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The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles

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I. INTRODUCTION

The exhaustion doctrine in federal habeas corpus contemplates not the relinquishment of federal jurisdiction to determine the merits of federal claims arising in state criminal prosecutions, but the appropriate timing of an undoubted federal power to adjudicate in due course.[1] Simply stated, the doctrine postpones federal review until petitioners have exhausted state judicial remedies still available for the treatment of their federal claims at the time they wish to apply for federal relief.[2] The resulting delay is justified on the twin grounds that earlier federal intervention would disrupt the orderly administration of state criminal prosecutions[3] and deprive the state courts of their rightful part in making and enforcing federal law.[4] The working prin-

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* Professor of Law, University of Alabama. A.B. 1968, J.D. 1973, University of Kansas; LL.M. 1974, Harvard University. Readers should know that I consulted with counsel on both sides of the litigation that resulted in the Supreme Court's decision in Rose v. Lundy, 455 U.S. 509 (1982), a case I will examine below. In conversations and correspondence with Mr. John C. Zimmerman, then Assistant Attorney General for the State of Tennessee, I tried to point out what I considered to be the flaws in his argument, and in similar contacts with Mr. D. Shannon Smith, who represented the prisoner, I made suggestions for the brief and oral argument. I suspect I benefited more from the experience than did counsel, both of whom taught me something about federal habeas corpus along the way. I am indebted to Mr. Zimmerman for providing me with a copy of the transcript of oral argument, from which I steal a quotation or two.

1. *See* Bowen v. Johnston, 306 U.S. 19, 27 (1939) (the exhaustion doctrine "is not one defining power but one which relates to the appropriate exercise of power"). The doctrine was "first articulated" by the Supreme Court in cases described below and then "incorporated" into the Judicial Code. Wainwright v. Sykes, 433 U.S. 72, 80 (1977). The relevant statute, 28 U.S.C. § 2254(b)-(c) (1976), provides as follows:

> (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.
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> (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.

2. State remedies that were available at one time, but for some reason are no longer accessible to the prisoner, are relevant not to the question of exhaustion but to the related matter of the effect to be given abortive state proceedings. *See* Wainwright v. Sykes, 433 U.S. 72, 80–82 (1977). The Justices have not always been so precise. In Irvin v. Dowd, 359 U.S. 394 (1959), Justice Brennan's opinion for the Court attempted to resolve a question touching the prisoner's procedural default in state court by reference to the exhaustion doctrine, suggesting essentially that prisoners might be turned away from the federal forum for failing to "exhaust" state procedures no longer available to them. *Id.* at 405–06. Professor Hart quickly pointed out that the *Irvin* analysis would preclude many federal claims altogether, because prisoners would be unable to cure their failure to exhaust by seeking relief from the state courts and returning to federal habeas. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 112–14 (1959). Thereafter Justice Brennan corrected his mistake in Fay v. Noia, 372 U.S. 391, 424–26 (1963), in which the exhaustion doctrine was limited to state remedies still available at the time federal habeas relief is sought.

3. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1094 (1970).

4. *Id. See generally* Robb v. Connolly, 111 U.S. 624, 637 (1884):

> Upon 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 and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them.

Other rationales for the exhaustion doctrine have been offered from time to time. *E.g.*, Goodloe v. Parratt, 605 F.2d 1041, 1048 (8th Cir. 1979) (suggesting that the exhaustion doctrine may alleviate the burden on federal

ciple, borrowed from the law of nations, is the notion of comity—the recognition that the courts of coordinate systems can and must exercise forbearance in cases in which both are interested, lest they interfere with each other, create confusion and distrust, and sacrifice the utility that comes with cooperation.[5] To be effective, the exhaustion doctrine must be flexible. It must present the federal courts with general guidance, but permit them to appraise the circumstances in each case with sensitivity to competing interests. The doctrine is, or ought to be, a fact-oriented rule of prudence and discretion, applied on a case-by-case basis to orchestrate the exercise of federal jurisdiction in an effective manner without disrupting or displacing the work of the state courts. That, at any rate, is the theory on which the federal habeas courts have operated for a hundred years.[6]

Recent developments have drawn this previously well-established understanding of the exhaustion doctrine into question. Some courts and some Justices have displayed a demonstrable tendency to transform the doctrine into something approaching a jurisdictional barrier to federal review. Evidence of this transformation appears on two levels. First, exhaustion doctrine issues are increasingly treated as though they were jurisdictional.[7] Jurisdictional language is used, and jurisdictional consequences are invoked, when the doctrine is found unsatisfied.[8] Second, the federal courts' discretion in exhaustion cases is gradually being replaced by a set of rigid rules that fails to serve the doctrine's rationales and, indeed, threatens to create greater friction between the federal and state courts.[9] These inflexible rules are unrealistic at best. They imply that the federal district courts cannot be trusted to apply a

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dockets by channeling federal issues to the state courts where relief may be granted and federal review rendered unnecessary); Rose v. Dickson, 327 F.2d 27, 28 (9th Cir. 1964) (suggesting that state judges are in the best position to examine federal claims arising in local proceedings attended by procedures and rules with which they alone are familiar). If valid at all, *see infra* text accompanying notes 229–32, these justifications are at best "less persuasive" than the paramount rationales treated in the text. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1094 n.5 (1970).

5. *See Ex parte* Royall, 117 U.S. 241, 252 (1886) (relying on comity as the basis for the exhaustion doctrine). *See generally* Wainwright v. Sykes, 433 U.S. 72, 80 (1977); Darr v. Burford, 339 U.S. 200, 208 (1950). The most familiar articulation of the comity notion in international law is Justice Gray's opinion in Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

6. *See infra* text accompanying notes 57–136.

7. The federal courts' jurisdiction, in the fundamental sense of power to adjudicate, was established at least as early as the Judiciary Act of 1789 and was extended to attacks on state custody in 1867. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86; *cf.* Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605 (arguing that the suspension clause provides a constitutional basis for the habeas jurisdiction). The current version of the Act is found at 28 U.S.C. § 2241(c)(3) (1976). While the 1948 legislation that "codified" the exhaustion doctrine contains language that suggests a jurisdictional grant, *see* 28 U.S.C. § 2254(a) (1976), clearly the federal courts enjoyed the power to entertain petitions well before that time. The Court's occasional lapses should not be taken as evidence to the contrary. *See* Lehman v. Lycoming County Children's Servs. Agency, 102 S. Ct. 3231, 3236 n.9 (1982) ("[j]urisdiction to challenge both state and federal judgments is conferred by § 2241" but § 2254 confers "general jurisdiction" to entertain collateral attacks on state judgments); Engle v. Isaac, 456 U.S. 107, 110 n.1 (1982) (§ 2254(a) "empowers" the federal courts to entertain challenges to state court judgments).

8. *See infra* notes 148–85 and accompanying text.

9. *Cf.* Engle v. Isaac, 456 U.S. 107, 136 (1982) (Stevens, J., concurring & dissenting) (arguing that "the Court's preoccupation with procedural hurdles is more likely to complicate than to simplify the processing of habeas corpus petitions by federal judges").

discretionary doctrine properly and that, left to themselves, federal judges would lurch to the merits of federal claims without just cause. At worst the rules are misleading. They are presented, like all procedural rules, as value-neutral devices geared to the efficiency of the process rather than the substance of the issues at stake. Yet they operate irrationally and harshly to deprive litigants of effective access to the federal forum.[10]

These developments, in turn, must be understood in context. It is no secret that the general availability of the federal, trial-level forum for the litigation of federal claims has been drastically curtailed in the last decade.[11] The Warren Court not only established substantive principles for the protection of individual liberty, but constructed federal enforcement machinery to ensure respect for its new decisions.[12] The Burger Court has left most substantive precedents in place, but has chipped away at the federal enforcement machinery and has erected new procedural barriers when none existed previously.[13] The books abound with fitting illustrations.[14] For present purposes, the "equitable restraint" cases are most significant.[15] The Warren Court revived the Ku Klux Klan Act of 1871 as an appropriate vehicle to enforce fourteenth amendment rights during the civil rights movement in the 1960s.[16] In a series of decisions, the Court freed section 1983 actions from any re-

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10. *See infra* notes 186–261 and accompanying text.

11. *See generally* 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).

12. Monaghan, *The Burger Court and "Our Federalism,"* LAW & CONTEMP. PROBS. Summer 1980, at 39, 43–44. *See generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

13. *See* Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977).

14. I count the Court's recent justiciability decisions. *E.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); *see* LeBel, *Standing After* Havens Realty: *A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013 (finding in the Burger Court's recent decisions a repudiation of standing analysis established during the Warren era). *Compare* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979) (providing an essential *apologia* for the Court's "standing" cases), *with* Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980) (putting forward a more critical analysis). Less visible manipulations of the standards for class actions are also illustrative. *E.g.*, General Tel. Co. v. Falcon, 457 U.S. 147 (1982) (refusing to permit an employee who had been denied promotion to represent a class including persons denied employment); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (reading Fed. R. Civ. P. 23(c)(2) to require personal notice by mail to approximately two million class members); *see* Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) (appraising both the standing and class action cases for their impact on the ability of the federal courts to reach and dispose of constitutional issues). The application of abstention principles in civil liberties cases provides a further example. *E.g.*, Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979). For a good discussion, see generally Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977).

15. I distinguish *Pullman*- and *Burford*-type abstention cases from the decisions that rest on an asserted restraint in exercising the federal courts' power to issue equitable relief. As a general matter, the abstention doctrines prefer early state court litigation in the hope that the state courts' resolution of state law issues will make it unnecessary for a federal court to reach and determine posterior federal issues. The "equitable restraint" cases place the litigation of *federal* issues with the state courts. *See generally* Theis, Younger v. Harris: *Federalism in Context*, 33 HASTINGS L.J. 103 (1981) (collecting relevant authorities).

16. *E.g.*, Monroe v. Pape, 365 U.S. 167 (1961); *see Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1169 (1977) (*Monroe* "resurrected section 1983 from ninety years of obscurity").

quirement that state judicial or administrative remedies be exhausted,[17] excepted them from the Anti-Injunction Statute,[18] and opened them to a wide range of federal claims, all to be adjudicated in the federal forum.[19] When, however, the change in the Court's membership began to affect its judgments, the *Younger*[20] line of cases gradually pushed would-be federal litigants back into the state courts.[21] While the Court still has not fastened an exhaustion doctrine on section 1983 litigation generally,[22] it has held that federal claims can be shunted off to the state courts even if the litigant desiring a federal forum wins the race to the court house door,[23] that unfavorable judgments returned by the state courts must be appealed within the state system,[24] and that ordinary collateral estoppel rules will operate thereafter to bar the relitigation of issues in federal court.[25] This last is most important. It promises not merely to defer federal consideration of issues, but to foreclose federal treatment of the merits entirely.[26]

One should expect the Burger Court's apparent preference for state court litigation of federal claims to spill over into the habeas field. The modern availability of the postconviction writ rests on two propositions that the *Younger* line of cases would deny. First, the enforcement of federal standards can be effective only if prisoners' claims are treated in proceedings collateral to the criminal trial itself, in which attention is focused on the question of factual guilt and federal safeguards may be subordinated to expediency.[27] Second, those separate proceedings must be held in a federal forum, where Article III judges with life tenure assume primary responsibility for the enforcement of the Constitution.[28] These two propositions were firmly established for a score of years in the wake of the watershed decision, *Brown v.*

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17. McNeese v. Board of Educ., 373 U.S. 668, 674–76 (1963) (administrative remedies); Monroe v. Pape, 365 U.S. 167, 183 (1961) (judicial remedies). *See generally* Note, *Exhaustion of State Remedies under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968).

18. Mitchum v. Foster, 407 U.S. 225 (1972).

19. *See generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977). The "cause of action" statute, 42 U.S.C. § 1983 (Supp. 1980), does not itself establish federal court power to adjudicate, but works in tandem with the jurisdictional statute, 28 U.S.C. § 1343(a)(3) (Supp. 1981), to lodge federal constitutional issues in the federal forum. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 615 (1979).

20. Younger v. Harris, 401 U.S. 37 (1971).

21. *See* Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1129–30 (1977) (ascribing responsibility for the development of the *Younger* analysis to the Nixon appointees).

22. *See* Patsy v. Board of Regents, 102 S. Ct. 2557 (1982) (refusing to require § 1983 plaintiffs to exhaust state administrative remedies in advance of federal court litigation).

23. Hicks v. Miranda, 422 U.S. 332 (1975).

24. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

25. Allen v. McCurry, 449 U.S. 90 (1980).

26. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1331–60 (1977).

27. *See* Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U. L. REV. 78 (1964).

28. *See* Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106–07 (1959).

Allen.[29] The Warren Court's great trilogy of habeas cases, *Fay v. Noia*,[30] *Townsend v. Sain*,[31] and *Sanders v. United States*,[32] all decided in 1963, built upon *Brown* and elaborated a complete, internally consistent system of federal postconviction review.[33]

The Warren Court undoubtedly believed that at least the threat of federal collateral review in habeas was necessary to impress upon recalcitrant state courts that the Court's innovations in criminal procedure had to be respected.[34] Only a decade ago, it was possible to take stock of habeas developments, to describe the writ and its supporting rationales in precisely this way, and to suggest, at least implicitly, that the habeas jurisdiction, so described and justified, had at last won a vital place in American public law.[35] Today it is widely accepted that postconviction habeas plays an essential role in the criminal justice system.[36] The Great Writ provides the machinery by which the Constitution is enforced on a daily basis. I, for one, despair for the maintenance of federal safeguards in criminal cases if the availability of habeas is curtailed and the making and application of federal standards is left to the state courts, subject to occasional direct review in the Supreme Court itself.[37] Some of the Justices now sitting take a different view.[38] They have revived old controversies in which the fundamental propositions supporting the availability of the writ have again come under examination.[39] Indeed, they have squarely proposed that some federal claims *can* be enforced successfully

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29. 344 U.S. 443 (1953). *See generally Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1056–62 (1970).

30. 372 U.S. 391 (1963).

31. 372 U.S. 293 (1963).

32. 373 U.S. 1 (1963).

33. I have tried to describe that system in L. YACKLE, POSTCONVICTION REMEDIES (1981).

34. I frankly doubt that any Justice then sitting wished for the routine relitigation of state criminal cases in the lower federal courts. Rather, the aim was to establish habeas corpus as an effective supervisory tool, which would encourage the state courts to take seriously their responsibilities to respect federal standards—making federal examination of federal claims, and certainly the award of federal relief, unnecessary. *See* Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting) (placing emphasis on the "threat" of federal review in habeas).

35. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1061–62 (1970).

36. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS 1546–1635 (5th ed. 1980); F. MILLER, R. DAWSON, G. DIX & R. PARNAS, CASES AND MATERIALS ON CRIMINAL JUSTICE ADMINISTRATION ch. 26 (2d ed. 1982). While occasional attempts have been made in Congress to curtail the availability of collateral review in habeas, to date those efforts have been uniformly unsuccessful. *See* Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609 (1983) (surveying the most recent legislative assault on the federal writ).

37. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (making the argument that the state courts do not provide sufficient protection for citizens' federal rights).

38. *See, e.g.*, Snead v. Stringer, 454 U.S. 988, 993–94 (1981) (Rehnquist, J., joined by the Chief Justice & O'Connor, J., dissenting from denial of certiorari) (complaining 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"). The Court's majority has squarely rejected the argument that only life-tenured, Article III judges are competent to pass on federal issues arising in criminal prosecutions. Swain v. Pressley, 430 U.S. 372, 381–83 (1977).

39. *See* L. YACKLE, POSTCONVICTION REMEDIES § 21 (1981) (describing the primary themes in recent cases).

at trial or on direct review without the backstop of federal collateral proceedings[40] and that all claims may properly be subordinated to the demands of orderly state court administration, subject to exceptions essential to avoid a miscarriage of justice.[41] Within the habeas field, as in the *Younger* cases, there have been and continue to be efforts to preclude entirely claims that were, or might have been, litigated in state court.[42]

Other contributors to this symposium have addressed these vexing matters, however, and I intend to focus elsewhere. My enterprise is an examination and criticism of recent innovations regarding the exhaustion doctrine. The doctrine assumes the federal habeas courts' authority to reach the merits of federal claims at some point and seeks only to choose the occasion for that adjudication, balancing the individual's interest in early consideration of what may be meritorious claims against the state's countervailing interests in orderly procedures and an opportunity to contribute to the enforcement of federal law.[43] The exhaustion doctrine, properly understood and applied, has nothing to do with preclusion. Indeed, the essence of my quarrel with recent decisions is that they seem calculated to make the doctrine precisely what it is not. If the desirability of postconviction habeas, not to say its legitimacy, is to be questioned, if ostensibly valid claims are not to be entertained in habeas as a sequel to state court litigation, then the appropriate means to that end is hardly to be found in the exhaustion doctrine. To put it bluntly, we cannot have it both ways. We cannot force prisoners to litigate first in state court on the ground that federal habeas review should properly await state court adjudication and then propose that, the state courts having denied relief, federal habeas review is no longer appropriate.[44] I have my doubts about the *Younger* cases, which may accomplish a similar end by denying federal injunctive relief

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40. *E.g.*, Stone v. Powell, 428 U.S. 465, 494–95 (1976) (fourth amendment exclusionary rule claims may be entertained in federal habeas only if the state courts fail to provide an "opportunity" for "full and fair litigation" of those claims); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 250–71 (1973) (Powell, J., concurring) (suggesting the essentials of the analysis later accepted in *Stone*).

41. *E.g.*, Engle v. Isaac, 456 U.S. 107 (1982) (refusing to vary the approach to abortive state proceedings according to the character of a prisoner's claim).

42. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977).

43. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1094–95 (1970).

44. I am aware that Professor Bator argues that the exhaustion doctrine is "intelligible" only if it is presumed that the state courts will be allowed to decide both state and federal questions arising in a case and that their decisions will "count." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 483 (1963). "It would make little sense," Bator argues, "to encourage the use of state remedial processes through a requirement of exhaustion only in order to ignore these processes on collateral attack." *Id.* (citing *In re* Spencer, 228 U.S. 652, 660 (1913) (the exhaustion doctrine " would be useless except to enforce a temporary delay if it did not compel a review of the question in the state court and, in the event of an adverse decision, the prosecution of error from [the Supreme Court]")). I am aware of his argument, but I do not understand it. I recognize that prior to *Noia* in 1963 habeas applicants had to seek direct review in the Supreme Court before requesting collateral review in habeas. *See infra* note 112. That, I assume, is what the Court meant to point out in *Spencer*. I recognize, too, that at the time *Royall* was decided only "jurisdictional" questions were cognizable in habeas (for whatever reason). Not even Bator would propose, however, that the later softening of the jurisdictional limit in habeas had much to do with the nature of the exhaustion doctrine. All that aside, it seems clear that the exhaustion doctrine generally is "intelligible" only if collateral review in habeas is available as a sequel to state court litigation. As the discussion in the text makes clear, *see infra* text

pending state court litigation and then barring it later by virtue of res judicata.[45] However that may be, nothing of the sort can be defended in the habeas context, in which res judicata is inapplicable and the relitigation of claims is routine.[46] The exhaustion doctrine, again, is a discretionary rule regarding the appropriate timing of federal collateral review. It cannot be recruited to the service of a campaign to preclude the federal forum in favor of adjudication in the courts of the states. I mean in what follows to demonstrate why that is so.

II. A Proposed Approach

I will argue for a return to first principles. The initial decision in the field, *Ex parte Royall*,[47] placed primary emphasis on the federal habeas courts' jurisdictional power to inquire into the cause of a prisoner's detention and to order discharge if the custody under attack is found to be in violation of federal law.[48] The exhaustion of state remedies prior to federal review entered *Royall* only in the Court's recognition that the federal courts have discretion to withhold the exercise of their jurisdiction until the appropriate time: "that discretion, however, to be subordinated to any special circumstances requiring immediate action."[49] Modern courts should take seriously the basic message in *Royall*. Habeas jurisdiction exists in all cases, and when "special circumstances" demanding immediate action are presented, that jurisdiction should be exercised. In the run of cases, the courts should defer federal review in their discretion.[50]

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accompanying notes 47–50, the *Royall* Court explicitly stated that the federal courts have jurisdiction to entertain federal claims before or after trial in state court. That critical matter being settled, it would make no sense whatever to subvert the habeas jurisdiction by channeling litigation into the state courts and giving their judgments preclusive effect. *Accord* Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741, 765 (1982) (arguing that the exhaustion doctrine in habeas makes the application of preclusion rules "almost entirely illogical because the case is never ripe for federal scrutiny until the state itself deems the resolution final"); Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 637 (1982) (stating that *Royall*'s "explicit recognition of federal relitigation authority" is inconsistent with Bator's view that state court judgments regarding federal claims must be accepted as "correct" even if a federal habeas court would have reached a different decision).

45. Huffman v. Pursue, Ltd., 420 U.S. 592, 606 n.18 (1975). *See also* Allen v. McCurry, 449 U.S. 90 (1980) (ordinary collateral estoppel rules apply when litigants raise issues in federal civil rights lawsuits that were determined unfavorably in previous state court litigation).

46. Brown v. Allen, 344 U.S. 443, 458 (1953); Salinger v. Loisel, 265 U.S. 224, 230 (1924).

47. 117 U.S. 241 (1886).

48. *See infra* notes 69–71 and accompanying text.

49. 117 U.S. 241, 253 (1886).

50. *Royall* itself had it the other way. The Court focused on the federal courts' power to entertain federal challenges to state custody at any time and only permitted the postponement of federal review as an exception to immediate adjudication—grounded in the habeas courts' discretion to stay their hand in deference to state court treatment of the same claims. *See infra* notes 85–91 and accompanying text. A fair amount of water has gone under the bridge since then, however, and I do not propose now to resurrect *Royall*'s specifics, to argue that immediate adjudication is the rule and delay is the exception, and thus to challenge the rudiments of the modern exhaustion doctrine. As a general matter, I am content with the balance of competing interests struck by the doctrine, provided it is understood and enforced in the fashion described below. *See* 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, 902 (1965) (labelling as "perverse" the development from

The best illustration, beyond *Royall*, is Justice Black's majority opinion in *Frisbie v. Collins*.[51] Responding to the State's "cloudy" argument that the prisoner's petition should have been dismissed for want of exhaustion, Justice Black recognized the "general rule" established in *Royall* and intervening cases.[52] He explained, however, that the "general rule" is not "rigid" and "inflexible" in its operation:

> [D]istrict courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals.[53]

In *Frisbie* the circuit court had addressed the exhaustion doctrine explicitly and had found "special circumstances" requiring prompt federal intervention "in this case."[54] Justice Black acquiesced:

> It would serve no useful purpose to review those special circumstances in detail. They are peculiar to this case, may never come up again, and a discussion of them could not give precision to the "special circumstances" rule. It is sufficient to say that there are sound arguments to support the Court of Appeals' conclusion that prompt decision of the issues raised was desirable.[55]

This language captures the essence of the exhaustion doctrine, as it was and should be again.[56] Federal courts should examine the circumstances of each case and on that basis determine whether it is reasonable to send the petitioner back to the state courts or, instead, to reach the merits immediately. As a general rule, petitioners should be required to pursue identifiable state remedies that promise a reasonable opportunity for litigation of their federal claims. If the federal courts reach the merits immediately notwithstanding the availability of state procedures, they should have sound reasons for concluding that prompt federal review is desirable. More than that need not be said. The lower federal courts can be trusted to exercise their discretion responsibly. In any case, the introduction of rigid rules designed to displace the exercise of discretion undercuts the exhaustion doctrine as it was

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Royall of a doctrine that favors the "dilatory exercise" of the habeas jurisdiction, but approving exhaustion generally in cases in which expeditious federal adjudication is not justified for the protection of federal rights put in jeopardy by unsympathetic state courts).

