ESSAY

LIGHT FROM DEAD STARS: THE PROCEDURAL ADEQUATE AND INDEPENDENT STATE GROUND RECONSIDERED

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The adequate and independent state ground doctrine shields from federal review state court judgments that rest on a foundation of state law. The product of canonical cases from the early part of the twentieth century, it both embodies and preserves basic understandings about the respective authority of state and federal courts within our system of dual sovereignty. The Supreme Court has applied it to state judgments based on substantive and procedural law alike and described the two contexts as essentially identical in principle. Yet at the same time it has created a set of exceptions for procedural cases that in practice differ significantly from those available in the substantive cases.

The combination of doctrinal similarity and practical divergence has not gone unnoticed, and scholars have regularly attempted to explain why federal courts enjoy greater power to disregard procedural adequate and independent state grounds. This Essay suggests that both the Supreme Court's current pronouncements and the scholars' exegesis are, in an important respect, fundamentally mistaken. As a theoretical matter, the explanation given for the operation of the substantive adequate and independent state ground doctrine simply does not work for its procedural counterpart. And as a historical matter, the explanation given at the procedural doctrine's birth in the late nineteenth century is quite different from that supporting the substantive version. Recovering the nineteenth-century understanding of the doctrine provides the long-sought justification for the Court's different treatment of the procedural variant; additionally, it offers guidance for the resolution of some unsettled questions of federal jurisdiction.

INTRODUCTION

The adequate and independent state ground doctrine shields from federal review state court judgments that rest upon a foundation of state

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law.[1] It follows naturally from what, after *Murdock*[2] and *Erie*,[3] is a basic axiom of our jurisprudence: the respective competencies of state and federal courts. Just as federal courts are supreme in the exposition of federal law, state courts are authoritative with respect to state law, and no federal court can controvert their interpretations.

The doctrine has obvious significance with respect to direct Supreme Court review of state decisions that rest on more than one substantive ground. If one of those grounds is rooted in state law, the doctrine, recognizing that the Supreme Court generally lacks the power to overturn a state-law ruling, denies appellate jurisdiction. But its applications are broader, for the doctrine applies to state procedural grounds as well. A litigant who fails to assert a federal right in the manner prescribed by state procedural rules will see his claim rejected on the basis of those rules—a state-law ground that a federal court has very limited power to second-guess. Thus in the context of either direct Supreme Court or collateral habeas review, a default under state procedural law can also shield a state court's judgment from federal scrutiny.

That much is generally taken as uncontroversial, and as stated, the doctrine might seem straightforward. But as things play out in practice, it becomes decidedly more complicated. The doctrine has exceptions, and the exceptions differ dramatically depending on whether the state-law ground is substantive or procedural. A substantive state ground will generally be ignored only if it is a "palpably erroneous"[4] or "manifestly wrong"[5] application of state law. That exception is easy enough to explain; a gross or willful misapplication of state law may be a violation of the Due Process Clause, and more plainly so when used to defeat the

1. My concern here is primarily with judgments in which reliance on the state ground results in the refusal to hear a claim of federal right. Such a state ground is sometimes referred to as "antecedent." See, e.g., Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 493, 498 (5th ed. 2003); Laura S. Fitzgerald, Suspecting the States: Supreme Court Review of State-Court State-Law Judgments, 101 Mich. L. Rev. 80, 83 n.11 (2002). If a litigant asserts that a state law unconstitutionally impairs a contractual right, for example, the antecedent question of whether a contract exists at all depends on state law, and if there is no contract, the federal question need not be decided. This does not mean that Supreme Court review is foreclosed; the implications for federal rights mean that the existence of a contract is "a federal question," on which the Supreme Court is not bound by state decisions, even though the question "turns on issues of general or purely local law." Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) (quoting Appleby v. City of New York, 271 U.S. 364, 380 (1926)); see also Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938) (describing question as "one primarily of state law"). Non-antecedent state-law grounds are by contrast frequently described as binding on the Supreme Court. See, e.g., Wisconsin v. Mitchell, 508 U.S. 476, 483 (1993) ("[W]e are bound by a state court's construction of a state statute.").

2. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

3. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

4. Phelps v. Bd. of Educ., 300 U.S. 319, 323 (1937).

5. Hale v. State Bd. of Assessment & Review, 302 U.S. 95, 101 (1937).

assertion of a federal right.[6] In the procedural context, however, the review is far more searching.[7] The Supreme Court has held that federal courts possess the power to make a qualitative assessment of the state procedural rule and to disregard it as "inadequate" on a number of different grounds, not merely because the particular application of the rule is palpably erroneous.[8] State procedural rules have been held insufficient to bar federal review if they are "not strictly or regularly followed,"[9] if they are "novel and unforeseeable,"[10] if they allow the state court to excuse noncompliance,[11] or if they impose undue burdens on the assertion of federal rights.[12] Indeed, the Court will sometimes go so far as to hold that although the state's rule is adequate in the abstract, its operation in a particular case does not sufficiently serve state interests to allow its application, however correct, to bar federal review.[13]

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6. The Court noted this possibility, with some skepticism, in Pulley v. Harris, 465 U.S. 37, 41–42 (1984). Perhaps more promising is the statement in Sun Oil Co. v. Wortman, 486 U.S. 717, 731 (1988), that a misconstruction of sister-state law "that is clearly established and that has been brought to the court's attention" would violate due process. The analogy is not exact, since *Sun Oil* is motivated chiefly by full faith and credit concerns, but it is reasonable to suppose that just as the Full Faith and Credit Clause obliges state courts not to willfully distort sister-state law, due process obliges them not to willfully distort their own.

7. See, e.g., Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 968 (1986) (noting "federal power to disregard state procedural but not substantive grounds"). The difference in the treatment of substantive and procedural grounds can to some degree be understood as a distinction between antecedent and non-antecedent grounds, for every procedural ground, but only some substantive ones, will be antecedent. See Fallon et al., supra note 1, at 564. Application of an antecedent state ground obviously merits closer federal scrutiny, since a non-antecedent ground can be used to avoid resolving a federal question only by granting relief to the federal claimant. Indeed, antecedent substantive grounds earn less respect from the Supreme Court. Fitzgerald, supra note 1, at 82–84, 140–51. Even within the category of antecedent state grounds, however, the distinction between procedural and substantive grounds persists. See id. R R

8. See generally Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1137–45 (1986) (describing types of inadequacy); Catherine T. Struve, Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules, 103 Colum. L. Rev. 243, 252, 255–64 (2003) (same).

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

10. Meltzer, supra note 8, at 1138–39 (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958)). R

11. See, e.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233–34 (1969) (finding discretionary rule does not bar federal review).

12. See, e.g., Douglas v. Alabama, 380 U.S. 415, 422–23 (1965) (rejecting state procedural rule which would have required counsel to repeat "plainly futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair").

13. See, e.g., Lee v. Kemna, 534 U.S. 362, 375–88 (2002) ("There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question."); Henry v. Mississippi, 379 U.S. 443, 447–49 (1965) (finding rule inadequate if purpose can otherwise be served). See generally Struve, supra note 8, at 264–77 (discussing "facial" and "as-applied" variants of adequacy analysis). R

The adequacy inquiry thus produces what seems to be a complex admixture of state and federal law governing the ability of federal courts to decide federal claims originating in state court. More seriously, the mere existence of such a power seems at variance with the fundamental principles underlying the doctrine: When holding a state procedural rule inadequate to bar direct federal review, the Supreme Court seems to have "displaced state procedural rules in areas of state competence—exactly what *Erie* and *Murdock* suggested it should not do."[14] Unsurprisingly, scholars have regularly attempted to explain the source of federal courts' ability to engage in adequacy analysis.[15]

A practical explanation is easy enough to come by: There is obvious danger in allowing state courts to have the last word on whether a claim of federal right will be heard. A litigant's failure to follow state procedures allows a state court, despite the Supremacy Clause, to disregard the assertion of a federal right. The litigant's procedural error justifies the refusal, because states are entitled to establish procedures for orderly litigation even of federal claims. However, if the state court's procedural ruling is erroneous, willfully or not, it has refused to hear a federal claim with no justification. That is plainly prejudicial to federal interests, and at least arguably contrary to federal law,[16] but it is a violation of federal law that a federal court cannot identify, much less correct, without assuming the power to review the state court's state-law ruling. The adequacy inquiry allows an end run around this problem, because a ruling that is erroneous in the sense of not following from settled law will almost certainly be too novel or inconsistently applied to survive adequacy analysis.[17]

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14. Meltzer, supra note 8, at 1158–59. R

15. Meltzer, supra note 8, and Field, supra note 7, both set out on this quest. Field, as mentioned supra note 7, explicitly describes the task in terms of explaining the differential treatment of substantive and procedural grounds. Id. at 967–69. R R

16. Some Supreme Court cases suggest that an erroneous application of state law to deny a federal right is unreviewable if the application has "fair or substantial support" in state law. See, e.g., Ward v. Bd. of County Comm'rs, 253 U.S. 17, 23 (1920). It is unclear why the existence of such support should make a difference for the Supremacy Clause, and such statements may simply reflect the Court's felt need to defer to state court applications of state law, despite the possibility of letting federally erroneous decisions slip by.

17. Early procedural default cases seem to have skipped the finesse described in the text and simply reviewed the state procedural ruling for correctness without couching the analysis in terms of novelty or consistency. In *Wainwright v. Sykes*, for example, the prisoner sought to challenge the admissibility of statements he alleged had been elicited in violation of the *Miranda* rule. See Wainwright v. Sykes, 433 U.S. 72, 75 (1977). He presented the claim for the first time in state postconviction proceedings, and the state courts refused to reach the merits. See id. The Supreme Court, in the course of deciding whether this procedural default barred federal habeas review, spent a paragraph discussing whether Florida law did in fact contain the procedural rule (contemporaneous objection) on which the state court relied and concluded that it "accept[ed] the State's position on this point." See id. at 85–86. *Wainwright*'s analysis lacks the deference accorded to state court applications of substantive state law antecedent to federal questions, which supports the

The practical desirability of the doctrine is, of course, no theoretical justification; moreover, the pragmatic concerns apply as well to antecedent substantive grounds, though the issue may arise less frequently. More troubling still, the adequacy analysis does more than detect error or discrimination against federal rights: A well-established rule punctiliously applied may still be set aside if deemed burdensome or unnecessary on particular facts.[18] The modern consensus, if there is one, appears to be that federal courts' ability to hear federal claims originating in state court is governed by some sort of federal common law, a common law that rejects inadequate procedural rules.[19] The existence of the power to make such a common law is not entirely clear, though scholars tend to take it as unproblematic.[20] My argument here, however, is not that this

general contention made here: Procedural grounds are reviewed more searchingly than substantive ones.

