Cases that Shaped the Federal Courts

Brown v. Allen

1953

Justice Stanley Reed

Federal Judicial Center
2020

Central Question

What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?

Historical Context

Brown v. Allen (1953) was a seemingly technical case that has come to hold much meaning for lawyers and historians. It is often credited with broadening the scope of federal review of state criminal trials through petitions for writs of habeas corpus. This writ is a versatile legal instrument that allows prisoners to challenge the basis for their detention. A habeas petition functions as a separate civil case, rather than an appeal from the state courts. In *Brown*, however, the Court held that district courts, the primary trial courts in the federal system, could undertake a thorough review of state proceedings even if the Supreme Court had chosen not to hear an initial appeal. The decision also held that district courts were not bound by many of the state courts' decisions in conducting these hearings.

Historians and legal scholars debate *Brown's* significance. Few doubt that the tone and scope of federal habeas review of state convictions changed significantly during the mid-twentieth century, but *Brown's* role in that transformation is contested. Some have claimed that *Brown* ushered in a new era in which federal district courts exercised remarkably broad powers to overturn or disregard state convictions. Others have portrayed *Brown* as the unexceptional continuation of a line of cases recognizing that federal judges had a duty to ensure the basic fairness of state criminal trials. All agree that the federal courts' expanded review of state convictions, for which *Brown* has become a shorthand, was a major change in American law, with significant implications for civil rights and federalism, though there is substantial disagreement as to whether this was a change for the better.

The scope of the federal writ of habeas corpus was an important debate throughout much of the late nineteenth and twentieth centuries. Congress gave federal courts power to hear petitions for writs of habeas corpus from state, as well as federal, prisoners in 1867. This post-Civil War legislation was primarily designed to allow formerly enslaved people to challenge the fairness of trials in states that Congress feared would ignore new laws protecting the civil rights of freedpeople. Early Supreme Court cases interpreted federal review of state convictions narrowly. Federal judges were generally limited to a determination whether the state courts had jurisdiction and had complied with very basic procedural requirements. This restricted approach respected the sovereignty of the states and the integrity of their courts, but some argued further federal review was needed to avoid the punishment of innocent defendants and ensure the fairness of trials involving members of unpopular minorities.

Beginning in the 1920s, the Supreme Court slowly adopted a broader understanding of the scope of federal habeas review. In *Moore v. Dempsey* (1923), for example, the Court held that a district court had to hold a hearing into the fairness of a racially charged Arkansas murder trial. Even so, the proper scope of such hearings remained uncertain. It was not clear, for instance, to what extent the district courts were bound by prior state-court rulings in the case, particularly on federal issues. Ordinarily, when one court has decided issues between parties, this decision is binding on other courts under a principle known as res judicata. Though habeas cases had often been understood as exceptions to this general rule, some worried that that exception could lead federal habeas hearings to become retrials or the equivalents of appeals, in which lower federal courts had the power to overturn the decisions of state supreme courts. Such a system, critics claimed, would be less efficient and infringe on states' rights.

Legal Debates before *Brown*

In the 1930s and 40s, it was unclear what, if any, weight the district courts should give to the Supreme Court's decision not to take a criminal appeal from the state system when they were presented with a habeas petition from the same case. Since 1925, the Supreme Court had exercised broad discretion over which appeals it heard. Parties seeking Supreme Court review petitioned the Court for a writ of certiorari, and four justices had to vote to grant this petition before the Court would hear an appeal. A 1950 case held state prisoners had to petition for a writ of certiorari before filing a habeas petition in a federal district court.

Courts usually did not treat the denial of certiorari petitions as having any precedential weight for other cases, but habeas cases were unusual. They typically involved the same facts, legal issues, and parties as the state criminal appeals. If the Supreme Court had not seen fit to hear an appeal from the state courts, some argued, it was fair to assume the justices thought the state courts had decided the case correctly. Others suggested that this was an unrealistic view of the Court's certiorari practices. Given the small number of cases the Court was able to hear each year, it might have rejected an appeal because it did not raise a major constitutional issue, for example, even if a majority of the justices believed the state courts had wrongly decided the case.

The Cases

Brown involved three separate suits that were consolidated into a single case before the Supreme Court. The cases involved four black prisoners who had been convicted of violent crimes (rape and murder) against white victims in North Carolina and sentenced to death. Each of the prisoners claimed the jury selection process for their trials had been tainted by

racism. Clyde Brown, the lead petitioner in the case, also claimed police had beaten his confession out of him. Such claims resonated strongly with the politics of the time. Groups advocating for the rights of racial and religious minorities had long pointed to discriminatory treatment in the justice system, particularly in Southern states. In the 1950s and 60s, however, the issue had gained the attention of most Americans.

Each of the prisoners appealed through the state courts, ultimately without success, and applied to the Supreme Court of the United States for a writ of certiorari. The Court declined to hear any of the cases.

The prisoners then petitioned U.S. district courts for a writ of habeas corpus. In Brown's case, the district court swiftly dismissed the petition on the ground that the state courts had already decided the issues he raised. In the other two cases, the court held a hearing, but ultimately declined to order the prisoners' release. Each of the prisoners appealed to the Court of Appeals for the Fourth Circuit. The Fourth Circuit ruled against the prisoners in all three appeals. In two of the appeals, the Fourth Circuit ruled that the Supreme Court's denial of a writ of certiorari precluded further review. As the state courts had reviewed the federal issues raised by the appeals, and the Supreme Court had not seen fit to review the rulings, the Fourth Circuit treated those issues as resolved.

The Fourth Circuit split in the third appeal. This case was slightly different than the others because lawyers for the two prisoners who had been convicted of murder had missed a deadline by one day during the state-court appeals process. The state courts had declined to review the merits of the appeal on the basis of this missed deadline. Two judges on the three-judge panel reasoned that the district court's dismissal of the petition was correct because the habeas petition was effectively seeking an appeal from the state courts. Judge Morris Soper dissented, however, reasoning that a technicality like the missed deadline should not have prohibited the prisoners from raising substantial objections to the fairness of the jury selection process in North Carolina.

The Supreme Court's Ruling

Brown was initially argued in 1952, but the justices requested that the appeals be reargued the next year. It appears they did so partly because of the complexity of the issues presented and partly because the justices were unable to agree on a coherent set of opinions. When the Court finally released its decision in the case, it did so in a somewhat confusing manner. The justices upheld the decisions of the district courts that the prisoners were not entitled to release by a 6–3 margin in seven different opinions, several of which appear contradictory.

