THE MISADVENTURES OF STATE POSTCONVICTION REMEDIES

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In a colloquium concentrating on the lower federal courts' jurisdiction to determine federal claims, it falls to me to treat state court opportunities to adjudicate the same issues in advance of, as an aid to, or in place of federal litigation. To do that, I will have to recount some conventional wisdom regarding the development of federal habeas corpus and state postconviction remedies in tandem during the last half century. In due course, I hope to solicit support for an unconventional conclusion to be drawn from that experience.

In my view, contemporary state postconviction remedies work such injury to federal interests that petitioners should not be required to invoke them. I reach this conclusion for two reasons. First, state postconviction remedies, in partnership with judge-made doctrines restricting the availability of federal habeas corpus, actually frustrate federal rights. Second, an insistence upon state postconviction litigation partakes of the "process model" in federal jurisprudence—an explanation for the distribution of responsibility between the state and federal courts that accords to the latter a residual role utterly at odds with what is, or should be, our constitutional framework. I begin with the options for postconviction litigation as they existed at one time and then track, with occasional backing and filling, the unfortunate course of events that has brought us to this pass.

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INTRODUCTION

Forty years ago, when Fred Vinson presided in Washington and Edward Levi was an obscure academic at the University of Chicago, the Supreme Court decided *Young v. Ragen*,[1] one of those recurrent little cases packing an enormous practical and theoretical wallop. Habeas corpus aficionados and Dean Levi, who served as counsel for the petitioner, will recall that Jack Young was convicted of burglary and larceny by an Illinois circuit court and was sentenced to a term in prison.[2] A year later, he filed a habeas corpus petition in state court, alleging among other things that the guilty plea entered against him in the trial court had been involuntary and thus invalid under the fourteenth amendment.[3] The state's attorney conceded that Young's allegations were substantial and that he was entitled to a hearing.[4] Yet the circuit court dismissed summarily, ostensibly on the ground that habeas corpus was not available in Illinois to test the validity of a criminal conviction on constitutional grounds.[5] Nor could Young raise his claim on writ of error or coram nobis.[6] To make matters worse, the Illinois appellate courts had no appellate jurisdiction to review denials of habeas relief. In the end, it appeared that there was no mechanism at all within the state court system by which Young, or prisoners like him,[7] could raise what might be meritorious federal contentions.[8]

The occasion was momentous. Notwithstanding the Court's rejection of Justice Black's "incorporation" theory several years earlier,[9] most of the Justices then sitting were poised to effect improvements in state criminal processes by forcing the states to conform to federal constitutional standards. Already the Court had agreed to examine the "totality of facts"[10] in each instance to ensure that state procedures were "fundamentally fair."[11] A few

1. 337 U.S. 235 (1948).

2. *Id.* at 237.

3. Levi's brief in the Supreme Court recited the allegations in the habeas petition below: that Young and his wife had been arrested without a warrant, that they had been held "incommunicado" for fifteen days, that they had been subjected to "abuse and torment," that Young's request for counsel had been denied, and that he had stood mute before the trial court and had not voluntarily agreed to the plea entered on his behalf. Brief for Petitioner at 3-4, *Young*, 337 U.S. 235 (1948).

4. *Young*, 337 U.S. at 237.

5. The circuit court explained only that Young's petition was "insufficient in law and substance." *Id.* at 237. The state Attorney General took that explanation to mean that, as a state procedural matter, habeas corpus was not an appropriate remedy for Young's claim. Other circuit court decisions in Illinois were consistent with that understanding. *Id.*

6. At any rate, the state Attorney General did not "suggest that either of the other two Illinois post-trial remedies, writ of error or coram nobis, [*was*] appropriate." *Id.* at 238 (emphasis added).

7. Young's case was consolidated in the Supreme Court with several similar cases. *Id.* at 239.

8. *Id.* at 234.

9. Adamson v. California, 332 U.S. 46, 52-53 (1947).

10. *E.g.*, Betts v. Brady, 316 U.S. 455, 461-62 (1942).

11. Lisenba v. California, 314 U.S. 219, 236 (1941).

years later, the Warren Court would demand that "fundamental" procedural safeguards recognized in the Bill of Rights be respected in state as well as federal prosecutions.[12] Simultaneously, the Court was grooming the lower federal courts to assume the primary burden for the enforcement of constitutional rights in federal court. Well before the decision in *Young*, the Court had established that district courts would issue the federal writ of habeas corpus on behalf of state prisoners whose convictions were obtained in violation of federal law.[13] Five years after *Young*, in *Brown v. Allen*,[14] the Court would underscore the availability of the federal habeas courts to guarantee compliance with federal standards.[15]

By common account, both the Court's innovations in substantive constitutional law and its development of federal habeas corpus to provide federal enforcement machinery reflected dismay over the arbitrary, even brutal, handling of criminal defendants by state authorities.[16] At the same time, however, the Court was trying desperately to obtain the cooperation of the state courts in the new federal order. A year earlier, the Court had read the supremacy clause to require state court enforcement of a valid federal statute despite its penal character.[17] And, in a series of criminal cases from Illinois culminating in *Young*, the Court had become increasingly distressed by state procedural complexities that seemed invariably to thwart the consideration of constitutional claims in state court.[18] In case after case, prisoners attempted to follow the procedural advice provided by the Illinois Supreme Court's most recent rulings. But, in case after case, that court concluded that the wrong writ had been chosen. In each instance, the United States Supreme Court found such state procedural grounds of decision to be sufficient.[19] Yet patience with common law formalisms was wearing thin. The Justices had recently warned that the state courts' refusal to address federal constitutional

12. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Gideon v. Wainwright, 372 U.S. 335 (1963); Malloy v. Hogan, 378 U.S. 1 (1964).

13. *E.g.*, Moore v. Dempsey, 261 U.S. 86 (1923); Mooney v. Holohan, 294 U.S. 103 (1935).

14. 344 U.S. 443 (1953).

15. *Compare* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963)(contending that *Brown* extended the federal habeas jurisdiction well beyond what it had been in the past) *with* Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982) (arguing that *Brown* only reaffirmed jurisdictional power that had existed for some time).

16. *E.g.*, Rochin v. California, 342 U.S. 165 (1952). *Compare Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1055-62 (1970) (explaining the expansion of federal habeas as the product of the Court's desire to offer at least one opportunity to litigate federal claims in a federal forum).

17. Testa v. Katt, 330 U.S. 386, 389 (1947). *See infra* text accompanying notes 133-35.

18. *See* Woods v. Nierstheimer, 328 U.S. 211 (1945); Marino v. Ragen, 332 U.S. 561 (1947); Loftus v. Illinois, 334 U.S. 804 (1947).

19. *E.g.*, Carter v. Illinois, 329 U.S. 173, 179 (1946) (accepting that the writ of error was inappropriate); *Woods*, 328 U.S. 216 (accepting the explanation that the petitioner had chosen the wrong writ—habeas corpus).

claims might itself constitute a due process violation.[20]

In *Young*, accordingly, Chief Justice Vinson faced a vital choice. On the one hand, it was perfectly open to him to wash his hands of the state courts and their vexing processes and to reach and resolve Young's federal claim. That would have been wholly consistent with the Court's growing willingness to measure state criminal process against federal constitutional standards. If the claim could not be determined without an evidentiary hearing, Vinson might have dismissed for that reason, without prejudice to a *federal* habeas corpus action in which a federal district court would take evidence, find the relevant facts, and dispose of the claim on the merits. Moreover, channeling constitutional litigation to the federal habeas courts would have accorded with the Justices' increasing recognition that the Supreme Court itself could not always correct errors in state criminal cases and that the lower federal courts, exercising their jurisdiction in habeas, could serve as surrogates. Clearly, the "adequate state ground" doctrine posed no bar this time around. Illinois was free to choose the state procedural vehicle it wished prisoners to employ. If the circuit court had dismissed Young's action because he had pursued habeas corpus, as opposed to some other "clearly defined method" for pressing his federal claim, Vinson would have affirmed on that nonfederal basis. In this instance, however, Illinois offered "no post-trial remedy" at all to prisoners in Young's position. That state of affairs could provide no "adequate" state procedural ground of decision on which the circuit court's judgment could rest.[21]

On the other hand, it was open to Vinson once more to exhort state authorities in Illinois to make the state courts available, by some means, for the treatment of Young's federal claim. That is the course the Chief Justice chose to follow. He vacated the circuit court order below and remanded for reconsideration.[22] No one dissented. There was reason to hope that something good might happen on remand. At the time, the Illinois Supreme Court had

20. A notation by Justice Frankfurter for the Court in Foster v. Illinois, 332 U.S. 134, 139 (1947), was oblique in this respect. It is possible to read his reference to the denial of corrective process in state court as a suggestion that, in the future, the Court would find such a ground of decision inadequate to cut off review on certiorari. More likely, Frankfurter intended to indicate that there are some occasions on which state postconviction remedies must be available. *See infra* text accompanying note 135.

21. Of course, an affirmance on an "adequate and independent state ground" would not have prejudiced a later petition for federal habeas relief—at least in 1948. House v. Mayo, 324 U.S. 42 (1945); *see* Fay v. Noia, 372 U.S. 391, 429-31 (1963). More recent decisions make it difficult for prisoners to avoid dismissal in habeas on the basis of procedural default in state court if their defaults were, or would be, sufficient to abrogate direct Supreme Court review. *See infra* text accompanying notes 112-21. Yet it is important to distinguish a denial of review in favor of fact-finding in a federal district court from an affirmance on the basis of "adequate" state grounds. *Cf.* Grace v. California, 360 U.S. 940 (1959) (denying certiorari "without prejudice to an application for writ of habeas corpus in an appropriate United States District Court"). In the former instance, the Court makes no public judgment regarding the procedures in state court and may well wish only to direct the litigant to a federal court able to provide a needed evidentiary hearing. *Cf.* White v. Ragen, 324 U.S. 760, 764-65 (1945).

22. *Young*, 337 U.S. at 240.

begun to widen the scope of state habeas corpus.[23] Even though some circuit courts had continued to dismiss postconviction petitions, it was at least possible that those trial-level courts had not been apprised of the state supreme court's change of heart.[24] Vinson's disposition was, then, entirely understandable and in keeping with the Supreme Court's practice of avoiding confrontations with the state courts whenever possible. Indeed, the decision in *Young* was admirably sensitive, measured and pragmatic. I mean in this essay to show that it was also dead wrong.

Two mistakes were made in *Young*. First, on a practical level, the Court signaled Illinois and other states to establish general state postconviction remedies for the litigation of federal claims raised after the completion of the ordinary appellate process. In Part I, I trace the development of state postconviction remedies since *Young* and examine the role they have come to play at present. That history has not been happy. Notwithstanding the best of intentions on the part of proponents, and despite the possibilities that surely existed, the states have established and now employ postconviction remedies that all too often frustrate the adjudication of federal claims. Accordingly, I contend that petitioners should be relieved of any responsibility to pursue those remedies before seeking federal habeas relief.

Second, on a conceptual level, the Court in *Young* lent credence to what is conventionally called the "process model" in American jurisprudence. At its core, the process model contemplates that the substantive conclusions of governmental institutions should be accepted on the whole, unless the process by which those outcomes were generated is found to be flawed in a manner that undercuts their political legitimacy or accuracy. In Part II, I elaborate on the process model more fully and explore its implications in this context. The appraisal is not sympathetic. As applied to the allocation of responsibility and authority between the federal and state courts, the process model fails to appreciate the value of ensuring that litigants with federal claims have at least one fair opportunity to litigate those claims in a federal forum. Accordingly, I contend on this more fundamental ground that state postconviction remedies should be optional.

I.
STATE POSTCONVICTION REMEDIES AND HOW THEY GREW

The circumstances in *Young* presented a narrow constitutional question: whether the states are obligated to offer criminal defendants a collateral opportunity to litigate federal claims that by their nature cannot be determined at trial or on direct review.[25] Three (overlapping) possibilities suggest them-

23. *Id.* at 237 (citing People v. Loftus, 400 Ill. 432, 81 N.E.2d 495 (1948); People v. Shoffner, 400 Ill. 174, 79 N.E.2d 200 (1948); People v. Wilson, 399 Ill. 437, 78 N.E.2d 514 (1948)).

24. *Id.* at 237, 239-40.

