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EQUAL PROTECTION AND THE PROCEDURAL BAR DOCTRINE IN FEDERAL HABEAS CORPUS

LAURA GASTON DOOLEY*

INTRODUCTION

WINFORD L. Stokes, Jr. and Theodore C. Harris had much in common. Both were death-row inmates in the late 1980s. Both were convicted of murder following bifurcated jury trials in which they later alleged that they had not received effective assistance of counsel as required by the federal Constitution. Both inmates sought collateral review of their convictions in federal courts. The similarities between them end there. Because Stokes had procedurally defaulted on his federal constitutional claim in state court under the law of Missouri, the federal appeals court refused to consider the merits of his federal constitutional claim. Harris, on the other hand, was convicted in a Florida state court, which allowed him to pursue his ineffective assistance of counsel claim even though he had not raised it in his initial appeal or in a state habeas proceeding. Although state courts denied Harris relief on

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1. See Stokes v. Armontrout, 851 F.2d 1085, 1087 (8th Cir. 1988); Harris v. State, 528 So. 2d 361, 362-63 (Fla. 1988). Stokes' ineffective assistance argument was based on his trial attorney's failure to challenge in his motion for new trial the trial court's refusal to offer a mandatory instruction. See Stokes, 851 F.2d at 1092. Harris claimed that his trial counsel had been constitutionally deficient during the sentencing phase of his trial by failing to investigate properly and to present mitigating evidence. See Harris v. Dugger, 874 F.2d 756, 762 (11th Cir. 1989).

2. See Harris, 874 F.2d at 758, 761; Stokes, 851 F.2d at 1087.

3. A "procedural default" occurs when a prisoner's non-compliance with a state procedural rule results in the state court's refusal to consider that prisoner's substantive claim. The problem for the federal court later reviewing the case in a habeas corpus proceeding is whether it should give preclusive effect to the state court procedural ruling. See infra notes 112-119 and accompanying text.

4. See Stokes v. Armontrout, 851 F.2d 1085, 1094 (8th Cir. 1988). Stokes had raised his ineffective assistance claim in a motion for post-conviction relief under a Missouri procedural rule, but his counsel did not pursue the claim on appeal of the denial of that motion. See id. at 1091. Therefore, under the law of Missouri, Stokes could not reactivate the claim in any later petition for post-conviction relief. See id. at 1092. Stokes' behavior was characterized as a "procedural default" under Missouri law, a characterization that federal courts were required to respect throughout the course of Stokes' application for federal habeas corpus relief. See id; see also infra notes 20-119 and accompanying text (explaining procedural bar rule).

5. See Harris v. State, 528 So. 2d 361, 362-63 (Fla. 1988). He advanced this claim in a state proceeding brought under a Florida procedural provision, after unsuccessfully pursuing a different ineffective-assistance-of-counsel claim in a state habeas proceeding. See Harris v. Dugger, 874 F.2d 756, 759 (11th Cir. 1989).
the merits of his federal constitutional claim, a federal court collaterally reviewed the merits of the claim. In 1989, a federal appeals court granted Harris a writ of habeas corpus on constitutional grounds. In 1990, Stokes was put to death by lethal injection.

The critical difference between death and life for Stokes and Harris was their geographical locations. Although both prisoners had a right under the Constitution and federal statutes to apply for habeas corpus relief in the federal courts, Stokes' federal right was eviscerated because he was convicted in Missouri, a state with a different procedural regime than that of Florida, where Harris was convicted.

The procedural bar doctrine in federal habeas corpus cases, as presently conceived and implemented by the Supreme Court, requires federal courts to deny consideration of the merits of a federal constitutional claim raised by a prisoner convicted in a state court whenever the relevant state procedural law would find the claim "defaulted." The rule applies unless the prisoner can demonstrate both "cause" for the state court default and "prejudice" resulting from it, or can show that the constitutional violation has probably resulted in conviction despite his actual innocence. Thus, Stokes, who was imprisoned in a state that applied a strict procedural default rule, was denied access to federal review of the merits of his federal constitutional claim, while Harris received a second review in federal court because the state in which he was imprisoned did not deem his procedural behavior a default.

Although our federal system is based on the dual sovereignty of the states and the federal government and tolerates much disparity in treatment based on geographical location, this Article argues that the equal protection guarantee of the Constitution does not countenance the dis-

6. See id. at 761.
7. See id. at 761-64.
8. See id. at 764.
10. See U.S. Const. art. I, § 9, cl. 2.
13. See Murray v. Carrier, 477 U.S. 497, 499-500 (1986); see also infra notes 86-99 (explaining "actual innocence" escape hatch).
15. The fourteenth amendment restricts only state action. See U.S. Const. amend. XIV, § 1. It is now well settled, however, that the amendment's equal protection guarantee operates by reverse incorporation through the fifth amendment to check federal government action that violates equal protection principles. See Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); J. Nowak, R. Rotunda & J. Young, Constitutional Law 524 (3d ed. 1986).
parity in treatment received by Stokes and Harris. Moreover, the equal protection problem inherent in the procedural bar doctrine is only one symptom of a more systemic illness in the federal habeas remedy. Simply put, the Supreme Court is using the procedural bar doctrine as a screening device to weed out constitutional claims that it does not consider compelling on the merits.

This Article proposes abandonment of the procedural bar doctrine in favor of a system that treats equally prisoners who are similarly situated in terms of both their claims for federal habeas relief and procedural behavior in state court. Part I of this Article traces the historical development of the procedural bar doctrine in federal habeas jurisprudence and describes the policies that motivated the Court to adopt it in its present form. This Part argues that the rule, which was developed in a case brought by a federal prisoner, was imported into the state petitioner context without a satisfactory analysis of the procedural situation of state prisoners seeking federal relief. This Part concludes that the Court has employed the rule as a substantive, rather than procedural, screening device. Part II includes a functional and theoretical critique of the rule, demonstrating that the current procedural bar regime violates the equal protection guarantee and arguing that the Constitution requires implementation of a federal collateral review system that does not unfairly discriminate against prisoners in states that have strict procedural regimes.

Part III examines several possible reformulations of the rule and demonstrates the difficulties inherent in any attempt to construct a procedural bar scheme that is not geographically discriminatory. This Part demonstrates that the doctrine is an unsatisfactory mechanism for controlling the tide of federal habeas petitions. This Part also concludes that it is impossible to construct a federal habeas procedural bar doctrine that neither unfairly discriminates among prisoners in different states nor infringes unnecessarily upon state interests. The final Part of this Article advocates a more straightforward approach to federal habeas review. Rather than using the procedural bar doctrine to weed out the constitutional claims that the Court considers less deserving of review, this Part concludes that the Court should explicitly identify those types of substantive claims that ought not be cognizable in federal habeas proceedings. Substantive claims that the Court considers proper for habeas review should be considered on their merits regardless of how a state characterizes a prisoner's procedural behavior. Adoption of such an approach would eliminate the awkward and cumbersome analysis presently required under the procedural default doctrine. Under the proposed

16. See Davis v. United States, 411 U.S. 233, 242 (1973); infra notes 70-76 and accompanying text.
18. See infra notes 124-29 and accompanying text.
standard, unless a state prisoner knowingly and intentionally waives his right to review of a federal claim, access to federal review should turn upon the substantive nature of his claims, not on the procedural vagaries of the state of his imprisonment. This Article concludes that the adoption of such a coherent, straightforward approach to federal habeas review would remove the unfair discrimination of the present procedural bar rule.

I. HISTORY OF THE PROCEDURAL BAR DOCTRINE

The Supreme Court created the procedural bar doctrine. The doctrine is without basis in either the language or legislative history of the statute granting federal courts subject matter jurisdiction over habeas corpus petitions. The Court has employed the doctrine to implement its members' philosophies concerning the proper scope of the habeas rem-


(a) Writs of habeas corpus may be granted by the Supreme Court, any Justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

Section 2254 speaks directly to the availability of the writ to prisoners in state custody:

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

(b) An 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, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Id. at § 2254.

The present Court uses the doctrine as a screening mechanism to weed out constitutional claims that it considers less compelling on the merits. A brief recounting of the doctrine's development is instructive for several reasons. First, it demonstrates the Court's willingness to adopt and modify the procedural bar doctrine absent any legislative directive. Second, it points to the equal protection problems inherent in the current formulation of the procedural bar doctrine. Finally, it sheds light on the Court's use of the doctrine as a screening device that facilitates a larger judicial attempt to cut back on the availability of federal habeas review.

The writ of habeas corpus had a long and illustrious history in the English law prior to the founding of the United States. The writ warranted mention in the United States Constitution, which provides that the "[p]rivilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Judiciary Act of 1789 authorized federal courts to issue the writ to prisoners in federal custody. In its earliest days, however, the writ generally issued only when the imprisoning court lacked jurisdiction over a petitioner. In the late nineteenth century, the scope of the federal writ was substantially expanded. As part of its Reconstruction legislative pack-

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23. See infra notes 181-182 and accompanying text.


25. U.S. Const. art I, § 9, cl. 2.


27. See Ex parte Watkins, 28 U.S. (1 Pet.) 193, 202 (1830); see also Bator, supra note 21, at 465-66 (original statutory authorization did not define the writ's substantive reach; thus, Court restricted its use to cases of improper jurisdiction). But see Fay v. Noia, 372 U.S. 391, 402-05 (1963) (demonstrating that habeas corpus was available to remedy any governmental restraint contrary to fundamental law). See generally Friedman, A Tale of Two Habeas, 73 Minn. L. Rev. 247, 262 (1988) (Act of 1867 was not used for convicted prisoners in state custody for first sixty years following enactment, despite broad language).

28. Even before the statutory expansion of the scope of the writ, federal cases had begun to recognize that the writ might be used to challenge convictions claimed to violate the Constitution. See Wainwright v. Sykes, 433 U.S. 72, 79 (1977).

29. This historical context is quite important, as Justice Brennan pointed out in Fay: [a]lthough the Act of 1867, like its English and American predecessors, nowhere defines habeas corpus, its expansive language and imperative tone, viewed against the background of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy, would seem to make inescapable the conclusion that Congress was enlarging the habeas remedy as previously understood, not only in extending its coverage to state prisoners, but also in making its procedures more efficacious. In 1867, Congress was anticipating
age, the post-Civil War Congress enacted a statute vesting the federal courts with power to issue the writ to anyone held "in custody in violation of the Constitution or laws or treaties of the United States."  

Although there is spirited debate in the literature concerning the precise scope Congress intended for the writ, it is clear that the legislature meant to grant federal courts the power to vindicate federal rights, even when that power clashed with state court action. Not until 1953, however, did the Court fully recognize the federal courts' duty to examine the federal law claims of state prisoners. In Brown v. Allen, a state death row prisoner alleged that racial discrimination had infected the selection of his grand jury and that a coerced confession had been used against him at trial. Although state courts had found those claims to lack merit, the Brown Court reconsidered the claims, noting that the state court's determination was not res judicata.

Unfortunately, Brown provided no explanation for its shift from the limited, common law scope of collateral review to this new use of the writ, although the plain language and the legislative history of the 1867 resistance to its Repeal means and planning the implementation of the post-war constitutional Amendments. Debated and enacted at the very peak of the Radical Republicans' power, the measure that became the Act of 1867 seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees. Congress seems to have had no thought, thus, that a state prisoner should abide state court determination of his constitutional defense—the necessary predicate of direct review by this Court—before resorting to federal habeas corpus. Rather, a remedy almost in the nature of removal from the state to the federal courts of state prisoners' constitutional contentions seems to have been envisaged. Fay, 372 U.S. at 415-16; see also Mitchum v. Foster, 407 U.S. 225, 238-39 (1972) ("new structure of law that emerged in the post-Civil War era," including habeas statute, clearly established "role of the Federal Government as a guarantor of basic federal rights against state power").


