Federal Habeas Review of State Prisoner Claims Based on Alleged Violations of Prophylactic Rules of Constitutional Criminal Procedure: Reviving and Extending *Stone v. Powell*

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I. INTRODUCTION

In 1976, in *Stone v. Powell*, the Supreme Court held that a state prisoner who had a full and fair opportunity to litigate a Fourth Amendment claim in state court, both at trial and on appeal, may not be granted federal habeas corpus relief on a claim that the trial court admitted evidence obtained in violation of the Fourth Amendment.[1] Justice Powell's opinion for the *Stone* majority emphasized the notion that the exclusionary rule, as derived from the Fourth Amendment, is not a personal constitutional right of the accused.[2] Instead, the rule is merely "'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.'"[3]

The Court "weigh[ed] the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims"[4] and reaffirmed its earlier view that, at trial and on direct appeal, the deterrent effect achieved by excluding evidence obtained through unconstitutional searches and seizures outweighs any costs.[5] In the context of collateral review, however, these costs persist unchanged while the incremental deterrent effect of exclusion becomes so attenuated that it is outweighed by the costs.[6]

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1. 428 U.S. 465, 481–82 (1976).
2. *Id.* at 494 n.37.
3. *Id.* at 486 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).
4. *Id.* at 489.
5. *Id.* at 493–94.
6. *Id.*

As a Fourth Amendment decision, *Stone* was unremarkable. The cost–benefit balancing used by the Court predates *Stone*[7] and has been relied upon since *Stone* to impose categorical limits on the application of the Fourth Amendment exclusionary rule.[8] In addition, however, *Stone* contained language and suggested theories that one could use to argue that collateral review of state prisoner claims based on alleged violations of all prophylactic rules of criminal procedure is inappropriate unless the prisoner can show that he did not have a full and fair hearing in state court on the violation in question.[9] The *Stone* Court observed that habeas review of state court convictions imposes its own costs, which add to the costs exacted by the exclusionary rule.[10]

This Article argues that violations of prophylactic rules are not violations of the Constitution, laws, or treaties of the United States, and, therefore, federal courts lack jurisdiction over habeas claims based on alleged violations of such rules when the claimant had a full and fair opportunity in state court to raise the claim in question. This Article further asserts that the equitable considerations that the Court noted in *Stone*—and that it has long used to raise and lower procedural barriers to habeas relief—should preclude a habeas court from reaching the merits of state prisoner claims based on alleged violations of prophylactic rules of criminal procedure if a state court afforded the prisoner a full and fair hearing on the violation in question.

Following this introduction, Part II of this Article defines and discusses the concept of prophylactic rules. Part III suggests that federal habeas courts lack jurisdiction over state prisoner claims that allege violations of prophylactic rules because persons in custody as a result of such violations are not "in custody in violation of the Constitution or laws . . . of the United States."[11] This proceeds in three subdivisions.

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7. *See, e.g.*, United States v. Janis, 428 U.S. 433, 448–49 (1976) (recognizing the costs of the exclusionary rule and balancing its utility as a deterrent against societal interests); *Calandra*, 414 U.S. at 349 (weighing the costs of extending the exclusionary rule to grand jury proceedings against the benefits of the rule in that context).

8. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (examining the use of the exclusionary rule in civil deportation hearings); United States v. Leon, 468 U.S. 897, 920–25 (1984) (discussing the exclusionary rule's applicability when police act in objectively reasonable reliance on a properly issued warrant); William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1373–78 (1981) (discussing cases involving questions related to the exclusionary rule that both predate and postdate *Stone*).

9. *See, e.g.*, *Stone*, 428 U.S. at 476 (citing Frank v. Mangum, 237 U.S. 309, 333–36 (1915)).

10. *See id.* at 493–94 & n.35.

11. 28 U.S.C. § 2241 (2006). Subsection (e) of § 2241 has been declared unconstitutional. *See* Boumediene v. Bush, 553 U.S. 723, 732 (2008) (declaring § 2241(e) "an unconstitutional

Section A focuses on the origin and evolution of habeas corpus in England and the United States in an effort to demonstrate that the limitations on habeas review herein proposed are consistent with historical limitations on habeas corpus. Section B discusses the Supreme Court's expansion of federal habeas jurisdiction from its earlier role as a forum to challenge the committing court's jurisdiction, to a forum in which a state prisoner could raise any federal constitutional claim. Section C develops the idea that habeas courts lack jurisdiction over claims based on alleged violations of prophylactic rules.

Part IV suggests that a cost–benefit analysis similar to that used in *Stone* bars habeas review of claims based on alleged violations of all prophylactic rules if there has been a full and fair hearing on the alleged violation in state court. Section A discusses the costs and benefits of prophylactic rules and describes the Court's use of a cost–benefit balancing test to limit the impact of those rules. Section B outlines the costs and benefits of habeas review and explores the Court's equitable weighing of those factors as it has raised and lowered procedural barriers to habeas relief. Section C explains how and why the Court should use its equitable powers to extend *Stone* to bar habeas review of most alleged violations of prophylactic rules. Part V offers a brief conclusion.

II. PROPHYLACTIC RULES AND REMEDIES

A. Prophylactic Rules

A prophylactic rule is a judge-made rule promulgated by the Supreme Court to help protect an underlying constitutional right where, for one reason or another, the Court believes that the law does not otherwise adequately protect the right.[12] Prophylactic rules are to be contrasted with personal constitutional rights. "A rule is properly classified as prophylactic only if it can be violated without necessarily violating the Constitution."[13] Prophylactic rules overprotect.[14] They bar

suspension of the writ"). This subsection, however, is not the focus of this Article.

12. *See, e.g.*, Mickens v. Taylor, 535 U.S. 162, 176 (2002) ("The purpose of our *Holloway* [*v. Arkansas*] and [*Cuyler v.*] *Sullivan* exceptions from the ordinary requirements of *Strickland* [*v. Washington*] . . . is . . . to apply needed prophylaxis . . . ."); *see also* Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 282–83 (1998) (discussing the debate over the Court's power to create such rules to protect social interests).

13. Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 163 (1985); *see also* Chavez v. Martinez, 538 U.S. 760, 772

much conduct that is otherwise constitutional because the Court believes that such conduct, if allowed, could lead to violations of constitutional rights[15] and because it is easier to draw and enforce bright-line rules than to identify constitutional violations on a case-by-case basis.[16] The difference between constitutional mandates and prophylactic rules is important because, theoretically, "prophylactic rules and incidental rights are fully open to revision by Congress, federal executive action, and state legislative, executive[,] or judicial action."[17]

To some extent, the difference between prophylactic rules and constitutional mandates is more semantic than real. The Supreme Court declares what is mandated by the Constitution. It also decides if implementation of a constitutional mandate requires any other rules[18] or remedies.[19]

The Court's rationale determines whether a rule is prophylactic.[20] It is not always obvious, however, which rules are prophylactic and which

(2003) ("[V]iolations of judicially crafted prophylactic rules do not violate the constitutional rights of any person.").

14. *See* Duckworth v. Eagan, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring) ("Like all prophylactic rules, the *Miranda* rule 'overprotects' the value at stake.").

15. *See, e.g.*, Maryland v. Shatzer, 130 S. Ct. 1213, 1220 (2010) ("The implicit assumption [for barring constitutional conduct] is that the [conduct] pose[s] a significantly greater risk of [constitutional violation]."); *see also* Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 950 (1999).

16. *See Shatzer*, 130 S. Ct. at 1222–23; Strickland v. Washington, 466 U.S. 668, 692 (1984); *cf.* Miranda v. Arizona, 384 U.S. 436, 544–45 (1966) (White, J., dissenting) (claiming that the argument that *Miranda* warnings will conserve judicial time and effort ignores the fact that the rule "leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, [and] whether the accused has effectively waived his rights").

17. Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1054 (2001). Judicial action may also revise prophylactic rules. *See, e.g.*, *Shatzer*, 130 S. Ct. at 1220, 1223 (holding that the "judicially prescribed prophylaxis" announced in *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), designed to prevent the police from badgering a suspect into waiving his right to the presence of counsel lasts only fourteen days).

18. *See, e.g.*, Texas v. McCullough, 475 U.S. 134, 138 (1986) ("Like other 'judicially created means of effectuating the rights secured by the [Constitution],' we have restricted application of [*North Carolina v.*] *Pearce* to areas where its 'objectives are thought most efficaciously served.' . . . Where the prophylactic rule of *Pearce* does not apply, the defendant may still obtain relief if he can show actual vindictiveness upon resentencing." (first alteration in original) (citations omitted) (quoting Stone v. Powell, 428 U.S. 465, 482 (1976))); *Miranda*, 384 U.S. at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

19. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 (1974) (calling the Fourth Amendment exclusionary rule "a judicially created remedy").

20. Grano, *supra* note 13, at 115.

are mandated by the Constitution.[21] "[A] slight change in rationale can alter the proper categorization of a rule."[22] For example, in *United States v. Wade*, the Court held that an accused is entitled to the presence of counsel when placed in a police lineup.[23] The Court emphasized that its "rules were required only in the absence of other devices to protect the underlying constitutional right to a fair trial."[24] *Wade*'s rationale fits exactly into the definition of a prophylactic rule—a bright-line rule that demands more of law enforcement than the Constitution requires, eliminates the need for case-by-case adjudication, and threatens the exclusion of evidence if procedures of some kind are not adopted to protect the underlying constitutional rights.[25]

One year after *Wade*, in *Simmons v. United States*, the Court clarified its rationale concerning the right to counsel.[26] Four years after *Simmons*, in *Kirby v. Illinois*, the Court transformed *Wade* into a constitutional mandate.[27] Justice Stewart's plurality opinion in *Kirby* unequivocally declared that "[t]he *Wade–Gilbert* exclusionary rule . . . stems from . . .

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21. *Compare* Cruz v. New York, 481 U.S. 186, 196 n.2 (1987) (White, J., dissenting) (positing that *Bruton v. United States*, 391 U.S. 123 (1968), "is prophylactic in nature"), *with* Dickerson v. United States, 530 U.S. 428, 458 (2000) (Scalia, J., dissenting) ("[*Bruton*] was based, not upon the theory that this was desirable protection 'beyond' what the Confrontation Clause technically required; but rather upon the self-evident proposition that the inability to cross-examine an available witness whose damaging out-of-court testimony is introduced violates the Confrontation Clause . . . ."); *see also* Grano, *supra* note 13, at 158 (referring to *Jackson v. Denno*, 378 U.S. 368 (1964), as a "case in which the Court is ambiguous concerning whether it established a prophylactic rule or recognized a procedural due process right").

22. Grano, *supra* note 13, at 115.

23. 388 U.S. 218, 236–39 (1967).

24. Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 20 (1975) (citing *Wade*, 388 U.S. at 239).

25. *See* Grano, *supra* note 13, at 105–06 (defining a prophylactic rule as one "that functions as a preventative safeguard to [e]nsure that constitutional violations will not occur" and stating that the Court "may speak of the difficulty of detecting constitutional violations on a case-by-case basis or of the need to establish understandable [bright-line] rules for law enforcement officers to follow"). Interestingly, Professor Grano was of the view that *Wade* was "rooted squarely in the [S]ixth [A]mendment's right to counsel provision" and was not a prophylactic rule. *Id.* at 119, 120-21. Others, however, saw the rule as prophylactic. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting) (calling the rule in *Wade* prophylactic).

26. 390 U.S. 377, 382–83 (1968) ("The rationale of [*Wade* and *Gilbert*] was that an accused is entitled to counsel at any 'critical stage of the prosecution,' and that a post-indictment lineup is such a 'critical stage.'" (quoting *Wade*, 388 U.S. at 236–37)).

27. In *Wade*, the Court declared that "[l]egislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'" 388 U.S. at 239. Such regulations would, presumably, also eliminate the need for counsel. *Kirby v. Illinois*, however, constitutionalized that right. 406 U.S. 682, 690 (1972) (plurality opinion).

the guarantee of the right to counsel contained in the Sixth and Fourteenth Amendments"[28] and becomes applicable only "at or after the initiation of adversary judicial criminal proceedings."[29]

The Court has directed most prophylactic rules at police conduct. Rules in this category include rules designed to regulate certain activities that implicate the Fourth Amendment,[30] the warnings required by *Miranda v. Arizona*,[31] the various rules the Court has designed to reinforce[32] and refine[33] *Miranda*'s protections, and some rules designed to regulate conduct that might compromise Sixth Amendment rights.[34]

28. *Kirby*, 406 U.S. at 688. *Kirby* recognized both a Sixth Amendment right to counsel that applies to lineups that are critical stages of a prosecution because they follow the initiation of adversary judicial criminal proceedings and a separate Due Process right not to be subjected to lineups that are unnecessarily suggestive. *Id.* at 690–91. Nothing in *Kirby* suggests that any prophylactic rules are necessary to protect either right.

29. *Id.* at 689; *cf.* Kansas v. Ventris, 129 S. Ct. 1841, 1845 (2009) (citing *Wade* as an example of a case where the Court mandated a rule that extended beyond the core constitutional right to counsel in order to encompass "various pretrial 'critical' interactions between the defendant and the State").

30. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450–51 (1990) (discussing rules governing DUI checkpoints); *see also* Klein, *supra* note 17, at 1037–38 (arguing that cases requiring that inventory searches of individuals and vehicles be conducted according to standardized procedures are prophylactic rules that limit officer discretion) (citing Colorado v. Bertine, 479 U.S. 367 (1987); Illinois v. LaFayette, 462 U.S. 640 (1983)). The Fourth Amendment exclusionary rule is not a prophylactic rule; rather, it is a prophylactic remedy. *See infra* notes 53–58 and accompanying text.

31. 384 U.S. 436 (1966); *see also* Brown v. Illinois, 422 U.S. 590, 600 (1975) ("This Court has described the *Miranda* warnings as a 'prophylactic rule,' and as a 'procedural safeguard,' employed to protect Fifth Amendment rights against 'the compulsion inherent in custodial surroundings.'" (citations omitted) (quoting Michigan v. Payne, 412 U.S. 47, 53 (1973); *Miranda*, 384 U.S. at 457, 478)).

32. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (holding that if a suspect has been given his *Miranda* warnings and requested an attorney, any statement thereafter made by that suspect is inadmissible in the prosecution's case-in-chief unless it is shown that the suspect thereafter initiated conversations with the police about the crime); *see also* Minnick v. Mississippi, 498 U.S. 146, 150 (1990) (stating that the *Edwards*' protection does not cease simply because the suspect has consulted with a lawyer).

33. *See, e.g.*, Maryland v. Shatzer, 130 S. Ct. 1213, 1220, 1223 (2010) (holding that the *Edwards* rule, a "judicially prescribed prophylaxis" designed to prevent police from badgering a suspect into waiving his previously asserted rights, lasts only fourteen days).

34. S*ee, e.g.*, Texas v. Cobb, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring) (observing that *Michigan v. Jackson*, 475 U.S. 625 (1986), *overruled by* Montejo v. Louisiana, 129 S. Ct. 2079 (2009), was a "wholesale importation of the *Edwards* rule into the Sixth Amendment").

Other prophylactic rules are directed at judges,[35] prosecutors,[36] and defense attorneys.[37]

Some prophylactic rules create rebuttable presumptions that the government acted unconstitutionally.[38] Others create so-called "conclusive presumptions."[39] Conclusive presumptions can result in the reversal of state court convictions even when the state can show that no constitutional violation occurred.[40]

Prophylactic rules and remedies protect values embodied in the Fourth Amendment,[41] the Fifth Amendment's Self-Incrimination[42] and Double Jeopardy[43] Clauses, the Sixth Amendment's Right to Counsel[44]

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35. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 725–26 (1969) ("[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the [sentencing judge's] reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."), *overruled in part by* Alabama v. Smith, 490 U.S. 794 (1989); *see also* Michigan v. Payne, 412 U.S. 47, 52–53 (1973) (adhering to *Pearce*, but declining to hold it to be retroactive).

36. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 97–98 (1986) (shifting to the prosecution the burden of offering a neutral explanation for challenging African-American jurors upon a prima facie showing of discrimination by the defendant); Blackledge v. Perry, 417 U.S. 21, 28–29 (1974) (extending *Pearce* to prosecutors).

37. *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 554–55 (1987) (explaining that in *Anders v. California*, 386 U.S. 738 (1967), the Court "did not set down an independent constitutional command that all lawyers, in all proceedings, must follow," but rather "established a prophylactic framework" to vindicate the defendant's constitutional right to appellate counsel); *see also* Smith v. Robbins, 528 U.S. 259, 265 (2000) (characterizing the *Anders* rule as prophylactic and stating that "the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel").

38. *See, e.g.*, Texas v. McCullough, 475 U.S. 134, 142 (1986) (stating that the rule in *Pearce* may perhaps be characterized as "'a presumption of vindictiveness, which may be overcome only by objective information . . . justifying the increased sentence'" (quoting United States v. Goodwin, 457 U.S. 368, 374 (1982))).

39. Conclusive presumptions are rules of substantive law. ROGER C. PARK ET AL., EVIDENCE LAW, § 4.08 (3d ed. 2011).

40. Grano, *supra* note 13, at 145 (suggesting that "*Miranda* created a conclusive presumption of involuntariness when its procedures are not followed, a presumption the state is not entitled to rebut").

41. *See supra* note 30 and accompanying text.

42. *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 770 (2003) (plurality opinion) ("[W]e have created prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause."); New York v. Quarles, 467 U.S. 649, 654 (1984) ("The prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution but, [are] instead measures to [e]nsure that the right against compulsory self-incrimination [is] protected.'" (first and third alterations in original) (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974))).

43. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359, 368–69 (1983) (noting that two statutes that proscribe the same offense will be construed not to authorize successive punishments unless the legislature clearly expressed an intent to do so).

44. *See, e.g.*, Mickens v. Taylor, 535 U.S. 162, 176 (2002) (observing that "[t]he purpose of

and Confrontation[45] Clauses, and the Fourteenth Amendment's Due Process[46] and Equal Protection[47] Clauses. Some prophylactic rules even protect values embodied in other prophylactic rules.[48]

B. Prophylactic Remedies

Some constitutional provisions are self-executing; that is, they operate directly against government actors[49] and, by their terms, command or invalidate certain actions. For example, a conviction cannot stand if there was a complete denial of counsel or some other structural error in a defendant's trial.[50]

Most constitutional guarantees are not self-executing in this way. Consequences only attach to their violation if found in, or imposed by, some source other than the constitutional guarantee itself.[51] Similarly, prophylactic rules do not, by their terms, prescribe a remedy for their

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our . . . exceptions from the ordinary requirements of [*Strickland v. Washington*, 466 U.S. 668 (1984)] is . . . to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel").

45. *See, e.g.*, Bruton v. United States, 391 U.S. 123, 126–28 (1968) (holding that, in a joint trial, a confession made by a non-testifying codefendant that implicates a defendant cannot be admitted into evidence against that defendant even if the jury is instructed to disregard any references in the confession to the defendant); *see also* Cruz v. New York, 481 U.S. 186, 196 n.2 (1987) (White, J., dissenting) (recognizing *Bruton* as "prophylactic in nature").

46. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 725–26 (1969) (recognizing a defendant's due process right to be free of vindictiveness and retaliatory motivations during sentencing), *overruled in part by* Alabama v. Smith, 490 U.S. 794 (1989).

47. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 84 (1986) (reaffirming the principle that the Equal Protection Clause bars the use of race as a factor in jury selection).

48. *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 176 (1991) (referring to *Edwards* as providing a "second layer of prophylaxis for the *Miranda* right"). In *Minnick v. Mississippi*, the Court held that *Edwards*' protection does not cease simply because the suspect has consulted a lawyer. 498 U.S. 146, 154–55 (1990). In dissent, Justice Scalia characterized *Minnick* as "the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement." *Id.* at 166 (Scalia, J., dissenting); *see also* Montejo v. Louisiana, 129 S. Ct. 2079, 2090 (2009) (declaring that "three layers of prophylaxis are sufficient").

49. *See, e.g.*, Rose v. Mitchell, 443 U.S. 545, 561–62 (1979) (barring discrimination when selecting a grand jury).

50. *See, e.g.*, Neder v. United States, 527 U.S. 1, 8 (1999) (gathering examples of structural errors); *see also* Kansas v. Ventris, 129 S. Ct. 1841, 1845 (2009) (observing that the Constitution mandates exclusion of evidence obtained in violation of some constitutional guarantees).

51. Legislation is often one such source. *See, e.g.*, 42 U.S.C. § 1983 (2006) (prescribing consequences for the deprivation of constitutional rights); Federal Tort Claims Act, 28 U.S.C. § 1346, 2671–80 (2006) (providing a cause of action against the United States for the deprivation of constitutional rights).

violation. To fill these gaps, the Supreme Court has created prophylactic remedies. These take two forms.

First, the Court has created prophylactic remedies to enforce certain constitutional commands.[52] The Fourth Amendment exclusionary rule is such a prophylactic remedy.[53] Even though the rule's stated purpose is "to prevent, not to repair,"[54] and it is not a personal constitutional right of the accused,[55] the rule provides a de facto remedy for some Fourth Amendment violations.[56] Because it attaches to a constitutional right and not to a prophylactic rule, however, the Fourth Amendment exclusionary rule extends direct relief only to individuals whose personal constitutional rights were violated.[57] These individuals do not receive a windfall; instead, the remedy merely restores them to their pre-violation condition.[58]

Second, to ensure that consequences attach to the violation of prophylactic rules, the Court has created another kind of prophylactic exclusionary remedy. Remedies in this category implement prophylactic rules by excluding evidence obtained in violation of those rules. The *Miranda* exclusionary rule—which excludes unwarned statements that were products of custodial interrogation, even if made voluntarily—falls into this category.[59]

The exclusion of evidence as a prophylactic remedy imposes substantial costs. If relevant, reliable, and trustworthy evidence is excluded, the truth-finding function of the courts is impaired.[60] Moreover, prophylactic remedies often extend relief to some people whose constitutional rights were violated as well as to some people

52. *See supra* notes 41–47 and accompanying text.

53. *See* Stone v. Powell, 428 U.S. 465, 479 (1976) (explaining that the exclusionary rule is "'simply a prophylactic device intended generally to deter Fourth Amendment violations'" (quoting Kaufman v. United States, 394 U.S. 217, 224 (1969))).

