It argues that, until the enactment of Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), it was broadly accepted that state prisoners were entitled to plenary federal review of the legal and mixed law/fact questions decided against them by state courts. Until 1916, such review was provided by the Supreme Court; after 1953, such review was provided by the lower federal courts via habeas. The situation between 1916 and 1953 was murkier. This Article shows that this was a transitional period marked by disagreement among the Justices as to the appropriate federal forum to review state court decisions resulting in custody. At the beginning of this period, a majority of Justices continued to insist that the responsibility rested with Supreme Court. Towards the end of this period, the Court shifted this responsibility to the habeas courts as a majority of Justices came to recognize that the Court could no longer hope to monitor state court criminal convictions. The Justices during this period agreed that federal review of state court convictions

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was necessary, but disagreed about which federal court should provide such review. The scope of habeas jurisdiction during this period, as before and after, reflected the Justices' views about the proper allocation of jurisdiction among federal courts to review the state courts' decisions on constitutional questions arising in criminal cases resulting in custody.

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INTRODUCTION

In *Brown v. Allen*, decided in 1953, the Supreme Court held that federal courts adjudicating the habeas petitions of persons convicted of crimes in state court should apply a de novo standard of review with respect to issues of law and of application of law to fact.[1] This

[1] *See* Brown v. Allen, 344 U.S. 443, 507 (1953) ("Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, the District Judge must exercise his own judgment on this blend of facts and their legal values."); Justice Frankfurter's analysis

standard of review prevailed until the Supreme Court in *Williams v. Taylor* interpreted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") as establishing a standard of review more deferential to state courts.[2] Whether *Brown*'s de novo standard was a departure from the standard the courts had previously applied in habeas cases is a famously disputed question. In an influential article, Professor Paul M. Bator argued that the Court in *Brown* broadly expanded the availability of habeas relief to state prisoners, an expansion that he criticized as undesirable as well as unprecedented.[3] Before *Brown*, he argued, the federal courts properly declined to grant habeas relief to state prisoners unless the state court had failed to provide a full and fair hearing of the petitioner's constitutional claims.[4] In Professor Bator's view, the limited scope of federal habeas review meant that the state courts often had the final word regarding the federal constitutional rights implicated in state criminal proceedings.[5] This view was disputed by Justice Brennan, who, in *Fay v. Noia*, maintained that habeas courts had always provided plenary review of state prisoners' fundamental rights.[6] Justice Brennan's version of the history was defended at some length by Professor Gary Peller.[7]

More recently, Professor James Liebman has offered a third version of the pre-*Brown* history, arguing that both Professor Bator, on the one hand, and Justice Brennan and Professor Peller, on the other

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on this point was expressly endorsed by Justices Burton and Clark, *see id.* at 488, and Justices Black and Douglas, *see id.* at 513. *See also* Wright v. West, 505 U.S. 277, 287–88 n.4 (1992).

[2] *See* Williams v. Taylor, 529 U.S. 362, 390–91 (2000). *See also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[3] *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 499–501 (1963).

[4] *Id.* at 463–64, 465 ("The understanding seemed to be much nearer to the guideposts set out above: a prisoner is not held in 'violation' of federal law if a state court of competent jurisdiction has through fair process—though perhaps erroneously—decided that question on the merits.").

[5] *See id.* at 448–49.

[6] Fay v. Noia, 372 U.S. 391, 426–27 (1963).

[7] *See generally* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 581–82 (1982).

hand, had gotten parts of the history wrong.[8] According to Professor Liebman, the habeas statutes always authorized de novo review of constitutional issues decided by the state courts, but only "where the writ is the only effective means of preserving [the petitioner's] rights."[9] During the Nineteenth Century, habeas was almost never necessary for this purpose, as any person convicted in the state courts had a right to Supreme Court review of any federal questions decided against her by the state courts.[10] When the Supreme Court's appellate jurisdiction became discretionary, however, the lower federal courts' habeas jurisdiction expanded to fill the gap.[11] The writ then became the only effective means of preserving the constitutional rights of state prisoners.[12] In Professor Liebman's telling, federal review of state court criminal convictions was always available, but the forum responsible for providing such review shifted in the early part of the Twentieth Century.[13]

Although Professor Liebman did not use the term, he argued essentially that the Supreme Court's rules addressing the scope of habeas review served a forum-allocation function: these rules allocated among federal courts the responsibility for monitoring the state courts' protection of the constitutional rights of state criminal defendants.[14] Before the shift, the Supreme Court was responsible for

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[8] *See generally* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2055–94 (1992).

[9] *Id.* at 2055 (quoting Waley v. Johnston, 316 U.S. 101, 105 (1943)).

[10] *See id.* at 2068–75.

[11] *See id.* at 2075–80.

[12] *See id.*

[13] *See id.* at 2073–75.

[14] All rules of federal jurisdiction are "forum allocating" in the sense that they distribute judicial power between federal and state courts. I use the term to describe the distribution of judicial power among *federal* courts. This sense of the term can be traced to Vicki C. Jackson's thesis that the Eleventh Amendment serves a forum-allocation function by allocating the power to enforce the federal obligations of the states between the Supreme Court and the lower federal courts. *See* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 14–15, 74 (1988). The Supreme Court rejected the forum allocation understanding of the Eleventh Amendment in *Alden v. Maine*, 527 U.S. 706 (1999). *See* Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927, 1927–30 (2000). *See*

providing such review; afterwards, the lower federal courts were responsible for doing so.[15] At no point were state prisoners' constitutional rights relegated to the state courts without de novo federal review, as Professor Bator had argued.[16]

This Article offers a fourth version of the pre-*Brown* history, bridging in some respects the other contending versions. The pre-*Brown* cases show that Professor Liebman is right about the *reason* for the Twentieth Century expansion of the availability of habeas review for state prisoners.[17] As discussed in Part I of this Article, de novo federal court review of state criminal convictions was available throughout the Nineteenth and early Twentieth Centuries.[18] Until 1916, state prisoners (like all state court litigants) had a right to review in the Supreme Court of any federal issue decided against them. Before 1867, the federal courts' habeas jurisdiction generally did not even extend to state prisoners. After that date, the Court articulated and enforced a rule under which the habeas courts were generally to deny relief to state prisoners convicted of crimes in state courts, the rationale being that direct review in the Supreme Court was available as of right and should ordinarily be pursued. Professor Liebman is correct to note that the rule requiring federal habeas courts to stay their hands fell away in direct response to the Supreme Court's renunciation of the error-correction role it had previously fulfilled.[19]

But Professor Bator is closer to being right regarding the *timing* of the expansion of habeas jurisdiction. Professor Liebman dates the shift from direct review in the Supreme Court to de novo review in

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also Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1700–08 (1997).

[15] *See* Liebman, *supra* note 8, at 2072–78.

[16] *See id.* at 2080 ("[F]ollowing the certiorarification of the Court's direct appellate docket, the Court's inability to satisfy by itself the federal courts' statutory obligation to conduct review as of right, *according to those principles*, of the constitutionality of state detention thrust the obligation on the lower federal courts on habeas corpus." (emphasis in original)).

[17] *See infra* Part II.

[18] *See* Jordan M. Steiker, *Habeas Corpus*, ENCYC. OF CRIME AND JUSTICE (2002), http://www.encyclopedia.com/social-sciences-and-law/law/law/habeas-corpus.

[19] *See* Liebman, *supra* note 8, at 2073–77

the habeas courts to the Court's 1915 decision in *Frank v. Magnum*.[20] Although the first statute replacing (some of) the Court's mandatory writ of error review with discretionary writ of certiorari review was enacted in 1916, Professor Liebman argues that Frank responded to an unofficial "certiorarification" of direct review that preceded the formal certiorarification beginning in 1916.[21]

But, as discussed in Part II of this Article, the pre-*Brown* cases tell a somewhat different story. Well after the 1916 amendments to the Supreme Court's appellate jurisdiction, the Court continued to recite and apply the restrictive standards it had applied before the amendments.[22] As this Article shows, the cases demonstrate that, long after the Supreme Court's jurisdiction over state court judgments became formally discretionary, the Court continued to regard itself as the appropriate forum for review of state criminal convictions. The Court realized only gradually that it could not hope to perform an error-correction function, and only then did it finally abandon the pre-1916 limits on habeas review of state criminal convictions.[23]

In particular, this Article shows that the years between 1916 and 1953 were a transitional period characterized by disagreement among the Justices about the appropriate scope of habeas review. The Justices agreed that meaningful federal review of state criminal convictions was necessary, but they disagreed about whether such review should take place in the Supreme Court on direct review or in the lower federal courts via habeas corpus.[24] Some Justices believed strongly that, in the absence of exceptional circumstances, only the Supreme Court should undertake the sensitive task of reviewing state court convictions and potentially setting free a person whose conviction had been upheld by the highest state court. In the view of these Justices, the Court should continue to perform an error-correction function in exercising its discretionary certiorari jurisdiction over state criminal convictions. Other Justices believed that the lower federal courts were better situated to perform such

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20 *See id. See generally* Frank v. Magnum, 237 U.S. 309 (1915).

21 *See* Liebman, *supra* note 8, at 2075–77

22 *See infra* text accompanying notes 136–160.

23 *See infra* Part II.

24 *See id.*

review via habeas corpus.[25] The latter view gradually came to prevail as the Justices came to realize that they could no longer feasibly fulfill an error-correction function. *Brown v. Allen* confirmed this shift in 1953 by holding both that the habeas courts should no longer regard a denial of certiorari as reflecting the Court's views on the merits of a state criminal defendant's legal claims and that the habeas courts should review questions of law and mixed questions of law and fact de novo.[26]

Although the cases tend to support Professor Bator's story insofar as the timing of the expansion of habeas review is concerned, they also show that he was wrong about the reason for the restricted availability of habeas relief in the decades before the *Brown* decision. At no point did the Court relegate state prisoners to the state courts for the protection of their constitutional rights. The need for broad federal review of state criminal convictions was recognized throughout. The narrow scope of review in the decades after 1916 was based on the Court's continuing conviction that, despite the newly discretionary nature of its appellate jurisdiction, it alone should be the federal forum reviewing and possibly reversing state criminal convictions.[27] The loosening of the restrictions on the lower courts' exercise of their habeas jurisdiction was based on the Court's gradual realization that it could no longer hope to monitor state court decisions resulting in custody.[28] This realization led the Court to conclude that the writ of habeas corpus was the only effective means of preserving the constitutional rights of state prisoners.[29] Although some pre-*Brown* cases included language or reasoning foreshadowing the shift, the first clear articulation of the de novo standard came in *Brown v. Allen*.[30]

The pre-*Brown* history of habeas corpus has potentially important implications for current debates about the scope of habeas relief for state prisoners. In *Wright v. West*, Justice Thomas relied on Professor Bator's claim that *Brown*'s standard was aberrational

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[25] *See infra* Part II and text accompanying notes 221–44.

[26] *See* Brown v. Allen, 344 U.S. 443, 489–97, 507 (1953) (opinion of Frankfurter, J.).

[27] *See infra* text accompanying notes 148–58, 192–214.

[28] *See infra* text accompanying notes 221–44.

[29] *See id.*

[30] *See Brown*, 344 U.S. at 507 (opinion of Frankfurter, J.)

in urging a return to a more deferential standard.[31] Justice O'Connor, for her part, relied on Justice Brennan's history in arguing that any change in the standard should come from Congress.[32] The new understanding of the pre-*Brown* standard defended here exposes as unprecedented Justice Thomas' proposal to narrow the scope of habeas review without correspondingly broadening the availability of direct review in the Supreme Court.

In enacting AEDPA in 1996, Congress amended the statute governing habeas relief for state prisoners, and a slim majority of the Court in *Williams v. Taylor* held that Congress had adopted Justice Thomas' deferential habeas standard.[33] Specifically, the Court held that, if the prisoner's federal claim had been adjudicated on the merits in the state courts, the habeas court may not grant relief merely because the state court's decision was erroneous; it may grant relief only if the state court's error was unreasonable.[34] In other words, AEDPA (as interpreted in *Williams*[35]) replaces the de novo standard of review with a standard requiring the habeas courts to deny relief to state prisoners in custody pursuant to wrong but reasonable state court decisions.[36] If so, then AEDPA consigns erroneously convicted state prisoners to continued imprisonment (or even execution).