31. Compare Bator, supra note 21, at 474-477 & n.80 (legislative history does not support notion that 1867 Act was intended to turn habeas remedy into general writ of error) with Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.-C.L. L. Rev. 579, 618 (1982) ("[T]he broad language of the 1867 Act must be read literally to require relitigation of every federal question . . . . Although it is sparse, the available legislative history supports this broad reading of the statutory language.").


33. See Fay, 372 U.S. at 415-17; see also Yackle, Explaining Habeas Corpus, 60 N.Y.U. L. Rev. 991, 1027 (1985) ("federal courts' special role in the protection of individual liberty against state power" was established by legislative activity of Reconstruction era, including adoption of 1867 Act).

34. 344 U.S. 443 (1953).

35. See id. at 466.

36. See id.

37. See id.

38. See id. at 458.
Act authorized this more expansive view. Brown's failure to provide a definitive justification for the expansion of federal review has plagued commentators who have searched for a measure by which to evaluate later doctrinal developments in the field. Despite its shaky doctrinal foundation, Brown has demonstrated remarkable staying power. Although advocates of limited federal review have decried the exercise of such federal power, it is well settled since Brown that federal courts have the power to consider the merits of federal claims made by state prisoners.

At the same time that the Court announced its broad construction of the jurisdictional scope of habeas statute, it imposed a significant limitation on the writ. Daniels v. Allen, a companion case to Brown, involved the same constitutional claims. Unlike Brown, whose federal claims had been considered on the merits by the state courts, Daniels' claims were never considered on direct appeal because his attorney had failed to perfect his appeal within the time required under state procedural rules. The Court held that Daniels' claims were foreclosed from federal habeas review by his state procedural "default."

The Court's 1963 decision in Fay v. Noia completely abrogated Daniels' formulation of the habeas corpus procedural bar rule. Fay set out a federal habeas corpus model that mirrored post-conviction review mechanisms in the states, recognizing that the habeas statute empowers federal courts to correct constitutional error in state proceedings, even when a state court procedural default has occurred. Fay explicitly distinguished federal habeas review of state court judgments from direct review.

39. See supra note 21.
40. See Friedman, supra note 27, at 264-65; Yackle, supra note 27, at 1008; see also Bator, supra note 21, at 502 (Brown's failure to provide principled rationale has caused difficulty in defining proper scope of federal review.).
42. As the discussion accompanying infra notes 50-60 indicates, the Court has never repudiated the notion that federal habeas courts have power to look beyond state procedural defaults and consider the merits of "defaulted" claims.
43. 344 U.S. 443 (1953).
44. Brown and Daniels challenged the selection of their juries on the basis of race discrimination and claimed that their confessions had been coerced. See Brown v. Allen, 344 U.S. 443, 466 (1953); Daniels, 344 U.S. at 483.
45. See Brown, 344 U.S. at 466-67.
46. See Daniels, 344 U.S. at 482-83.
47. See id. at 486. The Court failed to identify the specific basis for this holding, although it offered three possibilities—that the exhaustion doctrine required foreclosure of claims that cannot, due to procedural irregularity, be "exhausted" in state court, that Daniels' failure to perfect the appeal constituted a "waiver" of the claim, and that the state procedural holding was an adequate and independent state ground for the holding. See id. at 460.
49. See id. at 425-26.
50. See id. at 438-39.
51. See id. at 438.
Supreme Court review of state court judgments: "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." Thus, under Fay, there were no structural checks on federal court power to grant habeas relief; only prudential notions of comity and respect for state procedural regimes restrained judicial use of the writ. Accordingly, Fay settled on a standard that focused on the prisoner's responsibility for the state court procedural default: unless a prisoner "deliberately bypassed" state processes for relief, he had a right to federal habeas review. This test was to be applied uniformly across the spectrum of conceivable state rules and state determinations of procedural default. The federal courts were required to conduct independent inquiries into the nature of the procedural default, regardless of what state courts had concluded on the issue.

In contrast to the unsupported Brown decision, Fay offered substantial historical and theoretical support for its expanded understanding of the writ's scope. Most importantly, Fay rejected an appellate model of federal habeas corpus. Unlike direct appeal, "[t]he jurisdictional prerequisite [for habeas corpus] is not the judgment of a state court but detention simpliciter.... Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him." Thus, Fay stands for the proposition that a federal court has the power to look beyond a state court procedural "default" to consider the merits of a federal constitutional claim. Many commentators were, however,

52. Id. at 399; see also Wainwright v. Sykes, 433 U.S. 72, 82-83 (1977) (quoting Fay).
54. Fay made clear that the Court envisioned this test as a waiver rule, focusing on the volitional act of the prisoner himself:
   [t]he classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938)—"an intentional relinquishment or abandonment of a known right or privilege"—furnishes the controlling standard. . . . At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief.
Fay, 372 U.S. at 439 (footnotes omitted); see also Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1069-86 (1971) (describing Court's erosion of Fay waiver doctrine).
55. See Fay, 372 U.S. at 438.
56. See id. at 426.
57. See id. at 399-426; see also supra notes 20-47 and accompanying text (discussing historical support).
58. See id. at 426-35 (considering theoretical foundations for, and potential objections to, re-litigation of federal claims in federal habeas proceedings).
59. Id. at 430-31; cf. Friedman, supra note 27, at 277-324 (advocating appellate model).
60. Justice Brennan's dissent in Sykes indicates that he did not see that case as a departure from the Fay model for federal habeas corpus:
   [t]his Court has never taken issue with the foundation principle established by
dissatisfied with the broadened scope of federal habeas corpus review. The Court began to chip away at the expansive vision of Brown and Fay by reining in the outer reaches of federal habeas review. Most notably, in Stone v. Powell, the Court held that state prisoners may not relitigate fourth amendment claims on federal habeas corpus if such claims are fully and fairly considered in state court.

In 1977, the Court again confronted the procedural bar problem in Wainwright v. Sykes. In accordance with the trend to cut back on the availability and scope of federal habeas review, Sykes fashioned a new, restrictive formulation of the procedural bar doctrine, checking the exercise of federal judicial power to review habeas claims following state procedural defaults. In Sykes, a state prisoner sought to challenge the trial court's admission into evidence of Miranda-defective statements. Sykes' attorney failed to object to the admission of these statements at trial, and the matter was not included in his direct appeal. When Sykes presented the Miranda claim in his state court post-conviction proceedings, the Florida courts refused to consider the issue because of Sykes' failure to comply with Florida's contemporaneous-objection rule.

Fay v. Noia—that in considering a petition for the writ of habeas corpus, federal courts possess the power to look beyond a state procedural forfeiture in order to entertain the contention that a defendant's constitutional rights have been abridged.

63. See id. at 494. This, of course, conflicted with the Brown notion that state court adjudication of federal constitutional issues would not be res judicata on federal habeas review. See Brown v. Allen, 344 U.S. 443, 458 (1953). Powell also created an anomaly with respect to the procedural bar doctrine. Although a prisoner whose fourth amendment claim is decided adversely in state court is barred from receiving collateral federal review of his conviction, a prisoner who has defaulted on such a claim in state court might get review via one of the "escape hatches" left open in Sykes. See Stuntz & Jeffries, Ineffective Assistance and Procedural Default in Federal Habeas Corpus, 57 U. Chi. L. Rev. 679, 680-91 (1990); see also infra notes 69-78, 92-99 and accompanying text (discussing escape devices).  
65. In addition to Powell, the Court also restricted the scope of habeas relief by limiting the retroactive application of new constitutional rules in order to avoid having to retry all prisoners who might, after the fact, assert a claim based on a new rule. See Linkletter v. Walker, 381 U.S. 618, 639-40 (1965). But see Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (holding that new constitutional rules will apply to all cases pending on direct review at time new rule is announced). More recently, in Teague v. Lane, 489 U.S. 288 (1989), the Court went even further, holding that federal habeas courts may not even decide constitutional issues if the resulting new rule would not be eligible for retroactive application. See id. at 316.  
66. See Sykes, 433 U.S. at 74-75.  
67. See id. at 74.
Court held that Sykes could not pursue his federal constitutional claim on federal habeas corpus, even though he had not deliberately bypassed state procedures.68

Sykes thus replaced the Fay deliberate-bypass test with one that returned to the states the power to define what constitutes a procedural bar to federal habeas review. Under the new procedural bar rule announced in Sykes, a state court procedural default will preclude federal habeas corpus review unless the state prisoner can show both cause for his procedural “default” and prejudice resulting from the constitutional violation.69

The test adopted in Sykes was not developed for use in habeas cases brought by state prisoners. Rather, the test was first articulated in Davis v. United States,70 a habeas corpus case brought by a federal prisoner.71 Davis challenged the composition of the grand jury that had indicted him.72 A federal rule of criminal procedure provides that such challenges are waived if not made before trial, but also that “the court for cause shown may grant relief from the waiver.”73 Davis held that the special standard for determining the preclusive effect of the rule, contained in the rule itself, should govern in later habeas proceedings instead of the Fay deliberate bypass standard.74 Thus, because Davis was unable to demonstrate both cause for his failure to comply with the relevant procedural rule and prejudice arising from the alleged constitutional violation,75 he was not afforded an opportunity to litigate the claim in his

68. See id. at 86-91.
69. See id. at 87. The Court expressly declined to define the terms “cause” and “prejudice,” noting only that the cause and prejudice test was not satisfied in that case. See id. at 87, 91. Later cases made clear that showing “cause” for a procedural default is indeed a difficult thing to do. For example, in Murray v. Carrier, 477 U.S. 478 (1986), the Court held that attorney error short of ineffective assistance does not constitute “cause.” See id. at 488. The only situations in which the Court has so far found “cause” to exist are when an underlying constitutional claim was so novel that the attorney could not have been expected to raise it, see Reed v. Ross, 468 U.S. 1, 12-16 (1984), and when the government concealed evidence a prisoner needed to prove his claim. See Amadeo v. Zant, 486 U.S. 214, 221-23 (1988).

The term “prejudice” has eluded precise definition as well. In United States v. Frady, 456 U.S. 152 (1982), the Court stated that prejudice would only be shown if the constitutional violation worked to the prisoner’s “actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Id. at 170 (emphasis omitted). Professors Stuntz and Jeffries define Sykes prejudice as “some likelihood—greater than that sufficient to create a reasonable doubt but perhaps less than ‘more likely than not’—that the error or default affected the outcome of the prosecution.” Stuntz & Jeffries, supra note 63, at 684. See generally Marcus, supra note 12, at 733 (offering definition of prejudice that would require showing of substantial possibility that but for constitutional violation result would have differed).

71. See id. at 235.
72. See id.
73. Fed. R. Crim. P. 12(f); see Davis, 411 U.S. at 241.
74. See Davis v. United States, 411 U.S. 233, 242 (1973); see also supra notes 48-61 and accompanying text (explaining Fay standard).
75. See Davis, 411 U.S. at 243-45.
The next term, in *Francis v. Henderson*, the Court applied the *Davis* cause-and-prejudice test to a case involving a state prisoner who had failed to challenge the composition of his grand jury before trial, as required by state law.

