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COMMENTS

HARRIS V. REED: A NEW LOOK AT FEDERAL HABEAS JURISDICTION OVER STATE PETITIONERS

INTRODUCTION

Federal courts cannot exercise habeas corpus jurisdiction over state prisoners whose convictions rest on adequate\^1 and independent\^2 state procedural grounds.\^3 State judges, however, often fail to state clearly the basis of their decisions.\^4 Ambiguous state court decisions frequently occur where a petitioner presents a federal claim and the state court’s opinion addresses both federal and state issues. Moreover, state courts often render judgment without issuing an opinion.\^5 On direct\^6 or habeas\^7 re-

1. A state law is adequate when it provides a constitutionally sufficient basis on which to render judgment. See Matasar & Bruch, Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine, 86 Colum. L. Rev. 1291, 1292 n.2 (1986). For a discussion of the process by which courts determine adequacy, see infra notes 99-104 and accompanying text.

2. A state law is independent where a court can apply and construe it without reference to federal principles. See Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); see, e.g., Michigan v. Chesnutt, 486 U.S. 567, 571 n.3 (1988) (state ground not independent where state court felt bound by fourth amendment in construing its law); Ake v. Oklahoma, 470 U.S. 68, 75 (1985) (“when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court’s holding is not independent of federal law . . . .”); Delaware v. Prouse, 440 U.S. 648, 653 (1979) (state ground not independent because state court felt compelled by federal principles to construe state law as it did). For a discussion of methods used to determine whether state procedural grounds are adequate and independent, see infra notes 95-104 and accompanying text.

3. See Wainwright v. Sykes, 433 U.S. 72, 81-82 (1977). A petitioner who can, however, demonstrate cause for noncompliance with the procedural rule and actual prejudice will obtain access to a federal habeas forum. See id. at 87. For a discussion of the adequate and independent state grounds doctrine and the cause and prejudice test, see infra notes 21-35 and accompanying text.

Federal courts have power to address the merits of claims that are procedurally barred in state court. They do not exercise this power, however, out of respect for the state system. See Smith v. Murray, 477 U.S. 527, 533 (1986); infra note 26.


6. On direct review, which encompasses all appellate proceedings, a superior court examines whether a lower court properly decided issues of law. See L. Yackle, Postconviction Remedies § 1, at 1 (1981); see also 4 C.J.S. Appeal & Error § 17, at 91 (1957) (discussing appellate review). The superior court’s inquiry is limited to those issues tried in the lower court. See 4 C.J.S. Appeal & Error § 17, at 91 (1957); see also Note, State Criminal Procedure and Federal Habeas Corpus, 80 Harv. L. Rev. 422, 426-27 (1966) (contrasting direct and habeas review).

view, federal courts must struggle to divine whether state courts have relied on state or federal grounds in reaching their decision.\(^8\)

Prior to 1989, federal courts interpreted ambiguous state court decisions in one of three ways. Some courts demanded explicit reliance on the state ground before they would decline jurisdiction.\(^9\) Others determined the basis of the state court’s decision on a case-by-case basis.\(^10\) A third group of courts presumed reliance on a state procedural ground if the state court so much as mentioned such an issue.\(^11\)

Recently, in *Harris v. Reed*,\(^12\) the Supreme Court attempted to eliminate this confusion in the habeas context.\(^13\) *Harris* held that where the last state tribunal to render judgment in a case failed to articulate the basis of its decision, federal courts should presume reliance on federal grounds and exercise jurisdiction.\(^14\) Therefore, a state prisoner’s procedural default\(^15\) will bar access to a federal habeas forum only if the state court’s opinion plainly indicates reliance on a state rule.\(^16\)

Part I of this Comment explores the background of federal habeas jurisdiction over state prisoners. This section includes a discussion of the adequate and independent state grounds doctrine and the cause and prejudice test. Part II discusses the *Harris* decision itself. Part III addresses the majority’s goals and argues that *Harris* will not achieve these objectives. Part IV discusses probable effects of the decision and demonstrates

corpus is independent of the proceedings by which petitioner was convicted. *See* 39 C.J.S. Habeas Corpus § 3, at 463 (1976). Prisoners use habeas corpus to challenge the legality of confinement, not to contest errors in lower courts. *See id.* at 462.


9. *See*, e.g., *Bruni v. Lewis*, 847 F.2d 561, 563 (9th Cir.) (exercising jurisdiction because state court addressed procedural default and merits), *cert. denied*, 109 S. Ct. 403 (1988); *Bradford v. Stone*, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979) (same).


11. *See* *Bond v. Fulcomer*, 864 F.2d 306, 310-11 (3d Cir. 1989); *Bridge v. Lynaugh*, 860 F.2d 162, 163 (5th Cir. 1988), *vacated*, 863 F.2d 370 (5th Cir. 1989); *Davis v. Lansing*, 851 F.2d 72, 75 (2d Cir. 1988); *Goins v. Lane*, 787 F.2d 248, 251 (7th Cir.), *cert. denied*, 479 U.S. 846 (1986); *Davis v. Allsbrooks*, 778 F.2d 168, 176 (4th Cir. 1985); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982).


13. *See* id. at 1041.

14. *See* id. at 1045.

15. A procedural default occurs where a criminal defendant fails to comply with a state procedural rule. A state court will address the merits, if at all, only as an alternative holding. *See* *Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1316 (1961).

16. *See* *Harris*, 109 S. Ct. at 1044.
that *Harris* will either eviscerate the cause and prejudice test or compel changes in state court opinion writing.

## I. BACKGROUND

Habeas corpus is a traditional method of challenging imprisonment;\(^\text{17}\) it is not part of the original criminal proceeding, nor is it concerned fundamentally with the determination of guilt or innocence. Its primary inquiry is into the conviction process.\(^\text{18}\) The usual remedy available to prisoners who successfully attack their convictions is release from custody.\(^\text{19}\) Criminal defendants, however, are not automatically entitled to federal habeas forums. Congress authorized federal courts to exercise habeas jurisdiction over state prisoners where the applicant is in custody, presents a federal question and has exhausted all state remedies.\(^\text{20}\)

The exercise of federal habeas jurisdiction over state prisoners is further limited by the adequate and independent state grounds doctrine.\(^\text{21}\) This doctrine immunizes from federal habeas review state decisions resting on adequate and independent state grounds, absent a showing of

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In pertinent part, section 2254(a) provides that federal courts “shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” *Id.*

Section 2254(b) further provides that “[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.” *Id.*

Section 2254(c) provides in pertinent part that “[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.” *Id.* For a discussion of the exhaustion requirement, see *infra* notes 86, 105-112 and accompanying text.