Justice Stanley Reed announced a majority view on the question of district courts' hearings into the state court proceedings and a minority view on the effect of the denial

of certiorari. Justice Reed's opinion stated that federal courts could not re-examine issues of state law decided by the state courts, but were not bound by the state-court rulings on federal issues. He emphasized that the district courts had broad discretion to determine whether a hearing into the fairness of the state trial was necessary. That the district court did not hold such a hearing in Brown's case, for example, did not deprive him of any rights as the court had found there was a sufficient record to support the fairness of the state proceedings without a new hearing. Similarly, the state courts were within their rights to find that a missed deadline barred prisoners from raising further claims and the federal courts ought to respect that ruling. Reed also asserted that district courts should be allowed to consider the Supreme Court's denial of a certiorari petition and give "such weight to our denial as the District Court feels the record justifies," though a majority of the Court rejected this approach.

In the first of his two opinions in the case, Justice Felix Frankfurter announced a majority view on the effect of certiorari. Reasoning that the Court could deny certiorari for any number of reasons, many of which were unrelated to the merits of the state case, Justice Frankfurter held that lower courts could not give such a denial any weight. Frankfurter's opinion did not fundamentally differ from Reed's on the question of the weight to be given to state-court rulings, but was "designed to make explicit and detailed" the appropriate treatment of state convictions by district judges. Justice Frankfurter outlined a six-step approach to these cases that made fine distinctions between different types of factual and legal questions presented by state cases and outlined the appropriate response from district courts. As Frankfurter noted, this aspect of his opinion was effectively a joint expression of "[t]he views of the Court on these questions" alongside Justice Reed's opinion, and it has often been treated as the main opinion in the case. Justices Harold Burton and Tom Clark agreed with Justice Reed's opinion on the scope of the district court's hearings, and agreed with Justice Frankfurter's approach to the certiorari question.

Justices Black and Douglas expressed their views in two separate opinions. The first was in broad agreement with Frankfurter's approach to both the certiorari and state-ruling questions. Black, joined by Douglas, wrote a second opinion dissenting from the Court's decision to uphold the rulings in the courts below. They argued that there was clear evidence of racist jury selection in North Carolina in each of the three cases and that this constitutional violation should have negated the prisoners' convictions. Frankfurter, also writing a second opinion in the case, offered a further ground for dissent, in which he was joined by Black and Douglas. Having held that the Fourth Circuit had erred in its opinion that two of the appeals were foreclosed by the denial of certiorari, Frankfurter argued, the proper response should have been to send the case back to the lower courts to allow them to determine the constitutional issue of jury selection. In the third case, Frankfurter argued

that allowing a narrowly missed deadline to bar federal courts from considering claims of racist jury selection would sanction a "complete … miscarriage of justice."

Finally, Justice Robert Jackson wrote a memorable separate opinion that, while agreeing with the ultimate result in the cases, offered a scathing criticism of the Court's approach to both habeas corpus and criminal justice more broadly. Justice Jackson argued that the denial of a petition for a writ of certiorari should be treated as binding in the case itself, but should not be treated as precedent for future cases. Such a rule would likely have limited the number of federal habeas petitions, since the Supreme Court accepts very few criminal appeals each year. It seems probable that Jackson believed prior cases had permitted a lack of finality in state-court judgments and that he saw such a restriction as a necessary change. Adding further layers of federal review, Jackson argued, did not necessarily make it more likely that courts would reach the correct decision in criminal cases. "We are not final because we are infallible," he wrote, "but we are infallible only because we are final."

Aftermath and Legacy

All four of the petitioners in *Brown* were executed within months of the Supreme Court's decision. Nevertheless, the case has subsequently come to be seen as a watershed moment for the expansion of federal habeas for state prisoners. A series of prominent cases in the 1960s began to expand the rights of federal and, especially, state criminal defendants. *Brown* is often, although somewhat contentiously, regarded as one of the first major steps in this transformation. And, indeed, one can read Justice Jackson's concurring opinion as a warning against precisely the turn the Court's jurisprudence eventually took. Jackson's law clerk, William Rehnquist, who eventually joined the Supreme Court himself as an associate (and later, the chief) justice, wrote a series of legal memoranda strongly criticizing the trend towards broader federal habeas review of state convictions. Some scholars have suggested that Rehnquist's involvement in *Brown* led him to point to the case as the leading example of the abuse of federal habeas review of state convictions when he reached the Court.

The post-*Brown* habeas process was not without its critics, as many conservatives complained that federal review of state convictions had led to interminable delays in death penalty cases and had shifted the balance of federalism too far toward federal power. These critics often point to *Brown* as the source of these problems; the case has developed a totemic quality as a result. Conservatives in Congress made several attempts to reform federal habeas review from the 1950s to the 1990s, with limited success. Supreme Court decisions in the last few decades have curtailed access to habeas review for some state prisoners, but the fundamental aspects of the process remain in place.

Discussion Questions

- Although this case dealt with very serious criminal charges, the justices almost never discussed the prisoners' guilt or innocence. Why do you think this was? Should evidence of guilt or innocence matter in habeas cases?
- *Brown* is often portrayed as liberalizing the rules allowing state prisoners to make constitutional claims, yet all four of the prisoners in this case were executed. Is this a paradox? What might it suggest about the way changes occur in the legal system?
- State courts have almost always handled the vast majority of criminal cases, an increasing number of which raised constitutional issues around the time the Supreme Court decided *Brown*. Did this case make it easier or harder for these courts to do their work efficiently and fairly?
- The Supreme Court could simply have decided to hear the appeals in *Brown* and all other criminal appeals, thus eliminating the need for the petitioners to start a separate habeas case. Instead, the Court rejected (and continues to reject) the overwhelming majority of criminal appeals and relies on other federal courts to decide the issues raised in habeas hearings. Why do you think this might have been? What factors, other than guilt or innocence, do you think the Supreme Court might consider in taking or rejecting such an appeal?
- All four of the petitioners in *Brown* argued that the jury selection process was improper. Why might jury selection be an important issue?