51. 342 U.S. 519 (1952).

52. *Id.* at 520.

53. *Id.* at 521.

54. *Id.* at 521–22.

55. *Id.* at 522.

56. *Frisbie* has at times been understood as essentially aberrational, contemplating as it does that individual habeas judges, rather than the federal system as a whole, will exercise discretion on a case-by-case basis. *See, e.g.*, Amsterdam, *supra* note 50, at 889 n.408. That understanding may be accurate, but even if it is *Frisbie* provides the best model for an effective exhaustion doctrine. Alternatively, *Frisbie* constitutes evidence that the Court was still searching, in the year prior to *Brown*, for the proper role to be assigned to the state courts in the criminal justice system. If, having suggested a fact-oriented approach to exhaustion, the Justices chose instead to develop a blanket doctrine favoring the routine postponement of federal review, then they made entirely the wrong choice. We ought to go back, find the place where we lost our way, and begin again on the path lighted by Justice Black's opinion.

originally intended to operate and promises to frustrate the very interests the doctrine was designed to protect.

III. A Synopsis of the Relevant Background

A. *The Birth of the Exhaustion Doctrine*

I hardly want, or need, to traverse again the muddy history of postconviction habeas or to join issue on the question whether Congress originally intended to extend the federal writ to prisoners in state custody—before or after conviction.[57] The role the exhaustion doctrine should play depends on the availability of habeas for state prisoners. The existence of that jurisdiction today does not, one should hope, rest on the relative success of law office historians in persuading us that Congressman Lawrence, the draftsman of the 1867 Act, would have approved.[58] It is enough merely to note what everyone will concede. Since 1867 federal habeas review has been available for the litigation of at least some federal claims arising at some stages of the proceedings in state court.[59] In the first case to reach the Supreme Court, *Ex parte McCardle*,[60] the new habeas jurisdiction was said to be "of the most comprehensive character" and, indeed, so broad that it would be "impossible to widen."[61] That pronouncement prompted the immediate repeal of the section of the 1867 Act authorizing the Supreme Court to hear appeals.[62] The reasons for the repeal are familiar and are irrelevant here.[63] Without further guidance from the Supreme Court, the lower federal courts proceeded to issue the writ to state prisoners in a variety of circumstances.[64] In many cases they acted in advance of state court litigation of prisoners' federal claims.[65] When, however, the Supreme Court's appellate jurisdiction was restored in 1885,[66] and

57. *Compare Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1048 (1970) (presenting the conventional view that the Act was intended to enforce the Civil War amendments by making the writ available to prisoners in state custody in alleged violation of federal law), *with* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965) (arguing that the Act was designed to protect ex-slaves held in bondage or peonage); *compare* Bator, *supra* note 44, at 475 (insisting that Congress did not intend to establish habeas as a routine collateral remedy), *with* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 19–21 (1956) (arguing the opposing position).

58. *See* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 32 (1965) (conceding that "a purely historical inquiry" can make "no contribution" to modern questions regarding the appropriate place of habeas).

59. Even Professor Bator agrees that, whether with justification or not, the Court has always considered the writ to be available in at least some circumstances. Bator, *supra* note 44, at 486–87 (discussing with apparent approval early illustrations of habeas review when state courts failed to provide adequate "corrective process").

60. 73 U.S. (6 Wall.) 318 (1867).

61. *Id.* at 325–26.

62. Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

63. *See generally* C. FAIRMAN, RECONSTRUCTION AND REUNION 1864–88, PART I (1971); Van Alstyne, *A Critical Guide to Ex parte* McCardle, 15 ARIZ. L. REV. 229 (1973).

64. *See* Peller, *supra* note 44, at 623–25 (collecting illustrative cases).

65. *E.g.*, *In re* Tibarcio Parrott, 1 F. 481 (C.C.D. Cal. 1880); *Ex parte* McCready, 15 F. Cas. 1345 (C.C.E.D. Va. 1874) (No. 8,732).

66. Act of Mar. 3, 1885, ch. 353, 23 Stat. 437.

the Court was able to return to the matter in *Royall*, the exhaustion doctrine was born.[67]

The petitioner in *Royall* had been indicted in Virginia for selling a bond coupon without a license.[68] Without waiting for trial in state court, he requested a writ of habeas corpus from the appropriate federal circuit court, alleging that the state licensing statute and accompanying taxes violated the contract clause. The circuit court refused to entertain those federal claims for want of jurisdiction.[69] The Supreme Court affirmed, but for quite different reasons. Justice Harlan's opinion for a unanimous bench held explicitly that the circuit court had jurisdiction in the matter. The basic grant of habeas jurisdiction, carried forward from the Judiciary Act of 1789, was stated in language "as broad as could well be employed."[70] While that Act had recognized an exception for most petitioners held in "gaol,"[71] the 1867 statute had extended the availability of the writ to all prisoners alleging detention in violation of federal law.[72] Justice Harlan resisted, however, any implication that the statute required the circuit court to exercise its jurisdiction prior to trial in state court:

> We are of [sic] opinion that while the Circuit Court has the *power* to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the national Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of *discretion* as to the *time* and *mode* in which it will exert the powers conferred upon it. . . .
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> . . . [T]his court holds that where a person is in custody, under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a *discretion*, whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted; *that discretion, however, to be subordinated to any special circumstances requiring immediate action.*[73]

The exhaustion doctrine was established, then, in circumstances in which arguments for the deferral of federal review were extraordinarily powerful.

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67. *Ex parte* Royall, 117 U.S. 241 (1886). *See supra* text accompanying notes 47–49.

68. 117 U.S. 241, 242–45 (1886).

69. *Id.* at 245.

70. *Id.* at 247.

71. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

72. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86. I have traced the statutes authorizing various federal courts and judges to issue the writ. L. YACKLE, POSTCONVICTION REMEDIES § 18 (1981).

73. 117 U.S. 241, 251–53 (1866) (emphasis added).

The petitioner in *Royall* wished to abort trial in state court entirely, thus depriving the state courts of an opportunity to treat any issues in the case prior to a federal consideration of his federal defense. Small wonder the Court balked. The petitioner's position, taken to its logical conclusion and admitting of no exceptions, would have read the 1867 statute to draw many state criminal cases into the federal forum in the first instance. At the time comparatively few defendants had federal defenses to raise, and the primitive state of fourteenth amendment analysis would surely have trimmed the number of affected cases.[74] Later, as the Court poured meaning into the due process clause, the great majority of defendants would have fourteenth amendment claims and, presumably on that basis, an entitlement to immediate access to the federal courts.[75] In effect, the 1867 Act would have been read to establish a broad-ranging removal jurisdiction, swallowing up the separate federal statutes that Congress had apparently intended to identify the circumstances in which prosecutions begun in state court should be transferred to the federal forum for trial.[76] Even at that, the Court made it plain that the postponement of federal review was entirely discretionary. Nothing in the statute at the time demanded that the federal courts stay their hand. The exhaustion ground was offered in *Royall* only as an alternative basis for affirming the judgment below. It is not at all clear that if the circuit court had entertained the prisoner's petition and awarded relief the Supreme Court would have reversed, demanding exhaustion.[77]

Finally, Justice Harlan explicitly recognized that the discretion to postpone federal intervention must be subordinated to "special circumstances requiring immediate action."[78] The statute permitted, but did not demand, exhaustion, but only in cases in which federal treatment of the merits could be postponed without undue cost. If "special circumstances" required prompt litigation in habeas, the federal courts were not free to refuse immediate adjudication. The illustrations cited in *Royall* made the Court's meaning plain. In the past when habeas applicants had alleged that they were held in state custody for actions taken under some federal authority, or the authority of a foreign nation, and the disposition of their claims might affect the operations of the federal government or its relations with other nations, the federal courts

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74. *See* Bator, *supra* note 44, at 475 (recalling that at the time *Royall* was decided it was a "well-understood principle" that "detention pursuant to the judgment of a competent tribunal" was not invalid, even if the judgment was infected with error); Peller, *supra* note 44, at 630 (faulting Bator for failing to take sufficient account of the "narrow scope" of the due process clause during the relevant period).

75. *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).

76. *See* Fay v. Noia, 372 U.S. 391, 416 (1963) (speculating that Congress may well have intended the 1867 Act to establish "a remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions") (emphasis in original). *See generally* Amsterdam, *supra* note 50.

77. Amsterdam, *supra* note 50, at 888–89 (pointing out that *Royall* was not immediately understood to disallow anticipatory habeas corpus review and that the practice of reversing lower court decisions on the merits for want of exhaustion developed only later).

78. 117 U.S. 241, 253 (1886).

had found it appropriate to issue the writ.[79] Cases of that kind were controlled by other federal statutes, enacted previously in response to particularly sensitive problems.[80] They illustrated, however, situations in which federal intervention should not be delayed in deference to trial in state court. In those and "like cases of urgency,"[81] Justice Harlan explained, the 1867 statute would not countenance delay but, instead, would demand prompt federal review in habeas.[82]

B. *The Formative Period*

In the years immediately following *Royall*, it appeared that the Court might not insist that state remedies be exhausted in all, or even most, instances. In three notable cases the Court approved the treatment of federal claims raised by prisoners in pretrial custody without referring to the exhaustion doctrine.[83] The *Royall* decision was cited, but only during discussion of the habeas courts' jurisdiction. It was not long, however, before those cases were explained as having presented "special circumstances" demanding immediate federal intervention.[84] Far from providing evidence that exhaustion need not be demanded, they came to be regarded as exceptions to a developing "general rule" that in the absence of "special circumstances" the federal habeas courts "should not interfere . . . until after final action by the

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79. *Id.* at 251–52:

> When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under State authority.

80. *Id.* The Force Act of 1833, for example, authorized the federal courts to issue the writ in behalf of federal tax collectors arrested by state authorities, particularly in South Carolina. Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633–34. That enactment is carried forward in 28 U.S.C. § 2241(c)(2) (1976). Similarly, the Congress enacted legislation in 1842 to extend the writ to state authorities holding foreign nationals in custody. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539. *See* People v. McLeod, 25 Wend. 483 (N.Y. Sup. Ct. 1841) (the case that provided the catalyst for the enactment). The current version is found at 28 U.S.C. § 2241(c)(4) (1976).

81. 117 U.S. 241, 251 (1886).

82. This is the sense of the language quoted earlier in the text. *See supra* note 49 and accompanying text. The *Royall* Court recognized the habeas courts' discretion to withhold examination of federal claims until the state courts had had an opportunity to act, but stated squarely that that discretion was "subordinated" to the need for "immediate action" in cases presenting "special circumstances." *See supra* text accompanying notes 73 & 78. The federal courts were not permitted discretion to postpone habeas review when prompt action was required by the circumstances at bar. *See* Amsterdam, *supra* note 50, at 901.

83. Wildenhus's Case, 120 U.S. 1 (1887) (concerning a Belgian sailor charged with homicide and held in state custody pending trial); *In re* Neagle, 135 U.S. 1 (1890) (regarding a marshal charged with murdering an assailant who had attacked Justice Field as he "rode circuit" in California); *In re* Loney, 134 U.S. 372 (1890) (concerning a petitioner held in state custody pending trial for an offense that was allegedly within the exclusive jurisdiction of the federal courts).

84. Whitten v. Tomlinson, 160 U.S. 231, 241–42 (1895); *accord* New York v. Eno, 155 U.S. 89, 96–97 (1894) (dealing with the *Loney* case).

state courts."[85] In this, the analysis in *Royall* was essentially inverted. That case had held, quite plainly, that prompt habeas treatment of the merits was mandatory under the 1867 statute if "special circumstances" were shown and that it was permissible otherwise to postpone federal review. Subsequent cases held that exhaustion was the "rule"[86] and that "special circumstances" must be demonstrated to excuse a federal court's failure to require the petitioner to seek relief first from the state courts.[87] From there it was a short step to require, again as a "general rule," the exhaustion of state appellate procedures[88] and even, in some instances, the extraordinary writs.[89] What had begun in *Royall* as a common-sense reluctance to "wrest [a] petitioner from the custody of . . . State officers in advance of . . . trial in . . . State court"[90] hardened into a "general rule," albeit subject to exceptions, that federal habeas jurisdiction should await the exhaustion of available state remedies.[91]

Thereafter the Court had to define more crisply the "special circumstances" that would justify a relaxation of the "general rule" demanding exhaustion. When the Court spoke to that question, it tended to look back to the original discussion in *Royall*. There the Court had suggested that cases touching the operations of the federal government and its relations with other nations would present sufficient "urgency" to warrant immediate federal intervention.[92] Most early cases in which the Court approved habeas review prior to trial in state court were of that description.[93] Significantly, however, the Court did not expressly amend the "special circumstances" formula along those lines. The Court made no straightforward effort to restrict "special circumstances" to instances in which federal officials or aliens petitioned for the writ.[94] On several occasions, moreover, the Court took considerable time to address arguments for "special circumstances" that plainly lacked roots in national or international affairs.[95] While the Court ultimately concluded on

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85. Boske v. Comingore, 177 U.S. 459, 466 (1900).

86. Minnesota v. Brundage, 180 U.S. 499, 502–03 (1901); Urquhart v. Brown, 205 U.S. 179, 181 (1907).

87. *See* United States *ex rel.* Drury v. Lewis, 200 U.S. 1, 6–7 (1906) (collecting then-recent decisions in point).

88. *E.g.*, *Ex parte* Davis, 318 U.S. 412 (1943); Reid v. Jones, 187 U.S. 153 (1902). In truth, the Court had indicated in *Royall* that the exhaustion doctrine might extend to appellate remedies, 117 U.S. 241, 253 (1886), and in *Ex parte* Fonda, 117 U.S. 516, 518 (1886), decided a month later, the Court applied the *Royall* analysis in support of a decision to dismiss on the ground that state appellate remedies remained open.

89. Mooney v. Holohan, 294 U.S. 103, 113–15 (1935); Pepke v. Cronan, 155 U.S. 100, 101 (1894).

90. 117 U.S. 241, 251 (1886).

91. Darr v. Burford, 339 U.S. 200, 210 (1950) (providing a good discussion of this development). When, for example, the Court seemed to neglect the matter of state remedies, Justice Harlan, author of the progenitor opinion, dissented. Hunter v. Wood, 209 U.S. 205, 211 (1908) (Harlan, J., dissenting).

92. *See supra* notes 78–82 and accompanying text.

93. *See supra* note 83.

94. Looking back on the early cases in Darr v. Burford, 339 U.S. 200 (1950), the Court summed it up otherwise. "[S]pecial circumstances," said Justice Reed for the Court, "justify departure from rules designed to regulate the usual case. The exceptions are few but they exist. Other situations may develop." *Id.* at 210.

95. *E.g.*, Baker v. Grice, 169 U.S. 284, 292–93 (1898) (considering a prisoner's argument that "special circumstances" could be found in the state courts' failure to pass on the validity of his federal claim in an earlier appeal, a two-year delay in bringing him to trial a second time, and the asserted likelihood that, when faced with the federal claim again, the state courts would deny relief).

each of those occasions that "special circumstances" had not been demonstrated, its willingness to treat the arguments suggests that the matter was more open, and ad hoc, than some have assumed.[96]

The elaboration of the "special circumstances" exception to the exhaustion doctrine was complicated by parallel developments regarding the availability of the habeas writ generally. In a series of confused and confusing decisions, delivered over a half-century after *Royall*, several related and overlapping ideas, often invoked in combination, generally frustrated the pursuit of habeas relief by state prisoners.[97] It is extremely difficult to reread those cases now, with an eye on modern understandings of the nature and function of federal habeas, and to isolate the Court's treatment of "special circumstances" within the meaning of *Royall* from other matters then competing for domination.[98] Those cases presented more than the familiar pattern of ambiguous precedents that occur over a period of time when fundamental legal doctrines are shifting, looking toward the day when the Court stops, takes stock, and reconciles the cases along some preferred, but often previously unclear, line of analysis.[99] If that were the case, we would face problems enough. Here the inquiry is more difficult, for the Court's treatment of matters going to the very existence and function of the habeas jurisdiction pushed any consideration of the mere timing of federal intervention into the background. More weighty issues were at the forefront: the recurring insistence that the habeas jurisdiction should, in turn, be limited to cases in which the state courts lacked jurisdiction to adjudicate;[100] the contemporary understanding that petitioners were detained in violation of due process only if their

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96. *See, e.g.*, Bator, *supra* note 44, at 478 n.87.

97. *See generally* Fay v. Noia, 372 U.S. 391 (1963) (surveying the Court's cases in the period); Wainwright v. Sykes, 433 U.S. 72 (1977) (distinguishing the several issues treated in those cases).

98. Professor Peller's chief criticism of Bator's work is that the latter fails, in Peller's view, to distinguish the different matters influencing the Court's decisions in particular cases. *See* Peller, *supra* note 44, at 603–63.

99. *Cf.* Wainwright v. Sykes, 433 U.S. 72, 81 (1977) (recognizing that the Court's decisions reveal not so much a process of bringing loose ends together as an "historic willingness to overturn or modify" positions regarding the writ).

100. In *Royall* the Court had allowed the federal habeas court to stay its hand on the assumption that the state trial court had jurisdiction to try the case and would, in that posture, consider the petitioner's federal defense. It is possible that in cases in which the state court lacked jurisdiction, *Royall* was simply distinguishable. Delay in favor of trial in state court could not be justified if the trial court could not validly entertain the case and thus would have no legitimate occasion to address federal issues. *Compare* United States *ex rel.* Drury v. Lewis, 200 U.S. 1 (1906) (entertaining but rejecting an argument that habeas should be available before trial because the state trial court lacked jurisdiction), *with* Johnson v. Hoy, 227 U.S. 245 (1913) (insisting that habeas was not available prior to trial even though the prisoner challenged the validity of the statute under which he was charged in state court). On the other hand, some precedents indicate that, in the period immediately following *Royall*, the scope of federal habeas review was limited to jurisdictional error. If that is true, it is equally possible that applicants who failed to establish that their state courts lacked jurisdiction were denied access to the federal forum not for want of exhaustion, but for want of habeas power to adjudicate. *Cf.* Bergemann v. Backer, 157 U.S. 655, 659 (1895) (holding that the trial court had jurisdiction of both the defendant and the offense and had proceeded under a valid statute, thus the federal habeas court had "no authority to interfere" through habeas corpus after the prisoner's conviction in state court).

In this vein, for example, Bator and Peller have quarreled over the meaning to be derived from *In re* Wood, 140 U.S. 278 (1891), in which the petitioner complained of race discrimination in the selection of grand and petit juries. Professor Bator cites *Wood* as authority for the view that habeas was available only to challenge

custody arose from proceedings not in the "regular course of administration" through the state courts;[101] and the concern that an expansive use of habeas might undercut, or even displace, the Court's more limited jurisdiction on writ of error.[102]

The Court had first to sort out these matters, to establish habeas as a general postconviction remedy for the treatment of federal errors alleged to have been committed in the state courts, before it could address satisfactorily the matter of the appropriate timing of federal review. The inevitable, of

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jurisdictional error. Bator, *supra* note 44, at 481–82. Justice Harlan's opinion for the Court reaffirmed previous holdings that discriminatory jury selection was invalid (*see* Virginia v. Rives, 100 U.S. 313 (1879)) but distinguished the case at bar, in which the petitioner had not attacked the facial validity of the relevant state statutes but had alleged only that race discrimination had been practiced in his case. *In re* Wood, 140 U.S. 278, 284–86 (1891). That, in turn, was a question within the state trial court's jurisdiction and, according to Justice Harlan, even an erroneous decision by the court would not have rendered the conviction void, or detention under it illegal. *Id.* at 287. Bator concludes that Harlan meant to hold that, because no argument was made that the conviction in *Wood* arose from jurisdictional error, thus rendering the judgment void, habeas was unavailable and the only federal review open to the petitioner was direct appeal to the Supreme Court itself. Bator, *supra* note 44, at 481–82.

Professor Peller focuses elsewhere in Justice Harlan's opinion, finding yet more references to *Royall*, to the federal habeas courts' power to entertain challenges to the validity of detention in state custody at any time, and to the discretionary exhaustion doctrine. Peller, *supra* note 44, at 638–43 (citing *In re* Wood, 140 U.S. 278, 289–90 (1891)). He reads Justice Harlan essentially to have proclaimed, rather than denied, the availability of habeas in *Wood*. Immediate relief was denied, in Peller's view, only because the petitioner had not raised his federal claims in a proper and timely manner in state court and thus had failed to exhaust state remedies. According to Peller, Justice Harlan's distinction between cases in which the facial validity of statutes was attacked and cases like *Wood* in which only the application of state law was challenged was addressed to the question of remedy. Peller, *supra* note 44, at 639. The Court may have hesitated to accept *Wood* in habeas, in which the only relief could be release from custody, rather than on direct review, in which the state court judgment might have been "reexamined, and reversed, affirmed or modified." *In re* Wood, 140 U.S. 278, 287 (1891). By denying the writ, Justice Harlan may have attempted to discourage prisoners such as Wood from withholding as-applied claims until habeas review in hopes of obtaining outright release. Prisoners attacking the facial validity of state statutes needed no similar incentive, of course, because they would be entitled to release irrespective of the federal vehicle by which their claims were examined. Peller, *supra* note 44, at 638–43. *See also In re* Frederich, 149 U.S. 70, 77–78 (1893) (expressing a preference for direct review to have the benefit of the varied remedies available on appeal); Medley, Petitioner, 134 U.S. 160, 173 (1890) (also expressing concern over the inflexibility of the relief available in habeas). *But see* Bator, *supra* note 44, at 479 n.93 (relying on *Frederich* as further authority for the limitation of habeas to jurisdictional error). I will not attempt to decide who has the better of the argument concerning the meaning of *Wood*. It is enough merely to say that obscure opinions of the variety that *Wood* represents, blurring the analytically distinct questions of jurisdictional power and the exhaustion doctrine, produce only ambiguity regarding the Court's true intentions concerning the latter.

101. Caldwell v. Texas, 137 U.S. 692, 697–98 (1891); *cf.* Davis v. Burke, 179 U.S. 399, 403–04 (1900) (pointing out that the state constitution approved prosecution by information and stating that a Supreme Court holding that defendants prosecuted without indictment were denied due process "would involve the absurdity of holding that what the people had declared to be the law was not the law"); Tinsley v. Anderson, 171 U.S. 101, 106 (1898) (holding that the habeas writ could not be available unless the conviction was void, and that if the conviction was not void the "petitioner was not deprived of his liberty without due process of law").