54. Elkins v. United States, 364 U.S. 206, 217 (1960).

55. *Stone*, 428 U.S. at 486; *see also* United States v. Calandra, 414 U.S. 338, 348 (1974).

56. *See generally* William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633, 653–60 (1983) (discussing the available remedies for Fourth Amendment violations).

57. Grano, *supra* note 13, at 103–04.

58. *See* Schroeder, *supra* note 56, at 660 ("'[F]ederal courts may use any available remedy to make good the wrong done.'" (quoting Davis v. Passman, 442 U.S. 228, 245 (1979))).

59. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 306–07 (1985) (explaining the purpose behind the *Miranda* exclusionary rule); *see also* Chavez v. Martinez, 538 U.S. 760, 772 (2003) ("We have likewise established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of . . . the Self-Incrimination Clause . . . .").

60. *See, e.g.*, Michigan v. Harvey, 494 U.S. 344, 351–52 (1990) (explaining the importance of the truth-finding function of the courts).

whose constitutional rights were not violated.[61] In the latter case, the "remedy" does more than right a wrong—it provides the victim of the wrong with a windfall. Indeed, it is an inherent attribute of most prophylactic constitutional rules and remedies that their "retrospective application [and enforcement] will occasion windfall benefits for some defendants who have suffered no constitutional deprivation."[62]

C. Constitutional Legitimacy

Prophylactic rules and remedies raise serious questions of constitutional legitimacy when used by the courts to invalidate the conduct of state officials without a finding of an actual constitutional violation.[63] Some have suggested that court-made rules designed to deter executive branch officials from violating the Constitution "intrude[] upon the separation of powers."[64] "[B]ecause the Court always imposes prophylactic rules on both the federal and state courts," however, the paramount concern is federalism.[65]

The Supreme Court "has supervisory authority over the federal courts, and [it] may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."[66] The Supreme Court, however, has no supervisory authority over the state courts; if it is to impose rules on the state courts, its authority to do so must come from the Constitution.[67]

The Constitution nowhere grants the Supreme Court the power to create prophylactic rules and make them binding on the states. More specifically, Section 5 of the Fourteenth Amendment does not say that "the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities

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61. *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring in part and dissenting in part) (characterizing the *Miranda* warning requirement as a prophylactic rule and observing that "[b]ecause *Miranda* 'sweeps more broadly than the Fifth Amendment itself,' it excludes some confessions even though the Constitution would not . . . [and] 'provides a remedy even to the defendant who has suffered no identifiable constitutional harm'" (quoting *Elstad*, 470 U.S. at 306–07)).

62. Michigan v. Payne, 412 U.S. 47, 53 (1973).

63. A thorough exploration of the constitutional legitimacy of prophylactic rules is beyond the scope of this Article. Other authorities have explored this more in depth. *See* Grano, *supra* note 13; Klein, *supra* note 17; Landsberg, *supra* note 15; Monaghan, *supra* note 24.

64. Klein, *supra* note 17, at 1052.

65. *See* Grano, *supra* note 13, at 124.

66. Dickerson v. United States, 530 U.S. 428, 437 (2000).

67. *Id.* at 438; Grano, *supra* note 13, at 129, 141.

guaranteed"[68] by that amendment. Rather, it says that these guarantees and rights "may be enforced by Congress by means of appropriate legislation."[69] Congress, however, has only rarely acted in this manner.[70] In fact, in the criminal procedure area, it has often attempted to rescind the rules imposed by the Supreme Court.[71] These realities raise serious questions as to "whether the Court has the authority to require [prophylactic] rules of the state courts where it is unwilling to treat the . . . rule[s] as a necessary dimension of an underlying constitutional right."[72]

Perhaps out of recognition of the problems related to constitutional legitimacy, the Court has created a kind of in-between category of constitutionally mandated prophylactic rules. While these rules can be characterized as prophylactic, they are not subject to revision because the Court has held that the Constitution commands the specific prophylaxis they impose. The *Miranda* rule seems to fall into this category after *Dickerson v. United States* where the Court acknowledged earlier references to the "prophylactic" *Miranda* warnings,[73] but concluded that *Miranda* was "a constitutional rule."[74] Rules that the Court has characterized as "extensions" of core constitutional rights[75] may also fall into this category.

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68. *Ex parte* Virginia, 100 U.S. 339, 345 (1879).

69. *Id.*

70. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 649–58 (1966) (upholding part of the Voting Rights Act as "appropriate legislation [under Section 5] to enforce the Equal Protection Clause"); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3087 n.23 (2010) (Thomas, J., concurring) (characterizing as acts designed to enforce the Fourteenth Amendment, the Ku Klux Klan Act, Act of Apr. 20, 1871, 17 Stat. 13 (codified as amended in scattered sections of 42 U.S.C.), and the Force Acts, Act of Feb. 28, 1871, 16 Stat. 433; Act of May 31, 1870, 16 Stat. 140).

71. *See, e.g.*, 18 U.S.C. § 3501 (1970), *invalidated by Dickerson*, 530 U.S. at 444 ("Congress may not supersede [*Miranda*] legislatively.").

72. Monaghan, *supra* note 24, at 22; *see also Dickerson*, 530 U.S. at 446–50 (Scalia, J., dissenting) (arguing that unless the Court recognizes the underlying constitutional right, it may well overstep its authority by imposing prophylactic rules on the states). Still, some suggest that such "rules can be adequately rationalized as constitutional common law." Monaghan, *supra* note 24, at 23.

73. 530 U.S. at 437 (internal quotation marks omitted) (quoting New York v. Quarles, 467 U.S. 649, 653 (1984)).

74. *Id.* at 444.

75. *See, e.g.*, Kansas v. Ventris, 129 S. Ct. 1841, 1845–47 (2009) (calling the core right to counsel a trial right that protects the adversarial process and extending it to some "pretrial interrogations to ensure that police manipulation does not render counsel entirely impotent" (citing Massiah v. United States, 377 U.S. 201, 204 (1964); Miranda v. Arizona, 384 U.S. 436, 468–69 (1966))).

III. HABEAS JURISDICTION OVER CLAIMS BASED ON ALLEGED VIOLATIONS OF PROPHYLACTIC RULES OR DENIALS OF PROPHYLACTIC REMEDIES

A. Origin and Evolution of Habeas Corpus

Related to the problem of constitutional legitimacy is the question of whether a federal habeas court even has jurisdiction over claims based on violations of norms not required by the Constitution. Answering this question requires an examination of the history of habeas corpus.

1. Early English Common Law

The origins of habeas corpus are unclear. The writ has been said to be "of immemorial antiquity."[76] It was part of the early English common law,[77] and after the signing of the Magna Carta in 1215,[78] habeas corpus gradually became the primary means for enforcing its guarantees.[79]

Originally, the writ provided an avenue of relief to persons detained by executive authority without judicial trial.[80] Gradually, it evolved into a judicial order directing a jailor to bring a prisoner into court.[81] By the 1600s, the writ had become the judiciary's constraint on unfettered executive power and an avenue of relief for persons detained by executive authority without judicial sanction.[82] For that reason, it became known as the "Great Writ."[83]

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76. Fay v. Noia, 372 U.S. 391, 400 (1963) (quoting Sec'y of State for Home Affairs v. O'Brien, [1923] A.C. 603 (H.L.) 609) (internal quotation marks omitted), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

77. *See* Engle v. Isaac, 456 U.S. 107, 126 (1982).

78. The Magna Carta decreed that no free man could be punished "except by the legal judgment of his peers or by the law of the land." MAGNA CARTA of 1215, art. 39, *quoted in* Boumediene v. Bush, 553 U.S. 723, 740 (2008).

79. *Id.* By the middle of the fourteenth century, Chancery courts used the writ to review the judgments of inferior courts. Darnel's Case, (1627) 3 Cobbett's St. Tr. 1 (K.B.). It was also frequently used by participants in various political struggles. *See* LARRY YACKLE, POSTCONVICTION REMEDIES § 1:4, 9–10 (2010); *Developments in the Law—Habeas Corpus*, 83 HARV. L. REV. 1038, 1042–45 (1970).

80. Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)); *cf. Boumediene*, 553 U.S. at 740 ("Yet at the outset [the writ] was used to protect not the rights of citizens but those of the King and his courts.").

81. *Boumediene*, 553 U.S. at 741.

82. *See id.* at 741–43; *Brown*, 344 U.S. at 532–33 (Jackson, J., concurring).

83. *See* Charles Alan Wright, *Habeas Corpus: Its History and Its Future*, 81 MICH. L. REV.

The English Parliament codified the writ in the Habeas Corpus Act of 1679, which afforded habeas relief to prisoners who had been arbitrarily *arrested* by the Crown.[84] The 1679 Act, however, explicitly excluded persons who were in custody because they had been *convicted* of a crime.[85] Persons in this category were left with only the common law writ.[86] As a result, the English writ developed both statutory and common law forms.[87] The statutory writ was primarily a vehicle for attacking executive detentions.[88] The common law writ, in contrast, was available to challenge court judgments.[89] The latter, however, was not a general writ of error, but could be used only to attack the jurisdiction of the convicting court,[90] and it was available only to persons who were incarcerated.[91]

As an overall scheme, this model made perfect sense. If a person had been convicted of a crime in a court of competent jurisdiction, the law assumed the judicial process and its protections had been made available and that any errors could be corrected on appeal. If, however, a person was held by the executive, that person had not had the benefit of judicial process and could use the statutory writ. Similarly, if a person were held by order of a court which had no jurisdiction over him, no lawful judicial authority had passed on the validity of the detention.

2. The Writ in the United States Before the Civil War

Parliament never explicitly extended the English Habeas Corpus Acts to the colonies.[92] Nevertheless, the writ appears to have been part of the common law in the colonies.[93] Moreover, the United States Constitution specifically provides that "[t]he Privilege of the Writ of

802, 802 (1983) (book review) (referring to justices from John Marshall to Sandra Day O'Connor calling it the "Great Writ").

84. *Boumediene*, 553 U.S. at 741–42 (citing Habeas Corpus Act of 1679, 31 Car. 2, c. 2).

85. *Developments*, *supra* note 79, at 1045.

86. YACKLE, *supra* note 79, § 1:4, at 15; *Developments*, *supra* note 79, at 1045.

87. *See* YACKLE, *supra* note 79, § 1:4, at 9–15.

88. *See Boumediene*, 553 U.S. at 742 (citing Habeas Corpus Act, 1640, 16 Car. 1, c. 10).

89. YACKLE, *supra* note 79, § 1:4, at 12.

90. *Developments*, *supra* note 79, at 1045.

91. *Id.*

92. *Id.*

93. *Boumediene*, 553 U.S. at 845 (Scalia, J., dissenting) ("The writ was established in the Colonies beginning in the 1690's and at least one colony adopted the 1679 Act almost verbatim."); *see also* YACKLE, *supra* note 79, § 1:4, at 15–16 (noting occasional references to the writ before the Revolutionary War).

Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[94]

The language of the Suspension Clause suggests that the drafters of the Constitution assumed the right of habeas corpus to be inherent in the judicial power.[95] Nonetheless, the Judiciary Act of 1789—which Congress passed in its first session and which established the federal courts[96]—gave prisoners in federal custody the right to petition for habeas corpus relief.[97]

In 1807, in *Ex parte Bollman*, Chief Justice Marshall declared that the power to grant the writ derives from the Judiciary Act of 1789.[98] Two hundred years after *Bollman*, in *Boumediene v. Bush*, the Supreme Court suggested that the writ contains a constitutional dimension.[99] According to the *Boumediene* Court, "the Suspension Clause . . . ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[100]

Neither the Constitution nor the Judiciary Act defines habeas corpus.[101] It has long been clear, however, that habeas corpus is a civil remedy[102] whose "essence," according to the Supreme Court, allows "an attack by a person in custody upon the legality of that custody."[103] In the decades after the adoption of the United States Constitution, "English common law defined the substantive scope of the writ."[104] The early cases suggest, and most authorities agree, that prior to the Civil War, federal habeas corpus only allowed prisoners two types of claims. First,

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94. U.S. CONST. art. I, § 9, cl. 2.

95. *Boumediene*, 553 U.S. at 742–43 (2008) (citing "evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme"). The Clause may have been an effort to regularize the rules governing suspension in response to the fact that in the sixteenth and seventeenth centuries "in England, habeas relief often was denied by the courts or suspended by Parliament." *Id.* at 741.

96. Judiciary Act of 1789, ch. 20, §§ 2–11, 1 Stat. 73, 73–79 (1789).

97. The 1789 Act, however, did not authorize federal courts to issue the writ on behalf of prisoners held in custody under state law. *See Ex parte* Dorr, 44 U.S. 103, 105 (1845).

98. 8 U.S. (4 Cranch.) 75, 94 (1807).

99. 553 U.S. at 795–97.

100. *Id.* at 745 (quoting Hamdi v. Rumsfeld, 545 U.S. 507, 536 (2004) (plurality opinion)).

101. *See* U.S. CONST. art. I, § 9, cl. 2; Judiciary Act of 1789 § 14, 1 Stat. 73, 81–82.

102. *See* Cross v. Burke, 146 U.S. 82, 88 (1892) ("It is well settled that . . . habeas corpus is a civil, and not a criminal, proceeding.").

103. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

104. McCleskey v. Zant, 499 U.S. 467, 478 (1991), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

they could challenge detentions by the federal executive that had been imposed without proper legal process.[105] Second, they could challenge a federal judgment of imprisonment as a nullity on the ground that the imprisoning court lacked jurisdiction.[106] Some courts also thought that a "full and fair hearing" was necessary before a habeas court would consider a prior judgment conclusive.[107] Additionally, evidence suggests that even before the Civil War, American habeas courts routinely expanded the scope of review to allow prisoners to introduce previously unknown or unavailable exculpatory evidence.[108] It was clear, however, that state prisoners could not access the federal writ.[109] Since that time, "federal habeas corpus has evolved as the product of both judicial doctrine and statutory law."[110]

3. The Civil War Amendments

In 1867, the Civil War had just ended, and the federal government faced a recalcitrant and unrepentant South.[111] The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were designed to constitutionalize the results of that war. As President Lincoln said in his second inaugural address, slavery, in some way, was the cause of the war.[112] The Thirteenth Amendment abolished slavery.[113] The war was also about States' rights. The federal cause had prevailed; the States' rights cause had lost. The Fourteenth and Fifteenth Amendments

105. *See, e.g.*, *Ex parte* Wells, 59 U.S. 307, 318 (1855) (McLean, J., dissenting).

106. *See, e.g.*, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202–03 (1830) (holding that a court cannot invalidate a judgment made by a court with final jurisdiction over the case).

107. Boumediene v. Bush, 553 U.S. 723, 781 (2008) ("Justice McLean, on Circuit in 1855, expressed his view that a habeas court should consider a prior judgment conclusive 'where there was clearly jurisdiction and a full and fair hearing; but that it might not be so considered when any of these requisites were wanting.'" (quoting *Ex parte* Robinson, 20 F. Cas. 969, 971 (C.C.S.D. Ohio 1855) (No. 11,935))); Withrow v. Williams, 507 U.S. 680, 718–19 (1993) (Scalia, J., dissenting) (calling this factor conclusive at common law).

108. *Boumediene*, 553 U.S. at 780-81 (citing state court cases and *Robinson*, 20 F. Cas. at 971).

109. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 255–56 (1973) (Powell, J., concurring) (noting that prior to the Habeas Corpus Act of 1867, state prisoners did not have access to federal habeas review).

110. Duncan v. Walker, 533 U.S. 167, 183 (2001) (Stevens, J., concurring in part and concurring in the judgment).

111. After the war, the Southern states enacted the so-called "Black Codes." *See* CLINT BOLICK, DAVID'S HAMMER 99 (2007). Congress responded with the Civil Rights Act of 1866. *Id.*

112. JOINT CONG. COMM. ON INAUGURAL CEREMONIES, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES: FROM GEORGE WASHINGTON TO GEORGE BUSH 142–43 (Bicentennial ed. 1989).

113. U.S. CONST. amend. XIII.

cemented that victory. As the Supreme Court has long recognized, the Civil War Amendments to the Constitution "were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[114]

Section 1 of the Fourteenth Amendment declares:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[115]

The Privileges or Immunities Clause appears to have been intended to prevent the states from intruding on the privileges and immunities of citizens of the United States.[116] This provision adopted a broad definition of citizenship to ensure that the states could not abrogate those provisions of the Bill of Rights mentioned in *Dred Scott v. Sandford* such as liberty of speech, the right to hold public meetings on public affairs, and the right to keep and bear arms.[117] Some proponents of the Fourteenth Amendment felt the privileges and immunities of citizens, as "appl[ied] against [the] states," encompassed all "the personal rights guaranteed and secured by the first eight amendments of the

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114. City of Rome v. United States, 446 U.S. 156, 179 (1980); *see also Ex parte* Virginia, 100 U.S. 339, 345 (1879) (the Civil War Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress").

115. U.S. CONST. amend XIV, § 1.

116. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3063–83 (2010) (Thomas, J., concurring) (discussing the history of the Privileges or Immunities Clause).

In the *Slaughter-House Cases*, the Supreme Court held that the Privileges or Immunities Clause protected only the privileges and immunities of federal citizens and not those of citizens of the states. 83 U.S. (16 Wall.) 36, 77 (1873). Later, the Court narrowed the reach of this provision still further. *See McDonald*, 130 S. Ct. at 3060 (Thomas, J., concurring) (citing cases). Despite these limiting opinions, "[v]irtually no serious modern scholar . . . thinks this [is] a plausible reading of the [Fourteenth] Amendment." Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 n.127 (2000).

117. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 258 (1988); *see also McDonald*, 130 S. Ct. at 3068 (Thomas, J., concurring) ("Section 1 overruled *Dred Scott*'s holding that blacks were not citizens of either the United States or of their own state and, thus, did not enjoy 'the privileges and immunities of citizens' embodied in the Constitution. . . . It [also gave] examples of what the rights of citizens were—the constitutionally enumerated rights of 'the full liberty of speech' and the right 'to keep and carry arms.'").

Constitution,"[118] as well as "[o]ther rights declared elsewhere in the Constitution . . . [including] the 'privilege' of habeas corpus."[119]

The Due Process Clause seems to have been intended to guarantee that state actors followed their states' own rules when taking a person's life, liberty, or property.[120] More specifically, this clause seems to have been intended to extend to African-Americans the same protections against arbitrary state action as were due persons generally.[121] In 1867, however, due process only guaranteed a criminal defendant a full and fair hearing in a court with jurisdiction, where his rights were governed by general provisions of law applicable to all.[122] In a civil case, due process guaranteed a full and fair hearing, after proper notice, in a court with jurisdiction, where each party's rights were governed by general provisions of law applicable to all.[123]

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118. AKHIL REED AMAR, AMERICA'S CONSTITUTION 387–89 (2005); *McDonald*, 130 S. Ct. at 3071–79, 3083–84 (Thomas, J., concurring) (discussing the application of the Privileges or Immunities Clause). *See also id.* at 3033 (majority opinion) (observing that "the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court's decision in Barron [*ex rel*. Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833)]" (citing Adamson v. California, 332 U.S. 46, 72 (1947) (Black, J., dissenting), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964))); *cf. id.* at 3033 n.10 (noting the contention that "'there is support in the legislative history for no fewer than four interpretations of the . . . Privileges or Immunities Clause'") (quoting David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 406 (2008)).

119. AMAR, *supra* note 118, at 387–89. *See also McDonald*, 130 S. Ct. at 3071–79, 3083–84, 3084 n.20 (Thomas, J., concurring) (There is "no reason to assume that the constitutionally enumerated rights protected by the Privileges or Immunities Clause should consist of all the rights recognized in the Bill of Rights and no others. Constitutional provisions outside the Bill of Rights protect individual rights and there is no obvious evidence that the Framers of the Privileges or Immunities Clause meant to exclude them." (citation omitted)).

120. *See* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 483 (1982) ("We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause."); *see also* Frank v. Mangum, 237 U.S. 309, 326 (1915) (stating that the due process required by the Fourteenth Amendment is that process which is in accord with the established law of the state so long as it is not repugnant to the Constitution).

121. *See* Amar, *supra* note 116, at 104–07 (discussing the political and economic motivations that existed at the time the Fourteenth Amendment was ratified). The Due Process Clause was never meant to create substantive rights. *McDonald*, 130 S. Ct at 3062 (Thomas, J., concurring) (characterizing as "legal fiction" the notion "that a constitutional provision that guarantees only 'process' . . . could define the substance of . . . rights").

122. *McDonald*, 130 S. Ct. at 3062 (Thomas, J., concurring); *see also Frank*, 237 U.S. at 326.

123. *See* Marchant v. Pa. R.R. Co., 153 U.S. 380, 385–86 (1894) (finding that "errors alleged to have been committed by [a state] court in its construction of its domestic laws" did not present a federal question and that plaintiff was afforded due process because she had "the benefit of a full and fair trial," in a court which had jurisdiction, where "her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all in like condition").

The Equal Protection Clause was designed as a non-discrimination clause.[124] It granted to every person equal rights to the protections of the law.[125] In addition, it conferred on all persons the benefits of positive law, including the rights to own property, enter into contracts, sue in tort for damages, seek relief in the courts, and engage in other legal activities and occupations on an equal footing.[126] It was not meant to create substantive rights.[127]

Because there was no reason to think the Fourteenth Amendment's guarantees would be self-executing or would be faithfully followed, Congress included Section 5.[128] This provision gave Congress the power to enforce the Fourteenth Amendment through appropriate legislation[129] that would "necessarily overrid[e]" any "principles of federalism that might otherwise be an obstacle to congressional authority."[130]

124. *McDonald*, 130 S. Ct. at 3043 (observing that "§ 1 of the Fourteenth Amendment contains 'an antidiscrimination rule,' namely, the Equal Protection Clause").

125. Amar, *supra* note 116, at 63.

126. Robert J. Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368, 374 n.13 (1972); *see also* Missouri v. Lewis, 101 U.S. (11 Otto) 22, 31 (1880) ("[The Equal Protection Clause] means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.3.3, 503–05 (3d ed. 2006) (outlining those rights which have been considered incorporated into the Fourteenth Amendment).