*Davis* and *Francis* set the stage for the shift from the deliberate-bypass rule of *Fay* to the new rule of *Sykes*, under which the states themselves determine the preclusive effect in later federal habeas corpus proceedings of their prisoners' failures to comply with state procedural rules—a determination that the federal habeas court may not tamper with unless it finds cause and prejudice. Interestingly, *Sykes* noted that the state procedural rule involved in *Francis* lacked the "cause" language of the federal procedural rule that had been the source of the cause-and-prejudice test used in *Davis*. Nonetheless, *Francis* had concluded that "there is no reason to... give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants." The reference to *Francis* was *Sykes*' sole authority for the appropriation of a doctrine of habeas corpus for federal prisoners into the state prisoner habeas context. The Court overlooked, however, a key difference between the procedural situations of federal and state prisoners: federal prisoners are subject to uniform rules of procedure in the first instance, while state prisoners who sue in federal court for habeas relief have been subject to one of fifty different procedural regimes.

*Sykes* was a relatively easy case because the Court's result would probably have been reached under the rule of *Fay*. The record suggested that Sykes' trial counsel had a strategic reason for his conduct. At least two Justices viewed that strategic decision as a valid one with consequences that Sykes should be required to bear. Moreover, the Court noted that Sykes had not met his burden under the *Fay* rule to "negat[e] deliberate bypass and explain his failure to object." Indeed, the three concurring Justices in *Sykes* apparently did not view the case as a significant departure from *Fay*. Later cases make clear, however, that *Sykes* severely curtailed the reach of the habeas remedy.

The Court's new hard-line approach in habeas cases involving state procedural defaults was graphically demonstrated in the treatment of a

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76. See id. at 245.
78. See id. at 541-42. *Francis* explicitly noted that the result reached in that case, because it involved a state prisoner, was based on "considerations of comity and concerns for the orderly administration of criminal justice." Id. at 539; see Wainwright v. *Sykes*, 433 U.S. 72, 84 (1977).
79. See *Sykes*, 433 U.S. at 84.
81. See *Sykes*, 433 U.S. at 89.
82. See id. at 96 (Stevens, J., concurring); id. at 99 (White, J., concurring).
83. Id. at 99 (White, J. concurring).
84. See id. at 91 (Burger, C.J., concurring); id. at 94 (Stevens, J., concurring); id. at 97-98 (White, J., concurring).
question left unanswered in Sykes: what content should be given to the cause-and-prejudice escape hatch of the new procedural bar rule. In two 1986 cases, the Court developed startlingly restrictive definitions of these terms.

The first was Murray v. Carrier. Carrier had been convicted in a state court of rape and abduction. Despite several requests by his counsel, the judge presiding over his trial refused to allow counsel to examine potentially exculpatory statements made by the victim. Although this alleged error was mentioned in Carrier’s notice of appeal, Carrier’s appellate counsel failed to include it in his client’s petition for appeal, thus barring appellate consideration of the claim under state law. Carrier held that inadvertent attorney error that does not constitute ineffective assistance of counsel under the relevant sixth amendment standard does not amount to cause to excuse the procedural default. In Carrier, the Court reaffirmed its commitment to the Sykes cause-and-prejudice test, characterizing it as a “sound and workable means of channeling the discretion of federal habeas courts.” Carrier, however, fashioned another escape hatch in the seemingly impenetrable procedural bar rule: when 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 thus exposed the Court’s strategic use of the procedural bar rule. The Court tightened the cause-and-prejudice test by giving the term “cause” a restrictive interpretation. Accordingly, any constitutional claim, as a general matter, may be precluded from federal collateral review by a state procedural default. At the same time, however, the Court created the mechanism by which certain types of substantive constitutional claims, namely those that bear on actual innocence, may receive federal review despite state procedural default. In determining the applicability of this escape hatch, federal courts screen the merits of petitioners’ constitutional claims before deciding whether a state procedural default

85. See id. at 87.
87. See id. at 482.
88. See id. Such a failure by the government to produce exculpatory evidence would violate the rule of Brady v. Maryland, 373 U.S. 83, 86-88 (1963).
89. See Carrier, 477 U.S. at 482.
92. Id. at 497. The use of the term “discretion” demonstrates the Court’s continued recognition that federal courts have the statutory power to look beyond state procedural defaults but choose not to. The Court also refers to the “habeas court’s equitable discretion” to handle claims procedurally defaulted in state court. Id. at 496 (quoting Reed v. Ross, 468 U.S. 1, 9 (1984)).
bar will be given preclusive effect in federal court. In Smith v. Murray, the Court held, in accordance with Carrier, that a prisoner could not resurrect a claim that his counsel had decided not to pursue on direct appeal. The Court concluded that Smith was not entitled to relief via the Carrier escape hatch because his claim, that inadmissible evidence was used against him during the sentencing phase of his trial, did not go toward proving that he was "actually innocent" of the crime. In order to decide this, of course, the Court had to examine the substantive basis of Smith's underlying constitutional claim. Provides further evidence that the Court uses the procedural bar doctrine as a device to weed out substantive claims that it finds less than compelling.

4. For example, imagine a capital murder case in which the convicted defendant claims to have received ineffective assistance of counsel based on his trial attorney's failure to call alibi witnesses. Because the law of the state in which this defendant is imprisoned forbids the presentation of a claim on post-conviction review that could have been, but was not, raised on appeal, the defendant is procedurally barred from pursuing his claim in state court. On the prisoner's application for federal habeas relief, the court, faced with the state procedural bar, must consider whether the defendant can show cause for his failure to include the matter on appeal and prejudice resulting therefrom. See Murray v. Carrier, 477 U.S. 478, 492 (1986). Defendant's only argument is that his appellate counsel failed to see the merit in his claim and therefore did not include it in his appeal. Under Murray, this does not constitute cause if it does not itself amount to ineffective assistance of appellate counsel. See id. Because cause is not present, a court would not need to consider the prejudice prong. Under Murray, however, the court must go on to consider whether the alleged constitutional defect probably resulted in the defendant's conviction despite his actual innocence. See id. at 495-96. This inquiry requires the court to consider the strength of the excluded evidence and the likelihood that it would have produced a not guilty verdict. Essentially, this is a determination of the merits of the ineffective assistance of counsel claim.


6. See id. at 535-37. The Court, however, left a petitioner the option of arguing that his counsel performed in a constitutionally ineffective manner in failing to raise a constitutional objection. See id. at 535.

7. See id. at 537-38.

8. In order to explore the availability of psychiatric defenses, counsel for the defendant requested that the trial court appoint a psychiatrist to his client, who had been convicted of rape. See id. at 529. Counsel advised the defendant not to discuss any prior criminal episodes. Nevertheless, the defendant told the doctor of an incident in which the defendant, with intent to rape, tore the clothes off a girl on a school bus and then decided not to rape her. The defendant was not informed that his statements would be used against him. See id. at 530. Over the defendant's objection, the doctor testified about the incident at trial. See id. at 530. On appeal, however, the defendant's counsel did not pursue his objection to the doctor's testimony. See id. at 531. The Court held that the alleged constitutional error of admitting the psychiatrist's testimony did not preclude the finding of true facts or result in the admission of false facts. As such, the refusal to consider the defendant's claim at the habeas corpus proceeding did not constitute a manifest miscarriage of justice. See id. at 538.

9. A recent habeas decision further demonstrates the Court's willingness to invoke the procedural bar doctrine when the underlying claim does not implicate petitioner's guilt. Dugger v. Adams, 489 U.S. 401 (1989), involved an eighth amendment challenge made by state prisoner Adams to the instructions given to the jury regarding their responsibility in sentencing to death. See id. at 405. In a five to four decision, the Court held that Adams' claim was procedurally barred in federal court because of his failure to
Though Sykes and Carrier reaffirmed the Fay premise that a state court procedural default does not deprive federal habeas courts of jurisdiction, the Court sometimes refers to state court determinations of procedural default as adequate and independent state grounds foreclosing federal consideration of the merits of petitioners' claims.\textsuperscript{100} In \textit{Harris v. Reed},\textsuperscript{101} the Supreme Court stated that Sykes "made clear" that the procedural bar doctrine was an outgrowth of the adequate and independent state ground doctrine.\textsuperscript{102} This statement, however, appeared in the context of the Court's holding that the plain statement rule, which requires the Supreme Court to reach the merits of cases on direct review when state court decisions are ambiguous as to whether they rest on federal or adequate and independent state grounds,\textsuperscript{103} should be applied in federal habeas corpus cases.\textsuperscript{104} Concluding that the "problem of ambiguous

raise the claim on direct appeal of his conviction, a procedural default under state law. See \textit{id.} at 410. Adams had argued successfully in the court below that he could show cause for his failure to assert the eighth amendment claim in his direct appeal because at that time the Court had not yet recognized that such a claim might exist. See \textit{id.} at 406. Although the Court had previously held that the novelty of a constitutional claim constituted cause to excuse a state court procedural default, see Reed v. Ross, 468 U.S. 1, 20 (1984), \textit{Adams} concluded that Adams' state procedural default would bar federal habeas review because he should have recognized during the state proceedings that his jury had not been instructed properly under state law. See \textit{Adams}, 489 U.S. at 407-08. That conclusion elicited a stinging dissent from Justice Blackmun, who was joined by three Justices: "the Court today . . . arbitrarily imposes procedural obstacles to thwart the vindication of what apparently is a meritorious Eighth Amendment claim." \textit{Id.} at 412-13 (Blackmun, J., dissenting).

100. The adequate and independent state ground doctrine states that the Court will not hear an appeal from a state's highest court under 28 U.S.C. § 1257 (1988) if the state court's decision is independent of federal law and sufficient to sustain the result. See \textit{Michigan v. Long}, 463 U.S. 1032, 1041 (1983); see also E. Chemerinsky, \textit{Federal Jurisdiction} 530-551 (1989) (discussing adequate and independent state ground doctrine). Thus, when a state court decision rests on two grounds, one state and one federal, the Court will not review the decision if the state law relied upon is independent and adequate. See E. Chemerinsky, \textit{supra}, at 533. The doctrine was created in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875). Since that time, the primary justification for maintaining the rule has been to avoid impermissible advisory opinions. See, e.g., \textit{Herb v. Pitcairn}, 324 U.S. 117, 126 (1945) (holding that rulings on state court decisions supported by adequate and independent state grounds would be advisory opinions). But see Matasar & Bruch, \textit{Procedural Common Law, Federal Jurisdiction Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine}, 86 Colum. L. Rev. 1291, 1302-10 (1986) (arguing that such review would not violate bar on advisory opinions).


102. \textit{Id.} at 262. It may be significant that the Court turned to the adequate state ground model to justify importing a rule from that context that is actually more protective of the prisoners' access to habeas review. \textit{Harris} invoked the model in adopting the plain statement rule to require that states make clear that their denials of relief are based on procedural grounds. See \textit{Harris v. Reed}, 489 U.S. 255, 265-66 (citing \textit{Michigan v. Long}, 463 U.S. 1032, 1041 (1983)). But see Coleman v. Thompson, 59 U.S.L.W. 4789, 4792-95 (U.S. June 25, 1991) (finding \textit{Long} standard satisfied absent explicit statement of state court reliance upon procedural rule). Obviously, the Court is ambivalent about the harsh results that flow from strict application of a federal procedural bar doctrine that is effectively controlled by the states.