At the time of its enactment, the statute codified existing common-law doctrines. See *Sanders v. United States*, 373 U.S. 1, 11 (1963); see, e.g., *Ex parte Hawk*, 321 U.S. 114, 116-17 (1944) (reaffirming common-law exhaustion requirement); *Waley v. Johnson*, 316 U.S. 101, 105 (1942) (federal habeas jurisdiction “extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused”); L. Yackle, *supra* note 6, § 19, at 90.

cause and prejudice.\textsuperscript{22}

Traditionally, the adequate and independent state grounds doctrine has applied to habeas petitions.\textsuperscript{23} The Supreme Court's 1963 decision in \textit{Fay v. Noia},\textsuperscript{24} however, represented a temporary departure from strict application of the doctrine in habeas cases.\textsuperscript{25} Under \textit{Noia}, the presence of an adequate and independent state ground did not bar state prisoners from federal habeas forums.\textsuperscript{26} Federal courts, however, could deny habeas applications of defendants whose strategic decisions resulted in their procedural defaults.\textsuperscript{27} Fourteen years later, \textit{Wainwright v. Sykes}\textsuperscript{28} effectively overruled \textit{Noia} by prohibiting the exercise of federal habeas jurisdiction where petitioner's conviction rested on adequate and independent state grounds.\textsuperscript{29} But petitioner could still obtain habeas review upon a showing of cause for the default and consequent prejudice.\textsuperscript{30}


25. \textit{See id.} at 438. \textit{Noia} is representative of the Court's jurisprudence in the federal habeas area at that time. Other decisions of this period also fostered greater merits review of state prisoners' claims in federal habeas cases. \textit{See}, e.g., Sanders v. United States, 373 U.S. 1, 15-29 (1963) (circumstances in which federal habeas courts may grant successive habeas applications); Townsend v. Sain, 372 U.S. 293, 310-12 (1963) (circumstances in which federal habeas courts must hold evidentiary hearings).

26. \textit{See Noia}, 372 U.S. at 437. The Court justified this action by stating that prior use of the doctrine had "rarely, if ever" been predicated on a lack of power, but rather, had been based on deference to the state system. \textit{See id.} at 425. The Court has consistently affirmed this notion. \textit{See} Smith v. Murray, 477 U.S. 527, 533 (1986); Reed v. Ross, 468 U.S. 1, 9 (1984); Wainwright v. Sykes, 433 U.S. 72, 84 (1977).

27. This is the "deliberate by-pass" exception. \textit{See} Humphrey v. Cady, 405 U.S. 504, 517 (1972) (only petitioner, not counsel, can deliberately by-pass state procedural rule); \textit{Noia}, 372 U.S. at 439 (only "an intentional relinquishment . . . of a known right or privilege" constitutes deliberate by-pass) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).


29. \textit{See id.} at 87-88.

Sykes remains the governing standard in federal habeas cases.\textsuperscript{31}

Several rationales have been advanced for adhering to the adequate and independent state grounds doctrine. One is that use of the doctrine avoids advisory opinions.\textsuperscript{32} One commentator has suggested that the Court employs the doctrine to maintain the integrity of state procedural laws.\textsuperscript{33} Some courts and commentators have suggested that federal courts exhibit disrespect for the state judiciary by granting either direct or habeas review of cases involving adequate and independent state


The Court has also addressed prejudice. See, e.g., Carrier, 477 U.S. at 494 (prejudice results from fundamental unfairness); United States v. Frady, 456 U.S. 152, 169 (1982) (prejudice results when error by itself infects entire proceeding and violates due process).

There are rare instances where a state prisoner may gain access to a federal habeas forum despite the existence of adequate and independent state grounds and no showing of cause and prejudice. One such instance occurs where the petitioner will be the "'victim[] of a fundamental miscarriage of justice'" without federal adjudication of the claim. See Carrier, 477 U.S. at 495 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)); Sykes, 433 U.S. at 90-91; see also Dugger v. Adams, 109 S. Ct. 1211, 1219 (1989) ("'substantial' showing 'that the alleged error undermined the accuracy of the guilt or sentencing determination'" is a fundamental miscarriage of justice) (Blackmun, J., dissenting) (quoting Smith v. Murray, 477 U.S. at 539); Smith v. Murray, 477 U.S. at 546-50 (Stevens, J., dissenting) (barring petitioner from federal habeas forum because of minor procedural default in capital case could be fundamentally unfair). A fundamental miscarriage of justice occurs where one is "actually innocent." See Smith v. Murray, 477 U.S. at 537 (quoting Carrier, 477 U.S. at 496).


The presence of an adequate and independent state ground implies that a federal court's conclusion on federal issues cannot affect the outcome of the case on remand. Once remanded, the state court could simply reinstate its original ruling by relying on the state ground. Invocation of the doctrine, which precludes the exercise of federal jurisdiction, thus prevents rendering advisory opinions. See Herb, 324 U.S. at 125-26; see, e.g., People v. Class, 67 N.Y.2d 431, 433, 494 N.E.2d 444, 445, 503 N.Y.S.2d 313, 314 (1986) (per curiam) (United States Supreme Court rendered advisory opinion because upon reversing federal issues and remanding to New York Court of Appeals, New York court reinstated original ruling by relying solely on state grounds).

grounds. Finally, Justice Kennedy has noted that the doctrine helps reduce the case load of the federal courts.