127. City of Boerne v. Flores, 521 U.S. 507, 520 (1997) ("Congress does not enforce a constitutional right by changing what the right is.").

128. *See* Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 124–27 (1999) (outlining the original draft of the Fourteenth Amendment and the subsequent second draft which included a self-executing Section 5).

129. The Civil Rights Act of 1871 (The Ku Klux Klan Act) was designed to implement the Fourteenth Amendment. *See* 17 Stat. 13 (1871) (codified as amended in sections of 42 U.S.C.); *see also McDonald*, 130 S. Ct. at 3087 n.23 (Thomas, J., concurring) (characterizing the Ku Klux Klan Act as an act designed to enforce the Fourteenth Amendment). The Civil Rights Act of 1875 had a similar purpose, *see* 18 Stat. 335 (1875), but was largely nullified in the *Civil Rights Cases*, 109 U.S. 3, 32 (1883) (rejecting the Civil Rights Act of 1875 because it regulated private actors rather than state actors).

130. City of Rome v. United States, 446 U.S. 156, 179 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973b (2006)), *as recognized in* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009); *see also Ex parte* Virginia, 100 U.S. 339, 347–48 (1880) (observing that "there might be room for argument that the first section is only declaratory of the moral duty of the State," but Section 5 "gives authority for congressional interference and compulsion" of state actors in those matters embraced within its authority).

The Fourteenth Amendment was adopted on July 9, 1868.[131] Of the states in the old Confederacy, only Tennessee ratified it.[132] In response, the federal government divided the South into military districts and stationed federal troops there.[133]

In theory, direct appeals from decisions in the state courts could have sufficed to vindicate the federal rights created by the Fourteenth Amendment.[134] The Fourteenth Amendment, however, primarily targeted systemic abuses, and Congress, distrustful of Southern state governments and courts, thought more was necessary.[135]

4. The Habeas Corpus Act of 1867

The Habeas Corpus Act of 1867[136] "seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees."[137] It did not define habeas corpus,[138] and it did not, by its terms, extend the habeas power to state prisoners. Rather, it extended the habeas jurisdiction of the federal courts to include, "'in addition to the authority already conferred by law,'" the power to issue the writ to "'all cases where any person may be restrained of his or her liberty in violation of the [C]onstitution, or of any treaty or law of the United States.'"[139]

131. U.S. CONST. amend. XIV.

132. FONER, *supra* note 117, at 261, 268–69.

133. *Id.* at 276.

134. *See, e.g.*, Carter v. Texas, 177 U.S. 442, 448–49 (1900) (overturning a state court decision on direct appeal based on equal protection grounds).

135. *See* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 13–14 (2010).

136. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

137. Fay v. Noia, 372 U.S. 391, 416 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977); *Ex parte* Tom Tong, 108 U.S. 556, 559–60 (1883) (providing that "the writ of habeas corpus . . . is not a proceeding in th[e] prosecution [of a criminal defendant]. On the contrary, it is a new suit brought by [the defendant] to enforce a civil right"). Giving the federal judiciary the power to enforce civil rights was thought preferable to giving that power to either Congress or to a permanent national bureaucracy, or to maintaining a standing army in the South. FONER, *supra* note 117, at 258.

138. *Fay*, 372 U.S. at 415.

139. Schneckloth v. Bustamonte, 412 U.S. 218, 252 n.2 (1973) (Powell, J., concurring) (quoting § 1, 14 Stat. at 385). The Habeas Corpus Act of 1867 was "the direct ancestor of contemporary habeas statutes." *Id.* at 252. Until the 1996 amendments added through the Antiterrorism and Effective Death Penalty Act (AEDPA), the Habeas Corpus Act of 1867 had undergone only minor changes. *See* Woodford v. Ngo, 548 U.S. 81, 97 (2006) (stating that the AEDPA gave habeas review a different look than what previously existed). The core of the Act remains essentially

The legal basis for the Act of 1867 remains unclear.[140] The Supreme Court, however, quickly recognized its breadth. "This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[141]

B. Expansion of Habeas Jurisdiction: From Challenging the Trial Court's Jurisdiction to Challenging All Constitutional Violations

When the 1867 Congress added the Habeas Corpus Act, "'it undoubtedly intended . . . to incorporate the common-law uses and functions of this remedy.'"[142] Consistent with that intent, for some time after the Act of 1867, the Court limited the availability of habeas relief to jurisdictional claims.[143] The Court soon expanded the term *jurisdiction*, however, to encompass sentences imposed in violation of the Double

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unchanged. *See* 28 U.S.C. §§ 2241–2255 (2006).

140. Even though the Act of 1867 preceded the ratification of the Fourteenth Amendment in 1868, both seem to have been part of a larger congressional package. The Act was probably seen by many of its supporters as "appropriate legislation" under Section 5, but became law more quickly than the Fourteenth Amendment because the latter had to be ratified by the states. It is also possible that the Act was simply a freestanding effort to expand the powers of the federal judiciary. *See Fay*, 372 U.S. at 415 (noting that the Act of 1867 when "viewed against the background of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy" suggests that Congress was intent on expanding federal habeas review). Because Congress did not extend general federal question jurisdiction to the federal courts until 1875, Judiciary Act of 1875, ch. 137, 18 Stat. 470 (1875), Congress might have wanted to allow a defendant who claimed a constitutional violation, and thereby raised a federal question in a state court, to be able to invoke habeas jurisdiction immediately without allowing the case to run its course in the state system. *But cf. Ex parte* Royall, 117 U.S. 241, 251 (1886) (observing that considerations of federal–state relations will ordinarily suggest non-intervention until the state proceeding has run its course).

141. *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325–26 (1868). It has occasionally been suggested that once Congress extended habeas review to state prisoners, its ability to "suspend" that review was limited by the Suspension Clause. *See, e.g.*, *Royall*, 117 U.S. at 249; Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 865–66 (1994).

142. *Schneckloth*, 412 U.S. at 253 (Powell, J., concurring) (quoting Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 452 (1966)).

143. *See, e.g.*, Andrews v. Swartz, 156 U.S. 272, 275 (1895) (stating that whether the statute is in violation of the state constitution is not a federal question); *In re* Loney, 134 U.S. 372, 375–76 (1890) (granting habeas review on jurisdictional grounds); *see also* Kuhlmann v. Wilson, 477 U.S. 436, 444–46 (1986) (briefly examining the historical limitations of habeas review), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)); *Ex parte* Siebold, 100 U.S. (10 Otto) 371, 377 (1880) (explaining that habeas review is limited to those courts with jurisdiction to hear the case); *Developments*, *supra* note 79, at 1048–49 (same).

Jeopardy Clause[144] and convictions obtained under an unconstitutional statute.[145] The law remained in essentially this posture until 1915. That year, in *Frank v. Mangum*,[146] the Court took the first step in a long journey that culminated, almost fifty years later, in the expansion of habeas jurisdiction almost beyond recognition.

In *Frank*, the Court examined Leo Frank's claim that the guilty verdict returned against him by a Georgia jury and his subsequent death sentence—both affirmed by the Georgia Supreme Court—were the result of the jury being intimidated by a mob.[147] The United States Supreme Court held that a federal court hearing a petition for a writ of habeas corpus may "look behind and beyond the record of [a prisoner's] conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment."[148] That jurisdiction, said the Court, could be lost, and a new trial would be warranted, if the accused did not receive due process of law,[149] unless the state made available to the accused a "corrective process" such as appellate review.[150] The majority found that Georgia's courts "accorded to [Frank] the fullest right and opportunity to be heard according to the established modes of procedure," including

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144. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 176–78 (1874); *see also* Stone v. Powell, 428 U.S. 465, 476 n.8 (1976) (characterizing this exception as encompassing "allegedly illegal sentences").

145. *Siebold*, 100 U.S. at 376–77 (holding that enforcement of an unconstitutional law deprives the convicting court of jurisdiction because such a law is void); *see also Royall*, 117 U.S. at 248–49 (noting that a defendant could use federal habeas review to challenge the validity of the statute under which he was convicted).

In the first fifty years after the Civil War, very few state prisoners sought habeas relief in the federal courts. This was probably because the freed blacks who were the intended beneficiaries of the Act of 1867 were too intimidated, too poor, or too uneducated to take advantage of it. *See* FONER, *supra* note 117, at 425–44. Moreover, by 1873, the Court and Congress were beginning to lose interest in both enforcing the civil rights laws and protecting freed blacks in the South. *See id.* at 524–34. This loss of interest accelerated after the withdrawal of federal troops from the South pursuant to the compromise that followed the disputed presidential election of 1876. *See id.* at 564–82; LLOYD ROBINSON, THE STOLEN ELECTION: HAYES VERSUS TILDEN—1876, at 213–29 (1968).

146. 237 U.S. 309 (1915).

147. *Id.* at 324–25.

148. *Id.* at 331.

149. *Id.* at 327. The Court declared that the Due Process Clause of the Fourteenth Amendment did not impose upon the States any particular form or mode of procedure. *Id.* at 326–27. Due process, in the constitutional sense, is provided if

> a criminal prosecution [is] based upon a law not in itself repugnant to the Federal Constitution, and [is] conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure.

Id. at 326.

150. *Id.* at 327, 335.

appellate review,[151] rejected his claims that his trial was dominated by a mob, and affirmed his conviction.[152]

Despite its outcome, *Frank* opened the door to a broader federal review of state court convictions. Eight years later, six African-Americans imprisoned in Arkansas walked through that door. In 1923, in *Moore v. Dempsey*, the six state prisoners alleged that a mob had dominated their trial.[153] Like *Frank*, the defendants in *Moore* had appealed to the state supreme court, and it had affirmed their convictions.[154]

In an opinion by Justice Holmes—who had dissented in *Frank*—the *Moore* Court read *Frank* as establishing the rule that where "a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law."[155] Even then, though, "the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed."[156] Holmes concluded that the corrective process in question did not seem "sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the

151. *Id.* at 345. His counsel

> twice . . . moved the trial court to grant a new trial, and once to set aside the verdict as a nullity; three times he has been heard upon appeal before the court of last resort of that State, and in every instance the adverse action of the trial court has been affirmed.

Id. at 344.

152. *Id.* at 345.

153. 261 U.S. 86, 87 (1923).

154. *Id.* at 91. Many years later, in *Fay v. Noia*, the Supreme Court characterized *Moore* and *Frank* as "almost identical in all pertinent respects." 372 U.S. 391, 421 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977). The underlying facts, however, were quite different. Although Frank was tried in a mob-dominated atmosphere, *Frank*, 237 U.S. at 347 (Holmes, J., dissenting), he was a relatively well-off white man who received most of the process that was due a defendant who was charged with a serious crime in Georgia. *Id.* at 345. His trial lasted four weeks, and he had the assistance of several attorneys who worked diligently on his behalf. *Id.* at 312 (statement of Justice Pitney preceding the opinion of the Court). In contrast, the defendants in *Moore* were poor African-Americans, 261 U.S. at 87, members of the group the Fourteenth Amendment was clearly designed to protect. The proceedings "were only a form"—"a mask"—in which the process due under Arkansas law was provided in name only. *Id.* at 87, 91. At trial, the *Moore* defendants were assigned an attorney who did almost nothing on their behalf, and the state corrective process was deficient. *Id.* at 92.

155. *Moore*, 261 U.S. at 90–91 (citing *Frank*, 237 U.S. at 335).

156. *Id.* at 90–91. In *Fay*, the Court recognized that *Moore* "substantially repudiated" *Frank.* 372 U.S. at 421. Professor Bator seems correct, however, in saying that *Moore* did not, in fact, discredit *Frank. See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 488–89 (1963).

trial absolutely void."[157] The *Moore* Court therefore held that the federal district court should have granted the habeas petition.[158]

Taken together, *Frank* and *Moore* probably illustrate the way the radical Republicans, and many others, intended the Fourteenth Amendment's Due Process Clause and the Habeas Corpus Act of 1867 to operate.[159] In both cases, the Court emphasized that mere errors of law committed by the trial court cannot be reviewed by habeas corpus.[160] In *Frank*, however, the defendant was given "the fullest right and opportunity to be heard according to the established modes of procedure."[161] He therefore received all the process that was due him under the Constitution. In contrast, the *Moore* defendants had no real trial at all, and the state's corrective processes did not remedy that failure.[162] Because the state denied the *Moore* defendants a full and fair hearing on their claims, it denied them the basic process that, under the Constitution, was due to all criminal defendants.[163]

In 1938, in *Johnson v. Zerbst*, the Court affirmed that "habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial."[164] Even as it made this statement, however, the Court greatly expanded the concept of jurisdiction by characterizing the Sixth Amendment right to the assistance of counsel as "an essential jurisdictional prerequisite to a federal court's authority to deprive an

157. *Moore*, 261 U.S. at 92.

158. *Id.* at 91–92.

159. "Reconstruction's primary goal [was] to prevent states from infringing on individual liberties. . . . Before the Civil War, states could operate virtually unfettered within their sovereign domain. Not so after Reconstruction." Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities*, The Constitution in 2020, *and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 63–64 (2009).

160. *Frank*, 237 U.S. at 326 ("Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus."); *Moore*, 261 U.S. at 91 ("It certainly is true that mere mistakes of law in the course of a trial are not to be corrected [by habeas corpus].").

161. *Frank*, 237 U.S. at 345.

162. *Moore*, 261 U.S. at 92. In 1996, the AEPDA codified the principles of *Frank* and *Moore* under the rubric of exhaustion of remedies. 28 U.S.C. § 2254(b)(1)(B)(ii) (2006) (exhaustion is not necessary where "circumstances exist that render such process ineffective to protect the rights of the applicant").

163. *Cf.* Boumediene v. Bush, 553 U.S. 723, 781 (2008) (observing that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context").

164. 304 U.S. 458, 465 (1938).

accused of his life or liberty."[165] The Court found, therefore, that a federal prisoner was entitled to habeas relief if he could show that his trial and conviction occurred in violation of his constitutional right to the assistance of counsel.[166]

In 1942, in *Waley v. Johnston*, the Supreme Court "openly discarded the concept of jurisdiction—by then more a fiction than anything else"[167]—and explicitly expanded the availability of habeas relief to encompass more than jurisdictional defects.[168] The Court noted that the facts relied upon for relief were not in the trial court's record[169] and held that habeas relief "is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it."[170] In addition, it extends "to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."[171]

Read narrowly, with the focus on its facts, *Waley* merely affirms *Frank* and *Moore*—habeas corpus is not appropriate where corrective processes to preserve the defendant's due process rights remain available within the jurisdiction. Read broadly, with the focus on its language, *Waley* goes far beyond *Frank* and *Moore* by providing habeas relief whenever the constitutional rights of an accused are violated and "the writ is the only effective means of preserving [those] rights."[172]

In 1953, in *Brown v. Allen*, the Court adopted the broad view of *Waley* and suggested that any cognizable federal constitutional claim raised by a state prisoner could be heard in federal court on a petition for a writ of habeas corpus even if the claims had been adjudicated in state court.[173] Ten years later, in *Fay v. Noia*, the Court removed the final barrier to broad collateral reexamination of state criminal convictions

165. *Id.* at 467.

166. *Id.* at 469.

167. Wainwright v. Sykes, 433 U.S. 72, 79 (1977) (discussing Waley v. Johnston, 316 U.S. 101 (1942) (per curiam)).

168. *Waley*, 316 U.S. at 104–05.

169. *Id.* at 104. Waley pleaded guilty in federal court to a kidnaping charge and was sentenced. *Id.* at 102. While in custody, he petitioned for habeas corpus on the ground that his plea was a result of coercion, intimidation, and threats made by an FBI agent. *Id.*

170. *Id.* at 104–05.

171. *Id.* at 105.

172. *Id.*

173. 344 U.S. 443, 458 (1953) (finding that state court adjudications on federal constitutional issues are not res judicata).

and proclaimed "federal court jurisdiction is conferred by the allegation of an unconstitutional restraint."[174]

If any doubt remained as to the meaning of *Brown* and *Fay*, *Wainwright v. Sykes* removed it in 1977. That year, the Court found that

> since *Brown v. Allen*, it has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings.[175]

C. Federal Court Habeas Jurisdiction over Claims Based on Prophylactic Rules

In 1948, Congress amended the Habeas Corpus Act of 1867.[176] Like its predecessor, the new text granted the right to federal habeas corpus relief to any state prisoner "in custody in violation of the Constitution or laws or treaties of the United States."[177] Congress retained this language in the 1996 amendments contained in the Antiterrorism and Effective Death Penalty Act.[178]

In his *Stone* dissent, Justice Brennan characterized the majority's decision as one that denied federal courts "habeas jurisdiction over claims of Fourth Amendment violations brought by state prisoners" on the grounds that such persons "are not, as a matter of statutory construction, 'in custody in violation of the Constitution or laws . . . of

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174. 372 U.S. 391, 426 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

175. 433 U.S. at 87 (citation omitted). *See also id.* at 79 ("In *Brown v. Allen*, it was made explicit that a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game on federal habeas." (citation omitted)).

176. *See* Act of June 25, 1948, ch. 646, §§ 2241–55, 62 Stat. 869, 964–68 (codified as amended at 28 U.S.C. §§ 2241–54 (2006)).

177. 28 U.S.C. § 2241(c)(3). State court judgments other than criminal convictions, including an order of civil commitment or civil contempt, may give rise to a person's being "in custody within the meaning of the federal habeas statute." Duncan v. Walker, 533 U.S. 167, 176 (2001).

178. *See* 28 U.S.C. § 2241(c). "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . . ." *Id.* Section 2254(a), provides:

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

Id. § 2254(a).

the United States.'"[179] The *Stone* majority dismissed this claim as "hyperbole" and responded that the "decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both [a deprivation of a full and fair adjudication at trial and direct review] *and a Fourth Amendment violation*."[180]

"During the period in which the substantive scope of the writ was expanded, the Court did not consider whether exceptions to full review might exist with respect to particular categories of constitutional claims."[181] Scholarship, however, "has cast grave doubt on" the *Fay* Court's claim that "we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint."[182] In fact, as shown in the preceding section:

> The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction, to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims, and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions.[183]

"[C]ommon-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances."[184] There is thus no inherent reason that a particular kind or category of claim cannot be excluded from federal habeas jurisdiction. For example, the Court could decline to extend habeas jurisdiction to any

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179. Stone v. Powell, 428 U.S 465, 503–05 (1976) (Brennan, J., dissenting) (quoting *id.* at 478 n.11 (majority opinion)).

180. *Id.* at 494 n.37 (majority opinion) (emphasis added). *See also* Withrow v. Williams, 507 U.S. 680, 686 (1993) (citing *Stone*, 428 U.S. at 494 n.37) (stating that "*Stone*'s limitation on federal habeas relief was not jurisdictional in nature"). The *Stone* Court acknowledged an argument could be made that a federal habeas court lacks jurisdiction over such claims, but it did not address it because it was not presented to the Court on the petition for certiorari. 428 U.S. at 481 n.15.

181. *Stone*, 428 U.S. at 478–79.

182. Schneckloth v. Bustamonte, 412 U.S. 218, 252–53 (1973) (Powell, J., concurring) (quoting Fay v. Noia, 372 U.S. 391, 426 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977)). "At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution." *Id.* (quoting *Fay*, 372 U.S. at 426).

183. *Id.* at 255–56 (citations omitted). As the Court incorporated more and more provisions of the Bill of Rights against the states through the Due Process Clause, any petitioner who claimed that a state denied him one of the new rights had a plausible due process claim.

184. Boumediene v. Bush, 553 U.S. 723, 779 (2008).

and all Fourth Amendment claims. If this were the rule, then the federal courts would "be powerless to consider even those Fourth Amendment claims that had not been fully and fairly litigated in the state courts."[185]

The Court could also decline jurisdiction over claims based on a state court's failure to enforce a prophylactic rule or prophylactic remedy. Habeas jurisdiction has long extended to persons "in custody in violation of the Constitution or laws or treaties of the United States."[186] If the exclusion of unconstitutionally obtained evidence were a personal constitutional right of the accused, then the use of that evidence against him would seemingly result in his being held in custody in violation of the Constitution—which would entitle him to habeas relief.[187] The Court's opinion in *Stone*, however, placed heavy emphasis on the idea that the Fourth Amendment exclusionary rule is not a personal constitutional right of the accused but, instead, is "a judicially created means of effectuating the rights secured by the Fourth Amendment."[188] Similarly, prophylactic remedies that attach to prophylactic rules are "judicially created" means of effectuating those rules.

"A rule is properly classified as prophylactic only if it can be violated without necessarily violating the Constitution."[189] Similarly, a remedy is prophylactic only if it can be withheld without necessarily violating the Constitution. These rules and remedies are not constitutional commands; they are judicially created means of effectuating those commands. State prisoners erroneously denied the benefits of prophylactic exclusionary remedies not required by the Constitution are therefore not in custody in violation of the Constitution, laws, or treaties of the United States; federal habeas jurisdiction does not extend to such claims.[190]

Even if one views prophylactic rules as a kind of federal common law,[191] "[s]tate violations of federal common law rules are generally not

185. Duckworth v. Eagan, 492 U.S. 195, 221 n.5 (1989) (Marshall, J., dissenting).

186. 28 U.S.C. § 2241(c)(3) (2006).

187. *See* Jackson v. Virginia, 443 U.S. 307, 320–21 (1979) ("Under 28 U.S.C. § 2254, a federal court must entertain a claim by a state prisoner that he or she is being held in 'custody in violation of the Constitution or laws or treaties of the United States.'").

188. Stone v. Powell, 428 U.S. 465, 482, 486 (1976).

189. Grano, *supra* note 13, at 163.

190. *See* Dickerson v. United States, 530 U.S. 428, 439 n.3 (2000) (using *Miranda* claims as an example).

