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Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism

Jordan Steiker†

The traditional critique of excessive proceduralism in our criminal justice system is directed toward the wide-ranging protections afforded criminal defendants. The story is a familiar and powerful one. When the Warren Court incorporated many of the provisions in the Bill of Rights and applied them against the states, the Court significantly transformed state trials. The “substance” of such trials — the actual guilt or innocence of the defendant — was increasingly displaced by an emerging concern for procedural regularity. The testimony of fact witnesses — formerly the centerpiece of criminal trials — was now invariably preceded by motions, hearings, and extensive litigation over police and prosecutorial compliance with the newly applied constitutional norms. Moreover, the Warren Court’s constitutional rulings themselves were designed not merely to vindicate the individual interests of the accused, but to regulate and transform state police practices. Exclusionary remedies for constitutional violations became the rule, elevating process over substance, fairness over truth, and defendants’ rights over efficient enforcement of the law.

Thus, “overproceduralism” appears to be the rallying cry for “law-and-order.” On this view, we must restructure constitutional criminal procedure to accommodate society’s undervalued interest in effective law enforcement.

The lament of excessive proceduralism, however, is no longer exclusively the cry of those who want criminals punished and communities protected. Defense lawyers and civil rights activists have increasingly decried statutory and court-driven procedural barriers to post-conviction relief in criminal cases.¹ According to


¹ Barry Friedman, A Tale of Two Habeas, 73 Minn L Rev 247 (1988); James S.
this version of the overproceduralism critique, the substance of post-conviction proceedings is the enforcement of state and federal constitutional law; excessive proceduralism appears in the form of elaborate doctrines — such as procedural default, non-retroactivity, exhaustion, and limitations on successive claims — that frustrate review of the merits of inmates' constitutional claims.

Now it's possible of course to regard state and federal habeas as just additional procedural protections for the accused, so that reducing their availability protects the overriding substantive goal of the criminal justice system — to identify and punish criminals. There is some force to this appeal, and many detractors of the current system would undoubtedly say that any new limits on the enforcement of constitutional rights (whether at trial or in collateral proceedings) would be welcome correctives. But at least part — and perhaps a large part — of the excessive proceduralism critique need not take sides in the debate between prosecutorial and defense interests. Whether one is more committed to punishing criminals or to enforcing constitutional norms, one can lament the high cost of extraordinarily intricate procedural litigation in criminal cases. Just as state trial courts spend a considerable (and perhaps inordinate) amount of time sorting through procedural issues during criminal trials, federal judges devote tremendous energy and resources to resolving procedural questions on federal habeas.

This essay addresses excessive proceduralism in post-conviction proceedings and suggests ways to redesign federal habeas review of state convictions in capital cases. The proposal does not simply discard the strong state interests that have prompted recent judicial and statutory procedural reforms of federal habeas. Instead, this essay explores more productive and less procedurally burdensome ways of serving those interests — while also serving the competing interest of vindicating prisoners' constitutional rights.

Virtually any recent federal decision reviewing a state conviction reveals the procedural morass in federal habeas. A typi-

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cal decision will briefly recite the facts of the crime and the inmate’s constitutional allegations. The bulk of the opinion, though, will address whether the inmate timely filed the petition, exhausted state remedies, avoided all state procedural defaults (or offered some persuasive reason for overlooking the defaults), and adequately developed a factual record in state court. If by some good luck the inmate’s claim survives these inquiries, the decision will turn to the “merits,” which does not mean exactly what the term suggests. The court will first decide if relief is barred by its nonretroactivity doctrine. In a federal habeas proceeding, a federal court generally cannot grant relief if the inmate seeks the benefit of “new” law, even if the court believes the inmate’s claims are compelling in light of prevailing constitutional norms. If, by some luck, the inmate is seeking only the application of well-established constitutional law, the federal court will then get to the crux of the matter: whether the state court’s decision was unreasonable. Instead of asking whether the state court’s decision was correct according to the federal court’s best understanding of the Constitution, the court will undertake the largely anthropological task of determining whether the state court judge remained within the community of respectable interpreters of the federal Constitution.

Federal habeas litigation is now overwhelmingly concerned with the procedural posture of an inmate’s constitutional claims rather than with the merits of those claims. What accounts for this emerging procedural fetishism? One somewhat crude answer is that the Court and Congress have become increasingly hostile to the two commonly asserted premises of federal habeas — that unconstitutional detentions should be remedied and that federal courts should supervise state adjudication of federal rights. A slight variant of this answer is that the Court and Congress have simply paid more attention to the substantial costs — both in terms of finality and comity — of relitigating constitutional claims in federal court.

Both of these answers have some explanatory force, but a fuller understanding requires closer examination of the system that the Court and Congress are attempting to reform. The central and perhaps most puzzling feature of our system for reviewing federal claims of state prisoners is the sheer number of courts involved. Federal claims generally move through three tiers of review, and each tier involves review by at least two courts.

Defendants can first raise federal claims at trial, and then
again on direct appeal to the state’s highest criminal court (some states provide for review by an intermediate appellate court). Then, the defendant can present these “record” claims to the United States Supreme Court for discretionary review via appellate certiorari jurisdiction.

Assuming certiorari is denied (as it almost always is), the defendant can file for state post-conviction relief, the second tier of review. Depending on the state, the post-conviction forum will address record federal constitutional claims, non-record federal constitutional claims, various state law claims, or some combination of the above. Generally the defendant presents the state post-conviction petition to a trial court, usually the court of conviction. The defendant can appeal the trial court’s decision to the highest state court, and the state court’s decision to the United States Supreme Court.

The final tier is federal habeas, where the defendant first presents federal claims in a federal district court. The defendant has a limited right of appeal to the federal court of appeals (the petitioner must obtain a certificate of appealability, which differs in some important respects from the former certificate of probable cause), followed by certiorari to the United States Supreme Court.

Four, five or even six federal and state courts might address the merits of a federal claim before the defendant’s legal remedies are exhausted. And the first merits review on federal habeas may occur long after the first merits review at trial (direct appeals in state court take a long time to resolve, as do state post-conviction proceedings). Furthermore the tiers of review do not uniformly or even generally distinguish between “non-record claims,” which require factual development beyond the trial record, and record claims, which do not; therefore trial courts (both federal and state) review legal claims initially only to have their determinations reviewed de novo by appellate courts.

One question an observer might reasonably ask is, who chose this system? The honest answer is that no one did; our layered system of review emerged from a series of ad hoc decisions and practices. When Congress first granted federal habeas jurisdiction in the Judiciary Act of 1789,\(^2\) it did not intend to provide a robust post-conviction remedy at all; it was undoubtedly more concerned with providing a remedy against unjustified pre-trial

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\(^2\) Act of Sept 24, 1789, § 14, 1 Stat 73, 81–82.
detentions. Moreover, federal habeas jurisdiction appeared to be vested primarily in federal judges in their individual capacities, not in courts, and Congress certainly did not anticipate or desire that federal habeas cases would ordinarily work their way through all three levels of the federal judiciary. Ultimately, the federal habeas remedy evolved into a vehicle for challenging criminal convictions (as well as mere detentions), and the Federal Rules established procedures for initiating federal habeas cases in the federal district courts. Federal habeas was not generally available for state prisoners until 1867. It was not until the 1950s and early 1960s that the modern role of federal habeas as a forum for relitigating virtually all federal constitutional claims was firmly established, with defendants litigating federal habeas applications in a manner similar to other federal civil suits.