18. See supra note 13. R

19. See Field, supra note 7, at 969–70 ("[I]t is federal courts' power to mandate federal procedural rules when federal rights are at stake that enables federal courts instead to bend existing state rules to make them consistent with federal interests."); Meltzer, supra note 8, at 1185 ("I believe that the otherwise elusive source of federal supervision of state procedural default rules lies in the power to fashion federal common law."); Struve, supra note 8, at 280 ("[W]hen 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."). R R R

20. Field states: "It seems clear, as a matter of constitutional power, that federal courts could devise and impose upon state courts procedures for vindicating federal rights." Field, supra note 7, at 969. Though he also endorses the existence of such power, Meltzer comments that "[t]he proper scope of federal common lawmaking is a matter of considerable uncertainty." Meltzer, supra note 8, at 1167. Indeed, the ability of federal courts to impose procedural law upon the states is not clearly established in the case law. Some degree of federal power is undeniable; as the Supreme Court has held: "Legal rules which impact significantly upon the effectuation of federal rights must . . . be treated as raising federal questions." Burks v. Lasker, 441 U.S. 471, 477 (1979). And it is clear, therefore, that state procedural rules that bar the assertion of a federal right may be invalidated as attempts to achieve via procedure what the Supremacy Clause forbids to state substantive law, and likewise that state rules, though denominated procedural, may be invalid if they affect the substance of federal rights. See, e.g., Felder v. Casey, 487 U.S. 131, 138 (1988) (holding that Wisconsin notice-of-claim requirement could not be applied to § 1983 suit); 1 Laurence H. Tribe, American Constitutional Law § 3-24, at 509 (3d ed. 2000) ("The extent to which state law may limit the impact of federal law is, under the Supremacy Clause of Article VI, a federal question . . . ."). R R R

But it is one thing to say that state rules overstepping a notoriously ill-defined boundary will be deemed substantive and swept aside by the Supremacy Clause and another to say that federal courts can create common law that applies in state courts to override state rules concededly procedural in nature. The Supreme Court has distinguished the two propositions and can be viewed as having endorsed the latter, though hardly in the clearest of terms. See Brown v. W. Ry., 338 U.S. 294, 296 (1949); Meltzer, supra note 8, at 1143 & n.65 (discussing difficulty of interpreting *Brown*). Field explains such federal power by suggesting that every federal right carries with it a penumbra of procedural protection, invisible unless trenched upon by state rules, which federal courts can activate and invoke as a basis for common lawmaking. See Field, supra note 7, at 969 n.385 ("The source of authority for a federal procedural rule would be the R R

answer is incorrect but that it is unnecessary. It is unnecessary because the wrong question is being asked. What needs explanation is not the fact that federal courts can on occasion look through state procedural rules, but rather the idea that a state procedural rule can *ever*, of its own force, prevent federal review of a federal claim.

This assertion may seem surprising. The adequate and independent state ground doctrine, after all, is bathed in the soothing glow of canonical cases,[21] so deeply ingrained in contemporary legal consciousness as to seem beyond challenge. And I do not intend to challenge the substantive variant of the doctrine; there things are in order as they are. What I will argue is that *Erie* itself provides reasons to doubt that the procedural adequate and independent state ground, as currently understood, actually exists. Further investigation confirms the doubt: An examination of the doctrine's origins in early twentieth-century Supreme Court decisions will reveal that what is now called the procedural adequate and independent state ground doctrine is quite different from its substantive counterpart, and it will show that the attempts to justify adequacy analysis by appeals to federal common law are looking at the problem from the wrong side entirely. Once the doctrine's origins are understood, adequacy analysis is easily intelligible and fully justified.

The new understanding I propose thus does not amount to a rejection of current Supreme Court doctrine. Rather, it performs a modest theoretical service by placing the results currently achieved under the name of the procedural adequate and independent state ground on a sounder foundation, and incidentally laying to rest any doubts about the power of federal courts to perform qualitative assessments of state procedural rules. It has some similarly modest practical consequences in offer-

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federal right the Court was enforcing in the particular case—the right that the state procedural rule purports to block."). Justice Frankfurter, interpreting the *Brown* opinion in such terms, registered a strong protest. See *Brown*, 338 U.S. at 300–03 (Frankfurter, J., dissenting) ("If a litigant chooses to enforce a Federal right in a State court, he cannot be heard to object if he is treated exactly as are plaintiffs who press like claims arising under State law with regard to the form in which the claim must be stated . . . ."). Nor did subsequent discussions take *Brown* to have settled the matter. See, e.g., Fay v. Noia, 372 U.S. 391, 466–67 (1963) (Harlan, J., dissenting) (finding that state's right "to regulate its own procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing 'substantive' laws governing other aspects of the conduct of those within its borders"); see also Alfred Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 972–73 (1965) (noting "important questions of constitutional dimension" raised by suggestion that Supreme Court has power "to impose a second procedural system upon the states in accordance with its own conceptions of what a reasonable system ought to provide").

21. For discussions of canons in the law, see Legal Canons (J.M. Balkin & Sanford Levinson eds., 2000), and Richard A. Primus, Canon, Anti-Canon, and Judicial Dissent, 48 Duke L.J. 243 (1998). See also Field, supra note 7, at 920 ("[T]he scheme we have inherited from *Erie* and developed since has become such a fundamental part of our way of thinking about the boundary between state and federal power that many of our suppositions, constitutional and otherwise, are built upon it."). R

ing a different perspective on questions that the Supreme Court has yet to definitively resolve.

The first Part of the Essay sets out the substantive variant of the adequate and independent state ground doctrine. The second Part discusses the procedural version, suggests that it is without analytical support, and attempts to run the doctrine to ground, tracing it back through almost a century of Supreme Court decisions and arriving at an understanding of its actual source. Parts III and IV examine the implications of this alternative explanation, first for cases presented to the Supreme Court on direct review and then for those heard first by lower federal courts in the exercise of their habeas jurisdiction.

I. THE SUBSTANTIVE ADEQUATE AND INDEPENDENT STATE GROUND

The locus classicus of the substantive adequate and independent state ground doctrine is the Supreme Court's 1875 decision in *Murdock v. City of Memphis*.[22] That decision, construing the 1867 amendments to the Judiciary Act of 1789, set out the principle that the Supreme Court is "not authorized to examine [state law] questions for the purpose of deciding whether the State court ruled correctly on them or not."[23] If a plaintiff in error presented a federal question that the Court determined had been decided incorrectly by the state court, the Supreme Court announced, it would examine the record to see if there existed alternative grounds "actually decided by the State court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question."[24] In such a case, the Court concluded, "the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue."[25]

This raised the question of why the Court should undertake to decide a federal issue that could have no possible impact on the outcome of the case. Within twenty years of the *Murdock* decision, the Court began its current practice of dismissing for want of jurisdiction cases in which the judgment rested on an adequate and independent state-law ground, commenting that this was the "logical course."[26] Some decades later, the Court articulated the proposition that the existence of an adequate and independent state ground supporting a judgment meant that the Court had "no power to disturb it."[27] Finally, in *Herb v. Pitcairn*, the jurisdictional barrier was described as one of constitutional magnitude: "[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

22. 87 U.S. (20 Wall.) 590 (1875).
23. Id. at 635.
24. Id.
25. Id. at 636.
26. See Eustis v. Bolles, 150 U.S. 361, 370 (1893).
27. Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917).

an advisory opinion."[28] The understanding that the incompatibility of advisory opinions with the jurisdiction granted by Article III underlies the adequate and independent state ground doctrine, though questioned by scholars,[29] is well established in modern Supreme Court case law.[30]

Why the Court took so many years to realize that an adequate and independent state ground created not only a jurisdictional bar but one with constitutional roots is not entirely clear. One is tempted to invoke Moliere's bourgeois gentilhomme, who belatedly discovered that he had been speaking prose all along. But it may well be that the constitutional barrier, so evident to modern eyes, came into being somewhere along the way. The text of the constitution provides some reason to think that the original design contemplated the possibility of Supreme Court review of state court interpretations of state law. Article III gives the Supreme Court appellate jurisdiction over controversies between citizens of different states; if the lower federal courts had not been created, this appellate jurisdiction would have been exercised over state courts, and without the power to review state-law issues, it would have been largely useless.[31] And while the last sentence of the Judiciary Act of 1789 restricted the Court's

28. 324 U.S. 117, 126 (1945); see also Fay v. Noia, 372 U.S. 391, 464–68 (1963) (Harlan, J., dissenting) (discussing constitutional basis of adequate and independent state ground doctrine).

29. See, e.g., 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."); 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."). For a contrary assessment, see Cynthia L. Fountaine, Article III and the Adequate and Independent State Grounds Doctrine, 48 Am. U. L. Rev. 1053, 1082 (1999) (suggesting that adequate state ground eliminates redressability required by Article III).

30. See, e.g., Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory."); Ake v. Oklahoma, 470 U.S. 68, 75 (1985) (citing *Herb*, 324 U.S. at 125–26). The modern Court has also made clear that its lack of power to review state court decisions on matters of state law could not be remedied by a more generous statute. See, e.g., New York v. Ferber, 458 U.S. 747, 769 n.24 (1982) (noting that state-court construction of a state statute "is binding on us"). As the text discusses, this understanding is in large part a product of the jurisprudential revolution embodied in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), discussed infra notes 34–39 and accompanying text. R

31. The interpretation of the jurisdictional grants in Article III is complicated and has spawned a voluminous literature. See generally Fallon et al., supra note 1, at 343–44 (discussing issues and collecting sources). I do not mean to suggest that Supreme Court appellate jurisdiction would have been required in diversity cases, see Akhil Reed Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499, 1508 (1990), and it is also worth pointing out that a founding-era Court could have exerted substantial control over state courts by asserting independence on questions of "general" law even if it followed state court interpretations of "local" law. R

review to federal questions,[32] that was a limit on the jurisdiction vested by Congress, not the federal judicial power created by the Constitution. The Reconstruction Congress eliminated the restrictive statutory language, thus raising the issue decided in *Murdock*, and though the Court declined to assume the authority to review state-law issues in cases also presenting federal questions, it gave no substantial indication of thinking that Congress could not have extended it such power.[33]

One thing that intervened between *Murdock* and *Herb*, of course, was the Court's 1938 decision in *Erie Railroad Co. v. Tompkins*,[34] which did much to delineate the respective state and federal spheres of supremacy. The pre-*Erie* regime, canonically associated with *Swift v. Tyson*,[35] postulated three different types of law: federal law, "local" state law, and general law. Federal courts were, of course, the supreme expositors of the first; state courts, at least in theory, were authoritative with respect to the second.[36] The third, which included the common law and some principles of general higher or constitutional law, emanated from no sovereign and federal and state courts were consequently equals in its interpretation.[37]

Erie rejected the existence of this last category, a move whose effects on the relative competencies of state and federal courts with respect to state law might not be immediately obvious. The key point is that the neat tripartite distinction of the preceding paragraph understates the extent to which the "general law" cropped up in such ostensibly local issues as the application of state statutes or constitutions. As a recent survey of the pre-*Erie* case law shows, federal courts were able to discover general law questions in a wide variety of cases, and the general law thus served as a powerful tool for federal independence from state court rulings.[38] The

32. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 87; see also Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 593 (1875) (quoting statutory restriction of jurisdiction to "questions of validity or construction of the [federal] Constitution, treaties, statutes, commissions, or authorities in dispute").