104. See \textit{Harris}, 489 U.S. at 265. This indicates another drawback to the present pro-
state-court references to state law,” which led to the adoption of the plain statement rule in *Michigan v. Long*, is "common to both direct and habeas review," *Harris* held that "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." *Harris*’ analysis was based upon a 1979 case, *Ulster County Court v. Allen*, that held that the federal courts had jurisdiction to reach the merits of a petitioner’s constitutional challenge to a state statute despite the petitioner’s failure to raise the issue at trial. The Court’s conclusion was linked to its determination that the state courts had reached the merits of the constitutional issue presented. Further, it was unclear whether the petitioner’s claim was subject to a procedural bar under the applicable state law. The Court implied, however, that if the state courts had rejected petitioner’s claims on an “independent and adequate state procedural ground,” the federal habeas courts would not have had jurisdiction to reach the claims.

The procedural bar doctrine—the federal courts’ mandated reliance on state rules of preclusion means that they must continually examine the states’ application of those rules to ensure that they are fairly and consistently applied. A case like *Dugger v. Adams*, 489 U.S. 401 (1989), in which the Court undertook extensive historical and functional analysis of the Florida rule precluding pursuit of claims in post-conviction proceedings not raised on direct appeal, illustrates how inefficient this process can be. *See id.* at 405-10. This process is necessary when the Supreme Court is considering the adequacy of state preclusion rules on direct appeal, given that the Court's jurisdiction turns on a finding that the state judgment did not rest on state grounds. *See supra* note 100. But on federal habeas review, in which federal courts have jurisdiction over the cases in any event, *see supra* notes 51-56 and accompanying text, this inquiry is a waste of judicial resources, and could be avoided by a system that did not depend on state law to determine preclusive effect of prisoners’ procedural behavior.

108. *See id.* at 154.
109. *See id.* at 152.
110. *See id.* at 152-53.
111. *Id.* at 148. The Court later acknowledged that the procedural bar doctrine was prudential. After concluding that it was appropriate to reach the merits, the Court noted that to do so would confirm the “policies informing the ‘adequate state ground’ exception to habeas corpus jurisdiction” by according “appropriate respect to the sovereignty of the States in our federal system.” *Id.* at 154 (citing *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977)). The Court went on to say that “if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim.” *Id.* Thus, although the Court implied that jurisdiction of federal habeas courts turns on whether an adequate state ground exists, it also indicated that the federal habeas courts’ decision to reach the merits would be appropriate as long as that did not demonstrate disrespect for the sovereignty of the states—a reference to comity, which is the policy that all the previous decisions, from Daniels to Fay to Sykes, had recognized as the underlying basis for the procedural bar doctrine in federal habeas corpus. *See supra* notes 30-85 and accompanying text.
Despite these references, it is clear that the Court has not jettisoned its expansive notion of the jurisdictional power granted by the habeas statute. The procedural bar rule remains a prudential, rather than jurisdictional, doctrine that ostensibly tempers federal courts' power of review with proper respect for valid state court procedures. The very existence of the cause-and-prejudice and actually innocent escape hatches belies the notion that procedural default creates an absolute jurisdictional bar to federal collateral review. Moreover, in its most recent procedural bar case, *Coleman v. Thompson,* the Court explicitly accepted *Fay's* scope-of-jurisdiction foundation. In contrast to direct review, the Court noted that "[i]n the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism." The Court's references to the similarities between the jurisdiction-defining adequate state ground doctrine and procedural bar in federal habeas corpus do not signal a change in the Court's understanding of its jurisdictional power. Rather, they signal the Court's effort to strengthen the procedural bar doctrine as a mechanism to filter out unwanted claims from federal collateral review, while allowing federal review of claims bearing on innocence through the escape hatches.

*Sykes* is the source of the current doctrinal confusion. In rejecting the *Fay* deliberate-bypass rule, *Sykes* described the problem as one concerning "the adequacy of state grounds to bar federal habeas review." In framing the key issue in the case as whether the cause-and-prejudice standard derived from federal criminal procedural rules should apply in federal habeas review of state prisoners' claims, the Court noted that *Sykes*' "failure to timely object to [the evidentiary] admission amounted to an independent and adequate state procedural ground which would have prevented direct review" in the Supreme Court. Nevertheless, *Sykes* did not explicitly reject *Fay's* model of federal habeas as including federal power to look beyond state court procedural defaults. To the contrary, *Sykes* recognized that in *Francis,* the first case to apply the cause-and-prejudice standard to a state court procedural default, the

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112. See, e.g., Harris v. Reed, 489 U.S. 255, 260-262 (1989) (federal court may reach federal question unless state court's holding clearly based on state grounds); Ulster County Court v. Allen, 442 U.S. 140, 154 (1979) (federal court had jurisdiction to hear respondent's claim that statutory presumption was unconstitutional).
114. Id. at 4791; see also id. at 4800 (Blackmun, J., dissenting) ("It is well settled that the existence of a state procedural default does not divest a federal court of jurisdiction on collateral review."); infra notes 60-63 and accompanying text (noting that Court never disavowed *Fay's* construction of scope of federal habeas jurisdiction).
115. The Court has also maintained that the procedural bar doctrine is an expression of comity toward the states. See Murray v. Carrier, 477 U.S. 478, 497 (1986); see also Harris v. Reed, 489 U.S. 255, 267 (1989) (Stevens, J., concurring) ("As our decisions in [*Fay*] and [*Sykes*] make clear, an adequate and independent state ground for decision does not dispossess the federal courts of jurisdiction on collateral review.") (citations omitted).
117. Id. at 87.
118. See supra notes 77-78 and accompanying text.
Court had explicitly stated that the federal courts had power “to entertain an application” but would refuse when “considerations of comity and concerns for the orderly administration of criminal justice” demanded. Given that the procedural bar rule does not implicate the jurisdictional power of federal courts to review habeas claims from state petitioners, the task of the federal courts is to determine whether prudential comity interests justify a federal habeas system that does not afford evenhanded access to federal court for all state prisoners.

II. EXPLAINING THE PROCEDURAL BAR DOCTRINE AS A VIOLATION OF EQUAL PROTECTION

A. Why Equal Protection is Implemented

The application of the procedural bar doctrine to state court procedural defaults violates equal protection principles. The federal government, acting through Congress, granted to all United States citizens a right to seek habeas corpus relief in the federal courts if they are in custody in violation of federal law. If access to federal habeas review turns on a state's characterization of prisoners' procedural behavior, then prisoners in different states that define default differently are denied equal access to federal collateral review. Thus, the Sykes procedural bar rule violates equal protection principles by allowing states to determine the preclusive effect of their procedural rules in federal habeas proceedings.

A hypothetical brings the problem into focus more sharply. Suppose State A refuses to consider on post-conviction review any claim that could have been but was not raised on direct appeal. Suppose further that prisoner Smith has a presumptively valid claim that the instructions at his murder trial violated his due process rights. On direct appeal, Smith's lawyer, although not altogether incompetent by sixth amendment standards, nevertheless negligently fails to see the merit of Smith's due process claim and does not raise it on appeal. Consequently, when Smith applies for post-conviction relief in state court, the court refuses to consider the merits of his due process claim because of his failure to raise it on direct appeal. Smith next applies for federal habeas corpus relief. The federal district court applies the Sykes rule, and because the courts of State A have ruled that Smith's due process claim is procedurally defaulted, the federal court refuses to entertain the claim. This is true so long as the plain statement rule is satisfied and the state procedural rule is adequate and independent.

122. See supra notes 102-103 and accompanying text.
The laws of State B, on the other hand, allow a prisoner to bring claims in a petition for post-conviction review even when those claims were not presented on direct appeal. Jones, like Smith, claims that his trial court erred in instructing the jury and that the error infected the fairness of his trial in violation of due process. Again, the attorney fails to raise the due process claim on direct appeal. Because State B has a more forgiving procedural regime than State A, however, Jones is able to present the claim in a petition for post-conviction relief in the courts of State B. If a state B court denies Jones’s due process claim on the merits, Jones may apply for federal habeas corpus relief. Jones will get federal habeas review despite his failure to bring his due process claim on direct appeal solely because the courts of State B did not characterize his procedural behavior as a “default.” Thus, the federal court system will treat Smith and Jones differently, even though their federal constitutional claims and their state procedural behaviors are identical. That different treatment, mandated by the Sykes procedural bar doctrine, violates equal protection principles.

Because states may fashion their procedural regimes in whatever manner they wish, procedural rules on particular issues vary among the states. The result is that prisoners in two different states who both claim that they are being imprisoned “in violation of the Constitution or laws of the United States” and whose procedural behavior in the state courts has been exactly the same, will be treated differently by the federal habeas court solely because they are imprisoned in states that treat their procedural actions differently.

The Sykes procedural bar doctrine operates in a way that triggers equal protection analysis. By allowing state law to control the preclusive effect given to state court procedural behavior when it is later reviewed in federal court, the federal courts restrict the scope of federal habeas review in a geographically discriminatory manner. It is essential to remember that this disparity in treatment is not mandated by any structural check on federal habeas corpus jurisdiction. The question thus becomes whether the federal courts may, in the name of comity, cut back on habeas review in a manner that discriminates along geographical lines.

Explaining this disparity in treatment as an equal protection problem is in accord with another strand of the Court’s equal protection analysis. The Court has been particularly critical of laws that adversely affect litigants’ access to court systems. In Griffin v. Illinois, for example, the Court held that a state must provide a transcript to indigent criminal defendants seeking to appeal criminal convictions. In later equal protection cases, the Court held that states’ obligation to provide fair access...
to their courts required that they provide counsel to indigent criminal
defendants on appeal and waive filing fees. Underlying these decisions is a notion that when the government provides an avenue for vindication of rights, here in the form of an opportunity to present a claim that one has been wrongly convicted, it may not cut back on that opportunity in a manner that unfairly discriminates.

126. See Douglas v. California, 372 U.S. 353, 357-58 (1963); see also Draper v. Washington, 372 U.S. 487, 497-98 (1963) (invalidating law that provided transcripts only upon trial court's finding that appeal is not frivolous); Lane v. Brown, 372 U.S. 477, 485 (1963) (invalidating state law that provided indigent prisoners with transcripts only when requested by a public defender); Burns v. Ohio, 360 U.S. 252, 257 (1959) ("Once the state chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty.").


128. Griffin spawned a number of other protections for would-be litigants precluded from pursuing vindication of their rights by lack of money. See, e.g., Bounds v. Smith, 430 U.S. 817, 828-29 (1977) (prison authorities must provide adequate law libraries and assistance to prisoners who wish to pursue court claims to preserve their fundamental constitutional right of access to the courts); Mayer v. City of Chicago, 404 U.S. 189, 198 (1971) (defendant convicted on misdemeanor charges entitled to transcript on appeal); Douglas v. California, 372 U.S. 353, 357-58 (1963) (state's refusal to provide indigent appellants with counsel in appeals as of right violates equal protection); Smith v. Bennett, 365 U.S. 708, 714 (1961) (nominal filing fee required of habeas corpus petitioners violates equal protection). Unfortunately, however, the Court never settled on a theoretical framework for these holdings. Instead, as Justice O'Connor put it in Bearden v. Georgia, 461 U.S. 660 (1983):

[d]ue process and equal protection principles converge in the Court's analysis in these cases. Most decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns. . . . We generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.

Id. at 665 (citations omitted).