II. HARRIS v. REED

A. Procedural History

Harris was convicted of murder after a three-day jury trial in the Circuit Court of Cook County, Illinois. On direct appeal, the Appellate Court of Illinois rejected Harris's claim that the evidence was constitutionally insufficient to support the conviction. This was the only argument that Harris's appointed counsel presented. Harris then petitioned for state post-conviction relief on the grounds of ineffective assistance of counsel. The court denied his petition, holding that Harris was procedurally barred from presenting his ineffective assistance claim because he failed to preserve it on direct appeal. Nevertheless, the court also addressed and rejected this claim on the merits.

In deciding whether to exercise habeas jurisdiction over Harris's petition, the federal district court concluded that the Illinois appellate post-conviction court had excused Harris's waiver and actually dismissed the claim on the merits. The district court therefore assumed jurisdiction and ordered an evidentiary hearing to assess the merits of the claim. Ultimately, it dismissed Harris's petition.

Harris appealed the district court's decision to the Court of Appeals for the Seventh Circuit, which affirmed the judgment on jurisdictional grounds.


36. See Harris, 109 S. Ct. at 1040. Citation to the Supreme Court's opinion is necessary because the state trial court's opinion is unpublished.

37. See United States ex rel. Harris v. Reed, 608 F. Supp. 1369, 1373-74 (N.D. Ill. 1985), aff'd, Harris v. Reed, 822 F.2d 684, 687 (7th Cir. 1987), rev'd, 109 S. Ct. 1038, 1045 (1989); see also People v. Harris, 71 Ill. App. 3d 1113, 392 N.E.2d 1386 (1979) (the Appellate Court of Illinois affirmed Harris's conviction without opinion, and therefore, reference to federal decisions is helpful).

38. See Harris, 109 S. Ct. at 1039.


40. See id.

41. See id.

42. See id. at 1378.

43. See id. at 1385.

44. See Harris v. Reed, 822 F.2d 684, 685 (7th Cir. 1987), rev'd, 109 S. Ct. 1038 (1989).

45. See id. at 684.
grounds. It concluded that the district court improperly exercised habeas jurisdiction, reasoning that the Illinois appellate post-conviction court had actually relied on the procedural bar. It found that the state court addressed the merits only as an alternative holding.

B. The Supreme Court Decision

The United States Supreme Court reversed the decision of the Seventh Circuit Court of Appeals. The Court acknowledged the difficulty of ascertaining whether a state court relied on an adequate and independent ground where the state court rendered an ambiguous decision. The Court had addressed this issue previously in the context of state litigants seeking direct review in the Supreme Court. In Michigan v. Long, the Court formulated the plain statement rule:

[when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

The Court reasoned that because federal courts confront common jurisdictional dilemmas on habeas as well as direct review, it was appropriate to adopt the plain statement rule to demonstrate "respect for state courts, and to avoid advisory opinions." Long, 463 U.S. at 1040; see supra note 32.

The Long Court believed that adoption of the plain statement rule exhibits respect for state procedural rules because federal courts no longer have to interpret them. See Long, 463 U.S. at 1041. Prior to Long, the Supreme Court on direct review had to construe state law to determine the basis for the state decision. See infra note 85. The plain statement rule eliminates this task and is therefore intended to be deferential. In reality, however, the plain statement rule greatly intrudes on the state judiciary's autonomy. See Harris v. Reed, 109 S. Ct. 1038, 1052-53 (1989) (Kennedy, J., dissenting); supra notes 9-11 and accompanying text. See generally Elison & NettikSimmons, Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds, 45 Mont. L. Rev. 177, 195-200 (1984) (explanation and critique of Michigan v. Long plain statement rule); Welsh, Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long, 59 Notre Dame L. Rev. 1118 (1984) (consequences of Michigan v. Long).

54. Long, 463 U.S. at 1040-41.
ate to apply the Long plain statement rule in the habeas arena. Under Harris, "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." The majority believed that its decision would resolve a disagreement among the circuits and foster judicial efficiency. The Court also believed that adopting the plain statement rule would reduce the need to construe state law, further promoting judicial efficiency. Concurring in the result, Justice Stevens stated that "the concerns that prevented me from joining the majority opinion in Michigan v. Long are not present in [habeas] case[s]." Specifically, Justice Stevens contended that the rule in Long "expanded this Court's review of cases in which state courts had overprotected their respective citizens." Justice Stevens believed that review of this sort is seldom appropriate. However, because federal habeas cases address a prisoner's claim that his federal rights have been violated, Justice Stevens agreed that a presumption of jurisdiction in ambiguous cases is appropriate.

Justice O'Connor also concurred in the result. She stressed that while the majority simultaneously applied the "miscarriage of justice" test and the cause and prejudice standard, the latter alone is operative. She added that the law requiring petitioners to exhaust state remedies prior to federal habeas adjudication was unaffected by the plain statement rule.

55. See Harris, 109 S. Ct. at 1043 ("Faced with a common problem, we adopt a common solution.").
56. Id.
57. See id. at 1041; supra notes 9-11 and accompanying text (discussing division among circuits).
60. See Harris, 109 S. Ct. at 1045-46.
61. See id. at 1046.
62. Id. at 1045. The Long presumption indicates over-protection because Justice Stevens assumes that the state is appealing a state court decision that broadly construed federal rights. See id. at 1045 (Stevens, J., concurring); Michigan v. Long, 463 U.S. 1032, 1067-68 (1983) (Stevens, J., dissenting).
63. See Harris v. Reed, 109 S. Ct. 1038, 1045 (1989) (Stevens, J., concurring). Justice Stevens maintained that federal courts on direct review should primarily secure federal rights and not question all state court decisions "involving overly expansive interpretations of federally protected rights." Id. (Stevens, J., concurring).
64. See id. at 1046 (Stevens, J., concurring).
66. See supra note 30.
67. See Harris, 109 S. Ct. at 1048; supra note 30.
68. See Harris, 109 S. Ct. at 1046 (O'Connor, J., concurring). Hence, a federal court must still examine state law to determine whether the petitioner, upon presenting a claim for the first time in habeas application, has exhausted state remedies. See generally Davis v. Armontout, No. 88-1194 (W.D. Mo. Aug. 16, 1989) (LEXIS, Genfed library, Dist file) (explaining Justice O'Connor's concurrence); Littlejohn v. Higgins, No. 88-0641
Justice Kennedy, dissenting from the opinion, stated that "it is most unreasonable to adopt a rule that assumes either that state courts routinely invoke exceptions to their procedural bars without saying so, or that those courts are in the habit of disregarding their own rules." He asserted that if the majority desired a bright-line rule in these cases, it should make the opposite assumption. Refusing jurisdiction, Justice Kennedy reasoned, reflects a more reasonable presumption that the state court applied its rule.

