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EXPLAINING HABEAS CORPUS

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In an era when increasingly vociferous attacks on federal habeas corpus doctrine threaten the availability of the writ, the development of a contemporary relevant explanation for the doctrine is particularly important. In this Article, Professor Larry Yackle fashions an alternative to the traditional explanation. Professor Yackle begins by illuminating the deficiencies in the conventional "custody" explanation. He then canvasses the criticisms of the modern use of the writ and various proposals for its change or abolition. Next, he presents his explanation. Professor Yackle contends that the writ is better explained as providing a federal forum in which to enforce federal rights that may be unpopular with the states. His theory accounts both for the availability of the federal forum to state criminal defendants with federal claims and for the postponement of federal adjudication until after the completion of state proceedings. In conclusion, Professor Yackle elaborates on the implications of his model of collateral review for related areas of the law and for current habeas doctrine itself.

INTRODUCTION

The controversy surrounding federal habeas corpus has not abated.[1] It will continue until the federal courts' authority to discharge prisoners from state custody is explained on some conceptually satisfying basis.[2] I mean in this Article to offer such an explanation. Conventional wisdom

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I would like to thank Thomas E. Baker, Michael J. Churgin, Jerome Hoffman, Aviam Soifer, and especially Lawrence G. Sager for comments on the initial draft of this piece. I also had the benefit of presenting a draft to the Legal Theory Workshop at Boston University. At various places below, I have tried to respond to the points and questions raised in that company.

[1] See C. Wright, The Law of Federal Courts § 53, at 344 (4th ed. 1983) (noting that "habeas corpus for state prisoners is, and always has been, a controversial and emotion-ridden subject"). See generally State Prisoner Use of Federal Habeas Corpus Procedures, 44 Ohio St. L.J. 269 (1983); State Courts and Federalism in the 1980's, 22 Wm. & Mary L. Rev. 599 (1981).

[2] There is also debate over the related question whether federal criminal judgments should be open to collateral attack. It is less vigorous, however, because comity and federalism do not figure in that discussion. See Kaufman v. United States, 394 U.S. 217, 228-31 (1969) (holding that claims asserted by prisoners attacking federal judgments require the protection of collat-

justifies habeas on the ground that the individual interest at stake—physical liberty—warrants supervision of state criminal process by the lower federal courts.[3] That rationale does not withstand scrutiny. It implies that habeas is no more than a throw-back to the days when substantive rights were bound up inextricably with forms of action freighted with mysterious complexity; it breeds misconceived proposals to eliminate or to trim the writ's availability; it distracts attention from the very practical and instrumental uses to which the writ has been put by the modern Supreme Court; and it frustrates serious consideration of the role the writ plays within the framework of federal jurisdiction generally.

At first glance, the very existence of habeas appears anomalous. State courts plainly are empowered to determine federal issues that arise in state criminal prosecutions,[4] and the federal district courts lack power to review state judgments directly.[5] Yet under the rule of *Brown v. Allen*,[6] prisoners may attack their state convictions collaterally by way of habeas corpus,[7] which is perforce unencumbered by ordinary preclusion rules.[8] If they are successful, applicants obtain orders for their release, provided that state authorities are unable to cure federal error in further state proceedings.[9] In conventional theory, habeas merely permits peti-

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eral review even though federal prisoners had access to a federal forum in the first instance). See notes 8, 45, 62 infra.

[3] See text accompanying notes 23-26 infra.

[4] U.S. Const. art. VI; Robb v. Connolly, 111 U.S. 624, 637 (1884) (stating that "[u]pon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States").

[5] See, e.g., Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 296 (1970); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923).

[6] 344 U.S. 443 (1953).

[7] The *Brown* case is widely understood to have established, or at least affirmed, the proposition that federal constitutional issues adjudicated in state court can be relitigated in federal habeas corpus. See, e.g., P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1465 (2d ed. 1973) [hereinafter Hart & Wechsler]. Later, in its great trilogy of habeas cases in 1963, the Warren Court built upon the *Brown* idea. See Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

[8] *Brown*, 344 U.S. at 458; see Salinger v. Loisel, 265 U.S. 224, 230 (1924). Some specially designed preclusion rules exist *within* federal habeas—in cases in which the respondent raises claims that were or might have been raised in previous *federal* habeas proceedings. The Court held in Sanders v. United States, 373 U.S. 1 (1963), that a federal district court *may* give controlling weight to a prior judgment if the "same ground" was presented and determined adversely in the previous adjudication, the prior determination was "on the merits," and the "ends of justice would not be served by reaching the merits of the subsequent application." Id. at 15. As to new claims that were not, but might have been, raised in prior proceedings, the Court held in *Sanders* that the district court may dismiss only if the petitioner is found to have abused the writ by deliberately withholding or abandoning a claim in the first application. Id. at 17-18. A more recent statute, 28 U.S.C. § 2244(b) (1982), and the applicable rule, 28 U.S.C. § 2254, Rule 9(b) (1982), codify the holdings in *Sanders*. Rose v. Lundy, 455 U.S. 509, 520-21 (1982).

[9] See, e.g., Whiteley v. Warden, 401 U.S. 560, 569 (1971); Irvin v. Dowd, 366 U.S. 717,

tioners to contest the validity of their detention in independent, civil proceedings in the federal forum.[10] Indeed, the federal habeas courts have power to act "only on the body of the petitioner."[11] In reality, habeas offers a vehicle for the federal relitigation of federal questions, factual and legal, as a sequel to state court adjudication.[12]

Postconviction habeas does not exist because of enthusiasm for collateral review among the current Justices of the Supreme Court. Several members of the Court have complained bitterly about the writ, both on[13]

729 (1961). The language of the relevant statutes and the habeas corpus rules is a bit more elastic. E.g., 28 U.S.C. § 2243 (1982) (authorizing the district courts to "dispose of the [habeas] matter as law and justice require"); 28 U.S.C. § 2244(b) (1982) (referring to the habeas courts' power to order "release from custody or other remedy"); 28 U.S.C. § 2254, Rule 2(b) (1982) (permitting applicants to pray for "appropriate relief"); 28 U.S.C. § 2254 Rule 8(a) (1982) (authorizing the district courts to dispose of petitions "as justice shall require").

10 Fay v. Noia, 372 U.S. 391, 430 (1963).

11 Id. at 431.

12 See id. at 469 (Harlan, J., dissenting) (insisting that "ordering the prisoner's release invalidates the judgment of conviction"); Hart & Wechsler, supra note 7, at 1485 (asking rhetorically how a court can "determine the lawfulness of a detention without considering the lawfulness of the judgment which authorized it"). The Court has dropped its guard on occasion. E.g., Wood v. Georgia, 450 U.S. 261, 274 n.21 (1981) (refusing to vacate a state criminal judgment on appeal but stating that "this relief may be available in habeas corpus proceedings").

13 Justice Rehnquist has been the most critical. Dissenting from the denial of certiorari in Snead v. Stringer, 454 U.S. 988 (1981), he stated that "[i]t is scarcely surprising that fewer and fewer capable lawyers can be found to serve on state benches when they may find their considered decisions overturned by the ruling of a single federal district judge on grounds as tenuous as these." Id. at 993-94. His criticism has been particularly sharp in capital cases, in which he apparently believes litigants abuse the habeas machinery to postpone executions. In another dissent from a denial of certiorari, for example, he complained that after years of litigation in state court the prisoner's death sentence was "still not final" because "as in so many criminal cases these days" the prisoner had been able to seek relitigation of federal claims in habeas. Estelle v. Jurek, 450 U.S. 1014, 1015 (1981).

In a separate statement filed in Spalding v. Aiken, 460 U.S. 1093 (1983), the Chief Justice proposed the consideration of "limitations on the availability of the writ of habeas corpus in federal courts, especially for prisoners pressing stale claims that were fully ventilated in state courts." Id. at 1093-94. In his view, stale claims "impose especially heavy burdens on the prison system, on society, and on the administration of justice." Id. at 1096. The Court's willingness to entertain them and society's "constant willingness to reopen cases long closed tells the public that we have no confidence that the laws are administered justly." Id. at 1097. Justice Powell has argued repeatedly that the scope of habeas should be restricted. Concurring in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), he insisted that "[a]t some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." Id. at 262. Justice O'Connor, the author of several majority opinions of late, has found it necessary to marshal the "costs" of collateral review before addressing the particular issue at bar. Engle v. Isaac, 456 U.S. 107, 126 (1982). She has noted that habeas "extends the ordeal of trial," that it "degrades the prominence of the trial itself," that it may result in the release of "admitted offenders," and that it frustrates "both the

and off[14] the bench. Moreover, the Court has established procedural barriers that may frustrate the effective use of habeas—especially by pro se petitioners.[15] Nevertheless, the Justices have eschewed any forthright assault on the substance of the writ.[16] The question before the house is "why?" If the Justices are disenchanted with habeas, and some of them surely are, why do they not gather themselves to abrogate collateral review entirely? The answer provided by section 2241 is incomplete.[17]

States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." Id. at 126-28.

Other Justices have been less vociferous in their comments. In the "custody" case, Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), Justice Blackmun said that the "common-law scholars of the past hardly would recognize" the writ today. Id. at 501 (concurring opinion). Writing for the Court in Barefoot v. Estelle, 463 U.S. 880 (1983), Justice White insisted that the role of habeas is "secondary and limited" and that the lower federal courts are not "forums in which to relitigate state trials." Id. at 887. Sitting as Circuit Justice in Autry v. Estelle, 464 U.S. 1301 (1983), he offered his view that "it would be desirable to require by statute that all federal grounds for challenging a conviction or a sentence be presented in the first petition for habeas corpus." Id. at 1303. And Justice Stevens said in Rose v. Lundy, 455 U.S. 509 (1982), that, in his opinion, the district judge below had exceeded the "proper restraints on the scope of collateral review of state-court judgments." Id. at 539 (dissenting opinion).

[14] Addressing the American Bar Association recently, Chief Justice Burger questioned whether habeas is not an "endless quest for technical errors unrelated to guilt or innocence." Burger, Annual Report to the American Bar Association by the Chief Justice of the United States, 67 A.B.A. J. 290, 292 (1981). And in a recent speech, Justice Powell asked Congress to limit habeas to "cases of manifest injustice, where the issue is guilt or innocence." L. Powell, Remarks at the Eleventh Circuit Conference, Savannah, Georgia (May 8-10, 1983) (on file at New York University Law Review). Cf. O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 Wm. & Mary L. Rev. 801 (1981) (presenting views unsympathetic to habeas—but expressing doubt that it discourages able men and women from becoming state judges).

[15] The "total exhaustion" rule established in *Rose*, 455 U.S. 509, is a case in point. In an opinion concurring in the judgment in that case, Justice Blackmun condemned the majority's position in strong terms:

> What troubles me is that the "total exhaustion" rule, now adopted by this Court, can be read into the statute . . . only by sheer force; that it operates as a trap for the uneducated and indigent *pro se* prisoner-applicant; that it delays the resolution of claims that are not frivolous; and that it tends to increase, rather than to alleviate, the caseload burdens on both state and federal courts.

Id. at 522. Justice Stevens took a similar view. Id. at 550 (dissenting opinion) (complaining of "procedural niceties that merely complicate and delay the resolution of disputes"). See also Engle v. Isaac, 456 U.S. 107, 136 (1982) (Stevens, J., concurring in part and dissenting in part) (calling attention to "the Court's preoccupation with procedural hurdles" that only complicate the work of federal habeas courts).

[16] Justice Rehnquist's opinion for the Court in Wainwright v. Sykes, 433 U.S. 72 (1977), expressly confirmed the Justices' commitment to Brown v. Allen, the primary precedent for plenary habeas adjudication. Id. at 87. See note 7 supra.

[17] 28 U.S.C. § 2241 (1982) provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

Although that statute has been read on many occasions to contemplate

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(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgement and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2254 (1982) provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

substantive reexamination of state court judgments on federal issues,[18] it was enacted over a hundred years ago when the scope of habeas was a mere hint of what it is today.[19] Section 2241 has countenanced substantial, judicially crafted expansion of the writ, and some have argued that it would tolerate judicial manipulation in the opposite direction.[20]

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(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

[18] See, e.g., Fay v. Noia, 372 U.S. 391, 426 (1963). Cf. Schneckloth v. Bustamonte, 412 U.S. 218, 252-56 (1973) (Powell, J., concurring) (recognizing the prevailing construction but arguing against it).

[19] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

[20] In his opinion for the Court in *Wainwright*, 433 U.S. 72, Justice Rehnquist noted the Court's "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." Id. at 81. More recently, the Court has refused to entertain some claims in federal proceedings attacking federal convictions and sentences. See, e.g., United States v. Addonizio, 442 U.S. 178, 184-90 (1979); United States v. Timmreck, 441 U.S. 780, 783-84 (1979). The Court has done so although the relevant statute, 28 U.S.C. § 2255 (1982), states clearly that such judg-

I mean to propose an alternative explanation for habeas. Properly conceived, the writ is not a procedural vehicle for the protection of physical liberty, available in circumstances identified at common law, but an instrument of governmental administration employed to distribute authority and responsibility between courts of concurrent jurisdiction. Habeas survives because of its relation to the often-denied but deeply held idea that state criminal defendants are entitled to litigate their federal claims in a federal forum other than the Supreme Court.

This is not, of course, to propose a right to litigate originally in the federal courts. State criminal defendants can be required to defer their requests for federal relief until after their claims have been considered by the state courts in the course of the criminal proceedings against them. Habeas corpus identifies the occasions on which federal litigation is warranted notwithstanding prior state court treatment of the same federal issues. The conventional explanation for habeas appreciates the significance of relitigating federal claims but mistakes the reason for it. Relitigation in habeas is appropriate not because petitioners' interest in physical liberty justifies an exemption from ordinary preclusion rules, but because criminal defendants in state court are not permitted to remove their cases to federal court when they have federal claims to raise in their defense. Because there is no opportunity for removal, it is essential that postconviction habeas be available to ensure the choice of a federal forum—at some point.

This alternative explanation for habeas is prescriptive, for I will argue that removal is, and should be, denied to criminal defendants not simply out of deference to state interests, but also to preserve individual liberty. If the making and enforcement of substantive criminal law were to come under centralized authority, it would be less difficult for the criminal law to be employed as an organ of repression. Accordingly, responsibility for fashioning and implementing substantive criminal law should be lodged at the local level. The same concerns are inapposite regarding the enforcement of procedural safeguards in criminal cases. With respect to procedural rights guaranteed by federal law, individual freedom is best served by resting authoritative judgment with the federal courts.

In Part I, I criticize the conventional understanding that collateral review in habeas is occasioned by state criminal defendants' interest in physical liberty and argue that habeas can be explained more satisfactorily as a vehicle for according state criminal defendants an opportunity

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ments may be challenged if prisoners are held in violation of "the Constitution or *laws* of the United States." Rose v. Lundy, 455 U.S. 509, 548-49 n.18 (1982) (Stevens, J., dissenting) (making these points in support of his view that the Court could restrict habeas to "instances of fundamental unfairness" without running afoul of § 2241).

for federal adjudication of federal claims. I discuss in Part II various criticisms of postconviction habeas and proposals for change, in particular Professor Bator's proposal that habeas be governed by a "process" model. In Part III, I offer an alternative explanation for habeas, which accounts both for the availability of the federal forum and for the postponement of federal adjudication until after the state courts have completed their work. Finally, in Part IV, I describe the crosscurrents among habeas, the *Younger v. Harris*[21] line of cases, and the preclusion cases, and discuss reformulations of current habeas doctrine that would be appropriate under my proposed explanation for habeas.[22]

I
THE CONVENTIONAL EXPLANATION

Habeas corpus historically has been explained as a procedural safeguard for personal liberty. The rationale underlying postconviction habeas in the federal forum is that the individual's interest in freedom from unlawful detention warrants a second look at federal claims already rejected by the state courts.[23] Not every would-be litigant is entitled to

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[21] 401 U.S. 37 (1971).

[22] I will not address the question whether the Justices employ the structural notion of federalism to achieve substantive ends. Undoubtedly, judicial attempts to further substantive policies often are disguised in the language of federalism. See generally B. Marshall, Federalism and Civil Rights (1964); Durchslag, Federalism and Constitutional Liberties: Varying the Remedy to Save the Right, 54 N.Y.U. L. Rev. 723 (1979). The assignment of authority to the state courts may well produce outcomes more palatable to the conservative wing of the Court. See Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1106 (1977) (arguing that state judges are less likely than federal judges to be receptive to federal constitutional rights). Chief Justice Burger's outburst in Florida v. Casal, 462 U.S. 637 (1983), illustrates the point. The full Court dismissed the writ of certiorari in that case on the ground that the state court had rested its decision excluding evidence from a criminal trial upon state law. One might have expected the Chief Justice to be pleased that a state court had found local law controlling and that the Supreme Court was not called upon to second-guess the disposition of a state criminal case. His reaction was, however, anything but sympathetic. Although he concurred in the Court's judgment, he wrote separately to make clear that the "untoward" result in *Casal* should be ascribed entirely to Florida law and, it seems, the Florida Supreme Court. Id. at 637. He pointed out that the Florida Constitution had recently been amended to track the fourth amendment and that, accordingly, the Florida courts would "no longer be able to rely on the State Constitution to suppress evidence that would be admissible under the decisions of the Supreme Court of the United States." Id. at 638. Moreover, to the extent the judgment below might have rested upon a state statute, the Chief Justice advised "the people of Florida and their representatives" that they were free to repeal that statute in order to avoid its "burden" on law enforcement officers in the future. Id. at 639. Chief Justice Burger's concurrence in *Casal* may indicate his disappointment that federal deference to state court decisionmaking had not produced a substantive result that the Court's decisions, channeling issues to the state courts, had been intended to produce.

[23] See Hart & Wechsler, supra note 7, at 1477; Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1073 (1970) [hereinafter Habeas Developments]. I have reported as much:

relitigation. The subject matter jurisdiction of the habeas courts is limited explicitly to petitions from applicants who allege they are in "custody" in violation of federal law.[24] The modern "custody" requirement has ancient roots, bearing a correlative relation to the function of the writ in the seventeenth century—to secure the release of persons who were wrongfully confined.[25] Applicants for the writ had to be in some form of "custody" from which they could be discharged. The "custody" requirement is, then, no mere artificial prerequisite to a habeas action, designed to restrict access to those most in need of judicial attention. It is part and parcel of what habeas corpus is, what it means, or, at least, what it has been and meant traditionally.[26]

> Today, it is accurate to say that "custody" reflects the delicate balance in collateral proceedings between the individual's interest in the protection of fundamental rights on the one hand and societal interests in federalism and the finality of judgments on the other. Simply put, the requirement of "custody" identifies those restraints upon individual liberty that are severe enough to justify the exercise of the extraordinary federal habeas jurisdiction.

L. Yackle, Postconviction Remedies § 42, at 178 (1981 & Supp. 1985) (footnotes omitted). I do not repent of my own summary of conventional thinking, yet I hope in this essay to demonstrate its inadequacy and to offer an alternative.

[24] 28 U.S.C. § 2241(c) (1982). The Court usually includes a reference to the importance of "custody" in its boilerplate regarding the place of the writ. For example, in Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 510 (1982), the Court noted that "past decisions have limited the writ's availability to challenges to state-court judgments in situations where—as a result of a state-court criminal conviction—a petitioner has suffered substantial restraints not shared by the public generally." In Hensley v. Municipal Court, San Jose-Milpitas Judicial Dist., 411 U.S. 345, 351 (1973), the Court stated:

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. . . . [I]ts use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

And, in Fay v. Noia, 372 U.S. 391, 401-02 (1963):

> Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.

[25] See generally W. Duker, A Constitutional History of Habeas Corpus 287-306 (1980); D. Meador, Habeas Corpus and Magna Carta (1966); R. Walker, The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty (1960).

[26] See *Fay*, 372 U.S. at 427 n.38; McNally v. Hill, 293 U.S. 131, 136-38 (1934). Although *McNally*'s understanding of "custody" was rejected in Peyton v. Rowe, 391 U.S. 54, 67 (1968), see text accompanying notes 37-39 infra, the link between the writ and restraints on liberty has never been severed. See, e.g., Preiser v. Rodriguez, 411 U.S. 475 (1973) ("It is clear, not only from the language of [the federal habeas statutes], but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody."); accord Allen v. McCurry, 449 U.S. 90, 98 n.12 (1980).

Within the framework of federal jurisdiction, however, the "custody" requirement does operate as a gate-keeping device. It screens cases according to the nature of the individual interests at stake, limiting relitigation to cases in which petitioners allege unlawful restraints on liberty.[27] Petitioners who complain that they have been ordered to pay unlawful fines, for example, are excluded.[28] Likewise, the "custody" requirement screens petitions according to when petitioners request federal relief. Only applicants who are in "custody" at the time of filing are heard. Those who are not yet threatened with detention[29] or who have been unconditionally discharged from past confinement[30] are not entitled to pursue the writ.[31]

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[27] *Hensley*, 411 U.S. at 351.

[28] Hanson v. Circuit Court of First Judicial Circuit, 591 F.2d 404, 405 (7th Cir.), cert. denied, 444 U.S. 907 (1979). But see Thistlethwaite v. City of New York, 497 F.2d 339, 343 (2d Cir.) (dictum) (suggesting that habeas may be available where petitioners have only paid a $10 fine if they show "possible adverse collateral effects" of their conviction), cert. denied, 419 U.S. 1093 (1974); cf. Pueschel v. Leuba, 383 F. Supp. 576, 580 (D. Conn. 1974) (noting that *Thistlethwaite* may have cast some doubt on, but cannot be regarded as an abandonment of, the "custody" requirement). The Supreme Court has not considered the question directly, but it seems likely that the Justices would not approve relitigation when the applicant stands only to recoup financial losses. Compare Ellis v. Dyson, 421 U.S. 426, 440 (1975) (Powell, J., dissenting from denial of certiorari) (suggesting that "custody" did not exist where the litigant had only been fined) with Jones v. United States, 419 U.S. 907, 910 (1974) (Douglas, J., dissenting) (arguing that a distinction between prisoners and persons sentenced to pay fines constitutes a denial of equal protection).

[29] See, e.g., Brewster v. Secretary of U.S. Army, 489 F. Supp. 85, 88 (E.D.N.Y. 1980) (finding damage to reputation insufficient to warrant habeas review). Cf. Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982) (explaining earlier cases as involving the "imminent" threat of arrest).

[30] See, e.g., Carter v. Hardy, 526 F.2d 314, 315 (5th Cir.), cert. denied, 429 U.S. 838 (1976).

[31] It occasionally happens that a previous conviction, the sentence for which has been served, nonetheless continues to influence a litigant's current status. See, e.g., Loper v. Beto, 405 U.S. 473, 483 (1972) (involving use of a prior conviction to impeach the testimony of a litigant in a subsequent and unrelated prosecution); United States v. Tucker, 404 U.S. 443, 448-49 (1972) (involving a sentencing judge's reliance upon prior convictions to enhance the sentence for a subsequent and unrelated conviction). In circumstances of that kind, the validity of the prior conviction can be challenged in a habeas attack upon the new conviction or sentence—based on the theory that use of an invalid prior judgment constitutes new and independent federal error. The result, of course, is a belated attack on the prior conviction itself. In some instances, courts have permitted petitioners to challenge previous convictions straightforwardly in these circumstances, apparently on the theory that their effect upon applicants' current detention constitutes "custody" for habeas purposes. See, e.g., Jackson v. Louisiana, 452 F.2d 451 (5th Cir. 1971). Compare Escobedo v. Estelle, 650 F.2d 70, 71 (5th Cir. 1981) (stating that an attack on a previous conviction is permissible if there is a " 'possibility . . . [of] collateral legal consequences' ") (quoting Sibron v. New York, 392 U.S. 40, 57 (1968)) with Carter v. Estelle, 677 F.2d 427, 450-51 n.22 (5th Cir. 1982) (stating that it is "unsettled" in the Fifth Circuit whether the use of a prior conviction for sentence enhancement alone satisfies the "custody" requirement for an assault on the former conviction itself), cert. denied, 460 U.S. 1056 (1983). See generally Note, Sentencing, Due Process, and Invalid Prior Convictions: The Aftermath of *United States v. Tucker*, 77 Colum. L. Rev. 1099 (1977); Comment, Due Process

As a docket control mechanism, the "custody" doctrine has come under enormous pressure to give way in the interest of providing meaningful relitigation opportunities to applicants.[32] A few common illustrations will suffice. Habeas petitioners need time after trial to marshal their federal claims, exhaust state remedies, and frame their contentions for federal adjudication. In order to ensure that habeas applicants have that time, the Court held in *Jones v. Cunningham*[33] that the constraints associated with parole constitute "custody" for habeas purposes.[34] A contrary decision would have required dismissal for want of subject matter jurisdiction when a petitioner is released on parole before federal review is concluded[35] and thus would have made a shambles of postconviction habeas.[36] Approaching the same practical problem from the other direc-

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at Sentencing: Implementing the Rule of *United States v. Tucker*, 125 U. Pa. L. Rev. 1111 (1977).

