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## ARTICLES

# THE DECONSTRUCTION AND RECONSTRUCTION OF HABEAS

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## I. INTRODUCTION

Habeas is an anomaly in the law of federal courts.<sup>1</sup> For decades now, state courts have solely and finally resolved federal issues with minimal federal superintendency. For nearly as long, however, the federal writ of habeas corpus has not adhered to this general paradigm and has been interpreted to permit federal courts to revisit anew federal issues litigated before state courts in the course of state criminal prosecutions. Indeed, the special treatment of habeas is so longstanding that it is a near-axiomatic contour in the fabric of federal courts law. This Article questions that axiom. Starting from a premise placing high value on theoretical consistency (a premise subject to legitimate criticism), I examine the functional and theoretical differences between the paradigm that typically governs adjudication of federal issues in the state courts (which I dub the “paradigmatic construct”) and the paradigm that applies to adjudication of federal issues in state criminal prosecutions and in subsequent, federal habeas corpus proceedings (the “habeas construct”). This deconstructive exercise reveals that these two constructs are animated by fundamentally different views of the interrelationship of the state and federal judiciaries. Starting from the further premise that the paradigmatic construct is the appropriate baseline (a premise also subject to debate), I then examine two very different approaches to eliminate this theoretical discord. The less aggressive approach attempts to cure the discord by providing a new *theoretical* basis for habeas that justifies its current contours. The more aggressive approach attempts to cure the discord by reshaping the contours of the writ to treat adjudications of federal issues in the habeas construct more like they are treated under the paradigmatic construct.

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1. “[H]abeas corpus relitigation is an exception to the normal pattern of state court enforcement of federal law. In virtually all other areas, state court enforcement is subject only to the limited supervision of Supreme Court review.” Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1233 (1986). See *Brown v. Allen*, 344 U.S. 443, 512 (1953) (Frankfurter, J., concurring) (“The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized.”). See generally Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 936 (1998) (“Habeas . . . is different.”); Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1707 (2000) (explaining several ways in which habeas corpus is “a distinctive forum”).

As discussed in Part II, state court adjudication of federal claims typically proceeds as follows: a person who opts to litigate a federal issue to conclusion in state court<sup>2</sup> may seek federal review of that issue by petitioning the United States Supreme Court for a writ of certiorari;<sup>3</sup> in the likely event of denial,<sup>4</sup> however, the state judgment is deemed to be “final” and once final, federal issues adjudicated therein may not be revisited by the federal courts in any collateral attack.<sup>5</sup> This allocation of adjudicative authority is a by-product of several doctrines within the law of federal courts—among others, full faith and credit<sup>6</sup> and res judicata,<sup>7</sup> the *Rooker-Feldman* doctrine,<sup>8</sup> the Anti-Injunction Act,<sup>9</sup> the *Younger* abstention

2. For civil cases involving the choice of federal causes of action, the choice of forum belongs to the plaintiff and defendant; the plaintiff initially chooses the forum, and the defendant may elect to remove the action to federal court. See 28 U.S.C. § 1441(b) (2000) (“Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable . . .”). For civil cases premised on state law, however, the plaintiff’s choice of forum generally controls, even if the defendant seeks to raise a substantive defense grounded in federal law. See *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2494–95 (2004).

3. See 28 U.S.C. § 1257(a) (2000) (“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any . . . right . . . is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States.”).

4. Supreme Court review is unlikely. By its rules, the Court has indicated an inclination only to grant certiorari for cases involving “important federal question[s]” or for those which create or present a conflict of authority. SUP. CT. R. 10. The empirical data confirms the Court’s selectivity: in the 1992 October Term, the court received 4792 petitions for a writ of certiorari, and heard only fourteen cases from that pool. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS* 70–71 (2004).

5. See *infra* text accompanying notes 67–77, 124.

6. The Full Faith and Credit statute requires federal courts to honor the final judgments of state courts, thereby precluding collateral attacks on those judgments and relitigation of claims. See 28 U.S.C. § 1738 (2000) (“The records and judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . .”). For a fuller discussion of this doctrine, see *infra* text accompanying notes 67–69.

7. Similar to full faith and credit, the doctrines of res judicata and collateral estoppel also grant preclusive effect to claims or issues that have already been litigated between the same or similarly situated parties. See, e.g., *Allen v. McCurry*, 449 U.S. 90, 94–95 (1980) (“The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. . . . The federal courts generally have also consistently accorded preclusive effect to issues decided by state courts.”). For a discussion of these doctrines, see *infra* text accompanying notes 70–77.

8. The *Rooker-Feldman* doctrine funnels any federal review of issues resolved in state courts to the United States Supreme Court on direct review by precluding lower federal courts from engaging in such review. See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) (“[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings.”); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) (holding that only the United States Supreme Court can “reverse or modify” a state court judgment). See generally Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1101 (1999) (explaining the *Rooker-Feldman* doctrine and observing that it “is first and foremost an

doctrine,<sup>10</sup> and the Eleventh Amendment.<sup>11</sup> While serving different primary functions, these doctrines secondarily form the paradigmatic construct, which itself independently embodies particular historical, instrumental, and normative assumptions regarding: the quantum of federal court review necessary to ensure the supremacy of federal law, the value of dialectic interaction between the federal and state courts in developing federal law, the competence of the state courts to resolve definitively questions of federal law, and consistency and symmetry among other doctrines governing the federal and state courts.<sup>12</sup>

Unlike the paradigmatic construct, the very hallmark of the present writ of habeas corpus is, as discussed in Part III, the relitigation of claims in federal court that were already decided by the state courts.<sup>13</sup> The federal

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integral part of judicial federalism”). For a fuller discussion of this doctrine, see *infra* text accompanying notes 62–66.

9. The Anti-Injunction Act prohibits the lower federal courts from intervening in ongoing state proceedings. 28 U.S.C. § 2283 (2000) (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”). See *infra* text accompanying notes 49–56.

10. In *Younger v. Harris*, 401 U.S. 37, 46–49 (1971), the Supreme Court held that a criminal defendant could not seek a federal injunction to halt an ongoing state criminal prosecution except in rare situations involving multiple, harassing prosecutions. See also *infra* text accompanying notes 57–60.

11. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). As currently interpreted, the Eleventh Amendment generally prohibits an individual from suing a state for violations of federal law in either federal or state court, with various exceptions (including the right to sue a state officer for solely prospective injunctive or declaratory relief). See, e.g., *Alden v. Maine*, 527 U.S. 706, 748–49 (1999) (holding that the Eleventh Amendment bars similar lawsuits brought in state courts); *Seminole Tribe v. Florida*, 517 U.S. 44, 59, 72–73 (1996) (holding that the Eleventh Amendment may be abrogated solely by legislation enacted under Section 5 of the Fourteenth Amendment); *Hans v. Louisiana*, 134 U.S. 1, 15–16 (1890) (holding that the Eleventh Amendment applies even to a suit brought against a state by one of its own citizens). Cf. *Ex parte Young*, 209 U.S. 123, 150 (1908) (stating that a federal lawsuit for injunctive relief against a state officer for violation of federal law is permitted under the Eleventh Amendment); *General Oil Co. v. Crain*, 209 U.S. 211, 227–28 (1908) (holding that *Ex parte Young* applies in state court). This interpretation is at odds with the plain text of the Eleventh Amendment, which prohibits only lawsuits by one individual against another State. This doctrine is discussed more fully *infra* in Section II.B.5.

12. See *infra* Section II.B.

13. Admittedly, the paradigmatic and habeas corpus constructs identified in this Article are not the sole “models of jurisdictional allocation” as between the state and federal courts. Several models have previously been catalogued. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 425–27 (5th ed. 2003); HOWARD P. FINK ET AL., FEDERAL COURTS IN THE 21ST CENTURY: CASES AND MATERIALS 26–31 (1996); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1226–34 (2004). The two constructs discussed in this Article, however, are the

writ of habeas corpus currently permits state prisoners to challenge their convictions and sentences as obtained in contravention of federal law.<sup>14</sup> In form, the writ is a statutorily based mechanism for state prisoners to enter federal district court asserting that their continued “custody” is “in violation of” federal law.<sup>15</sup> In function, the writ is a lawsuit against a state in federal court that seeks declaratory and injunctive relief—namely, the invalidation of a conviction or sentence with concomitant release or reduction in the sentence—on the basis of federal statutory and

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only two that by definition involve state court adjudication of federal issues. In his recent article, Barry Friedman identifies a total of eight models of jurisdictional allocation, four of which he terms “multijurisdictional models”—namely, “reference models” (involving certification of questions by federal courts to state courts on state law issues), “collateral review models” (habeas corpus), “double-tracking” (parallel, simultaneous litigation in state and federal courts), and “sequencing” (seriatim litigation of state issues in state court and federal issues in federal court). Friedman, *supra*, at 1226–35. Friedman nevertheless seems to agree with the central premise of this Article that one of his eight models corresponds with the paradigmatic construct outlined in this Article, *id.* at 1227, that the “collateral review,” or habeas corpus model is the only multijurisdictional model to entail routine relitigation of federal issues, *id.* at 1234–35, and that these two models entail “different treatment of federal claims” vis-à-vis relitigation of those claims, which, he notes, lacks “satisfactory explanation.” *Id.* at 1253–54.

14. Except where otherwise noted, this Article concerns solely the statutory writ of habeas corpus available to persons held in state custody pursuant to a judgment of conviction. 28 U.S.C. § 2254 (2000). The writ of “habeas corpus” commonly includes two other statutory writs: (i) one available to persons held in federal custody pursuant to a conviction, *see* 28 U.S.C. § 2255 (2000); and (ii) one available to any person held “in custody in violation of the Constitution of the United States or laws or treaties of the United States,” *see* 28 U.S.C. § 2241(c)(3) (2000). There may also be a nonstatutory, common law writ of habeas corpus that is narrower than the statutory writs. *See* Eric M. Freedman, *Milestones in Habeas Corpus: Part I*, 51 ALA. L. REV. 531, 587 (2000) (“[N]o statute of Congress was needed to give the federal courts authority to issue the writ of habeas corpus.”); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 254 (1988). Although persons held in state custody prior to conviction may seek relief under § 2241(c)(3) or the common law writ, the exhaustion doctrine, *see infra* text accompanying notes 149–54, will generally postpone review until it comports with § 2254. *See* § 2254(b); *Ex parte Royall*, 117 U.S. 241, 251 (1886) (postponing pretrial review because the statutory writ of habeas corpus “does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it”).

15. According to statutory mandate:

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.

§ 2254(a). Although the writ by its plain terms authorizes an assessment of the legality of “custody,” *id.*; *Fay v. Noia*, 372 U.S. 391, 427–28 (1963) (authorizing courts to overlook procedural default of claims in state court absent a deliberate bypass because habeas corpus adjudges “custody”), the Court has since acknowledged that it is, in actuality, reviewing the legality of the conviction underlying the custodial sentence. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (observing that, although a court entertaining a habeas petition “does not review a judgment, but [rather] the lawfulness of the petitioner’s custody *simpliciter*,” a state prisoner is “in custody pursuant to a judgment”).

constitutional law.<sup>16</sup> The federal court hearing a state prisoner's habeas action is not only empowered to litigate federal issues previously litigated and necessarily rejected by the state courts,<sup>17</sup> it is also largely limited to reviewing *only* those claims.<sup>18</sup>

The differential treatment of federal claims under this habeas construct is authorized by positive law—namely, through the exception of habeas from the federal courts doctrines that interact to form the paradigmatic construct.<sup>19</sup> The fact remains, however, that this alteration of doctrinal law has created a second, competing construct that markedly differs from the

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16. Habeas corpus relief will not lie for: violations of state law that do not amount to a due process violation, *see Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (noting that “federal habeas corpus relief does not lie for errors of state law” unless the error otherwise violates federal due process); for ineffective assistance of counsel during state post-conviction proceedings, *see* § 2254(i); where no such right exists, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . . Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.”); or for violations of the Fourth Amendment where the state provided an “opportunity for full and fair litigation” of such claims, *see Stone v. Powell*, 428 U.S. 465, 482 (1976).

17. The general rule of *res judicata* does not apply in habeas corpus proceedings initiated by state prisoners. *See infra* text accompanying notes 169–74. Moreover, the exhaustion doctrine generally requires state prisoners to present their federal claims to the state courts before such claims can be raised in a habeas petition. *See* § 2254(b)(1)(A) (“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.”).

18. A federal habeas court may consider a claim not previously raised in state court if (1) it rests on new facts not available to the state courts, *see* § 2254(e)(2)(A)(ii); (2) it seeks to apply a new rule of constitutional criminal procedure made retroactive to cases on collateral review by the Supreme Court, *see* § 2254(e)(2)(A)(i); or (3) “circumstances exist that render [the usual state appeals] process ineffective to protect the rights of “the applicant,” *see* § 2254(b)(1)(B)(ii).

19. *See Sumner v. Mata*, 449 U.S. 539, 543–44 (1981) (excepting habeas from the *Rooker-Feldman* doctrine by holding that “[i]t has long been established, as to those constitutional issues which may properly be raised under § 2254, that even a single federal judge may overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question”); *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973) (“Principles of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings.”); *Mitchum v. Foster*, 407 U.S. 225, 234–35 n.16 (1972) (stating that habeas corpus is an “expressly authorized” exception to the Anti-Injunction Act, pursuant to 28 U.S.C. § 2251); *Sanders v. United States*, 373 U.S. 1, 7 (1963) (“At common law, the denial by a court or judge of an application for habeas corpus was not *res judicata*.”); *Brown v. Allen*, 344 U.S. 443, 458 (1953) (holding that, for purposes of § 2254, prior state adjudication of an issue “is not *res judicata*”); *Ex parte Young*, 209 U.S. 123, 167–68 (1908) (relying on habeas corpus as authority for carving out the *Ex parte Young* injunctive relief exception); *Johnson v. City of Sherwood, Minn.*, 360 F.3d 810, 818 (8th Cir. 2004) (noting that habeas corpus actions are a “limited exception to the *Rooker-Feldman* doctrine”); *American Reliable Ins. Co. v. Stillwell*, 336 F.3d 311, 316–17 (4th Cir. 2003) (same); *Booth v. Maryland*, 112 F.3d 139, 144 (4th Cir. 1997) (“From the earliest times, Eleventh Amendment immunity has not prevented actions seeking a writ of habeas corpus, whether the defendant be the sovereign itself, or some agent of the sovereign.”); Sherry, *supra* note 8, at 1101 (“Petitions for habeas corpus are an explicit exception to *Rooker-Feldman* . . . .”).

paradigmatic construct in its assumptions about the supremacy of federal law, the value of a federal-state dialectic, and the competency of the state courts. Indeed, the habeas construct governing review of federal claims asserted by state prisoners is particularly unique insofar as it does not apply to review of federal claims by federal prisoners<sup>20</sup> or to review of federal claims by civil rights plaintiffs suing under 42 U.S.C. § 1983,<sup>21</sup> both of which remain governed by the paradigmatic construct.

For years, the coexistence of these two constructs has been noted,<sup>22</sup> but not examined in any depth or, for that matter, earnestly questioned. This is no idle question. As I argue in Parts II and III, each construct and in particular each one's treatment of federal claims already litigated by the state courts, evinces a fundamentally different view of judicial federalism. By entrusting the state courts to decide federal issues definitively with only occasional oversight by the Supreme Court, the paradigmatic construct resembles most closely a "Federalist" rhetorical structure, as that term is defined by Richard Fallon.<sup>23</sup> Conversely, by empowering the federal courts to rehear federal claims already litigated by the state courts, the habeas construct ascribes to the federal courts a special role as true arbiters of federal law, which is more consistent with Fallon's "Nationalist" rhetorical structure.<sup>24</sup> The discord would be tolerable—or at the very least mitigated—if the differential treatment of federal claims by the habeas construct were adequately justified. Although many reasons have been proffered over the years for why habeas is different, I argue in Part III that none is entirely satisfactory. The theoretical discord persists.

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20. Although the text of 28 U.S.C. § 2255 does not prescribe that preclusive effect be given to a federal court's adjudication of an issue on direct review, the federal courts have accorded prior adjudications such an effect absent intervening facts or law. *See, e.g.*, *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003); *United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000); *Myers v. United States*, 198 F.3d 615, 619–20 (6th Cir. 1999); *Underwood v. United States*, 15 F.3d 16, 18 (2d Cir. 1993); *Olson v. United States*, 989 F.2d 229, 230 (7th Cir. 1993).

21. *See Allen v. McCurry*, 449 U.S. 90, 103–05 (1980) (holding that a plaintiff bringing a civil rights action under 42 U.S.C. § 1983 may not relitigate issues otherwise precluded by res judicata or collateral estoppel). *But see Mitchum*, 407 U.S. at 243 (holding that § 1983 lawsuits are an exception to the Anti-Injunction Act, but pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), a district court retains jurisdiction to abstain from staying a pending criminal prosecution).

22. *See supra* note 1.

23. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1151–57 (1988) (describing the Federalist model in detail). *See infra* Section II.C.5.

24. *Id.* at 1158–62. *See infra* Section III.B.5.

Such disjunction is typical of the “undertheorized” field of federal courts.<sup>25</sup> The incompatibility of these constructs is only likely to grow more pronounced in the coming years if the Supreme Court and Congress continue to redefine the principles governing the federal and state governments, thereby shifting the paradigmatic construct toward a more Federalist ideal.<sup>26</sup> More practically, habeas filings by state prisoners continue to rise statistically and thus drain federal judicial resources,<sup>27</sup> despite Congressional efforts to curtail such filings, such as the Antiterrorism Effective Death Penalty Act of 1996 (“AEDPA”).<sup>28</sup> Thus, the habeas construct’s treatment of already adjudicated federal claims imposes both theoretical and actual costs to the judiciary.

Deconstructing the writ of habeas corpus to evaluate how it differs from the paradigmatic construct is only the first step. I next turn to the task of reconstructing habeas to eliminate the utilitarian and theoretical disharmony between the habeas and paradigmatic constructs. In so doing, I proceed from two assumptions.<sup>29</sup> First, I assume that theoretical discord is disfavored and should, if possible, be eliminated. This is hardly a universally accepted assumption and is subject to valid criticism, particularly in the law of federal courts, which is rife with doctrines at

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25. Friedman, *supra* note 13, at 1213 (noting that “[t]he law of federal jurisdiction lacks an overarching theory to explain the allocation of claims between state and federal courts”); Steiker, *supra* note 1, at 1720 (observing how the Supreme Court “has notably shown little enthusiasm for general theorizing about Article III”).

26. See John J. Dinan, *The Rehnquist Court’s Federalism Decisions in Perspective*, 15 J.L. & POL. 127, 191 (1999) (“[I]t is clear that federalism is a primary value for a majority of the members of the current Court.”); Vicki C. Jackson, Seminole Tribe, *the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 542 (1997) (noting how, recently, the Supreme Court has been “redrawing lines of federalism”). As discussed more fully *infra* in the text accompanying notes 128–31, the Court’s redefinition of the federal-state balance has been most evident in its recent decisions interpreting the Commerce Clause, the Tenth Amendment and, most prominently, the Eleventh Amendment.

27. Between 1995 and 2000, the number of habeas corpus petitions filed by state prisoners increased by more than 50%—from 13,627 to 21,345. JOHN SCALIA, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 2 tbl.1 (2002). This number of petitions accounts for more than 6% of the total caseload of the federal district courts in 2000, which handled 322,225 cases in total that year. See United States Courts, Library, Statistical Reports, Judicial Facts and Figures, *Table 4.1, U.S. District Combined Civil and Criminal Courts*, at <http://www.uscourts.gov/judicialfactsfigures/table4.01.pdf> (last visited July 16, 2005).

28. Antiterrorism Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA]. Congress designed AEDPA specifically to “reduce the abuse of habeas corpus that results from delayed and repetitive filings.” H.R. REP. NO. 104-23, at 8 (1995).

29. As the discussion *infra* in Part VI indicates, I do not necessarily subscribe to either premise, but I adopt them for the purposes of this Article.

theoretical odds with one another. Second, I assume that the paradigmatic construct should be used as the baseline when attempting to eliminate the theoretical discord. I adopt this assumption given the prevalence of the paradigmatic construct in dictating how relitigation of federal claims should proceed. Barry Friedman, in a recent article, starts from precisely the opposite assumption and, in a well-reasoned piece, argues that habeas corpus should be the template for the relitigation of federal claims in other contexts.<sup>30</sup>

Proceeding from these two assumptions, in Part IV, I examine two approaches to reconstructing the theoretical foundation of the writ with the aim of making it more consistent with the paradigmatic construct. Both approaches leave the actual contours of the habeas writ largely untouched. Under the first approach, which has been espoused most notably by Friedman, James Liebman, and William Ryan, habeas is not viewed as a separate, collateral attack on an already final judgment of the state courts, but rather, as a continuance of the direct appeal process that began in the state courts and merely continues before the lower federal courts.<sup>31</sup> Although this approach harmonizes some of the discord between the habeas construct and the paradigmatic construct, several inconsistencies persist. I propose a second approach, under which all review occurring after imposition of a sentence in the state court is viewed as part of a unitary, *federal* habeas action that first proceeds in state courts as adjuncts to the federal courts and ultimately shifts to the lower federal courts. Under this approach, a state prisoner's direct appeal and collateral proceedings in the state courts are not an exercise of the state's sovereign adjudicatory authority, but are instead an exercise of federal jurisdiction in the preliminary stage of a *federal* habeas corpus action. In other words, a prisoner's direct appeal in the state courts would be seen as a form of nonremovable federal question jurisdiction (with pendant jurisdiction over

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30. Relying on "interest analysis," Friedman starts from the premise that there should be a federal forum for issues of federal law. He goes on to question the logic of what I refer to as the paradigmatic construct and to argue that it should be eliminated in favor of a model similar to habeas corpus insofar as state resolution of federal issues would no longer be final (as it is under the paradigmatic construct outlined in this Article). See Friedman, *supra* note 13, at 1241, 1243, 1261–79. Friedman expressly declined to consider how habeas itself might be altered, *id.* at 1261 n.148, which is the subject of this Article.

31. See James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 883–84 (1998). See also Friedman, *supra* note 14, at 261 ("Habeas must be seen . . . as an appeal to a federal forum available in every state criminal case."); David McCord, *Visions of Habeas*, 1994 B.Y.U. L. REV. 735, 838 (1994) ("There were then, and still are, many significant areas of habeas jurisprudence that can be explained by the appellate review vision . . .").

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related state-law claims) that necessarily antedates, and creates the record for, subsequent review by the federal courts in the latter stages of the same habeas action. This approach largely harmonizes the writ with the doctrines underlying the paradigmatic construct, although the writ could be tailored to better fit within this reconceptualization.

Of course, reenvisioning the writ does not eliminate the utilitarian reality that federal claims previously resolved in federal courts are still subject to relitigation under the habeas construct but not under the paradigmatic construct. In Part V, I examine how the writ might be altered (and, as one might expect, narrowed) to make the writ compatible in functionality with the paradigmatic construct and the Federalist assumptions that underlie it.

As written now, however, the writ of habeas corpus is anomalous not only to the Federalist rhetorical structure underlying the paradigmatic construct, but also to the Nationalist model to which the habeas construct purports to subscribe. If the assumptions I make in this Article regarding the importance of theoretical tidiness and the use of the paradigmatic construct as the relevant baseline are rejected, or if habeas is deemed to be an adequately justified exception to the paradigmatic construct, the current writ's existence as a hybrid of the Nationalist and Federalist models is a clumsy means of achieving its Nationalist ends. Accordingly, in Part VI, I explore how the writ might be amended to fully realize its Nationalist foundation.

Finally, I conclude that the critical deconstruction of habeas corpus indicates that its reconstruction is necessary—one way or the other—or else the writ will remain an unjustified, theoretical outlier under any view of federal courts law.

## II. THE PARADIGMATIC CONSTRUCT

Through a series of federal statutory amendments and interpretive decisions, Congress and the federal courts have pronounced a handful of doctrines governing the interrelationship of the federal and state courts that have had the residual effect of forming a paradigm that, in most cases, governs the federal review of federal-law issues that originate in state court proceedings. This section is wholly descriptive, examining the various constitutional and legislative enactments, as well as court-fashioned doctrines, that interact to elucidate this paradigmatic construct. When viewed as a whole, the construct effectuates structural and instrumental

values that reflect a specific vision of judicial federalism respecting the role of state and federal courts.

#### A. THE CONSTRUCT ITSELF

The framers of the Constitution envisioned that the state courts would play an integral role in the interpretation and development of federal law, because the Constitution itself—as part of the “Madisonian Compromise” reached at the Convention—created only the Supreme Court, leaving to the first Congress the question of whether to create lower federal courts at all, or to leave the state courts as the primary arbiters of federal law.<sup>32</sup> Although the Judicial Act of 1789 created the lower federal courts,<sup>33</sup> the command of the Supremacy Clause that “[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land”<sup>34</sup> nevertheless reinforced the notion that federal constitutional and statutory law is part of the organic law of the state courts.<sup>35</sup> Although the Civil War

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32. Article III of the Constitution provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1 (emphasis added). “It is a familiar argument, based on the ‘Madisonian Compromise,’ that because Article III does not require Congress to create lower federal courts, Congress could compel state courts to hear Article III cases and controversies.” Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 963 n.90 (2001). *Accord* *Brown v. Allen*, 344 U.S. 443, 499 (1953) (Frankfurter, J.) (“Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts.”); Vicki C. Jackson, Printz & Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 121 (1998) (“State courts . . . are part of the constitutional infrastructure contemplated and required by the Constitution.”); Tonya M. Gray, Note, *Separate but Not Sovereign: Reconciling Federal Commandeering of State Courts*, 52 VAND. L. REV. 143, 164 (1999) (“If the lower federal courts were not created, the implication would be that the state courts are subject to the direction of the Supreme Court. The adjudication of federal claims would be left to the states by the simple expedient of not creating federal court jurisdiction to hear such claims.”) (internal footnote and quotation omitted). *But see* James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 172 (1998) (arguing that, due to the prevalence of legislative petitions (rather than lawsuits), “the Framers of the Eleventh Amendment could not have anticipated the availability of state courts as courts of first instance where suitors might reliably bring their claims against the states, subject to ultimate review in the Supreme Court”). Indeed, the absence of the lower federal courts from the original constitutional design should be contrasted with the seeming requirement that the states possess a judicial branch, as part of their obligation to create a republican form of government. *See* U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”); Jackson, *supra*, at 120 n.38; Jackson, *supra* note 26, at 505 n.41 (“The Constitution itself contemplates that states will maintain court systems.”).

33. *See* Act of Sept. 24, 1789, ch. 20, § 9, 11, 1 Stat. 73, 76–77, 78.

34. U.S. CONST. art. VI, cl. 2.

35. *See Brown*, 344 U.S. at 499 (Frankfurter, J.) (“Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the

Amendments, and the Fourteenth Amendment in particular, unquestionably shifted the federal-state balance of power,<sup>36</sup> they effectuated that shift by authorizing the expansion of the universe of actions heard by the federal courts<sup>37</sup>—not by contracting the power or duty of the state courts to adjudicate federal questions. Thus, in *Testa v. Katt*,<sup>38</sup> the Court reaffirmed that the state courts could not refuse to entertain lawsuits based on federal law,<sup>39</sup> and, in *Printz v. United States*,<sup>40</sup> the Court proclaimed that any

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United States Constitution.”); *Robb v. Connolly*, 111 U.S. 624, 637 (1884) (“Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States . . .”). *See also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 510–11 (1963) (“From the beginning, it was one of the central features of our federalism that federal law is a part of the state law, that deciding federal questions is an intrinsic part of the business of state judges.”) (internal footnotes omitted); Bellia, *supra* note 32, at 951 (“It is well-established that state courts must enforce federal rights of action if their jurisdiction is adequate and appropriate.”); Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257, 308 (2000) (noting that both federal and state courts “can declare finality in matters of federal law”). *Cf.* Fallon, *supra* note 23, at 1215 (“If Congress withdraws lower federal court jurisdiction over a class of cases, the normal result will be that adjudication must occur in state court.”); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1716 (2003) (“Congress can create federal causes of action that the state courts are not at absolute liberty to decline to adjudicate.”); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 99 (2003) (noting that “the states are bound to abide by federal law”). *But see* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles”*, 78 VA. L. REV. 1769, 1774, 1787 (1992) (arguing that federal courts are the “primary shapers and enforcers of federal law”).

36. Jackson, *supra* note 32, at 122 (observing that the Fourteenth Amendment altered the constitutional meaning of federalism); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1117 (2001) (“[T]he Civil War itself must be understood as transforming national power vis-à-vis the states.”).

37. Indeed, as discussed more fully *infra* in the text accompanying notes 282–303, it was first in the wake of the Fourteenth Amendment that Congress extended the writ of habeas corpus generally to persons held in state custody, *see* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86, and created the civil action for violations of federal constitutional rights by states currently codified at 42 U.S.C. § 1983 (2000). Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1996)). *Accord* *Allen v. McCurry*, 449 U.S. 90, 99 (1980) (noting that, in enacting § 1983, “Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts”).

38. *Testa v. Katt*, 330 U.S. 386 (1947).

39. In *Testa*, the Court held that a Rhode Island court could not refuse to entertain a lawsuit under the federal Emergency Price Control Act of 1942 seeking penal damages for a wartime manufacturer’s sale of goods above the federally mandated price cap. *Id.* at 394. The Court acknowledged that Rhode Island was not obligated to enforce the criminal laws of a sister state in its courts, *see generally* *Huntington v. Attrill*, 146 U.S. 657, 669 (1892), but noted that “[i]t cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibility to enforce federal laws.” *Testa*, 330 U.S. at 389. The Court thus reaffirmed “the power and duty of state courts to enforce federal penal laws.” *Id.* at 391. *See also* *Clafin v. Houseman*, 93 U.S. 130, 136–37 (1876) (“The laws of the United States are laws in the several States, and just as much binding on the . . . courts thereof as the State laws are . . . . The two together form one system of jurisprudence, which constitute the law of the land for the State . . .”).

“commandeering” occasioned by this co-opting of the state courts did not offend the Court’s more aggressive vision of the Tenth Amendment.<sup>41</sup> Moreover, except where a case is removed from state to federal court at the outset, the state court’s adjudication of the federal issue may generally not be interrupted or co-opted by the federal courts.<sup>42</sup>

Although the state courts have the duty to hear federal claims, they do not have the unsupervised authority to adjudicate and finally decide such claims.<sup>43</sup> Rather, federal claims raised in state court proceedings are

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*Accord* Gray, *supra* note 32, at 153 (“In *Chafin v. Houseman*, the Supreme Court held that absent a specific enactment of an exclusive federal remedy, state courts are required to enforce the laws of Congress.”).

40. *Printz v. United States*, 521 U.S. 898 (1997).

41. In *Printz*, the Court held that certain provisions of the interim Brady Handgun Violence Prevention Act that obligated local law enforcement personnel to carry out certain duties respecting background checks for prospective firearms buyers violated the Tenth Amendment. *Id.* at 932–33. The Court reaffirmed its prior precedent that the Tenth Amendment prohibited federal “commandeering” of state legislative personnel. *Id.* at 924 (citing *New York v. United States*, 505 U.S. 144, 166 (1992)). The Court held the federal “commandeering” of state executive personnel mandated by the interim Brady Act provisions similarly infirm, finding no constitutional sanction for the “forced participation of the States’ executive in the actual administration of a federal program.” *Id.* at 918. The Court nevertheless distinguished the federal “commandeering” of state judiciaries occasioned by “forcing” them to entertain federal causes of action, reasoning that “unlike legislatures and executives, they applied the law of other sovereigns all the time” as part of the constitutional design. *Id.* at 907. Although *Printz*’s rationale has been roundly criticized by commentators, *see, e.g.*, Bellia, *supra* note 32, at 973 (criticizing *Printz* for relying on the State Judges Clause as an authority for judicial commandeering); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 72 (1998) (same), few question the wisdom of its ultimate holding on this point.

42. The Anti-Injunction Act and the *Younger* abstention doctrine implement this noninterruption aspect of the paradigmatic construct and are discussed more fully *infra* in Section II.B. The paradigmatic construct deals with cases in which the initial litigation is brought in state court. At times, litigation may proceed simultaneously in a parallel fashion in the state and federal courts. In that situation, the parallel litigation is typically permitted to proceed until one of the courts reaches final judgment. At that point, litigation in the other forum must stop: if the state court rules first, the Full Faith and Credit statute and preclusion doctrines bar the federal court from relitigating the issue; if the federal court reaches judgment first, the federal court may invoke the Anti-Injunction Act to enjoin further state litigation. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1525–26 (2005).

43. In their comprehensive article espousing the five attributes of “federal judicial power,” James Liebman and William Ryan argue that “[t]he judicial Power” delegated solely to the federal courts entails the “authority and obligation . . . independently, *finally*, and effectually to decide the whole case and nothing but the case on the basis . . . of the whole federal law.” Liebman & Ryan, *supra* note 31, at 771 (emphasis added). In their view, the Constitution contemplates a “system of federal appellate superintendency under Article III of state judges’ quasi-federal functions.” *Id.* at 764. Akhil Amar agrees: “[T]he Constitution itself says that the last word on federal question cases cannot be left with state judges, but can be left with federal judges, whether on the Supreme Court or lower federal courts.” Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 650 (1991). As this Article

subject to review—if properly preserved—by the United States Supreme Court,<sup>44</sup> though not by any lower federal court.<sup>45</sup> The Court’s review is not generally mandatory,<sup>46</sup> however, and the Court exercises its discretion and

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details more fully below, the true debate does not regard whether *some* federal superintendency is required, but rather, the appropriate *quantum* of such superintendency.