The long history of treating habeas as a forum-allocation device—as detailed in this Article—suggests an alternative understanding of AEDPA. AEDPA does not limit the Supreme Court's power to review and reverse wrong but reasonable state court decisions resulting in custody. Indeed, the statute's sponsors believed that Congress lacked the constitutional power to limit the Supreme

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[31] *See* Wright v. West, 505 U.S. 277, 285 (1992) (citing Bator, *supra* note 3, at 478–99).

[32] *See id.* at 305–06 (O'Connor, J., concurring in judgment).

[33] *See* Williams v. Taylor, 529 U.S. 362, 410–13 (2000).

[34] *See id.* at 412–13. *See also* Carlos M. Vázquez, AEDPA as Forum-Allocation Rule 101–02 (Jan. 18, 2017) (unpublished manuscript) (on file with author) [hereinafter Vázquez, AEDPA as Forum-Allocation Rule].

[35] *See Williams*, 529 U.S. at 390–91.

[36] *See id.* at 385. *See also* Jordan M. Steiker, *Habeas Corpus*, ENCYC. OF CRIME AND JUSTICE (2002), http://www.encyclopedia.com/social-sciences-and-law/law/law/habeas-corpus.

Court's appellate jurisdiction over state criminal convictions.[37] The Court's long-standing treatment of habeas and direct review as alternative mechanisms for providing the necessary federal review of state criminal convictions invites an interpretation of AEDPA as shifting back to the Supreme Court the responsibility for monitoring state court decisions and granting relief for wrong but reasonable state court convictions.[38]

At the same time, the Court's reasons for shifting the responsibility for monitoring state court convictions to the lower federal courts exposes the highly dysfunctional nature of AEDPA if understood as a forum-allocation device.[39] The reasons that drove that shift are just as applicable today as they were in 1953. The Court is in no better position to fulfill an error-correction role with respect to state criminal convictions today than it was then. If anything, allocating such a role to the Supreme Court would be even more dysfunctional today than it was in 1953.

I develop and critique the forum-allocation reading of AEDPA elsewhere.[40] This Article details the long history of treating habeas for state prisoners as allocating among the federal courts the power and responsibility for safeguarding the constitutional rights of persons convicted of crimes in state court. I show that, before *Williams*, de novo federal review of legal and mixed questions decided by the state courts in cases resulting in custody was always understood to be necessary and that, between 1916 and 1953, the debate was not about whether state prisoners' constitutional claims should be relegated to state court; it was instead about whether federal review should be undertaken in the Supreme Court or the lower federal courts. The Court eventually concluded that it could not hope to monitor state court compliance with the constitutional rights of state court criminal defendants and accordingly expanded the lower federal courts' power to do so via habeas.

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[37] 141 CONG. REC. S7833 (daily ed. June 7, 1995) (statement of Sen. Kyl) (introducing an amendment titled "Stopping Abuse of Federal Collateral Remedies" and stating that "it should go without saying that there is always a review in the U.S. Supreme Court from any decision of the highest court of a State. So there is ultimately still the potential for Federal review of a State court decision.").

[38] *See* Vázquez, AEDPA as Forum-Allocation Rule, *supra* note 34, at 101.

[39] *See id.* at 102.

[40] *See generally id.*

In Part I, I examine the period between the Founding and 1916, when Congress amended the statute governing the Supreme Court's jurisdiction over cases from the state courts, replacing its mandatory writ of error jurisdiction with discretionary writ of certiorari jurisdiction. Until 1867, the habeas jurisdiction of the lower federal courts did not generally extend to state prisoners.[41] During this period, state prisoners were entitled to de novo review in the Supreme Court of legal and mixed questions of federal law decided against them in the state courts.[42] Even after Congress extended the lower federal courts' habeas jurisdiction to state prisoners, the Court interpreted the jurisdiction narrowly, channeling such cases to the Supreme Court. During this period, the Court regarded direct review as the proper mechanism for ensuring state court protection of the constitutional rights of persons convicted of crimes in state court.

In Part II, the heart of the Article, I examine the period between 1916 and the Court's 1953 decision in *Brown v. Allen*. I show that this was a transitional one marked by disagreement among the Justices about whether the responsibility for monitoring state court decisions resulting in custody should be allocated to the Court itself or to the lower federal courts on habeas. The evolution of the Justices' views on this question is reflected mainly in the decisions that gradually rejected the doctrine that a prior denial of certiorari should be understood to reflect the Justices' views on the merits of the legal claims raised in the habeas petition. It is no accident that *Brown v. Allen*, the decision that all recognize as adopting a de novo standard of review of legal and mixed questions on habeas, was also the decision that made clear that a prior denial of certiorari deserved no weight in the habeas calculus.[43] The close link the Court perceived between the two issues reflects the Court's understanding of the forum-allocation function of habeas jurisdiction.

In Part III, I show that the Court continued to adhere to the de novo standard of review until the enactment of AEDPA in 1996. I review some of the limitations on habeas adopted by the Burger and Rehnquist Courts and show that, notwithstanding these limitations,

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[41] *See infra* text accompanying notes 57–59.

[42] *See infra* text accompanying notes 55–56.

[43] *See* Brown v. Allen, 344 U.S. 443, 489–97, 507 (1953) (opinion of Frankfurter, J.).

the Court continued to recognize that federal review of state court decisions resulting in custody was necessary to ensure that the state courts "toe[d] the constitutional mark."[44] If the Court continues to believe this, and if AEDPA bars the lower federal courts from granting habeas relief for some constitutional errors that otherwise would warrant reversal of the conviction, then the Court will need to rethink its current approach to granting direct review to state prisoners alleging constitutional violations.

I. THE 1789–1916 PERIOD

From the beginning of our history until after the Civil War, the federal courts generally lacked jurisdiction to grants writs of habeas corpus to persons in state custody.[45] After the Civil War, the habeas jurisdiction of the federal courts was extended to persons in state custody, but, as discussed below, the Court articulated and enforced extra-statutory rules according to which the federal courts were ordinarily to deny relief to persons who were being criminally tried or had been convicted in the state courts.[46] Nevertheless, during this entire period, state prisoners had a right of access to the federal courts for de novo review of questions of federal law and of application of such law to fact. State prisoners had access to the Supreme Court, whose jurisdiction over federal questions decided in the state courts against a federal right-holder was mandatory.[47] The extra-statutory limits on the lower federal courts' habeas jurisdiction were justified by the Court on forum-allocation grounds: the proper forum for reviewing state criminal convictions was the Supreme Court on direct review, not the lower federal courts on collateral review.[48]

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[44] Solem v. Stumes, 465 U.S. 638, 653 (1984) (Powell, J., concurring) (quoting Mackey v. United States, 401 U.S. 667, 687 (1971)) (internal quotation marks omitted).

[45] *See infra* text accompanying notes 57–59.

[46] *See Habeas Corpus Jurisdiction in the Federal Courts*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/jurisdiction_habeas.html (last visited Jan. 25, 2017). *See, e.g.*, *Ex Parte* Siebold, 100 U.S. 371, 375 (1879); *Ex Parte* Royall, 117 U.S. 241, 251–52 (1886); *In re* Frederich, 149 U.S. 70, 78 (1893).

[47] *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86. *See generally Habeas Corpus Jurisdiction in the Federal Courts*, *supra* note 46.

[48] *See infra* text accompanying notes 85–88.

The Founders agreed that the Constitution should provide for federal courts in order to ensure state compliance with federal law and to protect federal rights.[49] Some believed that the Constitution should establish federal courts to adjudicate federal law in the first instance.[50] Others believed that it would be sufficient to provide for Supreme Court review of state court decisions regarding federal law.[51] As a result of the well-known "Madisonian Compromise,"[52] the Constitution created a Supreme Court and gave it jurisdiction to review state court decisions on federal questions while also empowering Congress to create lower federal courts, if it desired, to hear federal claims in the first instance.[53] The Constitution's default mechanism for monitoring state court enforcement of federal law was thus Supreme Court review of state court decisions on federal questions.

The Constitution gave Congress the power to make exceptions to the Supreme Court's jurisdiction.[54] Nevertheless, the Judiciary Act of 1789 provided for mandatory Supreme Court review by writ of error of state court decisions in which an asserted federal right or privilege had been denied.[55] Thus, from the beginning, persons convicted of a crime in state court—like all litigants in the state courts—had a right to Supreme Court review of any federal claims or defenses they had raised that the state court had denied.[56]

Congress did not grant to the federal courts a general authority to grant habeas relief to state prisoners until after the Civil War.[57] The Judiciary Act of 1789 provided:

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[49] *See generally* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 6–7 (7th ed. 2015).

[50] *See id.* at 7–9.

[51] *See id.*

[52] *See id.* at 8.

[53] *See id.* at 18–19.

[54] U.S. CONST. art III, § 2, cl. 2.

[55] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

[56] *See, e.g.*, Cohens v. Virginia, 19 U.S. 264, 406–12, 415–16 (1821) (holding that Supreme Court review of such cases does not violate the Eleventh Amendment).

[57] Pursuant to amendments enacted in 1833 and 1842, the federal courts did have the authority to grant habeas relief (a) to persons in state or federal custody "for any act done or omitted in pursuance of a law of the United States, or of any order, process, or decree of any judge or court of the United States," and (b) to

> [t]hat writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.[58]

As a result of this proviso, the federal courts were empowered to grant habeas relief only to federal prisoners.[59] The Judiciary Act of 1789 thus entitled persons convicted of crimes in state court to federal review of their convictions, but allocated the responsibility of performing such review to the Supreme Court rather than the lower federal courts.

In 1867, Congress amended the Judiciary Act to authorize habeas relief "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States . . . ."[60] The amendment thus conferred jurisdiction on the federal courts to grant habeas relief to persons in either state or federal custody. The Supreme Court did not have occasion to interpret this provision until 1886,[61] however, as Congress famously repealed the section of the Act authorizing appeals to the Supreme Court of the lower federal courts' decisions under this Act.[62]

In *Ex parte Royall*, the first case to address the availability of federal habeas relief for state prisoners after Congress restored the Court's jurisdiction over such appeals, the Court addressed the relation between the lower federal courts' jurisdiction to entertain habeas petitions by persons in state custody and the Supreme Court's obligation to review federal questions arising in state court through writ of error.[63] *Royall* is best known for articulating what has since

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"subjects or citizens of foreign states, in custody under National or State authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations." *Ex parte* Yerger, 75 U.S. 85, 101–02 (1869).

[58] Judiciary Act of 1789 § 14.

[59] The federal courts could only issue writs of habeas corpus *ad testificandum* on behalf of persons in state custody.

[60] Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385 (1867).

[61] *See Ex parte* Royall, 117 U.S. 241, 245 (1886).

[62] *See Ex parte* McCardle, 74 U.S. 506, 514–15 (1868) (affirming constitutionality of repeal).

[63] *Ex parte* Royall, 117 U.S. at 252–53.

become known as the rule of exhaustion of state remedies.[64] The Court in *Royall* confirmed that the federal courts have the power under the 1867 statutes to grant habeas relief to persons in state custody who are restrained of their liberty in violation of the Constitution, but went on to hold that the courts have discretion as to the time and mode of exercising this power.[65] "That discretion," the Court held,

> should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.[66]

According to the Court, the federal courts should grant the writ immediately in "cases of urgency," such as those "involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations . . . ."[67] But, in the absence of "special circumstances requiring immediate action," the court has discretion to remit the petitioner to the state courts, which have an equal obligation to give effect to federal constitutional rights.[68] What the Court in *Royall* held to be within the courts' discretion morphed in later cases into a requirement to exhaust state court remedies, which today is a statutory requirement.[69]

After state remedies have been exhausted, the Court in *Royall* went on to state, the habeas court

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64 *See id. See generally* FALLON ET AL., *supra* note 49, at 1349–55.

65 *Ex parte Royall*, 117 U.S. at 251–53.

66 *Id*. at 251.

67 *Id.*

68 *Id.* at 253.

69 *See* 28 U.S.C. § 2254(c) (2006) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."); *Ex parte Royall,* 117 U.S. at 251–53.