25. *Id.* at 238-39.

selves: claims touching the appellate court's handling of an appeal; claims depending upon new, but retroactively applicable, propositions of federal law; and claims depending upon factual allegations that could not have been raised at trial or on direct review. Of these, the third is by far the most significant inasmuch as it includes a variety of constitutional grounds for relief. In *Young*, for example, the petitioner was said to have pleaded guilty as charged, aborting trial and appeal altogether, and thus had to pursue *some* postconviction remedy—or nothing.[26] I will return to the states' constitutional responsibilities in cases of that kind.[27]

Chief Justice Vinson's opinion suggested, however, more sweeping remedies to accommodate litigants whose claims are raised as a matter of fact, not logic, after direct review is complete. Some such petitioners failed to raise claims when they might have and subsequently must insist that their procedural defaults should be excused. Others raised their claims in season but now present new allegations of fact that arguably put the matter in a different light. Whether or not the states *must* establish state remedies for defaulting petitioners, there were intimations aplenty when the Court decided *Young* that such remedies *should* be adopted to keep pace with the federal habeas courts, which *would* be open to adjudicate federal claims notwithstanding procedural defaults in state court. Some states had already begun to experiment with remedies capable of meeting demands for postconviction adjudication. Vinson's opinion fueled movements of that kind, generating widespread expectations that the states would provide for postconviction litigation of federal claims that were not, but might have been, adjudicated at trial or on direct review.

A. The Common Law Writs

In a sizeable number of jurisdictions, state appellate courts initially attempted to refurbish two common law writs for the new duty—habeas corpus and coram nobis. The intuitively more likely candidate of the two, habeas corpus, paradoxically presented greater difficulty. To begin, the common law rule governing habeas in most jurisdictions, including Illinois,[28] limited petitioners challenging detention under court order, as opposed to executive custody, to attacks on the sentencing court's jurisdiction.[29] The Supreme Court had recently faced the same difficulty with respect to the *federal* habeas writ. At first, the Court had indulged the fiction that constitutional error in a criminal conviction robbed the court concerned of jurisdiction; later, the Court

26. *Id.* at 237-38.

27. *See infra* text accompanying notes 129-37.

28. *See, e.g.*, Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 262 (1965); Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?* 40 CALIF. L. REV. 335, 337-38 (1952).

29. *See* Granucci, *Review of Criminal Convictions by Habeas Corpus in California*, 15 HASTINGS L.J. 189, 192 (1963); Comment, *The Use of Habeas Corpus for Collateral Attacks on Criminal Judgments*, 36 CALIF. L. REV. 420, 421-22 (1948); Wilkes, *Post-Conviction Habeas Corpus Relief in Georgia: A Decade After the Habeas Corpus Act*, 12 GA. L. REV. 249, 250 (1978).

abandoned references to jurisdiction entirely and held forthrightly that convictions were open to collateral attack in habeas corpus proceedings.[30] Some state courts followed suit—often for the express purpose of providing state court process in the hope of avoiding litigation in the federal forum.[31]

Nevertheless, other formalisms associated with habeas at common law typically barred convicts from the state writ. Even in jurisdictions in which nonjurisdictional claims were now cognizable, state courts insisted that habeas remained a "supplementary" remedy, not a "substitute for appeal."[32] Procedural irregularities making criminal judgments "voidable" constituted "mere error" subject to correction only on direct review.[33] By contrast, postconviction habeas corpus was restricted to more fundamental defects rendering convictions entirely "void."[34] There were other obstacles as well.[35] While some states gradually relaxed such barriers,[36] others maintained them intact—seriously undercutting the utility of habeas corpus as a routinely available vehicle for postconviction litigation in state court.[37]

Coram nobis was free of at least some of the disabilities associated with habeas corpus,[38] but it had drawbacks of its own as a postconviction remedy for claims that might have been raised in prior proceedings. Developed at common law to complement the writ of error, by which the record at trial could be removed to a higher court for the consideration of questions of *law*, coram nobis was available in the trial court—but only for the assertion of

30. *Compare* Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (employing the fiction) *with* Waley v. Johnson, 316 U.S. 101, 104-05 (1942) (discarding it).

31. *E.g.*, Huffman v. Alexander, 197 Or. 283, 251 P.2d 87 (1952). *See also Ex parte* Seeley, 29 Cal. 2d 294, 176 P.2d 24 (1946); *Ex parte* McVickers, 29 Cal. 2d 264, 176 P.2d 40 (1946); Comment, *supra* note 29.

32. *E.g.*, Harrison v. Amrine, 155 Kan. 186, 124 P.2d 202 (1942); *accord* Morris v. Peacock, 202 Ga. 524, 43 S.E.2d 531, *cert. denied*, 332 U.S. 832 (1947). *See* Note, *State Post-Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U. L. REV. 154, 161 (1965) (describing the sense in which many state courts understood habeas to be a "supplementary" remedy only).

33. Hobson v. Youell, 177 Va. 906, 916, 15 S.E.2d 76 (1941).

34. *In re* Shaffer, 70 Mont. 609, 227 P. 37 (1924).

35. For example, since only prisoners in physical detention could seek habeas relief, petitioners seeking to challenge sentences before their incarceration were ineligible to apply. *E.g.*, *In re* Rosencrantz, 205 Cal. 534, 271 P. 902 (1928). And, since habeas applications could be filed only in the immediate vicinity of a petitioner's place of detention, courts situated near penal institutions could be swamped with prisoner petitions, while sentencing courts, with more convenient access to records and witnesses, handled other judicial business. *See* People *ex rel.* Latham v. Warden, 39 A.D.2d 660, 331 N.Y.S.2d 729 (1972) (explaining this impediment to effective postconviction habeas in New York State).

36. *E.g.*, *In re* Chapman, 43 Cal. 2d 385, 273 P.2d 817 (1954) (permitting a petitioner to attack the second of two consecutive sentences while serving the first).

37. *See* Note, *supra* note 32.

38. Coram nobis had long been available after trial in criminal cases and, indeed, had been developed as a vehicle for the correction of judgments in an era that recognized no post-trial motions. Freedman, *The Writ of Error Coram Nobis*, 3 TEMPLE L.Q. 365, 366-70 (1929). There was no requirement that coram nobis applicants be in custody. *E.g.*, State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1930). Petitions were properly filed in the trial court that imposed the sentence. *E.g.*, People v. Wurzler, 300 N.Y. 344, 90 N.E.2d 886 (1950).

matters of *fact* outside the record.[39] If the applicant's allegations had been considered at trial, or through the exercise of diligence might have been so considered, coram nobis was unavailable. Indeed, even if petitioners were able to allege mistakes of fact that the trial court, in ignorance, could not have avoided, relief was available only if the truth, if known previously, would have prevented the judgment against the applicant.[40] Some states overcame these shortcomings.[41] Yet others could not, and in the end, the capacity of coram nobis to serve as a general postconviction remedy for federal claims was much in doubt in most jurisdictions.

For some time, state courts across the country struggled with their task—some choosing habeas, others coram nobis, to shape into something serviceable. Usually, coram nobis won out.[42] In due course, however, the efforts of state courts to fashion either writ into an effective postconviction vehicle gave way to legislative decisions to establish new statutory remedies. These new remedies, typically in the *nature* of coram nobis, superseded the development of the common law writs—which soon were relegated to the fringes of postconviction practice or abandoned altogether.[43]

B. Statutory Remedies

Illinois, whose "merry-go-round" of postconviction writs had prompted so much attention in the Supreme Court,[44] produced the first legislative action. Initially, the Chicago and Illinois State Bar Associations formed a special joint committee, chaired by Albert Jenner, which proposed a new court rule providing for postconviction litigation.[45] The state supreme court declined to adopt the proposed new rule, apparently because it was impermissibly legislative in character, but the state legislature put it in the form of a bill and promptly enacted it into statutory law.[46] The Illinois Post-Conviction Hearing Act[47] was by all accounts an attempt to resolve the problems that had

39. *E.g.*, Fugate v. State, 85 Miss. 94, 37 So. 554 (1904).

40. *E.g.*, Maynard v. Downer, 13 Wend. 575 (1835); People v. Touhy, 397 Ill. 19, 72 N.E.2d 827 (1947); State v. Turner, 194 Neb. 252, 231 N.W.2d 345 (1975).

41. The leading case is Sanders v. State, 85 Ind. 318 (1882). *See generally* E. FRANK, CORAM NOBIS (1953); Thornton, *Coram Nobis Et Coram Vobis*, 5 IND. L.J. 603 (1930); Orfield, *Applicability of Writ of Error Coram Nobis in Nebraska*, 10 NEB. L. BULL. 314 (1932).

42. Note, *Postrelease Remedies for Wrongful Conviction*, 74 HARV. L. REV. 1615, 1623 (1961). For example, coram nobis won out in New York. Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943); *In re* Morhous v. N.Y. Supreme Court, 293 N.Y. 131, 56 N.E.2d 79 (1943). *Cf.* New York *ex rel.* Whitman v. Wilson, 318 U.S. 688 (1943) (remanding to permit the New York courts to decide which writ was appropriate for postconviction litigation). *See generally* Cohen, *Post-Conviction Relief in the New York Court of Appeals: New Wine and Broken Bottles*, 35 BROOKLYN L. REV. 1 (1968).

43. *E.g.*, People *ex rel.* Russell v. LeFevre, 59 A.D.2d 588, 397 N.Y.S.2d 27 (1977) (explaining that postconviction habeas corpus is now available in New York only if the petitioner shows that the statutory remedy is inadequate).

44. Marino v. Ragen, 332 U.S. 561, 570 (1947) (Rutledge, J., concurring).

45. Jenner, *The Illinois Post-Conviction Hearing Act*, 9 F.R.D. 347, 357 (1950).

46. *Id.*

47. ILL. REV. STAT. ch. 38, H.S. 826-32 (1949) (repealed 1964).

vexed state courts forced to make do with the common law writs and, on its face, offered a significant improvement upon them.[48] Indeed, the Illinois statute became the model for a uniform act, published by the American Law Institute's National Conference of Commissioners on Uniform State Laws.[49] Within a few years, most states adopted new statutory remedies of their own.[50]

On close examination, however, the Illinois remedy and statutory procedures like it in other states were riddled with holes through which meritorious federal claims might fall. By the express terms of the Illinois law, for example, only prisoners actually incarcerated in the state penitentiary were eligible to invoke the new remedy. Petitioners who qualified to apply for relief were required to do so within five years after conviction—unless the delay could not be ascribed to the petitioner's "culpable negligence." In addition, and despite prisoners' acknowledged need for professional assistance, the statute provided for the appointment of counsel for indigents only after an application raising a substantial claim was filed. In 1968, the American Bar Association's Advisory Committee on Sentencing and Review, chaired by Simon Sobeloff and advised by Curtis Reitz, drafted guidelines suggesting improvements on the Illinois model.[51] Those guidelines were incorporated into the now familiar ABA Standards for Criminal Justice—Postconviction Remedies.[52]

The most significant shortcoming in the new state postconviction remedies was their inhospitality to claims that were not, but might have been, determined at trial or on direct review.[53] Just how significant that limitation was

48. In theory, the statutory remedy in Illinois did not displace any of the writs previously employed in postconviction litigation, all of which remained available within their own obscure spheres. In practice, however, the statutory remedy soon consolidated most applications for collateral relief. Applicants wishing to challenge their criminal convictions on federal constitutional grounds were permitted to file petitions in the most convenient forum (the court in which the conviction was obtained), and the state official in the best position to respond (the local prosecutor) was required to answer. Flexible fact-finding procedures, including evidentiary hearings, were established, and decisions were made reviewable on writ of error. *See id.*

49. Note, *The Uniform Post-Conviction Procedure Act*, 69 HARV. L. REV. 1289, 1289-90 (1956).

50. A few states enacted statutes tracking 28 U.S.C. § 2255, which was enacted by Congress as part of the general revision of the Judicial Code in 1948. That new section permitted petitioners attacking federal criminal judgments to file "motions to vacate sentence" in the sentencing district as substitutes for habeas petitions in the district of confinement. *See generally* Note, *Section 2255 of the Judicial Code: The Threatened Demise of Habeas Corpus*, 59 YALE L.J. 1183 (1960).

51. ABA ADVISORY COMMITTEE ON SENTENCING AND REVIEW, STANDARDS RELATING TO POST-CONVICTION REMEDIES (1968) [hereinafter ABA STANDARDS (1968 version)]. *See, e.g., id.* § 2.3 at 40-45 (advising against a "custody requirement"); § 2.4 at 45-48 (opposing a statute of limitations as a bar to postconviction relief); and § 4.4 at 64-67 (emphasizing the need for assigned counsel in postconviction proceedings).

52. *See Postconviction Remedies*, ABA STANDARDS FOR CRIMINAL JUSTICE, ch. 22 (1982) [hereinafter ABA STANDARDS (1982 version)].

