DIRECT AND COLLATERAL FEDERAL COURT REVIEW OF THE ADEQUACY OF STATE PROCEDURAL RULES

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If a state's highest court refuses to consider a litigant's federal-law contention because the litigant failed to comply with a state procedural rule, the litigant's default will bar Supreme Court review (and, usually, federal habeas review) if the procedural ruling is independent of any federal law questions and adequate to support the judgment. State procedural requirements sometimes are found inadequate, however, and one potential basis for such a finding is that the requirement imposes an "undue burden" on the assertion of a federal right.

Although the standard notion of the "undue burden" analysis is that it should take the form of a facial, rather than an as-applied, review, this Article contends that the Court's prior analyses actually span a spectrum from facial to more case-specific. However, a comparison of the relative institutional attributes of the Supreme Court and the lower federal courts suggests that the latter are better suited to engage in searching as-applied review. Accordingly, this Article concludes that the Court generally (though not always) should abstain from performing rigorous as-applied adequacy analysis on direct review, but that the federal courts should be able to employ such an analysis in habeas proceedings.

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INTRODUCTION

Numerous limitations circumscribe federal court review of state court judgments. The Supreme Court generally may review a state court judgment only for errors of federal law.[1] Moreover, even if such errors have been committed, Supreme Court review is impermissible if the state court judgment rests, in the alternative, on independent and adequate state law grounds. Lower federal court review is narrower still, because the general rule is that federal courts (other than the Supreme Court) cannot review the merits of state court judgments.[2] However, in the exercise of their habeas corpus jurisdiction, the lower federal courts may, within limits, review the legality of the imprisonment of a person convicted in state court. A key constraint on habeas review resembles the limitations on direct Supreme Court review: Because state procedural rules can provide an independent and adequate state law ground for the state courts' rejection of defendants' federal-law contentions, a federal habeas court may not review the merits of a claim defaulted in state court unless the habeas petitioner meets demanding tests for showing "cause and prejudice" or "actual innocence." As this description suggests, the current notion of procedural default, in the habeas context, borrows from the independent and adequate state grounds doctrine developed for direct Supreme Court review.

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1. Construing section 25 of the Judiciary Act of 1789, as amended in 1867—the statute that then authorized Supreme Court review of state court judgments that rejected a claim of federal right—the Supreme Court held in *Murdock v. Memphis* that "the jurisdiction conferred is limited to the decision of the questions mentioned in the statute, and . . . to the exercise of such powers as may be necessary to cause the judgment in that decision to be respected." Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 627–28 (1874). Although the relevant jurisdictional statute has changed since *Murdock*, see, e.g., Act of December 23, 1914, ch. 2, 39 Stat. 790 (expanding Supreme Court jurisdiction to include review of state court judgments in cases where state court had decided *in favor of* a claim of federal right); 28 U.S.C. § 1257 (2000) (current jurisdictional statute), it remains the case that the Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights," Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945) (construing a predecessor to 28 U.S.C. § 1257).

A nuance of this general rule is that the Supreme Court occasionally may consider issues of state law when reviewing a state court judgment in a case "in which federal law protects interests that are created primarily, if not exclusively, by state law." Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 555 (4th ed. 1996) [hereinafter Hart & Wechsler].

2. E.g., D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415–16 (1923).

Analytically, the adequacy doctrine[3] is driven by its role in direct Supreme Court review; and periodically the doctrine has indeed played a major role in determining the scope of Supreme Court jurisdiction. During the 1950s and 1960s, for example, the Court refined, and sometimes stretched, the doctrine in ways that reflected the Court's struggle to induce state court compliance with the Court's expanding recognition of civil rights.[4] More recently, the doctrine gained notoriety in connection with the Supreme Court's review of the Florida state court rulings in the *Bush v. Gore* litigation.[5] In practical terms, however, the doctrine's main impact currently derives from procedural bar rulings by lower federal courts in habeas proceedings.[6]

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3. Admittedly, the direct-review and habeas-review incarnations of the independent and adequate state grounds doctrine are not precisely congruent, and I shall argue here that the two contexts warrant some differences in the application of the doctrine. However, because there is such a close parallel between the doctrine's two incarnations, I shall use the term "adequacy review" to denote a federal court's analysis—applied either on direct or on habeas review—of whether a litigant's state court procedural default provides a sufficient basis for barring federal court review of the litigant's federal-law contention.

4. See Hart & Wechsler, supra note 1, at 576–77; Robert Jerome Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 895 (1994) ("There were numerous examples in the 1960s of state court efforts to use their procedural rules to impede the civil rights movement; and there were as many examples of the Supreme Court's refusal to allow the independent and adequate state ground doctrine to prevent its review of the federal questions raised."). For a detailed discussion of one such case, see Del Dickson, State Court Defiance and the Limits of Supreme Court Authority: *Williams v. Georgia* Revisited, 103 Yale L.J. 1423 (1994). R

5. See Bush v. Gore, 531 U.S. 98, 114–15 (2000) (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring) (relying on precedents concerning inadequate state law grounds); id. at 140 (Ginsburg, J., joined by Stevens, J., and in relevant part by Souter and Breyer, JJ., dissenting) (arguing that the adequate state grounds cases cited by Chief Justice Rehnquist "are embedded in historical contexts hardly comparable to the situation here"). See generally Michael E. Solimine, Supreme Court Monitoring of State Courts in the Twenty-First Century, 35 Ind. L. Rev. 335, 345–49 (2002) (discussing treatment of adequate state grounds precedents in Chief Justice Rehnquist's concurrence and Justice Ginsburg's dissent); Michael L. Wells, Were There Adequate State Grounds in *Bush v. Gore*?, 18 Const. Comment. 403 (2001) (critiquing Chief Justice Rehnquist's analysis).

6. As a very rough measure of the relative frequency with which the adequate and independent state grounds doctrine comes into play in decisions rendered by the Supreme Court and by lower federal courts, I searched the "ALLFEDS" database on Westlaw for opinions that mentioned the doctrine in 2001. That search indicated that the doctrine was mentioned in 2001 in one Supreme Court opinion, in 97 federal court of appeals opinions, and in 222 federal district court opinions.

These figures include unpublished opinions; the district court figures include documents containing proposed findings and recommendations by magistrate judges, whether or not those proposed findings and recommendations were subsequently adopted by the district court. The search (which I performed on November 15, 2002) read: DA(AFT 12/31/2000) & DA(BEF 1/1/2002) & FT(ADEQUA! /S INDEPENDEN!). I limited my search to the "FT" ("FULL-TEXT") field in order to exclude language added by West editors. The initial search pulled up 443 documents, but I excluded the documents that were irrelevant to the independent and adequate state grounds doctrine. A list of the search results is on file with the *Columbia Law Review*.

Although the Court's discussions often seem to assume that the doctrine functions identically on direct review and in habeas proceedings, the two contexts differ both in the underlying rationale for the doctrine's application and in the institutional capabilities of the courts applying it. On direct review, the Court treats the doctrine as jurisdictional;[7] in habeas proceedings, though no such jurisdictional constraint exists, the Court applies the doctrine for reasons of comity and federalism.[8] In particular, the Court cites a risk of "sandbagging" by state court criminal defendants as the most pressing justification for applying the doctrine to bar habeas relief.[9] Apart from this analytical distinction, the habeas and direct review contexts obviously differ in terms of the capacities of the federal courts involved. Many lower federal court judges—particularly district judges—have recent trial experience and expertise in state court procedure; the members of the Supreme Court, by contrast, are unlikely to have much of either.

This Article posits that these distinctions between direct and habeas review could help to resolve a current disagreement among members of the Court concerning the appropriate method for adequacy review. One branch of the adequacy doctrine asks whether the state's procedural rule unduly burdens the assertion of a federal right.[10] This analysis calls for a

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Obviously, this search is a very blunt tool. The results are overinclusive, in the sense that some of the opinions counted in the results merely mention the doctrine without applying it to the case at hand. At the same time, the results are probably underinclusive, in that not all opinions applying the doctrine will contain the words "adequate" or "adequacy" within the same sentence as the words "independent" or "independence." In addition, a more comprehensive study would include a longer range of time than just one year. For present purposes, however, this study does indicate that of the three levels of federal courts, the trial level courts discuss the doctrine more frequently than the mid-level appellate courts, and courts at both those levels discuss the doctrine much more frequently than the Supreme Court does.

7. E.g., Coleman v. Thompson, 501 U.S. 722, 729 (1991).

8. See id. at 730. Because the doctrine is not viewed as "jurisdictional" in the habeas context, the state's failure to timely assert a procedural bar argument can result in waiver. See, e.g., Gray v. Netherland, 518 U.S. 152, 165–66 (1996) (explaining that in a habeas proceeding, procedural default is an affirmative defense that is waived if not timely asserted by the state); Kit Kinports, Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law, 33 Ariz. L. Rev. 115, 125 n.47 (1991) (noting that on direct review, the independent and adequate state grounds doctrine "is jurisdictional and can therefore be raised at any time," but that "the courts routinely overlook default arguments on habeas if the state does not raise them in a timely fashion" (citations omitted)). See generally Jordan Steiker, Innocence and Federal Habeas, 41 UCLA L. Rev. 303, 322–42 (1993) (discussing significance of Court's "refusal to erect a jurisdictional bar to federal claims defaulted in state court").

9. See infra note 284 and accompanying text (discussing Court's stated concern about "sandbagging"). R

10. The adequacy doctrine includes several other branches as well. The due process branch of the doctrine assesses whether the state rule gave the litigant a reasonable opportunity to present her contention. See infra text accompanying notes 37–49. R Similarly, the novelty branch asks whether the litigant had fair notice of the requirements set by the state rule. See infra text accompanying notes 50–74. The inconsistency branch R

balancing of the federal interest in the consideration of the federal right against the state's interest in the enforcement of its procedural rule. The standard account of the undue burden analysis is that courts use a facial, rather than an as-applied, approach when balancing state and federal interests: In other words, courts consider the state's interest in having the rule in general, rather than the state's interest in enforcing the rule under the circumstances of the particular case.[11] In this view, the Court's 1965 decision in *Henry v. Mississippi*[12] presented a radical departure from the norm, because in *Henry* the Court reasoned that the state rule must serve "legitimate state interests" in the circumstances of the case;[13] if the litigant had taken other actions that fulfilled the purposes of the rule, then strict enforcement of the rule would not meet the test of adequacy.[14] Events reinforced the perception of *Henry* as anomalous: Later cases that addressed similar issues failed to cite *Henry*, and a number of

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focuses on whether the state rule has been enforced with equal severity in prior cases, see infra text accompanying notes 75–78, and the discretion branch suggests that a rule may be inadequate if the state courts retain the power to excuse noncompliance, see infra text accompanying notes 79–81. R R

11. See infra text accompanying notes 25–32 (discussing distinctions between facial and as-applied analysis); infra text accompanying notes 82–87 (discussing instances of facial undue burden analysis). R R R

12. 379 U.S. 443 (1965).

13. Id. at 447–49.

14. See, e.g., Hart & Wechsler, supra note 1, at 584–85 ("The more radical element in Henry was the suggestion that failure to comply with a rule that undoubtedly serves a legitimate interest should be overlooked because, in the particular case, that interest could have been 'substantially served' by some *other* procedure."); Alfred Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 Colum. L. Rev. 1050, 1052 (1978) [hereinafter Hill, Forfeiture] (arguing that *Henry* implied that the Court would invalidate state criminal procedure rules it considered "unduly onerous as compared with hypothetical rules that would serve the interests of the state at least as well, or 'substantially' so," observing that "the Court has refrained from undertaking such a task," and stating that "one can only wonder that [this task] was ever contemplated"); Alfred Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 988 (1965) (maintaining that until its decision in *Henry* the Court had "never suggested" that a plain violation of a definite rule such as the one at issue in *Henry* "is excusable because the rule is a technical one, or because a hypothetical rule under which the litigant would not have been in default is one that would serve the 'interest' of the state just as well"); Terrance Sandalow, *Henry v. Mississippi* and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 230 (arguing that in cases prior to *Henry*, "if the procedural rule invoked by the state court is one generally supported by state policy, the Court's tendency has been to avoid close scrutiny of whether the policy is served by invoking the rule in the particular case."). But see Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 274 (2d ed. 1990) [hereinafter Redish, Federal Jurisdiction] (citing Staub v. City of Baxley, 355 U.S. 313 (1958), to support the argument that "[p]recedent did exist . . . for an inquiry at least approaching the depth of the one adopted by the *Henry* majority"); cf. id. (noting that in terms of tone, *Staub* and *Henry* are "quite different; while for *Staub* the state rule must border on the irrational before it will be disregarded, the language of the general test used in *Henry* implies a more searching inquiry into the validity of the state procedure").

The standard view may be changing. For example, the forthcoming Fifth Edition of the Hart & Wechsler casebook has somewhat revised the analysis of *Henry*. In place of the remark quoted above, the Fifth Edition observes:

commentators suggested that *Henry's* approach had little or no influence on later doctrine.[15] Last Term, however, in *Lee v. Kemna*,[16] a majority of the Court again used an as-applied approach to hold a state court defendant's procedural default inadequate to bar federal habeas review. Three Justices dissented vigorously in *Lee*, accusing the majority of reviving *Henry*,[17] and arguing that the Court's as-applied approach showed insufficient respect for state procedures.

> What made *Henry* radical in this respect was not so much the mere suggestion that a state ground was inadequate when the litigant, though failing to comply with the state rule, had sufficiently served the rule's purpose. Rather, Henry's radicalism lay in its entirely unpersuasive suggestion that a one-sentence objection in a directed verdict motion adequately served the purposes of the contemporaneous objection rule—and in its implication that violation of many other, entirely conventional, state procedural rules would also not bar Supreme Court review. Under cases like *Staub* [v. City of Baxley, 355 U.S. 313 (1958)], only a very small number of highly technical and often pointless requirements were deemed inadequate; had Henry's approach been followed, by contrast, a vast domain of state procedural requirements might have been suspect.

Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System (5th ed., forthcoming 2003) [hereinafter Hart & Wechsler, Fifth Edition]. The Fourth Edition's discussion of *Henry*, however, has been influential: Last Term, for example, the dissenters in *Lee v. Kemna* cited that discussion as support for their argument that "*Henry* was troubling . . . because it injected an as-applied factor into the equation." Lee v. Kemna, 534 U.S. 362, 393 (2002) (Kennedy, J., joined by Scalia & Thomas, JJ., dissenting).

15. See, e.g., Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1145 (1986) [hereinafter Meltzer, Forfeitures] ("Although *Henry* seemed to promise a significant expansion of the inadequate state ground doctrine, a number of subsequent decisions have failed to cite *Henry* despite its apparent pertinence; other decisions have found state procedural grounds adequate when *Henry* seemed to suggest the contrary."); Hart & Wechsler, supra note 1, at 585 ("Some decisions finding state procedural grounds inadequate failed to cite Henry, even though it seemed pertinent; when Henry was cited, the decision usually appeared to rest on more traditional formulations of inadequacy."); Hill, Forfeiture, supra note 14, at 1051 (stating that "*Henry* is . . . dead, or nearly so"). But see Redish, Federal Jurisdiction, supra note 14, at 278 (arguing that "although the Court has had relatively rare occasion to deal with the issue of the adequate state ground doctrine in the context of direct Supreme Court review since . . . *Henry*," there is little reason "to believe that the broad outline of the 'legitimate state interest' test has been abandoned"). R R R

16. 534 U.S. at 362.

17. The forthcoming Fifth Edition of the Hart & Wechsler casebook questions the merit of this accusation:

> Does the majority in *Lee* resurrect *Henry*, or can its ruling be grounded on the more traditional and limited doctrine that a state ground is inadequate if it is excessively burdensome or requires resort to an "arid ritual of meaningless form"? Doesn't application of that doctrine implicitly incorporate a judgment that the procedure actually followed by the defendant sufficed to serve the rule's purpose? In *Staub* [v. City of Baxley, 355 U.S. 313 (1958)], for example, the Court did not suggest that the defendant need not have objected to the ordinance at all, but rather that the objection that was made, even if it did not satisfy state rules, sufficed to serve the rule's purpose.

Hart & Wechsler, Fifth Edition, supra note 14. R

I will argue that although the *Lee* dissenters may be right to question the Court's use of as-applied review, they ground their opposition in the wrong concerns. Contrary to the dissent's assumption, the Court's prior analyses in a variety of branches of adequacy review cover a spectrum that ranges from purely facial to quite fact-intensive. The undue burden branch of the analysis is no exception. Seen in this perspective, the propriety of using as-applied review in the undue burden analysis becomes a question of degree. This question of degree, however, also raises a question of comparative institutional competence: Assuming that some searching applications of the undue burden analysis could be appropriate in theory, is the Supreme Court well suited to engage in such review?[18]

My consideration of these questions proceeds in four parts. In Part I, I briefly summarize the adequate and independent state grounds doctrine. After reviewing the Court's methods of adequacy review, Part I argues that the various branches of the adequacy doctrine present a continuum of approaches that ranges from facial to as-applied. A number of the undue burden cases, in particular, use case-specific review. In Part II, I survey the possible advantages and risks of the as-applied approach, and I critically assess some instances of as-applied analysis on direct Supreme Court review of state court judgments. Those instances suggest that the Court may be somewhat inconsistent and inexpert in its use of as-applied adequacy review. Moreover, the Court's ability to control its docket raises the concern that the Court might expand the scope of its jurisdiction on an ad hoc basis—through as-applied review—without appreciating the burdens that such an approach may impose on other courts. I then compare the institutional characteristics of the lower federal courts, and argue that searching as-applied adequacy review should raise fewer concerns if it occurs in the context of habeas review by lower federal courts. Part III, accordingly, argues that to the extent that the Court favors a more searching as-applied undue burden analysis, the Court itself generally should abstain from using that analysis on direct review of state court judgments, but should authorize its use on habeas review. Part III also considers instances in which the Supreme Court should make exceptions to the general policy of abstention.

The proposal outlined in Part III invites a number of possible objections. The most powerful objection stems from a concern that the proposal would in effect deny as-applied review to civil litigants and to criminal

18. Commentators have noted, in other contexts, the importance of analyzing the relative suitability of various institutions for a particular task. See, e.g., Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 1–50 (1994) (advocating "comparative institutional analysis"); Arti K. Rai, Facts, Law, and Policy: An Allocation-of-Powers Approach to Patent System Reform, 103 Colum. L. Rev. (forthcoming 2003) ("[O]nly by evaluating the relative competence of the various institutions in performing the tasks required by the patent process can we hope to design a system that works reasonably well . . . .").

defendants who are unable to obtain federal habeas relief. Other objections include the argument that the contours of the adequacy doctrine in habeas proceedings should mirror those applied on direct Supreme Court review, and the contention that Congress's 1996 amendments to the statutory framework for habeas review should affect the federal courts' analysis of procedural bar issues. Part IV addresses these concerns, and concludes that although the access concern, in particular, has weight, the proposal may still on balance be a good option for addressing the problem of as-applied review. My proposal attempts a compromise between the concerns expressed by the majority and the dissent in *Lee*: A general policy of Supreme Court restraint on direct review would address the most significant arguments supporting the dissent's position, while rigorous adequacy review in habeas proceedings would help to assure federal court access for at least some of the litigants who need it most.

Having outlined my proposal, I conclude by assessing its potential impact. The proposal could improve the Court's decisionmaking on direct review of state court judgments, by encouraging the Court to use more care in selecting the level of scrutiny to which it subjects state procedural rules. I recognize, though, that the precedents give some reason to doubt whether members of the Court will take the trouble to draw what may, in practice, turn out to be rather subtle distinctions concerning the appropriate level of review. At the same time, however, those precedents suggest that the Court may deviate from its *Lee v. Kemna* approach in some subsequent cases. In the face of later Supreme Court decisions that refuse to engage in searching as-applied adequacy review, how should the lower federal courts approach their task on habeas review? Adoption of the argument that I make here would provide an answer to this question: Unwillingness on the part of the Court to engage in rigorous as-applied adequacy review should not deter the use of that review by lower federal courts in habeas proceedings.

I. A Brief Taxonomy of Adequacy

State courts have concurrent jurisdiction to determine most federal issues, and the Supreme Court has jurisdiction to review the judgments of a state's highest court on issues of federal law. However, if Supreme Court review of the federal issue would have no effect on the outcome of the case—because the judgment would in any event be supported by a state-law ground—then the Court lacks jurisdiction to review the judgment.[19] Implicit in the idea that the outcome would be the same is the

19. See Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.").

Although the Court has set forth the independence and adequacy doctrine as a matter of statutory construction, see Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 632–33 (1874), it has also suggested that a contrary system would violate the ban on advisory

assumption that the state-law ground is both independent of the federal issue and adequate to support the judgment; if independence or adequacy is absent, the Supreme Court has jurisdiction to consider the federal issue.

State procedure, like state substantive law, can form the basis for an independent and adequate state-law ground. In order to secure Supreme Court review of a federal-law contention, a state court litigant must raise that question in the state courts. Generally, the Supreme Court will not review matters not raised and passed upon in the state courts below.[20] In addition, state procedural rules set requirements that regulate the time and manner for raising contentions in the course of litigation. In many instances, state courts, like their federal counterparts, enforce such rules by holding that a noncompliant litigant forfeits the chance to have the contention considered on its merits.[21] When a litigant's procedural default causes the state courts to refuse to address the litigant's federal-law contention, the default can constitute an independent and adequate state ground that will bar Supreme Court review. On occasion, however, the Court has held a state court procedural ground inadequate to bar review.

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opinions, see, e.g., Herb v. Pitcairn, 324 U.S. 117, 126 (1945) ("[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."). Commentators are divided on the question of whether the doctrine is constitutionally required. Compare Cynthia L. Fountaine, Article III and the Adequate and Independent State Grounds Doctrine, 48 Am. U. L. Rev. 1053, 1100 (1999) (arguing that the adequate state grounds doctrine "derives from the Article III advisory opinion ban, in general, and the constitutional standing requirement and mootness doctrine, in particular"), with Thomas E. Baker, The *Ambiguous* Independent and Adequate State Ground in Criminal Cases: Federalism Along a Möbius Strip, 19 Ga. L. Rev. 799, 806 (1985) ("The independent and adequate state ground doctrine is best explained on a prudential level."), Richard A. Matasar & Gregory S. Bruch, Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine, 86 Colum. L. Rev. 1291, 1322 (1986) ("The adequacy doctrine is required by neither the Constitution nor any current statute."), and Martin H. Redish, Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism, 19 Ga. L. Rev. 861, 911 (1985) ("Commentators have expressed doubt about the 'advisory opinion' rationale for the doctrine . . . and with good reason." (footnote omitted)). It is unnecessary to resolve this question here, because the arguments made in this Article apply equally whether the doctrine is required by Article III or merely by 28 U.S.C. § 1257 (2000) (the statute that currently governs Supreme Court review of state court judgments). Either way, the current doctrine does not permit an *in*adequate state ground to bar review; my focus here is on the appropriate method for determining adequacy.

20. See Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (stating that "the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions").

21. See Hart & Wechsler, supra note 1, at 576 (noting that "ordinarily when a state court litigant . . . has failed to raise a federal question in accordance with state procedural rules . . . the state court will refuse to decide the federal question"). R

The bases for such findings of inadequacy can be sorted into a few rough categories.[22] Obviously, a state procedural rule that violates due process will be inadequate. Thus, state rules that deprive a litigant of a reasonable opportunity to present his or her contentions will not preclude Supreme Court review of the resulting judgment.[23] A related branch of the doctrine holds that state rules may be inadequate if they are novel or inconsistently applied. The novelty criterion could be seen as enforcing due process principles, because litigants cannot reasonably be expected to comply with requirements that are unknown at the time the litigant acts. In addition, novelty and inconsistency both could flag the existence of state court discrimination against the assertion of a federal right, and thus these criteria could also be seen as enforcing the supremacy of federal law.[24] The supremacy rationale also seems to underpin another branch of the doctrine, which holds that a procedural ground may be inadequate if enforcement of forfeiture for noncompliance is discretionary. In this view, if the state courts have discretion to excuse compliance with the requirement, then refusal to excuse compliance where a federal right is concerned can indicate an intent to discriminate against the assertion of the federal right. Finally—and of primary concern to this Article—the Court has sometimes held a procedural rule inadequate on the ground that it unduly burdens the assertion of the federal right.

As noted above, the standard view of the undue burden analysis is that it should consider the facial validity of the state procedural rule, rather than the rule's application in a particular case. To assess this view, it is useful first to consider the extent to which other branches of the procedural adequacy doctrine function as-applied or facially. I thus begin, in Part I.A, by canvassing those other branches; based on this survey, I argue that the Court's analyses fall within a broad range on the spectrum from facial to as-applied. I next contend, in Part I.B, that the Court's undue burden cases cover a similar range, and that they include not just facial analyses but also a number of as-applied examinations.

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22. A helpful discussion of these categories can be found in Meltzer, Forfeitures, supra note 15, at 1137–45. R

23. The reach of the due process rationale, however, is somewhat limited, for many defaults result from procedural rules that do provide some opportunity to assert the relevant claim, and merely regulate the time and manner in which it is presented. See Laura S. Fitzgerald, Suspecting the States: Supreme Court Review of State-Court State-Law Judgments, 101 Mich. L. Rev. 201, 279 (2002) (noting that the Court's due process cases over the past several decades "have opened a much wider spread between what due process formally requires and what flaws the Court has criticized in its nonconstitutional inadequacy reversals, making it far more difficult now to justify those reversals on quasi-due process grounds").

