

STONE v. POWELL: THE HERMENEUTICS OF THE BURGER COURT

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In *Stone v. Powell*,¹ the Supreme Court effectively removed state search and seizure cases from the ambit of federal habeas corpus. The decision was based upon the type of cost benefit analysis recently adopted by the Court in search and seizure cases.² The Court has decided that either the cost of excluding evidence must be justified by the deterrent effect of the exclusion on unlawful searches or the exclusion should not be granted.

The exclusionary rule was adopted to deter unlawful searches. The accomplishment of this deterrent purpose is costly since exclusion is granted without regard to the guilt or innocence of the victim of the unlawful search and bars the fruits of the search from admission in evidence without regard to their probative character. Since the rule renders probative evidence of guilt inadmissible, the guilty often go free. This cost may be an inevitable price of the attempt to protect against unlawful search and seizure, but it should only be paid where the deterrent purpose of the exclusionary rule will be advanced. In habeas corpus cases the contribution to deterrence is too attenuated to justify consideration of exclusionary rule issues on collateral review.³

The Court's analysis of the exclusionary rule issue is a compact restatement of its approach to exclusionary rule cases. If federal habeas corpus existed as a judicially created remedy in the service of the exclusionary rule, the result reached would be highly defensible.⁴ However, habeas corpus is a statutory remedy created

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1. 428 U.S. 465 (1976).

2. *Id.* at 486-89; see *United States v. Peltier*, 422 U.S. 531, 536-39 (1975); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

3. 428 U.S. at 490-95.

4. The Court based its analysis upon Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-89 (1964). 428 U.S. at 487 n.24. However, Amsterdam himself disagreed with the use made of his analysis by the Court. Thus in the article quoted, he stated:

One must distinguish at the outset the problem of federal habeas corpus for state prisoners * * * there are substantial justifications for federal district court litigation or relitigation of federal contentions invoked in bar of a state criminal conviction.

Volume of cases and inadequate state procedures make reliance on the Supreme Court unsatisfactory here; the Court is not properly a routine enforcement agency; in any event, with perhaps greater reason than supports the district courts' federal question, civil rights, and specified removal jurisdictions—not to speak of the diversity jurisdiction—it makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal constitutional claim. Absent an applicable removal provision, *Brown v. Allen* thus construed the federal habeas corpus jurisdiction * * *

Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378-80 (1964).

However, the argument can be further elaborated. The cases that have come to the federal court raising search and seizure issues have generally been tried in full. Cases where search and seizure issues were resolved adversely to the petitioner and a guilty plea followed are barred in the absence of a showing of inadequacy of counsel. Cf. *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Tollett v. Henderson*, 411 U.S. 258, 261-69 (1973) (both cases involved coerced confessions). Thus, the usual federal habeas corpus case falls into the class where the exclusionary rule has its maximum deterrent effect, the class of cases where trial can be foreseen. Oaks, *Studying The Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 731-32 (1970); Cf. J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 224-25 (2d ed. 1975).

One justification for the federal habeas corpus jurisdiction is that "on a practical level the state judge's allegiance to the Constitution may be weakened by his proximity to the state's enforcement of its criminal law." *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1061 (1970); Cf. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 802-03 (1965). This proximity to the state's enforcement of its criminal law would have its greatest impact on a judge in cases where the constitutional provision involved was irrelevant to guilt or innocence. Search and seizure cases are a paradigm of constitutional litigation in which guilt or innocence is not involved. They are the cases in which it is most likely that federal rules will be ignored in service of the interest of law enforcement. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 471-72 n.532 (1974).

If the federal habeas corpus jurisdiction were removed, the police would foresee resolution of search and seizure issues primarily by state trial judges as potentially more sympathetic to the policeman than to the fourth amendment. Since the efficacy of a sanction turns in large measure on the perception of the risks of detection and adjudication of fault, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 724-25 (1970); R. POSNER, *ECONOMIC ANALYSIS OF LAW* 384 (1973), this anticipation of a friendly forum would enervate the deterrent effect of the rule in cases where it now has an impact. On the other hand, the threat of having conduct reviewed before a federal judge, whose "primary allegiance is to the Supreme Court's interpretation of the Constitution," serves as a substantial deterrent, even where the police can foresee being heard in the first instance by a sympathetic state judiciary. *Developments—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1061 (1970).

There is an additional difficulty in any attempt to argue that the removal of search and seizure cases from federal habeas corpus is a minor modification of the exclusionary rule and that, therefore, such a modifica-

by Congress.⁵ Where statutory construction is involved, the language of the statutes is normative.⁶ In *Stone*, however, the language of the Habeas Corpus Act did not play this central role. Instead, the Court was at pains to point out that "our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally."⁷ This treatment of the statute is peculiar since the author of the opinion, Mr. Justice Powell, had previously sought to justify the result reached in *Stone* on the basis of an analysis of the Habeas Corpus Act and its history.⁸

A prisoner incarcerated pursuant to the judgment of a state court may seek habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."⁹ Since the exclusionary rule was regarded by the Court as judge made,¹⁰ *Stone* could be grounded on the theory that incarceration due to misapplication of the exclusionary rule

tion would have only a minor impact on the deterrent value of the rule. As Oaks noted:

[D]irect deterrence is also dependent upon how gravely law enforcement officers view the consequences of excluding evidence, and upon how they compare those consequences with the competing alternatives. In other words, the direct deterrent effect of the exclusionary rule will depend upon the individuals' perceptions of the relative costs of conformity or non-conformity with the rule. . . . Because the exclusionary rule operates upon conduct that is generally quite deliberate and frequently even the result of formal or informal law enforcement policies, it is likely to involve a calculation of alternatives at some point.

Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 710-11 (1970).

A modification of the exclusionary rule, such as removal of exclusionary cases from habeas, reduces the cost of noncompliance. While the diminution in cost may appear small, there is no reason to assume *a priori* that the corresponding change in conduct will be small. The magnitude of the effect would depend on the responsiveness of police conduct to the change in the cost of noncompliance. See R. POSNER, *ECONOMIC ANALYSIS OF LAW*, 224-25 (1973). Cf. Tushnet, *Judicial Revision of the Habeas Corpus Statute*, 1975 Wis. L. REV. 484, 498-99.

Despite these countervailing considerations, the Court's argument is a strong one. However, as will become clear, my difficulty is not with the Court's analysis, but with its right to make it.

5. 28 U.S.C. § 2254 (1971).

6. The statute is an exclusionary norm as well as a primary norm. That is, it not only sets the rule of decision but also suppresses the consideration of reasons and methods for determining the controversy. J. RAZ, *PRACTICAL REASON AND NORMS* 62-65 (1975).

7. 428 U.S. at 494 n.37.