Documents

Supreme Court of the United States, Opinion in *Brown v. Allen*, February 9, 1953

The multiple opinions in Brown *can make the case a confusing read. The excerpts included here focus on the issues of the effect of certiorari and the scope of district court review of state convictions.*

In cases such as these, a minority of this Court is of the opinion that there is no reason why a district court should not give consideration to the record of the prior certiorari in this Court and such weight to our denial as the District Court feels the record justifies. This is the view of the Court of Appeals.... We have frequently said that the denial of certiorari "imports no expression of opinion upon the merits of a case." When on review of proceedings no res judicata or precedential effect follows, the result would be in accord with that expression, that statement is satisfied. But denial of certiorari marks final action on state criminal proceedings. In fields other than habeas corpus with its unique opportunity for repetitious litigation . . . the denial would make the issues res judicata. The minority thinks that where a record distinctly presenting a substantial federal constitutional question disentangled from problems of procedure is brought here by certiorari and denied, courts dealing with the petitioner's future applications for habeas corpus on the same issues presented in earlier applications for writs of certiorari to this Court, should have the power to take the denial into consideration in determining their action.... Permitting a district court to dismiss an application for habeas corpus on the strength of the prior record should be a procedural development to reduce abuse of the right to repeated hearings such as were permitted during the period when there was no review of the refusal of a habeas corpus application.... Since a federal district court has power to intervene, there is a guard against injustice through error. It should be noted that the minority does not urge that the denial of certiorari here is res judicata of the issues presented. It is true, as is pointed out in the opinion of Mr. Justice Frankfurter, the records of applications for certiorari to review state criminal convictions, directly or collaterally, through habeas corpus or otherwise, are not always clear and full. Some records, however, are. It seems proper for a district court to give to these refusals of certiorari on adequate records the consideration the district court may conclude these refusals merit. This would be a matter of practice to keep pace with the statutory development of 1867 that expanded habeas corpus. We think it inconsistent to allow a district court to dismiss an application on its appraisal of the state trial record, as we understand those do who oppose our suggestion, but to refuse to permit the district court to consider relevant our denial of certiorari....

The fact that no weight is to be given by the Federal District Court to our denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue. In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not res judicata.…

Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion. Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required. However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution. Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice. As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies.…

Document Source: *Brown v. Allen*, 344 U.S. 443, 456–58, 463–65 (1953) (citations omitted).

Justice Felix Frankfurter, Opinion in *Brown v. Allen*, February 9, 1953

From its inception certiorari jurisdiction has been treated for what it is in view of the function that it was devised to serve. It was designed to permit this Court to keep within manageable proportions, having due regard to the conditions indispensable for the wise adjudication of those cases which must be decided here, the business that is allowed to come before us.…

It is within the experience of every member of this Court that we do not have to, and frequently do not, reach the merits of a case to decide that it is not of sufficient importance to warrant review here.… We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.…

Just as there is no ground for holding that our denial is in effect res judicata, so equally is there no basis for leaving the District Judge free to decide whether we passed on the merits. For there is more to the story. The District Judge ordinarily knows painfully little of the painfully little we knew. It is a rare case indeed in which the District Court has any information concerning the certiorari proceeding.… We would be inviting a busy federal district judge to rest on our denial and cloak his failure to exercise a judgment in formal compliance with a statement that he can give meaning to something that almost always must to him be meaningless.…

We must not invite the exercise of judicial impressionism. Discretion there may be, but "methodized by analogy, disciplined by system." Discretion without a criterion for its exercise is authorization of arbitrariness. The Nation's Supreme Court ought to be able to do better than to tell the Federal Judges of the land, in a field so vital as that of habeas corpus to vindicate constitutional rights, that they may do as they please—that they are not to be bound, nor to be guided, by considerations capable of rational formulation.… The issue of the significance of the denial of certiorari raises a sharp division in the Court. This is not so as to the bearing of the proceedings in the State courts upon the disposition of the application for a writ of habeas corpus in the Federal District Courts. This opinion is designed to make explicit and detailed matters that are also the concern of Mr. Justice Reed's opinion. The uncommon circumstances in which a district court should entertain an application ought to be defined with greater particularity, as should be the criteria for determining when a hearing is proper. The views of the Court on these questions may thus be drawn from the two opinions jointly.…

[E]xperience cautions that the very nature and function of the writ of habeas corpus precludes the formulation of fool-proof standards which the 225 District Judges can

automatically apply. Here as elsewhere in matters of judicial administration we must attribute to them the good sense and sturdiness appropriate for men who wield the power of a federal judge. Certainly we will not get these qualities if we fashion rules assuming the contrary. But it is important, in order to preclude individualized enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State courts.

First. Just as in all other litigation, a prima facie case must be made out by the petitioner. The application should be dismissed when it fails to state a federal question, or fails to set forth facts which, if accepted at face value, would entitle the applicant to relief.… Second. Failure to exhaust an available State remedy is an obvious ground for denying the application. An attempt must have been made in the State court to present the claim now asserted in the District Court, in compliance with § 2254 of the Judicial Code. Section 2254 does not, however, require repeated attempts to invoke the same remedy nor more than one attempts where there are alternative remedies.…

Third. If the record of the State proceedings is not filed, the judge is required to decide, with due regard to efficiency in judicial administration, whether it is more desirable to call for the record or to hold a hearing. Ordinarily, where the issues are complex, it will be simpler to call for the record, certainly in the first instance. If the issues are simple, or if the record is called for and is found inadequate to show how the State court decided the relevant historical facts, the District Court shall use appropriate procedures, including a hearing if necessary, to decide the issues.…

Fourth. When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application. On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.…

Fifth. 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. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.…

Sixth. A federal district judge may under § 2244 take into consideration a prior denial of relief by a federal court, and in that sense § 2244 is of course applicable to State

prisoners. Section 2244 merely gave statutory form to the practice established by Salinger v. Loisel. What was there decided and what § 2244 now authorizes is that a federal judge, although he may, need not inquire anew into a prior denial of a habeas corpus application in a federal court if "the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry." …

Document Source: *Brown v. Allen*, 344 U.S. 443, 491–92, 494–95, 496–97, 501–02, 503, 506, 507, 508 (1953) (citations omitted).