Modern state post-conviction practice is likewise of relatively recent vintage. In some respects, the growth of state post-conviction remedies was no accident. Prior to the 1960s, virtually no state had robust or comprehensive post-conviction remedies for federal constitutional violations; most states simply entertained a variety of limited post-conviction common law writs, such as coram nobis and habeas corpus. As state inmates increasingly used federal habeas to attack state convictions, states began to adopt post-conviction procedures to protect their judgments. Procedural default rules, the exhaustion requirement, and deferential review of state factfinding together provided substantial incentive for states to entertain federal claims in their own post-conviction proceedings rather than to accelerate and in many cases to broaden the scope of federal habeas review. Today, virtually all states conduct post-conviction review of federal constitutional claims precisely to define the record that the federal habeas court will ultimately review.

Hence, the current system of multiple relitigation of federal constitutional issues — through the mechanisms of direct review, state post-conviction and federal habeas — emerged from ad hoc, albeit interactive, evolution of state and federal practices. This
system, of course, is extremely inefficient and burdensome. In capital litigation, where virtually all inmates avail themselves of all three tiers of review, it creates a forest of litigation that the state must traverse before firmly securing a death sentence.

The public, the courts, and elected officials have decried this cumbersome system of inmate “appeals,” which is the popular shorthand for federal and state post-conviction remedies. But in confronting this enormous system, reformers have avoided questioning its basic structure and have instead sought to reduce inmates’ chances of prevailing on their constitutional claims. Thus, Congress and the Court have preserved all the layers of review, but imposed increasingly rigid procedural barriers, making success in federal habeas more difficult. The effect on judicial economy and efficiency has been disastrous. Instead of pruning the forest by rethinking the duplicative, multi-tiered system of post-conviction review, Congress and the Court have added more trees. Federal courts spend an extraordinary amount of time sorting through highly technical procedural doctrines, and states must expend their energies defending their convictions in multiple courts.

This article proposes to reconstruct the multi-tiered system, eliminate many of the purely procedural questions in federal habeas, and reduce the time between state and federal court resolution of federal constitutional claims. Most significantly, the proposal seeks to disentangle federal habeas appellate review from federal habeas post-conviction review. Specifically, this involves the following reforms:

1. Allow all state death-row inmates to litigate record federal constitutional claims in the federal courts of appeal immediately after relief is denied by the highest state court on direct review. The circuit court would perform de novo review (rather than reasonableness review), and the court would apply prevailing constitutional norms (rather than invoke the nonretroactivity doctrine). In addition, the circuit court would enforce as jurisdictional any state procedural bars. Death-row inmates could appeal circuit court decisions to the United States Supreme Court via certiorari.

2. A death-row inmate could raise non-record federal constitutional claims on federal habeas after state post-conviction review. The inmate would present the federal habeas petition to the federal district court, which would determine whether the

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9 See, for example, William F. Buckley, Jr., The War Against Capital Punishment, National Review 62 (June 25, 1990).
state court's procedures for adjudicating disputed facts were ade-
quate and whether the state court's factfindings were supported
by the record. If the district court approved the state court's pro-
cedures and factfinding, the case would move to the federal court
of appeals, which would review the legal conclusions of the state
court de novo. As in its review of record claims, the appeals court
would enforce state procedural defaults jurisdictionally and apply
prevailing constitutional norms. If the appeals court denied re-
lief, the inmate could seek discretionary certiorari review in the
Supreme Court.

If the federal district court found the state procedures inade-
quate or the factfinding insufficient, the district court would hold
an evidentiary hearing and ultimately rule on the constitutional
claims, applying the same standards as the federal court of ap-
peals. The inmate could appeal the district court decision to the
federal court of appeals via a discretionary writ (akin to the
United States Supreme Court's certiorari jurisdiction). If the fed-
eral court of appeals accepted jurisdiction, its final decision would
be subject to discretionary review in the Supreme Court; if the
appeals court denied review, the district court decision would
likewise be reviewable via certiorari.

These changes ensure that federal review of record claims
occurs soon after state courts resolve those claims. Since record
claims constitute a substantial portion of federal constitutional
claims raised on federal habeas, much litigation would be defini-
tively resolved early in the process. Because federal courts would
review state court decisions soon after they were made, they
would not need to apply the nonretroactivity doctrine to protect
state finality interests. Indeed, the federal court of appeals
would essentially take the place of the United States Supreme
Court, which for practical reasons cannot review all state capital
convictions.10 And established constitutional doctrine suggests
that defendants get the benefit of prevailing constitutional norms
on direct review.11 Enforcing procedural bars jurisdictionally will
eliminate lengthy, disruptive litigation over the defendant's justi-
fications for failing to adhere to state procedural rules. It also
accords with the view of circuit court review as a substitute for
Supreme Court review.

The federal courts should apply the de novo rather than the
reasonableness standard (both for record and non-record claims)
for three reasons: (1) states' finality interests will be adequately served because federal courts will review state decisions soon after they are made; (2) de novo review is more consistent with the basic commitment to review state decisions at all; and (3) de novo review is less cumbersome to administer because federal courts need not investigate into prevailing interpretive practices in state and federal courts.

In addition to accelerating federal review, this new system also generally eliminates duplicative review of legal issues by federal district and appellate courts. For record claims, the duplication is eliminated entirely; for non-record claims, the federal district court will rule on legal issues only if it finds it necessary to develop a new factual record in the case. In such circumstances, federal appellate review should be rare, given that one federal court has already addressed the merits of the federal constitutional claim. The certiorari standard is less elusive than the certificate-of-appealability inquiry and better captures the justification for expending the energies of more than one federal court: to ensure uniform treatment of important, recurring federal claims.

Pruning the three tiers of review will accelerate federal review of federal claims. During the pendancy of the record claims on direct review, the defendant could (and should) litigate any non-record claims in state court. By eliminating certain procedural inquires (procedural default, nonretroactivity, reasonableness review) which are time-consuming and cumbersome to apply, the streamlined procedure will also reduce the burden of post-conviction litigation on the federal courts.

This proposed revamping of current post-conviction practices takes seriously the goal of reducing excessive proceduralism in the criminal justice system. It removes layers of review and procedural quagmires. But, perhaps ironically, simplifying post-conviction in capital cases, in addition to limiting highly technical litigation, might actually advance the goal of constitutional norm enforcement (although not necessarily). And if constitutional norm enforcement is the true problem, then from the perspective of the traditional critique, the proposed changes are not part of the solution but part of the problem. The last thing we need, critics might insist, is more state prisoners prevailing on federal constitutional claims.

But if that critique is persuasive, then we should simply get rid of federal habeas altogether. It makes no sense to erect a
drawn-out system of appeals, and then apply a tremendous system of procedural obstacles, just to ensure that no one gets relief in federal court. If that is the goal, we should save the states, the inmates, and the federal courts all the trouble. If, on the other hand, there is some significant value in federal resolution of federal claims, then such review should be a practical and efficient reality, rather than a cumbersome and wasteful mirage.

The first part of this essay describes the inordinate proceduralism surrounding contemporary post-conviction review of state convictions. The second part offers a brief history of the development of federal habeas and state post-conviction review of state convictions. The history reveals the ad hoc development of current federal and state post-conviction remedies. The third part defends a restructuring of state and federal post-conviction review. The restructuring streamlines resolution of constitutional claims by distinguishing between record and non-record claims and by reducing duplicative review.

Current reformers, though understandably frustrated with the status quo, have taken too much of the status quo for granted. The increased proceduralization of federal habeas — with the simultaneous preservation of the three burdensome tiers of review for federal claims — exacts substantial and unnecessary costs. Ultimately, this essay argues for a broad rethinking of the structure and goals of federal habeas.