33. See *Murdock*, 87 U.S. (20 Wall.) at 633 (reserving question).

34. 304 U.S. 64 (1938).

35. 41 U.S. (16 Pet.) 1 (1842).

36. The Supreme Court had long announced that state court interpretations of state statutes were, "as a general rule," binding on federal courts. See, e.g., Forsyth v. Hammond, 166 U.S. 506, 518–19 (1897). But it reserved the power to make its own decision in exceptional circumstances. See, e.g., Michael G. Collins, Before *Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law, 74 Tul. L. Rev. 1263, 1280 & n.86 (2000) (stating that Court's approach to state law "general principles" was for Court to "elaborate those same general principles on its own"); Barton H. Thompson, Jr., The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause, 44 Stan. L. Rev. 1373, 1388 & n.70 (1992) (noting inconsistent treatment by Marshall Court).

37. See generally 1 Tribe, supra note 20, § 3-23, at 470–72; id. § 3-24, at 504. R

38. See Collins, supra note 36, at 1273–99; see also Girardeau A. Spann, Functional R Analysis of the Plain-Error Rule, 71 Geo. L.J. 945, 972–73 & nn.182–184 (collecting similar cases). Because the Supreme Court's appellate jurisdiction over state courts was by statute limited to federal questions, the invocation of general law was not possible in cases that

end of that practice ushered in an era in which, as Judge Friendly put it, "federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states."[39] With the federal power of independent judgment curtailed, the futility of federal review of judgments supported by adequate and independent state grounds became clear.

Erie thus provided significant support for the view that the adequate and independent state ground doctrine had constitutional roots, but the idea of federal independence retained some champions even substantially later. As recently as 1953, it was possible to receive favorable notices for a book arguing that the Supreme Court should properly exercise not merely independent but conclusive judgment on questions of state law.[40] Even more recently, leading law reviews have featured arguments that the adequate and independent state ground doctrine is misconceived and should be restructured,[41] and that the Supreme Court has the power to correct plain errors of federal law even if the federal claims have been improperly asserted below.[42]

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reached the Court through the state system rather than via the exercise of diversity jurisdiction, and the Court in such cases showed greater deference to state court interpretations of state law. See generally Paul Brest et al., Processes of Constitutional Decisionmaking 109–12, 343 (2000); G. Edward White, The Marshall Court and Cultural Change, 1815–35, at 605–06, 674–76 (1988).

39. Henry J. Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 422 (1964).

40. The first two volumes of William Winslow Crosskey, Politics and the Constitution in the History of the United States (1953), argued this point. The favorable reviews endured a year before they were submerged in a wash of criticism. See Philip Bobbitt, Constitutional Fate 16–21 (1982) (detailing critical reaction). Crosskey's vision of American history was paranoiac enough to please Thomas Pynchon; it included the charge that Madison had altered his notes of the Convention after the event. See id. at 16. As a matter of fact, it seems likely that Madison did introduce errors into his notes via subsequent revision, but this appears to be a consequence of amendments made to bring them into conformity with the official journal, itself erroneous. The significance of these errors is unclear. See James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1, 31 (1986) (arguing that mistakes in journal were "inconsequential").

41. See Matasar & Bruch, supra note 29, at 1294. Matasar and Bruch engage the argument that a decision rendered despite an adequate and independent state ground would be advisory with the response that the litigants are sufficiently adverse to create a "case or controversy" even if the Supreme Court's opinion cannot affect the state court's judgment. See id. at 1301–10. The suggestion is wildly inconsistent with the modern approach to justiciability, though in fairness to the authors, much of that approach developed after the publication of their article. R

42. See Spann, supra note 38, at 946. Spann relies primarily on Vachon v. New Hampshire, 414 U.S. 478 (1974) (per curiam), in which, he claims, the Court decided a due process challenge that the petitioner had never presented to the state courts. The specific problem with this claim is that the Court explicitly stated that the petitioner had done so. See id. at 479. Spann relies instead on the dissent's description of the state-court proceedings. Obviously, combining the dissent's characterization of the facts with the majority's disposition of the case will create extraordinary rules of law; that is why dissents employ such characterizations. (Justice Rehnquist, who wrote the dissent in *Vachon*, confused matters somewhat by repeating his characterization of that case in the majority R

Despite these complications, the Supreme Court's analysis of the adequate and independent state ground doctrine with respect to substantive state law is straightforward and perfectly satisfactory: If the Court lacks the power to overturn the judgment, its decision can have no legal effect and is in consequence advisory. (Another, perhaps more compelling, way of phrasing this is that the Court's inability to reverse the judgment makes the federal question moot, which likewise creates an Article III barrier to review.[43]) What is far less obvious is how the doctrine has come to extend to procedural "adequate and independent grounds." Modern Supreme Court decisions frequently recite the rule, but they offer no explanation; *Coleman v. Thompson*, a typical example, notes without analysis that the doctrine "applies whether the state law ground is substantive or procedural."[44] The scholarship similarly tends to report the judicial practice without comment, simply stating, for example, that "the adequate and independent state ground doctrine has been applied rou-

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opinion in Illinois v. Gates, 462 U.S. 213, 219 (1983).) More generally, Spann seeks to overcome the adequate and independent state ground doctrine via Supreme Court Rule 24.1(a), which allows the Court to resolve plain errors evident from the record without the parties' urging, if those errors are otherwise within the Court's jurisdiction. Spann, supra note 38, at 946–47, 951. The stratagem may have some efficacy with respect to errors committed by a state court of last resort and unnoticed by the parties. But see Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 567 n.1 (4th ed. 1996) (suggesting that Rule 24.1(a) contemplates review of "only an issue properly raised in state court but not presented in the petition for certiorari"). Spann's stronger claim appears to be that Rule 24.1(a) can pierce an adequate and independent state ground invoked by a state high court. But if a state court has refused to decide a federal claim on state procedural grounds, it has made no error of federal law, plain or otherwise. Thus plain error review will not overcome a forfeiture imposed by the state court of last resort. The idea that the Supreme Court's jurisdiction can be enlarged by a procedural rule promulgated by the Court itself is decidedly odd in any event. R

43. See Fountaine, supra note 29, at 1085 n.229. Mootness, of course, has exceptions, most notably the proviso that the Court will hear disputes "capable of repetition, yet evading review." E.g., Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 594 n.6 (1999). The presence of an adequate and independent substantive state ground does not fit that exception, however, since the federal question could surely be resolved in a case in which no such adequate and independent state ground existed. R

44. 501 U.S. 722, 729 (1991). Interestingly, the Court has at least once appeared to suggest that the advisory opinion bar does not apply to procedural grounds. See Henry v. Mississippi, 379 U.S. 443, 446–47 (1965) ("But it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition . . . . Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions. *These justifications have no application where the state ground is purely procedural.*" (emphasis added)). Despite the sweeping nature of this language, the rest of the opinion suggests that it means only that the Court will conduct an adequacy review, not that an adequate procedural ground does not create a jurisdictional bar. See id. at 452. More modern cases such as Lambrix v. Singletary, 520 U.S. 518, 522–23 (1997), *Coleman*, 501 U.S. at 729, and Harris v. Reed, 489 U.S. 255, 260–61 (1989), all seem to assume that there is no distinction between a procedural and substantive adequate and independent state ground on direct review. For an excellent discussion of *Henry* and its place in the Court's adequacy jurisprudence, see Struve, supra note 8, at 272–76. R

tinely to state decisions forfeiting federal claims for violation of state procedural rules."[45] The next section first argues that the extension of the adequate and independent state ground doctrine to procedural grounds is unjustifiable and then attempts to identify an alternate explanation for the current practice.

II. The Procedural Adequate and Independent State Ground?

Upon reflection, the idea that a state court procedural ruling can bar federal review in the same way as a substantive alternate ground demands some explanation. In the substantive context, to put it briefly, an adequate and independent state ground provides support for the judgment that is beyond the power of a federal court to dislodge. A federal court examining the state-law issue is virtually bound to reach the same conclusion.[46] The same is true in a certain sense of a procedural ground—a federal court cannot correct the state court's application of a state procedural rule. But while since *Erie* it is a truism that state courts are superior in the interpretation of state law, it is equally a truism that federal courts apply federal procedure.[47] And if a federal court does not apply state procedural rules, its inability to reverse a procedural ruling is of no consequence. Whether a federal court will hear a claim forfeited under state procedural law is not a question of state law.[48] The Supreme Court could, then, simply rule that while a claim may be barred in state court as a matter of state procedural law, it can nonetheless be heard by the Supreme Court as a matter of federal procedure. An early opinion by Justice Holmes, in fact, contains just such a statement: "We do not undertake to review the decision of the [state] Supreme Court as to state

45. Meltzer, supra note 8, at 1134; see also, e.g., Struve, supra note 8, at 251 ("State procedure, like state substantive law, can form the basis for an independent and adequate state-law ground."). In the habeas context, the Court has at least acknowledged the discrepancies between its treatment of procedural and substantive grounds. See Wainwright v. Sykes, 433 U.S. 72, 82 (1977) ("The adequacy of such an independent state procedural ground to prevent federal habeas review of the underlying federal issue has been treated very differently than where the state-law ground is substantive."). R

46. "Virtually" because the Court may, as noted below, disregard state decisions that are egregiously wrong, at least where acceptance would preclude consideration of a federal question. See infra note 86. R

47. This is not to say that the line between substance and procedure is clear for *Erie* purposes; indeed, federal courts do in some circumstances apply state-law rules that are for other purposes classed as procedural. See, e.g., Guar. Trust Co. v. York, 326 U.S. 99, 108–10 (1945) (statute of limitations). But the concern with regard to the adequate and independent state ground is typically a procedural rule that governs purely in-court conduct, such as a contemporaneous objection rule. That sort of rule is uncontroversially procedural and would never apply, *ex proprio vigore*, in a federal court.