[32] Physical incarceration itself is no longer necessary. See, e.g., Hensley v. Municipal Court, San Jose-Milpitas Judicial Dist., 411 U.S. 345, 349 (1973) (finding restraints attending bail or personal recognizance sufficient to constitute custody); see also Jones v. Cunningham, 371 U.S. 236, 241-43 (1963) (parole); Cervantes v. Walker, 589 F.2d 424, 425 n.1 (9th Cir. 1978) (probation); Walker v. North Carolina, 262 F. Supp. 102, 104-05 (W.D.N.C. 1966) (suspended sentence), aff'd per curiam, 372 F.2d 129 (4th Cir.), cert. denied, 388 U.S. 917 (1967). See generally Note, Federal Habeas Corpus: The Concept of Custody and Access to Federal Court, 53 J. Urb. L. 61 (1975).

[33] 371 U.S. 236 (1963).

[34] Id. at 241-43. Justice Black's opinion for the Court noted that the conditions routinely placed on parolees, and the possibility that they can be "rearrested at any time" if parole authorities believe they have violated parole conditions, are enough to keep parolees in the "custody" of the parole board. Id. at 242-43. Cf. Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (holding that parole revocation hearings need not respect all the procedural safeguards that are essential to due process in criminal trials).

[35] There was a time when a prisoner's release from physical incarceration was thought not only to foreclose habeas jurisdiction for want of "custody," but also to render her claims moot and thus beyond the reach of a federal court even on direct review. See, e.g., Parker v. Ellis, 362 U.S. 574, 575-76 (1960) (per curiam) (habeas); St. Pierre v. United States, 319 U.S. 41, 42 (1943) (per curiam) (direct review). In the wake of *Jones*, however, the Court adopted the view that at least some collateral consequences stemming from criminal convictions can maintain an appellant's "stake in the outcome" of federal litigation well after release from actual incarceration. See, e.g., *Sibron*, 392 U.S. at 50; Ginsberg v. New York, 390 U.S. 629, 633 n.2 (1968). In Carafas v. LaVallee, 391 U.S. 234 (1968), the Court extended that view to habeas, id. at 237-38, and held that the writ is available to litigants who have been discharged from parole, so long as the habeas petition was filed while the petitioner was still in "custody" within the meaning of *Jones*. Id. at 238-40. See also Evitts v. Lucey, 105 S. Ct. 830, 833 n.4 (1985) (holding that possible future use of a conviction for impeachment or sentence enhancement constituted sufficient collateral consequences to avoid mootness). Cf. Lane v. Williams, 455 U.S. 624, 632-33 (1982) (suggesting that "nonstatutory consequences" are insufficient to avoid mootness in a habeas case).

[36] Justice Black's rhetoric in *Jones* revealed the Court's objective:

> Of course, [the habeas corpus] writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

tion in *Peyton v. Rowe*,[37] the Court held that a petitioner is in the "custody" of a future, challenged sentence scheduled to be served after the completion of a current, unchallenged term.[38] If the law were otherwise, the petitioner would have to delay a habeas attack on a future sentence until she begins serving it. Such a postponement would not only subject successful petitioners to a period of unlawful detention while the petition is being heard, but would premise federal adjudication upon a needlessly cold record.[39] Finally, in *Hensley v. Municipal Court, San Jose-Milpitas Judicial District*,[40] the Court held that petitioners free on bail after trial are nonetheless in "custody" for habeas purposes.[41] These three decisions both underscore the Court's intention to define "custody" in a way that assures an effective postconviction remedy[42] and provide the ammu-

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371 U.S. at 243.

[37] 391 U.S. 54 (1968).

[38] Id. at 67. Chief Justice Warren's opinion for the Court chose to view the prisoners in *Peyton* to be in the "custody" of an aggregate term embracing both their present, unchallenged and the future, challenged sentences. Id. at 64.

[39] Id. at 62-64.

[40] 411 U.S. 345 (1973).

[41] Id. at 348-53. See also Justices of Boston Mun. Court v. Lydon, 104 S. Ct. 1805, 1809-10 (1984) (finding "custody" where the petitioner had been permitted to remain at large pending trial de novo). Cf. Stallings v. Splain, 253 U.S. 339 (1920) (holding that preconviction bail is not "custody" for habeas purposes).

[42] The Court has recently stated this point explicitly. See Minnesota v. Murphy, 465 U.S. 420, 430 (1984) (acknowledging that "custody" has been "defined broadly to effectuate the purposes of the [habeas] writ"). There are still circumstances, however, in which the "custody" doctrine precludes jurisdiction even though failure to grant habeas interferes with the orderly review of petitioners' federal claims. The best illustrations arise when more than one state is involved. For example, a petitioner confined in Kansas under an unchallenged sentence imposed by a Kansas court may seek to challenge another, yet-to-be-served sentence imposed by a Missouri court. In such a case, the petitioner clearly is in "custody" for purposes of the writ if the Missouri authorities have issued a "detainer" or "hold order," notifying the Kansas warden that they intend to enforce the Missouri sentence against the petitioner after the completion of his present, Kansas term. See Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 488-89 (1973) (involving an application for habeas in advance of trial in another state). The Court is prepared to ascribe the Kansas warden's physical "custody" of the petitioner to the Missouri authorities. Id. at 489 n.4. Accordingly, the petitioner is permitted to seek habeas review either in the appropriate federal district court in Missouri, challenging the Missouri sentence straightforwardly, *Braden*, 410 U.S. at 499 n.15, or to seek relief in a district court in Kansas, attacking any additional restraints imposed by the Kansas warden because of the Missouri "detainer." See Nelson v. George, 399 U.S. 224, 229-30 (1970). In either instance, the "detainer" establishes "custody" for subject matter jurisdiction in habeas. If, however, the authorities in Missouri fail to lodge a "detainer" with the Kansas warden, there is no tangible connection between the prisoner's present custodian and those responsible for the sentence outstanding in Missouri. The Supreme Court has not addressed this problem, see *Braden*, 410 U.S. at 489 n.4, and the lower courts are divided. Compare Shelton v. Meier, 485 F.2d 1177, 1178 (9th Cir. 1973) (finding a "detainer" crucial) with Clonce v. Presley, 640 F.2d 271, 273 n.1 (10th Cir. 1981) (finding it inconsequential that parole authorities had lodged no "detainer" with the federal authorities holding the petitioner). As a matter of policy, it seems apparent that the availability of federal litigation should not turn upon the formality of a "detainer." If it is clear, and it is, that the petitioner would be permitted to attack a future

nition for occasional arguments that the "custody" requirement should be discarded entirely.[43]

Arguments for the abandonment of the "custody" doctrine are powerful. Other extraordinary writs in the federal system, notably *coram nobis*,[44] may be employed in collateral proceedings irrespective of whether the applicant remains under restraint.[45] Nor do similar state court remedies require petitioners to be in "custody" as a precondition.[46] Retention of the "custody" requirement in habeas is hardly essential to maintain the traditional relation between habeas and a particular form of

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Kansas sentence scheduled for service after the completion of his present term, it seems equally clear that the same result should be reached when another state is concerned, regardless of whether the authorities in that state are in formal contact with the Kansas warden. Nevertheless, in order to reach that result the Court would have to dilute the "custody" requirement yet again. Furthermore, the interplay of the habeas "custody" doctrine, a question of subject matter jurisdiction, and the requisites of ordinary, personal jurisdiction of adverse parties in federal proceedings causes additional, and perplexing, difficulty in interjurisdictional cases. See generally Comment, Habeas Corpus: Interstate Detainers and In Personam Jurisdiction, 125 U. Pa. L. Rev. 215 (1976); Comment, Interstate Detainers and Federal Habeas Corpus: Long-Arm Shortcut to Solving the Catch 2241, 1982 Wis. L. Rev. 863.

[43] See, e.g., Comment, Beyond Custody: Expanding Collateral Review of State Convictions, 14 U. Mich. J.L. Ref. 465 (1981).

[44] *Coram nobis* is an extraordinary writ available at common law to correct alleged errors of fact. United States v. Morgan, 346 U.S. 502, 507 (1954). It is authorized by the "all-writs" section of the Judicial Code, 28 U.S.C. § 1651(a) (1982), which provides that "the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Morgan*, 346 U.S. at 502.

[45] See *Morgan*, 346 U.S. at 510-11. The routine postconviction remedy for prisoners still in "custody" who wish to challenge federal judgments is a motion to vacate the sentence pursuant to 28 U.S.C. § 2255 (1982). But if a litigant fails to meet the "custody" requirement of § 2255, courts will treat the proceeding as a petition for a writ of *coram nobis*. E.g., United States v. Correa-De Jesus, 708 F.2d 1283, 1285 (7th Cir. 1983); Carbo v. United States, 581 F.2d 91, 92 (5th Cir. 1978). There are hints in some cases that the scope of *coram nobis* is narrow and that litigants may lose something in the move from § 2255. E.g., United States v. Morgan, 39 F.R.D. 323, 327 (N.D. Miss. 1966) (warning that *coram nobis* is "not merely a means of evading the jurisdictional prerequisites of a section 2255 motion"). Yet most courts seem to assume that *coram nobis* is essentially interchangeable with § 2255, the only difference being the inconvenient "custody" requirement attaching to the latter. See, e.g., United States v. Travers, 514 F.2d 1171, 1173 n.1 (2d Cir. 1974); Laughlin v. United States, 474 F.2d 444, 451 (D.C. Cir. 1972), cert. denied, 412 U.S. 941 (1973). The result, of course, is that the "custody" requirement in § 2255 proceedings is rendered meaningless. Cf. Polizzi v. United States, 550 F.2d 1133 (9th Cir. 1976) (finding *coram nobis* available to a corporation, which could not be held in "custody").

[46] E.g., N.Y. Crim. Proc. Law §§ 440.10-.30 (McKinney 1983); Mass. R. Crim. P. 30. Indeed, both the American Bar Association and the National Conference of Commissioners on Uniform State Laws have recommended that state postconviction remedies be freed of any requirement that applicants be in "custody." Standards for Criminal Justice § 22-2.3 (2d ed. 1980); Uniform Post-Conviction Procedure Act § 1, 11 U.L.A. 485-86 (1974). See Cohen, Post-Conviction Relief in the New York Court of Appeals: New Wine and Broken Bottles, 35 Brooklyn L. Rev. 1, 25-26 (1968) (attributing the New York courts' preference for *coram nobis* over habeas corpus, at least in part, to the inconvenience of the "custody" requirement attending the latter).

relief—release from detention. Applicants who win habeas relief from the conditions of parole or bail are in no obvious way released from physical detention. Officials responsible for their supervision are simply instructed to cease enforcement of such conditions.[47] Similarly, petitioners who use habeas to avoid future, as yet unserved sentences obtain relief in a form akin to ordinary injunctions. State authorities are instructed to strike references to invalid sentences from relevant state records.[48] Inasmuch as such petitioners may continue to be held under a current, unchallenged sentence, habeas relief regarding a future sentence does not necessarily contemplate immediate release.[49] The long association between habeas and personal liberty could be acknowledged, it may be argued, even if the "custody" requirement were abandoned and the federal courts' jurisdiction were brought into symmetry with their modern authority to fashion relief appropriate to the circumstances at bar.

Despite these cogent arguments, the "custody" doctrine proves resilient, primarily as a basis for distinguishing federal claims entitled to relitigation from those for which only original federal court jurisdiction is available.[50] "Custody" functions, on a nonconstitutional level, similarly to the "injury in fact" requirement for adjudication in an article III court. The "injury in fact" standard delineates disputes within the constitutional jurisdiction of federal courts generally,[51] whereas the "cus-

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[47] See Peyton v. Rowe, 391 U.S. 54, 67 (1968) (citing Jones v. Cunningham, 371 U.S. 236 (1963)). The habeas court may allow state authorities time in which to cure federal error and, if they do so, the habeas action will be dismissed. See Dennis v. Solem, 690 F.2d 145, 147 (8th Cir. 1982); see also Jacobs v. Redman, 616 F.2d 1251, 1259 (3d Cir.), cert. denied, 446 U.S. 944 (1980). If, however, curative action is not taken seasonably, the habeas court may order state authorities to "release" the petitioner from further parole supervision. See Bulger v. McClay, 575 F.2d 407, 411 (2d Cir.), cert. denied, 439 U.S. 915 (1978).

[48] See, e.g., Rowe v. Peyton, 383 F.2d 709, 719 (4th Cir. 1967), aff'd, 391 U.S. 54 (1968).

[49] *Peyton*, 391 U.S. at 66 (recognizing as much but insisting that the federal habeas courts have power to "fashion appropriate relief other than immediate release"). See also 28 U.S.C. § 2254 Rule 2(b) (1982) (instructing applicants attacking future "custody" to include a prayer for "appropriate relief").

[50] E.g., Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) (denying a litigant with a first amendment claim access to a federal court by according "full faith and credit" to a prior state court judgment on the theory that the litigant might have raised her first amendment claim in state court); Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982) (invoking the "full faith and credit" statute, 28 U.S.C. § 1738 (1982), to foreclose relitigation of a civil rights claim). Cf. Theis, Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, 70 Nw. U.L. Rev. 859, 873 n.76 (1976) (questioning the notion that relitigation should be allowed in habeas cases but disallowed in civil rights cases). It is well settled that habeas represents an express, statutory exception both to § 1738 and to ordinary preclusion rules. *Kremer*, 456 U.S. at 485 n.27.

[51] Compare Sierra Club v. Morton, 405 U.S. 727 (1972) (finding no standing where the plaintiff organization failed to allege that any of its members was actually injured by the action under attack) with United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (resting a determination of standing on the plaintiff organization's allegations of noneconomic injury).

tody" doctrine divides cases justiciable under article III into two further categories: those in which federal adjudication must come initially, if at all, and those in which it may await preliminary litigation in state court.

The explanation that "custody" provides for relitigation in habeas is as weak as it is essential to the conventional understanding of the writ. Given that there must be a line between claims that can only be entertained originally and those that can be raised collaterally in the federal forum, it is entirely unclear why that line should be where the "custody" requirement draws it. A petitioner who is incarcerated clearly has a greater interest in relitigation of a federal claim than, for example, a petitioner who wishes to raise the same issue but who seeks only reimbursement for a ten-dollar fine.[52] It is hardly so clear, however, that a petitioner who files a petition the day before a parole term expires has a greater interest in relitigation than one who faces an enormous fine scheduled for payment in installments for the foreseeable future. It is possible to blame the modern Court's dilution of the "custody" requirement for its inability persuasively to distinguish cases involving other, important individual interests. A return to the physical detention standard would, however, neglect the reasons why the Justices have interpreted the "custody" requirement as they have.[53]

The "custody" explanation is weak for entirely different reasons. First, the historical requirement that habeas applicants be in "custody" was never intended to identify litigants who should be permitted to relitigate claims.[54] Indeed, the extent to which habeas was available after trial at common law remains a controversial question.[55] Petitioners in England were allowed to file repetitive applications for the habeas writ.[56]

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[52] But cf. Thistlethwaite v. City of New York, 497 F.2d 339, 343 (2d Cir.) (suggesting that habeas corpus relief may be sought by a petitioner whose punishment was a $10 fine), cert. denied, 419 U.S. 1093 (1974). That the substantive issue in *Thistlethwaite* was an important first amendment challenge to a city licensing scheme, the very kind of issue on which federal adjudication seems most desirable, only underscores the inadequacy of the "custody" doctrine to determine the availability of the federal forum. Cf. Wisconsin v. Yoder, 406 U.S. 205 (1972) (exercising appellate jurisdiction to review a free exercise clause claim advanced by Amish parents who had suffered $5 fines for keeping their children home from school). See also Hart & Wechsler, supra note 7, at 1477 (asking rhetorically whether the distinction between "criminal cases ending in custody and all other cases" can be justified).

[53] See text accompanying notes 32-43 supra.

[54] See W. Duker, supra note 25, at 288.

[55] Compare Fay v. Noia, 372 U.S. 391, 399-415 (1963) (interpreting the historical materials to show that habeas was available to attack judicial orders of detention) with id. at 449-63 (Harlan, J., dissenting) (taking a substantially more circumscribed view). See Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 458-68 (1966) (taking issue with the *Noia* majority).

[56] The most famous rendition of the common law rule came in Cox v. Hakes, 15 App. Cas. 506 (1890), in which the House of Lords acknowledged that "[a] person detained in custody might . . . proceed from court to court until he obtained his liberty." Id. at 527 (Lord Her-

Yet the rationale for that rule is unclear. One possible explanation is that a decision unfavorable to the petitioner was thought not to be an adjudication at all, but a mere refusal to act.[57] An alternative explanation for allowing petitioners to submit successive habeas petitions is tied to the absence of appellate review.[58] English judges may have considered habeas to be a summary proceeding giving rise to no reviewable judgment. Because only judgments subject to review were given preclusive effect, habeas decisions could not bar further applications for relief.[59] There is no indication, in any case, that successive litigation was permissible in habeas because of the applicant's detention. The Supreme Court came to the "custody" explanation for relitigation only recently and in aid of judicial policies forged independently.[60] On reflection, the Court's

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schell, J.). Accord Ex parte Partington, 153 Eng. Rep. 284, 286 (Ex. 1845) (stating that "[t]he defendant . . . has a right to the opinion of every court as to the propriety of his imprisonment"); Burdett v. Abbot, 104 Eng. Rep. 501, 535 (K.B. 1811); King v. Suddis, 102 Eng. Rep. 119, 122 (K.B. 1801). See also W. Church, A Treatise on the Writ of Habeas Corpus § 389g, at 601 (2d ed. 1893) (reporting that prisoners could move from a single judge to the full court and then on to another court); Gordon, Habeas Corpus—Right of Applicant to Apply to All Judges of Same Court, 7 Can. B. Rev. 50, 53 (1929) (criticizing the ability of prisoners to "canvass judges" and finding it "surely unsatisfactory that although a dozen judges think a criminal ought not to be at large, their decisions may be nullified by the wrong-headedness of a thirteenth judge").

57 Gordon, supra note 56, at 52.

58 Ex parte Savarkar, [1910] 2 K.B. 1056, 1063. Nor could direct review be obtained by writ of error. R. Sharpe, The Law of Habeas Corpus 195 (1976); Longsdorf, Habeas Corpus: A Protean Writ and Remedy, 8 F.R.D. 179, 189 (1948).

59 See R. Sharpe, supra note 58, at 194-203; Gordon, The Unruly Writ of Habeas Corpus, 26 Mod. L. Rev. 520, 523 (1963). The view that only judgments reviewable on writ of error could be given preclusive effect can be traced to Lord Coke's opinion in Bonham's Case, 8 Coke 114a, 121a (1609). See also The Case of the City of London, 8 Coke 121b, 127b-128a (1609).

60 The problem was framed most apparently in Sanders v. United States, 373 U.S. 1 (1963), a case involving the preclusive effect of prior postconviction proceedings in the federal forum. Writing for the Court, Justice Brennan acknowledged that the historical rule that preclusion rules are inapplicable in habeas may have rested on want of appellate review. Implicitly, at least, he recognized as well that the modern availability of appeals in habeas might, in turn, undercut the traditional rule. In response, he shifted rationales:

> It has been suggested . . . that this principle [the inapplicability of preclusion in habeas] derives from the fact that at common law habeas corpus judgments were not appealable. But its roots would seem to go deeper. Conventional notions of finality of litigation have no place where life or *liberty* is at stake and infringement of constitutional rights is alleged. If "government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment," . . . access to the courts on habeas must not be thus impeded. The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ.

Id. at 8 (quoting Fay v. Noia, 372 U.S. 391, 402 (1963)) (emphasis added). Dissenting in *Sanders*, Justice Harlan would have accorded prior judgments a greater measure of respect, even in habeas. Yet on the critical question of interest here, he was in full agreement with the Court:

> At the outset, there is one straw man that should be removed from this case. The

use of "custody" to explain its innovations in habeas appears more expedient than principled. In the typical judicial manner, the Court has borrowed an idea from the past and refashioned it into a device for resolving a current problem quite unrelated to the reasons that gave birth to the doctrine in the first instance. This is not to suggest illegitimacy, but only to account for employment of the "custody" requirement as a matter of convenience.

More important, the "custody" requirement was never intended to resolve the uniquely American question whether relitigation, if warranted at all, should be undertaken in federal rather than state court.[61] Emphasis on criminal defendants' interest in personal liberty may make at least some rough sense if the question is whether to relitigate claims within a single judicial system.[62] It is vastly more doubtful that "custody" offers a rational standard when the issue is whether the *federal* courts should become involved in the treatment of litigants' claims.[63]

> Court is at great pains to develop the theme that denial of a prisoner's application for collateral relief is not *res judicata*. But the Government recognizes, as indeed it must in view of the decisions, that strict doctrines of *res judicata* do not apply in this field. The *consequences* of injustice—*loss of liberty* and sometimes loss of life—are far too great to permit the automatic application of an entire body of technical rules whose primary relevance lies in the area of civil litigation.

Id. at 24 (emphasis added). Both Justice Brennan and Justice Harlan thus rested the habeas writ's exemption from preclusion rules not upon the historical rationales, nor upon the nature of the claims that prisoners might present in habeas, but upon "custody." Neither cited any authorities in point. Indeed, the absence of precedents makes the truth rather clear. Sensing a need for a way to distinguish habeas from other actions, the Justices simply *chose* "custody." Justice Brennan's citation to *Noia* is most telling. The Court had decided, perhaps as early as *Brown* but surely by the time of *Noia*, that habeas should serve as a general postconviction remedy. To make that decision meaningful, it was necessary in *Sanders*, delivered only a month after *Noia*, to fashion a justification for perpetuating the writ's freedom from preclusion rules even after historical rationales had become obsolete.

[61] If the issue were whether the *state* courts should offer routine opportunities for the relitigation of claims already adjudicated at trial or on appeal in state court, the current debate would be lively but hardly so heated. See Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies, 53 Colum. L. Rev. 1143 (1953) (developing an argument that the states are constitutionally bound to provide for state postconviction review).

[62] Once again, *Sanders*, 373 U.S. 1, proves useful. The litigant in that case was a federal prisoner attacking a federal conviction pursuant to § 2255. He had been denied relief on two prior occasions. The Court refused to apply ordinary preclusion rules, relying on the prisoner's detention as an explanation. Id. at 8. The *Sanders* Court recognized, however, that prisoners may occasionally harass their keepers deliberately by stringing out postconviction litigation piecemeal. To contend with that difficulty, the Court fashioned guidelines for the treatment of successive applications for federal collateral relief. Those guidelines, applicable in both § 2255 and habeas cases, permit summary dismissal if prisoners "abuse" federal remedies. Id. at 17. More recently, the same guidelines have been incorporated into the habeas and § 2255 rules. See 28 U.S.C. § 2254 Rule 9(b) (1982); id. § 2255 Rule 9(b).