24. See Redish, Federal Jurisdiction, supra note 14, at 271 (positing that "it could be argued that the use by the state court of a rule never used before to defeat a federal claim is inherently suspect" because "[i]t might well be that the state court has developed the rule for the sole purpose of discriminating against the federal claim"). R

Before I begin this analysis, however, a preliminary note on terminology may be helpful. In this Article, I use the terms "as-applied" and "facial" to distinguish opposite ends on a spectrum that reflects the degree of fact-specificity of a federal court's adequacy ruling. Thus, for instance, in my analysis of the "undue burden" branch of the adequacy doctrine, I use the term "as-applied" to describe cases in which a court holds a state procedural ground inadequate because, *under the circumstances of the particular case*, the use of that ground to bar the adjudication of a federal-law contention unduly burdens the assertion of the federal right. An "as-applied" inadequacy ruling does not prevent the state courts from employing the same procedural rule in future cases with different facts. A "facial" ruling, by contrast, is one in which the court holds the state-law procedural requirement invalid irrespective of the facts of the particular case; such a ruling, I will argue, bars state courts from using that procedural ground to bar the assertion of federal-law contentions in *any* subsequent case.

Although the Court in prior years has not used these terms in connection with the independent and adequate state grounds doctrine, the dissenters in *Lee v. Kemna* premised their critique of the majority's decision on the contention that "as-applied" adequacy review is illegitimate.[25] Notably, the *Lee* dissenters' argument against as-applied adequacy analysis contrasts with the preference some of them have expressed for as-applied, rather than facial, review in other contexts.[26] Indeed, as Richard Fallon has observed,

> [t]raditional thinking has long held that the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge, in which a party argues that a statute cannot be applied to her because its application would violate her personal constitutional rights. Within the customary understanding, "facial" attacks maintaining that a statute is more generally invalid were considered rare and suspect. And "overbreadth" doctrine, which allows a statute to be challenged facially on the ground that it has too many unconstitutional applications, was thought to be limited mostly if not exclusively to the First Amendment.[27]

25. See 534 U.S. 362, 393–95 (2002) (Kennedy, J., joined by Scalia & Thomas, JJ., dissenting).

26. See Renne v. Geary, 501 U.S. 312, 323–24 (1991) (Kennedy, J., joined by Rehnquist, C.J., Stevens, O'Connor, & Souter, JJ., and in relevant part by Scalia, J.) (in a case involving a First Amendment challenge to a state constitutional provision prohibiting party endorsements of certain candidates, questioning "the propriety of resolving the facial constitutionality of [the challenged provision] without first addressing its application to a particular set of facts").

27. Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1321 (2000) (footnotes omitted). Although there exists a rich scholarly literature exploring the notions of facial and as-applied review outside the adequate state grounds context, see generally, Matthew D. Adler, Rights Against Rules: The Moral Structure of American Constitutional Law, 97 Mich. L. Rev. 1 (1998); Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235 (1994);

Although this traditional view is open to question,[28] it is generally true that as-applied invalidation is thought to be less invasive than facial invalidation, because the as-applied ruling permits continued application of the challenged provision, so long as the circumstances that rendered the provision invalid are absent.[29]

Viewed in the light of the traditional preference for as-applied review, the dissenters' critique of fact-specific adequacy review presents a puzzle: Why should as-applied review cause such consternation in the context of adequacy analysis? One answer might be that systems of judicial procedure require rule-like rules that provide clear guidance in the course of litigation. As Justice Frankfurter argued, "rules are not made solely for the easiest cases they govern"; thus, "[t]he fact that the reason for a rule does not clearly apply in a given situation does not eliminate the necessity for compliance with the rule."[30] During quickly unfolding litigation, there may be a strong government interest in ensuring that the judge can enforce procedural requirements without having to second-guess the applicability of those requirements in the particular case.[31] If this objection has force in the context of litigation, however, it is not entirely clear why it would not also carry at least some weight with respect to rules governing nonlitigation conduct.[32] Perhaps a more cynical view might be that the dissenters' opposition to as-applied adequacy review serves the function of raising the stakes: If as-applied review is unavailable, then a state procedural rule can be held inadequate only if the Court is willing to hold that the state cannot use that procedural rule to bar consideration of a federal-law contention under *any* circumstances—a standard likely to produce a finding of inadequacy only in the rarest of cases.

Fallon, supra; Marc E. Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359 (1998), that broader debate lies beyond the scope of this Article.

28. See Fallon, supra note 27, at 1322 (critiquing the traditional view). R

29. See, e.g., Samuel Estreicher & John E. Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681, 729 (1984) (arguing that as-applied invalidation "does not normally involve a significant interference with state activities [because] the statute remains capable of application to other cases").

30. Staub v. City of Baxley, 355 U.S. 313, 333 (1958) (Frankfurter, J., joined by Clark, J., dissenting).

31. See Hart & Wechsler, supra note 1, at 585 (quoting Justice Frankfurter's reasoning in *Staub* and asking whether it is "feasible to require a judge, in the midst of trial, to determine before enforcing a general procedural rule whether noncompliance should be excused because some alternative procedure might be deemed adequate in the particular situation"); see also infra text accompanying notes 185–187. R R

32. One reason for the difference might be that the ability to regulate some, but not all, instances of a type of conduct may sometimes be less valuable with respect to rules governing litigation conduct than with respect to rules governing nonlitigation conduct, for reasons that have to do with the concerns voiced by Justice Frankfurter in *Staub*. See supra text accompanying notes 30–31. R

In this respect, *Lee* illustrates the significance of the debate: Had the majority restricted itself to facial review of the relevant state rules, at least one of those rules could have provided a state-law ground adequate to bar federal habeas review of Lee's incarceration.[33] Instead, the *Lee* Court used an as-applied approach, repeatedly emphasizing that it was merely holding the relevant rule inadequate "under the circumstances of this case."[34] Picking up on this aspect of the decision, the dissent argued that the majority's analysis revived the approach taken in *Henry*; and, in the dissenters' view, "*Henry* was troubling, and much criticized, because it injected an as-applied factor into the equation."[35]

The *Lee* dissenters supported their critique by asserting that no other Supreme Court cases, before *Henry* or since, had used such as-applied adequacy review.[36] At first glance, the dissenters' contention has some plausibility, because the Court has not often discussed explicitly whether its adequacy analysis is facial or as-applied. However, the following survey will demonstrate that the dissenters misread the precedents: As-applied review, as we shall see, has played a role in decisions under each branch of the adequacy doctrine.

A. *Other Branches of the Adequacy Doctrine*

As might be expected, the nature of each branch of the adequacy doctrine influences the degree to which the analysis under that branch tends to be fact-intensive rather than facial. However, a review of illustrative cases discloses some degree of fact-specific analysis under each branch.

The due process branch of the adequacy doctrine asks whether the litigant had a reasonable opportunity to present the relevant contention in the state court proceeding.[37] In assessing this question, the Court may

33. See infra text accompanying notes 117–118. R

34. Lee v. Kemna, 534 U.S. 362, 366 (2002); see also id. at 376 ("under the extraordinary circumstances of this case"); id. at 387 ("Under the special circumstances so combined, we conclude that no adequate state-law ground hinders consideration of Lee's federal claim.").

35. Id. at 393 (Kennedy, J., joined by Scalia & Thomas, JJ., dissenting).

36. See id. ("Before Henry, the adequacy inquiry focused on the general legitimacy of the established procedural rule, overlooking its violation only when the rule itself served no legitimate interest."); id. at 394 ("Subsequent cases maintained the pre-*Henry* focus on the general validity of the challenged state practice . . . .").

37. Due process requires that the litigant have "an opportunity to present its case and be heard in its support." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 (1930). Thus, for instance, the Court has found due process violations where a defendant's conviction was affirmed on the basis that the evidence showed him guilty of a crime for which he had not been charged or tried, see Cole v. Arkansas, 333 U.S. 196, 201 (1948), and where a defendant in a civil suit lost on appeal on a ground that had been ruled inadmissible at trial, see Saunders v. Shaw, 244 U.S. 317, 319 (1917) (agreeing with defendant-intervenor's contention that "the case has been decided against him without his ever having had the proper opportunity to present his evidence").

use an as-applied analysis.[38] Thus, for example, in *Reece v. Georgia*, when faced with a state requirement that one accused of a crime must challenge the composition of the grand jury prior to the issuance of the indictment, the Court declined to consider whether an accused represented by counsel would have had a reasonable opportunity to raise a pre-indictment challenge.[39] Instead, the Court held the state requirement unconstitutional as applied, finding it "utterly unrealistic to say that [the defendant] had such opportunity when counsel was not provided for him until the day after he was indicted."[40] The *Reece* Court's approach did not necessarily entail particularly rigorous scrutiny; indeed, in a set of companion cases decided the same day as *Reece*, the Court demonstrated that some severe state procedural rules could survive due process review, even under an as-applied analysis.[41] Nonetheless, *Reece* provides an example of

38. Of course, the Court sometimes employs a facial approach to due process questions. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (adopting three-factor balancing test to assess what process is required prior to termination of Social Security disability benefits); id. at 344 (acknowledging that "credibility and veracity may be a factor in the ultimate disability assessment in some cases," but stating that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions").

39. 350 U.S. 85, 88–89 (1955).

40. Id. at 89–90.

41. See Michel v. Louisiana, 350 U.S. 91 (1955). *Michel*, like *Reece*, involved attempts to challenge the racial composition of grand juries. The state rule at issue in *Michel* required that objections to the grand jury be raised before the earlier of the third judicial day after the end of the grand jury's term or the beginning of trial. Id. at 92. Although the Court noted that "in the circumstances of a particular case, the application of such a rule may not give a reasonable opportunity to raise the federal question," id. at 95, the Court proceeded to find such a reasonable opportunity in the case of each of the three defendants before it.

In Michel's case, on the day the relevant grand jury's term expired, the court orally appointed a lawyer to represent Michel, and granted the lawyer a week's continuance "to look [the case] over." Id. Because Michel's motion to quash the indictment was not filed until five judicial days later, the state court held the motion untimely, and the Supreme Court found no due process violation—even though Michel's lawyer argued that he did not receive formal notice of appointment until three days after the oral appointment, that for two further days he was unaware that he would be chief counsel, and that in any event he assumed the one-week continuance "held open for that period all of petitioner's rights." Id. at 93, 96. In the Court's view, Michel's counsel, "a lawyer experienced in state criminal practice, had adequate time to file the motion after his appointment." Id. at 96.

In a companion case, the defendant, Poret, fled the state after the crime was committed. Id. Poret was indicted in absentia, and the statutory time for challenging the grand jury expired while his whereabouts were still unknown to the state authorities. Id. at 96–97. Again, the Court found no due process violation in the state courts' finding of untimeliness. The Court reasoned that Poret could have met the filing deadline "had he not elected to flee." Id. at 99. Moreover, the Court noted that even after returning to the state and hiring a lawyer, Poret did not file the motion "until 12 days after his selection of counsel"— "four times the period we upheld in *Michel*." Id. at 100.

Labat, Poret's codefendant, failed to challenge the grand jury until almost two years after his indictment. Id. at 100. Though Labat's first lawyer was in his late seventies, was ill in bed for several months during the relevant period, and ultimately withdrew (over a year after the indictment was issued) without having taken any action on Labat's behalf, the

a due process analysis that invalidated a particular application of a state procedural requirement, without ruling upon the requirement's general validity.

Similarly, in *Brinkerhoff-Faris Trust & Savings Co.*, in reviewing a state court decision that laches barred the plaintiff's suit to enjoin the collection of taxes,[42] the Court did not question the adequacy of the laches doctrine in general.[43] Rather, the Court held the laches ground inadequate because, as applied, it deprived the plaintiff of an opportunity to be heard on its claim of federal right.[44] Brinkerhoff-Faris asserted that certain local taxes had been discriminatorily assessed against it in violation of the Equal Protection Clause.[45] The state's highest court rejected Brinkerhoff-Faris's claim on the theory that the bank was guilty of laches, because it had failed to apply to the state tax commission for relief prior to delivering its books to the tax collector.[46] As the Supreme Court explained, however, the problem with the state court's reasoning was that until the state court's decision in *Brinkerhoff-Faris* itself, controlling state precedent had made clear that the commission had no power to grant the relief sought.[47] Brinkerhoff-Faris could not have sought relief from the state commission prior to the court ruling, because the governing law held such relief unavailable; and it could not have done so after the court ruling, because by that time the tax books had already been provided to the tax collector.[48] Since on these facts, Brinkerhoff-Faris had no "real

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state courts rejected Labat's claim of ineffective assistance and the Supreme Court affirmed, finding "no evidence of incompetence." Id. at 100–01.

Three Justices dissented in *Michel*, arguing that each of the three defendants had lacked a reasonable opportunity to challenge the grand jury. Id. at 102–03 (Black, J., joined by Warren, C.J., and Douglas, J., dissenting); id. at 104 (Douglas, J., joined by Warren, C.J., and Black, J., dissenting).

42. 281 U.S. at 675–76.

43. The doctrine of laches can bar equitable relief in cases where a claimant's delay has resulted in prejudice to the defendant. See, e.g., Murphy v. Timberlane Reg'l Sch. Dist., 22 F.3d 1186, 1189 (1st Cir. 1994) (for laches to bar a claim for equitable relief, plaintiff's delay must be unreasonable and must result in prejudice to defendant); cf. Wauer v. Bank of Pendleton, 65 S.W.2d 167, 171 (Mo. Ct. App. 1933) (relief not barred by laches where no prejudice resulted from delay). The laches analysis, by definition, is a fact-intensive inquiry. See, e.g., id. ("[W]hether or not relief is to be barred for laches must depend upon the particular circumstances of each case."). As Stephen Burbank pointed out to me, it is unsurprising that the Court would use as-applied, rather than facial, adequacy review with respect to a state court's application of laches, given the fact-specific nature of the laches inquiry.

44. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 682 (1930).

45. Id. at 674. Brinkerhoff-Faris brought the suit on behalf of its shareholders, claiming that a local tax collector "had intentionally and systematically discriminated against the shareholders by assessing bank stock at full value, while . . . omitting to assess certain classes of property and assessing all other classes of property at 75 per cent or less of their value." Id.

46. Id. at 675.

47. Id. at 679.

48. Id. at 677.

opportunity" to protect its rights, the ground of laches was not adequate to support the judgment.[49]

As *Brinkerhoff-Faris* suggests, novel state court rulings can implicate due process concerns if the result is that a litigant never gets an opportunity to be heard in response to the unanticipated ruling.[50] Similar concerns underlie the branch of the adequacy doctrine that holds that the novelty of a state procedural rule itself can render the rule inadequate.[51] Novelty-based inadequacy rulings are, by definition, as-applied rather

49. Id. at 682.

50. However, the Court's ruling in Herndon v. Georgia, 295 U.S. 441 (1935), suggests that a litigant may sometimes have a difficult time establishing that the ruling was unanticipated. Cf. Hart & Wechsler, supra note 1, at 577–78 (juxtaposing *Brinkerhoff-Faris* and *Herndon*). R

In *Herndon*, the defendant—an African American and a member of the Communist Party, see Glennon, supra note 4, at 886—was convicted in state court of "an attempt to incite insurrection." *Herndon*, 295 U.S. at 442 & n.1 (quoting Ga. Code Ann. § 26-902 (Harrison 1935)). The trial court gave the relevant statute a narrowing construction, under which "it must appear clearly . . . that immediate serious violence against the State of Georgia was to be expected or was advocated." Id. at 444 (quoting Charge of the Court, State v. Herndon, Record at 126, 133, Herndon v. Georgia, 295 U.S. 441 (1935) (No. 665)). On appeal, however, Georgia's highest state court held that the statute did not require "that an insurrection should follow instantly or at any given time," but merely that the defendant "intended it to happen at any time, as a result of his influence, by those whom he sought to incite." Herndon v. State, 174 S.E. 597, 610 (Ga. 1934). Defendant petitioned for rehearing on the ground that the statute, so construed, violated the federal constitution, but the state supreme court denied the petition. Herndon v. State, 176 S.E. 620, 622–24 (Ga. 1934). The United States Supreme Court held that the defendant's failure to raise the constitutional issue prior to the petition for rehearing prevented the Court from reviewing the merits of the challenge. *Herndon*, 295 U.S. at 442–43. The Court acknowledged that in the light of the trial court's narrow construction of the statute, Herndon's "contention that the federal question was raised at the earliest opportunity well might be sustained" were it not for the Georgia Supreme Court's decision in Carr v. State, 169 S.E. 201 (Ga. 1933). *Herndon*, 295 U.S. at 444–45. In *Carr*, the Georgia Supreme Court construed the same statute, and the court adopted substantially the same broad interpretation of that statute that it would later employ in Herndon's case. Because the state high court handed down its decision in *Carr* prior to the trial court's decision on Herndon's new trial motion and prior to Herndon's appeal, the United States Supreme Court held that Herndon "was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here" by raising his constitutional challenge in his initial appeal to the Georgia Supreme Court. *Herndon*, 295 U.S. at 446. R

(Herndon later obtained habeas relief from a state trial court on the ground that the statute was unconstitutional. Although the Georgia Supreme Court reversed the grant of habeas relief, Lowry v. Herndon, 186 S.E. 429, 430 (Ga. 1936), the United States Supreme Court in turn reversed that judgment and held the statute unconstitutional as applied to Herndon. Herndon v. Lowry, 301 U.S. 242, 261, 263–64 (1937).)

51. Despite the conceptual similarities between the due process analysis and the novelty analysis, the two appear to form distinct branches of the inadequacy doctrine. Thus, for instance, the cases discussed below with respect to the novelty branch do not explicitly analyze the adequacy question as one of due process. See Ford v. Georgia, 498 U.S. 411 (1991); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964); Wright v. Georgia, 373 U.S. 284 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). But cf. *Patterson*, 357 U.S. at 458 (citing *Brinkerhoff-Faris* with a "cf." signal); Fitzgerald, supra note 23, at 290 n.384 (noting the *Patterson* Court's citation to *Brinkerhoff-Faris* and R

than facial analyses.[52] Even an otherwise valid procedural requirement can be inadequate if the litigant in the case at hand lacked notice of the rule; and, conversely, a novelty-based inadequacy determination does not preclude subsequent enforcement of the rule against litigants who had reasonable notice of it. Thus, for instance, a state can set strict timing rules for criminal defendants to raise *Batson* challenges to the prosecution's use of peremptory challenges—such as a rule that such challenges are untimely if made prior to jury selection, or after the jury is sworn[53]—but the state cannot newly mint such a requirement and apply it to bar the claim of a defendant who was tried prior to the announcement of the rule.[54] In this way, the circumstances of the particular case are relevant to the novelty analysis because they can demonstrate that the litigant in question lacked fair notice of the requirement.[55]

In addition, fact-specific novelty analysis can also disclose facts relevant to the other underlying rationale for novelty-based inadequacy review: the concern that the state court may be discriminating against the assertion of the federal right. The litigation that arose in the late 1950s from Alabama's attempt to shut down the state branch of the NAACP provides an illustration.[56] The Alabama Attorney General sued in state court to enjoin the NAACP from acting within the state, and obtained an

observing that "[t]he *Patterson* Court itself hedges on the question whether the flaw it detected in the Alabama courts' judgment had a constitutional dimension").

52. Barry Friedman has pointed out to me that novelty-based rulings differ from other as-applied analyses because in novelty analyses the court examines the relevant rule in comparison to prior formulations of state law, and does not necessarily examine how the rule in question was applied to the facts of the particular case. Nonetheless, I consider the novelty cases to present a form of as-applied review—if only in a negative sense—because a novelty-based inadequacy ruling does not prevent the application of the rule in cases where it is not novel.

53. See *Ford*, 498 U.S. at 423 ("Undoubtedly, then, a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected.").

54. See id. at 424 ("To apply *Sparks* retroactively to bar consideration of a claim not raised between the jurors' selection and oath would . . . apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve as an independent state ground . . . ."). (The Court was referring to "the state procedural rule announced in *State v. Sparks*, 257 Ga. 97, 98, 355 S.E.2d 658, 659 (1987), that a *Batson* claim must 'be raised prior to the time the jurors selected to try the case are sworn.'" *Ford*, 498 U.S. at 418 (quoting *Sparks*).)

55. The novelty argument is most intuitively obvious when the rule itself was previously unannounced. However, the same reasoning might support the view that a surprising application of a standard-like rule could also be so novel as to be inadequate. Cf. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 231 n.1, 245 (1969) (Harlan, J., joined by Burger, C.J., and White, J., dissenting) (agreeing with the majority that a state rule—which required litigants to give opposing counsel "a reasonable opportunity to examine" the trial record—was inadequate as applied, but arguing that the reason the rule was inadequate was that the application of the rule in the case at hand was "based on a standard of reasonableness much stricter than that which could have been fairly extracted from the earlier Virginia cases applying the rule").

56. For a detailed description of this litigation, see Glennon, supra note 4, at 889–95. R

ex parte restraining order.[57] Over the NAACP's objections, the court granted the state's request for production of records that included the NAACP's Alabama membership lists.[58] The NAACP refused to turn over the lists, on the ground that it was unconstitutional to require such disclosure, and the trial court held it in contempt and fined it $100,000.[59] Under state law, the contempt judgment blocked the NAACP from seeking dissolution of the restraining order and from defending on the merits until it "purged itself of contempt."[60] When the NAACP petitioned the state supreme court for review of the contempt judgment, that court denied relief on the ground that the NAACP should instead have sought a writ of mandamus "to quash the discovery order" before the trial court held it in contempt.[61]

In *NAACP v. Alabama ex rel. Patterson*, the Supreme Court held this to be an inadequate ground for the state court's refusal to review the contempt judgment, because—in light of prior Alabama case law—the NAACP had lacked notice that precontempt mandamus was the only means for appellate review of disclosure orders.[62] As the Court explained, "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."[63] The Supreme Court reversed the contempt judgment,[64] and, after a long hiatus, the case proceeded to a hearing on the

57. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 452–53 (1958). The restraining order enjoined the NAACP from acting within the state or attempting to qualify to do business within the state. Id. at 452–53.

58. Id. at 453.

59. Id. at 453–54. The court initially set the fine at $10,000, and provided that the NAACP might avoid the fine by complying within five days, but that if the NAACP did not comply within the five days the fine would rise to $100,000. Id. Following the NAACP's continued noncompliance, the court increased the fine to $100,000. Id. at 454.

60. Id.

61. Id. at 455.

62. Id. at 457.

63. Id. at 457–58. The Court here cited *Brinkerhoff-Faris* with a "cf.," which underlines the connection between the novelty and due process branches of the inadequacy doctrine. Cf. Reich v. Collins, 513 U.S. 106, 112–13 (1994) (citing *Patterson* in support of a due process analysis).

64. On remand, the state supreme court initially used another procedural ground to attempt to avoid the Supreme Court's reversal of the contempt judgment. Arguing that the Supreme Court had mistakenly assumed the NAACP had complied with the discovery order in all respects other than its refusal to produce the membership lists, the state court held this assumption untenable because the trial court's order had held that the NAACP had not complied, and because "nothing in the record" supported the contention of compliance. Ex parte NAACP, 109 So. 2d 138, 139 (Ala. 1959). The Supreme Court once again reversed, holding that because Alabama had not previously disputed the NAACP's contention that it had complied with the other aspects of the order, the state was estopped from later claiming noncompliance, and thus the Alabama Supreme Court was "foreclosed from re-examining the grounds of [its] disposition." NAACP v. Alabama ex rel. Patterson, 360 U.S. 240, 244 (1959).

merits in state court.[65] The trial court found that the NAACP had violated Alabama law, and it permanently enjoined the organization from conducting any business within the state.[66] On appeal, the state supreme court once again found a procedural basis for refusing to review the merits: It invoked a "long standing" rule that "where unrelated assignments of error are argued together [in an appellate brief] and one is without merit, the others will not be considered."[67] As to each of the five subdivisions of the NAACP's argument section, the court held that the inclusion of an allegedly meritless assignment of error precluded consideration of the remaining assignments of error.[68]

The state supreme court's protestations that it was merely enforcing an evenhanded and necessary procedural rule[69] did not persuade the Supreme Court; in *NAACP v. Alabama ex rel. Flowers*, the Court held the procedural ruling inadequate and proceeded to review the merits.[70] One basis for the Court's finding of inadequacy was that the NAACP's brief had substantially complied with the purposes of the rule[71]—a rationale that invokes the undue burden branch of the inadequacy doctrine, discussed below.[72] The Court coupled this reasoning, however, with a finding of novelty, for it stated that "[t]he Alabama courts have not heretofore applied their rules respecting the preparation of briefs with the pointless severity shown here."[73] *Patterson* and *Flowers* illustrate that the

65. The delay favored the state, since the "temporary" restraining order apparently remained in effect until the hearing on the merits in 1961. See NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 292 (1964). In 1960, the NAACP had sued in federal court, claiming that the state courts' refusal to proceed to the merits was violating its constitutional rights. See id. at 291. In late 1961, the Supreme Court directed the federal district court to adjudicate the NAACP's claim, unless by January 2, 1962, the state court accorded the NAACP a hearing on its motion to dissolve the restraining order and on the merits. NAACP v. Gallion, 368 U.S. 16, 16 (1961). The state court held a hearing in December 1961 and entered a final decree against the NAACP on December 29, 1961, four days before the deadline set by the Supreme Court. *Flowers*, 377 U.S. at 292.