8. *Schnecko v. Bustamonte*, 412 U.S. 218, 250-74 (1973).

9. 28 U.S.C. § 2254 (1971).

10. 428 U.S. at 482.

is not an incarceration in violation of the Constitution or laws of the United States. In *Stone*, if the petitioner had been denied a fair opportunity to litigate his fourth amendment claim, habeas corpus jurisdiction would have been retained. This exception to the general bar would then be bottomed on the theory that the denial of a fair opportunity to be heard was an independent denial of due process.¹¹ However, the Court rejected this explanation.¹²

The traditional reading of the Habeas Corpus Act has been that it reaches any case in which controlling federal constitutional law has been misapplied.¹³ *Stone* does not reject this approach. Rather, it fashions a judicial exception to habeas corpus jurisdiction which excludes search and seizure cases from the generality of the statute. This exception is not supported by either the language of the statute or its history. On its face, then, *Stone* seems to adopt the proposition "that the reformulation of an obsolete statutory provision is quite as legitimately within judicial competence as the reformulation of an obsolete common law rule."¹⁴

However, there is an alternative explanation of the case. In his concurring opinion in *Schnecko v. Bustamonte*,¹⁵ Mr. Justice Powell argued for a reinterpretation of the habeas corpus jurisdiction.¹⁶ Under his approach, constitutional rules binding on the state would be divided into two classes. In the first class would go all of those limitations designed to assure a fair outcome of the judicial process. As to the first class, the habeas jurisdiction would remain unaltered. Into the second class would go those limitations

11. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Goldberg v. Kelley*, 397 U.S. 254 (1970); this is what Justice Brandeis referred to as "due process in primary sense—whether it has had an opportunity to present its case and be heard in its support" in *Brinkhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 (1930).

12. 412 U.S. at 494 n.37.

13. *Fay v. Noia*, 372 U.S. 391, 426 (1963); *Brown v. Allen*, 344 U.S. 443 (1953); Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106 (1959); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1045-62 (1970). Thus in an exhaustive study of the history of the Habeas Corpus Act of 1867, Amsterdam notes:

[T]he overriding purpose of the Act of February 5, 1867 * * * [is] to give all state prisoners both a federal trial forum and access to the Supreme Court for litigation of their federal claims, whatever those claims might be.

Amsterdam, *Removal and Habeas Corpus*, 113 U. PA. L. REV. 793, 839 n.191 (1965) [hereinafter cited as Amsterdam].

14. G. GILMORE, *THE AGES OF AMERICAN LAW* 97 (1977).

15. 412 U.S. 218 (1973).

16. *Id.* at 250-74.

which serve other purposes, such as the exclusionary rule. As to these, habeas corpus would only lie where the state denied the petitioner a fair opportunity to litigate the federal constitutional issue.¹⁷ It is apparent from his concurring opinion in *Brewer v. Williams*,¹⁸ that Mr. Justice Powell views this analysis as the true basis for the decision in *Stone*.¹⁹

It may be that the opinion in *Stone* was so narrowly written because a majority of the court could not be persuaded to adopt the *Schneekloth* approach except in the fourth amendment area. If that is the case, then the decision will stand as an illustration of the low regard in which the exclusionary rule is held.²⁰ If, on

17. *Id.* at 266.

18. 45 L.W. 4287 (1977).

19. *Id.* at 4294-95.

20. The Chief Justice has been the most outspoken critic as his concurrence in *Stone* demonstrates. However, the trend of the Court's search and seizure cases has at least been indicative that the Chief Justice's views are symptomatic of a broader discontent.

It has always seemed to me that criticism of the exclusionary rule has arisen from an inadequate appreciation of the rule's function in the overall scheme of constitutional control of the police and that this inadequate appreciation arises out of the narrow notion of a deterrent with which the Court has been operating.

In focusing on deterrence as a cost changing mechanism, the Court has focused on the role of the rule as a sanction to deter future wrongful conduct by setting the price of wrongdoing higher than its benefits. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 7 (1973). See, e.g., *Brown v. Illinois*, 422 U.S. 590, 599-600 (1975). Since searches in criminal cases are undertaken to procure evidence, the advantage of unlawful search is nullified when admissibility is denied. The Court has also emphasized the role of the exclusionary rule in the preservation of judicial integrity. *Id.* Most obviously, judicial integrity is served when the courts refuse to become parties to an unlawful search by admitting its fruits. But more than this is involved in the concept of judicial integrity. That function is intimately related to what may be referred to as the preservation of legality. A legal rule honored only in the breach loses its character as a law. When a court rejects unlawfully seized evidence, it preserves the fourth amendment. It re-announces that the fourth amendment is part of the Constitution, and that the values contained in the fourth amendment are worth preserving. It speaks on behalf of the legal system to authoritatively disavow the unlawful act. While the policeman purported to act in the name of the law, he went beyond his authority, and that excess of power is condemned. See FEINBERG, *THE EXPRESSIVE FUNCTION OF PUNISHMENT, IN DOING AND DESERVING* 101-04 (1970).

The reinforcement of the social norm embodied in the fourth amendment by exclusion is not aimed solely at the police. The legal system depends on citizen cooperation for its operation. Law derives its binding force and secures that cooperation "more from its claim to embody society's conception of justice than from its threat of penalties." D. POTTER, *HISTORY AND AMERICAN SOCIETY* 405 (1974). Much of that claim would be lost if the government came to be perceived as a law breaker. Since many

the other hand, the opinion covertly adopts the *Schneckloth* concurrence, then it is a substantial change in the habeas corpus jurisdiction. In either event the opinion represents, as I will seek to demonstrate, a peculiar disregard for the congressional function of establishing the jurisdiction of the federal courts.

PRELIMINARIES: DEFERENCE TO THE STATES,
JUDICIAL ECONOMY, AND ALL THAT

The authority of Congress to create and grant jurisdiction to the inferior federal courts is beyond question.²¹ With particular regard to the vindication of fourteenth amendment rights, Con-

perceive the legal system solely in terms of police conduct, a perception of the police as law breakers leads to a perception of the legal system as lawless. "[L]oss of faith in the authority of the law may move rational persons toward extralegal action." J. SKOLNICK, *THE POLITICS OF PROTEST* 325 (1969).

The police are dependent upon community cooperation for effective functioning. This cooperation is only forthcoming when the police are perceived as instruments of law rather than aggressors. A REISS, *THE PUBLIC AND THE POLICE* 69-70, 175 (1971).

Police are not supposed to adjudicate and punish; they are supposed to apprehend and take into custody. To the extent to which a nation's police step outside such bounds, that nation has given up the rule of law in a self-defeating quest for order. J. SKOLNICK, *THE POLITICS OF PROTEST* 249 (1969). When the police step beyond the bounds of law, they lose their claim to legitimacy. Legitimacy being absent, force and violence become the only techniques of law enforcement.