53. People v. Dale, 406 Ill. 238, 92 N.E.2d 761 (1950). *See* United States *ex rel.* Touhy v. Ragen, 224 F.2d 611 (7th Cir.), *cert. denied*, 350 U.S. 983 (1955); United States *ex rel.* Barksdale v. Sielaff, 585 F.2d 288 (7th Cir.), *cert. denied*, 441 U.S. 962 (1978). The Illinois remedy could not be used to obtain reconsideration of claims determined previously. People v.

then, and remains today, becomes clear in the interplay between state postconviction remedies and federal habeas. That is the subject to which I now turn.

C. *State Remedies and Federal Habeas*

Once state postconviction remedies were installed in most jurisdictions, they had a telling impact upon the work of the lower federal courts exercising their jurisdiction to entertain habeas corpus petitions from state prisoners. In this section, I examine three aspects of federal habeas practice in which state postconviction remedies have come to play a significant, and I think undesirable, role: the exhaustion doctrine, fact-finding, and the effect of procedural default in state court. Indeed, the relationship between and among these elements of habeas corpus lore exacerbates the pernicious effects of any requirement that prisoners pursue postconviction litigation in state court.

1. *The Exhaustion Doctrine*

It is common currency that federal habeas corpus petitioners attacking custody in the hands of state authorities first are expected to exhaust any effective remedy available in the courts of the state concerned.[54] The exhaustion doctrine is not jurisdictional, but a matter of comity between the federal and state judicial systems.[55] Yet with few exceptions, the Supreme Court has insisted upon exhaustion as a condition precedent to the availability of the federal forum.[56]

The case for exhaustion is most powerful when criminal defendants seek federal habeas relief while trial proceedings are pending in state court.[57] Habeas relief at that stage would disrupt orderly state proceedings much in the fashion of injunctions[58] or pre-trial removal.[59] Exhaustion is also expected, however, when trial-level courts have completed their work and the state appellate courts stand ready to entertain claims of federal error. After

Bernovich, 403 Ill. 480, 87 N.E.2d 609 (1949); People v. Marino, 404 Ill. 37, 88 N.E.2d 8 (1949).

54. *See generally Developments, supra* note 16, at 1093-103. The expectation that state *judicial* remedies must be exhausted complements the understanding that federal habeas corpus is a statutory exception to the federal full faith and credit statute, 28 U.S.C. § 1738 (1982), which ordinarily instructs the federal courts to accord state court judgments the preclusive effect they would have in the state concerned.

55. Strickland v. Washington, 466 U.S. 668, 679 (1984).

56. Preiser v. Rodriguez, 411 U.S. 475, 489 (1973).

57. *E.g., Ex parte* Royall, 117 U.S. 241 (1886) (the progenitor case).

58. *See* Younger v. Harris, 401 U.S. 37 (1971).

59. *See* Greenwood v. Peacock, 394 U.S. 808 (1966). *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 (1965) (arguing *for* pre-trial habeas and removal in certain civil rights contexts but recognizing the similar impact of either on state criminal prosecutions). There are, to be sure, instances in which petitioners contend that trial in state court would itself be unconstitutional, such that habeas should be available earlier—provided that state pre-trial remedies are exhausted. *E.g.*, Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984) (involving a double jeopardy claim). My focus here, however, is on the impact of state postconviction remedies on the exhaustion doctrine.

trial, to be sure, the risk of disrupting state adjudicatory machinery is minimal. The exhaustion of state appellate remedies is demanded for an additional reason: to involve the state appellate courts in the development of federal law. Convicts are asked, accordingly, to put their federal claims before the highest state court empowered to hear such contentions.[60] This is hardly surprising, given that state appellate review is the straightforward means by which state courts can treat federal claims in light of the record at trial and the legal arguments presented in brief.[61]

State postconviction remedies collateral to trial and appeal cut their own figure in this pattern. On the one hand, there are many instances in which the mere existence of such remedies has no effect on petitioners' obligations under the exhaustion doctrine. If, for example, a petitioner raises a purely legal claim, depending entirely upon facts developed at trial, an appeal to the appropriate state appellate court will suffice. It is unnecessary in such a case "to ask the state for collateral relief, based on the same evidence and issues already decided by direct review."[62] In numerous other instances, on the other hand, the exhaustion doctrine, as it is currently understood, contemplates the employment of state postconviction remedies. If, for example, a petitioner neglected appeal entirely,[63] or failed to press on appeal the claim sought to be raised in federal habeas,[64] resort to state postconviction remedies is expected in order to provide the state courts with one fair opportunity to treat the

60. The identification of such a court can be difficult inasmuch as many states now sever their most authoritative courts from ordinary appellate practice after the pattern of the Supreme Court of the United States. If appeal lies to a court as a matter of right, it is clear that petitioners must ordinarily seek appellate review there to satisfy the exhaustion doctrine. Meeks v. Jago, 548 F.2d 134 (6th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977). If, however, a court enjoys discretion under state law to accept only cases of special significance, petitioners' obligations are less clear. *Compare* Buck v. Green, 743 F.2d 1567 (11th Cir. 1984) (holding that the Georgia Supreme Court's jurisdiction is sufficiently circumscribed to make it unnecessary to apply there for discretionary review in order to satisfy the exhaustion doctrine) *with* Richardson v. Procunier, 762 F.2d 429 (5th Cir. 1985) (requiring Texas petitioners to seek discretionary review in the Texas Court of Criminal Appeals).

61. I acknowledge, but put to one side, the possibility that federal claims can be presented to the trial court by post-trial motion, such as an application for new trial.

62. Brown v. Allen, 344 U.S. 443, 447 (1953). Indeed, even this statement of the law, read literally, asks too much of the petitioner. So long as the claim is presented in the appropriate fashion on direct review, and so long as it is identified clearly to the appellate court, the exhaustion doctrine is satisfied even if the court ignores the claim, Smith v. Digmon, 434 U.S. 332 (1978), or refuses to address it on procedural grounds, Roberts v. La Vallee, 389 U.S. 40 (1967). The working idea is that the state court should be allowed a fair opportunity to address the petitioner's federal contentions, Picard v. Connor, 404 U.S. 270, 275 (1971), not that the court must seize such an opportunity to reach the merits. Certainly, petitioners cannot force state courts to take their claims seriously. *See generally* Castille v. Peoples, 57 U.S.L.W. 4249 (U.S. Feb. 21, 1989).

63. Klein v. Harris, 667 F.2d 274, 282 (2d Cir. 1981); Campbell v. Crist, 647 F.2d 956, 957 (9th Cir. 1981).

64. *See* Jones v. Helms, 452 U.S. 412, 419 (1981) (explaining that a petitioner had failed to raise his federal claim on appeal but had put it forward in state postconviction proceedings and in that way satisfied the exhaustion doctrine).

claim.[65] For the same reason, petitioners are required to seek reconsideration of federal claims in state court if, because of an interim change in federal law, the state courts might treat the claim differently on rehearing.[66]

Commonly, moreover, the claims petitioners wish to litigate in the federal forum simply rest upon factual allegations outside the state court record. The exhaustion doctrine ordinarily contemplates use of state postconviction remedies prior to federal habeas where, after state appeal, petitioners raise fact-bound constitutional claims that either were omitted altogether from the appellate briefs or were considered without benefit of evidence discovered after the state appellate court denied relief.[67] Into this category fall many constitutional claims, including all-important allegations that defense counsel's representation, evidenced by facts outside the formal record, was constitutionally deficient.[68] If relief is denied at the trial level in state postconviction proceedings, petitioners must seek review in the state appellate courts.[69] In cases in which a petitioner's postconviction allegations make out new and different federal claims, the state appellate courts may then consider those claims for the first time;[70] in cases in which the applicant's claims were before the appellate courts on direct review, albeit without benefit of newly discovered facts, the appellate courts may see the claims differently in light of the embellished record.[71]

At first blush, the occasions on which the exhaustion doctrine calls on would-be federal habeas petitioners to exhaust state postconviction remedies may seem justifiable. For by now we are accustomed to the practice of identi-

65. *E.g.*, Drake v. Wyrick, 640 F.2d 912 (8th Cir. 1981).

66. Picard v. Connor, 404 U.S. 270, 276 (1971). *See* Comment, *Habeas Corpus—Effect of Supreme Court Change in Law on Exhaustion of State Remedies Requisite to Federal Habeas Corpus*, 113 U. PA. L. REV. 1303 (1965). *But see* Roberts v. La Vallee, 389 U.S. 40 (1967) (finding it unnecessary to return to state court on account of more favorable state court decisions on point). Indeed, even if the applicable federal standard has not changed since a claim was raised on direct review, the petitioner may be required to exhaust state postconviction remedies if the documentary record before the state appellate court was incomplete, such that the state court was deprived of materials essential to proper adjudication. *See, e.g.*, Needel v. Scafati, 412 F.2d 761 (1st Cir.), *cert. denied*, 396 U.S. 861 (1969); Joyner v. Swenson, 254 F. Supp. 843 (W.D. Mo. 1966); United States *ex rel.* Boodie v. Herold, 349 F.2d 372 (2d Cir. 1965).

67. Tyler v. Wyrick, 730 F.2d 1209, 1210 (8th Cir. 1984); Isaac v. Perrin, 659 F.2d 279, 281 n.1 (1st Cir. 1981); Zicarelli v. Gray, 543 F.2d 466, 475 (3d Cir. 1976) (en banc).

68. *E.g.*, Rodriguez v. McKaskle, 724 F.2d 463 (5th Cir.), *cert. denied sub nom*, Rodriguez v. Procunier, 460 U.S. 1039 (1984); Burns v. Estelle, 695 F.2d 847 (5th Cir. 1983).

69. Domaingue v. Butterworth, 641 F.2d 8 (1st Cir. 1981); Reynolds v. Wainwright, 460 F.2d 1026 (5th Cir.), *cert. denied*, 409 U.S. 34 (1972). *Cf.* Jones v. Helms, 452 U.S. 412, 415 n.5 (1981) (explaining that a petitioner had appealed from the denial of state postconviction relief).

70. *See* Horowitz v. Wainwright, 709 F.2d 1403 (11th Cir. 1983) (insisting that a petitioner complete an appeal from the denial of postconviction relief); Piercy v. Parratt, 579 F.2d 470, 473 (8th Cir. 1978) (same). *Cf. Ex parte* Davis, 318 U.S. 412 (1943) (insisting upon an appeal from an unsuccessful coram nobis petition at the trial level in state court).

71. Brown v. Crouse, 395 F.2d 755 (10th Cir. 1968). *But see* Wood v. Crouse, 389 F.2d 747 (10th Cir. 1968), *vacated on other grounds*, 399 U.S. 520 (1970) (finding it unnecessary to appeal when the claim had been treated on direct review in the first instance and trial-level postconviction proceedings had not altered the record).

fying issues that have not clearly been put to the state courts, ascertaining that some state postconviction remedy provides a formal vehicle for presenting those matters, and then refusing access to federal habeas corpus until that opportunity for state court litigation is exhausted. Yet it is vital to recognize that this pattern is founded upon the existence of state postconviction remedies, which do not merely add an additional layer of state court litigation to petitioners' obligations under the exhaustion doctrine, but create myriad opportunities for forcing them into state court litigation of doubtful substantive value. My reading of the cases convinces me that (some) state's attorneys searching for easy exits from federal habeas proceedings, and (some) federal magistrates and district judges hoping to dispose of potentially meritorious habeas applications without a hearing, seize upon the formal availability of state postconviction remedies to justify summary dismissal in a range of cases in which prompt federal treatment of the merits is appropriate. In theory, of course, exhaustion dismissals simply postpone federal habeas adjudication. In practice, however, dismissals on this basis may entirely discourage undereducated prison inmates who find *themselves* exhausted before they are able to plumb state postconviction remedies to the bottom.[72]

To understand how this can be so, one need only reflect on the nature of the constitutional claims that typically arise in criminal cases. Those claims are rarely pristine legal arguments. They are sensitive to factual context, as well as to the state of decisional law at the time they are examined. Initially, then, it is often difficult to say with confidence whether a claim was presented to the state courts and whether, if it was, it was framed for those courts in the best possible way. In cases in which it is clear that a claim was not raised at trial or on direct review, it is often difficult to distinguish petitioners like Jack Young, who, by hypothesis, committed no default and plainly are entitled to pursue state postconviction relief, from others who did commit default by failing to raise claims earlier and thus may be barred from state postconviction proceedings. Even applicants in the latter category, moreover, may be able to satisfy stringent state standards for escaping dismissal for procedural default. Whether they can, in turn, is a matter for the state courts.