> has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States.[70]

Again, however, what in *Royall* was left largely to the lower federal court's discretion morphed into a stricter requirement in later cases. As the Court put it in *In re Frederich*,

> the general rule and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a state court violates his rights under the Constitution or laws of the United States, to seek a review thereof by writ of error instead of resorting to the writ of *habeas corpus*.[71]

In *Royall*, the Court cited *Ex parte Bridges* as a case in which the court had found it appropriate for the federal court to grant habeas relief after exhaustion, rather than remit the petitioner to his writ of error.[72]

> Adverting to the argument that where a defendant has been regularly indicted, tried, and convicted in a State court, his only remedy was to carry the judgment to the State court of last resort, and thence by writ of error to this court, [Justice Bradley in Bridges] said: "This might be so if the proceeding in the State court was merely erroneous; but where it is

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[70] *Ex Parte Royall*, 117 U.S. at 253.

[71] *In re Frederich*, 149 U.S. at 78; *accord* Baker v. Grice, 169 U.S. 284, 290–91 (1898); Whitten v. Tomlinson, 160 U.S. 231, 242 (1896); *Ex parte* Fonda, 117 U.S. 516, 518 (1886); Duncan v. McCall, 139 U.S. 449, 460 (1891); Wood v. Brush, 140 U. S. 278, 289–90 (1891); Jugiro v. Brush, 140 U.S. 291, 295–97 (1891); Cook v. Hart, 146 U.S. 183, 195 (1892); New York v. Eno, 155 U.S. 89, 94 (1894); Pepke v. Cronan, 155 U.S. 100, 101 (1894); Bergemann v. Backer, 157 U.S. 655, 659 (1895).

[72] *Ex Parte Royall*, 117 U.S. at 253.

> void for want of jurisdiction, habeas corpus will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case."[73]

Bradley was referring to the distinction, often invoked during this period, "between an erroneous judgment, and one that is illegal or void . . . ."[74] As the Court put it in *Ex parte Siebold*,

> [t]he only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.[75]

The distinction between erroneous and void convictions was articulated in cases such as *Siebold*, which involved petitions for habeas corpus by persons in federal custody,[76] but the Court came to apply the distinction to habeas petitions by state prisoners.[77] In addition to the rendering court's lack of jurisdiction over the defendant or the subject matter, the Court came to recognize, as among the flaws that render a conviction void, the unconstitutionality of the statute that the petitioner was convicted of violating or of the sentence imposed.[78] The cases gradually expanding the types of errors that render a criminal conviction void appear to base that conclusion on the Court's evaluation of the importance of the right that was violated rather than any inherent characteristic of the state court's error.[79] Be that as it may, the permissible grounds for granting habeas relief during this period were narrower than the grounds for reversing a state court conviction on direct appeal.

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[73] *Id.*

[74] *Ex Parte* Siebold, 100 U.S. 371, 375 (1879).

[75] *Id.*

[76] *See generally id.* at 373–75.

[77] *See, e.g.*, *In re* Frederich, 149 U.S. 70, 70 (1893).

[78] See *Bator*, *supra* note 3, at 468.

[79] This is the position defended by Professor Liebman, who disputes Professor Bator's claim that habeas review was available only if the rendering court

Royall's citation of *Bridges* suggested that cases in which the state court judgment was void were among those in which remitting the prisoner to his writ of error was not appropriate.[80] Later cases, however, made clear that, except in cases of urgency, a petitioner would be left to his writ of error even in such cases.[81] As *Bridges* illustrates, the Court did occasionally uphold a grant of habeas relief to a state prisoner, but, as the turn of the century approached, the Court's insistence on the exclusivity of recourse to the writ of error grew more rigid,[82] rendering largely moot the theoretical availability of habeas to release state prisoners whose convictions were void.

Importantly, however, the Court's curtailment of habeas relief for state prisoners during this period did not mean that federal relief for erroneously convicted state prisoners was unavailable.[83] Such prisoners had a right to direct review of their convictions in the Supreme Court.[84] The cases limiting the availability of habeas relief when writ of error review was available were explained in forum-allocation terms. The Supreme Court was regarded as the more appropriate forum for the adjudication of such cases because of the sensitivity of the reversal of a state criminal conviction that had been upheld by the state's highest court:

> It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented.[85]

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lacked jurisdiction or if the petitioner was convicted under an unconstitutional law or received an unconstitutional sentence. *See* Liebman, *supra* note 8, at 2041–48.

80 *Ex Parte* Royall, 117 U.S. 241, 253 (1886).

81 *See, e.g.*, Baker v. Grice, 169 U.S. 284, 284 (1898).

82 *See* Liebman, *supra* note 8, at 2005, 2065–72.

83 *See id.* at 2070–73.

84 *See id.*

85 *Baker*, 169 U.S. at 291.

It was considered unseemly for a single lower federal court to set a state prisoner free and create "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."[86] Only review in the Supreme Court would be consistent with the dignity of the state courts and respect for their constitutional obligation to enforce federal rights.[87] Confirming the forum-allocation nature of these rules, the Court did allow the grant of habeas relief in the few cases in which writ of error review was unavailable.[88]

II. THE 1916–1953 PERIOD

Beginning in 1916, the Supreme Court's appellate jurisdiction over state court decisions denying federal rights began to shift from being mandatory to being discretionary.[89] In 1916, Congress for the first time made Supreme Court review of some state court decisions denying claims of federal rights discretionary.[90] Writ of error review was retained for state court decisions upholding "an authority exercised under any State" that had been challenged on federal grounds, as well as decisions upholding state statutes challenged on federal grounds or invalidating federal statutes or treaties on constitutional grounds.[91] In other cases raising federal questions, review was available only through the discretionary writ of certiorari.[92] Congress restricted the scope of writ of error review further in 1925, retaining such review only for decisions upholding state statutes challenged on constitutional grounds or invalidating federal statutes or treaties on constitutional grounds.[93]

Although some appeals of state criminal convictions continued to fall within the categories of cases subject to mandatory Supreme Court review under the 1916 and 1925 amendments to the Judiciary

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86 New York v. Eno, 155 U.S. 89, 94 (1894).

87 *See supra* note 71.

88 *See* Liebman, *supra* note 8, at 2073, 2076–81.

89 *See* FALLON ET AL., *supra* note 49, at 462.

90 *See id.*

91 *See id.* at 463 n.3.

92 *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1658 (2000).

93 Congress eliminated mandatory Supreme Court review of state courts decisions entirely in 1988. *See* FALLON ET AL., *supra* note 49, at 463.

Act, they constituted only a small portion of the state criminal convictions that fell within the Court's mandatory jurisdiction before 1916. Thus, after 1916, and especially after 1925, very few persons convicted of crimes in state court were entitled, as a statutory matter, to Supreme Court review of the federal issues that were decided against them by the state courts.

All agree that de novo review was available to state prisoners via habeas corpus at least as of the Supreme Court's decision in *Brown v. Allen* in 1953.[94] Thus, at least as of that date, federal habeas review filled the gap that was created by the elimination of mandatory Supreme Court review via writ of error. The situation during the decades before *Brown v. Allen* is a matter of some controversy, however.

The scope of federal habeas review in the decades before *Brown* has been the subject of fierce debate among modern scholars. The controversy is reflected in the highly charged exchange of dicta between Justice Thomas and Justice O'Connor in *Wright v. West*.[95] One side of this debate, whose version of the pre-*Brown* history was endorsed by Justice Thomas,[96] relies heavily on the analysis of Professor Paul M. Bator in his influential article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*.[97] This side contends that, before *Brown v. Allen*, habeas review was available only for claims that the state court lacked jurisdiction or denied a full and fair hearing for the constitutional claim.[98] The other side of the debate, endorsed by Justice O'Connor in *Wright v. West*,[99] was developed by Justice Brennan in *Fay v. Noia*,[100] and later defended by Professor Gary Peller.[101] This side contends that de novo review of constitutional claims was always available on habeas and that only the substantive protections provided by the Constitution in

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94 *See* Brown v. Allen, 344 U.S. 443, 507 (1953) (opinion of Frankfurter, J.). *See also* Bator, *supra* note 3, at 444–45.

95 *See* Wright v. West, 505 U.S. 277, 298–306 (O'Connor, J., concurring in judgment).

96 *See id.* at 285 (majority opinion).

97 *See generally* Bator, *supra* note 3.

98 *See Wright*, 505 U.S. at 285.

99 *See id.* at 304–05 (O'Connor, J., concurring in the judgment).

100 *See* Fay v. Noia, 372 U.S. 391, 426–35 (1963).

101 *See generally* Peller, *supra* note 7, at 581–82, 616.

criminal trials expanded over the years.[102] More recently, Professor James Liebman has argued that both Bator and Brennan/Peller got certain aspects of the history wrong and has defended an intermediate position.[103] Liebman maintains that the availability of habeas review of constitutional questions was limited when Supreme Court review of state criminal convictions was mandatory, but became plenary when Supreme Court review became discretionary.[104]

Justice Frankfurter understated matters when he wrote in 1947 that the availability of habeas relief in the federal courts during this period was "an untidy area" of the law.[105] Nevertheless, the cases do strongly support two interrelated theses. First, the period between 1916 and 1953 was a transitional period characterized by disagreement among the Justices about the appropriate scope of habeas review. Second, the debate among the Justices was not about the need for meaningful federal review of state criminal convictions, but about whether such review should take place in the Supreme Court on direct review or in the lower federal courts via habeas corpus. The need for meaningful review in some federal court was recognized on all sides; the disagreement was about the appropriate tribunal.

A. *The Debate About the Scope of Habeas Review Before Brown*

The opening salvo in the current debate about the scope of habeas review of state criminal convictions during this period came from Professor Bator.[106] Bator claimed that the basic rule during the Nineteenth Century was that habeas relief was available only to challenge the jurisdiction of the committing court, although he acknowledged that the concept of "jurisdiction" was stretched to include the constitutionality of the law under which the petitioner was convicted and the constitutionality of the sentence imposed,[107] and he acknowledged that some cases were difficult to reconcile with his claim.[108] According to Bator, the Court broadened the availability

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102 *See id.* at 690–91.
103 *See* Liebman, *supra* note 8, at 2093.
104 *See id.* at 2072–80, 2092–93.
105 Sunal v. Large, 332 U.S. 174, 184 (1947) (Frankfurter, J., dissenting).
106 *See generally* Bator, *supra* note 3.
107 *See id.* at 468, 483–84.
108 *See id.* at 470–71.

of habeas review in *Frank v. Magnum*,[109] holding that mob domination of the court and jury would be a cognizable claim on habeas if the state court system failed to cure the problem by offering an untainted hearing.[110] In his view, the Court in *Moore v. Dempsey*[111] applied this standard and concluded that habeas relief was required because the state had failed to provide an untainted hearing for the claim of mob domination.[112] According to Professor Bator, the Court in *Brown v. Allen* radically expanded the availability of habeas relief by holding for the first time that habeas was available for the relitigation of constitutional claims that had been fully and fairly litigated in the state courts.[113]

Justice Brennan and Professor Peller, for their part, argued that federal habeas jurisdiction was available for the relitigation of constitutional claims from the beginning.[114] The Nineteenth Century denials of relief during earlier periods merely reflected the narrow scope then given to substantive constitutional rights.[115] The apparent broadening of habeas relief reflected in *Moore* and then in *Brown* actually resulted from the progressive broadening of constitutional protections in the criminal sphere.[116]

Professor Liebman argues that both Bator and Peller get the history wrong in certain respects.[117] Liebman argues that the 1867 statute always authorized review of constitutional issues decided by the state courts, but only "where the writ is the only effective means of

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[109] *See id.* at 487, 523 (commenting on Frank v. Magnum, 237 U.S. 309, 329–36 (1915)).

[110] *See id.* at 486–87.

[111] Moore v. Dempsey, 261 U.S. 86, 90–92 (1923).

[112] *See* Bator, *supra* note 3, at 488–91 (commenting on *Moore*, 261 U.S. at 90–92).

[113] *See id.* at 500–01.

[114] *See* Peller, *supra* note 7, at 581–82, 662–63. *See also* Fay v. Noia, 372 U.S. 391, 426 (1963) ("Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings.").

[115] *See* Peller, *supra* note 7, at 616–22.

[116] *See id.* at 643–49.