44. See 28 U.S.C. § 1257(a) (2000). This jurisdiction was created in 1789. See Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85–87. At least in federal question cases—rather than in cases arising under the diversity jurisdiction of the federal courts—the Court is not empowered typically to decide questions of state law presented in a petition for certiorari. See, e.g., *Adams v. Robertson*, 520 U.S. 83, 86–87 (1997) (dismissing a writ of certiorari as improvidently granted because the petition presented only questions of state law). See also *Bell v. Maryland*, 378 U.S. 226, 238 (1964) (“‘Ordinarily this court on writ of error to a state court considers only federal questions and does not review questions of state law.’”) (quoting *Missouri ex rel Wabash Ry. Co. v. Public Serv. Comm’n*, 273 U.S. 126, 131 (1927)). The Court will, however, confront a state law issue if that issue is a bar to reaching the merits of the federal claim, in the guise of testing whether that state law bar was an adequate and independent state ground for the judgment. See *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (“‘Ordinarily, violation of ‘firmly established and regularly followed’ state rules . . . will be adequate to foreclose review of a federal claim.’”); *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983) (“[W]e have long recognized that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”) (internal quotation omitted); *Murdock v. City of Memphis*, 87 U.S. 590, 625–26 (1874). Accord *Kermit Roosevelt III, Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1895 (2003) (“The text of the Constitution provides some reason to think that the original design contemplated the possibility of Supreme Court review of state court interpretations of state law.”). *Kermit Roosevelt* has argued that such federal probing of state procedural bars is authorized by the language of § 1257, which requires the Supreme Court to ensure that any federal claim it reviews be “specially set up or claimed,” and obviates the “obvious danger in allowing state courts to have the last word on whether a claim of federal right will be heard.” *Roosevelt*, *supra*, at 1891. See also *Laura S. Fitzgerald, Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 152–78 (2002) (noting several possible bases for the Court’s authority to reach federal issues notwithstanding an inadequate state procedural bar, and arguing that the Court’s authority to do so should be limited to cases in which there is a “proven mistrust” of the state court’s reasons for not reaching a federal issue); *Meltzer, supra* note 1, at 1138–45 (discussing grounds of “inadequacy”).

45. This rule against lower federal court supervision of the state courts is statutory, not constitutional. See THE FEDERALIST NO. 82, at 255 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) (perceiving “at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals”). The current limits against such superintendency spring from the *Rooker-Feldman* doctrine, which generally prohibits the lower courts from reviewing state supreme court judgments, and which is discussed more fully *infra* in Section II.B.3.

46. 28 U.S.C. § 1253 (2000) (authorizing the direct appeal of orders “granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges”). Congress has authorized such three-judge district court panels in cases involving legislative reapportionment, and in cases that review new, federal legislation that Congress believes may be constitutionally problematic. See 28 U.S.C. § 2284 (2000) (authorizing the convening of three-judge district court panels); 42 U.S.C. § 1973c (2000) (authorizing the convening of three-judge district court panels in voting reapportionment cases); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(1), (3), 116 Stat. 81; Children’s Internet Protection Act, Pub. L. No. 106-554, § 1741, 114 Stat. 2763 (2000); Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200; Communications

grants a writ of certiorari in only a very small fraction of the cases for which it receives petitions. Once the Supreme Court adjudicates the federal issue—or, as is more likely the case, once the Court denies the writ of certiorari—the federal issue is finally decided. Parties may not collaterally attack or otherwise relitigate the issue in state or federal proceedings,<sup>47</sup> nor may Congress alter that final judgment via legislation.<sup>48</sup>

## B. THE UNDERLYING DOCTRINES

As noted above, several seemingly independent federal courts doctrines interact to form the paradigmatic construct outlined above. This section sets forth a brief, descriptive analysis of the various constituent pillars of the construct.

### 1. The Anti-Injunction Act

Created in 1793, the Anti-Injunction Act<sup>49</sup> aims to keep the federal courts from interfering with ongoing litigation in the state courts by prohibiting a federal court from “stay[ing] proceedings in a State court.”<sup>50</sup> More than a “flexible doctrine of comity,” the Act “imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding, in the absence of one of the recognized exceptions.”<sup>51</sup> The Act

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Decency Act of 1996, Pub. L. No. 104-104, Title V, § 561, 110 Stat. 133, 142–43; Gramm-Rudman-Hollings Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038. *See also* United States v. Am. Library Ass’n, 539 U.S. 194, 203–04 (2003) (hearing the direct appeal of the Children’s Internet Protection Act); Reno v. ACLU, 521 U.S. 844, 864 (1997) (hearing the direct appeal of the Communications Decency Act); Bowsher v. Synar, 478 U.S. 714, 717–18 (1986) (hearing the direct appeal of the Gramm-Rudman-Hollings Act). Mandatory review is also available in a narrow class of civil antitrust actions involving the United States as a party, if the district court certifies that “immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.” 15 U.S.C. § 29(b) (2000).

47. As discussed more fully *infra* in Section II.B.4, the doctrines of res judicata and full faith and credit preclude such collateral attacks.

48. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (holding unconstitutional federal legislation aimed at reinstating certain securities actions that would have been valid under a new, extended statute of limitations because that legislation “retroactively command[ed] the federal courts to reopen final judgments” of dismissal). *See also* Stogner v. California, 539 U.S. 607, 609–10 (2003) (holding unconstitutional, under the Ex Post Facto Clauses, state legislation reviving criminal prosecutions for sex-related charges involving children that had expired under the prior statute of limitations). The Executive may also not alter final judgments. *See, e.g.*, United States v. O’Grady, 89 U.S. (22 Wall.) 641, 647–48 (1874) (holding that the Secretary of the Treasury is not empowered to revise a court’s judgment).

49. Act of Mar. 2, 1793, ch. 23, 1 Stat. 335, 335–36.

50. 28 U.S.C. § 2283 (2000).

51. *Mitchum v. Foster*, 407 U.S. 225, 228–29 (1972).

has three explicit exceptions that grant a federal court authority to enjoin ongoing state judicial proceedings: (1) where expressly authorized by an act of Congress, (2) where necessary in aid of its jurisdiction, or (3) where needed to protect or effectuate its judgments.<sup>52</sup> In an exercise of common lawmaking, the federal courts have interpreted the final two statutory exceptions to permit federal injunctions enjoining state proceedings where (1) necessary to retain jurisdiction over property over which it first obtained jurisdiction in an in rem action,<sup>53</sup> (2) necessary to prevent a state court from relitigating issues already decided by the federal court,<sup>54</sup> (3) the plaintiff is the United States or a federal agency asserting “superior federal interests,”<sup>55</sup> or (4) the applicant for injunctive relief would otherwise “suffer irreparable damages.”<sup>56</sup>

## 2. The *Younger* Abstention Doctrine

Functioning as a more particularized version of the Anti-Injunction Act in the context of criminal prosecutions in the state courts, the *Younger* abstention doctrine takes its name from the Supreme Court’s decision in *Younger v. Harris*.<sup>57</sup> In that decision, the Court held that a criminal defendant could not seek to enjoin his pending state prosecution by resorting to federal injunctive relief absent a showing that he would suffer “great and immediate” irreparable injury, that the prosecution was part of a bad faith campaign to harass him, or that other “extraordinary circumstances” (such as where the state criminal law at issue flagrantly and patently violates the Constitution) were present.<sup>58</sup> The Court made clear

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52. § 2283. *See also* *Younger v. Harris*, 401 U.S. 37, 43–44 (1971) (describing these exceptions in greater detail). Additionally, the Court has identified several express exceptions to the Anti-Injunction Act, including (1) removal of litigation from state to federal court, 28 U.S.C. § 1446(e) (2000); (2) actions limiting the liability of ship owners, 46 U.S.C. § 1485 (2000); (3) federal interpleader actions, 28 U.S.C. § 2261 (2000); (4) certain farm mortgage proceedings, 11 U.S.C. § 203(s)(2) (2000); and (5) habeas corpus actions, 28 U.S.C. § 2251 (2000). *See generally* *Mitchum*, 407 U.S. at 234–35.

53. *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 135–36 (1941).

54. *Id.* at 137; *Dial v. Reynolds*, 96 U.S. 340, 341 (1877). The “relitigation exception” is an integral part of ensuring the finality of federal judgments in state courts, as discussed more fully *infra* in the text accompanying notes 121, 124.

55. *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 145 (1971) (citing *Leiter Minerals Inc. v. United States*, 352 U.S. 220, 225–26 (1957)).

56. *Younger*, 401 U.S. at 43 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

57. *Id.* at 37.

58. *Id.* at 45–53 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965)). *See also* *Mitchum v. Foster*, 407 U.S. 225, 230–31 (1972). Years earlier, the Court presaged this type of doctrine when it observed that a “[f]ederal court cannot, of course, interfere in a [criminal] case where the proceedings were already pending in a state court.” *Ex parte Young*, 209 U.S. at 162.

that “the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered ‘irreparable.’”<sup>59</sup> As the Court has subsequently explained, the *Younger* bar to federal court intervention in ongoing state proceedings, including civil proceedings in which the state’s vital interest in enforcing its orders and judgments is at stake,<sup>60</sup> operates as a separate and independent ground for abstaining from the exercise of federal jurisdiction apart from the Anti-Injunction Act.<sup>61</sup>

### 3. The *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine, which takes its name from two Supreme Court decisions handed down sixty years apart from one another,<sup>62</sup> erects a jurisdictional bar that effectively prohibits the lower federal courts from reviewing the judgments of state courts by barring federal courts from entertaining any action that seeks review of the final judgment of a state court,<sup>63</sup> even if the action otherwise satisfies the

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59. *Younger*, 401 U.S. at 46.

60. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10–16 (1987). Friedman suggests that the *Younger* doctrine is additionally justified as a matter of “interest analysis” insofar as *Younger*’s non-interference doctrine vindicates a state’s interest in enforcing its laws once they are broken—an interest that has particular relevance to criminal proceedings. Friedman, *supra* note 13, at 1248–50.

61. In *Mitchum*, the Court held that a civil rights action under 42 U.S.C. § 1983 qualified as an “express” exception to the Anti-Injunction Act, but could nevertheless be barred by the *Younger* abstention doctrine. *Mitchum*, 407 U.S. at 243.

62. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). In *Feldman*, the Court dismissed the plaintiff’s lawsuit in federal district court that sought review of the judgment of the District of Columbia Court of Appeals that the plaintiff was not qualified to sit for the bar examination. *Feldman*, 460 U.S. at 482. In *Rooker*, the Court rejected the plaintiff’s attempt to seek injunctive relief from a federal district court to nullify a final state court judgment on Contract Clause grounds. *Rooker*, 263 U.S. at 416.

63. Several federal courts have adopted a more nuanced view of the doctrine, holding that it applies when the federal plaintiff alleges injury stemming from the erroneous state judgment, but not when the alleged injury stems from the adverse underlying party’s conduct. *See Noel v. Hall*, 341 F.3d 1148, 1163–65 (9th Cir. 2003); *GASH Assoc. v. Village of Rosemont*, 995 F.2d 726, 728–29 (7th Cir. 1993). These courts have reasoned that their view is necessary in order to harmonize the *Rooker-Feldman* doctrine with the general rules touched upon above, *see supra* note 42, that federal and state courts may simultaneously litigate the same issue. *Hall*, 341 F.3d at 1159–60. The Supreme Court adopted this view. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1526 (2005). Of course, given that the *Rooker-Feldman* doctrine is not typically asserted until after state court litigation has produced a final judgment, it is unclear what import the policy of preserving parallel litigation rights should play given that such litigation is over by that time and given the panoply of other doctrines that preclude any further parallel litigation once one court reaches a final judgment. *See infra* Section II.B.4 (discussing full faith and credit accorded state judgments); *infra* Sections II.C.3 and II.C.4 (discussing how federal courts will enjoin state court proceedings that entrench upon final federal judgments).

jurisdictional requirements for federal jurisdiction (that is, presents a federal question or involves diverse parties).<sup>64</sup> The doctrine is premised on the notion that Congress chose to vest the lower courts solely with “original” jurisdiction<sup>65</sup> and that lower court review of a final state judgment amounts to a de facto appeal of that judgment, which Congress reserved to the Supreme Court alone in 28 U.S.C. § 1257.<sup>66</sup>

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64. *Exxon Mobil Corp.*, 125 S. Ct. at 1526 (explaining that the *Rooker-Feldman* doctrine covers situations in which “the losing party in state court filed suit in federal court after the state court proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment”); *Feldman*, 460 U.S. at 482 (“[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings.”); *Rooker*, 263 U.S. at 416 (“[N]o court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction.”) (internal citation omitted). *Accord* Sherry, *supra* note 8, at 1114 (noting that the *Rooker-Feldman* doctrine is “designed to keep the lower federal courts from reviewing state court judgments”); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 406 (1996) (“Subjecting state supreme court judgments to appellate review in the federal district courts would not only constitute a startling deviation from custom. It would raise the most serious constitutional questions.”). The bar applies to issues actually litigated and those “inextricably intertwined” with the litigated issues. *See, e.g.*, *Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 707 (10th Cir. 2004); *Noel*, 341 F.3d at 1158; *Desi’s Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 418–19 (3d Cir. 2003). *Accord* Sherry, *supra* note 8, at 1097.

65. 18 U.S.C. § 3231 (2000) (“The district courts of the United States shall have *original* jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”) (emphasis added); 28 U.S.C. § 1331 (2000) (“The district courts shall have *original* jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”) (emphasis added); 28 U.S.C. § 1332 (2000) (stating that the district courts shall have original jurisdiction over diversity cases). *See also* *Rooker*, 263 U.S. at 416. *Accord* Scheidegger, *supra* note 1, at 900 (“‘Superintending’ state court decisions is a job for the Supreme Court alone, not for the lower federal courts.”). The structural danger from dual review of the same issues is that “[s]ince the state courts and lower federal courts share jurisdiction over federal questions, the creation of lower federal courts aggravates rather than cures splits of authority.” *Id.* at 899.

66. *See supra* note 44. *Accord* *Feldman*, 460 U.S. at 486 (citing 28 U.S.C. § 1257); *Rooker*, 263 U.S. at 416 (citing predecessor to § 1257); *Noel*, 341 F.3d at 1154–55 (citing § 1257). Given this purpose, the Supreme Court has understandably held that the doctrine does not reach a federal action to review executive (nonjudicial) actions of a state, *see* *Verizon Md., Inc. v. Public Serv. Comm’n*, 535 U.S. 635, 644 n.3 (2002), or a federal action to review a state judgment brought by a nonparty to the state suit, *see* *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994). Because it is not a constitutionally mandated doctrine, *see supra* note 63, there is much room to debate its normative wisdom. Amar has argued that the removal jurisdiction of the federal courts is a legitimate and constitutional form of appellate review and that the *Rooker-Feldman* doctrine erects an artificial bar to lower court appellate review that is inconsistent with the structure of Article III. Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1536 (1990).

#### 4. Full Faith and Credit, Res Judicata, and Collateral Estoppel

Originally enacted in 1790,<sup>67</sup> the Full Faith and Credit Act, now codified at 28 U.S.C. § 1738, dictates that a state court judgment must, in federal court, be accorded the same degree of full faith and credit as it receives in its home state.<sup>68</sup> This requirement has been characterized as “exacting.”<sup>69</sup>

Intimately related, the doctrines of res judicata and collateral estoppel more generally provide that “a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.”<sup>70</sup> Both doctrines have also consistently been applied to state court judgments.<sup>71</sup> The federal courts have fashioned a number of exceptions to res judicata and collateral estoppel, however. First, neither doctrine applies where a party or another who “adequately represents” that party’s interests has not had an opportunity to litigate the issue.<sup>72</sup> This encompasses the situation in which

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67. Act of Mar. 27, 1804, ch. 56, 2 Stat. 298, 298–99; Act of May 26, 1790, ch. 11, 1 Stat. 122.

68. “[J]udicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.” 28 U.S.C. § 1738 (2000). *See also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 369 (1996) (holding that “§ 1738 requires federal courts to give *the same preclusive effect* to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged”); Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 523 (1986) (same); Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 82–85 (1984) (same); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982) (same). In *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998), the Court stated that “[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.”

69. *Baker*, 522 U.S. at 233 (“Regarding judgments . . . the full faith and credit obligation is exacting.”). The Court has held that the statute accords less credit to the *legislative* acts of states (as opposed to their final judgments). *Id.* Accord Rex Glensy, Note, *The Extent of Congress’ Power Under the Full Faith and Credit Clause*, 71 S. CAL. L. REV. 137, 148–59 (1997) (detailing this distinction).

70. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979) (“Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.”) (internal citations omitted).

71. *McCurry*, 449 U.S. at 95 (“The federal courts generally have also consistently accorded preclusive effect to issues decided by state courts.”). Accord *Baker*, 522 U.S. at 233 (same); *Brown v. Allen*, 344 U.S. 443, 458 (1953) (holding that, outside the habeas context, a “state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues”).

72. *Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996) (“The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent

the party seeking to relitigate the issue is relying on facts or law not available at the time of the initial litigation<sup>73</sup> or in which there is “reason to doubt” the adequacy of the procedures used in the prior litigation. Second, the doctrines may not be applied if “special circumstances warrant an exception to the normal rules of preclusion.”<sup>74</sup> Thus far, the Court has identified two such circumstances: (1) when “[u]nreflective invocation” of preclusion would “freeze” constitutional law in an area where “responsiveness to changing patterns of conduct or social mores is critical,”<sup>75</sup> or (2) when a party who has an initial right to litigate an issue in federal court is forced into state court by application of an abstention doctrine and is thereby precluded from exercising that initial right to federal consideration of that party’s claims.<sup>76</sup> Third, the lower federal courts have opined that the doctrines may not apply where the first court to

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jurisdiction.”) (quoting *Postal Telegraph Cable Co. v. City of Newport*, 247 U.S. 464, 476 (1918)); *McCurry*, 449 U.S. at 95, 101 (holding that collateral estoppel does not apply where a party did not have a “full and fair opportunity” to litigate the issue previously); *Licari v. City of Chicago*, 298 F.3d 664, 666–67 (7th Cir. 2002) (“An exception to the *res judicata* rule exists if the plaintiff did not have a full and fair opportunity to litigate his claim in state court.”).

Due process itself dictates that preclusion may not attach unless there was a prior full and fair opportunity to be heard on the issue. *Richards*, 517 U.S. at 797. If otherwise appropriate, a federal court may apply a preclusion doctrine against a prior party to the action, someone in privity with that party, or a third party if that party’s “interests [were] adequately represented by someone with the same interests who is a party.” *Id.* at 798 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)). *Cf.* *Hansberry v. Lee*, 311 U.S. 32, 41–46 (1940) (holding that applying *res judicata* to nonlitigants to a prior action violates due process).

73. *Montana*, 440 U.S. at 155, 159 (noting that significant changes in the law or facts may avoid preclusion and further observing that “changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues”). Some lower federal courts have extended this rule to encompass the situation in which facts that existed at the time of the initial litigation were nevertheless fraudulently concealed. *Compare* *McCarty v. First of Ga. Ins. Co.*, 713 F.2d 609, 612–13 (10th Cir. 1983) (so holding) with *Lawrence v. Wink (In re Wink)*, 293 F.3d 615, 621–22 (2d Cir. 2002) (avoiding the issue).

74. *Montana*, 440 U.S. at 155.

75. *Id.* at 162–63.

76. *Id.* at 163. *Accord* *Friedman*, *supra* note 13, at 1258–59, 1265–66. This exception originates in the Supreme Court’s decision in *England v. Board of Medical Examiners*, 375 U.S. 411 (1964). In *England*, the plaintiff brought suit in federal court challenging the constitutionality of the state’s medical licensing requirement as applied to chiropractics, but the federal court abstained in order to permit the state courts to first interpret the state licensing requirement. When the state court also adjudicated the federal constitutional issue, the federal court held that the prior state adjudication was *res judicata* when the case returned to federal court. The Court rejected the application of *res judicata* on these facts, reasoning that it should not apply when a “litigant . . . has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims . . . [and is] compelled without his consent . . . to accept instead a state court’s determination of those claims.” *Id.* at 415.

hear the issue during the initial litigation expressly reserves the parties' rights to relitigate the issue.<sup>77</sup>

### 5. Claims Against the State and the Eleventh Amendment

In cases in which a state (though not a local government within a state)<sup>78</sup> is a defendant, the Eleventh Amendment adds an additional layer of complexity to the paradigmatic construct by creating a bar against suing the state for violating federal law in either state or federal courts. This rule ends up encompassing most claims of constitutional violations because the Constitution applies almost solely to state actors, not private individuals.<sup>79</sup>

By its plain language, the Amendment prohibits a citizen of one state from suing a different state in federal court.<sup>80</sup> Since 1890, however, the Court has refused to limit its interpretation of the Amendment to the "ahistorical literalism"<sup>81</sup> of its text. Thus, in *Hans v. Louisiana*,<sup>82</sup> the Court held that the Amendment barred lawsuits against a state (whether formally or de facto against the state),<sup>83</sup> not only by diverse citizens, but also by a

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77. Cent. States, S.E. & S.W. Areas Pension Fund v. Hunt Truck Lines, Inc., 296 F.3d 624, 629 (7th Cir. 2002) (holding that res judicata does not bar a lawsuit "if the court in an earlier action expressly reserves the litigant's right to bring those claims in a later action").

78. Lawsuits against local government entities, such as cities and counties, are not barred by the Eleventh Amendment. See *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) ("The Eleventh Amendment limits the jurisdiction only as to suits against a state.").

79. *Georgia v. McCollum*, 505 U.S. 42, 50 (1992) ("Racial discrimination . . . violates the Constitution only when it is attributable to state action."); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) ("With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities."); *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978) ("[M]ost rights secured by the Constitution are protected only against infringement by governments."). Accord *Weinberg*, *supra* note 36, at 1129 ("Now recall that constitutional claims almost invariably have to be claims against government.").

80. Specifically, the Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Neither by its language nor subsequent interpretation has the Amendment been held to confer sovereign immunity on a state against defending state-law actions in a different state's courts. *Alden*, 527 U.S. at 738–39 (preserving *Nevada v. Hall*); *Nevada v. Hall*, 440 U.S. 410, 416 (1979).

81. *Alden*, 527 U.S. at 730.

82. *Hans v. Louisiana*, 134 U.S. 1 (1890).

83. Prior to *Hans*, the Court had interpreted the Amendment to apply only when a state was a "named party." See *Osborn v. Bank of the United States*, 22 U.S. 738, 846, 857–60 (1824). See also *Jackson*, *supra* note 26, at 496–98 (discussing how the named party rule limited the reach of the Eleventh Amendment). That rule was subsequently abandoned in favor of a more functional approach. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("[E]ven though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment."); *Larson v. Domestic & Foreign Commerce Corp.* 337 U.S. 682, 687 (1949).

state's own citizens.<sup>84</sup> In the late 1990s, the Court extended the Amendment's reach into the state courts, ruling in *Alden v. Maine* that the Amendment precluded a lawsuit against a state by one of its own citizens, not only in federal court, but also in state court.<sup>85</sup>

Given the Amendment's present breadth, the Court has, of necessity, carved out several exceptions that permit otherwise precluded lawsuits. First, the Amendment does not apply when a state is brought before the United States Supreme Court on a direct appeal of a lawsuit litigated in state court,<sup>86</sup> thus reaffirming an important aspect of the paradigmatic construct. Second, the Amendment does not apply to lawsuits prosecuted by the United States.<sup>87</sup> Third, the Amendment does not preclude a person from suing a state officer in federal court<sup>88</sup> for prospective injunctive and declaratory relief to halt an ongoing federal constitutional violation.<sup>89</sup> Such

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84. In *Hans*, the Court held that the Eleventh Amendment barred a Louisiana citizen's lawsuit in federal court against the state of Louisiana to collect on a bond that the citizen claimed had been unconstitutionally nullified by the state legislature. *Hans*, 134 U.S. at 15–17. See also *Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003) (“For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States.”); *Ex parte Young*, 209 U.S. 123, 150 (1908) (holding that the Amendment “applies to a suit brought against a state by one of its own citizens, as well as to a suit brought by a citizen of another state”).

85. *Alden*, 527 U.S. at 726–30. In *Alden*, several state probation officers sued the state of Maine in state court alleging violations of the federal Fair Labor Standards Act. The Court held that the lawsuit was barred. *Id.* at 754, 757–61. The Court further extended the Amendment to preclude lawsuits in administrative fora in *Federal Maritime Commission v. Ports Authority*, 535 U.S. 743, 753–67 (2002).

86. *Hans*, 134 U.S. at 19 (recognizing the validity of exception articulated in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 410 (1821)); Pfander, *supra* note 32, at 169 (commenting on the importance of this exception); Weinberg, *supra* note 36, at 1134 (noting that “falling into” the category of cases covered by the Eleventh Amendment are “petitions for Supreme Court review of state-court cases in which the judgment has been for the state—most importantly, cases affirming criminal convictions. Supreme Court review of such cases was saved early on by Chief Justice Marshall, in his great opinion in *The Cohens v. Virginia*.”).

87. *Bd. of Trustees v. Garrett*, 531 U.S. 356, 369 (2001); *Alden*, 527 U.S. at 756; *Seminole Tribe v. Florida*, 517 U.S. 44, 69–70 (1996); *United States v. Texas*, 143 U.S. 621, 644–45 (1892). Such suits are not barred by the Eleventh Amendment because “[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.” *Alden*, 527 U.S. at 756. See also Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1023 (2000) (discussing the relative virtue of the “public” lawsuit option discussed in *Alden*).

88. Curiously, the Court had already explicitly authorized such lawsuits in state court, even though the Amendment did not explicitly preclude such state-based lawsuits until *Alden*. See *General Oil Co. v. Crain*, 209 U.S. 211, 226–27 (1908) (authorizing a lawsuit against a state officer in state court under *Ex parte Young*).

89. In *Young*, the plaintiff, the Attorney General of Minnesota, sought relief from contempt when he violated a federal court order enjoining him from enforcing a state law respecting railroad rates due to the law's unconstitutionality. *Ex parte Young*, 209 U.S. at 126. The Court affirmed the contempt order, finding that the underlying lawsuit to enjoin his enforcement of the state law was not barred by

a lawsuit—a so-called *Ex parte Young* lawsuit, named after the 1908 decision first recognizing this exception<sup>90</sup>—authorizes recovery only of injunctive and declaratory relief and does not permit a plaintiff to recover damages or equitable redress for past violations,<sup>91</sup> even though prospective injunctive relief may still impose financial burdens on a state.<sup>92</sup> Fourth, the Amendment does not apply if a state waives its immunity under the Amendment by making a “clear declaration” of its consent to suit.<sup>93</sup> Fifth,

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the Eleventh Amendment. *Id.* at 157. *Accord Seminole Tribe*, 517 U.S. at 73 (noting that *Ex parte Young* confers “federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to ‘end a continuing violation of federal law’”) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

Two decisions in the late 1990s—*Seminole Tribe* and *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997)—cast doubt on the continuing validity of *Ex parte Young* suits. *See, e.g.*, Jackson, *supra* note 26, at 495 (arguing that *Seminole Tribe* “may presage a substantial limitation of the *Ex parte Young* doctrine in the federal courts”); Weinberg, *supra* note 36, at 1180 (“The Supreme Court itself seems increasingly inhospitable to the Young device.”). *But see* David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 549–50 (1997) (arguing that *Seminole Tribe* did not irrevocably harm the *Ex parte Young* doctrine). In *Seminole Tribe*, the Court held that an *Ex parte Young* action did not lie “where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right,” as it did with the Indian Gaming Regulation Act at issue in the case. *Seminole Tribe*, 517 U.S. at 74. The following year, in *Coeur d’Alene*, Justice Kennedy wrote for a plurality of the Court and espoused the view that *Ex parte Young* was not a categorical exception to the Eleventh Amendment, but was instead reserved for cases in which access to the federal courts was “necessary to permit the federal courts to vindicate federal rights” and in which “special factors” did not “counsel hesitation.” *Coeur d’Alene*, 521 U.S. at 274, 280. This position did not garner a majority of votes, however, and Justice O’Connor’s separate opinion defended the categorical availability of *Ex parte Young* lawsuits. *Id.* at 291 (O’Connor, J., concurring).

90. Some have commented that *Ex parte Young* was a necessary (and relatively speedy) reaction to *Hans*, to preserve some means of ensuring state compliance with federal law. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 170 (Souter, J., dissenting) (arguing that *Ex parte Young* reconciled *Hans* with the Supremacy Clause).

91. *Edelman v. Jordan*, 415 U.S. 651, 666–67 (1974). In *Edelman*, the Court held that a lawsuit for “equitable restitution” of benefits retroactively owed by the state was barred by the Eleventh Amendment.

92. The Court has acknowledged that lawsuits under *Ex parte Young* awarding prospective injunctive or declaratory relief have “fiscal consequences to state treasuries” that are the “necessary result[s] of compliance with decrees which by their terms were prospective in nature.” *Id.* at 667–68. The Court has nevertheless found this “ancillary effect” to be permissible, but has refused to authorize lawsuits for damages or “equitable restitution” for past wrongs. *Id.* *But see* Meltzer, *supra* note 87, at 1033 (arguing that the Court’s line between prospective and retrospective relief is illogical because the “cost of ongoing compliance . . . is likely over time to far exceed the cost of remedying past violations”).

93. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999); *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883) (establishing consent as an exception to Eleventh Amendment immunity). In *College Savings Bank*, the Court departed from its prior precedent that authorized the federal courts to find, under certain circumstances, that a state had “constructively consented” to suit notwithstanding the Amendment. *College Savings Bank*, 527 U.S. at 680 (overruling *Parden v. Terminal Ry. of Ala. Docks Dept.*, 377 U.S. 184 (1964)). The Court in *College Savings Bank* reasoned that the notion of a “constructive waiver,” which was inappropriate for other constitutional

Congress may abrogate the Amendment by enacting legislation pursuant to Section Five of the Fourteenth Amendment.<sup>94</sup> As the Court made clear in *City of Boerne v. Flores*,<sup>95</sup> however, Congress properly exercises its authority under the Fourteenth Amendment only when there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>96</sup> The Court has taken a narrow view of this authority, and has invalidated legislation purporting to authorize lawsuits against a state under the Trademark Remedy Clarification Act,<sup>97</sup> the Patent and Plant Variety Protection Remedy Clarification Act,<sup>98</sup> Title I of the Americans with Disabilities Act,<sup>99</sup> and the Age Discrimination in Employment Act,<sup>100</sup> as legislation lacking the requisite “congruence and proportionality.”

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rights under *Johnson v. Zerbst*, 304 U.S. 458 (1938), was equally inappropriate for the Eleventh Amendment, which, in the Court’s view, rests on equally fundamental constitutional grounds. *Id.* at 682. Construing a state’s participation in a federal program as a constructive waiver, the Court reasoned, would effectively grant Congress the power to abrogate a state’s immunity outside the Fourteenth Amendment context. *Id.* at 683–84 (noting that “constructive waiver is little more than abrogation under another name”). Thus, the Court held that a state does not waive its immunity under the Eleventh Amendment by “consenting to suit in the courts of its own creation,” by “merely . . . stating its intention to ‘sue and be sued,’” or by “authorizing suits against it ‘in any court of competent jurisdiction.’” *Id.* at 675–76. A state nevertheless retains the ability to expressly waive its immunity as a condition of receiving federal funds. *See South Dakota v. Dole*, 483 U.S. 203–04 (1987). *See also College Savings Bank*, 527 U.S. at 685.

94. Abrogation based on the Fourteenth Amendment was explicitly recognized in *Fitzpatrick v. Bitzer*, 427 U.S. 445, (1976). “[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment.” *Id.* at 456 (internal citation omitted). In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court held that Congress may also abrogate Eleventh Amendment immunity through legislation grounded—not in the Fourteenth Amendment—but in its Article I powers. *See id.* at 14–19 (upholding legislation abrogating sovereign immunity enacted pursuant to the Commerce Clause). In *Seminole Tribe*, the Court overruled *Union Gas* and held that “[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.” *Seminole Tribe*, 517 U.S. at 45.

95. *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

96. *Id.* at 520; *Nev. Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728–40 (2003) (applying the *City of Boerne* test and holding that the Family and Medical Leave Act of 1993, which authorizes a damages lawsuit against state employers in federal court for their failure to comply with the Act, satisfied the *City of Boerne* test and constituted a valid abrogation of sovereign immunity); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (applying the *City of Boerne* test); *College Savings Bank*, 527 U.S. at 672–75 (same).

97. *College Savings Bank*, 527 U.S. at 671–75.

98. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 646 (1999).