191. *See* Monaghan, *supra* note 24, at 23 (suggesting that the Supreme Court has the "power to fashion a substructure of implementing 'legislative' rules—rules that are admittedly *not* integral parts of the Constitution and that go beyond its minimum requirements . . . , [and such rules] can be

cognizable in federal habeas proceedings."[192] Because the Supreme Court has no supervisory authority over the state courts, its power to intervene in state judicial proceedings extends only "to correct wrongs of constitutional dimension."[193] As the Court noted in *Stone*, "the established rule" provides that state prisoners may not assert non-constitutional claims in collateral proceedings.[194]

Finally, the *Stone* Court could have taken a third position. In *Dickerson*, the Court said that "'federal judges . . . may not require the observance of any special procedures' in state courts 'except when necessary to assure compliance with the dictates of the Federal Constitution.'"[195] Implicit in this statement is the proposition that the Supreme Court may impose some procedural requirements on the states where necessary to secure underlying constitutional rights. Because, theoretically, "prophylactic rules . . . are fully open to revision by Congress, federal executive action, and state legislative, executive[,] or judicial action," some argue that "the use of prophylactic rules . . . rather than pure constitutional interpretation [and mandate] gives the states . . . [the] opportunity for diversity and experimentation."[196] Such rules amount to the Court's requiring that states protect a constitutional right, offering one solution, acknowledging that other solutions exist, and, ultimately, warning that a failure to take action of some kind would violate the protections of due process as required by the Constitution.[197]

When the Supreme Court incorporates a constitutional provision against the states through the Due Process Clause and acknowledges that multiple "procedural safeguards" exist, then the states must only follow *some* rule and not necessarily a *specific* rule.[198] Moreover,

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adequately rationalized as constitutional common law").

192. Loliscio v. Goord, 263 F.3d 178, 188 n.5 (2d Cir. 2001).

193. *Dickerson*, 530 U.S. at 438 (quoting Smith v. Phillips, 455 U.S. 209, 221 (1982)); *see also* Grano, *supra* note 13, at 129, 141.

194. Stone v. Powell, 428 U.S. 465, 477 n.10 (1976). A state prisoner may assert a federal habeas corpus claim that he is held in violation of federal law if he can show that his incarceration is "a complete miscarriage of justice." Hussong v. Warden, 623 F.2d 1185, 1191 (7th Cir. 1980) (quoting Davis v. United States, 417 U.S. 333, 346 (1974)) (distinguishing *Davis*).

195. *Dickerson*, 530 U.S. at 438–39 (quoting Harris v. Rivera, 454 U.S. 339, 344–45 (1981) (per curiam)).

196. Klein, *supra* note 17, at 1054.

197. *See, e.g.*, cases cited *supra* notes 18 and 37.

198. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444 (1966) (stating that "unless other fully effective means are devised" by the state, this procedure should be followed).

> [a]t common law, the opportunity for full and fair litigation of an issue at trial and (if available) direct appeal was not only *a* factor weighing against reaching the merits of an issue; it was a *conclusive* factor, unless the issue was a legal issue going to the jurisdiction of the trial court.[199]

If a state makes a good faith effort to implement a particular prophylactic protection or devises a reasonable alternative, then a defendant's receipt of either the benefit of that protection or a full and fair opportunity to contest its adequacy satisfies constitutional due process. *Frank* and *Moore* point to the same conclusion.

IV. USING EQUITABLE CONSIDERATIONS TO DENY RELIEF TO HABEAS PETITIONERS WHO CLAIM VIOLATIONS OF PROPHYLACTIC RULES OR DENIALS OF PROPHYLACTIC REMEDIES

In his dissent in *Stone*, Justice Brennan opined that "[m]uch in the Court's opinion suggests that a construction of the habeas statutes to deny relief for non-'guilt-related' constitutional violations, based on this Court's vague notions of comity and federalism is the actual premise for today's decision."[200] Though later decisions proved this comment to be an overstatement, *Stone* can, and should, be extended to deny habeas relief for all claims based on violations of prophylactic rules or the denial of prophylactic remedies.

A. Prophylactic Rules: Costs, Benefits, and Limits

1. The Costs and Benefits of Prophylactic Rules and Remedies

When the Supreme Court "creates a prophylactic rule in order to protect a constitutional right, the relevant 'reasoning' is the weighing of the rule's benefits against its costs."[201] "A judicially crafted rule is 'justified only by reference to its prophylactic purpose'"[202] and should apply "only where its benefits outweigh its costs."[203]

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199. Withrow v. Williams, 507 U.S. 680, 718–19 (1993) (Scalia, J., concurring in part and dissenting in part).

200. 428 U.S. 465, 516 (1976) (Brennan, J., dissenting) (citation omitted).

201. Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (2009).

202. Maryland v. Shatzer, 130 S. Ct. 1213, 1220 (2010) (quoting Davis v. United States, 512 U.S. 452, 458 (1994)).

203. *Id.* (citing *Montejo*, 129 S. Ct. at 2089).

The most obvious benefit of prophylactic rules is the protection of constitutional rights that might otherwise have been compromised.[204] In addition, these rules can promote other values, [205] as well as conserve judicial resources by providing easy to administer bright-line rules.[206] Those benefits, however, come at a price.[207] Reliable, probative evidence is sometimes excluded from trial,[208] and there is an overall "hindering [of] 'society's compelling interest in finding, convicting, and punishing those who violate the law.'"[209] Occasionally, prophylactic rules and remedies "deter[] law enforcement officers from even trying to obtain" certain evidence out of concern that their efforts might be ruled improper.[210]

In the abstract, the direct costs and benefits of prophylactic rules and remedies are difficult to measure. Constitutional violations prevented and exclusions of evidence not obtained are non-events. One cannot count the number non-events that did not occur. In addition, administering prophylactic rules is costly in other ways.[211]

In practice, any time a defendant can make a rational argument that a prophylactic exclusionary remedy is available, that defendant will almost surely file a motion to suppress any evidence obtained as result of the claimed violation. These motions, and the burdensome and time-

204. *See, e.g., id.* at 1220 ("[T]he benefits of the [*Edwards*] rule are measured by the number of coerced confessions it suppresses that otherwise would have been admitted.").

205. *See, e.g., id.* (observing that *Edwards* protects the integrity of the "'accused's choice to communicate with police only through counsel'" (quoting Patterson v. Illinois, 487 U.S. 285, 291 (1988))); *Stone*, 428 U.S. at 492 (majority opinion) (observing that the exclusionary rule may nurture respect for Fourth Amendment values and encourage police officers to incorporate those into their value system).

206. *Shatzer*, 130 S. Ct. at 1220; *see also* Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 562 (2007) ("If [*Miranda*] warnings were delivered by the police and a waiver was given or signed, it is almost impossible to persuade a judge that the resultant confession or admission is "'involuntary.'").

207. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (2009) ("'The value of any prophylactic rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost.'" (quoting Minnick v. Mississippi, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting))).

208. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 444 (2000) ("The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary . . . may nonetheless be excluded[,] and a guilty defendant [may] go free as a result.").

209. *Montejo*, 129 S. Ct. at 2089 (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).

210. *Shatzer*, 130 S. Ct. at 1222; *see also Montejo*, 129 S. Ct. at 2091 (noting that the *Jackson* rule "deters law enforcement officers from even trying to obtain voluntary confessions").

211. *See Montejo*, 129 S. Ct. at 2091 ("[W]hen the marginal benefits of the *Jackson* rule are weighed against its substantial costs to . . . the criminal justice system, we readily conclude that the rule does not 'pay its way.'" (quoting United States v. Leon, 468 U.S. 897, 907–08 n.6 (1984))).

consuming procedures,[212] hearings, appeals, and collateral attacks that spin off them, consume large amounts of attorney, judicial, and police time and energy.[213] Finally, prophylactic rules and remedies, like the Fourth Amendment exclusionary rule at issue in *Stone*, (1) shift the focus of the criminal proceeding away from the central issue of the defendant's guilt or innocence to the collateral issue of the legality of the search and seizure, (2) free the guilty through the suppression of physical evidence that is no less reliable because of the method used to obtain it, and (3) offend a popular sense of justice and proportionality by undermining respect for the law and the administration of justice.[214]

a. Shifting the Focus of Criminal Proceedings Away from the Factual Guilt or Innocence of the Defendant and Corrupting the Fact-Finding Process

"'[T]he ultimate objective [of our criminal justice system is] that the guilty be convicted and the innocent go free.'"[215] Claims invoking prophylactic rules are, by definition, non-guilt related. Hearings on non-guilt-related claims divert attention "from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding,"[216] degrade the importance of the trial itself,[217] and focus attention on the collateral issues of the adherence to the rules and the conduct of law enforcement officials.[218]

The possible exclusion of evidence obtained in violation of prophylactic rules corrupts the judicial process. Because the stakes are so high, the administration of these rules often fosters perjury on all sides,[219] consumes "limited judicial resources,"[220] and contributes to

212. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 93–94 (1986) (shifting the burden to the prosecution to show a neutral explanation for challenging jurors who are members of the same cognizable racial group as the defendant).

213. *Montejo*, 129 S. Ct. at 2090–91.

214. Stone v. Powell, 428 U.S. 465, 489–90 (1976).

215. Evitts v. Lucey, 469 U.S. 387, 394 (1985) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)).

216. *Stone*, 428 U.S. at 490.

217. Engle v. Isaac, 456 U.S. 107, 127 (1982).

218. *Stone*, 428 U.S. at 490–91.

219. *See* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 82–83 (1992).

This author witnessed this firsthand as a prosecutor in the Career Criminal/Major Violators Unit in a district attorney's office in Massachusetts.

220. *Stone*, 428 U.S. at 491 n.31 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973)

court delays.[221] The exclusion of evidence deprives the trier of fact of relevant, and often reliable, information and corrupts the fact-finding process.

b. Freeing the Guilty

The exclusion of otherwise admissible and reliable evidence because of the methods used to obtain it often affects the outcome of prosecutions. Prosecution may become difficult or even impossible. In some of these cases, the offense is minor or victimless, and the cost to society of a lost prosecution is minimal. Occasionally, however, the prosecution of a serious offender is impossible or unsuccessful because a prophylactic rule or remedy bars essential evidence of guilt.[222]

c. Offending a Popular Sense of Proportionality and Eroding Respect for the Legal System

Most people view the criminal justice system as a mechanism to separate the guilty from the innocent and punish the guilty in a way that is reasonably proportionate to their guilt. Most prophylactic rules do not advance these goals. Moreover, exceptions comparable to the Fourth Amendment's good-faith exception do not exist for violations of most prophylactic rules.[223] When a prophylactic rule results in the release of a serious offender—especially when guilt appears patent—the windfall afforded the offender often seems disproportionate to the magnitude of the wrong that led to the release. This is especially true when a serious criminal is released because of a minor, unintentional police mistake related to a prophylactic rule.[224]

In all likelihood, few members of the public have any idea that prophylactic rules exist. Fewer still know why they exist. In contrast, evidence that is the subject of a motion to suppress may be in the public

(Powell, J., concurring)).

221. *See id.*

222. *See, e.g.*, *id*. at 490 (observing that the application of the Fourth Amendment exclusionary rule typically excludes reliable physical evidence and frees the guilty).

223. *See, e.g.*, Kansas v. Ventris, 129 S. Ct. 1841, 1845 (2009) (comparing Fifth and Fourth Amendment exclusionary rules and prophylactic rules).

224. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2090–91 (2009) (emphasizing the release of guilty criminals as "[t]he principal cost of applying any exclusionary rule" and concluding that the "unworkable" rule in *Michigan v. Jackson* "does not 'pay its way' [and] . . . should be and now is overruled" (quoting United States v. Leon, 468 U.S. 897, 907–08 n.6 (1984))).

domain, and its import is therefore known to all. The loss of that evidence seems especially galling when the police appear to have tried in good faith to comply with the rules at issue. In the public's mind, the offender has been released on a "technicality." Results of this kind pose an affront to popular notions of proportionality, diminish the moral force of the criminal law, and fuel a loss of respect for the legal system.[225]

2. Judicially Created Limits on Prophylactic Remedies

Violations of prophylactic rules rarely have consequences if the government either did not obtain evidence as a result of the violation[226] or declined to use it in a criminal case.[227] Even if the government seeks to use the evidence, the benefits of prophylactic remedies do not extend to every person who might, in theory, seem eligible. Some will lack standing to assert a claim.[228] Others may be ineligible for relief for other reasons.[229]

Concern over the costs of prophylactic rules and remedies likely has caused the Supreme Court to carve out exceptions allowing the use, under certain circumstances, of evidence obtained in violation of both constitutional commands and prophylactic rules. Just as prophylactic rules can be violated without violating the Constitution, prophylactic remedies can be withheld without violating the Constitution. In determining the proper scope of prophylactic remedies, the Court has applied a balancing test that weighs the costs of exclusion against its benefits.[230] That test is very similar to the one used to create the rules in

225. *Stone*, 428 U.S. at 490–91.

226. *See* Chavez v. Martinez, 538 U.S. 760, 767 (2003) (noting that mere compulsive questioning does not violate the Constitution).

227. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 14 (1968) (declaring that the Fourth Amendment exclusionary rule is unavailable to those whose rights were violated if "the police . . . have no interest in prosecuting"); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (rejecting the Fourth Amendment's exclusionary rule in civil cases).

228. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 140–42 (1978) (stating that the exclusionary remedy is only available to a person whose legitimate personal expectations of privacy were violated by the contested search).

229. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 449–50 (1984) (admitting evidence on the basis that ongoing law enforcement activities would have inevitably discovered it).

230. Kansas v. Ventris, 129 S. Ct. 1841, 1845 (2009). Some constitutional guarantees mandate exclusion of evidence obtained in violation of that guarantee whereas with others "exclusion comes by way of [a] deterrent sanction rather than to avoid violation of the substantive [constitutional] guarantee." *Id.* In these latter cases, the Court has "applied an exclusionary-rule balancing test." *Id.*

the first place.[231] As a result, "the scope of the remedy" for violations that have already occurred may be narrower than the violations.[232]

In the Fourth Amendment setting, the Court has allowed the prosecution to use, as part of its case-in-chief, evidence obtained unconstitutionally but in objective, good-faith reliance on a facially valid warrant.[233] The prosecution may also use evidence obtained in violation of the Fourth Amendment to impeach a defendant's testimony.[234]

The rules excluding statements made in violation of *Miranda* and *Massiah v. United States*[235] have received similar treatment. For example, the government may use, as part of its case-in-chief, some kinds of evidence obtained in violation of *Miranda*.[236] Similarly, the prosecution may impeach the defendant with evidence obtained in violation of *Miranda*.[237]

The scope of the remedy for a *Massiah* violation that has already occurred may also be narrower than the violation.[238] Like *Miranda*, the *Massiah* right to counsel seems quasi-constitutional. The core right to

231. S*ee, e.g.*, Maryland v. Shatzer, 130 S. Ct. 1213, 1219–20 (2010); *see also* New York v. Quarles, 467 U.S. 649, 657–58 (1984) (using a balancing test to create a "public safety" exception to the *Miranda* rule after "conclud[ing] that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule").

232. *Ventris*, 129 S. Ct. at 1846.

233. *See, e.g.*, United States v. Leon, 468 U.S. 897, 920–21 (1984).

234. *See, e.g.*, United States v. Havens, 446 U.S. 620, 628 (1980); Walder v. United States, 347 U.S. 62, 65 (1954); *cf.* James v. Illinois, 493 U.S. 307, 319–20 (1990) (declining to extend the "impeachment exception" to all defense witnesses).

235. 377 U.S. 201, 207 (1964) ("Defendant's own incriminating statements, obtained by federal agents [through deliberate elicitation and after the commencement of criminal proceedings], could not constitutionally be used . . . against *him* at trial.").

236. *See, e.g.*, United States v. Patane, 542 U.S. 630, 633–38 (2008) (recognizing that the Self-Incrimination Clause "cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements" even if the *Miranda* warnings were defective or nonexistent); Oregon v. Elstad, 470 U.S. 298, 306–08 (1985) (refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases to Fifth Amendment successive confession cases); *Quarles*, 467 U.S. at 657–58 (creating a "public safety" exception to *Miranda*).

237. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 722 (1975) (holding that a defendant's statements made after police wrongfully continued to question him after he asserted his *Miranda* rights can be used to impeach him because "there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief"); Harris v. New York, 401 U.S. 222, 225–26 (1971) (holding that statements made by defendant after he was given defective *Miranda* warning may be used to impeach his credibility because if the *Miranda* "exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case-in-chief").

238. Kansas v. Ventris, 129 S. Ct. 1841, 1846 (2009); *see also Elstad*, 470 U.S. at 309 ("If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.").

counsel is a trial right. According to the Supreme Court, however, that right has been extended to "pretrial interrogations to ensure that police manipulation does not render counsel entirely impotent."[239] Because the core Sixth Amendment right is not at issue, the scope of the remedy for a *Massiah* violation that has occurred is properly determined by using a cost–benefit balancing test.[240] Using that test, the Court concluded that responses to an informant's interrogation of an uncounseled defendant are admissible to impeach that defendant's trial testimony.[241]

3. The Costs and Benefits of Prophylactic Rules and Remedies When Applied on Habeas Review

The Court's demonstrated willingness to balance costs and benefits—to limit both the reach of prophylactic rules and the application of prophylactic remedies—suggests that a similar balancing approach might be appropriate to restrict federal habeas review of all claims based on prophylactic rules and remedies. In *Stone*, the Court held that when a state prisoner received a full and fair opportunity to litigate a Fourth Amendment claim in state court at trial and on appeal, the prisoner "may not be granted federal habeas corpus relief on the ground that evidence obtained in [violation of the Fourth Amendment] was introduced at his trial."[242] In reaching this result, the Court "weigh[ed] the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims."[243] The Court reaffirmed its earlier view that—at least at trial and on direct appeal—these costs were outweighed by whatever deterrent effect arose from excluding evidence obtained by unconstitutional searches and seizures.[244] The Court observed, however, that in the context of collateral review, the costs of the exclusionary rule

239. *Ventris*, 129 S. Ct. at 1845.

240. *See, e.g.*, *id.* at 1846–47 (stating that because *Massiah*'s "right to be free of uncounseled interrogation . . . is infringed at the time of the interrogation," determining whether statements obtained through an informant's interrogation of an uncounseled defendant might be admissible to impeach that defendant's trial testimony requires determining "the scope of the remedy for a violation that has already occurred"). Justice Stevens characterized *Ventris* as "[t]reating the State's actions in this case as a violation of a prophylactic right." *Id.* at 1848 (Stevens, J., dissenting).

241. *See, e.g.*, *id.* at 1846–47; *cf.* Michigan v. Harvey, 494 U.S. 344, 345–46 (1990) (holding that evidence obtained in violation of *Michigan v. Jackson* can be used to impeach).

242. 428 U.S. 465, 494 (1976).

243. *Id.* at 489–94.

244. *Id.*

persist unchanged while the incremental deterrent effect of exclusion becomes so attenuated that it is outweighed by the costs.[245]

A similar cost–benefit analysis applies to prophylactic rules and remedies. When such claims are presented at another time and in another forum,[246] the original distortions and disruptions are "far more severe."[247] If examination of these claims at trial and on direct appeal "stretches resources," then examination of these claims on collateral review in a habeas proceeding "spreads them thinner still."[248] The ordeal of trial continues, and "[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system."[249] The costs of suppressing evidence—already high when suppression occurs at trial or on direct appeal—"are significantly magnified" when imposed by a federal habeas court.[250] In addition, habeas review of state court convictions imposes its own costs, which must be added to the costs exacted by prophylactic rules and remedies. As a result, the costs of this extra layer of review far outweigh any additional deterrent effects.

B. Federal Habeas Review: Costs, Benefits, and Limits

1. The Court's Discretionary Powers and the Origin of Procedural Barriers to Habeas Review

By 1886, the Supreme Court had accepted the view that the Habeas Corpus Act of 1867 gave the federal courts the power to grant habeas relief to state prisoners.[251] That same Act makes it clear, however, that the court receiving an application for a writ of habeas corpus shall have

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245. *Id.* at 493–94. The Court further observed that Fourth Amendment claims have no bearing on factual guilt. *Id.* at 492 n.31.

246. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring) ("When raised on federal habeas, a claim generally has been considered by two or more tiers of state courts.").

247. *See* McCleskey v. Zant, 499 U.S. 467, 492 (1991) (referring to successive habeas petitions), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

248. *Id.*

249. *Id.*

250. Duckworth v. Eagan, 492 U.S. 195, 211 (1989) (O'Connor, J., concurring).

251. *See Ex parte* Royall, 117 U.S. 241, 253 (1886) ("[W]hile it might appear unseemly that a prisoner, after conviction in a State court, should be set at liberty by a single judge on habeas corpus, there was no escape from the act of 1867."); *id.* at 249 (observing that the Act of 1867 "does not except from its operation cases in which the applicant for the writ is held in custody by the authority of a State").

discretion to "'dispose of [habeas petitions] as law and justice require.'"[252] Because "'habeas corpus has traditionally been regarded as governed by equitable principles,'"[253] the Court, in exercising its discretion, has used a cost–benefit analysis when deciding whether to make federal habeas review more or less accessible.[254] On some occasions, the Court has emphasized the benefits of habeas review and made it more available.[255] On other occasions, it has emphasized the costs of habeas review and has restricted access to the writ.[256] After Reconstruction, the Court began to limit the habeas power by focusing on its costs.

In 1886, in *Ex parte Royall*, the Court rejected the notion "that [C]ongress intended to compel [the federal] courts . . . to draw to themselves . . . the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits."[257] The *Royall* Court concluded that the federal courts had the power to regulate the time, mode, and circumstances under which they exercised the broad powers conferred on them by Congress.[258] More specifically, the Court concluded that the federal courts have the power to wrest custody of a habeas petitioner from the state court even before trial but that they "[were] not bound in every case to exercise such a power immediately upon application being made for the writ."[259] Instead, a court should take into account the relationship existing between the judicial tribunals of the Union and the States in deciding "whether it will discharge [a state prisoner], upon habeas corpus, in advance of his trial in the court in which he is indicted."[260] "[A]s a matter of comity, federal

252. Withrow v. Williams, 507 U.S. 680, 699 (1993) (O'Connor, J., concurring in part and dissenting in part) (alteration in original) (quoting 28 U.S.C. § 2243 (1988)). The current version of § 2243 contains identical language. *See* 28 U.S.C. § 2243 (2006).

253. *See* Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (plurality opinion) (quoting Fay v. Noia, 372 U.S. 391, 438 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977)), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

254. *See* Teague v. Lane, 489 U.S. 288, 308 (1989) ("This Court has not 'always followed an unwavering line in its conclusions as to the availability of the Great Writ.'" (quoting *Fay*, 372 U.S. at 411–12)).