102. Congress did not grant the Court appellate jurisdiction in criminal cases until 1889. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656 (granting those convicted of capital crimes "before any court of the United States" an appeal as of right to the Supreme Court). In earlier years, then, the Court was understandably hesitant to claim, by way of habeas corpus, the very authority to superintend judgments in criminal cases that Congress had deliberately withheld. That hesitancy may account for the results in early habeas cases concerning federal prisoners, in which the Court used language apparently controlling habeas for state prisoners as well. *E.g.*, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 203 (1830) (noting that the Court had "no power to examine the proceedings [below] on a writ of error," and that it would be "strange" if the Court could nevertheless "substantially reverse" the judgment by directing the issuance of a writ of habeas corpus); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 166 (1873) (disclaiming a general power to review criminal judgments "by the use of the writ of habeas corpus or otherwise"); *see* Peller, *supra* note 44, at 610–16 (citing these and other cases in point).

course, occurred. The cases managed to blur issues that the *Royall* Court had taken pains to keep separate—the federal habeas courts' power to inquire into the validity of detention in state custody and their discretion to postpone the exercise of that power. In *United States ex rel. Kennedy v. Tyler*,[103] for example, the Court explained that the state courts were not to be interfered with "save in rare cases where exceptional circumstances of peculiar urgency are shown to exist."[104] That holding was consistent with the application of a rule of timing. The Court also said, however, that the habeas courts' "power" was "not unqualified," but was to be "exerted in the exercise of a sound discretion."[105] That assertion linked jurisdiction with the distinguishable matter of the discretionary exercise of jurisdiction. The lower federal courts can hardly be blamed for understanding *Tyler* to bring the discussion full circle—to make of the exhaustion doctrine the very impediment to federal jurisdiction that *Royall* had denied.[106]

The Supreme Court hastily responded with its explanatory opinion in *Ex parte Hawk*:[107]

> Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. . . .
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> The denial of relief to petitioner by the federal courts and judges in this, as in a number of other cases, appears to have been on the ground that it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only "in rare cases where exceptional circumstances of peculiar urgency are shown to exist." . . . To this, some courts have added the intimation that when the writ is sought by one held under a state conviction the only remedy ordinarily to be had in a federal court is by way of application to this Court. . . .
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> The statement that the writ is available in the federal courts only "in rare cases" presenting "exceptional circumstances of peculiar urgency," often quoted [from *Tyler*], was made in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right.

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103. 269 U.S. 13 (1925).

104. *Id.* at 17.

105. *Id.*

106. It is worth noting, for example, that the *Tyler* opinion included a citation to Glasgow v. Moyer, 225 U.S. 420 (1912), in which a federal prisoner had sought habeas relief after a trial in federal court. 269 U.S. 13, 18 (1925) (citing 225 U.S. 420, 424–25 (1912)). In that context, in which no question of postponing federal review in deference to adjudication in the courts of any state could arise, Justice McKenna's opinion for the Court seems clearly to have been addressed to a "limitation upon the scope" of the writ. 225 U.S. 420, 428 (1912). Specifically, Justice McKenna wrote: "The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact." *Id.* at 429. This was not, of course, to enforce an exhaustion requirement, but to commit the federal prisoner in *Glasgow* entirely to the jurisdiction of the federal trial court, subject to direct review, without the promise of collateral review later.

107. 321 U.S. 114 (1944).

> Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the question thus adjudicated. . . . But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, . . . a federal court should entertain his petition for habeas corpus, else he would be remediless.[108]

The Court plainly intended that this language would lay to rest misconceptions regarding the availability of habeas and the proper role of the exhaustion doctrine.[109] Its effort, however, was only partly successful. The reference in the first paragraph to direct review in the Supreme Court as being essentially among the state remedies that must be exhausted not only perpetuated the myth that the Supreme Court was equipped to correct federal errors in the run of state criminal cases, but fed speculation that habeas at the district level might not be available at all after conviction, except, of course, in "exceptional circumstances." Yet that was precisely the misconception that *Hawk* was intended to correct, as the second and third paragraphs make clear.[110] The reference to "full and fair adjudication" in state court raised even more difficulty. Read literally, that language in the fourth paragraph refuted the propositions established in the second and third, leaving habeas open only when state processes did not exist or broke down and not for the routine reexamination of federal claims to determine whether the state courts had arrived at correct results.[111] Talk of "unavailable" or "inadequate" state remedies, introduced for the first time in *Hawk*, also suggested a process model in habeas in which federal review would be forthcoming only when federal claims were not fairly adjudicated in state court.

Two more decades passed before the notion that direct review in the Supreme Court must always be sought in advance of an application for habeas review at the district level was dispelled.[112] Fortunately, the Court's true

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108. *Id.* at 116–18 (citations omitted).

109. *See* Darr v. Burford, 339 U.S. 200, 211 (1950) (conceding as much and noting that the Court had caused the *Hawk* opinion to be circulated to prisoners contemplating attacks on state detention).

110. A number of earlier cases had held, quite clearly, that dismissal for want of exhaustion was without prejudice to a new habeas petition at the district level once state remedies had been pursued. *E.g.*, Minnesota v. Brundage, 180 U.S. 499, 505 (1901). At the risk of invoking a precedent that has fallen from the Justices' favor (for other reasons), I should mention that the survey of exhaustion provided in Fay v. Noia, 372 U.S. 391, 419–20 (1963), is explicit on this point.

111. In all candor, I have to concede that this portion of the Court's explanation in *Hawk* reads strangely like an advance glimpse of Stone v. Powell, 428 U.S. 465 (1976). The issue in *Hawk* was not, however, the substantive scope of habeas, but the appropriate timing of federal review. The court's decisions immediately following reveal no intention by this language to anticipate the extraordinary innovations that *Stone* accomplished regarding fourth amendment exclusionary rule claims.

112. Actually, two distinct questions were presented. First, given that the federal district courts enjoyed power to entertain habeas corpus petitions after conviction in state court, was it necessary for litigants nevertheless to ask the Supreme Court to review their state judgments directly before seeking habeas relief at the district level? *See In re* Frederich, 149 U.S. 70, 78 (1893) (the federal habeas courts have power to entertain postconvic-

intentions concerning the scope of review in habeas and its relationship to exhaustion were clarified sooner. In *Wade v. Mayo*,[113] decided three years after *Hawk*, the Court approved a district court's award of habeas relief to a state prisoner who had first taken his claim of denial of counsel to the highest state court and had received an unfavorable judgment on the merits. It was not suggested that the proceedings in state court had not been "full and fair" or that state remedies had been "unavailable" or "inadequate." The state courts had treated the claim fairly, but had simply reached the wrong conclusion.[114] The view that the exhaustion doctrine recognized the state court as the appropriate forum in which "all the problems incident to a state criminal prosecution" should be resolved, save in "the most exceptional cases," was relegated to the dissent.[115] The availability of habeas corpus as a postconviction remedy having thus been settled, the exhaustion doctrine emerged, in isolation from other matters, as the rule of timing it was and had been since *Royall*. Attention to whether state court litigation had been "full and fair" subsided, and the question whether state remedies were "unavailable" or "inadequate" merged with the more familiar issue whether "special circumstances" justified prompt federal intervention. That understanding of *Hawk* survived and, in due course, was written into the statute books.[116]

C. *The "Codification" in Section 2254*

The very existence of the federal writ as a sequel to state court litigation of federal claims generated widespread controversy during the 1940s.[117] Not only were state judges disturbed that their judgments would be subject to review by trial-level federal habeas courts, but many federal judges resisted the function assigned to them.[118] If the exhaustion doctrine cut any figure at

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tion applications, but "in the absence of special facts and circumstances" it was the "better practice" to require convicted prisoners to seek direct review in the Supreme Court). The Court gave an affirmative answer in Darr v. Burford, 339 U.S. 200, 214–17 (1950), but later reversed itself in Fay v. Noia, 372 U.S. 391, 435–38 (1963). Second, if a prisoner did seek direct review in the Supreme Court and certiorari was denied, what effect, if any, should be given that denial in subsequent habeas proceedings? The Justices also quarreled over this second question, but ultimately adopted Justice Frankfurter's position. The denial of certiorari constitutes only a decision not to decide and is entitled to no weight when a disappointed petitioner turns to habeas corpus thereafter. Brown v. Allen, 344 U.S. 443, 488–97 (1953) (Frankfurter, J.) (expressing the majority's position on the issue). The reasons are self-evident; they are treated at length in *Brown* and in Justice Frankfurter's dissent in *Darr*, 339 U.S. 200, 219–38 (1950) (Frankfurter, J., dissenting).

113. 334 U.S. 672 (1948).

114. Judge Parker apparently hoped to restrict *Wade* to something far less significant. *See* Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 177–78 (1949) (reading the case to contemplate habeas review only in "special circumstances"). That effort was, however, unsuccessful. *See infra* notes 117–31 and accompanying text.

115. Wade v. Mayo, 334 U.S. 672, 694 (1948) (Reed, J., dissenting).

116. *See infra* note 137 and accompanying text. The Court described these developments at some length in Darr v. Burford, 339 U.S. 200, 210–11 (1950).

117. *See* Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949).

118. *See, e.g.*, United States *ex rel.* Rooney v. Ragen, 173 F.2d 668 (7th Cir.), *cert. denied*, 337 U.S. 961 (1949); Stonebreaker v. Smyth, 163 F.2d 498 (4th Cir. 1947). In 1954 the large majority of state attorneys general joined in an unsuccessful attempt to win a judgment that postconviction habeas was itself unconstitutional. United States *ex rel.* Elliott v. Hendricks, 213 F.2d 922 (3d Cir.), *cert. denied*, 348 U.S. 851 (1954).

all in the debates, it tended to mitigate concerns on both sides by deferring federal review until after the state courts had had an opportunity to act.

In 1942 the Judicial Conference of the United States appointed a committee, chaired by Judge John J. Parker, to investigate the relevant issues.[119] That committee returned the following year with two proposals, one of which would virtually have eliminated the federal courts' power to entertain petitions from state prisoners.[120] The Conference adopted the jurisdictional bill with amendments.[121] Shortly thereafter, however, Congress' consideration of the Revision of the Judicial Code outstripped efforts to deal with habeas corpus alone. While the proposed Revision embraced some of the provisions included in the committee's bills, it did not take aim at the jurisdictional power of the federal courts.[122] Nevertheless, sensing that an independent course might prove futile, the committee acquiesced and urged the Conference to join the larger effort.[123] The Conference approved the tactic at its 1947 session and, for the moment, it appeared that a frontal assault on the habeas jurisdiction was abandoned. Indeed, the Revision's essential objective was not to alter habeas corpus law as it had developed in the Court's decisions, but to "codify" those decisions and to establish procedures for giving effect to the value judgments reflected in them.[124]

As often happens in law and politics, however, surface placidity concealed feverish activity below. At the same 1947 meeting, the Conference adopted two proposed amendments to the Revision bill, offered by the Parker committee.[125] In one, ostensibly intended only to "codify" the exhaustion doctrine, Judge Parker hoped effectively to reintroduce the jurisdictional barrier to the federal forum that he had failed to achieve straightforwardly. Once again, the exhaustion doctrine was merged with the idea of preclusion. The bill provided, first, that state prisoners must exhaust "available" and "adequate" state remedies before seeking federal review in habeas. In that, it was unremarkable, given the Court's conclusion in *Hawk* that those same matters were relevant to the existence of "special circumstances" warranting

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119. *See* Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 173 (1949).

120. The Committee's recommendations are discussed in JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES, REPORT OF THE JUDICIAL CONFERENCE 22–24 (1943).

121. The Conference adopted a recommendation that a specific bill be enacted by the Congress, with three judges, including Judge Parker, appointed as a committee on style with authority to submit proposals for revisions to the individual Conference members. The proposed bill would have abrogated federal habeas corpus for state prisoners "unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis or otherwise in the courts of the state." *Id.* at 23. The phrase "no adequate remedy" was explicitly defined as the "absence of state corrective process or existence of exceptional circumstances, rendering such process unavailable to protect his [a prisoner's] rights." *Id.*

122. *See* Brown v. Allen, 344 U.S. 443 (1953) (examining the relevant evidence).

123. *See* JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES, REPORT OF THE JUDICIAL CONFERENCE 19–20 (1947).

124. *See generally* H.R. REP. NO. 308, 80th Cong., 1st Sess. A177–A180 (1947).

125. There were, of course, other "procedural" proposals during this period, first from the committee and then from the Judicial Conference. Those matters are not pertinent to the present discussion. *See generally* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 230–31 & nn.73–75 (1948).

prompt federal review.[126] Next the bill provided that prisoners would not be deemed to have complied with the exhaustion requirement if they had "the right under the law of the state to raise the question presented by any available procedure."[127] In that, the bill was either redundant or misleading. Judge Parker plainly intended the latter. He and the other draftsmen understood that in most states prisoners could theoretically seek postconviction relief through some common-law remedy over and over again. Accordingly, they would never be able to demonstrate that no available procedure existed for raising their claims in state court. In every instance yet another, albeit futile, request for the state writ of habeas corpus or *coram nobis* would be available. The effect of the amendment, in Judge Parker's own words, would be to "eliminate, for all practical purposes, the right to apply to the lower federal courts for habeas corpus in all states in which successive applications may be made . . . to the state courts."[128]

Although Congress ultimately embraced the language urged by the Judicial Conference, the sparse legislative history provides no basis for concluding that it intended to adopt Judge Parker's understanding of the bill's practical effect. Indeed, in *Brown v. Allen*[129] the Justices were unanimous in rejecting Judge Parker's view expressly.[130]Justice Reed, speaking for the Court, stated: "We do not believe Congress intended to require repetitious applications to state courts."[131] *Brown* was firmly grounded in the Justices' recognition that the exhaustion doctrine was not a device for cutting off the federal forum to state prisoners, but was only a rule of timing. That, of course, was precisely the view the Court had taken in *Frisbie*, decided prior to *Brown*.[132] It was the view taken in *Noia* and other decisions of the Warren era.[133] And, in all fairness, it is the view usually expressed by the Burger Court.[134] The difficulty is that the Justices are not always careful to make the discretionary nature of the doctrine clear, and, regarding its practical application, they make such a "fetish"[135] of exhaustion that once again it threatens to frustrate collateral review at any time.[136]

126. *See supra* text accompanying note 108.

127. H.R. 3214, 80th Cong., 1st Sess. (1947).

128. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176 (1949).

129. 344 U.S. 443 (1953).

130. *Id.* at 448 n.3.

131. *Id.*

132. *See supra* text accompanying notes 51–55.

133. Fay v. Noia, 372 U.S. 391, 418–20 (1963); *see supra* notes 30–33 and accompanying text.

134. *E.g.*, Smith v. Digmon, 434 U.S. 332 (1978) (per curiam) (finding the exhaustion doctrine satisfied and habeas review available even though the state supreme court had ignored a federal claim raised by the petitioner in brief); Preiser v. Rodriguez, 411 U.S. 475 (1973) (describing the exhaustion of state remedies as a "condition precedent to the invocation of federal judicial relief").

135. 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4264, at 653–54 (1978).

136. *See infra* notes 148–85 and accompanying text.

IV. THE EXHAUSTION DOCTRINE TODAY: AN APPRAISAL AND CRITIQUE

A. *The Effect of "Codification"*

The relationship between the exhaustion doctrine as it developed in the wake of *Royall* and the pertinent provisions of the 1948 Revision, subsections 2254(b)-(c), is problematic. For the most part, the statute has been read merely to acknowledge the pre-existing, judge-made rule. The reviser's note, for example, states that "[t]his new section is declaratory of existing law as affirmed by the Supreme Court . . . ."[137] One could plausibly construe the statute to occupy the field, demanding exhaustion only in those cases and under those circumstances described in its text. I suspect that at least some Justices are tempted in that direction. Strict focus on and enforcement of the terms of the statute would not only shift responsibility for exhaustion doctrine cases to the legislative branch, but would link the doctrine, at least superficially, with congressional authority to affect the federal courts' jurisdiction.[138] Rigid rules respecting exhaustion might be justified on a statutory ground even if, judged in light of the policies the Court has identified, those same rules would be vulnerable. One budding example, together with the decided cases I will treat below, should suffice to make the point.

Read closely, section 2254(b) provides only that applications for habeas relief shall not be granted in the absence of exhaustion.[139] The Court has enforced that directive vigorously, insisting on exhaustion even when prisoners' entitlement to relief is "clear."[140] The statute says nothing, however, about exhaustion in cases in which habeas relief is denied. The Supreme Court has not yet addressed the issue, but several lower courts have concluded that frivolous petitions can be dismissed on the merits whether or not state remedies have been exhausted.[141] As a practical matter, state authorities will probably not be greatly offended that the exhaustion doctrine is relaxed,

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137. H.R. REP. NO. 308, 80th Cong., 1st Sess. A180 (1947) (referring explicitly to *Hawk*).

138. *Cf.* Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) (the jurisdiction of the lower federal courts is limited to that prescribed by statute). Even the most vigorous proponents of federal habeas have generally conceded that much of the present framework is the product of statute. *E.g.*, Stone v. Powell, 428 U.S. 465, 515–29 (1976) (Brennan, J., dissenting); Brown v. Allen, 344 U.S. 443, 508–10 (1953) (Frankfurter, J.). I need not and, therefore, choose not to consider the question whether the Constitution itself contemplates the availability of the writ in the federal forum. *Compare* Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, *with* Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335 (1952).

139. *See supra* note 1; *see also* Stamper v. Baskerville, 531 F. Supp. 1122, 1132 (E.D. Va. 1982).

140. Duckworth v. Serrano, 454 U.S. 1 (1981) (per curiam).

141. Gutierrez v. Griggs, 695 F.2d 1195, 1198 (9th Cir. 1983); Collins v. Housewright, 664 F.2d 181, 183 (8th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982); Grieco v. Hall, 641 F.2d 1029, 1036 (1st Cir. 1981); *cf.* De Martino v. Weidenburner, 616 F.2d 708, 710 n.1 (3d Cir. 1980) (affirming the denial of relief on the merits and thus failing to "reach" the exhaustion issue). The Fifth Circuit has long taken this view, but has more recently worried that the Supreme Court's decision in Rose v. Lundy, 455 U.S. 509 (1982), discussed below, makes the dismissal of unexhausted claims inappropriate. Caldwell v. Line, 679 F.2d 494, 497 n.2 (5th Cir. 1982) (finding it unnecessary to decide the question).

if federal relief is denied summarily. The dismissal of habeas applications probably does generate less friction between the two systems than the award of habeas relief.[142] It may be possible, for example, to deny relief summarily without calling for a response from the state's attorney or in any similar way disrupting contemporaneous state proceedings.[143] Nevertheless, the mere fact of early federal adjudication plainly subordinates the state courts' interest in addressing federal issues. If the Supreme Court parses the language of section 2254(b) and concludes that failure to exhaust state remedies may be overlooked so long as prisoners lose, but that state courts must be consulted before prisoners can be permitted to win, it must do so in the teeth of a key policy underlying the exhaustion doctrine the Court established in *Royall*.[144]

Whatever the statute's potential as a vehicle for establishing rules to the detriment of early federal adjudication, the Court is most unlikely to restrict the exhaustion doctrine to what Congress has mandated. If section 2254 were understood to occupy the field, exhaustion would not be required in the very cases in which the arguments for it are most powerful. The statute speaks only to cases in which petitioners attack custody pursuant to a state court judgment. It has nothing to say about the timing of federal intervention prior to conviction. If the Court were to hold that the exhaustion doctrine is entirely captured in the statute, the federal courts would be free, even compelled, to adjudicate prior to, or in the midst of, trial, when the state's interests in orderly administration and an opportunity to pass on federal claims are at their height.[145] The Justices have no intention of abandoning the exhaustion doctrine established in *Royall*, itself concerning a request for habeas relief in advance of trial.[146] They do not feel bound by the statute, but consider themselves free to examine exhaustion doctrine problems by reference not only to section 2254 and its legislative history, but to the underlying policies identified

142. In his barely temperate lecture on the subject, Judge Cooke has proposed that "[t]he most incessant abrader of judicial feelings may be in the *overturn* of the deliberative judgment of the highest court of a state by a single federal trial court judge." Cooke, *Waste Not, Wait Not—A Consideration of Federal and State Jurisdiction*, 49 FORDHAM L. REV. 895, 900 (1981) (emphasis added).

143. 28 U.S.C. § 2254 Rule 4 (1976) (permitting the district judge to make a preliminary appraisal of petitions and to dismiss them summarily, without calling for an answer or other pleading from the respondent, if they plainly lack merit).

144. In this vein, the Fourth Circuit has flatly rejected the suggestion that states' attorneys may enter conditional waivers of the exhaustion doctrine by which they acquiesce in immediate federal habeas review but reserve their "right" to insist that claims be put to the state courts later if the federal court finds those claims to be meritorious. Harding v. North Carolina, 683 F.2d 850 (4th Cir. 1982). Federal adjudication, not merely adverse federal outcome, touches the comity rationale of the exhaustion doctrine. Nevertheless, the Reagan Administration has proposed legislation that would permit the federal habeas courts to deny relief on the merits regardless of exhaustion. The Administration's Proposed Reforms in Habeas Corpus Procedures (March 4, 1982), *reprinted in Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the Judiciary*, 97th Cong., 2d Sess. 9 (1982); *see* S. 217, 98th Cong., 1st Sess., 129 CONG. REC. 402 (1983) (incorporating the Administration's proposals). I have criticized that proposal elsewhere. *See* Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 635–36 n.120 (1983).

145. *But see* Amsterdam, *supra* note 50, at 835, 902–03 (arguing that exhaustion is less justifiable prior to trial—before a state court has come to a judgment that a federal habeas court might effectively set at naught).

146. *See supra* notes 70–77 and accompanying text.

in their own decisions.[147] That being true, the same freedom permits movement in either direction. The statute neither prevents the habeas courts from requiring exhaustion in pretrial cases, nor requires them to disregard exhaustion in cases in which relief is denied. In both instances the federal courts are charged, as they have been since *Royall*, to orchestrate the timing of their treatment of federal claims according to prudence and sound discretion, keeping in mind the delicate balance of interests at stake in every case. In the long history of the exhaustion doctrine, *Frisbie* presents the best illustration of the way in which the courts should exercise that discretion.

B. *Renewed Talk of Jurisdiction*

The Court has not abandoned the basic premise regarding exhaustion in habeas. When called upon to do so, the Justices acknowledge that the federal courts have jurisdiction to entertain habeas petitions at any time and that the doctrine is a device for choosing the appropriate occasion for habeas review.[148] Nevertheless, some recent cases can be read to undercut that understanding, feeding speculation that the doctrine does affect the federal courts' power to adjudicate. While the Court has occasionally approved the practice of holding habeas petitions on the federal docket while petitioners pursue state remedies,[149] it stated explicitly in *Slayton v. Smith*[150] that the better disposition is outright dismissal, without prejudice to a new petition when the exhaustion doctrine has been satisfied.[151] Dismissal, of course, is associated with jurisdictional error.[152]

Then, too, the Court has repeatedly vacated judgments on the merits on the stated ground that the lower courts misapplied the exhaustion doctrine. In *Picard v. Connor*[153] the Court dismissed for want of clear identification of a

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147. It is true, of course, that the original draft of the bill that became the Judical Code included language extending the habeas jurisdiction to petitioners held under "the authority of a State officer." H.R. 3214, 80th Cong., 1st Sess. (1947). The Congress adopted an amendment restricting the statutory exhaustion doctrine to prisoners detained pursuant to a state court judgment. It appears that the intention was to avoid any potential difficulty should federal officers seek habeas relief from state court prosecution for actions taken in their official capacity. S. REP. NO. 1559, 80th Cong., 2d Sess. 9 (1948). The result is ambiguity. To the extent that the reviser's note interprets the new statute to embrace only the judge-made doctrine as set forth in *Hawk*, *see supra* note 137 and accompanying text, it appears there was no intention to change, or in any way restrict, that doctrine legislatively. At the same time, to the extent Congress found it necessary to confine the statute to postjudgment cases to avoid requiring exhaustion in pretrial cases concerning federal officers, it seems that some change was contemplated. Prior law had not required exhaustion in cases of that kind, finding in them "special circumstances" justifying immediate federal intervention. *See supra* note 83. Professor Amsterdam has treated these materials at greater length, and I defer to his discussion. Amsterdam, *supra* note 50, at 890–91 nn.416–17.