99. *Garrett*, 531 U.S. at 368. In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court recently upheld Title II of the Americans with Disabilities Act, which authorizes suits for damages against states providing public services (and, in particular, states obligated to provide access to state courts).

100. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–83 (2000).

Although these various doctrines were unquestionably designed to serve different primary functions, their collective effect is to funnel federal claims through the state courts and to the United States Supreme Court (and to no courts thereafter). Moreover, this collective interaction is compelling enough to be deemed a “construct.” To be sure, nearly each of the doctrines listed is not without its carefully delineated legislative or judicial exceptions.<sup>101</sup> But exceptions to individual doctrines do not detract from the efficacy or force of their collective effect. That is because the doctrines themselves are mutually reinforcing: the Anti-Injunction Act and *Younger* abstention doctrine work together to prevent litigants from short-circuiting initial state court review of their federal claims; the *Rooker-Feldman* doctrine, the preclusion doctrines, and the Eleventh Amendment work together to ensure that the direct appeal of initial state judgments is conducted by the state courts alone and by the United States Supreme Court; and the Eleventh Amendment and preclusion doctrines work together to preclude collateral attacks after the conclusion of the direct appeal. An exception to one doctrine is not necessarily an exception to its mutually reinforcing companion doctrines, thereby preserving the integrity of the construct.<sup>102</sup> Additionally, with the exception of habeas corpus, there is no across-the-board exception to all these doctrines.<sup>103</sup> Not surprisingly, academics have long viewed the funneling of federal claims described in this Article as a paradigmatic construct of sufficient rigidity to be considered a well-established legal reality within the law of federal courts.<sup>104</sup>

### C. THE CONSTRUCT’S VISION OF JUDICIAL FEDERALISM

The Court has consistently justified its development of the individual doctrines comprising the paradigmatic construct by citing a concern for federal-state comity<sup>105</sup> and for respecting the “dignity”<sup>106</sup> of the states as

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101. See *supra* notes 52–56, 58, 72–77, 86–100 and accompanying text.

102. In *Mitchum v. Foster*, 407 U.S. 225, 242–43 (1972), for example, the Court held that a lawsuit that qualified as an exception to the Anti-Injunction Act did not necessarily qualify as an exception to the *Younger* abstention doctrine.

103. See *supra* notes 52–56, 58, 72–77, 86–100 and accompanying text.

104. See *supra* note 1.

105. The “basic purpose” of the Anti-Injunction Act “is to prevent ‘needless friction between state and federal courts.’” *Mitchum*, 407 U.S. at 233. Similarly, the *Younger* abstention doctrine is based, not on any statutory authority, but on what the Supreme Court referred to in *Younger* as “Our Federalism”—that is, a policy of comity that is solicitous of the fact that “the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” *Younger v.*

sovereign entities. Although these doctrines certainly reflect those justifications to some degree, this Article does not take these concerns at face value and instead takes a more intrusive and holistic approach<sup>107</sup> by stepping back to examine the construct that takes its shape from the confluence of these doctrines, and thereby to discover the underlying, structural principles that the construct as a whole embodies.

## 1. Supremacy of Federal Law

A central tenet of the Constitution is the supremacy of federal law.<sup>108</sup> Federal law is not self-executing, however, and the supremacy of federal law is thus ensured by opening the courts—state or federal—to lawsuits to enforce federal constitutional and statutory law. Hence, the availability of the state courts as a forum for entertaining actions based on federal law ensures the supremacy of federal law.<sup>109</sup> Similarly, the power of the federal courts to entertain actions based on federal law,<sup>110</sup> or to review or co-opt

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Harris, 401 U.S. 37, 44 (1971). Comity also underlies the *Rooker-Feldman* doctrine, which recognizes the “desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments.” *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983). “Res judicata and collateral estoppel . . . also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system.” *Allen v. McCurry*, 449 U.S. 90, 95–96 (1980).

106. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (“[I]mmunity from private suits [is] central to sovereign dignity.”); *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (noting the Eleventh Amendment’s concern with “avoid[ing] the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties”). The concern with “dignity” traces back to the *Federalist Papers*. See *THE FEDERALIST NO. 81*, at 247 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) (“In cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.”). For a critical evaluation of the dignity rationale and how it is inconsistent with the international law principles upon which it purports to rest, see Smith, *supra* note 35.

107. Akhil Amar has long advocated a more holistic approach to federal courts law. See, e.g., Amar, *supra* note 66, at 1506–07.

108. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

109. See Friedman, *supra* note 13, at 1241 (observing that “assuring the supremacy of federal law” can be a serious problem if state courts are left, unsupervised, to adjudicate federal law issues); Redish & Sklaver, *supra* note 41, at 73 (“State court enforcement of federal law may be necessary in order to preserve federal supremacy or to facilitate attainment of substantive congressional goals.”). Martin Redish and Steven Sklaver argue that congressional commandeering of state courts to entertain federal suits, rather than reflecting deference to their abilities to adjudicate such actions, “reflects the goal of assuring federal supremacy.” *Id.* at 93.

110. *Ex parte Young* actions, as an exception to the Eleventh Amendment’s bar to federal jurisdiction over actions to enforce federal law against the states, are widely recognized as “based in part on the premise that . . . certain suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land.” *Alden*, 527 U.S. at 747; *Green v. Mansour*, 474 U.S. 64, 68 (1985) (“[T]he availability of prospective relief of the sort

state-court adjudication of federal issues ensures the supremacy of federal law.<sup>111</sup> The paradigmatic construct, while recognizing this principle, does not give it controlling weight. Rather, the construct embodies the judgment that litigation in state courts—with the opportunity for review by the United States Supreme Court on direct review—is sufficient to ensure the supremacy of federal law, without the need for subsequent relitigation of the federal issues by the federal courts.<sup>112</sup>

## 2. Development of Federal Law

State and federal courts play a critical role in interpreting both the Constitution and statutes promulgated by Congress.<sup>113</sup> A second, defining attribute of judicial federalism is the degree to which the two systems of courts engage in a dialogue—or, as Robert Cover and T. Alexander Aleinikoff refer to it, a “dialectic”—regarding the development of federal

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awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.”); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (“[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the ‘supreme authority of the United States.’”). *See also* FALLON ET AL., *supra* note 13, at 1189 (“[S]tate sovereign immunity is arguably incompatible . . . with the accepted constitutional concept of federal supremacy.”); Jackson, *supra* note 26, at 499 (“By limiting the jurisdiction of the lower federal courts to hear [*Ex parte Young*] claims, moreover, the Court risks undermining the important role the federal courts, as a whole, can play in assuring the supremacy of federal law.”); Weinberg, *supra* note 36, at 1129 (“Obviously the rule of *Hans v. Louisiana*, barring federal claims against a state in federal court, obstructs the enforcement of federal law.”). *Cf. Seminole Tribe*, 517 U.S. at 71 n.14 (justifying the elimination of Congress’s power to abrogate Eleventh Amendment immunity in the exercise of its Article I powers in part because other means existed to “[ensure] States’ compliance with federal law”).

111. *See, e.g., Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1014 (8th Cir. 2002) (“The purpose of [the] exceptions [to the Anti-Injunction Act] is to ensure the effectiveness and supremacy of federal law.”); Liebman & Ryan, *supra* note 31, at 778 (commenting on the “supremacy-maintaining understanding of the federal courts’ role in reviewing state decisional and other law”).

112. “Congress adopted a general policy under which state proceedings ‘should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.’” *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (quoting *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 287 (1970)). This principle is arguably in tension with the Court’s earlier pronouncement in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 416 (1964), that the opportunity for certiorari review by the Supreme Court “is an inadequate substitute for the initial [federal] District Court determination” in a lawsuit. *England*, however, involved a case in which a lawsuit properly brought in federal district court was shunted to the state courts. *Id.* at 417 (noting how the substitution of a state ruling for what should have been a federal rule “against a party’s wishes” justified an exception to *res judicata* to permit relitigation in federal court).

113. Indeed, the judiciary is exclusively charged with interpreting the Constitution. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (“Legislation which alters the meaning of the [Constitution] cannot be said to be enforcing [it].”).

law.<sup>114</sup> The degree of dialectic deemed necessary, in turn, rests upon a judgment about the relative competence of the state courts to interpret federal law on their own, without the involvement of the federal courts.<sup>115</sup> The paradigmatic construct involves only infrequent review by the United States Supreme Court in the rare event a writ of certiorari is granted, and accordingly involves little or no dialogue between the court systems. Without taking a position on the contentious and likely irresolvable debate regarding the parity of the federal and state courts,<sup>116</sup> one can observe that

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114. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036, 1045–47 (1977) (noting that the redundant review attendant to habeas review of state convictions results in a “dialogue” between the federal and state courts defining constitutional rights that “fosters greater certainty that constitutional rights will not be erroneously denied”); R. Stephen Painter, Jr., Note, *O’Sullivan v. Boerckel and the Default of State Prisoners’ Federal Claims: Comity or Tragedy?*, 78 N.C. L. REV. 1604, 1642 (2000) (“[F]ederal habeas corpus facilitates a conversation between state and federal courts that results in the cooperative interpretation of federal law.”). Similarly, Redish identifies “intersystemic cross-pollination”—that is, the “dialogue” between the federal and state courts respecting the interpretation of federal law—as one of seven “normative factors” that should be used to evaluate the allocation of judicial power. Redish, *supra* note 35, at 1770–87. Indeed, the Supreme Court has recognized a possible exception to collateral estoppel in areas of constitutional law where it is “critical” not to “freeze” the law, but rather to maintain an ongoing dialogue. See *Montana v. United States*, 440 U.S. 147, 162–63 (1979).

115. Redish identifies “systemic representativeness” as a second “normative factor,” Redish, *supra* note 35, at 1772, and posits that the courts of a sovereign have a greater vested interest in properly interpreting the laws of their sovereign, over the laws of another. *Id.* at 1774 (“[A] sovereign’s courts . . . have primary responsibility for adjudication of that sovereign’s law.”). Friedman points to a similar factor. See Friedman, *supra* note 13, at 1243 (“The federal government, like the state governments, has an interest in having its own laws enforced in its own courts.”). Of course, as noted above, federal law is not “foreign law” from a state court’s perspective because it is part of the binding, organic law of the state courts. See *supra* text accompanying note 35.

116. The parity debate has both structural and empirical components, although the debate primarily concerns the structural reasons why federal courts are superior to state courts in the adjudication of federal actions. Compare Bator, *supra* note 35, at 509 (“There is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the applicable federal law than his neighbor in the state courthouse.”), and Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 165 & n.26 (1970) (rejecting the notion that state judges are less competent than federal judges), with *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986) (“[F]ederal courts shall be staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office.”), and Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 202 (1994) (“In enacting [the 1867 habeas statute], the Thirty-Ninth Congress essentially made a legislative finding of fact that state courts are less trustworthy in the vindication of civil rights and civil liberties than federal courts.”), and Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120–21 (1977) (arguing that federal judges have greater “technical competence,” a superior “psychological set,” and better insulation from the majoritarian processes because of life tenure), and Redish, *supra* note 35, at 1826 (arguing that state courts have “divided allegiance” to state and federal law that may interfere with their willingness to strike down state law). See also Amar, *supra* note 43, at 645–46 (arguing that state courts are competent to hear federal actions “in the first instance” but subject to federal court review). The empirical component of the parity debate stems from a study that was conducted in 1983, see Michael E. Solimine & James L. Walker, *Constitutional Litigation in*

the primacy of the state courts within the paradigmatic construct has necessarily adopted a view on parity—namely, that the state courts are capable of interpreting and applying federal law largely on their own.<sup>117</sup>

### 3. Symmetry

The paradigmatic construct examined in this Article addresses the doctrine and underlying principles concerning lawsuits premised on federal law arising out of the state courts. This is but a part of a much larger body of law concerning the interaction between the federal and state courts. How the paradigmatic construct complements or contradicts other, related federal courts doctrines is yet another principle both justifying and motivating the current contours of the construct. As noted above, the construct describes the degree of finality that federal courts attach to state-court judgments as well as the general inability of federal courts to intervene in ongoing state proceedings.<sup>118</sup> The treatment of federal judgments by state courts, as well as the treatment of state judgments by other states' courts, share a symmetry with the paradigmatic construct. Much as the Anti-Injunction Act and *Younger* abstention doctrines prohibit a federal court from enjoining a pending state-court proceeding,<sup>119</sup> a state court may not enjoin a federal proceeding.<sup>120</sup> Similarly, as much as a federal court may not revisit issues finally decided by a state court, a state court may not revisit an issue finally decided by a federal court without

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*Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214 (1983), and subsequent criticism of it. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 261–69 (1988); Redish, *supra* note 35, at 1826 n.304. See generally Friedman, *supra* note 13, at 1221 n.25 (arguing that “the answer to the parity question is one of insoluble empirical complexity”). For a recent discussion of the empirical, doctrinal, and normative advances in the parity debate, see Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005).

117. See *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 275 (1997) (Kennedy, J.) (“A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.”); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988) (noting that the state courts “are presumed competent to resolve federal issues”); *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (finding that a “general distrust of . . . state courts” is not a reason to allow relitigation of issues).

118. See *supra* Section II.A.

119. See *supra* Sections II.B.1 and II.B.2.

120. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 236 n.9 (1998) (“This Court has held it impermissible for a state court to enjoin a party from proceeding in federal court . . . .”); *Donovan v. City of Dallas*, 377 U.S. 408, 412–13 (1964) (citing “the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here”) (internal footnotes omitted).

risking a federal injunction prohibiting such review.<sup>121</sup> The Full Faith and Credit Clause of the Constitution effectuates the same result as between two states by precluding one state court from reopening litigation finally resolved by another state.<sup>122</sup> Thus, the paradigmatic construct adheres to a principle of symmetry and consistency within the law of federal courts.<sup>123</sup>

#### 4. Finality and Repose

By attaching finality to litigation on a federal issue once the Supreme Court denies certiorari, the paradigmatic construct also places great weight on the value of repose, which itself espouses several principles relevant to evaluating the place of the construct within the realm of federal courts law. In particular, the repose that attaches to rulings on federal laws conserves judicial resources by avoiding relitigation, greatly reduces the risk of inconsistent decisions between the state and federal courts, and encourages more immediate reliance on the state courts' adjudication (which itself eliminates the uncertainty that can harm business and aids in rehabilitation of criminals).<sup>124</sup>

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121. A federal court's ability to enjoin an ongoing state proceeding that reviews its judgment is an express exception to the Anti-Injunction Act. *See* 28 U.S.C. § 2283 (2000) (authorizing an injunction to "stay proceedings in a State court . . . to protect or effectuate its judgments"). This "relitigation exception" to the Act "was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo*, 486 U.S. at 147.

122. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such . . . Proceedings shall be proved, and the Effect thereof."); *Baker*, 522 U.S. at 232 (finding that the Full Faith and Credit clause "substituted a command for the earlier principles of comity" present under the Articles of Confederation) (quoting *Estin v. Estin*, 334 U.S. 541, 546 (1948)).

123. Redish has similarly identified "logical consistency"—that is, how one doctrine is legally reconciled with other doctrines—as another "normative factor" to be considered in evaluating a doctrine. *See* Redish, *supra* note 35, at 1785 ("[T]he federal judiciary must justify its existence by reliance on its special ability to explain its decisions by resort to reason.").

124. *See* *Arizona v. California*, 530 U.S. 392, 412 (2000) (noting that *res judicata* is "not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste"); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (noting how *res judicata* and other finality-driven doctrines "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication"); *Montana v. United States*, 440 U.S. 147, 153–54 (1979) (noting how *res judicata* "protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"); *Developments in the Law—The Preclusive Effect of Prior State and Federal Judgments*, 90 HARV. L. REV. 1330, 1333 (1977) (noting how *res judicata* promotes "the efficient use of judicial resources, preservation of the integrity of prior judgments and facilitation of the parties' reliance thereon, fostering respect for the rendering court, and avoidance of inconvenience and harassment of the litigants"); Glensy, *supra* note 69 at 156–57 (1997) (noting how "settled rights" are an "essential part of

## 5. The Paradigmatic Construct as a “Federalist” Vision

In his seminal article, Fallon described what he viewed as the two primary “rhetorical structures” threaded through nearly every federal courts doctrine: a “Federalist” structure and a “Nationalist” structure.<sup>125</sup> The Federalist structure rests on the premises that states retain a modicum of sovereignty and that “state courts are constitutionally as competent as federal courts to adjudicate federal issues.”<sup>126</sup> The Nationalist structure rests on diametrically opposed premises, namely, that the Constitution “embodies a strong conception of national supremacy that exalts federal interests” above “state sovereign interests” and contemplates a “special role” for the federal judiciary in “ensuring the supremacy of national authority,” such that federal courts should generally be presumed “to be more prompt and effective than state courts in protecting federal constitutional rights.”<sup>127</sup> The paradigmatic construct, and the doctrines of which it is comprised, have a distinctly Federalist flavor: under the construct, state courts are presumed competent to adjudicate federal questions, develop federal law, and ensure the supremacy of federal law—all with minimal federal review. Moreover, the Court’s reliance upon the rationales of comity and sovereign dignity mirror the Federalist view of meaningful, residual state sovereignty.

The paradigmatic construct’s adherence to the Federalist rhetorical structure has become more pronounced in the last decade. In those years, the Court has placed a Federalist imprimatur on several doctrines affecting the relationship between the state and federal governments. The Court has interpreted the Constitution to place limits on Congress’s power to enact federal legislation under the Commerce Clause,<sup>128</sup> the Fourteenth

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any justice system” and “avoid[] unnecessary exploitation of limited judicial resources but quashes any possibility of conflicting decisions on the same cause of action”). *Accord* Friedman, *supra* note 13, at 1244 n.91 (explaining the value of repose as “giving individual litigants an end to their controversy” and as “the role it plays in society as a whole—to ensure respect for the judicial process and to give citizens a sense of predictability”).

125. Fallon, *supra* note 23, at 1148–51.

126. *Id.* at 1152–55.

127. *Id.* at 1158–61.

128. See *United States v. Morrison*, 529 U.S. 598, 609–19 (2000) (invalidating the civil remedy provisions of the Violence Against Women Act as beyond Congress’s authority to enact under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 562–68 (1995) (invalidating the Gun-Free School Zones Act of 1990 as beyond Congress’s authority to enact under the Commerce Clause). Just recently, however, the Court—over vocal dissent—signaled against further expansion of *Lopez* and *Morrison*, and upheld Congress’s authority to apply the federal Controlled Substances Act against personal use quantities of marijuana grown for medical purposes. See *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

Amendment,<sup>129</sup> and the Tenth Amendment.<sup>130</sup> The Court has also curtailed the remedial authority of federal and state courts by reading the Eleventh Amendment expansively to bar lawsuits in federal or state courts and to be immune to congressional abrogation.<sup>131</sup>

### III. THE DECONSTRUCTION OF HABEAS CORPUS

As it exists today, the writ of habeas corpus is an obvious exception and theoretical apostate to the doctrinal law that comprises, and the principles that underlie, the paradigmatic construct. This part descriptively sets forth the current habeas construct, including the legislative and judicial innovations that dictate the construct, and then takes a more nuanced and critical look at the principles that the habeas construct espouses. With these in mind, it becomes clearer that the writ of habeas corpus—although an express exception to the doctrines that comprise the paradigmatic construct—is nevertheless inconsistent with the general thrust of the doctrines and, more fundamentally, with the principles undergirding the paradigmatic construct that the doctrines form.

#### A. THE HABEAS CONSTRUCT

Although Congress has in the past half century enacted an ever-increasing cadre of federal criminal statutes that have been upheld by the

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129. See *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (imposing limitations on Congress's authority to enact legislation under § 5 of the Fourteenth Amendment and invalidating a portion of the Religious Freedom Restoration Act).

130. See *Printz v. United States*, 521 U.S. 898, 925–33 (1997) (invalidating under the Tenth Amendment the interim provisions of the Brady Handgun Violence Prevention Act requiring state executive officers to take certain actions because the Act amounted to a “commandeering” of state executive officers by Congress); *New York v. United States*, 505 U.S. 144, 169–77 (1992) (invalidating the “take title” provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 under the Tenth Amendment because they effectively “commandeered” state legislatures).

131. See *supra* text accompanying notes 94–100. Interestingly, the Court has started to rely upon the Tenth Amendment in justifying its Eleventh Amendment jurisprudence. See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (observing that the Tenth Amendment removes any doubt “regarding the constitutional role of the States as sovereign entities”); Meltzer, *supra* note 87, at 1026–27 (commenting on the blending of the Tenth and Eleventh Amendments).

By eliminating the availability of private lawsuits, the Court seemingly places greater reliance on public lawsuits initiated by the United States. See *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996). Many commentators have questioned whether such lawsuits are an effective substitute for private actions. See *id.* at 157 n.52 (Souter, J., dissenting) (criticizing the majority for “ignor[ing] the importance of citizen suits to enforcement of federal law”); Meltzer, *supra* note 87, at 1026–27, 1044 (same).

Supreme Court,<sup>132</sup> there is no roving federal police power and the business of policing criminal behavior continues to be primarily a state affair.<sup>133</sup> During a trial in state court, a criminal defendant may assert objections based on either state or federal law. If convicted, the defendant may renew those objections and raise others by appealing the conviction to the state appellate courts. The defendant may not, however, remove this “direct appeal” to the federal courts, even if the defendant attacks the conviction on the basis of federal law.<sup>134</sup> Once the state appellate courts have concluded their review, the defendant may seek a writ of certiorari from the Supreme Court as to issues of federal law only.<sup>135</sup> After the Supreme Court resolves the defendant’s claim (whether on the merits or by denying

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132. Now, federal law criminalizes everything from possession of drugs, guns, and child pornography to bank robbery to white-collar crime to identity theft to computer hacking to the transportation of certain dentures, as long as there is some individual or aggregate connection with interstate or foreign commerce. *See, e.g.*, 15 U.S.C. § 77q(a) (2000) (securities fraud); 18 U.S.C. § 1028 (2000) (identity theft); 18 U.S.C. § 1030 (2000) (computer hacking); 18 U.S.C. §§ 1341, 1343, 1344 (2000) (mail, wire, and bank fraud); 18 U.S.C. § 1821 (2000) (interstate transportation of certain dentures); 18 U.S.C. § 2113 (2000) (bank robbery); 18 U.S.C. § 2252 (2000) (possession of child pornography); 21 U.S.C. § 801 (2000) (controlled substances); 26 U.S.C. § 5681 (2000) (sale and manufacture of liquor). Although this dramatic expansion of federal criminal jurisdiction has been largely upheld by the Supreme Court, it has not been universally embraced as a policy matter. *See Perez v. United States*, 402 U.S. 146 (1971) (upholding reliance on Commerce Clause as authority for federal criminal statute). *But cf. United States v. Lopez*, 514 U.S. 549, 562–65 (1995) (invalidating, as beyond the reach of the Commerce Clause, a federal law prohibiting possession of firearms within school zones). *See also* Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1230–31 (2000) (arguing that new federal crimes should be created “only when there is a demonstrated need for federal intervention”).

133. “The regulation and punishment of intrastate violence . . . has always been the province of the States.” *Morrison*, 529 U.S. at 618. *See* Beale, *supra* note 132, at 1230–31 (“The federal government’s enumerated powers do not include a general police power, which is reserved to the States.”) (internal footnotes omitted). *See generally* James A. Strazella, *Task Force on Federalization of Criminal Law*, 19 ABA CRIM. JUSTICE. 5–14 (1998) (discussing the history and expansion of federal criminal jurisdiction). Not surprisingly, the vast majority of prisoners in the United States are persons convicted in state court rather than federal. *See* SCALIA, *supra* note 27, at 3 tbl.2 (noting that in 2000, there were 145,416 federal prisoners and 1.23 million state prisoners).

134. Removal is foreclosed by the plain language of the federal removal statute, which applies solely to civil proceedings. *See* 28 U.S.C. § 1441(a), (b) (2000) (authorizing removal only of “any civil action” over which the district courts have diversity or federal question jurisdiction) (emphasis added).

135. *See supra* note 44. Again, the Supreme Court’s review of federal issues may be constrained by the existence of any adequate and independent state grounds. *See id.* Moreover, if the Supreme Court grants certiorari and resolves an issue on its merits, the defendant may not raise that issue again in a federal habeas petition. As the United States Code mandates:

In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless new, material facts exist.

28 U.S.C. § 2244(c) (2000).

certiorari), the defendant's conviction is deemed to be "final" and all further judicial review termed "collateral."<sup>136</sup> At that time, the prisoner has the option of either (1) returning to state court to file a state habeas petition raising new objections to the conviction based on facts that could not have been developed on direct appeal (such as ineffective assistance of counsel)<sup>137</sup> and thereafter filing a habeas petition in federal court, or (2) immediately filing a habeas petition in federal court.

In either event, a person convicted in state court and who is "in [state] custody" may next petition a federal district court for a writ of habeas corpus on the ground that continued custody is "in violation of the Constitution or laws . . . of the United States."<sup>138</sup> A habeas petition names the petitioner's custodian as the defendant and seeks release from custody (rather than damages) due to the invalidity of the state conviction or sentence.<sup>139</sup> A habeas petition is "timely" only if filed within one year of

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136. *Clay v. United States*, 537 U.S. 522, 527 (2003) (noting that the "relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when [the] Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires"). *See also* *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993) (holding that final convictions are "collaterally attacked").

137. Most appellate courts are limited to evidence contained in the trial record. *See, e.g.*, FED. R. APP. P. 10(a). Thus, there is a universe of claims that cannot be raised on direct appeal because they rely upon extra-record facts. These include claims of ineffective assistance of trial counsel or appellate counsel and claims of government misconduct stemming from extra-judicial behavior. *See, e.g.*, *Massaro v. United States*, 538 U.S. 500, 507-09 (2003) (holding that the failure to raise an ineffective assistance of counsel claim on direct appeal generally does not amount to a procedural bar); *United States v. Haese*, 162 F.3d 359 (5th Cir. 1998) (evaluating an ineffective assistance of counsel claim in a proceeding pursuant to 28 U.S.C. § 2255).

138. 28 U.S.C. § 2254(a) (2005).

139. *See* 28 U.S.C. § 2254 note (1977) (Rule 2(a)) ("If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent."). *Accord* 28 U.S.C. § 2242 (2000) ("Application for a writ of habeas corpus . . . shall allege . . . the name of the person who has custody over him."); 28 U.S.C. § 2243 (2000) ("The writ . . . shall be directed to the person having custody of the person detained."); *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2718 (2004) ("[L]ongstanding practice confirms that in habeas challenges to present physical confinement . . . the default rule is that the proper respondent is the warden of the facility where the prisoner is being held . . ."). In actuality, the state is called upon to defend the conviction or sentence. 28 U.S.C. § 2252 (2000) ("Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.").

A habeas petition is directed solely at release from custody. *See* *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he traditional function of the writ is to secure release from illegal custody."). As a result, damages are not an appropriate form of relief. *Id.* at 494 ("In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy."). *See also* *Nelson v. Campbell*, 541 U.S. 637, 646 (2004) ("[D]amages are not an available habeas remedy."); *Muhammad v. Close*, 540 U.S. 749,

when the petitioner's conviction becomes "final," although the clock is tolled while a state habeas petition is pending.<sup>140</sup> As noted above, the defendant filing the habeas petition must also be in "custody"—though not necessarily in custody for the conviction that defendant seeks to attack or by the sovereign under whose authority that conviction was sustained<sup>141</sup>—at the time the petition is filed.<sup>142</sup> The Court has "liberally construed the custody requirement"<sup>143</sup> to reach a defendant whether the defendant is incarcerated, on probation, or on parole,<sup>144</sup> and a petitioner's post-filing

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751 (2003) (same). A prisoner may seek damages in a civil lawsuit pursuant to 42 U.S.C. § 1983 but only if the lawsuit does not necessarily call into question the validity of the conviction—if it does, the prisoner's sole remedy is a habeas petition. *See Nelson*, 541 U.S. at 646–47; *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). *Cf. Edwards v. Balisok*, 520 U.S. 641, 642 (1997) (holding that nominal damages for a challenge to the procedures used in imposing prison discipline may be cognizable in a § 1983 lawsuit). In *Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005), the Supreme Court clarified that a challenge to a state's parole procedures does not necessarily call into question the validity of a conviction or necessarily seek speedier release from custody, such that a § 1983 action may lie.

140. § 2244(d)(1), (d)(2). *See Clay*, 537 U.S. at 532 (holding that a conviction becomes final on the date that the Supreme Court denies certiorari or at the time when the ninety-day period for petition for a writ of certiorari expires). The lower federal courts have also held that the period may be tolled for other "equitable" reasons. *See, e.g., United States v. Battles*, 362 F.3d 1195, 1197 (9th Cir. 2004); *United States v. Riggs*, 314 F.3d 796, 799 n.6 (5th Cir. 2002); *Green v. United States*, 260 F.3d 78, 82 (2d Cir. 2001); *Dunlap v. United States*, 250 F.3d 1001, 1004 (6th Cir. 2001); *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000); *United States v. Willis*, 202 F.3d 1279, 1281 n.2 (10th Cir. 2000); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). This one-year statutory limitation period was created by AEDPA in 1996. Prior to that time, courts relied upon the more elastic standard for evaluating when a habeas petition was untimely contained in Rule 9(a) of the Rules Governing § 2254 Cases in the United States District Courts. That standard barred a petition only when "the state . . . has been prejudiced in its ability to respond to the petition by delay," but excepted situations in which the delay could not have been avoided by the "reasonable diligence" of the prisoner. *See* 28 U.S.C. § 2254 note (1977) (Rule 9(a)). *Accord Vasquez v. Hillery*, 474 U.S. 254, 264–65 (1986) (noting the availability of relief, but a lack of prejudice in a habeas corpus petition).

141. A defendant may attack a conviction, even though that defendant has yet to begin serving the sentence on that conviction. *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968); *Peyton v. Rowe*, 391 U.S. 54, 67 (1968). This interpretation overruled the Court's earlier precedent that deemed such habeas petitions "premature." *See McNally v. Hill*, 293 U.S. 131 (1934). A defendant may also attack a conviction for which that defendant has already fully served the sentence—so long as the defendant is "in custody" on a different conviction and if granting relief on the expired sentence could advance the anticipated release date. *See Garlotte v. Fordice*, 515 U.S. 39, 45–46 (1995). *But see id.* at 47–49 (Thomas, J., dissenting) (arguing that this rule permits prisoners to attack expired convictions, in violation of *Maleng*). A defendant may not attack, however, a prior conviction for which the defendant is no longer in custody "merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he may be convicted." *Maleng*, 490 U.S. at 492.

142. In *Jones v. Cunningham*, 371 U.S. 236, 241–43 (1963), the Court held that the relevant time for assessing "custody" is the time of filing. *Accord Carafas*, 391 U.S. at 238.

143. *Maleng*, 490 U.S. at 492.

144. *Jones*, 371 U.S. at 242 (parole qualifies as "custody" because it is only a conditional release, subject to reporting requirements and other restrictions).

release from “custody” does not negate the statutory grant of jurisdiction<sup>145</sup> or otherwise moot the habeas petition within the meaning of Article III of the Constitution.<sup>146</sup>

Although the statutory language in 28 U.S.C. § 2254 purports to encompass any claim that the petitioner’s custody is “in violation of the Constitution or laws . . . of the United States,” this language has been interpreted to exclude certain federal statutory or constitutional claims.<sup>147</sup> The Court has carved out two categories of federal constitutional claims from the ambit of federal habeas review. First, a habeas petitioner may not assert a Fourth Amendment violation in habeas proceedings unless the state failed to afford the petitioner “an opportunity for full and fair litigation” of that claim.<sup>148</sup> Second, a habeas petitioner is usually barred from bringing *any* claim premised on federal constitutional criminal procedure<sup>149</sup> if that claim relies upon decisional law handed down after the conviction became

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145. See *Carafas*, 391 U.S. at 238 (“[U]nder the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the [habeas] petitioner prior to completion of proceedings on such application.”).

146. The “collateral consequences” of a conviction—namely, perpetual limitations on a person’s civil rights such as the right to vote, hold office, or possess firearms—are deemed to constitute a “case or controversy” regardless of whether a prior convict fits within the statutory definition of “custody.” See, e.g., *Spencer v. Kemna*, 523 U.S. 1, 7–11 (1998); *Carafas*, 391 U.S. at 237–38.

147. The statutory language itself precludes relief based on any violation of *state* constitutional or federal law, unless that violation independently amounts to a due process violation. See *Estelle v. McGuire*, 502 U.S. 62, 68–69 (1991).

148. *Stone v. Powell*, 428 U.S. 465, 481–82 (1976). The Court has steadfastly refused to extend the policy-based prohibition of habeas review recognized in *Stone* to other types of constitutional claims. See *Withrow v. Williams*, 507 U.S. 680, 691–93 (1993) (evaluating a Fifth Amendment-based claim to suppress evidence for failure to comply with *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Kimmelman v. Morrison*, 477 U.S. 365, 375–78 (1986) (addressing a claim of ineffective assistance of counsel premised on counsel’s failure to seek suppression of evidence under the Fourth Amendment); *Rose v. Mitchell*, 443 U.S. 545, 560–61 (1979) (reviewing an equal protection claim of discrimination in the selection of grand jurors); *Jackson v. Virginia*, 443 U.S. 307, 321–23 (1979) (evaluating a due process claim of insufficient evidence to support a conviction).