Justice Robert Jackson, Concurring Opinion in *Brown v. Allen*, February 9, 1953

Controversy as to the undiscriminating use of the writ of habeas corpus by federal judges to set aside state court convictions is traceable to three principal causes: (1) this Court's use of the generality of the Fourteenth Amendment to subject state courts to increasing federal control, especially in the criminal law field; (2) ad hoc determination of due process of law issues by personal notions of justice instead of by known rules of law; and (3) the breakdown of procedural safeguards against abuse of the writ.…

The generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states. The expansion now has reached a point where any state court conviction, disapproved by a majority of this Court, thereby becomes unconstitutional and subject to nullification by habeas corpus.

This might not be so demoralizing if state judges could anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them. But they cannot.…

Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.…

The fact that the substantive law of due process is and probably must remain so vague and unsettled as to invite farfetched or borderline petitions makes it important to adhere to procedures which enable courts readily to distinguish a probable constitutional

grievance from a convict's mere gamble on persuading some indulgent judge to let him out of jail. Instead, this Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own.… It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.…

Conflict with state courts is the inevitable result of giving the convict a virtual new trial before a federal court sitting without a jury. Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.…

The states all allow some appeal from a judgment of conviction which permits review of any question of law, state or federal, raised upon the record. No state is obliged to furnish multiple remedies for the same grievance. Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. A state properly may deny habeas corpus to raise either state or federal issues that were or could have been considered on appeal. Such restriction by the state should be respected by federal courts.…

The Court is not quite of one mind on the subject [of the effect of certiorari denials]. Some say denial means nothing, others say it means nothing much. Realistically, the first position is untenable and the second is unintelligible. How can we say that the prisoner must present his case to us and at the same time say that what we do with it means nothing to anybody. We might conceivably take either position but not, rationally, both, for the two will not only burden our own docket and harass the state authorities but it makes a prisoner's legitimate quest for federal justice an endurance contest.

True, neither those outside of the Court, nor on many occasions those inside of it, know just what reasons led six Justices to withhold consent to a certiorari. But all know that a majority, larger than can be mustered for a good many decisions, has found reason for not reviewing the case here. Because no one knows all that a denial means, does it mean that it means nothing? …

I can see order in the confusion as to its meaning only by distinguishing its significance under the doctrine of stare decisis, from its effect under the doctrine of res judicata. I agree that, as stare decisis, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any

other case. But, for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts.…

It is sometimes said that res judicata has no application whatever in habeas corpus cases and surely it does not apply with all of its conventional severity. Habeas corpus differs from the ordinary judgment in that, although an adjudication has become final, the application is renewable, at least if new evidence and material is discovered or if, perhaps as the result of a new decision, a new law becomes applicable to the case. This is quite proper so long as its issues relate to jurisdiction. But call it res judicata or what one will, courts ought not to be obliged to allow a convict to litigate again and again exactly the same question on the same evidence. Nor is there any good reason why an identical contention rejected by a higher court should be reviewed on the same facts in a lower one.…

If a state is really obtaining conviction by laws or procedures which violate the Federal Constitution, it is always a serious wrong, not only to a particular convict, but to federal law. It is not probable that six Justices would pass up a case which intelligibly presented this situation. But an examination of these petitions will show that few of them, tested by any rational rules of pleading, actually raise any question of law on which the state court has differed from the understanding prevailing in this Court.…

My conclusion is that whether or not this Court has denied certiorari from a state court's judgment in a habeas corpus proceeding, no lower federal court should entertain a petition except on the following conditions: (1) that the petition raises a jurisdictional question involving federal law on which the state law allowed no access to its courts, either by habeas corpus or appeal from the conviction, and that he therefore has no state remedy; or (2) that the petition shows that although the law allows a remedy, he was actually improperly obstructed from making a record upon which the question could be presented, so that his remedy by way of ultimate application to this Court for certiorari has been frustrated. There may be circumstances so extraordinary that I do not now think of them which would justify a departure from this rule, but the run-of-the-mill case certainly does not.…

Society has no interest in maintaining an unconstitutional conviction and every interest in preserving the writ of habeas corpus to nullify them when they occur. But the Constitution does not prevent the state courts from determining the facts in criminal cases. It does not make it unconstitutional for them to have a different opinion than a federal judge about the weight to be given to evidence.…

Document Source: *Brown v. Allen*, 344 U.S. 443, 532, 534, 535, 536–37, 540, 541, 542, 543–45, 548 (1953) (citations omitted).

Justice Hugo L. Black, Dissenting Opinion in *Brown v. Allen*, February 9, 1953 (Joined by Justice William O. Douglas)

The four petitioners in these cases are under sentences of death imposed by North Carolina state courts. All are Negroes. Brown and Speller were convicted of raping white women; the two Daniels, aged 17 when arrested, were convicted of murdering a white man.…

The chief constitutional claims throughout have been and are: (a) extorted confessions were used to convict; (b) Negroes were deliberately excluded from service as jurors on account of their race. For the following reasons I would reverse each of the judgments denying habeas corpus.…

Brown v. Allen, No. 32. Brown's death sentence for rape rests on an indictment returned by a Forsyth County grand jury. We recently reversed five North Carolina convictions on the ground that there had been a systematic racial exclusion of Negroes from Forsyth County's juries for many years prior to 1947. Upon a review of the evidence in Brown's habeas corpus proceeding this Court holds that Forsyth County's discriminatory jury practice was abandoned in 1949 when the old jury boxes were refilled. The testimony on which the Court relies is that the names put in the 1949 box were taken indiscriminately from the list of county taxpayers, 16% of whom were Negroes, 84% whites. Other evidence relied on was that since 1949 four to seven Negroes have been included in each jury venire of 44 to 60. The concrete effect of the new box in this case was stated by the North Carolina Supreme Court to be this:

"One Negro woman served on the grand jury and at least one prospective Negro juror was tendered to the defendant for the petit jury and was excused or rejected by his counsel."

