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Ariadne's Provisions: A Clue of Thread to the Intricacies of Procedural Default, Adequate and Independant State Grounds, and Florida's Death Penalty

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Ariadne’s Provisions: A “Clue of Thread” to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida’s Death Penalty

Ruthann Robson
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Ruthann Robson†
Michael Mello‡

This Article explores the refusal of federal courts to grant habeas corpus review to state death penalty decisions where the state court has refused review based upon discretionary or haphazardly applied state procedural rules. Specifically, the Article evaluates whether state procedural rules that are applied with discretion and with haphazard application furnish an adequate and independent ground for barring federal court review. Employing a metaphor from greek mythology, the authors compare federalism to a great labryinth which houses a "deadly" sanction within its intricate procedural passageways. The Article is offered as a "clue of thread" to navigating the habeas corpus passage and assuring that death penalty decisions are subject to adequate procedural scrutiny. The authors contend that the United States Supreme Court's decision in Wainwright v. Sykes implicitly imports a requirement from federal direct review to federal habeas corpus review: that adequate and independent state grounds for the decision to deny review must exist before a federal court is barred from reviewing a federal constitutional claim. The authors evaluate the adequacy and independence of discretionary state procedural grounds and of haphazardly applied procedural default rules to bar federal habeas corpus review. The authors conclude that such procedural default rules that are applied with discretion do not furnish adequate or independent grounds to bar federal review of the merits of a death penalty case.

I

INTRODUCTION

A. The Metaphor of a Greek Myth

Minos ruled the island of Crete wisely. He created an enlightened

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system of laws and dispensed exemplary justice. Through a series of the sort of unfortunate circumstances which typify Greek myths and tragedies, Minos finds within his sovereignty the minotaur, a half-human and half-bull monster that demands human sacrifices. Minos directs the famous artist Daedalus to construct an edifice of intricate passageways. The labyrinth serves to contain the minotaur and to render impossible any escape by the monster's victims. The Athenian hero, Theseus, offers himself as a victim, intending to slay the minotaur. After Theseus arrives in Crete, Ariadne, the daughter of Minos, agrees to assist Theseus. Ariadne gives Theseus a sword with which to slay the minotaur. She also gives him a "clue of thread" so that he can find his way out of the labyrinth after his deed. Theseus returns alive after successfully slaying the minotaur.¹

This Article will attempt to provide a "clue of thread" to state prisoners who wish to return alive from their venture into the habeas corpus corridor of the labyrinth of federalism. This labyrinth's intricate passageways include the doctrines of procedural default and adequate and independent state grounds. The labyrinth of federalism houses the half-capital punishment and half-states rights creature born from a series of unfortunate circumstances typical of Greek tragedies. Like the minotaur, this creature demands human sacrifices.

This Article begins with a general introduction to federalism and to the doctrine of procedural default as applied in capital cases. The Article then shows that the doctrine of adequate and independent state grounds, developed by the Supreme Court in the context of its direct review of state decisions, applies as well to federal habeas corpus for state prisoners. This leads to an exploration of the "adequacy" principle as it applies to habeas corpus review, with special attention to state procedural default rules that are applied with discretion. The Article also explores the "independence" principle, focusing on ambiguous state dispositions which do not clearly articulate a state procedural ground for decision. The Article then applies these principles in a case study of discretionary review in Florida.² This Article concludes that a procedural default which is not an adequate or an independent state ground for a decision

¹. See 3 A. BANIER, THE MYTHOLOGY AND FABLES OF THE ANCIENTS EXPLAIN'D FROM HISTORY 500-05 (1739-40 & photo. reprint 1976); M. HERZBERG, CLASSICAL MYTHS 220-23 (1941); A. MURRAY, MANUAL OF MYTHOLOGY 274-77, 304-05 (1935); W. ROSCHER, AUSFÜHRLICHES LEXIKON DER GRIECHISCHEN UND RÖMISCHEN MYTHOLOGIE, pt. 1, at 540-46 (1884-86); H. ROSE, A HANDBOOK OF GREEK MYTHOLOGY 64-65 (1928). For a novelistic revisioning of the myth of Ariadne, including a different interpretation of the minotaur, see J. BRINDEL, ARIADNE (1980).

². See infra notes 233-45 and accompanying text for a discussion of the choice of Florida as an appropriate case study.
cannot bar federal review of the merits of a petitioner's habeas corpus claim.

B. The Labyrinth of Federalism

The label “federalism” applies to the various laws, theories and practices which govern relations between the United States government and the governments of individual states. Federalism is implicit in the United States Constitution. In addition to the doctrine of separation of powers and the recognition of individual rights, it forms one of the three branches of constitutional structure. Yet, like most “implicit” doctrines, federalism is often ill-defined and unevenly applied. Commentators on federalism are equally capable of extolling its easy virtues and of bemoaning its unfortunate history. One United States Supreme Court Justice has referred to federalism as “a marriage for better or for worse.”

Federalism, like a labyrinth, has many intricate passageways and corridors. The intertwining concepts of state enforcement of federal law, the statutory prohibition against federal injunctions of state proceedings, federal actions against state officers, exhaustion of state remedies, Pullman abstention, the principles of Younger v. Harris, and habeas corpus all comprise the labyrinth of federalism. This Article focuses upon the relationship between state enforcement of federal law and the protection of state prisoners' federal rights by federal courts exercising the power of habeas corpus.

The doctrine of adequate and independent state grounds provides

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4. See, e.g., Fein, The Waxing and Waning of Federalism, A.B.A. J., Jan. 1986, at 118 (“Federalism diffuses political power, thereby reducing the likelihood of oppressive centralized government. . . . Federalism makes state officials more responsive to the people, because the more Congress, the chief executive and the Supreme Court fashion public policy in areas of traditional state concern, the easier it is for states to evade responsibility for failure.”).
5. See, e.g., Rapacyzinski, supra note 3, at 342.
9. The “fiction” of Ex parte Young, 209 U.S. 123 (1908), allows suits against state officials despite the eleventh amendment's prohibition of suits against states.
10. See 17 C. WRIGHT, A. MILLER & E. COOPER, supra note 7, at § 4233.
12. 401 U.S. 37 (1971) (federal equitable relief generally unavailable against pending state criminal prosecutions). The doctrine of equitable abstention is often referred to as “Our Federalism.” Ibid. at 44.
13. See infra notes 16-20 and accompanying text.
that the United States Supreme Court will refrain from reviewing a decision of the highest courts of a state if the state court's decision is based upon adequate and independent state grounds in addition to any grounds that would give the United States Supreme Court jurisdiction. The doctrine derives from the United States Supreme Court's jurisdiction to review state court decisions and the ability of state courts to enforce federal law as well as state law. Although the doctrine of adequate and independent state grounds is one which arises in the context of direct review, this Article argues that the doctrine also applies in collateral proceedings, specifically habeas corpus.

Habeas corpus has historical roots which pre-date the Constitution. Habeas corpus, especially as it relates to death sentenced persons, nevertheless is one of the most controversial aspects of federalism. See infra notes 62-68 and accompanying text.

14. See infra notes 62-68 and accompanying text.
17. In capital cases, the debate over habeas corpus often is not polite. For example, the Eleventh Circuit recently unleashed a firestorm of criticism, much of it directed specifically at the court, when a panel ordered new trials for three Georgia inmates condemned for murdering several members of the Alday family. The court granted relief based on pervasive pretrial publicity. Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985); Dungee v. Kemp, 778 F.2d 876 (11th Cir. 1985); Isaacs v. Kemp, 778 F.2d 876 (11th Cir. 1985). Three days after the rulings, one newspaper reported that with one notable exception, editorial pages across Georgia "blasted the 11th U.S. Circuit Court of Appeals decision." Most state editorial pages decry Alday ruling, Macon [Ga.] Telegraph & News, Dec. 12, 1985, at B1, col. 1. See Resch, Midstate judge has tried his share of "glamour cases," Macon Telegraph & News, July 21, 1986, at B2, col. 2 (quoting state judge assigned to retry Alday case as saying, "I'm completely put out by the federal government on the death system. . . . The general public equates the inability of federal courts to establish finality on death verdicts with the entire court system."); Grimm, We'll never be the same, Macon Telegraph & News, June 10, 1986, at B1, col. 2 ("[T]he words are not as the inexplicable acts of madmen. They solidified all the local mistrust of the everything urban and Washington, of slick lawyers and their technical maneuvering, of the Ivy tower judges and their niggling fascination with the seemingly irrelevant. 'Ought to hang them judges.'"); Measure hits court ruling in Alday case, Atlanta Const., Jan. 18, 1986, at 3 (40 members of the Georgia House of Representatives signed, as co-sponsors, resolution condemning Alday rulings); McLeod, Newspaper would do nothing different in covering Alday murders, Atlanta J. & Const., Dec. 22, 1985, at D6, col. 2 ("We have saddled ourselves with people ruling who are far removed from real life, who are trying to reach forth and grab powers they don't have and use them for purposes only they can explain."); Letter to the Editor, Macon Telegraph & News, Dec. 20, 1985, at A11 ("[I]t is just such stupid decisions by men such as [the Eleventh Circuit panel of judges] that one day will force the very best of men to begin to take revenge, for most good men in America have about come to feel that there is no justice at all left in America."); Woolner, The "faceless" men of 11th Circuit Court, Atlanta Const., Dec. 18, 1985 (in week following rulings, the court "was besieged with phone calls—more calls than the 4-year-old court had ever received on a case. According to court personnel many callers simply wanted to know the names of the faceless men who set aside the convictions"); Corson, Alday retrial decision vehemently opposed, Macon Telegraph & News, Dec. 13, 1985, at A14, col. 1 ("As might be expected, the readers' hot line Wednesday was dominated by the subject of the federal appeals court's decision"; some callers stating that the judges "should be disqualified and disbarred"); Allen, Alday jury, not appeals judges, upheld the law, Atlanta Const., Dec. 12, 1985, at A2 (decisions were a product of "the rarefied atmosphere of a life
eral methods have been designed to ease the friction between state and federal courts in the area of habeas corpus: including an exhaustion doctrine,\(^\text{18}\) limitations on the claims a federal court may consider,\(^\text{19}\) a legis-

appointment to the federal bench and of federal judges who are “actively hostile to capital punishment”); Hansen, *Harris vents "shock" over Alday case*, Atlanta Const., Dec. 12, 1985, at 38 (Governor of Georgia quoted as calling decisions a “flaw in our system”); McKerley, *Anger, disbelief greet Alday ruling*, Dec. 11, 1985 at A1, col. 1 (describing local residents’ “anger and frustration” concerning the rulings); Thompson, *Bowers: Alday ruling marks demand for perfection*, Atlanta Const., Dec. 11, 1985 (quoting Georgia Attorney General: “[A]ppeals courts are holding trial court judges to impossibly high standards” of “perfection or near perfection.”); Montgomery, *Ruling in Alday case reopens old wounds*, Atlanta Const., Dec. 11, 1985, at A1 (quoting Governor of Georgia as being “outraged” by court’s decisions: “It indicates that something is terribly wrong with our judicial system. How can the system be defended?”); Boyd, *Time to pull the switch*, Macon Telegraph & News, Dec. 11, 1985, at B1 (condemning multiple levels of review of capital cases and “high-and-mighty judges”); Montgomery & Woolner, *Seminole outraged at Alday ruling*, Atlanta J., Dec. 10, 1985, at A1 (quoting local citizen as saying, “maybe they ought to turn them loose and hang some judges”); Woolner, *Alday murder convictions overturned*, Atlanta Const., Dec. 10, 1985, at A1 (quoting Georgia Lt. Gov. as calling the rulings the “outrage of the century” and saying that “the judges ought to be required to go down to Seminole County, lay down on the Alday family graves and apologize”). *But cf. Decision shocking but also necessary*, Macon Telegraph & News, Dec. 12, 1985 (state courts “dropped the ball. Finally, after all these years, the federal appeals court had to pick it up and do what the state courts apparently lacked the courage to do—something unpopular, yet important to our freedoms”); Teepen, *Buck stopped at 11th Circuit*, Atlanta Const., Dec. 12, 1985, at A22; *Tough, but correct, Alday ruling*, Atlanta Const., Nov. 11, 1985, at A12.


The Alday rulings also prompted Georgia officials and legislators to call for reforms in the federal judiciary and in habeas corpus. McDonald, *Judges in Alday case can’t be impeached, panel rules*, Atlanta Const., Oct. 17, 1986, at A26 (Rep. Charles Hetcher of Georgia said, he plans to “co-sponsor legislation when Congress reconvenes next year that would limit the powers of federal courts in deciding whether to overturn or grant new trials for convicted murderers”); *Death appeals resolution approved*, Atlanta Const., Feb. 7, 1986 (Georgia Senate resolution urging Congress to require all appeals in death cases to be filed within 12 months); McAlister, *Alday case calls for new legislation, not outrage*, Atlanta J., June 4, 1986, at A14 (“At the federal level, Rep. Newt Gingrich has called on Congress to enact a law to speed action in death-penalty cases. He would eliminate the U.S. District Court from the appeals process, limit the federal portion of the appeal to two years and require that all grounds be included in one appeal.”); Cowles, *Court won’t reconsider Alday ruling*, Atlanta Const., Feb. 1, 1986, at B1 (Georgia Lt. Gov. said “he will lead an effort to have federal judges face election every eight years”). This outpouring of rage led former Attorney General Griffen Bell to suggest that issuance of habeas corpus writs be limited to three years after exhaustion of a defendant’s appeals or the appearance of new evidence. Brady, *Right of habeas corpus endangered, Griffen Bell says*, Atlanta Const., Jan. 9, 1986, at A24.

18. This has been mandated by Congress, 28 U.S.C. § 2254(b), (o), and expanded by the Supreme Court, *e.g.*, *Rose v. Lundy*, 455 U.S. 509 (1982) (adoption of a total exhaustion rule, requiring the dismissal of mixed petitions containing both exhausted and unexhausted claims).

19. For a discussion of the expansion of the issues cognizable in habeas corpus proceedings
tive and judicial rule of deference to state court findings of fact, and the judicially created policy of procedural default. This Article is concerned with the doctrine of procedural default, which provides that if a state court relies on a state procedural rule to bar any claim, including a federal claim, then the federal court must honor the state court and bar consideration of that claim.

This Article explores the twisting passageways between the doctrines of "adequate and independent state grounds" and "procedural default." To navigate these passageways, it is necessary first to discuss the development of procedural default as it relates to habeas corpus, especially in the context of capital punishment.

C. Procedural Default and Capital Punishment

During the evolution of the modern procedural default doctrine, the death penalty did not exist as a practical matter in the United States. In 1963, in Fay v. Noia, the Supreme Court held that "the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute." The Court recognized, however, that the interests of comity and federalism required that federal courts be granted a limited discretion to deny relief based on failure to comply with state procedures. If the prisoner deliberately bypassed the state procedures, then the federal courts could enforce that waiver. The Court based determination of deliberate bypass on the preexisting standard for waiver of constitutional rights: an intentional relinquishment of a known right or privilege.

Fay v. Noia would remain the controlling articulation of procedural default beyond the notion that only challenges to the original court's "jurisdiction" were properly addressed in habeas corpus actions, see Developments, supra note 16, at 1045-55. More recently, the Court has limited the substantive scope of habeas in some areas while expanding it in other areas. In Stone v. Powell, 428 U.S. 465 (1976), decided one year before Wainwright v. Sykes, 433 U.S. 72 (1977), the Court held that fourth amendment search and seizure claims involving the exclusionary rule would be cognizable in habeas only if the state failed to provide for full and fair litigation of the fourth amendment claim.

20. 28 U.S.C. § 2254(d) provides that a state court's findings of historical fact are entitled to a presumption of correctness unless the state factfinding procedure was deficient in one of eight specified respects. See Ford v. Wainwright, 106 S. Ct. 2595, 2602-03 (1986); Wainwright v. Witt, 466 U.S. 412, 426-28; Patton v. Yount, 467 U.S. 1025 (1984); Rushen v. Spain, 464 U.S. 114 (1983); Sumner v. Mata, 449 U.S. 539 (1982).
22. Id. at 399 (emphasis added).
default standards until 1977. The constitutional attack against the
death penalty, which was in its formative stages when the Court rendered
its decision in Noia, gained momentum and eventually led to a ten year
(1967—1977) de facto moratorium on executions in America. Also
during the regime of the Noia deliberate bypass test, the United States
Supreme Court decided Furman v. Georgia which held that the “impo-
sition and carrying out of the death penalty” in the cases before the
Court constituted “cruel and unusual punishment.” However, four
years later and still during the Noia regime, the Supreme Court held that
the post-Furman statutes of Florida, Georgia and Texas did not offend
the Constitution.