148. *E.g.*, Wainwright v. Sykes, 433 U.S. 72, 80–81 (1977).

149. *E.g.*, Nelson v. George, 399 U.S. 224, 229 (1970); Wade v. Wilson, 396 U.S. 282, 287 (1970).

150. 404 U.S. 53 (1971) (per curiam).

151. *Id.* at 54. *See* Fay v. Noia, 372 U.S. 391, 420 (1963) (pointing out the obvious—if prisoners were not permitted to return to the federal forum after complying with the exhaustion doctrine "a rule of timing would become a rule circumscribing the power of the federal courts on habeas").

152. *See, e.g.*, Muskrat v. United States, 219 U.S. 346 (1911).

153. 404 U.S. 270 (1971).

federal claim in state court, even though the essential character of the claim had not become plain until the case reached the Supreme Court. Later in *Pitchess v. Davis*[154] a per curiam explained *Picard* as having held that exhaustion is a "precondition" or "prerequisite" to federal review in habeas.[155] These recent cases evidence a "reluctance" on the part of the Court to "backstop" the exhaustion judgments of the lower federal courts.[156] Rather than permit the lower courts the discretion contemplated in *Frisbie*, the Justices seem poised to review the doctrine's application to ensure that it is not relaxed.

Language in other recent cases suggests that the Court is infusing even more rigidity into the doctrine. In *Sumner v. Mata*[157] the matter of exhaustion was not squarely at issue. The question was whether the circuit court below should have attached a statutory presumption of correctness to state court findings of primary fact, pursuant to subsection 2254(d).[158] The close proximity of that section to subsections 2254(b)-(c), which codify the exhaustion doctrine, could not, however, be missed. The prisoner in *Mata* argued that subsection 2254(d) should not control, because the warden had not raised the statute in a timely fashion below and, thus, should forfeit reliance on it on appeal. At oral argument Justice Rehnquist proposed that the "phraseology" of the statute made it "practically a part of the habeas corpus cause of action."[159] Continuing, he asked, "Isn't it jurisdictional?"[160] Then, in his opinion for the Court, he addressed the prisoner's "abandonment" contention forthrightly:

> Whether or not the [warden] specifically directed the Court of Appeals' attention to § 2254(d) makes no difference as to the outcome of this case. The present codification of the federal habeas statute is the successor to "the first [C]ongressional grant of jurisdiction to the federal courts," . . . and the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction. . . . "[I]t is the duty of this [C]ourt to see to it that the jurisdiction of the [district court] . . . is not exceeded."[161]

This language is ambiguous, referring as it does to the "exercise" of jurisdiction rather than to jurisdiction itself.[162] And we must not forget that the subject under discussion is subsection 2254(d), not subsections 2254(b)-(c). It

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154. 421 U.S. 482 (1975).
155. *Id.* at 486–87.
156. Picard v. Connor, 404 U.S. 270, 281 (1971) (Douglas, J., dissenting).
157. 449 U.S. 539 (1981).
158. Subsection 2254(d) provides:

> (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 [one or more prescribed circumstances is demonstrated] . . . .

28 U.S.C. § 2254(d) (1976).
159. 28 CRIM. L. REP. (BNA) 4138 (Dec. 24, 1980).
160. *Id.*
161. Sumner v. Mata, 449 U.S. 539, 547–48 n.2 (1981) (citations omitted).
162. *See* Bowen v. Johnston, 306 U.S. 19, 27 (1939), quoted *supra* note 1.

seems plain, however, that Justice Rehnquist meant to explain why the warden's argument should be entertained despite his procedural default below. The explanation, evidently, was that the argument grounded in subsection 2254(d) went to the courts' power to adjudicate and, thus, could be raised at any time.[163]

The available bases of distinguishing *Mata* did not dissuade the warden in *Rose v. Lundy*[164] from relying on Justice Rehnquist's language to propose that the exhaustion doctrine is a "jurisdictional limitation upon federal habeas review."[165] Conceding that in *Royall* the doctrine had been a matter of discretion, the warden contended that the 1948 codification "translated" that discretion "into a limitation of *power*."[166] That position attracted attention at oral argument in the following exchange:

> Mr. Zimmerman: The exhaustion requirement, we submit, operates as a prerequisite to habeas review, a precondition to habeas review. It has never been, since 1948, anyway, a discretionary tool.
>
> Justice Brennan: Well, didn't Picard say that? Didn't Picard hold that?
>
> Mr. Zimmerman: I don't recall—
>
> Justice Brennan: That it was not a discretionary rule? I thought Picard held that. No?
>
> Mr. Zimmerman: That it was not a discretionary—
>
> Justice Brennan: Yes, that the exhaustion requirement is a requirement, period.[167]

Here again, there is ambiguity. While counsel may have meant to argue that the exhaustion doctrine is jurisdictional, he only quoted *Pitchess*.[168] When Justice Brennan seemed to agree, he may have understood only that exhaustion is generally to be demanded and that the district courts stand to be reversed when they overlook a failure to exhaust in the absence of "special circumstances." In this regard, it is worth pointing out that counsel for the prisoner in *Lundy* disagreed with the view that exhaustion is jurisdictional and requested an opportunity to file a supplemental brief if the Justices intended to reach that question.[169] No one pursued the matter further, and there is no

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163. *See* FED. R. CIV. P. 12(h)(3).

164. 455 U.S. 509 (1982).

165. Reply Brief for Petitioner at 3.

166. *Id.* at 4.

167. Oral Argument Transcript at 24. I rely upon Mr. Zimmerman's memory for the identification of Justice Brennan as the questioner in this exchange.

168. *See supra* text accompanying note 155.

169. Oral Argument Transcript at 32–33 (argument of Mr. Smith):

> Now, the basis of the proposition put forth by Petitioner, at least in his brief filed in this Court, was comity. In the reply brief filed in this Court, he stated that the basis of this proposition was jurisdictional, that the District Court did not have jurisdiction to hear petitions which contained exhausted and unexhausted claims.
>
> I don't believe that this is the case. If the Court wishes to pursue that matter, this is the case in which it is to be raised. If it is the case, and if the Court feels so, I feel that both sides should be permitted to brief that jurisdictional issue.

Id. The Court's ultimate opinion in *Lundy* did not address the "jurisdiction" issue, and, while the decision has surely imported additional rigidity into habeas law, it has not been read to make the exhaustion of state remedies "jurisdictional" after all. *See* Niziolek v. Ashe, 694 F.2d 282, 285 (1st Cir. 1982); Washington v. Strickland, 693 F.2d 1243, 1248–49 n.7 (5th Cir. 1982).

mention of it in the Court's opinion. Still, the doubts persist. At a minimum, even Justice Brennan takes the position that exhaustion is ordinarily a "requirement" and that the district courts are not free to exercise discretion without appellate supervision. It may be a short and practical, if not a theoretical, step from that position to a holding that exhaustion goes to the courts' fundamental power to adjudicate.

Other recent cases outside the habeas field can be cited on the point. In *Webb v. Webb*[170] Justice White's opinion for the Court argued that the "principal [sic] of comity" behind the "properly-raised-federal-question" doctrine is "similar" to that behind the exhaustion doctrine in habeas.[171] The requirement that litigants "properly raise" federal claims in state court before they can present them on direct review in the Supreme Court is, of course, jurisdictional.[172] In *Webb* the Court found that the petitioner had not raised her claim properly below and thus dismissed the writ of certiorari "for want of jurisdiction."[173] In *Fair Assessment in Real Estate Association v. McNary*[174] Justice Rehnquist's opinion for the Court held that the "principle of comity" underlying the Tax Injunction Act "bars" the federal courts from awarding damages in civil rights suits attacking allegedly unconstitutional state tax assessments.[175] The attempt to find a jurisdictional defect in *McNary* elicited a rejoinder from Justice Brennan, who reminded the Court that Congress bears responsibility for establishing the jurisdiction of the federal courts. Justice Brennan worried aloud that the majority's approach to comity constituted an "abdication" of the federal habeas courts' responsibility to operate "within their assigned jurisdiction in accordance with established principles respecting the prudent exercise of equitable power."[176] Yet even he was obscure in referring to the role played by comity in habeas corpus: "While current habeas *jurisdiction* is wholly a statutory matter . . . comity surely played a part in the development of the exhaustion *requirement*. . . . But the judicial creation of that *requirement* reflected no usurpation of judicial power. Issuance of the Great Writ was historically regarded as a matter of equitable discretion."[177] It is possible to read this passage as an attempt to explain the discretion exercised by the federal habeas courts on the basis of the equitable nature of the common-law writ rather than the essential character of the exhaustion doctrine.[178]

The loose language in these cases is perplexing. Still, I am not yet persuaded that a majority of the Justices mean, essentially, to overrule *Royall.*

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170. 451 U.S. 493 (1981).
171. *Id.* at 500.
172. *See* Cardinale v. Louisiana, 394 U.S. 437 (1969) (collecting the authorities).
173. 451 U.S. 493, 502 (1981).
174. 454 U.S. 100 (1981).
175. *Id.* at 107.
176. *Id.* at 117, 133 (Brennan, J., concurring).
177. *Id.* at 121 n.4 (Brennan, J., concurring) (emphasis added).
178. *See* Fay v. Noia, 372 U.S. 391, 438 (1963) (noting that the writ "has traditionally been regarded as governed by equitable principles"); *accord* Stone v. Powell, 428 U.S. 465, 478 n.11 (1976).

Perhaps the Court wishes to signal the lower courts that the exhaustion doctrine is discretionary only in the definitional sense. The Supreme Court itself will employ discretion in establishing both the doctrine and certain exceptions to it. The task of the lower courts, then, is not to exercise discretion again in the circumstances of the individual case, but to apply the doctrine, including its exceptions, as it is described in the Court's precedents.[179] I would prefer a more flexible approach than that described—one that contemplates an ad hoc appraisal at the district level.[180] Yet anything would seem preferable to the erection of a jurisdictional bar. All the same, I cannot fault some lower courts for concluding that the Court has precisely that in mind.[181] Nor is it surprising that many courts insist upon raising the exhaustion question sua sponte, the manner appropriate for jurisdictional defects, even when counsel for the respondent overlooks,[182] concedes,[183] or waives[184] the matter. Those decisions are ill-advised. And certainly they cannot rest upon the unexamined proposition that comity is owed to the state courts, rather than the states themselves,

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179. *See* Amsterdam, *supra* note 50, at 889 (reading the cases decided soon after *Royall* to have established that the "discretion" in habeas cases would be exercised by the Supreme Court and not by trial level judges on a case-by-case basis).

180. *See supra* part II; *cf.* Amsterdam, *supra* note 50, at 889 n.408 (recognizing that in *Frisbie* the Court showed some deference to the circuit court below, but apparently viewing that case as an aberration and concluding that "on the whole" it is "apparent" that the "discretion" contemplated in *Royall* is for the "federal judicial system" rather than the "trial judge").

181. *Accord* LaBruna v. Marshal, 665 F.2d 439, 442 (2d Cir. 1981); Franklin v. State, 662 F.2d 1337, 1347–48 (9th Cir. 1981); *cf.* United States *ex rel.* Clauser v. Shadid, 677 F.2d 591, 594 (7th Cir. 1982) (instructing the district court to dismiss for want of "jurisdiction" when the only flaw was a failure to exhaust); Chancery Clerk of Chickasaw County v. Wallace, 646 F.2d 151, 158 (5th Cir. 1981) (referring to the exhaustion doctrine as "jurisdictional"). *But see* Morgan v. Wainwright, 676 F.2d 476, 477 n.1 (11th Cir.) (clarifying that the doctrine is not "jurisdictional"), *cert. denied*, 103 S. Ct. 380 (1982).

182. *E.g.*, Wilson v. Fogg, 571 F.2d 91, 94 n.5 (2d Cir. 1978); *cf.* Campbell v. Crist, 647 F.2d 956, 957 (9th Cir. 1981) (the circuit "may consider whether state remedies have been exhausted even if the state does not raise the issue"); Davis v. Campbell, 608 F.2d 317, 320 (8th Cir. 1979) (an "inadvertent" failure to raise the exhaustion question would not prevent the court itself from insisting that the prisoner return to state court).

183. *E.g.*, Jackson v. Cupp, 693 F.2d 867, 868 (9th Cir. 1982). The best illustration may be Zicarelli v. Gray, 543 F.2d 466 (3d Cir. 1976), in which counsel for the respondent had originally argued that the prisoner had failed to exhaust state remedies but, after losing on that question at the district level, changed his position on appeal. At oral argument counsel explained that he had reexamined the record and concluded "in all fairness" that the prisoner's claim had, indeed, been presented to the highest state court. *Id.* at 471 n.20. Nevertheless, the circuit rejected that concession, raised the exhaustion question sua sponte, and determined the matter against the prisoner. *Id.* at 470–75.

184. United States *ex rel.* Trantino v. Hatrack, 563 F.2d 86, 96 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978); United States *ex rel.* Sostre v. Festa, 513 F.2d 1313, 1314 n.1 (2d Cir.), *cert. denied*, 423 U.S. 841 (1975); Needel v. Scafati, 412 F.2d 761, 765–66 (1st Cir. 1969); *see* Sweet v. Cupp, 640 F.2d 233, 237 n.5 (9th Cir. 1981) (the state can "waive" exhaustion only if "the interest of justice so requires"); *accord* Ventura v. Cupp, 690 F.2d 740, 741 (9th Cir. 1982) (per curiam) (quoting Sweet v. Cupp, 640 F.2d 233, 237 n.5 (9th Cir. 1981)); *cf.* Baxter v. Estelle, 614 F.2d 1030, 1033 n.3 (5th Cir. 1980) (noting but failing to decide whether the state has "power" to waive exhaustion), *cert. denied*, 449 U.S. 1085 (1981). Occasionally a court applies a doctrine of clear statement to the matter, as though it will consider a waiver only when it is undoubtedly intended. *E.g.*, Strader v. Allsbrook, 656 F.2d 67, 68 (4th Cir. 1981) (per curiam) (recognizing that counsel had stated in a pleading below that the exhaustion doctrine had been satisfied, but refusing to accept that pleading as either "conclusive" or as a "waiver"); United States *ex rel.* Isaac v. Franzen, 531 F. Supp. 1086, 1089 (N.D. Ill. 1982) (taking the position that only an explicit waiver or a considerable investment of federal resources will justify a district court in neglecting the exhaustion doctrine). *See generally* United States *ex rel.* Lockett v. Illinois Parole and Pardon Bd., 600 F.2d 116, 117–18 (7th Cir. 1979) (per curiam) (noting the divided authorities on the waiver issue).

so that duly-appointed states' attorneys are without authority to acquiesce in federal review in the absence of exhaustion.[185] Nevertheless, given the Supreme Court's recent enigmatic signals, one can only expect that the lower courts should begin to treat the exhaustion doctrine as jurisdictional after all.

C. *A Tendency Toward Rigidity*

Not only does the present Court demand that state remedies be exhausted in every case, but it increasingly prefers the establishment of inflexible rules, which, when applied without reference to the peculiar facts and circumstances of the case at bar, threaten to undermine, rather than serve, the doctrine's objectives. I have already mentioned the Court's insistence upon exhaustion even when it is "clear" that prisoners are entitled to relief and, accordingly, that they will suffer unconstitutional detention while they present their claims to the state courts. In *Duckworth v. Serrano*[186] the Court recognized that the exhaustion doctrine holds only that state remedies must "normally" be pursued prior to federal review in habeas.[187] Yet in short order

185. *See* Sweet v. Cupp, 640 F.2d 233, 237 n.5 (9th Cir. 1981) (accepting the argument); United States *ex rel.* Trantino v. Hatrack, 563 F.2d 86, 96 (3d Cir. 1977) (making the argument), *cert. denied*, 435 U.S. 928 (1978). Because the state courts themselves have no apparent way to enter a waiver, the suggestion that the state's attorney cannot do so amounts to a proposal that waivers simply cannot be entertained. While one may argue that a state can decide for itself who will be authorized to speak in such matters, it is inadmissible to contend that when a state officer has been duly appointed to do so the federal courts should refuse to listen and should insist instead upon hearing from those who cannot respond. Felder v. Estelle, 693 F.2d 549, 554–55 (5th Cir. 1982) (Higginbotham, J., concurring). Even if one concedes the specious point that states' attorneys do not and cannot represent the interests of state courts, and I certainly do not, comity is owed to governmental units—that is, the states themselves. Judge Gibbons' dissent in *Trantino*, 563 F.2d 86, 100–05 (3d Cir. 1977) (Gibbons, J., concurring and dissenting), is, I think, unanswerable. *See* Preiser v. Rodriguez, 411 U.S. 475, 490–92 (1973) (making it clear that comity is owed to both state administrative bodies and state courts); *cf.* United States v. Gillock, 445 U.S. 360, 370–71 (1980) (understanding comity as partly an expression of deference to state legislatures); Pacific Tel. & Tel. Co. v. Public Utils. Comm'n, 443 U.S. 1301, 1304 (1979) (Rehnquist, Circuit J.) (invoking comity regarding state policy expressed by an administrative agency); Nevada v. Hall, 440 U.S. 410, 416 (1979) (using the term in referring to the asserted immunity of a state to suit in the courts of another state).

Some lines, of course, may be drawn. It is one thing, for example, to permit counsel to concede exhaustion when the issue is close, thus rescuing the federal habeas court from a troublesome inquiry into obscure state procedures and postconviction remedies of questionable availability. It may be quite another to accept counsel's waiver, to take the extreme case, in the absence of any contention whatever that the state courts have been given an opportunity to address a prisoner's claims. Nevertheless, since a waiver is entirely proper in these nonjurisdictional circumstances, it hardly seems worthwhile to identify distinctions that make no practical difference. The courts routinely refer to concessions and waivers as essentially interchangeable. *E.g.*, Montague v. Vinzant, 643 F.2d 657, 659 n.1 (9th Cir. 1981) (noting that counsel had "conceded" satisfaction of the exhaustion doctrine and in the same breath recognizing that the circuits are divided on the question whether the state may "waive" the matter). Regarding inadvertent failure to raise the exhaustion question, it seems only reasonable and just to follow the ordinary appellate practice of entertaining only questions properly preserved below by either party. *See infra* notes 278–80 and accompanying text (collecting the counter-authorities on this and previous questions). The Supreme Court has referred, albeit obliquely, to these problems, but has suggested no interest in resting its analysis on the differences, if any, among a mere failure to assert exhaustion, a concession that the doctrine has been satisfied, and an outright waiver. *See* Estelle v. Dorrough, 420 U.S. 534, 536 n.2 (1975) (mentioning that the district court had decided the exhaustion question in the prisoner's favor and that the warden had not raised it again in the court of appeals); Francisco v. Gathright, 419 U.S. 59, 60 (1974) (noting that the warden had "conceded" that state remedies had been exhausted).

186. 454 U.S. 1 (1981) (per curiam).

187. *Id.* at 3 (citing *Ex parte* Royall, 117 U.S. 241 (1886)).

the per curiam announced that exceptions can be made under section 2254 "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."[188] In all other cases, the federal courts are apparently "obligated" to dismiss.[189]

On the facts presented in *Serrano*, perhaps the Court's disposition was understandable. The prisoner had made no attempt to litigate his federal claim in state court and had actually raised it for the first time in the Ninth Circuit. That court had reached the merits and had awarded relief "in the interest of judicial economy."[190] The Supreme Court could not approve that action without discarding the exhaustion doctrine entirely. Immediate attention to the merits often conserves judicial resources, especially if the proper result is apparent. The exhaustion doctrine tolerates some measure of inefficiency in deference to legitimate state interests. Moreover, if the constitutional violation is genuinely clear, the state courts can, perhaps, be relied upon to award relief just as quickly as would a federal court in habeas.[191] On a practical level, a different result in *Serrano* might have encouraged ever-optimistic prisoners to bypass the state courts routinely in hopes of persuading the federal courts of the obvious merit of their claims. That, in turn, would waste precious time. The available data demonstrate that few habeas claims promise to be that clear, and the likely result in most instances would be an order demanding exhaustion.[192]

The difficulty arises in *Serrano* when the Court leaves the facts of that case and implies that the relative clarity of a prisoner's right to relief has no bearing whatsoever on the proper application of the exhaustion doctrine. If prisoners make some effort at exhaustion and present at least an arguable case for compliance, and if it appears that the state courts have concluded that no relief is warranted, then surely it is reasonable to consider the perceived merit of the claim before bucking the case back to the state forum in knee-jerk fashion. In cases in which the federal habeas court anticipates that relief will be awarded when the merits are reached, it seems unduly harsh to condemn prisoners to further, unconstitutional confinement if, and this is important, a

188. 454 U.S. 1 (1981) (per curiam).

189. *Id.* at 4.

190. *Id.* at 2.

191. The point would hardly hold in every case. When, for example, what is clear about a federal claim is that some state statute or settled practice is unconstitutional, the prisoner can expect to obtain relief only after getting past the trial and intermediate-level appellate courts, which cannot be expected to challenge those statutes or practices whatever their true opinions, and finding his or her way to the state appellate court with responsibility for making so momentous a decision. Even then the state supreme court may insist upon the validity of state statutes or practices rather than take the extraordinary step of pronouncing them void.

192. The Court makes this point in *Serrano*. 454 U.S. 1, 4 (1981). While I find it marginally persuasive, I tend to think it ought to be recalled when the Congress evaluates the Reagan Administration's proposal to permit the federal courts to conduct a preliminary examination of "unexhausted" habeas claims to decide whether they should be denied summarily. To put it bluntly, it seems that the argument should work both ways. *See supra* note 144 and accompanying text.

legitimate argument can be made that the exhaustion doctrine has been satisfied. The *Serrano* opinion contains no signal that flexibility of that kind will be tolerated. Another recent per curiam, *Anderson v. Harless*,[193] drives the point home. In *Harless* the petitioner had made an effort to exhaust state remedies regarding his claim that the trial judge's instructions to the jury had impermissibly shifted the burden of proof to the defense. While he had not explicitly cited the due process clause in his brief in state court, he had apprised the state courts of the facts critical to that federal claim and had argued that the instructions were "erroneous" because they obligated the jury to infer malice.[194] His principal authority was a previous state court decision in which the defendant had raised both state and federal objections to similar instructions. The argument for compliance with the exhaustion doctrine was certainly marginal, but after examining the state court opinion denying the petitioner relief the federal district court below had decided that it was appropriate to reach the merits and grant relief. The court of appeals also concluded that the "due process ramifications" of the petitioner's claim had been clear enough to the state courts and that, accordingly, they had been presented with the "substance" of his federal claim.[195] Still, the Supreme Court reversed, sending the prisoner back to the state courts.