48. As we will see, the Supreme Court agrees on this much. See Lee v. Kemna, 534 U.S. 362, 375 (2002) ("[A]dequacy is 'itself a federal question.'" (quoting Douglas v. Alabama, 380 U.S. 415, 422 (1965))).

procedure, but if the Railroads were too late to argue their case before that Court they are not too late to argue it here."[49]

One might thus expect to find some account of how it is that state procedural law is taken to apply of its own force in the Supreme Court, to bind the Court in the same manner as a ruling on state substantive law. That explanation, as already noted, is lacking, and it has been for some time. As long ago as 1935, the Court had begun its current practice of taking the procedural adequate and independent state ground as all but self-evident: "[T]he state supreme court declined to review any of the rulings of the trial court [on federal questions]; and this determination of the state court is conclusive here."[50]

Given the absence of reasoning in the modern decisions, it seems a plausible step to follow the chain of citations back into the past to seek out the origin of the doctrine. Some attempts at this doctrinal genealogy reach dead ends; though Justice Harlan's writings tend to the scholarly, his dissenting opinion in *Fay v. Noia*, which observes that the adequate and independent state ground doctrine "of course, is as applicable to procedural as to substantive grounds," appends no citation to this statement and proceeds to discuss *Murdock*.[51] An explanation of sorts is forthcoming a few pages later, where Justice Harlan notes that to review the accuracy of a state court procedural ruling would "be to assume full control over a State's procedures for the administration of its own criminal justice," an act that "is and must be beyond our power if the federal system is to exist in substance as well as form."[52] But asserting that the Supreme Court applies federal procedure is a far cry from assuming full control over the state adjudicative process, and the cases on which Justice Harlan relies for the existence of the adequacy requirement in fact suggest that federal independence on matters of procedure is all it amounts to.[53] (To

49. N.Y. Cent. R.R. Co. v. N.Y. & Pa. Co., 271 U.S. 124, 126–27 (1926).

50. Herndon v. Georgia, 295 U.S. 441, 443 (1935).

51. Fay v. Noia, 372 U.S. 391, 464 (1963) (Harlan, J., dissenting).

52. Id. at 466 (Harlan, J., dissenting).

53. Field and Meltzer, though both identifying federal common lawmaking power as the source of the power to engage in adequacy analysis, disagree on this point, as will be discussed more fully infra note 83. In his *Fay* dissent, 372 U.S. at 466, Justice Harlan cites R
Davis v. Wechsler, 263 U.S. 22 (1923), and *New York Central*, 271 U.S. at 124. Both opinions were written by Justice Holmes, and both feature his characteristically blunt and aphoristic style, which is a pleasure to read but somewhat difficult to translate into doctrine. *Davis* does indeed at one point intimate that the relevant distinction is between federal and state rights, wherever asserted: "The state courts may deal with [a procedural error] as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right." 263 U.S. at 24. The more-quoted sound bite from *Davis* is ambiguous, however. Holmes notes that "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice," id., but does not explain whether this means that federal rights *must* be heard in state court, or merely that they *may* be heard on direct Supreme Court review. As already noted, see text accompanying note 49, *New York Central* supports the latter reading: "We do not undertake R
to review the decision of the [state] Supreme Court as to state procedure, but if the

be clear: The distinction concerns whether a finding of inadequacy means only that a federal court will look through the procedural rule and hear the federal claim, or whether it means in addition that state courts cannot apply the rule to assertions of federal right in future cases. That is, it is a question of whether the adequacy analysis governs proceedings only in federal courts, or in state courts as well.)

Other paths back may exist, but the most useful I have found begins with *Coleman v. Thompson*.[54] *Coleman* gives a typical unadorned statement of the rule and points readers to *Herndon v. Georgia*.[55] *Herndon*, as already noted, offers a similar vatic pronouncement,[56] but there is considerably more supporting authority: an impressive string cite consisting of no fewer than seven different cases from the late nineteenth and early twentieth centuries.[57] And at this point the archaeology starts to pay off, for these cases do discuss the basis for what has come to be called the procedural adequate and independent state ground doctrine. Each one, upon inspection, relies upon the same authority: the Supreme Court's limited statutory jurisdiction to review judgments of state courts of last resort. That by itself means little; *Murdock* construes the same statute.[58] But the *Murdock* rule, which has hardened into a constitutional command, comes from a different part of the statute and is expressed in quite different terms. At issue in *Murdock* was whether the Supreme Court was authorized to review state-law issues in a case that presented a federal question, and by deciding that such review was not authorized, *Murdock* created the situation in which review of the federal question alone would be of no legal effect.[59] This issue arose because the 1867 Act removed from the Judiciary Act of 1789 restrictive language that had explicitly limited the Supreme Court's jurisdiction to federal questions.[60]

Murdock also noted, as jurisdictional requirements flowing from the statute, that the federal question for which review was sought "must have been raised, and presented to the State court . . . [t]hat it must have been decided by the State court, or that its decision was necessary to the judgment [and] [t]hat the decision must have been against the right claimed

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Railroads were too late to argue their case before that Court they are not too late to argue it here." 271 U.S. at 126–27.

54. 501 U.S. 722, 729 (1991).

55. *Herndon*, 295 U.S. at 441.

56. "[T]he state supreme court declined to review any of the rulings of the trial court [on federal questions]; and this determination of the state court is conclusive here." Id. at 443.

57. Id. (citing John v. Paullin, 231 U.S. 583, 585 (1913); Atl. Coast Line R.R. Co. v. Mims, 242 U.S. 532, 535 (1917); Nev.-Cal.-Or. Ry. v. Burrus, 244 U.S. 103, 105 (1917); Brooks v. Missouri, 124 U.S. 394, 400 (1888); Cent. Union Tel. Co. v. Edwardsville, 269 U.S. 190, 194–95 (1925); Erie R.R. Co. v. Purdy, 185 U.S. 148, 154 (1902); Mut. Life Ins. Co. v. McGrew, 188 U.S. 291, 308 (1903)).

58. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 510, 633 (1875).

59. Id. at 636. Now, of course, *Erie* has revealed a constitutional barrier that a more generous statute could not overcome. See supra notes 34–42 and accompanying text. R

60. See *Murdock*, 87 U.S. (20 Wall.) at 616.

or asserted."[61] These requirements came from the statutory authorization of jurisdiction in suits "where any title, right, privilege, or immunity is claimed under [federal law] and the decision is against the title, right, privilege, or immunity specially set up or claimed . . . ."[62] And it is this language to which the cases *Herndon* cites appeal—in particular, the requirement that the federal right be "specially set up or claimed" and that the state decision be against the right.[63] For if a party has failed to properly assert his right, it has not been "specially set up or claimed,"[64] and if a state court has declined to consider it, it has not rendered a decision against the federal right.[65]

Of the seven cases *Herndon* cites, *Erie Railroad Co. v. Purdy* is perhaps the clearest in its application of this analysis. The railroad company, the

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61. Id. at 636.

62. See id. at 593 (emphasis deleted) (quoting Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386–87).

63. *John*, *Atlantic Coast Line*, *Brooks*, *Purdy*, and *McGrew* all cite the statute and rely upon the "specially set up or claimed" requirement. 231 U.S. 583, 585 (1913); 242 U.S. 532, 535 (1917); 124 U.S. 394, 395 (1888); 185 U.S. 148, 152 (1902); 188 U.S. 291, 308 (1903). *Burrus* does not cite the statute but relies entirely on *Atlantic Coast Line*. See 244 U.S. at 105. *Central Union* grants that "it is for this Court to determine finally whether a litigant in a state court has waived his federal right" but holds that such determination will be made on the basis of applicable state law, absent unfairness. See 269 U.S. 190, 194–95 (1925) (also citing *John*, 231 U.S. at 585). As I will suggest, this is most naturally understood as a ruling that the federal statutory standard ("specially set up or claimed") typically incorporates state law.

64. See *Atlantic Coast Line*, 242 U.S. at 535 ("To become the basis of a proceeding in error from this court to the Supreme Court of a State 'a right, privilege or immunity' claimed under a statute of the United States must be 'especially set up or claimed,' and must be denied by the state court." (citation omitted)).

65. See *John*, 231 U.S. at 585 (noting that if a state court declines to hear an improperly presented federal claim, "no Federal right was denied by that court"). It is interesting to compare in this context the Court's treatment of claims never presented to the state courts. On direct review, the Court has announced what is called the "pressed or passed on" requirement, which generally bars review of unpresented claims, but it has equivocated about whether the barrier is jurisdictional or merely prudential. See Yee v. City of Escondido, 503 U.S. 519, 533 (1992) (noting the Court's "inconsistent views as to whether this rule is jurisdictional or prudential"). See generally 1 Tribe, supra note 20, § 3-24, at 516–18 (discussing Court's inconsistent treatment of "pressed or passed on" rule). More strikingly, the Court has in this context continued to rely upon the statutory "specially set up or claimed" requirement. See Webb v. Webb, 451 U.S. 493, 495 (1981). It has even echoed the early procedural adequate and independent state ground cases. Compare id. at 501 (interpreting requirement to mean "at the time and in the manner required by the state law"), with *McGrew*, 188 U.S. at 308 (holding that federal right must be "specially set up or claimed . . . at the proper time and in the proper way," where "[t]he proper time is in the trial court whenever that is required by the state practice"). That the Supreme Court seems to believe the "pressed or passed on" rule is materially different from the procedural adequate and independent state ground—in particular, that it may be merely a prudential requirement—is yet another of the puzzling aspects of this area of jurisprudence. It is the more puzzling because the two situations have been unified in the habeas context, where the procedural default rule treats such claims as if they had been presented and rejected on procedural grounds, in effect hypothesizing an adequate and independent state ground. See infra note 108. R

defendant in a state court action, had argued for the first time before the New York Court of Appeals that the law the plaintiff relied on was an invasion of its property rights and therefore invalid under the Fourteenth Amendment. The Court of Appeals refused to consider the argument, noting that "the rule seems settled that such an objection, to be available here, must have been raised in the courts below."[66]

That is, of course, a plain example of what would now be considered a procedural adequate and independent state ground. The *Purdy* Court, however, said nothing about state supremacy with respect to state law or the possibility that a state procedural ruling could bind the Supreme Court. It did not cite *Murdock*, and it mentioned the adequate and independent state ground doctrine only in its substantive form and then only to note that the New York Court of Appeals could have declined to consider a properly asserted federal right if such a substantive state ground existed.[67] Instead, *Purdy* quotes the statutory grant of jurisdiction and states explicitly that

> whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State.[68]

This is to be expected, for the law granting the Supreme Court jurisdiction over certain federal issues is, of course, a federal law. *Purdy* goes on to find that the railroad failed to satisfy the federal requirement and therefore that Supreme Court jurisdiction was lacking.[69]

Traced to its origins, then, the rationale for the lack of jurisdiction over claims barred by state procedural rules is not that a state court ruling on state procedural law binds the Supreme Court (the rationale in the substantive adequate and independent state ground cases). It is that litigants who fail to observe state procedure have not satisfied the federal statutory requirement that their federal rights be "specially set up or claimed" and, while the requirement existed, that the decision be adverse to the federal right.[70] The consequences of this alternative explanation will depend on whether the operative context is direct or collateral review, and also on the substance given the "specially set up or claimed" requirement. Those topics are the subject of the following Parts.