[117] Liebman, *supra* note 8, at 2093.

preserving his rights."[118] During the Nineteenth Century, habeas was almost never necessary for this purpose, as any person convicted in the state courts had a right to Supreme Court review of any federal questions decided against him by the state court.[119] Thus, the Court during this period established that federal habeas corpus was not available as a substitute for writ of error review, holding that the writ of error was the exclusive remedy.[120] But, according to Liebman, the Court abandoned its rule treating writ of error review as exclusive in the early Twentieth Century when its mandatory writ of error jurisdiction came to be replaced by discretionary certiorari jurisdiction.[121]

The replacement of mandatory review with discretionary review happened officially with the enactment of legislation amending the statutes governing the Supreme Court's appellate jurisdiction in 1916 and 1925,[122] but Professor Liebman claims that the change began to occur "unofficially" shortly before that.[123] Thus, he explains *Frank v. Magnum*'s failure to rely on the exclusivity of writ of error review in 1915 as resulting from the unofficial "certiorarification" of the Court's appellate jurisdiction,[124] and he argues that the *Moore v. Dempsey* decision in 1923 was based on the statutory shift to certiorari review.[125] The different outcomes in *Frank* and *Moore*, according to Liebman, are attributable to their differing conceptions of the mob domination question.[126] In *Frank*, the question was treated as one of fact, as to which de novo habeas review does not extend;[127] in *Moore*, the issue was treated as a mixed question subject to de novo review.[128] In Liebman's view, de novo relitigation of legal and

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[118] *Id.* at 2055 (quoting Waley v. Johnston, 316 U.S. 101, 105 (1943)).

[119] *See generally id.* at 2068–73.

[120] *See* Tinsley v. Anderson, 171 U.S. 101, 106 (1898). *See also supra* Part I.

[121] *See* Liebman, *supra* note 8, at 2075.

[122] *See id.*

[123] *See id.* at 2077–78.

[124] *See id*. Professor Liebman was referring to the Court's practice of dismissing writs of error summarily if they did not present a substantial federal question. *See id.*

[125] *See id.*

[126] *See id.* at 2078–81.

[127] *See generally* Frank v. Mangum, 237 U.S. 309 (1915).

[128] Liebman, *supra* note 8, at 2078–81; *see generally* Moore v. Dempsey, 261 U.S. 86 (1923).

mixed questions on habeas has clearly been available since writ of error review was replaced by certiorari review.[129] The only significant change between *Moore* and *Brown*, in his view, was the increase in the number of federal constitutional rights applicable in state criminal proceedings.[130]

Professors Bator and Peller both acknowledge that some of the Court's cases are in tension with their theories, as did Justice Brennan.[131] Their disagreement was thus about the overall thrust of the law during this period.[132] Professor Liebman too recognizes that some of the cases are difficult to reconcile with his theory.[133] In particular, he recognizes that the Court took "time to come to grips with the fact that the certioratification of its direct appeal docket made the *Royall* compromise untenable," and that, "[a]lthough *Frank* and especially *Moore* adumbrated the Court's eventual resolution, only *Brown* forthrightly adopted it . . . ."[134] As the cases discussed below show, however, *Brown* was not a belated recognition of a change in the Court's direct review that had occurred many years earlier. Rather, the pre-*Brown* cases reflected the continued belief by the Court

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[129] *See id.* at 2075–81.

[130] *See id.* at 2081–83.

[131] Professor Bator admitted that the Court gave no "consideration to the reaches and purposes of the habeas jurisdiction" between *Frank* and *Brown* and that "some opinions [] could be taken to intimate that the writ automatically reaches the merits of all federal constitutional questions." Bator, *supra* note 3, at 496–97. Justice Brennan conceded that the Court did not hold to an "unwavering line in its conclusions as to the availability of the Great Writ," and that the availability of writ of error review prior to 1916 was "a powerful influence against the allowance of [habeas review for] . . . state prisoners . . . ." Fay v. Noia, 372 U.S. 391, 411–13 (1963). Finally, in examining how denials of certiorari foreclosed habeas review of state-prisoner claims between *Frank* and *Brown*, Professor Peller explains that "*Hawk* and its progeny invited the federal habeas courts to give substantive weight to the Supreme Court's denial of certiorari," but that the lower courts at the time either "gave no weight to the Court's denial[s]" or were in fact deferring to the Supreme Court, rather than the state courts. Peller, *supra* note 7, at 660–61.

[132] *See* Peller, *supra* note 7, at 662–63.

[133] *See* Liebman, *supra* note 8, at 2083 (noting that, although "some pre-*Brown* cases assumed or concluded that the Court's denial of certiorari did not supply the statutorily mandated review as of right . . . [o]ther decisions did give the denial of certiorari effect . . . .").

[134] *Id.*

(or some Justices), long after the Court had adopted a highly discretionary approach reviewing state court decisions on other matters, that the Supreme Court had a duty to review the constitutional claims of persons convicted of crimes in state court.

Professor Liebman is correct in arguing that the federal courts' habeas jurisdiction expanded to fill the gap in federal review left by the certiorarification of the Supreme Court's appellate jurisdiction.[135] But the cases show that this certiorarification took considerably longer to take hold with respect to state court decisions resulting in criminal convictions than in other cases. Well after 1916, a majority of Justices continued to adhere to the Court's pre-1916 view that the sensitive task of reviewing state court convictions and possibly releasing a state prisoner whose conviction had been affirmed by the highest state courts was a task solely for the Supreme Court itself to perform. Only when the Court came to realize that it could no longer hope to fulfill this error-correction role did the Court definitively abandon the pre-1916 preference for direct review as the exclusive mechanism for reviewing state court convictions. The Court wavered on this point in the years immediately preceding *Brown*. The Court's definitive abandonment of its insistence on direct review as the preferred mechanism for reviewing state court convictions is reflected in its holding in *Brown* that denials of certiorari do not reflect the Justices' views on the merits of the petitioners' federal claims. The Court's holding in *Brown* that habeas courts should apply a de novo standard in deciding questions of law and mixed questions of law and fact was directly related to its holding that the Court's denial of certiorari should be given no weight by federal courts adjudicating habeas petitions.

B. *The Court's Gradual Expansion of Habeas Review Between 1916 and 1953*

Professor Liebman is clearly right to note that habeas relief was generally unavailable when a state prisoner had a right to direct review in the Supreme Court via writ of error. He also convincingly shows that, after the shift from mandatory to discretionary direct review, the Court abandoned pre-1916 limits on the availability of ha-

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[135] *See* Liebman, *supra* note 8, at 2083, 2092.

beas relief in direct response to the more limited availability of direct review of state criminal convictions in the Supreme Court. But this shift did not occur on or around 1916. The shift was more gradual and only completed with the *Brown* decision in 1953.

1. THE COURT'S CONTINUED APPLICATION OF PRE-1916 LIMITS

In the early post-1916 cases, the Court continued to invoke and apply the proposition that habeas relief is available only if the state court lacked jurisdiction or if for other reasons its judgment was void. In *Knewal v. Egan*, for example, the Court wrote that "[i]t is the settled rule of this court that habeas corpus calls in question only the jurisdiction of the court whose judgment is challenged."[136] As late as 1938, the Court was continuing to recite this limit on habeas relief. Thus, in *Johnson v. Zerbst*, the Court explained that "habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and 'the writ of habeas corpus cannot be used as a writ of error.'"[137]

At the same time, the Court expanded the concept of jurisdictional errors to include errors that are not jurisdictional in any straightforward sense. Thus, in *Johnson v. Zerbst*, the Court concluded that a violation of the Sixth Amendment right to counsel during the course of a trial "stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty."[138] The Court's characterization of this defect as a jurisdictional one appears to have followed, in the Court's analysis, from its view that the denial of habeas relief for this type of error would have left the victim of a constitutional error remediless: "To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice."[139] The Court appears to have concluded that any violation of constitutional rights was a "jurisdictional" defect warranting habeas relief, reasoning that, "[s]ince the

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[136] *See* Knewel v. Egan, 268 U.S. 442, 445 (1925) (citing, *inter alia*, *Frank*, 237 U.S. at 327).

[137] Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (citing, *inter alia*, *Knewal*, 268 U.S. 442) (quoting Woolsey v. Best, 299 U.S. 1, 2 (1936)).

[138] *Id.* at 468.

[139] *Id.* at 467 (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."[140] That the Court had reached this understanding of a "jurisdictional" defect, and thus of the available scope of habeas relief, is confirmed by its decision the following term in *Bowen v. Johnston*.[141] After again reciting that "[t]he scope of review on habeas corpus is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged,"[142] the Court went on to state: "But if it be found that the court had no jurisdiction to try the petitioner, *or that in its proceedings his constitutional rights have been denied*, the remedy of habeas corpus is available."[143]

The Court abandoned the "jurisdictional" limitation with respect to claims of constitutional error a few years later in *Waley v. Johnston*. The Court stated:

> [T]he use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.[144]

Professor Liebman argues that this had been the rule all along.[145] State court convictions infected with constitutional error had always been understood to be "void," but, when the Supreme Court's appellate jurisdiction over state court decisions was mandatory, habeas

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[140] *Id.* at 467.

[141] *See* Bowen v. Johnston, 306 U.S. 19, 24 (1939).

[142] *Id*. at 23 (citing, *inter alia*, *Knewal*, 268 U.S. at 445).

[143] *Id.* at 24 (citing, *inter alia*, Moore v. Dempsey, 261 U.S. 86, 91 (1923); *Johnson*, 304 U.S. at 467) (emphasis added).

[144] Waley v. Johnston, 316 U.S. 101, 104–05 (1943).

[145] *See* Liebman, *supra* note 8, at 2055.

review was not "the only effective means of preserving [the prisoner's] rights."[146] When the Supreme Court's jurisdiction became discretionary, he argues, this rationale for denying habeas relief evaporated and habeas relief became widely available.[147]

The cases discussed above, however, indicate that the "jurisdictional" category came to encompass constitutional errors only gradually. The demise of the preference for direct review of state criminal convictions also occurred more gradually. Indeed, the Court in *Waley* itself hinted at this latter limitation when it noted that habeas relief was appropriate in the case because "[t]he facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal."[148] This qualification suggests the Court's continued adherence to the belief that habeas should not be used as a substitute for direct review in the Supreme Court.

Earlier post-1916 cases are more explicit in asserting the exclusivity of direct review, even in cases that did not appear to fall within the scope of the Court's narrowed mandatory jurisdiction.[149] Thus, in *Craig v. Hecht*, decided in 1923, the Court affirmed the denial of habeas relief on the ground that "[t]he Circuit Court of Appeals correctly applied the well-established general rule that a writ of habeas corpus cannot be utilized for the purpose of proceedings in error."[150] And in *Goto v. Lane*, decided the following year, the Court affirmed the denial of habeas relief on the ground that:

> If [the court in which the petitioner was convicted] erred in determining [federal law], its judgment was not for that reason void . . . but subject to correction in regular course on writ of error. If the questions presented involved the application of constitutional principles, that alone did not alter the rule. And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse and thereby lost the opportunity for such a review, that

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146 *See Waley*, 316 U.S. at 105.

147 *See* Liebman, *supra* note 8, at 2055–57, 2075–83.

148 *Waley*, 316 U.S. at 104.

149 *See, e.g.*, Craig v. Hecht, 263 U.S. 255, 277 (1923); Goto v. Lane, 265 U.S. 393, 402 (1924).

150 *Craig*, 263 U.S. at 277.

> gave no right to resort to habeas corpus as a substitute.[151]

In *United States ex rel. Kennedy v. Tyler*, decided in 1925, the Court wrote:

> In so far as [the petitioner's claims] involve treaty or constitutional rights, [the state] courts are as competent as the federal courts to decide them. In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against any adverse decision involving a denial of a federal right properly asserted by him.[152]

As late as the early 1940's, the lower federal courts understood the Supreme Court's doctrine on this question to be that "[w]hen [a state prisoner] has exhausted the judicial remedies afforded by the State and has secured a decision from its highest court, his sole recourse will be to invoke the authority of the Supreme Court of the United States 'to protect . . . against any adverse decision involving a denial of a federal right properly asserted . . . .'"[153]

> [I]n view of the delicate question of interference by inferior Federal courts with the judgment of the courts of a sovereign state of the Union which is presented by an application [for habeas corpus], it appears to be the approved practice that if such an application is to be presented after exhaustion of the State judicial remedies, it should be made directly to the Supreme Court of the United States.[154]

The Supreme Court addressed the issue in *Ex parte Hawk*, in 1944, citing the foregoing lower court cases and others to the same

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[151] *Goto*, 265 U.S. at 402 (1924) (internal citations omitted).