Furthermore, the Burger Court moved away from the intensive scrutiny of schemes that cut off access to the courts, holding in a number of cases that governmental financial constraints adequately justified burdening access for both criminal and civil litigants. See, e.g., Ross v. Moffitt, 417 U.S. 600, 617-18 (1974) (state need not provide counsel for indigent prisoners pursuing discretionary post-conviction relief); see also Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (appellate filing fee precluding an indigent litigant from obtaining judicial review of administrative reduction in old-age benefits does not offend either due process or equal protection); United States v. Kras, 409 U.S. 434, 443-49 (1971) (bankruptcy filing fee does not offend Constitution).

Professor Tribe is able to extract from this confusing line of cases the following principle: "[t]he states are required to subsidize the most basic civil litigation costs of indigents only when: the state has a complete monopoly on resolution of the dispute, a fundamental interest is at stake, and the resulting financial burden on the state treasury would be light." L. Tribe, American Constitutional Law (2d ed. 1988) 1652. These recent cases evidence the Court's apparent adoption of Justice Harlan's argument in his Griffin dissent that states ought not be constitutionally required to "lift the handicaps flowing from differences in economic circumstances . . . [which] produces the anomalous result that a constitutional admonition to the States to treat all persons equally means in this instance that [the state] must give to some what it requires others to pay for." Griffin v. Illinois, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting).

Of course, the equal protection problem identified here is different in that it does not
When the federal government bestows a right on the people of the several states, it may not unjustifiably impose limitations on access to the right upon some but not others. Thus, because Congress has mandated federal habeas review for state prisoners held in violation of federal constitutional rights, the Court may not, in the guise of respect for state procedures, restrict that review in a geographically discriminatory manner.

As free sovereigns within our federal system, individual states have the unquestioned power to enact laws governing the administration of their judicial processes. And the states can enforce sanctions for noncompliance with valid procedural laws. It is perfectly appropriate for a state to determine, for example, that a criminal defendant's failure to object at trial to the introduction of allegedly inadmissible evidence precludes him from challenging that introduction at any later time in his journey through the state court system, including post-conviction review. It does not necessarily follow, however, that the state should be able to determine the preclusive effect its procedural ruling will have on federal habeas corpus review.

This conclusion assumes a quite literal understanding of the term "similarly situated." Persons in different states who have acted in exactly the same way procedurally are similarly situated. A counter-argument might be made that the prisoners are not similarly situated in terms of their compliance with their respective states' procedural laws. Thus, the argument would continue, the federal courts are quite justified in treating these prisoners differently in federal habeas proceedings.

This argument has an appealing simplicity. Throughout the evolution of its equal protection jurisprudence, however, the Court has refused to focus solely on the nature of the classification involved—here, one based on geographical location—and has instead looked to whether the situations of the individuals involved are arguably indistinguishable, especially involve a classification based on wealth: that is, to require the federal courts to abandon the procedural bar doctrine in favor of a system that does not change the availability of review according to state lines does not require them to take on an affirmative financial obligation, except to the extent that the new non-discriminatory rule might result in an increase in the number of cases processed, with the concomitant institutional costs. Thus, the Court's retreat from strict scrutiny in court access cases that involve discrimination against poorer litigants does not necessarily signal its rejection of the fundamental nature of the right to access court systems, but rather an unwillingness to require the government to remedy economic imbalances in the litigation context. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 102 n.61 (1973) (Marshall, J., dissenting) (Griffin and Douglas were not wealth classification cases; they "can only be understood as premised on a recognition of the fundamental importance of the criminal appellate process.")

129. See Ross v. Moffit, 417 U.S. 600, 609 (1974) (equal protection implicated where government treats differently persons "whose situations are arguably indistinguishable").

130. See, e.g., Bearden v. Georgia, 461 U.S. 660, 665 (1983) (equal protection involves "the question [of] whether the state has invidiously denied one class of defendants a substantial benefit available to another class of defendants"); Ross v. Moffitt, 417 U.S. 600, 609 (1974) ("'Equal protection'... emphasizes disparity in treatment by a State between
cially with respect to the exercise of a fundamental right.\footnote{131} The notion that geographical discriminations ought to be subject to equal protection scrutiny is not a new one. Attempts to challenge the constitutionality of laws that treat persons differently due to their locations date back to the late nineteenth century.\footnote{132} The Court's willingness to apply equal protection analysis to laws that discriminate along geographical lines evolved in a series of cases involving state laws that applied different procedural rules to litigants in different parts of states. Although laws that discriminated along geographical lines were upheld through the early part of this century,\footnote{133} the decisions indicated that the Court believed that such laws implicated equal protection concerns.\footnote{134}

The advent of the fundamental rights branch of equal protection jurisprudence in \textit{Skinner v. Oklahoma},\footnote{135} decided in 1942, marked a shift in

\begin{itemize}
\item \footnote{131} In determining which rights are fundamental, thus triggering strict scrutiny of classifications that burden them, the Supreme Court has looked to the explicit guarantees of the Bill of Rights. The Court has, however, also treated certain other rights not enumerated in the constitution as fundamental. For example, the Court has recognized as fundamental the right to interstate travel, see \textit{Shapiro v. Thompson}, 394 U.S. 618, 630-31 (1969), the rights to marry and procreate, see \textit{Zablocki v. Redhail}, 434 U.S. 374, 383-84 (1978); \textit{Skinner v. Oklahoma}, 316 U.S. 535, 541 (1942), and, most importantly for our purposes, the right to access to the courts. See \textit{Bounds v. Smith}, 430 U.S. 817, 821 (1977); \textit{Douglas v. California}, 372 U.S. 353, 357-58 (1963); \textit{Burns v. Ohio}, 360 U.S. 252, 258 (1959); \textit{Smith v. Bennett}, 365 U.S. 708, 713-14 (1961). See \textit{generally} J. Nowak, R. Rotunda & J. Young, \textit{supra} note 15, at 785-88 (discussing right to fairness in criminal justice system).

\item \footnote{132} The first case involving such a challenge was \textit{Missouri v. Lewis}, 101 U.S. 22 (1879), in which the Court considered a Missouri law allowing direct state supreme court review of decisions to disbar attorneys in all but a few counties in Missouri. See \textit{id.} at 29. See \textit{generally} Neuman, \textit{supra} note 14, at 267-275 (describing history of equal protection analysis of laws that discriminate along territorial lines).


\item \footnote{134} Missouri v. \textit{Lewis}, 101 U.S. 22 (1879), provided the governing standard for these cases:

\begin{quote}
[the equal protection clause] is not violated by any diversity in the jurisdiction of the several courts ... if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. ... [N]o person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.
\end{quote}


\item \footnote{135} 316 U.S. 535 (1942).
the Court’s approach. The Court began to apply the strict scrutiny standard to laws that employ any classification, including non-invidious ones, in a way that infringes upon a fundamental right. During the 1960s, for example, the Supreme Court applied strict scrutiny to strike down laws that changed citizens’ voting rights along ostensibly innocuous geographical lines.

In cases that dealt with geographically discriminatory court procedures, the defendants could have argued that there was no discriminatory classification simply because geographically disparate groups were not similarly situated. Although the Court was willing to accept this as a justification for geographically discriminatory laws during its pre-Skinner equal protection regime, it did not consider such laws exempt from equal protection scrutiny. Moreover, the Court’s analytic scrutiny became stricter, at least where fundamental rights were implicated, after Skinner and its progeny. Accordingly, when a law discriminatorily infringes upon a fundamental right through the imposition of different substantive duties or different substantive sanctions, a court must consider whether the difference in treatment is justified on a level more sophisticated than mere difference of geographical location.

136. Strict scrutiny analysis means that unless the law burdening a fundamental right is “necessary” to achieve “compelling” governmental interests, it must be struck down. See generally G. Gunther, Constitutional Law 588-93 (11th ed. 1985) (discussing development of equal protection doctrine); L. Tribe, supra note 128, at 1431-54 (discussing strict scrutiny doctrine). This highly intensive review is, as Professor Gunther put it, “strict in theory and fatal in fact.” With rare exceptions, application of strict scrutiny results in the law in question being struck down. Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

137. See Skinner, 316 U.S. at 541; supra note 136; see also Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 906 n.6 (1986) (“It is well established that ... where a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required.”)


139. See supra note 133.

140. Professor Neuman describes Lewis as a complete rejection of equal protection analysis for geographical classifications, but notes that around 1910 the Court began applying the analysis in such cases. See Neuman, supra note 14, at 267-72. He rightly points out that “the choice of approach did not yet matter, because the Court was always willing to hypothesize a local variation in conditions sufficient to render any territorial classification rational.” Id. at 272.

141. The Court’s adherence to this position is demonstrated in the case of San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). In that case, eight members of the Court acknowledged that strict scrutiny would apply to a geographical classification that burdened a fundamental right, but a five-Judge majority concluded that the right to education is not fundamental. See id. at 17, 37, 125-26. The majority found that the law, which resulted in unequal funding for education in different parts of the state, survived a
But the analysis does not end once an equal protection problem is identified. The next step is to determine whether the offending rule is justified. The next section examines the procedural bar doctrine in light of the fundamental rights branch of equal protection jurisprudence.

B. Equal Protection Analysis

State prisoners who apply for federal habeas corpus relief have much at stake: namely, their life or personal liberty. Moreover, they are seeking to vindicate in federal courts rights that the federal constitution explicitly guarantees. The Court has characterized prisoners' right to utilize available court procedures to challenge their convictions as fundamental. But the Court has been less than systematic in its approach

142. See, e.g., Bounds v. Smith, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."). Bounds noted that "habeas corpus and civil rights actions are of "fundamental importance ... in our constitutional scheme" because they directly protect our most valued rights," id. at 827 (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969)), and held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Id. at 828 (footnote omitted).

The dissenting Justices in Bounds, which was a due process case, doubted the existence of a fundamental constitutional right of access to the courts. See id. at 834-35 (Burger, C.J., dissenting); id. at 837 (Stewart, J., dissenting); id at 839-40 (Rehnquist, J., dissenting). Chief Justice Burger, having concluded that prisoners' right to federal habeas review was statutory rather than constitutional, argued that there was "no basis on which a federal court may require States to fund costly law libraries for prison inmates." Id. at 835 (Burger, C.J., dissenting). Justice Rehnquist argued that:

[i]f a prisoner incarcerated pursuant to a final judgment of conviction is not prevented from physical access to the federal courts in order that he may file therein petitions for relief which Congress has authorized those courts to grant, he has been accorded the only constitutional right of access to the courts that our cases have articulated in a reasoned way.

Id. at 839-40 (Rehnquist, J., dissenting) (citing Ex parte Hull, 312 U.S. 546, 550-51 (1941) (striking down state prison regulation that had allowed state officials to screen federal habeas petitions)).

To conclude that the procedural bar doctrine is constitutionally suspect would comport even with Justice Rehnquist's characterization of prisoners' right of access in Bounds: the rule has the effect of completely cutting off access to federal habeas review in an arbitrary manner.

143. See supra notes 124-128. Although the court has repeatedly, beginning with Griffin and continuing through Bounds, recognized the existence of a right of access to the courts in equal protection cases, its failure to commit to a particular constitutional source for that right has created some confusion. See, e.g., Bearden v. Georgia, 461 U.S. 660, 665 (1983) (due process and equal protection converge in cases involving access to the courts).