At the beginning of 1977, Gary Gilmore became the first person to
be executed under the modern capital punishment statutes. In June of
that year, the United States Supreme Court rejected the deliberate bypass
standard of Noia in its decision in Wainwright v. Sykes. The Court’s opinion in Sykes marks the culmination of the shift in
focus from considerations of federal power to considerations of comity.
The lower federal courts had ruled that Sykes was entitled to a hearing

27. 408 U.S. 238 (1972) (per curiam).
28. Id. at 239-40.
30. See generally N. Mailer, THE EXECUTIONER’S SONG (1979) (factual account of events during the nine months preceding Gilmore’s execution).
31. 433 U.S. 72 (1977). However, Noia may still apply in some cases. See Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), where a court stated that “[d]espite the rejection of the deliberate bypass standard in the procedural default and fourth amendment settings, the Fay v. Noia test remains intact and workable in the context of the Townsend issue.” Id. at 982. The court was referring to Townsend v. Sain, 372 U.S. 293 (1963) which, in conjunction with 28 U.S.C. § 2254(d), governs the circumstances under which state court factfindings are entitled to a presumption of accuracy by a federal court considering a petition for habeas corpus. See supra note 20. For commentary on Thomas v. Zant, see Cats, Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception, 18 U.C. Davis L. Rev. 1177, 1208-09 (1985).
32. In discussing Noia, the Sykes Court stated that “[a]s a matter of comity but not of federal power” the Noia Court acknowledged limited discretion to deny relief to a petitioner who had deliberately bypassed state court remedies. 433 U.S. at 83. Similarly, the Court in Francis v. Henderson, 425 U.S. 536 (1976), had “noted that there was power in the federal courts to entertain an application in such a case, but rested its holding on ‘considerations of comity and concerns for the
on his habeas claim although he had not complied with Florida's "contemporaneous objection" rule. The Supreme Court reversed, holding that a federal habeas corpus petitioner in state custody must show both "cause" for and actual "prejudice" resulting from the procedural default in order to obtain federal review of the merits of the defaulted claim.\(^3\)

_Syk es_ has become a seemingly permanent addition to the labyrinthine edifice of federalism. The Court has extended _Sykes_ to appellate defaults in the state court system\(^3\) and intimated that it may apply to state postconviction defaults as well.\(^3\) While the Court in _Sykes_ declined to define "cause" and "prejudice,"\(^3\) it has done so in subsequent cases. A prisoner must show that an external, objective factor prevented his counsel from complying with the state's procedural rule.\(^3\) An attorney's inadvertent tardiness in raising the federal claim in state court will not constitute cause unless the attorney's error rises to the level of a violation of the sixth amendment right to the effective assistance of counsel.\(^3\) Novelty of a federal constitutional claim will constitute cause for a failure to timely raise the claim in state court,\(^3\) but only if the constitutional arguments for framing the claim were unavailable at the time.\(^4\) In proving prejudice, at least as to jury instructional error, a petitioner must "shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to the [prisoner's] actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions."\(^4\)
The extension of Sykes made escape from the labyrinth more difficult. Still, the possibility remained that the Court would retain the Noia rule when a prisoner challenged his death sentence. Federal habeas corpus petitioner Michael Marnell Smith, sentenced to death in state court, urged the Court to accept the reasoning of commentators who have argued that procedural defaults in state courts should not bar federal review of death sentences unless the petitioner deliberately bypassed the state process.\(^4\)

Justice O'Connor, writing for herself and four other Justices, held that Smith had forfeited his federal claim because he did not assign it as error in his direct appeal to the Virginia Supreme Court. In the first fully briefed and argued case\(^4\) since the modern resumption of capital punishment, the Court explicitly “reject[ed] the suggestion that the principles of Wainwright v. Sykes apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws.”\(^4\)

Justice Stevens, in a dissent joined by three other Justices, criticized the majority for neglecting the uniqueness of capital punishment. He called for stricter standards of fundamental fairness in capital cases because, as the Court has long recognized, “death is a different kind of punishment from any other which may be imposed in this country.”\(^4\)\(^5\)

The Court in Smith rejected the broad notion that procedural default can never bar federal review in a capital case. But Smith raises more questions than it answers. The state procedural rule at issue in Smith was nondiscretionary.\(^4\) Therefore, the case does not decide whether a discretionary default rule can bar federal claims in a capital case. If the Court finds that there has been a “fundamentally unjust incarceration,” it will excuse a failure to show cause for a procedural default. See Carrier, 106 S. Ct. at 2654 (quoting Engle, 456 U.S. at 135). This fundamental fairness exception to Sykes will be satisfied if a petitioner can make a colorable claim of innocence: “[W]here 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.” Carrier, 106 S. Ct. 2650.


\(^{44}\) Smith v. Murray, 106 S. Ct. 2661, 2668 (1986).

\(^{45}\) Id. at 2672 & n.11 (Stevens, J., dissenting) (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977)).

Michael Marnell Smith was executed in July 1986. NAACP Legal Defense Fund, Death Row, U.S.A., March 1, 1988, at 4-5.

\(^{46}\) Rule 5:17 of the Virginia Rules of Court provides that “[o]nly errors assigned in the petition for appeal will be noticed by this Court.” This default rule is on its face uncompromising,
case. The state courts in Smith clearly applied the procedural bar and did not address the merits of the federal claim, but the opinion gives little guidance on how the Court would treat the many ambiguous state court invocations of procedural bars.

These unanswered questions reveal that there is an inquiry which must precede the Sykes cause and prejudice analysis. This Article contends that before examining cause and prejudice, the federal court must first determine that the state procedural rule being invoked is both an adequate and an independent state ground that would bar direct United States Supreme Court review of the federal constitutional claim. The adequate and independent state ground doctrine, as developed in the context of direct review by the United States Supreme Court of state court decisions, provides that if a state court decision rests on two pillars—one purely federal and one purely state law—and if the state pillar, standing alone, would support the result reached by the state court, then the Supreme Court will decline to decide the federal issue. The adequate and independent state ground may either be substantive law or a rule of state procedure.

From this maze, a "clue of thread" appears: The rule which permits direct federal review where the state ground is not adequate or independent should also apply to habeas corpus. A state procedural ground which is either not adequate or not independent should not bar habeas corpus review in the federal district court of the merits of the federal constitutional claim. This Article will follow that thread.

Unlike Virginia's Rule 5:25, which permits appellate review of error not objected to at trial "for good cause shown or to enable this Court to attain the ends of justice."

These rules have been enforced in capital cases. See, e.g., Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), cert. denied, 460 U.S. 1029 (1983); Coppola v. Warden, 222 Va. 369, 282 S.E.2d 10 (1981), cert. denied, 455 U.S. 927 (1982). The capital statute does require the Virginia Supreme Court to consider and determine two matters even if not enumerated on appeal: (1) whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor" and (2) whether the sentence of death is "excessive or disproportionate." VA. CODE ANN. § 17-110.1 (Supp. 1987).


48. See also infra notes 62-68 and accompanying text.

49. See, e.g., Oliver v. Wainwright, 795 F.2d 1524, 1529-30 (11th Cir. 1986) (unexpected and inconsistent application of Florida's procedural default rule rendered it inadequate to bar federal review), cert. denied, 107 S. Ct. 1380 (1987); Wheat v. Thigpen, 793 F.2d 621, 624-27 (5th Cir. 1986) (Mississippi procedural default rule that was not clearly announced or strictly followed deemed inadequate), cert. denied, 107 S. Ct. 1566 (1987).
II

THE PRELIMINARY INQUIRY: WHETHER THE STATE
PROCEDURAL GROUND IS "ADEQUATE" AND
"INDEPENDENT"

A. Wainwright v. Sykes

The structure of the analysis in Sykes, as well as its language, indicate that the adequacy and independence of the state ground constitute an inquiry which must precede the cause and prejudice tests. The Sykes Court framed the question as follows: "In what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review?"\(^50\) The Court reiterated the rule that a state decision based upon adequate state substantive law could not be reviewed by the federal courts and pointed out that this principle applied equally in the context of federal habeas corpus.\(^51\) However, it was less certain whether a state procedural ground was adequate to prevent federal habeas review of an underlying federal issue. The Court confessed that its efforts to deal with the controversial problem of procedural defaults had been "somewhat tortuous."\(^52\) It concluded that its recent decisions had retreated from the "sweeping language" of Fay v. Noia.\(^53\)

After discussing the state procedural default at issue\(^54\) and after not-

\(^{51}\) Id. at 82.
\(^{52}\) Id. (citing Ex Parte Spencer, 228 U.S. 652 (1913); Brown v. Allen, 344 U.S. 443 (1953); Fay v. Noia, 372 U.S. 391 (1963); Davis v. United States, 411 U.S. 233 (1973); Francis v. Henderson, 425 U.S. 536 (1976)). The Sykes Court interpreted Brown v. Allen to hold that "federal habeas was not available to review a constitutional claim which could not have been reviewed on direct appeal here because it rested on an independent and adequate state procedural ground." Sykes, 433 U.S. at 82 (citing Brown, 344 U.S. at 486-87). The Court then characterized Noia as overruling Brown, noting that Noia refused to extend the direct review doctrine "to limit the power granted the federal courts under the federal habeas statute." Sykes, 433 U.S. at 83-84 (quoting Noia, 372 U.S. at 399).
\(^{53}\) Sykes, 433 U.S. at 87. The Court read Davis v. United States, 411 U.S. 233 (1973), as holding that a federal prisoner's defaulted claim "should be barred on habeas, as on direct appeal absent a showing of cause... and... prejudice." Sykes, 433 U.S. at 84. The Court then considered its decision in Francis v. Henderson, where the Court had reasoned that "'[t]here is no reason to... give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants.'" Sykes, 433 U.S. at 85-86 (quoting Francis, 425 U.S. at 542 (quoting Kaufman v. United States, 394 U.S. 217, 228 (1969))). The Sykes Court also discussed Henry v. Mississippi, 379 U.S. 433 (1965), stating that the Court in Henry had "considered the question of the adequacy of a state procedural ground to bar direct Supreme Court review, and concluded that failure to comply with a state contemporaneous objection rule applying to the admission of evidence did not necessarily foreclose consideration of the underlying" constitutional claim. Sykes, 433 U.S. at 83 n. 8. For further discussion of Henry, see infra notes 101-07, 148-52 and accompanying text.
\(^{54}\) Sykes had argued that FLA. R. CRIM. P. 3.190(i)(2) was not a procedural default rule. Brief for Respondent at 11-14, Wainwright v. Sykes, 433 U.S. 72 (1977) (No. 75-1578); see also Sykes, 433 U.S. at 85-86.
ing that the Florida appellate courts had refused to review the merits of Sykes's federal claim, the Court concluded that the failure to make a timely objection to the admission of a confession would have constituted an independent and adequate state procedural ground sufficient to preclude direct review.6 This brought the Court to the crux of the case: whether the rule "barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver, [should] be applied to a waived objection to the admission of a confession at trial?" The Court decided that this procedural default did bar habeas review.57

For the Sykes Court, the adequate and independent state ground issue was a preliminary inquiry.58 Thus, the Sykes opinion implies that a federal court must first analyze the ability of a state rule to adequately and independently support a conviction before engaging in the cause and prejudice inquiries. Courts have generally done this.59 An examination of the theoretical and historical relationships between the doctrines of adequate and independent state grounds and of procedural defaults shows that this inference from Sykes is sound.

55. 433 U.S. at 85.
56. Id. at 87 (citing Henry v. Mississippi, 379 U.S. 443 (1965)).
57. Id.
58. See Goodman & Sallett, Wainwright v. Sykes: The Lower Federal Courts Respond, 30 HASTINGS L.J. 1683, 1690-92 (1979) (suggesting that the adequacy and independenee of a state ground was a preliminary inquiry for the Sykes court); Note, Applying Wainwright v. Sykes to State Alternative Holdings and Summary Affirmances, 53 FORDHAM L. REV. 1357, 1364-65 (1985) [hereinafter FORDHAM Note] (contending that adequacy of state procedural ground is a federal question which a federal habeas court has jurisdiction to decide); Note, On the Threshold of Wainwright v. Sykes: Federal Habeas Court Scrutiny of State Procedural Rules and Rulings, 83 MICH. L. REV. 1393, 1416-17 n.102 (1985) [hereinafter MICHIGAN Note] (arguing that adequacy for habeas purposes is closely analogous to adequacy for direct review purposes).
59. The Eleventh Circuit, the Fifth Circuit and the First Circuit have treated the adequate and independent state ground doctrine as a condition precedent to the cause and prejudice inquiry and have looked to the Supreme Court's direct review cases for guidance in making this preliminary determination. See Spencer v. Kemp, 781 F.2d 1458, 1470 (11th Cir. 1986) (en banc) (applying principles derived from Supreme Court direct review cases to habeas corpus, court finds asserted state ground inadequate); Wheat v. Thigpen, 793 F.2d 621, 627 (5th Cir. 1986) (court found that "no independent and adequate state grounds exist to prevent federal review" and did not apply Sykes), cert. denied, 107 S. Ct. 1059 (1987); Breest v. Perrin, 655 F.2d 1, 2 n.1 (1st Cir. 1981) (cause and prejudice issues reached after adequacy and independence inquiry, "an issue that must be considered before deciding the effect of Wainwright v. Sykes"), cert. denied, 454 U.S. 1059 (1981).

The Second Circuit also has acknowledged that "if the state court relied on an adequate and independent state procedural ground, federal habeas review is unavailable absent a showing of cause and prejudice." Phillips v. Smith, 717 F.2d 44, 49 (2d Cir. 1983), cert. denied, 465 U.S. 1027 (1984). The Second Circuit's analysis of the independence question was "similar to" and the court was "guided by" the Supreme Court's principal direct review cases, but the Second Circuit did not explicitly follow those cases. Id. at 50 n.2. The Sixth Circuit has mentioned the issue in passing, reading Sykes as having "held that the failure to comply with a state's contemporaneous objection requirement which precludes direct review likewise precludes federal habeas corpus review absent a showing of 'cause' and 'prejudice.'" Hockenbury v. Sowders, 620 F.2d 111, 112 (6th Cir. 1980), cert. denied, 450 U.S. 933 (1981).
B. The Federalist Underpinnings of Direct Review and Habeas Petitions

Federal habeas corpus jurisdiction over claims by state prisoners and federal authority to directly review state court decisions share special similarities. By simultaneously considering the procedural default doctrine of habeas review and the adequate and independent state ground doctrine of direct review, this section attempts to highlight these similarities. These common elements were previously discussed by Justice Harlan in his dissent in Fay v. Noia. While this Article does not accept Harlan's conclusion that an adequate state procedural ground bars federal habeas review as a matter of jurisdiction, it nevertheless appreciates Harlan's erudite treatment of the theoretical and the historical relationship between the doctrines. In arguing that the adequate state ground rule is constitutionally required, he perceptively elucidated the fundamental principles which underlie both the Court's habeas corpus and its direct review jurisdiction.

The adequate and independent state ground doctrine is basic to the American judicial system. The United States Supreme Court has implied that the doctrine is constitutionally mandated although commentators have argued that the rule is statutory, or prudential. Whatever its genesis, there is little doubt that the doctrine is central to federalism. The Court first articulated the doctrine in Murdock v. City of Memphis, holding that it was precluded from reviewing state law questions, and

60. See Meltzer, State Court Forfeitures of Federal Rights, 99 HARV. L. REV. 1128 (1986) (arguing that adequate and independent state ground doctrine and habeas corpus procedural default doctrine are both best understood as examples of federal common law).


65. Noia, 372 U.S. at 464 (Harlan, J., dissenting) (the independent and adequate state ground doctrine as limitation on advisory opinions, implying that any other rule would violate Article III of the Constitution).

66. 87 U.S. (20 Wall.) 590 (1875). The Supreme Court has described Murdock as "one of the 'twin pillars'... on which have been built 'the main lines of demarcation between the authority of the state legal systems and that of the federal system.'" Irvin v. Dowd, 359 U.S. 394, 408 (1959) (quoting Hart, The Relations Between State and Federal Law, 54 COLUM. L. REV. 489, 503-04 (1954)). The other "pillar" is Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), which upheld the Supreme Court's power to review state court decisions. Hart, supra, at 503.
thus a state court’s erroneous determination of federal law could not form the basis of the reversal if the state ground was sufficient to support the result. The Court has explained the rationale for this rule both in terms of comity and with reference to the limitations of its own jurisdiction. By refusing to review state court decisions which rest upon adequate and independent state grounds, the Court respects the independence of the state courts. In addition, the Court avoids the risk of issuing an advisory opinion. Without the rule, the Court might correct a state court’s mistaken interpretation of federal law, only to see the same judgment rendered again by the state court upon remand, this time relying exclusively on state law. This would convert the Court’s decision in the case into an advisory opinion about a point of federal law.

The centrality of the adequate and independent state grounds doctrine to federalist jurisprudence renders it relevant to federal habeas corpus proceedings, notwithstanding its development as a direct review principle. This relevance is evident from judicial attempts to resolve claims made by state prisoners in federal habeas corpus proceedings, as was illustrated by Noia itself. The Second Circuit in Noia analyzed the problem in terms of the mutual comity owed by two sovereignties that function within the same territory. The court reasoned that a lower federal court’s disregard of the state ground for a judgment when granting habeas relief would encroach upon the prerogatives of the state just as much as would the disregard of a state ground by the Supreme Court upon direct review. The court concluded that the adequate and independent state grounds doctrine must therefore apply in cases of federal habeas corpus for state prisoners just as it applies in the direct federal review of state court decisions. The court then examined the state grounds for Noia’s conviction and imprisonment and, finding them inadequate, reversed and remanded the case.

The Supreme Court affirmed this decision, but not its reasoning. The Court held that even an adequate and independent state ground could not limit federal habeas review. Justice Harlan, in dissent, agreed with the lower court’s reasoning concerning the application of the adequate and independent state ground doctrine to federal habeas proceedings. He offered a hypothetical: Harlan assumed an indictment by a

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70. 300 F.2d at 359.
71. *Id.* at 360.
73. The hypothetical parallels the facts of *Michel* v. *Louisiana*, 350 U.S. 91 (1955), and
state grand jury composed in a racially exclusive manner, a state rule which required that objections to grand jury composition be raised prior to the verdict, the failure of a defendant to make such an objection and the state appellate court's refusal to consider the claim. Harlan concluded that the Court should uphold the conviction if it granted certiorari in such a case. Although the indictment had violated the petitioner's constitutional rights, the Court should give effect to the adequate state ground for the judgment below. While Harlan acknowledged that the Court could weigh the adequacy and independence of the state ground against the requirements of fairness, he posited that the determination of the adequacy and independence "marks the constitutional limit of our power in this sphere."