66. See *Flowers*, 377 U.S. at 292.

67. NAACP v. State, 150 So. 2d 677, 679 (Ala. 1963).

68. Id. at 680–82.

69. The state supreme court opened its opinion by disclaiming an intent to "evade decisions" on the merits. Id. at 678. It argued that its rules of procedure were necessary for orderly adjudication, and—with presumably unintentional irony—noted that "[w]e are not a court which treats most litigants one way, but has favored and special treatment for the litigant who comes into court on an alleged racial issue." Id.

70. *Flowers*, 377 U.S. at 302.

71. See id. at 297 ("The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense.").

72. See infra Part I.B.

73. *Flowers*, 377 U.S. at 297. The Court employed a similar analysis in Wright v. Georgia, 373 U.S. 284 (1963), when it held inadequate a ruling by the state supreme court that the appellants had failed properly to brief their contention of error with respect to the denial of their new trial motion. See id. at 287, 291. The Court reviewed the appellants' state court brief and found that it satisfied the purposes of the state appellate rule; the Court then added that the inadequacy of the state procedural ruling "is especially apparent

circumstances underlying the Court's findings of novelty can indicate state court hostility to the assertion of federal rights.[74]

Concern for the supremacy of federal law also undergirds the inconsistency and discretion branches of the inadequacy doctrine; these branches, like the novelty branch, tend to focus less on the rule's application to the particular case alone and more on a comparison between that application and the functioning of the rule in other cases. Under the inconsistency branch, a state rule will not bar review if, in other cases, it has not been "strictly or regularly followed."[75] Inconsistent application suggests that the state interest in the enforcement of the rule may be weak,[76] and it admits the possibility that the rule might be enforced selectively, perhaps to discriminate against assertions of federal right.[77] Accordingly, the Court may find inadequacy by comparing the rule's application in similar cases; if no forfeiture resulted in other cases, the rule can be viewed as inadequate to bar review in the case at hand.[78]

The discretion branch of the analysis holds that if the state court has the power to excuse noncompliance with a procedural rule, then its refusal to do so is not an adequate ground to bar review.[79] Although the

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because no prior Georgia case . . . gives notice of the existence of any requirement that an argument in a brief be specifically identified with a motion made in the trial court." Id. at 291 (quoting *Patterson*'s statement that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court").

74. Acknowledging this fact, the Court in *Flowers* noted that though the usual course (upon finding the procedural ground inadequate) might be to remand for the state court to consider the merits of the appeal, "in view of what has gone before, we reject that contention and proceed to the merits." *Flowers*, 377 U.S. at 302.

75. Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

76. Thus, a finding of irregular application can bolster a finding that the state rule fails to serve a legitimate state interest. See, e.g., James v. Kentucky, 466 U.S. 341, 348–49 (1984) (holding that "Kentucky's distinction between admonitions and instructions is not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights," and that a forfeiture based on the failure to use the correct term "would further no perceivable state interest").

77. See Hathorn v. Lovorn, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.").

78. See id. at 263–65 (holding that if state supreme court denied petition for rehearing on ground that issues should not be raised for first time in such petitions, this ruling would be an inadequate ground, in light of fact that the state supreme court "regularly grants petitions for rehearing without mentioning any restrictions on its authority to consider issues raised for the first time in the petitions"); *Barr*, 378 U.S. at 149 (holding that state supreme court could not reject defendants' objection as "too general" when that court had considered the merits of similarly worded objections in other recent cases).

79. See Sullivan v. Little Hunting Park, 396 U.S. 229, 231 n.1, 233–34 (1969) (with respect to state rule requiring notice and a reasonable opportunity for opposing counsel to examine trial transcript for purposes of record on appeal, holding rule inadequate because state precedents "do not enable us to say that the Virginia court has so consistently applied [the rule] . . . as to amount to a self-denial of the *power* to entertain the federal claim here presented if the [court] . . . desires to do so"); Williams v. Georgia, 349 U.S. 375, 383

discretion rationale is open to criticism[80] and is not always followed,[81] the significant fact for purposes of the present analysis is that this branch of the doctrine, like the inconsistency analysis, entails a comparison of the default in the case at hand with the rule's application in other cases.

Different branches of the adequacy doctrine invite a variety of levels of review. Some of the due process decisions, such as *Reece* and *Brinkerhoff-Faris*, are cast in terms that invalidate the state procedural ground only as it applies to the circumstances of the particular case. In a different sense, a novelty-based inadequacy analysis—such as that in *Patterson*—looks to the case at hand in order to determine whether the litigant *in that case* had fair notice of the procedural requirement. A resulting inadequacy holding will not prevent the rule's application, in future cases, against litigants who do have proper notice; thus, a novelty-based inadequacy holding does not result in facial invalidation of the rule. The inconsistency and discretion analyses, by contrast, seem more likely to result in facial invalidation, since a determination of inadequacy on one of those grounds would likely taint any future application of the same rule. In sum, no set formula governs the level of scrutiny applied to state procedural grounds under the various branches of the adequacy doctrine.

(1955) ("A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.").

80. For example, Justice Harlan argued that discretion, in the sense of the ability to exercise judgment "to decide a close case either of two ways without creating an obvious conflict with earlier decisions," was not a factor that should render a state procedural ground inadequate. *Sullivan*, 396 U.S. at 244 (Harlan, J., joined by Burger, C.J., & White, J., dissenting). Justice Harlan argued that a state ground should be "no less adequate simply because it involves a standard that requires a judgment of what is reasonable, and because the result may turn on a close analysis of the facts of a particular case in light of competing policy considerations." Id. at 245. Daniel Meltzer has suggested that "the Court generally should view open-textured decisions as judicial formulation of law . . . because that presumption is closer to the truth over a large range of cases . . . and because placing the burden of persuasion upon the state would have undesirable consequences." Meltzer, Forfeitures, supra note 15, at 1141. Accordingly, Meltzer finds it "likely that the refusal to exercise discretion to forgive a procedural default will rarely have significance independent of the test of consistency." Id. at 1142. R

On the other hand, some kinds of discretion to excuse procedural defaults may turn on standards that depend on the application of federal law—as where the state court may overlook a default in the case of "plain error" or "fundamental error." To the extent that the application of such a standard is not independent of federal law, it could be argued that the state court's refusal to consider the defaulted claim should not bar federal court review. See Hart & Wechsler, supra note 1, at 590 (raising this possibility); cf. Patterson v. Alabama, 294 U.S. 600, 606–07 (1935) (vacating and remanding on the ground that if the state's highest court had realized that the petitioner had a valid argument on the merits, it might have found itself to have the power to review, despite the petitioner's assertedly untimely filing). R

81. See, e.g., Wolfe v. North Carolina, 364 U.S. 177, 188, 191–92 (1960) (holding state ground adequate on basis that even if state court had power to excuse default, it had consistently refused to do so in other cases and thus was not discriminating against the assertion of federal rights).

As we shall see, the undue burden branch, in particular, includes examples of fact-specific as well as facial review.

B. *The Undue Burden Branch of the Adequacy Doctrine*

In assessing whether a state procedural rule unduly burdens the assertion of federal rights, the Court has used both facial and as-applied review. Moreover, the Court's use of as-applied review has varied in its aggressiveness. In some cases, the application of the state rule to the facts of the case was close to absurd; in other cases, the Court has held inadequate a rule the application of which was less obviously inappropriate, because the Court reasoned that, under the circumstances, the rule's purposes were substantially served by other measures. In this Part, I briefly survey cases that seem to present a facial-invalidation approach. I then examine cases such as *Staub v. City of Baxley*, in which the application of the state rule approached the absurd. Next, I discuss two instances—*Osborne v. Ohio* and *Lee v. Kemna*—in which the Court's use of as-applied review seemed to present a closer case. *Lee*, in turn, leads me to *Henry v. Mississippi*. The *Lee* dissenters grounded their opposition to as-applied review in the premise that such review was exemplified by, and discredited along with, *Henry*. As I shall demonstrate, however, *Henry*'s lack of subsequent influence arises from the content of the Court's analysis, not from the fact that the analysis was fact-specific rather than facial.

A number of undue burden cases involve facial analysis, which is to say that their reasoning does not depend on the facts of the particular case, and they would appear to render the state ground inadequate in any case involving an attempt to assert a federal right. *Brown v. Western Railway* arguably provides an example of such analysis;[82] the Court held in *Brown* that "a Georgia rule of practice to construe pleading allegations 'most strongly against the pleader'" could not be applied to suits under the Federal Employers' Liability Act,[83] because "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."[84] In *Brown*, the Court seems to have considered the state procedural rule *qua* rule, rather than focusing on the rule as applied in the particular case: The Court reasoned that if it were to "fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."[85] Other examples of inadequacy likewise seem to rest entirely on the insubstantiality of the state interest, overall, in enforcement of the

82. On the other hand, the Court's analysis in *Brown* focused closely on the specifics of the case: The Court spent a full page of its opinion discussing the plaintiff's allegations. Brown v. W. Ry., 338 U.S. 294, 297–98 (1949). Thus, *Brown* could also be viewed as using an as-applied analysis.

83. Id. at 295.

84. Id. at 298 (citing Davis v. Wechsler, 263 U.S. 22 (1923)).

85. Id. at 299.

state rule. In the face of Supreme Court rulings finding inadequacy in a state court decision striking a certiorari petition because the petition was not on "transcript paper,"[86] or a state court decision refusing to consider a litigant's right to a jury "instruction" because the litigant had mistakenly referred to the requested instruction as an "admonition,"[87] it is hard to imagine that such grounds could thenceforth serve to bar the assertion of a federal right in any subsequent case.

In a second subset of the undue burden cases, the Court has held a rule inadequate because, as applied, the rule was close to absurd—or, as the Court often puts it, because enforcement under the circumstances would "force resort to an arid ritual of meaningless form."[88] Thus, a state may require a litigant challenging the constitutionality of an ordinance to identify the particular sections asserted to be unconstitutional—unless the litigant is challenging all the sections and the sections are interdependent.[89] A state may provide that failure to object to a

86. Shuttlesworth v. City of Birmingham, 376 U.S. 339, 339 (1964) (per curiam), reversing Shuttlesworth v. City of Birmingham, 149 So. 2d 923, 923 (Ala. 1962).

87. See James v. Kentucky, 466 U.S. 341 (1984). After the close of testimony in James's criminal trial, when the proposed jury instructions were being discussed, James's lawyer requested "that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify." Id. at 343. The court denied the request, and James was convicted. Id. at 343–44. In affirming James's conviction, the Kentucky Supreme Court conceded that James had been entitled to the instruction on failure to testify, but it held that James had not properly requested the instruction, because his request used the word "admonition" rather than "instruction," and there was a "vast difference" between those terms under Kentucky law. James v. Commonwealth, 647 S.W.2d 794, 795–96 (Ky. 1983). The Kentucky Supreme Court did not elaborate on the nature of the difference. The United States Supreme Court reversed and remanded, holding that the admonition/instruction distinction was inadequate. The Court noted that under Kentucky law, "instructions" generally are "statements of black-letter law" and are given both orally and in writing, whereas "admonitions" usually are "cautionary statements regarding the jury's conduct" and customarily are given only orally. *James*, 466 U.S. at 345, 347. However, the Court observed that Kentucky's admonition/instruction distinction "is not always clear or closely hewn to," id. at 346, and that the adverse-inference statement requested by James "would seem to fall more neatly into the admonition category than the instruction category," id. at 347. In holding the Kentucky procedural ground inadequate, the Court stated that the distinction "[wa]s not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights"; but the Court also termed the distinction an "arid ritual" (quoting *Staub*) which "would further no perceivable state interest" (citing *Henry*) and would not be allowed to block "the assertion of federal rights" (quoting *Davis*). Id. at 348–49.

88. Staub v. City of Baxley, 355 U.S. 313, 320 (1958).

89. See id. In *Staub*, the Court confronted a state requirement that a litigant challenging the constitutionality of an ordinance "state what section of the ordinance is unconstitutional." Staub v. City of Baxley, 93 S.E.2d 375, 378 (Ga. Ct. App. 1956) (citation omitted). The ordinance in question prohibited the solicitation of memberships in dues-paying organizations unless the solicitor first obtained a permit (the issuance of which was within the discretion of the mayor and city council) and paid a fee. See *Staub*, 355 U.S. at 314 n.1 (quoting ordinance). (The ordinance required payment of the fee only if the solicitor was a salaried employee or officer of the organization in question or received a fee for obtaining members, see id.; Staub, as a salaried employee of the International Ladies'

question before the witness answers waives any error in the admission of the testimony—but not if the defendant objects to the first two questions in a string of twenty-one questions that are objectionable in exactly the same way, only stops objecting after the first two objections are overruled, and renews the objection at the end.[90] A state court

Garment Workers Union, see id. at 315, would have been subject to the fee requirement.) Rose Staub, a union organizer, was prosecuted for violating the ordinance; although she objected to the prosecution on First and Fourteenth Amendment grounds, the trial court overruled her objections and she was convicted. Id. at 314, 317. When Staub sought review in the Georgia Court of Appeals, that court affirmed, holding that Staub's constitutional challenge "should have been made against specific sections of the ordinance and not against the ordinance as a whole." See *Staub*, 93 S.E.2d at 378. The court held, in the alternative, that Staub had no right to challenge the ordinance because she "ha[d] made no effort to comply" with it. Id. at 379. The Supreme Court of Georgia subsequently denied Staub's application for certiorari. *Staub*, 355 U.S. at 314.

On review, the United States Supreme Court disagreed. The Court found it reasonable for Staub to challenge the constitutionality of the whole ordinance, because "[t]he several sections of the ordinance are interdependent in their application to one in appellant's position and constitute but one complete act for the licensing and taxing of her described activities." Id. at 320. Because Staub's objections "used language challenging the constitutional effect of all [the ordinance's] sections," the Court held that "[t]o require her, in these circumstances, to count off, one by one, the several sections of the ordinance would be to force resort to an arid ritual of meaningless form." Id. In addition, the Court invoked the inconsistency branch of the adequacy doctrine, noting that the Georgia Supreme Court had previously held a facial attack permissible "if 'the [statute] so challenged was invalid in every part for some reason alleged.'" Id.

The Court also held inadequate the other ground relied upon by the Georgia Court of Appeals. See id. at 319 (holding that "the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court").

90. See Douglas v. Alabama, 380 U.S. 415, 420–23 (1965). In *Douglas*, the Court reviewed the Alabama Court of Appeals' holding that under Alabama's contemporaneous objection requirement, a defendant who objects to a line of questioning must object to each question in the series. Douglas v. State, 163 So. 2d 477, 494–95 (Ala. Ct. App. 1963). Douglas and another defendant, Loyd, were tried separately for the same assault. The state called Loyd as a witness in Douglas's trial, but Loyd invoked his privilege against self-incrimination and refused to answer any questions. Undeterred, the state "produced a document said to be a confession signed by Loyd" and proceeded to read the document in the presence of the jury, "[u]nder the guise of cross-examination to refresh Loyd's recollection." *Douglas*, 380 U.S. at 416 (citing state court). Throughout the reading of the confession, the state periodically stopped and asked Loyd whether he had made the statement that had just been read; each time, Loyd refused to answer. Id. at 416–17. Douglas's attorney objected twice at the outset of the prosecutor's reading of the confession and renewed the objection at the end of the line of questioning; all three objections were overruled. See id. at 421 n.4 (quoting trial transcript). The concept behind Douglas's objections plainly applied with equal force to each of the "questions," since in each "question" the prosecutor used the same tactic of reading the confession in the presence of the jury and then asking the witness if he had made the statement that had just been read. Nonetheless, applying its contemporaneous objection rule, the state appellate court found waiver because Douglas failed to object to each of the twenty-one questions. See *Douglas*, 163 So. 2d at 495.

The Supreme Court held the state procedural bar inadequate and reversed, reasoning that "an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient

may strike a pleading for prolixity—but not if the pleading is two pages long.[91]

In the third subcategory of undue burden cases, by contrast, the application of the rule to the case is not obviously absurd, but the Court nonetheless holds the rule inadequate because it finds that, under the circumstances, the rule's purposes have been served through other means. In *Osborne v. Ohio*,[92] for example, the Court concluded that a state court defendant's pretrial motion to dismiss fulfilled the purposes of the state's rule requiring contemporaneous objections to jury instructions. On appeal from his conviction for possession of child pornography, Osborne argued, inter alia, that the conviction violated due process because there was no assurance that the jury had found that Osborne acted recklessly and that the photographs in question were lewd.[93] Ohio's highest court rejected these contentions, holding that Osborne waived them by failing either to submit proposed jury instructions reflecting them or to object to their omission from the instructions that ultimately were given.[94] On review, the Supreme Court had "no difficulty" in finding Osborne's default an independent and adequate state law ground with respect to Osborne's scienter argument.[95] With respect to Osborne's lewdness argument, however, the Court held that Osborne's failure to object to the jury instructions was inadequate to bar review.[96] Although the rule requiring objection to jury instructions "serves the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions," the Court reasoned that this interest was sufficiently served, under the circumstances, by Osborne's pretrial motion to dismiss on overbreadth grounds.[97] In the Court's view, this motion put "the issue of the State's failure of proof on lewdness" before the trial judge, and because the

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to serve legitimate state interests." *Douglas*, 380 U.S. at 422. The Court's reasoning focused closely on the details of Douglas's case:

> No legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair. Too, after the confession was read, the defense moved to exclude it; it then moved for a mistrial and a new trial; all three motions were denied.

Id. at 422–23. "On these facts," the Court concluded, "the Alabama rule . . . is plainly inadequate." Id. at 423.

91. See Rogers v. Alabama, 192 U.S. 226, 230 (1904) (holding that a two-page-long motion designed solely to put forward a clearly asserted constitutional claim "cannot be withdrawn for prolixity from the consideration of this court, under the color of local practice, because it contains a statement of matter which perhaps it would have been better to omit but which is relevant to the principal fact averred").

92. 495 U.S. 103 (1990).

93. Id. at 122–23.

94. See State v. Young, 525 N.E.2d 1363, 1369, 1373 (Ohio 1988).

95. *Osborne*, 495 U.S. at 123.

96. Id.

97. Id. at 123–24.

judge denied Osborne's motion, "under the circumstances, nothing would be gained by requiring Osborne's lawyer to object a second time, specifically to the jury instructions."[98]

The Court employed a similar analysis last term, in *Lee v. Kemna*.[99] Lee was tried and convicted in Missouri state court for murder and armed criminal action.[100] Lee's defense, as expressed to the jury during opening statements, focused on an alleged alibi that was to be provided by Lee's mother, sister, and stepfather.[101] On the third day of trial, after the defense case began, Lee's counsel learned that the three alibi witnesses (who had been sequestered in the courthouse) could not be found.[102] Lee moved for a continuance to the next morning (a Friday), in order to try to locate the witnesses, but the trial court denied the motion.[103] In explaining the denial, the judge cited timing issues (he had to be at the hospital with his daughter the next day and he had another trial starting the following Monday), and he speculated that the witnesses had "abandoned the defendant."[104] Neither the judge nor any other participant suggested any defects in the form of Lee's motion.[105] The defense rested without putting in any more testimony, and after closing arguments in which both sides discussed the absence of the promised alibi witnesses, the jury found Lee guilty.[106]

On appeal,[107] the Missouri Court of Appeals affirmed Lee's conviction, ruling that Lee's continuance motion had failed to meet procedural

98. Id. at 124. In support of its conclusion, the Court cited James v. Kentucky, 466 U.S. 341 (1984); Douglas v. Alabama, 380 U.S. 415 (1965); Henry v. Mississippi, 379 U.S. 443 (1965); Staub v. City of Baxley, 355 U.S. 313 (1958); Davis v. Wechsler, 263 U.S. 22 (1923). *Osborne*, 495 U.S. at 124–25.

99. 534 U.S. 362 (2002).

100. Id. at 367–71.

101. Id. at 367. The alibi witnesses had traveled from California in order to testify. Id. at 365.

102. Id. at 369.

103. Id.

104. Id. at 370.

105. As the Supreme Court later explained,

> [t]he asserted procedural oversights in Lee's case, his alleged failures fully to comply with Rules 24.09 and 24.10, were first raised more than two and a half years after Lee's trial. . . . [N]either the prosecutor nor the trial judge so much as mentioned the Rules as a reason for denying Lee's continuance motion. If either prosecutor or judge considered supplementation of Lee's motion necessary, they likely would have alerted the defense at the appropriate time, and Lee would have had an opportunity to perfect his plea to hold the case over until the next day.

Id. at 380 (footnote omitted).

106. Id. at 370–71. The trial court denied Lee's motion for a new trial, which was based in part on the denial of the continuance. Id. at 371.

107. Lee also sought state court postconviction review, alleging that an unidentified person had told his alibi witnesses that their testimony would not be needed until the next day. Id. However, the trial court denied relief, holding that under Missouri law the continuance issue fell within the category of "trial error" that must be raised on direct, rather than collateral, review. Id. at 371 & n.3.

requirements set by Missouri Supreme Court Rules 24.09 and 24.10.[108] Rule 24.09—which no one had cited in *Lee* prior to the decision of the Court of Appeals—requires a continuance motion to be made in writing and to include an affidavit of a "credible person" giving the facts on which the motion is based.[109] Rule 24.10—which the state had cited for the first time in *Lee* in its papers on appeal[110]—requires an applicant for a continuance to detail the applicant's due diligence and good faith; the witness's name and residence; the grounds for belief that the testimony can be procured in a reasonable time; the facts the witness will prove; the materiality of those facts; and the absence of a substitute whose testimony "can prove or so fully prove the same facts."[111] Because Lee's continuance motion was oral, and because the appellate court found that Lee had failed to make "the factual showing required by Rule 24.10," it held the trial court did not abuse its discretion in denying the continuance.[112]

Lee next sought federal habeas relief, contending that the state trial court's refusal to grant him the one-day continuance denied him due process.[113] The lower federal courts denied relief, holding that Lee had procedurally defaulted on his continuance claim by failing to comply with Rules 24.09 and 24.10.[114] The Supreme Court, however, vacated and remanded, on the ground that, under the circumstances, Rules 24.09 and

108. See Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b) and 30.25(b), State v. Lee, 935 S.W.2d 689 (Mo. Ct. App. 1996) (Nos. WD 49456, WD 51717), at 4–5 (on file with the *Columbia Law Review*) [hereinafter Memorandum Supplementing Order].

109. Mo. Sup. Ct. R. 24.09; see Memorandum Supplementing Order, supra note 108, at 4 (ruling that "the trial court could have properly denied the motion for a failure to comply with Rule 24.09"). R

110. See *Lee*, 534 U.S. at 371.

111. Mo. Sup. Ct. R. 24.10. The rule provides that if the court finds the application insufficient "it shall permit it to be amended." Id.

112. Memorandum Supplementing Order, supra note 108, at 5. In the alternative, the court held that in any event the witnesses' testimony was not "so crucial that it is reasonably probable a different outcome would have resulted." Id. at 5. Lee later moved for rehearing and for transfer to the Missouri Supreme Court, but those motions were denied. *Lee*, 534 U.S. at 373. R

113. See *Lee*, 534 U.S. at 373–74.

114. See, e.g., Opinion and Order Denying Petition for Writ of Habeas Corpus, Lee v. Kemna (W.D. Mo. Filed Apr. 19, 1999) (No 98-0074-CV-W-6-P), aff'd, 213 F.3d 1037 (8th Cir. 2000), vacated, 534 U.S. 362 (2002), reprinted in Joint Appendix, Lee v. Kemna, 534 U.S. 362 (2002) (No. 00-6933), at 212, 217. The district court also agreed with the Missouri Court of Appeals's alternative ruling that Lee had failed to show a reasonable probability that the alibi witnesses' testimony would have changed the outcome of the trial. See id., reprinted in Joint Appendix at 217.

A divided panel of the Eighth Circuit Court of Appeals affirmed. The majority reasoned that the procedural default provided an independent and adequate state ground, and that Lee had failed to show either cause and prejudice or actual innocence. Lee v. Kemna, 213 F.3d 1037, 1038–39 (8th Cir. 2000). Chief District Judge Bennett, sitting by designation, filed a vigorous dissent, arguing that under the circumstances of Lee's trial, Rules 24.09 and 24.10 were inadequate grounds to uphold the denial of Lee's continuance motion. See id. at 1041–47.

24.10 were inadequate to bar federal review of Lee's due process claim.[115] The Court held Rule 24.09's requirement of a written motion inadequate as a ground for denying a continuance motion made in response to unexpected developments during trial.[116]

The Court's reasons for holding Rule 24.10 inadequate were somewhat more complex. The majority acknowledged that Rule 24.10 serves valid state purposes—in that it places relevant information before the trial court and helps ensure that litigants do not seek continuances as a delaying ploy[117]—and it in effect conceded that Lee was not in full technical compliance with the Rule.[118] In the Court's view, however, "the purpose of the Rules was served by Lee's submissions both immediately before and at the short trial,"[119] because all the required information was "either covered by the oral continuance motion or otherwise conspicuously apparent on the record,"[120] based on statements made during voir dire, opening statements, prosecution witness testimony, the charge conference that preceded the continuance motion, and the continuance motion itself.[121] The Court reasoned that in light of the trial court's stated grounds for denying the motion, perfect technical compliance on Lee's part would not have changed the result.[122] In the Court's view, the failure of any participant to raise the issue until Lee's appeal was evidence

115. *Lee*, 534 U.S. at 366, 387.