255. *See id.* (giving examples of the benefits of widespread availability of habeas review).

256. *See id.* at 308–09 (noting cases that promote finality at the state court level).

257. 117 U.S. 241, 251 (1886).

258. *Id.*

259. *Id.*

260. *Id.* at 251, 253.

courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act . . . ."[261]

This limitation, which became known as the exhaustion doctrine, was the first of many procedural barriers to habeas review of state court convictions.[262] These operate as gateways, or windows, through which a habeas petitioner's constitutional claim must pass before a federal court will consider its merits.[263]

At an early date, the Court recognized that a potential habeas petitioner could avoid the exhaustion rule by waiving, defaulting, or forfeiting any federal constitutional claims in state court.[264] Such a person would meet the technical requirements for exhaustion because no state remedies would remain unexhausted.[265] To avoid this result, and thereby ensure that the state courts are given the first opportunity to address a state prisoner's constitutional claims, the Supreme Court developed the procedural-default doctrine as a kind of corollary to the exhaustion doctrine.[266] This doctrine, the second procedural barrier that a habeas petitioner faces, bars habeas review of claims that the prisoner waived, defaulted, or forfeited in state court because he did not present them at the time, or in the manner, required by applicable state procedural rules.[267] Of course, the procedural default must constitute adequate and independent grounds under state law for the adverse judgment.[268]

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261. Rose v. Lundy, 455 U.S. 509, 515 (1982) (citing *Royall*, 117 U.S. at 251), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

262. The exhaustion doctrine "has not been without historical uncertainties and changes in direction on the part of the Court." Wainwright v. Sykes, 433 U.S. 72, 80–81 (1977) (gathering cases). The Supreme Court refined it in *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17–19 (1925), and *Ex parte Hawk*, 321 U.S. 114, 117 (1944) (per curiam). *See Lundy*, 455 U.S. at 515–16. Aspects of the exhaustion requirement were codified in 1948 at 28 U.S.C. § 2254. *Id.* at 516 n.8.

263. Herrera v. Collins, 506 U.S. 390, 404 (1993) (stating that a claim of actual innocence is one such gateway).

264. *See In re* Spencer, 228 U.S. 652, 660 (1913) (observing that the exhaustion rule "would be useless except to enforce a temporary delay if it did not compel a review of the question in the state court and, in the event of an adverse decision, the prosecution of error from this court").

The intimate connection between the exhaustion rules and the procedural-default rules is illustrated by the Court's discussion in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8–10 (1992), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

265. Coleman v. Thompson, 501 U.S. 722, 732 (1991).

266. *See Spencer*, 228 U.S. at 659–60 (stating that petitioner must raise claims in state court); *see also* Brown v. Allen, 344 U.S. 443, 486–87 (1953), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

267. *See Coleman*, 501 U.S. at 732.

268. *See id.* at 731–32 (noting that procedural default of a federal claim in state court would

With its third procedural barrier, the Court barred most successive habeas petitions. In 1924, the Court "reaffirmed that res judicata does not apply 'to a decision on *habeas corpus* refusing to discharge the prisoner,'"[269] but recognized that successive applications for a writ could be limited and "'disposed of in the exercise of a sound judicial discretion.'"[270]

2. Lowering Procedural Barriers to Habeas Review by Focusing on the Benefits of Habeas Review: The Warren Court

In 1953, the Supreme Court had just begun the process of incorporating various provisions of the Bill of Rights against the states through the Due Process Clause.[271] Its decision that year, in *Brown v. Allen*—which suggested that a federal habeas court could hear any kind of constitutional claim brought by a state prisoner[272]—may well have reflected a perceived need for a federal forum to adjudicate and enforce those rights.[273] That need grew ever more pressing after *Brown v. Board of Education*,[274] as the civil rights struggle in the South intensified, and some state judges—both in the South and elsewhere—manifested a notorious lack of sympathy toward the federal government and toward the rights protected by the federal Constitution.[275]

In 1963, the Supreme Court decided three cases which greatly expanded the availability of habeas relief by lowering the associated

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technically satisfy the exhaustion rule, but the doctrine requires a petitioner to have raised those claims in state court to get federal habeas corpus review).

269. *See* McCleskey v. Zant, 499 U.S. 467, 480–81 (1991) (quoting Salinger v. Loisel, 265 U.S. 224, 230 (1924); citing Wong Doo v. United States, 265 U.S. 239, 240 (1924)), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

270. *Id.* at 481 (quoting *Salinger*, 265 U.S. at 231).

271. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 27–28 (1949) (incorporating the Fourth Amendment against the states), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1963).

272. 344 U.S. 443, 462–63 (1953), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214; *see also supra* text accompanying notes 173–75.

273. *See Developments*, *supra* note 79, at 1059–60 (stating that *Brown* assumes there "is an interest in having a federal forum adjudicate federal constitutional claims of state prisoners").

274. 347 U.S. 483 (1954).

275. *See generally* Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L.J. 1423, 1425–26, 1465–79 (1994) (discussing southern hostility to federal constitutional claims regarding racial discrimination); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (discussing the preference of a federal forum to adjudicate federal constitutional claims). Most judges, including many in the South, respected *Brown*'s mandate. *See generally* JACK BASS, UNLIKELY HEROES (1981) (discussing southern judges who worked to enforce *Brown*).

procedural barriers. The first, *Townsend v. Sain*, held that while a federal habeas court must presume the validity of a state court's findings of fact, it has the power to conduct a plenary fact-finding hearing if a habeas applicant "alleges facts which, if proved, would entitle him to relief."[276] Further, when the facts are in dispute, such hearings are mandatory "if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding," unless the habeas petitioner had deliberately bypassed state procedures.[277] The *Townsend* Court stated that its holding "supersede[d]" *Brown v. Allen* "to the extent of any inconsistencies."[278]

In *Fay v. Noia*, the Court, purporting to apply 28 U.S.C. § 2254(b) and (c), relaxed traditional procedural constraints regarding exhaustion[279]

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276. 372 U.S. 293, 312 (1963), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214. The *Townsend* Court observed that the history of habeas corpus "refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." *Id.* at 311.

277. *Id.* at 312. The *Townsend* Court went on to find that an evidentiary hearing must be afforded a habeas applicant if

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.

278. *Id.* at 312. In 1966, Congress enacted what the Court, referring to 28 U.S.C. § 2254(d), called "an almost verbatim codification of the standards delineated in *Townsend*." Miller v. Fenton, 474 U.S. 104, 111 (1985). "In the strict sense," however, § 2254(d) did not codify *Townsend* because "[t]he listed circumstances in *Townsend* are those in which a hearing must be held; the nearly identical listed circumstances in § 2254(d) are those in which facts found by a state court are not presumed correct." *Keeney*, 504 U.S. at 20–21.

It is not clear whether *Townsend* represented a departure from then existing law, but, in any event, it was overruled in *Keeney*. *See Keeney*, 504 U.S. at 5 n.2.

279. 372 U.S. 391, 435 (1963) (holding that the traditional exhaustion requirement means only that the federal habeas applicant must have exhausted those state remedies which were "still open" to him "at the time he files his application in federal court"), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

In the 1960s and early 1970s, the Court continued to relax the exhaustion rule. *See, e.g.*, Roberts v. LaVallee, 389 U.S. 40, 42–43 (1967) (per curiam) (finding that petitioner need not return to state court when, because of a change in state law since his first appeals, a second effort to secure relief might be successful); Wilwording v. Swenson, 404 U.S. 249, 250–52 (1971) (per curiam) (finding that petitioner need not file repetitious, unknown, or futile applications to satisfy the exhaustion rule), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321–71 (codified as amended in various sections of 42 U.S.C. § 1997e), *as recognized in* Woodford v. Ngo, 548 U.S. 81, 84 (2006); *cf.* Picard v. Connor, 404 U.S. 270, 275–77 (1971) (holding that exhaustion applies by claim and that a petitioner need not place the correct label on the claim so long as he presents the substance).

and procedural default[280] that had often barred state prisoners from seeking federal habeas review of their claims. In addition, in dicta, the *Fay* Court made federal habeas corpus relief available to any state prisoner with any constitutional claim who had not knowingly and deliberately waived the federal constitutional contention.[281] Writing for the majority, Justice Brennan found that "[a]lthough in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty."[282]

In *Sanders v. United States*, the Court relaxed the rules governing successive habeas petitions. It held that even if a court previously rejected a claim on the merits, the applicant has the right to be heard again upon showing that "the ends of justice would be served by permitting the redetermination of the ground."[283] In addition, the Court held that a federal habeas court must relitigate a successive habeas petition if that petition raises new claims or claims previously raised but not decided on their merits, unless there has been an abuse of the writ.[284]

As Justice Brennan's comment suggests, *Townsend*, *Fay*, and *Sanders* should be viewed in their historical context. Two years earlier, the Supreme Court had decided *Mapp v. Ohio*;[285] it was rapidly applying more federal rights and remedies to the states. In some places, there was resentment toward this trend as well as persistent resistance to desegregation.

Habeas review effectively reveals[286] and corrects systemic flaws and abuses.[287] It also provides a method to correct individual abuses.[288]

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280. 372 U.S. at 438 (holding that even when a state court decision relied on adequate and independent state procedural grounds to bar further state litigation, the law only barred federal habeas relief when petitioner "deliberately by-passed" state procedures).

281. *See id.* at 433, 438–41.

282. *Id.* at 401.

283. 373 U.S. 1, 16 (1963). Justice Brennan explained this result by pointing out that a state court judgment is a prerequisite to direct review, whereas only unlawful detention is necessary for habeas jurisdiction. *Fay*, 372 U.S. at 416. This reasoning has been criticized. *See, e.g.*, *Developments*, *supra* note 79, at 1104.

284. *Sanders*, 373 U.S. at 17. The abuse-of-the-writ doctrine was later codified in 28 U.S.C. § 2254(b). Williams v. Taylor, 529 U.S. 362, 380 n.11 (2000).

285. 367 U.S. 643, 660 (1961).

286. *See* Rose v. Mitchell, 443 U.S. 545, 563 (1979) (explaining that federal habeas review may reveal hidden, systemic flaws and may have profound educational deterrent effects on state court judges once those flaws are revealed); Joseph L. Hoffmann & Nancy J. King, Essay, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 823–33 (2009) (outlining a new way to promote and further the goal of revealing systemic flaws and abuses).

287. Hoffmann & King, *supra* note 286, at 795–96 (arguing that the expansion of habeas review responded to the structural and systemic problems that existed in criminal justice in the 1950s and

With its decisions in these cases, the Supreme Court made it relatively easy for aggrieved parties to take constitutional issues away from possibly unsympathetic state courts and move them quickly into federal court.

In 1969, in *Kaufman v. United States*, the Supreme Court observed that *Fay* provided a federal forum for state prisoners and gave the federal courts the "last say" on questions of federal law.[289] Habeas review overcomes "the inadequacy of state procedures to raise and preserve federal claims, [addresses] the concern that state judges may be unsympathetic to federally created rights, [and deals with] the institutional constraints on the exercise of [the Supreme] Court's certiorari jurisdiction to review state convictions."[290] Habeas review also helps ensure that courts respect and uniformly protect constitutional rights.[291]

Kaufman was the high water mark in the Court's expansion of the availability of federal habeas corpus. *Kaufman*'s broad language suggests that some members of the Court believed that a federal habeas corpus court should decide any claims by a state prisoner alleging that a violation of any constitutional provision facilitated his conviction.[292] This view, however, has never been the law.[293] Instead, federal courts

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1960s and played a major role in ensuring that the states respected new constitutional rights). Systemic abuses still occur. *See* Primus, *supra* note 135, at 18–23 (detailing specific abuses in various states).

288. *See* Jackson v. Virginia, 443 U.S. 307, 322 (1979) ("It is the occasional abuse that the federal writ of habeas corpus stands ready to correct." (citing Brown v. Allen, 344 U.S. 443, 498–501 (1953) (opinion of Frankfurter, J.))); Hoffmann & King, *supra* note 286, at 804–05.

289. 394 U.S. 217, 225 (1969) (internal quotation marks omitted), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

290. *Id.* at 225–26; *see also* Primus, *supra* note 135, at 17 ("The mainstream view today is that federal judges are more expert than their state counterparts, more solicitous of constitutional rights, more insulated from political pressure, and more able to apply uniform interpretations of federal law.").

291. *See* Teague v. Lane, 489 U.S. 288, 306 (1989); *Kaufman*, 394 U.S. at 231. The *Kaufman* Court conceded that these justifications were absent where federal prisoners sought habeas relief and noted that a district court has discretion to decline to reach the merits of a claim that had previously been adjudicated. *Id.* at 227 n.8. Nonetheless, it held that a federal prisoner's "claim of unconstitutional search and seizure is cognizable in a § 2255 proceeding" because collateral review of any conviction enhances constitutional protections by ensuring that a mechanism for relief is always available. *Id.* at 226, 231; *see also* Neuborne, *supra* note 275, at 1105–06.

292. *See Kaufman*, 394 U.S. at 223–24.

293. *See* Stone v. Powell, 428 U.S. 465, 481 n.16 (1976) ("To the extent the application of the exclusionary rule in *Kaufman* did not rely upon the supervisory role of this Court over the lower federal courts, the rationale for its application in [the federal] context is also rejected." (internal citation omitted)).

exercising habeas jurisdiction have long refused to grant relief "on certain claims because of 'prudential concerns.'"[294]

3. Recognizing the Costs of Habeas Review

As the Warren Court expanded the scope of federal habeas corpus review, critics began to observe that "'the Great Writ entails significant costs.'"[295] In *Stone*, the Court recognized that "[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government."[296] Habeas review, according to the Court, compromises the public interest in "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."[297] Later cases reiterated these costs, often using slightly different language,[298] and also observed that broad collateral review of state court convictions "degrades the prominence of the trial itself," shifts the focus of criminal proceedings from the defendant's factual guilt or innocence to the technicalities of trial or arrest, and needlessly frees the guilty.[299] For all these reasons, critics concerned with the effect of habeas review on federalism often argue that if a state prisoner's constitutional claim has been heard in state court, the federal courts should defer to the state's disposition of the claim unless the petitioner can show that the state's processes were inadequate because, for example, he was not provided a full and fair hearing on his claim.[300]

294. Withrow v. Williams, 507 U.S. 680, 699 (1993) (O'Connor, J., concurring in part and dissenting in part).

295. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 747–48 (1991) (quoting Engle v. Isaac, 456 U.S. 107, 126 (1982) (noting other views)).

296. *Stone*, 428 U.S. at 491 n.31.

297. *Id.* (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring)) (internal quotation marks omitted).

298. *See, e.g.*, *Engle*, 456 U.S. at 127–28 (explaining that habeas review undermines the principles of finality by extending "the ordeal of trial" and imposes costs on the federal system by "frustrat[ing] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights").

299. *Id.* To the extent that some of these costs replicate the costs of prophylactic rules at trial and on direct appeal, habeas review simply magnifies those costs. *See* Duckworth v. Eagan, 492 U.S. 195, 211 (1989) (O'Connor, J., concurring).

300. *See, e.g.*, Bator, *supra* note 156, at 522.

a. The Federal Caseload and the Effective Utilization of Judicial Resources

There can be little doubt that "[f]ederal habeas litigation . . . places a heavy burden on scarce judicial resources."[301] Until the 1960s, habeas petitions were few in number.[302] By 1978, habeas petitions constituted "the largest element of the civil caseload in the district courts."[303] Currently, "[o]ver 18,000 federal habeas cases are filed each year."[304]

Critics contend that habeas review is inefficient and wastes resources because it involves redundancy and duplication of effort without any meaningful corresponding benefit.[305] They further argue that the large volume of petitions "threatens the capacity of the system to resolve primary disputes,"[306] causes some innocent persons to languish in jail while criminals argue,[307] and "prejudice[s] the occasional meritorious application [because it is] buried in a flood of worthless ones."[308]

The large number of habeas petitions—most of which contain no claim that the prisoner is innocent[309]—should not be surprising. The

301. Keeney v. Tamayo-Reyes, 504 U.S. 1, 7 (1992), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

302. In 1952, state prisoners filed 541 habeas petitions. *Brown*, 344 U.S. at 536 n.8 (Jackson, J., concurring). By 1962, the number of petitions had risen to 1,232. Fay v. Noia, 372 U.S. 391, 446 n.2 (1963) (Clark, J., dissenting), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977). "[O]ver 12,000 were filed in 1990, compared to 127 in 1941." Withrow v. Williams, 507 U.S. 680, 697 (1993) (O'Connor, J., concurring in part and dissenting in part). In part, this increase can be attributed to the Court's application to the states of more guarantees of the Bill of Rights, but it is clear that other forces are at work as well.

303. Ramsey v. United States, 448 F. Supp. 1264, 1276 n.22 (N.D. Ill. 1978) (quoting CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 246 (3d ed. 1976)).

304. *See* Nancy J. King & Joseph L. Hoffmann, *Envisioning Post-Conviction Review for the Twenty-First Century*, 78 MISS. L.J. 433, 436 (2008).

305. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970) ("[T]he most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community—judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms.").

306. McCleskey v. Zant, 499 U.S. 467, 491 (1991) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 260 (1973) (Powell, J., concurring)), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

307. *Id.* at 494.

308. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) ("[One] who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

309. Friendly, *supra* note 305, at 145 (observing that "the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime").

ready availability of habeas relief creates a powerful incentive to file for habeas review,[310] fosters perjury, and contributes to court delays. Because almost every trial contains some debatable ruling, nearly every convicted defendant has some rational argument for relief and, thus, a chance for a "big score." Very few of these petitions, however, are successful.[311] The result is "a substantial drain on the limited resources of the American criminal justice system for almost no return."[312] Given these realities, courts often recognize judicial economy and the conservation of resources as reasons to limit habeas review.[313]

b. The Necessity of Finality

The most significant cost imposed by federal collateral review "is the cost to finality in criminal litigation."[314]

> [B]oth the individual criminal defendant and society have an interest in insuring [sic] that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.[315]

"[T]his absence of finality also frustrates deterrence and rehabilitation."[316] "Deterrence depends upon the expectation that 'one violating the law will swiftly and certainly become subject to . . . just punishment.'"[317] Persons are more likely to engage in criminal activity if they believe that they might ultimately escape punishment through repetitive collateral attacks.[318] "Rehabilitation demands that the

310. Hoffmann & King, *supra* note 286, at 814 ("No matter how long the odds of habeas success may be, filing and losing is virtually cost free for prisoners.").

311. King & Hoffmann, *supra* note 304, at 437 (noting a one-third of one percent chance that a petitioner will succeed in obtaining some kind of relief on habeas).

312. *Id.*

313. *See, e.g.*, Keeney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

314. Coleman v. Thompson, 501 U.S. 722, 748 (1991).

315. Engle v. Isaac, 456 U.S. 107, 127 (1982) (internal quotation marks omitted) (quoting Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting)).

316. *Id.* at 127 n.32; *see also* Teague v. Lane, 489 U.S. 288, 309 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect.").

317. *Engle*, 456 U.S. at 127 n.32 (quoting Bator, *supra* note 156, at 452 (arguing that habeas review undermines the rehabilitative process because rehabilitation requires the prisoner realize that he "is justly subject to sanction")).

318. Kuhlmann v. Wilson, 477 U.S. 436, 452–53 (1986), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

convicted defendant realize that 'he is justly subject to sanction, [and] he stands in need of rehabilitation.'"[319]

"Finality also serves the State's legitimate punitive interests. When a prisoner is freed . . . many years after his crime, the State may be unable successfully to retry him"[320] because of the passage of time, the deterioration of memories, the dispersion or death of witnesses, or the loss of evidence.[321] If the retrial is not possible or results in a wrongful acquittal, a guilty individual goes free.[322] Society then suffers because it "again finds a guilty and potentially dangerous [offender] in its midst."[323]

In practice, few habeas petitions succeed, and few prisoners win release from custody as a result of habeas corpus.[324] Even successful habeas corpus claimants frequently suffer conviction upon retrial.[325] Some dangerous individuals, however, may remain free for long periods pending retrial. Moreover, retrials undermine the usual principles of finality and extend the ordeal of trials for society, defendants,[326] witnesses, and victims who may be asked to relive their disturbing experience. Retrials also impact jurors, courts, prosecutors, and defense counsel—all of whom must "expend further time, energy, and other resources to repeat a trial that has already once taken place."[327] It is not surprising, given all the interests advanced by finality, that the States'

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319. *Engle*, 456 U.S. at 127 n.32 (quoting Bator, *supra* note 156, at 452).

320. *Kuhlmann*, 477 U.S. at 453. In a footnote, Justice Powell identified some additional goals promoted by finality, including reducing the burdens unlimited collateral attacks impose on the criminal justice system, reducing the friction between state and federal courts generated by state judges knowing that their judgments may be set aside years later by a single federal judge, and reducing the frustrations federal intrusions into state criminal trials impose on the "State's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* at 453 n.16 (quoting *Engle*, 456 U.S. at 128) (internal quotations marks omitted).

321. *See* McCleskey v. Zant, 499 U.S. 467, 491 (1991) (quoting *Kuhlmann*, 477 U.S. at 453), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214; *Kuhlmann*, 477 U.S. at 453; *Engle*, 456 U.S. at 127–28; *but cf.* Vasquez v. Hillery, 474 U.S. 254, 262 (1986) (stating that requiring the state to retry a defendant who had been convicted of murder twenty-three years earlier is not "an unduly harsh penalty" given the magnitude of the constitutional wrong despite the difficulties the state would encounter on retrial).

322. *See* Withrow v. Williams, 507 U.S. 680, 701 (1993) (O'Connor, concurring in part and dissenting in part).

323. *Id.* at 701.

324. *See* King & Hoffmann, *supra* note 304, at 437 (observing that a sampling of nearly 2,400 petitions revealed only seven that received any sort of relief).

325. *See id.* (noting that of the seven that received relief, one petition had already been overturned in a year's time).

326. *Engle*, 456 U.S. at 126–27. "[P]risoners whose guilt is conceded or plain" have no legitimate interest in release; rather, they have an interest in finality. *Kuhlmann*, 477 U.S. at 452.