Justice Harlan's hypothetical state prisoner then filed a petition for writ of habeas corpus in federal district court; again challenging the composition of his grand jury. Harlan posed the question whether the federal court would be constitutionally freer than the Supreme Court would be on direct review to "ignore" the adequate state ground. Harlan answered that it would not be. He reasoned that "[i]n habeas as on direct review, ordering the prisoner's release invalidates the judgment of conviction and renders ineffective the state rule relied upon to sustain that judgment." In Harlan's view, the majority's approach eliminated the adequate state ground rule in cases presenting a federal question where detention followed a state judgment. This, Harlan argued, exceeded the Court's constitutional power.

As this examination of relevant theory has shown, both habeas jurisdiction and direct review draw their meaning from the same source—federalism; which in turn, is a labyrinth constructed to house both the national interest in imposing federal law as well as the state's interest in applying its own law. Such cohabitation has an enlightening history.

C. The Historical Evolution of the Standards for Granting Habeas Petitions and Direct Review

Chapter 28 of the Act of Feb. 5, 1867, includes two provisions:

prefigures Francis v. Henderson, 425 U.S. 536, 541 (1976) (challenge to identical Louisiana law; Court, in precursor to Sykes, for first time applied "cause" and "prejudice" test to habeas petitioner in state custody).

74. Noia, 372 U.S. at 463-64. Harlan also assumed that the petitioner was represented by competent counsel and that the information necessary for an objection was available at the time of the trial. Id.

75. Id. (citing Michel v. Louisiana, 350 U.S. 91 (1955)).

76. Id. at 466.

77. Id. at 469.

78. Id. at 469-70.

79. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385-87. This Act is variously referred to as the Habeas Corpus Act of 1867 and as the Judiciary Act of 1867, evincing the confusion in this area. For sake of
Section one concerns habeas corpus for state prisoners, and section two concerns direct review by the United States Supreme Court of decisions of the highest state courts. Neither provision strictly originated with the Act of Feb. 5, 1867. The United States Constitution, \(^{80}\) and prior acts of Congress\(^ {81}\) provided for the "great writ" of habeas corpus, although the Act of Feb. 5, 1867 innovated by extending federal habeas power to include state prisoners. Likewise, the Constitution implies that there should be direct review of state court decisions by the United States Supreme Court, \(^{82}\) and, in fact, a prior act of Congress specifically provided for such review. \(^{83}\)

It is uncertain what inferences, if any, may be drawn from the pairing of habeas corpus and direct review in the Act of Feb. 5, 1867. \(^{84}\) There is an historical supposition concerning the Reconstruction government's attempt to fetter state power after the Civil War, \(^ {85}\) but this view is not uniformly accepted. \(^{86}\) The legislative history is scant and provides little insight into any ulterior motives or policy considerations underlying the Act of Feb. 5, 1867. There was almost no discussion of the distinction between habeas corpus and direct review during the legislative debate. \(^ {87}\) While it is the position of this Article that the appearance of habeas corpus and direct review in a single act is theoretically sound, it is quite possible that the presence of the two sections in Chapter 28 of the

\(^{80}\) U.S. CONST. art. I, § 9, cl. 2.


\(^{82}\) The implication is derived from the supremacy clause, U.S. CONST. art. VI, cl. 2. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 339-40 (1816).

\(^{83}\) Judiciary Act of 1789, ch. 20, 1 Stat. 86-87.

\(^{84}\) Judicial review of state court decisions started with the Constitution, see U.S. Const. art. VI, cl. 2. The two-section Act of Feb. 5, 1867, must be contrasted with the Judiciary Act of the First Congress, Act of 1789, ch. 20, 1 Stat. 73-93. While the 1789 Act encompassed both habeas corpus and direct review, it also included thirty-five sections concerning the plethora of subjects requiring legislative action in an act which had as its purpose to "establish the judicial courts of the United States." Given the comprehensive intent of the Judiciary Act of 1789, it is unremarkable that section 25 concerned direct review of state court decision and that section 14 concerned habeas corpus for persons in federal custody.


\(^{87}\) See CONG. GLOBE, 39th Cong., 1st Sess. 4150-51, 4228-30 (1866); see also Mayers, supra note 86, at 36-43 (indicating that the legislative debate centered almost exclusively on the Act's exclusion of military prisoners).

The text of the Act of Feb. 5, 1867 evinces this lack of distinction between habeas corpus and direct review. For example, the amendment regarding persons in military custody is placed in section two, which concerns direct review, rather than in section one, relating to habeas corpus. See Appendix, infra.
Act is mere coincidence. Whether coincidence or not, however, the construction of the Act connects habeas corpus for state prisoners with United States Supreme Court direct review of state court judgments.

The Court has struggled in its efforts to develop consistent standards for habeas corpus and the direct review of state court judgments. Prior to the Court's 1963 decision in Fay v. Noia, the jurisdictional inquiries governing habeas corpus and direct review jurisdiction were roughly equivalent, since both applied the doctrine of adequate and independent state grounds. In the years preceding Noia, however, the inquiries

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88. Concerning habeas corpus, especially for state prisoners, see generally Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 478-99 (1963) (reviewing evolution of habeas corpus doctrine from 1886 to 1952); Feller, supra note 85, at 620-63 (reviewing federal habeas corpus doctrine prior to 1915); Developments, supra note 16, at 1048-62 (historical examination of the changing course of federal habeas corpus jurisdiction).

Concerning direct review of state court decisions by the United States Supreme Court, see generally Michigan v. Long, 463 U.S. 1032, 1038 (1983) (Court "openly admit[s] that we have thus far not developed a satisfying and consistent approach" to direct review doctrine); M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 216-31 (1980) (general description of the independent and adequate state grounds doctrine); R. Stern, *E. Gressman & S. Shapiro, Supreme Court Practice* 174-78 (6th ed. 1986) (discussing the presumption that the federal ground prevails); 10 C. Wright, A. Miller & E. Cooper, supra note 7, at §§ 4019-4032 (describing the origin, evolution, and current status of the independent and adequate state grounds doctrine); Ellison & NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 Mont. L. Rev. 177, 185-93 (1984) (tracing the development of the doctrine from 1870 to 1983); Note, *Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision*, 62 Colum. L. Rev. 822, 835-48 (1962) (reviewing Court dispositions of state decisions where grounds were ambiguous).


90. Justice Harlan, dissenting in Noia, described a "formative stage" in the development of habeas corpus jurisprudence, during which habeas corpus could lie only for challenges to the jurisdiction of the original court. 372 U.S. at 450; see, e.g., Ex parte Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830). Harlan stated that habeas corpus would not be available to consider any claims which "rested on an adequate nonfederal ground." 372 U.S. at 454 (emphasis in original).

During what Harlan terms the second stage, from 1915 to 1953, the courts began to consider the adequacy of the opportunity to raise constitutional claims in state court in addition to "jurisdictional" questions. Id. at 456. Thus, according to Harlan's reasoning, habeas corpus
became increasingly dissimilar, as three capital cases demonstrate.

*Brown v. Allen*\(^{91}\) expanded the scope of federal habeas corpus review. The Court held for the first time that a prisoner who claimed a state court judgment rested upon an erroneous interpretation of federal constitutional law was entitled to full reconsideration of the constitutional claim by a federal habeas court. In other words, if adequate nonfederal grounds for the state judgment were absent, federal habeas relief might lie.

In a companion case, *Daniels v. Allen*,\(^{92}\) the Court considered for the first time the federal habeas implications of a state procedural default which was determined to be an adequate and independent state ground for the state judgment.\(^{93}\) The petitioner in *Daniels* had filed his state court appeal papers one day too late, and the state court applied its procedural law in refusing the tardy appeal. The Court held that the state did not violate the Constitution by enforcing the procedural default rule \(^{94}\) and that the state action was based on an adequate state ground; therefore, federal habeas relief was unavailable.\(^{95}\)

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\(^{91}\) 344 U.S. 443 (1953).

\(^{92}\) 344 U.S. 443, 482-87 (1953).

\(^{93}\) For Harlan, dissenting in *Noia*, the important point was that:
The approach in *Daniels* was wholly consistent with established principles in the field of habeas corpus jurisdiction. The problem, however, had been brought into sharper focus by the result in *Brown*. Once it is made clear that the questions open on federal habeas extend to such matters as the admissibility of confessions, or of other evidence, the possibility that inquiry may be precluded by the existence of a state ground adequate to support the judgment is substantially increased.

\(^{94}\) 344 U.S. at 486.

\(^{95}\) *Id.* at 485. *But see id.* at 487 (failure to exhaust available state remedies bars federal habeas corpus).

Justice Black, joined by Justice Douglas, dissented in *Daniels*, arguing that "it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution." *Id.* at 554 (relying on *Moore v. Dempsey*, 261 U.S. 86 (1923)). Justice Black's dissent also mentioned the fact that the procedural rule was discretionary, 344 U.S. at 553, a feature of the case also highlighted in a dissent
Irvin v. Dowd, 96 decided six years after Brown and Daniels and four years before Noia, also involved a possible procedural default in state court. Unlike Daniels, however, the state court in Irvin addressed both the issue of procedural default and the merits of the federal claim "because of the finality of the sentence" and "to satisfy ourselves that there [was] no miscarriage of justice." 97 The Supreme Court interpreted the state court's opinion as representing a considered conclusion that the conviction and death sentence did not offend the federal Constitution. This made federal review of the habeas claim possible. The majority framed the issue in the language of exhaustion, but the decision rested on the notion that a state procedural default did not bar federal habeas corpus review. 98

In Justice Brennan's opinion for the Court in Fay v. Noia, as well as the again instructive dissent by Justice Harlan, procedural default rules brought together the doctrines of habeas corpus and direct review. Yet Brennan's majority opinion displays evidence of the tunnel vision that often afflicts treatments of the convergence of these two cumbersome doctrines. It is difficult to think of the doctrines in pari materia when the thinker is cornered by one of the doctrines and looking to the other as either an obstacle or an escape route.

For example, the majority rejected the argument that because Noia's procedural default, if deemed adequate and independent, would preclude direct review by the United States Supreme Court, then the default should also bar the remedy of habeas corpus. The majority reasoned that "[t]he fatal weakness of this contention is its failure to recognize that the adequate [and independent] state-ground rule is a function of the limitations of appellate review." 99 For the majority, the adequate and independent state grounds doctrine presented an obstacle to habeas review. The escape lay in the simple distinguishing fact that habeas corpus is not direct review. The Court in Noia thus held that an adequate and independent state procedural ground would not bar federal habeas review absent deliberate bypass. 100

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97. Id. at 404 (quoting Irvin v. State, 236 Ind. 384, 392-93, 139 N.E.2d 898, 902, cert. denied, 353 U.S. 948 (1957)).
98. Id. at 406. However, the dissenters in Irvin focused directly on the adequacy and independence of the state procedural ground at issue in the case; see id. at 407-12 (Frankfurter, J., dissenting), 412-15 (Harlan, J., dissenting).
100. Id. at 438-39. The Court differentiated adequate and independent state substantive grounds from adequate and indepenedent procedural grounds. Justice Brennan wrote that while the Court

has deferred to state substantive grounds so long as they are not patently evasive of or
As might have been predicted, the issue was not so easily settled. Two years after Noia, the Court in Henry v. Mississippi (1965) revisited its substance/procedure distinction. Henry was not a habeas corpus case, but a direct review case. Justice Brennan, writing for the majority as he had in Noia, again emphasized the difference between substantive and procedural grounds. He acknowledged that the adequate nonfederal grounds doctrine is necessary to avoid advisory opinions where the state ground is substantive. However, he noted that these considerations do not apply when a state procedural rule blocks the vindication of a federal right, because the operation of state procedural default rules to preclude federal review is itself a federal question. Brennan concluded that “a litigant’s procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State’s insistence on compliance with its procedural rule serves a legitimate state interest.”

Applying this reasoning, the Court found that the procedural rule at issue in Henry served state interests, but the Court remanded the case for a determination of whether defense counsel had deliberately bypassed available state procedures. Thus, it appeared that the Court was willing to extend the Noia deliberate bypass test to the adequacy determination on direct review.

Justice Harlan, dissenting as he had in Noia, wrote that the Henry decision portended an abolition of the concept of adequacy as part of the state procedural grounds inquiry. Commentators questioned the Henry Court’s distinction between substance and procedure. The discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights. That the Court nevertheless ordinarily gives effect to state procedural grounds may be attributed to considerations which are peculiar to the Court’s role and function and have no relevance to habeas corpus proceedings in the Federal District Courts: the unfamiliarity of members of this Court with the minutiae of 50 States’ procedures; the inappropriateness of crowding our docket with questions turning wholly on particular state procedures; the web of rules and statutes that circumscribes our appellate jurisdiction; and the inherent and historical limitations of such a jurisdiction.

Id. at 432-33 (footnote omitted).

Justice Harlan in dissent argued that constitutional history and theory compelled the conclusion that an adequate and independent state procedural ground was a jurisdictional bar to federal habeas corpus review. Id. at 448 (Harlan, J., dissenting).

102. Id. at 447.
103. Id. at 457; see also Sandalow, supra note 65, at 195-97.
104. For example, Sandalow has written, The distinction rests in part, it will be recalled, on the premise that determination of the federal question cannot affect disposition of the case if the state court decision on the question of state substantive law is allowed to stand. The premise is equally true, however, of a state court decision with respect to procedure. If it is allowed to stand, Supreme Court decision of the question of federal law cannot affect disposition of the case. In either event, whether the state ground is substantive or procedural, once the Supreme Court decided that it should be allowed to stand, the adequate state ground doctrine “is necessary to avoid advisory opinions.” The “advisory opinion” rationale, in other words, is concerned with the appropriate disposition of the case once it is determined that the state ground is
Henry Court’s loosening of the strict adequacy requirements, though perhaps inevitable after Noia, was an ironic product of the confusion between habeas corpus jurisdiction and direct review jurisdiction. However, the extension of Noia predicted by Harlan in Henry did not occur. In the years following the opinion, Henry was treated with “intelligent neglect,”105 seemed “relatively moribund”106 and was applied only “sporadically.”107

Interestingly, Sykes unearthed Henry, relying on Henry as the sole support provided for its finding that Florida’s procedural default rule was adequate and independent.108 The Sykes opinion reveals the sometimes tenuous but nevertheless real relationship between the adequate and independent state grounds doctrine and habeas corpus challenges to procedural default rules. In substituting the cause and prejudice test for Noia’s deliberate bypass rule, the Sykes Court assumed that the procedural default was—and had to be—an adequate and independent state ground for the judgment.109

The evolution of the relationship between these two doctrines can therefore be divided into three stages. During the first stage, the period prior to Noia, the courts equated habeas jurisdiction with direct review jurisdiction; an adequate and independent state ground was deemed to bar federal habeas corpus review as well as direct review. Procedural default and adequate and independent state grounds were not separate concepts; both were woven into the same theoretical fabric of jurisdiction.110 During the second stage, from Noia to Sykes, federal habeas
corpus review was considerably broader than direct review; an adequate and independent state procedural ground would not bar habeas review unless the petitioner had deliberately bypassed the remedies provided by the state. During the third stage, from Sykes to the present, the Court has returne~ its traditional conception, in which the scope of habeas review and the scope of direct review are roughly equivalent, though to a lesser degree than they had previously been. Yet, this equation is even rougher than the earlier one. Justice Harlan’s dissenting view in Noia has not prevailed: A showing of cause and prejudice, or a showing of “fundamentally unjust incarceration” will still permit federal review of a claim even though the state’s rejection of that claim rests on adequate and independent state grounds. However, the increasing stringency of the cause and prejudice standards means that, in reality, the availability of habeas review often hinges on the adequacy and independence of the state ground. The following section will therefore explore each of these threshold requirements.

III
THE ADEQUACY THRESHOLD
A. The Dimensions of Adequacy

Developed as a direct review doctrine, “adequacy” includes several related concepts. The state ground must be sufficiently broad to support the disposition without reference to a federal question, and it must not be interwoven with the federal ground. It is often said that the state ground must be “tenable,” a notion embodying both constitutional and prudential concerns. A facially valid state procedural rule will be deemed inadequate when its application in a given case would violate due process. Due process requires a “reasonable opportunity” to have a constitutional claim heard by the state courts. However, a state pro-

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113. Id. at 179.
114. Id.; see also Note, supra note 64, at 1383-85 (tracing history of tenability concept).
115. Brilmayer, supra note 63, at 749.
116. Michel v. Louisiana, 350 U.S. 91, 93 (1955) (quoting Parker v. Illinois, 333 U.S. 571, 574 (1948)). For example, in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), the state supreme court held as a matter of state law that the case had been improperly brought as a certiorari proceeding. The United States Supreme Court found that although prior state law could have been interpreted as precluding certiorari, such an interpretation was clear only in retrospect. The petitioner “could not fairly be deemed to have been apprised” of the existence of such a requirement, and therefore the requirement was an inadequate ground that would not bar federal review. Id. at 457-58. The Court reasoned that “[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.” Id. In Reece v. Georgia, 350 U.S. 85 (1955), decided the same day as Michel, an otherwise adequate trial level procedural default rule was
cedual rule may be deemed inadequate for purposes of direct review jurisdiction even if it is not unconstitutional.\textsuperscript{117} If the state applies a novel procedural rule without notice or in an unexpectedly harsh manner, the rule will be inadequate to bar review.\textsuperscript{118}

Before discussing the complex dimensions of the adequacy principle,\textsuperscript{119} it is useful to consider the basis of the adequacy concept. The essential notion is that state procedural rules may not be employed as a subterfuge to evade the vindication of federal rights. Difficulties arise, however, in the process of appellate or habeas review when courts attempt to identify evasion in individual cases.