116. See id. at 366 ("Caught in the midst of a murder trial . . . defense counsel could hardly be expected to divert his attention from the proceedings rapidly unfolding in the courtroom and train, instead, on preparation of a written motion and affidavit."); id. at 383 ("[I]nsistence on a written continuance application, supported by an affidavit, 'in the midst of trial upon the discovery that subpoenaed witnesses are suddenly absent, would be so bizarre as to inject an Alice-in-Wonderland quality into the proceedings.'" (quoting *Lee*, 213 F.3d at 1047 (Bennett, C.D.J., dissenting))).

117. See id. at 366 ("Rule 24.10 serves the State's important interest in regulating motions for a continuance—motions readily susceptible to use as a delaying tactic."); id. at 385 (Rule 24.10 "is designed to arm trial judges with the information needed to rule reliably on a motion to delay a scheduled criminal trial").

118. See id. at 383 (noting State's argument that Lee's motion omitted required information, and responding that the relevant "matters . . . were either covered by the oral continuance motion or otherwise conspicuously apparent on the record").

119. Id. at 387.

120. Id. at 383.

121. See id. at 383–84.

122. As the Court explained,

> when the trial judge denied Lee's motion, he stated a reason that could not have been countered by a perfect motion for continuance. The judge said he could not carry the trial over until the next day because he had to be with his daughter in the hospital; the judge further informed counsel that another scheduled trial prevented him from concluding Lee's case on the following business day. Although the judge hypothesized that the witnesses had "abandoned" Lee, [Joint Appendix] at 22, he had not "a scintilla of evidence or a shred of information" on which to base this supposition, 213 F.3d, at 1040 (Bennett, C. J., dissenting).

Id. at 381 (quoting Trial Transcript, Feb. 24, 1994, Circuit Court of Jackson County, Mo., Case No. CR93-0453, Joint Appendix at 22, Lee v. Kemna, 534 U.S. 362 (2002) (No. 00-6933); Lee v. Kemna, 213 F.3d 1037, 1040 (8th Cir. 2000) (Bennett, C.D.J., dissenting)).

that neither the trial judge nor the prosecutor felt that Lee's technical noncompliance was an obstacle to proper consideration of the motion.[123] Moreover, although the Court acknowledged that the rules in question were not themselves novel, it concluded that no previously published decision had shown them to be applied with such severity.[124] Relying on *Osborne*, the Court held that because Lee had placed the substance of his grounds for the continuance motion before the trial court, the finding of procedural default was inadequate.[125]

In a vehement dissent, Justice Kennedy, joined by Justices Scalia and Thomas, argued that the majority's finding of inadequacy offended principles of federalism and cast "[s]erious doubt . . . upon many state procedural rules and the convictions sustained under them."[126] Even if Rule 24.09 would not suffice to bar review, the dissenters argued, Rule 24.10 was adequate.[127] Because "[t]he States have weighty interests in enforcing rules that protect the integrity and uniformity of trials, even when 'the reason for the rule does not clearly apply,'"[128] the dissenters contended that Missouri had "a freestanding interest in Rule 24.10 as a rule" irrespective of "the particular facts in extraordinary cases."[129] The dissenters warned that the Court's use of as-applied adequacy review would seriously disrupt state procedures, by requiring state judges to "inquire, even 'in the midst of trial, . . . whether noncompliance should be excused because some alternative procedure might be deemed adequate in the particular situation.'"[130] As-applied adequacy review, the dissenters argued, was almost unprecedented; in their view, the only previous case to advo-

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123. See *Lee*, 534 U.S. at 380, 387. The Court also noted that had the Rules' requirements been brought to the attention of Lee's counsel at the time of the motion, any omission could have been remedied at that time. See id. at 380.

124. The Court reasoned that

> no published Missouri decision directs flawless compliance with Rules 24.09 and 24.10 in the unique circumstances this case presents—the sudden, unanticipated, and at the time unexplained disappearance of critical, subpoenaed witnesses on what became the trial's last day. Lee's predicament, from all that appears, was one Missouri courts had not confronted before. "[A]lthough [the rules themselves] may not [have been] novel, . . . [their] application to the facts here was." Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 245 (1969) (Harlan, J., dissenting).

Id. at 382; see also id. at 387 ("[N]o published Missouri decision demands unmodified application of the Rules in the urgent situation Lee's case presented.").

125. See id. at 378 ("'[A]n objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests . . . .'" (quoting Osborne v. Ohio, 495 U.S. 103, 125 (1990))).

126. Id. at 406 (Kennedy, J., joined by Scalia & Thomas, JJ., dissenting).

127. See id. at 389.

128. Id. at 395 (quoting Staub v. City of Baxley, 355 U.S. 313, 333 (1958) (Frankfurter, J., dissenting)).

129. Id.

130. Id. (quoting Hart & Wechsler, supra note 1, at 585). R

cate such an analysis was *Henry v. Mississippi*.[131] *Henry*'s fall into disrepute, the dissenters claimed, demonstrated the Court's rejection of its experiment with as-applied review.[132]

The *Lee* dissenters adopted the standard view that *Henry*'s fatal weakness was the use of as-applied review; but though the dissenters were correct that *Henry* used an as-applied approach, the preceding discussion illustrates that they were inaccurate in claiming that *Henry* was the first case to do so.[133] Similarly, *Henry*'s apparent lack of influence in later cases may stem less from the fact that it employed as-applied review and more from the fact that its application of that method of review was faulty—as a brief examination of *Henry* will show.

Aaron Henry, an African American and a prominent Mississippi civil rights leader,[134] was prosecuted in Mississippi state court for disturbing the peace,[135] based on a white male eighteen-year-old hitchhiker's claim that Henry had touched the hitchhiker's crotch.[136] To corroborate the hitchhiker's testimony, the state introduced the testimony of a police officer who, with the permission of Henry's wife, had searched Henry's car and found the cigarette lighter broken and the ashtray filled with Dentyne chewing gum wrappers.[137] (This testimony tended to corroborate the hitchhiker's claim to have been inside the car, because two other prosecution witnesses testified that the hitchhiker had also described the broken lighter and the tray full of gum wrappers.[138]) Henry's lawyers failed to make a contemporaneous objection to the admission of the testi-

131. 379 U.S. 443 (1965).

132. See *Lee*, 534 U.S. at 393–95.

133. See id. at 393 ("Before *Henry*, the adequacy inquiry focused on the general legitimacy of the established procedural rule, overlooking its violation only when the rule itself served no legitimate interest." (citing Douglas v. Alabama, 380 U.S. 415, 422–23 (1965); Davis v. Wechsler, 263 U.S. 22, 24 (1923))). The dissent's citation to *Douglas* is puzzling, since—as discussed above—the Court in *Douglas* focused closely on the circumstances of the case, and held the rule in question inadequate only "[t]o the extent that [it] requires objection after each and every question in [the] prolonged series" of questions that occurred at Douglas's trial. *Douglas*, 380 U.S. at 423; see also supra note 90 and accompanying text. R

134. See infra text accompanying notes 161–165. R

135. The statute under which Henry was prosecuted had been amended in 1960. See Act of May 5, 1960, ch. 254, §§ 1–2, 1960 Miss. Laws 369, 369 (codified as amended at Miss. Code Ann. § 97-35-15 (1972)). Henry argued in his petition for certiorari that this statute was "one of a group of 'segregation laws' passed by the legislature as a part of the State's massive resistance program to the school desegregation decision." Petition for Writ of Certiorari to the Supreme Court of Mississippi at 18, Henry v. Mississippi, 379 U.S. 443 (1965) (No. 6) [hereinafter Henry Petition for Certiorari].

136. Transcript of Record at 15, 22, Henry v. Mississippi, 379 U.S. 443 (1965) (No. 6) [hereinafter Henry Transcript of Record] (reproducing trial testimony of hitchhiker); Henry v. Williams, 299 F. Supp. 36, 39 (N.D. Miss. 1969).

137. Henry Transcript of Record, supra note 136, at 98–99 (reproducing trial testimony of Chief of Police of Clarksdale, Miss.). R

138. Id. at 70–71 (testimony of deputy sheriff); id. at 86 (testimony of police officer).

mony,[139] but in their motion for a directed verdict at the close of the prosecution's case, they contended, inter alia, that the officer's search of Henry's car violated the Fourth Amendment.[140] The Mississippi Supreme Court held that the search was illegal, but affirmed the conviction on the basis of Henry's failure to make a contemporaneous objection.[141]

The United States Supreme Court vacated and remanded. Justice Brennan, writing for the Court, noted the principle that "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest."[142] The Court acknowledged that the contemporaneous objection rule "clearly does" serve such an interest: In the event that the evidence ought to be excluded, a contemporaneous objection "gives the court the opportunity to conduct the trial without using the tainted evidence," and thus avoids the necessity of holding a new trial.[143] The Court suggested, however, "that this purpose of the contemporaneous-objection rule may have been substantially served by petitioner's motion at the close of the State's evidence asking for a directed verdict," because, if the court had concluded that the testimony should have been excluded, it could have "submitted [the case] to the jury with a properly worded appropriate cautionary instruction."[144] If the failure to object "cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case," then "giving effect to the contemporaneous-objection rule for its own sake 'would be to force resort to an arid ritual of meaningless form.'"[145]

Ultimately, the Court did not decide the question of adequacy; instead, it remanded to the state courts for a determination of whether Henry "deliberately bypassed the opportunity to make timely objection in the state court."[146] Nonetheless, the Court's reasoning does support the

139. Id. at 98–99.

140. Id. at 112–13 (reproducing transcript of defendant's motion for directed verdict); *Henry*, 379 U.S. at 460 (Harlan, J., joined by Clark & Stewart, JJ., dissenting) (quoting motion for directed verdict). In their renewed motion after the close of evidence, Henry's lawyers incorporated by reference the grounds asserted in their prior motion for a directed verdict. Henry Transcript of Record, supra note 136, at 182 (reproducing transcript of defendant's renewed motion for a directed verdict). R

141. Henry v. State, 154 So. 2d 289, 294–96 (Miss. 1963). In the alternative, the court held that even if the evidence was erroneously admitted, any error was "cured" by the defendant's introduction of testimony concerning the matters to which the officer testified. Id. at 296.

142. *Henry*, 379 U.S. at 447.

143. Id. at 448.

144. Id.

145. Id. at 449 (quoting Staub v. City of Baxley, 355 U.S. 313, 320 (1958)).

146. Id. at 450, 452. The Court's disposition of *Henry* was peculiar. The Court suggested that, even if the state procedural ground would be inadequate because its purposes had been substantially served by Henry's directed verdict motion, Henry could still be precluded from raising his objection if he had deliberately bypassed the opportunity to assert it contemporaneously. Id. at 449–50. Later in its opinion, the Court appeared to back away from its earlier suggestion of inadequacy, retreating instead to the

notion that as-applied adequacy analysis is appropriate on direct review. However, *Henry* is more confusing than useful as a vehicle to assess as-applied analysis, since it is a singularly poor specimen of that technique.[147] As Justice Harlan persuasively argued in dissent, the state interests in the contemporaneous objection rule were not satisfied by Henry's motion for a directed verdict.[148] The rule serves the state's interests in "minimizing errors requiring mistrials and retrials," by directing the judge's attention to the particular question of admissibility, at a time when an appropriate form of relief—exclusion of the evidence—is readily achievable, and by providing the judge with an opportunity to seek elaboration of the defendant's grounds for objection.[149] Henry's directed verdict motion, by contrast, rested on three grounds, of which the objection to the officer's testimony was the most briefly stated.[150] The motion failed to state the theory under which Henry asserted the search was illegal, and it suggested no potential relief other than the grant of a directed verdict.[151] Accordingly, Justice Harlan argued, the directed verdict motion failed to suggest to the trial judge the measure (a cautionary instruction) which the Court later implied could have prevented the need for a mistrial.[152]

Henry may be best explained by its facts, for the Court's willingness to suggest procedural inadequacy may have stemmed from suspicion that the Mississippi state courts were biased against Aaron Henry.[153] Henry's

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argument that "a dismissal on the basis of an adequate state ground would not end this case," because Henry could seek federal habeas relief under the Court's recent decision in Fay v. Noia, 372 U.S. 391 (1963). *Henry*, 379 U.S. at 452. Accordingly, the Court concluded that a remand to the state courts was justified in order to give the state courts the first opportunity to address the "deliberate bypass" standard that the federal habeas court would later apply. Id. at 452–53.

147. See, e.g., Meltzer, Forfeitures, supra note 15, at 1144 (finding *Henry*'s reasoning "not very persuasive[ ]"); Recent Developments, Federal Jurisdiction: Adequate State Grounds and Supreme Court Review, 65 Colum. L. Rev. 710, 714 (1965) (arguing that *Henry* "presented a typical application of the contemporaneous objection rule," so that "[i]f the rule is inadequate in these circumstances, a set of facts under which it would be upheld is difficult to imagine"). R

148. See Hart & Wechsler, supra note 1, at 585 (noting that Harlan demonstrated that "presentation of a Fourth Amendment claim as part of a motion for directed verdict did not in fact substantially serve the purposes of Mississippi's contemporaneous objection rule"). R

149. See *Henry*, 379 U.S. at 462–63 (Harlan, J., joined by Clark & Stewart, JJ., dissenting).

150. See id. at 459–60 (quoting motion for directed verdict).

151. See id.

152. See id. at 461–62.

153. See Sandalow, supra note 14, at 190 (suggesting that the "material facts" in *Henry* included "that the petitioner was not merely a man charged with disturbing the peace, but Aaron Henry, a Negro resident of Clarksdale, Mississippi, and president of both the Coahoma County Branch of the [NAACP] and of its State Conference of Branches"); see also id. at 196; cf. Fitzgerald, supra note 23, at 290 (arguing that in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), the Court—instead of providing the rationale stated in its decision—"might have admitted outright that, given southern resistance to the civil R R

petition for certiorari summarized some of Henry's civil rights activities and argued that Mississippi was using criminal prosecutions such as Henry's "to enforce racial segregation."[154] By March 1962, when the hitchhiker's accusation surfaced, Henry had already been elected president of the NAACP's State Conference of Branches for Mississippi;[155] he had been questioned by a local prosecutor in connection with the arrests of Freedom Riders in Jackson, Mississippi;[156] and he had been arrested and charged with a violation of state law in connection with a claimed boycott by African Americans in his hometown of Clarksdale, Mississippi.[157] In his submissions to the Court, Henry argued that the police investigation of the hitchhiker's allegations targeted Henry because of his civil rights activities,[158] and he noted that his trial took place in a segregated courtroom.[159] The year after his conviction on the charge made by

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rights movement, the Court simply could not trust the Alabama supreme court to treat the NAACP fairly under state law even absent an outright federal-law violation").

Daniel Meltzer has pointed out that the *Henry* Court may also have been trying "to reduce the gap between direct and collateral review" that had been opened by the Court's adoption, in Fay v. Noia, 372 U.S. 391 (1963), of a forgiving "deliberate bypass" standard for federal habeas review of state court procedural defaults. See Meltzer, Forfeitures, supra note 15, at 1146. R

154. Henry Petition for Certiorari, supra note 135, at 2, 18–26. The State's submissions probably did not do much to refute this contention in the eyes of the Court. See Answer to Petition for Writ of Certiorari to the Supreme Court of Mississippi at 7–8, Henry v. Mississippi, 379 U.S. 443 (1965) (No. 6) [hereinafter Henry Answer] (arguing that "so-called civil rights activities" in Mississippi were "bringing about the destruction of one of the healthiest racial situations in the world"). R

155. Henry Petition for Certiorari, supra note 135, at 19. R

156. Id. The Freedom Riders were activists who challenged segregation in interstate public transportation and other public facilities. Encyclopedia of African-American Civil Rights: From Emancipation to the Present 204 (Charles D. Lowery & John F. Marszalek eds., 1992). Other accounts have stated that Henry was arrested with the Freedom Riders. See, e.g., id. at 253; Ralph E. Luker, Historical Dictionary of the Civil Rights Movement 117 (1997). However, Henry's petition for certiorari recounted the arrest of the Freedom Riders and stated that "[a]lthough petitioner was not among those students, following their arrest he was summoned to the office of Coahoma County Prosecutor Thomas Pearson for questioning regarding his attempts to 'disturb' existing 'race relations.'" Henry Petition for Certiorari, supra note 135, at 19. R

157. Henry Petition for Certiorari, supra note 135, at 19–20; Henry v. Pearson, 158 So. 2d 695, 700–01 (Miss. 1963) (in county attorney's libel action against Henry, recounting testimony concerning charge against Henry under anti-boycott statute). R

158. See Brief for Petitioner at 4–5, 36, Henry v. Mississippi, 379 U.S. 443 (1965) (No. 6). Henry pointed out, among other things, that when the hitchhiker provided a partial license plate number to the police, the number could have been one issued by any one of Mississippi's eighty-two counties, but the police checked only one county—that in which Henry lived. See id. at 5.

159. Id. at 32; see also Henry v. Williams, 299 F. Supp. 36, 41 (N.D. Miss. 1969) (finding that at Henry's trial, ice water was provided for the prosecutors but "[d]efense counsel were told . . . that they might use a 'for colored only' fountain located outside the courtroom").

the hitchhiker, Henry's house was firebombed, and though two men confessed to the bombing, neither was convicted.[160]

Moreover, during the years between his conviction in *Henry* and the oral argument of his appeal in the Supreme Court, Henry figured prominently in the civil rights movement.[161] In 1963, Henry won the post of Mississippi governor in a mock state election known as the "Freedom Ballot Campaign" or "Freedom Vote."[162] In the summer of 1964, under the leadership of Henry and others, the Mississippi Freedom Democratic Party (MFDP) sent a largely African American delegation to the Democratic National Convention, to contest the seating of the all-white Mississippi delegation.[163] In response to the MFDP's challenge, the DNC's Credentials Committee (with the concurrence of President Johnson) offered to seat Henry and one other activist as at-large delegates, but the MFDP refused to accept that arrangement.[164] Thus, by the fall of 1964, when his appeal was argued in the Supreme Court, Henry had become nationally visible in the civil rights movement.[165]

In light of the likelihood that the context influenced *Henry*'s outcome, and in light of the flaws in *Henry*'s application of the circumstance-based analysis, it is unsurprising that *Henry* itself appears to have had scant influence on the Court's subsequent practice.[166] The ongoing dispute over *Henry*'s significance, however, is a symptom of the Court's failure to provide an overarching theory that would explain, and render more predictable, its occasional use of searching fact-specific adequacy review.

In sum, the Court's adequacy jurisprudence demonstrates, first, that as-applied review is somewhat more common than the standard view

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160. See Henry Petition for Certiorari, supra note 135, at 20; Henry Answer, supra note 154, app. 7 at A69–A70. R R

161. A number of commentators have pointed out Henry's involvement in the civil rights movement at the state and local level. See, e.g., Sandalow, supra note 14, at 190. However, I am indebted to Barry Friedman for first alerting me to the fact that Henry became prominent at the national level as well. R

162. Luker, supra note 156, at 118; Juan Williams, Eyes on the Prize: America's Civil Rights Years, 1954–1965, at 228 (1987). The campaign, which took place in the fall of 1963, was designed to refute the contention (put forward by proponents of segregation) that African Americans did not want to vote. Harvard Sitkoff, The Struggle for Black Equality 1954–1992, at 157 (rev. ed. 1993); Williams, supra, at 228. R

163. See Williams, supra note 162, at 235, 241. R

164. See David J. Garrow, Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference 346–50 (1986); Frank R. Parker, Black Votes Count: Political Empowerment in Mississippi After 1965, at 25–26 (1990); Mark Stern, Calculating Visions: Kennedy, Johnson, and Civil Rights 204–08 (1992); Williams, supra note 162, at 242–44. R

165. Indeed, Mississippi's Attorney General described Henry as "a State, and now a national figure, engaged in Civil Rights activities"—and added pointedly that "[t]he writer of this brief cannot comprehend that this Court will be influenced by the status of a particular individual." Brief for Respondent at 13, Henry v. Mississippi, 379 U.S. 443 (1965) (No. 6).

166. See supra note 15. R

would suggest; and, second, that the Court currently lacks a sound doctrinal framework for deciding when, and how, to employ such review in its undue burden analysis. In Part III, I will argue that the Court's analytical framework should take account of the differences between the Court's own institutional capabilities and those of the lower federal courts. To lay the groundwork for this assertion, Part II first considers the nature of those differences.

II. AS-APPLIED ANALYSIS AND THE RELATIVE CAPABILITIES OF THE FEDERAL COURTS

If the Court's prior practices are any guide, as-applied analysis of state procedures has at least some role to play in adequacy review. However, the Court's track record also suggests that the more rigorous the as-applied review, the greater the likelihood that the Court may be inconsistent in its use of the technique. Moreover, the Court's inadequacy rulings on direct review would seem to impose obligations on state courts to perform similarly searching analyses. Because such analyses tend to transform rule-like rules into standard-like rules, they increase the costs of judicial application. Though such costs affect state court systems, they will not be felt by the Supreme Court itself, because the Court's control over its docket insulates it from any obligation to perform as-applied review as a matter of course.[167] Part II.A concludes that these considerations provide some support for the *Lee* dissenters' concerns, in the context of direct Supreme Court review. In Part II.B, however, I argue that such concerns are significantly less salient in the context of habeas review by the lower federal courts.

A. *The (In)capacities of the Supreme Court*

The cases considered in Part I illustrate the necessity for some use of as-applied review. If the Court were to eschew as-applied review altogether, troubling dilemmas would arise whenever a state court applied an otherwise valid rule in circumstances where the rule's application seemed absurd. If as-applied review were not an option, either the Court would have to hold the rule adequate in a case where it ought not to bar review, or the Court would have to hold facially inadequate a rule that in most instances would be perfectly legitimate. Take for example a rule providing that "objections to testimony are waived unless made before the witness answers the question"; and suppose that the state court has applied the rule to a case in which counsel vainly objected to the first five questions in a series of twenty similar questions, and renewed the objection at the end of the series.[168] Facial invalidation is undesirable, since the rule clearly serves valid state interests. On the other hand, under the circum-

167. See infra notes 188–189 and accompanying text. R

168. For a similar scenario, see supra note 90 (discussing Douglas v. Alabama, 380 U.S. 415 (1965)). R

stances of the case, most reasonable people would agree that the invocation of this rule should not be adequate to bar Supreme Court review. In such a case, the absurdity of the application is apparent enough that the Court should be able to maintain a relatively high level of consistency in its use of as-applied review. [169]

Similarly, as-applied review would impose minimal costs on the state in such a case. When a rule's application is absurd, not only is the state's interest in enforcement negligible, but so is its interest in preserving rule-

169. In some instances, another rationale for finding inadequacy might be the principle that a state ground will be inadequate if the record discloses no support for it. See, e.g., Ward v. Bd. of County Comm'rs, 253 U.S. 17, 22–23 (1920). The plaintiffs in *Ward* were Native Americans who had been allotted land under an 1898 federal statute that exempted the land from taxation for up to twenty-one years. Id. at 19. In 1908, Congress passed a statute that purported to remove the tax exemption. Id. When various counties started taxing formerly protected lands, Native American allottees brought a number of federal suits seeking to enjoin the impending taxation on the grounds that federal law had given the allottees a vested right in the tax exemption. Id. at 19–20. The Love County tax officials knew that their right to tax the land was in dispute, because they were defendants in one of those suits. Id. at 20. Ultimately, the Supreme Court held that the allottees had a vested property right in their tax exemptions and that they were entitled to an injunction against the taxation. Id. (citing, inter alia, Choate v. Trapp, 224 U.S. 665 (1912)). In the meantime, however, Love County had succeeded in extracting tax payments from the *Ward* plaintiffs, by threatening to sell their lands if the taxes were not paid and by actually selling the lands of similarly situated Native Americans. Id. When Ward and his coplaintiffs sought a refund of the illegal taxes, the trial-level state court ruled in their favor. Id. at 18–19. However, Oklahoma's highest state court reversed. See Bd. of County Comm'rs v. Ward, 173 P. 1050, 1052 (Okla. 1918). The court based its reversal on two alternative holdings, one of which was that, absent statutory authorization, a taxpayer could not sue to recover tax payments that were made voluntarily. Id. at 1050–52. When the plaintiffs sought review from the U.S. Supreme Court, the county argued that the Oklahoma Supreme Court's ruling on the voluntariness of the payments was an independent and adequate state law ground that barred Supreme Court review. *Ward*, 253 U.S. at 21. The Supreme Court disagreed. Though the Court "accept[ed]" the state court's legal ruling—that a taxpayer could not recover a voluntary tax payment without statutory authorization—the Court rejected the state court's application of that legal principle to the facts of the case. Id. at 22. Because the undisputed facts established that the state court's ruling—that the taxes were paid voluntarily—"was without any fair or substantial support," the voluntary-payment rationale did not suffice to block Supreme Court review. Id. at 23.