In many instances, then, it is plausible for a busy state's attorney to insist upon further state postconviction litigation as opposed to immediate federal adjudication. The slightest change in circumstances since the petitioner's previous appearance in state court provides an opening for an argument that the state courts might yet hear a claim in postconviction proceedings. This is not

72. Parker v. Ellis, 362 U.S. 574, 582 (1960) (Warren, C.J., dissenting), *overruled on other grounds*, Carafas v. La Vallee, 391 U.S. 234 (1968). In this vein, it should be noted that the processing of state postconviction petitions is often painfully slow. Extraordinary delay can lead, of course, to the conclusion that a state remedy is not "available" at all within the meaning of the exhaustion doctrine. *E.g.*, Mucie v. Missouri State Dept. of Corrections, 543 F.2d 633 (8th Cir. 1976). In most instances, however, the federal habeas courts have proved to be most patient—indulging the state courts while sacrificing petitioners' interests in expeditious adjudication. *E.g.*, Cook v. Florida Parole & Probation Comm'n, 749 F.2d 678 (11th Cir. 1985).

to resurrect the silly argument, put forward by Judge John J. Parker, that federal habeas corpus treatment of federal claims is never timely—it always being true that a disappointed prisoner nonetheless remains free again and again to press the state courts to adjudicate federal claims.[73] Yet the formal availability of state postconviction remedies to address subtle variations in federal claims does present a real threat to the enforcement of the Constitution in the federal forum.

Ordinary due process claims depending upon the "totality of facts" in a case[74] and ineffective assistance claims based upon the entirety of counsel's performance[75] are rife with opportunities for insisting upon further postconviction litigation in state court. Petitioners filing federal habeas petitions often rely in some measure upon recitations of fact not plainly presented to the state courts. Another trip to state court may be plausible when additional allegations significantly alter the nature and power of the claim. Yet the recent flood of decisions channeling prisoners back to state court is wholly unjustified.[76]

The extraordinary rigidity with which the exhaustion doctrine is employed these days is, of course, primarily to blame for this sorry state of affairs. I have argued elsewhere that exhaustion should be relaxed into a discretionary authority, lodged with the district courts, to require further litigation in state court when the circumstances in individual cases indicate that it is reasonable to postpone federal adjudication.[77] Without abandoning that

73. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176 (1948). In spite of Judge Parker's assertions, it is well settled that petitioners need not redundantly press the state courts to change their minds. Brown v. Allen, 344 U.S. 443, 448 n.3 (1953).

74. *See supra* note 10 and accompanying text.

75. *E.g.*, Strickland v. Washington, 466 U.S. 668 (1984).

76. I wish I could read Vasquez v. Hillery, 474 U.S. 254 (1986), to signal an end to this pattern. But Justice Marshall's comments for the Court in that case were too careful and confined to stem the tide of so many lower court decisions, which reflect the contradictory sentiments of other members of the Court. In *Hillery*, the district court had taken the initiative under Rule 7 of the federal habeas rules. The petitioner was directed to expand the record regarding his race discrimination claim by adducing statistical evidence. The new information produced in that way was largely cumulative. Even at that, Justice Marshall explicitly set to one side the appropriate disposition of any case in which a habeas petitioner "has attempted to expedite federal review by deliberately withholding essential facts from the state courts." *Id.* at 260. It is vital to recall that Justice O'Connor dissented bitterly from the denial of certiorari in another recent case, McKaskle v. Vela, 464 U.S. 1053 (1984), in which the lower courts were reasonable enough to consider additional shortcomings in a defense attorney's performance—when all the allegations on which the petitioner based his claim were derived from the transcript that had been before the state appellate courts on direct review.

77. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393 (1983). In my view, the more flexible approach suggested in Frisbie v. Collins, 342 U.S. 519 (1952), decided shortly after *Young*, would be appropriate. Although conceding the "general rule" that federal courts should not welcome habeas petitions in the face of available state remedies, *Frisbie* also suggested that the rule could be bent in "special circumstances." *Frisbie*, 342 U.S. at 520-21. The Court has recently warmed to *Frisbie*. *E.g.*, Granberry v. Greer, 481 U.S. 129 (1987). I consider this a positive development.

view, I now fault state postconviction remedies as well for enabling the Court to *be* so harsh in demanding exhaustion—and for no sound reason.

By hypothesis, at the postconviction stage, federal habeas corpus litigation poses no threat to orderly state processes leading to conviction. I should have thought, moreover, that the genuine value of involving the state appellate courts in making and enforcing federal law is served adequately by requiring direct review. It is difficult to discern any serious affront to the states and their legitimate interests attending immediate federal habeas adjudication of federal claims that remain after direct review is complete. After all, the states established the postconviction remedies they now have primarily to discourage prisoners' pursuit of federal relief. It is late in the day to invent outsized state interests in postconviction litigation and on that basis to insist upon the routine exhaustion of postconviction remedies.[78]

The states' minimal interest in postconviction litigation is nowhere more plain than in cases in which state authorities themselves choose to overlook prisoners' failure to pursue state remedies.[79] It will come as no surprise that state authorities tend to forego exhaustion in death penalty cases in which state's attorneys apparently value immediate federal adjudication (and perhaps early permission to execute the petitioner) over any local interests attached to further litigation in state court.[80] I do not mean to endorse the rush-to-judgment manifest in this kind of behavior or to criticize courts that quite properly regard waivers in death penalty cases with suspicion.[81] Nor do I

78. I do not overlook the codification of the exhaustion doctrine in 28 U.S.C. § 2254(a)-(c)(1982), which on its face requires petitioners attacking their convictions to exhaust "available" and "effective" state remedies and insists that exhaustion is not complete so long as prisoners have a right "by any available procedure" to raise their claims. It is well-settled that the statute merely embraces the judge-made doctrine that preceded it and establishes no jurisdictional prerequisite. Strickland v. Washington, 466 U.S. 668, 679 (1984). The Court has often acknowledged that its own decisions have altered habeas practice while "the statutory language authorizing judicial action has remained unchanged." Wainwright v. Sykes, 433 U.S. 72, 81 (1977); *accord* Rose v. Lundy, 455 U.S. 509, 548-49 n.18 (1982) (Stevens, J., dissenting). To be sure, the judicial innovations accomplished to date in the teeth of statutory language have typically denied business to the federal habeas courts. However, there is no good reason why statutes should be read imaginatively only in one direction.

79. *See Granberry*, 481 U.S. at 134 (apparently permitting appropriate state officials to concede or waive compliance with the exhaustion doctrine—subject to the district court's discretion nevertheless to dismiss in favor of further litigation in state court). *See* Note, *State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions*, 50 U. CHI. L. REV. 354 (1983).

80. *E.g.*, Briley v. Bass, 742 F.2d 155 (4th Cir.), *cert. denied*, 469 U.S. 893 (1984); Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982); Corn v. Zant, 708 F.2d 549 (11th Cir. 1983) *cert. denied*, 467 U.S. 1220 (1984), *vacated in part on other grounds*, Corn v. Kemp, 772 F.2d 681 (11th Cir. 1985), *vacated*, Kemp v. Corn, 478 U.S. 1016 (1986).

81. *See* McGee v. Estelle, 704 F.2d 764, 770 (5th Cir. 1983) (insisting that it would be dangerous to leave the exhaustion doctrine entirely to state authorities); Westbrook v. Zant, 704 F.2d 1487, 1494 n.9 (11th Cir. 1983), *overruled on other grounds*, Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986) (holding that the federal courts are not "bound" by state attempts to waive exhaustion). *Cf.* Harding v. North Carolina, 683 F.2d 850 (4th Cir. 1982) (refusing to allow state authorities to waive exhaustion on the condition that federal relief is denied on the merits). *See Granberry*, 481 U.S. at 136 (holding that when the warden fails to assert the exhaustion

mean to be ad hominem in my appraisal of these goings on. It does seem fair to point out, however, that any supposed state interests in postconviction litigation are dispelled quite readily when state authorities have an interest in expedited adjudication on the merits.

Accordingly, the current expectation that would-be federal habeas applicants must first exhaust state postconviction remedies lacks sound justification. A convict who has traversed trial and direct review in state court and who then wishes to pursue federal claims in a federal forum is indistinguishable from the great mass of federal plaintiffs whose affairs are sufficiently free of state proceedings that they are entitled to file federal lawsuits without fear of dismissal in favor of further litigation in state court.[82] By hypothesis, state authorities have vindicated state interests in the enforcement of state criminal law by completing a successful prosecution; any state court proceedings with which federal habeas adjudication might conceivably interfere are at an end.[83] If, at this point, the convict wishes to launch further state court litigation by engaging state postconviction remedies and forcing state authorities back into state court, one should hope that the state courts will open their doors. If, by contrast, the petitioner chooses a federal forum, the mere availability of a state collateral procedure should pose no bar.

If potential federal petitioners are required to invoke state postconviction remedies, federal adjudication in habeas corpus may not merely be postponed, but thwarted altogether. Together, state postconviction remedies and the exhaustion doctrine drive litigants with federal claims into state court not to protect identifiable state interests at all, but to foster *final* state court adjudication of at least some aspects of federal claims as a substitute for federal habeas. This conclusion is fortified by contemporaneous developments regarding the

doctrine at the district level the circuit courts should weigh a "wide variety of circumstances" in order to decide whether the "interests of justice" would be served by addressing the merits without further proceedings in state court); Note, *The Federal Interest Approach to State Waiver of the Exhaustion Requirement in Federal Habeas Corpus*, 97 HARV. L. REV. 511 (1983) (advocating district court discretion in accepting waivers).

82. Consider Steffel v. Thompson, 415 U.S. 452 (1974), in which the plaintiff, who was concretely threatened with criminal prosecution in state court but had not yet been formally charged, was permitted immediately to pursue declaratory relief in federal court. Inasmuch as no state proceeding was pending at the time of the federal complaint, there was no justification (grounded in federalism or comity) to insist that the plaintiff raise federal claims in state court. Similarly, there is no justification here for requiring a convict to exhaust state postconviction process (in the name of federalism or comity) after state authorities have ceased state court litigation against a would-be federal habeas petitioner.

83. It can be argued, indeed, that petitioners should not be required to exhaust even direct review in the state appellate courts. Inasmuch as appellate review is at the insistence of the individual concerned, rather than state authorities, a prisoner's failure to appeal cannot be said to interfere with state court proceedings pursued affirmatively by state officials to vindicate state interests. I accept the conventional wisdom, however, that convicts should be expected to exhaust state appellate remedies, both to allow the state courts an opportunity to correct trial court errors and to involve the state appellate courts in the maintenance and development of federal law. However, those explanations do not justify the current expectation that convicts must exhaust state postconviction remedies as well.

effect of state court fact-finding and petitioners' procedural default upon federal habeas proceedings—the subjects of the next two sections.

2. Fact-Finding

Virtually since *Young* was decided, the Supreme Court has protected the integrity of fact-finding in federal habeas corpus adjudication by mandating federal evidentiary hearings when facts alleged by the petitioner, if true, would justify relief and the proceedings in state court were insufficient to demonstrate that the allegations cannot be sustained.[84] I know of nothing that undercuts this crucial element of habeas law. In all candor, however, the Court's recent constructions of Section 2254(d) of the Judicial Code[85] give fact-finding in state court far more prominence than the mandate for federal evidentiary hearings would lead one to anticipate.[86] The statute is not well-drafted. It appears to instruct federal district courts to identify isolated state findings of primary fact, which were determined after a hearing in state court and evidenced in writing, and to presume that such findings are correct—provided they were generated by a process meeting several specified standards.[87] The accuracy of findings entitled to the statutory presumption may be rebutted only by convincing evidence.[88]

In a series of decisions, the Court has held that: (1) direct review in the state appellate courts may suffice for the state court "hearing" required by Section 2254(d);[89] (2) findings need not be expressly set forth in writing if they can be inferred from a state court judgment entered after a hearing;[90] and (3) district courts must explain any failure to invoke the statutory presumption in favor of state findings.[91] Moreover, in a move of greater import, the Court has meddled with the nature of the findings to which Section 2254(d) is applicable. The Justices have acknowledged as an abstract matter that the statute is addressed only to determinations of "primary" or "historical" fact rather than to conclusions regarding purely "legal" issues or so-called "mixed" questions of law and fact.[92] Yet that is where the similarity to con-

84. While this formulation is articulated most clearly in Townsend v. Sain, 372 U.S. 293 (1963), the core idea can be traced back to Justice Frankfurter's concurring opinion in Brown v. Allen, 344 U.S. 443, 506 (1953) (speaking for a majority on this point).

85. 28 U.S.C. § 2254(d) (1982).

86. *See infra* text accompanying notes 89-97.