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66. See *Purdy*, 185 U.S. at 150 (quoting Purdy v. Erie R.R. Co., 56 N.E. 508, 510 (N.Y. 1900)).

67. Id. at 152.

68. Id. (quoting Carter v. Texas, 177 U.S. 442, 447 (1900)).

69. Id. at 154.

70. The current statute retains the requirement that the federal right be "specially set up or claimed" but eliminates the requirement of an actual decision adverse to the federal claim. See 28 U.S.C. § 1257 (2000).

III. IMPLICATIONS FOR DIRECT REVIEW

What does this history establish? A hundred years or so ago, the Supreme Court did distinguish between substantive and procedural grounds, and found that it lacked jurisdiction over judgments resting on the latter because of a federal statutory requirement unrelated to its ability (or lack thereof) to review the correctness of state-law rulings. Given the recent and repeated statements to the contrary, these cases mean little now. They are the dead stars of the title, whose light offers information only about the past. But even dead light can illuminate the present, and what the cases show is that when the Supreme Court began the practice of declining to hear a federal claim forfeited under state procedural law, it was not recognizing a lack of power to affect the judgment but simply applying a federal standard implementing the statutory grant of jurisdiction.

The overwhelming question, given that approach, was what would be the content of the federal law standard. The Supreme Court could, conceivably, have created a purely federal procedure, with forfeiture rules entirely independent of state law. That, however, would have been a serious infringement on the ability of states to set their own procedures, since the penalty for not adopting the federal rules would be exposure to Supreme Court review despite correct application of even a settled state procedural rule. In consequence, it made far more sense for the federal rules to incorporate applicable state law. Thus *McGrew* holds that the federal right must be "specially set up or claimed . . . at the proper time and in the proper way," where "[t]he proper time is in the trial court whenever that is required by the state practice."[71]

The approach is not unknown; indeed, it is fairly common for federal law to incorporate state law rules.[72] What is distinctive about the so-called procedural adequate and independent state ground is that it presents the relatively unusual circumstance in which a federal court must be effectively integrated into a state system. After *Erie*, we typically think of state and federal systems as distinct, and worry about uniformity of result across the two. But a federal court—the Supreme Court—sits at the top of each state system. It does not, of course, sit to review questions of state law; nor does it apply state rules of procedure. Its choice of procedural rules, however, is not without consequence for the states, for to the extent that its rules for proper presentation depart from state law, that state law is rendered incapable of conclusively terminating a case.

In such circumstances, incorporation of state law makes obvious sense. Indeed, the Supreme Court has taken a similar approach to the

71. Mut. Life Ins. Co. v. McGrew, 188 U.S. 291, 308 (1903).

72. A classic example is the copyright statute's incorporation of state-law definitions of the "children" entitled to renew copyrights. See De Sylva v. Ballentine, 351 U.S. 570, 580–82 (1956) (interpreting Copyright Act of 1947, ch. 391, § 24, 61 Stat. 652, 659 (repealed 1976)).

somewhat similar issues presented by the question of what law determines the preclusive effects of judgments rendered by federal courts exercising diversity jurisdiction. The general rule, of course, is that the preclusive effect of a judgment is determined by the law of the rendering jurisdiction.[73] Thus the preclusive effect of the judgment of a New York court is determined by New York law, and the effect of the judgment of a federal court exercising federal question jurisdiction is a matter of federal law.[74] The law on which the judgment is based is ordinarily irrelevant; thus New York law controls the effect of the judgment of a New York court regardless of whether that court applies New York or Pennsylvania law.[75] The question of how to treat the judgment of a federal court exercising diversity jurisdiction thus comes down to the question of whether that federal court is understood to be a federal court that happens to be applying state law, or whether it is considered "in effect, only another court of the state."[76] Here, too, we face the question of how to deal with a federal court seemingly integrated into a state system, and the Supreme Court's solution, in *Semtek International Co. v. Lockheed Martin Co.*,[77] attempts to accommodate both perspectives. A federal court is undeniably federal, and hence there is strong intuitive appeal to the idea that the law that governs the preclusive effect of its judgments must likewise be federal. The *Semtek* Court was emphatic in refusing to cede control of the preclu-

73. See 28 U.S.C. § 1738 (dealing with effect given to state court judgments by courts of other states).

74. That federal preclusion law determines the effect of the judgment of a federal court exercising federal question jurisdiction seems to follow naturally from the conception of such federal courts as a distinct national jurisdiction. The proposition is commonly repeated but little analyzed in the cases. For a comprehensive approach to the problem of interjurisdictional preclusion, which reveals many seldom-appreciated complexities, see Stephen B. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 Cornell L. Rev. 733 (1986) [hereinafter Burbank, Interjurisdictional Preclusion]. To note but one, the general rule stated in the text—that the law of the rendering jurisdiction determines the preclusive effect of a judgment—does not necessarily mean that the domestic preclusion law of the rendering state will apply; the rendering state's law may pick, or be displaced by, sister-state or federal common law. See id. at 830.

75. But see id. at 747–53 (noting that Supreme Court of nineteenth and early twentieth centuries took preclusion law as means of protecting rights conferred by substantive law and hence linked preclusion law to governing substantive law). Indeed, this practice may persist to the extent that the rendering state's law picks some other state's preclusion law as the rule of decision, or that the rendering state's domestic preclusion law is displaced by federal common law, as could be the case when the judgment is based on federal law. See id. at 830.

76. Guar. Trust Co. v. York, 326 U.S. 99, 108 (1945) (describing role of federal court exercising jurisdiction in deciding state-law issues).

77. 531 U.S. 497 (2001). The text offers a particular, and narrow, perspective on *Semtek*, which is an unusually rich and complicated case. For a more thorough discussion of the Court's opinion, see Stephen B. Burbank, *Semtek*, Forum Shopping, and Federal Common Law, 77 Notre Dame L. Rev. 1027, 1036–47 (2002).

sive effects of federal judgments to state law.[78] But the purpose of diversity jurisdiction is simply to provide a neutral decisionmaker otherwise on an equal footing with state courts,[79] and hence the content of that federal law will typically be determined by reference to the law of the state in which the court sits.[80] Just so, I have suggested, the law that governs forfeiture of federal claims in Supreme Court direct review of state judgments is federal, but it will usually incorporate the law of the court whose judgment is under review.

The conclusion that the words "specially set up or claimed" are appropriately taken to incorporate state-law rules while retaining a federal veto power is novel in one sense. The scholarship on the procedural adequate and independent state ground does not focus on this language,[81] and it sets out to find the source of the Supreme Court's power to set aside state procedural rulings that generally bar review. I attempt to refocus the analysis on the source of the bar and offer the language for that purpose, obviating the need to invoke a federal common law untethered to the language of § 1257.[82] The endpoint of the analysis, however, is much the same; the scholars who turn instead to federal common law likewise conclude that this common law incorporates all adequate state procedural rules. Given that this is how adequacy analysis operates in the

78. See *Semtek*, 531 U.S. at 507 (holding that Supreme Court "has the last word on the claim-preclusive effects of *all* federal judgments").

79. See *Guar. Trust*, 326 U.S. at 108–09.

80. See *Semtek*, 531 U.S. at 508. The Court did, however, note that "[t]his federal reference to state law will not obtain . . . in situations in which the state law is incompatible with federal interests." Id. at 509; cf. Burbank, Interjurisdictional Preclusion, supra note 74, at 812 ("Having determined that uniform federal preclusion law is not required, under traditional federal common law analysis a court must still be alert to the possibility that application of state law, borrowed as federal law, will thwart the purposes of, or otherwise interfere with, federal substantive law."). R

81. Meltzer actually does consider this specific language in the course of canvassing possible sources of the Court's power to conduct adequacy review. He concludes that it is not a plausible candidate: "[I]t is hard to see anything in the statute affirmatively authorizing the Court to treat constitutional state forfeiture rules as nonetheless inadequate to bar review." Meltzer, supra note 8, at 1162. That is true, but as noted in the text, I believe that this is the wrong question. What needs explanation is not the avoidance of the bar, but the bar itself, and the statutory text serves this purpose well. R

82. The qualification is significant. The difference between "statutory construction" and "creation of federal common law" is one of degree rather than kind, and the characterization employed may at times be less a matter of substance than a rhetorical device used to attribute responsibility to Congress or the Court as an author prefers. See Peter Westen & Jeffrey S. Lehman, Is There Life for *Erie* After the Death of Diversity?, 78 Mich. L. Rev. 311, 331 (1980) (arguing that court acting in common law capacity performs "precisely the same function as when it interprets a statute"). And as the text indicates, the endeavor of giving substance to the phrase "specially set up or claimed" allows considerable room for judicial discretion. What distinguishes my account from the conventional understanding of adequacy analysis as rooted in federal common law is that the conventional understanding looks to multiple sources—the substantive federal right at issue in each individual case, see Field, supra note 7, at 969 n.385—whereas I suggest looking to the single statute that demarks the Supreme Court's jurisdiction. R

hands of the current Court, of course, no scholarship could depart from that conclusion without risking implausibility and greater than usual irrelevance.