What next when the Supreme Court decides that a prisoner has failed to exhaust state remedies, and, for that reason, vacates a judgment on the merits? The federal district court on remand must dismiss for want of exhaustion, but without prejudice to the renewed pursuit of the federal writ should the state courts fail to award relief.[196] The prisoner must apply for relief to the state courts by whatever means remain available, usually a motion or petition in the nature of habeas corpus or *coram nobis*.[197] The state courts may or may not be prepared to address the merits.[198] If they are, they know at the outset

193. 103 S. Ct. 276 (1982) (per curiam).

194. *Id.* at 277.

195. *Id.* at 278 (quoting Harless v. Anderson, 664 F.2d 610, 612 (6th Cir. 1982)). I may actually understate the case for the prisoner's compliance with the exhaustion doctrine. Justice Stevens, for his part, found the lower courts' treatment of the matter to reflect a "sensible approach," and, lest the majority's description mislead the reader, he set out the key portions of the circuit court's opinion in an extended note. *Id.* n.4 (Stevens, J., dissenting).

196. *See supra* notes 151–53 and accompanying text.

197. *See generally* L. YACKLE, POSTCONVICTION REMEDIES §§ 1–13 (1981). In Michigan, the state in which *Harless* arose, no standard postconviction remedy of the kind established in most jurisdictions is provided. Motions for a new trial must generally be filed in the trial court within sixty days of the judgment. MICH. COMP. LAWS ANN. § 770.2 (West 1982). Nonetheless, the Court understood that relief might still be sought from the Michigan Court of Appeals, apparently by a motion for delayed appeal. That, at any rate, was the procedure followed in People v. Berry, 10 Mich. App. 469, 157 N.W.2d 310 (1968), the state precedent the Court cited in *Harless* as an illustration. 103 S. Ct. 276, 278 (1982).

198. If they are, all is well. If relief is awarded, the prisoner has no further need to apply to the federal courts; if relief is denied, a renewed habeas petition will be in order. *E.g.*, Waters v. Wainwright, 527 F. Supp. 275, 276 (M.D. Fla. 1981) (noting that the prisoner's petition had originally been dismissed for want of exhaustion but that a new application had been entertained after the state courts had denied relief). If the merits are not addressed, the prisoner faces difficulties of a different order. If the state courts refuse to entertain tardy claims because they might have been, but were not, raised in prior state proceedings, the respondent may now claim the benefit of the Court's decisions regarding abortive state proceedings. *See* Wainwright v. Sykes, 433 U.S. 72

that it makes no practical difference what conclusion is reached. Even if they decide that the claim is without merit, it is clear that the federal courts will upset that judgment, effectively, when the prisoner returns to the federal forum.[199] A doctrine that puts the state courts to meaningless litigation can claim precious little basis in the notion of comity. Orderly state procedures are not so much disrupted as abused, the state courts' participation in the enforcement of federal law not so much frustrated as coerced.

The Court's response can be easily anticipated. If the doctrine exists it must be enforced, and enforcement contemplates occasional reversals when the lower courts have erroneously spoken to the merits. The rejoinder is equally obvious. The notion that the exhaustion doctrine must be policed in the manner of *Harless* rests on the unexamined premise that the federal habeas courts cannot be trusted to exercise discretion in a proper manner.[200] The premise is flawed. The appropriate timing of federal review is preeminently a matter to be determined on a case-by-case basis by the courts charged with responsibility for enforcing the Constitution on a daily basis. The district courts' determinations in the first instance should almost always be respected, subject to review for abuse at the circuit level. That is precisely the view the Court took in *Frisbie*. The present Court's abandonment of the flexibility of *Frisbie* for the relative rigidity of *Harless* bespeaks not an effort

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(1977); Fay v. Noia, 372 U.S. 391 (1963). It has happened time and again. Prisoners are sent back to state court with instructions to pursue relief on a federal claim in the most unlikely manner, only to be saddled with a new state court judgment that they have forfeited further state procedures for litigating that claim because of some earlier procedural default. That judgment then becomes the basis for outright dismissal of a renewed application for federal habeas review. *E.g.*, Santana v. Fenton, 685 F.2d 71, 77 (3d Cir. 1982) (recognizing the procedural default problem on the horizon); Matias v. Oshiro, 683 F.2d 318, 320–21 (9th Cir. 1982) (finding state remedies no longer available and remanding to the district court to determine whether the prisoner's procedural default was excusable); Domaingue v. Butterworth, 642 F.2d 8, 14 (1st Cir. 1981) (affirming a dismissal for want of exhaustion and leaving it to the district court to address the respondent's contention that habeas would be barred should the prisoner be rebuffed by the state courts on a procedural default ground and thereafter return to the federal forum); Thomas v. Wyrick, 622 F.2d 411, 414 (8th Cir. 1980) (anticipating the procedural default difficulty should the state courts refuse to address a claim now dismissed for want of exhaustion).

The only outcome worse than losing a close exhaustion question, from the prisoner's standpoint, is winning one. If, for example, a prisoner persuades the federal court that no state remedies remain available because the relevant time periods have expired, the respondent will make the procedural default argument immediately and, perhaps, win a prompt dismissal on that ground, with prejudice to further applications for relief. *See, e.g.*, McLallen v. Wyrick, 494 F. Supp. 138, 143–44 (W.D. Mo. 1980). Indeed, that is precisely what happened in Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982) (concluding that the prisoners had satisfied the exhaustion doctrine because their procedural defaults at trial had resulted in the forfeiture of further state remedies). Such is the lot of unrepresented prison inmates, batted between two court systems in a vain search for the bare opportunity to raise what may be a mertiorious claim that the United States Constitution has been violated.

199. *Cf.* Bergman v. Burton, 102 S. Ct. 2026, 2028 (1982) (Stevens, J., dissenting) (making the point in a slightly different context), discussed *infra* note 251. The Fourth Circuit recognized the same point in Carver v. Martin, 664 F.2d 932 (4th Cir. 1981), when it chose to reverse on the merits rather than remand with instructions to dismiss a prisoner's petition for failure to exhaust state remedies. The district court may have misapplied the exhaustion doctrine and reached the merits improperly, but if the judgment had been vacated only on the exhaustion point the state courts would undoubtedly have been influenced by the knowledge that the district court would rule the same way if presented with the same issue a second time. Of course, the same can be said in any case in which an appellate court finds fault with a prisoner's exhaustion of state remedies after a district court has awarded relief on the merits. That insight, however, only underscores the need for a reexamination of the way in which the exhaustion doctrine is administered on appeal. *See infra* note 259.

200. *See supra* text accompanying notes 9–10.

merely to ensure that habeas adjudication is deferred in appropriate cases, but an attempt to forge the exhaustion doctrine into an effective barrier to the federal forum.

1. Rose v. Lundy

The preclusive consequences of the Court's current approach to exhaustion is nowhere more evident than in the much-mooted decision in *Rose v. Lundy*.[201] Justice O'Connor's opinion for a larger than expected majority[202] embraced what Justice Blackmun termed the "total exhaustion" rule.[203] Simply stated, the district courts are instructed by *Lundy* to dismiss all claims in a federal habeas petition if state remedies have not been exhausted regarding any.[204] The rule contemplates the exhaustion of state remedies concerning an entire case, including all claims a prisoner may have to assert against his or her present detention, rather than the exhaustion of state remedies regarding each individual claim.[205] Necessarily, claims that have been properly pre-

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201. 455 U.S. 509 (1982).

202. Six members of the Court joined the portion of the opinion of primary interest here. Justice Blackmun concurred only in the judgment, *see infra* note 214, Justice White filed a separate opinion expressing general agreement with Justice Blackmun, *see infra* note 226, and Justice Stevens dissented, *see infra* note 214. Justice Brennan, joined by Justice Marshall, filed an opinion concurring on the major issue but dissenting from Part III-C, in which Justice O'Connor referred to the implications of *Lundy* for successive applications for habeas relief. *See infra* notes 233–45 and accompanying text.

It is surprising that Justices Brennan and Marshall should step so easily into line, though, to be sure, Brennan had signalled his views at oral argument. *See supra* notes 164–69 and accompanying text. The counterarguments made by Justices Blackmun and Stevens are admittedly powerful. And it is difficult to understand why two Justices who have defended postconviction habeas for so long should, without greater explanation, agree to an opinion that promises to frustrate applications for relief. Perhaps Justice Brennan simply wished to be in the majority on the primary issue to add weight to his dissent from Part III-C, which, by the way, deprived Justice O'Connor of a majority in that section of her opinion. That would have been a switch in tactics from his usual virulent dissents. *Compare* Stone v. Powell, 428 U.S. 465, 502–36 (1976) (Brennan, J., dissenting) (delivered well before *Lundy*), *with* Engle v. Isaac, 456 U.S. 107, 137–51 (1982) (Brennan, J., dissenting) (delivered only a month after *Lundy*). Given the present alignment of the Justices regarding habeas issues, it may have seemed to him that there was advantage to be gained by lowering his voice, even if only momentarily.

That possibility alone will not explain his position in *Lundy*. The votes were there for a majority opinion, written by Justice Brennan or, perhaps, Justice White, that might have rejected Justice O'Connor's approach to "mixed" petition cases in favor of, at the least, Justice White's alternative. I count Justices Blackmun and White as solid, and the addition of Justices Brennan and Marshall would have made four. While Justice Stevens might have refused to make a fifth for his own independent reasons, those same reasons might have caused him to concur in Justice O'Connor's judgment in *Lundy*. In fact, he dissented. *See infra* note 214.

203. 455 U.S. 509, 522 (1982) (Blackmun, J., concurring).

204. 455 U.S. 509, 510 (1982): "[W]e hold that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court."

205. *See* Oral Argument Transcript at 8:

> Justice Stevens: Would you say that the Federal judge should dismiss the entire case, or just say, sorry, but there is one thing here that isn't exhausted, I will adjudicate the other?
>
> Mr. Zimmerman: Yes, Your Honor, he should dismiss it and send it—
>
> Justice Stevens: What, the whole thing?
>
> Mr. Zimmerman: The prisoner—exactly. Remand the entire case back to the—
>
> Justice White: Well, what good would it do to remand the claim that has already been exhausted?
>
> Mr. Zimmerman: Well, you are remanding a case. You have to understand, Your Honor, that we are submitting you are looking at a case on collateral review, and many claims, many constitutional claims—
>
> Justice White: I am not sure about that.

Once again I rely upon Mr. Zimmerman's memory for identification of the questioners.

sented to the state courts and are thus "ripe" for federal review are to be dismissed nonetheless if they are included in the same petition with other claims regarding which state remedies have not been exhausted. No warrant can be found for such a rule in section 2254, which states that the exhaustion doctrine has yet to be satisfied if state procedures remain open for the litigation of the "question" presented.[206] Justice O'Connor recognized as much in *Lundy*, but found the statutory language "too ambiguous" to control the issue at bar.[207] Finding no better guidance in the legislative history, she concluded that in all probability Congress had not anticipated the "mixed" petition problem and, accordingly, had provided no resolution of it. Consequently, she turned to the policies underlying the statute to "determine its proper scope," and, in short order, found herself tracing once again the development of the exhaustion doctrine in the Court's own decisions prior to 1948.[208]

Justice O'Connor based the Court's conclusion primarily upon one of the two familiar rationales for the exhaustion doctrine generally—the maintenance of state court participation in the elaboration of federal law.[209] A "rigorously enforced" rule requiring total exhaustion, she said, will encourage state prisoners to seek "full" relief first from the state courts, providing those courts with the initial opportunity to consider "all" federal claims.[210] Accordingly, the state courts "may become increasingly familiar with and hospitable toward federal constitutional issues."[211] Next she proposed that the total exhaustion rule will "reduce the temptation to consider unexhausted claims."[212] Her opinion is oblique on the point, but it appears that she meant to embrace a line of argument put forward in some circuit opinions, in which it had been suggested that the immediate federal examination of "exhausted" claims may often result in some consideration of "unexhausted" claims into the bargain, no matter how carefully the district court seeks to ensure that only claims that have been to state court are determined on the merits.[213] The

206. *See supra* note 1; *accord* Galtieri v. Wainwright, 582 F.2d 348, 355 (5th Cir. 1978) (conceding as much but finding the point inconsequential).

207. 455 U.S. 509, 516 (1982).

208. *Id.* at 516–19. *See supra* notes 57–116 and accompanying text.

209. 455 U.S. 509, 518–19 (1982). *See supra* note 4 and accompanying text.

210. 455 U.S. 509, 518–19 (1982).

211. *Id.* at 519 (referring to Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973)).

212. 455 U.S. 509, 519 (1982).

213. Judge Tjoflat's opinion for the court in Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978), worries over the opportunity presented in such cases for manipulation by devious petitioners. He posits a prisoner who, having both exhausted and unexhausted claims, proffers both in a single petition for the purpose of spiriting evidence relating only to unexhausted claims into a hearing held to examine exhausted claims, hoping that the court will look upon exhausted claims with greater sympathy if it appears that arguably meritorious unexhausted claims are also available. *Id.* at 359. *See also id.* at 358 (suggesting that prisoners might attempt to avoid the defense of *laches* by attaching unexhausted claims to a petition asserting exhausted claims to notify the respondent that those claims exist). Happily, the Supreme Court's opinion in *Lundy* does not rest upon that kind of speculation. Judge Goldberg's dissent, one should hope, has carried the day:

> The majority also suggests that the rule of complete exhaustion will have the effect of denying a petitioner the opportunity to pursue an unfair trial strategy(!). The Clarence Darrow Joneses who apparently populate the state penitentiaries in the Fifth Circuit might otherwise include unexhausted claims in their petitions in the calculated hope of influencing the district court's resolution of the

inclusion of unexhausted claims in a petition apprises the district court of their existence. Thereafter, and particularly if those claims appear to have merit, the federal court's examination of exhausted claims properly at bar may be influenced by the memory of unexhausted claims lurking in the background at present but likely to be brought to the fore in subsequent petitions. Indeed, that consideration may be conscious. If, for example, the treatment of currently exhausted claims warrants an evidentiary hearing, the court may permit evidence to be adduced regarding unexhausted claims to derive maximum benefit from the hearing and, perhaps, to avoid another one when and if the prisoner returns to federal court.[214] Justice O'Connor next asserted a utilitarian argument. Federal claims that have been "fully exhausted," she said, "will more often be accompanied by a complete factual record to aid the federal courts in their review."[215] Because the federal habeas courts often

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exhausted claims. . . . I suppose it is possible to imagine a petitioner capable of formulating such a strategy. I cannot, however, imagine that the district judges of this circuit would be taken in by such a strategem [*sic*].

Although I hesitate to enter an argument which I am firmly convinced has more to do with the court of the Red Queen than it does with the courts of this circuit, I must point out that even on the majority's own premises, the threat of a laches dismissal is not likely to be perceived as a very serious incentive to join all potential claims in the initial federal proceeding. A petitioner sophisticated enough to worry about the laches problem, but determined to pursue a strategy of piecemeal litigation, will certainly be clever enough to develop the simple strategem [*sic*] which permits him to pursue his plan and avoid a laches defense: file two separate, but simultaneous, petitions, one in federal court containing only exhausted claims, the other, in either federal or state court, containing only unexhausted claims. Filing of the petition containing unexhausted claims will foreclose a laches defense to the extent that mere notice of the existence of such claims has this effect. . . . The rule of complete exhaustion is a very blunt and largely ineffective instrument for dealing with the legal prestidigitations of a habeas Houdini.

Id. at 370 nn.5–6 (Goldberg, J., dissenting).

214. The point might have provided a narrower ground of decision in *Lundy* itself. The prisoner had originally raised a total of four claims in federal habeas, two of which were conceded to be unexhausted. Nevertheless, the district court had referred to those claims and nineteen other instances of alleged prosecutorial misconduct in the course of reaching a favorable decision. Lundy v. Thompson, No. 79-3081-NA-CV, slip op. at 1–2 (M.D. Tenn. March 21, 1979). The district court explained that it was necessary to refer to unexhausted claims and to review the full record to assess the "atmosphere" in which the prisoner's constitutional claims had arisen. *Id.* at 2. In Justice O'Connor's estimate, the district court, accordingly, considered "several instances of prosecutorial misconduct never challenged in the state trial or appellate courts, or even raised in the [prisoner's] habeas petition." 455 U.S. 509, 513 (1982).

On appeal the circuit court understood the district court's judgment to rest solely upon the two exhausted, and therefore cognizable, grounds. Lundy v. Rose, No. 79-1280 (6th Cir. June 27, 1980). Nevertheless, the district court's work aroused legitimate suspicion that the award of habeas relief had been made, at least in part, on the basis of unexhausted claims. It was upon this basis that Justice Blackmun concurred in the judgment in *Lundy*. While he could not embrace the majority's total exhaustion rule as the ground for decision, he agreed that the case should be remanded "for reconsideration of the merits of [the prisoner's] constitutional arguments." 455 U.S. 509, 531 (1982) (Blackmun, J., concurring).

Justice Stevens, in contrast, insisted that "the procedure followed by the federal [district] court was entirely correct." *Id.* at 542 (Stevens, J., dissenting). The court was, in his judgment, under an obligation to consider the prisoner's exhausted claims against the "context" in which the alleged errors occurred to determine whether the errors were "aggravated" or "mitigated" by other aspects of the trial. *Id.* at 541–42 (Stevens, J., dissenting). The district court's error, then, was not in the procedure it followed in appraising exhausted claims nor in resting relief in part upon unexhausted grounds, but in determining that the prisoner was entitled to habeas corpus relief. Because Stevens concluded that neither exhausted nor unexhausted claims had rendered the prisoner's trial "fundamentally unfair," he would have denied relief on the merits. *Id.* at 545 (Stevens, J., dissenting).

215. 455 U.S. 509, 519 (1982).

may, and in some instances must, presume state factual findings to be correct, the availability of a complete state court record will render federal review more efficient.[216] Finally, she proposed that the total exhaustion rule will discourage "piecemeal" litigation.[217] The federal consideration of all claims in a single proceeding will benefit both the federal courts, which conserve their resources, and habeas applicants, whose claims may be treated to a "more focused and thorough review."[218]

None of Justice O'Connor's arguments justifies the total exhaustion rule established in *Lundy*. Only the first two enjoy firm footing in the Court's precedents pertaining to the postponement of federal habeas review. Even they fail to support the total exhaustion rule in whose defense they are proffered. The other two contentions have no history in previous exhaustion doctrine cases and, introduced for the first time in *Lundy*, carry no persuasiveness at all toward the matter in issue. It is not that they are irrational or in any way illegitimate, but only that they are irrelevant in this context.

The preservation of the state courts' role in the adjudication of federal claims provides powerful support for the exhaustion doctrine generally. That same policy fails to justify the total exhaustion rule, the effect of which is to delay the federal consideration of federal claims even though the state courts have had a fair opportunity to address them and have concluded that no relief is warranted. No court and few commentators have ever proposed that unexhausted claims should be reviewable in habeas, except in "special circumstances."[219] The ordinary exhaustion doctrine thus ensures that the state courts will have their chance to treat federal issues before the federal habeas courts exercise their independent jurisdiction.[220] I fail to comprehend how the postponement of federal review after the state courts have spoken furthers any interest the state courts have in an initial opportunity to speak. By hypothesis, that interest is respected by the exhaustion doctrine itself, unaided by the rule announced in *Lundy*.[221]

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216. *See* 28 U.S.C. § 2254(d) (1976) (quoted *supra* note 158).

217. 455 U.S. 509, 520 (1982).

218. *Id.*

219. I mean here to take in not only the cases mentioned earlier, but modern interpretations of 28 U.S.C. § 2254(b)-(c) (1976), in which the Court has found state remedies to be unavailable or ineffective within the meaning of the statute. *E.g.*, Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam); *cf.* Marino v. Ragen, 332 U.S. 561, 569–70 (1947) (Rutledge, J., concurring) (complaining about the Illinois "merry-go-round" of post-conviction remedies). The lower court decisions in point usually deal with undue delay in state court proceedings, *e.g.*, Mucie v. Missouri State Dep't of Corrections, 543 F.2d 633 (8th Cir. 1976), rules of practice that cut off further state proceedings because of a litigant's procedural default, *e.g.*, United States *ex rel.* Barksdale v. Sielaff, 585 F.2d 288 (7th Cir. 1978), *cert. denied*, 441 U.S. 962 (1979), or recent state court precedents making it clear that it would be futile to ask the state courts for relief on similar grounds, *e.g.*, Adkins v. Bordenkircher, 674 F.2d 279 (4th Cir.), *cert. denied*, 103 S. Ct. 119 (1982).

220. This is, of course, the point that Justice Blackmun attached to the top of his separate opinion. 455 U.S. 509, 524 (1982) (Blackmun, J., concurring): "I do not dispute the importance of the exhaustion requirement or the validity of the policies on which it is based. But I cannot agree that those concerns will be sacrificed by permitting district courts to consider *exhausted* habeas claims." *Id.*

221. *See* Comment, *Criminal Procedure—Habeas Corpus—Petition Containing Both Exhausted and Unexhausted Claims Dismissed for Failure to Exhaust State Remedies*—Gonzales v. Stone, 52 N.Y.U. L. REV.

Straining, I can anticipate two ways in which the total exhaustion rule might make a further contribution. First, one may argue that the rule will encourage state prisoners to raise a greater number of federal claims in state court and to do so as soon as possible to pave the way for federal review in habeas. Included in that mass of claims will be some upon which relief may be granted, in either forum, but also many that may be assumed to be without merit, even frivolous. The state courts should be consulted, however, even regarding these last. Even frivolous claims promise an opportunity to gain experience in handling federal issues, and the state courts need the practice. That is why federal habeas review of exhausted claims should await state court litigation of others. I say this argument may be made, but I frankly doubt that the Court intends to make it. The Justices can hardly say in one breath that the state courts are fully capable of adjudicating federal claims and in the next that they are so inexperienced that federal treatment of issues they have already considered must be delayed while they sharpen their skills on claims the federal courts are admittedly unwilling to examine immediately and that may never command federal attention.[222]

Second, in many cases two or more claims are related; effective treatment of any demands consideration of all. In some instances multiple claims may arise from the same facts.[223] And in many cases the merit of claims can be evaluated only against the background of other events at trial.[224] In those circumstances, one may argue that the state courts have not had a fair opportunity to adjudicate unless they have been presented with all related claims. No single, exhausted claim can or should be isolated from the others for separate treatment. The difficulty with this argument is that the Court explicitly rejected it in *Lundy*. Justice O'Connor acknowledged that several circuits had staked out this middle ground, dismissing mixed petitions presenting related claims rather than choosing between the total exhaustion rule adopted in a minority of circuits and the ordinary rule, adopted in most, that only unexhausted claims must be dismissed.[225] Indeed, she recognized that

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1428 (1977) (criticizing the total exhaustion rule); Note, *Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity and Judicial Efficiency*, 57 B.U.L. REV. 864 (1977) (making similar arguments).