87. The standards are procedural on the whole, but substantive in one respect. State findings are disentitled to the presumption if they are not supported by the record in state court. 28 U.S.C. § 2254(d)(8) (1982).

88. At this point, the federal district court's focus shifts from a procedural appraisal of the fact-finding process in state court to a substantive examination of the results reached in the state forum.

89. Sumner v. Mata, 449 U.S. 539, 545-47 (1981) [hereinafter *Mata I*].

90. Marshall v. Lonberger, 459 U.S. 422, 430-38 (1983).

91. *Mata I*, 449 U.S. at 547-52.

92. Wainwright v. Witt, 469 U.S. 412, 428 n.8 (1985) (citing Cuyler v. Sullivan, 446 U.S. 335, 342 (1980)).

ventional understanding ends and where the significance of fact-finding in state postconviction proceedings assumes unexpected significance.

In conventional understanding, courts make findings of primary fact when they describe historical events in elemental terms, engaging in a "case-specific inquiry into *what happened here*."[93] Courts determine legal or mixed issues when they judge the legal significance of historical events and come to judgments that "imply the application of standards of law."[94] This familiar "fact-law" distinction is not always easy to draw, and there plainly will be room for disagreement in particular cases.[95] Yet the Court's characterizations of late have been surprising, not to say startling.[96]

The explanation for these decisions is rather obvious. The Supreme Court, as currently constituted, prefers state court determinations of federal claims to federal adjudication in habeas corpus and uses Section 2254(d) as a means to that end. Without departing formally from the settled understanding that federal claims are subject to independent examination in federal habeas, the Court undercuts the habeas jurisdiction in substance by characterizing issues that plainly are legal or mixed as, instead, factual—and thus subject to the statutory presumption. In this way, the state courts assume significant, and largely final, decision-making authority with respect to questions that, but for such strained characterizations, would be open for federal adjudication.[97]

Indeed, the Court acknowledges as much, explaining that, in close cases, questions may be treated as factual if the Court determines that as a matter of "sound administration" the state courts are "better positioned" than are federal habeas corpus courts to make the necessary determination.[98] The best candidates are credibility choices traditionally left to the initial tribunal. The Court has placed great emphasis upon that explanation for its decisions.[99] It seems quite clear, however, that the Court's notion of "sound administration" allocates much more than appraisals of demeanor evidence to the state

93. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985) (emphasis in original).

94. Pullman-Standard v. Swint, 456 U.S. 273, 286-87 n.16 (1982) (quoting Baumgartner v. United States, 322 U.S. 665, 671 (1944)). *See generally* Brown v. Allen, 344 U.S. 443, 507 (1953) (Frankfurter, J., concurring).

95. Miller v. Fenton, 474 U.S. 104, 113 (1985); *Witt*, 469 U.S. at 429.

96. Questions focusing on whether a witness had an opportunity to observe the crime, Sumner v. Mata, 455 U.S. 591 (1982) [hereinafter *Mata II*], whether the defendant understood the charges, Marshall v. Lonberger, 459 U.S. 422 (1983), whether a juror was partial, Patton v. Yount, 467 U.S. 1025 (1984), or biased, *Witt*, 469 U.S. 412, whether jury deliberations as a whole were biased, Rushen v. Spain, 464 U.S. 114 (1983), and whether a defendant was competent to stand trial, Maggio v. Fulford, 462 U.S. 111 (1983), have all been held to be matters of primary fact to which the statutory presumption is applicable.

97. *See Spain*, 464 U.S. at 131-50 (Marshall, J., dissenting).

98. *Miller*, 474 U.S. at 114-15.

99. *Id.* at 114-15; *Witt*, 469 U.S. at 428; *Young*, 467 U.S. at 1038; *Maggio*, 462 U.S. at 117-18.

courts.[100]

The role played by state postconviction remedies in this scheme is self-evident—as is the explanation for the Court's insistence that those remedies be exhausted. Would-be federal habeas petitioners raising fact-sensitive claims are routinely diverted to state postconviction proceedings in which the state courts can determine "factual" issues (broadly conceived) that will then be entitled to the statutory presumption when, and if, petitioners return to the federal forum.[101] In the end, state postconviction remedies serve as substitutes for federal habeas corpus in the adjudication of federal claims.

3. *Procedural Default in State Court*

Adjudication in state court may be better than no adjudication at all. And it is often no adjudication at all that state postconviction remedies provide. In an extraordinary number of cases, the state courts decline to consider federal claims because of procedural default, and the federal habeas courts, following the Supreme Court's lead, find insufficient justification for overlooking state grounds of decision and reaching the merits.

As I explained earlier, the state postconviction remedies established in the wake of *Young* typically barred claims that might have been determined at trial or on direct review.[102] At the time, that limitation was devastating to the states' ostensible objective of making prisoners' resort to federal habeas unnecessary or ineffectual. For, as the Supreme Court made clear in *Fay v. Noia*,[103] procedural defaults in state court foreclosed federal habeas only if they constituted a "deliberate bypass" of state court opportunities for adjudication.[104] Inasmuch as the federal "waiver" standard was rarely met, the federal courts were routinely open to consider federal claims that were not, but might have been, raised and adjudicated in the proceedings leading to conviction or on appeal.[105] Recognizing the difficulty, the ABA Standards specified that claims

100. It should be recalled that Justice O'Connor's opinion for the Court in *Miller* did not suggest that it was easy to conclude that the voluntariness of a confession is a mixed question. Miller v. Fenton, 474 U.S. 104, 113 (1985). Justice Rehnquist actually dissented in that case. *Id.* at 118-19.

101. *Cf.* Rose v. Lundy, 455 U.S. 509, 519 (1982) (justifying the exhaustion doctrine in part on the ground that the state courts may find facts entitled to the § 2254(d) presumption).

102. *See supra* text accompanying note 53.

103. 372 U.S. 391 (1963).

104. The Court undoubtedly thought it essential to penalize at least egregious procedural defaults merely to underscore state prisoners' obligation to exhaust state remedies before seeking federal habeas relief. There is also something to be said for Justice Brennan's express explanation in *Noia*. Albeit habeas had originated at law, the writ had long been associated with equity, and it seemed appropriate to reserve its benefits for petitioners with "clean hands." For my part, though, the "deliberate bypass" rule (barring some but very few federal habeas claims because of procedural default in state court) was appended to the *Noia* opinion as a formal, but insubstantial, concession to Justice Harlan, whose doubts regarding the wisdom of federal habeas corpus were stated with feeling in dissent. *Noia*, 372 U.S. at 438. *Cf.* Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321 (1987-88) (on the infrequency of sandbagging).

105. The Supreme Court took the same approach to claims that were not, but might have

that had been the subject of procedural default ordinarily should not be denied state postconviction consideration for that reason alone.[106] Rather, petitioners should suffer dismissal only for an "abuse of process," meaning, in this instance, that they "knew" of their contentions at the time of trial or appeal, but nonetheless "deliberately and inexcusably" failed to raise them.[107] The Commissioners on Uniform State Laws adopted a similar rule in a revised edition of the Uniform Act, published in 1966.[108]

The justification for the proposed "waiver" standard for the state courts was clear. If the purpose of state postconviction remedies was to adjudicate federal claims that otherwise would be pursued in federal habeas, it only made sense that the ABA's Standards and the Uniform Act should dispose of procedural defaults in the manner in which they would be treated in federal court.[109] Still, the ABA Standards added a further, eminently sensible comment:

> Because of the special importance of rights subject to vindication in post-conviction proceedings, courts should be reluctant to deny relief to meritorious claims on procedural grounds. In most instances of unmeritorious claims, the litigation will be simplified and expedited if the court reaches the underlying merits despite possible procedural flaws.[110]

Some jurisdictions responded admirably, opening their collateral remedies to claims that might have been raised earlier unless petitioners were found to have deliberately bypassed state court opportunities for litigation.[111] Inexplicably, however, most states rejected the "waiver" test for procedural defaults. And, as expected during the 1960s when the Warren Court employed that standard, state intransigence funneled a steady stream of state prisoners into the federal courts.

The flow subsided in the 1970s, however, when, under the influence of the

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been, put forward in prior applications for federal habeas relief. *Cf.* Sanders v. United States, 373 U.S. 1, 15 n.8 (1963). Accordingly, state statutes allowing only one postconviction petition and thus imposing a forfeiture sanction for any failure to assert a claim were similarly ineffectual in averting federal treatment of such claims. The Illinois statute, for example, stated that claims omitted from an initial application were "waived" for purposes of successive applications. Inasmuch as state court treatment on the merits was foreclosed for *any* such omission, regardless of the reason, the Illinois remedy in fact imposed a forfeiture—thus inviting prisoners to seek federal habeas relief.

106. ABA STANDARDS (1968 version), *supra* note 51, § 6.1.

107. The ABA Standards typically employed an "abuse of process" safety valve for handling late and repetitive petitions. On the particular (and similar) question of the appropriate disposition of petitions presenting claims omitted from a prior petition, the ABA Standards provided for dismissal only if the petitioner committed an "abuse of process" by "deliberately and inexcusably" withholding the claims from the prior application. *Id.*

108. SECOND REVISED UNIFORM POST-CONVICTION PROCEDURE ACT § I (1966).

109. *See* Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 422, 434 (1966).

110. ABA STANDARDS (1968 version), *supra* note 51, § 6.1(d).

111. *E.g.*, Bristow v. State, 242 Md. 283, 219 A.2d 33 (1966).

Nixon appointees, the Supreme Court abandoned the "waiver" standard for federal habeas corpus in most instances. Then, longstanding limitations attending state postconviction remedies neatly complemented new-found restrictions on federal habeas—frustrating the litigation of prisoners' federal claims in any forum. To cynics, it appeared that the states had finally found a way to avoid defending state criminal convictions in federal court. No longer would the states provide postconviction opportunities for state court litigation of federal claims in hopes that prisoners would be satisfied or that the federal courts would approve state court judgments on the merits summarily. Now, restrictions on the availability of state remedies, in conjunction with doctrinal innovations regarding federal habeas, could prevent postconviction litigation entirely. Wholesale procedural dismissals in both state and federal court have now become commonplace. These days, it is the rare habeas decision that does not rely on procedural default to dispose of at least some claims.

Others have surveyed this bleak story.[112] It will suffice here merely to recognize that procedural dismissals, which formerly constituted an exception to the general rule, have *become* the rule, while adjudications on the merits despite procedural default have emerged as the exception. Federal habeas corpus is now largely closed to claims if the state courts refused, or would refuse, to address them because of procedural default in state court of the kind that would bar direct review in the Supreme Court.[113] Defaulting petitioners may have access to the federal forum only if they establish "cause" for their failure to raise claims seasonably in state court and "prejudice" flowing from the constitutional violations that went unchecked in state court because of procedural default.[114] There is, of course, no federal interest in the enforcement of state procedural rules, and if the state courts disregard a petitioner's failure to comply with state law the "cause-and-prejudice" formulation is inapposite.[115] In every case, then, it is essential to determine at the threshold whether the state courts closed their doors to an applicant because of default or would do so if asked.[116] State postconviction remedies provide the obvious

112. *See* Hughes, *supra* note 104, at 321.

113. I note this last condition deliberately. It is now settled that procedural defaults that would not establish adequate and independent state grounds of decision to cut off direct review in the Supreme Court will not foreclose federal habeas corpus either. Harris v. Reed, 57 U.S.L.W. 4224, 4226 (U.S. Feb. 21, 1989); *accord* Dugger v. Adams, 57 U.S.L.W. 4276, 4279 n.6 (U.S. Feb. 28, 1989). *See generally* Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 639-44 (1983). *Accord*, Robson & Mello, *Ariadne's Provisions for Returning Alive from the Labyrinth of Federalism: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CALIF. L. REV. 87 (1988).

114. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982). The requirement that both "cause" and "prejudice" be shown has recently been relaxed a bit. In Murray v. Carrier, 477 U.S. 478, 479 (1986), the Court said that in an "extraordinary" case in which a constitutional violation "probably resulted in the conviction of one who is actually innocent," a federal habeas court may reach the merits in the absence of "cause."

115. County Court of Ulster County v. Allen, 442 U.S. 140 (1979).

116. This conflates a number of issues. I have argued elsewhere that the district court should ask and determine several distinguishable questions seriatim: (1) whether, at the rele-

vehicle for making such a determination.