The exclusionary rule, to the extent it secures police compliance with the Constitution, vindicates the law's "claim to embody society's concept of justice." The stronger that claim, the more likely voluntary obedience to the law's commands. The exclusionary rule, to the extent it secures police compliance with the Constitution, preserves the police officers' claim to legitimacy.

Lest any one conclude that the dependence of a civil police on a civil society is a license for the police to misbehave, it should be clear that it is the responsibility of the government in a democratic society to insure that its servants behave in a civil fashion. The police are not only obligated to behave in a civil way towards citizens but their behavior is strategic in changing relations between citizens and the police. To the degree that we can develop civility in police relations with citizens, we move toward a civil society. A. REISS, *THE POLICE AND THE PUBLIC* 221 (1971). The exclusionary rule achieves these goals only imperfectly. That, however, is an unsurprising comment on a human institution.

21. U.S. CONST. art. III, § 1. With particular regard to habeas corpus, see Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 346, 356-57 (1952); Pollack, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 63-65 (1956).

gress is granted independent legislative authority by section 5 of that amendment.²²

The fourteenth amendment does, after all, direct supervening commands to the states in the management of their criminal law; the constitution does not accept the state process as "complete". The creation of a remedial framework to ensure effective implementation of these commands is, therefore, one of the important tasks of our system.²³

Thus, Congress had the task of creating a remedial framework to insure effective implementation of the commands of the fourteenth amendment. According to most interpretations, Congress performed that function when it enacted the Habeas Corpus Act of 1867.²⁴

Much of the dissatisfaction with the ambit of federal habeas corpus has involved the claim that inadequate attention has been paid to "(ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."²⁵ These are undoubtedly vital factors to be considered in the formulation of any jurisdictional legislation which might impinge upon the state criminal process. Congress may give these factors such weight as it wishes,²⁶ as long as it does not violate the tenth amendment. The fact that a different balance could be struck merely demonstrates that multiple results are possible in the political process.

This is not to suggest that preservation of the traditional relationship between the state and federal courts is not an important element in the process of construction of jurisdictional statutes. However, a distinction should be drawn between two types of situations. Where it is clear that the purpose of a statute does not include alteration of the relationship between state and federal courts, then traditional considerations of federalism are an important aid in construction. Any statutory formulation will incidentally catch situations not within its purpose.²⁷ Considerations

22. *Katzenbach v. Morgan*, 384 U.S. 641, 649-51 (1966).

23. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 445-46 (1963).

24. An Act Relating to Habeas Corpus, ch. 27, 14 Stat. 385 (1867) (current version at 22 U.S.C. § 2254 (1971)). See *Fay v. Noia*, 372 U.S. 426 (1963); *Brown v. Allen*, 344 U.S. 443 (1953).

25. *Schneckloth v. Bustamonte*, 412 U.S. 250, 259 (concurring opinion).

26. The caveat on the 10th Amendment is necessitated by *National League of Cities v. Usery*, 426 U.S. 833 (1976).

27. This type of overbreadth is a necessary consequence of the use

of federalism aid in the setting of the appropriate ambit of jurisdictional statutes which would otherwise have this impact. However, if Congress intends to alter the relationship between state and federal courts, the considerations of federalism lose relevance.²⁸ Policy arguments about federalism play a role only when it is assumed that the Habeas Corpus Act did not work a fundamental restructuring of the relationship between state and federal jurisdictions. Until that premise is demonstrated, such arguments are irrelevant.

A similar analysis is applicable to the considerations of judicial economy prayed in aid of criticisms of the habeas corpus jurisdiction. It is true that "the resources of our system are finite: their overextension jeopardizes the care and quality essential to a fair adjudication."²⁹ However, the allocation of those resources is for Congress. Congress is as free to waste the time of federal judges as it is to waste the taxpayers' dollars and undoubtedly does both with fair regularity. While judicial economy may be a legitimate consideration once the central thrust of a jurisdictional grant has been established, it has no justifiable role in defining that grant. If the Habeas Corpus Act in fact reaches all custody in violation of the Constitution, then it is not for judges to draw a distinction between trivial and nontrivial cases of custody in violation of the Constitution.

Policy is relevant to statutory construction. However, not every policy is relevant to the construction of every statute. Unless statutes are to be treated "as if they were a nose of wax, to be pulled about at will," the policies used to construe a statute must be relevant to it. They must either be those policies which apparently underpin the adoption of the particular verbal formula utilized or policies of such pervasive importance that they would not have been ignored in the adoption of a statute. Federalism and judicial economy fall into the class of pervasive policies. Ordinarily, these are factors Congress would want taken into account in the construction of a statute. However, if these factors clearly

of general language. It is an element of the open textured quality of such language. See W. ALSTON, *THE PHILOSOPHY OF LANGUAGE* 93-95 (1964); H. HART, *THE CONCEPT OF LAW* 123-24 (1961).

28. This is the essential relevance of Raz's concept of the exclusionary impact of norms as an element of the definition of authority. "[T]o regard somebody as an authority is to regard some of his utterances as authoritative even if wrong on the balance of reasons." J. RAZ, *PRACTICAL REASON AND NORMS* 65 (1975).

29. *Schneckloth v. Bustamonte*, 412 U.S. 218, 261 (Powell J., concurring).

work against the central policy thrust of a statute, they lose their relevance. The basic rationale of the legislation must be established before these pervasive policies can be given any weight.

THE HISTORIC EVOLUTION OF FEDERAL HABEAS CORPUS JURISDICTION

Habeas corpus jurisdiction was granted to the federal courts by the Judiciary Act of 1789.³⁰ The original Act did not reach state prisoners unless the writ of habeas corpus *ad testificandum* was involved.³¹ The original statute did not define the grounds upon which the writ would issue.³²

The absence of grounds for issuance of the writ left the courts with a choice.³³ They could have treated the reference as a reference to the historic practices of the English courts and limited the reach of the writ to cases where it would have lain at common law. They could have examined the history of the writ to find why a particular type of case was included and then applied the writ to all cases within the underlying rationale of the writ's historic reach.³⁴ Under the first approach, the writ would have been limited to cases where a court acted outside its jurisdiction.³⁵ The second approach would have noted that the writ was used to assure that imprisonments arose only in the ordinary course of the common law.³⁶ In English understanding, "process of law is an instruc-

30. Judiciary Act, ch. 20, § 14, 1 Stat. 81 (1789) (current version at 28 U.S.C. § 2254 (1971)).

31. *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845).

32. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 65, 93-95 (1807); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1836).