222. Said another way, at some point the Court must recognize that consistency is measured by analytic coherency, not by a pattern of decisions in which the prisoner always loses on whatever arguments come to hand. If, as the Court insisted in Stone v. Powell, 428 U.S. 465, 493 n.35 (1976), the state courts are capable of treating federal issues with imagination and sensitivity, then they presumably need no additional "practice" and *Lundy* must be justified on other grounds.

223. *Compare* Turner v. Louisiana, 379 U.S. 466 (1965) (treating a claim that an *ex parte* communication with a jury had robbed the defendant of an impartial jury), *with* Parker v. Gladden, 385 U.S. 363 (1966) (entertaining a claim that similar circumstances had deprived the defendant of the right to confront and cross-examine witnesses).

224. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) (concerning remarks by the prosecutor); Cupp v. Naughten, 414 U.S. 141, 146–47 (1973) (concerning jury instructions).

225. She cited three cases for the "general rule among the Courts of Appeals" that "mixed" petitions containing "interrelated" claims should be dismissed in their entirety. 455 U.S. 509, 519 (1982). Two of her examples, Triplett v. Wyrick, 549 F.2d 57 (8th Cir. 1977), and Miller v. Hall, 536 F.2d 967 (1st Cir. 1976), are directly on point. The third, Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969), did not address the issue

the case at bar might be disposed of in precisely that way.[226] Yet she chose instead to embrace the total exhaustion rule to "relieve the district courts of the difficult if not impossible task of deciding when claims are related."[227] Indeed, the difficulty goes deeper. The Court's rejection of a more flexible rule, by which the federal habeas courts would dismiss only mixed petitions asserting related grounds, some of which remain unexhausted, amounts to obvious overkill if, in truth, the evil to be prevented is premature treatment of unexhausted issues. For it is only in cases in which exhausted and unexhausted claims are related that the district courts face that problem. If prisoners' unexhausted claims are not tied in some way to issues that are ripe for decision, the habeas courts would have to reach out to determine them.[228]

The last two arguments raised in *Lundy* in support of the total exhaustion rule are of a different order entirely. They relate not to the justifications for delaying federal adjudication in the interest of comity, but to matters of efficiency. It is quite true that if the state courts develop complete records and, perhaps, find the primary facts in a reliable manner, the federal courts' subsequent task may be made easier. The efficiency of federal litigation is not, however, a reason for postponing that litigation until after the state courts have acted. Whatever benefit the federal courts may derive from previous

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directly and warrants citation only because the court relied at least in part upon Second Circuit precedents in reaching its decision. It is the Second Circuit that is most prominently associated with the view that the relationship, if any, between exhausted and unexhausted claims ought to make a difference. *E.g.*, United States *ex rel.* Levy v. McMann, 394 F.2d 402 (2d Cir. 1968). Indeed, that circuit had drawn even finer lines than the description in the text suggests. In United States *ex rel.* DeFlumer v. Mancusi, 380 F.2d 1018 (2d Cir. 1967) (per curiam), the court affirmed the dismissal of an entire mixed petition because if one unexhausted claim (that a plea of guilty had been coerced) was decided against the prisoner, his single exhausted claim (that an earlier confession had been coerced) would be rendered inconsequential. It was, at any rate, the position put forward in the Second Circuit's cases that the warden in *Lundy* challenged in brief. Brief for Petitioner at 18 n.12. *See generally* United States *ex rel.* Martin v. McMann, 348 F.2d 896, 898 (2d Cir. 1965).

226. 455 U.S. 509, 519 (1982). The district court had apparently concluded that the prisoner's four claims were related and for that reason had referred to all four in reaching a decision to award relief based upon the two claims regarding which state remedies had been exhausted. *See supra* note 214. On a parity of reasoning, the relationship between and among the claims might have warranted dismissal under the Second Circuit's intermediate approach to the mixed petition problem. Justice White, for his part, stated explicitly that the district court judge "should rule on . . . exhausted claims unless they are intertwined with those he must dismiss or unless the habeas petitioner prefers to have his entire petition dismissed." 455 U.S. 509, 538 (1982) (White, J., concurring & dissenting). While Justice White did not state explicitly that *Lundy* itself presented related claims, he identified his separate opinion as in part a concurrence. It seems reasonable to conclude that he meant to concur in the Court's judgment to remand the case, though on this independent basis. While Justice Blackmun was not convinced that the four claims raised by the prisoner were related, *see id.* at 531 n.8 (Blackmun, J., concurring), he also seemed to embrace the view that exhausted and unexhausted claims can be dismissed together if they are. That, in any event, is the most reasonable construction of his view that *Lundy* should have been remanded with instructions to examine the prisoner's exhausted claims and to "determine whether they [were] interrelated with the unexhausted grounds and, *if not*, whether they warrant[ed] collateral relief." *Id.*at 532 (Blackmun, J., concurring) (emphasis added).

227. 455 U.S. 509, 519 (1982). *But see id.* at 526–27 (Blackmun, J., concurring) (insisting that the federal habeas courts can distinguish "related" and "unrelated" claims).

228. Two student papers treating the total exhaustion rule, although published prior to *Lundy*, concluded that the intermediate position adopted in the Second Circuit fully protects relevant state interests. *See* Comment, *Criminal Procedure—Habeas Corpus—Petition Containing Both Exhausted and Unexhausted Claims Dismissed for Failure to Exhaust State Remedies*—Gonzales v. Stone, 52 N.Y.U. L. REV. 1428 (1977); Note, *Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity and Judicial Efficiency*, 57 B.U.L. REV. 864 (1977).

state court adjudication is, at most, an agreeable by-product. Federal review is not deferred to allow the state courts to assist the federal courts in the exercise of their independent habeas jurisdiction, but rather to accord appropriate respect to state interests in orderly administration and to ensure state courts a proper role in the creation and development of federal law. State courts might take offense if the Justices should instruct the lower federal courts to stay their hand regarding federal claims, because they stand to benefit from preliminary state review—as though the state courts were stalking horses to be used by federal judges anxious to conserve their own efforts in habeas cases.[229]

Coming to Justice O'Connor's argument that the total exhaustion rule discourages piecemeal litigation, it is clear that she misses the point once again. The state courts' function is not to assist in making federal habeas adjudication efficient, even "focused" or "thorough." The federal courts themselves shoulder that responsibility.[230] The state courts are free to establish rules designed to make their own work efficient and might, for that purpose, insist that prisoners present all their claims in a single state proceeding.[231] They have no responsibility to entertain a range of issues for the purpose of permitting the federal courts to treat those claims in a single federal proceeding.[232] Again, it is vital to keep in mind the nature of the exhaustion doctrine and its function. We deal here with a rule that contemplates the postponement of federal adjudication and, consequently, the continuation of what may be unconstitutional detention to avoid interference with state procedures and to foster state court participation in the examination of federal

229. I am reminded of the recommendations put forward by the Attorney General's Task Force on Violent Crime, formed by President Reagan to propose answers to serious national problems. The Task Force recommended that the Attorney General support or propose legislation that would require the federal habeas courts to give the state courts the opportunity to conduct any evidentiary hearings necessary to determine state prisoners' federal claims. The Task Force explained that under its proposal habeas cases would "in effect" be "remitted" to state court, where evidentiary hearings would be held "unless the state court was unable, due to court congestion, or unwilling to conduct the hearing." ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME U.S. DEP'T OF JUSTICE, FINAL REPORT 59 (1981). The Task Force neglected to explain why state courts should wish to replace federal magistrates, finding primary facts for federal district judges. *See also* 455 U.S. 509, 526 & n.3 (Blackmun, J., concurring) (pointing out that the federal habeas courts already have ample means of developing a complete factual record from which to work).

230. When the Ninth Circuit considered this argument prior to *Lundy*, it will be recalled, that court lumped the avoidance of "piecemeal" litigation in habeas with the "judicial policy against fragmentary appeals." Gonzales v. Stone, 546 F.2d 807, 809 (9th Cir. 1976) (citing federal appellate review cases). Nothing is wrong, of course, with federal court policies that encourage efficiency within the federal system. The relevance of those policies to the exhaustion doctrine is, however, quite another matter.

231. *See* 455 U.S. 509, 525 n.2 (1982) (Blackmun, J., concurring); Galtieri v. Wainwright, 582 F.2d 348, 373 (5th Cir. 1978) (Goldberg, J., dissenting). Of course, if a state were to rely upon a procedural default/forfeiture rule as an enforcement device, the consequences for federal habeas corpus would be measured by reference to *Noia* and *Sykes*. *See supra* notes 2 & 198.

232. *See* Comment, *Criminal Procedure—Habeas Corpus—Petition Containing Both Exhausted and Unexhausted Claims Dismissed for Failure to Exhaust State Remedies*—Gonzales v. Stone, 52 N.Y.U. L. REV. 1428, 1438 (1977) (insisting that if "judicial efficiency is a relevant consideration in habeas cases it is important to [understand] it for what it is—an administrative value").

issues. Innovations such as the total exhaustion rule must be justified accordingly.

2. *Exhaustion and Rule 9*

The confusion of the exhaustion doctrine with policies designed to streamline habeas litigation accounts, perhaps, for Justice O'Connor's apparent attempt to link the total exhaustion rule with the scheme established by section 2254 Rule 9.[233] An understanding of her effort, and why it must ultimately fail, requires some background. Under rule 9(a) state prisoners must not delay the presentation of their federal claims to the prejudice of the respondent. If they do, the federal courts may refuse to treat them. At the same time, under rule 9(b), prisoners may forfeit claims that might have been, but were not, raised in prior federal proceedings. Prisoners are thus squeezed from both directions. They are told that they must raise their federal claims promptly or lose them under rule 9(a), and they are told that if they pursue some claims while withholding others they may forfeit the latter under rule 9(b). The two halves of the rule are not in conflict. The lower courts have properly construed the term "delay" in rule 9(a) to mean "unreasonable delay"—delay that is not explained by the demands of adequate investigation, preparation, or preliminary procedure.[234] Federal review will not be denied unless that delay is ascribable to the prisoner and works to the proven prejudice of the respondent in answering the prisoner's allegations.[235] Rule 9(b) is wholly consistent. It seeks only to catch prisoners who consciously withhold claims from an initial petition with the intention of raising those claims in a subsequent application for relief. Prisoners who deliberately string out federal treatment of their claims in piecemeal fashion for the purpose of harassing the respondent may fairly be found to have abused the writ. To discourage abuse, rule 9(b) imposes a forfeiture sanction, permitting, but not requiring, the

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233. 28 U.S.C. § 2254 Rule 9 (1976). That rule provides as follows:

(a) Delayed petitions.

A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) Successive petitions.

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

See also 28 U.S.C. § 2244(b) (1976) (establishing similar standards for treating successive applications).

234. *See, e.g.*, Mayola v. Alabama, 623 F.2d 992, 999 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981); *accord* Moore v. Smith, 694 F.2d 115 (6th Cir. 1982); Brim v. Solem, 693 F.2d 44 (8th Cir. 1982) (per curiam).

235. *E.g.*, Marks v. Estelle, 691 F.2d 730, 733 (5th Cir. 1982) (embracing the conventional view that prisoners asserting right-to-counsel claims cannot be held responsible for delay occurring prior to Gideon v. Wainwright, 372 U.S. 335 (1963), and Argersinger v. Hamlin, 407 U.S. 25 (1972)); Paprskar v. Estelle, 612 F.2d 1003, 1005–07 (5th Cir.) (providing a good discussion), *cert. denied*, 449 U.S. 885 (1980).

federal habeas courts to dismiss claims that should have been raised in prior proceedings.[236] Taken together, the two rules encourage state prisoners to raise all their claims together and to do so as soon as possible.[237]

When in *Lundy* Justice O'Connor turned to the prisoner's protest that the total exhaustion rule would delay the treatment of currently exhausted claims, she offered that he might avoid delay by amending his petition to delete currently unexhausted claims and then requesting speedy consideration of the remaining exhausted claims. She warned, however, that if he were to do that he would "risk" the forfeiture of currently unexhausted claims under rule 9(b).[238] Read charitably, that dictum suggests that the total exhaustion rule can labor in tandem with rule 9 to produce what the latter was clearly intended to encourage—the early federal adjudication of all claims in a single federal proceeding. It won't work. The exhaustion doctrine, ever tied to the deferral of federal review, is at cross-purposes with rule 9. Prisoners whose mixed petitions are dismissed for want of total exhaustion may choose to abandon federal court regarding all claims for the moment, pursue state remedies for currently unexhausted claims, and later return to the federal forum with a new petition presenting all claims. Apparently, Justice O'Connor would prefer that route since it leads to the federal treatment of all claims in a single proceeding.[239] Yet the federal adjudication of federal claims will hardly be expedited

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236. *See* Jones v. Estelle, 692 F.2d 380 (5th Cir. 1982); Potts v. Zant, 638 F.2d 727 (5th Cir.), *cert. denied*, 454 U.S. 877 (1981). Judge Rosenn's application of these principles in Williams v. Holbrook, 691 F.2d 3, 11–15 (1st Cir. 1982), is exemplary.

237. Galtieri v. Wainwright, 582 F.2d 348, 357 (5th Cir. 1978). *See generally* Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15 (1977) (describing the legislative background).

238. 455 U.S. 509, 520–21 (1982). I hasten to point out that Justice O'Connor did not suggest that the federal habeas court entertaining a prisoner's initial application should deal with the consequences of withholding or withdrawing unexhausted claims. The effect of either action will be for the court entertaining any future application to determine. Niziolek v. Ashe, 694 F.2d 282, 285 (1st Cir. 1982); Powell v. Spalding, 679 F.2d 163, 165–66 n.2 (9th Cir. 1982); Yount v. Patton, 537 F. Supp. 873, 874–75 (W.D. Pa. 1982). The district court decision in Earl v. Estelle, 503 F. Supp. 406 (N.D. Tex. 1980), holding otherwise, is simply wrong. While counsel for the warden in *Lundy* cited *Earl* in brief, Brief for Petitioner at 24 n.16, he acknowledged at oral argument that the effect of the withdrawal of unexhausted claims would be controlled by rule 9(b). Oral Argument Transcript at 12. Counsel for the prisoner did not deal with the issue in brief, but directed the Court's attention to rule 9 during argument. *Id.* at 40. Of course, if a prisoner withholds a claim in the first instance, the district court may not be aware of its existence and thus can hardly be in a position to address the impact of the prisoner's action upon future applications. *Cf.* Jones v. Wainwright, 608 F.2d 180 (5th Cir. 1979) (refusing to entertain a warden's complaint that the prisoner was withholding an unexhausted claim and rejecting the argument that the court should require the prisoner to accept dismissal of his current petition or to "explicitly waive" the unexhausted claim).

If the prisoner initially asserts an unexhausted claim but withdraws it to protect other claims from dismissal under *Lundy*, the situation is a bit different. In that event the district court knows that the unexhausted claim exists. Still, the result is the same. The effect of its withdrawal cannot be assessed at present, but must be left to the future court that may be called upon to consider it. The necessary decision whether the prisoner has abused the writ can only be made at that time, when the future habeas court can appraise the facts and determine whether the withdrawal constituted a deliberate decision to abandon the unexhausted claim for the purpose of stringing out the proceedings in piecemeal fashion. *See* Paprskar v. Estelle, 612 F.2d 1003 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980).

239. 455 U.S. 509, 520 (1982) (describing the majority's decision as an instruction to habeas petitioners to take each of their claims to state court before bringing any to the federal forum in habeas).

in any way if prisoners follow the preferred course. Currently exhausted claims will be withheld pending the exhaustion of state remedies regarding unexhausted claims. Alternatively, prisoners may simply amend their mixed petitions to eliminate unexhausted claims and resubmit currently exhausted claims for immediate attention. Justice O'Connor plainly wishes to discourage that course, as evidenced by her reference to the risk of forfeiture under rule 9(b).[240] Yet prisoners can hope to accelerate the federal adjudication of any claims only by deleting those that are unexhausted.

Rule 9 expedites federal adjudication, while the exhaustion doctrine postpones it for certain identifiable reasons. Lower court interpretations of rule 9 have reached an accommodation with exhaustion, so that the policies favoring early federal review are served without jeopardizing the competing policies favoring delay until after the state courts have had an opportunity to act. Justice O'Connor's attempt to shift the exhaustion doctrine to ground occupied by rule 9 alone poses a serious threat to the current understanding of that rule. The result can only be confusion and, in some instances, the frustration of federal review at any time. Coming first to rule 9(a), it is well settled that the time necessary for compliance with the exhaustion doctrine cannot be counted as "delay" within the meaning of the rule.[241] Federal review is not foreclosed even if the respondent is prejudiced by the passage of time during which the prisoner pursues relief in state court. If it were otherwise, prisoners might be caught between two procedural rules, both of which could not be satisfied.[242] Turning to rule 9(b), it is equally well settled that the withholding

240. I choose the term "forfeiture" carefully. Justice O'Connor, for her part, tried in *Lundy* to equate the preclusion of unexhausted claims with a prisoner's deliberate decision to abandon those claims to pursue others. She recognized that rule 9(b) "incorporates" the judge-made guidelines set forth in Sanders v. United States, 373 U.S. 1 (1963), which, in turn, permit the federal habeas courts to identify an abuse of the writ only when prisoners are found to have waived an opportunity for litigating the same claims in prior postconviction proceedings. In an attending footnote she refered to Wong Doo v. United States, 265 U.S. 239 (1924), in which the Court refused to entertain a claim that might have been, but was not, litigated in prior habeas proceedings. Yet even as she acknowledged that exhaustion doctrine cases are not "controlled" by *Wong Doo* for the obvious reason that prisoners cannot litigate unexhausted claims and must hold them back until the state courts have examined them, she proposed that *Wong Doo* "provides some guidance for the situation in which a prisoner deliberately decides not to exhaust his claims in state court before filing a habeas corpus peititon." 455 U.S. 509, 521 n.13 (1982). That will not do at all. Even if prisoners do withhold unexhausted claims intentionally (knowing that they are not yet ripe for federal consideration and will be dismissed summarily if presented), their decisions are hardly to be equated with those of others who intentionally withhold claims that can be presented immediately for the purpose of harassing respondents with piecemeal litigation. On a more realistic plane, the most likely explanation for prisoners' failure to raise any claims, exhausted or unexhausted, is that those claims are simply overlooked out of negligence or ignorance. If, indeed, Justice O'Connor intended to box both unexhausted and exhausted claims out of later federal proceedings, it can hardly be as a suitable penalty for vexatious manipulation. There is a word to describe what she is talking about. It is not "waiver," but "forfeiture." *See* 455 U.S. 509, 528 (1982) (Blackmun, J., concurring).

241. *See* Louis v. Blackburn, 630 F.2d 1105, 1110 (5th Cir. 1980).

242. This argument prevailed in Congress when it was originally proposed that rule 9(a) should include an explicit "presumption" of prejudice to the respondent in any case in which federal relief was sought more than five years after the judgment under attack. Professor Clinton carried the day with the explanation that the exhaustion of state remedies might alone require that much time. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 26–29 (1977); *see also* Coleman v. Balkcom, 451 U.S. 949, 951 n.5 (1981) (Stevens, J., concurring in denial of certiorari) (remarking on the delay occasioned by compliance with the exhaustion doctrine). I have made an analogous argument

of a claim for want of exhaustion does not constitute an "abuse" of the writ.[243] While the act of withholding or withdrawing an unexhausted claim may well be "deliberate," no serious suggestion can be made that the prisoner, although free to include all federal claims, fails to do so in order, in Justice Brennan's terms, to "get more than 'one bite at the apple.'"[244] Claims that have not been put to the state courts must be omitted. Since the prisoner has no choice in the matter, it would be unrealistic and patently unfair to impose a penalty for a supposed "abuse."[245]

3. *Exhaustion and Efficiency*

The total exhaustion rule condemns itself. It furthers no values traditionally associated with exhaustion and promises no assistance within the framework described by rule 9. Even if those shortcomings are overlooked and the rule is defended as an aid to the efficiency of federal adjudication in habeas, it must be found wanting. Its likely effect in concrete cases will be to complicate, rather than simplify, the processing of habeas cases. To begin,

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against bills in the Congress that would establish a statute of limitations for habeas applications, with the time period running from the date of the conviction judgment. Prisoners cannot control the pace of state court litigation, and it would be fundamentally unfair to foreclose federal review after a fixed period of time when the delay results from compliance with the exhaustion doctrine. *Habeas Corpus Procedures Amendments Act of 1981: Hearings on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 179–80 (1982). The Reagan Administration's program attempts to meet that complaint by measuring its proposed limitation period from the date when state remedies have been exhausted. The Administration's Proposed Reforms in Habeas Corpus Procedures (March 4, 1982), *reprinted in Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the Judiciary, 97th Cong., 2d Sess. 9* (1982); *see* S. 217, 98th Cong., 1st Sess., 129 CONG. REC. 402 (1983) (incorporating the Administration's proposals). I have responded elsewhere. Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 612–14 n.22 (1983).

243. Brown v. Wyrick, 496 F. Supp. 177 (E.D. Mo. 1980); *accord* Galtieri v. Wainwright, 582 F.2d 348, 371 (5th Cir. 1978) (Goldberg, J., dissenting); *see* Waters v. Wainwright, 527 F. Supp. 275, 276 (M.D. Fla. 1981) (noting that the prisoner's claim had originally been dismissed for want of exhaustion but accepting a second petition raising the same issue); United States *ex rel.* Gardner v. Meyer, 519 F. Supp. 75, 82 n.4 (N.D. Ill. 1981) (dismissing one unexhausted claim but stating that the prisoner could raise it in a later petition after the state courts had denied relief); *cf.* Simpson v. Wainwright, 488 F.2d 494, 495 (5th Cir. 1973) (per curiam) (reaching the same result under the *Sanders* guidelines); Tannehill v. Fitzharris, 451 F.2d 1322, 1324 (9th Cir. 1971) (same).

244. 455 U.S. 509, 536 (1982) (Brennan, J., concurring in part & dissenting in part). The essential point is, of course, that both rule 9(b) and *Sanders* have as their objective the identification of petitioners who neglect some claims for the purpose of harassing the respondent. Prisoners who withhold or withdraw claims because they must hardly fall into that category. *See* Potts v. Zant, 638 F.2d 727, 742–47 (5th Cir.) (recalling that the "abuse of the writ" standard is equitable in nature and thus refusing to find a "waiver" simply because the prisoner had deliberately withdrawn a previous habeas petition), *cert. denied*, 454 U.S. 877 (1981); *cf.* McShane v. Estelle, 683 F.2d 867 (5th Cir. 1982) (illustrating that a federal evidentiary hearing may be necessary to determine whether dismissal under rule 9(b) is warranted).