The Supreme Court has noted the significance of the evasion principle.\textsuperscript{120} The principle does not and cannot mean, however, that the Supreme Court must inquire into whether state courts are applying their procedural rules with an actual intent to evade the enforcement of federal rights. Such an inquiry would undercuts any semblance of federalism.\textsuperscript{121} Further, the analytical tools available to the Court make such inquiry practically impossible as well as unseemly.\textsuperscript{122}

deemed inadequate because the “semi-illiterate” defendant “of low mentality” was not provided an attorney until after the time that state law required the constitutional challenge to be made. \textit{Id.} at 89-90.

\textsuperscript{117} “Despite occasional references to due process in the caselaw, . . . most commentators agree that inadequate procedural grounds are not necessarily unconstitutional.” Meltzer, supra note 60, at 1160 (footnotes omitted). However, Meltzer also notes that “findings of inadequacy and unconstitutionality implicate similar facts and values [and therefore] the distinction between the doctrines is surely elusive.” \textit{Id.}

\textsuperscript{118} See, e.g., Hathorn v. Lovorn, 457 U.S. 255, 262-65 (1982) (state procedural ground inadequate unless “strictly or regularly” followed); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 301 (1964) (novelty in procedural requirements will not bar review); see also Meltzer, supra note 60, at 1138 (risks posed by federal deference to state procedural defaults that are inconsistent with prior state decisions “are plain: the state court may be attempting to evade Supreme Court review by interposing a state law ground”); Sandalow, supra note 65, at 221 (“When a state ground of decision is supported by a history of consistent application, even in cases that do not involve a federal claim, it is not likely to have been used by the state court simply as a device to defeat the Court’s jurisdiction.”).

The Fifth and Eleventh Circuits have recently applied the novelty principle with no apparent difficulty. See Wheat v. Thigpen, 793 F.2d 621, 624-25 (5th Cir. 1986), \textit{cert. denied}, 107 S. Ct. 1566 (1987); Spencer v. Kemp, 781 F.2d 1458, 1470 (11th Cir. 1986) (en banc).

\textsuperscript{119} \textit{See infra} notes 123-52 and accompanying text.

\textsuperscript{120} \textit{See} Nickel v. Cole, 256 U.S. 222, 225 (1921); Vandalia R.R. v. Indiana ex rel. City of South Bend, 207 U.S. 359, 367 (1907); Leathe v. Thomas, 207 U.S. 93, 99 (1907).

\textsuperscript{121} “Few doctrines would be more destructive of harmonious relationships between federal and state judiciaries than one which requires the Supreme Court to inquire into the good faith of state judges.” Sandalow, supra note 65, at 220 n.141.

\textsuperscript{122} Wright, Miller, and Cooper identify two disadvantages in using the evasion test to assess the adequacy of independent state grounds:

\begin{itemize}
  \item One disadvantage is that an explicit evasion test is not apt to reach all cases of deliberate, subjective evasion. It is often easy to create plausible state grounds out of ambiguous precedent and code, beyond any opportunity at discovery. In addition, it is an onerous burden on the Supreme Court to be required to charge state judges with deliberate and clandestine disobedience to their oaths to support the Constitution. An evasion test is not
The Court has therefore developed surrogate doctrines that increase the likelihood that federal rights will be enforced but obviate the need for an inquiry into willful evasion. The following sections will consider two principles that are surrogates for evasion concerns and which therefore permit federal review: checks upon the uneven application of discretionary procedural rules and the apparent requirement that state procedural rules serve a "legitimate state interest."

B. Checks Upon State Court Discretion

The Supreme Court's application of the evasion principle exemplifies its distrust of unbridled state court discretion. Because inconsistency in the application of procedural rules may be evidence of evasion, the Court has repeatedly said that a state court's inconsistent or arbitrary application of a discretionary procedural rule will not bar federal review. By making consistency a component of adequacy, the federal courts protect federal rights against discriminatory treatment in state courts.

Significantly, the Court first articulated this arbitrariness standard in the death penalty context. In Williams v. Georgia, the petitioner claimed, and the state conceded, that the method of selecting the grand jury had discriminated on the basis of race. The state court had, on procedural grounds, denied the grand jury challenge as untimely, even though a state statute gave the court the discretion to entertain the challenge. Justice Frankfurter, writing for the majority, held that "the discretionary decision to deny the motion [for consideration of the federal claim] does not deprive this Court of jurisdiction to find that the substance of the claim is apt to be invoked except in the plainest of circumstances, as suggested by the cases that seem to draw from conclusions of evasion without explicit statement. A second disadvantage is that state courts should not always be free to avoid federal rights simply because of a good faith but absurd conclusion of state law. Particularly as to matters of procedure, the interest in state independence is simply not sufficient to subordinate federal rights so completely."

16 C. WRIGHT, A. MILLER & E. COOPER, supra note 7, § 4026, at 731-32.

123. See Staub v. City of Baxley, 355 U.S. 313, 333 (1958) (Frankfurter, J., dissenting) ("So long as a reasonable rule of state procedure is consistently applied, so long as it is not used as a means for evading vindication of federal rights, it should not be refused applicability.") (citation omitted); Hill, The Inadequate State Ground, 65 COLUM. L. REV. 943, 959 (1965) (exercise of discretion may conceal purposeful avoidance of federal claims).

124. Cf Hill, supra note 123 (under Court's decisions, showing of arbitrariness seems sufficient to hold state ground inadequate).

125. See MICHIGAN Note, supra note 58, at 1416 ("[T]he discretionary power to hear (or, conversely, not to hear) federal claims despite a default creates a special danger that those claims may be undervalued or even rejected in a discriminatory fashion.") (footnote omitted).


127. The discrimination claim was based on the holding in Avery v. Georgia, 345 U.S. 559 (1953), which had invalidated the jury selection procedure used in Williams.
tive issue is properly before us."\(^{128}\) Justice Frankfurter's opinion in *Williams* had its roots in his dissent two years earlier in *Daniels v. Allen*,\(^ {129}\) in which he had stressed that the Supreme Court possessed jurisdiction wherever the state courts possessed discretion to forgive the procedural default.\(^ {130}\)

This discretion principle extends beyond capital cases. For example, in *Barr v. City of Columbia*,\(^ {131}\) which involved a breach-of-peace conviction, the state court had refused to consider the merits of the federal claims, holding that the exceptions taken below were too general. The Supreme Court, noting that the state court had previously considered the merits of identical exceptions, concluded that a procedural rule that is not "strictly or regularly followed" is inadequate.\(^ {132}\) In *Sullivan v. Little Hunting Park, Inc.*,\(^ {133}\) the Court held a procedural default rule inadequate, stating that a rule "more properly deemed discretionary than jurisdictional" does not bar federal review.\(^ {134}\) The Court noted that the rule had not been so consistently applied as "to amount to a self-denial of the power to entertain the federal claim."\(^ {135}\) Finally, in *Hathorn v. Lovorn*,\(^ {136}\) where a state court refused to review issues raised for the first time on rehearing, the Supreme Court observed that the court had previously considered the merits of such issues and concluded that the denial of rehearing "must have rested either upon a substantive rejection of petitioners' federal claim or upon a procedural rule that the state court applies only irregularly."\(^ {137}\) Because the state court did not apply the rule consistently, the Court found the rule inadequate.\(^ {138}\)

The Court applied the discretion principle most recently in *James v.*

\(^{128}\) 349 U.S. at 389. Justice Clark's dissenting opinion in *Williams* argued that the mere refusal to exercise discretion did not imply an intent to evade the federal claims. *Id.* at 401 (Clark, J., dissenting).

\(^{129}\) 344 U.S. 443, 488-513 (1953) (Frankfurter, J., dissenting); see supra notes 92-95 and accompanying text.

\(^{130}\) [The North Carolina courts had discretion to hear this appeal. For me it is important to emphasize the fact that North Carolina does not have a fixed period for taking an appeal. The decisive question is whether a refusal to exercise a discretion which the Legislature of North Carolina has vested in its judges is an act so arbitrary and so cruel in its operation, considering that life is at stake, that in the circumstances of this case it constitutes a denial of due process in its rudimentary procedural aspect.]

\(^{131}\) 378 U.S. 146 (1964).

\(^{132}\) *Id.* at 149.

\(^{133}\) 396 U.S. 229 (1969).

\(^{134}\) *Id.* at 234.

\(^{135}\) *Id.*


\(^{137}\) *Id.* at 264-65 (footnote omitted).

\(^{138}\) *Id.* at 263.
Kentucky. In James, the trial court refused to instruct the jury that no adverse inference could be drawn from defendant’s failure to testify although the defendant had asked for an “admonition.” On appeal, the Kentucky Supreme Court recognized that the Constitution required that a jury instruction be given, but pointed out that the defendant had asked for an admonition instead of an instruction. Reasoning that “[t]here is a vast difference in a request for an admonition and a requested instruction,” the Kentucky Supreme Court held that the trial court properly denied the request for an admonition. The Supreme Court reversed, holding that the request for an admonition rather than an instruction was not a procedural default adequate to support the state court’s decision. The Court found that Kentucky’s distinction between admonitions and instructions was not a firmly established and regularly followed state practice and that, in general, substantive “distinction[s] between admonitions and instructions [are] not always clear or closely hewn to.” James illustrates that a state procedural rule applied in an arbitrary manner is not adequate to preclude Supreme Court review.

In each of these cases, it appears that the Supreme Court found the procedural default inadequate to bar review because the state court had discretion in deciding whether to apply the procedural rule. Thus, one could argue that the mere existence of state court discretion may require a finding of inadequacy. The Supreme Court, however, has not gone that far: The general rule appears to be that a state court’s discretionary procedural decision to bar a federal claim is not automatically inadequate unless the state court had ad hoc and unguided discretion in making that decision. Capital cases, however, may require a different

141. 466 U.S. at 348.
142. Id. at 346.
143. See also Henry v. Mississippi, 379 U.S. 443, 455-56 (1968) (Black, J., dissenting) (arguing that state procedural rule was inadequate because state court had discretion to excuse defaults and had done so in the past).
144. See Sandalow, supra note 65, at 225-26 (finding support for broad proposition that the very existence of discretion in the state court requires determination of inadequacy). But see Meltzer, supra note 60, at 1139-40 (stating that with the “apparent exception” of Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), “no case has held that a state procedural ruling is inadequate simply because the state court possessed but did not exercise discretion to excuse the procedural default”).
145. See MICHIGAN Note, supra note 58, at 1419-20 (terming such a view “radical” and inconsistent with Court’s intent in Sykes to limit the availability of habeas).
146. Assessment of these arguments requires a closer examination of the discretion exercised by state courts. Discretion, the power to choose among alternatives, may be either what Professors Hart and Sacks have termed “a power of reasoned elaboration” or “a power of continuing discretion.” The latter connotes “ad hocness”—a power to decide one way on one occasion and differently on another without obligation for explanation. Not surprisingly, in view of the general postulates of our judicial system, neither Henry nor any of the other cases that have reached the Court is of this type. Each involved discretion in the former sense. In that sense, however, discretion is nothing more than the judicial
rule because of the compelling constitutional interests at stake and the irreversibility of the punishment. Accordingly, this Article urges that in capital cases, the mere existence of discretion, regardless of whether such discretion is ad hoc or reasoned, should lead to a finding of inadequate grounds to bar review.\textsuperscript{147}

C. The Requirement of a "Legitimate" State Interest

The Supreme Court has required that a state court's application of a procedural rule must serve a "legitimate" state interest before it will allow procedural default to bar federal review. This requirement is another protection against using state procedural rules as a subterfuge for evasions of federally protected rights. \textit{Henry v. Mississippi}\textsuperscript{148} enunciated the "legitimate interest" requirement; however, trying to apply the Court's analysis in \textit{Henry} is almost as difficult as imagining a state procedural rule that did not serve any state interest. The Court neither defines "legitimacy" nor describes any methodology for recognizing it. The opinion in \textit{Henry} seems to require an analysis of the state's interest in enforcement of its procedural rule, yet the Court gave little guidance about the factors involved in such analysis.\textsuperscript{149} The Court had earlier noted that the state cannot permissibly "resort to an arid ritual of meaningless form,"\textsuperscript{150} but a contemporaneous objection rule, such as the one at issue in \textit{Henry}, is more than that, as the \textit{Henry} Court itself

\textsuperscript{147} See infra notes 156-64 and accompanying text.

\textsuperscript{148} 379 U.S. 443, 447 (1968).

\textsuperscript{149} The contemporaneous objection rule at issue in \textit{Henry} required objection at the time testimony was offered, but the defense counsel moved for a mistrial at the close of the state's case. The Supreme Court recognized that the contemporaneous objection rule "clearly does serve a legitimate state interest," because such objection "immediately appris[es] the trial judge" of the reasons for excluding the evidence, thus giving the court "the opportunity to conduct the trial without using the tainted evidence." \textit{Id.} at 448. Yet because "this purpose of the contemporaneous objection rule may have been substantially served" by a motion for directed verdict at the close of the state's case, the Court concluded that "enforcement of the rule here would serve no substantial state interest." \textit{Id.} at 448-49.

\textsuperscript{150} \textit{Id.} at 449 (quoting Staub v. City of Baxley, 355 U.S. 313, 320 (1958)).
As noted earlier, Henry has been subject more to scholarly debate than to judicial reliance. Yet Henry is not without significance in the direct review context, the habeas corpus context, or as a component of the adequacy requirement. If Henry's requirement that a state procedural ground serve a "legitimate" state interest is not to be a hollow requirement, there must be some jurisprudential guidance concerning the parameters of "legitimacy."

At present, adequacy is realistically limited only by considerations of state court discretion, and not the undefined "legitimacy" of state interests, where the state procedural rule does not deny constitutional rights. In the capital punishment context, where constitutional rights are at issue, adequacy then becomes a possible threshold between life and death.

D. Adequacy as a Threshold to Review of Capital Cases

As previously discussed, the adequacy principles of the doctrine of direct review are applicable to habeas corpus proceedings. Capital cases reach the United States Supreme Court by both direct review and habeas corpus, and reach other federal courts in habeas corpus proceedings.

It is no accident that Williams v. Georgia, the Court's first statement of the arbitrariness/discretion principle, was a capital case. The fact that a life was at stake was among the extraordinary factors in that case which, for Justice Frankfurter, justified holding the state ground

151. However, giving effect to the rule "for its own sake" would be such an "arid ritual." Id. The Court implies that the contemporaneous objection rule is not per se "legitimate," but is so only insofar as it serves the state's "interest in avoiding delay and waste of time in the disposition of the case." Id.

One explanation for Henry is political. Henry was president of the local chapter of the NAACP and the statewide NAACP Conference of Branches. The case arose in 1962 in Mississippi. Sandalow, supra note 65, at 190. Perhaps the Henry Court's somewhat strained reading of adequacy doctrine reflects no more than the Court's reluctance to accuse a state court of willful evasion of the Constitution.

152. See supra notes 105-07 and accompanying text.
153. See supra notes 60-111 and accompanying text.
155. In 1983, the Supreme Court noted that "[i]t is a matter of public record that an increasing number of death-sentenced petitioners are entering the appellate stages of the federal habeas process." Barefoot v. Estelle, 463 U.S. 880, 892 (1983); see also Brief of Amicus Curiae NAACP Legal Defense and Education Fund, Inc. at 35, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080) ("Approximately 60 [capital] cases have already reached the federal courts of appeal, and roughly 100 more are pending in the federal district courts").
156. 349 U.S. 375 (1955).
inadequate. The Court is concerned with a state court's ad hoc discretion. Distinguishing permissible guided discretion from ad hoc discretion is difficult. As one commentator Professor Meltzer has argued, judges cannot realistically be expected to provide reasoned explanations refuting a possible finding of ad hoc discretion for every issue in every case. The institutional difficulties of ascertaining whether specific decisions result from ad hoc discretion or from principled discretion led Meltzer to place the burden of proof in most cases upon the person whose claim has been forfeited. Yet Meltzer would reverse the burden in capital cases: "[W]hen state courts have broad discretion to excuse procedural defaults in capital cases, it seems appropriate to shift the burden of persuasion on the question of whether such discretion was exercised in an ad hoc or a principled manner; in view of the stakes involved, the burden should rest on the state, not the defendant." This Article similarly advocates a shifting of the burden to the state rather than the prisoner, in proceedings in which capital punishment is the penalty. The failure to comply with a procedural rule should not stand in the way of a federal court examining the merits of a condemned prisoner's constitutional claim.

The Supreme Court's modern death penalty jurisprudence emphasizes the importance of guiding discretion in view of the stakes. Unbridled discretion in capital cases obtains constitutional stature; it is the type of discretion which led the Court in Furman v. Georgia to invalidate the death penalty as then administered. Furman's nine separate opinions generated much confusion, but the Court has recently offered this interpretation:

A fair statement of the consensus expressed by the Court in Furman is that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

It follows that a state's ad hoc discretion to enforce or forgive procedural defaults cannot exist in harmony with the Constitution. This Article therefore advocates a rule that a state's discretionary procedural decision to bar the federal claim of a death sentenced person is never adequate or, at the very least, shifts the burden to the state to disprove ad

157. Id. at 391; see also Frankfurter's dissent in Daniels, supra note 130.
158. Meltzer, supra note 60, at 1140-41.
159. Id. at 1141.
160. Id. at 1222 (footnote omitted).
hoc discretion. Such a rule recognizes that the protections against unbridled discretion provided by the Supreme Court decisions in the death sentencing context are also necessary to check the powerful forces which can influence discretion in the state appellate process of reviewing capital cases.