Justice Kennedy added that applying the plain statement rule to habeas cases will not significantly reduce the federal courts' need to examine state law because the doctrines of adequacy and exhaustion still compel a thorough examination of state law. Furthermore, Justice Kennedy predicted that state judges would not plainly indicate reliance on a state procedural rule because they may be unfamiliar with the intricacies of federal habeas procedure. This would compel federal courts to exercise habeas jurisdiction in a larger number of cases, further swelling the federal docket. Finally, Justice Kennedy asserted that the decision burdened states' legitimate interest in finality and undermined their right to punish defendants.

(W.D. Mo. May 4, 1989) (LEXIS, Genfed library, Dist file) (same); infra note 86 (exhaustion principle).

While federal courts can exercise jurisdiction when there is no plain statement, they may not presume that a newly presented claim is exhausted. See Harris, 109 S. Ct. at 1046 (O'Connor, J., concurring). Justice O'Connor reasoned that a state court cannot rely on a state procedural rule where petitioner has never presented the claim to the state judiciary. See id. The majority, in a footnote, adopted Justice O'Connor's position. See id. at 1043 n.9; see also Parker v. Dugger, 876 F.2d 1470, 1477-78 (11th Cir. 1989) (refusing jurisdiction because petitioner never presented claim to state courts).

69. See Harris, 109 S. Ct. at 1048.
70. Id. at 1050; see also Peterson v. Scully, No. 89-2202 (2d Cir. Feb. 7, 1990) (LEXIS, Genfed library, Cir file) ("the state argues [that] to hold that the Appellate Division reached the merits would amount to a declaration that the court was unaware of [the procedural] rule and committed an error of elementary state law.").
72. See id. (Kennedy, J., dissenting). In addition, Justice Kennedy noted that federal courts are empowered to hear the habeas applications in question but refuse to do so because of comity and federalism. See id. at 1052. Therefore, "any determination that a state court did not intend to rely on a procedural default must be made with the same deference to the State's sovereignty that motivates our willingness to honor its procedural rules in the first place." Id. at 1053.
73. See id. at 1051 (Kennedy, J., dissenting).
74. See id. at 1051, 1055 (Kennedy, J., dissenting).
75. See id. at 1053-54 (Kennedy, J., dissenting).
76. See id. at 1054 n.6 (Kennedy, J., dissenting).
77. See id. at 1053 (Kennedy, J., dissenting). Justice Kennedy also found that Harris and Engle v. Isaac, 456 U.S. 107 (1982), express contradictory principles. See Harris v. Reed, 109 S. Ct. 1038, 1055 (1989). In Engle, the Court held that where petitioner first presents a claim in his federal habeas petition, a federal habeas court must examine state law to determine whether he has exhausted all state remedies. See id. at 1055.

Therefore, Engle compels construction of state law in the exhaustion area. See Harris, 109 S. Ct. at 1046-47 (O'Connor, J., concurring). The majority in Harris, however, assumes forgiveness of procedural defaults and prohibits an examination of state law to
III. *Harris v. Reed* Will Not Achieve Its Stated Goals

A. Providing Guidance to the Circuits in Construing Ambiguous State Court Decisions

Admittedly, *Harris* will provide some guidance to lower federal courts in construing ambiguous state decisions. The decision, however, may well provoke further confusion concerning the interpretation of the plain statement rule, leading courts to dispute determinations of ambiguity. Some will require literal plain statements, while others will be satisfied with mere efforts at clarity before refusing jurisdiction. For instance, the Court of Appeals for the Ninth Circuit found a plain statement from the tone of a state court opinion. Yet the state court addressed the merits and never expressed clearly its reliance on a procedural bar. Similarly, the Eleventh Circuit refused to exercise jurisdiction even where the state court opinion addressed the merits. In contrast, the Court of Appeals for the Fourth Circuit exercised jurisdiction because the state court did not issue a plain statement, despite its belief that Virginia intended to hold petitioner's claim procedurally barred. Even if *Harris* does provide guidance in some areas, this sort of confusion can now infect habeas decisions. *Harris* may well substitute one kind of confusion for another.

B. Judicial Efficiency

*Harris* will not substantially promote judicial economy. The decision will eliminate the need to construe state procedural rules in making a *Sykes* jurisdictional decision. The doctrines of adequacy, independence

Determine the accuracy of this assumption. See id. at 1056 (Kennedy, J., dissenting). Justice Kennedy does not believe that these principles are reconcilable. See id.

78. Lower federal courts now know how to construe ambiguous opinions. See supra notes 9-11 and accompanying text. Under *Harris*, an ambiguous decision will not bar federal habeas review. See *Harris*, 109 S. Ct. at 1043-44.


80. See, e.g., Waye v. Townley, 884 F.2d 762, 764 (4th Cir.) (refusing to exercise jurisdiction because lower state court held claim procedurally barred, even though Virginia Supreme Court affirmed without opinion), *cert. denied*, 110 S. Ct. 29 (1989); Fierro v. Lynaugh, 879 F.2d 1276, 1281 (5th Cir. 1989) (even though Texas Supreme Court addressed merits, Fifth Circuit found plain statement where state court declared that "[n]othing is presented for review").

81. See *Anselmo v. Sumner*, 882 F.2d 431, 434 (9th Cir. 1989).

82. See *id.* at 434.


84. See *Evans v. Thompson*, 881 F.2d 117, 123 n.2 (4th Cir. 1989); *see also* Nieto v. Sullivan, 879 F.2d 743, 746-47 & n.2 (10th Cir.) (despite procedural default, court exercised jurisdiction because New Mexico Court of Appeals addressed merits of petitioner's constitutional claim and did not plainly indicate reliance on default), *cert. denied*, 110 S. Ct. 373 (1989).