[152] United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13, 17 (1925).

[153] Hawk v. Olson, 130 F.2d 910, 912 (8th Cir. 1942) (quoting *Kennedy*, 269 U.S. at 17).

[154] Kramer v. Nevada, 122 F.2d 417, 419 (9th Cir. 1941).

effect, apparently with approval.[155] The Court stated that, "[w]here the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated."[156] The Court did qualify this rule:

> [W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, a federal court should entertain his petition for habeas corpus, else he would be remediless.[157]

These exceptions appear to align with Professor Bator's view of the limited nature of federal habeas relief before *Brown*.[158]

These cases are thus in tension with Professor Liebman's claim that habeas review of constitutional issues became generally available at the time of, and as a result of, the certiorarification of the Supreme Court's appellate jurisdiction just before 1916.[159] Even well after the Court's mandatory review by writ of error was replaced by discretionary certiorari review, the Court continued to express the view that review of state criminal convictions should ordinarily occur in the Supreme Court on direct review rather than on collateral review through habeas corpus.[160]

Nevertheless, the cases support a forum-allocation understanding of habeas jurisdiction. As shown below, the Court determined the availability of habeas jurisdiction based on its views regarding the proper federal forum for reviewing state criminal convictions.[161] The limitations on the availability of habeas relief during this period

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155 *Ex parte Hawk*, 321 U.S. 114, 116–17 (1944).

156 *Id.* at 118.

157 *Id.*

158 *See* Bator, *supra* note 3, at 463.

159 *See* Liebman, *supra* note 8, at 2075–80.

160 *See, e.g.*, Craig v. Hecht, 263 U.S. 255, 277 (1923); *see also* Goto v. Lane, 265 U.S. 393, 402 (1924).

161 *See infra* Part II.B.b.

did not reflect the view that state prisoners convicted as a result of constitutional error should nevertheless remain in prison. The Court's continuing insistence that review of state criminal convictions take place in the Supreme Court reflected its view that the Supreme Court itself was the appropriate forum for monitoring state court decisions resulting in custody, and that the Court remained capable of doing so. Gradually, as the constitutional rights of prisoners expanded and the number of cases increased, the Court reached the conclusion that it could no longer fulfill that role.[162] It is no coincidence that *Brown v. Allen*, the case that all agree affirmed the right to relitigate constitutional issues through habeas, was also the case in which the Court for the first time definitely held that a federal habeas court should give no weight to the Supreme Court's previous denial of state prisoner's petition for certiorari.[163]

Today, the Supreme Court grants a minuscule proportion of the petitions for certiorari presented to it.[164] It selects cases presenting important, broadly applicable issues in which the lower courts or the state courts have reached conflicting decisions.[165] A petition arguing that the court below has made a case-specific constitutional error will rarely, if ever, be granted.[166] If the Court had applied that standard during the years immediately following 1916, then many convictions vitiated by constitutional error would have remained unremedied as a result of the Court's insistence that such convictions should ordinarily be reviewed by the Court itself or not at all. But, the Court did not apply today's certiorari standard to certiorari petitions by state prisoners until well after 1916.[167]

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[162] *See id.* at 2080.

[163] *See* Brown v. Allen, 344 U.S. 443, 489–97, 507 (1953).

[164] *See, e.g.*, *The Statistics: The Supreme Court 2014 Term*, 129 HARV. L. REV. 381, 389 (2015) (noting that in 2014 the Court only granted review for one percent of the petitions before it).

[165] *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 239 (10th ed. 2013). *See also* SUP. CT. R. 10.

[166] *See id.* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") (internal quotation marks removed).

[167] *See id.*

2. THE COURT'S EARLY APPROACH TO CERTIORARI

The main advocate of limiting writ of error review and expanding certiorari review was the Supreme Court itself, principally Chief Justice Taft.[168] In advocating this change, the Justices assured Congress that it would exercise its discretion with particular attention to its responsibility to protect constitutional rights.[169] As far as the Justices' statements to Congress revealed, Professor Hartnett writes,

> the only use envisioned in constitutional cases was as a way of quickly dealing with claims that were either frivolous or plainly governed by precedent—that is, in cases where the lower court was obviously correct and summary affirmance would be appropriate. Taft expressed confidence that in no case "would a constitutional question of any real merit or doubt escape our review by the method of certiorari," explaining that the restrictions were merely "to keep out constitutional questions that have really no weight or have been fully decided in previous cases and that have only been projected into the case for the purpose of securing delay or a reconsideration of questions the decision of which has already become settled law."[170]

Consistent with this legislative history, the rule the Court adopted at the time to guide the exercise of its discretion with respect to certiorari differed substantially from the present rule.[171] Today's rule reflects the Court's focus on ensuring uniformity in the interpretation of federal law.[172] The factors it takes into account in granting certiorari include only the existence of a conflict in the interpretation of federal law among the courts of appeals or the state courts

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168 *See* Hartnett, *supra* note 92, at 1660–72, 1666 n.101, 1715.

169 *See id.* at 1715.

170 *Id.*

171 *Compare* SUP. CT. R. 10 *with* William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 75 YALE L.J. 1,3 n.4 (1925).

172 *See* SUP. CT. R. 10.

and the importance of the legal question.[173] The current rule also makes clear that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."[174]

The 1925 version of the rule differed in important respects. According to the earlier rule, the "reasons which will be considered" in determining whether to grant certiorari included that "a state court has decided a federal question of substance . . . in a way probably not in accord with applicable decisions of this court."[175] As written, the rule suggests that the Court at that time understood its role, with respect to cases coming from the state courts, to include an error-correction function. This would be consistent with the assurances the Chief Justice provided to Congress in advocating the shift to certiorari review.[176] Under this standard, a denial of certiorari in a case coming from the state courts might be understood to reflect a determination by at least six Justices that the underlying constitutional question had—in the Chief Justice's words—"no weight" or had been "projected into the case for the purpose of securing delay or a

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[173] *See* SHAPIRO ET AL., *supra* note 165, at 239. Rule 10 lists the following three factors:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10.

[174] SUP. CT. R. 10.

[175] *See* SUP. CT. R. 35.5(a), 266 U.S. 681 (1924). *See also* Taft, *supra* note 171, at 3 n.4.

[176] *See supra* text accompanying note 170.

reconsideration of questions the decision of which has already become settled law."[177]

Whether the Court in fact exercised its discretion in this way with respect to requests for review from persons convicted of crimes in state court is difficult to demonstrate directly. Since the Court does not explain its reasons for denying certiorari, it is difficult to establish definitively that such denials were tantamount to a determination on the merits that the underlying claim lacked merit. Nevertheless, there is indirect support in the Justices' opinions for the proposition that, at least in the early years after the shift from mandatory to discretionary jurisdiction, the Justices so understood its denials of certiorari to petitions filed by state prisoners.

As noted above, the early cases, up to and including *Ex parte Hawk*, reveal that, in the absence of exceptional urgency warranting a departure from the usual exhaustion rules, the Court insisted that state prisoners seek direct review in the Supreme Court and that, if the Court denied review, a lower federal court should ordinarily deny a subsequent habeas petition.[178] In support of this procedure, the Court cited pre-1916 cases that, in turn, made clear that the exclusivity of writ of error review was not just a matter of judicial efficiency.[179] The rule was also based on the notion that reversing a state criminal conviction that had been upheld by the states' highest courts was a delicate matter.[180] It was thought to be unseemly for a single federal judge to set at liberty a duly convicted prisoner who had received several layers of review in the state courts.[181] The Court's forum-allocation rule was thus based on the conviction that, of the two available avenues for reviewing state criminal convictions, direct review in the Supreme Court was superior from the standpoint of federal-state relations and respect for the dignity of state courts, and that the lower federal courts should accordingly grant habeas relief only in cases of peculiar urgency.[182]

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177 *See* Hartnett, *supra* note 92, at 1731 n.488.

178 *See supra* text accompanying notes 148–160.

179 *See*, *e.g.*, United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13, 17 (1925) (citing, inter alia, Baker v. Grice, 169 U.S. 284, 291 (1898)).

180 *See Baker*, 169 U.S. at 291; Cook v. Hart, 146 U.S. 183, 195 (1892).

181 *See supra* notes 84–87, 148–60.

182 *See id.*

The Court's continuing invocation of this preference after 1916 means that the Court believed that this rationale retained force despite the shift to discretionary review. This choice between two remedies available in federal court makes sense only if direct review offered a realistic avenue for correcting the errors that would otherwise be corrected in the lower federal courts on habeas. The idea was that it was the Supreme Court's obligation to monitor state court compliance with federal law in criminal cases. And because "ought" presupposes "can," the Court's adherence to this allocation of jurisdiction reflects the Justices' views that fulfilling this role was possible for the Court.

3. POST-*HAWK* EROSION OF PREFERENCE FOR DIRECT REVIEW

The Court's decisions after *Ex parte Hawk* show the gradual erosion of the pre-1916 limits on habeas review. At the same time, these cases provide additional support for the claim that these limits were continuously applied well into the 1916–1953 period. The post-*Hawk* decisions wavered on whether a request for direct review in the Supreme Court should be a pre-requisite for seeking habeas corpus in the lower federal courts. Moreover, the opinions in these cases show that the Justices who insisted on that requirement did so out of a belief, based on the dignitary concerns mentioned earlier, that reviewing a state conviction and possibly releasing a state prisoner was a role for the Supreme Court and not the lower federal courts. The cases show that, until at least the mid-1940s, these Justices believed the Supreme Court had a "duty of passing upon charges of state violations of federal constitutional rights" in such cases.[183]

Gradually, the contrary view came to prevail. The debate between the Justices in these later cases sheds useful light on the rationale supporting the narrower availability of habeas review in the earlier period, as well as the rationale for dropping those limits. The limits were dropped because the Justices came to recognize that, in light of the Supreme Court's increasing caseload, the Court could no longer hope to fulfill an error correction function, even in the subcategory of cases consisting of requests for direct review by state prisoners.[184]

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[183] Darr v. Burford, 339 U.S. 200, 216 (1950).

[184] *See infra* text accompanying notes 228–243.

Four years after *Ex parte Hawk*, the Court in *Wade v. Mayo* relaxed the requirement that a habeas petitioner must seek direct review of his claims in the Supreme Court. The majority quoted the relevant passage from *Ex parte Hawk*, and agreed that:

> Considerations of prompt and orderly procedure in the federal courts will often dictate that direct review be sought first in this Court. And where a prisoner has neglected to seek that review, such failure may be a relevant consideration for a district court in determining whether to entertain a subsequent *habeas corpus* petition.[185]

Nevertheless, the Court declined to adopt a "hard and fast rule" requiring a prior request for direct review in the Supreme Court.[186] The majority cited "the volume of this Court's business,"[187] and said that "[m]atters relevant to the exercise of our certiorari discretion frequently result in denials of the writ without any consideration of the merits."[188] "Where it is apparent or even possible" that the Court would deny the petition for certiorari for reasons that do not reflect its views of the merits of the underlying claim, "failure to file a petition should not prejudice the right to file a *habeas corpus* application in a district court."[189] The Court concluded that "it [was] reasonably certain" that the petition for certiorari had been denied because of doubts about whether the state court judgment rested on an adequate state ground.[190]

The majority's analysis shows that even the Justices in favor of relaxing the requirement understood that a denial of certiorari in cases seeking review of state court convictions sometimes reflected the Justices' views of the merits, and they appeared to require a showing of at least a possibility that such was not the case. But these Justices were willing to relax the requirement because, by this time, in their view, denials of certiorari "frequently" did not reflect the

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185 Wade v. Mayo, 334 U.S. 672, 680 (1948).
186 *See id.*
187 *Id.*
188 *Id.*
189 *Id.* at 680–81.
190 *Id.* at 682.