[63] There is no question but that the Court understands "custody" to explain not only relitigation, see text accompanying notes 27-31 supra, but relitigation in federal court. Dissenting in Ellis v. Dyson, 421 U.S. 426, 440 n.6 (1975), Justice Powell seized upon "custody" as the distinguishing characteristic justifying collateral attacks in habeas: "In my view, the harm

Habeas is no stranger to interjurisdictional conflict. The writ was used by the central courts in England to draw cases away from the local and manorial courts and to challenge each other for primacy.[64] The Supreme Court's use of habeas in the middle decades of this century to implement its innovations in criminal procedure is, then, hardly surprising. Indeed, the Warren Court's key decisions in 1963[65] are only recent American illustrations of the writ's usefulness in reordering the distribution of judicial authority and responsibility.[66] The establishment of collateral review through habeas did not represent a brazen grab for national power at the expense of the states, but rather an attempt to ensure the enforcement of unpopular substantive principles that the state courts might not respect.[67] The Justices knew they could not superintend fifty state supreme courts by means of direct review and therefore turned to the lower federal courts as surrogates.[68] Because those courts lacked jurisdiction to review state court judgments directly, their theoretical power to issue the writ of habeas corpus was refurbished to justify involvement at the post-conviction stage.[69] The Court's "procedural" decisions in the Warren

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asserted in habeas corpus proceedings—restraint on liberty—may justify a broader scope of collateral attack than would the kinds of injury normally concerned in actions under § 1983." Elaborating on the same theme in his opinion for the Court in Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982), Justice Powell concluded that children in foster homes are not in "custody" for purposes of a parent's next friend habeas attack on the state court judgment terminating parental rights. The gravamen of the mother's complaint was not, according to Justice Powell, that the physical liberty of her children was being restricted, but that her own parental rights had been violated. Id. at 511. It was clear in *Lehman* that if the mother had simply filed a civil rights action against responsible state authorities, she would have been met by a preclusion defense. Her federal claim (against the validity of the state statute governing the termination of parental rights) had been decided against her in state court. She had pursued the federal writ for the very purpose of avoiding collateral estoppel. The maneuver was unsuccessful for failure to slip over the line, drawn by the "custody" doctrine, between cases in which federal collateral attack is available and cases in which it is not. But see note 217 infra (discussing the exceptions to preclusion apart from habeas). At the outset, Justice Powell addressed the "custody" issue forthrightly, attempting to distinguish apparently relevant precedents. 458 U.S. at 509-11. In the end, however, he turned candidly to federalism as yet another value protected by the "custody" requirement. See id. at 512-14. In this vein, he distinguished some precedents in which "custody" had been found, but in which there were no federalism concerns. Id. at 508 n.9 (refusing to find authoritative cases in which federal prisoners had attacked prior federal judgments).

64 See 9 W. Holdsworth, History of English Law 109-11 (4th ed. 1926); R. Walker, supra note 25, at 22-25.

65 See note 7 supra.

66 See D. Meador, supra note 25.

67 See Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1041 (1977).

68 See Stone v. Powell, 428 U.S. 465, 526 (1976) (Brennan, J., dissenting); Haynsworth, Improving the Handling of Criminal Cases in the Federal Appellate System, 59 Cornell L. Rev. 597, 601 (1974). See also note 137 infra.

69 See Stolz, Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity, 64 Calif. L. Rev. 943, 960 (1976) (relating the expansion of

period seem plainly to have been designed to allow state criminal defendants an opportunity to litigate their federal claims in the federal forum.[70]

In sum, it was the nature of litigants' federal claims, rather than their interest in raising them, that motivated the Justices' decisions making postconviction habeas generally available. The writ's association with personal liberty made it an entirely appropriate vehicle for the Court's strategy to protect individuals from recalcitrant state authorities. Yet the "custody" requirement was merely a traditional component of habeas. It quickly gave ground whenever it threatened to interfere with the development of an effective system of federal postconviction review.[71] When habeas was recruited to new service for the protection of fourteenth amendment rights, "custody" offered an expedient and facially acceptable justification for federal judicial action notwithstanding previous litigation in state court. It would have been nonsense, however, to take "custody" seriously and actually to monitor the door to the federal forum on the basis of precedents regarding the meaning of "custody" for habeas purposes. The coincidence would have been startling if such an approach had produced satisfying answers to the entirely independent question at hand—whether the federal courts should entertain federal claims from state prisoners.[72] The Court never proposed or followed that course, but blithely departed from the historical doctrine that habeas applicants must be physically confined.[73] Today, "custody" serves a

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postconviction habeas to the Supreme Court's inability to review "more than a handful of state court decisions presenting a federal question").

[70] "[I]t was the deprivation of constitutional rights that was to be avoided." Cover & Aleinikoff, supra note 67, at 1046. See also Hart, The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 106-07 (1959) (reading *Brown* for this proposition); McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II, 60 Va. L. Rev. 250, 259-60 (1974) (rejecting the "custody" explanation). See generally Hart & Wechsler, supra note 7, at 1472-77. During the same period, the Court also experimented with opening the federal courts prior to the conclusion of state proceedings, when litigants faced with prosecution sought prospective relief. See, e.g., Dombrowski v. Pfister, 380 U.S. 479 (1965).

[71] See notes 32-43 and accompanying text supra.

[72] Cf. Fiss, Dombrowski, 86 Yale L.J. 1103, 1107 (1977) (taking a similar view of the Court's use of ideas borrowed from equity to determine whether the federal courts should enjoin state criminal proceedings).

[73] The parental rights case, Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982), illustrates the point. Justice Blackmun's dissent argued that habeas traditionally was used to free unlawfully confined children and that the children in that case were in "custody" for habeas purposes. Id. at 516-23. Yet to no one's surprise the Court's majority concluded otherwise. Justice Blackmun himself located an alternative, nonjurisdictional basis for declining federal relitigation. Id. at 523-26 (contending that the district court had discretionary authority to dismiss the mother's petition on the ground that she was an inappropriate "next friend" petitioner).

symbolic function. It would be a serious mistake to believe that it offers a sound basis for determining the availability of federal adjudication.

II
HABEAS AND ITS CRITICS

A. Criticisms of Habeas

The inadequacy of the conventional explanation for habeas invites criticism of federal collateral review generally. Because habeas allows federal courts to decide issues seriatim, and because habeas petitions often lack merit, critics have charged that habeas jurisdiction clogs federal calendars with frivolous claims and thus wastes valuable judicial resources.[74] Further, it is charged, the concentration of effort upon numerous meritless petitions may thwart the vindication of the very federal rights sought to be protected by the writ. As Justice Jackson warned, "[i]t 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."[75] It is also argued that collateral review in the federal forum produces friction between federal and state courts.[76] The latter may be offended by the occasional award of habeas relief to prisoners whose federal claims were found wanting in state court. More generally, state courts may resent federal, trial-level courts accepting habeas petitions and thus undertaking to second-guess judgments that may have been affirmed by the states' highest courts.[77] The delays associated with habeas are said to undercut the "finality" of state judgments[78] and, particularly in death penalty cases, to frustrate state attempts to carry out constitu-

[74] See, e.g., Weick, Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?, 21 De Paul L. Rev. 740, 747 (1972). Contrary to popular belief, the increase in the rate of prisoner filings in the past decade can be traced primarily to civil rights actions rather than habeas petitions. The raw number of habeas actions and the percentage of federal docket space claimed by them have actually declined since 1971, a period in which the prisoner population has skyrocketed. Resnik, Tiers, 57 S. Calif. L. Rev. 837, 839-48 (1984).

[75] Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

[76] E.g., Cooke, Waste Not, Wait Not—A Consideration of Federal and State Jurisdiction, 49 Fordham L. Rev. 895, 900 (1981) (condemning habeas as "[t]he most incessant abrader of [state] judicial feelings"); McGowan, The View from an Inferior Court, 19 San Diego L. Rev. 659, 667 (1982) (insisting that habeas has "rankled relations between state and federal courts").

[77] C. Wright, supra note 1, at 344 (identifying "an affront to state sensibilities when a single federal judge can order discharge of a prisoner whose conviction has been affirmed by the highest court of a state").

[78] Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963).

tionally valid sentencing policies.[79]

Habeas defenders have challenged these arguments on several grounds.[80] The costs of habeas are outweighed, it is argued, by the need to protect individual rights.[81] It may be true that most habeas petitions are unsuccessful.[82] Yet even a poor success rate may be revealing when, by hypothesis, the state courts have already rejected meritorious federal claims. If the state courts are offended by habeas review, they may have their own poor record to blame.[83] In addition, there are competing considerations outweighing the state interest in the "finality" of judgments. The institutional settings of state and federal courts make it imperative that the latter have the final word on federal issues.[84] Although habeas takes time and occasionally requires the postponement of criminal sanctions, the treatment of substantial claims should not be frustrated by a rush to judgment—particularly in death penalty cases.[85] The redundancy of habeas may produce better substantive analysis through a dialogue between state and federal courts.[86] If state judges have become more sensitive to federal claims in recent years, it is arguably because of the existence of federal habeas.[87] The writ's defenders have also argued that, in many instances, habeas better protects federal rights than does appellate review within a state system. Collateral review allows the federal courts to reach federal claims that counsel failed adequately to pursue.[88] Habeas also allows federal courts to treat federal claims apart

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[79] Cf. Kaplan, The Problem of Capital Punishment, 1983 U. Ill. L. Rev. 555, 573 (pointing out that death row prisoners have an incentive to employ whatever habeas remedies are available to them—for the obvious reason that time-consuming litigation may keep them alive).

[80] The best early defenses of the Supreme Court's expansion of habeas include Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L.J. 50 (1956); Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461 (1960); Habeas Corpus—Proposals for Reform, 9 Utah L. Rev. 18, 27 (1964) (remarks of Professor Paul Freund) [hereinafter Utah Symposium].

[81] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 25 (1956) ("it is not a needle we are looking for in these stacks of paper, but the rights of a human being").

[82] P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 14 (1979); Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 368-69 (1973).

[83] See Oliver, Postconviction Applications Viewed by a Federal Judge—Revisited, 45 F.R.D. 199, 221-25 (1968) (finding that the development of habeas was necessary in view of the state courts' poor record).

[84] Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.-C.L. L. Rev. 579, 663-69 (1982).

[85] See Goldberg, The Supreme Court Reaches Out and Touches Someone—Fatally, 10 Hastings Const. L.Q. 7 (1982) (arguing that excessive speed in death penalty cases prompts recollections of the Rosenberg episode).

[86] Cover & Aleinikoff, supra note 67.

[87] Yackle, Book Review, 36 Rutgers L. Rev. 375, 379 (1983).

[88] See Meador, The Impact of Federal Habeas Corpus on State Trial Procedures, 52 Va. L. Rev. 286, 287-88 (1966).

from both state procedural rules[89] and the inevitable focus in state court upon the guilt or innocence of the accused.[90] Finally, habeas allows courts to extend their consideration of claims to allegations outside the state court record[91] and to apply new constitutional decisions retroactively.[92]

B. Proposals for Change

Dissatisfaction with the conventional explanation for habeas has also generated a variety of proposals to abolish or to revise federal collateral review. Some abolitionists would discard postconviction habeas in favor of adjudication in state court, followed by direct review in the Supreme Court.[93] Others suggest that if the Court lacks the physical capacity both to meet its institutional responsibilities and to act as a court of error in state criminal cases,[94] the federal courts of appeal should be recruited to service in place of the district courts sitting in habeas.[95]

Proposals to revise habeas take several forms. Justice Stevens would allow relief only when habeas applicants raise "fundamental" constitutional claims that go to the "validity of the underlying judgment itself" or to "the integrity of the process by which that judgment was ob-

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[89] Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U. L. Rev. 78 (1964).

[90] Habeas Developments, supra note 23, at 1060-61. See also Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 802-03 (1965).

[91] See Habeas Developments, supra note 23, at 1113.

[92] See Mishkin, The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965) (discussing the Court's power to limit the retroactive effect of its decisions); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966).

[93] See, e.g., Robinson, Proposal and Analysis of a Unitary System for Review of Criminal Judgments, 54 B.U.L. Rev. 485 (1974).

[94] See note 137 infra.

[95] Meador, Straightening Out Federal Review of State Criminal Cases, 44 Ohio St. L.J. 273 (1983); see also P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 103-14 (1976); D. Meador, Criminal Appeals 178-84 (1973). Others have advanced similar proposals. See, e.g., Cameron, Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem, 1981 B.Y.U. L. Rev. 545, 558-74; Haynsworth, A New Court to Improve the Administration of Justice, 59 A.B.A. J. 841 (1973) (proposing a "national court of appeals" of limited jurisdiction); see also Haynsworth, supra note 68, at 604-07. A presidential commission established by the Nixon Administration embraced the idea. National Advisory Commission on Criminal Justice Standards and Goals, Courts 128-31 (1973). Ms. Hufstedler would eliminate federal direct review of state court denials of postconviction relief and channel the direct review of criminal convictions in the first instance to a new national court situated between the existing courts of appeals and the Supreme Court. She would, however, leave federal habeas corpus as it is. Hufstedler, Comity and the Constitution: The Changing Role of the Federal Judiciary, 47 N.Y.U. L. Rev. 841, 852-54 (1972).

tained."[96] Claims tied imaginatively to the fringes of the Bill of Rights should, in his view, be left to the state courts or to the Supreme Court exercising its appellate jurisdiction.[97] Other revisers insist that habeas should be limited to cases in which the applicant's "factual guilt" is seriously in issue.[98] Judge Friendly focused upon the individual petitioner at bar and would have denied habeas consideration of any claim in the absence of a colorable allegation of innocence.[99] By contrast, Justice Powell focuses not on the arguable innocence of the particular applicant, but on the nature of the federal claim asserted.[100] On his analysis, claims that by their nature have little to do with protecting the factually innocent from wrongful conviction should be excluded from habeas.[101] Still others find a ready vehicle for change in the relationship between habeas corpus and the retroactive effect of new constitutional decisions. Justice Harlan would have disposed of a fair share of habeas claims by instructing the federal courts to apply the law as it existed at the time of

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[96] Rose v. Lundy, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting). Justice Stevens suggests as models for habeas consideration the "classic" cases in which the petitioner's trial was dominated by a mob or the conviction was obtained through the use of perjured or extorted testimony. Id.

[97] Id. at 543; see also Rushen v. Spain, 464 U.S. 114, 124 n.3 (1983) (Stevens, J., concurring).

[98] The term in this context connotes confidence that the petitioner engaged in the conduct proscribed by the relevant criminal statute with the requisite level of culpability and in circumstances demonstrating no available defense. Cf. Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 Geo. L.J. 185, 197-98, 213-16 (1983) (resisting the mistaken view that criminal guilt is a matter of historical truth devoid of moral evaluation).

[99] Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970).

[100] See Schneckloth v. Bustamonte, 412 U.S. 218, 266 (1973) (Powell, J., concurring).

[101] Id. The lines of demarcation between the two tests are not so clear as the text may suggest. Four years after taking the position that habeas should be available only to an individual petitioner who makes a "colorable claim of innocence," Judge Friendly indicated support for the view that whole classes of claims insufficiently related to factual guilt should be eliminated from the scope of the writ. Friendly, Averting the Flood by Lessening the Flow, 59 Cornell L. Rev. 634, 636-37 (1974). Justice Powell's position expressed both in *Schneckloth* and, perhaps, his opinion for the Court in Stone v. Powell, 428 U.S. 465 (1976), rests not only on the importance of factual guilt, but also on the assumed virtues of the process model. See notes 248-62 and accompanying text infra; see also Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 Colum. L. Rev. 436, 456-59 (1980) (demonstrating that the opinion in *Stone* "attempted to respond with one stroke to two fundamentally inconsistent arguments often marshalled in criticism of the Warren Court's expansion of habeas jurisdiction"—neglect of factual guilt and the process model). I have treated *Stone* elsewhere. Yackle, The Reagan Administration's Habeas Corpus Proposals, 68 Iowa L. Rev. 609, 623-28 (1983) (concluding that *Stone* is not in the mainstream of habeas at all but constitutes only another limitation on the fourth amendment exclusionary rule); see Saltzburg, Habeas Corpus: The Supreme Court and the Congress, 44 Ohio St. L.J. 367, 388-90 (1983).

trial, notwithstanding interim changes beneficial to the applicant.[102] A bill proposed by the Nixon Administration would have permitted the federal habeas courts to treat federal issues only if new decisions regarding them would be applied retroactively—as determined by independent retroactivity analysis.[103]

C. *The Process Model*

The most persistent proposal for revising habeas partakes of the process model.[104] This is Professor Bator's approach,[105] and more recently it has been embraced by the Reagan Administration.[106] Bator argues

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[102] Mackey v. United States, 401 U.S. 667, 682-89 (1971) (Harlan, J., concurring and dissenting). See also Desist v. United States, 394 U.S. 244, 268 (1969) (Harlan, J., dissenting). See generally Note, *United States v. Johnson*: Reformulating the Retroactivity Doctrine, 69 Cornell L. Rev. 166, 178-83 (1983) (recalling Harlan's argument). Cf. Hankerson v. North Carolina, 432 U.S. 233, 246-48 (1977) (Powell, J., concurring) (urging adoption of Harlan's view).

[103] See 119 Cong. Rec. 2224 (Jan. 26, 1973) (letter from Richard Kleindienst, Attorney General, to Emanuel Celler, Chairman, House Committee on the Judiciary, June 21, 1972) (introduced in support of S. 567, 93d Cong., 1st Sess. (1973)) (explaining that the bill would limit habeas to claims having as their primary purpose the protection of either fact finding or appellate process and that the test would parallel the standards used by the Court to determine the retrospective effect of constitutional decisions).

[104] Process-oriented jurisprudence is the linchpin of a liberal tradition that defines a lawful result as the product of reasoned resolution by an institution competent to make such a decision. An articulation of the model can be found in the teaching materials prepared by Professors Hart and Sacks:

> The alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision. The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.

H. Hart & A. Sacks, The Legal Process 4 (tent. ed. 1958). The fundamental notion that law should be concerned with the adequacy of process rather than its substantive results is also reflected in popular explanations of both public and private law adjudication. See, e.g., J. Ely, Democracy and Distrust (1980) (justifying rigorous judicial review when there is a breakdown in the democratic character of legislative action); Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221 (1973) (drawing parallels to private law adjudication). The roots of the process model are found in the Austinian understanding that law is only the coercive command of the sovereign. On that view, the only questions that can be asked concerning a rule (or decision) are whether the sovereign (or decisionmaking body) is "duly constituted" and whether "proper procedures were followed" in producing the result. R. Hutchins, Two Faces of Federalism 18 (1961). Thus the process model assimilates both the "jurisdiction" and "adequate process" components of Professor Bator's analysis.

[105] See Bator, supra note 78. See generally Peller, supra note 84, at 610-63, 669-90 (examining Professor Bator's thesis and the process model generally).

[106] See The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the Judiciary, 97th Cong., 2d Sess. 30-34 (1982) (section-by-section analysis by the U.S. Dep't of Justice). Essentially the same program continues to be introduced in Congress. See, e.g., S. 238, 99th Cong., 1st Sess. (1985); Senate Comm. on the Judiciary, Reform of Federal Intervention in State Proceedings Act of 1983, S. Rep. No. 226, 98th Cong., 1st Sess. (1983). But see

that because the search for objective accuracy is futile in any event, there is generally no reason to prefer the judgments of federal district courts sitting in habeas to those of the state courts whose previous decisions are called into question.[107] Bator thus argues that the federal courts should entertain habeas petitions only if the state courts have failed to provide an adequate opportunity for the treatment of federal claims in the state forum. The federal habeas courts ought not presume to second-guess substantive decisions made by the state courts, even as to federal issues, unless there is reason to doubt the process by which those decisions were reached.[108]

Bator acknowledges that the fourteenth amendment has substantive content, that the state courts may reach incorrect decisions regarding federal claims after the most searching and fair-minded process, and that erroneous state decisions on federal constitutional issues may be upset by the Supreme Court on direct review.[109] If, however, federal claims are raised collaterally in habeas, he insists that the meaning of "due process" changes. In the habeas context, Bator argues, the states provide the process that is "due" if they accord criminal defendants a "full and fair opportunity" to litigate federal claims at some point in their procedures.[110]

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note 257 infra (noting the current bill's limited departure from the process model). I have treated the Administration's proposals elsewhere. See Yackle, supra note 101.

107 Bator, supra note 78, at 446-49.

108 Id. at 455-60. As precedent for his position, Bator relies primarily on Frank v. Mangum, 237 U.S. 309 (1915), which he interprets to hold that:

> [T]he fact that an unbiased court of competent jurisdiction has previously adjudicated, through a full and fair litigation, the merits of whether a defendant's federal rights were violated is crucially relevant to the question whether his detention may on habeas corpus be considered unlawful because he was denied due process of law.

Bator, supra note 78, at 487.

109 Bator, supra note 78, at 453-54.

110 Id. at 456-57. Bator *would* permit federal habeas review if the procedure employed in state court was so flawed that it should not " 'count' as a full and fair litigation." He would have a federal habeas court ask "*whether the conditions and tools of inquiry were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied.*" Id. at 455.

Bator does not argue that there are no identifiable federal issues apart from the process a state provides to adjudicate claims of federal error. He acknowledges that there are such claims and that they can be isolated from state corrective process. It is just that if state process meets due process standards, such errors can be corrected only by the Supreme Court. He explains using hypotheticals:

> [T]he prisoner may claim that a confession offered by the prosecution was coerced, or the jury discriminatorily selected . . . . Nothing in the nature of these issues prevents the state trial court from constituting an unbiased and rational tribunal with respect to their decision, so that, in the absence of an allegation of some *other* procedural flaw or absence of state remedy which prevented the fair and rational litigation of these issues, we do not have here a failure of process. If, then, *arguendo*, federal collateral inquiry is to be restricted to the category of cases exhibiting a failure of state process, an allegation on habeas that the state violated the defendant's federal constitutional rights

Bator concedes that his analysis can be "tricky."[111] He argues in essence that due process means one thing in the Supreme Court, but quite another to a federal habeas court asked to examine a federal claim that was not determined on appeal. The Supreme Court on direct review is free to disregard any state process that might have been instituted to cure federal error and to reverse a criminal conviction if such error occurred at any stage of the state proceedings.[112] A habeas court, by contrast, must take account of any state corrective process that followed the asserted federal error. If that process was itself "full and fair," the prisoner cannot be held to be in confinement in violation of federal law—even if, were the habeas court to treat the merits of the underlying claim, it would reach a different result.[113]

The notion that the meaning of the Constitution shifts with the procedural posture in which a claimed violation is examined is, indeed, "tricky." Yet Bator is obliged to link his proffered test for the availability of federal habeas to the scope of the constitutional claims open to state criminal defendants. The controlling statute, section 2241, grants federal courts jurisdiction to hear cases alleging "custody" in violation of the "constitution or laws" of the United States.[114] Bator recognizes as

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would always lead initially to this inquiry: viewing the state processes in totality, did the state at any time provide meaningful process for the testing of the question whether there was such a violation? If the underlying substantive issue was litigated at trial and does not bear on the integrity of the trial court's decision of the issue itself (*e.g.*, admissibility of a confession or jury discrimination), habeas would not lie. If the issue was not fairly litigated at trial, either because the question was simply unavailable at the time (*e.g.*, a later discovery of prosecution perjury, or a coerced guilty plea) or because the issue is of a type invalidating the trial court's own decision of it (*e.g.*, mob domination, or bribery of the judge), but the state provided a concededly unflawed tribunal to test it on appeal or collateral attack, habeas again would not lie. But if the state provides no process at all (as where there is no state postconviction remedy to test the question whether there was prosecution perjury), or provides only meaningless process (as where the allegation of mob domination is not canvassed by any state tribunal concededly free of such domination), habeas would be available.

Id. at 457 n.28.

111 Id.

112 Id. at 454.

113 Id. at 455-57. This, according to Bator, was what Justice Pitney envisioned in Frank v. Mangum, 237 U.S. 309 (1915):

> The important point to remember about *Frank* is its insight that there comes a point at which previous determinations, themselves fairly arrived at, *settle* the question whether due process was in fact afforded, and that in our legal system that point is usually where a judgment has become final and immune from direct review. There is, in other words, nothing radical about the notion that a judgment has accorded due process even though there remains a theoretical possibility—which possibility, it is the whole thrust of the doctrine, will not be explored—that error has occurred as to a due process question.

Id. at 486 n.119.