Powerful forces are also implicated in the “legitimacy” test of Henry v. Mississippi. Again, the Henry principle is relevant both to direct review and habeas corpus proceedings. As previously noted, the Sykes Court cited Henry—and only Henry—in support of its finding that the state procedure at issue in Sykes was adequate. It would therefore seem arguable that Henry raises a threshold issue that precedes a Sykes analysis. At least one student commentator has so argued, but several Supreme Court scholars are not so sure. Assuming a viable structuring of the concept of “legitimacy,” this Article advocates application of Henry in the habeas corpus context.

This Article also proposes that any analysis of “legitimacy” must be heavily weighted on the side of the death row inmate. In the analogous area of due process jurisprudence, the Court recently reiterated, in a capital punishment case, that “[t]he private interest in the accuracy of a criminal proceeding that places an individual’s life or liberty at risk is almost uniquely compelling.” Any application of the Henry standard in the capital punishment context should evince a sensitivity to the unique finality of death and the corresponding need for heightened reliability in a legal system deciding life and death.

A court may decide that a state procedural ground barring review in a death case is adequate. This satisfies the first part of the preliminary inquiry which precedes the Sykes cause and prejudice test. However,

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163. The adoption of this Article’s recommendation of a per se rule would obviate the need to assign any burden of proof.
164. See, e.g., supra note 17 and accompanying text.
165. 379 U.S. 443 (1965). For the political factors involved in Henry, see supra note 151.
166. See supra note 108 and accompanying text.
167. MICHIGAN Note, supra note 58, at 1422-27.
168. While the Wainright v. Sykes opinion explicitly disavowed some of what had previously been said in Fay v. Noia, 372 U.S. 391 (1963), the Court gave no indication of abandoning what was said in Henry. Indeed, without mentioning the Henry test of “legitimate state interest,” the Court went to great pains in Wainwright to justify the reasonableness of the state’s contemporaneous objection rule. The Wainwright decision thus leaves the status of Henry quite uncertain. In the absence of any specific repudiation, it remains to be seen how far or how consistently the Henry notion of “legitimate state interest with respect to state rules of procedure” will be applied. The Henry case itself arose in a racial and criminal context, but the doctrine does not appear to be so limited.
the second part must still be satisfied: The state ground must also be independent.

IV

THE INDEPENDENCE THRESHOLD

A. The Dimensions of Independence

The existence of an "adequate" state ground, as determined above, will not bar federal review unless that ground also formed an independent basis of the state court's judgment. Like adequacy, the independence concept developed as a direct review doctrine but is also relevant to habeas corpus proceedings. One rationale of the independence doctrine is that a state court decision that rests on independent state law cannot be disturbed by the United State Supreme Court because the Court does not have jurisdiction over matters of state law. For the Court to rule in such a case on any matters over which the Court does have jurisdiction, such as federal law, would be in effect to render a prohibited "advisory opinion."

The independence inquiry entails identifying the actual basis—state or federal—of the state disposition. Such a determination appears simple, but often it is not. A state court opinion may be perceived as unclear, either because the state court discussed both federal and state law or because it discussed neither. The following two sections will explore each of these two paths.

B. Forked Ways: State Court Opinions Mentioning Both State and Federal Law

State courts often refer to both state and federal law in support of their conclusions. The Supreme Court's jurisprudence suggests that a dual reference of this sort may render a state court's opinion "ambiguous." A federal habeas court must resolve such ambiguity in a state share equal status; one threshold is not a threshold to the other. By treating adequacy first, this Article does not imply that this order is theoretically mandated, or even preferable.

172. Cf. 28 U.S.C. § 1652 (1948) (providing that the laws of the several states are "rules of decision" in civil actions in courts of United States except as otherwise required).
173. See supra note 68 and accompanying text.
174. See Minnesota v. National Tea Co., 309 U.S. 551 (1940), reversing National Tea Co. v. State, 205 Minn. 443, 286 N.W. 360 (1939); see also Seid, Schizoid Federalism, Supreme Court Power and Inadequate State Ground Theory: Michigan v. Long, 18 CREIGHTON L. REV. 1 (1984), where the author discusses National Tea and states that "[s]ignificantly the Minnesota Supreme Court had stated: 'If we err in our construction of the latter, [the United States Constitution] our views may be corrected by the Supreme Court, our interpretation of our own constitution is, of course, final.' " Id. at 33 (quoting Reed v. Bjornson, 191 Minn. 254, 257, 253 N.W. 102, 104 (1934)). However, the author also acknowledges that "subject matter jurisdiction has never rested upon self-serving characterizations about the federal nature of a case." Id. at 12 (footnote omitted).
court opinion since the jurisdiction of the federal courts does not extend to reviewing questions of state law. The court will either opt for federal jurisdiction or defer to state court independence.

The federal court should not ignore the nature of the case when analyzing the ambiguity in a state court opinion. It is common for a case to involve a state procedural rule and a federal substantive right. The state court might not rely exclusively on the procedural rule and may reach the merits "just in case." This Article proposes that, in such cases, all ambiguities must be resolved in favor of federal jurisdiction. Even where a state court does not discuss the merits of the federal issue in detail, the federal court should resolve ambiguities in favor of federal jurisdiction. The abhorrence of advisory opinions, part of the rationale for the independent state grounds doctrine, supports this presumption. A decision based upon the federal issue in a case eliminates the state procedural ground and therefore does not risk becoming an advisory opinion.

This Article advocates distinctions not yet specifically recognized by the Supreme Court. However, the Court's opinions in cases in which the state ground was procedural are consistent with this Article's position. In Ulster County Court v. Allen, the Court suggested that ambiguity in a state court opinion should be resolved in favor of federal review. Allen was a habeas case in which the state court opinion relief was arguably ambiguous as to whether its denial of postconviction relief was based on state procedural grounds or federal law. The Supreme Court treated this ambiguity as if the state courts had decided the question of federal law on the merits. Justice Stevens, writing for the Court, examined whether state law could possibly have procedurally barred the federal claim. After determining that a state procedural rule did exist that might bar the claim in the procedural posture in which it was raised, Justice Stevens found that the state law contained exceptions which might have applied to the case. Thus, the ambiguity in the state court's opinion

175. See infra notes 218-22 and accompanying text for a discussion of the problem of alternative holdings. See infra notes 330-34 for examples from Florida.
176. Seid, supra note 174, at 26-27.
178. Id. at 148 n.6.
179. Id. at 151 & n.10. The record also indicated that the state courts did not rely upon a state procedural ground. Id. at 152-53. One student commentator has noted:

The structure of the Court's inquiry implies that if an exception to the relevant state procedural rule might have applied, the rule standing alone will not support the inference that the state court denied relief on a procedural ground. Rather than attempting to determine whether the state court actually applied the exception, the habeas court would presume in favor of habeas jurisdiction.

Michigan Note, supra note 58, at 1410-11 (footnote omitted). This commentator argues that Allen provides a "pattern for habeas review of a single affirmance without opinion." Id. at 1408. See infra notes 223-31 and accompanying text.
might have obscured the fact that the court had excused the procedural default and decided the case on the merits of the federal issue. Stevens concluded that the federal courts were therefore entitled to address the merits of the federal claim.

The Court may, in fact, be overeager to resolve ambiguity in favor of federal jurisdiction. Even in instances where the state court has vindicated federal rights, the Court has chosen to exercise its power to review the decision, and thereby risked issuing an advisory opinion. The most striking example of this is the case of *Michigan v. Long*, in which the Court presumed that it had jurisdiction in the absence of a "plain statement" by the state court of the adequate and independent state grounds for its decision. The Michigan Supreme Court had held that a vehicle search "was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution." Earlier in its opinion, the state court had similarly cited both state and federal law in a footnote. From this, the United States Supreme Court concluded upon direct review that the state decision vindicating the right to be free from unreasonable searches and seizures pursuant to both state and federal law did not rest on an independent state ground.

Writing for the Court in *Long*, Justice O'Conor examined and rejected methods previously used in direct review cases to resolve problems of ambiguity. She deemed it intrusive and inefficient for the Supreme Court to remand the case for clarification by the state court. It was also unsatisfactory for the Court itself to examine the state's law to determine whether state or federal law had been the actual basis of the state court's judgment because the justices are generally unfamiliar with state law. Finally, it would jeopardize the uniformity of federal law if the Court were simply to presume that the state ground was independent and to dismiss the case.

Justice O'Connor reiterated that the Court would refuse to decide cases where there is an adequate and independent state ground out of respect for the independence of the state courts and the desire to avoid rendering an advisory opinion. The *Long* Court therefore required a plain statement that state grounds were the basis for the decision. In the

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182. *Id.* at 471 n.4, 320 N.W.2d at 869 n.4.
183. 463 U.S. at 1043.
184. *Id.* at 1039-40. *But see* Seid, *supra* note 174, 16-25 (arguing that the presumption in favor of federal jurisdiction in *Long* is more "intrusive" than requesting a clarification from state courts).
185. 463 U.S. at 1039.
186. *Id.* at 1040. Justice Stevens, dissenting, favored this approach. *Id.* at 1066-72.
187. *Id.* at 1040-41.
case of ambiguity, the Court adopted a presumption\(^{188}\) that the Court has jurisdiction "when it is not clear from the [state court's] opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law."\(^{189}\)

Long was a direct review case. This Article maintains that, \textit{at a minimum}, its plain statement requirement should apply with full force in the context of habeas corpus as well. However, a putative "plain statement" ought not necessarily be deemed sufficient to bar federal review. The plain statement rule should not become a method by which state courts evade their obligation to vindicate federal rights.\(^{190}\) Long's analysis appears to allow a state court to draft opinions which will either permit or foreclose federal review merely by their language. It would conform with generally recognized legal principles to construe ambiguity in an opinion against its drafter.

Some critics, including Justice Stevens, have viewed Long as an expansion of the Court's power to review and limit state court decisions protecting individual rights.\(^{191}\) There is also a danger that Long's methodology will, in fact, show disrespect for the independence of state courts and may still result in the rendering of advisory opinions.\(^{192}\) Nonethe-

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188. However, one commentator has contended that Long does not "presume" jurisdiction. Schlueter, \textit{Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges}, 59 \textit{NOTRE DAME L. REV.} 1079, 1097 n.113 (1984).

189. 463 U.S. at 1042 (footnote omitted).

190. \textit{See supra} notes 120-22 and accompanying text.

191. \textit{See supra} notes 192-22 and accompanying text.

less, Long can become a means of upholding federal rights. It is usually true that if a state court relies on both state substantive law and federal substantive law to reach a conclusion barring rights, the aggrieved party still has recourse to federal courts. However, such may not be the case if the state court relies on a state procedural rule. If Long applies to state court decisions procedurally barring federal claims, as well as state court decisions substantively extending rights beyond federal constitutional limits, then Long will in fact result in the protection of federal claims that might have been foreclosed under pre-Long theory.

In a recent capital case, Caldwell v. Mississippi,194 the Supreme Court suggested that the Long approach does indeed apply to state court procedural rulings that bar the vindication of federal rights. The Court applied Ulster County Court v. Allen,195 as well as Long, to evaluate the state's claim that a defendant had forfeited a federal claim by failing to assign it as error on appeal. The state supreme court had raised the federal issue sua sponte, addressed it at oral argument, received post-argument briefing, and discussed the claim in its opinion.196 The United States Supreme Court examined the state decision and found that it did not contain a “clear or express indication that ‘separate, adequate, and independent’ state law grounds were the basis” for the state court's judgment.197 Because there was no such clear indication, the Court con-

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193. However, at least one pre-Long case employed a similar analysis in the context of habeas corpus and Sykes. In Booker v. Wainwright, 703 F.2d 1251 (11th Cir.), cert. denied, 464 U.S. 922 (1983), decided a few months before Long, the court quoted from Ulster County Court v. Allen, 422 U.S. 140, analyzed the state court opinion and then concluded that where a state court does not make explicit whether it is considering the federal constitutional provision or its state constitutional counterpart, and cites cases construing both, we will view the state court as having treated the issue as arising under both federal and state law for Sykes purposes. To hold otherwise would be to sanction an imprecision in jurisprudence intolerable in the realm of constitutional issues and to foreclose federal habeas review of federal claims because the language used by the state courts was vague.

Booker, 703 F.2d at 1256.


196. Caldwell, 472 U.S. at 327.

197. Id.
cluded that the procedural default could not have been the basis for the state court's decision.\(^\text{198}\) Thus, the Supreme Court resolved the ambiguity in the state court's opinion in favor of federal jurisdiction.\(^\text{199}\)

C. Blind Alleys: The "Silent" State Court Opinion

A reviewing court may perceive the legal underpinnings of a state court opinion to be ambiguous not only when the state court cites both federal and state law, but also when the state court does not cite any law. The "silent" state court opinion may be a summary affirmance (or, rarely, a summary reversal) without written opinion, or the opinion may be silent on a specific issue.

When confronted with a summary state court affirmance from which direct review is sought, the United States Supreme Court will look to an opinion below. For example, in *Oregon v. Kennedy*,\(^\text{200}\) Justice Rehnquist, writing for the Court, analyzed the Oregon Court of Appeals opinion and concluded that "a fair reading of the opinion below" was that the state court rested its decision solely on federal law.\(^\text{201}\) To an unwary reader, it might appear that the Oregon Court of Appeals was the highest court in Oregon which considered the case. Stevens, dissenting, indicated otherwise. While accepting the "fair reading" of the Oregon Court of Appeals opinion, Stevens found the question "somewhat more difficult" because "the Oregon Supreme Court declined to review the case without explaining its reasons."\(^\text{202}\) Stevens observed that a prior Oregon decision had interpreted the state constitutional protection at issue to be broader than the federal provision. He therefore hypothesized that the Oregon Supreme Court's refusal to review the court of appeals' decision was based on state law.\(^\text{203}\) Stevens, however, did not articulate

\(^{198}\) Id. at 328. The Court stated that its conclusion was substantially bolstered by the fact that the Mississippi court discussed the challenge to the prosecutor's argument at some length, evaluating it as a matter of both federal and state law before rejecting it as unmeritorious. Moreover, this conclusion is consistent with the Mississippi Supreme Court's behavior in other capital cases, where it has a number of times declined to invoke procedural bars. See, e.g., *Williams v. State*, 445 So. 2d 798, 810 (1984) (explicitly citing *Bell* as authority for the proposition that "we have in death penalty cases the prerogative of relaxing our contemporaneous objection and plain error rules when the interests of justice so require"); *Culberson v. State*, 379 So.2d 499, 506 (1979) (reaching merits "only because this is a capital case" where counsel failed to follow Rule requiring prior objections to jury instructions). Given the standards of *Michigan v. Long* and *Ulster County Court*, it is apparent that we have jurisdiction.

\(^{199}\) Cf. *Ake v. Oklahoma*, 470 U.S. 68 (1985) (finding state procedural ground in capital case not independent because procedural rule was defined in terms of federal standards).

\(^{200}\) 456 U.S. 667 (1982).

\(^{201}\) Id. at 671.

\(^{202}\) Id. at 681 n.1 (Stevens, J., dissenting).

\(^{203}\) Id.
how the ambiguity raised by the silence of the Oregon Supreme Court should be resolved.

Seemingly, for a majority of the Court, silence of a state supreme court does not present an ambiguity to be resolved if a lower court opinion exists. However, this approach fails to respect the structure of individual state systems. As Stevens stressed in *Kennedy*, it is always possible that the state's highest court refused to review a decision because it considered that decision to be predicated upon valid state law. This possibility rises to a probability when the highest state court accepts review of a decision, but addresses only some of the issues addressed by the intermediate state court.

In the absence of any state court opinion that relates to the issue on which federal review is sought, some Supreme Court scholars assert that the Court must look to the record to determine whether an independent (as well as an adequate) state ground exists. If such a ground does exist, then state courts will be presumed to have relied upon it. Such a presumption against federal review in the case of ambiguity by silence should not survive the Court's pronouncement in *Long* that state courts make a "plain statement" concerning the independence of the state ground.

Concerning interpretation of the ambiguities inherent in a state court's “silent” opinion, this Article reiterates its recommendations for resolving ambiguities based upon citations of both state and federal law. The Court should take into consideration the nature of the case and should resolve ambiguities in favor of federal review when a state court refuses on procedural grounds to vindicate federal rights.

D. Independence as a Threshold to Review of Capital Cases

As previously discussed, the independence principles of the doctrine

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204. Similarly, in the Court's per curiam opinion in Florida v. Meyers, 466 U.S. 380 (1984), the Court reversed a Florida District Court of Appeal decision which had reversed a conviction as violative of the fourth amendment. Stevens, again dissenting, wrote:

In this case the Florida District Court of Appeal for the Fourth District appears to have made an error. In the exercise of its discretion, the Florida Supreme Court elected not to correct that error. No reasons were given for its denial of review and since the record is not before us, we cannot know what discretionary factors may have prompted the Florida Supreme Court's decision.

Id. at 383 (Stevens, J., dissenting).


However, while the Supreme Court may properly inquire into the lower court record to determine if the federal question was presented below, the record might not disclose whether the lower court decided the merits of the claim or relied upon a procedural default.

206. 463 U.S. at 1042, 1044.
of direct review are applicable to habeas corpus proceedings, and capital cases may reach federal courts by means of direct review or by habeas corpus.