85. For instance, in *County Court v. Allen*, 442 U.S. 140 (1979), the Court found that the New York Court of Appeals had not relied on a state procedural default. See id. at
and exhaustion, however, compel lower federal courts to construe state procedural rules in other aspects of habeas cases. In addition, Harris will force federal courts to adjudicate many more claims by state prisoners. Thus, in practice the decision contributes little to judicial economy. Indeed, federalism concerns demand that federal courts accurately assess whether the state court relied on a procedural default. The Court ostensibly adopted the plain statement rule in deference to the state judiciary. Yet the rule presumes that state courts do not rely on their procedural laws. Far from demonstrating its avowed respect for the power and independence of state courts, the Harris decision tramples federalism concerns while only marginally increasing efficiency.

153. In reaching this conclusion, the Court first examined many New York cases interpreting the law to determine whether it applied to petitioner's claim. See id. at 150-52 & nn. 8-9. The Court then analyzed the trial and appellate opinions to discern reliance on the default or the merits. See id. at 152-53; see also Peterson v. Scully, No. 89-2202 (2d Cir. Feb. 7, 1990) (LEXIS, Genfed Library, Cir file) ("[o]ur review of the Appellate Division's decision is made easier by the Supreme Court's recent pronouncement in Harris v. Reed") (citation omitted).

Harris eliminates only the need to perform a small portion of this analysis. Federal courts must still examine the lower court record, appellate briefs and state procedural rules in other aspects of habeas cases. See infra notes 86-107 and accompanying text.

86. Congress requires state prisoners to exhaust all state remedies before obtaining access to a federal habeas forum. See 28 U.S.C. § 2254 (b)-(c) (1982); supra note 20. Federal courts, however, will refuse to exercise jurisdiction only when petitioner has failed "to exhaust state remedies still open . . . at the time he files his application in federal court." Fay v. Noia, 372 U.S. 391, 435 (1963).


87. See Harris v. Reed, 109 S. Ct. 1038, 1054-55 (1989) (Kennedy, J., dissenting); infra notes 95-116 and accompanying text.

88. See infra notes 113-116 and accompanying text.

89. See Anselmo v. Sumner, 882 F.2d 431, 433-34 (9th Cir. 1989).

90. See Harris, 109 S. Ct. at 1052-53 (Kennedy, J., dissenting).


92. See supra notes 70-72 and accompanying text.


94. See Harris, 109 S. Ct. at 1055 (Kennedy, J., dissenting) (because of adequacy, independence and exhaustion, "the majority's assessment of the marginal burdens imposed on federal courts by the need to construe those rules in [ambiguous habeas] cases . . . can only be described as extravagant"). The Court's decision in Harris intrudes on
1. Adequacy and Independence

The majority in *Harris* asserted that the decision would conserve judicial effort by eliminating the need to construe state law in deciding whether to exercise jurisdiction.\(^9\) Even if a state court explicitly relies on a state procedural bar, however, lower federal courts must still determine whether the state law is truly adequate and independent.\(^6\) This requires an evaluation of state procedural rules,\(^7\) which may be inadequate for several reasons.\(^8\) For instance, a state procedural bar is inadequate to preclude federal jurisdiction where federal law preempts the state rule.\(^9\) Inconsistent\(^{100}\) or novel\(^{101}\) application of the rule also ren-

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\(^9\) See *Harris*, 109 S. Ct. at 1044.

\(^6\) See *id.; Robson & Mello, supra* note 93, at 100; *infra* notes 97-103; see, e.g., Russell v. Rolfs, No. 88-3936 (9th Cir. Jan. 9, 1990) (LEXIS, Genfed library, Cir file) (plain statement of reliance on procedural bar will not preclude exercise of jurisdiction where bar is inadequate). In *Russell*, the Washington state court adhered to the plain statement rule; the state court plainly indicated reliance on a state procedural rule. The Ninth Circuit Court of Appeals, however, found the rule inadequate, and thus could exercise jurisdiction.

\(^7\) See, e.g., Reynolds v. Ellingsworth, 843 F.2d 712, 719-22 (3d Cir.) (examining many Delaware cases and statutes to determine adequacy of state rule), cert. denied, 109 S. Ct. 403 (1988); *infra* notes 99-104 and accompanying text (process by which courts determine adequacy).


For instance, in *Coleman v. Saffle*, 869 F.2d 1377 (10th Cir. 1989), the Court of Appeals for the Tenth Circuit examined an Oklahoma statute and case law. The Oklahoma courts alternatively enforced the rule, waived it, or required petitioner to satisfy newly invented standards. *See id.* at 1383. The Tenth Circuit concluded that the state court inconsistently applied the contemporaneous objection rule. *See id.*


For instance, in *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964), the Court
ders it inadequate. Inadequacy is found where the state courts have discretion to waive the rule. Finally, a state rule is adequate only if it serves a legitimate state interest. Thus, because federal judges are still faced with the very significant task of assessing adequacy and independence, it seems that the Supreme Court has overestimated Harris's impact on the need to construe state law.

2. Exhaustion

The majority asserted that the plain statement rule reduces the need to examine state procedural law, appellate briefs and lower court records. Lower federal courts, however, must still determine whether the petitioner has exhausted his state remedies. This process requires federal courts to examine state law, lower court records and appellate briefs. A claim is not exhausted until the petitioner fairly presents it to the state court and has no further recourse to state remedies. To determine whether the petitioner fairly presented his claim, federal courts must examine

held that failure to comply with the Alabama Rules of Court was an inadequate state ground. See id. at 296-97. Petitioner's brief was in almost perfect conformity with the rule. The Court found that "Alabama courts have not heretofore applied their rules... with the pointless severity shown here." Id. at 297.