Although *Ward*'s inadequacy holding hinged on the lack of factual support for the application of the state rule, rather than on the notion that the rule was applied in an absurd manner, the absurdity and lack-of-substantial-support rationales could overlap in some cases. Thus, some absurd applications of a rule could also be viewed as instances where the record in fact discloses compliance with the rule, despite the state court's finding to the contrary. Cf. Wolfe v. North Carolina, 364 U.S. 177, 197–99 (1960) (Warren, C.J., joined by Black, Douglas, & Brennan, JJ., dissenting) (arguing that state rule "that appellants must rely on evidence which was offered at the trial" was inadequate as applied to a case in which the record before the state supreme court made "reasonably clear" that the relevant material was offered in evidence and that the court sustained an objection to the admission of that evidence). However, in instances where the rule literally covers the facts disclosed by the record, the *Ward* rationale would not justify a finding of inadequacy, but the absurdity branch of the undue burden test could do so.

like rules. A state court judge, considering whether to apply the rule in such a case, should be able to discern readily that the rule's application serves no legitimate purpose. Thus, the use of as-applied review in such a situation would not impose undue costs of compliance on state courts, because those courts need not expend much time or effort to recognize the rare instances in which the rule, though literally apposite, would produce absurd results. The view that state courts can workably employ as-applied review of their rules under an absurdity standard accords with the fact that other branches of the adequacy doctrine sometimes entail as-applied review as well. Due process bars state courts from enforcing a procedural rule in circumstances where the rule deprived the litigant of a reasonable opportunity to present her case.[170] Moreover, the novelty branch of the adequacy doctrine requires state courts to assess whether the particular litigant should be regarded as having been on notice of the relevant rule.[171] In both these contexts, the adequacy doctrine requires state courts to review facially valid rules to ensure that, under the circumstances of the case, the litigant had fair notice of the rule and had a reasonable opportunity to present his federal law contention. Since state judges already must undertake these inquiries before enforcing a forfeiture, it does not seem a significant additional burden to require those judges also to consider whether enforcement of the rule would, under the circumstances, approach absurdity.

On the other hand, in cases such as *Osborne*, where the absurdity of applying the state procedural bar is somewhat less evident,[172] the Court appears less likely to maintain consistency in its use of as-applied review, and such review could impose greater costs on state courts. It certainly can be argued that enforcement of the procedural bar in *Osborne* served no weighty state interest;[173] but the Court's own subsequent treatment of

170. See supra notes 37–49 and accompanying text. R

171. See supra notes 50–55 and accompanying text. R

172. See supra notes 92–98 and accompanying text (discussing Osborne v. Ohio, 495 U.S. 103 (1990)). R

173. Osborne's appellate challenge to the jury instructions in his case rested on the contention that the statute under which he was convicted was unconstitutionally overbroad. *Osborne*, 495 U.S. at 111–12. Since Osborne had made a pretrial motion to dismiss on grounds of overbreadth and the trial court had denied the motion, Osborne had placed the substance of his argument before the court and had obtained a ruling on it. Id. at 123–24. As a logical matter, if the trial court denied Osborne's motion because it rejected his overbreadth contention, then the court would likewise have overruled an overbreadth objection to the jury instructions. Moreover, it is unclear whether a further objection could have led to error-free instructions in any event: Although (on Osborne's appeal) the state's highest court adopted a limiting construction of the statute that obviated any overbreadth concern, see id. at 113 (holding that "the statute, as construed by the Ohio Supreme Court on Osborne's direct appeal, plainly survives overbreadth scrutiny"), neither Osborne nor the trial court could have predicted that precise construction, see Lee v. Kemna, 534 U.S. 362, 397–99 (2002) (Kennedy, J., joined by Scalia & Thomas, JJ., dissenting). Thus, although the application of the state rule in *Osborne* was not as evidently inappropriate as in a case such as *Douglas*, similar reasoning supported the view that the procedural bar was inadequate.

the issue suggests that this assessment is less obvious than that in cases such as *Staub*, *Douglas*, and *Rogers*.[174] Although the Court held the state-law procedural bar inadequate as applied in *Osborne*, just two years later it placed a substantially identical procedural ground on the other side of the line. In *Sochor v. Florida*, the Court ruled that a state court defendant's failure to make a contemporaneous objection to a jury instruction was an adequate ground to bar federal review of the objection.[175] The dissenters in *Sochor* argued that the failure to object at trial did not bar review, because the defendant had made clear the substance of his objection in a pretrial motion.[176] This, of course, was the argument that had succeeded in establishing inadequacy in *Osborne*; but though Sochor had cited *Osborne* to the Court,[177] neither the dissent nor the majority[178] took notice of the case's existence. The contrast between the Court's analyses in *Sochor* and *Osborne* suggests that the Court itself is unlikely to maintain consistency if it attempts too searching an as-applied analysis on direct review.

The *Sochor/Osborne* inconsistency also suggests that the less apparent the absurdity, the closer a reviewing court must look to assess adequacy; this in turn provides some basis for the *Lee* dissenters' view that as-applied review may impose costs on state courts.[179] The nature of direct Supreme Court review, moreover, provides an institutional reason why the Court may tend to underestimate those costs: The Court's adequacy analyses impose obligations on state courts, but—in practice—they do not similarly constrain the Supreme Court.

As the above indicates, my discussion adopts the view that the adequacy analysis employed by the Court on direct review creates obligations that bind the state courts themselves, when a state-court litigant asserts a claim of federal right. In other words, when the Court holds a state procedural ground inadequate to bar direct review, the Court in effect holds, as a matter of federal common law, that the ground cannot validly be used by state courts to bar a litigant's assertion of a federal-law contention.[180] State courts generally have no obligation to consider a litigant's

174. See supra notes 88–91 and accompanying text. R

175. 504 U.S. 527, 534 (1992). The rule in question provides that objections to jury instructions are waived unless made "before the jury retires to consider its verdict." Fla. R. Crim. P. 3.390(d). (Rule 3.390(d) was amended in 1992, but the amendment did not affect the provision concerning timing. See In re Amend. to the Fla. Rules of Crim. Proc., 606 So. 2d 227, 316 (Fla. 1992).) Although the Rule itself does not specify the earliest time the objection can be made, the Supreme Court read Florida caselaw to require the litigant to object "after the trial judge has instructed the jury." *Sochor*, 504 U.S. at 534 n.*.

176. *Sochor*, 504 U.S. at 547 (Stevens, J., joined by Blackmun, J., dissenting in part).

177. Brief for Petitioner at 34, *Sochor* (No. 91-5843), available at 1992 WL 606716.

178. Of the six justices who joined the relevant portion of Justice Souter's opinion in *Sochor*, five had been among the *Osborne* majority.

179. See infra text accompanying notes 185–187. R

180. Cf. Meltzer, Forfeitures, supra note 15, at 1182 (arguing that "when state foreclosure rules . . . cannot be squared with federal purposes, state and federal courts should be free to exercise their authority to fashion federal common law in order to ensure R

federal-law contention unless the litigant complies with the relevant state procedures for raising the issue,[181] and a litigant's default generally will constitute an adequate state law ground which will deprive the Supreme Court of jurisdiction to review the judgment. If the state law ground is inadequate, however, the Court can review the federal law issue, and may vacate or reverse the judgment if the Court's disposition of the federal issue so requires. On remand, the Court's holding of inadequacy binds the state court: The latter may not simply reinstate its prior judgment on the basis of the ground held inadequate to bar Supreme Court review. In that particular case, then, the inadequacy ruling means that, as a matter of federal law, the state procedural ground cannot bar the vindication of the federal right, either in the Supreme Court, or in the state courts on remand. Moreover, the Supreme Court's vacatur of the state court judgment indicates that the state high court's prior disposition of the case was incorrect: The correct disposition would have been for the state court to ignore the inadequate procedural ground and reach the merits of the federal issue.

Viewed in this light, an inadequacy holding on direct review in effect imposes a duty on the state courts to vindicate the federal right despite the litigant's failure to comply with the relevant state procedural requirement.[182] Logically, it seems hard to confine such a duty to the case in

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the vindication of federal rights"). The phenomenon of federal common law procedural principles that state courts are bound to follow with respect to the adjudication of federal rights is not a concept unique to the issue of procedural default. For example, Stephen Burbank has argued that federal common law governs the preclusive effect of a judgment in a state court suit on a federal claim. Stephen B. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 Cornell L. Rev. 733, 762–63, 830 (1986). Burbank argues that the federal common law rules with respect to such judgments generally should borrow state preclusion law, and should depart from state rules only where the latter would be "hostile to or inconsistent with" federal policies or federal substantive rights. Id. at 830. Burbank also makes clear that such federal common law principles, where applicable, are binding on both state and federal courts. See id. at 763; see also Stephen B. Burbank, Federal Judgments Law: Sources of Authority and Sources of Rules, 70 Tex. L. Rev. 1551, 1554 (1992) (arguing that federal common law places "constraints on domestic state preclusion law in state court"). In these respects, Burbank's approach provides support for the view that I advance here: When the Supreme Court holds a state procedural ground inadequate because it unduly burdens the assertion of a federal right, that ruling establishes a federal common law principle that both state and federal courts must follow.

181. See Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.").

182. Martha Field has argued that "adequate state ground rules" can be viewed as "rules of access to federal courts," rather than as "rules of procedure" that would bind state courts. Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 973 n.395 (1986). In Field's view, a federal court "can simply refuse to follow state rules it finds objectionable, or contrary to United States policy," without "creat[ing] true federal common law rules of procedure—rules that state courts clearly must follow under the supremacy clause." Id. Such an approach, which would recognize "a spurious

which the inadequacy ruling is announced; if the ground is inadequate to block the state court's duty to consider the federal-law contention in one case, it ought to be equally inadequate in all similar cases.[183] Accordingly, this Article takes the view that when the Court crafts inadequacy doctrines it is creating federal common law rules concerning the extent to which state procedural rules can relieve state courts from their Supremacy Clause duty to vindicate claims of federal right.[184]

From this perspective, it can be seen that an aggressive use of as-applied adequacy review could weaken the general presumption that state courts can condition the vindication of federal rights on the litigant's compliance with state procedural rules. If the undue burden branch of adequacy review entailed a finding of inadequacy in every case in which a state rule's purposes had been substantially served by other occurrences during the litigation, then state courts arguably would be obliged to question the legitimacy of the relevant state rule, as applied, each time that they enforced a forfeiture for noncompliance.[185] In ef-

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federal law, dependent for its application upon which case found its way into which court," Hart, supra note 181, at 503, seems unpersuasive for the reasons I discuss in the text. See Meltzer, Forfeitures, supra note 15, at 1184, 1202 n.370 (critiquing Field's analysis and arguing that the validity of a state court litigant's forfeiture should not depend on whether the litigant succeeds in obtaining Supreme Court review). R R

183. See Meltzer, Forfeitures, supra note 15, at 1184 (making this point). R

184. See id. at 1185 (arguing that the Court's adequacy analyses should be seen as federal common law rulings that determine whether state courts' procedural default doctrines "pose a sufficient threat to federal interests that they should not be permitted to prevent the vindication of federal rights").

The standard view is that state courts have a duty to hear federal claims, at least in circumstances where the courts would hear similar state-law claims. See Testa v. Katt, 330 U.S. 386, 389, 394 (1947). It is unnecessary here to resolve the current status of *Testa*'s principle of state-court obligation to hear federal claims. Even if the Court's recent federalism jurisprudence might now afford state courts greater leeway to avoid hearing a claim based on federal law, see Fitzgerald, supra note 23, at 280 (noting that *Testa v. Katt* "held that the supremacy clause . . . prohibits state courts from discriminating against federal claims by refusing to adjudicate them, so long as state courts hear similar claims under state law"); id. at 282 (arguing that Alden v. Maine, 527 U.S. 706 (1999), "may represent a significant narrowing of *Testa*'s nondiscrimination principle"), a different question arises with respect to the state court's obligation to consider a contention of federal law raised by a litigant with respect to a claim for relief that the court has decided to hear, see, e.g., Hart, supra note 181, at 507 ("The supremacy clause, of course, makes plain that if a state court undertakes to adjudicate a controversy it must do so in accordance with whatever federal law is applicable. The doubt concerns a state court's power to decline to adjudicate . . . ."). The Supremacy Clause requires state courts to honor the dictates of applicable federal law in the course of deciding the cases before them, and, in order to fulfill this duty, the court must afford litigants an opportunity to raise contentions based on federal law. R R

185. This, of course, assumes that the state courts would be bound by the reasoning, as well as by the holdings (narrowly read), of the Supreme Court's adequacy decisions. If only the fact-specific holdings were binding on state courts, then they could eschew a standard-like analysis, and would merely have to refrain from enforcing procedural bars in circumstances where the Supreme Court had previously held the particular procedural rule inadequate as applied. Thus, for instance, assuming, as I do, that the Court's

fect, when a federal contention was at stake, even clear-cut rules would become standards. Though it is possible that a rule's purposes may in some cases be equally well served by other events during litigation, conditioning the enforcement of a forfeiture on the absence of such other events would increase the judicial effort required to rule on questions of procedural default. Standards are costlier to apply than rules;[186] and the state has a valid interest in minimizing the costs of application by keeping the rules rule-like.[187] Accordingly, when the adequacy analysis balances the state's interest in enforcement of the rule against the federal interest in vindication of the federal right, the state's side of the equation should include the state's systemic interest in maintaining rule-like rules, not merely the state's interest in enforcement of the rule in the particular case.

Even if the Supreme Court acknowledges as a theoretical matter that rigorous adequacy analysis imposes costs on the courts that must employ it, the Court itself will not experience those costs. The Court presumably will recognize that it ought to follow its adequacy precedents in each case that it selects for review; but the Court's complete discretion with respect to its certiorari docket[188] guarantees that the Court will face the obliga-

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inadequacy holdings set federal common law rules that bind state courts, the narrowest reading of *Lee*'s effect on state court procedure would be that a Missouri state court may not uphold the denial of a motion for a continuance (made in response to unexpected events during trial) based on the movant's failure to comply with Missouri Supreme Court Rules 24.09 and 24.10, when the relevant information was previously provided to the court during opening statements, testimony, and other events during a short trial and the trial court never mentioned the asserted procedural deficiencies when denying the motion. A broader reading, however, could require state courts not only to follow the rule that Missouri Supreme Court Rules 24.09 and 24.10 are inadequate under the circumstances present in *Lee*, but also to engage in an *analysis* similar to that undertaken by the *Lee* Court in reaching its holding of inadequacy. Such an analysis would extend to, and could require the state courts to invalidate the application of, rules other than Missouri Supreme Court Rules 24.09 and 24.10, under circumstances other than those described in *Lee*.

186. Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 570 (1992).

187. See Hart & Wechsler, supra note 1, at 585 ("Isn't there a legitimate state interest in enforcing the rule as a *rule*?"); Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 179 (1995) ("There is . . . a structural value in being able to rely on procedural rules of general applicability, and allowing an after-the-fact focus on whether the state might have used less drastic procedures would threaten to undermine the utility of rules." (citation omitted)). R

188. See 28 U.S.C. § 1257(a) (2000). For discussions of the statutory origins and development of the Supreme Court's control over its docket, see Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643, 1649–1704 (2000) [hereinafter Hartnett, Questioning Certiorari] (describing the passage of legislation in 1891, 1914, 1916, and 1925 concerning the Supreme Court's jurisdiction); Edward Hartnett, Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?, 75 Tex. L. Rev. 907, 933–55 (1997) (describing the passage of the 1914 legislation). In a passage that foreshadows some of the arguments I make here, Professor Hartnett posits that the Supreme Court's discretion with respect to review of state court judgments facilitated the Court's

tion to perform as-applied analysis of a state-law procedural bar only in cases where at least four Justices wish to grant review. In the state courts, by contrast, the as-applied approach creates an obligation that governs—in theory—whenever a state trial or appellate court enforces a procedural default. Of course, I do not suggest that the Court should not create federal common law rules that may burden other courts to a greater degree than they burden the Court itself. However, if the Court were likely to experience directly the costs of its approach, the Court's institutional self-interest might provide additional assurance that the Court was exercising care in its analysis.[189]

Moreover, even if the Court had the institutional incentives to use care when employing as-applied review, the Court lacks relevant expertise concerning trial practice and state procedural systems. Few if any members of the Court have recent trial experience in any court, state or federal, and the likelihood that any Justice would be familiar with the procedures of a given state is minuscule.[190] Indeed, as I discuss in Part III, the Court itself periodically acknowledges that relative to the lower federal courts, it lacks expertise with respect to state procedures. Yet the Court's use of as-applied review in close cases may turn on what the Justices imagine they would have done if they had been the trial judge in the case, as

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incorporation of Bill of Rights guarantees into the Due Process Clause of the Fourteenth Amendment:

> [W]ould the Supreme Court have incorporated the Fourth, Fifth, Sixth, and Eighth Amendments if it were obliged to review every state judgment that upheld a criminal conviction or sentence over a defendant's objection based on one of these Amendments? And if it did, is it remotely possible that it would have spun out such elaborate doctrinal requirements if it were required to apply and enforce them in every case?

Hartnett, Questioning Certiorari, supra, at 1732.

189. Cf. Kaplow, supra note 186, at 609 ("Legislatures and courts may each be more sensitive to costs that they directly incur than to costs incurred by other institutions or by individuals, which may induce them to prefer an otherwise inappropriate formulation."). R

190. Only two of the current Justices have ever served as trial judges. Justice O'Connor served as a Judge of the Maricopa County Superior Court (Arizona's trial court of general jurisdiction) for some four years in the late 1970s, and Justice Souter served as an Associate Justice of the Superior Court of New Hampshire (New Hampshire's trial court of general jurisdiction) for roughly five years in the late 1970s and early 1980s. See The Justices of the Supreme Court, at http://www.supremecourtus.gov/about/biographies current.pdf (last visited Nov. 8, 2002) (on file with the *Columbia Law Review*). Justices O'Connor and Souter also served as state appellate judges—Justice O'Connor on a mid-level state appellate court (the Arizona Court of Appeals) and Justice Souter on New Hampshire's highest court (the Supreme Court of New Hampshire). Id. (Prior federal appellate service is more common: Seven of the current Justices have served for a time on a federal court of appeals. See id.) A number of the current Justices undoubtedly spent time as litigators prior to going on the bench; but with the exception of Justice Thomas, all the Justices have been on one bench or another for at least the past two decades, see id., so it seems fair to say that the level of recent litigation experience among current members of the Court is minimal.

well as on the Justices' evaluation of how different parts of a state's procedural system relate to one another.[191]

In this regard, the Justices' reasoning in *Lee v. Kemna* provides an illustration. During oral argument in *Lee*, the questioning frequently focused on what the trial judge would have been thinking at relevant points during the trial.[192] These questions accurately foreshadowed the focus of both the majority and the dissent. The majority summed up its finding of inadequacy by reconstructing the trial from the perspectives of Lee's counsel and of the trial judge:

> Caught in the midst of a murder trial and unalerted to any procedural defect in his presentation, defense counsel could hardly be expected to divert his attention from the proceedings rapidly unfolding in the courtroom and train, instead, on preparation of a written motion and affidavit. Furthermore, the trial court, at the time Lee moved for a continuance, had in clear view the information needed to rule intelligently on the merits of the motion.[193]

Thus, in the view of the majority, "given 'the realities of trial,' . . . Lee substantially complied with Missouri's key Rule."[194] The dissenters, for their part, relied heavily on their views of how judges and lawyers think and act at trial. They argued that "seasoned trial judges are likely to look upon continuance motions based on the absence of witnesses with a considerable degree of skepticism";[195] that trial lawyers routinely "us[e] hyperbole in statements to the jury but then us[e] careful and documented arguments when making representations to the court in support of requests for specific rulings," and that "[t]rial judges must distinguish between the two on a daily basis";[196] that "[w]hen Lee's witnesses were then reported missing, the judge had ample reason to believe they had second thoughts about testifying";[197] and thus that "[b]efore any careful trial judge granted a continuance in these circumstances, he or she would

191. Cf. Recent Developments, supra note 147, at 714–15 (1965) (arguing that in *Henry*, the Court's "lack of knowledge of the reasons supporting local practice was illustrated by the failure . . . to recognize that the Mississippi rule serves purposes that were not satisfied by the pro forma objection in the defendant's directed verdict motion").

192. See, e.g., Transcript of Oral Argument at 5, Lee v. Kemna, 534 U.S. 362 (2002) (No. 00-6933), available at 2001 WL 1398620 ("QUESTION: So, the trial judge is supposed to remember the opening statement by--by defense counsel when he passes on a motion for a continuance that's made at the end of the trial?"); id. at 23 ("QUESTION: . . . I don't think, if I were a trial judge, I would have thought these witnesses are about to be found within—within a reasonable time."); id. at 35–36 ("QUESTION: . . . [I]f we're going to make an argument based on what trial counsel could be expected to do, why isn't it equally fair to make an argument about what trial judges could be expected to do?"); id. at 42 ("QUESTION: I don't suppose a lot of judges concentrate intently on opening statements the way they do perhaps motions that they have to decide or something like that.").

193. *Lee*, 534 U.S. at 366.

194. Id. at 382.

195. Id. at 401 (Kennedy, J., joined by Scalia & Thomas, JJ., dissenting).

196. Id.

197. Id. at 403.

want a representation that the movant believed the missing witnesses were still prepared to offer the alibi testimony."[198]

The terms in which the majority and dissent couched their disagreement in *Lee* illustrate that trial experience is an asset in performing a rigorous as-applied review.[199] Likewise, a court evaluating the state's interest in a procedural rule, as applied in a particular case, would benefit from a broader knowledge of how the various pieces of that state's procedural system fit together. And a court performing such a review would likely perform it more carefully if it knew that it would be obligated to use an equally searching approach the next time—or the next 100 times—it encountered a case involving a procedural default. As I have noted above, the Supreme Court lacks each of these attributes; by contrast, as I discuss in Part II.B, the lower federal courts possess them all.

B. *The Institutional Advantages of the Lower Federal Courts*

Having assessed some institutional characteristics that may make the Supreme Court less well suited to perform a stringent as-applied adequacy review, I now turn to an examination of the lower federal courts. As noted above, the vast majority of federal court rulings on independent and adequate state grounds occur in the context of habeas review by lower federal courts.[200] In contrast to the Supreme Court, lower federal courts are more likely to be staffed by judges familiar with trial practice and state court procedure. Moreover, when a lower federal court employs searching as-applied review, the standard set by that ruling is as likely to operate on the lower federal courts themselves as it is to constrain state courts.

For obvious reasons, the judges involved in federal habeas review are likely to have more trial experience and more expertise in state procedure than do the members of the Supreme Court. By definition, federal district judges have recent trial experience. Moreover, though federal trial experience does not automatically yield expertise in state procedure, and though state procedures often do not mimic federal procedures as a

198. Id.

199. Admittedly, *Lee* also illustrates that such experience provides no guarantee of consensus. In *Lee*, the federal district judge found the procedural ground adequate to bar habeas review, see supra note 114 and accompanying text, while another federal district judge, sitting by designation on the Court of Appeals, dissented from the panel's affirmance of the district court on the ground that the state rules were inadequate as applied, see Lee v. Kemna, 213 F.3d 1037, 1047 (8th Cir. 2000) (Bennett, C.D.J., dissenting). But such disagreements merely illustrate that on close adequacy questions even relatively expert judges may differ. That fact does not justify encouraging the resolution of such close questions by Supreme Court Justices—who have even less expertise—without the benefit of the lower federal courts' deliberations on the question. R

200. Such rulings are, of course, ultimately subject to Supreme Court review, and would continue to be subject to that review under my proposal. See infra Part III.C.

formal matter,[201] the actual practices in a given federal district may sometimes parallel the practices in the corresponding state trial courts.[202] In addition, many federal district judges have significant practice experience as litigators and/or judges in the state where their district is located.[203] Although federal Court of Appeals judges are less likely to have such experience, the Court of Appeals' consideration of a district court's adequacy determination can be informed by the lower court's assessment.

Additionally, institutional structure gives the lower federal courts (unlike the Supreme Court) a practical motive to weigh carefully the likely results of as-applied review: If a lower court adopts a particularly searching level of as-applied review in one case, the court will then be constrained to apply a similar level of review in future habeas cases.[204] Lower federal courts cannot pick and choose the cases on their dockets as the Supreme Court does.[205] A federal habeas court thus has an incentive to craft a standard that can be applied in future cases without undue expenditures of judicial time.

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201. See, e.g., John B. Oakley & Arthur F. Coon, The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure, 61 Wash. L. Rev. 1367, 1369 (1986) (based on a survey of state court procedures, finding that jurisdictions "generally following the model of the Federal Rules . . . embraced a majority of states but a minority of our national population" and that "only a minority of states have embraced the system and philosophy of the Federal Rules wholeheartedly enough to permit classification as true federal replicas").

202. For an argument (with respect to civil litigation) that in three particular states, federal and state courts apply "uniform procedural standards . . . in practice, notwithstanding fundamental differences in the texts of [the] federal and state procedural rules," see Thomas O. Main, Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure, 46 Vill. L. Rev. 311, 319 (2001).