Justices' views of the merits and, in light of the volume of the Court's business, "[g]ood judicial administration is not furthered by insistence on futile procedure."[191]

Writing for four Justices, Justice Reed strenuously dissented.[192] According to the dissenting Justices, "wise administration commands that this Court be asked, by appeal or certiorari, to pass upon the federal constitutional questions presented. It is only by such a procedure that the validity of state criminal conviction can be expeditiously and finally adjudicated."[193] Justice Reed elaborated:

> [W]henever a prisoner brings a petition for a writ of habeas corpus in the federal courts challenging collaterally a conviction in the state courts and asking release from state custody, serious questions of the relation between the federal and state judicial structures are raised. "It is an exceedingly delicate jurisdiction given to the federal courts, by which a person under an indictment in a state court, and subject to its laws, may, by a decision of a single judge of a federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the state and finally discharged therefrom . . . ." Respect for the theory and practice of our dual system government requires that federal courts intervene by habeas corpus in state criminal prosecutions only in exceptional circumstances.[194]

Justice Reed referred to appeal and certiorari as "the normal paths of review" which, when "open to correct federal constitutional errors in state criminal proceedings," bear upon the desirability of limiting the habeas corpus power of federal courts in respect of state criminal prosecutions.[195]

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[191] *Id.* at 681.

[192] *See id.* at 684–98 (Reed, J., dissenting).

[193] *Id.* at 687 (Reed, J., dissenting).

[194] *Id.* at 691 (Reed, J., dissenting) (quoting Baker v. Grice, 169 U.S. 284, 291 (1898)).

[195] *Id.* at 692 (Reed, J., dissenting). *See also id.* at 694 ("Where there is a denial of constitutional rights by the highest court of a state, a remedy exists by direct review in this Court.").

> It is not seemly that years after a conviction, when time has dulled memories, when death has stilled tongues, when records are unavailable, convicted felons, unburdened by any handicap to a normal presentation of any claim of unfairness in their trial, should be permitted to attack their sentences collaterally by habeas corpus because of errors, known to them at the time of trial.[196]

Although Justice Reed did not directly state that a denial of certiorari ordinarily reflects the Justices' view that the petitioner's claims are unmeritorious, this appears to be the implication of his insistence that the availability of certiorari review—the "normal" "remedy" for constitutional errors in the state courts—should ordinarily preclude habeas relief,[197] despite his agreement that the writ of habeas corpus is "a proper procedure 'to safeguard the liberty of all persons . . . against infringement through any violation of the Constitution.'"[198] That this was his view is confirmed by his written opinion for the majority in *Darr v. Burford*, discussed below.[199]

Between the decisions in *Wade v. Mayo* and *Darr v. Burford*, Congress amended the habeas statute.[200] The amendment codified the exhaustion rule of *Ex parte Hawk* in the following terms:

> Sec. 2254. State custody; remedies in State courts. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an ab-

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196 *Id.* at 695 (Reed, J., dissenting).

197 *See id.* at 690–92.

198 *Id.* at 690 (Reed, J., dissenting) (quoting Frank v. Magnum, 237 U.S. 309, 331 (1915)).

199 *See generally* Darr v. Burford, 339 U.S. 200 (1950).

200 *See generally* 28 U.S.C. § 2254 (1952) (originally enacted as the Act of June 25, 1948, ch. 646, 62 Stat. 967) (current version at 28 U.S.C. § 2254 (2016)). Congress enacted the amendment just two days after the decision in *Wade v. Mayo* came down, so Congress did not take the decision into account in its deliberations.

> sence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.[201]

Although the amendment did not refer to direct review in the Supreme Court, the chairman of the committee appointed by the Judicial Conference of the United States to propose the amendment ultimately adopted, Judge John Parker of the Fourth Circuit, explained that its primary purpose was to ensure that review of state criminal convictions should take place solely in the Supreme Court except in exceptional circumstances:

> The thing in mind in the drafting of this section was to provide that review of state court action be had so far as possible only by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by the lower federal courts, whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction.[202]

The amendment accomplished this goal through its final clause:

> The effect of this last provision is to eliminate, for all practical purposes, the right to apply to the lower federal courts for habeas corpus in all states in which successive applications may be made for habeas corpus to the state courts; for, in all such states, the applicant has the right, notwithstanding the denial of prior applications, to apply again to the state courts for habeas corpus and to have action upon such later

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[201] *Id.* (current version at 28 U.S.C. § 2254 (2016)).

[202] Hon. John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176 (1948).

> application reviewed by the Supreme Court of the United States on application for certiorari.[203]

According to Judge Parker, the holding of *Wade v. Mayo* would now "be in the teeth of" the habeas statute.[204] As Parker described the effect of the amendment,

> [t]here is preserved in full the right of persons imprisoned under judgments of state and federal courts to ask release on the ground that they have been denied the sort of trial guaranteed by the Constitution; but effective provision is made against the unseemly incidents which have arisen in the assertion of the right . . . .[T]here should be no more cases where proceedings of state courts, affirmed by the highest courts of the state, with denial of certiorari by the Supreme Court of the United States, will be reviewed by federal circuit or district judges.[205]

Judge Parker did not expressly state that the amendment presupposed that Supreme Court denials of certiorari reflected the Justices' view that the underlying claims were unmeritorious, but that is a fair inference from his statement that the amendment would avoid the "unseemly conflicts of jurisdiction which have arisen under recent habeas corpus decisions, *without in anywise impairing the rights which it was the purpose of those decisions to protect*."[206]

The Court relied in part on this amendment, and quoted Judge Parker's article at length, when it reversed *Wade v. Mayo* in *Darr v. Burford* and reimposed a rigid requirement of prior request for Supreme Court review via certiorari (in the absence of exceptional circumstances warranting a departure from the exhaustion requirement).[207] Justice Reed's opinion for the Court in *Darr* explained the theory underlying the rule in greater depth.[208] Again, Justice Reed

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203 *Id*.
204 *Id.* at 178.
205 *Id.*
206 *Id.* (emphasis supplied).
207 *Darr*, 339 U.S. at 210–14, 212–13 n.34.
208 *See id.* at 206–07.

quoted *Brice v. Grice* regarding the "exceedingly delicate jurisdiction" by which a single federal judge is empowered to release a state prisoner,[209] adding that "[t]he jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a State in which the constitutional rights of a prisoner could have been claimed . . . ."[210] For this reason,

> It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court.[211]

The Court referred to "[t]he responsibility to intervene in state criminal matters," which "rests primarily upon this Court,"[212] explaining that state prisoners should be required to seek direct review because "[t]he opportunity to meet that constitutional responsibility should be afforded."[213] Justice Reed also referred to the Supreme Court's "*duty* of passing upon charges of state violations of federal constitutional rights."[214] If the Justices have a "responsibility" and a "duty" to pass upon constitutional questions that arise in state criminal cases, and if that is the basis for limiting the discretion of the lower federal courts from doing so, then the Court's disposition of petitions for certiorari by state prisoners must reflect the Justices' views on the underlying merits of their claims.

By the time of *Darr v. Burford*, it is likely that these views were those of a minority of the Court. Justice Reed purported to be leaving open the question of "what effect the lower federal courts should accord a denial of certiorari by this Court when the state prisoner

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209 *Id.* at 206 (quoting Baker v. Grice, 169 U.S. 284, 291 (1898)).

210 *Id*. at 207 (quoting Markuson v. Boucher, 175 U.S. 184, 187 (1899)).

211 *Id*. at 217. *See also id.* at 216 ("It is this Court which ordinarily should reverse state court judgments concerning local criminal administration.").

212 *Id.* at 216.

213 *Id*.

214 *Id.* (emphasis added).

later applies for federal habeas corpus."[215] Justice Frankfurter's dissent understood Reed to be taking the position that the lower courts should treat a denial of certiorari as a decision on the merits.[216] Based on the excerpts from Reed's opinion quoted above, Frankfurter's reading of Reed's opinion was well grounded. Justice Reed's denial of Frankfurter's characterization of his views was only partial: he conceded that a denial of certiorari might reflect doubts about whether the underlying decision rested on adequate state grounds, and suggested that the lower courts should be free to reach the merits of the habeas petition when the Court includes "an express direction that the petitioner may proceed in the federal district court without prejudice from the denial of his petition for certiorari."[217] In the end, Reed purported to leave that question open.[218]

But, more importantly, two members of the majority filed a concurring opinion indicating that they joined Justice Reed's opinion "except for any indication it may contain that, although the reasons for a denial of certiorari are not stated, they nevertheless may be inferred from the record."[219] In the view of Justices Burton and Clark, "when the reasons for a denial of certiorari are not stated, the denial should be disregarded in passing upon a subsequent application for relief except to note that this source of possible relief has been exhausted."[220] It thus appears that a majority of the Court (the four dissenters and the two concurring Justices) had by this time concluded that a denial of certiorari did not ordinarily reflect the view that the underlying claims were unmeritorious. The views expressed by Justice Reed are nevertheless important—not because they reflect the views of a majority of the Court in 1950, but because they explain the rationale for the rule the Court adhered to until at least 1944.

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215 *Id.* at 214.

216 *See id.*; *id.* at 224–27 (Frankfurter, J., dissenting).

217 *Id.* at 214–16 (majority opinion).

218 *Id*. at 214 (stating "[t]he issue of the effect of such a denial apparently could arise only in a case where, after our refusal, the state prisoner presented his application to another federal court. It is not here in this case. We doubt the effectiveness of a voluntary statement on a point not in issue.").

219 *Id.* at 219 (Burton, J., concurring).

220 *Id.*

In view of the concurring opinion of Burton and Clark, it is fair to infer that the views of a majority of the Court in 1950 regarding the meaning of a denial of certiorari filed by a state prisoner are reflected in Justice Frankfurter's lengthy dissenting opinion in *Darr*.[221] Frankfurter explained that the majority's principal error was to treat the writ of certiorari as if it served the same function as the writ of error, when in fact the two are very different:

> A writ of error was a writ of right. It makes all the difference in the world whether a prisoner knocks at the door of this Court to invoke its grace or has unquestioned access for the final determination of the federal question as to which the highest court of the State was merely an intermediate tribunal . . . .In the writ of error cases this Court held *habeas corpus* in the lower federal courts ought not to take the place of a mandatory appeal. But this jurisdictional situation was drastically changed by the Act of September 6, 1916, 39 Stat. 726, and the Act of February 13, 1925, 43 Stat. 936 . . . .After this shift from review as of right to review by grace, it could no longer be said that a litigant forwent his right to have this Court review and reverse a State court. The right was gone. Only an opportunity—and a slim one—remained. It completely misconceives the doctrine which required a case to be brought to this Court by writ of error, because it was the duty of this Court to adjudicate the claim on the merits, to apply it to the totally different factors involved in certiorari.[222]

In arguing that state prisoners should not be required to seek certiorari before petitioning for habeas corpus,[223] Frankfurter noted the variety reasons for denying certiorari, "which precludes the implication that were the case here the merits would go against the petitioner."[224] In Justice Frankfurter's words:

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[221] *Id.* at 227 (Frankfurter, J., dissenting).
[222] *Id.* at 235 (Frankfurter, J., dissenting).
[223] *Id.* at 228 (Frankfurter, J., dissenting).
[224] *Id.* at 227(Frankfurter, J., dissenting).