I. THE CURRENT QUAGMIRE: PROCEDURALISM'S TRIUMPH IN FEDERAL HABEAS CORPUS

In its landmark 1953 decision, Brown v Allen, the Supreme Court confirmed what a half-century of practice had increasingly made clear: federal habeas would generally provide a forum for de novo review of state decisions rejecting the federal constitutional claims of state prisoners. Over the next two decades, the scope and significance of the habeas forum expanded dramatically. As the Court enlarged the federal constitutional rights of state criminal defendants by extending Fourth, Fifth, Sixth, and Eighth Amendment protections to state proceedings via the

12 344 US 443 (1953).
Fourteenth Amendment's Due Process Clause, the grounds for federal habeas relief radically broadened. At the same time, the Court showed tremendous reluctance to impose statutory or common law procedural obstacles to a petitioner's use of the "Great Writ." The famous habeas trilogy — *Fay v Noia,* 17 *Townsend v Sain,* 18 and *Sanders v United States* 19 — ushered in the "Golden Age" of federal habeas for state prisoners. These three cases essentially established a presumption in favor of petitioners seeking to avoid either state procedural defaults or bars to successive federal habeas petitions and established a relatively lenient standard for petitioners seeking to obtain hearings in federal court on disputed issues of fact.

It is almost quaint in retrospect to recall Justice Jackson's lament in *Brown* about the overwhelming number of habeas petitions inundating the federal courts. 20 The "haystack" of 541 petitions filed by state prisoners in 1951 became 12,000 by 1990. 21 More significantly, the number of successful petitions soared in the quarter century following *Brown,* particularly in capital litigation. 22 In the four years before *Brown,* five writs released four state prisoners; 23 after *Brown* hundreds of state inmates were resentenced or released.

The increased practical significance of federal habeas led to two intertwined critiques. First, many doubted the central premise of the federal habeas forum: that state courts should be subjected to ongoing federal supervision of their adjudication of federal rights. According to some opponents of broad federal habeas review, distrust of state courts might have been justified in an earlier dark era, but state courts had changed significantly and were no longer fairly regarded as hostile to or incapable of

20 344 US at 536–37 (Jackson concurring in the result) (footnote omitted)

("Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.").

22 James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure* §2.3 at 17 (Michie 2d ed 1994).
enforcing federal law. Others argued that intrusive review of state criminal processes by the lower federal courts is fundamentally inconsistent with our federal system.

An additional critique focused not on the comity issue, but on the fundamental lack of justification for any broad post-conviction relief. On this account, federal habeas had historically (and appropriately) served the narrow function ofremedying extraordinary injustices. Using it to correct ordinary or mundane constitutional errors — affording relief every time the constable blundered — transformed the habeas forum into a routine appeal as of right. Wholly apart from the federal-state tensions such review might excite, robust federal habeas severely undercut the finality of criminal convictions and, in turn, significantly undermined public confidence in the efficacy of the criminal justice system.

Despite repeated legislative attempts to curtail the new post-Brown, post-incorporation habeas, conservatives were unable to secure any meaningful statutory change in the four decades following Brown. Nonetheless, the Burger and Rehnquist courts successfully recalibrated several of the generous equitable standards of the earlier era and imposed substantial new procedural obstacles to habeas relief.

The most significant aspect of these reforms is what they did not accomplish: federal habeas remains available for the redress of virtually all federal constitutional violations. For a brief time, the Court appeared headed toward a general reevaluation of the role of federal courts in enforcing federal rights. In Stone v Powell, the Court foreclosed habeas review of Fourth Amendment exclusionary-rule claims litigated in state court. The Court insisted that its decision rested on an appraisal of the utility of post-conviction enforcement of the exclusionary rule (remarking that the rule "is a judicially created remedy" and not a "personal constitutional right") rather than a broader reassessment of the value of federal habeas review. Nonetheless, many observers believed that Powell provided the wedge for rethinking more globally the propriety of federal relitigation of federal claims. Two


26 Id at 486 (internal quotation marks omitted).
subsequent decisions, *Rose v Mitchell*27 (preserving the cognizability of grand jury discrimination claims) and *Withrow v Williams*28 (preserving *Miranda*29 claims) ended the seeming effort to selectively withdraw habeas jurisdiction in accordance with a Court-defined hierarchy of federal rights. Ultimately *Powell* became a lone exception to the general rule that federal constitutional claims are cognizable on federal habeas.

A. Procedural Default

Although the range of constitutional claims litigable on federal habeas remains intact, the procedural obstacles have become formidable. In its first significant procedural reform during the mid-1970s, the Court revisited the Warren Court's approach to state procedural defaults. In *Fay v Noia*, the Warren Court had rejected the contention that federal habeas courts should apply the same jurisdictional analysis to state procedural defaults that the Supreme Court applies when resolving claims on direct review. On direct review, of course, the independent and adequate state ground doctrine precludes Supreme Court review of defaulted federal claims because the Court lacks Article III power to revisit purely state law issues. Thus, the Court lacks jurisdiction to issue an advisory opinion regarding the defaulted federal claims.

In *Noia*, however, the Court characterized federal habeas review as an independent civil action rather than a formal appeal of a state court judgment and refused to apply the independent and adequate state ground doctrine to bar procedurally defaulted claims on federal habeas.31 Moreover, the Court concluded that such defaults should rarely be enforced as an equitable matter — only when the defendant deliberately bypasses an opportunity for presenting a federal claim in state court.32

Importantly, when the Burger Court renounced the deliberate bypass test as insufficiently protective of the states' legitimate interest in encouraging compliance with procedural rules within their courts,33 it did not seek to resurrect the potential jurisdictional bar to procedurally defaulted claims on federal ha-

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31 Id at 430.
32 Id at 438.
beas. As late as Brown, the Court had seemed to regard procedural defaults as fatal to federal jurisdiction (whether on direct review or federal habeas) and Justice Brennan's opinion in Noia is hardly persuasive in defending the equitable, nonjurisdictional approach that the Court embraced.

The prevailing equitable standard that the Court adopted and refined over several cases has predictably generated highly technical, inefficient litigation. The current standard forgiving state procedural defaults if the petitioner can demonstrate "cause" for failing to adhere to the state rule and resulting "prejudice" from its enforcement. Alternatively, petitioners can receive merits review of their underlying constitutional claims to prevent "fundamental miscarriages of justice." The Court has construed this last aspect of the test as providing a forum for petitioners who can establish a colorable claim of actual (as opposed to legal) innocence. Accordingly, courts spend much time and effort determining whether state prisoners can justify their failure to preserve a legal claim in state court. As a result of the Court's relatively narrow definition of "cause" — the default must be the result of some external impediment — many inmates seek to avoid defaults by relitigating their guilt of the underlying offense. Hence, the Court's effort to curtail review of procedurally-defaulted claims (while preserving a loophole for "miscarriages of justice") has invited intensive review of the underlying conviction in a substantial number of cases. In many respects, this approach turns federal habeas on its head: it encourages federal review of factual disputes and eschews federal review of federal constitutional questions. The absurdity of this "innocence" inquiry becomes even more apparent in those rare cases where an inmate does establish a colorable claim of innocence: the petitioner's possible innocence is only an occasion for reaching the merits of his constitutional claims. If these claims turn out to be unpersuasive, the court must deny relief to a petitioner who has made a substantial showing of the ultimate injustice of his conviction.