33. Essentially the distinction that I draw here is built on as analogy to that between a steno-symbol, whose reference exhausts its meaning, and the more open ended tensive symbol developed in N. PERRIN, *JESUS AND THE LANGUAGE OF THE KINGDOM* 30 (1976).

34. This problem arises whenever there is any question of extending an historically rooted legal doctrine. Do we examine the history of the doctrine to find what particular kinds of cases it reached, and then limit the doctrine only to those cases? Or do we examine history to ascertain the why of the rule to determine the reason why the particular type of cases were reached by the doctrine, and then apply the rule to all cases within the underlying rationale of the doctrine, rather than merely to the historic incidents?

In cases involving legislation, the type of language used is a guide to solution. Reference to well settled legal terms is treated as the adoption of the referential approach, while less historically rooted language is regarded as more open-ended.

35. See Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 459-60 (1966).

36. Oaks, *Habeas Corpus in the States—1776—1865*, 32 U. CHI. L. REV. 243, 244-45 (1965).

tion to those in power not to use coercion except with legal authority."³⁷ Under such a regime, habeas corpus functions to assure that all detentions are in accordance with the ordinary processes of law, whatever they may be.³⁸ Under the Constitution, the ordinary course of law is made subject to certain overriding limitations on power entrenched in the Constitution. Such an analysis might have stretched the writ to reach cases where an imprisonment resulted from a violation of the Constitution, even though the convicting court had technical jurisdiction.³⁹ However, the first approach, in which the writ is limited to cases where the court acted outside its jurisdiction, was taken. Common law doctrine defined the scope of the writ.⁴⁰

Until after the Civil War, the original Judiciary Act remained the fount of habeas corpus jurisdiction.⁴¹ During the period in which the first Judiciary Act governed, the courts exercised limited federal jurisdiction.⁴² There was no general federal question jurisdiction and issues of federal law were usually tried in the state courts.⁴³ The Civil War brought about a total reversal of this situation.⁴⁴ Jurisdictional statutes were passed channelling federal question litigation into the federal courts.⁴⁵ As part of this chang-

37. J. LUCAS, *THE PRINCIPLES OF POLITICS* 84 (1966). Modern habeas corpus arose out of the English constitutional struggles of the 17th Century. The struggle of that period was a struggle to assure the "due process of law" promised by the Magna Carta. In the context of the times, due process was regarded as equivalent to the ordinary processes of the common law. "Intolerable restraints" were those imposed outside those processes; all such restraints were reached by the writ. See *Fay v. Noia*, 372 U.S. 391, 426 (1963); see also D. KIER, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, 160, 198, 214 (8th ed. 1967).

38. A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 217-19 (10th ed. 1959); R. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* 107-11 (2d ed. 1964).

39. The Constitution alters our concept of due process. The ordinary course of law is made subject to certain overriding limitations on power entrenched in the Constitution. In the American context due process is particularized by the specific provisions of the Bill of Rights. Cf. the comments on the impact of the Constitution on the traditional practices of judicial review of administrative action in B. SCHWARTZ & H. WADE, *LEGAL CONTROL OF GOVERNMENT* 206 (1972).

40. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1836).

41. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465-66 (1963).

42. Amsterdam, *supra* note 13, at 805-06 (1965).

43. *Id.*

44. *Steffel v. Thompson*, 415 U.S. 452, 463-64 (1974); *Zwickler v. Koota*, 389 U.S. 241, 245-47 (1967).

45. Amsterdam, *supra* note 13, at 828-29.

ing pattern, a new Habeas Corpus Act was enacted in 1867.⁴⁶

The 1867 Act is a marked departure from the original Act of 1789. The courts no longer depend entirely upon the common law to dictate the grounds of habeas corpus jurisdiction. Jurisdictional grounds are stated in the Act. The writ would issue whenever "custody in violation of the constitutional laws or treaties of the United States" was involved.⁴⁷ The statute now explicitly encompasses persons in state custody.

The right to grant the writ where state custody is involved negates any broad principle of deference to the state courts.⁴⁸ While convicted state prisoners may not have been the principal class with whom Congress was concerned, they clearly fall within the language of the statute.⁴⁹ The very creation of jurisdiction

46. An Act Relating to Habeas Corpus, ch. 27, 14 Stat. 385 (1867). See note 22, *supra*.

47. The Act provided in pertinent part, as follows:

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

An Act Relating to Habeas Corpus, ch. 27, 14 Stat. 385 (1867). That language, substantially unaltered, is now contained in 28 U.S.C. § 2254(a) (1971).

The new habeas corpus legislation differs from the original legislation in two vital respects. First, it now reaches state prisoners. Second, the new act does not merely refer to the writ, leaving the grounds for its issuance to be inferred from the common law. It explicitly states the grounds upon which the writ will issue: "[C]ustody in violation of the Constitution or laws or treaties of the United States * * *." *Id.*

The 1867 Act is a marked departure from the original Act of 1789. The courts are no longer left dependent upon the common law for the grounds of habeas corpus. Grounds are stated. Thus, as the Court has often recognized, whatever the scope of the common law writ may have been, the scope of federal habeas corpus is to be determined from the language Congress used in granting jurisdiction. *United States v. Hayman*, 342 U.S. 205, 211 (1952); *Walker v. Johnston*, 312 U.S. 275, 285 (1941); *Johnson v. Zerbst*, 304 U.S. 458, 465-66 (1938).

48. Presumably, if the existing relationship between state and federal courts was satisfactory to the Congress, new legislation would not have been required. Moreover, as Amsterdam notes,

[i]t is impossible to read these debates of the Thirty-Ninth Congress without concluding that the federal legislators were intensely aware of the hostility and anti-Union prejudice of the Southern state courts and of the use of state court proceedings to harass those whom the Union had an obligation to protect.

Amsterdam, *supra* note 13, at 825. Cf. *Fay v. Noia*, 372 U.S. 391, 415-17 (1963).