245. To date the lower courts have not been enthusiastic about the prospect. *E.g.*, Powell v. Spalding, 679 F.2d 163, 165–66 n.2 (9th Cir. 1982) (taking note of the dictum in *Lundy* but stating that in the case at bar the prisoner could raise a withdrawn issue without abusing the writ); *see* Niziolek v. Ashe, 694 F.2d 282, 285 n.2 (1st Cir. 1982) (noting the question but failing to decide it); Taylor v. Scully, 535 F. Supp. 272, 276 n.3 (S.D.N.Y. 1982) (commenting that it is "very unclear" what will happen if prisoners accept the "risk" noted in *Lundy*); *cf.* Jones v. Hess, 681 F.2d 688, 695–96 (10th Cir. 1982) (issuing a warning that the "risk" exists). That is hardly surprising. Not only is Justice O'Connor's treatment of the rule 9 point dissatisfying, but it carried only four votes. *See* 455 U.S. 509, 538 (1982) (Brennan & Marshall, J.J., concurring in part & dissenting in part) (counting Justices White and Blackmun with them). While Justice Stevens did not reach the rule 9 question, the tenor of his opinion suggests that if he had, he would have joined the dissenters. *See* Martin v. White, 538 F. Supp. 326 327–28 (W.D. Mo. 1982) (anticipating that Justice Stevens will not join Justice O'Connor on this issue).

prisoners will not understand it. Invariably proceeding without counsel, they are unlikely to be aware of, let alone to comprehend, the Court's "simple and clear" instructions: "[B]efore you bring any claims to federal court, be sure that you first have taken each one to state court."[246] They will rely upon the statute, which does not reflect the total exhaustion rule, and the standard form, which insists that all grounds for relief be included.[247] When in their ignorance they file mixed petitions and suffer summary dismissal, they will not understand why. Sympathetic judges may offer an explanation, but *Lundy* does not seem to require one.[248] A brief explanation might be misleading in any event. Prisoners need to know, but may not be told, that they are free to return to federal court after exhausting state remedies regarding all their claims or to "redraft their [present] pleadings with black magic markers."[249] Then again, if in the interest of fairness the district courts take the time to guide prisoners through the justifications for, and the consequences of, dismissal under *Lundy*, the benefits of summary dismissal may be lost.

If prisoners are made to understand their options, and they return to state court with currently unexhausted claims, even more state and federal judicial resources may be squandered. The state courts may be put through needless litigation regarding claims that never command a federal hearing. If prisoners choose to pursue currently exhausted and unexhausted claims simultaneously, state court proceedings may be rendered moot by the award of habeas relief while unexhausted claims are pending and, perhaps, after considerable time and effort has been expended upon them.[250] The scenario may be no better if prisoners choose to withhold currently exhausted claims until all claims are ready for federal review. At that late date, the state courts will have fully adjudicated currently unexhausted claims only to find that relief is forthcoming based upon currently exhausted claims.[251] The federal courts, for their

246. 455 U.S. 509, 520 (1982).

247. 28 U.S.C. § 2254 Model Form for use in applications for habeas corpus under 28 U.S.C. § 2254 (1976). At oral argument in *Lundy*, counsel for the prisoner contended that the form might trap unwary prisoners, often proceeding *pro se*, into filing mixed petitions. Oral Argument Transcript at 38–40; *see also* 455 U.S. 509, 522 (1982) (Blackmun, J., concurring) (insisting that the total exhaustion rule can be read into the statute "only by sheer force" and that it "operates as a trap for the uneducated and indigent *pro se* prisoner-applicant").

248. Justice Blackmun raised the question in his separate opinion, but Justice O'Connor failed to treat it. *See* 455 U.S. 509, 530 (1982) (Blackmun, J., concurring) (insisting that a prisoner's opportunity to amend his or her way around *Lundy* "may depend on his awareness of the existence of that alternative or on a sympathetic district judge who informs him of the option and permits the amendment"); *cf.* FED. R. CIV. P. 15(a) (fixing limits on a party's ability to amend without leave of court).

249. 455 U.S. 509, 546 n.15 (1982) (Stevens, J., dissenting).

250. *See* 455 U.S. 509, 525 (1982) (Blackmun, J., concurring) (arguing that the total exhaustion rule will waste valuable state court resources on "meritless" claims that "doubtless will receive little or no attention in the subsequent federal proceeding that focuses on the substantial exhausted claim").

251. In Bergman v. Burton, 102 S. Ct. 2026 (1982), Justice Stevens, joined by Justices Marshall and Blackmun, dissented from the majority's decision to vacate the circuit court's judgment and to remand for reconsideration in light of *Lundy*, decided two months earlier. Justice Stevens pointed out that the circuit court had already held that the prisoner was entitled to relief on the basis of an exhausted claim that an invalid jury instruction had been given at trial in state court. By focusing upon another claim, one that was unexhausted, and insisting (apparently) that the entire petition be dismissed because of its inclusion with the jury instruction claim,

part, are forced through two examinations of the same claims.[252] They must consider each claim included in an initial petition to determine whether any one has yet to be presented to the state courts. If an unexhausted claim is discovered and the entire petition is dismissed, the same claims must be reviewed again if the prisoner files a new petition, immediately or years later, after state remedies have been exhausted regarding all issues.[253] If the lapse of time between the two examinations is significant, the record will be cold, frustrating not only the fair treatment of claims in federal habeas but the prosecution's chances of winning a new conviction should habeas relief be awarded and a new trial conducted.[254]

The practical consequences of the total exhaustion rule are exacerbated by its disquieting rigidity. The Court's opinion in *Lundy* admits of no flexibility at all, thus embracing an approach to mixed petitions harsher than any previously envisioned.[255] Apparently, no distinctions are to be drawn. It matters not that exhausted claims may be clearly meritorious while unexhausted claims are just as clearly frivolous.[256] It matters not that exhausted

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the Supreme Court provided, in Stevens' mind, only another illustration that *Lundy* "merely complicates and delays the termination of habeas corpus litigation," disserving "busy federal judges" and "deserving litigants" alike:

> Under *Rose v. Lundy*—if I read the Court's opinion correctly—after the case gets back to the District Court, that court must dismiss the habeas corpus petition that is now a part of the record. Thereafter, the respondent immediately will be entitled to resubmit a petition eliminating the unexhausted claim and confining his claim to relief to the issue that has already been resolved in his favor by the Court of Appeals. It seems reasonable to assume that the District Court will grant the relief mandated by the Court of Appeals that the District Court order will then be promptly appealed by the warden, and that the Court of Appeals thereafter will decide . . . the . . . questions precisely as it decided them in the opinion that this Court today is vacating. It seems equally likely that the warden will remain dissatisfied with that ruling and then once again file a petition for certiorari, at which time the Court can then determine whether to review the questions that are now presented.

Id. at 2028 (footnotes omitted).

252. 455 U.S. 509, 527–28 (1982) (Blackmun, J., concurring).

253. *Id.*

254. *Id.* at 528.

255. Justice Blackmun noted that the Fifth and Ninth Circuits, which had adopted a total exhaustion rule prior to *Lundy*, had not taken the "extreme" position that Justice O'Connor's opinion described. *Id.* at 529 n.7 (recalling that the Ninth Circuit permitted the district courts to consider prisoners' explanations for failing to exhaust state remedies regarding all claims and allowed them to entertain mixed petitions if the state courts delayed treatment of federal claims and that the Fifth Circuit had embraced an "appellate exception" to its version of the total exhaustion rule). *See infra* note 259; *see* Little Light v. Crist, 649 F.2d 682, 684–85 (9th Cir. 1981) (relaxing the Ninth Circuit's rule in the interest of fairness); Gonzales v. Stone, 546 F.2d 807, 810 (9th Cir. 1976) (describing that circuit's general position); *see also* D.D.v. White, 650 F.2d 749, 750 n.2 (5th Cir. 1981) (indicating that the Fifth Circuit admitted of exceptions to its rule for cases in which state remedies were "absent" or "futile" or "inefficient"); Henson v. Estelle, 641 F.2d 250, 252 n.1 (5th Cir.) (refusing to apply the total exhaustion rule because the prisoner's unexhausted claim was frivolous), *cert. denied*, 454 U.S. 1056 (1981). *But see* Genter v. Wainwright, 678 F.2d 934 (11th Cir. 1982) (per curiam) (understanding *Lundy* to adopt the previously established Fifth Circuit rule).

256. Justice Stevens understood the Court to mean that any unexhausted claims, "no matter how frivolous," will require the district court to postpone habeas review of exhausted claims, "no matter how obvious and outrageous the constitutional violation may be." 455 U.S. 508, 542 (Stevens, J., dissenting). If anything, Judge Goldberg was more eloquent in his dissent from the Fifth Circuit's adoption of a similar total exhaustion rule. Galtieri v. Wainwright, 582 F.2d 348, 367 (5th Cir. 1978) (Goldberg, J., dissenting): "For the unwitting, naive, or optimistic inclusion of a single unexhausted claim in a prisoner's petition, the majority would deny a federal hearing on a thousand exhausted claims. This is a new species of poisonous tree whose bitter fruit, I am convinced, is the frustration of justice."

and unexhausted claims are entirely unrelated, so that they may fairly be treated separately.[257] Indeed, it matters not that the case for compliance with the exhaustion doctrine regarding all claims is close, so that different federal judges might differ on the question whether a petition is mixed at all.[258] In every case the district courts "must" dismiss the entire petition.[259]

After *Lundy* the exhaustion doctrine threatens to become precisely what the Court has always disclaimed—a "blunderbuss" used to "shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence."[260] We can antici-

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257. As explained earlier, the total exhaustion rule is unnecessary if mixed petitions must be dismissed only if they contain "related" claims. *See supra* notes 225–28 and accompanying text; *see also* 455 U.S. 509, 526 (1982) (Blackmun, J., concurring).

258. Justice Stevens, for his part, worried that the total exhaustion rule will be invoked to short-circuit habeas petitions in every case in which an appellate court disagrees with a district court's decision regarding an exhaustion issue. Since many *pro se* applications are ambiguous at best, he warned that "such differing appraisals should not be uncommon." 455 U.S. 509, 546 n.15 (1982) (Stevens, J., dissenting).

259. The square holding in *Lundy* was arguably limited to a requirement that the district courts dismiss mixed petitions. 455 U.S. 509, 522 (1982). I judge it too early to conclude that appellate courts, indeed the Supreme Court itself, are equally obliged to dismiss for want of total exhaustion after a district court has reached the merits. In cases of that kind, an appellate court's refusal also to treat the merits places the parties and the state courts in the awkward position of undertaking what may be superfluous or repetitive litigation—aggravating, rather than reducing, interjurisdictional conflict. If the district court awarded relief on the basis of currently exhausted claims, the litigation of currently unexhausted claims would then seem futile. Whatever the state courts decide regarding those claims, it can be expected that, when given the opportunity once *Lundy* has been satisfied, the district court will reaffirm its previous judgment regarding exhausted claims. *Cf.* Bergman v. Burton, 102 S. Ct. 2026, 2028 (1982) (Stevens, J., dissenting) (pointing out that in many cases prisoners who have won a favorable judgment in the district court on some exhausted claims will simply delete unexhausted claims from their petitions if an appellate court remands under *Lundy*). If the district court denied relief regarding currently exhausted claims, renewed state court litigation may prove repetitive. In cases of that kind, the prisoner is free to raise both unexhausted claims (not yet treated on the merits in the federal forum) and exhausted claims (rejected on the merits by the district court but revived by the appellate court's order vacating that judgment for want of total exhaustion). The state courts might yet award relief on any grounds, and, on reexamining claims once rejected, the district court might take a position at odds with its decision when those claims were before it earlier.

Because of the substantial threat that dismissals for want of total exhaustion would create friction between the two systems, the Fifth Circuit has recognized an "appellate exception." Under that circuit's cases, decided prior to *Lundy*, the appellate panel can review the merits notwithstanding the total exhaustion rule if the district court erroneously failed to dismiss a mixed petition and, instead, reached the merits of some claims. Galtieri v. Wainwright, 582 F.2d 348, 360–62 (5th Cir. 1978). Whether the Supreme Court means to be equally flexible is problematic. If Justice O'Connor had wanted to adopt the Fifth Circuit's approach, she might have said as much in *Lundy*, announcing the total exhaustion rule for the district courts but refusing to order dismissal at the appellate level. Since Justice Blackmun raised the issue explicitly, it is difficult to propose that all the Justices were not aware of it. 455 U.S. 509, 529 n.7 (1982) (Blackmun, J., concurring). Indeed, it appears that Justice Stevens assumes that no "appellate exception" will be recognized. *Id.* at 546 n.15 (Stevens, J., dissenting) (stating his understanding that the total exhaustion rule will be invoked and the entire petition dismissed "every time an appellate court disagrees with a district court's judgment that a petition contains only exhausted claims"). I have to count the Court's disposition of several cases in the wake of *Lundy* to point in that direction. *See* Duckworth v. Cowell, 455 U.S. 996 (1982) (remanding with explicit instructions to dismiss a mixed petition); Rodriguez v. Harris, 455 U.S. 997 (1982) (same). Still, the arguments for an "appellate exception" being powerful, I hesitate to rule out the possibility that the Court will embrace the idea until, of course, the Justices speak to the issue. *But see* Pappageorge v. Sumner, 688 F.2d 1294 (9th Cir. 1982) (apparently invoking *Lundy* on appeal when the district court had denied relief on the basis of exhausted claims below). The Fifth Circuit cases to date are, I think, intentionally vague on the point. *E.g.*, Burns v. Estelle, 695 F.2d 847, 853 (5th Cir. 1983) (stating that little may remain of the "appellate exception"); Barksdale v. Blackburn, 670 F.2d 22, 24 n.1 (5th Cir. 1982) (referring to the "appellate exception" in a case decided after *Lundy*).

260. 455 U.S. 509, 523 (1982) (Blackmun, J., concurring) (quoting Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973)). In this same vein, I cannot resist one last quotation from Judge Goldberg. His words are as applicable to the Supreme Court's decision in *Lundy* as they were in the context in which he wrote them:

pate that, frustrated at the federal court house door by a rule that rejects some claims because of procedural shortcomings regarding others, many prisoners will abandon the habeas enterprise entirely. I will not accuse the Justices of intending that result, or of gaining satisfaction in the knowledge that they have established such onerous procedural burdens that prisoners are discouraged from requesting federal postconviction relief.[261] It is enough to point out that the total exhaustion rule promises no less. Here again, whether by design or not, the Court's approach to the exhaustion doctrine tends to transform it from a discretionary rule of timing into a mechanism for the preclusion of federal review.

4. *The Impact Below*

The Supreme Court's attitude regarding exhaustion, evidenced in *Serrano, Harless*, and *Lundy*, has an inevitable effect upon the daily work of the lower courts sitting in habeas. Some circuits increasingly hold state prisoners to exacting standards, insisting that they explore any possible means of raising their federal claims in state court and that, when the opportunity is presented, they identify those claims with precision.[262] Even when no state remedies appear to be available, the slightest doubt is resolved in favor of dismissal on the stated ground that the state courts should decide for

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> Mesmerized by a specter of its own creation, a litigious prisoner so diabolically clever that he may be counted on to outwit state's attorneys and federal district judges, the court today condemns real men of flesh and blood, untutored and unlettered in law, to years of unconstitutional confinement. Perhaps we as judges cannot be expected to understand the full meaning of imprisonment and to respond to the full measure of injustice visited upon one whose unlawful incarceration is prolonged for a year or more. We can, however, be expected to understand and respond to the historic office of the Great Writ, provision of "a swift and imperative remedy in all cases of illegal restraint or confinement."

Galtieri v. Wainwright, 582 F.2d 348, 367 (5th Cir. 1978) (Goldberg, J., dissenting) (also quoting Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973)).

261. I do not lay such a charge, but Justice Blackmun comes ever so close. *See* Rose v. Lundy, 455 U.S. 509, 528 (1982) (Blackmun, J., concurring) (referring to the possibility that prisoners might forfeit any unexhausted claims they withdraw from mixed petitions and the additional possibility that society might be "forced to sacrifice either the swiftness of habeas or its *availability* to remedy all unconstitutional imprisonments") (emphasis added).

262. The Supreme Court said in *Picard* that habeas applicants need not cite "book and verse on the federal constitution." Picard v. Connor, 404 U.S. 270, 278 (1971) (quoting Daugharty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958)). Nevertheless, some panels of the Second Circuit have insisted that a prisoner's briefs in state court "must have contained words such as 'under the due process clause' or 'under the Constitution,' that expressly spell out the petitioner's reliance on the United States Constitution." Klein v. Harris, 667 F.2d 274, 282 (2d Cir. 1981). The key precedent in that circuit has been Johnson v. Metz, 609 F.2d 1052 (2d Cir. 1979), in which a panel held that a prisoner's state court claim that he had been denied "a fair trial" was insufficient to charge a due process violation. More recently the en banc court has announced more flexible standards. Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982). In the future, state prisoners can satisfy the exhaustion doctrine without referring to a specific federal claim by relying on federal precedents employing a constitutional analysis, by relying on state court precedents employing a constitutional analysis in similar circumstances, by asserting a claim in language that calls to mind a specific right protected by federal law, or by alleging a pattern of facts that is "well within the mainstream of constitutional litigation." *Id.* at 194. The extent of the change is not yet clear. The *Daye* court found it unnecessary to overrule *Johnson*. Still, it appears that the Second Circuit may be coming around to an approach to the exhaustion doctrine that is more in keeping with its supporting rationales.

themselves whether some state procedure remains open.[263] And, at all events, the slightest shift in theories[264] or factual allegations[265] between the state and federal forums leads to dismissal for inadequate compliance with the exhaustion doctrine.[266] In the wake of *Lundy*, prisoners' difficulties will be multi-

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263. Stahl v. New York, 520 F. Supp. 221, 226 (S.D.N.Y. 1981) (insisting that it is for the state courts to determine whether their postconviction remedies are open); Sabino v. LeFevre, 490 F. Supp. 183, 188 n.3 (S.D.N.Y. 1980) (collecting the Second Circuit authorities to that effect); *accord* Santana v. Fenton, 685 F.2d 71 (3d Cir. 1982); White v. Wyrick, 651 F.2d 597 (8th Cir. 1981); *cf.* McPherson v. Barksdale, 640 F.2d 780 (6th Cir. 1981). *But see* Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982) (examining the possibilities for litigation under Ohio law and concluding that no remedies were reasonably available).

264. *E.g.*, Terrebonne v. Blackburn, 646 F.2d 997, 1002 n.6 (5th Cir. 1981) (refusing to consider whether a state sentencing scheme was so irrational that it violated the due process clause because the prisoner had argued in state court only that it ran afoul of the eighth amendment); Sneed v. Blackburn, 569 F.2d 854 (5th Cir. 1978) (per curiam) (concluding that the prisoner's claim in state court that the sheriff had consorted with jurors was not sufficient to raise a federal claim that the right to jury trial had been violated).

265. *E.g.*, Isaac v. Perrin, 659 F.2d 279, 281 n.1 (1st Cir. 1981) (refusing to consider allegations of fact going to the prisoner's speedy trial claim when they had not been presented to the state courts); Camillo v. Wyrick, 640 F.2d 931, 934–35 (8th Cir. 1981) (refusing to entertain allegations that a prisoner's plea of guilty had been influenced by drugs and hospitalization when he had alleged in state court that the plea had been coerced from him in jail).

266. Stringent pleading requirements regarding some common federal claims promise to leave the most assiduous litigant exasperated. When, for example, the claim is that defense counsel delivered ineffective assistance through a lengthy trial, or that a range of trial errors amounted in cumulative effect to a violation of due process, it is extremely unlikely that the petitioner will be able to present the state courts with precisely the same factual allegations and legal arguments the federal habeas court will be asked to entertain. To propose otherwise is to assume unrealistically that would-be habeas applicants, or their lawyers, have a later habeas petition in mind as they progress through the state courts with their federal claims. It also assumes that potential petitioners and their attorneys are able to marshal all possible allegations and identify their legal significance from the outset in state court. It would be nice (and efficient) if that were the case. It isn't. The run of the mine case to which the exhaustion doctrine must speak is one in which an undereducated prison inmate (acting *pro se*) is able (against the odds) to fashion a federal habeas petition that identifies (perhaps roughly) a cognizable claim and supports it (more roughly) with ambiguous assertions of fact. I concede the federal court's dilemma. If the claim is to be reached at all in the present atmosphere, it may seem necessary to treat only the particular allegations regarding it that were presented squarely to the state courts. *E.g.*, Garrison v. McCarthy, 653 F.2d 374, 379 (9th Cir. 1981) (limiting consideration to the specific point raised in state court—counsel's failure to object to particular evidence); Cox v. Wyrick, 642 F.2d 222, 226 (8th Cir.) (declining to consider allegations about counsel's work that were not raised in state court and limiting review to the prisoner's two specific allegations of counsel error), *cert. denied*, 451 U.S. 1021 (1981); *see* Pappageorge v. Sumner, 688 F.2d 1294, 1294–95 (9th Cir. 1982) (Ely, J., concurring) (offering a brief discussion). The likely result when that course is followed is plain enough—the denial of relief based on an incomplete record. *E.g.*, Hall v. Sumner, 512 F. Supp. 1014 (N.D. Cal. 1981), *aff'd*, 682 F.2d 786 (9th Cir. 1982).

Sympathetic judges who suspect that a prisoner's claim might be stronger than it appears from the *pro se* petition may assign counsel to investigate and, perhaps, to propose appropriate amendments. *E.g.*, Graham v. Mabry, 645 F.2d 603, 605 n.1 (8th Cir. 1981) (noting that several allegations had been introduced for the first time in an amended petition filed by counsel). Yet that is troublesome on the same ground. It seems that those allegations cannot be considered. *E.g.*, Campbell v. Leeke, 533 F. Supp 1314 (D.S.C. 1982); Evans v. LeFevre, 490 F. Supp. 813 (S.D.N.Y. 1980). If counsel gives up and decides to return to state court with new allegations before putting them to the federal habeas court in an amended complaint, problems of a different order may be presented. The state courts may be unwilling to consider those allegations because, to take the most common example, they were not raised in prior state proceedings when the prisoner was attempting to exhaust state remedies in the first instance. The state courts' refusal to consider the new allegations will, of course, satisfy the federal habeas court that state remedies have now been exhausted. Nevertheless, those allegations may be entirely foreclosed, in federal habeas as well as the state courts, because of the prisoner's unremediable procedural default in initial state court proceedings. *Cf.* Domaingue v. Butterworth, 641 F.2d 8, 12–13 (1st Cir. 1981) (refusing to permit counsel to expand the petitioner's challenge to trial counsel's effectiveness by adding new allegations in a supplemental application for further appellate relief in state court). See *supra* note 198 for a discussion of these problems. In sum, prisoners whose federal claims rest upon multiple factual allegations and subtle legal arguments are frustrated coming and going. The system in which they find themselves pictures an

plied. They will face dismissal if they fail to meet rigorous standards regarding any claims in their petitions, even, perhaps, claims of which they themselves are unaware but which are discoverable by imaginative federal judges searching for some basis upon which to rest a dismissal order.[267] In complex cases it will be extremely difficult to isolate particular federal claims and their supporting factual allegations, to identify them clearly to the state courts by any possible means, to construct a federal habeas corpus petition that includes those claims and allegations to the exclusion of all others, and thus to avoid *Lundy* and obtain federal examination of the merits.[268]

V. SOME SUGGESTIONS IN CONCLUSION

I do not propose an abandonment of the "general rule" calling for exhaustion in the run of cases. There are perfectly good reasons for preferring initial state court litigation of federal claims arising in state criminal prosecu-

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entirely unrealistic state of affairs, in which professionally represented litigants marshal their allegations and arguments with sophistication along a clear path to federal habeas. That is not, however, a realistic portrayal of the process.