149. Habeas petitioners may avail themselves of innovations in *substantive* criminal law (for example, a decision interpreting a federal criminal statute), even if such innovations occur after the convictions become final. *Bousley v. United States*, 523 U.S. 614, 619–20 (1998). Changes in substantive criminal law typically involve statutory construction, and the longstanding theory behind statutory construction is that judicial interpretation of a statute produces a ruling on what the statute meant at the outset (rather than changing the meaning at the time of judicial interpretation). See, e.g., *Bailey v. United States*, 516 U.S. 137, 150–51 (1995) (interpreting a criminal statute for the first time and applying it to defendant); *Coleman v. United States*, 329 F.3d 77, 86 (2d Cir. 2003) (same); *United States v. Gonzales*, 327 F.3d 416, 417 (5th Cir. 2003) (same). Thus, changes in substantive law do not involve any *innovation* or *change* in the law that would fit within the rationale of *Teague v. Lane*. See *Teague v. Lane*, 489 U.S. 288, 305–16 (1989) (plurality opinion); *Bousley*, 523 U.S. at 620 (“[B]ecause *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.”).

“final”—that is, after the direct appeal concluded.<sup>150</sup> The Court first announced this antiretroactivity principle in *Teague v. Lane*.<sup>151</sup>

Even if a habeas petitioner is “in custody” and seeks to raise a claim within the cognizance of the writ, the petitioner may generally only do so if all state remedies have been “exhausted” by first presenting the claim to a state court (whether on direct appeal or in a state habeas proceeding).<sup>152</sup> “Exhaustion” is a prudential and equitable (rather than jurisdictional)

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150. *Teague*, 489 U.S. at 305–16. Under *Teague*, a habeas petitioner may not rely upon “new rules” of constitutional criminal procedure. *Id.* A “new rule” is broadly defined to include any rule that is not “dictated” or “compelled” by existing precedent at the time the petitioner’s conviction became final. *See* *Lambrix v. Singletary*, 520 U.S. 518, 526 (1997); *Gray v. Netherland*, 518 U.S. 152, 166 (1996); *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Teague*, 489 U.S. at 305. A habeas petitioner may be able to rely upon a “new rule” if it: (1) “forbid[s] criminal punishment of certain primary conduct [or] prohibit[s] a certain category of punishment for a class of defendants because of their status or offense,” *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); or (2) is a “‘watershed rule[] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding,” *Graham v. Collins*, 506 U.S. 461, 478 (1993) (quoting *Saffle*, 494 U.S. at 495). Thus far, the Court has found only one “new rule” to fit within *Teague*’s first exception. *See Penry*, 492 U.S. at 330 (holding that a “new rule” barring the execution of mentally retarded persons fits within *Teague*’s first exception). However, the Court’s recent decision in *Roper v. Simmons*, 125 S. Ct. 1183 (2005) which barred executions of minors, may also qualify.

The Court has yet to find any “new rule” falling within *Teague*’s second exception. *See* Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 977 n.126 (2000) (collecting all pre-1999 Supreme Court cases invoking *Teague*, none of which found *Teague*’s second exception applicable). *See also* *Schriro v. Summerlin*, 124 S. Ct. 2519, 2526 (2004) (finding that the rule in *Ring v. Arizona*, 536 U.S. 584 (2002), that a judge may not decide aggravating factors making a defendant eligible for the death penalty, is *Teague*-barred); *Beard v. Banks*, 124 S. Ct. 2504, 2508 (2004) (finding that the rule permitting juries in capital cases to consider mitigating factors, even when the jury does not find them unanimously, was, pursuant to *Mills v. Maryland*, 486 U.S. 367 (1988), a “new rule” that was *Teague*-barred); *Tyler v. Cain*, 533 U.S. 656, 664–67 (2001) (finding that the rule regarding the appropriate “beyond a reasonable doubt” instruction set forth in *Cage v. Louisiana*, 498 U.S. 39 (1990), was a “new rule” not to be applied retroactively under *Teague*); *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (finding the rule that the Eighth Amendment’s protection against method of execution cannot be waived in a capital case would be a “new rule” barred by *Teague*).

151. *Teague*, 489 U.S. at 288–93.

152. 28 U.S.C. § 2254(b)(1)(A) (2000). The “exhaustion doctrine” was first fashioned by the Supreme Court. *See Ex parte Royall*, 117 U.S. 241, 251–53 (1886). In *Royall*, the Court held that a federal court had the discretion to delay until after trial consideration of a habeas petition filed by a person in state custody prior to trial. *Id.* In 1948, Congress incorporated *Royall* into § 2254 itself. *See* Act of June 25, 1948, Pub. L. No. 773-153, 62 Stat. 869, 967. A prisoner need not present a claim more than once to the state courts, even if other opportunities for state review remain open. *See* *Castille v. Peoples*, 489 U.S. 346, 350 (1989) (“[O]nce the state courts have ruled upon a claim, it is not necessary for a petitioner ‘to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review.’”) (quoting *Brown v. Allen*, 344 U.S. 433, 447 (1953)).

requirement,<sup>153</sup> however, and is not required where “there is an absence of available State corrective process” or if that process is otherwise “ineffective to protect” the habeas petitioner’s rights.<sup>154</sup>

A federal court may not generally hear challenges that a habeas petitioner failed to present to the state courts during a direct appeal or state habeas proceedings. The federal court reviewing the habeas petition will dismiss any such unexhausted claims.<sup>155</sup> Although a habeas petitioner could return to state court to file a state habeas petition seeking to exhaust the unexhausted claims, that petition is likely to be rejected for noncompliance with the state’s procedural rules that prohibit piecemeal challenges to convictions.<sup>156</sup> The state court’s refusal to entertain the claim would satisfy the federal habeas exhaustion requirement, as “there are no state remedies any longer ‘available’ to [the petitioner].”<sup>157</sup> But the state court’s refusal to entertain the claim on procedural grounds is likely to preclude review of that claim by the federal court because, under the doctrine of “procedural default,”<sup>158</sup> a federal court entertaining a habeas

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153. *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (“[S]tate remedies must be exhausted except in unusual circumstances.”); *Royall*, 117 U.S. at 251 (holding that a federal court has “discretion as to the time and mode in which it will exert” its power to review a habeas petition).

154. § 2254(b)(1)(B). *Accord* *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (holding that exhaustion is not required if “there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief”). A third exception exists, as well: a federal court may deny an exhausted claim on its merits if it so desires. § 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”).

155. In *Rose*, 455 U.S. at 518–19, the Court adopted a rule of “total exhaustion,” obligating the federal courts to dismiss an entire habeas petition if it contained both exhausted and unexhausted claims. *See also* *Duncan v. Walker*, 533 U.S. 167, 178–79 (2001).

156. *See* *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (finding that a habeas petitioner defaulted his claim when “the [state] court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred”). Should the habeas petitioner be able to exhaust the state remedies, however, a refiled petition would be treated as if it were the first petition. *Slack v. McDaniel*, 529 U.S. 473, 487–88 (2000). Most states require timely presentation of claims on direct and habeas review. *See, e.g.*, ALA. R. EVID. 103(d) (plain error rule); HAW. R. EVID. 103(d) (same); MO. R. CRIM. P. 29.12(b) (same).

157. *Coleman*, 501 U.S. at 732. *See also* *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982) (noting that a petitioner’s claims can be exhausted when the state procedural bars prevent consideration of some claims that could have been raised).

158. The “procedural default” doctrine that applies on collateral, habeas review is closely related to the adequate and independent state grounds doctrine that applies on direct appeal. *See* *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (observing that the procedural default doctrine “has its roots in the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds”). *See also* *Meltzer*, *supra* note 1, at 1135–58 (discussing the interrelationship between the doctrines); *Roosevelt*, *supra* note 44, at 1891–1917 (same). Both doctrines obviate a federal court’s review of a federal question due to a litigant’s failure to follow state procedural rules. *Compare supra* text accompanying notes 44, 136, *with infra* text accompanying notes 160–68.

petition will, in most instances, not review a federal issue that the state courts did not have the opportunity to address due to the petitioner's failure to comply with the state's procedural rules.<sup>159</sup> In fact, a procedurally defaulted claim may be reviewed on habeas only if the habeas petitioner: (1) shows "cause for the noncompliance [with the state procedural rule] and some showing of actual prejudice resulting from the alleged constitutional violation,"<sup>160</sup> or (2) can show "that failure to review [the petitioner's] federal claim will result in a fundamental miscarriage of justice."<sup>161</sup>

Both exceptions have been construed narrowly. With regard to the first exception, habeas petitioners have "cause" to excuse procedural default only when it can be demonstrated that (1) the petitioner's counsel was constitutionally ineffective under the Sixth Amendment for failing to

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*See also* Meltzer, *supra* note 1, at 1135 ("Forfeiture provisions supply a necessary bite to such structural rules."). There are a few differences, however, between the doctrines. On direct review, the Supreme Court will inquire into the adequacy of the state ground but, once found to be adequate, that doctrine has no exceptions. *See supra* note 44. *See also* Meltzer, *supra* note 1, at 1138–44 (describing the four types of inadequacy that may plague a state procedural rule); Roosevelt, *supra* note 44, at 1904–09 (discussing the depth and propriety of federal court inquiry into the adequacy of state procedural rules). Federal courts reviewing habeas petitions will usually not delve into the adequacy of the state ground but, once a claim is deemed to have been procedurally defaulted, the claim still may be reviewed if it fits within any of the exceptions to the doctrine. *See infra* text accompanying notes 160–68. Most importantly, if a state judgment on direct review rests on adequate and independent state grounds, the Supreme Court lacks *jurisdiction* to review the federal question. *Coleman*, 501 U.S. at 729–30; *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (noting that federal courts lack jurisdiction to review state court judgments that rest on independent, federal grounds). A habeas petitioner's procedural default does not deprive the federal court of *jurisdiction*, but counsels against the exercise of that jurisdiction. *Coleman*, 501 U.S. at 730.

159. *Dretke*, 541 U.S. at 392; *Coleman*, 501 U.S. at 750–51. Indeed, the *purpose* of the procedural default doctrine is to create an enforcement mechanism for the exhaustion doctrine. *Coleman*, 501 U.S. at 732. *Accord Dretke*, 541 U.S. at 392 (describing the procedural default doctrine as a "corollary to the habeas statute's exhaustion requirement"); Painter, *supra* note 114, at 1624 ("The exhaustion requirement's companion doctrine—the procedural default requirement—is critical if the exhaustion requirement is to have any effect.").

The rules governing procedural default have their genesis in *Wainwright v. Sykes*, 433 U.S. 72 (1977). Prior to *Wainwright*, a habeas petitioner did not "procedurally default" a claim in state court merely by failing to comply with the state's procedural rules; the state had to show that the petitioner had "deliberately bypassed" the state remedies, ostensibly to seek federal review rather than state review. *See Fay v. Noia*, 372 U.S. 391, 433 (1963). *Wainwright* explicitly overruled *Fay*. *Wainwright*, 433 U.S. at 87–89 (overruling *Fay* as to the failure to mount any direct appeal in state court). *See also Coleman*, 501 U.S. at 750–51 (overruling *Fay*'s standard as applied to the procedural default of a single claim).

160. *Wainwright*, 433 U.S. at 84. *See also Dretke*, 541 U.S. at 392.

161. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). In *Dretke*, the Court imposed a quasi-exhaustion doctrine within the context of evaluating procedural default when it held that a federal court reviewing a habeas petition should confront questions of actual innocence only *after* considering all nondefaulted claims and all other possible avenues of "cause" and "prejudice." *Dretke*, 541 U.S. at 392–96.

preserve the claim,<sup>162</sup> (2) the “factual or legal basis” for the claim “was not reasonably available to counsel,”<sup>163</sup> or (3) state officials interfered with the petitioner’s ability to comply with the state procedural rule.<sup>164</sup> The courts have yet to settle on a definition for when a petitioner establishes “prejudice,”<sup>165</sup> but it will likely require, at a minimum, a showing that the defaulted claim was meritorious and would probably have resulted in a different verdict or sentence.<sup>166</sup> With regard to the second exception, habeas petitioners can establish a “fundamental miscarriage of justice” only by showing that they are “actually innocent” of the underlying crime<sup>167</sup> or

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162. *Murray v. Carrier*, 477 U.S. 478, 487–88 (1986). The Court has made clear that “[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural default.” *Id.* at 492. As a consequence, a habeas petitioner’s failure to raise a claim beyond the first “appeal of right” (that is, to the state and United States Supreme Courts or on state habeas review) cannot be excused on this basis because there is no Sixth Amendment right to counsel at those stages. *See Evitts v. Lucey*, 469 U.S. 387, 396–400 (1985) (holding that a criminal defendant possesses a Sixth Amendment right to effective assistance of counsel during an “appeal of right” from that defendant’s state conviction). *See also Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (plurality opinion) (holding that there is no right to effective assistance of counsel in state collateral proceedings). *Cf. Ross v. Moffitt*, 417 U.S. 600, 617–18 (1974) (holding that no right to effective assistance of counsel exists when seeking a discretionary appeal following an appeal of right).

163. *Murray*, 477 U.S. at 488. *See also Reed v. Ross*, 468 U.S. 1, 14 (1984) (“[T]he failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met.”); *Engle v. Isaacs*, 456 U.S. 107, 130–34 (1982) (refusing to excuse procedural default where the legal basis for a defaulted claim was available at the time of default).

164. *Amadeo v. Zant*, 486 U.S. 214, 217–22 (1988) (holding that a state’s failure to disclose a memorandum detailing discriminatory practices in jury selection was “cause” excusing a defendant’s failure to object to the composition of the jury on that basis); *Brown v. Allen*, 344 U.S. 443, 486 (1953).

165. *United States v. Frady*, 456 U.S. 152, 168 (1982) (leaving the definition open). *See RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 1108 (3d ed. 1998) (“The Supreme Court has not yet provided any precise definition of the ‘prejudice’ half of the ‘cause and prejudice’ exception to the procedural default doctrine.”).

166. At a minimum, the “prejudice” showing will be more onerous than what is required to establish “plain error”—that is, it will require a showing that the error affects substantial rights and that the failure to correct the error would impugn the fairness, integrity, and public reputation of judicial proceedings. *Frady*, 456 U.S. at 166 (holding that cause and prejudice requires a greater showing than plain error). *See also* FED. R. CRIM. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732 (1993) (defining the “plain error” standard). The lower federal courts have interpreted the “prejudice” showing consistent with this definition. *See, e.g., Ouska v. Cahill-Masching*, 246 F.3d 1036, 1050 (7th Cir. 2001) (to show prejudice, a defendant must show “not merely that errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions”) (quoting *Frady*, 456 U.S. at 170); *LaGrand v. Stewart*, 173 F.3d 1144, 1148 (9th Cir. 1999) (defining prejudice as “actual harm resulting from the claimed constitutional error”); *Ratliff v. United States*, 999 F.2d 1023, 1025 (6th Cir. 1993) (defining prejudice as “actual and substantial disadvantage”).

167. *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Murray*, 477 U.S. 496. To prevail, habeas petitioners must show that, but for a constitutional violation, they would “more likely than not” have been found innocent. *Schlup*, 513 U.S. at 327. Habeas petitioners may *not* simply claim that they are factually innocent, without pointing to an antecedent constitutional violation; the Court in *Herrera v.*

factually disqualified from being sentenced to death (so-called actual innocence of the death penalty).<sup>168</sup>

Thus, the doctrines of exhaustion and procedural default work together to ensure that a federal court entertaining a habeas petition reviews only those claims already presented to and heard on their merits by a state court.<sup>169</sup> In other words, relitigation of issues on habeas is not just the norm—it is a prerequisite to federal review. Due to the procedural default and exhaustion doctrines discussed above, however, a federal habeas court will *not* usually reach the merits of an issue on which a petitioner procedurally defaulted in the state courts. In this fashion, a state court's failure to reach the merits of a federal challenge to a state conviction is given preclusive effect, while a state court's ruling on the merits of a challenge is not.<sup>170</sup>

A federal court's relitigation of issues resolved by a state court is not plenary, however. Federal courts defer to state courts' fact-finding.<sup>171</sup>

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*Collins*, 506 U.S. 390, 400 (1993), held that such a claim is not cognizable on habeas. "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.*

168. To demonstrate "innocence of the death penalty," the habeas petitioner must show that, but for a constitutional violation, "no reasonable juror would find him *eligible* for the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992) (emphasis added). The Court has yet to decide whether defendants may assert their "innocence" of noncapital sentences to excuse a procedural default. *See Dretke v. Haley*, 541 U.S. 386, 391–92, 396 (2004). The federal courts of appeals are currently divided on the question. *Compare Embrey v. Hershberger*, 131 F.3d 739, 741–42 (8th Cir. 1997) (en banc) (holding that there is no actual innocence exception for noncapital sentencing error), and *Reid v. Oklahoma*, 101 F.3d 628, 629 (10th Cir. 1996) (same), with *Haley v. Cockrell*, 306 F.3d 257, 264 (5th Cir. 2002) (holding that an actual innocence exception for noncapital sentencing error relating to recidivist enhancement applies in noncapital cases), and *Spence v. Superintendent, Great Meador Corr. Facility*, 219 F.3d 162 (2d Cir. 2000) (same), and *United States v. Mikalajunas*, 186 F.3d 490, 494–95 (4th Cir. 1999) (same).

169. Although the doctrine of procedural default typically applies to a habeas petitioner's failure to raise a legal challenge to a conviction or sentence, it also applies to a habeas petitioner's failure to develop facts before the state courts. *See* 28 U.S.C. § 2254(e)(2) (2000) (barring an evidentiary hearing to raise new facts except in limited circumstances); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 6 (1992). Like its counterpart, the procedural default doctrine as applied to factual defaults does not apply where new, previously unavailable facts or law exists or where "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2254(e)(2), (e)(2)(B); *Tamayo-Reyes*, 504 U.S. at 10 n.5.

170. Others have commented on the seeming illogic of this result. *See Meltzer, supra* note 1, at 1185, 1188.

171. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the

Since Congress enacted AEDPA in 1996, federal courts also defer to the state courts' legal rulings, and may not disturb them unless they are not only erroneous, but are also "objectively unreasonable."<sup>172</sup> Should a federal court determine that the state court clearly erred in its determination of the facts or erred unreasonably in interpreting applicable federal law, that federal court must also find that the error "had substantial and injurious effect or influence in determining the jury's verdict," before the court may reverse or vacate the conviction or sentence.<sup>173</sup> This standard is more forgiving than the standard employed during a prisoner's direct appeal,

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presumption of correctness by clear and convincing evidence."); *Thompson v. Keohane*, 516 U.S. 99, 107–08 (1995) ("In [federal habeas corpus] proceedings, § 2254(d) declares, state court determinations of 'a factual issue' 'shall be presumed to be correct' absent one of the enumerated exceptions.") (quoting 28 U.S.C. § 2254(d) (1994) (current version at 28 U.S.C. § 2254(e)(1) (2000)). *But see* *Bator*, *supra* note 35, at 502 ("If it is the purpose of habeas jurisdiction to assure that no error has been made, then there is no reason why the state courts' determinations of fact should be any more sacred than their conclusions of law.").

172. *Yarborough v. Alvarado*, 541 U.S. 652, 665–66 (2004); *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *Woodford v. Visciotti*, 537 U.S. 19, 24–25 (2002) ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly."); *Williams v. Taylor*, 529 U.S. 362, 409–10 (2000). This deferential standard of review is contained in § 2254(d), which provides that a habeas petition

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim[:] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding.

§ 2254(d)(1), (d)(2). Prior to *Williams*, several commentators argued that the Supreme Court would not (or should not) interpret the statutory language to defer to state court rulings on issues of federal law. *See, e.g.*, *Liebman & Ryan*, *supra* note 31, at 862 (arguing that deferential review violates the mandate of Article III courts to review federal issues "independently"). *But see* *Scheidegger*, *supra* note 1, at 917 (arguing that a deferential standard of review is entirely appropriate).

173. *Brecht v. Abrahamson*, 507 U.S. 619, 631, 637 (1993) (quoting *Kottaekos v. United States*, 328 U.S. 750, 776 (1946)). The habeas petitioner bears the burden of meeting this standard, although any uncertainty about whether it is met is to be resolved in the petitioner's favor. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) ("When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law 'had substantial and injurious effect or influence in determining the jury's verdict', that error is not harmless."). Certain types of errors—so-called structural errors—warrant reversal, even on habeas review, without any need for the petitioner to meet the *Brecht* standard. Those include the total deprivation of trial counsel or deprivation of the right of self-representation at trial, trial before a biased judge, an erroneous "beyond a reasonable doubt" jury instruction, deprivation of the right to a public trial, and discriminatory exclusion of members of the defendant's race from the grand jury. *See* *Sullivan v. Louisiana*, 508 U.S. 275, 277–82 (1993); *Vasquez v. Hillery*, 474 U.S. 254, 264–65 (1986); *Waller v. Georgia*, 467 U.S. 39, 44–48 (1984); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927).

under which errors must be corrected unless the state establishes they are “harmless beyond a reasonable doubt.”<sup>174</sup>

Even after a petitioner appeals the district court’s resolution of a habeas petition,<sup>175</sup> relitigation of issues may continue. A person “in custody” may file multiple habeas petitions in certain circumstances.<sup>176</sup> AEDPA limited the circumstances under which “second or successive” petitions may be filed: claims previously “presented” in a prior habeas petition may not be reheard at all,<sup>177</sup> while new claims may be heard for the first time in a “second or successive” petition only if they rely on new, previously unavailable facts or law or would demonstrate that, but for the newly asserted error, the petitioner would clearly and convincingly have been found innocent.<sup>178</sup> A prisoner must also obtain special permission from the appropriate federal court of appeals before a district court may entertain such a petition.<sup>179</sup>

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174. *Chapman v. California*, 386 U.S. 18, 24 (1967) (requiring reversal of conviction unless the state shows “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained”).

175. Before a habeas applicant appeals the district court’s denial of the applicant’s petition to the federal court of appeals, the applicant must obtain a certificate of appealability—a device to ensure that the appeal has merit—from the court of appeals specifying that “the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c) (2000) (“Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.”). *Accord Slack v. McDaniel*, 529 U.S. 473, 481–82 (2000).

176. See § 2254(a) (placing no absolute limits on the number of times a state prisoner may file a habeas petition if he remains “in custody”).

177. 28 U.S.C. § 2244(b)(1) (2000) (“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.”). This rule paralleled the prior, judicial treatment of so-called successive petitions: they were categorically barred absent a “fundamental miscarriage of justice.” See *McCleskey v. Zant*, 499 U.S. 467, 494–95 (1991); *Sanders v. United States*, 373 U.S. 1, 15–17 (1963).

178. *Id.* at 494. See also § 2244(b)(2). This rule parallels (but does not entirely mimic) the earlier, judicial treatment of so-called abusive petitions: they were deemed barred unless a petitioner could satisfy the standards to excuse a procedural default—cause and prejudice, or a fundamental miscarriage of justice. See *McCleskey*, 499 U.S. at 494.

179. § 2244(b)(3)(A) (“Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”). A certificate may issue only if the court of appeals “determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.” § 2244(b)(3)(C).

## B. THE HABEAS CONSTRUCT'S VISION OF JUDICIAL FEDERALISM

Although the habeas writ is codified, its contours were initially largely a product of judicial innovation,<sup>180</sup> but in recent years they have been defined more notably by statute.<sup>181</sup> In its decisions, the Supreme Court consistently cites the importance of federal-state comity,<sup>182</sup> respect to state courts,<sup>183</sup> and the need for finality respecting judgments.<sup>184</sup> Although the Court cited these same concerns when shaping the doctrines underlying the paradigmatic construct,<sup>185</sup> the habeas construct and the principles of judicial federalism it represents are vastly different.

### 1. Supremacy of Federal Law

The habeas construct requires habeas petitioners to present their federal claims to state courts in the name of deference to those courts, but refuses to grant that prior adjudication conclusive weight.<sup>186</sup> This arrangement ostensibly reflects the view that state adjudication of federal claims is insufficient to ensure the supremacy of federal law.<sup>187</sup> As Cover and Aleinikoff observed, “redundancy fosters greater certainty that constitutional rights will not be erroneously denied”<sup>188</sup>—the hallmark of ensuring the supremacy of federal law. To be sure, the relitigation

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180. As noted above, the doctrines of exhaustion, procedural default, antiretroactivity, and successive and abusive multiple petitions all had their genesis in decisions of the Court. *See supra* text accompanying notes 139–48, 148–71. *See also* Meltzer, *supra* note 1, at 1188 (“[T]he habeas statute is a kind of organic jurisdictional grant . . .”); Painter, *supra* note 114, at 1609 (“The modern writ of habeas corpus is the product of both federal statutes and judicial interpretations.”).

181. *See, e.g.*, AEDPA, Pub L. No. 104-132, 110 Stat. 1214 (1996).

182. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (observing that the exhaustion and procedural default doctrines are “grounded in concerns of comity and federalism”); *Teague v. Lane*, 489 U.S. 288, 308 (1989) (plurality opinion) (noting that the “[i]nterests of comity and finality must also be considered in determining the proper scope of habeas review”); *Rose v. Lundy*, 455 U.S. 509, 515, 518–19 (1982) (noting that the exhaustion doctrine is “a matter of comity” that permits a state court to fix its errors); *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973) (“The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity.”); *Ex parte Royall*, 117 U.S. 241, 252 (1886) (characterizing the exhaustion doctrine as a “principle of comity”).

183. *Coleman*, 501 U.S. at 748 (“[F]ederal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.”) (quoting *Engle v. Issac*, 456 U.S. 107, 128 (1982)).

184. *Id.* at 748 (noting how habeas corpus entails “the cost to finality in criminal litigation”); *Teague*, 489 U.S. at 308.

185. *See supra* notes 105–06.

186. *See supra* text accompanying notes 155–68 and 171–72.

187. *Accord Rose*, 455 U.S. at 518 (noting how the exhaustion doctrine is “principally designed to protect the state courts’ role in the enforcement of federal law”).

188. Cover & Aleinikoff, *supra* note 114, at 1045. *See also* Painter, *supra* note 114, at 1642 (“[F]ederal habeas review remains a powerful vehicle for the reliable interpretation of federal law.”).

undertaken by federal courts is no longer plenary: federal courts must now defer to the reasonable, though incorrect, interpretations of federal law made by state courts.<sup>189</sup> But the availability of federal courts to step in and correct even unreasonable errors nevertheless rests upon the premise that a single adjudication of federal issues by state courts on direct review (even with the possibility of Supreme Court review) is insufficient to guarantee that federal law will be supreme.<sup>190</sup>

## 2. Development of Federal Law

By authorizing federal courts to revisit state courts' resolutions of issues of federal law, the habeas construct evokes a fuller dialogue between state and federal courts regarding the interpretation and application—in other words, the development—of federal law than does the possibility for Supreme Court review alone.<sup>191</sup> To be sure, the common law method of adjudication by its very nature creates an indirect dialogue, as a state court relies upon federal court precedent in resolving the case before it. But habeas makes this dialogue more immediate and direct by having the state and then the federal courts apply the same federal law in the very same case. This dialectic is, however, mitigated in some respects by the antiretroactivity doctrine and by the deferential standard of review employed by state courts.<sup>192</sup> Antiretroactivity precludes the federal courts

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189. See *supra* text accompanying notes 171–72. Because appellate courts almost always defer to the lower courts' findings of fact, see, e.g., *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424, 440 n.14 (2001) (“[I]t of course remains true that the Court of Appeals should defer to the District Court’s findings of fact unless they are clearly erroneous.”); *Clemons v. Mississippi*, 494 U.S. 738, 768 (1990) (justifying the rule of deference because “only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said”) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)), but cf. *Edmond v. United States*, 520 U.S. 651, 652 (1997), deference to the lower courts’ legal rulings is remarkable.

190. Indeed, in some respects, this deferential standard of review may be perceived as more intrusive of state courts, as any intervention by the federal courts is now, by definition, a finding that the state court not only erred, but also did so in an unreasonable manner.

191. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) (arguing that the Supreme Court’s appellate jurisdiction “cannot even come close to ‘doing the whole job’” of “correct[ing] erroneous state-court decisions and . . . insur[ing] that federal law is interpreted and applied uniformly”); Cover & Aleinikoff, *supra* note 114, at 1047. See also Painter, *supra* note 114, at 1642 (“[F]ederal habeas corpus facilitates a conversation between state and federal courts that results in the cooperative interpretation of federal law.”). Cover and Aleinikoff argue that the federal courts favor a “utopian” constitutionalism, while the state courts favor a “pragmatic” constitutionalism, thereby creating a give-and-take in the dialogue. Cover & Aleinikoff, *supra* note 114, at 1050–51.

192. It is also undercut by the inability of state courts to adjudicate Fourth Amendment claims. See Cover & Aleinikoff, *supra* note 114, at 1036 (arguing that *Stone*’s exemption precluding relitigation will harm the dialogue between state and federal courts). The procedural default doctrine does not,

from articulating new rules of federal law to cases on collateral review, thereby eliminating the ability of the federal courts on habeas review to fashion “new” rules on habeas;<sup>193</sup> the dialogue regarding the law applicable at the time of conviction, however, remains fulsome. Similarly, the requirement that federal courts defer to reasonable, but erroneous, interpretations of federal law by state courts narrows federal court review to the prism of unreasonable errors, thereby constraining “discussion” on the nuances of federal law,<sup>194</sup> although the broader contours that are more likely to amount to unreasonable errors are still subject to dual review. Thus, the habeas construct rests on the view that a more-or-less direct dialogue between state and federal courts is necessary to ensure the development of federal law. A necessary corollary of this judgment is that state courts are incapable of being tasked with the development of federal law on their own.<sup>195</sup>

### 3. Asymmetry

The habeas construct creates an asymmetry in the law of federal courts along two axes. It is inconsistent with the general rule that prohibits relitigation of issues.<sup>196</sup> The paradigmatic construct adhered to this rule, and thus fit logically with the doctrines precluding relitigation in state court of issues previously resolved by a federal or state court.<sup>197</sup> Because the habeas construct authorizes relitigation in federal court of issues previously resolved in state court—where the converse is not true—it injects

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practically speaking, interfere with any dialogue because neither court—state nor federal—actually considers the merits of a procedurally defaulted claim.

193. Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 799–800 (1992) (“In *Teague v. Lane* and its progeny the Supreme Court silenced the habeas courts.”); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 922 (1994) (“[T]he Court’s expansive conception of ‘new’ law has threatened to undermine lower federal courts’ ability to apply established principles to novel fact patterns.”).

194. See Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA’s Standard of Review Operate After Williams v. Taylor?*, 2001 WIS. L. REV. 1493, 1521 n.118 (2001) (“[A]ny deference by federal habeas courts on pure issues of federal law potentially undermines the role of federal courts in this dialogue. If federal habeas courts are limited to asking whether the state court decision is analytically sound, as opposed to whether it is correct, they might not be speaking directly on the relevant legal issues.”).

195. See *supra* note 116 (discussing the ongoing debate about the parity of state and federal courts). Redish proffers a second possible interpretation that does not impugn the competency of the state courts: “[M]erely because state courts are competent to adjudicate federal law it does not necessarily follow that the litigants should be denied the option of a federal forum.” Redish, *supra* note 35, at 1788.

196. See *supra* text accompanying notes 67–77.

197. See *supra* Section II.C.3.

asymmetry. Relatedly, the habeas construct authorizes federal courts to review the legality of persons detained by state authorities.<sup>198</sup> Since the Supreme Court's decision in *Tarble's Case*,<sup>199</sup> however, it has been well settled—though not without criticism<sup>200</sup>—that state courts may not review the legality of persons detained by federal authorities.<sup>201</sup> Thus, the habeas construct places little value on symmetry.

#### 4. Finality and Repose

The habeas construct lastly places far less value on the attendant virtues of finality and repose than does the paradigmatic construct. Federal courts reviewing a habeas petition may revisit the merits of any federal issue properly and previously presented to a state court, albeit with some measure of deference.<sup>202</sup> Oddly, *res judicata* comes into play in only two narrow situations: (1) when a federal claim is procedurally defaulted, and (2) when a petitioner is seeking to file a successive habeas petition.<sup>203</sup> In both contexts, review is nevertheless permitted if the proffered claim rests upon new facts or law previously unavailable or if the petitioner was precluded from pressing the claim due to state interference (either directly or through the provision of constitutionally inadequate counsel);<sup>204</sup> each is a longstanding exception to the *res judicata* doctrine.<sup>205</sup> By making

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198. See *supra* Section III.A.

199. *In re Tarble's Case*, 80 U.S. 397 (1871). In *Tarble's Case*, the father of a minor who had enlisted into the federal military sought habeas relief from state court to release his son from the "custody" of the military. The Court held that the state court did not have the power to entertain the federal habeas petition. *Id.* at 403. The Court reasoned that "neither [the state nor federal government] can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority." *Id.* at 407.

200. Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2567 (1998) (arguing that *Tarble's Case* was wrongly decided).

201. The rule in *Tarble's Case* is paralleled in the context of actions for civil rights violations: the actions of state officers may be reviewed by the state or federal court under 42 U.S.C. § 1983, while the actions of federal officers may be reviewed solely by the federal courts under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *But see* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512–19 (1987) (arguing for a "converse 1983" action through which state courts would review the conduct of federal officers).

202. See *supra* text accompanying notes 19, 171–72, and *infra* note 217.

203. See *supra* text accompanying notes 155–70, 177–79. *Accord* *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (observing that AEDPA's successive petition rule "constitute[s] a modified *res judicata* rule"). More than one commentator or judge has noted the irony of the Court's grant of preclusive effect to the nonlitigation of an issue, but not to its litigation. See Meltzer, *supra* note 1, at 1185.

204. See *supra* text accompanying notes 162–64, 178.

205. The unavailability of law or facts at the time of the prior adjudication that constitutes "cause" corresponds with the exception to *res judicata* for prior litigation where there has been no opportunity to

relitigation the rule rather than the exception, however, the habeas construct places relatively less weight on the structural and consequentialist benefits of finality and repose—conserving judicial resources, reducing the risk of inconsistent decisions, and encouraging reliance on the prior state court adjudication.<sup>206</sup> The Court has noted a further policy consequence—diminution in the rehabilitative goals of criminal punishment.<sup>207</sup>

##### 5. The Habeas Construct as a Nationalist Vision

As discussed above,<sup>208</sup> Fallon has argued that decisions articulating federal courts doctrine implicitly adhere to one of two rhetorical structures—“Federalist” or “Nationalist.” The Nationalist structure embodies the view that the Reconstruction amendments vastly diminished any then-extant state sovereignty, thereby articulating a value judgment that state courts “are not as fair and effective as federal courts in enforcing constitutional rights” and necessitating a “special role” for the federal courts in guaranteeing those constitutional liberties.<sup>209</sup> By imbuing federal courts with authority to revisit the decisions of state courts regarding the merits of federal claims, the habeas construct is consistent with the judgment that federal court superintendency of state courts is necessary to aid in the development and ensure the supremacy of federal law, and that such tasks should not be left to the state courts with minimal federal supervision. Indeed, the habeas construct ostensibly finds that the need for

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litigate an issue. *Compare supra* text accompanying note 163, *with supra* text accompanying notes 72–73. State interference and the state’s provision of inadequate counsel, which constitute the other two means of establishing “cause,” also fit within res judicata exceptions. *Compare supra* text accompanying note 164, *with supra* text accompanying notes 72–73. To be sure, there is not a perfect correspondence. The exception to res judicata does not require any showing of prejudice. *See supra* text accompanying notes 72–73. Nor is there any exception to res judicata for “fundamental miscarriages of justice” as such, although there is a somewhat open-ended exception to res judicata where “special circumstances warrant an exception to the normal rules of preclusion.” *See supra* text accompanying notes 75–76.

206. *See supra* Section II.C.4.

207. *See Coleman v. Thompson*, 501 U.S. 722, 748 (1991) (“[B]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.”) (quoting *Sanders v. United States*, 373 U.S. 1, 24 (1963) (Harlan, J., dissenting); *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion) (“Without finality, the criminal law is deprived of much of its deterrent effect.”); Bator, *supra* note 35, at 452 (remarking that “surely it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating the law will swiftly and certainly become subject to punishment, just punishment,” such that lack of repose rehabilitation, which is “a psychological necessity in a secure and active society”).

208. *See supra* Section II.C.5.

209. Fallon, *supra* note 23, at 1158–61.

such intensive federal supervision is so compelling that it outweighs the destruction of the theoretical symmetry of federal courts law and the loss of the benefits of repose and finality. By these means, the habeas construct is aligned most closely with Fallon's Nationalist model, which embodies a similar distrust of state courts and calls for a similar, supervisory role of the federal courts.

### C. RECONCILING THE EXCEPTIONAL NATURE OF HABEAS

Despite its inconsistency with the paradigmatic construct, the federal writ of habeas corpus is sanctioned by positive law. Nearly every doctrine that animates the paradigmatic construct has a special exception designed specifically for the writ. As discussed below, however, these special exceptions are generally at odds with the purpose of the doctrines themselves, highlighting that the exceptions were created merely to accommodate habeas's longstanding status as an outlier. The typical inability of habeas to align with other, regular exceptions to these doctrines raises the further question: is there an *independent* justification for habeas's exceptional nature apart from historical practice? This section considers and ultimately rejects several proffered justifications.

#### 1. Habeas as Special Exception

As discussed above, the paradigmatic construct is formed by the confluence of five federal courts doctrines: the Anti-Injunction Act; the *Younger* abstention doctrine; the *Rooker-Feldman* doctrine; full faith and credit, *res judicata*, and collateral estoppel; and the Eleventh Amendment.<sup>210</sup>

Pragmatically speaking, habeas is consistent with the Anti-Injunction Act and the *Younger* abstention doctrine because those doctrines are mostly irrelevant to the habeas construct. Both doctrines preclude federal courts from enjoining *ongoing* state proceedings,<sup>211</sup> but the exhaustion requirement already requires habeas petitioners to present their federal claims to the state courts and requires federal courts to stay their hand until the state courts have completed their consideration of those claims.<sup>212</sup> For those rare situations in which exhaustion may not be required, however, habeas is an express exception to the statutory bar of the Anti-Injunction

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210. See *supra* Section II.B.

211. See *supra* Sections II.B.1 and II.B.2.

212. See *supra* text accompanying notes 152–54.

Act<sup>213</sup> and falls within the exceptions to the *Younger* abstention doctrine.<sup>214</sup>

Habeas is inconsistent with the remaining doctrines, each of which would otherwise bar the habeas action as it presently exists. The *Rooker-Feldman* doctrine has an exception for habeas actions;<sup>215</sup> absent that exception, the review of state court judgments by the federal district courts in a habeas action would be prohibited.<sup>216</sup> Similarly, habeas proceedings have been exempted from the Full Faith and Credit statute and the more general doctrines of res judicata and collateral estoppel;<sup>217</sup> again, absent those exceptions, federal courts would be prohibited from revisiting the legal and factual findings of state courts' final judgments of conviction.<sup>218</sup> Additionally, because a habeas action is functionally a lawsuit against a

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213. As the Court explained in *Mitchum*, legislation "governing federal habeas corpus proceedings" qualifies as an express, Congressional exception to the Anti-Injunction Act. *Mitchum v. Foster*, 407 U.S. 225, 234–35 (1972). In particular, the Court cited 28 U.S.C. § 2251, which provides that

[a] justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by any or under the authority of any State for any matter involved in the habeas corpus proceeding.

*Mitchum*, 407 U.S. at 234–35, n.16.

214. The exceptions applicable to *Younger*, while similar, may yet be narrower than the exceptions to the exhaustion requirement. Compare *Younger v. Harris*, 401 U.S. 37, 45–53 (1971) (authorizing intervention in ongoing criminal proceedings only where the petitioner would suffer "great and immediate" irreparable injury beyond enduring trial, where the prosecution is in bad faith and solely for harassment, or where other "exceptional circumstances" are present), with 28 U.S.C. § 2254(b)(1)(B) (2000) (excusing exhaustion requirement where there is "an absence of available State corrective process" or where "circumstances exist that render such process ineffective to protect the rights of the [habeas] applicant").

215. *Sumner v. Mata*, 449 U.S. 539, 543–44 (1981) (excepting habeas from the *Rooker-Feldman* doctrine by holding that it has long been established, "as to those constitutional issues which may properly be raised under § 2254, that even a single federal judge may overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question"). Accord *Noel v. Hall*, 341 F.3d 1148, 1155 (9th Cir. 2003) (confirming this exception). Indeed, federal courts have the power to review state judgments in contravention of the policy behind the *Rooker-Feldman* doctrine in only two contexts: habeas and bankruptcy. See *id.* at 1155 (citing 11 U.S.C. §§ 544, 547, 548, 549, 727, 1129, 1141, 1325, 1328 (2000)).

216. See *supra* text accompanying notes 62–66.

217. See *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973) ("Principles of res judicata are, of course, not wholly applicable to habeas corpus proceedings."); *Sanders v. United States*, 373 U.S. 1, 7 (1963) ("At common law, the denial by a court or judge of an application for habeas corpus was not res judicata."); *Brown v. Allen*, 344 U.S. 443, 458 (1953) (holding that for purposes of § 2254, prior state adjudication of an issue "is not res judicata"); *White v. Ind. Parole Bd.*, 266 F.3d 759, 764 (7th Cir. 2001) (holding that the Full Faith and Credit statute does not apply to habeas corpus proceedings); *Kruger v. Erickson*, 77 F.3d 1071, 1074 (8th Cir. 1996); *United States v. Jones*, 907 F.2d 456, 482 (4th Cir. 1990), *superseded on other grounds by United States v. Byrd*, 995 F.2d 536, 538 (4th Cir. 1993).

218. See *supra* text accompanying notes 67–77.

state seeking prospective declaratory and injunctive relief, it is also within the ambit of the Eleventh Amendment. Although some courts have recognized a special Eleventh Amendment exception for habeas,<sup>219</sup> habeas is most easily viewed as an *Ex parte Young* action.<sup>220</sup> Thus, at first glance, it might appear that a habeas action is not an unusual exception to the Eleventh Amendment given that it qualifies as an *Ex parte Young* action, until one recognizes that the Court in *Ex parte Young* relied on the existence of habeas proceedings to justify the *creation* of the broader exception to the Eleventh Amendment embodied by the *Ex parte Young* doctrine itself.<sup>221</sup>

## 2. Justifying Habeas

The exceptional nature of habeas proceedings vis-à-vis the doctrines that compose the paradigmatic construct is not intrinsically problematic as a threshold matter. The two constructs may coexist harmoniously if there is something about habeas proceedings that logically distinguishes those proceedings from actions otherwise governed by the paradigmatic construct. Over the years, judges and commentators have proffered several possible justifications for the differential treatment of habeas that have attained near-axiomatic status. Upon examination, however, none of these justifications withstands scrutiny.

### a. The Habeas Petitioner's Right to a Federal Forum

Some have argued that the habeas construct is justified because state prisoners should have a right to present claims based on federal constitutional and statutory law to a federal court, rather than merely to a

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219. The Fourth Circuit has recognized that, due to its status as an *Ex parte Young* action and, independently, due to its nature as a habeas action, habeas is excepted from the Eleventh Amendment:

It is true that the Eleventh Amendment offers no bar to a habeas corpus petition against a state which is holding a prisoner in violation of the Constitution or laws of the United States. From the earliest times, Eleventh Amendment immunity has not prevented actions seeking a writ of habeas corpus, whether the defendant be the sovereign itself, or some agent of the sovereign.

*Booth v. Maryland*, 112 F.3d 139, 144 (4th Cir. 1997) (citing *Elliot v. Hendricks*, 213 F.2d 922, 926 (3d Cir. 1954)).

220. See *Seminole Tribe v. Florida*, 517 U.S. 44, 75 n.17 (1996) (explaining that habeas proceedings under § 2254 fit within the *Ex parte Young* exceptions); *Booth*, 112 F.3d at 144 (noting that habeas actions “fall[] squarely under *Ex parte Young*”).

221. In *Ex parte Young*, 209 U.S. 123, 157–68 (1908), the Court proffered several justifications for its recognition of an action against state officers seeking prospective declaratory or injunctive relief. One of those reasons was the existence of habeas actions: “[I]t has never been supposed that there was any suit against the state by reason of serving the writ [of habeas corpus] upon one of the officers of the state in whose custody the person was found.” *Id.* at 168.

state court.<sup>222</sup> To do otherwise would be, as the argument goes, to create a federal right without a corresponding federal remedy in violation of the longstanding presumption that every right must have a remedy.<sup>223</sup>

As an initial matter, the Constitution does not mandate the existence of a federal forum. No such right is part of the dual federalism structure erected by the Constitution and the Madisonian Compromise it represents.<sup>224</sup> By providing solely for a federal Supreme Court and leaving it to Congress whether to create any lower federal courts at all,<sup>225</sup> the Constitution expressly contemplates that the state courts will adjudicate issues of federal law, and thus refutes the principle that there is a need, fulfilled by habeas, for a *federal* forum to hear federal claims. The availability of a remedy in *state* court satisfies the general requirement that rights have remedies (although the maxim that rights must have remedies is itself dubious).<sup>226</sup>

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222. This view has been espoused by Redish and Larry Yackle, and most recently, by Friedman. See Friedman, *supra* note 13, at 1241, 1243, 1264–74 (noting compelling, though admittedly imperfect, “federal enforcement interest” in having federal courts adjudicate issues of federal law, and arguing for such review in civil cases); Redish, *supra* note 35, at 1828 (“It is the federal courts, rather than the state courts, that should be presumed the primary forum for the enforcement of federal rights.”); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2425–26 (1993) (advocating this model). See also Redish, *supra* note 35, at 1788 (“[M]erely because state courts are competent to adjudicate federal law it does not necessarily follow that the litigants should be denied the option of a federal forum.”). In *Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973), the Court noted that habeas provides this sort of forum and thereby “preserv[es] for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress.”

223. See *Alden v. Maine*, 527 U.S. 706, 811 (1999) (Souter, J., dissenting) (“[W]here there is a right, there must be a remedy.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803) (“If he has a right, and that right has been violated, do the laws of his country afford him a remedy?”); Meltzer, *supra* note 200, at 2554 (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law wherever that right is invaded.”); Smith, *supra* note 35, at 102 (“[I]f Congress has the authority to impose substantive obligations . . . on the states, it is difficult to see why Congress should not also have the authority to create a remedy for when the state fails to fulfill its obligation.”) (internal footnotes omitted).

224. See *supra* text accompanying notes 32–35. See also Michael O’Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1541 (1996) (“The Constitution does not require creation of inferior courts. Accordingly, it can hardly be claimed that a litigant . . . has the right to demand adjudication of a federal claim in a federal forum. If no federal courts had been created, then surely state courts would have passed on federal questions.”); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1024–25 (1985) (“The Constitution, of its own force, does not necessarily establish a right to litigate in a federal forum. The language of Article III and the absence of general federal question jurisdiction until 1875 makes such a thesis virtually indefensible.”).

225. See *supra* text accompanying notes 32–35.

226. Meltzer, for example, points to “pockets of non-liability” where the qualified immunity of state actors precludes any remedy for constitutional wrongdoing. Meltzer, *supra* note 200, at 2564. As a result, he notes, “there are numerous cases involving constitutional wrongdoing by governmental actors in which there is in fact no remedy at all.” *Id.* See also Ann Woolhandler, *Demodeling Habeas*, 45

Of course, Congress is empowered under the Constitution to create a federal forum to adjudicate issues of federal law, thus raising the normative question of whether such a right to a federal forum *should* exist. In answering this question, it is important to keep in mind the context in which the particular federal questions at issue arise. Within the habeas context, the initial lawsuit in state court is the criminal prosecution of a defendant under the state's substantive, criminal law. The federal issues to be relitigated in a habeas action are therefore not the substantive basis of the state's lawsuit; indeed, the state's criminal lawsuit could *not* be brought in federal court at all. Nor does federal law provide a substantive defense to the state's criminal law.<sup>227</sup> Rather, federal law—and, most particularly, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments—provides the panoply of procedural rights that must be followed in the course of the state's prosecution. Thus, habeas involves the creation of a federal forum for the purpose of relitigating *procedural rules* that apply to a lawsuit that is (1) otherwise governed by state law, (2) required to be adjudicated in state court, and (3) initiated for the purpose of vindicating the state's prosecutorial interests. Thus, the considerations at issue when providing access to a federal forum in the habeas context differ markedly from those at play when providing such access for plaintiffs to sue under federal law in the first instance, such as in a § 1983 lawsuit.<sup>228</sup>

In the habeas context, the normative arguments in favor of providing a federal forum are weaker and, on balance, do not support the maintenance of such a forum. First, the utility of having habeas available as a federal forum in which to relitigate federal procedural issues is less compelling

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STAN. L. REV. 575, 635–36 (1993) (refusing to take the “extreme position that every violation of a constitutional right requires a remedy”). Even in the criminal context, the Court and commentators have noted that criminal defendants do not have a right to an “error free” trial. *See, e.g.,* Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion) (noting that the Court “never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error”); Bator, *supra* note 35, at 447 (echoing the notion that there is no guarantee of an error free trial).

227. There is currently no general right to adjudicate federal substantive defenses in a federal forum, if the plaintiff's cause of action does not arise under federal law. As the Court has observed:

Ordinarily, determining whether a particular case arises under federal law turns on the “well-pleaded complaint rule” . . . . In particular, the existence of a federal defense normally does not create statutory “arising under” jurisdiction, and a defendant may not [generally] remove a case to federal court unless the *plaintiff's* complaint establishes that the case “arises under” federal law.

*Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2494–95 (2004) (internal citations omitted).

228. As Paul Bator has argued, “[the] advantages [that] justify giving litigants the option to have their lawsuits tried entirely in federal court is surely a different one than where the question is whether a suit which is and must be tried in state court should then be reopened to allow the redetermination of federal questions by a federal judge.” *See* Bator, *supra* note 35, at 512.

because, in most cases, the issues to be adjudicated involve the “application of well-settled and well-understood principles to a highly particular and closely balanced set of facts with no further elaboration of the principles themselves being involved.”<sup>229</sup> Congress reduced the benefit of federal court oversight even further when it ordered federal courts to defer to any “reasonable” interpretations of state law.<sup>230</sup> Second, the alleged incompetency of state courts to resolve difficult or esoteric questions of federal law—a typical justification for the creation of a federal forum<sup>231</sup>—is similarly less pressing in the habeas context. The federal questions at issue in habeas lawsuits do not involve patent or antitrust law, but rather the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment jurisprudence routinely applied by the state courts. Any competency “gap” respecting the substantive law is accordingly smaller. Lastly, concerns about efficiency and avoiding undue expenditure of judicial resources are more weighty given the sheer number of possible federal claims that exist today<sup>232</sup> and the unavoidable fact that any federal issues adjudicated in habeas have necessarily already been litigated in the state courts.<sup>233</sup>

Given this normative cost-benefit analysis, it is not surprising that the Supreme Court has rejected, as a matter of positive law, the existence of any right to a federal forum in a context very similar to habeas—that is, relitigation of issues in a § 1983 lawsuit. Both § 1983 actions and habeas proceedings available to state prisoners share the same genesis in post-Civil War legislation, and both “interpose the federal courts between the States and the people, as guardians of the people’s federal rights.”<sup>234</sup> In both a § 1983 suit and a habeas action, the plaintiff sues the state for redress of a federal constitutional violation.<sup>235</sup> The primary difference between the

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229. *Id.* at 508.

230. See 28 U.S.C. § 2254(d) (2000). See also *supra* text accompanying notes 171–72.

231. See *Allen v. McCurry*, 449 U.S. 90, 96 (1980); Bator, *supra* note 35, at 509–11.

232. “Given the constitutionalization of most criminal procedure issues, as a practical matter it is impossible to guarantee a federal forum for every alleged federal violation.” O’Neill, *supra* note 224, at 1542.

233. Bator, *supra* note 35, at 512 (citing concern about “waste” of judicial resources occasioned by habeas review).

234. *Heck v. Humphrey*, 512 U.S. 477, 501 (1994). See also *id.* at 480 (“Both [§ 2254 and 42 U.S.C. § 1983] provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials, but they differ in their scope and operation.”); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

235. Compare 42 U.S.C. § 1983 (2000) (authorizing a lawsuit against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws”), with 28 U.S.C. § 2254.

actions is that a § 1983 plaintiff may seek any form of relief (including damages),<sup>236</sup> while a habeas petitioner may seek only a specific form of declaratory and injunctive relief—namely, invalidation of the state conviction and release from custody.<sup>237</sup> In *Allen v. McCurry*, the Court held that a plaintiff may not bring a § 1983 suit in federal court, seeking damages, when the legal basis of the suit was an issue already litigated in, and rejected by, the state courts.<sup>238</sup> In reaching this holding, the Court explicitly rejected any “generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises.”<sup>239</sup> The Court’s reasoning in *Allen* reaffirms the infirmity of the argument that persons seeking to litigate federal constitutional issues do, or should, have a right to a *federal* forum in which to do so.

b. The Habeas Petitioner’s Involuntary Choice of Forum

A second basis on which habeas might potentially be distinguished from lawsuits governed by the paradigmatic construct is that a habeas petitioner, unlike a § 1983 plaintiff, does not have the option of electing to litigate any federal constitutional claims in federal court in the first instance. A § 1983 plaintiff may elect to file suit in federal court,<sup>240</sup> or the defendant may remove the lawsuit premised on federal jurisdiction to

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236. Damages may generally be sought in a § 1983 action. *Nelson v. Campbell*, 541 U.S. 637, 646 (2004); *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Indeed, even a state prisoner may seek damages in a § 1983 action, but only if the award of damages does not “necessarily imply the invalidity” of the underlying state conviction—if it does, then habeas remains the sole remedy. *Edwards v. Balisok*, 520 U.S. 641, 645 (1997) (holding that a prisoner’s challenge to procedures followed in a prison disciplinary action might warrant nominal damages, but only if it does not necessarily imply invalidity of forfeiture of his good-time credits that affects the duration of his incarceration); *Heck*, 512 U.S. at 487. The rule requiring resort to habeas only does not apply when a prisoner’s request for relief does not directly seek speedier release, but instead it challenges parole procedures that may or may not hasten release. *See Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005).

237. *Wilkinson*, 125 S. Ct. at 1247 (stating that claims compelling speedy release seek “core” habeas relief); *Heck*, 512 U.S. at 480 (noting that habeas is the exclusive means of seeking release from state custody); *Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973) (observing that “the heart of habeas corpus” is “seeking immediate release or a speedier release from . . . confinement”).

238. *Allen v. McCurry*, 449 U.S. 90, 103–05 (1980). *Accord Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 82–83 (1984).

239. *McCurry*, 449 U.S. at 103. *See also* *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S. Ct. 2491 (2005) (rejecting the proposition “that plaintiffs have a right to vindicate their federal claims in a federal forum.”); *Bator*, *supra* note 35, at 507 (“Surely it is plain that there exists no constitutional right to have the merits of a federal question determined by a federal constitutional court . . .”).

240. *See* 42 U.S.C. § 1983 (2000). *See, e.g., Heck*, 512 U.S. at 477 (involving a § 1983 action in federal court); *Washington v. Harper*, 494 U.S. 210 (1990) (involving a § 1983 action in state court).

federal court;<sup>241</sup> thus, the litigation of a § 1983 suit by the state courts is, at least at some level, the product of (one of) the parties' choice. Habeas petitioners have no such freedom to choose: the state indicts them and they must raise and litigate their federal constitutional issues in the state courts at trial, on direct appeal, and possibly in state habeas proceedings before the exhaustion doctrine will permit them to file habeas petitions in federal court.<sup>242</sup> As Redish and Friedman argue, litigant choice is a relevant normative factor to consider when allocating judicial power between state and federal courts.<sup>243</sup> Consequently, habeas petitioners' lack of choice militates in favor of giving them the right to relitigate their federal issues in federal court.

Upon closer examination, however, this possible justification for the habeas construct cannot be sustained. This justification implicitly rests upon two interrelated premises: (1) the notion that litigants seeking to adjudicate federal constitutional and statutory issues have a right to have a federal court hear those issues, and (2) the notion that any litigant who does not waive that right is entitled to relitigate such issues in federal court. It is ostensibly due to these premises that § 1983 plaintiffs who voluntarily elect to proceed in state court "waive" the rights they otherwise had to proceed with their § 1983 suits in federal court. Because the habeas petitioners had no such choices and made no such voluntary elections, the argument goes, they never waived their rights to a federal forum, which justifies their abilities to relitigate issues in federal court. As noted above, however, the first premise—that litigants have a right to a *federal* forum for adjudication of federal issues—is not a normatively mandated outcome (at least in the habeas context).<sup>244</sup> The infirmity of this premise undermines this justification for habeas's differential treatment: habeas petitioners' lack of choice (and hence lack of waiver) does not deprive them of any rights they possessed. Indeed, even civil § 1983 plaintiffs do not always choose their forum, as they may seek to litigate issues in state court only to have the defendant remove the case to federal court.

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241. See 28 U.S.C. § 1441(b) (2000) (providing for removal to federal court of "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States").

242. See *supra* text accompanying notes 152–56.

243. Friedman, *supra* note 13, at 1257 (noting the "unequivocal" principle that "those who voluntarily choose state court will be precluded from then going to federal court"); Redish, *supra* note 35, at 1776–77. Redish argues that litigant choice may encourage competition between state and federal courts for litigants, and thereby improve the efficiency and effectiveness of the courts. *Id.*

244. See *supra* Section III.C.2.a.

As expected, the Court has largely rejected a litigant's lack of choice as a basis for opening the doors to the federal courts.<sup>245</sup> To be sure, some lower federal courts have interpreted the Supreme Court's decision in *England v. Louisiana Board of Medical Examiners*<sup>246</sup> as authorizing relitigation of federal issues previously decided by state courts in certain narrow situations outside the habeas context. But the circumstances in which this relitigation has taken place have been limited to cases in which the litigant is forced into state court for the interpretation of state law<sup>247</sup> or to issue a "final" decision ripe for federal review,<sup>248</sup> and in which the state

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245. Indeed, even Redish observes that litigant choice should not be a controlling normative factor. Redish, *supra* note 35, at 1776.

246. *England v. Louisiana Bd. of Med. Exam'rs*, 375 U.S. 411 (1964).

247. In *England*, the federal court relied upon the *Pullman* abstention to refer a case initially filed in federal court to the state court for the resolution of issues of state law. *England*, 375 U.S. at 415–17. It was when the state court adjudicated the related federal questions over the plaintiff's express reservation of the issue that the *England* Court held that relitigation of the federal issue by the federal court was appropriate. *Id.* The lower federal courts are divided on whether a litigant, to take advantage of the *England* exception, must first formally file a lawsuit in federal court or whether the exception applies when the litigant files in state court to avoid the delay of an inevitable *Pullman* abstention. Compare *Santini v. Conn. Hazardous Waste Mgmt.*, 342 F.3d 118, 130 (2d Cir. 2003) (holding that such a litigant does not need to file first in federal court), and *United Parcel Serv. v. Cal. Pub. Util. Comm'n*, 77 F.3d 1178, 1182–83 (9th Cir. 1996) (same), and *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1304–06 (11th Cir. 1992) (same), and *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071 (3d Cir. 1990) (same), with *Hickerson v. City of New York*, 146 F.3d 99, 111 (2d Cir. 1998) (holding that *England* applies only when a case is first filed in federal court and thereafter referred to state court), and *Schuster v. Martin*, 861 F.2d 1369, 1373–74 (5th Cir. 1988), and *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 311–12 (1st Cir. 1986).

248. The lower federal courts have also split over whether reference of a case to state court for the "final" resolution of antecedent issues as a prerequisite to federal court adjudication precludes relitigation of the subsequent federal claims when the state court decides the federal claim over the litigant's objection. Compare *Barefoot v. City of Wilmington*, 306 F.3d 113, 121 (4th Cir. 2002) (holding that there is no res judicata exception when a case is referred to state court so that the state could issue a "final" decision to ripen a Fifth Amendment takings claim), and *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1324 (10th Cir. 1998) (same), and *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364–65 (9th Cir. 1993) (same), and *Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989) (same), with *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487, 497 (6th Cir. 2001) (holding that a federal court may relitigate issues resolved by a federal court, when state court decides them when it is only asked to issue a "final" decision), and *Fields*, 953 F.2d at 1304–06 (same). The Supreme Court itself hinted at the difference between reference to state courts for the purpose of seeking a "final" decision and reference for the purpose of "exhaustion" and hence, relitigation:

The finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

*Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192–93 (1985). The Court appears to have largely resolved the issue, as it explicitly rejected *Santini's* rule and held that a

court ignores a litigant's request not to adjudicate the related federal claims.<sup>249</sup> A broader reading of the *England* exception to res judicata that would permit relitigation whenever a litigant's federal issues were adjudicated in a state forum not of that litigant's choosing is inconsistent with the general notion that *England* was not designed to "afford a litigant two bites at the apple."<sup>250</sup>

More importantly, such a reading would squarely conflict with the Supreme Court's decisions in *Allen* and most recently in *San Remo Hotel, L.P. v. City and State of San Francisco*,<sup>251</sup> both of which accord with the normative analysis set forth above.<sup>252</sup> In *Allen*, the Court held that a state prisoner could not seek damages in a § 1983 suit in federal court based on a Fourth Amendment claim that, due to necessity, the prisoner had previously litigated in the state courts in a motion to suppress he filed during the criminal proceedings.<sup>253</sup> In dissent, Justice Blackmun argued that "[a] state criminal defendant cannot be held to have chosen 'voluntarily' to litigate his Fourth Amendment claim in the state court."<sup>254</sup> Over this objection, the majority held that the prior adjudication in state court could not be revisited in the § 1983 lawsuit in federal court, even though the § 1983 plaintiff, as a state prisoner, had no choice in selecting the initial forum in which the issue was litigated. Similarly, in *San Remo*, the Court held that a state court's resolution of a state constitutional issue that tracked the federal constitutional question the plaintiff sought to raise

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return to state court to ripen a claim will not create an exception to preclusion doctrines. *See San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S. Ct. 2491 (2005).

249. *See, e.g., United Parcel Serv.*, 77 F.3d at 1183 (noting that the *England* exception applies only where the litigant "desist[s] from freely and without reservation litigating his federal claims in state court").

250. *Fuller*, 782 F.2d at 312. Indeed, there is little question that the federal courts are reviewing the state court's *decision* on the federal issue, rather than any predicate factual issue for finality or issues of state law. *See* 28 U.S.C. § 2254(d) (2000) (applying deference to the review of state court "decisions").

251. *San Remo*, 125 S. Ct. at 2491.

252. By arguing that *Allen* was wrongly decided, Friedman acknowledges that his argument for federal review of federal issues adjudicated by state courts seeks an *expansion* of *England* beyond its present boundaries. *See* Friedman, *supra* note 13, at 1262–63. The Court's decision in *San Remo* appears to counsel again such an expansive reading. Friedman's proposal also does not seem to squarely implicate res judicata insofar as he seeks "sequencing" of review by the state and federal courts—rather than relitigation of federal issues by those courts. *Id.* at 1275 (arguing that "most of [his] proposed reforms do not implicate finality at all").

253. *Allen v. McCurry*, 449 U.S. 90, 103–05 (1980).

254. *Id.* at 115 (Blackmun, J., dissenting). Justice Blackmun relied upon that same distinction when he upheld the applicability of the Full Faith and Credit statute to a § 1983 action in which the plaintiff voluntarily selected the forum. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 n.7 (1984).

in federal court was entitled to preclusive effect—notwithstanding *England* and even though the plaintiff “would have preferred not to litigate in state court, but was required to do so by statute or prudential rules.”<sup>255</sup>

For these reasons, habeas petitioners’ lack of choice in selecting the forum in which to initially adjudicate their federal constitutional claims does not explain why habeas should be excepted from the paradigmatic construct.

c. Habeas Petitions Involve Adjudication of Constitutional Rights

Others have argued that habeas petitions are different from lawsuits falling under the paradigmatic construct due to the nature of the rights at stake in a habeas proceeding—namely, federal constitutional rights. The nature of the right is certainly a valid concern in assessing the contours of a judicial remedy,<sup>256</sup> but it does not justify the differential treatment of habeas. To begin with, it could not explain why habeas permits relitigation of federal *statutory* rights.<sup>257</sup> More broadly, it suffers from the same deficiencies as the federal forum rationale: the Constitution contemplates the possibility that the state courts would be tasked with applying the “Supreme Law of the Land,” including federal constitutional claims,<sup>258</sup> and the normative case for a federal forum is much weaker in the habeas context.<sup>259</sup> These considerations held sway with the Court, as well, when, in *Allen*, it held that a § 1983 lawsuit did not provide a federal vehicle for relitigating a Fourth Amendment claim previously litigated by the state courts, notwithstanding the fact that no federal court could otherwise

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255. *San Remo*, 125 S. Ct. at 2491.

256. John Dinan has observed that the allocation of power between the federal and state courts may depend upon “whether [the issue is] framed in terms of securing individual rights or preserving the balance of power between the federal and state governments.” See Dinan, *supra* note 26, at 149. See also Meltzer, *supra* note 200, at 2576 (“[T]he required scope of judicial review may depend on the kind of liberty involved.”); Meltzer, *supra* note 1, at 1204 (citing “the individual’s interest in vindicating his substantive constitutional rights” as a valid policy consideration when ascribing rules to govern procedural defaults). Accord Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for “Reasonably Erroneous” Applications of Federal Law*, 63 OHIO ST. L.J. 731, 784 (2002) (noting that habeas corpus involves the conflict between interests in finality, comity, and vindication of individual rights).

257. 28 U.S.C. § 2254(a) (2000) (providing that the “writ of habeas corpus” may issue “on the ground that [the petitioner] is in custody in violation of the Constitution *or laws* . . . of the United States”) (emphasis added).