203. See Robert L. Stern et al., Supreme Court Practice 134 (8th ed. 2002) ("[M]ost federal district and appellate judges are appointed from states where they previously practiced or otherwise acquired some knowledge of the home state's legal system."); Steven Flanders, Local Rules in Federal District Courts: Usurpation, Legislation, or Information?, 14 Loy. L.A. L. Rev. 213, 263 (1981) ("Federal judges, for the most part, are products of the locations they serve.").

204. This is most obvious with respect to the treatment of circuit precedent by a federal court of appeals. Admittedly, the use of as-applied review by a particular district judge does not set a precedent that binds the other judges in the district, but any given judge is likely to feel an obligation to be somewhat consistent in his or her own approach to adequacy review.

205. This analysis is not changed by the requirement that the petitioner obtain a certificate of appealability in order to appeal to the Court of Appeals. When a district court denies a habeas petition on the ground that the petitioner procedurally defaulted in state court, one of the things that the petitioner must show in order to obtain a certificate of appealability is that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 478 (2000). The more searching the review of the adequacy of the procedural bar, the more labor-intensive that part of the certificate-of-appealability analysis becomes. Accordingly, federal court of appeals judges are likely to have a similar incentive to be judicious in their use of rigorous as-applied adequacy review.

Yet another institutional safeguard arises from the principle that adequacy review of state rules should not be applied to invalidate forfeitures that would be upheld in similar federal proceedings. As Daniel Meltzer has argued, the standards for adequacy of state procedural rules "should be no more forgiving than the analogous federal domestic law."[206] This idea provides a practical limit on the degree of as-applied review to be used in the undue burden analysis: If the rule, as applied, would be enforced in a federal proceeding, generally that rule, as applied, should not be invalidated under the undue burden branch of the adequacy doctrine.[207] Conversely, a holding of inadequacy with respect to a state procedural rule should also lead federal courts to refrain from enforcing forfeitures based on similar federal rules under like circumstances.[208] Meltzer points out that such parallelism can "help prevent one of the feared consequences of federal common lawmaking—overreaching federal regulation that is insensitive to the institutional interests of the state governments."[209] This constraint could provide an effective check on as-applied undue burden review, especially when that review occurs in the lower federal courts: The constraint will probably be most salient to courts that have more frequent occasion to enforce forfeitures in the course of federal proceedings.

In sum, the lower federal courts enjoy a comparative advantage over the Supreme Court in terms of the institutional characteristics that are relevant to as-applied undue burden review. It should be noted that I do not seek to make a broader argument concerning the relative capabilities of the various federal courts. Though my argument might seem relevant to analogous contexts, in those contexts some or all of the factors that contribute to the lower courts' comparative advantage will be missing. Thus, with respect to questions of federal (as opposed to state) procedure, the Supreme Court is likely to be more familiar with the overall system as well as with particular rules.[210] Likewise, with regard to as-ap-

206. Meltzer, Forfeitures, supra note 15, at 1203; see also John C. Jeffries, Jr. & William J. Stuntz, Ineffective Assistance and Procedural Default in Federal Habeas Corpus, 57 U. Chi. L. Rev. 679, 695 (1990) ("Surely if federal courts are entitled to insist on routine compliance with sensible procedures in their own trials, state courts should also be entitled to do so."). R

207. See, e.g., Francis v. Henderson, 425 U.S. 536, 542 (1976) ("There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants." (quoting Kaufman v. United States, 394 U.S. 217, 228 (1969))).

208. See, e.g., United States v. Latouf, 132 F.3d 320, 327 (6th Cir. 1997) (citing *Osborne* with respect to sufficiency of objection in federal criminal trial); United States v. Williams, 985 F.2d 749, 755 (5th Cir. 1993) (same).

209. Meltzer, Forfeitures, supra note 15, at 1179. R

210. This is not to say that members of the Court will necessarily have the expertise required for an optimal assessment of the wisdom of proposed federal procedural rules. Cf. Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brook. L. Rev. 841, 843–44 (1993) (noting that Supreme Court Justices, in reviewing proposed Federal Rules, might be tempted "to 'discuss a question on general principles

plied review of state laws concerning primary (nonlitigation) conduct, the lower federal courts' relative familiarity with state procedures would provide no advantage. Accordingly, my argument focuses on federal court review of state court procedural rules. In that context, I maintain, the lower federal courts' determinations are likely to be more accurate, in general, than those reached by the Supreme Court on direct review of state court judgments.

III. SUPREME COURT ABSTENTION AND LOWER FEDERAL COURT APPLICATION

Two conclusions can be drawn from the discussion in Parts I and II. First, cases arise in which rigorous adequacy analysis, expertly applied, could disclose that the state lacks a valid interest in enforcing a procedural bar in a particular case.[211] This insight is countered, however, by the second conclusion: The Supreme Court is relatively unlikely to possess either the necessary expertise or the incentive to engage carefully in such rigorous application. In both regards, the lower federal courts are significantly better suited to the task. Accordingly, I argue that the Court could meet many of the objections to as-applied review if it adopted an institution-specific approach. Under my proposal, the Court generally should not perform rigorous as-applied review on direct review of state court judgments, but could authorize the lower federal courts to perform such analyses in habeas proceedings; ultimately, the Court could review the resulting judgments in habeas proceedings, and its review would be informed by the reasoning of the lower federal courts.

My theory assumes that the Court has the power to apply on direct review the same searching as-applied analysis that I recommend for use in habeas proceedings. I will argue, however, that in cases where a state procedural bar could be surmounted only by a very rigorous as-applied adequacy review, the Court generally should exercise discretion to deny certiorari on direct review, or—if it has already granted certiorari—generally should refuse to apply the more searching analysis on direct review.

[even] when they [acknowledge that they] have forgotten the knowledge necessary for technical reasoning'" (quoting Oliver Wendell Holmes, Jr., The Common Law 64 (Mark DeWolfe Howe ed., 1963) (1881))).

211. Even if a rule serves valid state interests in the general run of cases (thus preventing facial invalidation under an undue burden analysis), a court might still hold the rule inadequate in a particular case if as-applied review is permitted. Of course, if a judge has extensive experience with the relevant state procedures—for instance, because the judge served on the state bench before being appointed to the federal bench—that experience might sometimes bias the judge in *favor* of the state procedural rule. Such a judge, therefore, might be more likely to make a finding of adequacy. However, even as to such judges, a regime that permits as-applied adequacy review will result in a finding of inadequacy more often than a system that permits only facial invalidation. (Put differently, a judge biased in favor of state rules may be less likely than other judges to find a rule inadequate as applied, but such a judge is, presumably, *even less* likely to find the rule facially inadequate.)

I describe my proposal as one for Supreme Court "abstention" on direct review, because I argue that though the Court *could* engage in searching as-applied review, concern for appropriate judicial administration will often counsel that the Court *should* not do so.

In framing my argument in this way, I am conscious of the fact that the term "abstention" has accumulated quite different associations in connection with the doctrines of *Younger*,[212] *Pullman*,[213] *Burford*,[214] and *Thibodaux*[215] abstention.[216] Such doctrines, which posit that the lower federal courts may sometimes decline to exercise the jurisdiction conferred on them by Congress,[217] raise questions of separation of powers because, as Martin Redish has argued, abstention by lower federal courts can be viewed as a refusal to implement Congress's statutory grant.[218] However, though Congress has provided a statutory framework for the Supreme Court's exercise of certiorari jurisdiction, it is well established that the statute grants the Supreme Court total discretion over its docket.[219] Accordingly, the Court's decision not to exercise review in a particular case does not raise separation-of-powers questions similar to those generated by lower-court abstention.

Moreover, in criminal cases in which the petitioner will be able to seek federal habeas relief, Supreme Court abstention on direct review merely delays federal as-applied adequacy review, rather than denying it. Arguably, this distinction would decrease the concerns traditionally asso-

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

213. See R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941). When the disposition of an unsettled question of state law might remove the need for a federal court to resolve a federal constitutional issue, the *Pullman* abstention doctrine counsels the federal court to stay its proceedings until the litigants have obtained a ruling on the state law issue from the state courts. See id. at 500–01. See generally Martha A. Field, Abstention in Constitutional Cases: The Scope of the *Pullman* Abstention Doctrine, 122 U. Pa. L. Rev. 1071 (1974) (describing and critiquing instances of *Pullman* abstention).

214. See Burford v. Sun Oil Co., 319 U.S. 315 (1943).

215. See La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

216. Although discussions of abstention sometimes also refer to "*Colorado River*" abstention, I have omitted it from my list because under Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), the general rule is that the pendency of a parallel state court proceeding does not require federal court abstention. See id. at 817–19 (stating general rule and discussing exceptions).

217. See Barry Friedman, A Revisionist Theory of Abstention, 88 Mich. L. Rev. 530, 530–31 (1989) [hereinafter Friedman, Revisionist Theory] ("In abstention cases, a federal court declines to exercise jurisdiction it unquestionably possesses in favor of the exercise of jurisdiction by a state court."); id. at 535 ("Abstention is controversial because it hampers a plaintiff's access to a lower federal court, even though the federal court has jurisdiction over the case and the parties.").

218. Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71, 73–74 (1984) [hereinafter Redish, Abstention]. But see David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 585 (1985) (arguing that "measured [judicial] discretion in [jurisdictional] matters" does not violate separation of powers).

219. See Shapiro, supra note 218, at 562–63; see also supra note 188. R

ciated with abstention,[220] because in such instances my abstention proposal would not deny a federal forum for as-applied adequacy review; rather, it would allocate the as-applied analysis to the lower federal courts, on habeas review, rather than to the Supreme Court, on direct review.[221] Of course, this argument applies only to criminal cases in which the defendant will later be able to obtain federal habeas review. In other criminal cases, and in all civil cases, Supreme Court abstention would mean that no federal court would be available to perform as-applied adequacy review;[222] and I address the difficulties posed by this fact in Part IV.B below.

As Part I demonstrated, there appears to be no hard-and-fast doctrinal reason why as-applied review could not be used to formulate the federal common law rules governing the undue burden adequacy analysis.

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220. In his analysis of lower court abstention doctrines, Martin Redish noted that since "*Pullman* abstention does nothing more in theory than delay federal adjudication," separation-of-powers concerns might be somewhat lessened because the doctrine "does not actually preclude the exercise of federal court jurisdiction." Redish, Abstention, supra note 218, at 90. Redish concluded, however, that "even a delay . . . may be considered a violation of separation of powers if it has not been contemplated by Congress." Id. R

It is true that the delay of federal court relief will impose costs on the petitioner. Cf. Meltzer, Forfeitures, supra note 15, at 1230 (arguing that when factfinding is needed to determine on direct review whether to excuse a state court default, the case should be remanded to the state trial court for such factfinding rather than leaving the petitioner to seek remedies in federal habeas). However, the costs of such delay must be balanced against the advantages to be gained from assigning as-applied review to courts better suited to perform it. R

221. Barry Friedman has argued that the traditional abstention doctrines should be reconceptualized based on "the notion that federal review may be necessary to protect federal interests, but . . . that such review need not always occur in a federal *trial* forum." Friedman, Revisionist Theory, supra note 217, at 533. Thus, Friedman notes that his theory may support abstention by lower federal courts "when federal interests . . . can be protected by direct review of state court decisions by the Supreme Court," id. at 547, or by federal habeas review after entry of a state court judgment, id. at 562. Somewhat similarly, my proposal contemplates that the Supreme Court should more readily abstain from as-applied federal adequacy analysis on direct Supreme Court review of a state court judgment, if it appears that such review can later be performed by federal habeas courts instead. See infra Part III.B. R

222. It is possible to imagine an alternative system in which Supreme Court abstention would not necessarily deny civil litigants the opportunity for as-applied review. For instance, Congress could establish a federal appellate court, inferior to the Supreme Court, with jurisdiction to review state court judgments that present questions of federal law. See generally Jon O. Newman, Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System, 56 U. Chi. L. Rev. 761, 774 (1989) (advocating "new appellate arrangements that permit federal law cases, relegated to state trial courts, to be eligible for federal court appeal" and arguing that "Supreme Court review through certiorari after state court appeal, although in theory available, is too limited in practice to ensure sufficient protection against inadequate state court exposition of federal law"); James E. Pfander, An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments after Seminole Tribe, 46 UCLA L. Rev. 161, 213–22 (1998) (arguing that there is no Article III barrier that would prevent Congress from authorizing lower federal appellate courts to hear appeals from state court judgments).

In theory, the Supreme Court would seem to possess the power to engage in as-applied adequacy analyses on direct review of a state court judgment. Part II, however, showed that in practice, the Court's institutional peculiarities (relative to other federal courts) render such searching review more troubling. However, one of the sources of the problem may also hold a key to its solution. As discussed above, the fact that the Supreme Court *may* review a state court judgment does not mean that the Supreme Court *must* do so. Similarly, even if the Court *could*, on direct review, declare a state ground inadequate as applied, it need not take the opportunity to do so. In this view, the Court could abstain from searching as-applied analysis on direct review, out of a recognition that it usually ought not to perform such review unassisted by the more expert views of lower federal courts.

Such a course would find support in Supreme Court precedents concerning adequacy. In *Lambrix v. Singletary*, for example, the state asserted both that *Teague v. Lane*[223] precluded habeas relief and that Lambrix's claim was procedurally barred. The Supreme Court reasoned that as between a procedural bar argument and a *Teague* issue, ordinarily the procedural bar should be considered first, because of the interest in avoiding the constitutional questions that would be raised by a *Teague* inquiry.[224] Nonetheless, the Supreme Court proceeded to address the *Teague* issue without resolving the question of procedural default. The Supreme Court did suggest that it seemed likely that Lambrix's claim was procedurally barred, but the Court acknowledged that this "may not be so."[225] Because "the courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit," and because the Court of Appeals had not addressed the procedural bar question, the Court avoided the issue and proceeded directly to the *Teague* question.[226]

The reasoning of *Lambrix* and similar cases[227] is not peculiar to the procedural bar context; rather, the *Lambrix* Court's approach mirrored

223. 489 U.S. 288 (1989). For a brief description of *Teague*, see infra text accompanying notes 235–239. R

224. Lambrix v. Singletary, 520 U.S. 518, 524 (1997).

225. Id. at 525.

226. Id.

227. See Rummel v. Estelle, 445 U.S. 263, 267 n.7 (1980) (rejecting state's assertion of procedural bar in habeas case, because U.S. Supreme Court "[d]efer[s] to the [federal] Court of Appeals' interpretation of Texas law"); County Court of Ulster County v. Allen, 442 U.S. 140, 153–54 (1979) (rejecting state's assertion of procedural bar on the ground, inter alia, "that three Second Circuit Judges, whose experience with New York practice is entitled to respect, concluded that the State's highest court had decided the issue on its merits"). In Jenkins v. Anderson, 447 U.S. 231 (1980), the Court explained its refusal to consider the state's contention that a habeas petitioner had procedurally defaulted his constitutional claims in his state court trial by stating that

> [c]onsiderations of judicial efficiency demand that a *Sykes* claim be presented before a case reaches this Court. The applicability of the *Sykes* "cause"-and-"prejudice" test may turn on an interpretation of state law. This Court's

the Court's more general practice of deferring to lower federal courts on questions of state law.[228] Admittedly, part of the explanation for this practice may be that the Court believes it should focus its time and effort on questions of federal, rather than state, law.[229] The Court often indicates, however, that the lower federal courts are better suited to the task of interpreting and applying state law.[230] As the Court has explained,

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> resolution of such a state-law question would be aided significantly by the views of other federal courts that may possess greater familiarity with Michigan law. Furthermore, application of the "cause"-and-"prejudice" standard may turn on factual findings that should be made by a district court.

Id. at 234 n.1 (citation omitted).

228. Of course, a federal court determination of state law in a diversity case does not raise exactly the same concerns as a federal court determination of the adequacy of a state procedural bar. For instance, state courts can disregard a federal court's ruling on a state-law issue, but—as discussed above—a Supreme Court determination of inadequacy can be seen as a federal common law ruling that binds state courts. Admittedly, a state court would not be bound by the ruling of a *lower* federal court on a question of federal common law. See, e.g., Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 825 (1994) ("[A] state court need not follow the holdings of any inferior federal court, including the court of appeals in whose geographical region the state court sits."); Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1049 (1977) ("[T]he constitutional decisions of inferior federal courts are not binding on state courts."); Pfander, supra note 222, at 201 n.157 ("Hornbook law holds that state courts must obey the precedents of the Supreme Court of the United States but not those of the lower federal courts."); cf. Donald H. Zeigler, Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law, 40 Wm. & Mary L. Rev. 1143, 1143–44 (1999) ("State courts vary greatly in the weight they give to lower federal court decisions [on questions of federal law]: some consider themselves bound by such decisions; others ignore them entirely. Most . . . take a position somewhere between these two extremes."). However, as a practical matter, to the extent that a determination of inadequacy by a lower federal court results in the grant of habeas relief, that determination can influence the future practices of the state courts. Thus, to the extent that the nonbinding nature of federal court rulings on state law contributes to the Supreme Court's practice of deference, cf. Leavitt v. Jane L., 518 U.S. 137, 146 (1996) (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting) (one reason the Court generally does not grant certiorari to review lower federal courts' determinations on state law question is that "the decision of a federal court (even this Court) on a question of state law is not binding on state tribunals"), such a rationale would be weaker in the context of adequacy determinations. R

229. See *Leavitt*, 518 U.S. at 145 (per curiam) ("Our general presumption that courts of appeals correctly decide questions of state law reflects a judgment as to the utility of reviewing them in most cases, not a belief that the courts of appeals have some natural advantage in this domain." (citations omitted)); 17 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4036 (2d ed. 1998) (noting "the value of preserving the Court's own attention and energies for the federal questions that clamor for deliberate decision").

To the extent that the Court views state-law questions as distractions from its mission to articulate federal law, such a view might also incline the Court to be less careful in its consideration of state procedures in the course of an adequacy determination.

230. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500 (1985) (stating that Court's deference to lower federal courts' interpretation of state statutes both relieves Court of need to review such interpretations and "reflect[s] our belief that district courts

> the expression of the views of the judges of [the intermediate federal appellate] courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions. This Court will not ordinarily decide them without that aid where they may conveniently first be decided by the court whose judgment we are called upon to review.[231]

From this perspective, direct Supreme Court review of a state court judgment ordinarily is not the best context in which to apply searching adequacy review. Instead of engaging in such review in the first instance, the Court could abstain from doing so, on the understanding that the lower federal courts would use more rigorous as-applied review in subse-

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and courts of appeals are better schooled in and more able to interpret the laws of their respective States"); *Leavitt*, 518 U.S. at 146 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting) (arguing that one reason for the Court's practice of not granting certiorari merely to review lower federal decisions on state law is that "[t]he courts of appeals are more familiar with and thus better qualified than we to interpret the laws of the States within their Circuits"); 17 Wright & Miller, supra note 229, § 4036 (arguing that the Court's "deference may be explained in part by the greater familiarity courts of appeals can claim with the law of states within each circuit"). But see *Leavitt*, 518 U.S. at 145 (per curiam) ("If, as we have said, the courts of appeals owe no deference to district court adjudications of state law, surely there is no basis for regarding panels of circuit judges as 'better qualified' than we to pass on such questions . . . ." (citations omitted)). R

On the question of whether federal courts of appeals should defer to federal district courts' state-law rulings, see infra note 231. R

231. Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) (vacating and remanding for reconsideration of state-law question by federal circuit court of appeals, in light of subsequent decision by state's highest court).

In contrast to its general practice of deference to lower federal courts' state-law rulings, the Court has held that the federal courts of appeals generally should review district courts' state-law rulings de novo. See Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991). The Court gave a number of reasons for this requirement. First, "[d]istrict judges preside alone over fast-paced trials," whereas "[c]ourts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy." Id. at 231–32. Second, court of appeals' deference on state-law issues would be "inconsistent with the principles underlying this Court's decision in *Erie*": such deference would promote forum-shopping (by denying federal court litigants "access to meaningful [appellate] review") and risk unfairness (by tolerating intrastate disuniformity among the federal district courts). Id. at 234. Third, the Court rejected the argument "that district judges are better arbiters of unsettled state law because they have exposure to the judicial system of the State in which they sit." Id. at 235; see also id. at 238–39 (rejecting the argument that "a district judge is better positioned to determine an issue of state law than are the judges on the court of appeals," and asserting that "the bases of state law are as equally communicable to the appellate judges as they are to the district judge"). However, the Court made clear that it intended its discussion to pertain only to court of appeals review, not to Supreme Court review. See id. at 235 n.3 ("We are not persuaded that the manner in which this Court chooses to expend its limited resources in the exercise of its discretionary jurisdiction has any relevance to the obligation of courts of appeals to review *de novo* those legal issues properly before them.").

quent federal habeas proceedings.[232] If the lower federal courts later made an as-applied adequacy determination in a habeas proceeding, the Supreme Court could review that determination. However, its review would be informed by the reasoning of the courts below.[233]

A. *A General Practice of Abstention*

The arguments outlined above suggest that in many instances the Court should avoid making as-applied adequacy determinations on direct review of state court judgments. Often, the Court could follow this policy simply by denying certiorari; additionally, in cases where it has granted certiorari, the Court could abstain from engaging in as-applied review.

In some cases, the briefs submitted with respect to the petition for certiorari may demonstrate that the case turns on a question of procedural default that will require as-applied adequacy review. In such instances, the Court could simply deny certiorari. In other cases, however, the Court might prefer to have the benefit of more extensive briefing and argument before deciding whether the adequacy question is one it can resolve on direct review. Moreover, it will not always be clear whether the question of adequacy will be determinative; for example, if a petitioner asserts two alternative bases for reversal, only one of which is subject to a claim of procedural bar, the Court might wish to have fuller briefing on both questions. In such a case, if the inadequacy question turned out to be a difficult one, the Court could abstain from resolving that question, without prejudice to the litigation of the question on habeas review.

B. *Some Exceptions*

A serious question arises, however, concerning the effect of such a practice on access to federal court relief. Clearly, Supreme Court abstention on direct review would eliminate the possibility of as-applied review for litigants in civil cases. Moreover, even as to criminal defendants who can seek habeas review, though the Supreme Court's refusal to address a petitioner's as-applied challenge on direct review might be formally "without prejudice" to the assertion of that challenge on habeas review, in practice, other circumstances might bar the grant of habeas relief to that

232. Under the current system, such review by lower federal courts would be unavailable to civil litigants; moreover, such review would fail to benefit criminal defendants in cases where other factors prevented the defendant from seeking federal habeas relief. For further discussion of these limitations, see infra Parts III.B, IV.B.

233. Even on direct Supreme Court review, the Court would have the benefit of any explanation provided by the state courts themselves. The state court judges, of course, will be expert in the relevant state's procedures. However, expertise is not the only requisite for adequacy review; the reviewing court must also be sensitive to the possibility that the procedural requirement, as applied, unduly burdens the assertion of the federal right. By definition, the as-applied undue burden precedents arose because state courts sometimes did not give due weight to this federal concern; this possibility supports the view that the adequacy issue demands informed analysis by a *federal* court, not just by the state courts themselves.

petitioner. Not all such circumstances will be apparent at the time a petitioner seeks direct Supreme Court review; accordingly, I discuss in Part IV.B the objection that my proposal would effectively foreclose relief to some litigants who might otherwise obtain redress on direct review. However, some of the relevant circumstances may be discernible at the time the petitioner seeks direct review. In cases where the Court anticipates a future bar to habeas relief, the Court would be justified in relaxing the proposed general policy against rigorous as-applied analysis on direct review.[234]

Habeas petitioners face a number of doctrinal barriers not applicable on direct Supreme Court review. For example, the Supreme Court can announce and apply a new constitutional rule on direct review of a state court judgment of conviction, but federal courts cannot do so on habeas review unless the case falls within one of the two exceptions articulated in *Teague v. Lane*.[235] Thus, under *Teague*, a habeas petitioner can obtain relief on the basis of a "new rule" only if the rule either "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"[236] or concerns "'procedures that . . . are "implicit in the concept of ordered liberty."'"[237] *Teague*'s effect is heightened by the fact that the Court generally has taken a broad view of what constitutes a "new rule"[238] and a narrow view of the scope of the second exception.[239] Another disparity between direct and habeas review concerns the question of harmless error: On direct review the Supreme Court will not affirm on the ground of harmless

234. Daniel Meltzer has suggested to me that other considerations might sometimes lead the Court to favor rigorous adequacy analysis on direct review. For example, the Court might wish to send a strong message to state courts that they are enforcing procedural defaults in an unfair manner, and it might believe that this message would be more forceful coming from the Court itself than from lower federal courts on habeas review. In addition, in some instances the Court might doubt whether the lower federal courts would provide appropriately rigorous as-applied review, or the Court might perceive the injustice in a particular case to be so great that it would engage in as-applied analysis on direct review to ensure that the result was corrected swiftly and firmly.

Nowadays, however, such instances may be more rare than they were in the 1950s and 1960s. Cf. Glennon, supra note 4, at 877 ("[T]he premise . . . that state courts are as fair and competent as federal courts[ ] makes more sense today than during the 1950s and 1960s."). R

235. Teague v. Lane, 489 U.S. 288, 307, 316 (1989) (plurality opinion) (articulating general prohibition on application of new rules on habeas review, and describing two exceptions); see also Penry v. Lynaugh, 492 U.S. 302, 313 (1989) (majority opinion) (following *Teague*).