The answer, to my mind, lies in renewed flexibility. While I would not propose that prisoners be permitted to present entirely different sets of operative facts in state and federal court and still claim that the same claim has been raised in both, these cases by their nature call for a realistic appraisal of the situation from all perspectives. Said another way, nothing is gained by demanding what cannot be supplied. If a prisoner, particularly one proceeding *pro se*, manages to present roughly the same judicial business in both forums, that ought to be enough. To parse habeas petitions and identify minor discrepancies with a prisoner's allegations in state court is to overestimate the ability of the participants in litigation to state and restate legal contentions with exaggerated precision. In this regard, it should be kept in mind that while Justice O'Connor complained in *Lundy* that the district court had considered several allegations of prosecutorial misconduct that had not been set before the state courts explicitly, she reserved her primary criticism for that court's apparent consideration of two analytically distinguishable unexhausted claims. 455 U.S. 509, 519 (1982). *See* Butler v. Rose, 686 F.2d 1163, 1167 n.3 (6th Cir. 1982) (reading *Lundy* in a similar manner). One may hope, then, that the Justices recognize that the fair and proper orchestration of federal habeas review demands a certain realism about the capacities of litigants.

The Eleventh Circuit's treatment in Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982), provides a good illustration. The prisoner in that case had clearly raised a claim of conviction on insufficient evidence in both state and federal court. The warden insisted, however, that he had also included in his federal petition the related and unexhausted claim that his conviction rested upon an unconstitutional mandatory presumption. *Id.* at 1376. The circuit court focused attention upon the precise language used in the federal habeas petition and concluded that only the exhausted claim had been stated. On that basis *Lundy* was distinguished. *Id.* at 1376–79. At the same time, the court signaled in parting that if it had found that both claims had been raised, it would have gone on to decide whether, upon reflection, they were sufficiently distinct to invoke *Lundy* in any event. *Id.* at 1379 n.11. The message was clear. Pressed to the boiling point, the court was prepared to declare the two claims to be essentially the same, avoiding dismissal under *Lundy* on a yet more fundamental basis.

267. The real threat may come from wardens, whose attorneys may find it to their immediate advantage in litigation to divert the case back to the state courts on any available basis. By combing an ambiguous *pro se* petition and identifying some unexhausted claim buried in it, counsel may avoid, at least for a time, coming to grips with the exhausted claims the prisoner meant to raise. In the long run, short-sighted tactics of this kind make no sense for anyone concerned, but litigating attorneys who measure success in the "win-loss" columns may have other things on their minds. I should hope that the federal habeas courts will be alert to the misuse of *Lundy*. E.g., Hicks v. Wainwright, 633 F.2d 1146, 1148 (5th Cir. 1981) (rejecting a respondent's argument that the prisoner's due process claim sounded in the sixth amendment and that the prisoner had failed to raise that claim explicitly in state court).

268. If, for example, a prisoner's inclusion of a single unexhausted allegation of counsel error at trial will mean that an entire petition, raising a dozen similar exhausted allegations, must be dismissed out of hand, the federal courts' ability to enforce the Constitution will be severely diminished. If, as might well happen, the dozen exhausted allegations make out a meritorious claim that counsel's representation was ineffective, wholly apart from the single unexhausted point, it strains the temper to propose that further resort to the state courts

tions, and I am content that the exercise of federal jurisdiction should ordinarily be postponed until the state courts have had a fair opportunity to act.[269] What I do propose, however, is that the federal courts acknowledge their undoubted power to entertain federal claims at any time and that the deferral of judgment pending the exhaustion of state remedies is only discretionary in the circumstances of the particular case. If I had been before the bar during oral argument in *Lundy*, I would have answered Justice Brennan forthrightly.[270] No, *Picard* did not decide that exhaustion is a *requirement*, if by that he means a jurisdictional predicate. Nor did *Pitchess* intend effectively to overrule *Royall* by referring to exhaustion as a *prerequisite* or *precondition* for federal habeas review.[271] At most those cases indicate that the appellate courts, indeed the Supreme Court itself, will occasionally second-guess district court applications of the exhaustion doctrine.[272] I also have my reservations about that, but the reviewability of exhaustion questions hardly makes them jurisdictional.[273] The Court's dicta in other cases, among them *Mata*, *Webb*, and *McNary*, serve only to obscure the truth even more.[274] If we are to arrive at a workable exhaustion doctrine, the first step is clear thinking and clear writing about the nature of the doctrine. It is a rule of timing, nothing more.

I also propose that the federal courts cease efforts to resolve exhaustion questions by reference to fixed rules rather than sound judgment groomed to the circumstances of the case at bar. As Chief Justice Warren once reminded his colleagues, it is state remedies that are to be exhausted, not state prisoners.[275] Rather than insisting that state prisoners turn square corners to comply with an increasingly complex set of rules, the habeas courts should look upon Justice Black's opinion in *Frisbie* as the relevant model. Flexibility, not rigidity, promises genuine success in the task at hand—the sensitive orchestration of state and federal court attempts to enforce the Constitution.

At least four conclusions follow logically from what I suggest—a return to *Frisbie*. First, the courts should stop talking about jurisdiction when dis-

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should be demanded. *But see* Duckworth v. Serrano, 454 U.S. 1 (1981) (per curiam), discussed *supra* in the text accompanying notes 186–92. The only possible counter is that, presented with one more pertinent allegation, the state courts might yet award relief. That is not only unrealistic but insensitive to the genuine human price that would be exacted.

269. The key word here is, of course, "ordinarily." "Special circumstances" will arise in which federal review should be available promptly. If some verbal formulation is needed to describe those circumstances beyond what the Supreme Court has said in the past, Judge Friendly's suggestion serves well enough. Prisoners' failure to exhaust state remedies should be overlooked "in those rare instances where justice so requires." United States *ex rel.* Graham v. Mancusi, 457 F.2d 463, 468 (2d Cir. 1972).

270. *See supra* text accompanying note 167.

271. *See supra* text accompanying notes 154–55.

272. The *Serrano* and *Harless* decisions are to the same effect, nothing more. *See supra* notes 186–200 and accompanying text.

273. *See supra* text accompanying notes 47–56 (proposing that the habeas courts follow the lead in *Frisbie* and thus respect the determinations of the lower courts in most instances).

274. *See supra* text accompanying notes 157–78.

275. Parker v. Ellis, 362 U.S. 574, 582 (1960) (Warren, C.J., dissenting).

cussing the exhaustion doctrine and should certainly stop invoking jurisdictional consequences when the doctrine is not satisfied. I do not contend that *Slayton* should be abandoned and that habeas petitions should be retained on the federal docket pending the exhaustion of state remedies.[276] While outright dismissal suggests a jurisdictional flaw that does not exist, it is efficient to use that device in exhaustion cases rather than to clutter federal dockets with cases that may be tied up in state court for years and that may never draw federal attention on the merits.[277] Other common practices, also suggesting jurisdictional difficulty, cannot be similarly justified. The federal habeas courts should not be concerned with exhaustion if the states' own representatives do not raise and insist upon it. If counsel for the respondent fails to assert an exhaustion argument in a proper and timely fashion, that procedural default warrants the normal sanction—forfeiture of any later opportunity to raise it.[278] If counsel concedes that state remedies have been exhausted, or waives the matter, the federal courts should again be unconcerned.[279] There is no greater justification for raising the exhaustion question sua sponte in habeas than in any other context. "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system."[280]

Second, the district courts should exercise sound judgment in all cases. They should balance the prisoner's interest in the prompt treatment of federal claims in the federal forum against the interests to be served by demanding further resort to the state courts. Notwithstanding *Serrano*, the clarity of a prisoner's entitlement to relief should be accorded some weight.[281] In every

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276. *See supra* text accompanying notes 149–52.

277. Of course, in some circumstances this dismissal is unwarranted. The Court has recognized as much, *see supra* note 149, and other illustrative cases have appeared in the books. When, for example, it appears that the prisoner will be released from "custody" before he or she can exhaust state remedies and return to the federal forum, it seems appropriate to hold the case on the docket for a reasonable time. If that is not done, the prisoner may lose the opportunity for federal adjudication altogether. *See* Kravitz v. Pennsylvania, 546 F.2d 1100 (3d Cir. 1977).

278. Notwithstanding the cases holding that the federal habeas courts should raise the exhaustion question sua sponte, *see supra* note 182, several circuits routinely refuse to entertain exhaustion claims not raised below. *E.g.*, Morgan v. Wainwright, 676 F.2d 476, 477 n.1 (11th Cir.), *cert. denied*, 103 S. Ct. 380 (1982); Barksdale v. Blackburn, 670 F.2d 22, 24 (5th Cir. 1982); *cf.* Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980) (refusing to consider a warden's procedural default argument because it had not been raised below).

279. Several circuits do respect state attorneys' concessions that the exhaustion doctrine has been met in a case. *E.g.*, Cosby v. Jones, 682 F.2d 1373, 1376 (11th Cir. 1982); Talamante v. Romero, 620 F.2d 784, 786 (10th Cir.), *cert. denied*, 449 U.S. 877 (1980); Schmidt v. Hewitt, 573 F.2d 794, 795 (3d Cir. 1978); Triplett v. Wyrick, 549 F.2d 57, 59 (8th Cir. 1977). Several circuits also permit counsel to waive compliance with the doctrine. *E.g.*, Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982); Cosby v. Jones, 682 F.2d 1373, 1376 n.6 (11th Cir. 1982); Welsh v. Mizell, 668 F.2d 328, 329 (7th Cir.), *cert. denied*, 103 S. Ct. 235 (1982); Collins v. Auger, 577 F.2d 1107, 1109 n.1 (8th Cir. 1978), *cert. denied*, 439 U.S. 1133 (1979); *see supra* notes 182–84 (taking note of the contrary authorities and the circuits that have not yet committed themselves on these questions).

280. Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 480 (1977) (rejecting an abstention argument); *cf.* Middendorf v. Henry, 425 U.S. 25, 29 n.6 (1976) (permitting the military to waive the ordinary rule that military remedies must be exhausted prior to review in federal habeas); Sosna v. Iowa, 419 U.S. 393, 396 & n.3 (1975) (reaching the merits when the state did not insist that the federal courts exercise equitable restraint).

281. I suppose for consistency's sake I must allow that the weakness of claims, as well as their strength, may properly be considered. At all events, the issue ought to turn on the extent to which dismissal in favor of

case the federal courts should examine the state remedies asserted to be available and ask prisoners to pursue them only if they promise a realistic opportunity for state court adjudication.[282] The habeas courts should not require such precise pleading in state court that good faith attempts at compliance routinely fall short of the mark. The key determination should be "whether any of [the] petitioner's claims is so clearly distinct from the claims he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim."[283] The district courts should neither overestimate the ability of *pro se* litigants, demanding that they articulate complex constitutional theories with great precision, nor underestimate the intelligence of state judges, suggesting that they cannot identify a federal claim when they see one.[284] Close cases will come along, but

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further litigation in state court would serve the values underlying the exhaustion doctrine. *See supra* text accompanying notes 3–6. Yet it also seems reasonable to consider the resources expended on a case in the federal forum before an exhaustion problem is discovered. As a practical matter, both parties may see an advantage in immediate federal adjudication of the merits if the habeas proceeding has already come so far toward a conclusion and further state court proceedings hold no better promise of a final and correct decision. *See* Miller v. Estelle, 677 F.2d 1080, 1083–84 (5th Cir. 1982) (declining to demand that a prisoner return to state court when new but cumulative facts were uncovered in a federal evidentiary hearing); Hillery v. Pulley, 533 F. Supp. 1189 (E.D. Cal. 1982) (holding that new facts found at the threshold of federal proceedings should prompt dismissal, but that facts found in a federal hearing should not so long as the character of the claim remains unchanged); Colville v. Scully, 532 F. Supp. 117, 118 n.3 (S.D.N.Y. 1982) (treating the merits because the federal court had already examined the records and read the briefs before discovering an exhaustion issue).

282. In making the necessary decision, the federal courts may fruitfully seek guidance from counsel. If counsel for the respondent makes a commitment to litigate in state court and insists that those courts will treat the merits, it may be appropriate to dismiss. *E.g.*, Hoover v. New York, 607 F.2d 1040, 1042–43 (2d Cir. 1979) (accepting counsel's promise to waive reliance upon a procedural default theory in state court); Rice v. Parratt, 605 F.2d 1091, 1093 (8th Cir. 1979) (resting upon counsel's statement at oral argument that the state courts were open to hear the prisoner's claim). If, however, it appears that the state courts will not entertain the claim, the exhaustion doctrine should be found satisfied. *E.g.*, Parton v. Wyrick, 614 F.2d 154, 157 (8th Cir. 1980) (declining to send a prisoner back to state court when the state's attorney acknowledged that he would seek dismissal there on a procedural ground), *cert. denied*, 449 U.S. 846 (1981); *accord* Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982) (finding Ohio state remedies unavailable).

The determination whether state remedies are realistically open to receive the prisoner should not, however, rest exclusively upon the assurances of states' attorneys, who have been known to take, shall we say, expedient positions in such matters. *E.g.*, Powell v. Spalding, 679 F.2d 163, 165 n.1 (9th Cir. 1982) (noting that counsel had argued in federal habeas that the prisoner had failed to exhaust state remedies but had contended in state court that the same claim had already been considered on the merits and denied); Moore v. Wyrick, 668 F.2d 1007, 1008–09 (9th Cir. 1982) (pointing out that counsel had argued in federal court that federal review should await the outcome of pending state postconviction proceedings but had contended in those proceedings that the issue was procedurally foreclosed).

Finally, it bears mention again that if state remedies are found to be unavailable because the state courts are likely to find a procedural bar, prisoners who are, accordingly, successful on the exhaustion question may find themselves boxed out of federal court nonetheless on the basis of what may be an adequate state ground of decision. *See supra* note 198. In some cases the better course will be to remit the prisoner to state court and thus to permit those courts to reach the merits and avoid preclusion in habeas. If the state courts award relief, further resort to the federal forum will be unnecessary. If they treat the merits and deny relief, there is no procedural bar to habeas thereafter. County Court of Ulster County v. Allen, 442 U.S. 140, 147–54 (1979).

283. Humphrey v. Cady, 405 U.S. 504, 517 n.18 (1972). The precise pleading standards demanded under the Second Circuit's decision in Johnson v. Metz, 609 F.2d 1052 (2d Cir. 1979), are entirely out of place in this field. That circuit's more realistic approach in the recent en banc decision in *Daye v. Attorney General* was overdue. *See supra* note 262.

284. The very existence of the federal collateral remedy in habeas rests, in substantial part, upon the suspicion that the enforcement of constitutional safeguards in criminal cases cannot be left to the state courts alone. I share that suspicion and would hardly wish to be understood to propose that the state courts offer such sensitive treatment of federal claims that federal postconviction review is unnecessary. I do not, however, skid

a genuine effort on the part of the district courts to employ the exhaustion doctrine prudently should prove equal to the task.[285]

Third, at least now that the Supreme Court has elaborated the doctrine in *Picard*, district court judgments regarding exhaustion should ordinarily be respected, subject to appellate review for abuse of discretion. Since those decisions are grounded, on this model, upon the facts of the particular case, routine appellate review is both unnecessary and unwise. The values protected by the exhaustion doctrine are hardly served when district court judgments on the merits are upset on appeal simply because an appellate panel disagrees with the district court's application of the doctrine.[286] Certainly the Supreme Court itself should rarely find it appropriate to become involved. The Court's primary responsibility lies in fashioning guiding principles and rules in the first instance, not in policing the application of those standards in

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to the other extreme and propose that the state courts are so insensitive to federal issues that they cannot identify them when given a fair opportunity. With Judge Sofaer, I doubt that state judges require "painstaking guidance as to federal rights." Sabino v. LeFevre, 490 F. Supp. 183, 187 (S.D.N.Y. 1980).

285. The federal habeas courts should take seriously the Supreme Court's instructions that the state courts be given a "fair opportunity" to address the "substance" of prisoners' federal claims. Picard v. Connor, 404 U.S. 270, 276–78 (1971). Moreover, they should understand that the critical question is not whether prisoners met some artificially established pleading or briefing standards in state court, but whether they said enough to warrant the conclusion that the state courts understood, or should have understood, that they were arguing federal grounds for relief. If prisoners then raise "substantially equivalent," if not "identical," claims in state and federal court, the exhaustion doctrine should be deemed satisfied. Lindsay v. Henderson, 499 F. Supp. 667, 668–69 n.1 (S.D.N.Y. 1980). The books are filled with fitting illustrations. In Smith v. Goguen, 415 U.S. 566 (1974), the Court found the exhaustion doctrine satisfied when the prisoner had argued in state court that the statute under which he had been convicted was vague as applied, but had contended in federal habeas that the statute was invalid on its face. *Id.* at 576–78. The best example may be Judge Rosenn's opinion for the court in Williams v. Holbrook, 691 F.2d 3 (1st Cir. 1982). I wish that such painstaking work were not necessary before the merits are reached in a habeas case, but until the Supreme Court recognizes the efforts its decisions demand, I am afraid that the federal habeas courts must reconcile themselves to the task. I only hope that most will bring to it the care that Judge Rosenn has demonstrated.

In doubtful cases several analytical devices can be brought into play. Pleading standards may fairly be relaxed in cases in which the prisoner's federal claim was "familiar" and, accordingly, likely to have been understood as such by the state courts. Wilks v. Israel, 627 F.2d 32, 38 n.12 (7th Cir. 1980), *cert. denied*, 449 U.S. 1086 (1981). When it is still unclear whether the prisoner was understood to be making a federal claim, both the respondent's and the petitioner's briefs should be examined for evidence. A respondent's recognition of a claim as federal in nature surely provides a basis for finding the exhaustion doctrine satisfied. *See* Cassesse v. New York, 530 F. Supp. 694, 695 (E.D.N.Y. 1982) (relying on the state's failure to resist appellate review in the Supreme Court on the ground that the prisoner had not presented a federal claim properly below).

Even when prisoners referred only to state law and precedents, it is quite possible that the state courts recognized the federal implications of the matter at hand. In this regard, the Third Circuit's approach is nothing short of refreshing. Even if a prisoner's claim was couched solely in state law terms, the exhaustion doctrine should be found satisfied regarding a related, federal claim if treatment of the state law claim called for the same "method of analysis" required for the federal claim. Bisaccia v. Attorney General, 623 F.2d 307, 309–12 (3d Cir. 1980), *cert. denied*, 449 U.S. 1042 (1981). *See* Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982). This is only reasonable. If the state courts were given an opportunity to analyze any claim, however denoted, in the way a prisoner's federal habeas claim must be examined, and relief was denied, it hardly can be proposed that they would have reached any other result if the prisoner had dressed the claim in federal clothing. More to the point, perhaps, in such a case the state courts are unlikely to reach a different result if the petitioner is forced to return to them.

286. Justice Stevens, at least, has come around on this. *E.g.*, Anderson v. Harless, 103 S. Ct. 276, 278–81 (1982) (dissenting opinion) (joined by Marshall & Brennan, J.J.); Bergman v. Burton, 102 S. Ct. 2026, 2027–28 (1982) (dissenting opinion) (joined by Marshall & Blackmun, J.J.).

individual cases. The Justices' failure to recognize as much was, above all else, the error in *Harless*.[287]

Fourth, the misguided total exhaustion rule in *Lundy* should be abrogated, and in its place the position taken previously in most circuits should be adopted.[288] The values served by the exhaustion doctrine are respected fully if the district courts dismiss only unexhausted claims, while giving prompt attention to exhausted claims included in the same petition. At the very most, dismissal of a mixed petition might be appropriate if exhausted and unexhausted claims are so closely related that an attempt to deal with exhausted claims in isolation would be futile.[289] At the very least, the federal courts clearly should not parse *pro se* petitions to discover previously unidentified, and thus unexhausted, claims and to justify dismissal of all claims under the total exhaustion rule.[290]

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287. *See supra* notes 193–200 and accompanying text. Justice Stevens said as much, of course, albeit in dissent. Anderson v. Harless, 103 S. Ct. 276, 280 (1982).

288. That is to say, the federal habeas courts should dismiss only unexhausted claims and treat exhausted claims promptly. *See* United States *ex rel.* Morano v. Wolff, 511 F. Supp. 66 (N.D. Ill. 1980).

289. By my count, as many as three of the Justices would prefer the Second Circuit's approach, *see supra* note 202, though, of course, the early overruling of *Lundy* would present problems of a different order. I am not sure what to make of Justice Marshall's endorsement of the Stevens dissent in Bergman v. Burton, 102 S. Ct. 2026 (1982) (Stevens, J., dissenting), which, of course, takes *Lundy* to task. Unfortunately, the best news to date is that some, though by no means all, of the circuits have refused to invoke the total exhaustion rule in cases decided at the district level prior to the *Lundy* decision. But, of course, those cases "will not exist for long." *See* Niziolek v. Ashe, 694 F.2d 282, 287 (1st Cir. 1982).

290. I would like to think that Justice O'Connor's response to Justice Brennan's dissent in Engle v. Isaac, 456 U.S. 107 (1982), amounts to more than gentle ribbing and actually provides a clear signal that the Justices are agreed that *Lundy* should not be taken to this extreme. The primary issue in *Isaac* was the effect in federal habeas of a prisoner's procedural default in state court. The Court, speaking through Justice O'Connor, held that in the circumstances at bar the default operated to foreclose habeas review entirely. *Id.* at 110. Justice Brennan dissented bitterly on that issue, but also added the argument that, given *Lundy*, the procedural default question should not have been reached. Examining one prisoner's petition closely, Brennan insisted that it included an unexhausted claim and that, accordingly, the entire petition should have been dismissed. He charged the Court with ignoring *Lundy* to choose a different, and vastly more dramatic, basis of decision—dismissal with prejudice under Wainwright v. Sykes, 433 U.S. 72 (1977). Engle v. Isaac, 456 U.S. 107, 137–44 (Brennan, J., dissenting).

In response Justice O'Connor acknowledged that it was "possible" to construe the prisoner's "confused petition" to raise the claim that Brennan had identified. *Id.* at 124 n.25. "Many prisoners," she said, "allege general deprivations of their constitutional rights and raise vague objections to various state rulings." *Id.* Moreover, a "creative appellate judge" (like Brennan, presumably) can "almost always distill from these allegations an unexhausted due process claim." *Id.* In *Isaac*, however, the district court had not identified this claim, and Justice O'Connor was "reluctant to interpolate an unexhausted claim not directly presented by the petition." *Id.* The *Lundy* decision, she said, "does not compel such harsh treatment of habeas petitions." *Id.* In all candor, I have to read O'Connor's comments as tongue-in-cheek, at least in part. It is clear enough that Justice Brennan's reliance upon *Lundy* was intended to protect the prisoner in *Isaac* from a worse fate under *Sykes*. Still, her recognition of the havoc that abuse of *Lundy* might wreak upon federal habeas is, perhaps, a welcome sign to guide the lower courts. *See* Cosby v. Jones, 682 F.2d 1373, 1377–78 (11th Cir. 1982) (relying upon *Isaac* for the view that ambiguous habeas petitions should not be read to raise unexhausted claims).