258. See *supra* text accompanying notes 32–35.

259. See *supra* text accompanying notes 230–33.

review that constitutional claim in a habeas action due to the Court's holding as such in *Stone v. Powell*.<sup>260</sup>

d. Habeas Petitioners Are "In Custody"

Habeas is certainly unique among federal actions insofar as it requires that the petitioner be "in custody."<sup>261</sup> Indeed, in *Allen*, the Court cited the "unique purpose of habeas corpus . . . to release the applicant . . . from unlawful confinement" as the reason why habeas corpus actions—but not civil actions under § 1983 seeking redress of the same claims—are exempt from the traditional rule of *res judicata*.<sup>262</sup> Despite the Court's positive reliance on this rationale in *Allen*, the rationale fails to explain habeas's exemption from the paradigmatic construct.

For the "custody" requirement of habeas to be a factor that distinguishes it from actions governed by the paradigmatic construct, two legal premises must be true: (1) the reach and scope of habeas is tailored to hastening the release of state prisoners from custody, and (2) constitutional violations resulting in custody place a greater burden upon persons than does the impact of other constitutional violations such that a second litigation of constitutional issues is appropriate. If the first premise is untrue and habeas reaches beyond custody, then the writ sweeps beyond its justification. If the second premise is untrue and custody is comparable to other burdens or is otherwise somehow not unique, then this justification would not excuse habeas from the paradigmatic construct. As it turns out, neither premise is true.

With respect to the first premise, habeas, as currently interpreted by the Court, reaches beyond those people actually in custody. For nearly four decades, the Court has held that a prisoner need not be "physically confined in order to challenge his sentence on habeas corpus."<sup>263</sup> Moreover, the

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260. *Allen v. McCurry*, 449 U.S. 90, 103–05 (1980) (citing *Stone v. Powell*, 428 U.S. 465, 489–96 (1976)).

261. § 2254(a). *See also supra* text accompanying notes 141–46.

262. In full, the Court observed: "[T]he traditional exception to *res judicata* for habeas corpus review provides no analogy to § 1983 cases, since that exception finds its source in the unique purpose of habeas corpus—to release the applicant for the writ from unlawful confinement." *Allen*, 449 U.S. at 98 n.12 (internal citations omitted). *See generally* *Heck v. Humphrey*, 512 U.S. 477, 480 (1994) (noting that habeas is the exclusive means of seeking release from state custody); *Prieser v. Rodriguez*, 411 U.S. 475, 498 (1973) (observing that "the heart of habeas corpus" is "seeking immediate release or a speedier release from . . . confinement"). *Accord* sources cited *supra* note 237. Meltzer has likewise observed how habeas is different because it involves review of a "judgment of condemnation and the possibility of imprisonment." Meltzer, *supra* note 1, at 1215.

263. *Maleng v. Cook*, 490 U.S. 488, 491 (1989). *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2719 (2004) (implying that a person's release on that person's own recognizance may constitute custody)

Court has held that habeas petitioners satisfy the “custody” requirement as long as they are “in custody” at the time they initially file their habeas petitions;<sup>264</sup> their subsequent and unfettered release from custody does not in any way negate their statutory claim or render their claims moot under Article III.<sup>265</sup> Not surprisingly, given this elasticity in the “custody” requirement, the Court allows prisoners to attack convictions for which they have yet to be “in custody,”<sup>266</sup> and for which they have already completed their “custody.”<sup>267</sup> For persons in any of these situations, habeas is simply not about “release . . . from unlawful confinement.”<sup>268</sup>

With respect to the second premise (and assuming for the moment that the habeas petitioner is actually in custody), the burden of “custody” is not a persuasive basis for treating habeas petitioners differently than other litigants asserting violation of their federal constitutional rights. As an initial matter, the courts themselves have not consistently treated custody as a distinguishing factor in other contexts. For example, *federal* prisoners seeking release from custody under the federal analogue to § 2254—a motion for relief under 28 U.S.C. § 2255—are bound by the paradigmatic construct and its res judicata bar prohibiting relitigation of federal claims handled on direct appeal, even though § 2255 movants are subject to the same custody requirement as § 2254 petitioners.<sup>269</sup> Indeed, federal prisoners who are already out of custody—and hence must file a writ of *coram nobis*—face the same res judicata bar as those filing § 2255

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(citing *Hensley v. Municipal Court*, 411 U.S. 345, 350 n.8 (1973)); *Jones v. Cunningham*, 371 U.S. 236, 242–43 (1963) (holding that a person on parole is in custody); *United States v. Monreal*, 301 F.3d 1127, 1132 (9th Cir. 2002) (same); *United States v. Pregent*, 190 F.3d 279, 283 (4th Cir. 1999) (holding that a person on “supervised release” is in custody); *United States v. Brown*, 117 F.3d 471, 474 (11th Cir. 1997).

264. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Maleng*, 490 U.S. at 490; *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968).

265. *Carafas*, 391 U.S. at 238 (“[O]nce the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application.”). The Court in *Carafas* reached this result by noting that 28 U.S.C. § 2243 “contemplate[s] the possibility of relief other than immediate release from physical custody.” *Id.* at 239. While this may be true (as petitioners may seek declaratory relief invalidating their convictions), it merely confirms that habeas sweeps more broadly than a remedy directed solely at custody. The Court has held that a habeas petition does not become moot, within the meaning of Article III of the Constitution, when the petitioner is released from custody due to the collateral consequences attendant to a criminal conviction. *Cf. Spencer*, 523 U.S. at 8–12 (reaffirming this general rule, but declining to apply it to revocations of probation or supervised release).

266. *Peyton v. Rowe*, 391 U.S. 54, 55 (1968).

267. *Garlotte v. Fordice*, 515 U.S. 39, 41 (1995).

268. *Allen v. McCurry*, 449 U.S. 90, 98 n.12 (1980).

269. *See supra* text accompanying note 20.

motions.<sup>270</sup> Thus, as to federal convicts, the custody requirement is irrelevant to the applicability of *res judicata* and has no effect on which construct governs § 2255 motions. Equally poignant, placing special weight upon custody ignores the fact that other constitutional violations can result in burdens nearly as onerous and oppressive as custody, but lawsuits alleging those injuries are not excepted from the paradigmatic construct. For example, § 1983 plaintiffs may allege that they were unconstitutionally enslaved by other persons in violation of the Thirteenth Amendment, or that they were continually physically or verbally harassed on the basis of their race or gender; both lawsuits involve burdens that arguably approximate custody,<sup>271</sup> and yet are nevertheless subject to the paradigmatic construct.

Thus, the custody requirement attendant to habeas does not furnish a basis for treating habeas litigation differently than other litigation involving federal rights.<sup>272</sup>

e. Habeas Follows Criminal Litigation

A closely related variant of the custody argument is the argument that habeas corpus is only available following state *criminal* convictions,<sup>273</sup> and, as such, is simply an additional layer of procedural protection for criminal defendants not unlike the procedural protections of a higher burden of proof, the requirement of a jury, or the provision of adequate counsel that are concomitant with criminal, but not civil, litigation.<sup>274</sup>

This criminal-civil dichotomy ultimately fails, however. As an initial matter, it has not been applied in other, analogous circumstances. Federal

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270. *United States v. Morgan*, 346 U.S. 502, 505–06 (1954). Unlike 28 U.S.C. § 2255, which has a statutory basis, the writ of *coram nobis* is grounded in the federal courts' common law power to fashion interstitial relief under 28 U.S.C. § 1651. *Id.* at 506–07. See generally Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1461–64 (2002).

271. Accord Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 309 (2003) (“[S]ome civil judgments could impact a litigant more severely than would some prison terms.”).

272. Accord Friedman, *supra* note 13, at 1264 n.158 (noting that the custody requirement of habeas is “perplexing” because it does not explicitly require incarceration).

273. *Id.* at 1253, 1264 (arguing that the availability of habeas in criminal cases “points to a gap on the civil side . . . [where] there is no subsequent adjudication of federal claims in a federal forum”).

274. See *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (reaffirming the Sixth Amendment requirement of a jury trial for facts affecting the statutory maximum of a criminal sentence, including the elements); *In re Winship*, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt to sustain a criminal conviction); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring provision of counsel in felony cases).

prisoners, with motions for relief under 22 U.S.C. § 2255 following criminal conviction, are subject to the same rules of res judicata as civil lawsuits.<sup>275</sup> The dichotomy is also not an adequate explanation even in regard to state prisoners. A state conviction of imprisonment ostensibly has two consequences: (1) the fact of conviction (which may be used to enhance future sentences, carries a stigma, etc.), and (2) incarceration. Neither consequence justifies the differential treatment of habeas. As noted above,<sup>276</sup> habeas relief is not concerned solely with securing a prisoner's release from custody. Habeas is also not concerned with removing the stigma of conviction, as prisoners sentenced to no time in prison or who have been released prior to exhausting their state remedies may not petition a federal court for habeas relief<sup>277</sup> (or, for that matter, for a writ of *coram nobis*),<sup>278</sup> and are thus effectively relegated to the paradigmatic construct's absence of collateral review. Other commentators have observed how the criminal-civil dichotomy is "not altogether satisfying."<sup>279</sup>

f. State Courts Lack the Competency of Federal Courts

Others have argued that the relative incompetence of the state courts vis-à-vis the federal courts in adjudicating federal rights warrants relitigation of issues previously handled in state court, thereby making express a central premise of the Nationalist paradigm.<sup>280</sup> The alleged superiority of the federal courts is typically viewed as a consequence of the structural protections of Article III (initial appointment, lifetime tenure, and the Emoluments Clause),<sup>281</sup> and of their singular loyalty to the federal system (whereas state courts have divided loyalty to the state and the

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275. See *supra* text accompanying note 20.

276. See *supra* Section III.C.2.d.

277. See *supra* text accompanying notes 141–46.

278. See, e.g., *Obado v. New Jersey*, 328 F.3d 716, 718 (3d Cir. 2003); *Lowery v. McCaughtry*, 954 F.2d 422, 423 (7th Cir. 1992); *Sinclair v. Louisiana*, 679 F.2d 513, 514 (5th Cir. 1982); *Thomas v. Cunningham*, 335 F.2d 67, 69 (4th Cir. 1964); *Rivenburgh v. Utah*, 299 F.2d 842, 843 (10th Cir. 1962).

279. Friedman, *supra* note 13, at 1264. See also *id.* at 1253 (“[T]here is no satisfactory explanation for the differential treatment of federal claims in criminal and noncriminal proceedings.”).

280. See *supra* text accompanying note 209.

281. As Vicki Jackson has explained:

[T]he constitutionally guaranteed tenure and salary protections for Article III federal judges promote judicial independence in ways that states may, but need not, provide for their judges. There is thus reason to believe that federal courts have some institutional superiority in judicial independence over the state courts, derived from the structural tenure and salary provisions of Article III.

Jackson, *supra* note 32, at 116. See also *Neuborne*, *supra* note 116, at 1120–21 (arguing that federal judges have greater “technical competence,” a superior “psychological set,” and better insulation from the majoritarian processes because of life tenure).

federal government).<sup>282</sup> It is this difference, for example, that explains why, under this view, § 2255 motions are placed under the paradigmatic construct (because direct review was handled by federal judges) while habeas petitions are governed by a different construct (where direct review was handled by the state courts).<sup>283</sup>

Relying on the relative incompetence of state courts as a reason for permitting relitigation of issues on habeas review suffers from several defects. First, as noted above, the so-called parity debate is nearly impossible to resolve as a matter of judicial policy or, at least at this time, empirical data.<sup>284</sup> Second, the argument that state courts are relatively incompetent is not so much a basis for distinguishing habeas from the paradigmatic construct as it is a wholesale attack on the viability of the paradigmatic construct itself, because the paradigmatic construct itself reflects a fundamental confidence in the competence of state courts to resolve federal issues, as it deems their resolution of issues final after a brief opportunity for Supreme Court certiorari review.<sup>285</sup> As a result, this argument is not a particularly helpful means of reconciling the theoretical disjunction of the two constructs, especially in the context of habeas, where state courts are charged with routinely applying the constitutional procedural protections with which they are quite familiar.<sup>286</sup> Lastly, the sole utilitarian basis for evaluating the persuasiveness of the incompetence rationale—looking to see when, if at all, state courts are deemed competent to adjudicate federal issues—refutes the notion that the state courts are incompetent to resolve federal issues. In addition to the general rule embodied by the paradigmatic construct, the Court in *Allen* applied that construct to a § 1983 plaintiff who sought to relitigate a Fourth Amendment issue resolved by the state courts when he was a state prisoner.<sup>287</sup> The Court's refusal to permit the § 1983 plaintiff to relitigate that federal constitutional issue first litigated when he was involuntarily in state court evinces a confidence in the state court litigation of that issue in a context nearly identical to habeas—the relitigation of a federal

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282. Redish, *supra* note 35, at 1826 (arguing that state courts have “divided allegiance” to state and federal law that may interfere with their willingness to strike down state law).

283. *See supra* Section III.C.2.d.

284. *See supra* note 116.

285. *See supra* text accompanying notes 47, 124.

286. *See supra* text accompanying notes 227–33.

287. *Allen v. McCurry*, 449 U.S. 90, 103–05 (1980).

constitutional issue after mandatory litigation in the state courts.<sup>288</sup> Thus, while there certainly is room to debate the relative parity of state and federal courts, the relative competence of state courts has not furnished a basis for distinguishing close analogues to habeas and, thus, does not furnish a basis for taking habeas itself outside the paradigmatic construct that rests upon a judgment that the state courts *are* competent to adjudicate federal issues.

g. Habeas Has a Unique History

The writ of habeas corpus is unquestionably *sui generis*<sup>289</sup>—born in the Middle Ages,<sup>290</sup> enshrined in the Constitution itself,<sup>291</sup> and codified to some extent in the Judiciary Act of 1789.<sup>292</sup> In *Brown v. Allen*, the Court cited and relied upon the unique history of habeas—and its traditional exception from the doctrine of *res judicata*<sup>293</sup>—to hold, for the first time, that federal courts could revisit the rulings of state courts when entertaining a habeas petition filed by a state prisoner.<sup>294</sup> As discussed below, however, the history of the writ of habeas corpus does not support the wholesale exemption of habeas as it exists today under § 2254 from the paradigmatic construct.

At common law, the writ of habeas corpus was sought primarily by persons detained pursuant to executive authority or prior to trial.<sup>295</sup> Even

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288. *Id.* at 105 (finding that a “general distrust of the capacity of the state courts” is not a reason to allow relitigation of issues). *See also* *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988) (noting that state courts are “presumed competent to resolve federal issues”).

289. *Brown v. Allen*, 344 U.S. 443, 512 (1953) (Frankfurter, J., concurring) (“The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized.”).

290. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 14–15 (1979); Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 905 & n.244 (1994) (“Habeas corpus dates back at least to the early Middle Ages.”); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042 (1970) (same).

291. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

292. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (authorizing the writ of habeas corpus to prisoners “in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same”).

293. *Allen*, 449 U.S. at 98 n.12 (noting “the traditional exception to *res judicata* for habeas corpus review”); *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973) (“Principles of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings.”); *Salinger v. Loisel*, 265 U.S. 224, 230 (1924) (“At common law, the doctrine of *res judicata* did not extend to a decision on habeas corpus refusing to discharge the prisoner.”). *See also supra* note 217.

294. *Brown*, 344 U.S. at 462–63 (citing *Salinger*, 265 U.S. at 231).

295. *Rasul v. Bush*, 124 S. Ct. 2686, 2692 (2004) (“[A]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”) (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)); *Brown*,

when a writ challenged detention following a conviction, a court entertaining a writ of habeas corpus could only inquire into the jurisdiction of the committing court; if the committing court was found to have had proper jurisdiction, then the writ had to be dismissed.<sup>296</sup> In short, the common law writ of habeas corpus was not a “writ of error” for reviewing the propriety of prior judicial rulings.<sup>297</sup> It was this narrow writ that existed when the Constitution was drafted in 1787 and ratified in 1791.

The evolution of the writ of habeas corpus from the traditional writ to its current iteration in § 2254 occurred relatively recently. The writ of habeas corpus codified by the First Congress in 1789 extended only to persons detained pursuant to federal authority.<sup>298</sup> In the early nineteenth century, the writ was extended to persons in state custody but only if they were arrested for committing acts authorized by federal law<sup>299</sup> or if they were the subject or citizen of a “foreign state.”<sup>300</sup> It was not until 1867 that the writ of habeas corpus was extended generally to persons held in state custody in violation of federal law.<sup>301</sup> Even then, the Court adhered to its prior rule that the writ of habeas corpus was not a writ of error.<sup>302</sup> It was not until the 1920s that the Court hinted that it might be appropriate to relitigate issues on habeas for which state courts had failed to provide

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344 U.S. at 533 (1953) (Jackson, J., concurring) (“The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.”); Bator, *supra* note 35, at 475 (“[T]he classical function of habeas corpus was to assure the liberty of subjects against detention by the executive or the military without any court process at all, not to provide postconviction remedies for prisoners.”).

296. Preiser, 411 U.S. at 485; Woolhandler, *supra* note 226, at 590–91. Gary Peller has argued that the habeas courts were not limited to verifying the jurisdiction of the committing court, but rather, that habeas reached all constitutional violations which, at that time, were simply limited to ensuring jurisdiction. Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 621–30 (1982). That thesis has met with resistance. See Woolhandler, *supra* note 226, at 601 (“Peller’s error lies in his refusal to accept that when the Court stated that habeas was limited to issues of jurisdiction, it was indeed discussing a limitation on habeas rather than referring solely to the merits of a due process claim.”).

297. Bator, *supra* note 35, at 471 (“The essential touchstone continued to be that the writ of habeas corpus was not to be used as a writ of error.”).

298. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82. Accord Painter, *supra* note 114, at 1611 (“The Judiciary Act [of 1789] . . . did not extend to prisoners confined pursuant to state law.”).

299. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634, 634–35.

300. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, 539–40.

301. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86.

302. The Court did engraft two limited exceptions where it would inquire beyond jurisdiction. In *Ex parte Seibold*, 100 U.S. 371 (1879), the Court held that it would inquire into whether the conviction was pursuant to an unconstitutional statute. In *Ex parte Lange*, 85 U.S. 163, 165–78 (1873), the Court held that it would inquire into whether the current sentence was an “illegal” second sentence in violation of double jeopardy because the second court lacked “authority” to impose judgment in that circumstance.

“corrective process.”<sup>303</sup> It would take another thirty years—nearly a century from its enactment—for the Court to interpret the 1867 statute as authorizing federal courts to disregard the prior rulings of state courts on federal issues presented in habeas petitions.

When the Court in *Brown* excused habeas petitions from the general rule of res judicata, it relied upon the exception attendant to the traditional writ of habeas corpus, citing *Salinger v. Loisel*.<sup>304</sup> The *Brown* Court’s conclusion does not follow from these authorities. As noted above, the traditional writ of habeas corpus was largely aimed at evaluating the legality of pretrial detention and, even when a court was presented with a person who was detained pursuant to a conviction, it authorized a court to examine no more than the jurisdiction of the court that committed the habeas petitioner. Indeed, *Salinger* itself involved a prisoner’s challenge to his pretrial detention.<sup>305</sup> In these situations, the habeas court is either not reviewing any prior judicial order or is giving minimal scrutiny to such an order; accordingly, the impact of not applying res judicata is relatively minor. The writ of habeas corpus codified by § 2254, however, necessarily involves the revisiting of the merits of the decisions of state courts; the impact of disregarding res judicata and thereby disregarding a fulsome decision on the merits of a federal issue pronounced by a state court is substantially greater. To apply the exemption from res judicata attendant to the narrow, traditional writ to the broad, modern writ ignores the cardinal, due process-based principle that the level of judicial scrutiny and deference to be given a claim depends in large measure upon what process was

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303. In *Frank v. Mangum*, 237 U.S. 309, 326 (1915), the Court in examining a claim that a habeas petitioner’s trial was “mob dominated” adhered to the traditional rule that the writ of habeas corpus “cannot be employed as a substitute for the writ of error.” The Court explained that this rule of noninterference presumed that the state proceedings accorded with due process insofar as they provided a defendant with notice, a hearing and opportunity to be heard, and a court of competent jurisdiction. *Id.* Thus, a federal court retained the authority to inquire into the sufficiency of the state proceedings to ensure that they provided sufficient “corrective process” to remedy any errors at a criminal trial: “[I]f the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law.” *Id.* at 335. In *Moore v. Dempsey*, 261 U.S. 86, 91 (1923), the Court adhered to *Frank* and remanded a case alleging a “mob dominated” trial for a hearing as to whether the state’s “corrective process” was adequate.

304. See *supra* note 294.

305. In *Salinger*, the habeas petitioner had failed to surrender himself on several occasions and filed multiple habeas petitions to avoid detention—all prior to his trial for wire fraud. The government argued that a New York decision regarding the petitioner’s bail was res judicata to the Louisiana court’s bail decision. The Court refused to exempt the prior bail decision from the traditional exception to res judicata for habeas petitions, but nevertheless held that the prior decision could be considered and “even given controlling weight.” *Salinger v. Loisel*, 265 U.S. 224, 230, 230–31 (1924)

already given to that claim.<sup>306</sup> Because a federal claim raised in a modern § 2254 motion has, by definition, already been heard by the state courts, resort to the traditional writ's exception from *res judicata* is inappropriate.<sup>307</sup>

There is one further wrinkle: the dramatic expansion of the writ of habeas corpus in 1867 to reach state prisoners. Some have interpreted this amendment as a Congressional mandate, made in the context of the Civil War Amendments, that state courts cannot be trusted.<sup>308</sup> But the writ that the Thirty-ninth Congress extended to state prisoners in 1867 was the narrow, common law writ, not the writ that exists today.<sup>309</sup> That it took the Supreme Court another eighty-six years to hold that the writ authorized relitigation of issues resolved by the state courts notwithstanding *res judicata* confirms that the Thirty-ninth Congress had no contemporaneous intent to exempt habeas either from its common law scope in 1867 or from the paradigmatic construct (beyond inquiries into the committing court's jurisdiction).

Although the history of the writ of habeas corpus does justify limited exemptions from the paradigmatic construct (for example, for inquiries into jurisdiction), it does not support the *Brown* Court's decision to exempt the modern writ from the paradigmatic construct.

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As this discussion indicates, none of the reasons typically proffered to justify the exclusion of habeas from the paradigmatic construct is satisfactory. Parts IV and V examine whether and how it is possible to reconcile habeas with the paradigmatic construct.

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306. *See id.* at 231 ("Among the matters which may be considered, and even given controlling weight, are . . . a prior refusal to discharge on a like [habeas] application."). As Meltzer has observed:

Indeed, the contrast . . . between postconviction habeas (where a prisoner has already had the opportunity to obtain review of most if not all of his legal claims) and executive detention simpliciter supports the point that the quality of any prior proceeding importantly affects the scope of review on habeas.

Meltzer, *supra* note 200, at 2576. *Accord* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Woolhandler, *supra* note 226, at 593-95.

307. *See generally* Heck v. Humphrey, 512 U.S. 477, 491 (1994) (Thomas, J., concurring) ("It has long been recognized that we have expanded the prerogative writ of habeas corpus and § 1983 far beyond the limited scope either was originally intended to have.").

308. Jackson, *supra* note 32, at 122 (observing that the Fourteenth Amendment "changed" federalism); Lee, *supra* note 116, at 202 ("In enacting [the 1867 habeas statute], the Thirty-ninth Congress essentially made a legislative finding of fact that state courts are less trustworthy in the vindication of civil rights and civil liberties than federal courts.").

309. *See supra* notes 301-02.

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#### IV. THE RECONSTRUCTION OF HABEAS THROUGH RECONCEPTUALIZATION

Thus far, this Article has explained how the writ of habeas corpus available to state prisoners does not fit within the paradigmatic construct governing the interaction between state and federal courts, and how none of the typical justifications for the habeas construct adequately harmonizes the coexistence of these two divergent constructs within the realm of federal courts. The next two parts of this Article address possible ways to reconstruct the writ in order to better harmonize it with the paradigmatic construct. This part examines two potential ways of reconstructing the writ by reconceptualization—that is, by making only minor changes to the writ itself but recalibrating its theoretical foundation with the aim of making habeas less of a theoretical outlier in the law of federal courts and, in particular, with respect to the five doctrines that synergistically function to create the paradigmatic construct: the Anti-Injunction Act; the *Younger* abstention doctrine; the *Rooker-Feldman* doctrine; full faith and credit, collateral estoppel and res judicata; and the Eleventh Amendment.<sup>310</sup>

##### A. HABEAS AS EXTENDED APPEAL

Rather than conceiving of habeas as an independent and original civil action, some commentators—Friedman, Liebman, and Ryan, in particular<sup>311</sup>—have argued that habeas should be viewed as an extension of the appellate process that begins immediately following conviction in the state appellate courts and continues through the conclusion of one round of habeas review by the federal courts. In this respect, federal courts hearing habeas petitions are acting as proxies for the Supreme Court in its review on direct appeal.<sup>312</sup> Seen this way, federal habeas courts review the decisions of the state courts that precede them in an unbroken chain of appellate review, much as state supreme courts review the decisions of the state appellate court that preceded them in the chain.

This reconceptualization of habeas finds support in many aspects of federal habeas review, which bear a striking resemblance to the latter

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310. See *supra* Section II.B.

311. Friedman, *supra* note 14, at 261; Liebman & Ryan, *supra* note 31, at 882–84; McCord, *supra* note 31, at 838. See also Roosevelt, *supra* note 44, at 1917 (“[H]abeas review is now the functional equivalent of a dispersed direct review.”).

312. This conceptualization is supported by Amar’s view that Congress may “shift final resolution of any cases within the Supreme Court’s appellate jurisdiction to any other Article III court that Congress may create.” Amar, *supra* note 66, at 1504.

stages of a single, continuous avenue of appeal, and bear little resemblance to an original, civil action. The exhaustion and procedural default doctrines that effectively require habeas petitioners to raise issues in the state courts as a prerequisite to their review on habeas provide a “channeling” function similar in effect to the procedural rules that govern most appeals and require litigants to preserve issues in a lower court before they may be reviewed by a superior tribunal.<sup>313</sup> Along the same lines, the appeal of a conviction in state court may not be removed via a habeas petition immediately to federal court,<sup>314</sup> much as state criminal defendants must raise their claims in each state court before raising them again before the next highest state tribunal.<sup>315</sup> Habeas courts defer to the factual findings of the state courts,<sup>316</sup> much as state appellate courts defer to the findings of the trial court.<sup>317</sup> Moreover, habeas review is precluded as to the merits of any claim heard on direct appeal by the Supreme Court upon a grant of certiorari,<sup>318</sup> thus reinforcing the notion that habeas courts act as the Court’s residual proxy in evaluating federal claims not heard by the Court itself.<sup>319</sup>

Although it can be a possible lens through which to view habeas, this conceptualization of the writ is only marginally more theoretically consistent with the doctrines that function to elucidate the paradigmatic construct than is viewing habeas as an entirely independent action. To be sure, habeas would fall under *two* exceptions to the Eleventh Amendment: the *Ex parte Young* lawsuit for actions seeking prospective relief for redress of constitutional violations,<sup>320</sup> and the *Cohens v. Virginia* exception for federal review of federal issues on direct appeal.<sup>321</sup> This provides the marginal benefit of justifying habeas on the basis of an Eleventh

313. Compare *supra* text accompanying notes 152–70, with ARIZ. R. CRIM. P. 21.3(c), and COLO. R. CRIM. P. 30, and FLA. R. CRIM. P. 3.390(d), and ILL. R. CRIM. P. 451(b).

314. State court appeals are not “civil,” and hence fall outside the scope of the removal statute. See 28 U.S.C. § 1441(b) (2000).

315. Liebman & Ryan, *supra* note 31, at 883–84.

316. 28 U.S.C. § 2254(e)(1) (2000). See also *supra* note 171.

317. See *supra* note 189.

318. 28 U.S.C. § 2244(c) (2000). See also *supra* note 135.

319. Fallon, *supra* note 23, at 1243 (“[J]urisdictional parallelism reduces pressure on the appellate docket of the Supreme Court, since the Court knows that legal issues over which it declines to exercise direct review will still be subject to federal habeas jurisdiction.”); Jackson, *supra* note 32, at 116 (observing that the federal courts are “important proxies to the Supreme Court”).

320. See *supra* text accompanying notes 88–92.

321. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 410–11 (1821). See *supra* note 86 and accompanying text. Accord Liebman & Ryan, *supra* note 31, at 883 (noting the dual exceptions to the Eleventh Amendment and arguing that habeas must be seen as an appellate proceeding).

Amendment exception that did not rest on habeas itself for its justification.<sup>322</sup>

At first blush, it would appear that the appellate reconceptualization of habeas would also be more consistent with *res judicata* and full faith and credit.<sup>323</sup> If habeas were seen as an extension of the state appellate process, the conviction under review would ostensibly be less “final” at the time of federal habeas review because the appellate process that is usually synonymous with finality is not yet completed. To be sure, *res judicata* and full faith and credit attach only to “final” judgments.<sup>324</sup> This ignores, however, the fact that the appellate review is being conducted by two different sovereigns in their independent sovereign capacities. Thus, the judgment of the *state* courts is truly final before the lower *federal* courts on habeas initiate review of that judgment.<sup>325</sup> As a result, perceiving habeas as part of a long appellate process does not obviate the tension between habeas review and the doctrines of *res judicata* or full faith and credit.

Moreover, there are several aspects of habeas review that are, on a purely descriptive level, inconsistent with treating habeas as an extension

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322. See *supra* notes 19, 221 and accompanying text (discussing the circular logic of using *Ex parte Young* to justify habeas, when habeas was part of the Court’s rationale for creating the *Ex parte Young* exception to the Eleventh Amendment in the first place). As noted above, the exhaustion doctrine largely makes habeas in any conceptualization consistent with the Anti-Injunction Act and *Younger* abstention doctrine, because habeas only applies to completed state proceedings and those two doctrines constrain federal intervention only in ongoing state proceedings. See *supra* Sections II.B.1 and II.B.2.

323. See Liebman & Ryan, *supra* note 31, at 882–83 (arguing that habeas must be appellate in nature because *res judicata* does not apply to habeas actions).

324. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (“A *final* judgment in one state . . . qualifies for recognition throughout the land.”) (emphasis added); *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 792 (1986) (noting that “*final* state-court judgments are entitled to full faith and credit”) (emphasis added); *Hanson v. Denckla*, 357 U.S. 235, 256 (1958) (“The rule of primacy to the first *final* judgment is a necessary incident to the requirement of full faith and credit.”) (emphasis added).

325. Admittedly, the case law provides that a conviction is “final” for purposes of *res judicata* and full faith and credit at the time of conviction, regardless of the pendency of any appeal. See *In re Kane*, 254 F.3d 325, 328 (1st Cir. 2001); *Conopco, Inc. v. Roll Int’l*, 231 F.3d 82, 90 (2d Cir. 2000) (noting that the rule in “federal court and the vast majority of states” is that judgment is final, even if subject to appeal); *Prymer v. Ogden*, 29 F.3d 1208, 1213 n.2 (7th Cir. 1994) (“[T]he general rule in American jurisprudence [is] that a final judgment of a court of first instance can be given collateral estoppel effect even while an appeal is pending.”); *Hawkins v. Risley*, 984 F.2d 321, 324–25 (9th Cir. 1993) (same); RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 972–73 & nn.128–34 (1998) (“Federal preclusion law provides that judgments are final pending appeal.”). But this rule involves finality vis-à-vis a collateral attack (such as in habeas) as to the facts established by the judgment. It does not make the judgment final as to the direct appeal of that judgment (or else no appeal would be permitted).

of a single chain of appellate review by two sovereigns.<sup>326</sup> On direct appeal, the reviewing court gives plenary review to the lower court's legal rulings.<sup>327</sup> Since 1996, however, habeas courts defer to the legal rulings of state courts and may only overturn them if they are not only wrong, but are also *unreasonably* wrong.<sup>328</sup> In a similar vein, a petitioner appealing a conviction is entitled to the benefit of any new decisions of constitutional criminal procedure that are handed down while a direct appeal is pending. That retroactivity rule, however, does not extend to habeas review, thereby distinguishing habeas from direct appeal in a second way. On direct appeal, a prisoner is entitled to have a conviction or sentence reversed due to constitutional error unless the *state* proves that the error was harmless "beyond a reasonable doubt";<sup>329</sup> on habeas review, however, an error does not require reversal unless the *petitioner* shows that the error "'had a substantial and injurious effect or influence in determining the jury's verdict.'"<sup>330</sup> Issues procedurally defaulted on direct review may be reviewed solely for plain error, while issues procedurally defaulted on habeas may be revisited only if one of the exceptions to the procedural default doctrine applies.<sup>331</sup> Lastly, appellate courts are limited to the record developed at trial,<sup>332</sup> while habeas courts may receive new facts.<sup>333</sup>

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326. To be sure, it is possible to explain the differences catalogued in this paragraph as a product of the writ's status as a "special kind" of appeal that is less exacting than the typical, direct appeal. Although plausible, this explanation fails to explain habeas's status as an independent, original action or to explain why habeas courts are empowered to develop the record further; these facets of habeas corpus are not typically associated with appellate review, regardless of how deferential it is.