In capital cases, the dual formula of "cause-and-prejudice" and "miscarriage of justice" is even more intricate. If a petitioner is attacking his death sentence, as opposed to the conviction for the underlying offense, the Court has developed a refined "mis-
Recognizing that a petitioner can be guilty of a serious crime and yet be "innocent of the death penalty," the Court has ruled that a procedural default will be excused if the petitioner can make a colorable claim that he is ineligible for the death penalty as a matter of state law (hence, a petitioner need not be innocent of the underlying offense to avoid the procedural default). This special qualification generates even further technical litigation as parties debate states' definitions of death-eligibility. And again, this litigation is only the prelude to addressing the merits of the petitioner's constitutional claims.

The familiar critique of the Court's current procedural default doctrine focuses on its harshness compared to the prior deliberate bypass standard. In particular, detractors lament the Court's refusal to recognize ordinary attorney error as "cause," which effectively precludes most defaulted constitutional claims from receiving any judicial scrutiny at all (in state or federal court).

But the greatest failing of the current approach is the tremendous burden it imposes on courts and litigants who must navigate the maze of its fact-intensive, complicated standard. Moreover, advocates for defendants have never quite offered a justification for rendering federal habeas review of constitutional claims more solicitous than direct review by the Supreme Court. A more efficient approach would treat all state procedural defaults jurisdictionally and abandon entirely the Court's equitable framework. The harshness of a purely jurisdictional approach could be mitigated by recalibrating the woefully low standards for effective assistance of counsel under the Sixth Amendment to reflect the importance of raising and preserving federal claims in state trials. In addition, if federal courts are promising fora for identifying convicted defendants who are actually innocent, bare-innocence claims should be separately cognizable — not merely occasions for convincing a federal court to redress federal constitutional violations.

But using procedural default rules to address the problems of ineffective representation (as the Warren Court did) or to reassess the accuracy of the underlying conviction (as the Burger Court did) makes little sense in a regime committed to resolving constitutional claims efficiently. To be sure, even the jurisdictional approach on direct review has invited some collateral liti-

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38 Id at 346.
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gation over the independence and adequacy of state procedural grounds for decision. Overall, though, the burden imposed by making such assessments pales in comparison with the costs of the current federal habeas regime.

B. Retroactivity

Perhaps the most pervasive procedural inquiry in current federal habeas practice arises whenever the petitioner is arguably seeking the benefit of "new" law. Prior to the mid-1960s, the Supreme Court drew no important distinctions between inmates' claims seeking the benefit of new law and those seeking vindication of clearly established or long-standing constitutional doctrines. All decisions enforcing the constitutional rights of criminal defendants were simply presumed to have full retroactive effect. But the unprecedented expansion of criminal defendants' rights after the incorporation decisions encouraged the Court to limit the impact of the growing constitutional criminal code. On the one hand, conservatives opposed to the reforms did not want to throw open the jail-house doors based on "violations" belatedly discovered by the Supreme Court. On the other hand, even Chief Justice Warren embraced some restrictions on retroactive application of new law in order to ensure that continued reform would remain practical (and attractive).

The first decade or so of the Court's development and application of a nonretroactivity principle was extraordinarily chaotic. The Court was fractured on virtually all basic questions: did the principle limit a defendant to the law as it existed at trial? At direct review? Or at some other point during the criminal process? What circumstances, if any, justified full retroactive application of a constitutional rule?

See, for example, Henry v Mississippi, 379 US 443, 447-48 (1965) (reinvigorating "adequacy" prong by requiring state procedural rules to serve a "legitimate state interest" as measured by federal law).

See, for example, Desist v United States, 394 US 244, 258 (1969) (Harlan dissenting) ("I have in the past joined in some of those [retroactivity] opinions which have, in so short a time, generated so many incompatible rules and inconsistent principles. I did so because I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle.").

Jenkins v Delaware, 395 US 213, 218 (1969) (arguing that the disadvantages of nonretroactivity "must be balanced against the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practically effected").
Which decisions established "new" law?

The Court initially considered entirely prospective decision-making, under which it would grant relief only to the very defendant whose case established the new rule on direct review. Justice Harlan responded with a series of highly critical opinions, and the Court ultimately decided that it would resolve all claims before it on direct review according to the constitutional norms prevailing at the time of its decision.

More significantly, the Court ultimately adopted the converse rule as well: inmates whose convictions have become final (as measured by denial of certiorari on direct review) ordinarily cannot receive the benefit of new law. As with its miscarriage of justice loophole for procedural defaults, the Court's equitable exceptions to its nonretroactivity principle focus primarily on ensuring the accuracy of the underlying conviction. Under the Court's current approach, a federal habeas petitioner can avoid the nonretroactivity bar against new-law claims only if the rule sought (or established in a recent decision) renders the underlying conduct of the petitioner unpunishable or represents a "watershed" contribution to the criminal system that substantially increases the reliability of the guilt-innocence determination.

The nonretroactivity doctrine has been of extraordinary practical significance. The Court's expansive conception of "new" law, which focuses on whether a petitioner's claim was "clearly dictated" by prior precedent, has blocked retroactive application of many decisions far less dramatic or path-breaking than the Warren Court rulings which had given rise to the doctrine. At the

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43 Desist, 394 US at 258 (Harlan dissenting); Mackey v United States, 401 US 667, 678-79 (1971) (Harlan concurring in the judgment).
45 Teague v Lane, 489 US 288 (1989).
46 Id at 310–13.
47 See Sawyer v Smith, 497 US 227, 234 (1990) (holding that the decision in Caldwell v Mississippi, 472 US 320 (1985), condemning prosecutorial argument that sought to diminish the jury's sense of responsibility for its verdict was novel, despite the fact that such comments had been condemned in prior cases as potentially violative of the Due Process Clause. See Donnelly v DeChristoforo, 416 US 637 (1974)).
48 See O'Dell v Netherland, 521 US 151 (1997) (rejecting retroactive application of rule in Simmons v South Carolina, 512 US 154 (1994), requiring states in some circumstances to permit defendants to introduce accurate information concerning the "true" meaning of a life sentence; Lambrix v Singletary, 520 US 518 (1997) (rejecting retroactive application of Espinosa v Florida, 505 US 1079 (1992), concerning the effect of invalid aggravating circumstances on a death verdict in a weighing jurisdiction); Butler v McKel-
same time, courts have construed the equitable exceptions quite narrowly. Few new rules prohibit states from punishing certain conduct at all, and, in the numerous retroactivity cases litigated at the Supreme Court level, the Court has declined to identify any new rule as sufficiently fundamental to command retroactive application. At a practical level, petitioners face an obvious and intractable litigation dilemma: they must first attempt to cast the sought-after rule as an unremarkable (and therefore not "new") extension of existing doctrine, but later must argue that the extension marks a "watershed" moment for the criminal justice system.

The breadth of the new nonretroactivity doctrine has significantly contributed to the excessive proceduralism of federal habeas. The elastic conception of "new law" has made retroactivity an issue in virtually every case, as states seek to highlight even minor factual or legal distinctions between petitioners' asserted claims and established case law. In many cases where a group of petitioners has relied upon a decision issued after their convictions became final, the state has insisted not only that the intervening decision represents new law, but that its application to each petitioner's facts should be deemed new law as well.

Moreover, application of the doctrine is extraordinarily fact-intensive and case-specific. By linking retroactivity to the date on which a petitioner's conviction becomes final, courts are constantly asked to determine the state of the law as of a particular moment. Slicing up the law in this way ensures that a decision foreclosing retroactive relief to one prisoner on a certain claim will not foreclose other prisoners from seeking the benefit of the same rule based on one month, one year, or one decade of intervening decisions upon which the subsequent petitioners can rely.