49. For a discussion of the probable class of persons who were the main concern of Congress, see *Mayers, The Habeas Corpus Act of 1867:*

where none existed before demonstrates congressional intent to change the existing relationship between the state and federal authorities, including the courts.⁵⁰

The grounds upon which the writ has to be granted, "custody in violation of the Constitution,"⁵¹ presented the courts with an interpretational choice where a convicted state prisoner was involved. The jurisdiction of a court is an internal concept.⁵² A court acts beyond its jurisdiction when it entertains a case that does not fall within the class of cases over which the court has been granted authority.⁵³ However, in a broader sense, the concept of jurisdiction is utilized to distinguish those failures of the judicial process of sufficient importance that they may not be treated as mere errors.⁵⁴ The new standard could not be interpreted readily on strictly jurisdictional grounds—that is, that a mere showing of a judgment of a court with jurisdiction would defeat the issuance of a writ of habeas corpus. However, the new standard could have been read with the closest possible analogy to the concept of jurisdiction. Presumably, then, requirements of notice and opportunity to be heard would have set the limits of the habeas corpus power, leading to results similar to constitutional limitations upon the jurisdiction of state courts in civil cases. Habeas corpus then would lie when the federal question had not been resolved because the prisoner had been denied a fair opportunity to litigate it.⁵⁵ Alter-

The Supreme Court as A Legal Historian, 33 U. CHI. L. REV. 31, 44-46 (1965). However, the language of the statute is broader than the narrow class Mayers cites as the primary beneficiary class. As Justice Rehnquist has observed of the Civil War Amendments, "To the extent that the language of these amendments is general, the courts are of course warranted in giving them an application coextensive with their language." Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 699 (1976). Cf. Tushnet, 1975 WIS. L. REV. 488-89.

50. Amsterdam, *supra* note 13, at 803 (1965).

51. See note 47 and accompanying text *supra*.

52. The primacy of the internal concept is noted in Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1126-27 (1966).

53. RESTATEMENT OF JUDGMENTS § 7 (1942); RESTATEMENT (SECOND) OF CONFLICTS § 105 (1969).

54. The imposition of constitutionally rooted limits on the civil jurisdiction of state courts is exemplary. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

55. This is the approach for which Bator argued. He noted "that the [habeas corpus] statute may at most be regarded as ambiguous with respect to what matters would be deemed to render a detention unlawful under federal law," and then proceeded to develop the "fair opportunity to be heard" doctrine as analogous to the pre-1867 practice in habeas corpus. Bator, *Finality in Criminal Law*, 76 HARV. L. REV. 441, 507-19 (1963).

natively, the full breadth of the language could have been accepted. Habeas corpus jurisdiction could have been treated as a function of the Constitution and set free to vary with the growth of the federal constitutional rights of those charged with crime in the state courts.⁵⁶

Prior to *Brown v. Allen*,⁵⁷ the interpretational choice which the Supreme Court made was ambiguous.⁵⁸ The habeas corpus cases arose in the context of an ordered liberty or selective incorporation approach to the due process clause. Thus, the cases could be read as either taking the view that any violation of due process came within the habeas corpus jurisdiction or as taking the view that those violations of due process which amounted to a denial of hearing came within the habeas corpus jurisdiction.⁵⁹ *Brown v. Allen*, however, settled the issue.⁶⁰ That case determined that all denials of due process came within the habeas corpus jurisdiction. When the viability of the selective incorporation approach ended, the logic of *Brown v. Allen* was still applicable. As the Bill of

56. This was the received interpretation until *Stone*. See, e.g., Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106 (1959).

Under this approach the habeas corpus jurisdiction follows the Constitution and has expanded "by reason of the Supreme Court's ever widening translation of the specific guarantees of the National Bill of Rights into the more generalized limitations upon state action stated in the Fourteenth Amendment." C. MCGOWAN, *THE ORGANIZATION OF THE JUDICIAL POWER IN THE UNITED STATES* 52 (1969).

57. 344 U.S. 443 (1953).

58. For example, in *Moore v. Dempsey*, 261 U.S. 86 (1923), which involved the conviction of black defendants by a biased all-white jury, the Court appeared to recognize that habeas corpus reaches all denials of due process. In the factual context of *Moore*, the Court equated due process with the right to be heard in an unbiased tribunal. However, at the time, and for a considerable period thereafter, the specific provisions of the Bill of Rights served at most as a kind of model of the broader "concept of ordered liberty" applicable to the states through the due process clause. Thus, the provisions of the Bill of Rights were not necessarily controlling on the states if such rights were not within the "concept of ordered liberty." See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937). Cf. *Adamson v. California*, 332 U.S. 46 (1947), and particularly the citation to *Moore v. Dempsey*, 261 U.S. 86 (1923), for the proposition that "[a]right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment." 332 U.S. at 53 n.11.

59. Thus, on the one hand, the earlier cases could be read as saying that habeas corpus reached a denial of the right to be heard. On the other hand, the cases could be read as saying habeas corpus reached all denials of due process including the denial of the right to be heard. Compare Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 105 (1959), with Bator, *Finality in Criminal Law*, 76 HARV. L. REV. 441, 488-91 (1963).

60. 344 U.S. 443, 497-513 (1953).

Rights became fully applicable to the states, habeas corpus jurisdiction expanded. This implication of *Brown v. Allen* was drawn in *Fay v. Noia*.⁶¹

61. 372 U.S. 391, 422 (1963).

With particular regard to search and seizure cases, once *Mapp v. Ohio*, 367 U.S. 643 (1961), was decided, the courts treated search and seizure cases as coming within the reach of § 2254. For example, courts of appeals began to entertain state search and seizure cases without any qualms about jurisdiction. See, e.g., *Hall v. Warden*, 313 F.2d 483 (4th Cir. 1963); *U.S. ex rel Linkletter v. Walker*, 323 F.2d 11 (5th Cir. 1963), *aff'd*, 381 U.S. 618 (1965); *California v. Hurst*, 325 F.2d 891 (9th Cir. 1963); *U.S. ex rel. Angelet v. Fay*, 333 F.2d 12 (2d Cir. 1964); *Sisek v. Lane*, 331 F.2d 235 (7th Cir. 1964); *Hubbard v. Tinsley*, 336 F.2d 854 (10th Cir. 1964); *Burnside v. Nebraska*, 346 F.2d 88 (8th Cir. 1965). In *Henry v. Mississippi*, 379 U.S. 443, 452 (1965) the Court intimated that the view on jurisdiction which the courts of appeals were taking was correct. In *Linkletter* the Court confirmed jurisdiction by deciding that case on the merits.