A familiar sequence is repeated again and again. A prisoner who seeks to litigate a federal claim in federal court is met by a boilerplate motion to dismiss for failure to exhaust state remedies.[117] The prisoner resists dismissal on that ground, contending that there is no currently available mechanism for putting the claim to the state courts—not because the state courts once rejected the claim on the merits and will not reconsider, but because some procedural default in state court resulted in a forfeiture of further state court opportunities for litigation.[118] The district court finds the existing record ambiguous and notes that the general postconviction remedy in the state concerned may be open to address the claim.[119] The court thus decides the exhaustion question against the petitioner and dismisses without prejudice to another federal application after that remedy has been employed. The petitioner returns to state court to press the claim in state postconviction proceedings, which then become the vehicle by which the state courts explicitly hold that the petitioner committed default in prior proceedings and must suffer a forfeiture sanction. Having now established that the state courts will not treat the claim, the prisoner has satisfied the exhaustion doctrine and may return to federal court. But, of course, the procedural default basis upon which state remedies can be said to be exhausted triggers the "cause-and-prejudice" inquiry. The prisoner will almost certainly suffer dismissal yet again, this time with prejudice.[120] Things are no different if, in the first instance, the petitioner

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vant time, there was a state procedural rule requiring the petitioner to raise the claim in a particular way or at a particular time; (2) whether, if so, the petitioner failed to comply with that rule; and (3) whether, if the rule was violated, the state courts imposed a forfeiture sanction. Each of these is a matter of state law, such that any state court determinations in the record are presumably authoritative. *See* L. YACKLE, POSTCONVICTION REMEDIES § 84 (Supp. 1988). *Accord* Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986).

117. *See supra* text accompanying notes 54-83.

118. At least since *Noia*, 372 U.S. 391, 434-35 (1963), and probably before that (*see* Mattox v. Sacks, 369 U.S. 656, 657 (1962)), it has been settled that the exhaustion doctrine demands only that petitioners pursue state remedies by means available at the time they wish to apply for federal habeas relief. Thus by asking the state courts to consider federal claims and being rebuffed on procedural default grounds, a prisoner has exhausted state remedies. *See* Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 112-14 (1959) (criticizing prior cases for indicating that the exhaustion doctrine required that claims dismissed in state court because of procedural default should be dismissed as well in federal habeas because of the petitioner's failure to exhaust state opportunities for litigation when they were open).

119. As might be expected, the federal courts uniformly resolve doubts in favor of another foray into state court litigation. *E.g.*, Snethen v. Nix, 736 F.2d 1241, 1245-46 (8th Cir. 1984); Hill v. Zimmerman, 709 F.2d 232, 237 (3d Cir.), *cert. denied*, 464 U.S. 940 (1983); Perry v. Fairman, 702 F.2d 119, 122-23 (7th Cir. 1983). Of course, dismissal on exhaustion grounds does keep a petitioner's claims alive, in the short run, and protects at least the possibility that the state courts will respond favorably. *Cf.* Goodloe v. Parratt, 605 F.2d 1041, 1049 n.20 (8th Cir. 1979) (dismissing for want of exhaustion when the petitioner's claim seemed viable and it was not "clear-cut" that the state courts would refuse to entertain it).

120. *See* Taylor v. Harris, 640 F.2d 1 (2d Cir.), *cert. denied*, 452 U.S. 942 (1981); Matias v. Oshiro, 683 F.2d 318, 321 (9th Cir. 1982). *See generally* Spearmen v. Greer, 592 F. Supp. 69, 70 (S.D. Ill. 1984) (explaining this "no win" situation).

avoids dismissal for want of exhaustion on the theory that, because of earlier procedural default, the state postconviction remedy is unavailable. In that case, the petitioner's federal action may be dismissed with prejudice immediately—unless "cause" and "prejudice" are shown.[121]

We should hardly be surprised that prisoners who escape the exhaustion doctrine's frying pan fall irretrievably into the procedural default doctrine's fire. Nor should we be surprised that state postconviction remedies provide the means by which current law often denies any judicial forum to prisoners' federal claims. The very point of the Supreme Court's modern procedural default cases is to identify, and to encourage the state courts to identify, procedural grounds for terminating constitutional litigation.[122] Sadly, as the Supreme Court has become less receptive to habeas petitioners who did not, but might have, raised claims at trial or on appeal in state court, even the professional organizations that once proclaimed the good sense of addressing claims on the merits[123] have abandoned their commitment to the "waiver" standard. The National Commissioners on Uniform State Laws now propose that petitioners' claims should be dismissed if they "inexcusably failed" to raise them in prior proceedings;[124] the ABA, borrowing from current federal law, suggests that petitioners "should be required to show cause" for failing to comply with state contemporaneous objection rules.[125] Procedural default dismissals consequently become routine.[126] Even states that once eschewed such dispositions in the absence of waiver now permit state standards for judging the effect of procedural default to seek the federal level.[127] Once again, then, state remedies fail to further the enforcement of federal law. In this instance, indeed, they are instruments for denying opportunities for litigation in any forum, state or federal.[128]

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121. *E.g.*, Engle v. Isaac, 456 U.S. 107, 123 n.25 (1982). Of course, federal habeas corpus might be foreclosed for procedural default at trial or on appeal even if my advice were taken and prisoners were not required to exhaust state postconviction remedies. It is only that, in the absence of postconviction litigation in state court, it may be more difficult for federal courts to ascertain any procedural basis for refusing to treat the merits.

122. *See* Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

123. *See supra* text accompanying note 110.

124. UNIFORM POST-CONVICTION PROCEDURE ACT § 12(b)(1)(1980).

125. ABA STANDARDS (1982 version), *supra* note 52, § 22-6.1(c).

126. *E.g.*, Witt v. State, 465 So. 2d 510, 513 (Fla.), *cert. denied*, 470 U.S. 1039 (1985) (reiterating that Florida habeas corpus is unavailable to litigate claims that "should have been raised on appeal"); Black v. Hardin, 255 Ga. 239, 240, 336 S.E.2d 754, 755 (1985) (refusing in the absence of "cause" to consider claims that might have been raised on appeal); Walker v. Kansas, 216 Kan. 1, 3-4, 530 P.2d 1235, 1238 (1975) (refusing in the absence of "exceptional circumstances" to treat claims that might have been raised on direct review).

127. *E.g.*, Curtis v. State, 284 Md. 132, 395 A.2d 464 (1978). Some people in Maryland not only applaud this shift but advocate statutory changes that would establish even more rigid preclusion rules for postconviction practice in that state. *E.g.*, Tomlinson, *Post-Conviction in Maryland: Past, Present and Future*, 45 MD. L. REV. 927 (1986).

128. In what may be the most cynical development in this field in a while, some states have recently amended their postconviction statutes to fix tight time limitations within which petitioners must file or forfeit all opportunity to litigate *any* claim in state court. For example, effective January 1, 1988, Missouri means to enforce a ninety-day statute of limitations. MO. R.

I hope that by this time I have persuaded at least some readers that state postconviction remedies are not all they are occasionally cracked up to be and that litigants should be permitted to take them or leave them. Others, I dare say, may fairly observe that my quarrel is with the Supreme Court, whose resistance to federal habeas corpus is primarily responsible for perpetrating the scheme I have just described. That may be so. Without discounting the states' complicity in the objectionable state of affairs at present, I now want to investigate the conceptual thinking that seems to drive the Supreme Court's campaign to trim federal habeas treatment of federal claims.

II.
DEEPER DIFFICULTY

Having wrung his judicial hands over the possibility that Illinois offered no remedy at all to prisoners in Jack Young's position, and having threatened to hold (in due course) that such a remedy was constitutionally mandated, Chief Justice Vinson remanded the dispute in *Young v. Ragen* for reconsideration by the state courts. I have described the practical effects of that disposition: the establishment of postconviction remedies in most jurisdictions. The theoretical implications of Vinson's action are, however, something else again. One possibility is that the states are, indeed, obligated to entertain petitions for postconviction relief and that the disposition in *Young* should be understood as a direction to Illinois to meet its constitutional responsibilities. Another is that state postconviction remedies, if established, can and perhaps should permit the state courts to serve as the primary adjudicators of federal claims arising in state criminal cases. I will treat each of these in turn.

A. An Aside for Constitutional Obligation

Little time and space need be spent on the question whether the states must maintain postconviction opportunities for the litigation of federal claims, provided the distinction I noted earlier is accepted.[129] However difficult it may be to draw the line in practice, there is a qualitative difference between claims that could not have been raised and litigated before the completion of appellate proceedings and claims that were or might have been addressed at trial or on direct review. Claims in the former category *do* command state postconviction remedies. For when there was no opportunity to litigate a federal claim earlier, some postconviction vehicle is essential if litigants are to have any access at all to a state forum. This was the constitutional evil presented in *Young* itself.[130] The proposition that the states can ignore liti-

CRIM. PROC., §§ 24.035(b), 29.15(b) (West Supp. 1987). I can only anticipate that the new rule will capture a large number of unrepresented Missouri prisoners, who will attempt to file late, suffer the forfeiture sanction, and then find themselves foreclosed in federal habeas corpus in the absence of "cause" for their "procedural defaults."

129. *See supra* text accompanying note 25.

130. At least this is true to the extent that the petitioner in *Young* attacked the plea of guilty entered against him. Cases in which litigants voluntarily pleaded guilty and nonetheless

gants who seek one and only one opportunity to complain to a state tribunal[131] that they are the victims of state action in violation of the Bill of Rights condemns itself. Overbroad dicta in recent cases notwithstanding,[132] such a proposition would have been rebuffed if it had been reached squarely in *Young* and would, I trust, be rejected out of hand by the Court as it is now constituted. The supremacy clause,[133] the well-established "right of access" to the courts,[134] and ordinary procedural due process considerations[135] compel the conclusion that the states must take account of constitutional objections to the behavior of their agents.

By hypothesis, however, claims in the latter category can be raised routinely in the proceedings leading to conviction or on appeal. If that is sufficient, and it seems it is, then no postconviction remedy need be established for litigants who failed to capitalize on prior chances for state court adjudication. This is the meaning to be attached to the Supreme Court's occasional statements that the states are *not* obligated to maintain general postconviction remedies of the kind I have been discussing.[136] This is not to say that the states

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seek to raise antecedent constitutional claims are distinguishable since criminal defendants who voluntarily acquiesced in their guilt chose, by hypothesis, to forego trial and appellate review and the occasions those proceedings would have presented for litigating antecedent claims.

131. I use this term to fudge the hard question whether a state entity not formally denominated a "court" and staffed by agents not denominated "judges" can serve the constitutional function. *Cf.* University of Tennessee v. Elliott, 478 U.S. 788 (1986) (according preclusive effect to fact-finding by a state administrative agency).

132. *E.g.*, Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (Rehnquist, C.J.) (commenting that the states have "no obligation" to establish a collateral "avenue of relief"). *Cf.* United States v. MacCollom, 426 U.S. 317, 323 (1976) (Rehnquist, J.) (stating in a federal Section 2255 case that the Constitution "certainly does not establish any right to collaterally attack a final judgment of conviction"). The related question whether the suspension clause makes federal habeas corpus mandatory has long been debated. *Compare* Jones v. Cunningham, 371 U.S. 236, 238 (1963) (citing the suspension clause as a "constitutional command") *with* Swain v. Pressley, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring) (insisting that the suspension clause does not require Congress to "provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction"). *Compare* Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605 (making the case that the suspension clause requires all courts to make the writ available) *with* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgment*, 38 U. CHI. L. REV. 142, 170 (1970) (contending that the suspension clause protects the writ only as it was understood at the time the Constitution was adopted).

133. *See* Testa v. Katt, 330 U.S. 386 (1947) (holding that a state court may not refuse to enforce a federal statute providing for punitive damages—at least where a similar claim under state law would have been given effect). *Cf.* McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230 (1934) (standing for the anti-discrimination principle). *See* Note, *Effect of the Federal Constitution in Requiring State Post-Conviction Remedies*, 53 COLUM. L. REV. 1143 (1953) (relying on *Testa* in this context).

134. *See* Bounds v. Smith, 430 U.S. 817 (1977) (requiring the states to provide indigent prisoners with lawyers or libraries on this basis).

135. In Foster v. Illinois, 332 U.S. 134, 139 (1947), Justice Frankfurter cited Mooney v. Hollohan, 294 U.S. 103 (1935), for the view that the states cannot deny prisoners some corrective process for unlawful detention. In *Mooney*, in turn, the Court relied on Frank v. Mangum, 237 U.S. 309, 335 (1915), and Moore v. Dempsey, 261 U.S. 86, 90-91 (1923), for the same general proposition.