*Michigan v. Long* governs the Supreme Court's direct review of capital cases. In *Caldwell v. Mississippi*, for example, the Court considered whether a procedural default rule relied upon by the Mississippi Supreme Court was an independent state ground where that court had also raised a federal constitutional issue *sua sponte* and had discussed the issue in its opinion. Justice Marshall, writing for the majority, rejected the state's claim that the Court lacked jurisdiction. Quoting language from *Long*, he reiterated the Court's assumption that a state court opinion does not rest on adequate and independent state grounds unless this is clear from the face of the state court opinion.

*Caldwell* was the first of many cases involving a refusal to vindicate federal rights due to a state procedural ground. It typifies capital cases in the federal courts, especially those brought in habeas corpus proceedings. Increasingly, federal courts must determine whether a state procedural ground is independent. Again, this Article argues that all ambiguities concerning the independence of the state ground must be resolved in favor of federal jurisdiction when the state ground is procedural. This suggestion has special import in the controversial area of habeas corpus and death penalty jurisprudence where elected state court officers might simultaneously attempt to evade Supreme Court review and to insulate the state ground from the political process.

207. *See supra* notes 60-111 and accompanying text.
208. *See supra* notes 154-55 and accompanying text.
210. *See supra* notes 180-89 and accompanying text for a discussion of federal jurisdiction in direct review cases.
212. *Id.* at 326-27.
213. *Id.* at 327.
214. *See supra* notes 174-99 and accompanying text.
215. *See, e.g., supra* note 17 and accompanying text.
216. In contrast to life-tenured federal judges, most state judges are either appointed or elected subject to retention election and serve for fixed terms. Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1127 n.81 (1977). In California, state supreme court Chief Justice Rose Bird and two Associate Justices recently lost reconfirmation to the court; an extensive campaign to defeat the justices focused on their voting records in capital cases. L.A. Daily J., Nov. 6, 1986, at 1, col. 6; *id.*, Aug. 26, 1986, at 1, col. 6.

However, this is not to suggest courts deviously inject ambiguities into opinions. For, as Baker also noted:
A state procedural ground is least likely to be independent when a state court discusses both a state procedural ground and a federal ground, but concludes that a decision of the federal issue is supposedly barred by the procedural ground. The state court usually attempts to make it clear, especially in capital cases, that its discussion of the federal ground is "dicta." This composition technique may result in alternative holdings. The alternative holdings issue has not yet reached the United States Supreme Court, and the circuits have reached varying results. For the First, Second, Third, Fourth and Seventh Circuits, a state court's alternative reliance on a procedural ground is sufficiently independent to invoke a Wainwright v. Sykes cause and prejudice analysis. For the Sixth Circuit, the state court's reliance on the procedural ground must be substantial. For the Ninth and Fifth Circuits, the state court must rely exclusively on the procedural default rule. The Eleventh Circuit's jurisprudence on this issue is contradictory.

A state procedural ground is not independent where a state court suggests that it would deny a claim of a federal constitutional right "even if" that claim were not procedurally barred by a state rule. By using the putative denial of a federal substantive right to bolster imposition of a state procedural bar, the state court demonstrates the non-independence of its state procedural ground. A truly independent ground need not be bolstered and need not be justified by reference to its ultimate ineffectuality.
A related problem occurs in the habeas corpus context when a state court is silent. The Supreme Court has not resolved this issue, and the circuits appear to be lost. For example, in *Martinez v. Harris*, a pre-*Long* decision, the Second Circuit considered a summary affirmance, without opinion, by a state court of a procedural default. The Second Circuit formulated a rule based on the state prosecutor's arguments before the state appellate courts: If the state prosecutor only argued the merits, then the federal courts may assume that the state courts relied only on the merits; if the state prosecutor relied solely on procedural default, then the state courts will be presumed to have based their decision on default; if the prosecutor argued in the alternative, then the federal courts may assume that the state court did not reach the merits—even if the state court possessed discretion to do so—unless the state court explicitly declined to apply its procedural default rule. The Fifth Circuit relies upon tautologies in determining whether a state court has based its decision upon a procedural default. Other courts have cited *Martinez* without reference to the intervening decision in *Long*. Such reasoning may have made sense prior to *Long*, but it should not survive *Long*’s "plain statement" rule.

A federal court may legitimately consult the state court record to determine whether the federal question was raised in the state court. However, *Long* suggests that the record in such a case cannot determine if the federal question was decided by the state courts, given the plain statement requirement. As the *Long* Court noted, it is "important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by [the Supreme] Court of the validity under the

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224. Id. at 54-55.
225. The Fifth Circuit recently reiterated its criteria:
Where the state court is silent as to its reason for denying relief, the absence of reliance on an available procedural ground does not mandate a conclusion that the decision was not based on procedural grounds. Likewise, the mere availability of a procedural ground does not compel a conclusion that this ground formed the basis for the court's holding. Where the state courts have been silent on the grounds for their denials of habeas relief, we consider: (1) whether the state court has used the procedural default of contemporaneous objection in similar cases to preclude review of a claim's merits; (2) whether the history of the case suggests that the state courts were aware of the procedural default; and (3) whether the state courts' silence suggest reliance upon procedural grounds or a determination on the merits.

227. But see MICHIGAN Note, supra note 58, at 1413 n.85, 1414 n.87 (rejecting *Martinez* as inconsistent with *Ulster County v. Allen*).
228. See FORDHAM Note, supra note 58, at 1379-81.
229. This, however, is more a matter of insuring exhaustion of state remedies. See supra note 95.
federal constitution of state action."\textsuperscript{230} If this is important when—as in \textit{Long}—the state court is asked to vindicate a federal right, it must be equally—if not more—important when the state court’s enforcement of a procedural default bars habeas corpus review designed to protect these same federal rights.

A state court’s silence is especially problematic in a capital case. The stakes are high and mistakes irreversible, which is why the United States Supreme Court based its approval of state death penalty statutes upon, inter alia, conscientious review by state appellate courts to ensure “consistency, fairness and rationality.”\textsuperscript{231} Where a state court has been silent, all ambiguities should therefore be resolved in favor of federal review.

Once all ambiguities concerning independence are resolved, whether they arise from state procedural law or state substantive law, and whether the state court has referred to federal law or no law, the state ground will be determined to be either independent or not. If the state ground was previously deemed adequate and it is now deemed independent, direct review by the United States Supreme Court is barred. In the habeas corpus context, if the default is procedural, another inquiry must also occur: the “cause” and “prejudice” inquiries of \textit{Wainwright v. Sykes}.\textsuperscript{232} However, a state procedural default rule has many conceptual and practical difficulties in meeting either the adequacy or the independence requirements, and thus should rarely reach the obstacles posed by \textit{Sykes}. The next sections present one state’s procedural default rules as an example of the barriers to crossing these thresholds.

\textbf{V}

\textbf{BEYOND THE THRESHOLD}

\textbf{A. Capital Punishment in Florida}

This Article will now explore the conjunction of three paths: state law, procedural default rules and death penalty jurisprudence. Florida


\textsuperscript{231} Proffitt v. Florida, 428 U.S. 242, 259-60 (1976). While commentators have questioned the quality of the Florida Supreme Court’s review of capital cases, see infra note 238, it is apparent that the United States Supreme Court’s initial approval of Florida’s post-\textit{Furman} capital punishment statute was based, at least in part, on the assumption that state appellate courts would provide careful review in death cases. \textit{Id.}; see also Gregg v. Georgia, 428 U.S. 153, 195, 207 (1976) (noting that the Georgia statute provided “meaningful appellate review . . . to ensure that death sentences are not imposed capriciously or in a freakish manner.”).

The Court later clarified that the Constitution does not require that state appellate courts conduct proportionality review of death sentences, under which the Court inquires whether the penalty is disproportionate to the punishment imposed on others convicted of the same crime. \textit{Pulley v. Harris}, 465 U.S. 37, 45-46 (1984).

\textsuperscript{232} 433 U.S. 72 (1977).
serves as the example of the state law and is an appropriate case study, both from the perspective of capital punishment and from the perspective of procedural default. As to the death penalty, Florida was the first state to enact a revised capital statute\textsuperscript{233} in response to \textit{Furman v. Georgia}'s\textsuperscript{234} invalidation of the death penalty as then administered nationally, including Florida.\textsuperscript{235} Florida's revised statute was one of the post-\textit{Furman} statutes specifically upheld by the United States Supreme Court in the 1976 series of cases that re-introduced the death penalty into the law of the United States.\textsuperscript{236} Between December 8, 1972, the effective date of Florida's post-\textit{Furman} statute, and September 20, 1984, three hundred seventy-six death sentences were imposed in Florida.\textsuperscript{237} By the end of 1986, the Florida Supreme Court had rendered more than 300 capital decisions, usually issuing one or more each week, thus giving Florida one of the most fully developed bodies of death penalty law in the nation.\textsuperscript{238} The United States Supreme Court has frequently used Florida cases to fine-tune the system of capital punishment, and in recent years the Court has granted plenary review to at least one Florida case each Term.\textsuperscript{239} Florida, the first state to commit a non-consensual execution after


\textsuperscript{234} 408 U.S. 238 (1972).

\textsuperscript{235} Although Florida's capital statute was not before the United States Supreme Court in \textit{Furman}, the Florida Supreme Court, in Donaldson v. Sack, 265 So. 2d 499, 501 (Fla. 1972), recognized that \textit{Furman} eliminated the death penalty in Florida until the state's legislature could enact a revised capital statute.

\textsuperscript{236} Proffitt v. Florida, 428 U.S. 242 (1976); see also Gregg v. Georgia, 428 U.S. 153 (1976) (upholding the constitutionality of the Georgia death penalty statute); Jurek v. Texas 428 U.S. 262 (1976) (upholding the constitutionality of the Texas death penalty statute). The statutes of Florida, Georgia and Texas attempted to insure that the death penalty be the result of a conscious decision by establishing procedures to be followed in determining which penalty should be imposed upon someone convicted of a capital felony. The Supreme Court invalidated the statutes in North Carolina and Louisiana, which made the death penalty mandatory upon conviction of specified offenses. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).


Furman, currently leads the nation in the number of persons on death row (267) and, until 1986, led the nation in the total number of executions since the modern resumption of capital punishment (16).

Florida's procedural default rules generally, and in death cases specifically, also provide an appropriate subject of inquiry. It was one of Florida's procedural default rules which was at issue in Wainwright v. Sykes itself. The Sykes Court held, without much elaboration, that Florida's rule provided an adequate and independent state ground. The Court's opinion did not measure the rule against traditional adequacy and independence standards such as the discretion principle. The increasing application of the default rules to bar claims pressed by Florida death row inmates now gives the issue special urgency, as does the active role played by some Florida officials in the effort to circumscribe habeas corpus with new legislation.
This Article's focus is on capital cases, but Florida's general procedural default rules provide the backdrop for the analysis of death penalty defaults. Florida's procedural default rules provide that errors must be preserved for appellate review by being raised at specified times before or at trial; that issues which were or could have been raised on plenary direct appeal to the Florida Supreme Court cannot later be brought for the first time in a state postconviction proceeding; and that all possible postconviction claims must be brought in a single postconviction proceeding. However, there is an important but nebulous exception to the state's default rules: Errors which are "fundamental" may be raised at any time, even if not preserved for review. The Florida Supreme Court has announced that it will reconsider claims previously settled by the earlier affirmance of a conviction or sentence "in the case of error that prejudicially deprives fundamental constitutional rights." Thus, as a lower court has recognized, "fundamental error may be presented for the first time on appeal or collaterally attacked in post-conviction proceedings."

246. A plethora of Florida rules purports to govern when counsel must raise legal issues. For example, a motion to dismiss an indictment must be made "either before or upon arraignment" or "shall be taken to have been waived," unless it falls within specified exceptions. FLA. R. CRIM. P. 3.190(c). Motions to suppress evidence obtained in an unlawful search must be made "before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court may entertain the motion or an appropriate objection at the trial." FLA. R. CRIM. P. 3.190(h)(4). Similarly, motions to suppress confessions or admissions illegally obtained "shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at trial." FLA. R. CRIM. P. 3.190(i)(2).

247. Death sentences are subject to automatic review by the Florida Supreme Court. FLA. STAT. ANN. § 921.141(4) (West 1987).

248. Postconviction proceedings generally are governed by FLA. R. CRIM. P. 3.850. The Florida Supreme Court has often said that postconviction proceedings are "neither a second appeal nor a substitute for appeal"; therefore, the postconviction court will not revisit claims raised on direct appeal and decided adversely to the defendant. McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983). In addition, "any matters which could have been presented on appeal are similarly held to be foreclosed from consideration" in postconviction proceedings. Id. But cf. Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986) ("[I]n the case of error that prejudicially deprives fundamental constitutional rights . . . this Court will revisit a matter previously settled by the affirmance of a conviction or sentence.")], cert. denied, 107 S. Ct. 291 (1986). All postconviction claims must be raised in a single collateral proceeding. FLA. R. CRIM. P. 3.850. This recent amendment to the Florida rules provides, in essence, that issues which could have been raised in an earlier postconviction motion cannot be litigated in a successive motion. The rule is discretionary, because claims not known or reasonably knowable to the inmate at the time counsel files an initial postconviction motion may be raised in a later motion. See State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987) (holding that a claim based on facts discovered after first postconviction motion was denied, but still in the process of appeal, may be brought in successive motion, where inmate attempted to amend first motion as soon as new facts became known); Christopher v. State, 489 So. 2d 22, 24 (Fla. 1986) (successive motion is improper "unless the movant alleges that the asserted grounds were not known and could not have been known to the movant at the time the initial motion was filed") (dictum).

proceedings.\textsuperscript{250}

The fundamental error exception has statutory and common law sources. Florida's evidence code provides that no contemporaneous objection rule "shall preclude [an appellate] court from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge."\textsuperscript{251} The Law Revision Council Note to the evidence statute explained that the purpose of this provision was to "allow appellate courts to raise issues \textit{sua sponte},"\textsuperscript{252} but the Note gave no guidance as to the sorts of error properly deemed fundamental.

Judicial attempts to define the term also provide no guidance and are hopelessly circular. According to the Florida courts, fundamental error is error that "reaches down to the legality of the trial itself;"\textsuperscript{253} "goes to the foundation of the case or goes to the merits of the cause of action;"\textsuperscript{254} is "so prejudicial to the rights of an accused that neither rebuke nor retraction could eradiate its evil influence;"\textsuperscript{255} and involves a violation which "will almost always be harmful, and it will be very difficult for a court to determine when it is not."\textsuperscript{256} In short, courts know fundamental error when they see it—and they see it fairly often.

The Florida Supreme Court has found fundamental error in a wide variety of cases. These include:

- a variety of sentencing violations: failure to adhere to juvenile sentencing requirements,\textsuperscript{257} failure to make the specific findings of fact required by the habitual offender sentencing statute,\textsuperscript{258} and improper retention by the trial court of jurisdiction over sentencing;\textsuperscript{259}
- failure of an indictment or an information to allege one or more of the essential elements of the crime;\textsuperscript{260}

\textsuperscript{251} FLA. STAT. ANN. § 90.104(3) (West 1979).
\textsuperscript{252} Law Revision Council Note—1976, FLA. STAT. ANN. § 90.104(3) (West 1979).
\textsuperscript{253} Hamilton v. State, 88 So. 2d 606, 607 (Fla. 1956) (Special Division B).
\textsuperscript{254} Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970).
\textsuperscript{255} Palt v. State, 112 So. 2d 380, 385 (Fla. 1959).
\textsuperscript{256} Demps v. State, 416 So. 2d 808, 810 (Fla. 1982) (quoting United States v. Hammond, 598 F.2d 1008, 1013 (5th Cir. 1979)).
\textsuperscript{257} State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984). The court in Rhoden reasoned that "[t]he purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge," \textit{id.}, and because counsel cannot challenge such errors contemporaneously. \textit{Id.} Such reasoning may be inapplicable to the advisory jury sentencing stage of Florida's capital sentencing procedure, though it would be apposite to errors in the judge's sentencing findings.
\textsuperscript{258} Walker v. State, 462 So. 2d 452, 454 (Fla. 1985).
\textsuperscript{259} State v. Walcott, 472 So. 2d 741, 742 (Fla. 1985); State v. Brumley, 471 So. 2d 1282, 1282 (Fla. 1985).
\textsuperscript{260} State v. Gray, 435 So. 2d 816, 818 (Fla. 1983).
— jury instructions on—and conviction for—a non-existent crime,\textsuperscript{261} or conviction for a crime “totally unsupported by the evidence”;\textsuperscript{262} 
— failure to instruct on the elements of the felony underlying a felony murder charge,\textsuperscript{263} or to define “premeditation.”\textsuperscript{264}

The Florida intermediate courts of appeal have found fundamental error in cases where:

— improper jury deadlock instructions required the jury to reach a unanimous verdict and admonished them to consider the expense of trial;\textsuperscript{265} 
— the jury was improperly instructed that the defendant had a duty to retreat before acting in self-defense;\textsuperscript{266} the prosecutor made an improper remark to the jury, stating that the defendant had “manipulated the judicial system and made ‘chumps’ out of the jury and judicial officers”;\textsuperscript{267} 
— jury instruction and prosecutorial argument improperly told the jury that they could convict the defendant even if the crime occurred at a time outside the statement of particulars;\textsuperscript{268} 
— the error was a “violation of [a] defendant’s substantive constitutional double jeopardy rights”;\textsuperscript{269} 
— a capital defendant claimed that his waiver of a twelve-person jury was invalid.\textsuperscript{270}