In Allison v. Fulton-De Kalb Hosp. Auth., 449 U.S. 939, 942 (1980) (Brennan, J., dissenting), Justice Brennan stated that a Georgia law requiring that defendants present federal before state claims serves no legitimate state interest. See id. at 942-43. The Georgia rule failed to foster judicial economy. While acknowledging that the rule prevented defendants from awaiting favorable decisions in other cases, Justice Brennan reasoned that this rationale also applied to state claims. See id. Justice Brennan concluded that "the Georgia Supreme Court's procedural rule effects an unnecessary and irrational discrimination against federal constitutional claims." Id. at 943; cf. United States ex rel. Fulton v. Franzen, 659 F.2d 741, 744 (7th Cir. 1981) (Illinois contemporaneous objection rule served legitimate state interests of finality and speed), cert. denied, 455 U.S. 1023 (1982). But see Meltzer, supra note 21, at 1142-44 (courts find state interest illegitimate only when procedural rule substantially burdens assertion of federal rights).

104. Federal courts assess adequacy and independence only if a state court uses a plain statement. When the decision is ambiguous, federal courts simply exercise jurisdiction. See Harris v. Reed, 109 S. Ct. 1038, 1044 (1989). By exercising jurisdiction more frequently, however, federal judges must expend their resources in disposing of a larger docket. This frustrates the majority's attempt to foster judicial efficiency. See infra notes 113-116. See generally, Hart, The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959) (even thirty years ago, when Court's docket was half current size, Justices had little time for each case).


106. See 28 U.S.C. § 2254(b)-(c) (1982); supra notes 20, 86.

107. See infra notes 108-112 and accompanying text.

amine the record and appellate briefs.\textsuperscript{110} Federal habeas courts must then ascertain whether any state remedies remain available,\textsuperscript{111} which requires an examination of state procedural rules.\textsuperscript{112} The exhaustion process, therefore, casts further doubt on the majority's assertion that \textit{Harris} will result in a meaningful conservation of judicial resources.

\textsuperscript{109} See Middleton v. Miles, No. 88 Civ. 6099 (S.D.N.Y. June 27, 1989) (LEXIS, Genfed library, Dist file) ("[T]he petitioner must show that he has utilized all available appellate procedures at the state level.").

\textsuperscript{110} See Peoples v. Fulcomer, 882 F.2d 828 (3d Cir. 1989). In \textit{Fulcomer}, the Third Circuit "examined the record from the state court proceedings in the appendix submitted on this appeal, which includes the trial court opinion . . . \ldots \), petitioner's} Superior Court brief, and the unreported Superior Court opinion," and concluded that petitioner's ineffective assistance of counsel claim had not been fairly presented. \textit{Id.} at 830-31.

In Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982) (en banc), \textit{cert. denied}, 464 U.S. 1048 (1984), the court extensively analyzed appellate briefs and New York law to determine whether petitioner fairly presented his claim. The Second Circuit noted that the appellate brief referred to New York cases that addressed the issue in state constitutional terms. \textit{See id.} at 193-94. Nonetheless, the Second Circuit held that, by referring to these cases, petitioner put New York courts on notice of his federal constitutional claim. \textit{See id.}

\textsuperscript{111} See supra note 109 and accompanying text.


Other aspects of exhaustion also require federal courts to be familiar with state procedural rules. For instance, petitioners have exhausted state remedies where state appellate courts have discretion not to invoke the procedural rule. \textit{See} White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988). Federal courts, therefore, must recognize rules providing for such discretion. \textit{See}, e.g., Davis v. Lansing, 851 F.2d 72, 75 (2d Cir. 1988) (petitioner's remedies not exhausted because Article 78 motion was improper vehicle for raising claim, which could still be raised on direct appeal); Hughes v. Stafford, 780 F.2d 1580, 1581 (11th Cir. 1986) (petitioner who did not seek certiorari in Georgia Supreme Court failed to exhaust state remedies, because that court must grant certiorari); Adail v. Wyrick, 671 F.2d 1218, 1219 (8th Cir. 1982) (state remedies exhausted despite petitioner's failure to move for transfer to Missouri Supreme Court, because that court's decision to grant motion is discretionary).

In addition, a petitioner need not pursue state remedies that are futile. \textit{See} Castille v. Peoples, 109 S. Ct. 1056, 1059 (1989); Varnell v. Young, 839 F.2d 1245, 1247-48 (7th Cir. 1988). To recognize futility, federal courts must understand state procedural law. \textit{See}, e.g., United States ex rel. Tonaldi v. Elrod, 716 F.2d 431, 434 (7th Cir. 1983) (state remedies exhausted despite petitioner's failure to seek state post-conviction relief because Illinois law does not offer access to post-conviction forum after petitioner has directly appealed), \textit{cert. denied} sub nom. Ferri v. Lane, 484 U.S. 843 (1987); Seemiller v. Wyrick, 663 F.2d 805, 807 (8th Cir. 1981) (not futile for petitioner to seek state court review because state law could favor petitioner's argument); United States ex rel. Graham v. Mancusi, 457 F.2d 463, 467 (2d Cir. 1972) (goal of exhaustion requirement is to exhaust state remedies, not prisoner).
3. Increased Federal Docket Congestion

A final consequence of *Harris* is that many more prisoners will obtain access to federal court. The resulting increase in the federal docket will further tax an already over-burdened judiciary. Having to adjudicate a significantly increased number of claims by state prisoners will hinder the promotion of judicial economy. Moreover, the federal courts' burden of having to handle substantially more cases will offset any judicial efficiencies created by the *Harris* decision.

IV. POSSIBLE EFFECTS OF THE DECISION

A. A Change in State Court Opinion Writing

Through its decisions in *Michigan v. Long* and *Harris v. Reed*, the Court may have hoped to induce state judges to write more opinions, and to do so with greater clarity. The Court's strict interpretation of the plain statement rule supports this theory. By requiring literal plain statements before refusing to exercise jurisdiction, the Court has eased

113. *See infra* notes 146-151 and accompanying text.
114. *See* Harris v. Reed, 109 S. Ct. 1038, 1054 n.6 (1989) (Kennedy, J., dissenting).
116. *See* Harris, 109 S. Ct. at 1053-54 (Kennedy, J., dissenting). Justice Kennedy asserted that state prisoners may flood state courts with successive habeas petitions in hopes of obtaining an ambiguous decision. *See id.* To the extent that this occurs, federal courts will have to exercise jurisdiction over greater numbers of state prisoners. *See id* at 1054 n.6. Furthermore, state justices will be hard pressed to improve their writing habits if they are deluged with habeas petitions.
117. *See* Baker, *supra* note 79, at 825-26 (1985); Matasar & Bruch, *supra* note 1, at 1376. In addition, the Court may have hoped the plain statement rule would reduce the frequency with which judges affirm without an opinion. *See infra* notes 127-134 and accompanying text. For an illustration of how a state court may plainly rely on a state ground, see O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 524, 523 N.E.2d 277, 278, 528 N.Y.S.2d 1, 2 (1988); People v. Alvarez, 70 N.Y.2d 375, 381, 515 N.E.2d 898, 901, 521 N.Y.S.2d 212, 215 (1987).