136. *See supra* note 132. In Pennsylvania v. Finley, 481 U.S. 551 (1987), the petitioner asked the Court to hold that court-appointed counsel in state postconviction proceedings must

should not enact postconviction statutes that offer prisoners a chance to ask for reconsideration of issues once determined against them or, more importantly, to raise claims they neglected in prior proceedings. It *is* to say that such general postconviction remedies are not constitutionally mandated and that the genuine explanation for the remand in *Young* lies elsewhere.[137]

B. State Court "Primacy"

On reflection, it seems clear that the Court decided in *Young* to encourage the states to establish state postconviction remedies in order to distribute judicial business as the Court itself (not the Constitution) saw fit. On the surface, Chief Justice Vinson framed the problem at hand as one of docket control. Complaining specifically about the volume of prisoner petitions in the Supreme Court itself, but using language equally applicable to habeas applications in the district courts, Vinson openly campaigned for a larger role for the state courts in postconviction litigation:

> The key to the problem, as I see it, lies in the post-trial procedures and policies adopted by the states. If a state provides a well-defined method by which prisoners can challenge their convictions, and if their allegations are aired in open hearings, most of the charges are either not proved or are found to be far outside the protection of the Due Process Clause. Faced with these facts, the prisoner sees little advantage in further appeal. . . .[138]

In this, the Chief Justice endorsed the development of state postconviction remedies for the very purpose for which most states ultimately acted—to curb federal habeas corpus petitions. Indeed, Vinson greeted the new Illinois Post-Conviction Hearing Act as a "definite" and "comprehensive" postconviction remedy, which promised to diminish the number of petitions received by the

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meet federal constitutional standards for effectiveness. The state courts had not only considered that contention when it was raised in a successive postconviction petition but had held for the petitioner on the point. *Finley*, 481 U.S. at 554. Moreover, the state courts were perfectly prepared to consider the underlying claims that the petitioner insisted counsel should have raised in the petitioner's initial postconviction petition. *Id.* So the *Finley* case was not one in which the state courts were closed entirely to any federal claim. Nor was United States v. MacCollom, 426 U.S. 317 (1976), such a case. There, the federal Section 2255 movant sought a transcript of his criminal trial in the hope of discovering error. That claim, and any other claims that a perusal of the transcript might have disclosed, were or would have been cognizable on direct review or in federal collateral proceedings.

137. The Court has said repeatedly that even appellate review is open to convicts at the option of the state concerned, rather than as a matter of constitutional right. *E.g.*, *Finley*, 481 U.S. at 556-57. Here again, however, I take it to be assumed that there was an opportunity to put federal claims to the trial court. *Cf.* Note, *State Court Withdrawal From Habeas Corpus*, 114 U. PA. L. REV. 1081 (1966) (assuming that the states need not offer litigants more than one opportunity to litigate federal claims and defending states that might choose to expend resources in other ways and leave collateral adjudication to federal habeas).

138. Vinson, *Work of the Federal Courts*, 69 S. Ct. v, viii (ABA Address, Sept. 7, 1949). *But see* Friendly, *supra* note 132, at 167-69 (insisting that disappointed petitioners may not cease their efforts and may press on to the federal forum).

federal courts from inmates in that state.[139]

A decade and a half later, similar sentiments were voiced in a second edition of *Young, Case v. Nebraska*.[140] By 1965, many states had established postconviction remedies in response to the Supreme Court's pleas. In *Case*, however, it appeared that another prisoner had been denied any process whatever for adjudicating a claim that his guilty plea was invalid for want of professional counseling.[141] Certiorari was granted to decide whether the fourteenth amendment mandated "some adequate corrective process" by which state prisoners might litigate federal claims, and another academic, Daniel Meador, was appointed to make the affirmative argument.[142] As often happens, the issue in *Case* itself was diffused in the eleventh hour when the Nebraska Legislature enacted a new postconviction statute and the Supreme Court, on that account, remanded to the state courts for reconsideration in light of changed circumstances. Counsel's argument, however, together with the reaction from Justices Clark and Brennan, who attached concurring opinions, casts considerable light on the thinking of the times.

Professor Meador dutifully urged the Court to proclaim that the states were constitutionally obligated to provide postconviction remedies to convicts. Recognizing the significance of the new law in Nebraska, he nonetheless insisted that the Court should avoid yet another ambiguous disposition like the one in *Young* and should instead make the states' responsibilities clear. In this, however, Meador rested not on the relevant constitutional bases cited in brief, but on "sound principles of federalism."[143] He reminded the Court of its innovative criminal procedure decisions of late and its related decisions expanding the scope of federal habeas corpus for the adjudication of federal claims. Already, in his telling, those precedents had generated a "vast increase" in the number of habeas corpus petitions filed in the federal courts.[144] If the federal courts were not to be drawn "increasingly into state criminal administration," Meador contended, then the states must make their own courts more available for the determination of newly announced federal safeguards.[145]

Meador's approach to the issue in *Case* embodied an implicit criticism of recruiting the lower federal courts to enforce federal procedural standards applicable to state criminal prosecutions. Given that the Constitution must be enforced somewhere, the sheer number of petitions raising federal claims made no argument regarding the allocation of business between state and fed-

139. Vinson, *supra* note 138, at viii.

140. 381 U.S. 336 (1965).

141. The prisoner's state habeas petition was filed a month after Gideon v. Wainwright, 372 U.S. 335 (1963).

142. Professor Meador, of course, did not limit himself to the fourteenth amendment but relied on supremacy clause precedents as well.

143. *Case*, 381 U.S. at 344 (Brennan, J., concurring).

144. *Id.*

145. *Id.*

eral courts of concurrent jurisdiction. To complain that the federal courts were flooded with petitions was to assume in the first instance that the state courts constituted a preferred forum. It is hardly surprising that a preference for the state courts should have been embraced in the mid-Sixties. Many respected observers at the time, including Professor Meador, doubted the wisdom of making federal habeas do service as a collateral remedy.[146] Justice Clark, who had dissented in *Fay v. Noia* and the other great habeas decisions in 1963,[147] could be expected to respond favorably. Clark wrote separately in *Case* to acknowledge the "tremendous increase" in federal petitions and, like Chief Justice Vinson before him, to insist that the "practical answer" to the "problem" lay in the enactment of state postconviction remedies permitting prisoners to "air out" their federal claims in state court.[148] The establishment of such remedies, according to Justice Clark, would both temper the "rising conflict" between the state and federal courts and "relieve" the latter of an "ever-increasing burden."[149]

It is surprising, however, that Justice Brennan, the architect of the Warren Court's innovations in *Noia*, should have stood for any of this.[150] But the fact is, he did. He wrote:

> The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied. Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well. If, by effective corrective processes, the States assumed this burden, the exhaustion requirement . . . would clearly promote state primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindi-

146. *See* D. MEADOR, HABEAS CORPUS AND MAGNA CARTA (1966); Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286 (1966). In the years since *Case*, Professor Meador has acquiesced in a significant federal role in the enforcement of federal safeguards but has championed a specially designed system for appellate review of state judgments at the circuit level, as opposed to the district courts' current habeas jurisdiction. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL (1976); Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273 (1983).

147. *See supra* notes 103-05.

148. *Case*, 381 U.S. 336, 339-40 (1965).

149. *Id.* at 340. Justice Clark noted the current "public agitation and debate" over proposals to limit the federal habeas jurisdiction but insisted that the reasons given for legislative action would not "survive careful scrutiny." *Id.* at 339. On prior occasions, he had not been so protective of federal habeas. Exasperated by the Court's decision in *Noia*, Clark hinted that, while he had previously opposed proposals to overrule *Brown v. Allen* legislatively, he had come to believe that legislation might be the only means of restoring habeas corpus to its "proper place in the judicial system." Fay v. Noia, 372 U.S. 391, 448 (1963).

150. *See also* Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961).

> cated without any need for federal court intervention, but that nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further. . . . Greater finality would inevitably attach to state court determinations of federal constitutional questions, because further evidentiary hearings on federal habeas corpus would . . . prove unnecessary.[151]

These points are controversial to say the least. One certainly *can* deny that it is desirable to channel state prisoners away from the federal courts for the adjudication of federal claims. While "[o]ur federal system" surely does assign responsibility for the enforcement of state substantive criminal law to state authorities, it is far from clear that federally guaranteed procedural safeguards form part of that state criminal law, such that they, too, should be addressed authoritatively by the state courts. The exhaustion doctrine hardly manifests any such understanding. Congress has assigned the determination of federal claims to the lower federal courts sitting in habeas, and the exhaustion doctrine merely postpones federal adjudication until the state courts have completed their work in order to avoid interference with state processes.[152] If the object of the federal system is to "promote state primacy," it is only in the literal sense that the state courts are first in line to hear litigants' contentions. State court determinations are not given preclusive effect, however. The very point of establishing the federal courts' power to make their own, posterior determinations is to ensure that controlling authority is *not* lodged with the state courts but rather in a federal tribunal. Nor is exhaustion meant to generate complete state court records to facilitate summary federal dispositions of meritless claims,[153] albeit that may occur in some instances.[154]

It seems that Justice Brennan was beguiled in *Case* by the facile premise on which counsel's arguments were grounded: that *ceteris paribus* the state courts are the primary dispute-resolution institutions in this society and that the federal courts have only a residual role, even with respect to federal constitutional issues. The "primacy" of the state courts in this substantive sense is seductive. Indeed, Justice Brennan bowed to it during the very period in which he and other members of the Warren Court were forging an expansive jurisdiction for the federal habeas courts. Yet it was impossible to have it both ways—to insist at one and the same time that state courts had principal responsibility for the enforcement of federal procedural rights and that state prisoners were entitled to seek authoritative judgments from the federal district courts. Today, of course, the Court discerns the tension between committing federal issues to the state courts and a muscular form of federal adjudication in habeas corpus. And a newly minted majority of the Justices

151. *Case*, 381 U.S. at 344-45 (Brennan, J., concurring) (footnotes omitted).
152. Yackle, *supra* note 77.
153. *See supra* text accompanying notes 57-61.
154. *See supra* note 101.

increasingly attempts to ameliorate that tension by foreclosing federal habeas whenever possible.[155]

To critique these unfortunate developments, it is necessary to trace the intellectual conflict embedded in Justice Brennan's statements in *Case* to its conceptual roots and to challenge the jurisprudential framework that is uncovered. I want to set these tasks for the remainder of this essay.

C. *Conceptual Underpinnings*

The notion that the state courts are the chief dispute-resolution institutions in American society, irrespective of the nature of the legal claims in issue, rests upon what may be called the "process model" in western jurisprudence. Within Austinian tradition, coercive governmental orders are to be respected, unless the body responsible for them fails either to respect legal restrictions on its power or to employ adequate procedures in coming to its decisions.[156] Attacks upon governmental outcomes, then, are recast as challenges to the process by which results are generated.

The process model is enormously appealing in the liberal state inasmuch as it maintains at least a surface neutrality.[157] What might have been straightforward confrontations over substantive choices are submerged in investigations of process. Governmental power is limited by dispersal according to presumed institutional competencies—on a variety of levels. In the separation-of-powers context, legislatures, said to be well-suited to policy formulation, are assigned the task of adapting legal arrangements to new circumstances; courts, better equipped to engage in the reasoned elaboration of rules, are assigned responsibility for adjudicating disputes.[158] Within the realm of dispute-resolution, judicial decisions are acceptable so long as the manner in which they are generated meets established standards that ensure judicial capacity to engage in fair and accurate decision-making.

About the time that *Young* and *Case* were decided, influential theorists at Harvard seized upon the process model as a generally applicable framework for the legal order. In their widely read teaching materials, made available in mimeograph form in 1958, Henry Hart and Albert Sacks pressed upon stu-

155. *See supra* text accompanying notes 102-28.

156. H.L.A. HART, THE CONCEPT OF LAW 64-69 (1961) (elaborating on the "legal limitations" on sovereign power); J. RAWLS, A THEORY OF JUSTICE 86-88 (1971) (explaining the model of "pure procedural justice" in liberal thought). For a constitutional analogue, see J. ELY, DEMOCRACY AND DISTRUST (1980); *cf.* Lyons, *Substance, Process, and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745 (1987) (examining the process model embedded in Ely's work).

157. *See* S. HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM 7 (1984) (restating liberalism's disbelief in the objectivity of values). *But see* Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113 (S. Hampshire ed. 1978) (distinguishing American "liberalism" from American "conservatism").

158. See M. KELMAN, A CRITICAL GUIDE TO CRITICAL LEGAL STUDIES 186-90 (1987); L. KALMAN, LEGAL REALISM AT YALE: 1927-1960, 22 (1986); Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 505 (1988).

dents a "principle of institutional settlement," which embodied the proposition that "decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed."[159] Thus generations of law students at Harvard and elsewhere were offered the process model as society's chief means of contending with governmental power—by allocating its exercise to the institutions best suited to use it wisely.