114 See note 17 supra.

much and, in order to reconcile his model with prevailing statutory law, explicitly blurs the kind of flawed process that he thinks should open the door to habeas with a failure to adjudicate a prisoner's claim consistent with due process. That heroic step having been taken, Bator next complicates matters still further by accepting relitigation in habeas if the state court that entered the judgment under attack lacked jurisdiction.[115] In this regard, he relies on traditional rhetoric to the effect that decisions rendered in the absence of jurisdiction are void and thus subject to collateral attack—particularly in habeas.[116] In truth, however, he is here again forced to argue as he does—this time because the process model on which his theory rests proceeds on the premise that the decision-making institution whose judgment is challenged was competent to decide the matter at hand. Bator rejects, of course, the Supreme Court's reformulation of the notion of jurisdiction as freedom from federal error.[117] Indeed, he would defer to a state court's determination of its own jurisdiction, unless there is reason to doubt the adequacy of the process that produced the jurisdictional judgment or jurisdiction was patently absent.[118] In this, he folds his "adequate process" concerns into the question of "competence."

If Bator's thesis appears strained, it is because the task he sets for himself is daunting. His project is to reject, at the threshold, the deeply rooted judgment that state criminal defendants are entitled at some point to litigate their federal claims in federal court (the proposition plainly implicated by the very existence of federal habeas corpus), to embrace the process model (itself a manifestation of the view that federal and state courts are fungible), and then to jam this analysis into the existing framework—shaving corners where necessary to achieve a rough fit. The fit, I am afraid, is *too* rough. The trouble with Bator's model is that it proceeds from the wrong premise which, in turn, generates the wrong question. Bator assumes that the purpose of habeas is to arrive at correct determinations of the issues that arise in state criminal prosecutions and

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115 Bator, supra note 78, at 460-62.

116 Id. at 460-61 (citing Restatement of Judgments § 7 (1942); see Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830)). Cf. Fay v. Noia, 372 U.S. 391, 423-24 (1963) (resting in part on the same tradition that void judgments may be collaterally impeached).

117 See Bator, supra note 78, at 513-14. But see Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (per curiam) (stating that the writ is not restricted to instances where the trial court lacked jurisdiction and holding that federal habeas courts can reexamine federal issues whether or not they involve the previous court's power to adjudicate); Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (maintaining the fiction that a court acts beyond its jurisdiction when it commits constitutional error).

118 Bator, supra note 78, at 461-62. There is some support for such a position. See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 705-10 (1982) (stating that because the jurisdictional issue was fully and fairly litigated previously, full faith and credit must be given to the prior court's judgment).

asks whether the existing framework is well-suited to that task. Concluding that it is not, he proposes to discard habeas except in those instances in which there is special reason to doubt the accuracy of prior state court judgments. Yet if accuracy regarding points of law were the sole purpose of habeas, we would hardly have the system we do. For one thing, we would want a mechanism for correcting not only errors of federal law, but errors of state law as well. That would evoke, one should think, an insistence upon adequate *state* process for the correction of errors made in earlier state proceedings. For another, we might be satisfied with direct, rather than collateral, review. Accuracy in the determination of legal questions is routinely achieved on appeal, and if, indeed, accuracy were our goal, we might demand, again, only an effective state appellate process. In such a system, it would perhaps make sense to limit federal habeas to the reserve role that Bator suggests. The regime actually in place is, however, much different. Federal habeas corpus is concerned only with state court errors touching federal claims and contemplates thorough relitigation of both legal and factual issues. The existing shape of habeas implies objectives well apart from ensuring accurate state court judgments generally.

Bator concedes that the alternative thesis I want to defend is, indeed, defensible. "[T]here is no a priori reason why we should not decide that the most acceptable arrangement for the decision of such questions is that all such state-court determinations should be reviewed by a federal district court on collateral attack."[119] His concern is merely that such an arrangement can be defended only on the basis of "functional, institutional and political considerations."[120] For Bator, the question is coldly utilitarian. "If one set of institutions is as capable of performing the task at hand as another, we should not ask both to do it."[121]

None of the suggestions for curtailing the availability of habeas has been adopted. The Supreme Court disclaimed Bator's analysis twenty years ago, only months after he put it forward.[122] It enjoys a curious staying power, perhaps because language suggesting the process model occasionally appears in Supreme Court opinions.[123] On examination, however, the few cases on point hardly attach to such language the thoroughgoing significance that Bator's thesis would demand. This is not to suggest contentment with postconviction habeas. I have conceded much discontent.[124] The source of concern, however, is fairly traceable to the

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119 Bator, supra note 78, at 449.

120 Id.

121 Id. at 451.

122 See Fay v. Noia, 372 U.S. 391 (1963).

123 See text accompanying notes 195-281 infra.

124 See text accompanying notes 74-79 supra.

failure of the conventional wisdom to explain federal habeas in a plausible manner. That is the task to which I now turn.

III
AN ALTERNATIVE EXPLANATION

A more satisfying explanation for collateral review in habeas emerges if the "custody" doctrine is set aside and habeas is appraised for its value within the general framework of federal jurisdiction. Relitigation in habeas ensures the availability of a trial-level federal forum to litigants whose federal claims arise initially as defenses to state criminal prosecutions. Although criminal defendants can be denied an opportunity to remove their cases to federal court for trial, they must be allowed to present their federal claims in federal court *after* state proceedings against them have been concluded. Postconviction habeas is not, on this analysis, an especially advantageous, and ostensibly anomalous, form of dispensation to state criminal defendants. Habeas is the trade-off for refusing litigants who enter the state courts as criminal defendants access to federal court in the first instance.

A fair elaboration of this alternative explanation for habeas requires discussion in three steps. First, I will treat the concededly controversial view that all litigants with federal claims have or should have a "right" to litigate those claims in a federal forum other than the Supreme Court. Although acceptance of such a thoroughgoing proposition is not essential to my thesis, the arguments for a general right to be in federal court are powerful and worth recounting to place what *is* critical to my thesis in perspective. In this regard, I will take up not only the lower federal courts' original jurisdiction, but the existing law of removal—which plainly frustrates the availability of the federal forum to some federal claims. Routine removal on the basis of a federal defense is not now available; I will contend that it should be. Second, I will address the less ambitious claim that state criminal defendants who have federal issues to raise in defense are or should be entitled to litigate those contentions in federal court. Finally, I will explain why such criminal defendants should not be allowed access to the federal forum originally, but should be asked to postpone federal litigation until after state proceedings are completed. At that point, they may then pursue federal relief in habeas corpus. In this, of course, I will distinguish the removal that should be denied—removal of criminal proceedings begun in state court—from removal that should be freely allowed.

A. The Right to Litigate Federal Claims in Federal Court

The notion that litigants have a "right" to be in federal court grinds

against the working assumption in the cases that litigants with federal claims are not invariably permitted to choose a federal forum.[125] Although plaintiffs with federal claims may elect a federal forum under section 1331,[126] section 1441[127] permits a defendant to remove only if the plaintiff might have sued in federal court in the first instance.[128] When a federal issue appears in a case only by way of defense, the *Mottley*[129] rule bars original federal jurisdiction and, accordingly, prevents removal at the behest of the defendant.[130] Gaps in current jurisdictional law do not,

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125 For expressions of the working assumption, see, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592, 606 n.18 (1975) (commenting that "we in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues"); Swain v. Pressley, 430 U.S. 372, 382-83 (1977) (stating that the Constitution does not demand that constitutional claims be considered by life-tenured, article III judges). Although in *Swain* the Court relied on its earlier decisions approving the assignment of federal issues to article I, legislative courts, see, e.g., Palmore v. United States, 411 U.S. 389 (1973), the Justices recently have shown less willingness to permit Congress to bypass the framework envisioned by article III. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion) (finding a broad grant of jurisdiction to non-article III bankruptcy judges unconstitutional). Even in *Northern Pipeline*, however, the Court did not deny that state courts can be asked to determine federal issues, whether or not the judges enjoy salary and tenure safeguards. Id. at 64 n.15.

126 28 U.S.C. § 1331 (1982).

127 28 U.S.C. § 1441 (1982). Civil rights removal under 28 U.S.C. § 1443 (1982) is, by common consent, a virtual dead letter. The key cases are City of Greenwood v. Peacock, 384 U.S. 808 (1966), and Georgia v. Rachel, 384 U.S. 780 (1966). See also Johnson v. Mississippi, 421 U.S. 213 (1975) (denying removal in light of *Peacock* and *Rachel*); Comment, Civil Rights Removal After *Rachel* and *Peacock*: A Limited Federal Remedy, 121 U. Pa. L. Rev. 351 (1972). Cf. Amsterdam, supra note 90 (arguing for a more liberal reading of the statute). Professor Redish has proposed a different construction of § 1443, which would permit removal "when state [court] procedures are so defective or the applicable state precedents [are] so in conflict with federal law that the defendant will be unable adequately to vindicate his applicable federal substantive rights in the state judicial system." M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 324 (1980). That "process" model approach would be consistent with the Court's response to similar, federal-state problems. See text accompanying notes 196-218 infra. My proposal, however, argues against such an approach.

128 Removal can come only at the insistence of a defendant resting upon the plaintiff's action—not a plaintiff responding to a federal counterclaim. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941).

129 Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

130 Existing law determines district court jurisdiction pursuant to § 1331 (claims arising under federal law) according to the court-fashioned rule that the federal claim must appear on the face of the plaintiff's "well-pleaded" complaint. See Taylor v. Anderson, 234 U.S. 74 (1914); *Mottley*, 211 U.S. 149. The American Law Institute's summary identifies three, related propositions encompassed by the rule—that jurisdiction cannot be established by a federal defense raised in the defendant's answer, that the plaintiff cannot anticipate such a federal defense in constructing the complaint, and that jurisdiction cannot be manufactured through the use of "nice" pleading rules. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 169-70 (1969) [hereinafter ALI Study]. The result, obviously enough, is that federal issues that do not appear on the face of the complaint but arise later are boxed out of the federal, trial-level forum and can hope for federal review only by the Supreme Court on direct review.

however, mute the powerful, normative case for the routine availability of the federal forum.

Ours is a system in which two parallel sets of courts enjoy concurrent jurisdiction in most cases arising under federal law.[131] No internally consistent arrangement can operate to perfection in such a system. The best we can do is to draw an admittedly value-laden line defining spheres of primary responsibility. It is light work to defend the general proposition that litigants with federal claims should be entitled to litigate in federal court and to rebut the contending view that state and federal courts are fungible for purposes of federal adjudication. This ground has been covered, and covered well, in familiar literature.[132] Indeed, a general right to litigate in a federal court, other than the Supreme Court, is already widely accepted in practice. In some instances, the desirability of federal adjudication is sufficiently plain that Congress has taken the choice of forum away from the litigants concerned by establishing exclusive jurisdiction in federal court.[133] In addition, there are cases in which it is doubtful that state courts can issue relief,[134] and others in which there are well-recognized historical claims in support of federal adjudication.[135]

Elsewhere, to be sure, the concurrent jurisdiction of state courts is generally accepted. Yet the recognition that state courts have power to determine federal issues hardly suggests that litigants with federal claims have no genuine interest in the choice of forum and thus can be diverted to state court at no cost. Nor should it be presumed that the state courts are society's primary dispute resolution institutions, irrespective of the nature of the claims in issue.[136] There are sound reasons for giving effect

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131 See, e.g., Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286 (1970).

132 See text accompanying notes 139-47 infra.

133 See, e.g., 28 U.S.C. § 1334 (1982) (bankruptcy); 28 U.S.C. § 1338(a) (1982) (patent and copyright); 18 U.S.C. § 3231 (1982) (federal crimes).

134 Hart & Wechsler, supra note 7, at 429 (reporting that the Supreme Court has never decided whether state courts can enjoin federal officers). See Tarble's Case, 80 U.S. (13 Wall.) 397 (1871) (concluding that a state court lacked jurisdiction to issue a writ of habeas corpus purporting to require the release of a prisoner held by federal military authorities); Redish & Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45, 93 (1975) (reading *Tarble's Case* to mean that the state courts lack power to "control directly the acts of federal officers").

135 See, e.g., Romero v. International Terminal Operating Co., 358 U.S. 354, 360-72 (1959) (recalling that the need for federal adjudication of admiralty cases was one of the chief reasons originally given for establishing a system of lower federal courts).

136 That is, those who would have the federal courts available for the adjudication of federal claims should not be required to bear the burden of proof. But see Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605, 637 (1981) (insisting that state courts should continue to play a substantial role in determining federal constitutional issues); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise

to litigants' choice of the federal forum.[137] Summarizing the literature in point, litigants have an interest in obtaining a sympathetic forum in which their federal claims will be addressed by independent judges familiar with relevant principles. In addition, there is a national interest in the correct and uniform interpretation of federal law.[138]

I do not propose to enter the debate regarding the comparative abilities and institutional competence of federal and state judges. One need not take the view that state judges are less sympathetic adjudicators of federal issues in order to propose that the system should indulge federal litigants' suspicions in that vein. In any case, others have given the argument for preferring federal judges.[139] Still others find federal judges to be

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in Dialectic, 66 Harv. L. Rev. 1362, 1363-64, 1401 (1953) (viewing state courts as our primary dispute-resolution mechanisms).

[137] No one seriously proposes that direct review in the Supreme Court can or should provide litigants with an adequate federal forum for litigation. The Court is not a court of error. While it depends upon cases as vehicles for judicial action and, indeed, has no power to act in the absence of an Article III case or controversy, the effect of its decisions upon the litigants at bar is only one factor in its decision to hear a case. The national significance of the issue presented is another, far weightier element in the same decision. P. Freund, The Supreme Court of the United States 16 (1961). Accord Anderson v. Harless, 459 U.S. 4, 12 n.6 (1982) (Stevens, J., dissenting, joined by Brennan and Marshall, J.J.); Boag v. MacDougall, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting, joined by Burger, C.J., and White, J.); Vinson, Address of the Chief Justice before the American Bar Association, Sept. 7, 1949, quoted in R. Stern & E. Gressman, Supreme Court Practice 258 (5th ed. 1978). As a practical matter, the Court is incapable of hearing all claims brought before it. See Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-18 (1950) (opinion of Frankfurter, J., respecting denial of writ of certiorari) (surveying the many reasons the Justices may have for declining review in a particular instance). Of course, these same problems have generated several plans for reducing the Justices' workload. See, e.g., Burger, Annual Report on the State of the Judiciary, 69 A.B.A. J. 442 (1983); Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court, reprinted in 57 F.R.D. 573 (1972); Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195 (1975); Coleman, The Supreme Court of the United States: Managing its Caseload to Achieve its Constitutional Purposes, 52 Fordham L. Rev. 1 (1983); Note, Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court, 97 Harv. L. Rev. 307 (1983). I mean to express no views regarding such proposals. For examples of two positions, compare Freund, A National Court of Appeals, 25 Hastings L.J. 1301 (1974) (recognizing the need for a National Court of Appeals due to caseload pressures) with Black, The National Court of Appeals: An Unwise Proposal, 83 Yale L.J. 883 (1974) (arguing on both constitutional and policy grounds that a National Court of Appeals is unwise); Brennan, The National Court of Appeals: Another Dissent, 40 U. Chi. L. Rev. 473, 474 (1973) (insisting that a National Court of Appeals is "unnecessary and ill-advised"); Estreicher & Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681 (1984) (arguing that the adoption of systematic criteria for granting certiorari would substantially reduce the Court's workload).

[138] See Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 510-13 (1974) (discussing the increasingly important role of the lower federal courts in maintaining uniformity).

[139] This issue has been accompanied by considerable debate. Compare Utah Symposium, supra note 80, at 33 (remarks of Professor Walter Gellhorn) (doubting the sensitivity of state judges) with id. at 43 (remarks of Judge Charles Desmond) (refusing to accept that position).

more independent[140] than their state counterparts and thus more appropriate enforcers of unpopular federal rights.[141] The American Law Institute finds ample support, even in recent decisions, for the view that federal judges are more sensitive to federal claims and bring greater familiarity and expertise to the treatment of those claims.[142] Conversely, state courts specialize in local, rather than federal, law issues.[143] Although state judges might gain expertise in treating federal claims if permitted to decide more cases in which federal issues are at stake, they have the opportunity to adjudicate federal issues whenever litigants entitled to be in federal court choose nevertheless to litigate in the state forum. Even then, the determination of federal issues will always be secondary to courts charged primarily with the enforcement of state law.[144] Nor would these interests be adequately protected in a regime in which the lower federal courts exercised only appellate jurisdiction in federal question cases originally litigated in state court.[145] Appellate review does not substitute for the trial-level resolution of factual disputes. Accurate determination of relevant facts has particular importance in constitutional adjudication,[146] and "Judges of the Third Article" have

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Compare also Congressional Limits on Federal Court Jurisdiction, 27 Vill. L. Rev. 893, 1070 (1982) (remarks of Professor Paul Bator) (insisting that there is no evidence that state judges are insensitive to federal issues) [hereinafter Villanova Symposium] with id. at 1071 (remarks of Professor Martin Redish) (taking the opposing view); Desmond, Federal Habeas Corpus Review of State Court Convictions, 50 Geo. L.J. 755, 755 (1962) (reporting the state courts' hostility to federal habeas corpus). See generally Solimine & Walker, Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity, 10 Hastings Const. L.Q. 213 (1983); Wright, In Praise of State Courts: Confessions of a Federal Judge, 11 Hastings Const. L.Q. 165 (1984).

[140] Professor Sager focuses his argument upon the tenure and salary protections guaranteed to federal judges but often not enjoyed by state judges. Sager, The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 61-68 (1981). Professor Redish holds different views on some points, but also doubts the independence of state judges (as compared to federal district judges) in the enforcement of fourteenth amendment claims. Redish, Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager, 77 Nw. U.L. Rev. 143, 161-66 (1982).

[141] E.g., Neuborne, supra note 22; Redish, The Doctrine of Younger v. Harris: Deference in Search of a Rationale, 63 Cornell L. Rev. 463, 488 (1978). See also R. Posner, The Federal Courts 171-72, 175 (1985); McCormack, supra note 70, at 262-64.

[142] ALI Study, supra note 130, at 165-67 (cited in Preiser v. Rodriguez, 411 U.S. 475, 514 (1973) (Brennan, J., dissenting)).

[143] The rhetoric urging the elimination of the federal courts' diversity jurisdiction places emphasis on this perception. See Burger, The State of the Federal Judiciary—1979, 65 A.B.A. J. 358, 362 (1979).

[144] M. Redish, supra note 127, at 2 & n.8. See also Brennan, Some Aspects of Federalism, 39 N.Y.U. L. Rev. 945, 948 (1964): "My state court responsibility, while it included jurisdiction over federal questions and federal-state conflicts, was inevitably colored by the fact that I was, after all, a state judge."

[145] See text accompanying note 95 supra.

[146] See, e.g., Townsend v. Sain, 372 U.S. 293, 312 (1963) (stating that "[i]t is the typical, not

traditionally distinguished themselves in their sensitive treatment of factfinding.[147] Appellate review also is unable to accommodate issues based on allegations outside the state court record. Claims of that kind frequently arise in constitutional challenges to state criminal processes.

There are, of course, many who disagree with these and similar arguments favoring the availability of a federal forum for federal issues.[148] The Court itself, in recent opinions, appears to have assumed the essential fungibility of state and federal judges.[149] Until very recently, however, the Court entertained little doubt that litigants had a "right" to invoke the jurisdiction of the federal courts—a "right" that was "theirs by reason of congressional enactments passed pursuant to congressional policy."[150] By writing jurisdictional legislation, "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."[151] The mere existence of jurisdiction established a choice of forums, and "[t]he right of a party plaintiff to choose a Federal court where there [was] a choice [could not] be properly denied."[152]

The Constitution, of its own force, does not necessarily establish a right to litigate in a federal forum. The language of article III and the

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the rare, case in which constitutional claims turn upon the resolution of contested factual issues"); Norris v. Alabama, 294 U.S. 587, 589-90 (1935). The Justices have often remarked that they hesitate to examine the validity of a state statute "on its face" and prefer to evaluate the constitutionality of its application in factual context. E.g., Broadrick v. Oklahoma, 413 U.S. 601, 611-15 (1973) (explaining that the Court's "overbreadth" analysis is limited to free speech cases). Similar concerns underlie the Court's "ripeness" decisions. See, e.g., United Pub. Workers v. Mitchell, 330 U.S. 75, 90 (1947).

147 The phrase belonged to the late Professor Bernard J. Ward. See United States v. Jannotti, 673 F.2d 578, 614 & n.8 (3d Cir.) (Aldisert, J., dissenting), cert. denied, 457 U.S. 1106 (1982). See also Wright, The Wit and Wisdom of Bernie Ward, 61 Tex. L. Rev. 13, 19 (1982).

148 See, e.g., Bator, supra note 136; O'Connor, supra note 14, at 812-14.

149 E.g., Sumner v. Mata, 449 U.S. 539, 549 (1981) (insisting that there is no reason to doubt that state judges are doing "their mortal best to discharge their oath of office"); Allen v. McCurry, 449 U.S. 90, 105 (1980) (refusing to credit any "general distrust of the capacity of the state courts to render correct decisions on constitutional issues"); Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (declining to assume that "there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States"). Similar sentiments appear in the *Younger v. Harris* line of cases. In Dombrowski v. Pfister, 380 U.S. 479 (1965), Justice Harlan filed a dissent objecting to the majority's "unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively." Id. at 499. The *Younger* cases decided in the wake of *Dombrowski* assume that state courts *are* competent to treat federal claims properly and to arrive at accurate results. See Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975).

150 Donovan v. City of Dallas, 377 U.S. 408, 412 (1964) (holding that a state court cannot enjoin parties from litigating an *in personam* action in a federal court that has jurisdiction over the parties and the subject matter).

151 Zwickler v. Koota, 389 U.S. 241, 248 (1967).

152 Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909).

absence of general federal question jurisdiction until 1875 makes such a thesis virtually indefensible.[153] Nor has Congress created such a right in every federal question case as a matter of statutory law. Congress appears satisfied with the "well-pleaded complaint" rule,[154] even as it has been applied in declaratory judgment cases,[155] and there is no sustainable basis for arguing that the rule misinterprets the meaning of section

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153 Article III does not create lower federal courts but apparently leaves their establishment to Congress. See Redish & Woods, supra note 134 (appraising possible limitations upon congressional power). Even the Supreme Court's appellate jurisdiction is subject to "exceptions" established by Congress. See Villanova Symposium, supra note 139 (surveying various interpretations of the "exceptions" clause). See also Gressman & Gressman, Necessary and Proper Roots of Exceptions to Federal Jurisdiction, 51 Geo. Wash. L. Rev. 495 (1983); Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53 (1962); Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960); Van Alstyne, A Critical Guide to Ex parte McCardle, 15 Ariz. Rev. 229 (1973). The conventional wisdom is that Congress has substantial power over the federal courts' jurisdiction at every level. See, e.g., C. Black, Decision According to Law 37-39 (1981); Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895 (1984). For the first century of the nation's history, the lower federal courts existed but exercised no general jurisdiction of cases "arising under" federal law. That authority was not granted until the 1875 Judiciary Act. Act of March 3, 1875, § 1, 18 Stat. Part 3, 470. In view of the tardy appearance of federal question jurisdiction, it is exceedingly difficult to contend that the *Constitution* itself entitles litigants to choose a federal forum. To take that position, one must argue either that Congress unconstitutionally denied access to the lower federal courts for a hundred years or that circumstances have changed so radically that earlier understandings of article III must be completely reformulated. See, e.g., Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741 (1984) (developing the thesis that Congress's power is limited to allocating the judicial power established by article III within the federal court system).

154 The Court has, even recently, made it implicitly clear that the "well-pleaded complaint" rule is not constitutionally mandated and that article III allows federal adjudication in any case "that might call for the application of federal law." E.g., Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 492 (1983) (relying on Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)). Yet Congress has not attempted to expand jurisdiction under § 1331 beyond the boundaries marked by the Court's "well-pleaded complaint" rule. See also Goldberg, The Influence of Procedural Rules on Federal Jurisdiction, 28 Stan. L. Rev. 395, 410-14 (1976) (identifying the rule as an illustration of the system's failure to take account of the relaxation in federal pleading standards).