Some members of the Court, however, have been more willing to accept inexact statements of reliance. *See*, e.g., Finley, 481 U.S. at 563 (Brennan, J., dissenting) (Court should refuse jurisdiction because state law not interwoven with federal law); *Van Arsdall*, 475 U.S. at 691 (Stevens, J., dissenting) (same); Meyers, 466 U.S. at 383 n.1 (Stevens, J., dissenting) (same).
access to federal forums. Yet an opposite interpretation of the plain statement rule, obstructing access to federal forums, better serves judicial efficiency.

One explanation for the Court's approach is that by permitting lower courts to exercise jurisdiction frequently, it can use the threat of reversal as a "stick" to persuade state courts to change their writing habits. Alternatively, state courts, by adopting a more conscientious writing style, can immunize their decision from federal habeas review: "the state court is given the opportunity for requiring deference to its plain statement. When that plain statement is lacking, dual federalism allows [federal courts] to treat the decision as within [their] domain."

Despite this opportunity, state court judges will probably not adopt more conscientious writing habits. Given their own crushing caseload, inadequate assistance and the repetitive nature of many of the cases that appear before them, it seems unrealistic to expect that state court judges will begin to produce precisely worded opinions. Even if they did attempt to write more opinions, ambiguity is simply impossible to eradicate.

1. ANOs

An appellate decision affirming without an opinion ("ANO") is ambiguous because a federal habeas court cannot determine whether the deci-

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119. See supra note 118 and accompanying text.
120. To the limited extent that the plain statement rule does foster judicial economy, it does so whether or not the Court exercises jurisdiction. Federal courts no longer have to expend effort on jurisdictional decisions. Yet adopting a presumption of jurisdiction grants more state prisoners access to federal courts, thus swelling the federal docket and expending judicial resources. See supra notes 113-116 and accompanying text.
122. See Baker, supra note 79, at 825-26. The Court may achieve at least partial success in this area. The New York Appellate Division's First Department changed its prior practice by instituting a policy of writing opinions for every disposition. See Parloff, Ist Dep't Pledges to Write Opinions for All Appeals, Manhattan Law., Oct. 3, 1989—Oct. 9, 1989, at 4 (hereinafter Parloff I). Harris may well have been the impetus for such a change. See Parloff, "Affirmed. No Opinion. All Concur.", Manhattan Law., Aug. 29, 1989—Sept. 11, 1989, at 19 (hereinafter Parloff II). The state court will preclude the possibility of reversal by issuing plain statements. Most state courts, however, will not match the First Department's example. See infra notes 121-145.
124. See infra notes 128-145 and accompanying text.
125. See infra note 140.
sion rests on federal or state grounds. Judges frequently render ANOs. For instance, in 1987, 92 percent of all criminal decisions and 98.5 percent of all criminal affirmances decided by the New York Appellate Division’s First Judicial Department were rendered as ANOs.

Indeed, a number of factors may lead judges to continue rendering ANOs:

The increases in case volume and difficulty have placed great pressure on the judiciary. Appellate judges have sought to reduce that pressure in a number of ways, one of the most common being to reduce the number of opinions that they publish. Doing so, it is believed, saves judges much valuable time because unpublished opinions require less judicial effort to prepare.

Rendering a decision as an ANO saves more time than not publishing the opinion. Other rationales include reduced costs in acquiring and storing legal materials as well as simplified legal research. An ANO also insulates state court judges from criticism by the electorate.

2. Ambiguous Opinions

When not using ANOs, state court judges will probably continue to write ambiguous opinions. By rendering ambiguous opinions, state judges can mitigate some political consequences of their decisions. For example, judges can blame a politically unpopular or sensitive decision on federal requirements.

Ambiguous state opinion writing will also continue because perfect

128. See Robson & Mello, supra note 93, at 124; see, e.g., Booker v. Lynaugh, 872 F.2d 100, 100-01 (5th Cir. 1989) (exercising jurisdiction because Texas Court of Criminal Appeals affirmed without opinion); Baum v. Leonardo, No. 88 Civ. 8171 (S.D.N.Y. July 24, 1989) (LEXIS, Genfed library, Dist file) (exercising jurisdiction because New York’s Appellate Division affirmed without opinion).

129. See Marvell, supra note 94, at 288, 291.

130. See Parloff II, supra note 122, at 1. The 1st Department has stated that it will now write opinions in all cases. See Parloff I, supra note 122, at 4.


132. Id.

133. Cf. Marvell, supra note 94, at 287 (when opinion not available to public, attorneys, or other courts, judges can save time by writing less refined opinions); Weaver, supra note 115, at 479 (same).

134. See Richman & Reynolds, supra note 131, at 313.

135. See id. at 313-14. Even assuming that ANOs are not prevalent, state court judges will still insulate themselves from criticism by the electorate by writing ambiguous opinions. See Matasar & Bruch, supra note 1, at 1378.

136. See Matasar & Bruch, supra note 1, at 1379-80.

137. See generally Harris v. Reed, 109 S. Ct. 1038, 1045 (1989) (Stevens, J., concurring) (state judges frequently overprotect citizens); Bice, supra note 33, at 756-57 (discussing political motivation to write ambiguously); Matasar & Bruch, supra note 1, at 1378 ("A state judge who holds that state and federal law together compel an unpopular result runs quite a different political risk compared to a judge who holds squarely that state law gives greater rights than federal law."). Political motivation is also a rationale for a judge’s use of ANOs. See supra note 135 and accompanying text.
clarity is difficult to achieve. One commentator has noted that "[j]udicial expression in opinion writing generally has its own limits, [and] in difficult cases dealing with complex issues the intellectual process is peculiarly fleeting." In addition, because the state court docket is so large, judges cannot devote much time to careful writing.