Although the Court permits lower federal courts to treat the retroactivity question as a threshold matter (thereby avoiding a merits inquiry if the claim is barred), this option has not lessened the substantial burdens imposed by the doctrine. In many situations, petitioners seek the benefit of rules adopted after their convictions became final; therefore the merits of their claims have already been conclusively established by the time of federal habeas review. In other situations, the lower courts address the

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concerning a separate offense in the absence of counsel, Arizona v Roberson, 486 US 675 (1988), was novel notwithstanding an earlier decision that had addressed a virtually identical Fifth Amendment violation, Edwards v Arizona, 451 US 477 (1981)).

Tsague, 489 US at 300–01.
merits of petitioners’ underlying claims as a way of facilitating their retroactivity inquiry (it is much easier to determine whether a given rule is “dictated” by precedent if you know what the current state of the law is). Lastly, lower courts understandably want to protect their judgments (and avoid remands) by ruling in the alternative, thus addressing both the merits and retroactivity questions in the same opinion.

In short, the Court’s nonretroactivity doctrine represents an intricate, burdensome choice-of-law rule. Instead of looking to prevailing federal law, federal habeas courts are compelled to reconstruct the state of federal law as of a specified date in the past. Wholly apart from its significance in reducing the likelihood of vindicating constitutional norms, the nonretroactivity principle has added to the numbing complexity of the habeas forum. It is difficult enough for federal judges to determine what the Constitution presently requires in addressing inmates’ claims; the effort begins to resemble a parlor game when federal judges are asked whether, as of a certain date in the past, the present constitutional landscape could have been otherwise.

Moreover, the central goal of the nonretroactivity doctrine could be better achieved by other means. States have a strong interest in the finality of their convictions, and the obvious failing of current post-conviction practice is the length of time between trial and the exhaustion of all state and federal collateral remedies. In some respects, the habeas provisions of the recently-adopted Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") attempt to address this concern by imposing, for the first time, a statute of limitations period governing the filing of federal habeas petitions. The one-year limitations period, though, is tolled during the pendency of state post-conviction proceedings, such that federal habeas review of federal claims will still occur several years after many of those claims are first addressed in state court. Instead of attempting to reconstruct the legal landscape as it existed at the expiration of direct review (the point at which many of the petitioner’s claims could have been, but were not reviewed in a timely manner by the Supreme Court), reform should focus on closing the gap between state and federal resolution of federal claims. The details of such a proposal are set forth in Part III below.

Although Justice Harlan invoked deterrence to justify pre-

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51 Id at § 2244(d)(2).
cluding federal habeas petitioners from receiving the retroactive benefit of new law, the current nonretroactivity rules do not uniformly reward state judges for toeing the constitutional mark. A decision by a state judge that is "correct" as of the time of the state court's decision must still be reversed if "new" law emerges before the defendant's conviction becomes final (as measured by the denial of certiorari on direct review). In this respect, the nonretroactivity doctrine reinforces the notion that federal habeas is best understood as a substitute for review of federal claims by the Supreme Court given that such review remains impractical in light of the Court's limited resources.

C. Reasonableness Review of Mixed Law-Fact Questions

Until recently, modern federal habeas practice has been defined by de novo review of state determinations of law and deferential review of state factfinding. Given that federal review of federal claims is justified in part by the desirability of uniform implementation of federal law and the perceived expertise of federal courts in adjudicating federal rights (as well as the possibility of state hostility to such rights), it has long been assumed that federal courts should not defer to the legal conclusions of state courts. As Justice Frankfurter proclaimed in his highly influential separate opinion in Brown v Allen, "[s]tate adjudications of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide."

Nonetheless, critics of the "relitigation" model of federal habeas have continually sought to characterize habeas corpus as an extraordinary remedy. Professor Paul Bator provided the framework for this sort of argument in his famous effort to document habeas' limited role during the late nineteenth and early twentieth centuries. According to Bator, habeas corpus never served as a plenary vehicle for revisiting state determinations of federal law; rather, habeas provided a more circumscribed remedy when states failed to provide adequate fora for the litigation of federal constitutional claims. Thus, in Bator's view, Justice Frank-

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52 Desist, 394 US at 262-63 (Harlan dissenting) (discussing deterrence function of federal habeas).
53 The effect of the new statute on this point remains unclear.
55 Bator, 76 Harv L Rev 441 (cited in note 3).
56 Id at 444.
The university's purported codification of habeas practice in Brown represented a monumental and normatively undesirable departure from the writ's historically less ambitious role.

Despite extensive criticism of the costs associated with habeas review, Congress rejected numerous efforts to curtail the habeas forum in the four decades following Brown.57 Some of those efforts sought to impose precisely the "full and fair review" standard that Bator claimed had roughly governed the Court's early cases.58

The Court, too, recently declined to revise its de novo approach to state legal determinations. In Wright v West,59 a highly contentious 1991 decision, no majority could be found to embrace a deferential approach toward "mixed questions of law and fact" despite Justice Thomas's insistence, invoking Bator, that such an approach better comported with the writ's historical function.60 Apart from historical practice, Justice Thomas suggested that the "significant costs" entailed by habeas review justified a more deferential "reasonableness" review of state court applications of law to fact.61 Although the facts in West were entirely mundane, and ultimately led the Court to reject relief under its de novo standard,62 the case received much attention because of the potentially far-reaching consequences of Justice Thomas's position: mixed law-fact questions dominate federal habeas, as virtually every federal constitutional claim (e.g., voluntariness of confessions, reasonableness of searches, effectiveness of counsel) calls for an assessment of facts in light of a prevailing legal standard.

In the wake of the Oklahoma City bombing, Congress again turned to federal habeas and enacted its first significant reform of the statute since 1867.63 The centerpiece of the habeas reforms is the revised § 2254(d) that provides the standard governing federal consideration of state prisoners' claims. In contrast to the old § 2254, which extended relief to all petitioners "in custody in violation of the Constitution or laws or treaties of the United States,"64 § 2254(d) additionally requires that the challenged state

58 See, for example, S 2216, 97th Cong, 2d Sess § 5 (1982).
60 Id at 285.
61 Id at 292–93.
62 Id at 295–97.
64 28 USC § 2254 (1994).
adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

The most pressing question now is whether this statutory change adopts Justice Thomas's proposed “reasonableness” review of mixed law-fact questions. The statutory language is hardly a model of legislative drafting, and some of the legislative history could be construed as rejecting the fundamental change that reasonableness review would represent. In addition, two scholars have insisted that such a reading would be difficult to square with separate provisions in the Act modifying (and strengthening) procedural obstacles to habeas relief; according to this view, Congress would not have spent so much energy meticulously refining the procedural aspects of habeas elsewhere in the Act if the amended § 2254 had effectively “desiccated the federal courts’ authority” to reach properly preserved claims.

Notwithstanding these plausible arguments for reading § 2254(d) more modestly, the lower federal courts that have addressed the provision thus far have basically read it to embrace reasonableness review of mixed law-fact questions. Proponents of this interpretation refuse to believe that, after decades of unsuccessful reform attempts, Congress’s first significant federal habeas corpus legislation would only tinker around the edges of the habeas forum. In addition, § 2254(d)’s reference to “unreasonable” applications of law to fact, adopted on the heels of Justice Thomas’s opinion in West, understandably invites the conclusion that Congress intended to carry some of the baggage of his opinion into § 2254(d).