155 The leading case is Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), in which Justice Frankfurter held for the Court that the Declaratory Judgment Act, 28 U.S.C. § 2201 (1977), is " 'procedural only.' " Id. at 671 (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937)). That is, the Act does not add to the jurisdiction enjoyed by the federal district courts prior to its enactment. Jurisdiction exists in a federal declaratory judgment action only if it would have existed in a coercive action in the absence of the Act. If in such an action the federal issue would have emerged only as a defense, there is no § 1331 jurisdiction even though the plaintiff requests a declaration regarding the merits of such an issue. Id. at 672. Aware of the *Skelly Oil* interpretation of the Declaratory Judgment Act and its relationship to the "well-pleaded complaint" rule, Congress has made no move to change the law. The American Law Institute, by contrast, would. See ALI Study, supra note 130, at 170-71.

1331.[156] Both the Constitution and congressional enactments, however, establish the predicates for a general right to litigate federal claims in federal court. The Constitution contemplates a role for the lower federal courts, particularly with respect to issues of federal law.[157] And Congress has gone far toward opening the federal courthouse to most would-be litigants with federal claims.[158] The elimination of the amount-in-controversy requirement from section 1331 is only the most recent illustration.[159]

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156 It is too late to do so. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-10 (1983) (referring to the rule as a "powerful doctrine" that resolves most jurisdictional questions and avoids "more-or-less automatically" many "potentially serious federal-state conflicts"). The ALI can find no better way of reading § 1331. See ALI Study, supra note 130, at 176.

157 See M. Redish, supra note 127, at 1 (advocating a presumption that individuals with federal claims are entitled to vindicate those claims in a federal forum). Although Justice Frankfurter believed that "[s]ome federal rights are readily adapted to enforcement by state tribunals," he recognized that "[n]ational sentiment also regards federal tribunals as the appropriate guardians of federal rights" and concluded that "[w]e may take it for granted . . . that our distinctively federal law will in the main be enforced through the federal courts." Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499, 515 (1928).

158 With the exception of the "well-pleaded complaint" rule, federal question jurisdiction under § 1331 is "very nearly as broad as the constitutional grant." C. Wright, supra note 1, at 6. Some modern critics of federal jurisdiction argue that Congress has opened the federal courts' doors too broadly and that the district courts' present jurisdiction should be curtailed. See, e.g., H. Friendly, Federal Jurisdiction: A General View 197-99 (1973); Hill & Baker, Dam Federal Jurisdiction!, 32 Emory L.J. 3, 76-87 (1983). See also Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law & Contemp. Soc. 557.

159 Pub. L. No. 96-486, 94 Stat. 2369 (1980). The elimination of the arbitrary, monetary barrier to federal jurisdiction reflects a congressional desire for access to the federal forum to turn on a substantive judgment regarding the propriety of federal, rather than state, adjudication. "Gate-keeping" proposals to reduce federal jurisdiction out of concern over swelled caseloads, see, e.g., Frankfurter, supra note 157, at 515-16; Goldberg, supra note 154, at 456-58, should also be rejected. There is no reason to believe that the quality of justice in the federal courts can be maintained only by restricting the sheer number of cases on the docket. I am aware of no data supporting the assertion that an increased number of federal judgeships would diminish the prestige of such positions, that heavy workloads will discourage able men and women from accepting appointments, or that there is an imminent threat of exhausting the supply of competent candidates for the federal bench. To insist that the "problem" in this field lies in overburdened federal dockets and that the "answer" is to channel more litigation to the state courts is to neglect not only the physical impact upon local tribunals, but the institutional responsibility to allocate judicial business on a principled basis. If the quality of federal justice would benefit from the elimination of an entire class of litigation, a more likely candidate is diversity jurisdiction. Accord H. Friendly, supra note 158, at 139-52; Redish, supra note 140, at 166 n.14. See also McGowan, Federal Jurisdiction: Legislative and Judicial Change, 28 Case W. Res. L. Rev. 517, 554 (1978) (advocating the elimination of diversity jurisdiction but urging that any effort to diminish federal court authority to consider federal questions should "proceed with caution"); Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv. L. Rev. 963 (1979) (noting that the abolition of diversity jurisdiction would allow rationalization and reform of many aspects of federal practice and procedure).

The reordering of the relations between the states and the national government in the wake of the Civil War brought with it the most profound implications for the federal judiciary.[160] The postwar amendments (particularly the fourteenth) and the flurry of legislative enactments (among them the Habeas Corpus Act of 1867)[161] established the federal courts' special role in the protection of individual liberty against state power.[162] The primacy of those courts in the determination of federal law was recognized early in this century, albeit for the purpose of limiting state attempts to regulate economic affairs.[163] Later, the Warren

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[160] The classic treatise explains that when Congress established general, federal question jurisdiction in 1875, the lower federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1927); see also S. Kutler, Judicial Power and Reconstruction Politics 143-60 (1968) (finding expansion of federal court power in removal jurisdiction); Soifer, Protecting Civil Rights: A Critique of Raoul Berger's History, 54 N.Y.U. L. Rev. 651 (1979). But see Benedict, Preserving Federalism: Reconstruction and the Waite Court, 1978 Sup. Ct. Rev. 39.

[161] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

[162] Blackmun, Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. Rev. 1, 7-8 (1985); Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1147-56 (1977) [hereinafter Section 1983 Developments]; see also Patsy v. Board of Regents, 457 U.S. 496, 503-07 (1982); Steffel v. Thompson, 415 U.S. 452, 463-65 (1974). The Court's most vigorous dissertation on the subject came in Justice Stewart's opinion for the majority in Mitchum v. Foster, 407 U.S. 225 (1972), in which the specific question in issue was whether civil rights actions pursuant to § 1983 are subject to the anti-injunction statute, § 2283:

> The predecessor of § 1983 was . . . an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established . . . . Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation . . . .
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> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts . . . .
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> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."

Id. at 238-39, 242 (citations and footnotes omitted).

[163] It was clear, of course, that if individuals were to be able to enforce the fourteenth amendment affirmatively, it was necessary to address the apparent barrier presented by the eleventh amendment. The analysis in Ex parte Young, 209 U.S. 123 (1908), provided the

Court surely assumed the desirability of ensuring litigants a choice of the federal forum for the adjudication of federal questions.[164] The recognition of such a choice now would be wholly consistent with the history of the past hundred years.[165]

It seems plain enough, then, that existing statutes and modern precedents can be reconciled with a general right to be in federal court and, accordingly, that little tinkering with existing arrangements would be required to make it law. Current statutes run counter in only one important respect: removal. Indeed, one may fairly insist that the denial

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answer: because no state has power either to enact an unconstitutional statute or to authorize one of its agents to enforce an unconstitutional policy, in any case in which state officers attempt to act in violation of the Constitution they act not for the state but as individuals—subject to suit in federal court. See also Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 292-93 (1913); Orth, The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power, 1983 U. Ill. L. Rev. 423 (explaining that *Young* was an essential ingredient of the campaign to involve the federal courts in the protection of economic interests against state regulation).

164 The habeas cases, particularly Fay v. Noia, 372 U.S. 391 (1963), and Townsend v. Sain, 372 U.S. 293 (1963), are the obvious examples. See note 7 supra. In those cases, the Warren Court embraced the root proposition, established earlier in Brown v. Allen, 344 U.S. 443 (1953), that litigants in "custody" are entitled to at least one opportunity to litigate their federal claims in the federal forum. See Hart & Wechsler, supra note 7, at 1465. In another context, the Court accepted the various abstention doctrines under which the federal courts decline to exercise jurisdictional power that is clearly theirs, but erected machinery to ensure that abstention would not deprive a litigant of his "right to litigate his federal claims fully in the federal courts." England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 417 (1964). See also Board of Regents of the Univ. of New York v. Tomanio, 446 U.S. 478, 496 (1980) (Brennan, J., dissenting).

165 If anyone doubts that a change has occurred only recently, I invite her to compare the portions of Justice Stewart's opinion for the Court in Mitchum v. Foster, 407 U.S. 225 (1972), quoted earlier, see note 162 supra, with his opinion for the majority in Allen v. McCurry, 449 U.S. 90 (1980):

> The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself. For reasons already discussed at length, nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights.

Id. at 103-04 (footnote omitted). The two cases themselves are easily reconciled. The question in *Mitchum* was whether a federal court had jurisdiction to adjudicate initially, while in *Allen* the Court was faced with an attempt to *relitigate* a federal issue already determined in state court. That distinction is important to me as well as the Court. Indeed, I want to focus on it in order to explain when, in some instances, the federal forum should be available only after the state courts have acted. See text accompanying notes 170-94 infra. The distinction is important to the Court, however, in that it identifies cases in which, if federal adjudication is not invoked initially, federal review later is foreclosed entirely.

of removal on the basis of a federal defense deflates the contention that the federal courts are now largely open for the litigation of federal issues. As long as federal defenses are relegated to state court, despite the desires of the parties and even when the defenses are dispositive, it is impossible to maintain that there *is* any general right to the federal forum. The critical point here, however, is that proposals to change current law and to permit removal routinely on the basis of a dispositive federal defense are long-standing and largely noncontroversial. The American Law Institute (ALI) proposed such a rule sixteen years ago, as part of its program for the general revision of the Judicial Code.[166] The ALI concluded that federal issues are entitled to federal adjudication, even if they emerge after the plaintiff's properly pleaded complaint is filed. At least when federal issues can be identified before the state courts invest substantial time and energy,[167] removal should be available to either

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166 ALI Study, supra note 130, at 187-96.

167 See Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 506 & n.53 (1954) (noting the inconvenience of tardy removal). Some observers have encouraged the use of "special jurisdictional allegations" to identify federal issues litigants expect to arise subsequent to the filing of a well-pleaded complaint. See ALI Study, supra note 130, at 190-91; see also Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 665 (1942); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 164 (1953). The purpose, of course, would be to avoid the rigidity of the "well-pleaded complaint" rule and to establish an alternative mechanism for flagging federal issues early.

The ALI would retain the "well-pleaded complaint" rule but would achieve a similar flexibility by permitting removal if a defendant raises a federal defense. The ALI would also permit defendants to remove on the basis of a federal compulsory counterclaim and would permit plaintiffs to remove on the basis of a permissive federal counterclaim, but would not allow any party to remove on the basis of federal cross- or third-party claims. The ALI proposes an amount-in-controversy requirement for federal defense and similar removal cases. Other limitations of lesser significance are also proposed. But see D. Currie, Federal Courts 185-86 (3d ed. 1982) (apparently finding the proposed limitations too restrictive).

The most important restriction on removal in the ALI proposal is the requirement that the federal issue must be "dispositive" of the litigation. This demand for decision-making significance restricts federal jurisdiction to cases well within the outer boundaries of article III, which authorizes Congress to confer jurisdiction when a federal issue potentially forms an "ingredient" of the action. See note 154 supra. Under the ALI proposal, some federal issues that arise in state court litigation in circumstances in which removal is unavailable will enjoy no access to a federal forum other than the Supreme Court. However, allowing a lower court federal forum for *every* federal issue, no matter how remote it may be from the actual dispute, might threaten the flexibility that cooperative federalism demands. Ordinary federal question jurisdiction under § 1331 is limited to "substantial" federal issues, excluding questions that have only an indirect or remote bearing on the matter at hand. See Joy v. St. Louis, 201 U.S. 332 (1906). See also ALI Study, supra note 130, at 177-78 (also adopting this rule). The exclusion of remote issues will not undercut the general expectation of federal court availability on which my explanation of habeas corpus is based.

Similarly, I do not pause to appraise the federal courts' familiar hesitancy to adjudicate federal issues arising in litigation touching subjects of extraordinary local interest, see, e.g., Burford v. Sun Oil Co., 319 U.S. 315 (1943) (relying on abstention to avoid treatment of a dispute involving oil and gas regulation), except to note that the Supreme Court has at times ruled on federal questions in cases generally considered to be the province of the state courts.

party.[168] Thus defendants should be permitted to remove on the basis of a federal defense and plaintiffs on the basis of a federal reply. In this

Compare Barber v. Barber, 62 U.S. (21 How.) 582 (1859) (disclaiming diversity jurisdiction in domestic relations cases) with Orr v. Orr, 440 U.S. 268 (1979) (finding that a state statute concerning the payment of alimony violated the equal protection clause). See generally Note, The Domestic Relations Exception to Diversity Jurisdiction, 83 Colum. L. Rev. 1824 (1983).

[168] "It is logically sound to permit removal to the party who opposes the federal right as well as to the party who asserts the right." ALI Study, supra note 130, at 194. A rule reserving removal to the party raising a federal claim would neglect the substantial interest of all concerned in the correct treatment of any federal issue. Cf. Villanova Symposium, supra note 139, at 1070-71 (1982) (remarks of Professor Bator) (pointing out that there are constitutional values on both sides of litigation and that state officers have an interest in obtaining an accurate determination of the extent of valid state power).

Professor Wechsler would deny removal in federal defense cases—on the ground that "[t]here is no need for the original jurisdiction when litigants rely on federal rights to furnish them a shield but not a sword." Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Probs. 216, 234 (1948). The ALI disagrees and has, in my judgment, the better argument.

Problems will arise. If, for example, the state itself is a defendant in state court litigation, the eleventh amendment may bar removal by a private plaintiff should the state raise a federal defense. See Chandler v. Dix, 194 U.S. 590, 591-92 (1904) (indicating that a state may waive sovereign immunity in suits in its own courts without relinquishing eleventh amendment immunity in similar actions in federal court); accord Edelman v. Jordan, 415 U.S. 651, 677 n.19 (1974).

If a state officer initiates suit in state court and a private defendant raises a federal defense, it may be unsettling to permit removal by *either* party. Inasmuch as the states have their own means of obtaining judicial review of administrative or legislative actions, the federal courts may hesitate to entertain suits to test the validity of state actions under federal law. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 21-22 (1983). Where the private defendant seeks removal, the federal courts may be reluctant, in the interest of comity, to "snatch" away lawsuits that a state has initiated in its own courts. Id. at 21 n.22.

Problems such as these nourish the unsettlement in recent, noncriminal cases in the Younger v. Harris line, in which early federal intervention threatens to frustrate state officers' attempts to employ the state courts to enforce state policies despite the existence of a federal defense. See, e.g., Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); see also Bartels, Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "Interfere" with State Civil Proceedings, 29 Stan. L. Rev. 27 (1976) (appraising earlier decisions). Although there is a close relationship between the circumstances in which prejudgment federal intervention by injunction and removal to the federal forum are or should be permitted, see text accompanying notes 196-218 infra, it is doubtful that the availability (or not) of removal at the instance of a state or state officer presents difficulties for my explanation of postconviction habeas. It is unlikely that the availability of removal to the states would generate many attempts to catapult state-initiated lawsuits into the federal forum. See *Franchise Tax Bd.*, 463 U.S. at n.22. Even if there is a substantial number of such cases, permitting states and state officers to invoke federal jurisdiction of federal issues would not seriously interfere with existing federal-state relations. States already can be parties to federal litigation by waiving or failing to raise nonjurisdictional barriers to federal adjudication. See, e.g., Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 480 (1977) (holding that a state may voluntarily submit to federal litigation despite an ability to insist upon *Younger* restraint); Huffman v. Pursue Ltd., 420 U.S. 592, 607 n.19 (1975) (noting that reliance on preclusion rules can also be waived).

Removal should be allowed even when it frustrates state attempts to further policies in the civil context. That, indeed, is the choice made when removal jurisdiction is established. If it is granted that the federal courts should have general jurisdiction in federal question cases, there

respect, present law is precisely the opposite of what it should be.[169]

B. The Federal Forum and State Criminal Defendants

The case for a general right to litigate federal claims in federal court is impressive, although not entirely undisputed. The case for a more limited right of access on behalf of state criminal defendants is, by comparison, irresistible. The arguments here are, of course, the very considerations that gave birth to federal habeas corpus for state prisoners in the aftermath of the Civil War and that led to the writ's development into a general postconviction remedy in this century. The federal claims raised by criminal defendants in state court are typically grounded in the fourteenth amendment, itself promulgated in part to establish procedural safeguards in state criminal prosecutions. We have in this country a long, cultural history that demonstrates the need for such safeguards. The Supreme Court's use of the fourteenth amendment, of its own force and as a vehicle for incorporating safeguards found in the Bill of Rights, testifies to the demand for significant federal involvement in state criminal cases. That involvement extends beyond the declaration of federal procedural standards to the enforcement of those standards in an independent, federal forum.

To be sure, this tradition of distrust is traceable to historical (and modern) suspicions regarding the commitment of the state courts to the federal procedural standards applicable to criminal cases. Yet the more telling explanation lies in the institutional setting in which state courts address fourteenth amendment claims. The primary focus in state court is upon the implementation of state substantive criminal law policies—upon the determination of guilt in the individual case. Although all participants, and certainly state judges, also have the duty to respect defendants' federal constitutional rights, their chief duty is to enforce the law with respect to individuals the police and prosecutors honestly believe to have violated that law. The overriding responsibility of the state courts

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is no reason to withhold such jurisdiction simply because a critical federal issue arises only by way of defense. ALI Study, supra note 130, at 188-91.

[169] The framework I propose would affect the state courts and their work very little. They would remain authoritative with respect to questions of local law. Pulley v. Harris, 465 U.S. 37, 41 (1984) (holding that a federal court may not issue the writ of habeas corpus on the basis of an error of state law). In addition, when nondispositive federal issues appear as mere "ingredients" in lawsuits otherwise governed by state law, the state courts would retain decision-making authority—subject to appellate review by the Supreme Court. Finally, allowing defendants having dispositive federal contentions to remove to federal court would not deprive the state courts of substantial business. It is not proposed that litigants be required to present federal claims to a federal forum, and not all litigants entitled to remove will do so. The actual incidence of removal under present law is very low, ALI Study, supra note 130, at 192, and there is no reason to think that the federal courts would be flooded if the rules were changed. But see H. Friendly, supra note 158, at 124-27.

to carry out state law thus deprives them of the neutrality and dispassion demanded for contemporaneous enforcement of the fourteenth amendment. It is because they are charged with other, potentially conflicting duties that state courts' determinations of federal claims raised in defense cannot be accepted as final.

Notwithstanding the compelling arguments for allowing state criminal defendants, if not all litigants with federal claims, *some* opportunity to litigate in federal court, existing law provides that opportunity only in postconviction habeas—after state court proceedings have come to an end. My project here is to explain why this should continue to be the law even if removal should become available on the basis of a federal defense in ordinary, civil actions—why, that is, litigants with the most powerful case for access to the federal forum should be forced to postpone federal adjudication when others enjoy it immediately.[170] While I appreciate the conventional argument that the state courts have important interests in their criminal proceedings,[171] I do not rest on that familiar ground. I rely, instead, on the practical difficulties that removal in criminal cases would present and, more important, on libertarian values that would be threatened by early federal interference with state criminal prosecutions.

The routine removal of criminal cases based on federal defenses is simply impractical. The federal claims available to criminal defendants are typically procedural, their effect on outcome characteristically obscure.[172] There are exceptions, of course, as when defendants challenge the validity of the statutes under which they are charged[173] or contend that the state trial itself would violate the Constitution.[174] Then it may be feasible to test the merit of claims before trial. Ordinarily, however, defendants complain that evidence against them was obtained unlaw-

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[170] I do not contend that Congress lacks power to provide for the removal of criminal cases involving federal issues. That issue has long been settled. See, e.g., City of Greenwood v. Peacock, 384 U.S. 808, 833 (1966); Tennessee v. Davis, 100 U.S. 257, 262-71 (1880). I argue only that action of that kind would be unwise.

[171] See, e.g., Reed v. Ross, 104 S. Ct. 2901, 2907 (1984).

[172] For the most part, federal claims in this context are grounded in the fourteenth amendment, especially as it "incorporates" more specific safeguards established by the Bill of Rights. See Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965); Pye, The Warren Court and Criminal Procedure, 67 Mich. L. Rev. 249 (1968). Nonconstitutional federal issues also occasionally arise. See, e.g., South Carolina v. Moore, 447 F.2d 1067 (4th Cir. 1971) (considering a claim that the state trial court had acted after a removal petition had been filed and thus lacked jurisdiction); Note, Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers, 83 Colum. L. Rev. 975 (1983).

[173] See, e.g., Smith v. Goguen, 415 U.S. 566 (1974) (holding a state statute unconstitutionally vague).

[174] See, e.g., Arizona v. Washington, 434 U.S. 497 (1978).

fully[175] or that procedures at trial fail adequately to respect federally guaranteed safeguards.[176] The merit of claims of that kind, and certainly their effect upon the proceedings, can be ascertained only later, after the state courts have responded to litigants' federal objections. Indeed, in the typical case federal complaints can be identified and formulated only as proceedings progress or, in some instances, when the prosecution has run its course. To take an obvious example, only in retrospect can defendants argue that various errors at trial, appraised in cumulative effect, resulted in fundamentally unfair proceedings in violation of the due process clause.[177]

Even if it were practical to permit criminal defendants to remove, it would be inappropriate to do so. Routine removal of state criminal prosecutions to the federal forum for trial would be inconsistent with a commonly invoked but rarely understood structural element of the American scheme—federalism. The very mention of the term will undoubtedly produce knowing nods of approval from some observers and impatient shakes of the head from others. Federalism is the Old Reliable of federal jurisdiction, the shibboleth of those whose tendency is to seek not justifications for the exercise of federal judicial power, but excuses for divesting the federal courts of cases or claims. I have nothing to do with that kind of federalism. There are perfectly good and articulable reasons for our constitutionally grounded distrust of concentrated power. Federalism has deep and ancient roots in a political philosophy that insists that decentralized government promises the greatest protection for individual liberty. The Constitution fosters centrifugal forces not because the diffusion of power has intrinsic value, but because the maintenance of freedom may well depend on it.

A large and familiar literature attests that decentralization serves genuine, identifiable functions in the American governmental scheme.[178]

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[175] See, e.g., Estelle v. Smith, 451 U.S. 454 (1981) (holding that the state had violated the fifth amendment in obtaining an inculpatory statement from the petitioner).

[176] See, e.g., Mullaney v. Wilbur, 421 U.S. 684 (1975) (striking down a jury instruction that shifted the burden of proving a material element of a crime to the defendant).

[177] See, e.g., Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (examining alleged constitutional infirmity in a prosecutor's summation); see also Jackson v. Virginia, 443 U.S. 307 (1979) (instructing habeas courts to award relief if the evidence adduced at trial was insufficient to establish guilt beyond a reasonable doubt).

[178] See, e.g., W. Bennett, American Theories of Federalism (1964); S. Davis, The Federal Principle (1978); Essays in Federalism (Institute for Studies in Federalism 1961); M. Grodzins, The American System (D. Elazar ed. 1966); R. Leach, American Federalism 57-82 (1970); D. Hume, Essays: Moral, Political and Literary 499-515 (1963) (advocating decentralized government); M. Reagan & J. Sanzone, The New Federalism 3-30 (2d ed. 1981); 1 A. Tocqueville, Democracy in America 85-97 (Alfred A. Knopf, Inc. ed. 1945); M. Vile, The Structure of American Federalism 21-40 (1961); K. Wheare, Federal Government 40-52 (4th ed. 1964); Kaden, Politics, Money and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 853-57 (1979).

First, decentralization accommodates diversity. Disparate groups, separated not only geographically but philosophically, may and often do wish to fashion governmental policy according to their own predilections and tastes. Different policy choices are the natural consequence of individualism and pluralism, which lie near the core of American presuppositions.[179] Second, decentralization encourages self-determination. Individuals can hope to participate meaningfully in politics only if the unit of government they seek to influence is small enough to be affected by, and to respond to, their attempts to be heard. The larger the population, the more difficult it becomes for individuals to have a hand in the determination of policy.[180] Third, decentralization fosters efficiency. Local government can take account of peculiar and varied circumstances in which policy must be applied and can be flexible, grooming rules to better serve actual needs. Larger governmental units must draw rough lines and create broad categories in order to implement policies formulated at a higher level of abstraction. Attempts to build flexibility into those policies or their attendant enforcement machinery may lead to excessive bureaucracy, accompanied in turn by its own inefficiencies.[181]

A fourth function of federalism, deeply grounded in the political theory that informed the enterprise in Philadelphia,[182] establishes the ra-

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[179] Justice Brandeis captured a similar idea in his famous dissent in New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932): "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

[180] See Dahl, Federalism and the Democratic Process, in Liberal Democracy 95 (J. Pennock & J. Chapman ed. 1983).