Linkletter was a habeas corpus case. If a conviction obtained through the use of illegally seized evidence did not come within the habeas corpus jurisdiction, the courts appealed from would not have had jurisdiction. *Carfer v. Caldwell*, 200 U.S. 293, 296 (1906); *Matters v. Ryan*, 249 U.S. 375, 377 (1919). Since the Court's jurisdiction depends upon that of the courts below, it would not have had jurisdiction to reach the merits. *Mansfield, C. & L.M.R.R. v. Swan*, 111 U.S. 378, 382 (1884); *Treines v. Sunshine Mining Co.*, 308 U.S. 66, 70 (1939). Since the Court reached the merits, it necessarily determined that federal habeas corpus is available for a prisoner claiming his conviction was obtained through the use of evidence procured in violation of the fourth amendment. *United States v. Haley*, 371 U.S. 18, 19 (1962); *Thornton v. United States*, 368 F.2d 822, 828-29, 831 (D.C. Cir. 1966); *Wilson v. Porter*, 361 F.2d 412, 416 (9th Cir. 1966). Since *Linkletter*, the Court has consistently taken jurisdiction over habeas corpus cases involving state prisoners' claims of fourth amendment violation. See, e.g., *Warden v. Hayden*, 387 U.S. 294 (1967); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

After tracing the expansion of the writ in its opinion in *Stone*, the Court notes that, "[d]uring the period in which the substantive scope of the writ was expanded, the Court did not consider whether exceptions to full review might exist with respect to particular categories of constitutional claims." *Stone* at 478-79. The Court's statement is extremely misleading, since such categories of exceptions are inconsistent with the premise that underpins the broad construction, that the writ's reach is coterminous with the scope of the fourteenth amendment. See Schafer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 20 (1956); Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 86-87 (1965).

Neither is it easy to see the relevance of the pre-*Kaufman* practice under 28 U.S.C. § 2255 (1971) to which the Court refers. *Stone* at 479. Underpinning the broad construction is the view that Congress intended to give state prisoners an automatic federal forum in which to try questions of constitutional right. *Amsterdam*, *supra* note 113, at 839 n.191 (1965). Hence, the practice where the prisoner has already been heard in a federal forum is not relevant. See *Thornton v. United States*, 368 F.2d 822, 828-29 (D.C. Cir. 1966).

The limited or fair opportunity approach to habeas corpus jurisdiction is defensible as an attempt to model the expanded habeas corpus authority upon the traditional limits of the habeas corpus power.⁶² The underlying assumption of this approach is that the 1867 Habeas Corpus Act was aimed at a narrow series of abuses involving free men and ex-Union soldiers. The vindication of their rights was the central purpose of Congress.⁶³ The language used accomplishes this purpose, but at the price of considerable overbreadth. Since only a narrow abuse was the target of the statute, considerations of federalism play a dominant role in its construction. While the language of the statute cannot be ignored, its breadth must be appropriately minimized.

The alternative approach accepts the language utilized. While specific abuses motivated the passage of the statute, language was deliberately adopted which would encompass all deprivations of constitutional rights within the habeas corpus jurisdiction.⁶⁴ Doubting the ability of the state courts to fairly deal with federal claims, Congress was determined "to give all state prisoners both a federal trial forum and access to the Supreme Court for litigation of their federal claims, whatever those claims might be."⁶⁵

The great difficulty with the *Stone* approach is that it does not attempt to resolve the conflict between the various interpretational approaches. Under the *Stone* approach, constitutional rights are sorted into categories. As to one category, those that are relevant to the establishment of guilt or innocence, the literal breadth of the act is accepted. As to other rights, the fair opportunity approach is adopted. While the language of the statute may justify either a literal or fair opportunity construction, it is difficult to see how a hybrid approach can be taken. If the Habeas Corpus Act, in cases involving state convicts, should be constructed in conjunction with the concept of jurisdiction, the *Stone* approach is improper in those cases where rights affecting guilt or innocence are involved. If a state prisoner had an adequate opportunity to litigate the admissibility of his confession, then an erroneous decision by the state court is irrelevant. However, if the broad approach

62. Bator, *Finality in Criminal Law*, 76 HARV. L. REV. 441, 463-99 (1963).

63. Mayers, 33 U. CHI. L. REV. 31, 37 (1965).

64. See, e.g., Trushnet, 1975 WIS. L. REV. 488-89. In Amsterdam, *supra* note 13, at 823, the author considered one purpose of the Act to be the expansion of habeas corpus jurisdiction to its constitutional limits. *Id.*

65. *Id.* at 839 n.191 (1965).

is appropriate, then it is difficult to see how rights affecting guilt or innocence may meaningfully be distinguished from rights which do not.

The *Stone* approach gains its greatest strength from its selective incorporation approach. It leaves within the ambit of habeas corpus jurisdiction those deprivations of constitutional rights going to "the fundamental conditions of justice."⁶⁶ However, if the habeas corpus cases prior to *Brown v. Allen* are read as selective incorporation cases, then they will not support *Stone*. As selective incorporation cases, their underlying premise with regard to the Habeas Corpus Act must have been that it reached all deprivations of constitutional rights. Since the due process clause of the fourteenth amendment did not make the Bill of Rights provisions applicable to the states, but rather imposed an ordered liberty scheme of rights on the states, granting habeas corpus where one of the selected ordered liberties was involved was an adoption of the view that the Habeas Corpus Act reached all denials of due process.⁶⁷ Once selective incorporation or ordered liberty is rejected as an approach to the due process clause, it becomes irrelevant to the interpretation of the Habeas Corpus Act. Either the Habeas Corpus Act reaches all denials of due process, in which event it would reach fourth amendment claims, since the fourth amendment is applied to the states through the due process clause of the fourteenth, or it reaches only failures to fairly entertain claims.

The difficulty with maintaining a fair opportunity approach for some constitutional rights and a full habeas corpus approach for others is illustrative of the underlying difficulty involved in the *Stone* approach. Habeas corpus is a remedy for violation of a right rather than a right in itself. The dissatisfaction with the habeas corpus remedy is, in large measure, a dissatisfaction with what the Supreme Court has done to the state criminal process in extending federal rights to the state level. However, if the problem concerns rights granted the accused in the state court, the appropriate area of surgery is at the level of constitutional right. The creation of lesser constitutional rights is no solution at all.

The broad approach to the Habeas Corpus Act rests "on the principle that a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal constitutional

66. The phrase is one recommended by Pollock to Holmes as the appropriate measure of habeas corpus. 1 HOLMES—POLLOCK LETTERS 226 (M. Howe ed. 1961).

67. See note 58 and accompanying text *supra*.

court. . . ."⁶⁸ Since the Supreme Court cannot in most cases grant that review, the task must necessarily be performed by a district court exercising habeas corpus jurisdiction.⁶⁹ If such a broad review power in the district courts was intended, it must have been adopted because of doubt of the ability of the state courts to adequately deal with federal constitutional claims.⁷⁰ The theory is that "on a practical level the state judge's allegiance to the Constitution may be weakened by his proximity to the state's enforcement of its criminal law."⁷¹

In *Stone*, the Supreme Court addressed this argument. It noted that:

The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. 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. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.⁷²

The difficulty with the Court's argument is that it does not agree with the Court's decision. If the underlying premise of the Habeas Corpus Act is a distrust of state judges and if such distrust is no longer warranted, the appropriate remedy is an amendment of the Habeas Corpus Act. The fact that the policy adopted by

68. Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106 (1959).

69. Reitz, *Federal Habeas Corpus; Post Conviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 474 (1960); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 380 (1964); Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 86-87 (1965).

70. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1060-62 (1970).

71. *Id.* at 1061.

72. *Stone* at 493-94 n.35.

a statute is no longer relevant has never been thought to justify a judicial abrogation of the policy. Conversely, if distrust of judges never underpinned the Habeas Corpus Act, then the Court's preservation of a broad review in cases going to guilt or innocence reflects an unwarranted suspicion of state judges.⁷³ Moreover, if a variable suspicion is to be the rule, then independent review would appear to be more necessary in cases involving rights which do not go to guilt or innocence, since such a right is less likely to excite state court deference to federal interests than one where relevance to guilt or innocence can be directly perceived.⁷⁴

The premise that "we . . . afforded broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty," has great rhetorical appeal.⁷⁵ However, the premise has no demonstrable relevance to either the history or to the policy considerations that underpin the Habeas Corpus Act. The premise is a judicial creation unrelated either to any arguable interpretation of the original understanding of the Act or to its subsequent constructional history.

When we make reference to the intention of the legislature in interpreting a statute, we adopt the fiction of a unitary legislative mind. The basis of this fiction lies in the recognition that a statute is a public linguistic performance to be construed by a process analogous to that applied to an utterance of an individual. In the usual situation, in which an individual's utterance is an answer to a question, the question precedes the answer and sets the context in which the answer is to be understood. In the process of judicial construction, the question arises after the answer. The problem is not one specifically in the mind of the legislature; otherwise it would have been resolved by the statutory language.⁷⁶ Nevertheless, the statutory language and the historic policy concerns that form the foundation of the statute, serve as models for an appropriate solution to the problem.⁷⁷ The original historical material does

73. See Bator, *Finality in the Criminal Law*, 76 HARV. L. REV. 441, 444-53, 510-11 (1963).

74. Mishkin, *Foreward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 86-87 (1965).

75. Stone at 491-92 n.31.

76. G. GILMORE, *THE AGES OF AMERICAN LAW* 96 (1977). This is an application of the broader premise that "nobody can decisively answer a question that has not come up at the time." A. DULLES, *THE SURVIVAL OF DOGMA* 185 (1973). "In every interpretation, then, something like an application to the present takes place." R. PALMER, *HERMENEUTICS* 236 (1969).

77. This should be seen as an element of the exclusionary character

not set the limits of the construction of the process.⁷⁸ An individual statute or constitutional provision has a history which is part of a broader legal and political history.⁷⁹ Evolving notions of value and policy may have a role to play in the construction process.⁸⁰

The difficulty with the *Stone* approach is that it is grounded neither on history nor upon broadly applicable policy considerations. From the historic point of view, the guilt or innocence dichotomy has no basis. Selective incorporation is no longer a model of constitutional adjudication. Its application in the peripheral area of habeas corpus, where it has no general role to play, is unsupported. It is not a broad policy of constitutional construction applied in a specific area, but rather, a new policy applicable only in that area.

THE COURT AND CONGRESS

The broad approach to the habeas corpus statute adopted in *Brown v. Allen*⁸¹ and *Fay v. Noia*⁸² represented, at a minimum, a not impermissible gloss on the original history of the statute. They were a logical outcome of a line of cases that began with *Moore v. Dempsey*.⁸³ These cases gradually expanded the concept of jurisdictional defect in tandem with the expansive recognition

of legislation. Even if the legislature has not directly provided the rule of decision, where it has articulated the reasons or policies upon which a decision is to be based, other reasons or policies become irrelevant.

78. This conclusion would follow from the impossibility of finding "a position outside history from which we can strip away the later accretions and purely and simply 'get back to the original.'" W. BEARDSLEE, *LITERARY CRITICISM OF THE NEW TESTAMENT* 6 (1970). "It is simply not possible to stop being men of the twentieth century while we engage in a judgment of the past." R. WELLEK & A. WARREN, *THEORY OF LITERATURE* 42 (3d ed. 1956). Cf. R. PALMER, *HERMENEUTICS* 224, 251 (1969); B. SCHILLEBEEKX, *TOWARD A CATHOLIC USE OF HERMENEUTICS IN GOD, THE FUTURE OF MAN* 23, 30 (1970).

79. W. BEARDSLEE, *LITERARY CRITICISM OF THE NEW TESTAMENT* 6, 10 (1970); R. WELLEK & A. WARREN, *THEORY OF LITERATURE* 42-43 (3d ed. 1956).

80. Any such approach encounters the difficulty of distinguishing the merely personal from that which is a valid part of the tradition. Even in the constitutional area, I doubt that these difficulties justify total skepticism, though they do argue for a strong deference by the Courts to the political process. See Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 704-05 (1976). In the statutory area, it is the policy considerations which have motivated and continue to motivate legislation and those that can be structurally deduced from the Constitution, e.g., federalism, which constitute the interpretive tradition.

81. 344 U.S. 443 (1953).

82. 372 U.S. 391, 398-99 (1963).

83. 261 U.S. 86 (1923).

of constitutional rights of the accused⁸⁴ until the analogy had become devoid of meaning and was rejected.

Arguments for a retrenchment from the position in *Brown v. Allen* were continually pressed on Congress. In 1956, a bill was introduced to limit habeas corpus to cases in which the state had not granted the defendant an adequate opportunity to litigate the issue under consideration. That legislation failed to pass.⁸⁵ Such legislation was again considered by Congress in 1958 and in 1959 but on neither occasion did the legislation become law.⁸⁶ By 1959, efforts to adopt the adequate opportunity limitations were abandoned.⁸⁷ Finally, in 1966, with full knowledge of the gloss which the Supreme Court had placed on the Habeas Corpus Act in *Brown v. Allen*, Congress enacted the current Habeas Corpus Statute, which continued the jurisdictional grant of the 1867 Act.⁸⁸ Under standard canons of construction, when Congress reenacted the jurisdictional grant of the 1867 Act, it thereby approved the gloss which the Court had placed upon it.⁸⁹

When Congress reenacted the jurisdictional grant in 1966, search and seizure cases clearly came within the habeas corpus jurisdiction with regard to state prisoners. *Mapp v. Ohio*⁹⁰ had been decided in 1961. *Mapp* had held that the admission of unlawfully seized evidence in a state trial was an error of constitutional dimension violative of the mandate of the fourth amendment "that no man is to be convicted on unconstitutional evidence."⁹¹ This mandate of the fourth amendment was to be "enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause . . ."⁹² Read with *Brown*, *Mapp* brought search and seizure cases within the habeas corpus jurisdiction where state prisoners were involved.⁹³

Apparently, the lower federal courts immediately drew the implication from *Mapp* that search and seizure cases came within

84. Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 104-06.