Florida’s fundamental error exception is no less well-defined or evenly applied, however, than the plain error rules of most states.\textsuperscript{271} For

\textsuperscript{261} State v. Ervin, 435 So. 2d 815, 815 (Fla. 1983); State v. Sykes, 434 So. 2d 325, 326 (Fla. 1983).
\textsuperscript{262} Troedel v. State, 462 So. 2d 392, 399 (Fla. 1984). Troedel appealed his convictions for murder and his death sentences. He had also been convicted of two counts of burglary, although he had committed only one crime. The court sua sponte reversed one of these convictions, finding the double conviction constituted fundamental error.
\textsuperscript{263} Franklin v. State, 403 So. 2d 975, 976 (Fla. 1981); State v. Jones, 377 So. 2d 1163, 1165 (Fla. 1979); Robles v. State, 188 So. 2d 789, 793 (Fla. 1966).
\textsuperscript{264} Anderson v. State, 276 So. 2d 17, 19 (Fla. 1973).
\textsuperscript{265} Rodriguez v. State, 462 So. 2d 1175, 1177-78 (Fla. Dist. Ct. App.), rev. denied, 471 So. 2d 44 (Fla. 1985).
\textsuperscript{266} Carter v. State, 469 So. 2d 194, 195-96 (Fla. Dist Ct. App. 1985). The court reasoned that where a trial judge “gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant’s only defense, it is fundamental error and highly prejudicial to the defendant. Failure to give a complete and accurate instruction is fundamental error, reviewable in the complete absence of a request or an objection.” \textit{Id.} at 196.
\textsuperscript{267} Jones v. State, 449 So. 2d 313, 314 (Fla. Dist. Ct. App.), rev. denied, 456 So. 2d 1182 (1984). The court did not explicitly find fundamental error; rather, the court reasoned that “in view of the weak case presented against Jones we cannot view the prosecution’s improper remarks as harmless.” \textit{Id.} at 314.
\textsuperscript{268} Brown v. State, 462 So. 2d 840, 843 n.4 (Fla. Dist. Ct. App. 1985) (“[P]rosecutorial error . . . will be reversible where the result is to deny a defendant a fair trial, or where the error is so basic as to never be harmless; that is, the error is fundamental.”) (citations omitted).
\textsuperscript{271} States which have fundamental error, plain error, or substantial error rules include Arizona, see, \textit{e.g.}, State v. Minecy, 130 Ariz. 389, 396-97, 636 P.2d 637, 644-45 (1981), cert. denied, 455 U.S. 1003 (1982); Connecticut, see, \textit{e.g.}, State v. McKenna, 11 Conn. App. 122, 125, 525 A.2d
example, a Texas judge writing about that state’s fundamental error rule pointed to inconsistencies in applying the rule to jury instruction cases and concluded that “[a]ny doctrine that plays as much havoc with convictions as this one does leads one to suspect that there must be something radically wrong, either with the Texas Court of Criminal Appeals’ perception of fundamental error as it relates to the [jury] charge or with the way in which our trial courts are going about instructing the jury or both.”

Similarly, a commentator on the Illinois statutory plain error rule noted that cases with virtually identical fact patterns may result in disparate relief. Pennsylvania’s fundamental error rule yielded inconsistent results before it was judicially abolished.

The ad hoc application of Florida’s fundamental error exception means that in essence Florida’s procedural default rules are discretionary. The rules themselves foster this interpretation: Several are discretionary by their own terms, and at least one, the rule governing challenges to indictments, explicitly excepts “fundamental grounds” from its timing requirements.

In the non-capital context, a rule’s ad hoc character may not infect procedural default with fatal discretion. However, this is not true in the


Iowa does not have a plain error rule, State v. Yaw, 398 N.W. 2d 803, 805 (Iowa 1987), while Pennsylvania abrogated its fundamental error rule in 1974, Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974). Louisiana does not have a plain error rule, except in capital cases. See note 280 infra.

272. Braswell, Fundamental Error in the Court’s Charge to the Jury in Texas Criminal Cases, 46 TEX. B.J. 409, 416 (1983). Among the cases considered by Braswell are Olveda v. State, 625 S.W.2d 13 (Tex. Ct. App. 1981), rev’d, 650 S.W.2d 408 (Tex. Crim. App. 1983), and Rohlfing v. State, 612 S.W.2d 598 (Tex. Crim. App. 1981). In Olveda, the court held that failing to instruct the jury on the statutory definition of “in the course of committing theft” was fundamental error. 625 S.W.2d at 14-15. In Rohlfing, the court held that an identical failure to instruct was not fundamental error. 612 S.W.2d at 602; see also Braswell, The Texas Approach to Fundamental Error in the Jury Criminal Charge, 48 Tex. B.J. 278, 279 (1985) (arguing that Texas’ fundamental error rule “ignores the element of actual harm in the context of the whole case”).


275. FLA. R. CRIM. P. 3.190(c). Note that neither the rule nor its accompanying Committee Notes define “fundamental grounds,” although the rule does provide that the defendant may move to dismiss based on any of four listed grounds: (1) that the defendant has been charged with an offense for which he has been pardoned; (2) that the indictment places the defendant in double jeopardy; (3) that the defendant has previously been granted immunity for the charged offense; (4) that there are “no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant.” Id.
capital context, where the central difference between the unconstitutional pre-
Furman statutes and the constitutional post-Furman statutes is the limitation of discretion within principled bounds. Generally, neither pro-
cedural default rules nor fundamental error exceptions distinguish
between capital and non-capital cases.\footnote{276}

In the next section, this Article examines the procedural default principle most important to death row inmates; the rule that excludes from collateral review any claims which were or could have been raised on direct appeal. This rule is important because many death-sentenced prisoners, represented by new counsel, present issues for the first time in postconviction litigation. If the federal court defers to the state proce-
dural default, the inmate loses. The question, then, is whether, for exam-
ple, Florida's application of its "raised or could have been raised" rule to
bar such claims constitutes an adequate and independent state ground,
thereby qualifying for the Sykes cause and prejudice test.

\textbf{B. Application of Procedural Default Rule—Never Adequate}

A proper assessment of a state appellate court's discretionary appli-
cation of its postconviction procedural default rule in capital cases
requires an appreciation of the broad scope of the court's review on
direct appeal. This broad scope allows a court to exercise discretion in
determining those claims which have been or could have been raised.

This section will again use Florida statutes and case law as example.
The Florida Rules of Appellate Procedure explicitly grant the Florida
Supreme Court a broader scope of review in capital cases:

The court shall review all rulings and orders appearing in the record
necessary to pass upon the grounds of an appeal. In the interest of jus-
tice, the court may grant any relief to which any party is entitled. In
capital cases, the court shall review the evidence to determine if the inter-
est of justice requires a new trial, whether or not insufficiency of the evi-
dence is an issue presented for review.\footnote{277}

Case law also demonstrates that the Florida Supreme Court exercises its
broadest scope of review in capital cases. It uses this discretion to forgive
trial level procedural defaults. For example, in \textit{Elledge v. State},\footnote{278}
the court referred to its "special scope of review" in death cases in excusing
the failure of the appellant's trial counsel to object to certain

\footnote{276. However, in 1987, the Florida Supreme Court adopted a default rule applicable solely to
capital cases. It provides that a failure to initiate postconviction proceedings within 30 days
following the setting of an execution date constitutes a procedural default unless the late filing
resulted from newly discovered evidence or the constitutional right claimed was established after the
time period expired and was held to apply retroactively. \textit{In re Florida Rules of Criminal Procedure},


278. 346 So. 2d 998 (Fla. 1977).}
The Florida Supreme Court’s discretion has not gone unnoticed by the federal courts. Considering a capital conviction on habeas corpus review, the United States Court of Appeals for the former Fifth Circuit in 1982 observed that “established [Florida] law” provided that “in death cases, the Florida Supreme Court exercises a special scope of review enabling them to excuse procedural defaults.”

While it might not be entirely clear what the Florida Supreme Court does when it reviews a capital case on direct appeal, it is clear that the court possesses broad discretion. The Florida Supreme Court recently reaffirmed the wide scope of its review in capital cases. In Davis v. State, the court held that it can consider all capital sentencing issues on direct appeal, whether or not the defendant has raised them. Although the appellate attorney in Davis made a deliberate choice not to challenge the death sentence, the Florida Supreme Court held that Florida’s capital statute “directs this Court to review both the conviction and sentence in a death case, and we will do so here on our own motion.”

When this case returned to the Florida Supreme Court on collateral review, the court affirmed the denial of postconviction relief and observed that it had previously reviewed the imposition of the death sen-

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279. Id. at 1002.


281. Skene, supra note 238, at 291.
283. Id.
284. Id. at 71.
tence "on our own as statute [sic] requires that we do."^{285}

Davis is not the sole example of the Florida Supreme Court's willingness to review the propriety of the death sentence, even when counsel does not raise the issue.^{286} Another example of the special attention paid by the Florida Supreme Court to appeals in capital cases is Rose v. State,^{287} in which the court stated that a six-to-six jury split on whether to recommend life imprisonment or death is a life recommendation rather than a hung jury. In Rose, the sentencing jury, after deliberating for some time, advised the court that they were tied six to six and that no one would change his or her mind; the jury requested further instruction. The trial judge responded by giving the jury an "Allen charge,"^{288} and the jury returned a seven-five recommendation for death shortly thereafter.^{289} The Florida Supreme Court reversed the death sentence and remanded for resentencing, holding that the proper action for the trial judge to have taken when confronted by the jury's request for further instructions would have been to instruct the jury that it was not necessary to have a majority reach a sentencing recommendation of life imprisonment, because "if seven jurors do not vote to recommend death, then the recommendation is life imprisonment."^{290} Although defendant challenged the "Allen charge" on appeal, he did not raise the rule adopted by the Court.^{291}

The court's discretion to review procedurally defaulted claims such as those not raised by the parties is not limited to cases on direct review but also extends to claims brought for the first time in a postconviction proceeding in state court. The Florida Supreme Court has exercised its discretion inconsistently in this area. When confronted with two cases presenting identical claims in identical procedural postures, the court may reach the merits in one case but not in the other.

The Florida Supreme Court's treatment of the claim that Florida's death penalty is applied in a racially discriminatory manner is an example of the court's inconsistency. As early as 1979, the Florida Supreme


^{286} See Jacobs v. State, 396 So. 2d 713, 717 (Fla. 1981) (In vacating the death penalty stating that "although this Court is not favored with any help from either counsel on the issue of the imposition of the death penalty, we must review the propriety of the death sentence"); see also Armstrong v. State, 429 So. 2d 287, 289 (Fla.), cert. denied, 464 U.S. 865 (1983).


^{288} See Allen v. United States, 164 U.S. 492 (1896). An Allen jury deadlock instruction, also referred to as a "hammer" or "dynamite" charge, encourages jurors to resolve their differences and reach a conclusion.

^{289} Rose, 425 So. 2d at 523.

^{290} Id. at 525.

^{291} Briefs and tapes of oral argument on file with authors. The North Carolina Supreme Court, in State v. Smith, 320 N.C. 404, 358 S.E.2d 329, 339 (1987), reached a similar conclusion: The court found the instruction given the jury to be in error and ordered a new sentencing proceeding despite counsel's failure to raise the issue.
Court held that such a claim "can properly be raised . . . in a proceeding for post-conviction relief." Yet in two later cases, the court barred postconviction claims raising this issue. Most recently, however, the court stated that it had consistently held that a "claim of arbitrary and capricious imposition of the death penalty because of racial discrimination should be presented in a motion for post-conviction relief." Interestingly, prior to the Florida Supreme Court's most recent enunciation of its "consistent" policy, the United States Court of Appeals had noted that although the Florida Supreme Court had found petitioner's postconviction claim of racial bias to be procedurally barred, such a claim was properly placed before the Florida Supreme Court according to that court's 1979 precedent. The federal appellate court based its jurisdiction upon this analysis.

The Florida Supreme Court's inconsistent record extends to other postconviction challenges. The court has been equally contradictory in cases concerning postconviction challenges to:

- death penalty phase jury instructions;
- the death penalty as inappropriate absent premeditation;


295. Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985), vacated on other grounds, 106 S. Ct. 1964 (1986). The Eleventh Circuit stated:

Griffin argues that the death penalty in Florida is discriminatorily imposed based on the race of the victim, and that the district court erred in denying him a hearing on this claim. The state habeas corpus court and the Supreme Court of Florida found that this issue was barred by procedural default. On federal habeas corpus, however, the district court found that Henry v. State of Florida dictated a different result. We agree.

In Henry, the Supreme Court of Florida held that a petitioner's contention that the death penalty is unconstitutionally applied in Florida "can properly be raised . . . in a proceeding for post-conviction relief." Griffin's claim of unconstitutional application of the death penalty was properly placed before the state courts in Griffin's petition for post-conviction relief.

760 F.2d at 1517-18 (citations omitted).

296. In Ford v. State, 407 So. 2d 907, 908 (Fla. 1981) and Thomas v. State, 421 So. 2d 160, 162 (Fla. 1982), the Florida Supreme Court held that challenges to penalty phase jury instructions could not be raised in a state postconviction motion because they could have been raised on direct appeal; see also Funchess v. State, 449 So. 2d 1283, 1284 (Fla. 1984); Songer v. State, 419 So. 2d 1044, 1046 (Fla. 1982);. However, in Riley v. State, 433 So. 2d 976, 978-79 (Fla. 1983) and Straight v. Wainwright, 422 So. 2d 827, 831 (Fla. 1982), the court—without discussion of procedural default—reached the merits of identical jury instruction claims in postconviction proceedings.

297. In Funchess v. State, 449 So. 2d 1283, 1284 (Fla. 1984), the defendant was barred from raising a postconviction claim that the death penalty was inappropriate in his case because he had not been convicted of premeditated murder, on the ground that the claim should have been raised on direct appeal. However, in Hall v. State, 420 So. 2d 872, 874 (Fla. 1980), the court discussed and ruled upon the merits of this claim without reference to procedural default.
These examples demonstrate that Florida's procedural default rule is clearly discretionary. Further, the Florida Supreme Court's discretion appears unbounded. The only principle that can fairly be derived from the application of this discretion is that the court applies it on an ad hoc basis.

Theoretically, principles do exist which might account for the court's exercise of discretion, but upon closer examination such principles prove to be, themselves, ill-defined. For example, a procedural default rule should not block a claim based on a landmark change of the law. The Florida Supreme Court has recognized this; but, as the court has stated, "only major constitutional changes of law will be cognizable in capital cases," citing Gideon v. Wainwright as a "prime example" of such a change. Another such landmark change occurred in Enmund v. Florida, where the United States Supreme Court reversed the Florida Supreme Court's holding that death may be imposed upon one who neither killed, intended to kill nor contemplated that death would occur. The Florida Supreme Court found that this constituted a sufficient jurisprudential upheaval to allow principled forgiveness of procedural defaults.

It might also be argued that "plain error" is a principle sufficient to ground the exercise of judicial discretion. This Article rejects the notion that the circular definitions of "fundamental" or "plain" error are sufficient to support the court's discretionary ventures. One student commentator has argued that a state appellate court's discretion to recognize "plain error" appearing on the face of the record is not the sort of ad hoc discretion that compels a finding of inadequacy. The power of state courts to notice errors which are fundamental, or basic, or which affect substantial rights, is, the argument continues, the sort of reasoned

298. In Goode v. State, 403 So. 2d 931, 932 (Fla. 1981), the court refused to consider a postconviction claim that the trial court had improperly relied upon an invalid aggravating circumstance. Yet in Demps v. State, 416 So. 2d 808, 809 (Fla. 1982), the court reached the merits of the claim of use of invalid aggravating circumstances. The court did not discuss the procedural bar as to this issue, despite an earlier discussion of the bar as to other claims in the case. And in Ruffin v. State, 420 So. 2d 591, 594 (Fla. 1982), the court discussed the merits of a postconviction claim that an aggravating circumstance was improperly found without discussion of procedural default.


300. 458 U.S. 782 (1982).

301. See Tafero v. State, 459 So. 2d 1034 (Fla. 1984) (Enmund was sufficient change in law under Witt).

302. See supra notes 249-71 and accompanying text.

303. MICHIGAN Note, supra note 58, at 1419-22.

304. Id. at 1410-11 n.77.
elaboration according to articulated principles that brings the discretion within the bounds of law.\textsuperscript{305} Even if this argument is correct, and this Article contends that it is not,\textsuperscript{306} the plain error approach must require some categorical narrowing. The Florida cases previously discussed reveal no such narrowing. The same jury instructions or racial discrimination claims are deemed cognizable in one instance, not cognizable in the next, and then cognizable again in the third.\textsuperscript{307}

This ad hoc discretion is dangerous because the Florida courts, as well as other state courts, may use procedural default rules to evade the enforcement of federal rights.\textsuperscript{308} Such a fear is not unfounded. There are compelling arguments that the Florida Supreme Court has previously evaded the enforcement of federal rights, both in the context of applying \textit{Lockett v. Ohio}\textsuperscript{309} and in the context of the so-called "Brown"

\textsuperscript{305} \textit{Id.} at 1420.

\textsuperscript{306} The cases cited by the commentator support this Article's contention. \textit{See id.} at 1410-11 n.77.

\textsuperscript{307} \textit{See supra} notes 292-96.

\textsuperscript{308} The historic concern has always been that state courts will be less protective of federal rights than federal courts.

\textsuperscript{309} 438 U.S. 586 (1978). In \textit{Lockett}, the Court held that the capital sentencer must be free to consider any relevant aspects of the character and background of the defendant in mitigation, even if such aspects are not listed as mitigating in the capital statute. \textit{Id.} at 604-05.