[181] See M. Grodzins, supra note 178, at 383 (advocating the maintenance of strong state and local authority in part because "other things being equal, judgments by neighbors are more apt to be correct than those by strangers"); H. Kaufman, Red Tape: Its Origins, Uses, and Abuses 78-82 (1977) (taking note of complaints that a "profusion of authoritative organs" can produce inconsistent and duplicative constraints and procedures, but concluding that concentrating authority "does not banish red tape any more than devolving power does" and "[s]ometimes . . . even adds to the problem").

[182] It was Montesquieu's view that the republican form of government could exist only if the population to be governed was small, yet he acknowledged that a large population might retain the essentials of a republic by establishing a confederate structure:

> If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection. . . .
>
> It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical government. I mean a confederate republic.
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> This form of government is a convention by which several petty states agree to become members of a larger one, which they intend to establish. . . .
>
> A republic of this kind, able to withstand an external force, may support itself without any internal corruption; the form of this society prevents all manner of inconveniences.
>
> If a single member should attempt to usurp the supreme power, he could not be

tionale for the thesis I want to defend. Decentralization constitutes a

supposed to have an equal authority and credit in all the confederate states. Were he to have too great an influence over one, this would alarm the rest; were he to subdue a part, that which would still remain free might oppose him with forces independent of those which he had usurped, and overpower him before he could be settled in his usurpation.

1 C. Montesquieu, The Spirit of Laws 126-27 (rev. ed. 1900). Whether fairly or not, Hamilton built upon Montesquieu's thesis to defend the peculiar brand of decentralization in the new American Constitution. The Federalist No. 9 (A. Hamilton). See also Diamond, The Federalist's View of Federalism, in Essays in Federalism 21 (1961). Madison worried not that an authoritarian few might gain control, but rather than an "unjust and interested majority" might be permitted to accomplish its "secret wishes" through factions. The Federalist No. 10, at 61 (J. Madison). Yet he trusted federalism to put obstacles in the way of anyone who would gain and hold power to the detriment of liberty:

> The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States . . . .
>
> In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

Id. at 61-62. See also The Federalist No. 51 (J. Madison): "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people." Id. at 339. See Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81, 88 (noting that the Framers sought to maintain freedom primarily through structural allocations of governmental power, not by granting individual rights). The analytic linkage between federal structure and individual liberty is noted routinely in discussions of American government. Benson, for example, lists as the first value protected by federalism that it establishes a "bulwark against usurpation of governmental power by a would-be dictator." Benson, Values of Decentralized Government, in Essays in Federalism 1, 3 (1961). While he concerns himself primarily with economic matters not relevant here, he identifies an older, more fundamental tenet of political theory:

> In the past, "usurpation of power" was thought of primarily in terms of military force or of political coercion. In 1788 the anti-federalists were concerned about the disproportionate strength of a President who was commander-in-chief of all the national armed forces, and they urged safeguards for the local militia and for the state control of some military and police power. Even now, we would be wise not to scoff too readily at the possibility of "involuntary servitude" of our population. Within our lifetime other nations—presumably liberty-loving—have succumbed to the sheer force of a tyrannic central government. In this sense, it is probably still important that we have a number of governors and mayors—often of an "opposition" party—who possess the physical means of opposing a proposed military coup d'etat.

Id. at 5. Similar, if less graphic, statements pepper the relevant literature.

> The first feature in the governmental system of the United States to which I will call attention as bearing upon the problem I am handling is that it is Federal Government. . . .
>
> In this distribution of governmental powers between two or more sets of governmental organs there is a certain security that the realm of Individual Immunity against governmental power will not be encroached upon.

J. Burgess, The Reconciliation of Government with Liberty 303 (1915). See also, e.g., Lee, Legislative and Judicial Questions, 7 Harv. J.L. & Pub. Pol'y 35 (1984). But see J. Choper, Judicial Review and the National Political Process 244 (1980) (denying that the institution of federalism protects liberty); W. Riker, Federalism: Origin, Operation and Significance 154-55 (1964) (arguing that federalism serves the ends of racial oppression).

structural defense for individual freedom, quite apart from the text-bound doctrines that dominate Supreme Court opinions and most of the relevant literature. There was, if you will, method in the apparent madness of diffusing power into the conceded chaos of multiple layers of government. That stratagem prevents and, indeed, was designed to prevent the concentration of power in the hands of centralized authority, where it might lend itself to the purposes of despotism. In a rough approximation of an even older, divide-and-conquer strategy, federalism anticipates that antilibertarian forces might come to power in a single state. Yet the practical impossibility of gaining a foothold everywhere at once will preserve the other states and, ultimately, the union itself from oppression. None of this means that modern extensions of national power at the expense of state prerogatives are uniformly unwise or unconstitutional. No one seriously laments the decline of nineteenth century dualism,[183] and occasional efforts to recapture that kind of rigidity have been deservedly unsuccessful.[184] We do well, however, to recognize the legitimate functions of decentralization and to fashion our policies, as well as our constitutional doctrine, accordingly. The task at hand is to identify those matters for which national authority presents the most danger. As to those matters, decision making responsibility should be allocated to state government.

Few instruments of social control can match the making and enforcement of substantive criminal law for sheer coercive capacity. The authority to declare what behavior will be condemned and the form and severity of punishments promises the most effective means for commanding conformity to the will of those in power. The authority to fashion substantive standards carries with it an entitlement to establish enforcement machinery—investigators, prosecutors, and courts. The more concentrated the decision-making authority and the more broad-reaching the range of that authority, the more sweeping the capacity of enforcement officials to demand adherence to substantive policies.[185] I do not

[183] See, e.g., New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837). Professor Corwin defined dual federalism as a constitutional system in which the national government is one of enumerated powers only; the purposes the national government can promote are few; within their respective spheres, states and the national government are "sovereign" and hence "equal;" and the relation of the states and the national government is one of tension, rather than collaboration. See Corwin, The Passing of Dual Federalism, 36 Va. L. Rev. 1, 4 (1950). See also Wisdom, Foreword: The Ever-Whirling Wheels of American Federalism, 59 Notre Dame L. Rev. 1063 (1984) (lamenting the apparent renewal of dual federalist thinking). It would nevertheless be inadvisable for Congress to set about fashioning a "whole catalogue of crimes." See United States v. Harris, 106 U.S. 629, 643 (1882) (defining the extent of congressional power to establish substantive criminal law).

[184] See e.g., National League of Cities v. Usery, 426 U.S. 833 (1976), overruled, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

[185] It is familiar history, for example, that the eighteenth amendment, followed by the Vol-

mean to invoke hyperbole, but there are nations on earth in which a ubiquitous central police force, charged with enforcing policies generated at the national level and coupled with a judicial system that depends for its existence upon favor in high places, can bend to a despotic will. The abuse of substantive criminal law in such nations is a matter of record.[186]

Repression will not necessarily follow the assignment of authority for the criminal law to any government national in scope. Indeed, it can be argued that the decentralized American system is atypical and that there are centralized criminal justice systems in which individual liberty is respected.[187] Nevertheless, decentralization in this country is no historical accident. If the concentration of power over the criminal law at the national level does not inevitably threaten liberty, it surely lends itself to manipulation that the diffusion of decision-making authority makes more difficult. There are *reasons* for leaving the making of substantive criminal law to state legislatures and, indeed, county and city councils, *reasons* for choosing and training police officers at the local level, and *reasons* for assigning the charging function to local prosecutors, whether or not elected. Criminal law enforcement is one of those "integral gov-

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stead Act, generated a national police force charged with enforcing an unpopular federal law in the face of widespread violations. See H. Johnston, What Rights Are Left 26 (1930). The Supreme Court was then forced to consider seriously the meaning of the fourth amendment's prohibition on unreasonable search and seizure. See Wilson, Attempts to Nullify the Fourth and Fifth Amendments to the Constitution, 32 W. Va. L.Q. 128, 128 (1926); see generally F. Black, Ill-Starred Prohibition Cases (1931).

I hardly want to be understood to insist that federalism demands that we deliberately construct ineffective mechanisms for the detection and prosecution of crime. Much criminal activity crosses state lines, and cooperative enforcement efforts among the states may require national coordination. See, e.g., M. Grodzins, supra note 178, at 89-124. At the same time, in my view, modern proposals to enhance the effectiveness of the police function should also consider the impact upon the allocation of governmental authority so essential to the maintenance of freedom. Legislative plans that put efficiency first and neglect the dangers to individual rights that centralization can bring, see, e.g., Specter & Michel, The Need for a New Federalism in Criminal Justice, 462 The Annals 59 (1982) (advocating federal jurisdiction for the prosecution of certain career criminals), should be looked upon with suspicion. In this regard, the Reagan Administration has things backward. Compare Final Report of the Attorney General's Task Force on Violent Crime (1981) (urging measures establishing greater national responsibility in controlling street crime) with The Habeas Corpus Reform Act of 1982: Hearings on § 2216 Before the Comm. on the Judiciary, 97th Cong., 2d Sess. 30-34 (1982) (section-by-section analysis by the U.S. Dep't of Justice) (urging restrictions on the availability of habeas for state prisoners). See also Armed Career Criminal Act of 1983, S. 52, 98th Cong., 1st Sess. (Jan. 26, 1983) (proposing to permit the prosecution of multiple offenders in federal court and to impose enhanced sentences).

[186] E.g., A. Solzhenitsyn, The Gulag Archipelago, 1918-1956 (T. Whitney trans. 1978); J. Timerman, Prisoner Without a Name, Cell Without a Number (T. Talbot trans. 1981). Abuses have also occurred within the United States. See, e.g., D. Carter, Scottsboro (1969); F. Frankfurter, The Case of Sacco and Vanzetti (1927); T. Wilson, The Black Codes of the South (1965).

[187] Examples include England and most of the civil law countries of Europe.

ernmental functions"[188] for which state governments were created. Some Justices have acknowledged as much, even as the Court has (properly) sustained the establishment of federal crimes that have doubtful impact upon interstate commerce.[189] As long as key decisions and functions are left to officials who answer to no central authority, the present system resists the subordination of the criminal law to calculated political ends of national moment. The republic is not so fragile that it will surrender to authoritarianism on the signal provided by a foolish and isolated failure to respect the *reasons* for federalism in criminal justice. Yet neglect of elemental principles that serve prophylactic functions risks disaster.

It is insufficient alone that local bodies draft criminal codes and that state officers investigate suspects and prefer charges. The adjudicatory proceedings that follow are crucial to local control of the criminal law. It is impossible to separate the establishment of substantive standards of behavior from their enforcement. Legislative objectives are identified and given practical meaning when courts implement the criminal law in concrete cases.[190] Only if state courts are allowed to do their assigned work can it be said that criminal law is safely in the hands of local authorities and beyond the effective reach of centralized control. State criminal process may fail occasionally, or even systematically, to identify those criminal defendants whom the legislature deems blameworthy. Yet local process with all its faults is essential to, indeed, part and parcel of, the criminal law enterprise at the local level. The removal of state criminal prosecutions to the federal forum for trial would test the grip of local authorities on substantive criminal law policy. Local standards, torn

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188 *National League of Cities*, 426 U.S. at 851.

189 E.g., Engle v. Isaac, 456 U.S. 107, 128 (1982) (insisting that "[t]he States possess primary authority for defining and enforcing the criminal law"); Patterson v. New York, 432 U.S. 197, 201 (1977) (stating that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government"); Perez v. United States, 402 U.S. 146, 158 (1971) (Stewart, J., dissenting) (arguing that the Framers "never intended that the National Government might define as a crime and prosecute . . . wholly local activity"). The Court has likewise found it prudent to construe federal criminal legislation narrowly in order to preserve "the traditional balance between the States and the national government in law enforcement." Screws v. United States, 325 U.S. 91, 105 (1945). The same sentiment leads to deference in reviewing state substantive criminal law policies. In the notorious case of Francis v. Resweber, Justice Frankfurter refused to hold that a second attempt to execute the petitioner would be invalid, primarily out of deference to the state's "penological policy." 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring). See also Rummel v. Estelle, 445 U.S. 263 (1980) (upholding a mandatory life sentence for multiple petty thefts). But see Solem v. Helm, 463 U.S. 277 (1983) (invalidating a similar sentence that lacked possibility of parole). State legislative and judicial judgments regarding the procedural safeguards accorded to defendants in criminal cases have never enjoyed the same blanket deference. See note 7 supra.

190 See Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 Geo. L.J. 185, 197 (1983).

away from local institutions before they are hammered into authoritative shape by the state courts, may feel the influence of concerns generated elsewhere.

There is little reason to fear, however, that federal court enforcement of federal criminal procedure could be employed as a tool of oppression. The purpose of federal procedural safeguards is to ensure not only accuracy, but fairness as elaborated in the Bill of Rights and cases construing it.[191] Procedural standards for the *benefit* of criminal defendants can safely be established and orchestrated at the national level, and, indeed, should be uniform across the country.[192] The task is to hold state authorities accountable and to insist that they fashion and enforce substantive criminal policies without denying fair process to individuals haled into court to answer charges. It is appropriate that this function be given to neutral authorities having no allegiance to state policies and whose primary responsibility is to protect the individual even if local objectives are frustrated.[193] Whatever may have been the case prior to the Civil War, the inauguration of the fourteenth amendment, and surely its interpretation in this century, suggests that federal primacy in matters of procedure is consistent with the constitutional scheme.[194] If the ex-

[191] Id. at 200-02; see Tribe, Unraveling *National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065, 1101 n.136 (1977) (linking the federalism concerns associated with *National League of Cities* with the concern in Younger v. Harris that the states' substantive decisions regarding criminal law not be disturbed—but distinguishing the asserted preference that the state courts have the initial opportunity to enforce federal procedural safeguards in criminal cases).

[192] Uniformity was, of course, a primary theme in Justice Black's campaign on behalf of incorporation theory. See Duncan v. Louisiana, 391 U.S. 145, 170 (1968) (Black, J., concurring) (insisting that the states should not be permitted "to experiment with the protections afforded [by] the Bill of Rights"). Professor Cox has argued that Congress has power under § 5 of the fourteenth amendment to establish a criminal procedure code to be followed in state prosecutions. Cox, The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 108 (1966). See also Mayers, Federal Review of State Convictions: The Need for Procedural Reappraisal, 34 Geo. Wash. L. Rev. 615, 623 (1966) (advocating the establishment of "uniform nation-wide" requirements to be followed by state courts treating federal claims).

[193] Cf. Posner, supra note 141, at 175 (suggesting that cases involving substantive matters governed by state law should be assigned to state courts—but acknowledging that when federal interests arise the federal courts may be more enthusiastic enforcement tribunals). See also id. at 173-74 (suggesting that state law enforcement agencies and state courts may be more vulnerable to corruption). Other observers have suggested that early federal involvement ought to be more palatable in criminal than in civil cases, because the threat to federal rights may be more pronounced in the criminal setting. See, e.g., Weinberg, The New Judicial Federalism, 29 Stan. L. Rev. 1191, 1213 (1977). Routine removal, however, would present the greater, incalculable danger of abuse. Although similar concerns can be asserted with respect to other state substantive policies, the dangers there are less grave. See, e.g., Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1210-22 (1977) (appraising the functions of federalism in a discussion of federal environmental policy that may displace individual state policies).

[194] See text accompanying notes 160-65 supra.

cesses of state authorities in furthering their policies must be checked, it is vital that the federal courts have the last word. They do. The vehicle by which they exercise their authority is not original jurisdiction in criminal cases, but postconviction habeas corpus. In the final analysis, it is not that the state courts are not good courts, nor even that they are or have been insensitive to federal rights. It is that the responsibility for policing state respect for procedural safeguards is best left to independent referees, unencumbered by the additional, and arguably inconsistent, obligation to implement state criminal law policies. This separation of functions, which places the construction and implementation of criminal law policy with state authorities but assigns the enforcement of federal procedural safeguards owed to the accused to the federal courts, is central to the federal system we have and have had for a hundred years.

IV
IMPLICATIONS

The explanation for habeas I want to propose has implications for the *Younger v. Harris*[195] line of cases, the cases on preclusion generally, and some aspects of current habeas corpus doctrine.

A. The Younger *Cases*

The effect of my explanation for postconviction habeas on the *Younger* line of cases appears on two levels. The result in the original case can be accommodated; the Court held only that in the absence of special circumstances the federal courts should not enjoin pending state criminal proceedings.[196] A decision to allow early federal intervention in the run of cases would have posed the same difficulties that the removal of state criminal cases for trial would present.[197] Accordingly, federal adjudication can and should be deferred until after the state courts have completed their work—at which time relitigation in habeas should be available.[198] Unfortunately, Justice Black's opinion for the Court in

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[195] 401 U.S. 37 (1971).

[196] Id. at 54.

[197] See text accompanying notes 170-94 supra.

[198] The core ideas in the *Younger* cases can be brought within this framework. The premise of those cases, to be sure, is that the state courts are fully competent to decide federal issues. See note 149 supra. And, in the Court's eyes, the consequence of *Younger* abstention is not the postponement but the relinquishment of (lower) federal court concern for the federal claims in issue. See Gibson v. Berryhill, 411 U.S. 564, 577 (1973). Then, too, the primary focus in *Younger* cases has often been the avoidance of interference with state courts rather than the enforcement of state substantive law. That accounts for Steffel v. Thompson, 415 U.S. 452 (1974), in which the absence of a pending state prosecution permitted a federal court to entertain a request for a declaratory judgment. Accord Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509 (1972). See also Zeigler, An Accommodation of the *Younger* Doctrine and the

Younger contained the seeds of quite different thinking. To begin, he relied, in part, on the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[199] There was no reason, however, to depend upon rules fashioned for equity practice to decide the entirely different question whether litigants should be able to thwart pending state court litigation by invoking the jurisdiction of the federal courts. If matters such as the availability of an "adequate remedy at law" help to decide whether a court should issue an injunction or award damages, and one tends to doubt it, they promise

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Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process, 125 U. Pa. L. Rev. 266, 285-86 (1976). At the same time, however, Justice Black's opinion in *Younger* spoke broadly of state attempts to carry out "the important . . . task of enforcing . . . laws against socially harmful conduct that the State believes in good faith to be punishable," 401 U.S. at 51-52, and indicated a preference for litigation in the state forum, thus "permitting the smooth and unimpeded operation of the collection of procedures that make up the normal course of criminal justice." Section 1983 Developments, supra note 162, at 1283. Ideas of that kind can claim a pedigree in precursor decisions that, I concede, richly deserve their unpopularity. See, e.g., Cleary v. Bolger, 371 U.S. 392, 397 (1963) (expressing the desire to avoid disrupting a "State's enforcement of its criminal law"); Stefanelli v. Minard, 342 U.S. 117, 120 (1951) (referring to the prosecution of "crimes solely within the power of the States").

Finally, and here I tread on truly dangerous ground, the extension of *Younger* to cases in which litigants seek injunctive relief against executive actions also reflects the belief that the making and enforcement of substantive criminal law is best left to local control. See, e.g., Rizzo v. Goode, 423 U.S. 362, 378-79 (1976) (expressing reservations about interfering with the conduct of a governmental body's "internal affairs"); O'Shea v. Littleton, 414 U.S. 488, 500 (1974) (worrying over any "ongoing federal audit of state criminal proceedings"). *Rizzo* and *O'Shea* were incorrectly decided. The Court has recognized that there are instances in which federal safeguards are threatened so severely by state law enforcement officers that early federal intervention is warranted, see, e.g., Allee v. Medrano, 416 U.S. 802, 814-16 (1974) (involving systematic police intimidation of union organizers), and it should have recognized that circumstances of that kind obtained in Cairo, Illinois (*O'Shea*) and Philadelphia, Pennsylvania (*Rizzo*). When the Justices relied on "principles of federalism" to shirk federal responsibility, they breached the very promise made in *Younger*—that the federal courts will not accord "blind deference" to the states, but will examine rigorously the particular federalism values at stake in a case and key the exercise of federal judical power accordingly. *Younger*, 401 U.S. at 44. See also Michelman, States' Rights and States' Roles: Permutations of "Sovereignty" in *National League of Cities v. Usery*, 86 Yale L.J. 1165, 1183 n.59, 1193-94 (1977); Weinberg, supra note 193, at 1222-27 (1977) (insisting that the decree set aside in *Rizzo* did not threaten effective law enforcement and that the Court actually disregarded the *federal* interest in the enforcement of *federal* law). I mean only that judicial recognition of the libertarian purpose of lodging responsibility for the substantive criminal law at the local level is surely welcome. The difficulty is that it is often voiced in grandly inappropriate circumstances. See, e.g., *Allee*, 416 U.S. at 836 (Burger, C.J., concurring and dissenting) (insisting that state law enforcement officers must have "broad discretion" and that state courts must be permitted to interpret state law and superintend state prosecutions initiated under that law). Of course, the transcendent difficulty in *Rizzo*, *O'Shea*, and *Allee* is the need for class-based, prospective relief in the criminal context.

[199] 401 U.S. at 43-44.

little assistance in resolving the choice-of-forum problem presented in *Younger* cases. Just as the "custody" doctrine in habeas fails adequately to explain relitigation of claims in *federal* court, the factors counseling "equitable restraint" fail to explain the circumstances in which *federal* relief should be available prior to judgment in state court.[200] The forum-allocation question should turn not on historical doctrines refurbished for new functions, but on a reasoned determination of whether and when the federal courts should be open to resolve litigants' disputes with state authorities.

More recent decisions seem to recognize this point. The Justices have abandoned the language of equity jurisprudence in explaining their hesitancy to allow early federal intervention and have substituted more general references to federalism and comity.[201] The Court's separation of the doctrine of restraint from equity generally should be applauded.[202] In abandoning reliance on equitable doctrines, however, the Court has ceased to limit *Younger* to criminal proceedings, as if it were only the equitable rule against enjoining criminal proceedings that linked *Younger* restraint to criminal cases in the first instance. The Court now seems committed to federal restraint in noncriminal cases in which state officers initiate litigation in state court to further important state policies.[203] In those cases, however, relitigation in habeas is unavailable. For even as they have discarded reliance on maxims of equity and, in that way, have justified extending *Younger* to civil actions, the Justices have seized upon

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[200] Professor Fiss has developed the point. Fiss, supra note 72, at 1107. See also Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 120-21 & n.4 (1981) (Brennan, J., concurring) (doubting the advisability of permitting equitable considerations to make the forum allocation choice between final adjudication in the state or federal courts).

[201] In Huffman v. Pursue, Ltd., 420 U.S. 592, 600-01 (1975), for example, the Court acknowledged *Younger*'s reliance on equitable restraint, but then concentrated attention on comity—also mentioned in *Younger* and, indeed, identified by Justice Black as a consideration "even more vital" than the equity rule barring injunctions against criminal proceedings. *Younger*, 401 U.S. at 44. Justice Rehnquist's opinion for the Court in *Huffman* further proposed that *Younger* had been "based" on "comity and federalism." 420 U.S. at 602. That shift was necessary in order to extend *Younger* beyond the criminal context to state proceedings which are at best only "in aid of" state criminal policies. Id. at 604.

[202] I do not mean to contradict Professors Soifer and Macgill, who complain that the Court's turn to comity and federalism and away from *Younger*'s roots in equity has unleashed "Our Federalism" to frustrate federal litigation in a wide range of cases. Soifer & Macgill, The *Younger* Doctrine: Reconstructing Reconstruction, 55 Tex. L. Rev. 1141, 1185 (1977). The impact of the *Younger* idea might have been diminished if it had been restricted to criminal cases by reference to the traditional rule in equity. Yet such an explanation for *Younger* would have been indefensible. There is no principled basis for asking the rules of equity to orchestrate the distribution of judicial business between the federal and state courts. Fiss, supra note 72, at 1107.

[203] See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (attorney discipline); Trainor v. Hernandez, 431 U.S. 434 (1977) (civil fraud); Juidice v. Vail, 430 U.S. 327 (1977) (contempt).

another kind of formalism, the "custody" doctrine, to restrict habeas to the criminal context.[204] In this, "custody" does double duty—explaining and justifying an opportunity for relitigation in *some* instances, but, at the same time, limiting drastically the occasions on which relitigation will actually be permitted. The result is that in a large body of cases federal adjudication of federal claims is foreclosed both early and late.