Indeed, empirical evidence following Michigan v. Long suggests that state courts may well continue writing ambiguous opinions. After an examination of over five hundred state cases involving constitutional claims, one author concluded that state courts have failed to adhere to the plain statement rule. It is unlikely that Harris v. Reed will do any more to inspire state courts to alter their habits than did Michigan v. Long.

3. One-Sentence Statements of Reliance

Moreover, state courts may write unambiguously without substantially changing their writing habits. State judges could plainly indicate the basis of their decision, and avoid federal habeas review, by using a one-sentence statement of reliance. This practice rewards state courts without exacting further clarification in their writing. Moreover, by briefly indicating reliance, judges erect insurmountable obstacles to further litigation while also remaining unaccountable for their decisions. Habeas corpus is a fundamental means of protecting a defendant's federal rights. State courts should not be able to foreclose federal habeas review without addressing the petitioner's case in a lucid opinion. Harris enables state courts to accomplish this without requiring any change in their writing habits.


142. See id. at 1047, 1068.


144. See Richman & Reynolds, supra note 131, at 313-14; Robson & Mello, supra note 93, at 122. Using a short statement of reliance does not always deny state prisoners a federal habeas forum. Petitioners may still obtain federal review by claiming that the state procedural rule is not adequate and independent. See supra note 96 (Ninth Circuit exercised jurisdiction even though state court relied on state procedural rule because state rule not adequate). See generally Henry v. Mississippi, 379 U.S. 443, 447 (1965) (determining that adequacy and independence is federal question).

145. See generally L. Yackle, supra note 6, § 17 (origins of "great writ").
Prior to *Harris*, most circuits either assumed reliance on the state ground or attempted to interpret the state court's intention. These approaches subjected a large percentage of petitioners to the cause and prejudice test because federal courts would find or presume reliance. In contrast, *Harris* compels these federal courts to exercise habeas jurisdiction without requiring petitioner to demonstrate cause and prejudice. Only deliberate bypasses of state procedural rules will bar petitioners from federal court. This approach represents a return to the *Noia* standard, and has been followed in many recent federal decisions.

This effective return to *Noia* will most likely persist. Despite *Harris*, state judges will probably continue to render ambiguous decisions. Furthermore, even if state courts attempt to indicate reliance explicitly, state prisoners will have greater access to federal post-conviction forums.

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146. See supra notes 9-11 and accompanying text.
147. See supra note 1, at 1376.
148. See generally Matasar & Bruch, supra note 1, at 1379-80 (reasons for state courts not writing opinions). The commentators note that "for myriad reasons, state courts may choose not to clarify the grounds of their decisions. To the extent that there are many such cases, the approach of *Michigan v. Long* [and thus *Harris v. Reed*] could increase rather than reduce the number of cases subject to [federal adjudication]." Matasar & Bruch, supra note 1, at 1375-76.
149. See, e.g., Peterson v. Scully, No. 89-2202 (2d Cir. Feb. 7, 1990) (LEXIS, Genfed library, Cir file) (court exercised jurisdiction because state court failed to even mention an obvious procedural default); Thompson v. Sowders, 887 F.2d 1088 (6th Cir. 1989) (exercising jurisdiction because state court failed to rely expressly on state procedural grounds); Edwards v. Butler, 882 F.2d 160, 165 (5th Cir. 1989) (exercising jurisdiction because state court failed to rely expressly on state procedural grounds); Evans v. Thompson, 881 F.2d 117, 123 n.2 (4th Cir. 1989) (court exercised jurisdiction because state court did not plainly indicate basis of decision, even though it felt Virginia intended to hold petitioner's claim procedurally barred). *Petition for cert. filed, — U.S.L.W. — (U.S. Sep. 27, 1989) (No. 89-516); Nieto v. Sullivan, 879 F.2d 743, 746 (10th Cir.). (while petitioner failed to preserve claim for appeal, court exercised jurisdiction because New Mexico Court of Appeals addressed merits of petitioner's constitutional claim and did not plainly indicate reliance on default), *cert. denied*, 110 S. Ct. 373 (1989); Owens v. Tred, 873 F.2d 604, 610-12 (2d Cir. 1989) (same); Booker v. Lynaugh, 872 F.2d 100, 100-01 (5th Cir. 1989) (exercising jurisdiction because Texas Court of Criminal Appeals affirmed without opinion).

150. See supra notes 117-145 and accompanying text.
if those courts require plain statements. An analysis of Supreme Court cases construing the *Michigan v. Long* plain statement rule suggests that the Court requires a very clear statement of reliance before it will refuse to exercise jurisdiction.\(^{151}\) Thus, even if state courts attempt to indicate that they relied on the state rule, petitioners will frequently obtain access to federal habeas forums without demonstrating cause and prejudice.

**CONCLUSION**

The majority in *Harris v. Reed* ostensibly adopted the plain statement rule to foster judicial economy and demonstrate respect for state procedural rules. It is unrealistic to assume, however, that the rule will significantly reduce the need to construe state law or examine lower court records and appellate briefs. In addition, the plain statement rule will eviscerate the cause and prejudice test. The resulting increase in the federal docket will offset whatever contribution *Harris* might make to judicial efficiency.

By exercising jurisdiction and thus threatening reversal, the Court may have hoped to induce changes in the state judiciary’s writing practices. This endeavor will not succeed. Political pressures, a voluminous caseload and the inherent difficulty of writing unambiguously will prevent the state judiciary from altering its routines. The paramount danger is that state courts will circumvent *Harris* by issuing one-line plain statements. While unambiguous, this type of decision would frustrate the Court’s objective. State courts will be able to deny plaintiffs a federal forum without a cogent explanation of their reasoning.

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\(^{151}\) *See supra* note 118 and accompanying text.