Whatever the wisdom of the lower courts’ construction of the statute, reasonableness review of mixed law-fact questions will likely become a familiar aspect of federal habeas practice. The

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68 Id.

69 See Drinkard v Johnson, 97 F3d 751 (5th Cir 1996), cert denied, 117 S Ct 1114 (1997) (adopting reasonableness review of mixed law-fact questions); Lindh v Murphy, 96 F3d 856 (7th Cir 1996), revd on other grounds 521 US 320 (1997) (same); Neelley v Nagle, 138 F3d 917 (11th Cir 1998) (same); Green v French, 143 F3d 865 (4th Cir 1998) (applying reasonableness review to certain types of state court decisionmaking that includes some applications of law to fact).

70 Drinkard, 97 F3d at 767 n 21 (rejecting as implausible the suggestion that “after all the years of failed attempts by Congress to adopt a deferential standard of review in this area, [§ 2254(d)] represents no more than the codification” of existing law).
nature and scope of such review, however, remains elusive. There simply is no other context in Anglo-American law in which legal determinations are accorded deference by a reviewing court. The closest analogues — court deference to federal executive agencies implementing federal statutes,71 and decisions granting "good faith" immunity to officials charged with constitutional violations72 — are not really close at all. In fact, deference to agencies is predicated in part on their supposed special expertise (vis a vis the federal court), a supposition that cannot apply to state courts interpreting federal law. Decisions granting "good faith" immunity impose a choice-of-law rule (much like the non-retroactivity doctrine); they do not foreclose courts from enforcing their own, independent judgment about the state of the law at the time of the official action.

Hence, federal habeas courts seeking to ascertain the reasonableness of state court applications of law to fact will be operating in uncharted waters. Suppose a petitioner seeks the benefit of a "new" — but retroactively applicable — decision issued by the Supreme Court applying a prior precedent to facts identical to those of the petitioner: will the reasonableness of the state court decision denying the petitioner relief turn on whether one or more Justices dissented from the Court's decision? On whether the dissents were good ones? Will reasonableness depend on whether a federal judge reviewing a state court decision subjectively entertains doubts about the correct application of law to a particular set of facts? Or will the federal judge be charged with the largely anthropological task of identifying constitutional interpretive practices of state (and federal?) courts and assessing whether particular decisions fall within those practices?

In short, the new reasonableness standard for mixed law-fact questions is unlikely to generate a workable or principled body of law. Moreover, the reform will likely be counterproductive to the extent that it is intended to highlight the equal status of state courts: it is hardly a respectful gesture for a federal court to conclude that a state decision is within the realm of reason (but wrong), and in those few cases that state decisions are deemed unreasonable, the federal court is essentially forced to declare the state court incompetent (as opposed to merely wrong).


72 See, for example, *Harlow v Fitzgerald*, 457 US 800 (1982) (holding that officials could be liable for constitutional infractions only if they violated clearly established constitutional norms).
Overall, and more importantly, reasonableness review of mixed law-fact questions is likely to contribute significantly to the density and intricacy of the already dense and intricate habeas forum. Applying Congress's new reasonableness test to the dwindling number of claims that manage to survive Court-imposed procedural obstacles to merits review will perhaps realign the current habeas forum with its historic roots. But the new habeas increasingly shares a greater affinity with the arcane, obscure writ practice of medieval England than with the habeas practice of our recent past. Federal habeas corpus law has assumed a life and logic of its own, such that an extraordinary amount of time and energy must be expended before the inquiry turns, if it ever turns, to the meaning of the federal constitution.

II. THE EMERGENCE OF MODERN FEDERAL HABEAS AND STATE POST-CONVICTION

A. The Multiple Roles of Federal Habeas Corpus

Federal habeas's current status as a forum for relitigating constitutional claims addressed in state court departs substantially from the writ's early role in this country. When Congress first established federal habeas in 1789, jurisdiction was limited to persons in federal custody. 73 Although Congress extended the federal writ to narrow classes of state prisoners during the antebellum period (for example, persons acting under color of federal law, 74 such as federal tax collectors, and citizens of foreign States 75), it did so in response to specific threats to federal interests posed by state prosecutions. 76 State prisoners were not uniformly afforded federal habeas remedies until Reconstruction, when Congress sought through a variety of jurisdictional devices (including expanded removal and writ of error provisions) to ensure federal power to enforce newly recognized federal rights. 77

73 Act of Sept 24, 1789, § 14, 1 Stat at 81–82.
74 Act of Mar 2, 1833, ch 57, § 7, 4 Stat 632, 634–35.
76 See William F. Duker, A Constitutional History of Habeas Corpus 187 (Greenwood 1980) (discussing nullification controversy and the decision to extend federal habeas jurisdiction to prisoners — federal or state — confined for acts committed pursuant to federal law); William W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina 1816-1836 283 (Harper & Row 1966) (same); Paul Bator, et al, Hart & Wechsler's The Federal Courts and the Federal System 1466 (Foundation 3d ed 1988) (discussing the "McLeod affair" that led Congress to extend federal habeas to federal or state prisoners who are subjects or citizens of foreign states).
77 See Liebman, 92 Colum L Rev at 2063–65 (cited in note 1).
During the first century or so of habeas jurisdiction under the 1789 Act, federal prisoners (like their state counterparts invoking state habeas jurisdiction) most frequently used the writ to challenge the lawfulness of pretrial or nonjudicial detentions. In this respect, early federal habeas practice in this country appears to have tracked the scope of the writ secured by the English Habeas Corpus Act of 1679, which limited relief to cases involving pretrial executive detentions.

Federal habeas for federal prisoners was not so strictly confined, though, and the writ was used successfully, albeit infrequently, to attack not only unauthorized detentions, but unlawfully obtained convictions. To some extent, this use of habeas to review judgments (rather than detentions) seemed at odds with Congress’s decision in the 1789 Act not to afford appeals as of right to federal prisoners (whereas the 1789 Act did provide state prisoners with an opportunity to present federal issues to the Supreme Court via writ of error review). Accordingly, in habeas cases in which a federal prisoner received relief from a conviction, the Court often insisted that the trial court had acted without "jurisdiction" or "authority" in order to disclaim any pretense to the plenary appellate power in federal criminal cases that Congress had clearly refused to grant. Not surprisingly, soon after Congress established appellate jurisdiction over federal prisoner cases at the end of the 19th century (both in the Supreme Court and the courts of appeals), federal habeas for federal prisoners diminished substantially as the Court relegated federal prisoners to those newly-secured appellate remedies, unless these proved

\textsuperscript{78} See Bator, 76 Harv L Rev at 465–67 (cited in note 3) (discussing the early federal cases); Dallin H. Oaks, Habeas Corpus in the States — 1776-1865, 32 U Chi L Rev 243, 253–58 (1965) (discussing early state habeas practices).

\textsuperscript{79} 31 Car 2, c2 (1679).


\textsuperscript{82} Act of Sept 24, 1789, ch 20 §25, 1 Stat 73, 85–86.

\textsuperscript{83} Bator, 76 Harv L Rev at 473 (cited in note 3) ("one overwhelming fact must be kept in mind in trying to rationalize these cases: throughout most of this period, federal criminal convictions were not appealable").