The practical significance of my suggested understanding of Supreme Court direct review of federal claims forfeited under state law is likewise limited—and not merely because the Supreme Court's willingness to take academic instruction upon settled doctrine is (justifiably) minimal. It does not, for instance, suggest that any of the Supreme Court's current results are incorrect. Current § 1257 retains the requirement that the federal right be "specially set up or claimed," and the Supreme Court may on that basis legitimately demand compliance with state procedure on pain of a jurisdictional bar. It does, however, have a few consequences. For one, it means that just as the Supreme Court is not bound by state procedural rules, state courts are not bound by the Supreme Court's finding of inadequacy. That is, by clarifying that the procedural law applied in the Supreme Court is a federal law distinct from the state procedural law applied in state courts of last resort, it shows that even if the Supreme Court finds that a state rule is inadequate to bar direct review, the state is not for that reason precluded from again applying that rule in its own courts.[83] For another, it means that the

83. Meltzer and Field, while agreeing that federal common law governs the adequacy analysis generally, differ over whether this common law also applies in state courts. As both believe that federal courts have the power to prescribe procedural common law either solely for federal courts or for state and federal courts alike, this is at most a policy dispute. But given that both also seek to explain current practice, it in fact comes down to the interpretation of a number of ambiguous Supreme Court decisions. See Meltzer, supra note 8, at 1180 (citing cases). Henry v. Mississippi, 379 U.S. 443 (1965), is one of the most recent and perhaps the most illuminating. Rather than holding the state-law ground inadequate in that case, the Court, while strongly intimating such a conclusion, remanded to the state court for consideration of the possibility that Henry had actually waived his federal claim. Then, puzzlingly, it announced: R

> Of course, in so remanding we neither hold nor even remotely imply that the State must forgo insistence on its procedural requirements if it finds no waiver. Such a finding would only mean that petitioner could have a federal court apply settled principles to test the effectiveness of the procedural default to foreclose consideration of his constitutional claim.

Id. at 452. This language could be taken to indicate that "[s]tate courts . . . can continue to apply their procedural rules strictly, as long as the rules are constitutional." Field, supra note 7, at 967; see also Terrance Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 233 (reaching same conclusion). Meltzer suggests to the contrary that the Court was concerned only to avoid the implication that it was imposing the *Fay v. Noia* "deliberate bypass" standard on state courts. Meltzer, supra note 8, at 1152 n.121. The passage is undoubtedly gnomic, but it seems likely that if the Court had, as Meltzer believes, assumed that a finding of inadequacy would bind state courts, it would have taken its strong suggestion of inadequacy to be more than a remote implication that the rule could not be applied. At the least, it would likely have suggested that the state court consider adequacy, as well as waiver, on remand. Other cases are equally difficult to interpret, but some support for Field's reading can be found in *New York Central*, where Justice Holmes seemed to suggest that federal and state standards of proper presentation were analytically distinct: "We do not undertake to R R R

jurisdictional bar is statutory only; because it is quite different from the adequate and independent state ground discussed in *Murdock*, it cannot harden into the same sort of constitutional command.

And in fact the procedural variant displays significantly less rigidity than the substantive in the hands of the modern Supreme Court. Though the Court does casually state that the adequate and independent state ground doctrine applies to procedural rules as well as substantive law, what it means for a ground to be "adequate" differs dramatically depending on whether the ground is substantive or procedural. In the substantive context, the meaning is fairly simple. Early decisions such as *Murdock* ask whether the state-law ground is "sufficiently broad"[84] to sustain the judgment, and this is the meaning that has persisted. The dispositive question was and has remained whether decision of the federal question in the claimant's favor would justify reversal of the judgment.

With respect to procedural grounds, however, the early decisions say nothing about the ability of the procedural ruling to support the judgment. Instead, as discussed above, they focus on the language of the jurisdictional grant. Perhaps more surprising, neither do the modern decisions. "Adequate," in the procedural context, means something like "consistently and regularly applied and neither novel nor burdensome."[85] It is, in short, a qualitative assessment of state law.[86] The existence of Supreme Court authority to make such a determination is, of course, a necessity if state courts are not to be given free rein to thwart federal rights by harsh procedural rules or unpredictable applications, but it is hard to square with the idea of a constitutional proscription on reexamin-

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review the decision of the [state] Supreme Court as to state procedure, but if the Railroads were too late to argue their case before that Court they are not too late to argue it here." N.Y. Cent. R.R. v. N.Y. & Pa. Co., 271 U.S. 124, 126–27 (1926). To the extent that practice is relevant, however, it appears that state courts tend to acquiesce in Supreme Court decisions and abandon procedural rules held to be inadequate on direct review. See Meltzer, supra note 8, at 1154 n.127 (collecting cases). R

84. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1874).

85. See Meltzer, supra note 8, at 1137–45 (discussing adequacy criteria); Struve, supra note 8, at 252 (same); supra text accompanying notes 7–13. R R

86. Decisions dealing with the substantive state ground do go beyond breadth to the extent that they ask whether the ruling has a "fair or substantial basis" in state law. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944) (quoting Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930)). This is, however, still not a qualitative assessment; it is effectively a test for whether the state court has egregiously misapplied state law. For an excellent general analysis of Supreme Court review of state law decisions, see Fitzgerald, supra note 1. Interestingly, some arguably procedural grounds are treated as substantive in the sense that the Supreme Court's adequacy analysis goes to breadth rather than the qualitative factors set out in the text. See, e.g., Utley v. City of St. Petersburg, 292 U.S. 106, 111 (1934) (laches); Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164–65 (1917) (estoppel); Wood v. Chesborough, 228 U.S. 672, 677–80 (1913) (limitations). What distinguishes these grounds, I suggest, is that they do not relate to whether a federal right was "specially set up or claimed," and hence they are not candidates for incorporation into a federal common law rule. R

ing state court rulings on state law.[87] It is much easier to understand as a determination whether state rules are appropriately incorporated into a federal forfeiture rule.

This understanding also explains the line of cases, apparent ancestors to the current adequacy analysis, which seem superficially to conflict with those enforcing state forfeiture rules. In a substantial number of cases the Supreme Court has held that it "is not bound by the decision of the state court that defendant waived his federal right . . . and it may determine for itself whether he sufficiently asserted and insisted upon that right."[88] These also display a starkly different treatment of substantive and procedural grounds. It is true, of course, that whether a state substantive ground is adequate to sustain a judgment is likewise a federal question, but the federal analysis in such cases generally goes only to the breadth and independence of the state court ruling. It does not embrace the merits, nor does it involve any qualitative assessment of the state law. But as the quotation above indicates, in considering an asserted procedural bar, the Supreme Court will do one or both of these things, depending on how the adequacy analysis is conceptualized. It will "re-examine the merits" in the sense that it will itself test under federal standards whether the presentation of the federal claim was sufficient. And, as I have been arguing, this "re-examination" is best understood as a qualitative analysis of the state rule in order to determine whether it should be incorporated into the federal definition of "specially set up or claimed."[89]

IV. Implications for Collateral Review

The practical implications of all this, I have said, are relatively slight. And so I have demonstrated, in the context of direct review. The procedural adequate and independent state ground, however, plays what is perhaps its most significant role in the context of collateral habeas review of state court judgments. As on direct review, federal courts presented with habeas petitions usually decline to hear claims forfeited by failure to observe state procedural rules. Habeas jurisdiction is not circumscribed by any requirement that the federal right be "specially set up or claimed,"

87. Admittedly, this is a proscription frequently honored in the breach; though the Supreme Court pays lip service to the idea that state high-court state-law rulings are binding, it has proved willing to reexamine them in a set of cases that defies easy characterization. See Fitzgerald, supra note 1, at 100–51. R

88. Davis v. O'Hara, 266 U.S. 314, 318 (1924) (citing Davis v. Wechsler, 263 U.S. 22, 24 (1923); R.R. Comm'n v. E. Tex. R.R., 264 U.S. 79, 86 (1924); Ga. Ry. Co. v. Decatur, 262 U.S. 432, 438 (1923); Creswill v. Knights of Pythias, 225 U.S. 246, 261 (1912)); see also Erie R.R. Co. v. Purdy, 185 U.S. 148, 152 (1902) (holding that whether a federal claim has been adequately presented in state court "is itself a Federal question" on which state court decisions are not conclusive (internal citation omitted)).

89. It could also, more pragmatically, be understood as a method of testing the correctness of the state procedural ruling. An incorrect application of state law will almost certainly be too novel to survive adequacy review. See supra notes 10–17 and accompanying text.

and so, one might think, an approach that roots the procedural state ground doctrine in that language will dramatically expand the scope of habeas. The application of the doctrine to habeas does indeed present complicated questions, whatever its source is deemed to be. In the end, however, I conclude that current habeas practice is not disturbed by my suggested reinterpretation.

The doctrine that bars habeas courts from considering claims rejected by state courts on procedural grounds typically goes under the name of procedural default, though the Supreme Court has repeatedly noted that it is "typically an instance" of "the independent and adequate state ground doctrine."[90] Its evolution is familiar history and discussed ably elsewhere.[91] The short version of the story has only two real twists. The first is the Supreme Court's rejection, in *Fay v. Noia*, of early cases suggesting that failure to present federal claims to state courts would bar subsequent habeas relief.[92] And the second is its rejection of *Noia* in *Wainwright v. Sykes*.[93] The two positions are easily stated. Under *Noia*, forfeiture of the federal claim could be accomplished only by classic waiver: "an intentional relinquishment or abandonment of a known right."[94] Under *Wainwright*, any act constituting a forfeiture under state law (including, most notably, failures that result from error or ignorance) works a forfeiture for the purposes of habeas unless the petitioner can show "actual innocence" or cause for the default and prejudice arising therefrom.[95]

While its endpoint is relatively easy to identify, the path to the current procedural default rule has not been straightforward. As Justice Brennan put it in *Noia*, the "development of the law of federal habeas corpus has been attended, seemingly, with some backing and filling."[96] Fourteen years later, Justice Rehnquist could agree on that much, noting

90. Trest v. Cain, 522 U.S. 87, 89 (1997) (quoting Coleman v. Thompson, 501 U.S. 722, 730 (1991)); see also, e.g., Harris v. Reed, 489 U.S. 255, 260 (1989) ("[T]he procedural default rule . . . has its historical and theoretical basis in the 'adequate and independent state ground' doctrine."). *Wainwright v. Sykes*, the modern birthplace of procedural default, presented it as a relatively straightforward application of the adequate and independent state ground doctrine. See 433 U.S. 72, 87 (1977).

91. See, e.g., Alfred Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944–52 (1965); Meltzer, supra note 8, at 1145–47; Struve, supra note 8, at 250–55. R

92. See 372 U.S. 391, 439 (1963).

93. 433 U.S. at 85–87. *Noia* was not explicitly overruled until *Coleman*, 501 U.S. at 750, but the delay amounted to little more than a refusal to accord it a decent burial. See, e.g., Francis v. Henderson, 425 U.S. 536, 546–47 (1976) (Brennan, J., dissenting) (accusing majority of departing from *Noia* without "com[ing] to grips with the constitutional and statutory principles and policy considerations underpinning that case").