> Petitions may have been denied because, even though serious constitutional questions were raised, it seemed to at least six members of the Court that the issue was either not ripe enough or too moribund for adjudication; that the question had better await the perspective of time or that time would soon bury the question or, for one reason or another, it was desirable to wait and see; or that the constitutional issue was entangled with nonconstitutional issues that raised doubt whether the constitutional issue could be effectively isolated; or for various other reasons not relating to the merits.[225]

This approach to certiorari, Frankfurter explained, was a necessary one. "It must be so unless the whole conception of certiorari in relation to the business of this Court is to be radically transformed."[226] "The most weighty considerations of practical administration counsel against" requiring state prisoners to seek relief in the Supreme Court.[227] Given the Court's "increasing subjection of [s]tate convictions to federal judicial review through the expanded concept of due process" during the previous twenty years,[228] and the resulting "flood of *habeas corpus* cases,"[229] a requirement that state prisoners seek relief in the Supreme Court would mean that "[t]he burden of the Court's volume of business will be greatly increased . . . ."[230]

Additionally, for a variety of reasons, the district courts are better placed to address these claims than is the Supreme Court. First, "cases involving federal claims by State prisoners . . . frequently involve questions of State law which must be answered before the federal issue can be reached,"[231] and the district courts are better situated to address such issues.[232] Additionally, the Supreme Court

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225 *Id.* (Frankfurter, J., dissenting).
226 *Id.* at 226 (Frankfurter, J., dissenting).
227 *Id.* at 229 (Frankfurter, J., dissenting).
228 *Id.* at 221 (Frankfurter, J., dissenting).
229 *Id.* at 235 (Frankfurter, J., dissenting).
230 *Id.* at 229 (Frankfurter, J., dissenting).
231 *Id.*
232 *Id.*

"can dispose of [these cases] only as a matter of abstract pleading," whereas "[t]he District Courts . . . can hold hearings when deemed appropriate, consider allegations on their merits if they are at all substantial and dispose of what often turn out to be unmeritorious claims."[233] For all of these reasons, "[i]n the present context of the Court's business in relation to these cases—their volume and the required knowledge of local law with which the local federal judges are much more familiar than we can possibly be—all considerations of policy" support the conclusion that these cases belong in the district courts rather than the Supreme Court.[234]

In sum, Frankfurter's dissent in *Darr* rests squarely on the recognition that the Supreme Court could no longer effectively monitor state court compliance with federal constitutional law in the "flood" of criminal appeals resulting from the expansion of the constitutional limits on state criminal proceedings, as well as on "policy" considerations making the lower federal courts the better forum for deciding these cases. Frankfurter's arguments regarding the meaning of a denial of certiorari seem self-evident to any observer of Supreme Court practice in 2017. What is noteworthy, however, is that these views are articulated in a dissenting opinion in 1950, thirty-four years after the shift from writ of error to certiorari review.[235] Although it is possible that these views commanded the support of a majority of the Court by this time, the Court appears to have arrived at the conclusions reached by Justice Frankfurter only gradually.

The question of the weight to be given by habeas courts to the Supreme Court's prior denial of certiorari was finally settled three years later in *Brown v. Allen*.[236] In holding that such denials should be given no weight, Justice Frankfurter's opinion for a majority repeated some of the same arguments found in his *Darr* dissent.[237] For example, he elaborated on the reasons making the district courts

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233 *Id.*

234 *Id.* at 236 (Frankfurter, J., dissenting).

235 *See supra* text accompanying note 90.

236 *See* Brown v. Allen, 344 U.S. 443, 489–97 (1953) (opinion of Frankfurter, J.). *Darr*'s holding that habeas was available only if the petitioner had previously sought direct review in the Supreme Court through certiorari was not reversed until 1963. *See* Fay v. Noia, 372 U.S. 391, 391 (1963).

237 *See Brown*, 344 U.S. at 489–97 (opinion of Frankfurter, J.).

more appropriate fora than the Supreme Court for deciding these cases:

> These petitions for certiorari are rarely drawn by lawyers; some are almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding, in view of the pressure of the Court's work. The certified records we have in the run of certiorari cases to assist understanding are almost unknown in this field. Indeed, the number of cases in which most of the papers necessary to prove what happened in the State proceedings are not filed is striking. Whether there has been an adjudication or simply a perfunctory denial of a claim below is rarely ascertainable. Seldom do we have enough on which to base a solid conclusion as to the adequacy of the State adjudication. Even if we are told something about a trial of the claims the applicant asserts, we almost never have a transcript of these proceedings to assist us in determining whether the trial was adequate. Equally unsatisfactory as a means for evaluating the State proceedings is the filing of opinions; in less than one-fourth of the cases is more than a perfunctory order of the State courts filed.[238]

Thus, *Brown* reflects the Court's preference for district courts over the Supreme Court on direct review as the forum for resolving these cases, a preference based on the Court's view that the Court should be focusing on "questions of sufficient gravity,"[239] as well as the burden that the "flood" of criminal cases would impose on the Court,[240] and the fact that district courts are better situated to handle these cases for a number of reasons.[241] The Court's well-known holding in *Brown*, affirming the availability of de novo review of

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238 *Brown*, 344 U.S at 493–94 (opinion of Frankfurter, J.).
239 *Id.* at 491 (opinion of Frankfurter, J.).
240 *See Darr v. Burford*, 399 U.S. at 235 (Frankfurter, J., dissenting).
241 *Id.* at 493–94 (opinion of Frankfurter, J.).

legal and mixed questions,[242] was directly tied to its largely forgotten holding that Supreme Court denials of certiorari were to be given no weight by the lower courts entertaining habeas corpus petitions.[243]

In sum, even during the period between 1916 and 1953, the doctrine regarding the scope of habeas review in the lower federal courts served a forum-allocation function. Limitations on the availability of habeas review in the lower federal courts were justified on the ground that it was the responsibility of the Supreme Court to exercise this "delicate jurisdiction."[244] Recognition of the need for review of state convictions in some federal court was a constant; the debate was about which federal court should undertake such review. The view that state prisoners should remain in custody without federal review of claimed constitutional errors in their convictions was not reflected in majority opinions during this era.

III. THE 1953–1996 PERIOD

Between its decision in *Brown v. Allen*[245] and the enactment of AEDPA in 1996,[246] the Supreme Court adhered to the view that de novo review was available on habeas for cognizable constitutional claims. The Burger and Rehnquist Courts tightened the procedural requirements for obtaining habeas relief and placed some limits on the types of claims that could be the basis for habeas relief, and the new limits had a significant impact on the practical availability of habeas relief and were subjected to (mostly well deserved) criticism.[247] But, unlike the limits the Court held in *Williams v. Taylor* were imposed by AEDPA, the pre-AEDPA limits articulated by the Burger and Rehnquist Courts were largely consistent with the idea that state prisoners are entitled to a federal forum for the vindication of their constitutional rights. Even during this period, the Court's

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242 *Id.* at 507 (opinion of Frankfurter, J.).

243 *Id.* at 489–97 (opinion of Frankfurter, J.).

244 *See* Baker v. Grice, 169 U.S. 284, 291 (1898); *Darr*, 339 U.S. at 206–07.

245 *See Brown*, 344 U.S. 443 (1953).

246 *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

247 *See, e.g.,* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies,* 104 HARV. L. REV. 1731, 1808 (1991).

decisions reflected its view that federal review of state court decisions resulting in custody was necessary to protect the constitutional rights of state prisoners and ensure that the state courts faithfully applied the Court's constitutional precedents.[248]

This section discusses two substantive limitations adopted by the Burger and Rehnquist Courts and their compatibility with the notion that state prisoners are entitled to plenary federal court review of constitutional issues decided against them by the state courts. The two limitations are the exclusion of Fourth Amendment exclusionary rule claims from the scope of habeas review and the exclusion of "new" rules not falling into one of two exceptions.

A. *Stone v. Powell and Errors Relating to Fourth Amendment Exclusionary Rule*

In *Stone v. Powell*, the Court held that habeas relief would be unavailable for claimed errors by state courts in the application of the Fourth Amendment exclusionary rule, unless the state did not "provid[e] . . . an opportunity for full and fair litigation of a Fourth Amendment claim" in its courts.[249] The Court thus adopted for habeas claims of Fourth Amendment error the standard that Professor Bator had advocated for all claims of constitutional error[250]—a standard akin to that adopted in *Williams v. Taylor* for all claims adjudicated on the merits in state court.[251] *Stone* thus appears to be an exception to proposition that, after *Brown* and before *Williams*, habeas was available for de novo federal review of constitutional issues decided by the state courts and resulting in custody.[252]

On closer inspection, however, *Stone* is more a decision about the Exclusionary Rule than a decision about the scope of habeas corpus jurisdiction. That is, at any rate, how the majority presented its holding. The Court stressed that prior decisions had "established that the [exclusionary] rule is not a personal constitutional right."[253] Rather, the exclusionary rule is "a judicially created remedy designed

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248 *See, e.g.*, Teague v. Lane, 489 U.S. 288, 306–08 (1989).
249 428 U.S. 465, 494 (1976).
250 *See* Bator, *supra* note 3, at 446.
251 *See* Williams v. Taylor, 529 U.S. 362, 390–91 (2000).
252 *See Stone*, 428 U.S. at 494–96.
253 *Id.* at 486.

to safeguard Fourth Amendment rights generally through its deterrent effect."[254] Given its prophylactic nature, the Court held, the rule should not be applicable in contexts in which its benefits are outweighed by its costs.[255] As support for this view, the Court cited prior decisions limiting the rule's applicability, such as the exception permitting the admission of evidence obtained in violation of the Fourth Amendment for purposes of impeachment[256] and the rule's "standing" limitation, permitting only the victim of the illegal search to invoke the exclusionary rule.[257] The Court understood these decisions to establish a "balancing" test under which the exclusionary remedy is available in a given context only if the rule's costs are outweighed by its benefits as a deterrent to Fourth Amendment violations.[258]

To be sure, the majority's application of the balancing test relied on certain assumptions about the reliability of state courts as enforcers of federal rights that, as Justice Brennan noted in his dissent, appear to contradict basic assumptions underlying the Court's habeas jurisprudence.[259] In a footnote, the majority noted its confidence in the state courts' ability and willingness to enforce federal rights faithfully: "Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."[260] As Justice Brennan noted, this assumption flies in the face of prior statements by the Court that "'habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards[,]'" and that "[t]he availability of collateral re-

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254 *Id.* (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)) (internal quotation marks omitted).

255 *See id*. at 494–95.

256 *See id.* at 485.

257 *See id.* at 488.

258 *See id.* at 489.

259 *See id.* at 509–10 (Brennan, J., dissenting).

260 *Id.* at 494 n.35.

view assures 'that the lower federal and state courts toe the constitutional line.'"[261] Since the majority's confidence in the lower courts extended to all "constitutional rights," Justice Brennan feared that the Court's holding portended a drastic narrowing of the availability of habeas review generally, or at least with respect to rules that, in the majority's words, did not bear on the defendant's guilt and hence on "the basic justice of [the prisoner's] incarceration."[262]

In the end, the majority's assumption about the reliability of state courts as enforcers of constitutional rights should not have led the Court to conclude that the costs of applying the exclusionary rule on habeas outweighed the benefits of doing so. The main cost of the exclusionary rule, according to the majority, was that it "often frees the guilty."[263] Against this cost, the majority weighed the "incremental deterrent effect" of applying the rule on habeas.[264] If the Court had compared the *incremental* costs of applying the rule on habeas with the incremental benefit of doing so, the Court would have found them to be congruent. This would be so whether or not one believed that the state courts were reliable enforcers of federal rights. If the state courts are not reliable enforcers of federal rights, then the federal courts would be freeing the guilty, but that would be because the state courts were failing to apply the exclusionary rule faithfully. On that assumption, application of the rule on habeas would be necessary as a deterrent. If the state courts are reliable enforcers of the exclusionary rule, then the federal courts on habeas would *not* be freeing the guilty—by hypothesis, the state courts would be doing so. Thus, the cost of applying the exclusionary rule on habeas that the Court identified would not be very high.[265]

Thus, the Court's cost-benefit analysis was structurally flawed and, in any event, did not really turn on the Court's footnote assumption that state courts are reliable enforcers of constitutional rights.

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[261] *Id.* at 520–21 (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)) (emphasis removed).

[262] *Id.* at 492 n.31.

[263] *Id.* at 490.

[264] *Id.* at 494.

[265] One might conclude that, if state courts are reliable enforcers of the exclusionary rule, application of the exclusionary rule on federal habeas is costly from the standpoint of judicial efficiency, but that is not the sort of cost the Court seemed to be relying upon in its opinion.

The latter assumption might well have justified a broader narrowing of habeas, but the majority responded to Justice Brennan's fear by describing it as a "hyperbole" and making clear that "[o]ur decision today is *not* concerned with the scope of the habeas statute as authority for litigating constitutional claims generally."[266] Indeed, Justice Powell, the author of *Stone*, subsequently affirmed his view that "[r]eview on habeas to determine that the conviction rests upon correct application of the law in effect at the time of the conviction is . . . required to 'forc[e] trial and appellate courts . . . to toe the constitutional mark.'"[267]

Instead, the majority in *Stone* made clear that its holding was based on the idea "that the exclusionary rule is a judicially created remedy rather than a personal constitutional right" and "the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding."[268] Since, as noted, the reasoning that led the Court to the latter conclusion was fundamentally flawed, the most convincing explanation of the Court's holding is that the Court did not regard the exclusionary rule as a *constitutional* right. So understood, *Stone v. Powell* is a modified application of the established principle, also noted by the majority, that habeas relief is not available for claimed errors of non-constitutional federal law unless "the alleged error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'"[269] If so, then *Stone v. Powell* is not in conflict with the proposition that state prisoners have a right to de novo review via habeas corpus of *constitutional* errors in their state court convictions.