327. *Ornelas v. United States*, 517 U.S. 690, 701 (1996) ("[I]t is well settled that appellate courts . . . 'decid[e] questions of law de novo.'" (quoting *First Options, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995))). As the Court has explained, "independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.* at 697.

328. See 28 U.S.C. § 2254(d) (2000). See also *Middleton v. McNeil*, 541 U.S. 433, 437–38 (2004); *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003); *Williams v. Taylor*, 529 U.S. 362, 408–10 (2000). See generally *supra* note 172 and accompanying text.

329. See *supra* note 174 and accompanying text.

330. *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Accord *McCord*, *supra* note 31, at 834 (declaring *Brecht* a "disaffirmation of the appellate review vision"). See also *supra* note 173.

331. See *supra* text accompanying notes 156, 160–68. See also FED. R. CRIM. P. 52(b); *United States v. Olano*, 507 U.S. 725, 725 (1993).

332. See FED. R. APP. P. 10(a).

333. 28 U.S.C. § 2246 (2000) ("On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit."). See also § 2254(e)(2) (detailing standards under which an evidentiary hearing is warranted); 28 U.S.C. § 2254 note (1977) (Rules 6–8) (setting forth procedures for obtaining discovery, for expanding the record, and for convening evidentiary hearings). Of course, the need for a federal court to hear new facts should, in practice, be relatively minor. The exhaustion doctrine requires the presentation of any then-extant claims to the state courts, where the factual record may be developed on direct appeal or during state collateral

To be sure, it may be possible to eliminate each of these dissimilarities by revising the writ itself. Doing so, however, would fail to cure the fundamental defect with the utility of reconceiving habeas as a federal extension of the state-based appellate process: the writ would still be inconsistent with *res judicata*, full faith and credit, and the *Rooker-Feldman* doctrine that prohibits the lower federal courts from sitting as appellate courts reviewing the state courts.<sup>334</sup> In fact, this reconceptualization would only exacerbate the inconsistency with these doctrines by explicitly calling habeas an appeal. Because this particular means of reconceptualizing habeas is not descriptively accurate and fails to harmonize habeas with most of the doctrines relevant to the paradigmatic construct in the habeas context, it is not an ideal means of conceptually reconstructing habeas.

#### B. HABEAS AS A UNITARY REVIEW PROCEEDING OF TWO SOVEREIGNS

Rather than viewing habeas as an independent federal action that follows direct appeal in state court or as a continuation of that state appeal, I propose that direct appeal in state courts and habeas review in federal courts be viewed as a single, unitary, *federal* proceeding. After examining the contours of this reconceptualization, this part examines its efficacy in terms of harmonizing habeas with the doctrines of the paradigmatic construct. This proposal enables habeas to be viewed more consistently with those doctrines, but presents a rare species of forum-shifting lawsuits of potentially dubious constitutionality. This part examines the legal feasibility of this proposal and then closes by looking at how the writ may be altered to fit it more neatly within this reconceptualization.

##### 1. The Contours of the Dual-Sovereign Habeas Action

Under the proposed reconceptualization, which is a form of “cooperative federalism”<sup>335</sup> as well as a “multijurisdictional model,”<sup>336</sup>

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proceedings. *See supra* text accompanying notes 152–57. Thus, it would only seem that an evidentiary hearing would be appropriate where new facts or new, retroactively applicable rules of law are available that did not previously exist and for which no state avenue of review remains available. One would expect claims fitting this description to be few and far between.

334. *See supra* Section II.B.3.

335. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1694 (2001). Weiser coins the term “cooperative federalism” to refer to the sharing of authority between federal and state agencies in the federal deregulation of the telecommunications industry. *Id.* at 1693–95. He contrasts it with “preemptive federalism,” where federal authorities assume control over an area within federal competence, and “dual federalism,” where the state authorities act largely autonomously within the legal strictures set out by Congress. *Id.* at 1694, 1697.

Congress would be deemed to have created a unitary, two-stage federal cause of action in which jurisdiction vests in both state and federal courts. In the first stage, Congress has created a form of nonremovable, federal question jurisdiction under which state prisoners attack their state convictions on state and federal grounds in state court. The initial, state-court stage of the action is followed by further review of federal questions in the federal courts—by the Supreme Court first via certiorari review to enable the Court to hear any immediately pressing questions, and thereafter by the lower federal courts (following any further litigation in state collateral proceedings).

This reconceptualization of habeas helps to explain several aspects of postconviction review that are otherwise anomalous. In most cases, as Liebman and Ryan observe,<sup>337</sup> a lawsuit involving state court consideration of federal questions may be immediately removed to federal court, where those federal questions and any pendant state questions will be reviewed.<sup>338</sup> The inability of state prisoners to remove their direct appeals in state court to federal court may be explained as part of Congress's creation of a unitary action for state prisoners.<sup>339</sup> More to the point, by calling upon state courts to use their inherent authority under the Supremacy Clause and Article III to review federal questions with which they are familiar, as well as state questions during the first stage of this unitary proceeding—and by precluding immediate removal—Congress gains two benefits. First, state law questions are immediately reviewed by the state courts. These courts presumably have the most expertise at interpreting state law,<sup>340</sup> which may

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336. Friedman makes a forceful argument that the “either-or” approach to allocating jurisdiction—that is, that an issue must be resolved “either” in state court “or” federal court, but not both—is deficient, such that multijurisdictional models have an important role to play in the allocation of judicial resources. *See* Friedman, *supra* note 13, at 1216–26.

337. Liebman & Ryan, *supra* note 31, at 883–84.

338. The current rule, of course, applies to “civil actions.” *See* 28 U.S.C. § 1441(b) (2000). Removal of a case to federal court encompasses both federal law issues and “all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a) (2000). A district court nevertheless retains the discretion, in certain circumstances, to decline to exercise this supplemental jurisdiction. *See* § 1367(b), (c).

339. It is not entirely clear, as argued *supra* in notes 2 and 227, whether federal constitutional claims pertinent to the procedural regularity of a state criminal trial would qualify as removable claims, even if § 1441 applied to criminal cases, given that federal, substantive defenses do not furnish a basis for removal. *See* *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2494–95 (2004).

340. *Accord* *Preiser v. Rodriguez*, 411 U.S. 475, 497–98 (1973) (“Federal habeas corpus . . . serves the important function of allowing the State to deal with . . . peculiarly local problems on its own, while preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress.”).

in turn obviate the need to reach federal issues<sup>341</sup> and avoid any need for certification of state law questions back to the state courts for guidance.<sup>342</sup> Second, channeling appeals to state courts first also makes best use of the familiarity of state appellate courts with state procedures and permits state courts to undertake most of the fact-finding function (primarily during state postconviction proceedings raising issues that require development of facts outside the record, such as claims involving ineffective assistance of counsel or government misconduct).<sup>343</sup>

Turning to the federal-court stage of this unitary suit, this conceptualization may be seen as aiding the speedy resolution of important federal questions by providing a direct outlet to the Supreme Court for such questions on certiorari review prior to any state court collateral proceedings.<sup>344</sup> Questions of a less pressing nature are then to be reviewed by the lower federal courts, once any supplemental fact-finding is completed by the state courts in collateral proceedings.<sup>345</sup> This additional federal court review creates a vehicle for reviewing the rulings of the state courts to ensure their accuracy and for addressing issues relying on facts and law unavailable during the state-court portion of the unitary lawsuit.<sup>346</sup>

## 2. The Virtue of the Unitary Proceeding

When viewed as a forum-shifting, unitary proceeding, the writ of habeas corpus, although having the same functionality as the appellate reconceptualization, aligns more neatly with the doctrines of the

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341. *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.”) (internal citations omitted). Indeed, the adequate and independent state grounds and procedural default doctrines, discussed *supra* in the text accompanying notes 44, 135, 158–68, are designed with this same goal—avoiding the unnecessary resolution of federal issues—in mind.

342. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 226–27 (1960). For a detailed history of the certification doctrine, see Nash, *supra* note 35, at 1686–90. However, certification appears to operate unidirectionally—the state courts may not certify questions to the Supreme Court, at least. See ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* § 9.1, at 449 (7th ed. 1993).

343. “The state court is the appropriate forum for resolution of factual issues in the first instance . . .” *Keeney v. Tomayo-Reyes*, 504 U.S. 1, 9 (1992). See also *supra* notes 332–33.

344. See SUP. CT. R. 10.1(a). See also *supra* note 135 and accompanying text.

345. The exhaustion requirement may obligate a state prisoner to present a claim involving extra-record facts to the state courts in a state postconviction proceeding. See 28 U.S.C. § 2254(b)(1), (e)(2) (2000).

346. Such claims are, by definition, excused from the ambit of the procedural default doctrine as applied to legal claims, as well as facts. See § 2254(e)(2); *supra* text accompanying note 163.

paradigmatic construct. This reconceptualization, like the other, also falls within multiple exceptions to the Eleventh Amendment. Initially, a unitary habeas proceeding would seem to fall within the *Cohens v. Virginia* exception created for the Court's review of state convictions on direct appeal because it is similarly the vehicle for the state and federal review of state convictions.<sup>347</sup> Indeed, the Court's discretionary review immediately following state court review, which is what *Cohens* addressed, is a part of the unitary lawsuit and thus the *Cohens* exception designed for it would arguably reach the remaining stages of the unitary lawsuit aimed at the same end. Additionally, the unitary habeas suit constitutes an *Ex parte Young* lawsuit for prospective, nonmonetary relief against state officials for the violation of federal rights.<sup>348</sup> The forum-shifting aspect of the lawsuit does not detract from this conclusion, as the Eleventh Amendment's application to federal question lawsuits in both federal and state courts carries with it a corresponding *Ex parte Young* exception.<sup>349</sup> However, the availability of the *Cohens* exception allays the danger of bootstrapping that springs from relying solely on *Ex parte Young* to justify habeas's continued existence.<sup>350</sup>

Unlike the appellate reconceptualization, however, the unitary view accords with the other doctrines. Because proceedings before state courts comprise only one part of a unitary habeas federal lawsuit that functions as *the* direct appeal of the judgment, rather than as a precursor to an independent habeas action in federal court, the preclusive doctrines of res judicata and full faith and credit do not apply until the unitary action is completed.<sup>351</sup> As a result, the unitary habeas proceeding is consistent with these two doctrines.

This reconceptualization of the writ is also more consistent with the *Rooker-Feldman* doctrine's bar of lower federal court review of state court judgments.<sup>352</sup> To be sure, a unitary action continues to resemble an appeal

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347. See *supra* text accompanying note 86.

348. See *supra* text accompanying notes 89–92.

349. In *Alden v. Maine*, 527 U.S. 706, 712–13 (1999), the Court held that the Eleventh Amendment barred lawsuits against a state in its own courts. The Court nevertheless defined—and limited—its holding by recognizing that *Ex parte Young* remained a viable exception to the Amendment even when applied to lawsuits in the state courts. *Id.* at 747, 763.

350. See *supra* text accompanying notes 19, 221 & 322.

351. Cf. *Arizona v. California*, 530 U.S. 392, 410 (2000) (“[W]hile the technical rules of preclusion are not strictly applicable [in the context of a single ongoing original action], the principles upon which these rules are founded should inform our decision.”) (quoting *Arizona v. California*, 460 U.S. 605, 619 (1983)).

352. See *supra* Section II.B.3.

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insofar as the federal court phase of the unitary lawsuit follows the state court phase, and the federal courts accordingly and necessarily review federal issues previously decided by the state courts. But federal “review” of state court rulings as part of the unitary proceeding is different from the federal review of final state judgments prohibited by the *Rooker-Feldman* doctrine. In the unitary proceeding, the state courts are acting as adjuncts to the federal courts pursuant to a delegation of adjudicative authority from the federal courts to the state courts and ultimately back to the federal courts. In this respect, the subsequent federal court review does not pose the same affront to state sovereignty and dignity as does the lower federal court review of final state supreme court adjudications in the exercise of the state’s sovereign authority, and the purpose of the *Rooker-Feldman* doctrine is not as strongly implicated.<sup>353</sup> As a result, habeas would be more consistent with the *Rooker-Feldman* doctrine and would no longer necessitate a special exception.

For these reasons, viewing the writ of habeas corpus as a single, unitary state and federal proceeding is a viable means to obviate the need for special exceptions to the doctrines that comprise the paradigmatic construct.<sup>354</sup> The resulting theoretical consistency makes habeas less of an outlier to the law of federal courts.

### 3. The Legality of the Unitary Habeas Action

This potential reconceptualization is helpful in reconciling habeas with the paradigmatic construct only if it is legally viable for such a unitary lawsuit to exist. A unitary lawsuit that effectively vests jurisdiction in both state *and* federal courts is a fairly novel creature. However, analogies exist and the precedent governing those analogies indicates that this type of unitary lawsuit may be viable under Article III of the Constitution, particularly if habeas is tweaked in minor ways to more closely resemble other types of federal jurisdiction that have been found to be valid.

Because there is nothing unusual about federal courts adjudicating federal issues as part of a federal action, the constitutionally problematic aspect of the unitary habeas action is its assignment of the first phase of the action to the state courts. Article III assigns the “judicial Power of the United States” solely to “one supreme Court, and [to] such inferior Courts

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353. *See id.*

354. As noted above, habeas in the context of postconviction review is already consistent with the Anti-Injunction Act and the *Younger* abstention doctrine. *See supra* text accompanying notes 211–14.

as the Congress may from time to time ordain and establish.”<sup>355</sup> It is the assignment of “judicial Power” to state courts—ostensibly, non-Article III courts—that presents the primary constitutional impediment to the reconceptualization of habeas as a single, unitary action.

The exercise of “judicial Power” by non-Article III courts potentially implicates two concerns—namely, the right of litigants to have their lawsuits adjudicated in Article III forums,<sup>356</sup> and the structural, separation-of-powers-based concern that the assignment of adjudicative authority away from the Judicial branch not amount to an “encroachment or aggrandizement of one branch at the expense of the other.”<sup>357</sup> The first, litigant-centered concern is not implicated by the unitary habeas action that permits state courts to entertain a convict’s challenges to a state conviction because there is no *right* to any review of a conviction.<sup>358</sup> Relatedly, there is no *right* to have one’s federal issues attendant to a conviction decided by a federal forum, at least when the alternative forum is a state court.<sup>359</sup>

The second, structural concern is more relevant, however. This concern is most immediately implicated when Congress enacts legislation that transplants lawsuits away from Article III courts and into independent, congressionally created tribunals. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, for example, the Court held that Congress violated the separation of powers by creating the federal bankruptcy courts

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355. U.S. CONST art. III, § 1.

356. *Peretz v. United States*, 501 U.S. 923, 930 n.6 (1991) (observing how “Article III, § 1’s guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests.”); *Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 883, 848 (1986) (“Article III, § 1 serves . . . to safeguard litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government.’”) (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (same).

357. *Schor*, 478 U.S. at 850 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). See also *Peretz*, 501 U.S. at 937 (discussing the “structural protections” of Article III that are implicated when adjudicatory functions within the ambit of Article III judicial power are delegated to a non-Article III entity); *Northern Pipeline*, 458 U.S. at 77.

358. In 1894, the Court held that a person convicted in state court does not have a constitutional right to appeal that conviction. *McKane v. Durston*, 153 U.S. 684 (1894). Although the Court has held that due process protections apply to a direct appeal once a state elects to permit such an appeal, see, e.g., *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (“[I]f a State has created appellate courts as ‘an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,’ the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.”) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)), the Court has yet to overturn its prior holding that the state retains the ability to eliminate its appeals process altogether.

359. See *supra* Section III.C.2.a.

and imbuing them with the authority to adjudicate not only federal bankruptcy matters, but also related state-law actions and even related habeas corpus petitions.<sup>360</sup> Similarly, in *Gomez v. United States*, the Court held that Congress could not assign the task of conducting *voir dire* in federal criminal cases to non-Article III, federal magistrate judges absent a defendant's consent.<sup>361</sup>

At the outset, it is doubtful that these concerns are strongly implicated where the alternate tribunal is the duly constituted court of a sovereign state, rather than a congressionally spawned Article III tribunal or some hybrid federal adjunct to the federal courts. As discussed elsewhere, the Constitution—by entertaining the possibility that lower federal courts may not be created at all—specifically contemplates that state courts will adjudicate questions of federal law, subject to Supreme Court appellate review.<sup>362</sup> Accordingly, it is arguably within the design of the Constitution that state courts wield “judicial Power,” even if it is not technically the same “judicial Power” that the Constitution specifies will be exercised by any congressionally created Article III courts.<sup>363</sup> To the extent that the “judicial Power of the United States” is distinguished from the “judicial Power” that state courts possess by encompassing the power to *finally* decide issues of federal law,<sup>364</sup> the availability of Supreme Court discretionary review and subsequent lower federal court review during the second stage of the unitary action eliminate any obstruction to vesting the state courts with non-Article III federal “judicial Power.”

Analysis of the unitary habeas action under the doctrinal law erected for examining transfers of Article III authority confirms that the structural

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360. *Northern Pipeline*, 458 U.S. at 59–85.

361. *Gomez v. United States*, 490 U.S. 858, 858–59 (1989). A few years later, the Court in *Peretz* held that magistrate oversight of *voir dire* was permissible with a defendant's consent. *Peretz*, 501 U.S. at 936–39. The defendant's consent in *Peretz* alleviated the litigant-based concern articulated in these cases, *id.* at 932–36, and thus justified a different result.

362. See *supra* text accompanying notes 32–35.

363. In a recent article, Brian Havel examines Article III through the lens of linguistic theory and posits that “judicial Power” and “judicial Power of the United States” are not coextensive but nevertheless “confirm a deep structure idea of shared judicial authority under Article III.” See Havel, *supra* note 35, at 305. State courts, he observes, lawfully exercise “judicial Power.” *Id.* at 308 (“State courts do not exercise their judicial authority upon grant from the Constitution of the United States, but by favor of their own State constitutions.”).

364. *Accord Amar*, *supra* note 66, at 1511 (“Congress may allow state courts . . . to exercise original jurisdiction in any of these cases, but, consistent with holism, only federal courts are vested with the judicial power of the United States—the power to speak in the name of the nation, definitively and finally on federal law.”). See also Liebman & Ryan, *supra* note 31, at 771 (listing as one attribute of Article III “judicial Power” the power to decide issues finally).

concerns raised by the unitary action are modest and surmountable. In the broader sense, Congress's creation of a unitary, forum-shifting habeas action does not endanger "the role of the independent judiciary within the constitutional scheme of tripartite government"<sup>365</sup> by "transfer[ing] jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts."<sup>366</sup> Although state courts would be exercising "judicial Power" during the first stage of the action, they would be using that power to review claims arising under both state and federal law; state court review of state law would not seem to threaten significantly the role of the federal courts as arbiters of federal law.<sup>367</sup> More to the point, the unitary action by definition encompasses a federal court component, designed to review federal issues. Thus, the unitary action does not detract from the jurisdiction of federal courts; rather, it provides them with a competent adjunct—the state courts—to resolve state law issues, develop relevant facts, and provide their insight and analysis on issues of federal law.<sup>368</sup> Doctrinally, the courts have adopted this reasoning in part when upholding the use of magistrate judges to evaluate federal habeas petitions subject to review by district courts.<sup>369</sup>

In addition to examining whether the sharing of federal judicial authority implicates the separation of powers in the broader sense, the doctrinal law also evaluates the quantum of "judicial Power" transferred to the non-Article III tribunal and the quantum retained by the federal courts.<sup>370</sup> In looking at how much judicial authority has been entrusted to the non-Article III tribunal, the Court examines the attributes of the non-Article III tribunal, including the breadth of substantive issues it may

365. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583–84 (1985).

366. *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 883, 850 (1986) (quoting *Nat'l Mut. Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)).

367. To be sure, the federal courts do at times adjudicate state law issues, particularly in lawsuits premised on diversity jurisdiction. 28 U.S.C. § 1332 (2000). *See also* Roosevelt, *supra* note 44, at 1895. Had Congress elected to make criminal actions involving federal issues removable, the related state law issues might have fallen within the federal courts' supplemental jurisdiction. 28 U.S.C. § 1367 (2000). Thus, the unitary action may pose a small threat to the *possibility* of federal review of state issues.

368. *See supra* text accompanying notes 347–54.

369. *See, e.g.*, *United States v. Bryson*, 981 F.2d 720, 722–24 (4th Cir. 1992); *Orsini v. Wallace*, 913 F.2d 474, 477 (8th Cir. 1990); *Bowman v. Bordenkircher*, 522 F.2d 209, 210 (4th Cir. 1975); *United States ex rel. Henderson v. Brierley*, 468 F.2d 1193, 1194 (3d Cir. 1972). These cases rest on the statutory empowerment of magistrate judges to be "assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3) (2000). Assignment to a magistrate absent further review by the district court, however, may run afoul of Article III. *See United States v. Johnston*, 258 F.3d 361 (5th Cir. 2001) (so holding); *Farmer v. Litscher*, 303 F.3d 840, 844–45 (7th Cir. 2002) (reserving the issue).

370. *Schor*, 478 U.S. at 851.

adjudicate,<sup>371</sup> whether those issues entail public or private rights,<sup>372</sup> whether that adjudication entails more than fact-finding,<sup>373</sup> whether the tribunal may issue final judgments,<sup>374</sup> and whether the tribunal has been granted other powers typically entrusted solely to the federal courts (for example, the power to grant writs of habeas corpus).<sup>375</sup> In examining what judicial power has been retained by the federal courts, the Court looks to whether the federal courts review the factual and legal rulings of the non-Article III tribunal and the degree of deference owed to those rulings;<sup>376</sup> the more plenary the federal court review, the less intrusive the delegation to the non-Article III tribunal.<sup>377</sup> The Court also examines the historical precedent for the jurisdiction-sharing arrangement.<sup>378</sup>

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371. *Id.* at 851–53. In *Schor*, the Court held that Congress could imbue the Commodity Futures Trading Commission with authority over monetary claims against member traders, along with related state counterclaims, in part because the Commission’s authority dealt only with a particularized area of law. *Id.* See also *Crowell v. Benson*, 285 U.S. 22 (1932) (upholding the authority of the United States Employees’ Compensation Commission to adjudicate certain admiralty damages claims).

372. *Schor*, 478 U.S. at 851 (looking to the “origins and importance of the right to be adjudicated”). Federal courts are more typically concerned with adjudicating cases of “private right”—that is, “of the liability of one individual to another under the law as defined”—such that assignment of such claims to a non-Article III tribunal is more problematic. *Crowell*, 285 U.S. at 51. See also *Schor*, 478 U.S. at 853 (noting that a state-law action for damages against a broker is “assumed to be at the ‘core’ of matters normally reserved to Article III courts”); *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 85 (1982).

373. *Northern Pipeline*, 458 U.S. at 85 (invalidating delegation to the bankruptcy courts because those courts engaged in more than simply fact-finding). *Cf. Crowell*, 285 U.S. at 53–54 (holding that an agency determination was limited to a determination of relevant facts and application of the law to those facts).

374. *Northern Pipeline*, 458 U.S. at 85 (invalidating delegation to the bankruptcy courts because their orders were final orders subject to immediate appeal to the Courts of Appeals, without district court review).

375. The Court in *Northern Pipeline* found it particularly troublesome that the bankruptcy courts had been granted the power to grant writs of habeas corpus when necessary to effectuate their mandate. *See id.* at 85. *Cf. Schor*, 478 U.S. at 853 (observing that the inability of the Commodities Futures Trading Commission to grant habeas corpus or preside over jury trials weighed in favor of affirming a jurisdictional grant to that Commission, as those powers are typically reserved to Article III courts).

376. *Peretz v. United States*, 501 U.S. 923, 937, 939 (1991); *Schor*, 478 U.S. at 853; *Northern Pipeline*, 458 U.S. at 85; *United States v. Raddatz*, 447 U.S. 667, 680–83 (1980).

377. Plenary review of the factual and legal rulings of the non-Article III tribunal is the least problematic. *See Peretz*, 501 U.S. at 937 (affirming the delegation of jury selection in a federal trial to a federal magistrate, in part, because “the entire process takes place under the district court’s total control and jurisdiction”); *Raddatz*, 447 U.S. at 681–83 (affirming delegation to a federal magistrate presiding over a motion to suppress evidence attendant to a federal felony trial, in part, because the district court could revisit the magistrate’s factual and legal findings *de novo* and because “the ultimate decision is made by the district court”). *Cf. Northern Pipeline*, 458 U.S. at 85 (invalidating delegation to bankruptcy courts where their rulings were subject to clear error review). Plenary review is not, however, a prerequisite to a valid delegation of judicial power. *Schor*, 478 U.S. at 848 (“Article III does not confer on litigants an absolute right to the *plenary* consideration of every nature of claim by an Article III court.”) (emphasis added). Thus, the Court has affirmed delegations even when a district

Applying these considerations, the unitary habeas action certainly imbues state courts with jurisdiction to adjudicate a wide variety of state and federal challenges to the underlying state conviction, many of which arise under the Constitution and involve far more than fact-finding. The state tribunal lacks the power to issue final judgments, at least with respect to decisions that affirm a habeas petitioner's conviction,<sup>379</sup> as its rulings will be revisited by the federal courts in the second phase of the habeas action. The state courts are also not granted any power reserved solely to the Article III courts, as state courts have long had the authority to grant their prisoners relief from conviction or sentence.<sup>380</sup> Under current law, however, the lower federal courts tasked with reviewing the federal issues decided by state courts in the first phase may only correct errors of law that are "unreasonable."<sup>381</sup> They may not engage in plenary review, even of federal constitutional issues. This is the most problematic aspect of the unitary action. Lastly, although the theoretical notion of a unitary habeas action is new, state and federal courts have been adjudicating the legality of state convictions under the current habeas construct for more than half a century, thereby defeating any persuasive argument that the practical effect of a unitary proceeding offends the separation of powers.<sup>382</sup> In sum, the Constitution does not seem to be an impediment to reconceptualizing the writ of habeas corpus as a unitary action that shifts between the federal and state courts.<sup>383</sup>

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court was empowered to revisit a decision only if that decision was against the "weight of the evidence," a standard typical for agency review. *Id.* at 853; *Crowell*, 285 U.S. at 49–50.

In *Crowell*, the Court opined that plenary review might be necessary for constitutional issues. *Crowell*, 285 U.S. at 60 ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."). *Crowell*'s holding in this respect seems to have been overturned by *Williams v. Taylor*, 529 U.S. 362 (2000), which implicitly found no constitutional impediment to federal court deference to both the legal and factual findings of the state courts during habeas review, including legal claims premised on constitutional violations.

378. *Schor*, 478 U.S. at 853–54 (looking to how the rights at issue "were historically" resolved).

379. A state court's reversal of a conviction or sentence, and remand for further proceedings, arguably constitutes a "final judgment" insofar as it precludes the habeas petitioner from seeking relief from the federal court; the prisoner, however, is unlikely to complain in that situation.

380. Moreover, the unitary habeas action does not in any way alter the existing rule that state courts lack the power to grant habeas relief to federal prisoners. See *In re Tarble's Case*, 80 U.S. 397, 407 (1871). See also *supra* notes 199–201 and accompanying text.

381. 28 U.S.C. § 2254(d) (2000). For the reasons noted above, the deference to the state court's factual findings mandated by § 2254(e)(1), is less problematic. See *supra* notes 316–17.

382. See *supra* Section III.A.

383. Because this approach rests on a more explicit acknowledgment that state courts are acting as "adjuncts" to federal courts when adjudicating habeas petitions, this approach ostensibly poses a greater

In a recent article, Jonathan Nash examines the federal court practice of certifying questions of state law to the state courts.<sup>384</sup> He argues that the process of certifying state questions entails forum-shifting between the federal and state courts, and examines whether the resulting litigation should be considered “unitary” (a single lawsuit that shifted between the federal and state courts) or “binary” (a federal lawsuit that is halted, followed by an independent state adjudication of the state question, and concluded by continuation of the federal action).<sup>385</sup> Nash concludes that the unitary conception of certification would run afoul of the Constitution because it entails an impermissible delegation of Article III authority to a state court—a non-Article III tribunal.<sup>386</sup> That is because a state court’s jurisdiction to resolve the certified question is “entirely derivative of the federal court’s jurisdiction.”<sup>387</sup> The unitary habeas proceeding<sup>388</sup> does not suffer from the same flaw as certification because the state court jurisdiction in the habeas action is not derivative of the federal *court’s* jurisdiction in the way condemned by Nash—that is, the state-court stage of the unitary action is not an exercise of the state court’s own sovereign power at the prompting of a federal referral; instead, it is the exercise of federal jurisdiction by a state court at the behest of the prisoner-litigant it is designed to benefit.

#### 4. Tailoring the Writ to the Unitary Conception

Notwithstanding the theoretical attractiveness and likely constitutionality of conceiving of all postconviction review of state convictions as a unitary, dual-sovereign proceeding, the second stage of that unitary proceeding—those portions in federal court—should be

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affront to the “dignity” of the states, at least as a matter of nomenclature. *See, e.g.*, Jackson, *supra* note 32, at 131 (noting problems with viewing state courts as “‘junior varsity’ versions of federal courts”).

384. Nash, *supra* note 35.

385. *Id.* at 1674–78.

386. *Id.* at 1721–29. Nash noted that, while constitutional, the “binary” conception of certification conflicted with the policy behind diversity jurisdiction—which is to have the federal courts adjudicate questions of state law so as to avoid biased state court decisions—because it asked the state courts to resolve the very state law questions diversity jurisdiction was invoked to have the federal courts resolve. *Id.* at 1730–33.

387. *Id.* at 1727. *See also id.* at 1721.

388. Under Nash’s terminology, a “unitary” lawsuit is one where the jurisdiction of each court is predicated on, “and is non-existent without, the [sequentially prior] court’s jurisdiction.” *Id.* at 1704. Under this definition, the forum-shifting habeas action I propose in this Article would qualify as a “unitary” action. Nash, however, properly categorizes the current habeas construct as “binary” insofar as it envisions that the federal habeas petition follows the final adjudication of federal issues by state courts. *See id.* at 1701. *See also supra* Section III.A.

modified slightly both to align the functionality of habeas review with its new, theoretical foundation and to further insulate the writ from constitutional infirmity.

Although the doctrines of exhaustion and procedural default should be retained as a means of ensuring that federal claims are properly funneled through the state courts,<sup>389</sup> many other aspects of the writ should be tweaked to account for the greatest change attendant to conceiving of all postconviction review as a single, unitary proceeding: that a conviction is not deemed “final” until the conclusion of the unitary proceeding rather than at the conclusion of state court review on direct appeal (as it is under the traditional habeas construct). The Court has placed significant weight on the finality of a conviction, which manifests itself through several doctrines animating the habeas construct. Before a conviction is “final,” convicts may avail themselves of innovations in federal constitutional criminal procedure that inure to their benefit;<sup>390</sup> they are entitled to relief unless the state can establish that any constitutional error is harmless beyond a reasonable doubt;<sup>391</sup> and the sole federal review available to them (the Court’s certiorari review) is plenary.<sup>392</sup> The subsequent collateral review of “final” convictions is less exacting and slanted demonstrably against overturning convictions or sentences. Once convictions are final, convicts may not rely upon new rules of federal constitutional criminal procedure;<sup>393</sup> they bear the burden of establishing that any constitutional error has “a substantial and injurious effect or influence in determining the jury’s verdict”;<sup>394</sup> and the federal courts defer to the legal rulings and factual findings of the state courts.<sup>395</sup> Under the current habeas construct, a conviction becomes “final” once the state courts have completed the direct appeal and the Supreme Court has either denied certiorari or completed its plenary review. This is a logical point at which to draw the line of finality under the habeas construct, which conceives of a federal habeas petition as an independent lawsuit that follows the conclusion of direct review.

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389. See *supra* text accompanying notes 152–69.

390. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). See also *supra* notes 150–51 and accompanying text.

391. See *supra* note 174 and accompanying text.

392. Compare *supra* notes 135, 137 and accompanying text, with note 172 and accompanying text.

393. See *supra* notes 150–51 and accompanying text.

394. See *supra* note 173 and accompanying text.

395. See *supra* notes 171–72 and accompanying text.

The unitary habeas action described above, however, is different. Because it views state review and one round of federal review as part of the same action, a conviction is not deemed “final” until the unitary action is complete—that is, a conviction would not be “final” until review was completed by the state courts, by the Supreme Court, by the state courts on collateral review, and by the federal district, appellate, and Supreme courts on the first round of habeas review. Consequently, the standards of review, harmless error standards, and retroactivity rules currently applicable to nonfinal convictions should apply through the completion of the unitary habeas action. To do otherwise is to have many of the rules governing challenges to a state conviction change midway through what should be a single, seamless lawsuit. Granting the federal courts plenary review of the federal questions decided by the state courts would also aid in ensuring the constitutionality of the unitary proceeding, since it would permit the federal courts to retain the full spectrum of their Article III powers to adjudicate federal issues and would further strengthen the notion that the lower federal courts are acting as proxies for the Supreme Court.