327. United States v. Mechanik, 475 U.S. 66, 72 (1986).

interest in the finality of convictions is the reason most often given by the Supreme Court when withholding collateral review.[328]

c. The Minimization of Friction Between Federal and State Courts

Even after the passage of the Civil War Amendments, "[t]he States [continued to] possess primary authority for defining and enforcing the criminal law."[329] Thus, the states necessarily have primary responsibility for vindicating those constitutional rights that protect the accused in criminal prosecutions.[330] "Reexamination of state convictions on federal habeas 'frustrate[s] . . . both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights'"[331] and can adversely affect the "integrity and effectiveness of the substantive criminal law of the states."[332] It can also seriously erode the morale of state court judges who know that their judgments may be set aside years later by a single federal judge.[333] As one author has noted:

> I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an

328. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 635 (1993); Keeney v. Tamayo-Reyes, 504 U.S. 1, 7 (1992) ("The writ strikes at finality of a state criminal conviction, a matter of particular importance in a federal system."), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)); Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (stating that resorting to habeas corpus for non-guilt-related claims compromises the necessity for finality); *see also* Withrow v. Williams, 507 U.S. 680, 698 (1993) (O'Connor, J., concurring in part and dissenting in part) (observing that finality is the most profound concern raised by collateral review).

Finality was also a goal of the AEDPA. *See* Rhines v. Weber, 544 U.S. 269, 278 (2005).

329. *Brecht*, 507 U.S. at 635 (quoting *Engle*, 456 U.S. at 128). The police power in the United States resides with the States; the federal government has no police power. *See* U.S. CONST. art. I.

330. *Withrow*, 507 U.S. at 698 (O'Connor, J., concurring in part and dissenting in part).

331. McCleskey v. Zant, 499 U.S. 467, 491 (1991) (alteration in original) (internal quotation marks omitted) (quoting Murray v. Carrier, 477 U.S. 478, 487 (1986), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

332. Bator, *supra* note 156, at 506; *see also* Younger v. Harris, 401 U.S. 37, 44 (1971) ("[T]he National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.").

333. Kuhlmann v. Wilson, 477 U.S. 436, 453 n.16 (1986), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

indiscriminate acceptance of the notion that all the shots will always be called by someone else.[334]

d. The Maintenance of the Constitutional Balance upon Which the Doctrine of Federalism Is Founded

Courts and commentators have often opined that habeas review imposes "special costs on our federal system."[335] Federalism, however, is a doctrine that has been invoked far more often than it has been defined. At bottom, it is more historical reality than policy choice.[336]

In a broad sense, federalism refers to the constitutional balance between the states and the federal government.[337] The original Constitution struck one balance by imposing very few limits on the power of state governments beyond commanding that the states establish "a Republican Form of Government."[338] In contrast, it severely limited

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334. Bator, *supra* note 156, at 451. The Court has recognized that "there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [applicable federal law] than his neighbor in the state courthouse.'" Stone v. Powell, 428 U.S. 465, 494 n.35 (1976) (quoting Bator, *supra* note 156, at 509). In many jurisdictions, however, state judges are elected, *see* William Cousins, Jr., *A Judge's View of Judicial Selection Plans*, 76 ILL. B.J. 790, 792 tbl. I (1987), or are subject to retention votes, *see* Gino L. DiVito, *HJR-CA20:ISBA's Resolution for Merit Selection of Judges by Appointment*, 76 ILL. B.J. 784, 786 (1987). In these jurisdictions, judges are subject to pressures from constituents who are often more concerned with law and order than with the constitutional rights of criminal defendants. *Id.* at 784–85 (discussing the electoral process's effect on judicial candidates' impartiality). In addition, even when they are not subject to the ballot box, the very closeness of state judges to the pulse of the electorate, which federalists exalt, makes those judges more sensitive to majoritarian demands, *id.*, and to the demands of powerful local interests, *see* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259–60 (2009) (discussing a judge's local financial interests).

335. Engle v. Isaac, 456 U.S. 107, 128 (1982); *see also* Bator, *supra* note 156, at 503–07 (discussing the tension between federal and state judges with respect to habeas review).

336. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3 (1988) ("The federal system resulted from a compromise between those who saw the need for a strong central government and those who were wedded to the independent sovereignty of the states. . . . Federalism in the United States thus was born as a political compromise rather than as a theoretical ideal.").

337. *See Stone*, 428 U.S. at 491 n.31; *see also* Rizzo v. Goode, 423 U.S. 362, 374–75 (1976) (emphasizing considerations of federalism in holding that federal courts may not enjoin upper echelon police officials pursuant to § 1983, unless constitutional violations by subordinates are a result of "a 'pervasive pattern of intimidation' flowing from a deliberate plan" on the part of the named defendants (quoting Allee v. Medrano, 416 U.S. 802, 812 (1974))).

338. U.S. CONST. art. IV, § 4; *see also* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1033–36 (1985) (examining the functions and virtues of the allocation of authority based on principles of federalism).

Federalism is, in a sense, a core idea. Among other things, it relates to the concentration in the states of many sovereign powers such as the powers to tax and spend and to make and enforce valid criminal laws. *See generally* Merritt, *supra* note 336, at 2–22 (discussing the history and values of

the federal government by giving it only those powers specifically assigned to it.[339] The adoption of the Civil War Amendments radically changed that balance.[340] Those Amendments operate directly against the states.[341] Because the passage of these Amendments settled some federalism issues, federalism is not a concern when the Supreme Court declares the existence of constitutional rights[342] or when it enforces legislation authorized by the Fourteenth Amendment.[343]

In the context of habeas review of state court convictions, federalism focuses on the respect the federal courts owe state court adjudications.[344] Federalism concerns are important when the Court creates prophylactic rules and remedies, applies them against the states, and allows their violation to be contested on federal habeas corpus.[345]

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the separation of state and federal powers). Its most ardent defenders view the doctrine as central to the avoidance of those concentrations of power that are inconsistent with the notion of limited government and, by their very magnitude, threaten individual liberties. *E.g.*, Yackle, *supra*, at 1036–37. The diffusion of the responsibility for enacting and enforcing such laws among the several states also recognizes political and cultural diversity and provides laboratories for social and economic experiments. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory . . . .").

339. U.S. CONST. amend. X.

340. S*ee* Mitchum v. Foster, 407 U.S. 225, 238–39 (1972) ("As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established."). "The Fourteenth Amendment can only be understood as a whole, for while respecting federalism, it intervened directly in Southern politics, seeking . . . respect [for] the principle of equality before the law." FONER, *supra* note 117, at 259.

341. Rose v. Mitchell, 443 U.S. 545, 561–62 (1979) (observing that allegations of grand jury discrimination involve a direct violation of the Fourteenth Amendment, which has long been held to operate against the state, whereas *Stone* merely considered "'a judicially created remedy rather than a personal constitutional right'" (quoting *Stone*, 428 U.S. at 495 n.37)). To the extent that the Fourteenth Amendment incorporates any guarantees of the Bill of Rights, those guarantees can also be said to operate directly against the states.

342. *See Ex parte* Virginia, 100 U.S. (10 Otto) 339, 345–46 (1879). Absent legislation passed under Section 5, there is "room for argument that the first section is only declaratory of [a] moral duty." *Id.* at 347.

343. *See id.* at 347–48 ("[T]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment.").

344. *See* Williams v. Taylor, 529 U.S. 420, 436 (2000) (citing Coleman v. Thompson, 501 U.S. 722, 726 (1991)).

345. *See supra* notes 329–44 and accompanying text; *see also Ex parte* Virginia, 100 U.S. at 345–46 ("It is not said [the judicial power] shall be authorized to declare void any action of a State in violation of the prohibitions [of the Fourteenth Amendment].").

e. Shifting the Focus of Criminal Proceedings Away from the Factual Guilt or Innocence of the Petitioners onto the Behavior of State Actors and Freeing the Guilty

Most provisions of the Bill of Rights constrain the government and do not advance the truth-seeking function of the courts. As a result, many convicted and seemingly guilty persons who claim constitutional violations necessarily seek relief on grounds that have no obvious relation to their guilt or innocence.[346] When the courts hear those claims, the public may get the impression that the courts care more about "technicalities" than guilt or innocence.[347]

The availability of collateral review can "give litigants incentives to withhold claims for manipulative purposes, [which] may create disincentives to present claims when evidence is fresh."[348] To the extent that non-guilt-related claims are reexamined on habeas review, the original distortions and disruptions caused by such claims[349] become "[f]ar more severe,"[350] and the chances increase that a guilty person will be released for reasons that are unrelated to guilt or innocence.

4. Raising Procedural Barriers to Habeas Review by Focusing on Its Costs

After *Kaufman*, with the help of new Justices appointed by President Nixon, the Supreme Court's habeas jurisprudence shifted course. The Court focused on the costs of habeas review and factual innocence, deferred to state processes, and began raising old barriers to habeas relief. In addition, it created some new barriers.[351] With *Stone* in 1976,

346. *See, e.g.*, *Stone*, 428 U.S. at 492 n.31 ("[I]n the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration.").

347. *See* Kuhlmann v. Wilson, 477 U.S. 436, 467 (1986) (Brennan, J., dissenting), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

348. Keeney v. Tamayo-Reyes, 504 U.S. 1, 7 (1992), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214; *see also* McCleskey v. Zant, 499 U.S. 467, 491–92 (1991), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

349. For a description of such disruptions, see *supra* Part IV.A.1.

350. *See McCleskey*, 499 U.S. at 492.

351. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 81 (1977) (noting "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").

the Court barred habeas courts from hearing Fourth Amendment claims brought by state prisoners that had received a full and fair hearing on the claim in state court.[352] In 1990, the Court held that most new rules of constitutional criminal procedure did not apply retroactively to cases on collateral review.[353] Finally, in 1993, the Court imposed a more demanding standard of habeas review for claims of trial-type errors raised on appeal than for comparable claims raised on direct review.[354]

a. The Exhaustion Doctrine

In 1981, the Court began tightening the exhaustion rule it had expanded eighteen years earlier in *Fay v. Noia*.[355] In *Rose v. Lundy*, it held that the statutory-exhaustion rule requires a federal court to "dismiss habeas petitions containing both unexhausted and exhausted claims."[356] In requiring "total exhaustion," the *Lundy* Court invoked federalism and the doctrine of comity, which it interpreted as "'teach[ing] that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.'"[357]

"*Lundy*'s 'simple and clear instruction to potential litigants [was] before you bring any claims to federal court, be sure that you first have taken each one to state court.'"[358] The 1996 amendments to the Habeas Corpus Act repeated that instruction.[359]

Exhaustion "ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before

352. 428 U.S. 465, 494 (1976).

353. Saffle v. Parks, 494 U.S. 484, 494 (1990); *see also* Teague v. Lane, 489 U.S. 288, 310 (1989) (applying the same idea a year earlier).

354. Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993).

355. 372 U.S. 391 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

356. 455 U.S. 509, 522 (1982) (construing 28 U.S.C. § 2254(b)–(c) (1976)), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)). In *Fay*, the Court, purporting to apply § 2254(b) and (c), relaxed traditional procedural constraints regarding exhaustion. 372 U.S. at 398–99.

357. *Lundy*, 455 U.S. at 518 (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)); *see also* Coleman v. Thompson, 501 U.S. 722, 731 (1991) (observing that the exhaustion doctrine is "grounded in principles of comity").

358. Rhines v. Weber, 544 U.S. 269, 276–77 (2005) (quoting *Lundy*, 455 U.S. at 520); *see also* Duncan v. Henry, 513 U.S. 364, 365–66 (1995) (per curiam) (finding that a mere reference to the Constitution in state court will satisfy the exhaustion requirement for a constitutional claim).

359. *See* 28 U.S.C. §§ 2241–2254.

the lower federal courts may entertain a collateral attack upon that judgment,"[360] and it thereby prevents piecemeal litigation[361] and channels claims into the appropriate forum.[362] Accordingly, in 1992, the Court held in *Keeney v. Tamayo-Reyes* that the mere statement of a claim in state court does not satisfy the exhaustion requirement.[363] "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits."[364]

b. Claims Foreclosed by Procedural Default: Cause and Prejudice

In *Francis v. Henderson* in 1976, the Supreme Court used considerations of comity and federalism to raise the bar for review of procedurally defaulted claims.[365] The Court held that if a state court judgment rests on independent and adequate state grounds,[366] then a habeas petitioner could only obtain federal review of it if he could show both good cause for his failure to properly raise his claim in state court[367] and actual prejudice resulting from the constitutional wrong under review.[368]

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360. Duncan v. Walker, 533 U.S. 167, 178–79 (2001).

361. *Id.* at 180.

362. Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

363. *Id.* at 9–10. In *Duncan v. Henry*, the Court held that a habeas petitioner who wishes to assert a constitutional claim must do so in both federal and state court. 513 U.S. 364, 366 (1995) (per curiam).

364. *Keeney*, 504 U.S. at 10.

365. 425 U.S. 536, 541 (1976). The petitioner claimed that the Louisiana grand jury which had indicted him six years earlier had improperly excluded blacks. *Id.* at 537.

366. Lambrix v. Singletary, 520 U.S. 518, 523 (1997). The Court further noted that:

> [t]he "independent and adequate state ground" doctrine is not technically jurisdictional when a federal court considers a state prisoner's petition for habeas corpus pursuant to 28 U.S.C. § 2254, since the federal court is not formally reviewing a judgment, but is determining whether the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States."

Id. at 523 (quoting Coleman v. Thompson, 501 U.S. 722, 729–30, 750 (1991)). The Court later observed that "[a]pplication of the 'independent and adequate state ground' doctrine to federal habeas review is based upon equitable considerations of federalism and comity." *Id.* at 523.

367. *Francis*, 425 U.S. at 542. Good cause means an objective factor external to the defense that prevented compliance with relevant procedural rules. Murray v. Carrier, 477 U.S. 478, 488 (1986), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214. *See also* Trotter v. McKune, No. 09-3076-WEB, 2010 WL 750248, at *8 (D. Kan. Mar. 2, 2010) (requiring that "'good cause' . . . arise[] from external factors, not petitioner's own decisions" (quoting Ramdeo v. Phillips, No. 04-CV-1157 (SLT), 2006 WL 297426, *6 (E.D.N.Y. Feb. 8, 2006) (internal quotation marks omitted))).

368. *Francis*, 425 U.S. at 542. The Court found there was "no question of a federal district

The next year, in *Wainwright v. Sykes*, the Court held that *Francis*'s "'cause' and 'prejudice'" standard should "appl[y] to a waived objection to the admission of a confession at trial" even if the defendant's attorney waived the objection and not the defendant himself.[369] The *Sykes* Court left to later decisions the task of more precisely defining its "'cause'[370] and 'prejudice' test"[371] but noted that state contemporaneous-objection rules promote finality and make the state court trial the "main event" rather than a "tryout on the road" to a later determinative federal habeas proceeding[372] and therefore rejected the sweeping "deliberate bypass" language in *Fay v. Noia*.[373]

In 1982, in *Engle v. Isaac*, the Court rejected the argument that *Sykes* should be limited to cases in which the constitutional error did not affect the truth-finding function of the trial.[374] Four years later, however, the

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court's power to entertain an application for a writ of habeas corpus in a case such as this," but framed the issue as whether it was an "appropriate exercise of that power." *Id.* at 538–39.

369. 433 U.S. 72, 87, 90–91 (1977). Because Sykes' attorney failed to comply with Florida's contemporaneous-objection rule and did not object at trial to testimony that he later claimed was admitted in violation of his *Miranda* rights, the Florida courts refused to hear his constitutional claims. *Id.* at 74. The Supreme Court rejected the habeas petition. *Id.* at 91.

370. *See, e.g.*, *Carrier*, 477 U.S. at 488 (finding that external impediments that could constitute sufficient cause include that (1) "the factual or legal basis for the claim was not reasonably available to counsel" at the time; (2) "'some interference by [state] officials'" made compliance impracticable; or (3) counsel was ineffective (quoting Brown v. Allen, 344 U.S. 443, 486 (1953), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214)).

Occasional decisions have elaborated on the meaning of state interference. *See, e.g.*, Banks v. Dretke, 540 U.S. 668, 694–95 (2004) (petitioner established cause); Strickler v. Greene, 527 U.S. 263, 289 (1999) (holding that petitioner established cause to raise a *Brady* claim); Amadeo v. Zant, 486 U.S. 214, 217–24, 228 n.6 (1988) (petitioner established cause).

Ineffective assistance of counsel is the most commonly asserted cause. According to one study, out of approximately 480 cases where procedural default was claimed because of ineffective assistance of counsel, "in none did a federal court grant relief." King & Hoffmann, *supra* note 304, at 440.

371. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 434 (1995). To establish prejudice, a petitioner must demonstrate that there is a "reasonable probability" that but for the constitutional error, the result of the trial would have been different. A "reasonable probability" is one that "'undermines confidence in the outcome of the trial.'" *Id.* at 433–34 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)); *cf.* Strickland v. Washington, 466 U.S. 668, 694–96 (1984) (articulating identical standards for determining when ineffective assistance of counsel prejudiced a defendant).

372. *Sykes*, 433 U.S. at 89–90 (internal quotation marks omitted) (rejecting and overruling in part *Fay*). *Sykes* only applies if a state court has rejected the petitioner's constitutional claims on independent and adequate state grounds of noncompliance with state procedural rules governing the raising of such claims. If a state court rejects a federal constitutional claim on the merits, then the cause-and-prejudice requirement does not apply and federal habeas review is available to the extent otherwise permitted. *See* Cnty. Court of Ulster Cnty. v. Allen, 442 U.S. 140, 154 (1979).

373. See *supra* notes 279–82 and accompanying text.

374. 456 U.S. 107, 110 (1982) (holding that a habeas petitioner who failed to comply with state procedural rules requiring a contemporaneous objection to jury instructions could not "challenge the

Court acknowledged the importance of truth finding and found that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[375]

In later cases, the Court relied on finality, comity, and the "profound societal costs that attend the exercise of habeas jurisdiction," to further define "cause"[376] and as reasons to hold that habeas courts should evaluate procedural defaults on appeals under the cause-and-prejudice standards.[377] In *Coleman v. Thompson*, the Court emphasized federalism, noted the "important interest in finality served by state procedural rules,"[378] and explicitly held that:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.[379]

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constitutionality of those instructions in a federal habeas proceeding").

375. *Carrier*, 477 U.S. at 496. In *Sykes*, the Court stated in passing that the failure to establish cause and prejudice would not preclude habeas review of the "federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." *Sykes*, 433 U.S. at 90–91, *quoted in Carrier*, 477 U.S. at 504 (Stevens, J., concurring). Following *Carrier*, the Court regularly applied the miscarriage-of-justice test as an element of the default standard of *Sykes* and its progeny. *See* Withrow v. Williams, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part) ("[A] sufficient showing of actual innocence . . . is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim.").

376. Smith v. Murray, 477 U.S. 527, 539 (1986). The Court also noted "cause" did not include an attorney's "deliberate, tactical decision not to pursue a particular claim" on direct appeal. *Id.* at 533–34. *See also Carrier*, 477 U.S. at 486–87 (finding that an otherwise competent attorney's inadvertent failure to raise a substantive claim of error on appeal did not constitute "cause").

377. *Smith*, 477 U.S. at 533 (observing that the State's interests in finality and efficiency are paramount and are the same at both the trial level and the appellate level).

378. 501 U.S. 722, 750 (1991). Coleman's state post-conviction counsel missed a state filing deadline by three days, and as a result, Coleman's constitutional claims were not heard. *Id.* at 727. The Supreme Court held that because there is no constitutional right to an attorney in state post-conviction proceedings, *id.* at 752 (citing Pennsylvania v. Finley, 481 U.S. 551, 556 (1987)), Coleman "cannot claim constitutionally ineffective assistance of counsel in such proceedings," *id.* (citing Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (per curiam)), and "must 'bear the risk of attorney error that results in a procedural default,'" *id.* at 752–53 (quoting *Carrier*, 477 U.S. at 488).

379. *Id.* at 750. The Court further observed that "[t]he cause and prejudice standard in federal habeas evinces far greater respect for state procedural rules than does the deliberate bypass standard of *Fay*." *Id.* at 747.

Finally, in *Keeney v. Tamayo-Reyes*, the Court overruled *Townsend* and held that, absent a fundamental miscarriage of justice, a habeas petitioner who failed to develop a record in state court may not develop a factual record in federal court unless he can show good cause for his failure to develop the record in state court as well as prejudice flowing from that failure.[380] Just as in the case of procedural default, the cause-and-prejudice standard, according to the *Keeney* Court, "appropriately accommodate[s] concerns of finality, comity, [and] judicial economy, and channel[s] the resolution of claims into the most appropriate forum."[381]

c. Successive Petitions: Cause and Prejudice

In *Kuhlmann v. Wilson*, the Court concluded that the "ends of justice" exception to the bar on successive habeas petitions[382]—which it set out twenty-three years earlier in *Sanders v. United States*[383]—"require[s] federal courts to entertain [a successive] petition[] only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[384] In reaching this conclusion, the Court observed that it has consistently viewed habeas corpus "'as governed by equitable principles.'"[385] It then balanced the prisoner's interests in

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The Court later held that the failure to comply with a state procedural rule might not bar federal habeas review if (1) on the facts of the case, even perfect compliance with the rule would not have helped the petitioner; (2) the state has not always demanded "flawless compliance" with the rule; or (3) the petitioner "substantially complied" with the rule's essential requirements. Lee v. Kemna, 534 U.S. 362, 381–82 (2002).

380. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9–11 (1992), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)). In 1981, the Court expanded deference to state court evidentiary findings and limited the circumstances under which a federal court can request an evidentiary hearing. *See* Sumner v. Mata, 449 U.S. 539, 551–52 (1981).

381. *Keeney*, 504 U.S. at 8. The AEDPA further "raised the bar *Keeney* imposed." Williams v. Taylor, 529 U.S. 420, 433 (2000).

382. 477 U.S. 436, 454 (1986), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214. The Court defined a successive petition as one which "raises grounds identical to those raised and rejected on the merits on a prior petition." *Id.* at 444, n.6 (citing Sanders v. United States, 373 U.S. 1, 15–16 (1963)).

383. 373 U.S. at 16–17.