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[266] *Id.* at 495 n.37.

[267] Solem v. Stumes, 465 U.S. 638, 653 (1984) (Powell, J., concurring) (quoting Mackey v. United States, 401 U.S. 667, 687 (1971)).

[268] *Stone*, 428 U.S. at 495 n.37. For a more recent articulation of this view, *see* Davis v. United States, 564 U.S. 229, 236–37 (2011) ("The Fourth Amendment . . . says nothing about suppressing evidence obtained in violation of [its] command. [The exclusionary rule] is a 'prudential' doctrine created by this Court to 'compel respect for the constitutional guaranty.' Exclusion is 'not a personal constitutional right'. . . ." (citations omitted)).

[269] *Id.* at 477 n.10 (quoting Davis v. United States, 417 U.S. 333, 346 (1974) (quoting Hill v. United States, 368 U.S. 424, 428 (1962))) (internal quotation marks removed). It is a *modified* application of the principle insofar as it leaves open the possibility of federal habeas relief for exclusionary rule claims if the state did not provide an opportunity for full and fair litigation of the claim. *See id.*

B. *Teague v. Lane and "New" Rules of Constitutional Law*

The Court adopted another substantive limit on the availability of habeas review in *Teague v. Lane*.[270] *Teague* was framed as a holding regarding the retroactive applicability of Supreme Court decisions recognizing "new" rules of constitutional law.[271] At one time, the Court permitted the articulation of "new" rules of constitutional law by the lower courts on habeas review, and the new rule was always applied in the case in which it was articulated.[272] The "retroactivity" issue would be addressed in a subsequent case and would be decided according to a multi-factor test that did not turn on whether the later case was pending on direct review at the time of the rule's articulation or subsequently commenced on collateral review.[273] In *Griffith v. Kentucky*, the Court held that new rules must be applied to all cases pending on direct review at the time the new rule was announced.[274] "[T]he Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review," the Court explained in *Griffith*, "is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation."[275]

Although *Griffith*'s reasoning seemed to deny the very concept of a "new" constitutional rule, in *Teague* the Court held that new constitutional rules should generally not be applied on collateral review.[276] In reaching this decision, the Court endorsed the view that "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional

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[270] Teague v. Lane, 489 U.S. 288, 316 (1989) (plurality opinion).

[271] *See id.* at 316 ("We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all other similarly situated . . . .We think this approach is a sound one.").

[272] *See* Fallon & Meltzer, *supra* note 247, at 1741.

[273] FALLON ET AL., *supra* note 49, at 1295–96. *See also* Fallon & Meltzer, *supra* note 247, at 1743–46.

[274] 479 U.S. 314, 328 (1987).

[275] *Id.* at 323 (quoting Mackey v. United States, 401 U.S. 667, 679 (1971)).

[276] *See Teague*, 489 U.S. at 316 ("We therefore hold that . . . habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review . . . .").

standards."[277] But, the Court wrote, "[i]n order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[278] For this reason, the Court held, "new" constitutional rules should ordinarily not be applicable on federal habeas review.[279]

The Court recognized two exceptions to this non-retroactivity rule.[280] "First, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[281] The Court subsequently expanded this category "to cover not only rules forbidding criminal punishment of certain primary conduct, but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[282] The second exception consists of constitutional decisions recognizing "new procedures without which the likelihood of an accurate conviction is seriously diminished."[283] The Court in *Teague* thought it "unlikely that many such components of basic due process have yet to emerge,"[284] and it has yet to find that a new constitutional rule falls in this category. New rules that fall in either category are applicable retroactively to prisoners seeking collateral review, but otherwise habeas relief is available only for claims that the state court violated an "old" rule—i.e., one that had been articulated at the time his conviction became final.[285]

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277 *Id.* at 306 (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)) (internal quotation marks omitted).

278 *Id.* (quoting *Desist*, 394 U.S. at 263 (Harlan, J., dissenting)) (internal quotation marks omitted). The Court also quoted and endorsed Justice Powell's statement from *Stumes*, quoted above, to the effect that habeas review is required to force the trial and appellate courts to "toe the constitutional mark." *Id.* (quoting Solem v. Stumes, 465 U.S. 638, 653 (1984) (quoting Mackey v. United States, 401 U.S. 667, 687 (1971)) (internal quotation marks omitted)).

279 *See id.* at 316.

280 *See id.* at 307.

281 *Id.* at 307 (quoting *Mackey*, 401 U.S. at 692).

282 Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

283 *Teague*, 489 U.S. at 313.

284 *Id.*

285 *See id.* at 316.

In principle at least, the *Teague* doctrine is consistent with the proposition that state prisoners are entitled to de novo review of their constitutional claims. *Teague* merely tells the habeas court what law they should apply in performing this de novo review. The state court proceeding is to be tested against the law in effect at the time of the state proceeding. Rules articulated by the Supreme Court after those proceedings are to be disregarded unless they fall within one of the two exceptions. If the purpose of habeas review is to provide state courts with an incentive to apply federal law faithfully, this rule makes some sense. After all, state trial and appellate judges cannot reasonably be expected to comply with constitutional principles not yet articulated.[286] The *Teague* rule also produces, again in principle, a sensible division of authority as between the Supreme Court and the lower federal courts.[287] Unless the claim falls within one of the two narrow exceptions the Court recognized, the role of the lower federal courts on habeas is to carry out the comparatively mundane task of ensuring state-court compliance with well-established constitutional rules. The Supreme Court, in directly reviewing state court judgments of conviction, would retain the responsibility for resolving unsettled questions of federal constitutional law arising in state criminal cases.

As applied, however, the *Teague* doctrine has been rightly criticized as giving state courts an insufficient incentive to apply federal precedents faithfully.[288] The problem has primarily been the Court's very broad interpretation of the concept of "new" law.[289] Moreover, the Court's test for distinguishing old from new rules blurs the line between de novo and deferential review of state decisions. The Court determines whether a claimed rule would be new and hence inapplicable on habeas by asking whether a reasonable jurist examining the extant precedents would conclude that the claimed rule was already established.

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[286] *See id.* (quoting Brown v. Allen, 344 U.S. 443, 534 (1953) (Jackson, J., concurring in result) ("[S]tate courts cannot 'anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them'")).

[287] That is, compared to AEDPA as interpreted in *Williams v. Taylor*. *See* Vázquez, AEDPA as Forum-Allocation Rule, *supra* note 34.

[288] *See, e.g.*, Fallon & Meltzer, *supra* note 247, at 1816–17.

[289] *See id.* at 1816.

In *Wright v. West*, Justice Thomas (writing for himself, Chief Justice Rehnquist, and Justice Scalia) argued that this test effectively requires the habeas court to defer to the state court's interpretation of the then-existing precedents.[290] Justice O'Connor (*Teague*'s author) disagreed:

> *Teague* did not establish a "deferential" standard of review of state court determinations of federal law. It did not establish a standard of review at all. Instead, *Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final. In *Teague*, we refused to give state prisoners the retroactive benefit of new rules of law, but we did *not* create any deferential standard of review with regard to old rules.[291]

Justice Kennedy agreed with Justice O'Connor:

> *Teague* did not establish a deferential standard of review of state-court decisions of federal law. It established instead a principle of retroactivity . . . .To be sure, the fact that our standard for distinguishing old rules from new ones turns on the reasonableness of a state court's interpretation of then existing precedents suggests that federal courts do in one sense defer to state-court determinations. But we should not lose sight of the purpose of the reasonableness inquiry where a *Teague* issue is raised: The purpose is to determine whether application of a new rule would upset a conviction that was obtained in accordance

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[290] *See* Wright v. West, 505 U.S. 277, 291 (1992) ("In other words, a federal habeas court 'must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable.'" (quoting Butler v. McKellar, 494 U.S. 407, 422 (1990) (Brennan, J., dissenting))).

[291] *Id*. at 303–304 (O'Connor, J., concurring in judgment) (internal citations removed).

> with the constitutional interpretations existing at the time of the prisoner's conviction.[292]

In sum, *Teague* retained de novo habeas corpus review for "old" rules.[293]

Although Justice Thomas lost the battle in *Wright v. West*, he may have won the war. Justices O'Connor and Kennedy made clear in *Wright* that *Teague* had not mandated deferential review of "old" constitutional claims on habeas.[294] In *Williams*, however, these Justices joined Justice Thomas and two other Justices who had joined his opinion in concluding that Congress, in enacting AEDPA, had displaced de novo review of old claims that had been adjudicated on the merits in state court, imposing the deferential standard of review that Justice Thomas had mistakenly believed had been established by *Teague*.[295]

The Court in *Williams* did not discuss whether the denial of habeas relief for wrong but reasonable errors would affect its approach to certiorari petitions of persons convicted in state court who would no longer be able to obtain relief from the lower federal courts on habeas review.[296] As this Article has shown, state prisoners had always had access to federal review of errors of federal constitutional law and of mixed questions from either the Supreme Court or the lower federal courts.[297] Between 1916 and 1953, the responsibility for providing such review shifted from the Supreme Court to the lower federal courts as the Court came to realize that it could no longer hope to fulfill an error-correction role.[298] Between 1953 and 1996, the Court cut back on habeas relief in certain respects but maintained the de novo standard of review in habeas cases, believing that such review provided "a necessary additional incentive for

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[292] *Id.* at 307 (Kennedy, J., concurring in judgment).

[293] *See id.* at 303–04 (O'Connor, J., concurring in judgment). *See also Teague*, 489 U.S. at 316.

[294] *See id.* at 303–04, 307.

[295] *See* Williams v. Taylor, 529 U.S. 362, 390–91 (2000).

[296] *See id.*

[297] *See supra* Parts I–II.

[298] *See supra* Part II.

trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[299]

If the Court still believes that such an incentive is necessary, it may need to rethink its current approach to certiorari petitions by state prisoners whose access to the habeas relief has been curtailed by AEDPA, as the Court interpreted the statute in *Williams*.[300] Just as habeas has always served a forum-allocation function, *Williams* may require the Court to understand AEDPA as a forum-allocation rule. The Court will need to consider whether Congress in enacting AEDPA meant, improbably, to reestablish the regime for reviewing state court criminal convictions that the Court emphatically rejected in 1953.[301]

CONCLUSION

The scope of federal habeas relief available to state prisoners in the years before *Brown v. Allen* was decided in 1953 is a famously disputed question—a question of recognized importance to current debates about the proper scope of habeas relief. This Article has shown that the available scope of habeas relief has always been directly linked to the effective availability of direct review of state criminal convictions in the Supreme Court. The need for federal review of issues of constitutional law and the application of such law to facts decided against criminal defendants in the state courts has always been recognized. Only the forum affording such review has changed. Between 1789 and 1916, state criminal defendants were entitled to review of such issues in the U.S. Supreme Court. Between 1953 and 1996, de novo review of such issues was available in the lower federal courts via habeas. The period between 1916 and 1953 was a transitional period marked by disagreement among the Justices as to the proper federal forum for providing such review. At first, a majority of the Court continued to regard the Supreme Court as the proper forum for the sensitive task of reviewing and possibly reversing state court criminal judgments that had been affirmed by the highest state courts. Gradually, the Court came to recognize that

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299 *See supra* Parts III (A)–(B).

300 *See Williams*, 529 U.S. at 390–91.

301 *See generally* Vázquez, AEDPA as Forum-Allocation Rule, *supra* note 34.

it could not hope to fulfill an error-correction function in such cases. The Court thus made clear in *Brown v. Allen* both that the Court's denials of certiorari petitions filed by state prisoners should not be regarded as reflecting its views on the merits of the prisoner's constitutional claims and that the habeas courts should review de novo the issues of federal constitutional law and of application of such law to fact decided against the prisoner by the state courts.