\textsuperscript{84} Act of Mar 3, 1891, ch 517, § 5, 26 Stat 826, 827–28 (establishing writ of error review for federal prisoners in the Supreme Court); Act of Jan 20, 1897, ch 68, 29 Stat 492 (establishing appeals as of right in noncapital cases in the Circuit Courts of Appeals); Act of Mar 3, 1911, ch 231, §§ 128, 238, 36 Stat 1087, 1133–34, 1157 (establishing appeals as of right in capital cases in the Circuit Courts of Appeals).
Notwithstanding the Court's concern that habeas not emerge as an alternative vehicle for routing appeals in federal criminal cases to the Court, the Court's use of habeas to review the federal claims of federal prisoners during the nineteenth century was generally of an appellate nature. The Court insisted it could not look beyond the face of the record in determining the lawfulness of a detention pursuant to a judgment. This restriction, too, eventually was relaxed and by the mid-twentieth century, defendants could use federal habeas to raise both record and non-record claims. Indeed, cases advancing non-record claims presented obvious circumstances in which appellate claims would be inadequate. As the Court concluded in *Waley v Johnston*, in which the petitioner alleged that his plea agreement had been coerced by federal agents, the claim was appropriately brought on habeas corpus because "[t]he facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal." Ultimately, federal habeas for federal prisoners was largely supplanted by a distinct statutory remedy (§ 2255) whose substantive scope is basically congruent with the habeas remedy that it displaced.

State prisoners seeking federal habeas relief during the late 19th century were generally denied review if their claims could be adequately addressed via writ of error review. Also, consistent with the treatment of federal prisoners' claims, state prisoners could receive habeas review if writ of error remedies were not meaningfully available. When, in 1925, Congress replaced the Court's mandatory writ of error jurisdiction with discretionary certiorari jurisdiction, the Court began to regard federal habeas as a more suitable forum for reviewing the federal claims of state prisoners. Thus, by the time the Court decided *Brown v Allen* in 1953, federal habeas had already emerged as a forum for state prisoners to raise federal claims that could have been, but were not, reviewed by the Supreme Court via certiorari. In holding that the Court's denials of certiorari should be accorded no weight

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85 Liebman, 92 Colum L Rev at 2072–73 (cited in note 1) (discussing effect of “rearranged . . . appellate map” on the availability of federal habeas for federal prisoners).
86 Id at 2061–62.
87 316 US 101 (1942).
88 Id at 104.
89 Liebman, 92 Colum L Rev at 2070–71 (cited in note 1).
90 Id.
92 344 US 443 (1953).
on federal habeas, Brown confirmed the appropriateness of the lower federal courts effectively assuming the Supreme Court's appellate responsibilities over federal claims.

As the Court extended numerous constitutional protections to state prisoners during the 1960s, it substantially increased the number of non-record claims — which required post-trial factual development — that state prisoners could pursue in federal court. These claims, too, were fully cognizable on federal habeas. Although the Court consistently applied an exhaustion requirement (meaning that state prisoners must avail themselves of whatever litigation opportunities remain available within the state courts before seeking relief in federal court), many states did not have robust post-conviction remedies for non-record claims; therefore a substantial number of non-record claims were brought to federal court in the first instance. Indeed, even before the constitutional rights explosion of the 1960s, state judges had occasionally been compelled to appear as fact witnesses in federal habeas hearings addressing non-record issues advanced by state prisoners.

In many respects, then, the federal writ of habeas corpus has come to serve a number of distinct purposes: (1) providing a means of forcing officials to justify executive and pretrial detentions; (2) giving the Supreme Court the final say in federal prisoner cases about the meaning of federal law (despite Congress's decision not to extend appellate jurisdiction over federal criminal trials until the late nineteenth century); (3) giving federal prisoners a means to raise claims requiring post-trial factual development; (4) giving state prisoners a meaningful opportunity to have a federal court rule on federal claims in a manner similar to an appeal; and (5) giving state prisoners an opportunity to litigate non-record federal claims in federal court after exhausting all state post-conviction remedies.

B. The Growth of State Post-conviction Remedies

The availability, scope, and significance of state post-conviction review has changed dramatically over the past half-century. Prior to the 1950s, state post-conviction remedies consisted almost entirely of common law writs, most prominently

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93 Id at 491 (opinion of Frankfurter).
94 See, for example, Rose v Lundy, 455 US 509 (1982) (detailing scope of exhaustion requirement).
95 Larry W. Yackle, Postconviction Remedies § 19 at 90 (Lawyers Coop 1981).
habeas corpus and coram nobis. These writs did not generally afford state inmates a meaningful opportunity to adjudicate federal constitutional issues.

State habeas corpus, like its federal counterpart, had originally served primarily as a vehicle for challenging pretrial or extrajudicial detentions. When state inmates invoked habeas to challenge their continued detention after conviction, state courts did not view the writ as a basis for revisiting every legal issue bearing on the conviction. Rather, state courts often described their inquiry as confined to "jurisdictional" questions and they repeated the black letter rule that habeas relief was available only if the challenged conviction was not merely "voidable" but absolutely "void." The jurisdictional limitation rendered state habeas an unpromising means of addressing federal constitutional claims because such claims were not ordinarily thought to undermine the basic authority of the trial court to conduct the proceedings leading to the challenged conviction.

Coram nobis, on the other hand, was the traditional post-conviction mechanism for revisiting convictions based on non-record facts. Coram nobis was available in the court of conviction — not in a reviewing or appellate court — and it did not generally extend to pure legal error. Moreover, coram nobis did not afford relief unless the newly found facts would have resulted in a different judgment. Accordingly, state coram nobis remedies also seemed an unlikely means of vindicating federal constitutional rights.

The problem of state enforcement of federal constitutional rights, though, was not simply a matter of putting ancient writs to modern uses. In the first half of this century, states seemed less than zealous in protecting defendants' rights. Perceived state hostility to federal rights and irregularities in state criminal procedures — including the absence of effective post-conviction review — no doubt encouraged federal courts to review state convictions for constitutional error through federal habeas corpus.

Independent developments also strengthened the federal ha-
beas forum. In the federal prisoner cases, the Court seemed more willing to view habeas as the appropriate means for adjudicating a wide set of constitutional claims. In *Johnson v Zerbst*, the Court held that a trial court's jurisdiction “may be lost” if a defendant is deprived of his Sixth Amendment right to counsel. Although it is not clear that the Court had uniformly required habeas claims to attack the “jurisdiction” of the trial court, the Court's elastic approach to “jurisdiction” in *Zerbst* paved the way for extending habeas to ordinary constitutional error.

In addition, the range of constitutional claims available to state prisoners increased dramatically in the 1950s and 1960s. The simultaneous expansion of the federal writ and federal constitutional rights thus led to increased federal supervision of state criminal processes. As federal habeas review of federal constitutional claims became more common — and more intrusive — states had strong incentives to develop more extensive post-conviction procedures. These procedures protected state convictions from federal review in two important respects: first, state factfinding in post-conviction would ordinarily earn deference in federal court, allowing state courts to shape the future federal habeas litigation; second, additional post-conviction opportunities for state prisoners meant additional opportunities to enforce state procedural rules, leading to increased forfeitures in federal court. Apart from these practical benefits, states had reason to believe that their failure to provide effective post-conviction means of adjudicating federal rights might itself be found to violate the Constitution (although contemporary doctrine obviously points in the opposite direction).

States reformed their post-conviction procedures in a variety of ways. Some states simply broadened one or both of the common law writs to accommodate post-conviction litigation of federal rights. Others followed the federal model for federal prisoners and modified post-conviction remedies via statute in order to simplify and centralize post-conviction practice. Even as

103 304 US 458 (1938).
104 Id at 468.
105 See Liebman, 92 Colum L Rev 2059-60 (cited in note 1).
108 Note, 40 NYU L Rev at 165-67 (cited in note 7).
109 Id at 167-72.
states ostensibly broadened the grounds of post-conviction attack, though, they continued to frustrate state (and federal) review of constitutional claims through complicated pleading rules and other procedural obstacles.  