The Court's reasoning is flawed. The reference in *Younger* to the rule against enjoining criminal proceedings was in essence only an attempt to articulate a broad preference for state court enforcement of the substantive criminal law. There are reasons for declining to interfere with state criminal proceedings that have nothing to do with chancery's traditional refusal to enjoin criminal prosecutions. They are the same reasons it is inappropriate to permit state criminal defendants to remove their prosecutions to federal court for trial.[205] Because civil actions are not accompanied by the threat to liberty posed by centralized control of the criminal law, however, the reasons for exercising restraint do not apply to them. In *Younger*, itself a criminal case, the Court drew the right distinction for the wrong reasons. It only compounds error now to disregard the important differences between criminal and civil cases merely because it appears, on reflection, that the Court's original basis for distinguishing the two was unsound.

The error is not yet at an end. The extension of federal restraint to the civil context contemplates that collateral review in habeas will not be available and, accordingly, that federal adjudication apart from direct review in the Supreme Court may be foreclosed entirely. Having taken this ground, the Court has evidently found it a short next step to deploy the process model in justification of its decisions. The Justices have said on several occasions that restraint should be exercised if state court proceedings offer would-be federal litigants a fair opportunity to litigate federal claims.[206] This means in effect that, whenever possible, the Court

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[204] See text accompanying notes 24-31 supra.

[205] See text accompanying notes 170-94 supra.

[206] See, e.g., Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975) (finding injunctive relief appropriate because the federal plaintiffs would not be able to raise their federal claim at their upcoming trials). Justice Stevens has argued repeatedly, but unsuccessfully, that federal restraint is inappropriate in any case in which the federal plaintiff challenges the federal validity of the very state procedure that she would be forced to employ should *Younger* be invoked. See, e.g., Trainor v. Hernandez, 431 U.S. 434, 469 (1977) (dissenting opinion); Juidice v. Vail, 430 U.S. 327, 340-41 (1977) (concurring opinion). That approach coincides with the arguments made by Professor Bator in the habeas context. See Bator, supra note 78, at 455-59. The Court's majority, however, has preferred to resolve doubts in favor of federal restraint. See Moore v. Sims, 442 U.S. 415, 426 n.10 (1979) (rejecting the contention that "a constitutional attack on state procedures automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases"). In *Trainor*, however, the Court summarily affirmed when, on remand, the court below explicitly held that state law precluded the federal claim the plain-

will redirect litigants with federal claims to state court rather than allowing them to proceed in federal court.[207] It has, indeed, become commonplace for the Court to drive litigants with federal claims into state court until a judgment has been rendered that is entitled to preclusive effect.[208] The application of the process model in this context was admit-

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tiff wished to raise. Hernandez v. Finley, 471 F. Supp. 516, 520 (N.D. Ill. 1978), aff'd sub nom. Quern v. Hernandez, 440 U.S. 951 (1979).

[207] The *Younger* cases are, perhaps, the best illustrations, but the Court's various abstention decisions also make the point. See, e.g., Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). See generally Field, Abstention in Constitutional Cases: The Scope of the *Pullman* Abstention Doctrine, 122 U. Pa. L. Rev. 1071 (1974); Field, The Abstention Doctrine Today, 125 U. Pa. L. Rev. 590 (1977).

[208] This purpose is accomplished by the combination of three recent decisions. In Hicks v. Miranda, 422 U.S. 332 (1975), the Court held that a federal district court should have invoked *Younger* when state authorities instituted state enforcement proceedings *after* a federal plaintiff had filed a complaint but before any proceedings of substance had taken place in federal court. In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the Court held that state proceedings are still pending for *Younger* purposes through the appellate stages. And in Allen v. McCurry, 449 U.S. 90 (1980), the Court held that issues actually litigated in state court will be subject to ordinary collateral estoppel rules should a disappointed litigant seek collateral review in subsequent federal proceedings. Other observers have noted the combined effect of *Hicks* and *Huffman* in excluding litigants from federal court. See Society of American Law Teachers, Supreme Court Denial of Citizen Access to Federal Courts to Challenge Unconstitutional or Other Unlawful Actions: The Record of the Burger Court (1976); Soifer & Macgill, supra note 202; Bartels, supra note 168, at 29-30. With the addition of *Allen*, the exclusionary effect truly becomes final.

The Court's curious resurrection of the eleventh amendment promises similar preclusive results. In the wake of Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), unless the eleventh amendment is waived or otherwise avoided, the federal district courts lack power to entertain state law claims against state officers. A litigant that has both state and federal claims presumably may file lawsuits in state and federal court simultaneously. The federal court, then, can adjudicate the federal claim, while the state court treats the state law claim. This course is, however, both burdensome and dangerous, for under Government & Civic Employees Org. Comm. v. Windsor, 353 U.S. 364, 366 (1957), it seems the litigant must present the state court with the federal claim as well, in order to permit that court to appraise the state claim in a federal light. When a litigant is forced in an abstention case to submit federal claims to a state court, the litigant is permitted to preserve her entitlement to return to federal court with the federal claim. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). It is unclear, however, whether the same opportunity to preserve federal claims would be respected in the *Younger* context. See Board of Regents of Univ. of New York v. Tomanio, 446 U.S. 478, 496-97 (1980) (Brennan, J., dissenting) (arguing that an express reservation should be effective in similar circumstances). If it is not, and the state court purports to decide the federal issue before the federal court acts, the state court judgment may be given preclusive effect. The likelihood that the state court might reach a conclusion first would be enhanced, of course, if the federal court were to stay its own proceedings in deference to parallel litigation in state court. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817-20 (1976) (finding dismissal by a federal court in light of state court proceedings appropriate). Preclusion ordinarily *would* be the result if the litigant were to sue only in state court on the state law claim, withholding the federal claim in hopes of raising it later in an independent federal lawsuit, and the federal court determined that the federal claim would be precluded in subsequent proceedings in state court. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) (decided with *Pennhurst*). But see Marrese v. American

tedly prefigured by language in the original *Younger* opinion. While declaring that federal injunctions against state proceedings are usually improper, Justice Black recognized that federal courts may relent upon a showing of "bad faith and harassment" or other "extraordinary circumstances."[209] This language can be assimilated into the process model conception that the federal forum should be open if there is a breakdown in state judicial machinery.[210] It is not surprising that the Court should establish exceptions to its policy against early federal intervention or that it should recruit the process model to emphasize the point that, there being good reasons to leave the criminal law to the states, any reasons offered for interfering with state processes at mid-stream ought also be good.[211] The criminal defendant in *Younger*, however, would have his

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Academy of Orthopaedic Surgeons, 105 S.Ct. 1327, 1335 (1985)(recognizing that there will be exceptions in some instances).

[209] *Younger*, 401 U.S. at 53.

[210] In Kugler v. Helfant, 421 U.S. 117 (1975), the Court said that a "bad faith" prosecution is one brought "without a reasonable expectation of obtaining a valid conviction." Id. at 126 n.6. If that is the case, then Professor Fiss is probably correct in collapsing the "bad faith" test into concerns regarding the opportunity afforded litigants to litigate federal claims in state court. If state proceedings are initiated for purposes other than to obtain a valid judgment, it cannot be expected they will offer an adequate opportunity for the adjudication of federal claims. Fiss, supra note 72, 1114-15. But see Sedler, Dombrowski in the Wake of Younger: The View From Without and Within, 1972 Wis. L. Rev. 1, 29-40 (arguing that federal courts since *Younger* have granted injunctive relief in cases of obvious bad faith prosecution). Some cases have suggested that "bad faith" and "harassment" are distinct justifications for federal intervention. These two concepts were stated in the disjunctive in *Huffman*, 420 U.S. at 611. In *Moore*, 442 U.S. at 432, the Court addressed "harassment" separately, but with extraordinary dispatch. Still, Fiss's view is more plausible. A prosecution is pursued in "bad faith" when there is no anticipation of a valid conviction and the only true purpose is to "harass" the defendant. Fiss, supra note 72, at 1115 n.34. See also Perez v. Ledesma, 401 U.S. 82, 97 (1971) (Brennan, J., concurring) (referring to "bad-faith harassment"). Compare Fiss, supra note 72, at 1118 (finding it unlikely that one should be found without the other) with M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 304 n.98 (1980) (suggesting that "harassment" may contemplate multiple proceedings and positing a case in which a single prosecution is initiated in "bad faith").

Justice Black gave only one illustration of "any other unusual circumstance" in *Younger*—prosecution under a " 'flagrantly and patently' " invalid statute. 401 U.S. at 53 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)). Since then, however, the Court has found no statute to be *that* troubling, and, indeed, apparently has merged this single illustration of "extraordinary circumstances" into the question of whether state proceedings offer a fair opportunity to litigate a federal claim. See *Kugler*, 421 U.S. at 126 n.6 (noting that the "gravamen" of the plaintiff's complaint was that "it [was] impossible for him to receive a fair hearing in the state-court system" where the "extraordinary circumstances" allegation was that members of the state supreme court had coerced the plaintiff into giving grand jury testimony leading to the prosecution sought to be enjoined).

[211] I do not argue that when the exceptions recognized in *Younger* are met, state criminal defendants should still be required to stand trial in state court before being entitled to the federal forum. That much concession to the process model is tolerable, even essential, and in any event inconsequential. The exceptions to the general rule against early federal interference are so narrow that they will admit only a trivial number of cases into federal court for original adjudication. The reason is plain enough. To conclude that early federal intervention is avail-

day in federal court later in habeas. Justice Black invoked the process model not to foreclose federal examination of federal claims entirely, but rather simply to postpone federal adjudication to an appropriate time. More recently, the Court has not confined the process model to cases in which habeas will be available. Thus a rule of timing has been transformed into a rule of preclusion.[212]

The Court's stated reason for limiting the availability of the federal courts is concern both for the retention of state control of substantive criminal law and for the maintenance of state autonomy.[213] The Court worries that by recognizing any preference for federal adjudication of federal claims, it might deny state legislatures and state courts the respect to which they are entitled in the federal system. Accordingly, the Court lurches to the other extreme and proposes actually to prefer the state courts. This is sloppy thinking. It comes too late, it ignores too much, and it rests upon a blind faith in decentralization untroubled by rigorous inquiry into underlying values. In Justice Rehnquist's hands,[214]

able is to decide that pending state proceedings accord no fair opportunity to litigate federal claims. Such a determination impugns the motives and capacities of the state officials concerned, including state judges. See Maraist, Federal Injunctive Relief Against State Court Proceedings: The Significance of *Dombrowski*, 48 Tex. L. Rev. 535, 587 (1970); cf. Steffel v. Thompson, 415 U.S. 452, 462 (1974) (insisting that the same negative reflection on the state courts is not implicated when a federal court awards declaratory relief in the absence of pending state proceedings). Even when litigants cannot meet the stringent requirements for early federal involvement and are thus forced to litigate in state court in the first instance, they should not be condemned by the same process model to accept the resulting state court judgment or to seek federal review of it only in the Supreme Court. The process model may determine the timing of federal adjudication. It may screen the wealth of criminal prosecutions begun in state court for the comparatively rare cases in which federal adjudication should not await judgment. It cannot operate to foreclose federal review in the lower courts altogether. Of course, when an injunction against pending proceedings is properly issued, or when removal for trial is properly accomplished, disappointed litigants cannot later claim an entitlement to relitigation in habeas on the ground that they have a right to federal review. Federal adjudication having been made available initially, any right to postconviction consideration must rest on other bases. See note 2 supra.

212 The explanation for recent decisions is not merely analytic confusion or even the Court's failure to appreciate the reasons for limiting restraint to state criminal cases. The litigant in *Huffman*, 420 U.S. 592, a civil case, argued explicitly that *Younger* should not control because habeas review would not be available after judgment. Writing for the Court, Justice Rehnquist recognized the argument and rejected it. Id. at 605-07. The Court, it appears, has reexamined threshold arguments regarding the proper distribution of judicial business in the United States, has concluded, at least in the *Younger* context, that federal and state courts are fungible for purposes of adjudicating federal issues, and has placed decision-making authority with the state courts. To reach this conclusion, a majority of the Justices must not only reject arguments favoring the right to adjudicate federal claims in a federal forum, but must also disregard the clear implications of current jurisdictional statutes and turn an astonishing about-face on previous judicial statements. See text accompanying notes 131-65 supra.

213 See, e.g., Juidice v. Vail, 430 U.S. 327, 334 (1977); *Huffman*, 420 U.S. at 601.

214 See Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293, 317 (1976).

and all too often in the hands of other Justices,[215] federalism is a code word for routine and undifferentiated deference to the states and the state courts in virtually any context. This understanding of federalism neglects the genuine meaning that decentralization has in criminal cases, substituting labels for analysis. Things can be set right only if it is once agreed that collateral rather than original federal adjudication is appropriate in criminal cases in light of the special, libertarian reasons for assigning responsibility for the making and enforcement of criminal law to the states. *Younger* itself can be accommodated. What *Younger* has become cannot.

B. Preclusion

If relitigation in habeas demands special justification, it seems self-evident that collateral review should not ordinarily be available apart from habeas. All the evidence is not in, but this appears to be the present state of the law.[216] Cases in which prior judgments rendered by the state courts are denied preclusive effect in later federal litigation are and should be rare. Here, as in the *Younger* context, exceptions are identified according to the process model. Just as *Younger* restraint is unwarranted where state court proceedings do not offer a fair opportunity to litigate federal claims, preclusion rules should not bar the relitigation in federal court of claims and issues that litigants had no fair opportunity to pursue in state proceedings.[217] Otherwise, state court judgments, even regarding

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[215] Chief Justice Burger wrote for the Court in the most extreme exercise of *Younger* restraint to date. See Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982); see also Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1033 (1985) (O'Connor, J., dissenting) (complaining in a tenth amendment context that the Court had surveyed "the battle scene of federalism" and sounded a "retreat"); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (Powell, J.) (relying upon the "principles of federalism that inform Eleventh Amendment doctrine") (quoting Hutto v. Finney, 437 U.S. 678, 691 (1978)).

[216] The Court has held that 42 U.S.C. § 1983 is not a statutory exception to 28 U.S.C. § 1738 or ordinary federal preclusion rules. See note 50 supra. In Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984), however, the Court explicitly declined to address the question of whether § 1738 controls cases in which the would-be federal litigant was not the moving party in state court. Id. at 85 n.7. Some observers have argued that relitigation should be permitted in such cases. See, e.g., Averitt, Federal Section 1983 Actions After State Court Judgment, 44 U. Colo. L. Rev. 191, 195-96 (1972); Theis, supra note 50, at 868. But see Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317 (1978).

[217] Some Justices insist that federal preclusion rules take into account more than the question whether a litigant was accorded a "full and fair opportunity" to litigate a federal claim in prior proceedings. See Haring v. Prosise, 462 U.S. 306, 313 n.7. (1983) (Marshall, J.) (reaffirming various "conditions" that must be satisfied before state determinations can be given preclusive effect); Allen v. McCurry, 449 U.S. 90, 112-13 (1980) (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.) (arguing that the majority's discussion of preclusion had failed to mention all the exceptions established by the Court's precedents). Other Justices contend that the federal courts could constitutionally apply federal judge-made rules to pre-

federal issues, are entitled to respect.

Use of the process model in this context does not conflict with the view that litigants are entitled to litigate federal claims in a federal forum. If litigants with federal claims choose the federal forum initially, they have the benefit of original federal adjudication. If, however, they choose to litigate federal claims in state rather than in federal court, then they must live with their choice.[218] State court judgments regarding fed-

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clude relitigation in cases in which litigants would not be precluded under relevant state rules. See, e.g., Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 88 (1984) (White, J., concurring, joined by Burger, C.J. and Powell, J.). The latter argument appears thwarted, however, by the federal "full faith and credit" statute, 28 U.S.C. § 1738 (1982), which instructs the federal courts to give prior state judgments the "same" effect they would be accorded in the courts of that state. See Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich. L. Rev. 1723, 1738-39 (1968) (pointing out that the prior litigation in state court presumably was undertaken with the expectation that the forum state's preclusion policies would control in any subsequent lawsuit). For a discussion of the interplay between preclusion and § 1738, see generally Atwood, State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit, 58 Ind. L.J. 59 (1982); Degnan, Federalized Res Judicata, 85 Yale L.J. 741 (1976).

When the question is the effect to be given one federal court's judgment by another federal court in a later adjudication, the Supreme Court apparently feels free to fashion a federal common law of preclusion. See, e.g., Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). The Court is ambivalent, however, about the federal effect to be accorded prior state court judgments. In some cases, the Court has treated the problem as one of preclusion and therefore subject to the same federal common law analysis established in cases wholly within the federal system. See, e.g., Brown v. Felsen, 442 U.S. 127 (1979); Montana v. United States, 440 U.S. 147 (1979). In other cases, the Court has invoked § 1738, limiting discussion to applicable state precedents as though they alone control. See, e.g., Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985); *Migra*, 465 U.S. at 85; Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982). The Court has held, however, that § 1738, too, admits of an exception if the state courts fail to provide a "full and fair opportunity" to litigate federal claims. See, e.g., *Haring*, 462 U.S. at 313; *Allen*, 449 U.S. at 101.

The Court has offered clear guidance regarding the meaning of such an "opportunity" only in cases subject to § 1738, in which "state proceedings need do no more than satisfy the minimal procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. This constitutional test is consistent with Bator's process model framework for habeas. See note 110 supra. All told, the Court has been slow to set down clear standards in this field—and properly so, given the many variables that may be taken into account in appraising the effect that should be accorded prior state proceedings. See Castorr v. Brundage, 459 U.S. 928, 929-30 (1982) (opinion of Stevens, J., respecting denial of certiorari).

[218] This assumes, of course, the change in removal jurisdiction treated earlier. See text accompanying notes 166-69 supra. It is admittedly painful to deny access to the federal forum to a litigant who in fact pursued relief in state court, but failed to recognize the significance of that action. In blunt language, the question is whether litigants should *forfeit* the opportunity to litigate in federal court simply because they failed to insist upon it seasonably, or whether we should look closer, examine the surrounding circumstances, and foreclose relitigation only if the litigant understood her options, genuinely chose the state forum, and thus *waived* her right to invoke federal jurisdiction. The problems attending procedural default command their own rich literature. See text accompanying notes 263-81 infra. Let me only say that I am less concerned in this context than in others that litigants might be bound not only by the strategic

eral claims are subject to direct review in the Supreme Court, and there is no reason to accord litigants who voluntarily give up their right to litigate initially in federal court the possibility of collateral review—absent a showing of flawed state process that frustrated treatment of their federal claims.

C. *Ramifications for Habeas*

My purpose here has been to explain habeas corpus, not to advocate significant changes in current doctrines and practices attending the writ. Except for those aspects of current habeas practice that employ a process model, my explanation for habeas is entirely consistent with existing law. Accordingly, federal district courts should continue to adjudicate habeas petitions, and their power should remain plenary—allowing for full relitigation of factual and legal issues. The "fundamental" nature of federal claims, the apparent relationship of claims to "factual guilt," and the "retroactivity problem" should have no bearing on petitioners' ability to litigate federal claims in a federal district court.[219]

The availability of collateral review in habeas cannot, however, be explained by reference to the "custody" doctrine. The historical relationship between the writ and detention has no bearing on the question of whether there should be relitigation in federal court. Although there may be rhetorical value in associating the adjudication of fourteenth amendment claims with the grand tradition of the Great Writ of Liberty, neither the availability nor the timing of federal adjudication can rightly turn on the label attached to the proceedings. Rather, habeas must be explained by reference to normative decisions about the role of the federal courts. Specifically, collateral review in habeas is explained by the underlying reasons for making federal adjudication available to state criminal defendants and for deferring federal adjudication until after state court proceedings have been concluded.[220] The "custody" requirement, as now understood and applied, is inconsistent with the fundamental purpose of habeas, which is to assure access to the federal forum for state criminal defendants raising federal claims. In order to conform current practice to the postconviction writ's reason for being, either the

choices, but also by the negligent blunders, of counsel. See, e.g., Board of Regents of Univ. of New York v. Tomanio, 446 U.S. 478, 496-97 (1980) (Brennan, J., dissenting) (noting the problem and suggesting that litigants be asked to state their intentions unequivocally). Cf. City of Columbus v. Leonard, 443 U.S. 905, 907-09 (1979) (insisting that litigants cannot avoid *Younger* by failing to comply with state procedural rules and in that way terminating state proceedings before appellate judgment) (Rehnquist, J., dissenting from denial of certiorari); Huffman v. Pursue, Ltd., 420 U.S. 592, 611 n.22 (1975) (same).

219 See text accompanying notes 96-103 supra.

220 But see Jones v. Cunningham, 371 U.S. 236, 243 (1963), quoted in note 36 supra.

definition of "custody" should be diluted still further,[221] or, if that is intolerably duplicitous, the requirement should be deleted from section 2241. Thus, for example, petitioners who have been unconditionally discharged from prior detention or who were only fined as punishment after criminal conviction should be able to seek federal relitigation.[222] They, too, were denied an opportunity to choose the federal forum originally by way of removal and, accordingly, they should be entitled to apply to the federal courts collaterally. The "custody" doctrine need no longer carry any justificatory weight in this respect.

What I have said entails no change in the exhaustion doctrine, which requires habeas applicants to pursue fully their federal claims in the state courts before seeking federal relief.[223] Properly conceived, exhaustion determines only the timing of a habeas petition; it has nothing to do with the federal courts' subject matter jurisdiction.[224] Indeed, my alternative explanation for postconviction habeas essentially collapses into the exhaustion doctrine. The decision to open the federal courts to habeas claims is made independently. To say in addition that federal adjudication should be postponed to allow the state courts an opportunity to correct their own mistakes of federal law is to contemplate that would-be petitioners for federal relief will first raise their federal defenses in state court. That, of course, is consistent with the view that the federal courts should not interfere with state criminal proceedings early on.[225]

It would be possible to permit litigants to raise only state law defenses in state court and to hold any federal claims they may have in reserve for authoritative treatment in federal habeas. Yet that course would needlessly discredit the state courts' ability and willingness to participate in the making and enforcement of federal law. In any event, rational litigants would rarely adopt such a strategy. Safe in the knowledge that federal courts are available to reconsider federal issues treated in state court, litigants now have, and would have under the regime I envision, powerful incentives to raise and litigate their federal claims vig-

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221 See text accompanying notes 32-43 supra.

222 See text accompanying notes 27-31 supra. If our Kansas prisoner wishes to attack a yet-to-be-served sentence in Missouri, a habeas petition should be entertained even in the absence of a "detainer." See note 42 supra.

223 28 U.S.C. § 2254(b)-(c) (1977).

224 See Ex parte Royall, 117 U.S. 241 (1886) (affirming a district court's exercise of discretion in dismissing a petition filed by a prisoner held in custody while awaiting trial, but recognizing that the court had jurisdiction to grant the writ and that its refusal to do so did not prejudice petitioner's right to renew the application later). I have worried in print that the Court's recent decisions have given the exhaustion doctrine an improper jurisdictional flavor. See Yackle, The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles, 44 Ohio St. L.J. 393 (1983). But see Strickland v. Washington, 466 U.S. 668, 684 (1984) (reaffirming the nonjurisdictional character of the exhaustion doctrine).

225 See notes 172-94 and accompanying text supra.

orously in state court. At best, the state courts, perhaps with a glance over the shoulder at the federal habeas courts waiting in the wings, may award relief when it is warranted—making it unnecessary even to petition the federal habeas courts for relitigation.[226] At worst, the federal courts will be available to correct any errors of federal law made by the state courts that first treat federal claims. If, moreover, the legitimacy of habeas were accepted without apology to the state courts, whose judgments are *not* in any realistic sense considered final, it would make sense for the federal courts to be more flexible than they are now in the enforcement of the exhaustion doctrine. The habeas courts should conserve the effort they now squander on the threshold question whether further resort to the state courts should be required and focus attention more readily on the merits of claims for which they have primary responsibility.[227]

My explanation for postconviction habeas is less easily reconciled with existing law in three instances in which the process model appears to have been incorporated into habeas jurisprudence. These are, first, federal factfinding in the wake of state court determinations of the same factual issues; second, the treatment of fourth amendment exclusionary rule claims in habeas; and, third, the federal effect given litigants' procedural defaults in state court.