The “custody” requirement would also need to be altered. Under the habeas construct, state prisoners must be in custody at the time they file their habeas petitions in federal court<sup>396</sup>—in other words, at the time they would enter the second phase of the unitary habeas action. Their custody prior to that time is not governed by the rules attendant to federal habeas (and is thus not required), and their custody subsequent to filing the habeas petition is irrelevant.<sup>397</sup> Again, if habeas is to be viewed as a single, unitary proceeding, it would be illogical to impose a custody requirement midway through the proceeding and deem custody irrelevant thereafter. Thus, the custody requirement should be altered to require that state convict be “in custody” from the outset and that they *remain* in custody at all times or else their habeas lawsuits will become statutorily moot.<sup>398</sup> This change has the tripartite advantages of blending what was once two proceedings into a unitary writ, tailoring habeas to its historical purpose as a means of securing release from custody,<sup>399</sup> and pragmatically ensuring that the resources of the courts are devoted to reviewing the more egregious convictions (evidenced by their longer sentences).

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396. See *supra* text accompanying notes 141–42.

397. See *supra* text accompanying notes 141–42, 145.

398. The action would, of course, retain its vitality as a matter of constitutional mootness. See *supra* notes 146, 265.

399. See *supra* note 262 and accompanying text.

For these reasons, these slight modifications<sup>400</sup> to the writ of habeas corpus would reinforce its reconception as a unitary proceeding and assist in defeating constitutional challenges to that conception.

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Of the two possible ways in which the writ of habeas corpus might be reconceptualized, the concept of habeas as a unitary, forum-shifting action best reconciles the writ as it exists today with the doctrines that comprise the paradigmatic construct. Neither reconceptualization, however, alters the gravamen of the writ itself and, thus, neither reconceptualization cures the fundamental inconsistency that exists between the paradigmatic construct and the habeas construct.

#### V. THE RECONSTRUCTION OF HABEAS THROUGH REVISION AS A "FEDERALIST" ACTION

The early parts of this Article explain why the writ of habeas corpus as it exists today rests on a mostly Nationalist foundation that is fundamentally inconsistent with both the federal courts doctrines that comprise the paradigmatic construct of which habeas corpus should be a part, and with the largely Federalist foundation of that construct. Although the two constructs could theoretically coexist harmoniously, the justifications that would explain the anomalous treatment of habeas corpus vis-à-vis the paradigmatic construct do not withstand scrutiny. Thus, habeas continues to be an unexplained exception to the law of federal courts. The reconceptualizations proffered in the previous part of this Article cure some of the theoretical discord by providing a means of aligning the current writ with the federal courts doctrines that form the paradigmatic construct. But both are merely means of altering the manner in which one views habeas. Neither reconceptualization significantly alters the actual contours of the writ. Thus, neither reconceptualization cures the underlying inconsistency between the paradigmatic construct's Federalist

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400. There is no need to require the state courts to adhere to federal procedural rules in adjudicating the first phase of the unitary proceeding. While Congress ostensibly has the power to require state courts to follow federal procedural rules when adjudicating federal actions, *see, e.g.*, *Felder v. Casey*, 487 U.S. 131, 138 (1988); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 360–63 (1952); *Central Vermont Ry. v. White*, 238 U.S. 507, 511 (1915); *Bellia*, *supra* note 32, at 959–62, it need not exercise that power. Nor would that exercise be warranted in this case given that the state courts would also be adjudicating state-law claims and that state courts have historically adjudicated federal claims on direct review while using state procedural rules. The option of having state courts adhere to state procedural rules for state claims and federal procedures for federal claims is even less appetizing, given the cumbersome difficulties of applying two sets of procedural rules.

base and the habeas construct's mostly Nationalist base. This part turns to the larger problem—how to cure the practical inconsistency itself, assuming, as I did at the outset, that the paradigmatic construct, rather than the habeas construct, should be the appropriate baseline.

As discussed more fully in Part II, the paradigmatic construct is the blueprint that cases raising federal issues but originating in state courts typically follow, and is a consequence of the collective effect of five federal courts doctrines—the Anti-Injunction Act; the *Younger* abstention doctrine; the *Rooker-Feldman* doctrine; full faith and credit, res judicata, and collateral estoppel; and the Eleventh Amendment.<sup>401</sup> Together, these doctrines dictate that state courts may finally resolve issues of federal law subject solely to the discretionary, certiorari review of the Supreme Court on appeal, and with no further review by the federal courts.<sup>402</sup> Because this construct rests upon an underlying confidence in the competency of state courts, it adheres to the “Federalist” vision of federal courts, as that concept is coined by Fallon.<sup>403</sup> From this Federalist premise, the paradigmatic construct necessarily embodies the judgment that a single opportunity for review from the Supreme Court is sufficient to ensure the supremacy of federal law, that no further dialectic between the state and lower federal courts is necessary for the proper development of federal law, and that finality and repose play an important role in the relationship between the state and federal judiciaries.<sup>404</sup>

Given these tenets of the paradigmatic construct, a writ of habeas corpus consistent with those tenets would not, as the writ currently does, serve the function of providing a forum for the relitigation of issues of federal law previously resolved by state courts. Instead, relitigation would generally be prohibited. Precluding the wholesale relitigation of issues sanctioned by the Court in *Brown v. Allen*<sup>405</sup> would grant state judgments of conviction full faith and credit and res judicata effect, would comply with the *Rooker-Feldman* doctrine by taking the lower federal courts out of the business of acting as appellate courts, and would obviate many federal habeas lawsuits and any corresponding need to rely on *Ex parte Young*.<sup>406</sup>

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401. See *supra* Section II.B.

402. See *supra* Section II.A.

403. See *supra* text accompanying notes 125–27.

404. See *supra* Section II.C.5.

405. *Brown v. Allen*, 344 U.S. 443, 458 (1953). See also *supra* note 217 and accompanying text.

406. See generally *supra* text accompanying notes 62–96.

The writ of habeas corpus would continue to play an important role, however. Persons in state custody would still be able to file habeas petitions if they could show (1) that they seek to assert a claim (a) relying on newly created federal law (that is retroactively applicable under *Teague*),<sup>407</sup> or (b) relying on new facts previously unavailable due to circumstances beyond their control bearing on their innocence; and (2) that the state courts do not provide an opportunity to assert these claims. This is similar (though not identical) to the showing that habeas petitioners must currently make before filing a second or successive habeas petition.<sup>408</sup>

Although the threshold showings are similar, the revised writ of habeas corpus is analytically and functionally distinct from a successive habeas petition under current law. The current writ serves primarily as a vehicle for relitigation of federal claims, with the initial habeas petition available for relitigation of any and all properly preserved federal claims, and successive habeas petitions available for relitigation of any newly available claims. A habeas writ revised to accord with the paradigmatic construct serves a much narrower function—to provide a forum for the initial assertion of new claims affecting the fundamental fairness<sup>409</sup> of the

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407. See *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). The antiretroactivity principle embodied in *Teague* is consistent with the premise of the paradigmatic construct that no dialectic between the state and federal judiciaries is necessary for the development of federal law.

408. See 28 U.S.C. § 2244(b) (2000). Under this statute, claims already presented in a prior habeas petition are absolutely barred from reconsideration. § 2244(b)(1). Claims not previously presented are permitted only if (1) “the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court,” or (2) “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” § 2244(b)(2). See also *supra* notes 176–78. These provisions were enacted as part of AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Prior to that time, claims not previously litigated and presented in a successive habeas petition were called “abusive” claims and would be entertained only if the state prisoner could satisfy the standards for excusing a procedural default—that is, cause and prejudice or a miscarriage of justice. See *McCleskey v. Zant*, 499 U.S. 467, 493 (1991).

409. The requirements for habeas review under the revised writ ensure that only claims relevant to the fundamental fairness of the state conviction are heard. Claims based on new law would be cognizable on habeas only if they are made retroactive under *Teague*, which requires that the new law set down a “‘watershed [rule] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” *Graham v. Collins*, 506 U.S. 461, 478 (1993). Only the more fundamental rules of criminal procedure would meet this standard, as is confirmed by the Court’s refusal to place any “new rule” in that category since *Teague* was handed down in 1989. See *supra* note 150.

Similarly, claims based on newly discovered facts would be cognizable only if they demonstrate the state convict’s innocence. This category would encompass claims broader than those currently available on habeas because confinement of an innocent person would provide a ground for relief, even absent a related constitutional violation (which is a departure from *Herrera v. Collins*, 506 U.S. 390 (1993)). See *supra* note 167. That is because, as a normative matter, confining an innocent person

underlying state conviction where no alternative state forum is available.<sup>410</sup> Given this shift in function, a federal court hearing a habeas petition is properly viewed as effectively hearing the issue for the first time on direct review. Among other things—and unlike successive habeas petitions currently—this means that the habeas petitioner need not obtain permission of the federal court of appeals to file an initial habeas petition;<sup>411</sup> the federal court’s factual and legal findings would be plenary;<sup>412</sup> and, upon a finding of constitutional error where applicable, the prisoner would be entitled to relief unless the state proved the error to be “harmless beyond a reasonable doubt” (rather than the prisoner having to demonstrate affirmatively the prejudice arising from the error).<sup>413</sup>

Keeping habeas open as a vehicle for the assertion of newly created, fundamentally important claims does no violence either to the doctrines comprising the paradigmatic construct or to the construct’s structural principles. Although the state judgment of conviction would be final by the time habeas review occurs, neither *res judicata* nor the Full Faith and Credit statute preclude a person from revisiting a final judgment on the basis of new facts or new law.<sup>414</sup> Similarly, because federal courts would hear a

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implicates the fundamental fairness of the conviction. *See* *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (“[A] prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.”); Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 88 (1994) (“[C]onstructing the law of habeas without reference to innocence and guilt means ignoring the central point of the criminal justice system.”). *See generally* Hoffstadt, *supra* note 150, at 1012 (arguing that “true innocence” claims should be cognizable on habeas, albeit with standards to guard against frivolous claims).

410. “The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.” *Kaufman v. United States*, 394 U.S. 217, 226 (1969), *overruled on other grounds by* *Stone v. Powell*, 428 U.S. 465 (1976). *Accord* *Brown v. Allen*, 344 U.S. 443, 543–45 (1953) (Jackson, J., concurring) (arguing that habeas corpus should be available for claims based on new evidence).

411. Currently, a state convict seeking to file a successive habeas petition must obtain the permission of the federal court of appeals by demonstrating that the second petition “satisfies the requirements” for filing a successive petition. *See* § 2244(b)(3)(C) (2000). *See also supra* note 179.

412. Plenary review is effectively mandated because the prerequisite for habeas review is the absence of any state review. In those circumstances, the federal court necessarily is tasked with making the initial—and hence, plenary—factual and legal determinations. This *de facto* plenary review also happens to accord with treating the federal habeas court as a court hearing the issue on direct appeal, where the standard is plenary rather than the deferential standard mandated by 28 U.S.C. § 2254(d) for collateral review of convictions.

413. *Compare* *Chapman v. California*, 386 U.S. 18, 24 (1967), *with* *Brecht v. Abrahamson*, 507 U.S. 619, 631, 637 (1993). *See also supra* notes 173–74 and accompanying text.

414. *See supra* text accompanying notes 67–73. Indeed, the Court recognized as much in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998), when it held that a claim that could not be present in

newly available claim only if no other state avenues for relief were available, there is little danger that a federal court would sit as an appellate court reviewing the judgment of the state courts in contravention of the *Rooker-Feldman* doctrine.<sup>415</sup> The habeas suit would also qualify as an *Ex parte Young* suit for prospective declaratory and injunctive relief only.<sup>416</sup> With respect to the structural principles effectuated by the paradigmatic construct, this residual role for habeas is necessary to ensure both the supremacy and development of federal law because, without this avenue for review, *no* court—state or federal—would adjudicate the newly extant claim.<sup>417</sup> Habeas is essential to fill that vacuum. For the same reasons that this narrower writ is consistent with both the full faith and credit and res judicata doctrines, it accords with the importance that the paradigmatic construct places on finality and repose, as well as with the symmetry that exists between the federal and state judiciaries vis-à-vis the finality that they grant one another's judgments.<sup>418</sup>

The primary impediment to crafting the writ of habeas corpus in this fashion is the Suspension Clause of the Constitution.<sup>419</sup> The Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>420</sup> The linguistic construction of the Clause is unusual insofar as it guarantees the writ only by negative implication—that is, by prohibiting its suspension. The Clause also fails to define the contours of the “Writ of Habeas Corpus” protected from suspension. This textual ambiguity has yet to be resolved by the Court. Instead, the Court has either assumed the Clause's reach for the sake of argument<sup>421</sup> or avoided the issue of the Clause's reach entirely by construing whatever statute

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earlier habeas petitions was not a “successive” petition within the meaning of AEDPA in part because the “claim would not be barred under any form of res judicata.”

415. See *supra* text accompanying notes 62–66.

416. See *supra* text accompanying notes 88–92.

417. See *supra* Sections II.C.1 and II.C.2.

418. See *supra* Sections II.C.3 and II.C.4.

419. The Court has long rejected the notion that the federal Due Process Clause guarantees the availability of the writ of habeas corpus, given that due process does not even mandate the provision of a direct appeal. See *Pennsylvania v. Finley*, 481 U.S. 551, 555–56 (1987) (noting that there is no right to counsel beyond the first appeal of right); *McKane v. Durston*, 153 U.S. 684, 687–88 (1894). See also *Scheidegger*, *supra* note 1, at 919 (“Federal habeas corpus for state prisoners is not constitutionally required . . .”).

420. U.S. CONST. art. I, § 9, cl. 2.

421. *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996) (assuming, but explicitly reserving the issue, of whether the Suspension Clause “refers to the writ as it exists today”); *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977) (finding “no occasion” to define the contours of Congress's powers to modify the statutory writ).

implicating the Clause in a manner that obviates the need to resolve the constitutional issue.<sup>422</sup> Needless to say, neither an assumption about the reach of the Clause nor familiarity with the “constitutional avoidance” penumbra surrounding the Clause provides a definitive meaning of the Clause itself.<sup>423</sup>

The most that has emerged from these decisions and related commentary is two possible approaches to construing the Clause: historical and pragmatic. Historically, one could construe the Clause to protect from suspension only the writ at the time the Constitution and the Suspension Clause were ratified.<sup>424</sup> Alternatively, Jordan Steiker has suggested construing the Clause to refer to the writ at the time of the Civil War Amendments,<sup>425</sup> the time at which the fundamental balance of power between federal and state courts shifted.<sup>426</sup> Under either historical approach, however, a writ revised to accord with the paradigmatic construct would likely be deemed constitutional. At the time of our country’s founding, the writ applied solely to persons in federal custody and further limited judicial inquiry of convictions to whether they were

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422. See *supra* note 341.

423. Richard Posner is a leading critic of the constitutional avoidance doctrine. See Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983). See also David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 7 (2002) (“The avoidance canon . . . may extend judicial policy-making power by creating a constitutional penumbra, effectively extending the scope of a constitutional doctrine . . .”) (internal footnote omitted); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 862 (2001); Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. PITT. L. REV. 529, 565 (2003).

424. See, e.g., *Swain*, 430 U.S. at 384 (Burger, C.J., concurring) (“The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted.”); Friendly, *supra* note 116, at 170 (“It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers . . .”). Accord Scheidegger, *supra* note 1, at 919 (“Federal habeas corpus for state prisoners is not constitutionally required . . . nor is habeas review of final judgments.”) (internal footnote omitted). The Seventh and Fourth Circuits have taken this approach to the Suspension Clause. See, e.g., *Freeman v. Page*, 208 F.3d 572, 576 (7th Cir. 2000) (“[E]ven the national government, to which the Suspension Clause of the Constitution applies, may eliminate collateral review of *final judgments*; the writ that may not be suspended is the *pretrial* writ to test the Executive’s power to hold a suspect without trial.”); *Green v. French*, 143 F.3d 865, 875–76 (4th Cir. 1998), *abrogated on other grounds by Williams v. Taylor*, 529 U.S. 362 (2000).

425. Steiker, *supra* note 193, at 888. In particular, Steiker argues that the Suspension Clause should be incorporated and made applicable to the state through the Fourteenth Amendment’s Due Process Clause. *Id.* From that, he argues that “[i]f the ‘right’ to habeas corpus is properly located in the Fourteenth Amendment, the contours of that right must be discussed in light of the writ’s transformation between 1789 and 1868.” *Id.*

426. See *supra* notes 36–37 and accompanying text.

entered by a court of competent jurisdiction.<sup>427</sup> By the time of the Civil War Amendments, the writ had been extended to reach persons held in state custody pursuant to valid state convictions, but the scope of judicial inquiry was still limited to whether the committing court had jurisdiction, whether the criminal statute underlying the conviction was constitutional, and whether the sentence was an “illegal” second sentence for the same crime.<sup>428</sup> There is no question that the revised writ would be acceptable under the “original intent” approach, as that writ did not apply to state prisoners at all. It is a closer question when the revised writ is compared to the 1867 writ. The revised writ is broader than the writ of 1867 insofar as the revised writ provides an avenue for *any* federal constitutional claim that satisfies the prerequisites for review. It is narrower, however, insofar as it would not permit a state prisoner to attack a state court’s jurisdiction or raise constitutional challenges to the underlying statute or double jeopardy if those claims were, or could have been, litigated in the state courts. Given the breadth of the writ and the relative confidence the Court has shown in the competency of state courts in the late twentieth and early twenty-first centuries,<sup>429</sup> however, the revised writ is likely to pass muster under an interpretation of the Suspension Clause keyed to the post-Civil War writ.

Under the pragmatic approach, the Clause is construed in a manner that recognizes that the writ is a “complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.”<sup>430</sup> As such, current modifications to the writ are constitutionally permissible as long as they are “within the compass of [the] evolutionary process” of habeas.<sup>431</sup> This approach rests on

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427. See *supra* text accompanying notes 295–97.

428. See *supra* notes 301–09 and accompanying text. To be sure, there is disagreement in the academy regarding whether these limitations stemmed from the scope of the writ or the scope of constitutional protections at that time. See *supra* text accompanying note 296. This disagreement is of marginal significance, however, because the effective reach of the writ is the same regardless of the doctrinal basis for it.

429. See *supra* notes 117, 128–31.

430. *Felker v. Turpin*, 518 U.S. 651, 652 (1996) (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)).

431. *Id.* There is a second possible pragmatic approach that would prohibit the placement of any new restrictions on the writ beyond those that exist presently. See, e.g., *Magana-Pizano v. INS*, 152 F.3d 1213, 1218 (9th Cir. 1998), *amended by* 159 F.3d 1217 (9th Cir. 1998), *vacated*, 526 U.S. 1001 (1999). This approach, however, is flawed for several reasons. First, it has implicitly been rejected by the federal courts, which have yet to find constitutional infirmity in *Stone v. Powell* or most of the manifold restrictions imposed by AEDPA. See, e.g., *Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000) (upholding AEDPA’s one-year limitations period against a Suspension Clause challenge); *Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000) (same). Second, it would mean that the Clause would operate as a one-way “ratchet” under which “[h]abeas corpus could always be enlarged, but once

the utilitarian premise that the Clause may place restrictions on the scope of the statutorily created writ, even if Congress was not obligated to enact such a writ in the first place.<sup>432</sup> It is an open question whether the revised writ would be found constitutional under the pragmatic approach. On one hand, the revised writ is broader in many ways than the historical writ, which ostensibly forms the “floor” of the evolutionary process. Moreover, the revised writ effectively overrules *Allen* and returns the writ to its pre-1953 role of providing a forum for claims that state courts could not, or would not, entertain.<sup>433</sup> In that respect, the revised writ is certainly within the writ’s “evolutionary process” in a very literal sense. On the other hand, however, the revised writ is a stark and dramatic curtailment of the writ as it exists today. As noted above, the revised writ functions like a successive writ currently does, except with an additional requirement that no state forum exist in which to hear the newly available federal constitutional claim.<sup>434</sup> Because it is not clear—either doctrinally or theoretically—whether inquiry into the “evolutionary process” of the writ of habeas corpus is a historically driven test or is more of a normative test measuring the degree of change vis-à-vis the current writ, it is difficult to predict whether the fifty-year step backwards embodied in the revised writ is within the “evolutionary process” contemplated by the Court in *Felker v. Turpin*.<sup>435</sup> Thus, there is some risk that the revised writ may be deemed unconstitutional.

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enlarged could not be returned to its previous, less generous scope without a constitutional amendment.” *LaGuerre v. Reno*, 164 F.3d 1035, 1038 (7th Cir. 1998).

432. Steiker, *supra* note 193, at 864 (observing that “the Clause might simply limit Congress’s ability to abolish a judicial remedy that it is not elsewhere required to establish”). In this respect, the Clause is not dissimilar to the Court’s due process jurisprudence that places limits on how a state may structure its criminal appellate process, even though the state is under no constitutional obligation to create such a process in the first place. *See supra* note 358.

433. *See supra* text accompanying note 303.

434. *See supra* text accompanying notes 176–78.

435. *Felker*, 518 U.S. at 664. Several federal courts, drawing on language in the majority opinion in *Swain v. Pressley*, 430 U.S. 327, 381 (1977), have held that the Suspension Clause is violated if the legislative innovation would “render[] the habeas remedy ‘inadequate or ineffective.’” *Wyzykowski v. Dept. of Corr.*, 226 F.3d 1213, 1217 & n.3 (11th Cir. 2000); *Green*, 223 F.3d at 1003–04; *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir. 1998); *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997). It is not clear that these cases read *Swain* correctly, as the *Swain* Court simply held that a violation of the Suspension Clause does not occur where an alternative remedy to habeas was adequate and effective; it did not purport to establish the converse as a threshold test or thereby to delineate the outer boundary of the Clause. *Swain*, 430 U.S. at 381. Other circuits have adopted similar tests. *See James v. Walsh*, 308 F.3d 162, 168 (2d Cir. 2002) (holding that changes to the writ that “create an ‘unreasonable burden’ to habeas relief” violate the Suspension Clause); *Delaney v. Matesanz*, 264 F.3d 7, 12 (1st Cir. 2001) (holding that “reasonable limits” on the writ do not violate the Suspension Clause).

In sum, it is possible to fashion a writ of habeas corpus consistent with the paradigmatic construct, even though it is possible that such a writ would be unconstitutional.

#### VI. THE RECONSTRUCTION OF HABEAS THROUGH REVISION AS A “NATIONALIST” ACTION

The arguments that habeas is a justified exception to the paradigmatic construct or that the paradigmatic construct is not the appropriate baseline are not to be ignored. Indeed, the specter of merit to the Suspension Clause arguments challenging a more Federalist-flavored writ counsels that habeas may need to be inconsistent with the paradigmatic construct to be constitutional. In its current form, however, the writ is a hybrid that borrows heavily from the paradigmatic construct without adopting it and, in so doing, is a poor vehicle for executing a Nationalist foundation. The habeas construct purports to rest upon the Nationalist premise that state courts are not competent to finally adjudicate issues of federal law affecting persons in custody, and that the Supreme Court’s fleeting opportunity for discretionary review on direct appeal is insufficient either to ensure the supremacy of federal law or to provide valuable federal judicial input into the development of federal law.<sup>436</sup> Not surprisingly, many of the proffered justifications for the differential treatment of habeas rest either explicitly<sup>437</sup> or implicitly<sup>438</sup> on the same need for a plenary, federal review.

In order to serve the function of acting as a backstop for state-court review of criminal convictions, the writ of habeas corpus should provide a forum for plenary relitigation of all federal constitutional and statutory issues attendant to the criminal conviction. Currently, it does not. A federal court hearing a habeas petition is not empowered to hear all federal constitutional and statutory claims; Fourth Amendment claims are outside the cognizable reach of habeas,<sup>439</sup> as are claims based on “technical” violations of procedural rules.<sup>440</sup> More sweepingly, a federal court

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436. See *supra* text accompanying notes 191–95.

437. See *supra* Section III.C.2.f.

438. See *supra* Sections III.C.2.a–d.

439. See *Stone v. Powell*, 428 U.S. 465, 494 (1976).

440. See *Peguero v. United States*, 526 U.S. 23, 27–29 (1999) (holding that a court’s failure to advise the defendant of that defendant’s right to appeal, as required by the federal rules, does not warrant § 2255 relief where the defendant already knew of the right to appeal); *United States v. Timmreck*, 441 U.S. 780, 783–85 (1979) (holding that a court’s failure to advise the defendant of the minimum term of special parole, in violation of Federal Rule of Criminal Procedure 11, is not cognizable in a § 2255 motion in the absence of “aggravating circumstances” because it is neither “a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission

relitigating an issue of federal law no longer has the authority to correct what it determines to be an incorrect application of the law, at least where that application is only “reasonably” wrong.<sup>441</sup> Along the same lines, if the incompetence of the state courts renders the Court’s discretionary review on direct appeal inadequate to ensure the supremacy of federal law, such that the lower federal courts must act as the Court’s proxy, there is no reason why the standard for granting relief on habeas should be more onerous than it is on direct appeal.<sup>442</sup> Similarly, if state courts are unable by themselves to contribute to the development of federal law, there is little reason to squelch the dialogue between the federal and state courts through a retroactivity doctrine that “freezes” federal law to include only the law that existed on direct appeal.<sup>443</sup> In sum, the fundamental premise that underlies and is the collective product of the proffered justifications for habeas—that the writ of habeas corpus as a vehicle for plenary, federal relitigation of federal constitutional claims is an essential means of ensuring the supremacy and proper development of federal law as it applies to persons in state custody<sup>444</sup>—is not reflected in the writ today. Thus, this ultimate justification for the differential treatment of habeas is accordingly undermined and weakened by the writ itself.<sup>445</sup> Aligning the writ with its justification strengthens that justification.

A truly Nationalist writ would apply solely to persons who are in state custody—that is, incarcerated—during the entire period in which the habeas writ is being litigated.<sup>446</sup> In this fashion, habeas would be narrowed slightly to fit more squarely within its historical basis as a means of ensuring release from actual custody.<sup>447</sup> State prisoners filing a writ,

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inconsistent with the rudimentary demands of fair procedure”); *Hill v. United States*, 368 U.S. 424, 428 (1962) (holding that a court’s failure to advise the defendant of that defendant’s right to allocute, in violation of Federal Rule of Criminal Procedure 32, is not cognizable in a § 2255 motion).

441. 28 U.S.C. § 2254(d)(1) (2000); *Middleton v. McNeil*, 541 U.S. 433, 436–37 (2004); *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *Williams v. Taylor*, 529 U.S. 362, 409 (2000). *See also supra* notes 171–72 and accompanying text.

442. *Compare* *Chapman v. California*, 386 U.S. 18, 24 (1967), *with* *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). *See also supra* notes 173–74.

443. *See supra* text accompanying notes 149–51.

444. *See supra* Section III.C.

445. Fallon has urged the development of federal courts doctrine that is “between the poles”—that is, a mixture of Federalist and Nationalist ideals. *See* Fallon, *supra* note 23, at 1224–44. Despite the merits of this balanced and moderate approach, it is not helpful in this situation because it is the fact that the writ is neither Nationalist nor Federalist that undermines its justification for being different from the paradigmatic construct.

446. Again, such a continuing custody requirement would be statutory, not constitutional. *See supra* notes 146, 265.

447. *See supra* text accompanying note 262.

however, would be entitled to plenary federal review of the federal constitutional or statutory claims they present. The deferential standard of review as to legal rulings would be eliminated, although deference to state court fact finding would be appropriate given that such deference is a hallmark even of simple appellate review.<sup>448</sup> Habeas petitioners should also be permitted to inquire into the adequacy and independence of any state procedural rules used as bases for procedural defaults of their claims, just as they are permitted to do on direct appeal.<sup>449</sup> Once prisoners establish error of constitutional magnitude, they would be entitled to relief unless the state could show that the error was “harmless beyond a reasonable doubt.”<sup>450</sup>

The current writ need not be entirely renovated. It may be advisable, as a normative matter, to retain the *Teague* antiretroactivity rule. Although, as noted above, *Teague* eliminates some federal-state dialogue (and thereby undermines the structural principle of encouraging dialectic as a means of currying the proper development of federal law), the dialogue *Teague* precludes is the dialogue respecting the creation of “new rules” of constitutional criminal procedure.<sup>451</sup> To the extent that a dialogue is essential as a means of compensating for the relative incompetence of the state courts, that dialogue need only pertain to the law at the time of direct appeal.<sup>452</sup> *Teague* does not interfere with *that* dialogue. Moreover, the antiretroactivity rule of *Teague* reflects the normative judgment that convictions should eventually become “final” and (with limited exceptions) immune to renewed attack under new innovations in the law.<sup>453</sup> This policy

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448. See *supra* note 189.

449. See *supra* note 44 and accompanying text.

450. See *supra* note 174.

451. See *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). See also *supra* text accompanying notes 146–51.

452. Peller, *supra* note 296, at 668 (observing how federal habeas serves as a deterrent to state courts’ misconstruing of federal constitutional law). See also *Desist v. United States*, 394 U.S. 244, 264 (1969) (Harlan, J., dissenting) (“[T]he threat of collateral attack may be necessary to assure that the lower federal and state courts toe the constitutional line . . .”).

453. *Sawyer v. Smith*, 497 U.S. 227, 234 (1990) (“*Teague* . . . is but a recognition that the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine.”). See also *Johnson v. Texas*, 509 U.S. 350, 378 (1993) (“The purpose of *Teague* is to accommodate the competing demands of constitutional imperatives and the ‘principle of finality which is essential to the operation of our criminal justice system.’”) (quoting *Teague*, 489 U.S. at 309); *Withrow v. Williams*, 507 U.S. 680, 698 (1993) (O’Connor, J., concurring) (arguing that the writ strikes at finality and deprives the criminal law of its deterrent effect).

is consistent with the policy of providing a single opportunity for state prisoners to relitigate their claims in federal court.

Relatedly, a revision of the writ need not entail the overruling of *Stone v. Powell*. To be sure, it is inconsistent with the Nationalist vision of habeas as a necessary means for relitigating state court resolution of federal issues not to permit full relitigation of every federal issue passed on by the state courts. There is some precedent, however, for viewing habeas as a tool for revisiting only those federal constitutional claims deemed essential to the fundamental fairness of the underlying state criminal proceedings.<sup>454</sup> This countervailing policy may outweigh the justification proffered in this Article and warrants a closer look at a means of narrowing the scope of the writ by more narrowly focusing the writ's substantive breadth.<sup>455</sup>

By broadening the actual contours of the writ to more closely fit its purported justifications, the writ can be reconstructed in a manner that enables it to exist alongside the other procedural mechanisms governed by the paradigmatic construct.

## VII. CONCLUSION

The first half of this Article explained why the writ of habeas corpus presently available to state prisoners is both a doctrinal and theoretical outlier as compared with the paradigmatic manner in which state courts finally adjudicate issues of federal law with minimal review by the federal courts. By functioning as a vehicle for the relitigation of federal issues already handled by state courts, the writ seemingly rests on a Nationalist premise that deems state courts structurally incompetent to finally resolve issues of federal law. Unfortunately, none of the possible justifications for why the writ does not hew to the Federalist principles underlying the paradigmatic construct adequately explains the differential treatment of

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454. Justice Stevens has been a vocal advocate of this approach to habeas. See *Williams v. Taylor*, 529 U.S. 362, 375 (2000) (Stevens, J.) (noting how “errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ”); *Brecht v. Abrahamson*, 507 U.S. 619, 640 (1993) (Stevens, J., concurring) (“[C]ollateral relief [has been limited] to cases that involve fundamental defects or omissions inconsistent with the rudimentary demands of fair procedure.”); *Rose v. Lundy*, 455 U.S. 509, 543–44 (1982) (Stevens, J., dissenting) (drawing a distinction between rights “important enough to require reversal on direct appeal” and rights “so fundamental that [their violation] infect[s] the validity of the underlying judgment itself” and thus warrant collateral relief).

455. See generally Hoffstadt, *supra* note 150, at 1003–26 (detailing how the substantive scope of the writ might be narrowed by prioritizing among federal constitutional claims and authorizing relitigation only of the most fundamental claims).

habeas. Thus, this deconstruction of the writ of habeas corpus into its component elements and underlying structural principles reveals that the writ rests on faulty theoretical premises.

The second half of the Article turned to the issue of how the writ might be reconstructed—that is, how the writ might be reenvisioned or revised to eliminate the theoretical disparity that currently exists between the paradigmatic construct and the habeas construct. Of the two possible means of reconceptualizing the writ, viewing the writ as a unitary, forum-shifting action best harmonizes the writ with the doctrines of the paradigmatic construct. But neither reconceptualization alters the contours of the writ, and thus neither cures the underlying instrumental disparity. To do that, some revision of the writ is required. The writ could be substantially narrowed to accord with the paradigmatic construct, but could potentially run afoul of the Suspension Clause in that form. Alternatively, the writ could be broadened to accord with its Nationalist premise. The conclusion that emerges from this discussion and from the Article as a whole is clear: habeas is an anomaly and it should be reconstructed, one way or the other, to bring greater consistency and rationality to the law of federal courts.