The foregoing evidence does show a partial abandonment of the old discriminatory jury practices—since 1949 a small number of Negroes have regularly been summoned for jury duty. But proof of a lesser degree of discrimination now than before 1949 is insufficient to show that impartial selection of jurors which the Constitution requires. Negroes are about one-third of Forsyth County's population. Consequently, the number of Negroes now called for jury duty is still glaringly disproportionate to their percentage of citizenship. It is not possible to attribute either the pre-1949 or the post-1949 disproportions entirely to accident. And the state has not produced evidence to show that the partial continuation of the long-standing failure to use Negro jurors is due to some cause other than racial discrimination. Recognizing this difficulty the Court sanctions the continued disproportions because they were the result of selecting jurors exclusively from the county tax list. But even this questionable method of selection falls short of showing a genuine abandonment of old discriminatory practices. Certainly discriminatory results remained. I

do not believe the Court should permit this tax list technique to be treated as a complete neutralizer of racial discrimination.…

Speller v. Allen, No. 22. The jury that tried Speller was drawn from Vance County, North Carolina. Before this trial no Negro had served on a Vance Country jury in recent years. No Negro had even been summoned. That this was the result of unconstitutional discrimination is made clear by the fact that Negroes constitute 45% of the country's population and 38% of its taxpayers. The Court holds, however, that this discrimination was completely cured by refilling the jury box with the names of 145 Negroes and 1,981 whites. Such a small number of Negro jurors is difficult to explain except on the basis of racial discrimination. The Court attempts to explain it by relying upon another discrimination, one which can hardly be classified as most appealing in a democratic society. What the Court apparently finds is that Negroes were excluded from this new jury box not because they were Negroes but because they happened to own less property than white people. In other words, the Court finds as a fact that the discrimination, if any, was based not on race but on wealth—the jurors were selected from taxpayers with "the most property." The Court then even declines to pass on the constitutionality of this property discrimination on the ground that petitioner's objections were based on racial, not on property, discriminations. I cannot agree to such a narrow restriction of petitioner's objections to the jury that brought in the death verdict. Jury discriminations here seem plain to me and I would not by-pass them.…

Daniels v. Allen, No. 20. Here also evidence establishes an unlawful exclusion of Negroes from juries because of race. The State Supreme Court refused to review this evidence on state procedural grounds. Absence of state court review on this ground is now held to cut off review in federal habeas corpus proceedings. But in the two preceding cases where the State Supreme Court did review the evidence, this Court has also reviewed it. I find it difficult to agree with the soundness of a philosophy which prompts this Court to grant a second review where the state has granted one but to deny any review at all where the state has granted none.…

The Court's conclusion not to consider and act on this manifest racial discrimination rests on these facts: After petitioners' death sentence they were granted an appeal in forma pauperis to the State Supreme Court. June 6th the trial judge granted 60 days for their lawyers to make up and serve their "statement of case on appeal." Preparation of this statement (comparable to a bill of exceptions) consumed valuable time because of difficulty in getting the stenographic transcript. On completion petitioners' counsel on Friday, August 5th, called the prosecuting attorney's office to serve him but found he was out of town. According to the record he and his family were away for the weekend at a beach. They returned home Sunday, but he did not get back to his office until Monday, August 8th.

Had the statement been delivered at his office by a sheriff on Friday the 60th day, apparently there would have been compliance with North Carolina law. Instead it was receipted for at his office on the 61st day, two days before his return from the beach. In the State Supreme Court the Attorney General moved to dismiss on the ground that the notice was one day late. Although admittedly the court had discretionary authority to hear the appeal, it dismissed the case. Petitioners were thereby prevented from arguing the point of racial discrimination and consequently it has never been passed on by an appellate court. This denial of state appellate review plus the obvious racial discrimination thus left uncorrected should be enough to make one of those "extraordinary situations" which the Court says authorizes federal courts to protect the constitutional rights of state prisoners.

The Court thinks that to review this question and grant petitioners the protections guaranteed by the Constitution would "subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime." I cannot agree. State systems are not so feeble. And the object of habeas corpus is to search records to prevent illegal imprisonments. To hold it unavailable under the circumstances here is to degrade it.… I cannot join in any opinion that attempts to confine the Great Writ within rigid formalistic boundaries.

Document Source: *Brown v. Allen*, 344 U.S. 443, 548, 549, 550–54 (1953) (citations omitted).

Justice Felix Frankfurter, Dissenting Opinion in *Brown v. Allen*, February 9, 1953 (Joined by Justices Hugo L. Black and William O. Douglas)

Nos. 22 and 32.

The Court is holding today that a denial of certiorari in habeas corpus cases is without substantive significance. The Court of Appeals sustained denials of applications for writs of habeas corpus chiefly because it treated our denial of a petition for certiorari from the original conviction in each of these cases as a review on the merits and a rejection of the constitutional claims asserted by these petitioners.…

I cannot protest too strongly against affirming a decision of the Court of Appeals patently based on the ground that that court was foreclosed on procedural grounds from considering the merits of constitutional claims, when we now decide that the court was wrong in believing that it was so foreclosed. The affirmance by this Court of the District Court's denial of writs of habeas corpus in these cases is all the more vulnerable in that this Court, without guidance from the Court of Appeals, proceeds to consider the merits of the constitutional claim. This Court concludes that there was not a systematic discrimination in keeping Negroes off juries. If this Court deemed it necessary to consider the merits, the

merits should equally have been open to the Court of Appeals. As I have already indicated, that court is far better situated than we are to assess the circumstances of jury selection in North Carolina and to draw the appropriate inferences.

No. 20.…

This Court sustains the lower courts on the ground that the right of review on the merits was foreclosed because the petitioners lost their right of review through failure to comply with the requirements of North Carolina law for perfecting an appeal in the Supreme Court of North Carolina.

We were given to understand on the argument that if petitioners' lawyer had mailed his "statement of case on appeal" on the 60th day and the prosecutor's office had received it on the 61st day the law of North Carolina would clearly have been complied with, but because he delivered it by hand on the 61st day all opportunities for appeal, both in the North Carolina courts and in the federal courts, are cut off although the North Carolina courts had discretion to hear this appeal. For me it is important to emphasize the fact that North Carolina does not have a fixed period for taking an appeal. The decisive question is whether a refusal to exercise a discretion which the Legislature of North Carolina has vested in its judges is an act so arbitrary and so cruel in its operation, considering that life is at stake, that in the circumstances of this case it constitutes a denial of due process in its rudimentary procedural aspect.…

The basic reason for closing both the federal and State courts to the petitioners on such serious claims and under these circumstances is the jejune abstraction that habeas corpus cannot be used for an appeal. Judge Soper dealt with the deceptiveness of this formula by quoting what Judge Learned Hand had found to be the truth in regard to this generality thirty years ago:

"… We can find no more definite rule than that the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice."