Justice Harlan, who dissented in Griffin and Douglas, believed that the cases were best handled with a due process analysis. In particular, he disputed the notion that equal protection would require a state to "alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." Griffin v. Illinois, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting). As to due process, Justice Harlan's position was
to cases involving challenges to laws that burden access to courts. At first, the Court seemed to be sending a consistent message to states that once they establish criminal review systems, equal protection principles require that they ensure equal access to all potential appellants. This message manifested itself in decisions requiring the states to provide transcripts, \(^{144}\) waive filing fees, \(^{145}\) and even provide counsel. \(^{146}\)

The Court's commitment to equal access, however, was called into question by its decision in Ross v. Moffitt, \(^{147}\) which held that states were not constitutionally required to finance counsel for prisoners who were petitioning for discretionary review in the state courts or the United States Supreme Court. \(^{148}\) Ross explained somewhat cryptically that the equal protection problem "is not one of absolutes, but one of degrees," \(^{149}\) and noted that while equal protection does not require the equalization of economic conditions, "it does require that the state appellate system be 'free of unreasoned distinctions'... and that indigents have an adequate opportunity to present their claims fairly within the adversary system." \(^{150}\)

Although the Court may have diminished its scrutiny of laws that burden court access due to the state's refusal to undertake affirmative financial obligations, \(^{151}\) it has not lost its concern that all prisoners be afforded a fair chance at review. Because fairness can only be measured by reference to how others are treated, laws that restrict some prisoners' access to court for reasons other than governmental financial constraints ought to be subject to exacting review.

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\(^{147}\) 417 U.S. 600 (1974).

\(^{148}\) See id. at 612.

\(^{149}\) Id.

\(^{150}\) Id. (citations omitted) (quoting Rinaldi v. Yeager, 384 U.S. 305, 310 (1966)).

\(^{151}\) In the area of litigants' access to civil courts, the Court has charted an equally uncertain path. For example, in Boddie v. Connecticut, 401 U.S. 371 (1971), the Court held that litigants could not be denied access to state courts to obtain divorces on the basis of their inability to pay filing fees. See id. at 382-83. The Court refused, however, to extend that principle to bankruptcy cases. See United States v. Kras, 409 U.S. 434, 450 (1973); see also Ortwein v. Schwab, 410 U.S. 656, 661 (1973) (upholding appellate filing fee in cases involving judicial review of reduction in welfare assistance). The Court viewed the access right in divorce cases as more important because it affected the privacy interests of the litigants. See Boddie, 401 U.S. at 382-83. In the habeas context, foreclosing access to the federal courts affects the fundamental underlying constitutional right that the imprisoned litigant seeks to assert. See Note, Due Process, Court Access Fees and the Right to Litigate, 57 N.Y.U. L. Rev. 768, 777-78 (1982).
If the geographically discriminatory classification created by the Sykes procedural bar rule is to receive the exacting review necessary when fundamental rights are burdened, the question becomes whether the Sykes rule is narrowly tailored to effectuate a compelling governmental interest.152 The traditional justification, comity to the states,153 does not constitute a compelling interest. The states' interest in enforcing their procedural rules to maintain the integrity of their judicial processes loses its force in the federal habeas context. As Justice Brennan noted in his Sykes dissent:

[a] regime of federal habeas corpus jurisdiction that permits the reopening of state procedural defaults does not invalidate any state procedural rule as such; [a state's] courts remain entirely free to enforce their own rules as they choose, and to deny any and all state rights and remedies to a defendant who fails to comply with applicable state procedure.154

The issue is whether federalism demands comity on the part of the federal courts. Because states have no authority to control the preclusive effect of their procedural judgments in the federal court system,155 the argument that this near-total deference to states is warranted at the expense of federal constitutional rights is not persuasive.

Moreover, the procedural bar doctrine, which has the effect of punishing prisoners who inadvertently fail to comply with a state procedural rule, or whose constitutionally effective counsel has erred, is not narrowly tailored to the goal of cultivating respect for state procedural processes. It is easy to conceive of options more narrowly tailored; the deliberate bypass standard of Fay, with its focus upon deliberate flouting of state court procedures, is an example of such a rule. Moreover, permanent preclusion of a prisoner's opportunity to seek vindication of his federal constitutional rights because of his counsel's or his own inadvertent error seems an unnecessarily harsh way to promote respect for state court procedures.156

Even assuming that the right to access federal habeas courts is less

152. For an explanation of the strict scrutiny standard, see supra note 136.
153. See supra note 111 and accompanying text.
155. The federal courts' decision to honor the preclusive effect of state procedural rules is an exercise of comity, not a jurisdictional necessity. See supra note 111 and accompanying text.
156. Because most procedural rules are designed to structure the course of litigation generally rather than to affix just resolutions to particular cases . . . [t]he sanction of forfeiture, which may result in the loss of a constitutional defense, is not proportioned to the gravity of the defendant's disobedience of the procedural rule. Brilmayer, State Forfeiture Rules and Federal Review of State Criminal Convictions, 49 U. Chi. L. Rev. 741, 772 (1982). But see Coleman v. Thompson, —U.S.—, 111 S.Ct. 2546, 2568 (1991) (rejecting notion that access to habeas review should not be barred by inadvertent counsel error).
than fundamental, the Sykes procedural bar rule still may be constitutionally suspect. To survive even a minimal level of equal protection scrutiny, the rule must be found to be rationally related to a legitimate governmental interest. Certainly the rule is in some sense "related" to the goal of promoting compliance with state court procedures. But given the burden upon prisoners seeking to vindicate their federal constitutional rights, one could question the legitimacy of that goal for federal courts charged by statute to hear these cases. The legitimacy of this goal seems especially suspect in light of the Court's use of the doctrine to screen out substantively unattractive claims. It is arguable that the Sykes procedural bar rule is a wholly irrational response to the problem of non-compliance with state court rules, given that the doctrine is most

157. This position was advanced by the dissenting Justices in Bounds. See Bounds v. Smith, 430 U.S. 817, 835-36 (1977) (Burger, C.J., dissenting); id. at 836-37 (Stewart, J., dissenting); id. at 837-41 (Rehnquist, J., dissenting).

158. Because of the confusion concerning the proper constitutional line of inquiry, see supra note 128, some laws that burden litigants' access to courts have been evaluated using the procedural due process test set up in Mathews v. Eldridge, 424 U.S. 319 (1976), which requires balancing the private interest affected, the risk of error in the determination and the governmental interest in retaining the challenged procedure. See id. at 335; see also Lassiter v. Department of Social Serv., 452 U.S. 18, 31-32 (1981) (applying Mathews to evaluate the right to appointed counsel in termination of parental rights proceedings); Little v. Streater, 452 U.S. 1, 16 (1981) (applying Mathews to require states to pay for blood tests in paternity suits); Note, supra note 151, at 779-803 (analyzing procedural due process model and its application to court access fee cases). The Sykes procedural bar doctrine would not survive the Mathews analysis. The private interest of the prisoner who seeks both personal liberty and the vindication of the underlying constitutional claim is great and the substantial risk of constitutional error during state court proceedings is the reason the writ exists in the first place. Although the federal government's interest in retaining the rule might be great in that it allows courts to rid their dockets of many claims, the rule is an imperfect means of weeding out claims not appropriate for federal habeas review. See infra notes 181-182 and accompanying text; cf. Note, supra note 150, at 780 ("[m]odern procedural due process analysis... suggests [that] [f]iling fees must be waived if the appeal involves a claim of constitutional right").

159. This lower level of scrutiny, which asks only whether a rational relationship exists between a rule and its purposes, is used to evaluate the constitutionality of laws that draw classifications that do not impinge on fundamental rights. See L. Tribe, supra note 128, at 1439-43; see also G. Gunther, supra note 136, at 588 (discussing development of two-tier analysis during Warren Court era). If prisoners' right to access federal habeas courts were not considered fundamental, the Sykes procedural bar rule would only have to survive this less intensive inquiry. It is no longer necessarily true, as it once was, however, that the Court's decision to use the rational basis test means that the challenged law will survive. On several occasions throughout the last decade, the Court has struck down laws that failed to satisfy the test. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985) (applying rationality standard to strike down application of ordinance requiring special use permit for operating group home for the mentally retarded); Plyler v. Doe, 457 U.S. 202, 230 (1982) (applying rationality standard to strike down Texas law denying public education to children of illegal immigrants); see also J. Nowak, R. Rotunda & J. Young, supra note 15, at 517 ("The arbitrary refusal to allow individuals to use the established state court process would seem to be invalid under even the most minimal due process or equal protection standards.") (footnote omitted).

160. See City of Cleburne, 473 U.S. at 452 (Stevens, J., concurring) ("the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially").
often invoked to preclude review of claims that were inadvertently defaulted under state law.\(^{161}\) As Justice Brennan pointed out in *Sykes*, the goal of deterring attorneys from failing by mere inadvertence to preserve issues under state law is better furthered by visiting the consequences of such failures on the states, which have responsibility for certifying attorneys in the first place.\(^{162}\)

A conclusion that the *Sykes* formulation of the procedural bar doctrine violates equal protection principles need not imply rejection of the Court's interest in accommodating states' interests and promoting intersystem comity. The next section will explore why *Sykes* appropriately refused to ignore state procedural concerns to the extent allowed by *Fay* and will conclude that a federal common law of preclusion would be similarly flawed. It will then explain why it would be completely impractical to construct a procedural bar doctrine that both promotes respect for state court procedural rules and affords equal treatment to those in similar procedural postures.

### III. PROBLEMS IN CONSTRUCTING PROCEDURAL BAR DOCTRINES THAT DO NOT DISCRIMINATE ALONG GEOGRAPHICAL LINES

In constructing a procedural bar rule, the Court must attempt to accommodate the states' interest in preserving the finality of criminal judgments and the integrity of their procedural regimes as well as prisoners' interest in receiving equal treatment at the federal habeas bar. These competing interests ought to inform the formulation of a procedural bar rule in federal habeas cases, both as a matter of timing—when to apply the rule—and as a matter of substance—what the rule's content will be.

First, the rule must apply in all federal habeas cases and to all procedural defaults by state prisoners. If the rule is structured to account for the qualitative differences in various state procedural regimes, then it will fulfill the federal courts' obligation to exercise their jurisdiction in accordance with equal protection principles. In addition, the rule will not displace state court authority. States will be free to structure their procedural regimes however they see fit, so long as they do not conflict with federal law.

Second, to effectuate uniformity, the Court should eliminate the deferential cause-and-prejudice rule of *Sykes* and its progeny. Federal courts should not defer to a state court determination that a prisoner has procedurally defaulted on a federal claim. Rather, they should apply a federal standard to determine whether a prisoner is precluded from pursuing his claim in federal court. Such a standard must be applied consistently re-

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162. See id. at 114. Moreover, it seems unfair to visit the "sins" of the attorneys on their prisoner-clients, who probably did not participate at all in the default and for whom the sanction of foreclosed federal review may have severe consequences.
A. A Return to Fay or a Federal Common Law of Preclusion

Sykes acknowledged that federal court denial of review to state prisoners who procedurally default in state court was a matter of "comity but not of federal power." In concluding that comity demanded a much greater deference to state court preclusion judgments than Fay allowed, the Court cited several negative effects of the Fay rule's broad forgiveness of prisoners' procedural errors. For example, the Court asserted that Fay put state appellate courts in the uncomfortable position of having to choose between respecting their own state preclusion rules and thus risking later federal consideration of the merits of the issue without their input, and ignoring their own procedural rules. The Court expressed a concern that federal courts' failure to defer to state preclusion judgments tends "to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event."

These concerns are valid insofar as they reflect the Court's reluctance to provide federal rules of procedure for all state court criminal actions.