384. 477 U.S. at 454. The Court further stated that this showing must be made "even though . . . the evidence of guilt may have been unlawfully admitted." *Id.* at 454. The current version of 28 U.S.C. § 2244(b) narrows the broad *Kuhlmann* exception for successive petitioners. *See* 28 U.S.C. § 2244(b) (2006).

385. *Kuhlmann*, 477 U.S. at 447 (quoting Fay v. Noia, 372 U.S. 391, 438 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977)).

relitigating the "fundamental justice of his incarceration" against the state's interests in finality and the administration of justice.[386]

In *McCleskey v. Zant*, the Court observed that "[t]he prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine."[387] It held that federal habeas courts should therefore use the same cause-and-prejudice standard to determine whether to dismiss a claim in a successive habeas petition because the petitioner inexcusably failed to raise that claim in an initial habeas petition.[388] The Court emphasized that "the writ strikes at finality" and noted that its availability "may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh."[389] Additionally, federal habeas litigation "places a heavy burden on scarce federal judicial resources, and [it] threatens the capacity of the system to resolve primary disputes."[390]

The *McCleskey* Court observed that when a petitioner presents a claim for the first time in a subsequent petition, these disruptions are "far more severe."[391] "[T]he ordeal [of trial] worsens . . . [and] [p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system."[392] Similarly,

> [i]f reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still. . . . And if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition.[393]

386. *Id.* at 452–53. The *Kuhlmann* Court identified six different goals advanced by finality or compromised by its ready availability. *Id.* at 453–54, 454 n.16.

387. 499 U.S. 467, 490 (1991), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

388. *Id.* at 503.

389. *Id.* at 491–92.

390. *Id.* at 491.

391. *Id.* at 492.

392. *Id.*

393. *Id.* In 1996, through the AEDPA, Congress further restricted review of claims contained in successive petitions. *See* 28 U.S.C. § 2244(b) (2006).

d. Retroactivity and the *Teague* Doctrine

In *Teague v. Lane*, a plurality of the Supreme Court rejected the retroactive application of new constitutional rules of criminal procedure to cases on collateral review.[394] The Court explained that the "'costs imposed [on society] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application.'"[395] As a result, a habeas petitioner can only prevail by relying on rules that had been established at the time that the state courts considered the petitioner's claim.[396]

Despite its status as a plurality opinion, *Teague* quickly morphed into the Court's settled position on retroactivity.[397] By 1997, the Court had determined that "whether a constitutional rule of criminal procedure applies to a case on collateral review involves [the *Teague*] three step process."[398] Thus, "the *Teague* principle protects not only the reasonable

394. 489 U.S. 288, 310 (1989) (plurality opinion); *but cf.* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that new rules must apply retroactively to all criminal cases pending on direct review).

395. *Teague*, 489 U.S. at 310 (quoting Salem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring)).

396. O'Dell v. Netherland, 521 U.S. 151, 156 (1997). It appears that a constitutional rule is "new" unless all reasonable jurists would agree that it is "*dictated* by then-existing precedent." Lambrix v. Singletary, 520 U.S. 518, 527–28 (1997). It is not enough that the rule of constitutional law allegedly violated by the state courts was "a reasonable interpretation of prior law—perhaps even the most reasonable one." *Id.* at 538. Instead, *Teague* "asks whether [the outcome] was *dictated* by precedent—*i.e.*, whether *no other* interpretation was reasonable." *Id.*

If the Supreme Court was closely divided on the merits of the rule from which the petitioner seeks to benefit, the rule is not likely to apply retroactively. *See* Beard v. Banks, 542 U.S. 406, 415–16 (2004) (observing that the prior decisions relied on were 5–4 and 6–3). "The mere existence of a dissent [does not, itself,] suffice[] to show that the rule is new." *Id.* at 416 n.5.

397. *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 488–89 (1990) (recognizing the rule created by *Teague* and refusing to modify its holding); *see also* Graham v. Collins, 506 U.S. 461, 467 (1993) (confirming the no-other-reasonable-interpretation requirement); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 540 (1991) (plurality opinion) ("Whereas *Griffith* held that new rules must apply retroactively to all criminal cases pending on direct review, we have since concluded that new rules will not relate back to convictions challenged on habeas corpus." (citing *Teague*, 489 U.S. at 310)).

398. *Beard*, 542 U.S. at 411 (citing *Lambrix*, 520 U.S. at 527). The first step in the *Teague* inquiry determines when the habeas petitioner's state conviction became final. *Id.* The second step ascertains the "'legal landscape as it then existed'" and asks if the rule is compelled by the Constitution as then interpreted. *Id.* (quoting *Graham*, 506 U.S. at 468; citing Saffle v. Parks, 494 U.S. 484, 488 (1990)). If the second step determines that the rule is new—not compelled by then-existing precedent—then the court must consider whether the rule falls into one of two exceptions to nonretroactivity. *Id.* (citing *Lambrix*, 520 U.S. at 527).

judgments of state courts but also the States' interest in finality quite apart from their courts."[399]

5. Raising the Standard of Review for Habeas Claims

In *Brecht v. Abrahamson*, the Court held that the *Chapman* harmless-error standard for reviewing constitutional errors—which requires that a court find the error harmless beyond a reasonable doubt[400]—does not apply to trial-type constitutional errors reviewed on habeas corpus.[401] The Court noted that the reason most often advanced for distinguishing between direct and collateral review—the state's interest in finality—worked against applying the *Chapman* standard.[402] Instead, the *Brecht* Court held that the standard announced in *Kotteakos v. United States*[403] should be applied because it more properly considers the "nature and purpose of collateral review."[404] Using that standard, habeas courts should reverse only when the petitioner demonstrates actual prejudice and can show that "the error 'had [a] substantial and injurious'" impact on the verdict.[405] The general idea suggested in *Brecht*—that habeas

399. *Id.* at 413. The AEDPA adopted the suggestion that habeas relief is only necessary when a state court adopts unreasonable interpretations of state law or unreasonably applies the law to the facts. *See* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 214–15 (2008). Still, "the AEDPA and *Teague* inquiries are distinct. Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." Horn v. Banks, 536 U.S. 266, 272 (2002) (per curiam) (citations omitted).

Because "the *Teague* inquiry requires a detailed analysis of federal constitutional law," it should ordinarily be postponed until after procedural bar issues are considered. *Lambrix*, 520 U.S. at 524. It "should be addressed 'before considering the merits of [a] claim.'" *Id.* (alteration in original) (quoting Caspari v. Bohlen, 510 U.S. 383, 389 (1994)).

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

401. 507 U.S. 619, 623 (1993). The Supreme Court has classified errors into two categories: trial errors and structural errors. Neder v. United States, 527 U.S. 1, 7–8 (1999). Trial errors "'occur[] during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented.'" United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006) (quoting Arizona v. Fulminante, 499 U.S. 279, 307–08 (1991)). "Most constitutional errors" fall into the trial-error category. *Id.* (quoting *Fulminante*, 499 U.S. at 306) (internal quotation marks omitted). Structural errors include a complete "denial of counsel, the denial of the right of self-representation, the denial of the right to a public trial, and the denial of the right to a trial by jury." *Id.* at 149 (citations omitted). Also included are racial discrimination in the selection of a grand jury and defective reasonable-doubt instructions. *Neder*, 527 U.S. at 8.

402. *Brecht*, 507 U.S. at 637.

403. 328 U.S. 750, 764–65 (1946).

404. *Brecht*, 507 U.S. at 637–38.

405. *Id.* After the AEDPA, however, it is unclear "whether a federal habeas court should continue to apply the *Brecht* standard or determine instead whether the state court's decision was

review should only correct the most egregious errors—was incorporated into the AEDPA in 1996.[406]

6. Legislatively Imposed Limits on Habeas Relief: The AEDPA

The Supreme Court's raising and lowering of the procedural barriers to habeas relief left no doubt as to its equitable powers over the scope of the writ. There is also "no doubt of the authority of the Congress to . . . liberalize the common law procedure on *habeas corpus*"[407] and, to the extent permitted by the Constitution, narrow it.[408] As it exists today, it appears that the writ has a constitutionally commanded core, but both the Supreme Court and Congress may expand and contract its reach.

Over the years, Congress codified some of the Supreme Court's procedural barriers.[409] Until 1996, however, almost all limits on habeas review originated in the Supreme Court. That year, in a major overhaul of habeas law, Congress passed the AEDPA and amended the Habeas Corpus Act.[410]

The "AEDPA's purpose [was] to further the principles of comity, finality, and federalism."[411] The AEDPA said nothing about the rules governing procedural default and left the rules governing exhaustion of remedies largely unchanged.[412] In many other respects, however, its enactment "dramatically altered the landscape for federal habeas corpus petitions."[413] The AEDPA made it more difficult for a state prisoner to obtain an evidentiary hearing when he failed to develop the facts in state court[414] and "greatly restrict[ed] the power of federal courts to award

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contrary to, or involved an unreasonable application of the *Chapman* harmless error standard." Loliscio v. Goord, 263 F.3d 178, 185 n.1 (2d Cir. 2001) (citing Noble v. Kelly, 246 F.3d 93, 101 n.5 (2d Cir. 2001)).

406. *See* 28 U.S.C. § 2254(e) (2006).

407. Frank v. Mangum, 237 U.S. 309, 331 (1915); *see also Ex parte* Royall, 117 U.S. 241, 248–49 (1886).

408. Boumediene v. Bush, 553 U.S. 723, 746 (2008) ("'[A]t the absolute minimum' the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified." (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001))).

409. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 516 n.8 (1982) (observing that in 1948, "Congress gave legislative recognition to the *Hawk* [exhaustion] rule" through § 2254 (quoting Darr v. Burford, 339 U.S. 200, 210 (1950))), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

410. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. at 1214.

411. Williams v. Taylor, 529 U.S. 420, 436 (2000).

412. *See* 28 U.S.C. § 2254(b)(1).

413. Rhines v. Weber, 544 U.S. 269, 274 (2005).

414. *See* 28 U.S.C. § 2254(e)(2); *see also Williams*, 529 U.S. at 434 (observing that "the opening

relief to state prisoners who file second or successive habeas corpus applications."[415] In addition, the AEDPA added a one-year statute of limitations for filing a federal habeas corpus petition, which begins when appeals of the state judgment are exhausted,[416] and added a new standard of review for evaluating state court determinations of fact and applications of constitutional law.[417]

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clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence"). Still, "in requiring that prisoners who have not been diligent [to] satisfy § 2254(e)(2)'s provisions rather than show cause and prejudice, and in eliminating a freestanding 'miscarriage of justice' exception, Congress raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings." *Id*. at 433.

415. Tyler v. Cain, 533 U.S. 656, 661 (2001).

416. 28 U.S.C. § 2244(d). The AEDPA "encourages petitioners to seek relief from state courts . . . by tolling the 1-year limitations period while a 'properly filed application for State post-conviction or other collateral review' is pending." *Rhines*, 544 U.S. at 273–76 (quoting 28 U.S.C. § 2254(d)(2)) (discussing the rules governing "mixed" petitions—those containing both exhausted and unexhausted claims). In addition, the Supreme Court has interpreted the limitations period to allow a kind of "equitable tolling" to avoid particularly harsh results. *See, e.g.*, Holland v. Florida, 130 S. Ct. 2549, 2562 (2010) (stating that the limitations period can be equitably tolled if a habeas petitioner can show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way'" (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005))).

417. 28 U.S.C. § 2254(d) (2006). As amended by the AEDPA, section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams v. Taylor*, the Court explained:

> Under the "contrary to" clause [in the AEDPA], a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

529 U.S. 362, 412–13 (2000).

"'[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" Renico v. Lett, 130 S. Ct. 1855, 1862 (2010) (quoting *Williams*, 529 U.S. at 410). "'[C]learly established Federal law . . . refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.'" Carey v. Musladin, 549 U.S. 70, 74 (2006) (quoting *Williams*, 529 U.S. at 412).

C. Extending Stone *to Other Kinds of Claims*

1. Generally

Sound reasons support the limitation of the availability of habeas review. These reasons led both the Supreme Court and Congress to restrict access to habeas review and to make it more difficult for habeas petitioners to obtain relief even if their claim has some merit. Prior to the adoption of the AEDPA, advocates of habeas reform proposed several other approaches to limit the availability of habeas. Some suggested that the availability of collateral review should extend only to prisoners who could demonstrate innocence[418] or otherwise make "a colorable showing of [factual] innocence."[419] Others argued for the limitation of review to claims that, by their very nature, bear on the determination of guilt or innocence.[420] Still others suggested a preferred-rights approach under which habeas courts would consider only claims involving "fundamental" constitutional rights.[421] Finally, at least five Supreme Court Justices argued for a process-oriented approach to habeas review.[422] Under this approach, habeas relief would only be available in

418. *See, e.g.*, Whiteley v. Warden, 401 U.S. 560, 574–75 (1971) (Black, J., dissenting).

419. *See* Friendly, *supra* note 305, at 151–54 (suggesting four exceptions to this bar).

420. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring); *see also* Vasquez v. Hillery, 474 U.S. 254, 278 n.10 (1986) (Powell, J., dissenting) (questioning "whether a defendant should be permitted to relitigate [any] claim that has no bearing on either his guilt or on the fairness of the trial that convicted him").

It is not always obvious which types of claims bear on innocence. Sixth Amendment claims have been generally seen as relating to the accuracy of the fact-finding process. *See* United States *ex rel.* Sanders v. Rowe, 460 F. Supp. 1128, 1142 (N.D. Ill. 1978). On the other hand, Fourth Amendment claims generally do not. *Schneckloth*, 412 U.S. at 257–58 (Powell, J., concurring). Some other claims, however, are more difficult to categorize. *See* Withrow v. Williams, 507 U.S. 680, 690–92 (1993) (suggesting that *Miranda* violations can compromise the truth-seeking process).

In *Sanders*, the court referred to the distinction between a showing of innocence and a showing that a claim bears on innocence as "two strands" of the same argument. 460 F. Supp. at 1142.

421. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 538–50 (1982) (Stevens, J., dissenting) (suggesting collateral review should be limited to fundamental constitutional errors), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)); Marilyn L. Kelley, *Preferred Rights and Strict Scrutiny in the Law of Habeas Corpus*, 9 U. TOL. L. REV. 754, 781–82 (1978) (observing that the right to counsel is a "preferred right" because it is necessary to protect all other rights); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 455 (1980); *see also* Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 1002 (2000).

422. *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 720 (1993) (Scalia, J., with whom Thomas, J., joins, concurring in part and dissenting in part) (suggesting that an opportunity to litigate should

cases in which the state processes were demonstrably inadequate and the petitioner, therefore, did not receive a full and fair hearing on the claim in state court.[423]

The AEDPA did not adopt any of these approaches and contains no categorical exclusions akin to that announced in *Stone*. The Supreme Court has also declined to create any other categorical exclusions. Indeed, its restraint has been "[n]owhere . . . more evident than when it is asked to exclude a substantive category of issues from relitigation on habeas."[424]

Despite Justice Brennan's statement in *Stone* that "there are no 'second class' constitutional rights for purposes of federal habeas jurisdiction,"[425] the Court seems to have made exactly that kind of distinction in *Stone* and *Teague*.[426] It has also ranked or classified constitutional rights for other purposes.[427] Moreover, "the Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error."[428] Finally, it has often treated particular

be dispositive unless a claim goes to the fairness and accuracy of the result); *Vasquez*, 474 U.S. at 266–67 (O'Connor, J., concurring) (stating that "a petitioner who has been afforded by the state courts a full and fair opportunity to litigate" a claim of grand jury discrimination should not be allowed to raise that claim again on federal habeas corpus); Rose v. Mitchell, 443 U.S. 545, 588 (1979) (Powell, J., with whom Rehnquist, J., joins, concurring) ("I . . . would hold that a challenge to the composition of a state prisoner's grand jury cannot be raised in a collateral federal challenge to his incarceration, provided that a full and fair opportunity was provided in the state courts for the consideration of the federal claim."); *see also* Bator, *supra* note 156, at 492; Frank J. Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287, 287–89 (1983) (stating that recent Supreme Court decisions are consistent with the proposition that habeas review can be denied when the validity of the claim has been adjudicated in a state court).

423. *Withrow*, 507 U.S. at 715–17 (Scalia, J., concurring in part and dissenting in part). Those who espoused this view argued that a state judge is just as likely, under normal circumstances, to reach a "correct" result as is a federal judge, Friendly, *supra* note 305, at 168–69, that no system of justice can yield "correct" results in every case even under the best of circumstances, *see* Bator, *supra* note 156, at 89–93, and that the Bill of Rights says nothing about guilt or innocence, but it says much about process, *see* U.S. CONST. amends. I–X. Adherence to process is demonstrable. Even a judgment of doubtful accuracy may be accepted as legitimate if agreement that proper processes—those that were due—were followed. *See* Kremer v. Chem. Constr. Corp. 456 U.S. 461, 481–85 (1982) (discussing res judicata and collateral estoppel).

424. *Id.* at 700 (O'Connor, J., concurring in part and dissenting in part).

425. Stone v. Powell, 428 U.S. 465, 515 (1976) (Brennan, J., dissenting).

426. *Id.* (Brennan, J., dissenting); *see also* Teague v. Lane, 489 U.S. 288, 329 n.2 (1989) (Brennan, J., dissenting).

427. *See supra* note 401 (discussing the distinction between structural errors and trial-type errors). *See also* Kansas v. Ventris, 129 S. Ct. 1841, 1845 (2009) (distinguishing between "the core right to counsel" and extensions of that right).

428. Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986), *superseded by statute*, Antiterrorism and

constitutional errors differently depending on whether they were before the Court on direct or collateral review.[429] Thus, no inherent reason prevents the exclusion of a particular kind or category of claim from federal habeas jurisdiction.[430] The Supreme Court should extend *Stone* to bar habeas review of claims involving alleged violations of prophylactic rules when a state court conducted a full and fair hearing on the alleged violation.

2. *Stone*'s Progeny

In his dissent in *Stone*, Justice Brennan stated that "[m]uch in the Court's opinion suggests that a construction of the habeas statutes to deny relief for non-'guilt-related' constitutional violations, based on this Court's vague notions of comity and federalism is the actual premise for today's decision."[431] In fact, however, in only one case has the Supreme Court relied on *Stone* to deny habeas relief. In *Cardwell v. Taylor*, the petitioner claimed that custodial statements he made to the police should have been excluded because they occurred after an arrest that violated the Fourth Amendment.[432] In a per curiam opinion, the Court stated that "[o]nly if the statements were involuntary, and therefore obtained in violation of the Fifth Amendment, could the federal courts grant relief on collateral review."[433]

With the exception of *Cardwell*, the Court has declined to extend *Stone* to other types of constitutional claims.[434] This does not, however,

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Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

429. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 622–23 (1993) (holding that two different standards apply to reviews of a *Doyle* error depending on whether the review is direct or collateral); United States v. Timmreck, 441 U.S. 780, 783–84 (1979) (holding that a showing of noncompliance with the formal requirements of Rule 11 of the Federal Rules of Criminal Procedure is not grounds for collateral relief, but that such a claim could be raised on direct appeal); Henderson v. Kibbe, 431 U.S. 145, 154 (1977) ("The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.").

430. This possibility was first recognized by Justice Harlan in *Williams v. United States*. 401 U.S. 675, 683 (1971) (Harlan, J., concurring in part and dissenting in part).

431. *Stone*, 428 U.S. at 516 (Brennan, J., dissenting) (citation omitted).

432. 461 U.S. 571, 572–73 (1983) (per curiam).

433. *Id.* at 573.

434. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 375–80 (1986) (ineffective-assistance claim); Rose v. Mitchell, 443 U.S. 545, 564 (1979) (racial discrimination in jury selection); Jackson v. Virginia, 443 U.S. 307, 323–24 (1979) (due process for insufficient evidence). The lower federal courts have also been hesitant to extend *Stone* beyond the Fourth Amendment setting and have rejected its application to a wide range of claims. *See, e.g.*, Patterson v. Warden, 624 F.2d 69, 70

necessarily suggest an unwillingness to bar habeas review for claims founded on alleged violations of prophylactic rules. In fact, one can easily distinguish each of *Stone*'s progeny.

a. Sufficiency of the Evidence

In *Jackson v. Virginia*, the Court rejected the argument that *Stone* should extend to bar federal habeas review of a state prisoner's insufficient-evidence claim, which had been fully and fairly adjudicated in state court.[435] The *Jackson* Court acknowledged the costs of habeas review in terms of federalism and federal–state comity, but found that the availability of collateral relief for claims involving the sufficiency of evidence imposes only a relatively small burden on the federal courts because most such claims are disposed of in state court.[436] The Court observed that "whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence" and is "far different from the kind of issue" before the Court in *Stone*.[437] It therefore held that even if a federal habeas applicant had a full and fair hearing on the issue in state court, he may seek relief if, on the evidence introduced at trial, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt."[438]

b. Discrimination in the Selection of Grand Jurors

In 1977, in *Castaneda v. Partida*, Justice Powell, in a dissent joined by Chief Justice Burger, Justice Rehnquist, and, inferentially, Justice Stewart, observed that "[a] strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after

(9th Cir. 1980) (per curiam) (Fifth Amendment claims); Swicegood v. Alabama, 577 F.2d 1322, 1324–25 (5th Cir. 1978) (suggestive identification); Morgan v. Hall, 569 F.2d 1161, 1168–69 (1st Cir. 1978) (prosecutorial comment on post-arrest silence); Greene v. Massey, 546 F.2d 51, 53 n.6 (5th Cir. 1977) (double jeopardy), *rev'd on other grounds*, 437 U.S. 19 (1978); Berg v. Morris, 483 F. Supp. 179, 184–85 (E.D. Cal. 1980) (coerced witness testimony); United States *ex rel.* Burton v. Cuyler, 439 F. Supp. 1173, 1182 n.14 (E.D. Pa. 1977) (denial of the Sixth Amendment right to counsel), *aff'd*, 582 F.2d 1278 (3d Cir. 1978) (unpublished table decision).

435. 443 U.S. 307, 323–24 (1979).

436. *Id.* at 321–22; *see also* Withrow v. Williams, 507 U.S. 680, 687 (1993) (describing the Court's reasoning in *Jackson*).