The reasons for finding that we have here so complete a miscarriage of justice are so powerfully stated by Judge Soper that I cannot do better than to adopt them as my own:

> The [trial] court's strict application of the procedural rules in a capital case in these two instances … can hardly be approved as a proper exercise of judicial discretion.… It can hardly be doubted that the decision in each case lay within the discretion of the judge, but once it was taken, the Supreme Court of the state deemed itself powerless to interfere. Thus there is presented an impasse which can be surmounted only by a proceeding like that before this court. We have been told time and again that legalistic requirements should be disregarded in examining applications for the writ of habeas corpus and the rules have been relaxed in cases when the trial court has acted under duress or perjured

> testimony has been knowingly used by the prosecution, or a plea of guilty has been obtained by trick, or the defendant has been inadequately represented by counsel.… It is difficult to see any material distinction in practical effect between these circumstances and the plight of the prisoners in the pending case who have been caught in the technicalities of local procedure and in consequence have been denied their constitutional right.

Document Source: *Brown v. Allen*, 344 U.S. 443, 554–55, 556, 557–60 (1953) (citations omitted).

Paul M. Bator, *Harvard Law Review*, 1962

In this article, Harvard Law professor Paul Bator leveled several criticisms at the Supreme Court's approach to habeas corpus generally and Brown v. Allen *in particular. The excerpt included below focuses on issues related to federalism.*

[T]he opinions in *Brown v. Allen* [do not] deal adequately with the grave problems of federalism created by the doctrine of that case. It is fashionable today to dismiss the resentments created in the states by the existence of an indiscriminate federal habeas jurisdiction; we are told that complaints about intrusion by federal habeas courts into state criminal process are disingenuous, directed not at the remedy but at the substantive due process doctrines enforced thereby; we are further assured that such complaints are in any case beside the mark since very few prisoners are actually released by the federal courts. But the very unanimity of the resentment among state law-enforcement officials and judges, many of them, surely, as conscientious in their adherence to the Constitution and as intellectually honest as their critics, counsels, not against the jurisdiction, but against its indiscriminate expansion without principled justification.…

The point is not that it is unseemly for a federal district judge to reverse the action of the highest court of the state, but that it is unseemly for him to do so without principled institutional justification for his power. This justification was simply not provided by the opinions in *Brown v. Allen*.…

Of course federal law is higher than state law. But that does not *automatically* tell us that it is better for federal judges to pronounce it than state judges, much less that once a state judge has done so on a fair and rational investigation, this should be disregarded and done over again by a federal judge.…

The problem of federalism created by *Brown v. Allen* should not be seen in terms of the possible irritation of state judges at being reversed by federal district judges. The crucial issue is the possibility of damage done to the inner sense of responsibility, to the pride and

conscientiousness, of a state judge in doing what is, after all, under the constitutional scheme a part of his business: the decision of federal questions properly raised in state litigation.…

Finally, the doctrine of *Brown v. Allen* must be assessed in light of the strains put on the federal judicial system itself by the ever increasing flood of habeas petitions from state prisoners. It is, of course, notorious that most of these petitions are frivolous. And as Justice Shaefer has said, that these "have depreciated the writ of habeas corpus cannot be doubted." I have suggested before that this matter should be seen not only in terms of time and money but in terms of husbanding the intellectual and moral energies of our judges.…

Document Source: Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," *Harvard Law Review*, vol. 76 (1962): 503–04, 505–06 (footnotes omitted).

Supreme Court of the United States, Opinion in *Fay v. Noia*, March 18, 1963

In these brief excerpts from another leading habeas corpus case, Justice William Brennan and Justice John Marshall Harlan II differed as to the merits of Bator's arguments. In the first excerpt, Justice Brennan argued that searching review of state convictions dated back at least to the Court's decision in Moore v. Dempsey *(1923). In the second excerpt, Justice Harlan suggested* Brown *played a more transformative role.*

The argument has recently been advanced that the *Moore* decision did not in fact discredit the position advanced by the Court in *Frank v. Mangum* (that habeas would lie only if the state courts had failed to afford petitioner corrective process), and that this position was first upset in *Brown v. Allen*. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 488–500 (1963). The argument would seem untenable in light of certain factors: (1) The opinion of the Court in *Moore*, written by Mr. Justice Holmes, is a virtual paraphrase of his dissenting opinion in Frank. (2) The thesis of the *Frank* majority finds no support in other decisions of the Court; though the availability of corrective process is sometimes mentioned as a factor bearing upon grant or denial of federal habeas, such language typically appears in the context of the exhaustion problem; indeed, "available State corrective process" is part of the language of 28 U. S. C. § 2254. (3) None of the opinions in *Brown v. Allen* even remotely suggests that the Court was changing the existing law in allowing coerced confessions and racial discrimination in jury selection to be challenged on habeas notwithstanding state court review of the merits of these constitutional claims.…

Document Source: *Fay v. Noia*, 372 U.S. 391, 421 n.30 (1963) (citations omitted).

Justice John Marshall Harlan II, Dissenting Opinion in *Fay v. Noia*, March 18, 1963 (joined by Justices Tom C. Clark and Potter Stewart)

[P]rior to *Brown v. Allen*, habeas corpus would not lie for a prisoner who was in custody pursuant to a state judgment of conviction by a court of competent jurisdiction if he had been given an adequate opportunity to obtain full and fair consideration of his federal claim in the state courts. Clearly, under this approach, a detention was not in violation of federal law if the validity of the state conviction on which that detention was based rested on an adequate nonfederal ground.…

In 1953, this Court rendered its landmark decisions in *Brown v. Allen* and *Daniels v. Allen*, reported therewith.….

It is manifest that this decision substantially expanded the scope of inquiry on an application for federal habeas corpus. *Frank v. Mangum* and *Moore v. Dempsey* had denied that the federal courts in habeas corpus sat to determine whether errors of law, even constitutional law, had been made in the original trial and appellate proceedings. Under the decision in Brown, if a petitioner could show that the validity of a state decision to detain rested on a determination of a constitutional claim, and if he alleged that determination to be erroneous, the federal court had the right and the duty to satisfy itself of the correctness of the state decision.…

I do not pause to reconsider here the question whether the state ground in Daniels was an adequate one; persuasive arguments can be made that it was not. The important point for present purposes is that the approach in *Daniels* was wholly consistent with established principles in the field of habeas corpus jurisdiction. The problem, however, had been brought into sharper focus by the result in *Brown*. Once it is made clear that the questions open on federal habeas extend to such matters as the admissibility of confessions, or of other evidence, the possibility that inquiry may be precluded by the existence of a state ground adequate to support the judgment is substantially increased.…

Document Source: *Fay v. Noia*, 372 U.S. 391, 459–61, 462 (1963) (citations omitted).