85. Pollack, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L. J. 50, 57 (1956).

86. See 105 CONG. REC. 14630 (1959).

87. Reitz, *Federal Habeas Corpus: Post Conviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 523-24 (1960).

88. Habeas Corpus Act of 1966, Pub. L. No. 89-711, 80 Stat. 1104 (codified at 28 U.S.C. § 2256 (1971)).

89. *Georgia v. United States*, 411 U.S. 526, 533 (1973).

90. 367 U.S. 643 (1961).

91. *Id.* at 657.

92. *Id.* at 660.

93. *Id.* at 656-57. See also note 61 *supra*.

the Habeas Corpus Act. While they had held that federal prisoner search and seizure claims did not come within the federal Habeas Corpus Statute,⁹⁴ they began to entertain state prisoner habeas corpus cases, involving claims of unlawful search and seizure without indicating any doubt as to jurisdiction.⁹⁵ In 1965, before the amending statute was passed, the Supreme Court indicated in *Henry v. Mississippi*⁹⁶, and then held by implication in *Linkletter v. Walker*⁹⁷, that state search and seizure cases came within the habeas corpus jurisdiction. "The longstanding acceptance by the courts" of this jurisdiction "coupled with Congress' failure to reject" this "reasonable interpretation of the wording" of 2254 "argues significantly in favor" of continuing the habeas corpus jurisdiction over search and seizure cases.⁹⁸ The policy arguments amassed by Justice Powell in *Schneckloth* were not unfamiliar to the Congress. Legislation in accordance with his position had been introduced in Congress but failed to pass.⁹⁹

The process of interpretation of a statute can be viewed as a reference of the solution, which the court has reached, back to the political process. Once the statute has been construed, the political process has an opportunity to see how the construction works. If it is dissatisfied with the operation of the statute, amendment is possible. This model of the interpretational process, the typical one, argues in favor of a strong deference to prior interpretation of statutes. Practically, there are a large number of statutes which are not a subject of continuing political debate. These statutes either are not of sufficient importance or do not impact enough persons so that dissatisfaction with their operation would produce amendment. These practicalities may argue against a strong deference to prior decisional law, where such a statute was involved. However, these practicalities are not relevant to the Habeas Corpus Act. Its interpretation was not a matter with which the political process was unfamiliar. Federal habeas corpus has long been a subject of debate. In such a context, a broad change in policy at the

94. 28 U.S.C. § 2255 (1971); see note 61 *supra*.

95. *Hall v. Warden*, 313 F.2d 483 (4th Cir. 1963); *U.S. ex rel. Linkletter v. Walker*, 323 F.2d 11 (5th Cir. 1963), *aff'd*, 381 U.S. 618 (1965); *California v. Hurst*, 325 F.2d 891 (9th Cir. 1963); *U.S. ex rel. Angelet v. Fay*, 333 F.2d 12 (2d Cir. 1964); *Sisek v. Lane*, 331 F.2d 235 (7th Cir. 1964); *Hubbard v. Tinsley*, 336 F.2d 854 (10th Cir. 1964); *Burnside v. Nebraska*, 346 F.2d 88 (8th Cir. 1965).

96. 379 U.S. 443, 452 (1964).

97. 381 U.S. 618, 640 (1965).

98. *Blue Chip Stamps v. Manor Drug*, 421 U.S. 723, 733 (1975).

99. See Comment, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L. J. 1221 (1973).

judicial level, which has been unachievable in the political process, represents an inadequate deference to the policy formulation role of Congress.¹⁰⁰

CONCLUSION

One of the principal thrusts of the developing jurisprudence of the Burger Court has been a rejection of judicial activism. The Court has sought to destroy what it regarded as the existing view—that the judicial process was a principal center of problem solving.¹⁰¹ Much of the Court's work appears to embody a conscious effort to return those seeking a redress of their grievances to other processes, either those of the state courts or of the legislature.

Such an approach may be commended. However, its application is subject to its underlying rationale. If the political process is the principal problem solver, then the courts owe a broad deference to that process and the solutions which it has achieved. A judicial dissatisfaction with results, unaccompanied by evidence that the political process is unaware of the results, does not justify judicial activism. If Congress appears to have blundered but knows what results have been achieved, then its blunder must be accepted by the courts.

A principal criticism of the activism of the Warren Court was that the results reached could not be justified on broadly accepted principles of constitutional methodology. Not merely the results reached by the Court, but the way they were reached, were in debate.¹⁰² Reversal of a prior decision may still result in criticism. However, if the reversal is not methodologically stronger than the

100. It is ironic that those dissatisfied with the habeas corpus jurisdiction, while unable to secure change from Congress, obtained it from a Supreme Court majority whose members are continually reminding us that we must accept the outcome of the political process and not turn to the courts for relief. See Rehnquist, *The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693, 705-06.

101. *United States v. Richardson*, 418 U.S. 166 (1974), is an explicit example. "As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than at any period of our national development." *Id.* at 179.

In his concurrence, Mr. Justice Powell commented: "It merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." *Id.* at 192.

102. Hart, *Foreword: The Time Chart of the Justices*, 73 *HARV. L. REV.* 84 (1959), is a classic example of one commentator's theory of the Court's methodology followed by a criticism of Warren Court opinions.

case overruled, it has no greater justification.¹⁰³ The decision in *Stone* creates an exception to the broad language of the Habeas Corpus Act of the type one would expect to find in a proviso to a statute. The policy arguments amassed in the case are the type which would support limiting language in the Act. However, no such limitation appears in the statute.¹⁰⁴

The decision in *Stone* demonstrates the Supreme Court's dissatisfaction with the exclusionary rule. The dissatisfaction with the exclusionary rule is irrelevant to the construction of the Habeas Corpus Act. While the rule stands, given the language of the Act, search and seizure cases should have come within it. If the exclusionary rule is to be modified, the appropriate place of modification is constitutional adjudication, where the rule is the judicial creation. Ad hoc modification of a statute is a legislative role.

103. Agreed methods of adjudication will not produce agreement or result. We cannot hope for a decision theory which would produce the one right answer. However, method can on the one hand narrow the range of debate and on the other, persuade those who disagree, that the decision is at least appropriate, though not right.

104. As should now be clear from this article, my title promised more than the article delivered. The title suggests a general critique of the interpretive methods of the Burger Court. I have not, however, tried to demonstrate that *Stone* is a typical decision. Rather, what I have sought to accomplish is a development of a non-activist approach to legislative interpretation and a test of this decision against the model. However, if *Stone* is a typical decision then one may suspect that the non-activist posture of the Burger Court is a selective one, and that where ideological presuppositions collide with the canons of restraint, it is the canons which will be ignored.