Two years before \textit{Lockett}, in \textit{Cooper v. State}, the Florida Supreme Court had explicitly declared that the state's death penalty statute did indeed restrict mitigating factors to those set forth in the statute. 336 So. 2d 1133, 1139 & n.7 (Fla. 1976), \textit{cert. denied}, 431 U.S. 925 (1977). At the penalty phase of his capital trial, Cooper had proffered his stable employment history as mitigating evidence relevant to his character. The sentencing judge excluded the evidence. The Florida Supreme Court held that the trial judge properly precluded the presentation and consideration of the proffered mitigating evidence. The opinion emphasized that the "sole issue" in a penalty trial under the statute is "to examine in each case the itemized aggravating and mitigating circumstances." \textit{Id.} at 1139 (emphasis added). The court reasoned that allowing nonstatutory mitigating factors to be presented and considered would make the statute unconstitutional, as it would "threaten[] the proceeding with the undisciplined discretion condemned in \textit{Furman v. Georgia}, 408 U.S. 238 (1972)." \textit{Cooper}, 336 So. 2d at 1139. The court pointed to the statutory limit on consideration of mitigating circumstances—those "\textit{as enumerated in subsection (7)}"—as showing the intent to avoid such arbitrariness. \textit{Id.} at 1139 n.7 (emphasis in original). The court emphasized that these were words of "\textit{mandatory limitation}," \textit{id.}, thus leaving no doubt as to its interpretation of the statute. The court commented that "employment is not a guarantee that one will be law-abiding. . . . In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty . . . and we are not free to expand that list." \textit{Id.} at 1139.

The United States Supreme Court's decision in \textit{Lockett} was announced in June, 1978. In December, 1978, the Florida Supreme Court in \textit{Singer v. State}, 365 So. 2d 696 (Fla. 1978) (opinion on rehearing), \textit{cert. denied}, 441 U.S. 956 (1979), repudiated its earlier construction of the statute, thus disavowing its position in \textit{Cooper}. Singer had argued that the court's decision in \textit{Cooper} had stated explicitly that mitigating circumstances were limited to the factors enumerated in the statute and thus that the statute violated \textit{Lockett}. However, the Florida Supreme Court explained that \textit{Cooper} should not be read as limiting mitigating circumstances but merely as affirming the trial judge's customary right to exclude irrelevant evidence. The court then explicitly construed the mitigating circumstances provision as nonexclusive, and explained that the language of the statute
The Eleventh Circuit has twice rejected claims by death row inmates that Florida's "raised or could have been raised" procedural default rule is discretionary and arbitrary and, therefore, inadequate. In *Hall v. Wainwright*, the Eleventh Circuit mischaracterized the petitioner's and the interpretation given it by the courts indicated an intent to permit the sentencer to consider any mitigating circumstances proffered by the defendant. *Id.* at 700.

Commentators have noted that in *Songer* the Florida Supreme Court was among those state courts that construed their statutes "in such a way as to evade the effect of Lockett. . . . [The court] ignored statutory language and earlier case law to construe [an] apparently exclusive statutory roster[] as nonexclusive and . . . then applied the new construction[] retroactively to validate sentences imposed under the previous, unconstitutional [construction of its statute]." Hertz and Weisberg, *In Mitigation of the Penalty of Death*, 69 CALIF. L. REV. 317, 351 (1981). After analyzing the pre-*Songer* Florida law, the commentators concluded that the *Songer* case is "so lacking in 'fair and substantial' support in state law as to be [a] subterfuge[] or pretext[] for evading a federal claim." *Id.* at 356. See also *Dix*, *supra* note 238, at 138 (criticizing the Florida Supreme Court for its "unwillingness in *Songer* to acknowledge that *Cooper* was wrongly decided and to rectify that error").

Significantly, the Florida legislature revised its death penalty law shortly after the *Songer* decision to bring it into conformity with what the *Songer* court said had been the legislative intent all along. 1979 Fla. Law ch. 79-353 § 1 (amending FLA. STAT. ANN. § 921.141 (2)(b) & (3)(b) (West 1985)); see *Herz and Weisberg*, *supra*, at 355 & n.185.

The "Brown issue" involved the Florida Supreme Court's *ex parte* solicitation of psychiatric information on death row inmates; it derives its name from the class action habeas corpus proceeding *Brown v. Wainwright*, 392 So. 2d 1327 (Fla. 1981). One commentator has aptly described the issue:

Perhaps the most bizarre episode in the twelve years of capital review was the court's solicitation of psychological screening reports on capital defendants. The reports, prepared by the Florida Department of Corrections as part of its routine procedures for handling new prisoners, wound up in the court files of at least twenty-five capital defendants between 1976 and 1978. The information had not been available to the trial judge and was not disclosed to defense counsel on appeal. The material was fortuitously discovered after it was mentioned at oral argument.

. . .

Subsequently, 123 death row inmates at various stages of their appeals filed a class-action petition for habeas corpus. Those proving that their profiles had been obtained complained that use of the profiles violated the U.S. Supreme Court's ruling in *Gardner v. Florida* which recognized a defendant's right to see and challenge information used against him at sentencing. Petitioners who could not demonstrate that their profiles had been obtained complained that the use of the profiles in some cases tainted the overall fairness of capital sentencing and required the court to invalidate all death sentences in Florida. The case came to be known as *Brown v. Wainwright*.

As one might expect, the court ruled in its own favor. The cornerstone of the opinion was its decision that *Gardner* applied only to trial judges' "imposition" of a sentence and not to an appellate court's "review" of that decision. In contrast with the zealous tone of *Dixon*, the court suggested that its review was quite limited. Indeed, the court suggested that it mattered not whether it had reviewed the illicit material, because its function was not to "reweigh" evidence, but merely to look for "procedural regularity" and proportionality.


claim as an argument that “the Supreme Court of Florida does not enforce its procedural default rules in capital cases.” In fact, the claim was that Florida’s procedural default rule was applied inconsistently, with no principled basis to distinguish application from non-application. Having misstated the claim, the Eleventh Circuit could easily reject it by correctly concluding that the Florida Supreme Court does indeed enforce its procedural default rules in capital cases.

The Eleventh Circuit treated a similar claim somewhat more accurately in *Booker v. Wainwright*. The court in *Booker* accurately recognized the petitioner’s argument that Florida’s enforcement of the procedural rule was haphazard and thus inadequate under *Sykes*. The court then asserted—incorrectly—that the argument overlooked “our contrary opinion in *Hall v. Wainwright*.” This mischaracterized the court’s own precedent: *Hall* stands only for the unremarkable proposition that the Florida Supreme Court sometimes enforces its procedural default rules; it is not authority for denying that the Florida court enforces those rules haphazardly. Nonetheless, the *Booker* court proceeded to address the petitioner’s claim of arbitrariness. In its meager analysis, the court merely claimed that cases cited to demonstrate the state’s arbitrariness were “irrelevant” since some of them failed to state claims for which relief could be granted “as a matter of state law.”

This analysis misses the point. It does not matter that the merits of the claims failed as a “matter of state law.” Rather, the problem is that in some cases the Florida courts reached the merits, while in other identically situated cases raising identical claims the state courts applied the procedural default rule to bar consideration of the merits.

Subsequently and rather curiously, in *Adams v. Dugger*, the Eleventh Circuit, without citing either *Hall* or *Booker*, seemed to recognize that Florida’s “raised or could have been raised” rule is inconsistently applied and that such irregularity renders the rule inadequate. Adams

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312. *Id.* at 777.
314. *Hall*, 733 F.2d at 777.
316. *Id.* at 1379.
317. See Brief for Appellant at 34 n.24, *Booker v. Wainwright*, 764 F.2d 1371 (11th Cir. 1985) (No. 84-3306) (citing *Hall*, noting that “Mr. Booker acknowledges that the Florida Supreme Court does enforce a procedural bar rule in many capital cases; it did so in his case and in others discussed herein,” but claiming that “the Florida Supreme Court applies that procedural bar rule in a haphazard and arbitrary manner, applying it in some cases and not applying it in others in the same procedural posture”).
318. *Booker*, 764 F.2d at 1379.
319. *Id.*
320. 816 F.2d 1493 (11th Cir. 1987) (on rehearing). The original panel opinion is reported at 804 F.2d 1526 (11th Cir. 1986).
had sought postconviction relief in the state courts, claiming that the trial judge had misled the advisory jury concerning their role in the sentencing process.\textsuperscript{321} The lower court denied relief, and the Florida Supreme Court affirmed, apparently based on Adams' failure to raise the issue on direct appeal.\textsuperscript{322} The federal district court denied the habeas petition on similar grounds.\textsuperscript{323} The Eleventh Circuit reversed, holding that the legal basis for Adams' claim was not reasonably available until after the initiation of the prior postconviction proceedings.\textsuperscript{324} Noting that claims based on fundamental errors or changes in the law can be brought in state postconviction proceedings, the Eleventh Circuit concluded that the Florida Supreme Court erred either in misunderstanding the federal substantive claim, or in applying the procedural bar inconsistently.\textsuperscript{325}

This case study has shown that the Florida courts apply their procedural default rules in an ad hoc, unprincipled manner. A recognition of this fact could have far-reaching consequences in capital cases, as in all cases subject to state or federal habeas corpus review. In federal courts, such a recognition would compel a finding that Florida's procedural default rule cannot constitute an adequate state ground, thereby obviating the need to examine the state ground's independence or to engage in a \textit{Wainwright v. Sykes}\textsuperscript{326} analysis. Thus, federal courts could consider the merits of all claims seeking vindication of federal rights where the state court has refused to hear the claim by arbitrarily imposing a procedural bar.\textsuperscript{327} While this conclusion may sound radical, it is actually less threatening to federalism's delicate balance than is a state's continued ad hoc application of discretion which results in the denial of important federal rights.

\textbf{C. Application of Procedural Default Rules in Capital Cases—Erratically Independent}

This Article contends that decisions to apply discretionary proce-

\begin{itemize}
  \item \textsuperscript{321} \textit{Adams}, 804 F.2d at 1528; see \textit{Caldwell v. Mississippi}, 472 U.S. 320, 328-29 (1985) ("[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.").
  \item \textsuperscript{322} \textit{Adams v. State}, 484 So. 2d 1216, 1217 (Fla.) \textit{cert. denied}, 106 S. Ct. 1505 (1986).
  \item \textsuperscript{323} "The district court found that all of the claims raised in Adams' second petition were barred, either because of procedural default in the state courts or because raising them in this second habeas petition constituted an abuse of the writ." \textit{Adams}, 804 F.2d at 1528. The Eleventh Circuit's analysis removed both procedural obstacles to the consideration of the merits of the \textit{Caldwell} claim.
  \item \textsuperscript{324} \textit{Adams}, 816 F.2d at 1497.
  \item \textsuperscript{325} \textit{Id.}
  \item \textsuperscript{326} 433 U.S. 72 (1977).
  \item \textsuperscript{327} \textit{See} \textit{Collins}, supra note 191; \textit{Seid}, supra note 174.
\end{itemize}
dural default rules to foreclose capital claims are generally inadequate, and thus entitled to no deference in federal court. Adoption of this position, of course, forecloses the need to determine whether or not state courts rely on the procedural ground as an independent basis of the decision. However, even if a federal court concludes that a procedural ground is adequate in a given case, it must still analyze the state court opinion to determine whether or not the procedural ground is independent. As Florida capital cases demonstrate, the independence of the procedural ground occurs only erratically.

As previously discussed, the independence inquiry is most complicated when the state court engages either in a discussion of both the procedural grounds and the merits (alternative holdings) or in a discussion of neither the procedural grounds nor the merits (summary affirmance). Although the Florida Supreme Court sometimes finds dural default without discussing the merits, more often the court hedges its default rulings with opinions concerning the merits. Frequently, the Florida Supreme Court takes an “even if” approach. A typical example is Groover v. State, where the court denied postconviction claims because they should have been raised on direct appeal, and then added: “Even if not procedurally barred, we find these claims devoid of any merit.” Similarly, the Florida Supreme Court in Smith v. State, first held that a claim was not properly presented, and then observed that “even if [the] claim had been preserved and even if we were to consider the merits of this claim, we would have to hold that it is insufficient as a matter of law.”

Such examples from the Florida Supreme Court’s capital cases demonstrate the basis for the fear that elected state court officers might
simultaneously attempt to evade federal review and to insulate the state ground from the local political process. By using the putative denial of a substantive right to bolster the imposition of a state procedural bar, the state court demonstrates the non-independence of its state procedural bar. Thus, this Article advocates a rule that whenever a state court mentions both the procedural bar and a substantive right, the procedural bar should be held not independent.

Although Florida does not generally practice summary affirmance in capital cases, at least on direct review, Florida Supreme Court opinions in capital cases often do not address all the claims presented. In these cases, courts attempting to determine the grounds for ignoring a petitioner's claim encounter the problem of "silence" discussed previously.

The approach adopted by the Second Circuit in *Martinez v. Harris* cannot be transplanted into Florida's discretionary procedural default rule. The *Martinez* approach assumes that the state court applies a state procedural default rule consistently. The Eleventh Circuit, in *Campbell v. Wainwright*, appeared to recognize that *Martinez* presupposed an established state procedural rule. However, as this Article has argued, there are no clearly established Florida procedural default rules operable in capital cases. There is only arbitrary discretion to enforce or to forgive various procedural defaults.

State courts should not be permitted to avoid reasoned elaboration in capital cases. Political pressures and time constraints make it unlikely

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335. See supra notes 215-17.
336. See supra notes 200-06 and accompanying text.
337. 675 F.2d 51 (2nd Cir. 1982). See supra notes 223-24 and accompanying text.
338. Cf. Hawkins v. LaFevre, 758 F.2d 866, 872 (2nd Cir. 1985) (expressing doubts about the efficacy of the *Martinez* approach when the procedural rule is "arguable but not clear").
340. The *Campbell* court referred to Florida's procedural default rule in original habeas proceedings—as distinct from postconviction proceedings—as an "established rule." *Id.* at 1578.
341. The Eleventh Circuit's recent decision in Hargrave v. Wainwright, 804 F.2d 1182 (1986), vacated pending rehearing en banc, 809 F.2d 1486 (11th Cir. 1987), is not to the contrary. Hargrave raised two relevant claims, one at oral argument and by supplemental brief to the Florida Supreme Court and one by a petition for rehearing in the Florida Supreme Court. The Florida Supreme Court's opinion and order denying rehearing did not discuss either claim. The Eleventh Circuit presumed procedural default from the state court's silence, apparently based upon the absoluteness of the procedural default rules involved. The Eleventh Circuit quoted from former Florida Rule of Appellate Procedure 3.14(b) (1962) ("the petition for rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted") and former Florida Rule of Appellate Procedure 3.7(i) (1963) ("such assignments of error as are not argued in the briefs will be deemed abandoned and may not be argued orally"), and the court suggested that these rules allowed no exceptions. 804 F.2d at 1187-88. Such mechanistic applications may have led to the modifications of both rules. See FLA. R. APP. P. 9.330 (deleting language that new issues may not be raised in motions for rehearing); FLA. R. CRIM. P. 9.210 & Advisory Committee Notes (abolishing assignments of error and deleting language that assignments of error not argued in the briefs will be deemed abandoned).
that the courts will summarily dispose of only those claims which undoubtedly lack merit. This may be especially true of the Florida Supreme Court. In one capital case, that court's opinion ignored a claim that was subsequently recognized by the United States Supreme Court.

Neither the summary rejection of the claims of death sentenced prisoners nor the "even if" analysis would have satisfied the expectations of the United States Supreme Court when it upheld Florida's death penalty statute. In 1976, the Court expressed confidence that all death penalty cases would be "conscientiously reviewed by a court which, because of its statewide jurisdiction, can ensure consistency, fairness and rationality in the evenhanded operation of the state law."

VI
CONCLUSION

This Article has attempted to provide a "clue of thread" for the as yet anonymous Theseus who might slay the minotaur inhabiting the labyrinth of federalism. Ariadne's thread has wound through the passages of capital punishment, procedural default, the doctrine of adequate and independent state grounds, and finally through Florida as a case study. While the nature of Ariadne's thread is to guide as well as to describe, the principle intent of the journey has been to furnish a navigational device as rudimentary and as successful as the one in the original myth.

342. See supra notes 309-10 and accompanying text.
343. The majority opinion in Gardner v. State, 313 So. 2d 675 (Fla. 1975), rev'd, 430 U.S. 349 (1977), did not mention the claim that the sentencing judge improperly used a confidential presentence investigation report. The United States Supreme Court subsequently granted relief based on this contention. Gardner v. Florida, 430 U.S. 349 (1977). Justice Marshall, concurring in Gardner, charged that the Florida Supreme Court had engaged in a "cursory or rubber stamp review" of the death sentence, id. at 367, a charge which he recently reiterated, Barclay v. Florida, 463 U.S. 939, 974, 982-84 (1983) (Marshall, J., dissenting).
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless such person be detained beyond the distance of twenty miles; and if beyond the distance of twenty miles and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days. And upon the return of the writ of habeas corpus a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or persons to whom such writ of habeas corpus may be directed shall refuse to obey the same, or shall neglect to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of the case. From the final decision of any judge, justice or court, inferior to the cir-
circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States, on such terms and under such regulations and orders, as well as for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default of such, as the judge hearing such cause may prescribe; and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any manner or thing so heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.

SEC. 2 And be it further enacted, That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity of or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such validity, or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall also be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award execution, or remand the same to an inferior court. This act shall not apply in the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offense or with having aided or abetted rebellion against the government of the United States prior to the passage of this act.