163. For example, suppose the Court set out the following rule of preclusion: a federal court may not refuse to entertain the federal claim of a state prisoner who has procedurally defaulted in state court unless the default resulted from a strategic decision by the prisoner. This approach, like the one in Fay, would punish petitioners who flout state court procedures and threaten state court procedural integrity. See Fay v. Noia, 372 U.S. 391, 439 (1963). Inadvertent defaults, such as failing to file a particular pleading on time or not phrasing a claim in the specified manner, would not preclude review of valid habeas claims. This approach would avoid results like those in Brown v. Allen, 344 U.S. 443 (1953), where the Court refused to grant habeas corpus review to a defendant sentenced to death because he failed to properly invoke the state remedy by filing his appeal one day late. See id. at 482-87. See also Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546, 2547 (1991) (attorney's "failure to file timely notice on appeal in state court did not excuse procedural default so as to preclude habeas review."). The states, which have grown accustomed to their power under the Sykes procedural bar doctrine, would undoubtedly be unhappy with such a rule, which would be subject to the same sorts of criticisms that have been levelled against the Fay rule. See infra note 175 and accompanying text.


165. See id. at 89-90. Justice Rehnquist used state contemporaneous objection rules as an example: [the refusal of federal habeas courts to honor contemporaneous-objective rules may also make state courts themselves less stringent in their enforcement. Under the rule of Fay v. Noia, state appellate courts know that a federal constitutional issue raised for the first time in the proceeding before them may well be decided in any event by a federal habeas tribunal. Thus, their choice is between addressing the issue notwithstanding the petitioner's failure to timely object, or else face the prospect that the federal habeas court will decide the question without the benefit of their views.

Id. Justice Rehnquist thus concluded that Fay encouraged "sandbagging" on the part of defense lawyers, "who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." Id. at 89. Justice Brennan properly noted in his dissent that Fay's insistence that a state prisoner not deliberately flout state procedure provided an adequate check on any incentive to "sandbag." Id. at 112 (Brennan, J., dissenting).

166. See id. at 90.
States retain the sovereign right to tailor their procedural rules according to local custom to promote an orderly and fair disposition of criminal cases. Federal habeas jurisdiction should not infringe unnecessarily upon that power.

Professor Meltzer suggests that federal courts develop a federal common law of preclusion that state courts could anticipate and apply. He reasons that the federal courts possess the authority to excuse state court procedural defaults in a variety of contexts, including federal habeas corpus actions. Meltzer finds the source for that authority difficult to pinpoint, but the necessity for it derives “from the need to ensure adequate effectuation of federal rights themselves, and in criminal cases, reinforced by a range of related federal interests.” Meltzer places the federal doctrines that excuse state court procedural defaults within the larger body of federal common law. He argues that in the post-Erie era, federal common law doctrines designed to handle procedural defaults should apply in state courts in the first instance. In Meltzer's view, federal courts do not “second-guess” a state's application of its procedural rules. Rather, they determine whether a state rule poses “a sufficient threat to federal interests [such] that [it] should not be permitted to prevent the vindication of federal rights.”

Although Meltzer does not explain the procedural bar problem as one implicating equal protection concerns, his approach would in fact solve the constitutional problem. Applying a uniform federal standard to determine the preclusive effect of a state prisoner's procedural behavior will prevent geographically disparate treatment of habeas petitioners. The federal common-law approach, however, encroaches further than necessary upon state sovereignty to solve the equal protection problem. For example, requiring a state to enforce a federal standard to determine the preclusive effect of a failure to make contemporaneous objection at trial is unnecessarily intrusive. This is especially true given the substantial likelihood that state courts' treatment of such procedural behavior will never be reviewed by a federal court. A state's determination that a particular doctrine of preclusion should apply is entitled to deference when it does not actually conflict with any federal policy. Such direct federal interference with local choices about procedural policy is not necessary.

Any procedural bar doctrine attempts to balance states' interests in according their decisions some measure of finality and state prisoners' interests in the appropriate opportunity to litigate their federal constitu-

167. Meltzer, supra note 12, at 1189-1195.
168. See id. at 1188-90.
169. See id. at 1178-83.
170. Id. at 1167.
171. Id. at 1183-85.
172. Id. at 1185.
173. Meltzer notes that the number of federal habeas petitions actually filed is “small when compared to the number of individuals in custody.” Id. at 1191.
tional claims. There are, however, difficulties in constructing such a rule. The next section of this Article demonstrates that although it might be theoretically possible to construct a procedural bar rule that does not unfairly discriminate along geographical lines, as a practical matter, such a rule would be unworkable.

B. The Difficulties in Determining the Content of an Appropriate Uniform Federal Procedural Bar Rule

If the Court wishes to solve the equal protection problems outlined above, it must construct a uniform procedural bar rule that does not depend for its content upon the procedural rules of each prisoner's state. The task for the courts is to fashion a rule that avoids constitutional flaws yet reflects a healthy respect for legitimate state court interests in protecting finality of judgments. In pursuing this goal, the federal courts would not operate in a vacuum; they have as models the states' fifty different procedural regimes. Choosing one procedural bar regime over others will, however, result in insufficient deference toward states whose default provisions are stricter than the federal rule. On the other hand, to the extent that state procedural bar rules are justified as a means of bolstering the integrity of state procedural regimes by heightening sanctions for initial failures to comply, it makes sense for the federal courts to base the federal rule on state procedural regimes.

How would such a process of rule development work? Suppose that the federal courts could develop a continuum, plotting procedural rules on a given topic across the fifty state procedural regimes from most strict to most lenient. For example, many states that provide post-conviction review mechanisms forbid a prisoner from raising in his petition any issue that could have been but was not raised on direct appeal, \(174\) Choosing one procedural bar regime over others will, however, result in insufficient deference toward states whose default provisions are stricter than the federal rule. On the other hand, to the extent that state procedural bar rules are justified as a means of bolstering the integrity of state procedural regimes by heightening sanctions for initial failures to comply, it makes sense for the federal courts to base the federal rule on state procedural regimes.

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\[174\] Of course, the disparity among state regimes is what gives rise to the equal protection problem in the first place. See supra notes 124-28 and accompanying text.

\[175\] See, e.g., Ala. R. Cr. P. Temp. § 20.2(a)(5) (1990) (Alabama rule that petitioner for post-conviction relief may not raise issue that could have been but was not raised on appeal), construed in Cleveland v. State, 570 So. 2d 855, 857 (Ala. Crim. App. 1990); Mont. Code Ann. § 46-21-101 (1989), construed in Fitzpatrick v. State, 206 Mont. 205, 209, 671 P.2d 1, 4 (1983) (holding that language of Montana's statute clearly indicates that allowing an issue to be raised in post-conviction proceeding that could have been raised on direct appeal would be an abuse of process); Or. Rev. Stat. § 138.550(2) (1990) (citing Guinn v. Cupp, 80 Or. App. 125, 128, 720 P.2d 1330, 1331-32 (1983) (holding that Oregon petitioner for post-conviction relief was precluded from raising issue that could have been raised on direct appeal)).

\[176\] See, e.g., People v. Flowers, 138 Ill.2d 218, 221, 561 N.E.2d 674, 677 (1990) (holding that res judicata and waiver ordinarily prohibit Illinois petitioner from raising an issue in post-conviction hearing that could have been but was not raised on direct appeal unless fundamental fairness dictates otherwise); Nev. Rev. Stat. Ann. § 177.375 (Michie Supp. 1989) (Nevada petitioner in post-conviction hearing whose conviction resulted from trial waives issues that could have been but were not raised on appeal unless
respect state procedural bar rules that lie within a permissible range. If
the state has applied a rule that is stricter than the range permits, the
federal court could refuse to respect that rule and proceed to the merits
of a state prisoner's constitutional claim.

The range of state procedural bar rules deemed permissible by federal
courts must, however, include the most lenient of the state court rules on
the continuum. Federal courts cannot refuse to respect a state court pro-
cedural bar rule because it is too lenient. The procedural bar doctrine
serves interests of intersystem comity by demonstrating respect for state
court rules of preclusion. 177 No such comity is required when there is no
state preclusion rule in conflict with federal review of the merits of a
habeas petitioner's claim.

If, however, federal courts reach the merits of the claims of petitioners
from states with lenient procedural bar rules, they must also grant review
to petitioners from states with stricter rules to avoid violating equal pro-
tection principles. Therefore, federal courts will be required to adhere to
the most lenient state preclusion rule in any given context in order to
satisfy the Constitution. Application of such a principle will be neither
straightforward nor practical. Ascertaining the procedural preclusion
rules of fifty states is a cumbersome task. Moreover, because procedural
rules change, the process must be repeated in virtually every case to de-
termine whether any state has enacted a more liberal rule on a given
subject since the last survey was conducted.

This analysis demonstrates a fundamental problem underlying any at-
tempts to conceive a procedural bar doctrine for federal habeas review
that lies between the extremes of Sykes and Fay. On the one hand, if the
Court intends to construct a procedural bar doctrine that affords some
degree of intersystem comity, then it needs more bite than Fay, which
was more nearly a waiver 178 than a procedural default case. On the other
hand, a strict procedural bar scheme has the necessary side effect of dis-
criminating against prisoners in states with strict procedural regimes.

Thus, any procedural bar rule devised for federal habeas cases will
either be geographically discriminatory or afford insufficient deference to
states. This dilemma is ironic because comity to the states is the ostensi-
ble justification for the rule. 179 It is important to remember that the
Court's expansion of the procedural bar doctrine is part of a judicial ef-
tort to restrict the scope of federal collateral review of state criminal

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178. See supra note 54.
179. See supra note 177 and accompanying text; see also Coleman v. Thompson, 111 S.
  Ct. 2546, 2547 (1991) (procedural bar rule addresses "the respect that federal courts owe
  the States").
IV. A COHERENT APPROACH TO THE AVAILABILITY OF FEDERAL HABEAS REVIEW

The Supreme Court developed the Sykes doctrine at least in part to curb the intrusion by federal courts into state court criminal systems. Sykes may be viewed as part of a larger judicial agenda designed to limit the types of substantive claims deemed worthy of federal habeas review. In Powell, the Court held that fourth amendment claims fully litigated in the state courts would not be reviewed in federal habeas proceedings.\textsuperscript{181} In applying the Sykes rule in Carrier, the Court created the actual-innocence escape hatch, requiring courts to examine the substantive basis of petitioners' claims to determine which procedurally defaulted claims will be afforded federal habeas review.\textsuperscript{182} In both the fourth amendment and procedural bar contexts, the Court reordered the scope of federal habeas review in a manner that excluded certain substantive claims while including others.

This trend indicates that the Court is using the procedural bar doctrine as a means of denying review to federal claims that it does not deem worthy of review, while using the doctrine's escape hatches to afford review to other claims. The Court should cut through this elaborate and cumbersome charade and eliminate the procedural bar doctrine altogether. To the extent that it wishes to deny federal review to certain types of substantive claims, it should do so explicitly and comprehensively, without reference to state court procedural default.