94. *Noia*, 372 U.S. at 439.

95. See, e.g., Edwards v. Carpenter, 529 U.S. 446, 451 (2000). The meaning of "cause and prejudice" has proved somewhat elusive. See id. (noting Court's failure to "identif[y] with precision exactly what constitutes 'cause'"). In Murray v. Carrier, 477 U.S. 478, 488 (1986), the Court explained that attorney error not rising to the level of constitutionally ineffective assistance would not constitute cause.

96. 372 U.S. at 412.

"th[e] Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."[97] The tortuous path of habeas jurisprudence has raised some skeptical eyebrows, for it appears at times to have been guided by nothing more than the shifting composition of the Supreme Court.[98] Another explanation was undoubtedly the pressure that the Warren Court's innovations in constitutional criminal procedure placed on habeas jurisdiction. If a court adjudicating a habeas petition is to look only to the merits of the federal claims, it is natural to suppose that those claims will be decided according to the law in effect at the time the petition is filed. This approach, however, would have inflicted unacceptable disruption on state administration of justice because it would have allowed almost all state prisoners to take advantage of new constitutional rules of criminal procedure.[99] After some ill-fated attempts to deal with this problem via a jurisprudence of nonretroactivity,[100] the Court in *Teague v. Lane* eventually settled on an approach that directed federal habeas courts to examine state judgments according to the law in effect at the time they became final.[101]

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97. *Wainwright*, 433 U.S. at 81.

98. See, e.g., *Coleman*, 501 U.S. at 758–59 (Blackmun, J., dissenting) (attributing majority's "crusade to erect petty procedural barriers" to "obvious exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings"); Alan W. Clarke, Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two), 30 U. Rich. L. Rev. 303, 330 (1996) (citing "more conservative judicial philosophy of the Burger and then Rehnquist Court" as driving habeas retrenchment). Those seeking an explanation that goes beyond simple ideology might look to the dictates of 28 U.S.C. § 2243, which directs the habeas court to dispose of the petition "as law and justice require." 28 U.S.C. § 2243 (2000). Greater faith in the reliability of state courts as protectors of federal rights translates quite naturally into a greater respect for state procedural rules. The second half of the twentieth century witnessed both these shifts, and one way of describing the change thus wrought is that the Court stopped believing that justice required a willingness to look through state procedural rules. See generally Robert Jerome Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 895 (1994) (noting state court use of procedural rules in 1960s "to impede the civil rights movement" and Supreme Court willingness to look through procedural rules in response).

99. See Kermit Roosevelt III, A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity, 31 Conn. L. Rev. 1075, 1093 (1999).

100. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537–38 (1991) (discussing retroactivity jurisprudence). Justice Harlan, whose attempts to rework the Court's approach to retroactivity eventually won majority support, see Griffith v. Kentucky, 479 U.S. 314, 321–23 (1987) (adopting Harlan's view), explicitly stated that "the problem of retroactivity is in truth none other than one of resettling the limits of the reach of the Great Writ." Mackey v. United States, 401 U.S. 667, 701–02 (1971) (Harlan, J., concurring in part and dissenting in part).

101. See Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion); see also Roosevelt, supra note 99, at 1095–96 (discussing *Teague* and retroactivity). *Teague* was, more or less, codified by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. See Williams v. Taylor, 529 U.S. 362, 412 (2000) ("[W]hatever would qualify as an old rule under our *Teague* jurisprudence will R

The doctrinal changes in habeas jurisprudence both reflect and embody a fundamental conceptual shift in the understanding of the habeas action. *Noia*'s waiver rule, which requires the intentional relinquishment of a known right, is that applied to acts outside of litigation; its appropriateness depends on the assumption that the habeas action is unconnected to the state proceedings.[102] *Wainwright*, by contrast, employs the standard for forfeiture of a claim within a single course of litigation, an approach that makes sense if a habeas court is reviewing state decisions.[103] AEDPA, which largely codified the Supreme Court's habeas revolution, has made this new understanding explicit: The availability of habeas relief depends on the soundness of the "decisions" of the state courts and federal review is both deferential and circumscribed.[104] The current regime, then, directs the habeas court's attention to state court decisions, and uses as a standard of correctness the law in effect at the time the decisions became final.

This changed understanding of habeas, which takes it to be not an independent action but a review of state court decisions, provides the theoretical basis for procedural default. Since *Brown v. Allen*, it has been clear that a state court's resolution of a federal claim will not preclude

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constitute 'clearly established Federal law [under AEDPA].'"). *Teague*'s focus on the law in effect at the time the state court decision became final is very much in keeping with the post-*Wainwright* procedural default rule, which similarly shifts the focus of habeas analysis from the merits of a prisoner's federal claims to the decisions of state courts, refusing to disturb state judgments that reject even meritorious federal claims on procedural grounds. See *Wainwright*, 433 U.S. at 87.

102. See Meltzer, supra note 8, at 1188 ("[T]he theory of habeas corpus reflected in *Noia* was that of a proceeding independent of the prior state court action and unaffected by procedural defaults of the prisoner."). R

103. 433 U.S. at 87. Pre-AEDPA Supreme Court decisions tended to give a formal nod to the idea that habeas is a freestanding civil action while admitting that it amounts in practice to review of a state judgment. See, e.g., *Coleman*, 501 U.S. at 730 ("[A] state prisoner is in custody *pursuant* to a judgment."); Fay v. Noia, 372 U.S. 391, 469 (1963) (Harlan, J., dissenting) ("In habeas as on direct review, ordering the prisoner's release invalidates the judgment of conviction and renders ineffective the state rule relied upon to sustain that judgment."). The *Wainwright* Court's identification of the adequate and independent state ground doctrine as the basis for the procedural default rule, and AEDPA's statutory directive to assess the decisions of state courts, make clear that a habeas court does in fact review state judgments. See generally Roosevelt, supra note 99, at 1121–23 (discussing nature of collateral attack). R

104. Current 28 U.S.C. § 2254 effectively demands some deference to state-court application of federal law, allowing habeas relief only if the state courts have rendered "a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2000). The "unreasonable application" clause grants state courts some latitude in their application of law to fact (as in, say, an ineffective assistance of counsel analysis): "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, 529 U.S. at 410. Limiting the source of the federal law to the Supreme Court imposes another restriction: After AEDPA, a federal district court cannot, for example, grant a habeas petition on the basis of circuit law alone, even though that law is binding on the district court. See id. at 412.

relitigation on habeas.[105] If a habeas action is understood as independent of prior state court adjudications, it might be natural to suppose that a state court's failure to decide an issue can have no more preclusive effect than a decision.[106] But the question appears quite different if the federal habeas court is taken instead to be reviewing the state judgment. If a habeas court is reviewing a state judgment, the effect of the state court's decision is not a question of preclusion. It is instead a question of the ability of the federal court to overturn particular rulings. And here the difference between deciding a claim and declining to do so assumes rather different significance. A state court's resolution of federal questions commands no deference from federal courts,[107] but its resolution of state-law questions does, and the procedural rules under which state courts decline to hear federal claims are of course rules of state law. In delimiting the scope of the habeas writ, the Supreme Court thus turned to doctrines controlling its own ability to reverse state rulings. It turned, in particular, to the doctrine of the procedural adequate and independent state ground.[108]

If that doctrine is merely an application of 28 U.S.C. § 1257, one might think that it should have no place in habeas jurisprudence. As I hope to show, however, collateral review is the one place in which the doctrine—or something much like it—actually does make good theoretical sense. The reasoning starts with the point that a habeas petitioner is not entitled to relitigate his claims as if his case were being heard on direct review. For example, he cannot, with some exceptions, avail himself of intervening changes in the law. Under AEDPA, he cannot even rely on a simple mistaken application of law by the state courts; he must show that the state courts acted unreasonably. What this means is that the federal court is effectively reviewing the judgment on its own terms and looking for significant error. It is asking whether the judgment was correct when rendered—not whether the federal court itself would reach the same result.[109] The Supreme Court's interpretation of AEDPA in *Williams v. Taylor* makes this quite clear.[110]

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105. 344 U.S. 443, 458 (1953).

106. More precisely, the failure to decide an issue can have as much res judicata effect as a decision, but will not give rise to collateral estoppel.

107. Again, AEDPA has changed this rule to some extent in the habeas context. See 28 U.S.C. § 2254.

108. One interesting aspect of the current Court's procedural adequate and independent state ground jurisprudence is that in the habeas context, if a petitioner asserts a federal claim never presented to state courts but clearly defaulted by the time of the federal petition, habeas courts are instructed to in effect hypothesize a state court decision rejecting the claim on procedural grounds and to assess the adequacy of those grounds. See, e.g., Gray v. Netherland, 518 U.S. 152, 161–62 (1996).

109. For a more extended discussion of the differences between direct and collateral review, see Roosevelt, supra note 99, at 1120–21. R

110. 529 U.S. 362, 410 (2000); see also supra note 104. R

And since what is being reviewed is not the federal claims themselves but the state court's treatment of those claims, a refusal to hear the claims based on state procedure should be respected. Even assuming, as I do, that federal standards generally govern the procedural question of whether a claim can be heard in federal court, there is no reason for a federal habeas court to apply those standards. It is not itself either hearing the federal claims or declining to do so, as it would if a habeas action were independent of state adjudications, or if it were engaged in direct review. All it is doing is assessing the state court's performance, and state law, if not unconstitutional, provides the proper yardstick by which to do so. A state court that refuses to decide a federal claim on the grounds that it was improperly presented under state procedure has not denied a federal right; it has not even decided a federal question.[111] Absent an outrageous error of state law, or a state law independently unconstitutional, it is hard to see how there could be any federal grounds on which to attack the judgment. And with no federal grounds on which to attack the judgment, it is hard to see how confinement pursuant to that judgment could be a violation of federal law entitling a prisoner to habeas relief.[112]

Thus a refusal to hear claims forfeited under state procedural law follows quite logically from the nature of collateral review, given the Supreme Court's understanding of a habeas petition as a collateral attack on a state judgment and AEDPA's codification of that understanding. The question is not whether a state procedural rule can apply of its own

111. When 28 U.S.C. § 1257 made an actual state court decision adverse to a claim of federal right a prerequisite to Supreme Court jurisdiction, it similarly required the Supreme Court to inspect the state decision, and language from such decisions recognizes that reliance on procedural law, if sound, does not amount to the denial of a federal right. See John v. Paullin, 231 U.S. 583, 585 (1913) ("Certainly no Federal right was denied" by a state court relying on state procedural law, and if the ruling was correct "no Federal question was before it for decision.").