236. *Teague*, 489 U.S. at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

237. Id. (quoting *Mackey*, 401 U.S. at 693 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).

238. See generally 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 25.5, at 1064–1106 (4th ed. 2001) (surveying Supreme Court precedents concerning "new rules" under *Teague*).

239. See id. § 25.7, at 1121.

error unless the state establishes that the error was harmless beyond a reasonable doubt.[240] By contrast, federal habeas courts now ask "whether the . . . error 'had substantial and injurious effect or influence . . . .'"[241] Each of these differences can prevent the grant of habeas relief to petitioners who could have succeeded if the Supreme Court had reached the merits on direct review.

In addition, even apart from the *Teague* barrier, if the state courts have ruled on the merits of the petitioner's federal contention, then 28 U.S.C. § 2254 requires federal habeas courts to employ deferential standards of review.[242] These deferential standards, particularly the standards concerning questions of law and the application of law to fact, differ from the standards applied on direct Supreme Court review. On direct review, the Supreme Court reviews legal questions de novo, and commonly reviews the application of law to fact de novo as well. By contrast, section 2254(d) provides that with respect to such questions, a federal habeas court cannot grant relief unless the state court ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[243] Thus, to the extent that section 2254(d) applies, it could bar relief on habeas in cases where a petitioner could have succeeded if the Supreme Court had reached the merits on direct review.

It is unclear, however, whether section 2254(d) will ever apply in cases involving state court procedural default. In many procedural default cases, there will have been no state court determination on the merits of the petitioner's federal contention. In such cases, section 2254(d) will be inapplicable, since its strictures are limited to "claim[s] that w[ere] adjudicated on the merits in State court proceedings . . . ."[244] In some procedural default cases, though, there may have been a lower state court ruling on the merits.[245] For example, a state appellate court might hold that a litigant's purported default bars appellate review of the state trial court's merits determination. In such an instance, there arguably has been a determination "on the merits," for purposes of section 2254(d). It should be noted that at least one circuit has rejected this contention: In *Liegakos v. Cooke*, the Seventh Circuit took the view that where a lower state court rules on the merits but the state appellate court reaches only the issue of procedural default, the claim has not been "ad-

240. See Chapman v. California, 386 U.S. 18, 24 (1967).

241. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)); see also Barry Friedman, Failed Enterprise: The Supreme Court's Habeas Reform, 83 Cal. L. Rev. 485, 492–503, 545 (1995) (criticizing *Brecht*'s harmless error rule as unjust, unwise as a matter of court administration, and contrary to federalism principles).

242. See 28 U.S.C. §§ 2254(d)–2254(e)(1) (2000).

243. Id. § 2254(d)(1).

244. Id. § 2254(d).

245. I am grateful to Daniel Meltzer for drawing my attention to this issue.

judicated on the merits" for purposes of section 2254(d).[246] However, if the Court were to decide that such cases fall within section 2254(d), then some petitioners would be ineligible for habeas relief even though their claims could have succeeded had the Supreme Court reached the merits on direct review.

Where a defendant's claim appears to fit within one of these categories, the Court would be justified in relaxing the general rule against searching as-applied analysis on direct review. The considerations in favor of Supreme Court abstention on direct review are counterbalanced by the fact that in these cases, direct review is the petitioner's only opportunity for federal court relief. In such instances, accordingly, the Court should have more latitude to question the adequacy, as applied, of the procedural default.

C. *Reviewing Lower Federal Court Determinations*

If the Court were to adopt a policy of abstention on direct review, this would not foreclose Supreme Court as-applied adequacy analysis; it merely would defer that analysis until the lower federal courts had considered the question. The Supreme Court would retain general control over the as-applied undue burden branch of the adequacy doctrine, through its review of the judgments rendered by lower federal habeas courts. Thus, to the extent that the Court wishes to maintain national uniformity with respect to as-applied adequacy review,[247] it could do so. In reviewing the lower federal courts' determinations, however, the Court would have the benefit of their analyses of the procedural issues.[248]

The weight to be accorded to the lower courts' reasoning might vary somewhat. For instance, the Court might give more weight to a determi-

246. Liegakos v. Cooke, 106 F.3d 1381, 1385 (7th Cir. 1997).

247. Arguably, in the context of as-applied adequacy review, nationwide uniformity may be less important than intracircuit uniformity. The more specific an as-applied ruling is to a particular state's practices, the less likely that it will be necessary for that ruling to be reconciled closely with rulings concerning the procedures of another state. To the extent that this argument holds true, the necessary uniformity could be provided by the courts of appeals.

248. In a somewhat similar vein, commentators have argued that a period of lower court disagreement on a question of federal law can be desirable, in that "[t]he process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule." Estreicher & Sexton, supra note 29, at 716. In this Article, I am not making such a broad argument for percolation. Rather than advocating that the Court avoid as-applied review entirely for some period of time, I merely contend that with respect to any particular state court default by a criminal defendant, rigorous as-applied adequacy review usually should occur on habeas review rather than on direct Supreme Court review. However, the close kinship between my proposal and the percolation concept is demonstrated by the fact that Estreicher and Sexton also argue that "where federal habeas review is available, the Court should ordinarily defer consideration of rulings on direct review from state criminal proceedings, and await the outcome of federal habeas review." Id. at 732 (footnote omitted). R

nation in which every lower federal court judge had concurred, than to a determination reached by a split court of appeals, or to a court of appeals' reversal of a district judge's ruling.[249] Moreover, the Court might accord more weight to a lower court determination if some or all of the lower court judges had extensive experience with the procedure of the relevant state.[250] Likewise, the Court might be more inclined to defer to a federal court finding of inadequacy (in a case involving failure to comply with state trial-level procedures) if the procedural defect is one that the trial court would be expected to notice and yet the procedural-default argument was first asserted on appeal.[251] In other cases, the lower court determination may deserve less deference: For instance, a divided panel of the court of appeals might reverse a district judge, and all the lower court judges involved might lack direct familiarity with trial procedure.[252] In such a case, however, although the lower federal judges might have no advantage in terms of expertise, they still would be subject to the incentives discussed in Part II.B—incentives not shared in the same immediate way by the Justices of the Supreme Court.[253] Thus, even in such cases, Supreme Court abstention on direct review would likely result in a more careful and judicious application of adequacy review in a later habeas proceeding.

Such considerations are useful in assessing the result in *Lee v. Kemna*. Although *Lee* was a habeas case, and thus the Court had the benefit of the lower federal courts' views, the Court reversed the judgment of the Court of Appeals (which had affirmed the judgment of the District Court). At first glance, then, the result in *Lee* might seem at odds with my argument that the Court should give weight to the lower federal courts' determinations. However, the judges involved in *Lee* showed no unanimity with respect to the procedures in question. During the state court litigation, the trial judge never mentioned the pertinent rules and never suggested that Lee's noncompliance posed any impediment to the consideration of his continuance request; to the contrary, the trial court denied the request on the merits.[254] In the federal habeas proceeding, though the district

249. Cf. Leavitt v. Jane L., 518 U.S. 137, 145 (1996) (per curiam) (stating that an "appeal to the supposed greater expertise of courts of appeals regarding state law is particularly weak (if not indeed counterindicative) where a Court of Appeals panel consisting of judges from Oklahoma, Colorado, and Kansas has reversed the District Court of Utah on a point of Utah law").

250. See, e.g., McMillian v. Monroe County, 520 U.S. 781, 786 & n.3 (1997) ("defer[ring] considerably" to court of appeals' expertise with respect to Alabama law, where "two of the three judges on the Eleventh Circuit's panel are based in Alabama" and "this is the second Eleventh Circuit panel to have reached" the relevant determination).

251. Cf. infra note 254 and accompanying text (discussing the fact that the trial judge in *Lee* never mentioned the procedural defects that the state appellate court later used as the basis for refusing to review the merits of Lee's federal-law contention). R

252. This might occur if the district judge were a new appointee and if all of the relevant district and court of appeals judges lacked litigation experience.

253. See supra text accompanying notes 204–209. R

254. See supra text accompanying note 105. R

court found the requirements to be adequate and a majority of the Court of Appeals agreed, this conclusion provoked a vigorous, lengthy, and thoughtful dissent by Chief District Judge Bennett, who sat by designation on the appellate panel.[255] In addition, two Eighth Circuit judges indicated that they would have granted a petition for rehearing en banc.[256] Moreover, in the light of the standard view that the undue burden analysis should proceed at the level of facial, not as-applied analysis, it was possible that the panel majority simply failed to perform an as-applied review: The majority's brief per curiam opinion took a mere two sentences to conclude that the rules presented an adequate state ground, and the opinion did not mention the distinction between facial and as-applied review.[257] If the panel majority assumed that facial review was the only option, then its finding of adequacy need not carry weight in the Court's analysis.

Despite the support it finds in the Court's practices with respect to questions of state law, my proposal also must confront the fact that such deference is much less common with respect to matters of federal law. Federal appellate courts defer to federal district courts with respect to determinations of fact,[258] but generally they review questions of federal law de novo. De novo Supreme Court review promotes the uniformity and clarity of federal law; thus, one might question why the Court should defer on a question of inadequacy, if, as I have argued, that question is one of federal common law. The answer cannot simply be that deference is more acceptable with respect to procedural law. Some of the Court's most far-reaching decisions have concerned the constitutional law of criminal procedure, and the Court has not evinced an inclination to defer, in such matters, to the judgment of the lower federal courts.[259]

On the other hand, as *Lambrix* indicates, the Court has suggested that some deference to lower federal courts makes sense when the question is one of state court procedural default. With respect to adequacy review, one justification for such a distinction is that as-applied adequacy determinations often will be tied closely to the procedural specifics of the relevant state, as well as to the unique events of a particular trial.[260] In

255. Lee v. Kemna, 213 F.3d 1037, 1039 (8th Cir. 2000) (Bennett, C.D.J., dissenting).

256. Id. at 1037 n.*.

257. See id. at 1038 (per curiam).

258. See, e.g., Fed. R. Civ. P. 52(a) (findings of fact by a district court in a civil case "shall not be set aside unless clearly erroneous").

259. Indeed, the effect of Teague v. Lane, 489 U.S. 288 (1989)—and, now, 28 U.S.C. § 2254(d)(1)—is to limit the lower federal courts' involvement in the development of new constitutional rules.

260. This distinction helps to explain why the proposal outlined in this Article would not generalize to the context of Supreme Court review of questions of federal court procedure. Although members of the Court tend to lack recent trial experience, it is much more likely that they could become familiar, over time, with the details of federal procedure than that they would gain working knowledge of the procedural systems of each state.

other contexts, when the evaluation of a federal claim requires scrutiny of state law, the Court has deferred to lower federal court determinations on the state law questions.[261] Deference could serve a similar function in the adequacy context, because as-applied adequacy determinations likewise require scrutiny of state law, as well as expertise in trial procedure more generally.

Moreover, Supreme Court abstention on direct review would not threaten the uniformity of federal law. For one thing, the Court itself has been inconsistent in its use of as-applied review. In addition, the need for nationwide uniformity may not be as great in the context of as-applied adequacy review, in light of the fact-bound and state-specific nature of the analysis.[262] The ceiling set by the federal courts' own procedural default standards[263] would provide some guidance to the lower courts; and the Supreme Court, where necessary, could promote uniformity by reviewing the adequacy determinations of the habeas courts.

Accordingly, this proposal would permit more searching as-applied review while meeting the objections, detailed above, concerning the Court's lack of expertise and of appropriate institutional incentives. However, the proposal raises a number of other questions. Why should some (and only some) state criminal defendants be able to obtain—through habeas review—a more rigorous adequacy review than other state court litigants? Should not the standards applied on habeas review parallel those applied to the same case on direct review? Does Congress's recent habeas legislation call the proposal into question? I address these questions in Part IV, below.

IV. Potential Objections

The proposal outlined above could be questioned from a number of angles. If, as some have argued, federal habeas review should serve as a

261. See, e.g., Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738 (1989) (with respect to section 1983 claim against school district, remanding so that "the Court of Appeals, whose expertise in interpreting Texas law is greater than our own" could determine locus of policymaking authority); Pembaur v. City of Cincinnati, 475 U.S. 469, 484 & n.13 (1986) (for purposes of municipal liability under section 1983, "not question[ing]" court of appeals' determination that county sheriff and county prosecutor were policymaking officials under state law, because Court "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals").

Concededly, the Court in *Pembaur* reversed the court of appeals' determination on the question of section 1983 liability, but it did so based on reasoning that deferred to the court of appeals' determination of the subsidiary question of state law. See id. at 484–85. For present purposes, such cases suggest that the Court benefits from lower federal court consideration in cases where expertise in state law is useful, even if the Court ultimately does not agree with the court of appeals' determination. So too, here, abstention on direct review can be appropriate, whether or not the Supreme Court ultimately defers to the lower federal courts' adequacy evaluations.

262. In the context of as-applied analysis, the most important type of uniformity may be intrastate uniformity, and this can be provided by federal court of appeals review.

263. See supra text accompanying notes 206–209. R

substitute for Supreme Court review of state court convictions, then critics might contend that habeas review should be no more searching than direct Supreme Court review. Others, moreover, might point out that in practice habeas is at best an incomplete substitute for Supreme Court review, because of the potential barriers to habeas relief; for many petitioners, review delayed (until habeas) will be review denied (because habeas review is unavailable or ineffective). In this view, the Supreme Court should not abstain from as-applied review, because for most petitioners such abstention will mean that as-applied review never occurs. Finally, some might question whether the Antiterrorism and Effective Death Penalty Act's provisions relating to procedural default have a bearing on the analysis. In this Part, I address these issues, and conclude that although some of them—in particular, the concern with access to federal court relief—have merit, these concerns do not necessarily outweigh the advantages of my proposal.

A. *An Argument for Parallel Treatment*

One possible argument holds that habeas review should parallel the relief the petitioner could have obtained on direct Supreme Court review in the same case.[264] Closer examination, however, shows that current doctrine does not require rigid parallelism between direct and habeas review, and that the Court's rationales for applying the procedural default doctrine in the habeas context are consistent with the proposal I advance here.

As noted above, in many instances my proposal would result in broader review by habeas courts than the Supreme Court would undertake on direct review in the same case. If the notion behind federal habeas review is that each state prisoner should have one opportunity for effective federal court review of their federal-law contentions, then, as Barry Friedman and James Liebman have argued, federal habeas proceedings can be viewed as surrogates for the Supreme Court's appellate review of state court convictions.[265] In this view, it might at first seem

264. Another sort of parallelism argument holds that there should be no "inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own." Coleman v. Thompson, 501 U.S. 722, 751 (1991). Such a principle does not conflict with the proposal advanced in this Article. See supra text accompanying notes 206–209. R

265. Barry Friedman has argued that the Supreme Court "expanded the scope of the writ of habeas corpus in [Brown v. Allen, 344 U.S. 443 (1953)] because the Court recognized that it no longer could shoulder the burden on direct review of scrutinizing constitutional claims arising in state criminal proceedings." Barry Friedman, A Tale of Two Habeas, 73 Minn. L. Rev. 247, 253–54 (1988) [hereinafter Friedman, Tale]. From this premise, Friedman argues that key features of habeas review, including the procedural default doctrine, should be viewed in light of "the 'appellate' rationale for *Brown*." Id. at 255.

Similarly, James Liebman posits that parity between direct Supreme Court review and federal habeas review "seems simple and logical" because it "gives all state prisoners the

anomalous that habeas courts could hold inadequate a state ground that the Supreme Court would not disturb on direct review.[266]

Indeed, the suggestion that habeas review should disregard a state ground that would be held adequate on direct Supreme Court review seems to echo the now-rejected doctrine of *Fay v. Noia*.[267] In *Noia*, the Court reasoned that the habeas courts do not review the state court judgment, but rather the legality of the ongoing detention.[268] On this ground, among others,[269] the Court held that the limitations on Supreme

same limited appellate review, but spreads out that review among the entire federal judiciary." James S. Liebman, Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 2009–10 (1992).

266. See Friedman, Tale, supra note 265, at 298 (arguing that under the "appellate model" of habeas, "habeas courts would not hear defaulted claims unless they could be reviewed directly by the Supreme Court"); see also Henry M. Hart, Jr., Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 119 (1959) (arguing that the Supreme Court should not "concede to the district courts a wider scope of review of the correctness of state-court judgments as they stand on the record already made than it asserts itself"); Meltzer, Forfeitures, supra note 15, at 1132 ("[T]he standards applied by federal habeas courts in determining the acceptability of state court forfeitures should not differ from the standards applied by the Supreme Court on direct review of the same state criminal cases."). R R

A related argument might be that the states' dignity is more offended by a lower federal court's finding of inadequacy than by a similar finding on the part of the Supreme Court. The current Court's solicitude for state "dignity" in other contexts is notorious. See, e.g., Ann Althouse, On Dignity and Deference: The Supreme Court's New Federalism, 68 U. Cin. L. Rev. 245, 250–55, 265 (2000) (noting, and critiquing, Court's emphasis on state dignity in sovereign immunity decisions); Evan H. Caminker, Judicial Solicitude for State Dignity, 574 Annals Am. Acad. Pol. & Soc. Sci. 81, 84–91 (2001) (arguing that current state sovereign immunity doctrine cannot be justified by "state dignity," whether the latter is viewed as an "intrinsic expressive norm" or an "instrumental expressive norm"); Daniel J. Meltzer, State Sovereign Immunity: Five Authors in Search of a Theory, 75 Notre Dame L. Rev. 1011, 1038–47 (2000) (critiquing Court's reliance on notions of state dignity and state sovereignty in analyzing sovereign immunity and other issues implicating federalism). Moreover, the Court has argued that the procedural-default bar to federal habeas relief for state prisoners "concerns the respect that federal courts owe the States and the States' procedural rules." Coleman v. Thompson, 501 U.S. 722, 726 (1991). One might question, however, whether an abstract concern with state "dignity" should outweigh a state prisoner's interest in securing a federal forum for a claim of federal right. See Larry W. Yackle, Explaining Habeas Corpus, 60 N.Y.U. L. Rev. 991, 1058 (1985) (arguing that the Court's "insistence upon respect for state procedural rules, even when litigants stand to lose the opportunity to litigate federal issues in *any* court, reflects an exaggerated deference to the state courts"). Moreover, there is arguably less affront to state courts if an adequacy requirement is set by a lower federal court—which also will bear the burden of excusing similar defaults—than if it is set by the Supreme Court without the benefit of lower federal court consideration. See supra Part II.

267. 372 U.S. 391 (1963).

268. Id. at 430 ("The jurisdictional prerequisite [for habeas review] is not the judgment of a state court but detention *simpliciter*."); id. at 431 (federal habeas court "cannot revise the state court judgment; it can act only on the body of the petitioner").

269. The Court also reasoned that a state court procedural default deprived the petitioner of a state court remedy for the violation of the petitioner's constitutional rights, but did not determine whether the federal habeas courts should provide such a remedy. See id. at 427 (noting "the important difference between rights and particular remedies").

Court review of state court judgments should not constrain federal habeas review; thus, a petitioner could secure federal habeas relief—despite a state court procedural default—so long as he or she had not "deliberately bypassed" the opportunity to raise the federal contention in state court.[270]

As is well known, the Court soon retreated from *Noia*;[271] and in *Wainwright v. Sykes*,[272] the Court held that the adequate and independent state grounds doctrine should govern habeas review in certain cases where the petitioner defaulted at trial.[273] At Sykes's murder trial, Sykes's counsel failed to challenge the admissibility of testimony by prosecution witnesses that Sykes had confessed to the crime.[274] The Supreme Court held that Sykes's failure to comply with the state's contemporaneous objection rule prevented Sykes from mounting a federal habeas challenge to the admissibility of the testimony.[275] Although the Court stated that a petitioner could secure habeas review by showing "cause" for the failure to object at trial and "prejudice" resulting from the admission of the evidence, the Court found that Sykes had failed to meet this standard.[276] In subsequent cases, the Court extended *Sykes*'s holding,[277] and the current view, as noted above, is that state court procedural default generally will bar habeas review as well as direct Supreme Court review.[278]

Even under the Court's present restrictive approach to habeas review, however, habeas courts sometimes can grant relief despite the petitioner's failure to comply with an adequate state rule. Admittedly, in

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Additionally, the Court stated that the state's interest "in an airtight system of forfeitures" was not substantial enough to require that federal habeas courts enforce all such forfeitures. Id. at 432–33.

270. See id. at 438 (holding that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies").

271. See, e.g., Francis v. Henderson, 425 U.S. 536, 542 (1976). See generally Jack A. Guttenberg, Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance, 12 Hofstra L. Rev. 617, 623–36 (1984) (describing Court's move away from *Noia*'s deliberate bypass standard).

272. 433 U.S. 72 (1977).

273. Id. at 87.

274. Id. at 74–75.

275. Id. at 86–87, 91.

276. Id. at 90–91.

277. See, e.g., Coleman v. Thompson, 501 U.S. 722, 750 (1991) (overruling Fay v. Noia, 372 U.S. 391 (1963), and holding that *Sykes*'s procedural default analysis applies "[i]n all cases in which a state prisoner has defaulted his federal claims in state court").

278. As the Court put it in *Coleman*,

> [i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750.

practice such instances are quite rare: The petitioner must either show "cause" for the default and "prejudice" resulting therefrom, or demonstrate "actual innocence."[279] But the fact remains that a habeas court sometimes may grant relief, notwithstanding a procedural default that would bar direct review.[280] The exceptions to the procedural bar doctrine in the habeas context arguably reflect the differing capabilities of the Supreme Court and the lower federal courts: In some cases, the petitioner's effort to show cause and prejudice or actual innocence may require an evidentiary hearing[281]—a procedure more appropriately undertaken by the lower courts.[282] Similarly, the premise of this Article is that searching as-applied adequacy review is a task for which the lower federal courts are significantly better equipped.

The Court's dominant rationale[283] for importing the adequacy doctrine into the habeas context provides additional support for the notion that habeas courts could properly engage in a more rigorous as-applied

279. See, e.g., Murray v. Carrier, 477 U.S. 478, 485, 496–97 (1986) (discussing cause and prejudice standard, and stating that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default"); see also Hart & Wechsler, supra note 1, at 1438 (noting that "[i]n practice," the cause and prejudice and actual innocence grounds "are so narrow that the standards applied on direct and collateral [review] differ very little"). R

280. See Meltzer, Forfeitures, supra note 15, at 1150 ("At no time has the Supreme Court suggested that on direct review of a state criminal case, it would excuse a default and proceed to the merits if the defendant could demonstrate cause and prejudice."). R

281. See 2 Hertz & Liebman, supra note 238, § 26.3(e), at 1226–27. R

282. Cf. Bryan A. Stevenson, The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases, 77 N.Y.U. L. Rev. 699, 784 (2002) ("The Court is not well-positioned to receive unreviewed facts, conduct evidentiary hearings, or otherwise manage complex litigation, discovery, and the legal requirements of a fair adjudication.").

Admittedly, current law limits the circumstances under which the petitioner can obtain an evidentiary hearing in a federal habeas proceeding on "the factual basis of a claim." 28 U.S.C. § 2254(e)(2) (2000). This limitation, however, arguably should not apply to the facts relevant to show cause for, and prejudice from, a procedural default. See Cristin v. Brennan, 281 F.3d 404, 413, 415–16 (3d Cir. 2002) (reasoning that § 2254(e)(2)'s limitation ordinarily should not apply to the facts supporting a petitioner's attempt to show cause and prejudice for a state court procedural default, because the court "cannot generally expect petitioners to present in state court facts they may only need under federal law in a later federal proceeding to excuse a procedural default"); cf. id. at 416 & n.11 (noting that "when a petitioner relies solely on ineffective assistance of counsel to establish both cause and prejudice and as a claim for substantive habeas relief . . . . [the] ineffective assistance claims must be presented to the state courts to satisfy the exhaustion requirement," and suggesting that this could be viewed as one of the "rare case[s]" in which the state court proceedings would "afford a petitioner the opportunity to develop the facts" relevant to the cause and prejudice analysis); Edwards v. Carpenter, 529 U.S. 446, 453 (2000) (holding that "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted").

283. The Court has also offered other reasons for its adoption of the procedural bar rule in the habeas context. See Kinports, supra note 8, at 130–32 (noting that the Court's justifications for the procedural-default rule include comity and federalism, "respect for state procedural rules," an interest in finality, a fear of sandbagging, an impulse to lighten R

review. In *Wainwright v. Sykes*, then-Justice Rehnquist explained that *Noia*'s more forgiving habeas standard could "encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."[284] The Court's concern with sandbagging thus centers on the fear that a defense attorney might deliberately fail to raise a constitutional objection at trial, with the intention of holding that objection in reserve for post-trial use if the case ends in a conviction. Such a strategy could unfairly surprise the prosecutor by removing the opportunity for the prosecutor to attempt to cure or avoid the asserted constitutional defect. Thus, the Court explained that the contemporaneous-objection rule at issue in *Sykes* serves important interests by bringing the defendant's federal-law contention to the notice of the trial court and the prosecutor at a time when each can take meaningful action in response to it.[285] As the Court put it more recently, in the habeas context, the independent and adequate state grounds doctrine serves "the States' interest in correcting their own mistakes," because it bars habeas relief for petitioners who "deprived the state courts of an opportunity to address" their contentions.[286]

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the burden on federal courts, and a goal of "ensuring that the trial in state court is 'the main event'" (quoting Wainwright v. Sykes, 433 U.S. 72, 90 (1977))).