Henry J. Friendly, *University of Chicago Law Review*, 1970

This speech by a prominent federal judge criticized the extensive use of federal habeas corpus by prisoners in the years following Brown *and advocated a system that focused on evidence of actual innocence, rather than on evaluating the fairness of state procedures.*

Legal history has many instances where a remedy initially serving a felt need has expanded bit by bit, without much thought being given to any single step, until it has assumed an aspect so different from its origin as to demand reappraisal—agonizing or not. That, in my view, is what has happened with respect to collateral attack on criminal convictions. After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill's phrase, has not reached the end, or even the beginning of the end, but only the end of the beginning.…

Although, if past experience is any guide, I am sure I will be accused of proposing to abolish habeas corpus, my aim is rather to restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by current excesses.…

The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction. He would be surprised, I should suppose, to be told both that it never was really bad and that it has been steadily improving, particularly because of the Supreme Court's decision that an accused, whatever his financial means, is entitled to the assistance of counsel at every critical stage. His astonishment would grow when we told him that the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.… The time is ripe for reflection on the right road for the future.…

A remedy that produces no result in the overwhelming majority of cases, apparently well over ninety per cent, an unjust one to the state in much of the exceedingly small minority, and a truly good one only rarely, would seem to need reconsideration with a view to caring for the unusual case of the innocent man without being burdened by so much dross in the process.

Indeed, the most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms. Today of all times we should be conscious of the falsity of the bland assumption that these are in endless supply. Everyone concerned with the criminal process, whether his interest is with the prosecution, with the defense, or with neither, agrees that our greatest single problem is the long delay in bringing accused persons to trial. The time of judges, prosecutors, and lawyers now devoted to collateral attacks, most of them frivolous, would be much better spent in trying cases. To say we must provide fully for both has a virtuous sound but ignores the finite amount of funds available in the face of competing demands.…

The dimensions of the problem of collateral attack today are a consequence of two developments. One has been the Supreme Court's imposition of the rules of the fourth, fifth, sixth and eighth amendments concerning unreasonable searches and seizures, double

jeopardy, speedy trial, compulsory self-incrimination, jury trial in criminal cases, confrontation of adverse witnesses, assistance of counsel, and cruel and unusual punishments, upon state criminal trials. The other has been a tendency to read these provisions with ever increasing breadth. The Bill of Rights … has become a detailed Code of Criminal Procedure, to which a new chapter is added every year. The result of these two developments has been a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis.…

Today it is the rare criminal appeal that does not involve a "constitutional" claim.

I am not now concerned with the merits of these decisions which, whether right or wrong, have become part of our way of life. What I do challenge is the assumption that simply because a claim can be characterized as "constitutional," it should necessarily constitute a basis for collateral attack when there has been fair opportunity to litigate it at trial and on appeal.…

It defies good sense to say that after government has afforded a defendant every means to avoid conviction, not only on the merits but by preventing the prosecution from utilizing probative evidence obtained in violation of his constitutional rights, he is entitled to repeat engagements directed to issues of the latter type even though his guilt is patent. A rule recognizing this would go a long way toward halting the "inundation;" it would permit the speedy elimination of most of the petitions that are hopeless on the facts and the law, themselves a great preponderance of the total, and of others where, because of previous opportunity to litigate the point, release of a guilty man is not required in the interest of justice even though he might have escaped deserved punishment in the first instance with a brighter lawyer or a different judge.…

My submission, therefore, is that innocence should not be irrelevant on collateral attack even though it may continue to be largely so on direct appeal. To such extent as we have gone beyond this, and it is an enormous extent, the system needs revision to prevent abuse by prisoners, a waste of the precious and limited resources available for the criminal process, and public disrespect for the judgments of criminal courts.

Document Source: Henry J. Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," *University of Chicago Law Review* 38, no. 1 (Fall 1970): 142, 143, 145–46, 148–49, 155–56, 157, 172 (footnotes omitted).

Justice Clarence Thomas, Opinion in *Wright v. West*, June 19, 1992 (joined by Chief Justice William H. Rehnquist and Justice Antonin Scalia)

Debate over the meaning and scope of Brown *continued to animate Supreme Court decisions well into the 1990s. In these excerpts from a 1992 case in which the justices agreed on the judgment but could not agree on one opinion for the Court, Justice Clarence Thomas and Justice Sandra Day O'Connor offer contrasting views on the historical and institutional significance of the case.*

The habeas corpus statute permits a federal court to entertain a petition from a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." The court must "dispose of the matter as law and justice require." For much of our history, we interpreted these bare guidelines and their predecessors to reflect the common-law principle that a prisoner seeking a writ of habeas corpus could challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody. Gradually, we began to expand the category of claims deemed to be jurisdictional for habeas purposes. Next, we began to recognize federal claims by state prisoners if no state court had provided a full and fair opportunity to litigate those claims. Before 1953, however, the inverse of this rule also remained true: Absent an alleged jurisdictional defect, "habeas corpus would not lie for a [state] prisoner … if he had been given an adequate opportunity to obtain full and fair consideration of his federal claim in the state courts." In other words, the state-court judgment was entitled to "absolute respect," and a federal habeas court could not review it even for reasonableness.

We rejected the principle of absolute deference in our landmark decision in *Brown v. Allen* (1953). There, we held that a state-court judgment of conviction "is not res judicata" on federal habeas with respect to federal constitutional claims, even if the state court has rejected all such claims after a full and fair hearing. Instead, we held, a district court must determine whether the state-court adjudication "has resulted in a satisfactory conclusion." We had no occasion to explore in detail the question whether a "satisfactory" conclusion was one that the habeas court considered correct, as opposed to merely reasonable, because we concluded that the constitutional claims advanced in *Brown* itself would fail even if the state courts' rejection of them were reconsidered de novo. Nonetheless, we indicated that the federal courts enjoy at least the discretion to take into consideration the fact that a state court has previously rejected the federal claims asserted on habeas.…

In an influential separate opinion endorsed by a majority of the Court, Justice Frankfurter also rejected the principle of absolute deference to fairly litigated state-court judgments. He emphasized that a state-court determination of federal constitutional law is not "binding" on federal habeas, regardless of whether the determination involves a pure

question of law or a "so-called mixed questio[n]" requiring the application of law to fact. Nonetheless, he stated quite explicitly that a "prior State determination may guide [the] discretion [of the district court] in deciding upon the appropriate course to be followed in disposing of the application." Discussing mixed questions specifically, he noted further that "there is no need for the federal judge, if he could, to shut his eyes to the State consideration." …

Document Source: *Wright v. West*, 505 U.S. 277, 285–87, 288 (1992) (citations omitted).