112. The substantive grounds for habeas relief have always suggested some connection between the habeas action and the judgment, for the authorization to issue writs to those in custody in violation of federal law raises the question suggested in the text. As the Supreme Court put it in Coleman v. Thompson, 501 U.S. 722, 730 (1991), a prisoner is held "*pursuant* to a judgment," and if the judgment is sound, how can the confinement be a violation of federal law? The answer, I think, is that it cannot be. But if what is at issue is the soundness of the judgment, how can a habeas action be independent of state court proceedings? Again, I think the answer is that it cannot be. There is a limited exception, however. As an original matter, the only ground for habeas relief was a lack of jurisdiction, and that can indeed be determined without an assessment of whether the judgment is substantively correct. As Chief Justice Marshall put it many years ago, "[a]n imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the Court has general jurisdiction of the subject, although it should be erroneous." Ex Parte Watkins, 28 U.S. (3 Pet.) 193, 203 (1830). Once the grounds for habeas relief expanded to include reexamination of the merits, however, habeas practice necessarily took the form of an attack on the judgment and required that the judgment be assessed on its own terms. This is what the Supreme Court's post-*Noia* cases recognize and AEDPA makes clear.

force in federal court, but simply whether it was appropriately applied in state court. Procedural default is that rarest of things, a doctrine that makes more sense transplanted to a new context than it does in its doctrinal birthplace.

There is, admittedly, a problem with this account of the nature of procedural default, namely that it does not explain the presence of adequacy analysis on collateral review—though neither, of course, does the approach that takes adequacy analysis to be federal common law.[113] The puzzling thing about the Court's current jurisprudence is thus not the application of procedural default to habeas petitions, but rather the application of adequacy analysis—the idea that the qualitative inadequacy of a state procedural rule that would permit direct review of a state judgment will likewise allow collateral attack via habeas. As I have suggested above, there is no obvious theoretical reason why a habeas court should subject state procedural rules to any adequacy analysis beyond a simple review for constitutionality.[114] Still less obvious is the explanation for the

113. Meltzer suggests "that the 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." Meltzer, supra note 8, at 1132. But a habeas court is not, on the current approach, deciding whether a federal claim has been presented in a manner sufficient to justify a federal court in deciding it; it is reviewing the state court's handling of that claim for violations of federal law. Thus a federal common law of procedure governing the former question would have no application to the latter. Meltzer's answer would, admittedly, be satisfactory if the standards on direct and collateral review were identical and it were clear that application of a rule held inadequate on direct review was a violation of federal law, for then the state proceedings would be infected with federal error via the state court's use of an inadequate state ground. Neither of these propositions holds as a matter of current doctrine, and the account I have developed offers additional reasons to doubt the latter. R

114. The reason is that state procedural law is being reviewed on its own terms, not vetted for incorporation into a federal common law of procedure. One consequence of this understanding is that if a state procedural rule is inadequate to bar collateral review, it must be unsound as a matter of federal substantive (constitutional) law and therefore ineffective in state court. Interestingly, while state courts tend to follow Supreme Court findings of inadequacy and cease to apply rules held inadequate on direct review, see supra note 83, such acquiescence is less common with regard to findings of inadequacy on collateral review. See Meltzer, supra note 8, at 1155–57. Over five years ago the Tenth Circuit held inadequate an Oklahoma procedural rule requiring defendants to raise ineffective assistance of counsel claims on direct appeal even if trial counsel continues to represent the defendant on appeal. See Trim v. Cody, No. 95-6219, 1995 WL 729562, at *2 (10th Cir. Dec. 8, 1995) (holding state ground inadequate). The Oklahoma courts continue to apply the rule, and the Tenth Circuit continues to hold it inadequate. See, e.g., Charm v. Mullin, 37 Fed. Appx. 475, 478–79 (10th Cir. 2002). The practice can be justified on the grounds that the federal circuits' interpretations of federal law are not binding on state courts. More pragmatically, once we grant that habeas review has become the functional equivalent of direct review the Supreme Court lacks the institutional capacity to perform, see infra note 116 and accompanying text, it may make sense for habeas courts to treat state procedural rules as though the cases were presented on direct review. This would give them greater power to look through state procedure, but conversely it would imply that a finding of inadequacy should not prevent subsequent application of the rule in state court. R R R

ability of habeas courts to look through state procedural rules if the petitioner can demonstrate "actual innocence" or "cause and prejudice." Whether a petitioner can make this showing simply has nothing to do with whether the state court's judgment was federally erroneous, and hence nothing to do with whether confinement pursuant to that judgment violates federal law.[115]

The ultimate explanation for the Supreme Court's consistent rulings that the scope of federal review on habeas is no narrower than on direct review must be a recognition that the possibility of direct Supreme Court review is so vanishingly slight that the responsibility must be allocated elsewhere, if the idea of federal supervision of state judicial systems is not to become pure fiction.[116] The Supreme Court lacks the institutional capacity to review any significant fraction of state court convictions. Perhaps more to the point, the Court's primary current role in the federal system is to ensure uniformity of federal law.[117] The primary criterion for the exercise of its certiorari jurisdiction is thus the existence of a split between the federal circuits.[118] Put more simply, the Supreme Court does not ordinarily engage in error-correction. Protection of the rights of individual criminal defendants is a task more appropriately delegated to habeas courts.[119] If habeas courts have effectively assumed the Su-

115. The only explanation that fits with the textual grounds for habeas relief is that it is a violation of federal law to hold a prisoner who can demonstrate cause for and prejudice from his forfeiture of a claim of federal right. But if that is so, it is extremely puzzling that Supreme Court direct review is foreclosed, since whatever law is being violated should create a federal ground on which the Supreme Court could reverse. Put more simply, if a prisoner is in custody in violation of the laws of the United States, it is hard to understand how the judgment pursuant to which he is held could be proof against direct Supreme Court review. And conversely, if the Supreme Court could do nothing but affirm the judgment, it is hard to see how the custody is in violation of federal law. Remedies are either outstripping rights on collateral review or falling short on direct review.

116. The suggestion that habeas currently functions as a dispersed version of the direct review the Supreme Court can no longer meaningfully conduct has been made at greater length elsewhere. See, e.g., Barry Friedman, A Tale of Two Habeas, 73 Minn. L. Rev. 247, 253–54 (1988); James S. Liebman, Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 2009–10 (1992). This does not explain the actual innocence and cause and prejudice exceptions, which I believe must be traced, however unlikely it seems, to some vestigial notion of fair play persisting in habeas jurisprudence.

117. See, e.g., Robert L. Stern et al., Supreme Court Practice 226 (8th ed. 2002) ("One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on [federal questions] among the federal courts of appeals.").

118. See Sup. Ct. R. 10(a) (listing circuit splits as a reason for certiorari review); see also Stern et al., supra note 117, at 226 ("[A] square and irreconcilable conflict [between circuits] *ordinarily* should be enough to secure review."). R

119. In the early years of the Republic, of course, the volume of state criminal litigation was less, the Supreme Court's jurisdiction was largely nondiscretionary, and its role in the federal system was quite different. When state criminal defendants were entitled as of right to a Supreme Court hearing via writ of error for any state court decision rejecting a federal claim, the Supreme Court did indeed engage in error-correction.

preme Court's prior role of offering a federal forum for claims of federal right, it makes good sense to set the scope of habeas review approximately equal to the scope of direct Supreme Court review.[120] And this means, among other things, viewing state procedural rules as though the posture were direct and not collateral review. Indeed, although the Court maintains at least some distinction between the direct and the collateral context—it claims that the adequate and independent state ground doctrine is jurisdictional on direct review, but based merely on comity and federalism in habeas practice[121]—its cases treat the two contexts as identical and use their precedents interchangeably.[122]

The upshot of all this is in fact relatively simple. The Supreme Court's repeated explanations that procedural default is an application of the adequate and independent state ground doctrine are correct in the sense that habeas review is now the functional equivalent of a dispersed direct review and governed by the same standards. Whether the limitations currently imposed under the name of the procedural adequate and independent state ground doctrine could make the transition to collateral review is simply irrelevant, for habeas courts are now effectively engaged in direct review, at least as far as their jurisdiction is concerned.

CONCLUSION

I have suggested that the so-called procedural adequate and independent state ground, on direct review, is better understood as an implementation of statutory language describing the *types* of judgments that may be reviewed or set aside. On direct review, the Supreme Court may assert jurisdiction only over cases in which a federal right was "specially set up or claimed," and that language usually incorporates the requirements of applicable state procedure. Thus a procedural error that justifies a state court in not deciding a federal claim will typically prevent the decision from qualifying for federal review. Because the Supreme Court must decide in each case, however, whether the presentation of the federal claim met the "specially set up or claimed" standard, it has the freedom to disregard state requirements that undermine federal interests.[123]

Those days are gone, but the Court's impulse to preserve the possibility of meaningful federal review, even if displaced to the district courts, is laudable.

120. A number of scholars have suggested that the two should be coextensive. See sources cited supra note 116. I tend to agree—though I start from the position that a state procedural rule does not create an adequate and independent state ground on direct review. R

121. See Coleman v. Thompson, 501 U.S. 722, 729–30 (1991).

122. See Lee v. Kemna, 534 U.S. 362, 375 (2002).

123. Another implication of the fact that this decision must be made on a case-by-case basis is that there is nothing illegitimate about the practice of what Struve calls "as applied" adequacy review. As she points out, however, the differing competencies of the Supreme Court and its federal inferiors may make delegation of this sort of review to habeas courts desirable. See Struve, supra note 8, at 277, 286–88. R

This account offers a clear explanation of the source of the Supreme Court's power to engage in adequacy analysis on direct review. Though it seems to undermine the idea that procedural defaults can bar review via habeas petitions, where the statutory standard does not apply, an analysis of the Court's current understanding of the nature of a habeas action shows that this understanding—on which a federal court engages in a circumscribed review of state decisions—actually goes further in limiting review than the current procedural default doctrine. The explanation for the scope of habeas review is that the task of error-correction, once the province of the Supreme Court on direct review, has been farmed out to the federal district courts via habeas.

As I said at the beginning, then, the results of this foray into the doctrinal thicket are modest. There is no need to reshape current doctrine or to change current results. But it should allow us to cease worrying about the basis for adequacy analysis, and it does suggest some conclusions about the consequences of a finding of inadequacy. Finally, by reaffirming the conceptual distinctness of state and federal procedure, it offers a clearer and simpler perspective on this vexed corner of the law.