437. *Jackson*, 443 U.S. at 323. The *Jackson* Court emphasized the need for federal habeas to be available to correct "occasional abuse." *Id.* at 322.

438. *Id.* at 324. It had long been clear that a conviction supported by no evidence whatsoever cannot stand. *See* Thompson v. City of Louisville, 362 U.S. 199, 206 (1960).

Stone."[439] When the issue came before the Court, however, a majority decided otherwise.[440]

In *Rose v. Mitchell*, decided the same year as *Jackson*, the Supreme Court held that *Stone* did not preclude federal habeas corpus review of all non-guilt-related claims because *Stone* involved "the judicially created exclusionary rule" and was "'*not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally.'"[441] Discrimination in grand-jury selection, found the *Rose* majority, differed fundamentally from the Fourth Amendment issues raised in *Stone*.[442] The Court based its decision on five grounds.

First, a claim of grand-jury discrimination, in effect, claims that "the trial court itself violated the Fourteenth Amendment."[443] Since that very trial court must first rule on the discrimination claim, it is reasonable to doubt that the claim, if raised, will receive the full and fair hearing deemed essential in *Stone*.[444]

Second, "[a]llegations of grand jury discrimination involve charges that state officials are violating the direct command of the Fourteenth Amendment," whereas *Stone* involved a constitutional provision which had "only recently . . . been applied fully to the States" and was considered "'a judicially created remedy rather than a personal constitutional right.'"[445] Consequently, "the federalism concerns that motivated the Court to adopt the rule of *Stone v. Powell* are not present."[446]

Third, the *Rose* Court noted the *Stone* Court's belief in the minimal deterrent value of excluding, in a federal habeas corpus proceeding, evidence obtained in violation of the Fourth Amendment.[447] In contrast, the *Rose* Court stated that federal review of discrimination claims will likely reveal flaws not seen by those in day-to-day contact with the state

439. 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting).

440. *Id.* at 500–01 (majority opinion).

441. 443 U.S. 545, 560 (1979) (quoting Stone v. Powell, 428 U.S. 465, 495 (1976)).

442. *Id.* at 560–61. In concurrence, Justice Powell argued that the Court overstated the difference between *Stone* and *Rose*. *Id.* at 587 n.10 (Powell, J., concurring).

443. *Id.* at 561.

444. *Id.*

445. *Id.* at 561–62 (quoting *Stone*, 428 U.S. at 494 n.37).

446. *Id.* at 562.

447. *Id.* at 562–63.

system.[448] Thus, habeas review will have a powerful educative and deterrent effect on those who operate the system.[449]

Fourth, "concern[s] with judicial integrity, deprecated by the Court in *Stone* . . . [are] of much greater concern" where racial discrimination in grand jury selection is concerned.[450] Such a claim raises constitutional questions that strike at fundamental societal values that are "substantially more compelling than those at issue in *Stone*."[451]

Fifth, if the claim warrants relief, then the costs of suppressing evidence outweigh the costs of quashing an indictment.[452] The state may never use suppressed evidence in its case-in-chief, but often it may be able to pursue a new indictment.[453] Under these circumstances, concluded the Court, "the strong interest in making available federal habeas corpus relief outweighs the costs associated with such relief."[454]

c. Ineffective Assistance of Counsel

In *Kimmelman v. Morrison*, the Supreme Court held that *Stone* did not apply "to Sixth Amendment claims of ineffective assistance of counsel where the principal [deficiency alleged] . . . is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment."[455] Justice Brennan's majority opinion stated that *Stone* based its ruling on the fact that "the exclusionary rule [was] a 'judicially created' structural remedy 'designed to safeguard Fourth Amendment rights generally through its deterrent effect'" and "not a personal constitutional right" of the accused.[456] Thus, the *Stone* Court properly "rested its holding on prudential, rather than jurisdictional, grounds"[457] when it concluded that the minimal benefits of applying the exclusionary rule on habeas corpus review did not outweigh the costs to justify such review.[458] In contrast, *Morrison* concerned a

448. *Id.* at 563.
449. *Id.*
450. *Id.*
451. *Id.* at 564.
452. *Id.*
453. *Id.*
454. *Id.*
455. 477 U.S. 365, 368, 382–83 (1986).
456. *Id.* at 375–76 (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)).
457. *Id.* at 379 n.4.
458. Justice Brennan took the opportunity to reiterate that the Court in *Stone* was "'*not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims

prisoner who sought not to obtain a remedy that compromises the truth-seeking process, but rather to vindicate personal right-to-counsel claims that promote the fairness and integrity of the process.[459] According to the Court, where violations of core constitutional rights are concerned, habeas relief is warranted without respect to its costs, and the Court therefore could not balance competing considerations and allocate the costs of ineffective assistance.[460]

Finally, the *Morrison* Court observed that ineffective-assistance claims can often be vindicated only on collateral review.[461] In contrast, claims based on alleged violations of prophylactic rules can also be vindicated at trial and on direct appeal.

d. *Miranda* Claims

In *Miranda v. Arizona*, the Supreme Court held "that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized."[462] Therefore, in the absence of other methods, the state may not use a suspect's statement unless police told the suspect: (1) that he has a right to remain silent; (2) that if he gives up his right to remain silent, then anything he says can and will be used against him; (3) that he has a right to an attorney; and (4) that if he cannot afford an attorney, one will be appointed for him.[463]

In 1974, the Supreme Court began to refer to the *Miranda* warnings as prophylactic[464] and, in 1984, as a judicially created remedy.[465] These

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generally.'" *Id.* at 376 (quoting *Stone*, 428 U.S. at 495 n.37). He noted that the restrictions on federal habeas relief established in *Stone* were predicated on the availability "of 'an opportunity for full and fair litigation' of the constitutional claim advanced by the habeas petitioner." *Id.* at 378 n.3 (quoting *Stone*, 428 U.S. at 494).

459. *Id.* at 377.

460. *Id.* at 379. Thus, where an accused is deprived of the effective assistance of counsel, the "federal courts may grant habeas relief in appropriate cases, regardless of the nature of the underlying attorney error." *Id.* at 383.

461. *Id.* at 378.

462. 384 U.S. 436, 478 (1966). "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458.

463. *Id.* at 444–45.

464. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 444 (1974) (stating that the procedural safeguards established in *Miranda* were "not themselves rights protected by the Constitution but were instead measures to [e]nsure that the right against compulsory self-incrimination was protected").

465. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 653 n.3 (1984) (referring to the "judicially

references—coupled with Chief Justice Burger's comment in *Brewer v. Williams* suggesting the extension of *Stone* to *Miranda* warnings because *Miranda* imposed a prophylactic rule and not a constitutional right[466]—suggested that the Court had set the stage to extend *Stone* to *Miranda*.[467] Some lower federal courts shared this view,[468] and one federal district court so held.[469] Most courts faced with the issue, however, rejected the applicability of *Stone* to *Miranda* claims.[470]

In many ways, *Miranda* rights seemed like a perfect candidate for an extension of *Stone*. If *Miranda* is a prophylactic rule, the arguments for denying habeas review of alleged *Miranda* violations seem even stronger than the arguments advanced in *Stone* for denying such review of Fourth Amendment claims.[471] Nonetheless, when the issue came before it in *Withrow v. Williams*, the Supreme Court held that *Stone*'s restriction on habeas jurisdiction "does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda*."[472] This is so, wrote the majority, because the *Miranda* rule seeks not only to deter police misconduct, but also to uphold the adversarial nature of the criminal justice system.[473] More fundamentally, in *Stone*, the Court sought to reduce both the burden that Fourth Amendment claims imposed on limited federal judicial resources and the adverse impact on federal–state relations generated by federal review of such claims.[474] Extending *Stone* to *Miranda* claims would

imposed strictures" of *Miranda*).

466. *See* Brewer v. Williams, 430 U.S. 387, 425–29 (1977) (Burger, C.J., dissenting); *see also id.* at 438 (Blackmun, J., dissenting) (referring to "this Court's procedural (as distinguished from constitutional) ruling in *Miranda*").

467. In *Wainwright v. Sykes*, the Court specifically declined to address the question of whether *Stone* should apply to alleged *Miranda* violations where there is no claim that the underlying confession is involuntary or unreliable and where there was a full and fair opportunity to raise the allegations in state court proceedings. 433 U.S. 72, 87 n.11 (1977).

468. *See, e.g.*, White v. Finkbeiner, 570 F.2d 194, 200 (7th Cir. 1978) (stating that "a forceful argument" could be made for extending *Stone* to *Miranda* claims).

469. *See* Richardson v. Stone, 421 F. Supp. 577, 578–79 (N.D. Cal. 1976).

470. *See, e.g.*, Patterson v. Warden, 624 F.2d 69, 70 (9th Cir. 1980) (per curiam); Harryman v. Estelle, 616 F.2d 870, 872 n.3 (5th Cir. 1980) (en banc); Smith v. Wainwright, 581 F.2d 1149, 1151 (5th Cir. 1978); Wilson v. Henderson, 584 F.2d 1185, 1189 (2d Cir. 1978); Berg v. Morris, 483 F. Supp. 179, 184 n.3 (E.D. Cal. 1980); Cannistraci v. Smith, 470 F. Supp. 586, 590 (S.D.N.Y. 1979); United States *ex rel.* Sanders v. Rowe, 460 F. Supp. 1128, 1142 (N.D. Ill. 1978); Szaraz v. Perini, 422 F. Supp. 8, 10 (N.D. Ohio 1976).

471. Withrow v. Williams, 507 U.S. 680, 701–02 (1993) (O'Connor, J., concurring in part and dissenting in part).

472. *Id.* at 683.

473. *See id.* at 690–93.

474. *Id.* at 687.

accomplish neither objective because it "would not prevent a state prisoner from simply converting his barred *Miranda* claim into a due process claim resting on an involuntary confession."[475] Indeed, the extension of *Stone* to *Miranda* claims would not even remove the *Miranda* issue from habeas review because determinations of voluntariness inquire as to whether the police officer informed the confessing defendant of his rights.[476]

Because the "Court's rationale necessarily determines whether a rule is prophylactic,"[477] one need not view *Withrow* as a repudiation of the thesis that habeas review of claimed violations of prophylactic rules and remedies should be denied. If *Miranda* is a constitutionally mandated prophylactic rule, as the Court said a few years later in *Dickerson*,[478] then the availability of habeas relief on collateral review automatically follows. If the *Withrow* Court simply anticipated *Dickerson*, then its decision is consistent with a bar on habeas review of claims based on alleged violations of prophylactic rules. Moreover, the other arguments set out by the *Withrow* majority do not compel the rejection of such a bar.

3. Equitable Considerations Should Bar Habeas Review of Claims Based on Prophylactic Rules that Received a Full and Fair Hearing in State Court

The equitable considerations that the Court noted in *Stone*—and that it has long used to raise and lower procedural barriers to habeas relief—should preclude a habeas court from reaching the merits of state prisoner claims based on alleged violations of prophylactic rules of criminal procedure unless the prisoner can show that he "was denied an opportunity for a full and fair litigation of [his] claim at trial and on direct review" and that there was, in fact, a violation.[479] The arguments for denying habeas relief advanced in *Stone*—where the Court was

475. *Id.* at 693.

476. *Id.* at 693–94.

477. Grano, *supra* note 13, at 115.

478. *See* Dickerson v. United States, 530 U.S. 428, 437–38, 444 (2000) (acknowledging earlier references to the *Miranda* warnings as "prophylactic" and not constitutionally protected rights, but nevertheless considered them a "constitutional rule").

479. *See* Stone v. Powell, 428 U.S. 465, 495 n.37 (1976). *Cf.* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 482–83, 483 n.24 (1982) (discussing the meaning of "full and fair").

dealing with a Court-created remedy—apply with equal or greater force to any claim based on a Court-created prophylactic rule or remedy.[480]

A line dividing prophylactic rules and remedies from claims based on constitutional mandates is entirely within the control of the Supreme Court, and it is relatively clear and easy to administer. It is also principled. Prophylactic rules and remedies are not direct commands of the Constitution; they are Court-created rules and remedies.[481] The violation of such rules or the denial of such remedies is therefore not a constitutional wrong in its own right. "If the principles of federalism, finality, and fairness ever counsel in favor of withholding relief on habeas, surely they do so where there is no constitutional harm to remedy."[482]

Concededly, the impact of the rule suggested here might be slight. For one thing, habeas courts rarely issue writs on the basis of violations of prophylactic rules or denials of prophylactic remedies. Second, in *Withrow*, the Court focused on the argument that denying habeas review of *Miranda* claims would not significantly reduce the number of petitions filed by prisoners[483] because most *Miranda* claims can be reformulated as constitutional claims.[484] The same reality might apply to a rule denying habeas review of petitions raising claims based on prophylactic rules and remedies. Many habeas claims based on alleged violations of prophylactic rules could also be reformulated as constitutional claims.

Because most habeas petitioners are motivated by a desire to obtain release from incarceration—rather than a desire to vindicate any particular claim—most are likely to simply translate their claims into whatever claims the courts seem willing to hear. This task may not, however, be as easy as it appears at first glance. *Miranda* claims may be uniquely suited to reformulation because the giving of the *Miranda*

480. *Withrow*, 507 U.S. at 702 (O'Connor, J., concurring in part and dissenting in part); *see also* Duckworth v. Eagan, 492 U.S. 195, 209–12 (1989) (O'Connor, J., concurring); Maine v. Moulton, 474 U.S. 159, 192 (1985) (Burger, J., dissenting) (arguing that some Sixth Amendment claims "'closely parallel claims under the Fourth Amendment'" (quoting Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring))); United States *ex rel.* Sanders v. Rowe, 460 F. Supp. 1128, 1143 (N.D. Ill. 1978).

481. *See Withrow*, 507 U.S. at 701–02 (O'Connor, J., concurring in part and dissenting in part) (observing that prophylactic rules are not products of the Constitution, but rather are judicially created); United States *ex rel.* Sanders v. Rowe, 460 F. Supp. 1128, 1143 n.44 (N.D. Ill. 1978) (gathering cases that discuss "the apparent subconstitutional nature of the fourth amendment and *Miranda* exclusionary rules").

482. *See Withrow*, 507 U.S. at 707 (O'Connor, J., concurring in part and dissenting in part).

483. *See id.* at 694–95.

484. *See id.* at 693 (suggesting that *Miranda* claims could be converted into due process claims).

warnings is one of many factors a court looks to in determining whether a confession was voluntary.[485] Moreover, in many cases, if the constitutional claim were viable, the petitioner would have raised it in his petition along with the prophylactic rule claim.

Finally, the *Withrow* Court emphasized that "*Miranda* safeguards 'a fundamental *trial* right'"[486] and "serves to guard against 'the use of unreliable statements at trial.'"[487] The rights protected by many other prophylactic rules are not necessarily trial rights.[488] More fundamentally, however, the use of prophylactic exclusionary remedies, including those relied on to bar un-Mirandized statements, seems more likely to hinder, rather than advance, the search for truth.

In any event, these pragmatic concerns should be largely irrelevant to the propriety of habeas review of prophylactic-based claims. Denying review in those cases where no underlying constitutional violation is claimed will not infringe on constitutional protections. At the same time, if even a few petitions are barred by this rule, some time and resources will be saved. "The relative infrequency of relief, however, does not diminish the intrusion on state sovereignty" and does not reduce the diversion of resources necessary for states to defend claims and for courts to litigate them.[489] Finally, if relief is truly rare, "efficiency counsels in favor of dispensing with the search for the prophylactic rule violation in a haystack."[490]

An exception allowing habeas review in cases where there was not a full and fair hearing on a prophylactic rule claim in state court is analogous to the rule in *Stone* and is similar in its essential premise to the holdings in *Frank* and *Moore*. In *Frank*, the Court upheld the petitioner's conviction because the state court's processes, including its corrective processes, provided adequate protection.[491] In *Moore*, the Court reversed because the state processes provided inadequate

485. *See id.* at 693–94 (noting the totality-of-the-circumstances approach, listing factors, citing cases, and suggesting *Miranda* claims' convertibility).

486. *See id.* at 691 (quoting United States v. Verdugo–Urquidez, 494 U.S. 259, 264 (1990)).

487. *Id.* at 692 (quoting Johnson v. New Jersey, 384 U.S. 719, 730 (1966)).

488. *See* Kansas v. Ventris, 129 S. Ct. 1841, 1845–47 (2009). Claims based on Fourth Amendment violations are probably the most difficult to reformulate, but even these can often be transformed into ineffective-assistance of counsel claims. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 377–83 (1986) (rejecting defendant's Fourth Amendment claim, which was reformulated as an ineffective-assistance claim, but giving it considerable attention).

489. *Ventris*, 129 S. Ct. at 713 (O'Connor, J., concurring in part and dissenting in part).

490. *Id.*

491. *See generally supra* notes 146–52, 154, 160–61 and accompanying text.

protection.[492] The Second Circuit synthesized a rule from all three decisions which allows habeas review of Fourth Amendment claims

> in only one of two instances: (a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process.[493]

This rule should govern habeas review of all claims based on claimed violations of prophylactic rules and remedies.

In *Boumediene v. Bush*, the Court observed that "[t]he idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context."[494] When the Supreme Court incorporates a constitutional provision against the states through the Due Process Clause and acknowledges that multiple "procedural safeguards" exist, then the states must only follow *some* rule and not necessarily a *specific* rule.[495] If a state makes a good-faith effort to implement a particular prophylactic protection—or devises an alternative—and the defendant receives either the benefit of that protection or a full and fair opportunity to contest its adequacy, then the defendant received the process that was due under the Constitution. "[T]he privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[496] It should not be construed to afford him every possible opportunity to vindicate each and every claim in each and every forum.

Finally, as Justice Scalia noted in *Withrow*, under existing law, a habeas court always "ha[s] 'discretion' to refuse to reach the merits of a constitutional claim that ha[s] already been raised and resolved against the prisoner" after a full and fair hearing in state court.[497] Claims based

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492. *See generally supra* notes 153–60, 162 and accompanying text.

493. Capellan v. Riley, 975 F.2d 67, 70 (2d Cir. 1992) (citing Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977) (en banc)).

494. 553 U.S. 723, 781 (2008).

495. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444 (1966) (citing the proposition that "unless other fully effective means are devised by the state, this procedure should be followed"); *cf.* Franks v. Delaware, 438 U.S. 154, 171 (1978) (specifically acknowledging the continued value of the Fourth Amendment exclusionary rule, at least "in the absence of a more efficacious sanction," in cases involving "substantial and deliberate" Fourth Amendment violations).

496. *Boumediene*, 553 U.S. at 779 (quoting INS v. St. Cyr, 553 U.S. 289, 302 (2001)).

497. Withrow v. Williams, 507 U.S. 680, 720 (1993) (Scalia, J., concurring in part and dissenting

on prophylactic rules usually challenge process; they rarely raise questions about guilt or innocence.[498] When such a claim implicates questions of guilt or innocence, there is good reason for a habeas court to exercise its discretion in favor of review.[499]

V. CONCLUSION

Thirty-two years ago, in *Rose v. Mitchell*, Justice Powell, joined by Justice Rehnquist, wrote:

> In expanding the scope of habeas corpus . . . the Court seems to have lost sight entirely of the historical purpose of the writ. It has come to accept review by federal district courts of state-court judgments in criminal cases as the rule, rather than the exception that it should be.[500]

This statement remains true today, even though the *Stone* Court suggested a principled, though partial, solution to the problem.[501]

The Supreme Court should rule that federal habeas courts lack jurisdiction over state prisoner claims based on alleged violations of prophylactic rules because persons in custody as a result of such violations are not "in custody in violation of the Constitution or laws or treaties of the United States."[502] Alternatively, the Court should limit habeas review of such claims by using the equitable considerations that it outlined in *Stone* and that it has long used to raise and lower procedural barriers to habeas relief.

The Court should revive and extend *Stone* to bar habeas review of all claims based on prophylactic rules when the petitioner received a full and fair hearing on the claim in state court. Several reasons support this argument. First, the "exceptional conditions" that drove the expansion of

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in part) (citing Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969)).

498. *See* Butler v. McKellar, 494 U.S. 407, 416 (1990) (observing that a violation of the restrictions on police investigations imposed in *Arizona v. Roberson*, 486 U.S. 675 (1988), "would not seriously diminish the likelihood of obtaining an accurate determination" and "may increase that likelihood"); *cf.* Philip Halpern, *Federal Habeas Corpus and the* Mapp *Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1, 40 (1982) (suggesting that exclusion of statements obtained in violation of *Miranda* frequently enhances reliability); *but see* Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 891 (1981) (arguing against the extension of *Stone*).

499. *Withrow*, 507 U.S. at 720–21 (Scalia, J., concurring in part and dissenting in part) (distinguishing *Jackson*, *Rose*, and *Kimmelman* on this basis).

500. 443 U.S. 545, 581 (1979) (Powell, J., concurring).

501. 428 U.S. 465, 494–95 (1976).

502. 28 U.S.C. § 2241(c)(3) (2006).

habeas review—the civil rights revolution and the criminal procedure revolution—have passed into history. Historically, the Court has been "willing[] to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."[503] Second, habeas review protects constitutional values; prophylactic rules also protect constitutional values. Protecting the rules rather than the underlying values protects the protector; it is not the best use of limited resources. Third, violations of prophylactic rules ordinarily have no bearing on factual guilt or innocence. Fourth, "habeas corpus has traditionally been regarded as governed by equitable principles."[504] Where the state court provided the prisoner with a full and fair opportunity to litigate his claim, federal habeas corpus review adds very few benefits and exacts high costs. Fifth, the Court has often reminded the judiciary that "the writ should be available to afford relief to those 'persons whom society has grievously wronged.'"[505] Congress recognized the same thing in the AEDPA. Given the quasi-constitutional status of prophylactic rules and remedies, it is difficult to see how their violation can qualify as a "grievous wrong" that in equity and good conscience justifies the costs of correcting it on collateral review in federal court.

503. Wainwright v. Sykes, 433 U.S. 72, 81 (1977); *see also* Boumediene v. Bush, 553 U.S. 723, 779 (2008) (the "precise application and scope [of habeas corpus has] changed depending upon the circumstances").

504. Fay v. Noia, 372 U.S. 391, 438 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

505. Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (quoting *Fay*, 372 U.S. at 440–41), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2254 (2006)).