Justice Sandra Day O'Connor, Concuring Opinion in *Wright v. West*, June 19, 1992 (joined by Justices Harry Blackmun and John Paul Stevens)

Justice Thomas errs in describing the pre-1953 law of habeas corpus. While it is true that a state prisoner could not obtain the writ if he had been provided a full and fair hearing in the state courts, this rule governed the merits of a claim under the Due Process Clause. It was not a threshold bar to the consideration of other federal claims, because, with rare exceptions, there were no other federal claims available at the time. During the period Justice Thomas discusses, the guarantees of the Bill of Rights were not yet understood to apply in state criminal prosecutions.…

Thus, when the Court stated that a state prisoner who had been afforded a full and fair hearing could not obtain a writ of habeas corpus, the Court was propounding a rule of constitutional law, not a threshold requirement of habeas corpus.…

The cases cited by Justice Thomas … demonstrate that the absence of a full and fair hearing in the state courts was itself the relevant violation of the Constitution; it was not a prerequisite to a federal court's consideration of some other federal claim. Both cases held that a trial dominated by an angry mob was inconsistent with due process. In both, the Court recognized that the State could nevertheless afford due process if the state appellate courts provided a fair opportunity to correct the error.…

Justice Thomas errs in implying that *Brown v. Allen* was the first case in which the Court held that the doctrine of res judicata is not strictly followed on federal habeas. In fact, the Court explicitly reached this holding for the first time in *Salinger v. Loisel* (1924). Even *Salinger* did not break new ground: The *Salinger* Court observed that such had been the rule at common law, and that the Court had implicitly followed it in *Carter v. McClaughry* (1902), and *Ex parte Spencer* (1913). The Court reached the same conclusion in at least two other cases between *Salinger* and *Brown*.…

Justice Thomas understates the certainty with which *Brown v. Allen* rejected a deferential standard of review of issues of law. The passages in which the *Brown* Court stated

that a district court should determine whether the state adjudication had resulted in a "satisfactory conclusion," and that the federal courts had discretion to give some weight to state court determinations were passages in which the Court was discussing how federal courts should resolve questions of fact, not issues of law. This becomes apparent from a reading of the relevant section of *Brown*.... The proper standard of review of issues of law was also discussed in Justice Frankfurter's opinion, which a majority of the Court endorsed. After recognizing that state court fact finding need not always be repeated in federal court, Justice Frankfurter turned to the quite different question of determining the law. He wrote: "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. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." Justice Frankfurter concluded: "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."

Document Source: *Wright v. West*, 505 U.S. 277, 297–98, 299–301 (1992) (citations omitted).

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

In this essay, legal scholar Eric Freedman argues that Brown *was not as significant as many lawyers and historians have assumed. Freedman argues that the Court's opinion was best seen as a continuation of existing legal norms, rather than a revolution in the scope of federal habeas corpus.*

Brown v. Allen has long been the focus of an intense controversy in the history of habeas corpus. Beginning from a common agreement that the published opinion borders on the incomprehensible, some scholars—in a view that some current Justices accept—argue that the case revolutionized the ability of the federal courts to examine the constitutionality of state criminal convictions, while others assert with equal fervor that the decision "worked no revolution when it recognized the cognizability on habeas corpus of all federal constitutional claims presented by state prisoners." Both sides are motivated by unabashedly contemporary concerns: Those arguing for *Brown* as revolutionary seek to undermine the legitimacy of searching federal habeas corpus review of state criminal convictions by portraying the practice as a recent innovation, while their opponents wish to demonstrate the contrary....

Legally, *Brown* was an exceedingly minor event. On the issue of the federal habeas courts' re-examination of state court findings, its substantive standards were deferential in the extreme; its reaffirmation of independent federal review of legal issues was unsurprising; and its procedural guidelines for when hearings should be held proved ephemeral. The only enduring law that the case made—rejecting any preclusive effect for certiorari denials—was so eminently sensible as to be uncontroversial today.

But the pragmatic effect of that legal ruling—that primary responsibility for federal scrutiny of state criminal convictions would rest with the district courts rather than the Supreme Court—was to assure the real-world ability of the federal court system to apply the applicable substantive standards, thereby vindicating on the ground in the second half of the Twentieth Century the promises of *Frank* and *Moore* in the first. To seek to grasp *Brown* as new law is to clutch at a ghost; to understand it as the implementation of old law is to add a modest but solid stone to the fabric of a cathedral.…

No evidence for the proposition that Brown inaugurated some new and more intrusive level of federal scrutiny of state court proceedings is to be found in the opinions themselves.…

In the *Brown* case itself, not even Justices Frankfurter and Black were willing to assert that the district court should have conducted an independent review of the circumstances of the confession, notwithstanding the grave suspicions raised by those circumstances.… And two people whose constitutional rights had in all probability been denied died in North Carolina's gas chamber because the [Court] held that unless it gave preclusive effect to the one-day lateness in filing the appeals papers it "would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime." …

The attempt to find in *Brown* what is not there surely owes much to now Chief Justice Rehnquist, whether one attributes it to a desire common among law clerks to believe that cases in which they participated were of special importance, an exaggeration of the extent to which his views were ultimately shared either by Justice Jackson or by the Court, to intellectual sympathy with Bator, or to a more ideological distaste with the fact that *Brown* did buttress federal habeas corpus as a practical remedy.… But there is no ghost. Nothing about *Brown* was revolutionary.…

The theory that independent federal habeas corpus review of the constitutional validity of state criminal convictions is a modern innovation attributable to *Brown* is simply inconsistent with the historical evidence.

Document Source: Eric N. Freedman, "*Brown v. Allen*: The Habeas Corpus Revolution that Wasn't," *Alabama Law Review* 51 (2000): 1542–43, 1617, 1618, 1621 (footnotes omitted).

Cases that Shaped the Federal Courts

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

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

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