1. Federal Factfinding

Chief Justice Warren said in *Townsend v. Sain*[228] that a federal evidentiary hearing regarding disputed primary facts is mandatory in habeas if the applicant was denied a "full and fair" hearing in state court.[229] That was not to limit evidentiary hearings in habeas to instances in which there was some flaw in state process; it was clear that there is always power to hold an evidentiary hearing at the habeas court's

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[226] The Supreme Court ushered the lower federal courts into service in habeas to establish the *threat* of federal override and thereby to encourage the state courts to treat federal issues with care. Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting).

[227] At the moment, the Court's exhaustion doctrine decisions are very strict. See, e.g., Anderson v. Harless, 459 U.S. 4 (1982) (per curiam) (reversing a circuit decision that had concluded that the doctrine was satisfied); Rose v. Lundy, 455 U.S. 509 (1982) (instructing habeas courts to dismiss *all* claims in a single petition if state remedies have not been exhausted with respect to *any*); Duckworth v. Serrano, 454 U.S. 1 (1981) (per curiam) (insisting upon exhaustion even when the petitioner was clearly entitled to relief on the merits). Justice Stevens has lamented that "[f]ew issues consume as much of the scarce time of federal judges as the question whether a state prisoner adequately exhausted his state remedies before filing a petition for a federal writ of habeas corpus." Anderson v. Harless, 459 U.S. 4, 8 (1982) (dissenting opinion).

[228] 372 U.S. 293 (1963).

[229] Id. at 312.

discretion.[230] Nevertheless, Warren made use of the process model to distinguish cases in which a federal hearing must be held from those in which it is permissible to rely upon hearings conducted in state court. A more recent statute, building upon *Townsend*, attaches another process-oriented layer to the factfinding structure in habeas. Assuming that a federal evidentiary hearing is held, section 2254(d)[231] requires the federal district court to presume the accuracy of factual findings made by state courts of competent jurisdiction, provided that the record of the state proceedings can satisfy various tests for procedural regularity.[232] An applicant can rebut the presumption only by producing "convincing" evidence that the state courts were in error. Section 2254(d) thus applies the process model in cases not addressed in *Townsend*, limiting federal court discretion to make independent findings unless there was some breakdown in state factfinding machinery.[233]

The process model properly plays no role in habeas courts' factfinding function, especially given the importance of factfinding with respect to federal claims.[234] *Townsend* was in error to allow federal habeas courts to rely upon the work of the state courts for vitally significant elements of their jurisdiction. Because habeas constitutes the petitioner's long-postponed opportunity to litigate a federal claim in federal court, it is entirely reasonable that the federal adjudication now made available should be independent of the state adjudication that preceded it. If habeas courts rely upon state determination of facts that may have a bearing on ultimate conclusions of law, criminal defendants who were initially denied access to a federal forum will never enjoy the full measure of federal adjudication that the writ ostensibly promises. Yet it is late in the day to insist that the federal courts can never make use of state factfinding, but rather must relitigate all questions of fact.[235] The error in *Townsend* may not, in the end, require explicit disapproval of that case. *Townsend* focused upon the value, and even the necessity, of federal factfinding in most habeas cases. It is thus sufficient if the federal

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230 Id. at 318.

231 28 U.S.C. § 2254(d) (1977). See note 17 supra.

232 These tests track roughly the more elaborate definition of a "full and fair" hearing provided in *Townsend*, 372 U.S. at 313-18.

233 I have said elsewhere that if a state court finding is once presumed correct under the statute and the petitioner is invited to rebut that presumption with "convincing" evidence showing the finding to be erroneous, "[t]he matter shifts . . . from a structural appraisal of the state fact-finding procedure to a substantive review of the results reached, as to evidentiary facts, in state court." L. Yackle, supra note 23, § 134, at 508.

234 See text accompanying notes 146-47 supra.

235 See generally Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 75 Yale L.J. 895 (1966).

habeas courts keep that emphasis in mind as they invoke *Townsend* in deciding whether to hold a federal evidentiary hearing.

Recent cases applying the "presumption of correctness" in section 2254(d) underscore this point. It is accepted as a matter of statutory construction that the presumption works only in favor of state determinations of primary, basic, evidentiary, historical facts and has nothing to do with legal issues or "mixed" questions of law and fact.[236] In *Brown v. Allen*, Justice Frankfurter defined "basic," or "primary" facts as facts "in the sense of a recital of external events and the credibility of their narrators";[237] in *Townsend*, Chief Justice Warren explained that "mixed" questions "require the application of a legal standard to . . . historical-fact determinations."[238] The Court's recent cases, however, are not true to that distinction, albeit there may be close cases to be placed on one side of the line or the other.[239] The Justices have properly held that the "voluntariness" of a defendant's confession[240] and the effectiveness of counsel[241] are "mixed" issues not covered by the statute. Yet they have concluded that the "partiality"[242] or "bias"[243] of jurors, and have implied that the "competency" of prisoners to stand trial,[244] are questions of primary fact to which the statutory presumption applies. Small wonder, with these cases for guidance, that the lower courts are in "disarray"[245] over the application of section 2254(d).[246] The expansion of the category of questions characterized as issues of primary fact, and thus

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236 See, e.g., Wainwright v. Witt, 105 S. Ct. 844, 854 n.8 (1985) (citing Cuyler v. Sullivan, 446 U.S. 335, 342 (1980)); see also Sumner v. Mata, 455 U.S. 591, 597 (1982) (per curiam) (acknowledging that the "constitutionality of the pretrial identification procedures used in this case is a mixed question of law and fact that is not governed by § 2254(d)") (footnote omitted).

237 344 U.S. 433, 506 (1953) (Frankfurter, J., concurring).

238 372 U.S. at 309 n.6.

239 See, e.g., *Wainwright*, 105 S. Ct. at 855 (explaining that "[i]t will not always be easy to separate questions of 'fact' from 'mixed questions of law and fact' ") (citation omitted).

240 Miller v. Fenton, 106 S. Ct. 445 (1985).

241 Cuyler v. Sullivan, 446 U.S. 335, 342 (1980) (holding that the existence of a conflict of interest resulting from multiple representation is a "mixed" question).

242 See Patton v. Yount, 104 S. Ct. 2885, 2891 (1984); see also Rushen v. Spain, 464 U.S. 114, 120 (1983) (per curiam) (holding that the effect of ex parte communications on juror impartiality is a question of historical fact). But see Smith v. Phillips, 455 U.S. 209, 222 n.* (1982) (O'Connor, J., concurring) (stating that, in "exceptional situations" in which the impartiality of a juror is in doubt, a federal court may find bias "implied" and "need not be deterred by [§ 2254(d)]").

243 See *Wainwright*, 105 S. Ct. at 855.

244 See Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam). But see Drope v. Missouri, 420 U.S. 162, 174-75 & n.10 (1975).

245 Texas v. Mead, 104 S. Ct. 1318, 1322 (1984) (Rehnquist, J., dissenting from denial of certiorari).

246 The Third Circuit has concluded that recent Supreme Court cases can only be understood to say (in actions louder than words) that § 2254 *does* apply to state determinations of "mixed" questions. Patterson v. Cuyler, 729 F.2d 925, 931-32 (3d Cir. 1984).

subject to a presumption of correctness, threatens the core idea in habeas—that state court judgments regarding substantive federal claims are open for reexamination by the lower federal courts.[247] Section 2254(d) therefore should be confined to factual issues that cannot arguably be considered "mixed."

2. *The Exclusionary Rule*

The Court has also employed process model language in *Stone v. Powell*,[248] in which Justice Powell, writing for the Court, held that fourth amendment exclusionary rule claims would no longer be entertained in federal habeas unless the applicant was denied an "opportunity" for "full and fair litigation" in state court.[249] Several explanations have been offered for *Stone*.[250] There is reason to believe, for example, that the Court's primary emphasis was on the revision of the exclusionary rule and that the case had little to do with the scope of federal habeas.[251] *Stone* can plausibly be understood, however, to advocate application of the process model to habeas generally.[252]

Two observations are in order. First, it is dangerous to fasten upon the similarities between and among analytically related ideas at the expense of their apparently distinguishable descriptions and functions. It is not necessarily true that precisely the same ideas are reflected in the Court's references in *Younger* to "bad faith harassment" or "other extraordinary circumstances,"[253] in other *Younger* cases to the denial of an "opportunity" to litigate in state court,[254] in the preclusion cases to the absence of a "full and fair opportunity" to litigate,[255] in *Townsend* to the

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[247] See Rushen v. Spain, 464 U.S. 114, 142 n.22 (1983) (Marshall, J., dissenting) (making the point explicitly). The *Spain* case provides a good illustration. A per curiam opinion acknowledged that the "final decision" whether constitutional error was "harmless" is "one of federal law" not subject to § 2254(d). Id. at 120. Nevertheless, in the case at bar, the state court's determination that the jury's deliberations "as a whole, were not biased" *was* entitled to the presumption. Once that finding was given effect, in the absence of "convincing" evidence that it was erroneous, the habeas court below should have concluded that the alleged constitutional error was, indeed, harmless. The federal court was obliged to defer to a state finding of "fact" which, once accepted, virtually concluded the further, legal issue on which the habeas court was entitled to exercise independent judgment. Id.

[248] 428 U.S. 465 (1976).

[249] Id. at 494.

[250] See, e.g., Cover & Aleinikoff, supra note 67, at 1086-1100; Halpern, Federal Habeas Corpus and the *Mapp* Exclusionary Rule After *Stone v. Powell*, 82 Colum. L. Rev. 1 (1982); Robbins & Sanders, Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (Or More) with One *Stone*, 15 Am. Crim. L. Rev. 63 (1977); Seidman, supra note 101, at 449-59.

[251] See note 101 supra.

[252] See, e.g., Peller, supra note 84, at 594-602; Resnick, supra note 74, at 892-95.

[253] See text accompanying notes 209-11 supra.

[254] Id.

[255] See note 217 and accompanying text supra.

absence of state court litigation that was "full and fair,"[256] and in *Stone* to the denial of an "opportunity" for "full and fair litigation" of fourth amendment claims.[257] Even in the context of the exclusionary rule, the form the process model takes is unclear. Some lower courts have read *Stone* to be concerned only with the "opportunity" to litigate in state court rather than with actual litigation that was "full and fair."[258] Thus petitioners who fail to litigate exclusionary rule claims when given a chance to do so are foreclosed from raising those claims later in habeas.[259] Forfeiture under *Stone* occurs, accordingly, without regard to the ordinary rules in habeas for appraising the federal effect of procedural default in state court. If this is what *Stone* means, then it is not so closely related to versions of the process model in other contexts.[260]

The second observation about *Stone* and the process model is that the Court repeatedly has refused to extend the approach in *Stone* to other issues.[261] Accordingly, even if *Stone* established a beachhead for the pro-

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256 See text accompanying note 229 supra.

257 See text accompanying note 249 supra. It is not at all clear, for example, whether the "full and fair hearing" idea from *Townsend*, a case about factfinding in habeas, can be of help in determining whether the state courts accorded a litigant an "opportunity" for "full and fair litigation" of a substantive, fourth amendment claim within the meaning of *Stone*. In *Stone* itself, the Court used the introductory signal "cf." in referring to *Townsend*—suggesting that, at best, that case was only analogous. See 428 U.S. at 494 n.36; see also Halpern, supra note 250, at 14 n.94, 15-16 (arguing that the premises of *Townsend* and *Stone* are actually at odds). Lower courts have found it impossible to "borrow wholesale the *Townsend* formula for use in the *Stone* situation." O'Berry v. Wainwright, 546 F.2d 1204, 1212 (5th Cir.), cert. denied, 433 U.S. 911 (1977). See also Senate Comm. on the Judiciary, Reform of Federal Intervention in State Proceedings Act of 1983, S. Rep. No. 226, 98th Cong., 1st Sess. 24-26 (1983) (indicating that "full and fair" adjudication in state court within the meaning of the Reagan adminstration's current proposal to amend the habeus statutes contemplates a "reasonable" judgment on the merits).

258 E.g., Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980) (invoking *Stone* to foreclose federal habeas notwithstanding state court procedural error that thwarted presentation of the petitioner's exclusionary rule claim); see L. Yackle, supra note 23, at § 99 (collecting authorities).

259 See Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977) (en banc), cert. denied, 434 U.S. 1038 (1978).

260 See text accompanying notes 263-81 infra. There is another, competing view, which reads *Stone* as only an "issue preclusion" case, limited to fourth amendment exclusionary rule contentions. If, then, an exclusionary rule argument was presented to and decided by the state courts, it is precluded in federal habeas. If, however, the issue was not raised and adjudicated in state court, the ordinary rules for judging the federal effect of procedural default control. Dunn v. Rose, 504 F. Supp. 1333, 1335-39 (M.D. Tenn. 1981).

Meanwhile, the Supreme Court has confused the matter further by recalling *Stone* to have focused *not* upon an "opportunity" for "full and fair litigation," but upon a "full and fair opportunity" for litigation. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 82 n.5 (1984); Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977). The shift in language may have been simply mistaken, but it is curious that the same "mistake" should have been made twice.

261 The Justices passed over an opportunity to extend *Stone* to sixth amendment claims in Brewer v. Williams, 430 U.S. 387 (1977), and explicitly distinguished *Stone* in a grand jury

cess model in habeas, it appears that in nearly ten years the assault has not advanced beyond the shallows occupied by the fourth amendment exclusionary rule. This is not to suggest that *Stone* was correctly decided and now only wants for a better opinion in justification—one that does not depend upon the process model. The point is only that *Stone* itself constitutes slim evidence that the process model has any significant role to play in habeas generally.[262]

3. *State Court Procedural Default*

The third instance in which the process model has intruded into habeas is less apparent given the absence from the Court's opinions of language associated with that model. The Court held in *Fay v. Noia*[263] that postconviction habeas was not subject to the adequate state ground doctrine, which allows the Court itself to review questions of federal law decided in state court only when the decision below cannot rest on state grounds alone.[264] Would-be habeas applicants whose procedural defaults resulted in state court refusal to consider federal claims might nevertheless pursue those claims in federal habeas. At the same time, the Court said that habeas review could be denied to prisoners who "deliberately bypassed" state opportunities to litigate federal claims.[265] So long as the Court adhered to the *Noia* "deliberate bypass" rule, there was little similarity between its treatment of procedural default and the process model. Petitioners were not turned away from habeas unless they had personally participated in a deliberate strategy to circumvent the state courts. More recently, however, the Court has read the adequate state ground doctrine back into habeas, holding in *Wainwright v. Sykes*[266] that prisoners who would be denied direct review because of state procedural grounds of decision may be boxed out of federal habeas as well—unless they demonstrate "cause" for their defaults and "prejudice" flowing from the federal error that, because of default, went uncorrected in state court.[267] The

discrimination case, Rose v. Mitchell, 443 U.S. 545, 560-64 (1979). See also Estelle v. Smith, 451 U.S. 454 (1981) (entertaining fifth and sixth amendment claims in habeas); Jackson v. Virginia, 443 U.S. 307 (1979) (entertaining a due process claim); Arizona v. Washington, 434 U.S. 497 (1978) (considering a double jeopardy issue). Cf. Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977) (reserving the question whether *Miranda* claims are controlled by *Stone*).

262 See note 250 supra.

263 372 U.S. 391 (1963).

264 See, e.g., Herb v. Pitcairn, 324 U.S. 117 (1945); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); see also 28 U.S.C. § 1257 (1982).

265 *Noia*, 372 U.S. at 438.

266 433 U.S. 72 (1977).

267 Id. at 84, 90-91. For a more detailed discussion of *Sykes*, see L. Yackle, supra note 23, §§ 70-87. The extent to which *Sykes* has eclipsed *Noia* entirely is open. Compare Holcomb v. Murphy, 701 F.2d 1307, 1310 (10th Cir.) (insisting that the Supreme Court "knows how to overrule a case if it wishes to do so"), cert. denied, 463 U.S. 1211 (1983) with United States ex

result is that habeas applicants are routinely refused access to the federal forum for the litigation of federal issues that were not, but might have been, litigated in prior proceedings in state court.[268] The similarity of this state of affairs to familiar claim preclusion is plain enough.[269]

Here again, there is reason for pause. Writing for the Court in *Sykes*, Justice Rehnquist explicitly reaffirmed *Brown v. Allen*.[270] Notwithstanding their treatment of issues that *might have been* raised and determined in state court, the Justices remain committed to the relitigation of issues that *were* raised and determined there. In a reversal of the usual order, the Court apparently embraces something like claim preclusion in habeas even as it refuses to tolerate issue preclusion.[271] Even when a petitioner failed to litigate a federal contention in state court, however, *Sykes* does not automatically impose a forfeiture. Unlike the situation in *Stone*, in which fourth amendment exclusionary rule issues arguably may be foreclosed in habeas if there was any failure to take advantage of state court opportunities to litigate,[272] and unlike the situation in the ordinary preclusion cases, in which claims are cut off absolutely unless some flaw is identified in state court process,[273] federal issues can be entertained in federal habeas despite the petitioner's default in state court—if the applicant can demonstrate "cause" and "prejudice." It will be difficult to meet these standards.[274] Yet, the very possibility they represent (and the different language in which they are couched) suggests that they may fit the process model only roughly. In the end, it may be that the analysis in *Sykes* is related to the process model primarily with respect to its result (the foreclosure of federal

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rel. Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (concluding that "the rumors of *Fay*'s death are not greatly exaggerated"). Cf. Reed v. Ross, 104 S. Ct. 2901, 2907-08 (1984) (applying the *Sykes* doctrine but citing *Noia* with apparent approval).

[268] E.g., Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981) (indicating that procedural default due to ignorance or negligence may preclude federal habeas review). But see Carrier v. Hutto, 724 F.2d 396, 401 (4th Cir. 1983) (holding that "cause" should be found if defense counsel committed default out of ignorance or oversight), cert. granted sub nom. Sielaff v. Carrier, 105 S. Ct. 3523 (1985). See generally L. Yackle, supra note 23, § 86 (collecting cases on procedural default in the wake of *Sykes*).

[269] The Supreme Court has not yet decided whether federal issues that might have been raised *in defense* in state court will be precluded later in the federal forum. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 85 n.7 (1984).

[270] 433 U.S. at 87.

[271] In Allen v. McCurry, 449 U.S. 90 (1980), the Court decided that issue preclusion rules govern when prior proceedings were in state court, however, the Justices laid the more significant question of claim preclusion to one side. Id. at 94 n.5. The claim preclusion problem was resolved only later, in *Migra*, 465 U.S. 75 (invoking state claim preclusion rules).

[272] See text accompanying notes 258-60 supra.

[273] See text accompanying notes 216-18 supra.

[274] The feat has been accomplished. See, e.g., Reed v. Ross, 104 S. Ct. 2901, 2908-12 (1984).

claims not raised in prior proceedings) rather than the reasons for that result.

The Court's renewed insistence upon respect for state procedural rules, even when litigants stand to lose the opportunity to litigate federal issues in *any* court, reflects an exaggerated deference to the state courts. The Rehnquist opinion in *Sykes*, and more recent opinions by other Justices in cases in the *Sykes* line,[275] embrace a version of federalism already shown to have no basis.[276] If this undifferentiated deference to the state courts is stripped away, the only remaining justification for enforcing state forfeiture rules is concern that litigants have insufficient incentives to comply reasonably with the exhaustion doctrine and might, instead, "save" federal issues for initial treatment in habeas.[277] Yet the exhaustion doctrine itself credits the state courts with the capacity to treat federal issues with sensitivity. Moreover, as noted above, rational litigants would hardly find it *so* unlikely that they could obtain relief on the merits in state court that they would prefer to bypass those courts entirely and to seek only federal review.[278] The Court in *Noia* anticipated that most petitioners would find it to their advantage to give the state courts an opportunity to award relief. The "deliberate bypass" exception to the availability of federal habeas was narrow and, most likely, fashioned only to reassure those who feared that the Court's decision might encourage manipulative prisoners. Justice Brennan, writing for the Court, recognized that procedural defaults can validly cut off further state remedies and, in some instances, direct review in the Supreme Court.[279] He apparently concluded, however, that the threat of losing those opportunities for winning relief would discourage rational petitioners from failing to comply with state procedural requirements.[280]

If my alternative explanation for habeas were adopted, the federal habeas courts might well disregard procedural default in state court altogether and entertain federal claims even when petitioners "deliberately bypassed" state procedures. Positing that prior state court litigation is required primarily to maintain local control of the substantive criminal law, and given the incentives that litigants have to raise federal claims anyway, there is no reason why litigants' ultimate opportunity to pursue federal claims in the federal forum should be freighted with mechanisms

275 See, e.g., Engle v. Isaac, 456 U.S. 107 (1982) (O'Connor, J.).

276 See text accompanying note 178 supra.

277 See Wainwright v. Sykes, 433 U.S. 72, 89-90 (1977).

278 See text accompanying notes 226-27 supra.

279 Fay v. Noia, 372 U.S. 391, 438 (1963).

280 That Justice Brennan had deterrence in mind is abundantly clear from his language. E.g., id. at 439 ("At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner.").

for enforcing state procedural rules. Once again, the effort the habeas courts now waste in deciding whether to consider claims that were, or might have been, litigated in state court should better be spent on the merits of those claims.[281]

CONCLUSION

I hardly believe that the forces competing for dominance in American society can be yoked by structural arrangements alone. Devices that allocate authority and responsibility are blunt instruments of social order, which achieve only a provisional peace between and among power centers. Yet rough lines can and should be drawn in an effort to safeguard, however imperfectly, underlying values of transcendent importance. The framework I have suggested here is in this practical vein.

Presented with a system in which state and federal courts have concurrent jurisdiction in most federal question cases, in which the lower federal courts have no power to review state court judgments on appeal, and in which, accordingly, state court determinations are typically entitled to preclusive effect in later federal proceedings, I have attempted to explain the existence of federal habeas corpus for state prisoners—which seems, at first blush, to jar with much of the jurisdictional landscape in which the writ is situated. I have rejected the conventional view that postconviction litigation in habeas is justified by petitioners' interest in freedom from unlawful detention and have offered an alternative explanation, which assigns significance, first, to the acknowledged arguments in favor of a right to litigate federal claims in federal court, second, to the less familiar but especially compelling case for such a right on behalf of state criminal defendants, and third, to the largely neglected libertarian values served by postponing criminal defendants' access to the federal forum until after the state courts have completed their work. Along the

281 If the enforcement of the exhaustion doctrine is time-consuming, so too will the administration of the Court's analysis of abortive state proceedings promise burdensome work for a federal district court. First, the court must ascertain whether there *was* a state procedural rule demanding particular action, whether the petitioner at bar failed to comply with that rule, and, if so, whether the state courts imposed a forfeiture sanction for the default. If such a forfeiture is identified, the court must next determine whether the resulting state procedural basis of decision constitutes an adequate and independent state ground sufficient to cut off direct review in the Supreme Court. Finally, assuming that the state procedural ground is well-founded, the court must decide whether the default constituted a "deliberate bypass" of state procedures, or, in circumstances in which that test is inapplicable, whether there was "cause" for the default and "prejudice" flowing from the uncorrected federal error. Of course, a factfinding hearing is usually necessary to make some or all of these determinations. I have sketched the essential framework and provided relevant authorities. See L. Yackle, supra note 23, §§ 83-86. Judge Posner has recognized that in many instances it may be less onerous to reach and determine the merits than to grapple with threshold issues regarding the effects of procedural default. See Carbajol v. Fairman, 700 F.2d 397, 399-400 (7th Cir. 1983).

way, I have taken account of critics' assault on the writ, the persistent contention that habeas should be governed by a process model, other instances in which the process model checks the availability of federal adjudication, and the occasions on which the process model appears to have trespassed into the habeas sphere.

The adoption of my explanation for habeas would, I think, bring a measure of clarity and intellectual coherency to the law of federal jurisdiction. Moreover, it would give effect to two principles of governmental order in which, I confess, I believe there is incalculable value for human liberty: the maintenance of decentralized control of the substantive criminal law and a bold and unflagging guarantee that rights established by the United States Constitution will be enforced in independent federal tribunals.