When Hart and Herbert Wechsler turned their considerable talents to writing their great casebook on the jurisdiction of the federal courts, they invoked the process model to explain, and in some instances to prescribe, the orchestration of relations between the federal and state courts.[160] In a system in which two coordinate sets of courts enjoy concurrent jurisdiction in most cases arising under federal law, it makes some sense to fashion a principled basis for distributing business between them.[161] Hart and Wechsler met the challenge methodically. They noted that the states preexisted the Constitution and that local authorities can and are expected to make public policy in the ordinary exercise of their police power. Indeed, whatever positive law exists for the ordering of human affairs is largely traceable to the common law of the states as augmented by affirmative policy-making by state legislatures. The federal legislative power, by contrast, is in theory limited to the matters enumerated in Article I, such that federal enactments are by nature interstitial—fragments sprinkled over the body of state law in places in which there is some justification for federal standards.[162] In a like manner, the state courts, exercising a general jurisdiction owed to state law, are the routine mechanisms for the resolution of disputes, while the federal courts are available only in the exceptional instances specified in Article III—and then only when Congress enacts implementing legislation.[163]

Once the landscape is viewed in this way, it is a short step to the proposition that the state courts are the tribunals of choice even for federal issues. Those courts, too, are sworn to uphold the Constitution, and their judgments regarding federal questions are entitled to respect. Hart made the point explicitly in his famous dialogue on the federal courts' role: "In the scheme of the Constitution, [the state courts] are the primary guarantors of constitu-

159. H. HART & A. SACKS, THE LEGAL PROCESS 4 (tent. ed. 1958).

160. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

161. It is not, of course, essential to do so. The choice of forum can simply be left to the litigants concerned. That, indeed, is what most federal jurisdictional statutes seem on their face to contemplate.

162. H. HART & H. WECHSLER, *supra* note 160, *Introductory Note: The Interstitial Character of Federal Law*, at 435; *see also, e.g.*, Minnesota v. National Tea Co., 309 U.S. 551, 556-57 (1940).

163. H. HART & H WECHSLER, *supra* note 160, at 18 (ascribing to the Constitutional Convention a clear decision to give the lower federal courts only a limited purview, subject to still further limitations at the discretion of Congress).

tional rights, and in many cases they may be the ultimate ones."[164] Ten years later, Paul Bator elaborated the same theme in the context of federal habeas corpus—influencing not only the arguments put forward in *Case*, but, unfortunately, more recent decisions undercutting the availability of the federal writ.[165]

Professor Bator's article is well known, and I will give it only brief and oversimplified treatment here.[166] Essentially, Bator posits that substantive criminal law is ordinarily the business of state government and that, accordingly, criminal defendants are routinely haled into state court to answer charges. At that critical juncture, when the power of the state is arrayed against the individual, the Bill of Rights mediates the conflict to ensure fundamental fairness and to achieve results in which society may have genuine confidence. Federal law, then, specifies some basic rules under which state courts must operate as they set about their task of enforcing state substantive law. These federally guaranteed safeguards are and should be enforced by the state courts themselves as an adjunct to the substantive decision at hand: the determination of guilt or innocence. If state trial courts make mistakes with respect to federal issues, their errors may be corrected on direct review in the state appellate courts or in the Supreme Court of the United States. At least, Bator insists, there is no justification for believing that the lower federal courts are better adjudicators of constitutional questions, such that they have warrant to substitute their views for those of the state courts concerned.

According to the process model Bator has in mind, federal and state judges are fungible with respect to their ability to determine federal issues. It is essential, by hypothesis, that *some* court should be open to decide federal questions arising in state criminal prosecutions, and in the ordinary course that will be a state court. It is wholly unnecessary, and, indeed, counterproductive, for any other court, save an appellate court on direct review, to determine the same issues—redundantly pawing the same ground with no basis for believing that a second judgment will be an improvement on the first. The lower federal courts have a role to play only in rare circumstances in which state processes break down, such that criminal defendants who wish to

164. Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953). The dialogue was reproduced in the Hart and Wechsler casebook. While I am convinced that my treatment in the text accurately portrays the casebook's view of the relative place of the state and federal courts, I hasten to add that this broad language from the dialogue comes at the conclusion of Hart's treatment of Congress' power to *deny* litigants with federal claims any entitlement to litigate those claims in a *federal* court. Inasmuch as Hart concluded that Congress could eliminate any such forum in at least a class of cases, he was understandably pressed to offer the state courts as an available alternative. Otherwise, substantive constitutional claims would have no forum at all. Having seized upon the state courts in reserve, however, Hart flipped his discussion of the federal courts on end by promoting the state courts as the primary tribunals for federal claims and edging the federal courts into the background.

165. Bator, *supra* note 15.

166. I have dealt with Bator's thesis more thoroughly elsewhere. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1014-19 (1985).

raise Bill of Rights issues have no fair opportunity to pursue them in the course of state court proceedings. By this account, the states should provide procedurally satisfying opportunities for the litigation of federal claims in state court in order to avoid federal adjudication in habeas corpus—just as Chief Justice Vinson in *Young*, and Justices Clark and Brennan in *Case*, recommended.

D. Conceptual Conflict

To locate the process model behind the encouragement and growth of state postconviction remedies is to identify internal inconsistency in the Supreme Court's initial approach to postconviction litigation generally. For at the very time the Court was promoting state remedies in the way I have just described, the Justices were proclaiming the availability of federal habeas corpus for the adjudication of federal claims. The idea driving *Brown v. Allen*[167] in 1953 and certainly *Fay v. Noia*[168] in 1963 was that convicts with federal claims are routinely entitled to at least one opportunity to litigate those claims in a federal forum, usually federal habeas corpus, whether or not the state courts addressed the merits in a procedurally satisfying manner.

The tension between this proposition and the process model is manifest everywhere, but particularly in connection with the exhaustion doctrine. The process model understands the problem at hand to be how best to prosecute state criminal actions, with attention to both state and federal legal issues that may arise. Since criminal defendants will routinely be called to account in state court in the first instance, and since it is settled that they must exhaust state opportunities for litigating federal defenses, it only makes sense that the answers the state courts give to federal questions should suffice—provided the process in state court is adequate.[169] The leading Warren Court decisions, by contrast, understand the issue as how best to ensure that litigants with federal claims have access to a federal forum. The very statement of the *exhaustion* doctrine as the general expectation that would-be federal petitioners must pursue state judicial remedies *before* applying for federal relief signifies that the federal courts have the *last* word (in both senses of the term) on the meaning of federal law. Professor Bator himself has acknowledged that his approach to habeas corpus was squarely rejected in *Noia*.[170]

The Warren Court, too, recognized the need to allocate business between the state and federal courts and the apparent utility of making the state courts the *primary* adjudicators of federal claims (in both senses of *that* term). Yet the Justices then sitting insisted that the federal habeas courts must be open for the litigation of federal claims—should litigants wish to use them. Any

167. 344 U.S. 443 (1953). *See supra* text accompanying note 14.

168. 372 U.S. 391 (1963).

169. Bator, *supra* note 15.

170. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 613 n.24 (1981). *See* Resnik, *Tiers*, 57 SO. CALIF. L. REV. 840, 877-84 (1984) (examining the assumptions underlying *Noia*).

interjurisdictional friction that might result would simply have to be tolerated. In part at least, the Court's commitment to federal adjudication can be explained as a fair interpretation of the will of Congress embodied in the Habeas Corpus Act, as a reflection of the federal courts' historic role in the enforcement of the fourteenth amendment, and as a recognition of their independence and special competence in Bill of Rights matters.[171] In my view, moreover, it would be dangerous to accept state court judgments as authoritative when those courts have operated under conflicting duties—both to enforce state substantive criminal law and to respect federal procedural safeguards *designed* to make that task more difficult.[172]

On the surface, the current intellectual unsettlement arising from the process model appears to track the political divisions within the Supreme Court. Some of the Justices appointed in recent years by Presidents Nixon and Reagan plainly reject the Warren Court's enthusiasm for the adjudication of federal claims in federal court. Predictably, they find the process model useful in advancing their hopes of channeling litigation into the state forum. And they increasingly rely on that model, both with respect to habeas corpus[173] and in other, related contexts.[174] Justice Brennan and others of similar mind, by contrast, now seem to recognize more fully the process model's implications and thus resist its application in most instances.[175]

A bit deeper lies paradox. One would expect that the process model's adherents would insist upon sound state procedures in order to strengthen the case for relying on state adjudication to the exclusion of federal review. And it would seem that those who champion federal litigation would be less demanding of the states—in contemplation that litigants will have an opportunity to litigate in federal court in due course. Yet the reverse is true. The Justices who invoke the process model to explain decisions foreclosing federal litigation tend in the next breath to find the most primitive state procedures sufficient[176] and reject out of hand efforts to improve those procedures by

171. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

172. Yackle, *supra* note 166.

173. The obvious habeas illustration is Stone v. Powell, 428 U.S. 465 (1976). *See* Resnik, *supra* note 170, at 895. On the other hand, several observers have explained that case on other grounds. *E.g.*, Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 COLUM. L. REV. 1 (1982). *See* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 456-59 (1980) (contending that *Stone* responds to several themes evident in criticisms of the Warren Court). Professor Saltzburg considers *Stone* to be primarily a case about the exclusionary rule. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367, 388-90 (1983). That has also been my own view. Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 623-28 (1983).

174. I have found traces of the process model in cases on preclusion, *e.g.*, Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982), and equitable restraint, *e.g.*, Moore v. Sims, 442 U.S. 415 (1979). *See* Yackle, *supra* note 166.

175. *E.g.*, *Stone*, 428 U.S. at 515-33 (Brennan, J., dissenting).

176. *E.g.*, *Kremer*, 456 U.S. at 481 (stating in dictum that "state proceedings need do no more than satisfy the minimal procedural requirements of the Fourteenth Amendment's Due Process Clause" in order to be given preclusive effect in federal court).

constitutional means.[177] Only the Justices who contend that the federal courts should be more open to federal claims seem at all committed to making state proceedings genuinely "full and fair."[178] There is, of course, an ideological explanation for all this. The Court's "conservatives" may simply be hostile to the claims that litigants wish to press in *any* court and thus squeeze from both ends at once—forcing petitioners out of federal court on the promise of state process while at the same time signaling the state courts that most anything they do will suffice.[179] The Court's "liberals," by contrast, may be so solicitous of federal claims that they wish to make the most of all available litigational opportunities. I need not pass on the validity of explanations along these lines. It is enough for my purposes to recall that, when the Court encouraged the development of state postconviction remedies in *Case*, Justices of quite different ideological stripes rested upon the genuine process model put forward by Professor Meador.[180] That reliance, I have tried to show, was misplaced in light of contemporaneous decisions promoting federal habeas corpus. And to the extent the process model continues to influence thinking to this day, it generates only confusion and, I fear, erodes the Warren Court's great promise that petitioners with federal claims are entitled to a federal opportunity to litigate them.

CONCLUSION

I have labored longer than I intended—in order to announce and defend the view that would-be federal habeas corpus petitioners should not be asked to exhaust state postconviction remedies before applying for federal relief. I have advanced two arguments. First, the postconviction remedies now available in most states do not further and, indeed, often foil the adjudication of federal constitutional claims. Second, the process model, on which the Supreme Court has relied in insisting upon the exhaustion of state postconviction remedies, conflicts with the general proposition, embodied in the Warren Court's habeas cases, that litigants with federal claims are entitled to a federal forum at some point. I have not suggested that state postconviction remedies should be denied to litigants who wish to invoke them. Nor have I proposed that a reduction in their use would eliminate all, or even many, flaws in current federal habeas law. On the contrary, I have ascribed the vexing frustrations that still beset federal habeas corpus to the Supreme Court's inability or

177. *E.g.*, Pennsylvania v. Finley, 481 U.S. 455 (1987) (refusing to hold appointed counsel in state postconviction proceedings to a federal standard of effectiveness).

178. *E.g.*, Allen v. McCurry, 449 U.S. 90, 112-13 (1980) (Blackmun, J., dissenting) (joined by Brennan & Marshall, JJ.) (arguing that various "conditions" should be satisfied before state judgments are accorded preclusive effect).

179. There is also an argument from federalism. Justices who are concerned with federal evaluation of state court behavior of any kind may sense that the process model is actually more threatening to those courts than is independent federal adjudication. For the state courts may well resent examinations of their processes more than they resist appraisals of their substantive results. *See* Resnik, *supra* note 170, at 886 n.157.

180. *See supra* text accompanying notes 142-46, 154-55.

unwillingness to keep faith with the conceptual thinking on which the Warren Court's great habeas decisions were grounded.