Professors Stuntz and Jeffries offer a convincing argument for the proposition that federal habeas courts must abandon their focus on state prisoners' compliance with state procedures in favor of an approach that focuses "squarely on the substance of defaulted claims."\textsuperscript{183} Stuntz and Jeffries contend that if "consideration of a defaulted claim would present a realistic possibility of correcting an unjust conviction or sentence of death," then "procedural barriers should be swept aside and collateral review should be available."\textsuperscript{184} Accordingly, a federal court faced with a defaulted state prisoner claim should examine the merits of the defaulted claim as an initial matter. If the default raises a "reasonable possibility" of unjust outcome at the state criminal trial, then relief should be available notwithstanding the procedural default at the state level.\textsuperscript{185} If, however, the underlying claim is unrelated to guilt (or to the appropriateness

\textsuperscript{180} See supra note 23 and accompanying text.
\textsuperscript{182} See supra notes 86-94 and accompanying text.
\textsuperscript{183} Stuntz & Jeffries, supra note 63, at 680.
\textsuperscript{184} Id.
\textsuperscript{185} See id. at 728. This would include situations in which the accuracy of the guilt-finding proceeding is in question because of the underlying claim, as long as the case was a close one on guilt. See id. at 712.
of a death sentence), then relief should not be available.186

From an equal protection standpoint, this approach has the advantage of treating the claims of prisoners from different states similarly when those claims impact on guilt. By invoking state procedural bars on claims unrelated to guilt, however, the Stuntz and Jeffries approach has the same equal protection vulnerability as Sykes. The proponents of this approach make several points that are instructive in a quest to formulate an even-handed approach that does not unnecessarily infringe on the states' finality interests, however. Stuntz and Jeffries observe that

[c]onstitutional criminal procedure contains many rules designed to deter governmental misconduct. Implementing these rules benefits some defendants, but that benefit is incidental to the purpose of the rules. It follows that the benefits of such rules need not be made equally available to all . . . Where a given constitutional requirement is designed to deter police misconduct across the board rather than to secure correct outcomes in individual cases, there is no a priori reason why the protection of that requirement should be equally or comprehensively available to all defendants.187

Thus, they argue, claims based on the fourth amendment that have been procedurally defaulted in state court should be foreclosed from federal habeas review.188 Stuntz and Jeffries also note that adoption of their approach would bring the procedural default law of fourth amendment claims in accord with Powell.189

With Carrier's actual innocence escape hatch, the Court has developed a system of federal habeas review of state prisoner claims that implicitly calibrates review of procedurally defaulted claims to the merits of those claims. Stuntz and Jeffries in effect propose that the Court make this recalibration explicit.190 This Article offers a proposal that goes still further.

A more coherent and sensible way to determine whether claims that are procedurally defaulted in state courts should receive federal habeas review is simply to eliminate the procedural bar doctrine191 and explicitly identify which substantive claims are cognizable on federal collateral review of state convictions. The Court might conclude that issues that do not bear on innocence or proper application of the death sentence should

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186. See id. at 712-13.
187. Id. at 703.
188. See id. at 704.
189. See id. at 708 (citing Stone v. Powell, 428 U.S. 465 (1976)).
190. Stuntz and Jeffries believe that the Court's actual innocence escape hatch is welcome progress, but that it is too narrow: "the exception applies only to the 'extraordinary' case where the showing of actual innocence rises to the required level of probability." Stuntz & Jeffries, supra note 63, at 686. In contrast, Stuntz and Jeffries would excuse the state procedural bar when a "reasonable possibility" of a factually erroneous conviction or unjustified death sentence exists. Id. at 691.
191. This proposal is far from radical. Indeed, Stuntz and Jeffries effectively propose such elimination in the context of guilt-related claims. See id. at 712.
not be considered on collateral review. The Court would foreclose federal habeas review for such claims regardless of a state prisoner’s procedural behavior. The Court should not, however, foreclose review to a prisoner whose substantive claim merits review because of his state court procedural behavior unless it is affirmatively demonstrated that the prisoner intentionally and knowingly forfeited the claim he seeks to assert.

The proposed approach would include the adoption of a modified version of the Fay rule. The Court should decide which constitutional claims are cognizable on federal collateral review. After identifying those claims, the Court should direct federal courts to review the merits of those claims in all cases, regardless of the state courts’ treatment of the prisoners’ procedural behavior. A prisoner with such a claim should not be said to have forfeited the right to federal review absent the sort of knowing and intentional waiver that is demanded of waivers of other constitutional rights. This even-handed approach serves a dual pur-

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192. For example, the Court might choose to foreclose habeas review of Miranda claims, in accordance with its decision to foreclose fourth amendment claims in Powell. As Stuntz and Jeffries note, some constitutional requirements, including the one articulated in Miranda, are designed to deter police misconduct, and while implementing those requirements also benefits some defendants, that benefit is “incidental to the purpose of the rules.” Stuntz and Jeffries, supra note 63, at 705; see also Miranda v. Arizona, 384 U.S. 436, 458 (1966) (discussing need for protective rule in confession cases). “[T]here is no a priori reason why the protection of [Miranda] should be equally or comprehensively available to all defendants.” Stuntz and Jeffries, supra note 63, at 703. Stuntz and Jeffries conclude that defendants denied the “windfall” advantage of enforcement of such rules ought not be permitted to complain. Id. at 705. Justices O’Connor and Scalia have already indicated a willingness to foreclose review of Miranda claims. See Duckworth v. Eagan, 492 U.S. 195, 211 (1989) (O’Connor, J., concurring) (joined by Justice Scalia).

193. Though at first glance it may seem troublesome to propose a judicial cutback on substantive claim review without congressional authorization, the history of habeas jurisprudence amply demonstrates that the changing scope of habeas review has never turned on changes in statutory language. In Sykes itself, Justice Rehnquist noted the Court’s “historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.” Wainwright v. Sykes, 433 U.S. 72, 81 (1977). “[O]ne can hardly insist upon the primacy of legislative innovation in the law of federal habeas corpus. To put the matter bluntly, it is simply too late in the day to assert a lack of judicial authority to reform habeas law.” Stuntz & Jeffries, supra note 63, at 709.

194. This is the waiver standard articulated in Johnston v. Zerbst, 304 U.S. 458, 464 (1938).

195. In their efforts to categorize which claims ought to be considered on federal habeas review despite state court procedural default, Stuntz and Jeffries argue that all claims bearing upon actual innocence or the accuracy of fact-finding ought to receive federal habeas review. See Stuntz and Jeffries, supra note 63, at 712. They have laid the groundwork for the sort of categorization of substantive claims that should govern availability of habeas review. The Court might well decide that claims not falling into the “innocence” categories be foreclosed from federal review. While such a doctrinal shift entails a restriction on the scope of federal review, the cut-back will affect prisoners from all of the 50 states equally. Thus, the availability of habeas review will turn on the type of claim asserted, rather than on state courts’ characterization of prisoners’ procedural behavior.

196. See supra note 54.
pose. First, it streamlines courts' habeas dockets, leaving them with only
the substantive issues the Court considers appropriate for habeas review.
Second, it provides habeas review to prisoners from all states who have
the same types of constitutional claims, regardless of the strictness or
leniency of their respective states' procedural regimes.

By using the procedural bar rule to weed out unwanted substantive
claims, the Court has created an inequitable situation that treats prison-
ers in different states differently. A rule explicitly directed toward the
substantive bases of petitioners' claims would eliminate the constitution-
ally suspect inequities of the *Sykes* rule. Moreover, the Court's obvious
interest in eliminating certain types of substantive claims is better served
by the proposed rule than by the current procedural bar regime.

Two efficiency arguments offer additional support for adoption of the
proposed standard. First, such an approach is much easier for federal
district courts to apply than the complicated procedural bar scheme in-
troduced in *Sykes*. Under the proposed approach, federal courts
would not be required to conduct an inquiry into the strength and consist-
tency of the state procedural rule that precluded consideration of a pris-
oner's claim in state court. Under the proposed standard, the Court
could simply indicate which claims will be cognizable in federal habeas
proceedings, permitting the lower courts to get on with the business of
considering those claims.

There is a second, more important argument in favor of the efficiency
of the proposed standards. At present, federal courts spend a good deal
of time on the preliminary issue of whether a prisoner's state procedural
default should be enforced in federal court, beginning with an inquiry
into the adequacy and independence of the state procedural bar rule," and
followed by a subsequent analysis of whether cause and prejudice
exist to excuse the procedural default. These requirements squander
judicial resources. They also impede the refinement of constitutional
doctrines with which the states are expected to comply. This result bene-

197. *See supra* note 64-69 and accompanying text.
198. *See supra* note 94.
199. Given the lack of statutory guidance on the scope of habeas review, one might
wonder whether this proposal, which would require differentiating among types of constitu-
tional claims, itself gives rise to intolerably unequal treatment. Stuntz and Jeffries re-
ject the notion that "there should be not hierarchy among constitutional rights." Stuntz
& Jeffries, *supra* note 63, at 702, and note that all modern theories of constitutional adjudica-
tion "envision something other than a featureless plane of undifferentiated rights." *Id.* at 707.
They conclude that "there is nothing inherently wrong with differentiating among constitutional rights, whether directly or as a condition of habeas review[,]" and
that the differentiation should occur according to whether the claim raises a "'reasonable
possibility' of factually erroneous conviction." *Id.* at 709.
200. *See supra* notes 100-119 and accompanying text.
201. *See supra* notes 64-99 and accompanying text.
202. Ironically, Justice Kennedy discusses this administrative problem in supporting
his argument for a strong procedural bar rule. *See* Harris v. Reed, 489 U.S. 235, 276-78
fits nobody. Obviously the state prisoners who are denied a federal forum are disadvantaged, and the judicial systems of both the state and federal governments are damaged as well, as they continue to expend massive resources to *avoid* deciding issues that actually facilitate smoother functioning of their court systems. The habeas review system should place a high value on guiding state courts in implementing constitutional norms, thereby producing a more efficient criminal process in both the state and federal courts. If the issue presented by a federal habeas petition is one that warrants federal review, courts should allocate their scarce resources to consideration of the substantive merits of the claim, rather than resolution of peripheral procedural issues.

**CONCLUSION**

By constructing a procedural bar doctrine whose application depends on the substantive nature of the underlying claim, the Court has directed federal courts to use an ostensibly neutral procedural doctrine as a device to cut back on review of constitutional claims it considers less compelling. By allowing habeas review to turn on state courts’ designation of procedural behavior, moreover, the Court is restricting collateral review in a manner that unfairly and unconstitutionally discriminates along geographical boundaries. The Court should reassess the scope of federal habeas review of state prisoners’ claims and opt for a system that provides equal access to similarly situated prisoners whose substantive claims the Court deems appropriate for habeas review. The most sensible solution is also the most straightforward. The Court is obliged to apprise lower federal courts and potential habeas petitioners of which claims will receive habeas review. The lower courts could then afford that review without unnecessary and geographically discriminatory reliance on state court procedural decisions.

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203. There is a tension between the efficiency argument and the notion that courts should avoid deciding constitutional issues whenever possible. *See, e.g.*, New York Transit Auth. v. Beazer, 440 U.S. 568, 582-83 (1978) (courts must try to dispose of a case on statutory grounds before deciding the constitutional issue); Flast v. Cohen, 392 U.S. 83, 96-97 (1968) (same); Ashwander v. T.V.A., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (enumerating rules to avoid passing prematurely on constitutional issues); Muskrat v. United States, 219 U.S. 346, 359 (1911) (determining the constitutionality of an issue is “legitimate only in the last resort”). *But cf.* Ulster County Court v. Allen, 442 U.S. 140, 154 n.13 (1979) (recognizing “that the State of New York will benefit from an authoritative resolution of the conflict between its own courts and the federal courts sitting in New York concerning the constitutionality of one of its statutes”).