In addition, the Court has stated that lower federal courts should not "be able to do in habeas what this Court could not do on direct review," because otherwise habeas "would offer state prisoners . . . an end run around the limits of this Court's jurisdiction . . . ." *Coleman*, 501 U.S. at 730–31. This Article does not take issue with the argument that the content of the adequacy standard should be the same on both direct and habeas review; as explained above, it merely suggests that on direct review of state court judgments the Court generally should *abstain* from exercising its power to hold a state procedural rule inadequate as applied. See supra text accompanying notes 212–233. In cases where the habeas courts' as-applied review discloses that the procedural rule is inadequate, that holding indicates that the Court, as well, *would have had* jurisdiction to review the judgment on direct review; the fact that the Court, for institutional reasons, abstained from making this determination on direct review does not render the habeas determination an "end run" around the Court's jurisdictional limitations. R

284. *Sykes*, 433 U.S. at 89. Critics have argued persuasively that, in reality, the risk of such sandbagging is low. See Graham Hughes, Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle, 16 N.Y.U. Rev. L. & Soc. Change 321, 336–37 (1987–1988); Meltzer, Forfeitures, supra note 15, at 1196–99; Curtis R. Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315, 1368–69 (1961); Judith Resnik, Tiers, 57 S. Cal. L. Rev. 837, 896–98 (1984). R

285. The Court reasoned that a contemporaneous objection allows the federal contention to be evaluated, in the first instance, by the trial judge who has observed the relevant witnesses. *Sykes*, 433 U.S. at 88. If the court sustains the objection, the federal habeas courts need not deal with the issue; if the court overrules the objection, the federal habeas courts will have the benefit of the record made in state court. Id. at 88–89. Meanwhile, the objection may lead the prosecutor "to take a hard look at" the advisability of insisting on the admission of the evidence at issue. Id. at 89. As the Court put it, contemporaneous objections help keep the trial error free, and maintain the view of the state trial as "the 'main event,' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." Id. at 90.

286. *Coleman*, 501 U.S. at 732.

Clearly, the state interests identified by *Sykes* and its progeny come into play when a petitioner seeks habeas relief on a claim that was never raised at all in state court. Similarly, if the petitioner raised the claim in state court, but did not do so until it was too late for the state trial court to take ready remedial action, the *Sykes* rationale could support enforcement of the procedural bar. On the other hand, where the petitioner can show a genuine effort to raise the contention in a timely fashion in state court, so that the state trial court was made aware of the substance of the contention, the concern for sandbagging does not apply. Under the reasoning of *Sykes*, state courts should have the first opportunity to rule on a petitioner's federal-law contention; but if the petitioner timely presented the substance of that contention to the state court and the state court refused to rule on it because of an overly technical application of a procedural rule, *Sykes*'s rationale ought not to bar habeas review.

Osborne and *Lee* are illustrative. In *Osborne*, the defendant's mistake was that he raised his objection *too early*.[287] Once the state court rejected Osborne's pretrial overbreadth argument, it was likely that any overbreadth objection to the jury instructions was similarly doomed; yet the state appellate court barred Osborne's challenge, because it took the view that he should have made a (futile) objection to the instructions themselves. On direct review, the Supreme Court's as-applied analysis held this procedural bar inadequate under the circumstances, because compliance would be merely "an arid ritual of meaningless form."[288] Had *Osborne* been a habeas case, another way to look at the issue would have been to inquire whether Osborne had deprived the state trial court of the chance to rule on his overbreadth contention. Osborne provided the state court with an opportunity to address his federal contention; and the fact that he did so prior to trial, rather than after the instructions were given, should not subject Osborne to a charge of "sandbagging" the court or the prosecution.

Similarly, it is hard to imagine that Lee was trying to "take his chances" in state court, with the intention of complaining later in federal court of the denial of his request for a continuance.[289] To the contrary,

287. The facts of *Osborne* are somewhat similar in this respect to Monger v. Florida, 405 U.S. 958 (1972) (per curiam). In *Monger*, the defendant filed a notice of appeal prematurely, and did not renew it after judgment was formally entered. Id. at 958–59 (Douglas, J., joined by Brennan & Stewart, JJ., dissenting). When the Supreme Court denied certiorari on the ground that this failure was adequate to bar review, three dissenting Justices argued that although the state might have a legitimate interest in "foreclosing interlocutory appeals," no possible state interest "would be served by rejecting a notice of appeal filed after an oral pronouncement of judgment but before a written order." Id. at 962.

The tension between *Osborne* and *Monger* provides yet another illustration of the Supreme Court's tendency to be inconsistent with respect to undue burden review.

288. Osborne v. Ohio, 495 U.S. 103, 124 (1990) (quoting James v. Kentucky, 466 U.S. 341, 349 (1984) (quoting Staub v. City of Baxley, 355 U.S. 313, 320 (1958))).

289. In a variation on this argument, Lee contended before the Supreme Court that *Sykes*'s rationale "is simply inapposite where the petitioner has given the state courts every

Lee moved for a continuance and stressed to the trial court that his missing alibi witnesses were very important to his case, and there is no indication that the state trial court lacked any information necessary to rule on the continuance motion. Although Lee technically failed to comply with the state rules requiring a written pleading and an enumeration of the facts relevant to the motion, Lee did not deprive the court of an opportunity to rule on his application.[290] Indeed, the trial court ruled on the merits of the motion, without ever noting that Lee had failed to comply with the relevant rules.

These examples suggest that a more rigorous adequacy review could fit comfortably with the rationale for the application of the procedural bar rule to habeas proceedings. Neither that rationale nor the Court's treatment of other aspects of the independent and adequate state grounds doctrine[291] supports the view that application of the doctrine on direct and habeas review must be rigidly identical.

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opportunity, at every stage of the proceedings, to rectify the fundamental error that occurred when the trial court denied Lee a brief continuance." Petitioner's Brief at 41, Lee v. Kemna, 534 U.S. 362 (2002) (No. 00-6933), available at 2001 WL 537068, at *41.

290. The state also contended that Lee had "raised only state-law objections to denial of the continuance motion in state court." *Lee*, 534 U.S. at 376 n.8. The Court held this argument waived because the state had failed to assert it in the Eighth Circuit or in opposition to Lee's petition for certiorari. Id.

291. The Court's treatment of the "independence" branch of the doctrine in Michigan v. Long, 463 U.S. 1032 (1983), suggests that the Court is willing to countenance differences that *narrow* the availability of habeas review.

Under *Long*, when a state court decision rests on both state and federal grounds and the state-law ground seems interwoven with the federal ground, the Supreme Court will presume that the state-law ground is dependent on the federal ground, unless the state court decision provides a plain statement to the contrary. See id. at 1040–41. The effect, on direct review, is to permit Supreme Court jurisdiction in cases where state courts have "overenforced" federal rights. On habeas review, however, the Court has diluted the strength of the *Long* presumption, so as to narrow the range of cases in which federal habeas review is permissible. See *Coleman*, 501 U.S. at 735–40; Ylst v. Nunnemaker, 501 U.S. 797, 802–03 (1991). Commentators have noted that this disparity suggests a result-oriented bent to the *Long* doctrine: The Court applies it to expand to the scope of direct review concerning state court judgments that may have "overenforced" federal rights, but applies it restrictively on habeas review—a context which is concerned, by definition, with the underenforcement of the petitioner's federal rights. See Hart & Wechsler, supra note 1, at 541–43 (discussing this assertion); see also Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. Chi. L. Rev. 429, 473 (2002) (arguing that the Court's holding in *Long* "is virtually impossible to explain except by reference to the justices' substantively conservative commitments"). R

Likewise, the Court has suggested that its treatment of the plain error doctrine on direct review, in Ake v. Oklahoma, 470 U.S. 68 (1985), does not apply in the habeas context. See *Coleman*, 501 U.S. at 741 ("*Ake* was a direct review case. We have never applied its rule regarding independent state grounds in federal habeas."). However, the *Coleman* Court proceeded, in the alternative, to hold that the petitioner would not prevail under an *Ake* analysis. See id. at 741 (stating that "even if *Ake* applies here, it does Coleman no good").

B. *Access to Federal Court Review*

The discussion in Part IV.A proceeded from the notion that federal habeas review can provide a substitute for direct Supreme Court review. In actuality, however, both doctrinal and practical barriers to habeas relief may foreclose a remedy to petitioners who could have obtained relief had the Supreme Court considered the merits of their claims. In Part III.B, I argued that some of these barriers can be anticipated at the direct review stage, and that such barriers could provide a reason for deviating from the general practice of eschewing in-depth as-applied analysis on direct review. It must be acknowledged, however, that not all such barriers can be assessed prior to the habeas litigation itself. Accordingly, this Part considers whether the likelihood that such barriers will foreclose a number of habeas claims provides an argument against the abstention practice proposed in Part III.[292]

At the outset, it should be noted that one result of my abstention proposal is that civil litigants would be unable to get the benefit of as-applied review.[293] Arguably, a distinction drawn along these lines is unduly rough, since some civil judgments could impact a litigant more severely than would some prison terms.[294] This objection, however, at its core takes issue with the availability of habeas relief in general, not with the particulars of the current proposal. In light of the discretionary nature of the Supreme Court's jurisdiction to review state court judgments on questions of federal law, most state court civil litigants have no practical opportunity for federal court review in any event. If the deprivation of liberty is sufficiently different from other effects of a state court judgment that it justifies the availability of lower federal courts to review the

292. One response to the concern about court access might be that the Court's primary role is to declare and develop the law, not to correct errors in individual cases. See, e.g., Estreicher & Sexton, supra note 29, at 715 (taking "the traditional view that the Supreme Court is not simply another court of errors and appeals"). In this view, a practice that prevented Supreme Court review of a particular state court judgment would not be cause for concern so long as other cases were likely to arise that would provide adequate vehicles for Supreme Court attention to the relevant legal issues. However, the concern for justice in the individual case, and the interest of the litigant in access to a federal forum for claims of federal right, will weigh particularly heavily in cases where the defendant faces the death penalty; and for some of those defendants, habeas review may prove an inadequate proxy for Supreme Court review. R

293. If the Court were to adopt my proposal for a general policy of abstention, the Court might nonetheless decide to relax that policy in a particular civil case if the reasons for doing so were sufficiently compelling. However, in light of the potential costs of rigorous as-applied analysis on direct review, such instances would likely be rare.

294. In a forthcoming article, Barry Friedman addresses issues raised by the disparate treatment of civil enforcement defendants and criminal defendants. See Barry Friedman, Under the Law of Federal Jurisdiction (unpublished manuscript) (on file with the *Columbia Law Review*).

legality of the detention,[295] then a more searching application of adequacy review by habeas courts should not be seen as inappropriate either.

Civil litigants, however, are not the only ones who would be denied as-applied review under my proposal. In order to seek federal habeas relief, the petitioner must be "in custody"[296]—which means that the petitioner must be imprisoned or subject to certain other forms of restraint such as probation or parole at the time the petition is filed.[297] In addition, the petitioner must exhaust state remedies prior to filing a federal habeas petition,[298] and the Supreme Court has held that this requirement generally demands dismissal of the petition if any of the claims in the petition is unexhausted.[299] Many petitioners will no longer be in custody by the time they have exhausted state remedies, and accordingly they will be ineligible for federal habeas relief. Indeed, only a small percentage of those convicted in state court in non-death penalty cases go on to seek federal habeas review.[300] Admittedly, the relevant population, for purposes of the current inquiry, is the group of prisoners who seek direct Supreme Court review; such prisoners presumably are somewhat more likely to seek federal collateral review than are prisoners who fail to petition the Court for direct review. Nonetheless, it is clear that many prisoners who seek direct Supreme Court review will be unable to seek federal habeas review.

Additionally, even if a prisoner proceeds to seek habeas review, practical and doctrinal constraints will reduce the likelihood of success. Most noncapital habeas petitioners will lack counsel,[301] and many will run afoul of procedural hurdles such as the statute of limitations.[302] As I discussed in Part III.B, habeas will generally be unavailable as to claims based on new rules;[303] it will be easier for the state to prevail on harmless

295. Cf. Hill, Forfeiture, supra note 14, at 1072 ("The writ of habeas corpus, which receives important recognition in the Constitution, bespeaks a concern for the liberty of the person not matched in the arrangements for the protection of property."); Meltzer, Forfeitures, supra note 15, at 1213 ("A federal rightholder's stake in the litigation is generally less weighty in a civil case than in a criminal case."). R R

296. See 28 U.S.C. § 2254(a) (2000).

297. See 1 Hertz & Liebman, supra note 238, § 8.2(d), at 374–81 (discussing requirement of custody). R

298. See 28 U.S.C. §§ 2254(b)–2254(c).

299. See Rose v. Lundy, 455 U.S. 509, 522 (1982).

300. See Daniel J. Meltzer, Habeas Corpus Jurisdiction: The Limits of Models, 66 S. Cal. L. Rev. 2507, 2524 (1993) (estimating that "of every thousand persons convicted in state prosecutions and committed to custody in any given year, only three to four actually file habeas corpus petitions challenging their custody"); James S. Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030, 2053 n.90 (2000) (noting that "only a small subset of noncapital criminal convictions are appealed," and that "only a tiny proportion of cases that are appealed are challenged in state and federal post-conviction proceedings" (citing Meltzer's estimate, supra)).

301. See 1 Hertz & Liebman, supra note 238, § 12.2, at 601. R

302. See 28 U.S.C. § 2244(d) (setting statute of limitations for noncapital prisoners and capital prisoners in non-opt-in states).

303. See supra notes 235–239 and accompanying text. R

error grounds in habeas proceedings than on direct review;[304] and section 2254(d) may require a certain amount of deference to state court determinations in some procedural default cases.[305]

I have suggested that in cases where the Supreme Court can discern, at the time the petitioner seeks direct review, that such a barrier will prevent habeas relief, the Court should relax the policy against as-applied analysis on direct review. However, other potential barriers will be difficult or impossible to assess prior to the filing of the habeas petition. For instance, though capital prisoners generally will obtain representation for their federal habeas petitions,[306] in noncapital cases the likelihood of representation on habeas review is both slim and hard to predict. Thus, a policy of abstaining from as-applied analysis on direct Supreme Court review will prevent some prisoners from obtaining such analysis from any federal court.

In the end, an assessment of these issues must weigh the competing concerns. On the one hand, Supreme Court abstention should improve the quality of federal as-applied adequacy determinations and should help to avoid the risk of federal overreaching. On the other, abstention will result in the denial of as-applied review to all civil state court litigants and some state prisoners. However, in light of the fact that few of the litigants who seek Supreme Court review actually obtain it, abstention from as-applied analysis on direct Supreme Court review may have a relatively small net effect.[307] By contrast, given the relatively large number of procedural default questions adjudicated each year by the lower federal habeas courts, a doctrine that affirms those courts' ability to engage in as-applied review could bring a net improvement in the quality of federal determinations concerning the undue burden branch of the adequacy test.

304. See supra notes 240–241 and accompanying text. R

305. See supra notes 242–246 and accompanying text. R

306. See 21 U.S.C. § 848(q) (2000) (mandating provision of counsel to indigent state prisoners bringing federal habeas proceedings to challenge death sentences).

307. Admittedly, when the Supreme Court does grant review, this usually indicates that at least four members of the Court believe that the case presents a significant legal issue. An argument might thus be made that a general Supreme Court practice of abstaining from rigorous undue burden adequacy analysis on direct review might impede the Court's consideration of issues it views as important. However, to the extent that this argument focuses on the Court's ability to address the legal issue—rather than on a specific litigant's ability to obtain reversal on appeal—it can be met by the observation that the Court will most likely be able to find another case that presents a better vehicle for consideration of the issue. To the extent that the argument focuses on a particular civil litigant's inability to obtain rigorous adequacy review from the Supreme Court, the strongest rejoinder is that most such litigants have a minuscule chance of obtaining Supreme Court review in any event.

C. *The Implications of AEDPA*

The Antiterrorism and Effective Death Penalty Act of 1996 contains a number of provisions designed to narrow the availability of federal habeas review.[308] AEDPA does not, however, focus much attention on the doctrine of procedural default as such.[309] Only two aspects of AEDPA are potentially relevant: the provision relating to evidentiary hearings and the provision relating to procedural default in capital cases in states that qualify for fast track procedures.[310] A brief consideration will show that neither poses an obstacle to the approach I propose here.

In *Keeney v. Tamayo-Reyes*,[311] decided prior to the enactment of AEDPA, the Court borrowed the *Sykes* procedural-default analysis for application to a petitioner's failure to develop facts in state court. The Court reasoned in *Keeney* that it should not "distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim."[312] Thus, under *Keeney*, a petitioner who failed to develop the relevant facts in state court was required to show either cause and prejudice or actual innocence in order to obtain an evidentiary hearing in a federal habeas proceeding. AEDPA further nar-

308. See H.R. Conf. Rep. No. 104-518, at 111 (1996) (stating that AEDPA "incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases"); see also Stevenson, supra note 282, at 702–03 (listing ways in which AEDPA has changed federal habeas practice). R

309. A number of previous legislative proposals did include measures designed to alter the framework for analyzing state-court procedural defaults. Some of those proposals would have liberalized the existing framework, see, e.g., S. 1757, 101st Cong. § 2 (1989) (providing, in capital cases, that a district court "may refuse to consider" claims that petitioner procedurally defaulted in state court, except that the court "shall consider" the claim "if the prisoner shows that the failure to raise the claim in a State court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice"); H.R. 3584, 101st Cong. § 2 (1989) (same); H.R. 4002, 101st Cong. § 301 (1990) (same); S. 1241, 102d Cong. § 1102 (1991) (same); H.R. 4018, 103d Cong. § 5 (1994) (providing, in capital cases, that a federal habeas court shall not "decline to consider a claim" on the grounds of state-court procedural default, unless the relevant state met certain requirements for the provision of counsel to indigent capital defendants); id. § 10 (providing for cause-and-prejudice and miscarriage-of-justice exceptions to procedural default doctrine, and stating a number of ways for a petitioner to demonstrate cause, including by means of a showing that "the failure to raise the claim in State court was due to . . . counsel's ignorance or neglect"), while others would have further restricted a petitioner's ability to avoid the effects of a state-court default, see, e.g., S. 88, 101st Cong. § 2 (1989) (setting forth narrowly defined cause-and-prejudice test and including no provision for claims of actual innocence); H.R. 1090, 101st Cong. § 2 (1989) (same); H.R. 3918, 101st Cong. § 202 (1990) (same).

310. Although section 2244(b)'s limitations on successive federal court petitions could be viewed as penalizing a kind of default, those limitations concern a petitioner's failure to take required actions in federal, not state, court. 28 U.S.C. § 2244(b) (2000). Thus, the successive-petition limitations do not seem directly relevant to questions relating to state court procedural default.

311. 504 U.S. 1 (1992).

312. Id. at 8.

rowed the standard governing evidentiary hearings; under new section 2254(e)(2), the petitioner must now show not only statutorily defined cause,[313] but *also* that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[314] Nonetheless, the statute's reference to petitioners who have "failed to develop the factual basis of a claim in State court proceedings"[315] connotes the same notion of fault as the *Keeney* standard: Both hold that "prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing."[316] In the Court's view, the underlying rationale here is the same as in *Sykes*: In order "[f]or state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error."[317] As discussed in Part IV.A, my proposal for more rigorous as-applied adequacy review does not contravene this principle; it would merely enable federal habeas courts to review federal contentions when the petitioner had timely put the substance of the contention before the state court.

Likewise, AEDPA's procedures for capital cases in fast track jurisdictions do not undermine my proposal. Initially, it should be noted that only one jurisdiction has arguably been found qualified to use the fast track procedures;[318] but even if a set of procedures that has little or no current application anywhere in the U.S. could be viewed as altering the standards for habeas review in general, the fast track procedures do not do so. The new section 2264(a) provides that in capital cases subject to the fast track procedures,

> the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—
>
> (1) the result of State action in violation of the Constitution or laws of the United States;

313. See 28 U.S.C. § 2254(e)(2)(A) (requiring petitioner to show that the claim relies either on a new rule or on facts that could not previously have been discovered through due diligence).

314. Id. § 2254(e)(2)(B).

315. Id. § 2254(e)(2).

316. Michael Williams v. Taylor, 529 U.S. 420, 433 (2000) (unanimous opinion).

317. Id. at 437.

318. See Spears v. Stewart, 283 F.3d 992, 1018–19 (9th Cir. 2002) (stating that Arizona's system qualified, on its face, for opt-in status, but holding that because Arizona failed to provide Spears with postconviction counsel in a timely fashion, Arizona "is not entitled to enforce" the opt-in procedures "in Petitioner's case"). But see id. at 998–99 (Reinhardt, J., joined in relevant part by Hawkins, Thomas, Paez, Tashima, Rawlinson, Pregerson, Wardlaw, W. Fletcher, Fisher & Berzon, JJ.) (on denial of rehearing en banc, characterizing the panel's statement concerning Arizona's opt-in status as "an advisory opinion").

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.[319]

The language "raised and decided on the merits," read in isolation, might be argued to suggest that any state court ruling of procedural bar would preclude federal habeas review unless one of the exceptions in section 2264(a) applied. If this language were taken to foreclose federal review of the adequacy of the state procedural bar, however, the result would be perverse. To qualify for the fast track procedures, a state must provide prisoners who are sentenced to death with specified procedural safeguards in postconviction proceedings,[320] but the fast track requirements do not include any measures designed to improve the quality of representation at trial.[321] Many procedural defaults occur at trial, and the fast track requirements would do nothing to lower the incidence of such defaults; accordingly, to interpret the fast track procedures to bar adequacy review would unfairly and illogically penalize capital defendants.

In any event, the surrounding language indicates that no such result should follow. The statute indicates that Congress assumed that the state courts would omit to reach the merits only if the petitioner "fail[ed] to raise the claim properly." Certainly, this language intimates that the petitioner must raise the claim in compliance with valid state procedural rules, but it also suggests an independent federal test for assessing whether the claim was in fact "properly" raised.[322] The adequate state grounds doctrine, of course, is such a test; and rigorous as-applied adequacy review can appropriately form part of such a test, when applied by lower federal courts on habeas review.

CONCLUSION

Critics of the Court's habeas jurisprudence have charged that the federal habeas framework itself elevates procedural intricacies over federal rights.[323] There is thus perhaps some irony in any argument that

319. 28 U.S.C. § 2264(a).

320. See id. §§ 2261–2266.

321. See id. §§ 2261, 2265.

322. See Mark Tushnet & Larry Yackle, Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 Duke L.J. 1, 41 (1997) (arguing that courts should "read section 2264's reference to state decisions on the merits to assume that the state courts have addressed properly presented claims," and that courts should not read the statute "to cut off claims when that assumption is unwarranted").

323. See, e.g., Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., joined by Marshall & Stevens, JJ., dissenting) (arguing that the Court's habeas decisions "creat[e] a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights"); Jordan Steiker, Restructuring Post-Conviction Review of

seeks to justify tighter federal habeas review of *state* procedural rulings. Nonetheless, the proposal I outline here would be consistent both with the principles governing adequacy review and with the rationales for the present shape of federal habeas review. In the habeas context, the Court currently places great weight on the state courts' determination of the merits, and emphasizes that the state court trial should be the "main event," rather than a "try-out on the road." But if the state court rings the curtain down based merely on a hypertechnical application of a procedural rule, the federal courts should be able to excuse the alleged default if the petitioner timely put the substance of the federal contention before the state court. As-applied undue burden review does raise questions when performed by the Supreme Court on direct review; but the lower federal courts are better suited to the task.

In practice, the primary effect of my proposal would be seen in those lower courts. In any given year, the Supreme Court is likely to review at most a handful of cases in which as-applied adequacy review might alter the result. Since my proposal would require the Court to draw rather fine distinctions—both with respect to the appropriate level of adequacy review and with respect to the future potential (in a criminal case) for federal habeas relief—the Court might believe that the game is not worth the candle. Somewhat paradoxically, however, the Court's apparent lack of interest in adopting and maintaining consistent standards for adequacy review suggests why my proposal may nonetheless prove important. If the Court remains true to form, it likely will refuse, in some future cases, to apply the same searching level of adequacy review that it employed in *Lee v. Kemna*. When the Court retreats from the level of scrutiny it applied in *Lee*, the lower federal courts will have to decide whether to follow the Court's lead. They should not do so. As I have shown, the different capabilities and incentives of the Supreme Court and the lower federal courts can justify significant distinctions between the adequacy standard applied on direct review of state court judgments and that applied in federal habeas review.[324] Whatever the fate of as-applied adequacy analysis in the Supreme Court's direct review of state court judgments, the lower federal courts should continue to use that analysis, when appropriate, in federal habeas proceedings.

Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism, 1998 U. Chi. Legal F. 315, 344 (discussing the "labyrinthine obstacles to merits review on federal habeas").

324. Under my proposal, the Supreme Court would be justified, in many instances, in departing from *Lee*'s level of scrutiny in cases on direct review. However, the Court ought not to do so when reviewing the judgment of a lower federal court in a habeas proceeding. See supra Part III.C (discussing Supreme Court review of adequacy determinations by lower federal courts).