When the Court in *Noia* adopted an extraordinarily lenient approach to procedural default, many states followed the Court's lead and relaxed their enforcement of procedural bars, particularly in post-conviction proceedings. Indeed, some states allowed post-conviction litigation of record claims (which could have been raised at trial or on direct appeal) because such claims would almost certainly receive merits review on federal habeas notwithstanding the default.

The expansion of state post-conviction review, though welcome in some respects, has unfortunately also delayed federal habeas review of federal claims. Of course, some delay is unavoidable if state courts are to assume initial responsibility for adjudicating federal rights; if states fail to provide a forum for non-record federal claims, inmates must litigate these claims in the first instance on federal habeas. But state post-conviction review also delays federal review of record claims which could be fully adjudicated in the state courts on direct appeal (without any additional recourse to state post-conviction). Delays between state court resolution and federal habeas resolution of record claims contributes to the perception — and reality — that federal habeas undermines the finality of state convictions.

Moreover, despite expansion in the range of cognizable claims in state post-conviction proceedings, state post-conviction has not escaped its inauspicious roots. Designed to limit the effectiveness of federal habeas proceedings, contemporary state post-conviction remedies continue primarily to frustrate rather than advance enforcement of federal rights. Some states attempt to reap the advantage of factfinding in post-conviction without ensuring that the factfinding is reliable; in Texas, for example, state post-conviction courts routinely resolve contested factual issues through a "paper hearing," a euphemism, of course, for no hearing at all. States also often deny indigents the assis-

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110 See Yackle, 16 NYU L Rev L Soc Change at 377–79 (cited in note 8).
111 Id at 378.
112 See generally id at 369–82 (arguing that state post-conviction has served to frustrate federal review and insisting that the exhaustion requirement should be relaxed in light of this reality).
113 See, for example, *May v Collins*, 955 F2d 299, 309–315 (6th Cir 1992) (discussing usefulness of "paper hearing").
tance of counsel or experts in post-conviction, so that the proceedings lack the adversarial character of criminal trials.

Overall, the dynamic interplay between federal and state habeas has produced a tremendously burdensome system for reviewing federal claims. Concerns about the adequacy of state criminal justice systems led to the recognition of federal constitutional rights and the expansion of the federal remedy of habeas corpus. Robust federal habeas in turn led to widespread adoption of extensive state post-conviction proceedings, primarily to limit intrusive federal court review. The introduction of extensive state post-conviction proceedings substantially delayed federal review of federal claims and increased the costs of ultimately granting relief in federal court. Instead of reforming the multiple, successive tiers of review, Congress and the Supreme Court have in recent years erected labyrinthine obstacles to merits review on federal habeas. Hence, our current system produces lengthy, repetitive litigation that cannot be justified by the minimal constitutional norm enforcement that it ultimately secures.

III. Restructuring Post-conviction Review of Federal Claims

Much of the inefficiency in current habeas practice results from the failure to distinguish the two importantly different functions federal habeas currently performs. On the one hand, federal habeas has gradually emerged as a surrogate for Supreme Court review of federal claims arising in state criminal litigation. On the other hand, federal habeas has also provided a post-conviction remedy for non-record claims that were not adequately addressed in state courts because of the limited reach of state common law writs.

By combining the appellate function and the post-conviction function in one proceeding, federal habeas has exacerbated the costs of federal enforcement of federal rights. The growth of state post-conviction remedies, coupled with the exhaustion requirement, ensures that no federal issue will be addressed in federal habeas until years after the state criminal conviction. Recognizing the costs of such delay, the Court and Congress have reduced state petitioner’s chances of prevailing in federal court.

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114 See, for example, Murray, 492 US at 1 (finding no Sixth Amendment right to counsel in state post-conviction, even in capital cases).
Accordingly, the best way to reform the system is to disaggregate the appellate and post-conviction functions. The appellate function would be best accomplished by steering record federal claims arising in state criminal litigation directly to the federal courts of appeals. Such a mechanism could and probably should be limited to capital cases, because it is only those cases that routinely (indeed, inevitably) reach the federal courts of appeals on federal habeas. Although confining federal review as of right over state criminal processes to cases involving the death penalty might pose a skewing problem (in light of the highly charged context of capital litigation), extending such review to all state criminal cases would likely be unworkable because it would place too great a burden on the federal courts.

The closeness in time between the state court resolution of record claims and direct review by the federal courts of appeals justifies abandoning the distinctive doctrines that have developed in federal habeas. First, procedural defaults should be enforced jurisdictionally to parallel treatment of such defaults on direct review to the Supreme Court. Noia never adequately defended the more lenient (and procedurally burdensome) treatment accorded procedural defaults on federal habeas, and reconstructing habeas as an appellate review as of right makes clear that the...
distinction is insupportable.

Enforcing procedural bars jurisdictionally will no doubt have harsh consequences for many petitioners, but the appropriate solution to the hardship is to improve the level of representation in the state courts. As it stands, the federal courts provide virtually no supervision of representation in state criminal proceedings. Accordingly, the severity of this proposed reform could be mitigated by relaxing the insurmountable burden petitioners face in challenging the effectiveness of counsel under the Sixth Amendment. The narrow equitable exceptions to the procedural default doctrine are certainly poor vehicles for ensuring quality representation, and the cost of administering them simply does not justify their continued application.

Second, the federal courts of appeals should apply prevailing constitutional norms and exercise de novo review over both pure law and mixed law-fact claims. The acceleration of federal review of record claims fully addresses the finality concerns that led the Court to limit the retroactive application of its decisions on federal habeas. Moreover, abandoning the perplexing retroactivity and reasonableness inquiries accords with the basic reason for providing a federal forum for federal claims in the first instance.

The genuinely “post-conviction” function of habeas — review of non-record claims — should be modified in one important respect: if there are no disputes over fact, or if the federal district court concludes that further factfinding is unnecessary, the case should be moved from the district court to the federal court of appeals. Such a procedure would reduce the likelihood that multiple federal courts will be involved in revisiting federal issues already addressed in the state courts. Again, because federal review of non-record claims occurs soon after state court resolution of those claims, the habeas court should dispense with the burdensome retroactivity and reasonableness doctrines which are primarily concerned with protecting states’ finality interests.

CONCLUSION

Current federal habeas doctrine reflects an uneasy compromise between advocates of federal supervision over state criminal processes and defenders of state autonomy. The compromise protects the fundamental jurisdictional power of the federal courts to review unconstitutional detentions of state prisoners. Yet the compromise increasingly saddles such jurisdiction with an arcane set of procedural barriers. As a result, states, inmates, and the
federal judiciary devote extraordinary resources attempting to navigate the procedural maze. The increased proceduralization of federal habeas calls for a remedy.

This proposal rejects the prevailing orthodoxies from both the prosecution and defense camps. Advocates of a vigorous federal role have for too long insisted that state criminal processes should basically be set aside by the time a habeas petition reaches federal court; this perspective radically undervalues state interests in timely and efficient litigation. On the other hand, opponents of robust federal review have continually sought to clog the habeas forum with extraordinarily intricate obstacles. If federal review of federal claims is to be preserved, federal habeas must be reconstructed as an efficient and meaningful process. To do so requires increased attention to habeas’s roots and a willingness to revisit the basic structure of the lower federal courts’ role in enforcing constitutional norms.