EQUITABLE GATEWAYS: TOWARD EXPANDED FEDERAL HABEAS CORPUS REVIEW OF STATE-COURT CRIMINAL CONVICTIONS

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State prisoners who file federal habeas corpus petitions face a maze of procedural and substantive restrictions that effectively prevent almost all prisoners from obtaining meaningful review of their convictions. But it is a mistake to think that habeas litigation is just a Kafkaesque nightmare with no constructive potential. Federal courts do sometimes cut through the doctrinal morass to consider state prisoners' claims, relying on what this Article terms "equitable gateways" to federal habeas relief. Litigants and courts generally underestimate the potential these gateways offer, with the result that habeas litigation does not focus on them as often as it should.

Here I consider one important category of equitable gateways animated by a concern about ensuring that federal claims get fair consideration in the courts. When a federal court believes that a state prisoner has not yet had a full and fair opportunity to present his or her federal claims and have them fairly considered, it is more likely to bypass procedural and substantive restrictions on review. But state prisoners often fail to highlight certain kinds of fair consideration failures, thus depriving themselves of potential access to the equitable gateways. This Article suggests that this blind spot is partly due to the history of fair consideration principles: for decades, the idea of a fair consideration gateway was a central feature of proposals for further restricting the scope of federal habeas review. In current circumstances, however, fair consideration is a rubric for expanded habeas review, and habeas litigants should take note.

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INTRODUCTION

Federal habeas corpus review of state criminal convictions is a mess. The Supreme Court has described the Great Writ as "a bulwark against convictions that violate fundamental fairness,"[1] but one empirical study revealed that fewer than 0.3% of noncapital state petitioners get any form of federal habeas relief, and more than half of the prisoners who file habeas petitions have their petitions dismissed on procedural grounds without a federal court ever considering the merits of the underlying constitutional claims.[2] In a world with a properly rights-protective criminal justice system, the vanishingly small rate of habeas relief might just reflect the absence of unlawful convictions. But given substantial evidence that states systematically violate criminal defendants' constitutional rights[3] and the large

1. Engle v. Isaac, 456 U.S. 107, 126 (1982).

2. *See* NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 6, 9 (2007) [hereinafter KING REPORT], https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf.

3. *See, e.g.*, Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 16–23 (2010) (documenting systemic violations of defendants' rights in the states); *see also* Lynn Adelman, *Who Killed Habeas Corpus?*, DISSENT MAGAZINE Winter 2018, https://www.dissentmagazine.org/article/who-killed-habeas-corpus-bill-clinton-aedpa-

numbers of wrongful state convictions that have come to light,[4] the rate of relief cannot be explained on the grounds that everything is basically fine. Fundamental fairness is often violated, and 0.3% is not much of a bulwark.

It would be a mistake, however, to think that habeas litigation is just a Kafkaesque nightmare with no constructive potential. Now and then, federal courts cut through the doctrinal morass and consider the claims of state prisoners.[5] When they do, they rely on devices that I will call "equitable gateways" to federal habeas review. Attention to those equitable gateways can provide insight into the federal courts' implicit vision of the proper scope of habeas review of state criminal convictions and help draw a map for obtaining more robust federal review of state criminal convictions going forward. Someone who knows where the gateways are and litigates toward them has a better chance of getting through.

The equitable gateways to habeas review fall into two basic categories. Federal courts are more willing to look past procedural barriers and provide more robust merits review when state prisoners show either that they are innocent or that they did not have a full and fair opportunity to have their federal claims adjudicated in the convicting state's system.[6] Much has been written about the scope of equitable exceptions focused on innocence.[7] In this Article, I focus on the latter interest, which I refer to as an equitable concern about fair consideration.[8] The fair consideration

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states-rights ("As a federal judge, I have observed a considerable number of cases where state courts overlooked clear constitutional violations . . . .").

4. *See* Brandon L. Garrett, *Actual Innocence and Wrongful Convictions*, *in* 3 ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 193, 193–94 (Erik Luna ed., 2017).

5. *See infra* Part II.

6. *Cf.* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 166–67 (1970–71) (arguing that federal habeas review of state criminal convictions should focus on preventing the conviction of innocents and ensuring that states provide full and fair procedures to adjudicate federal claims). I don't mean to suggest that fair consideration and innocence concerns are the only factors that matter to federal habeas courts. In capital cases, the federal courts have different concerns about states' implementation of the death penalty. And, when they are reviewing the merits of a claim, the federal courts sometimes get upset when state courts misstate federal law or apply it in egregiously unreasonable ways. That said, when it comes to the many restrictions on federal habeas review of noncapital state prisoners' cases, federal courts seem most willing to bypass those restrictions when there are fair consideration or innocence concerns.

7. *See, e.g.*, Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417 (2018); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 691–712 (1990); Friendly, *supra* note 6.

8. In so doing, I build on recent scholarship that is focused on determining as a descriptive matter what motivates federal courts to provide more robust review of state-court convictions in certain cases and building off of that to consider the future trajectory of the doctrine. *See, e.g.*, Aziz Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 519–20 (2014) (arguing that the Supreme Court has adopted a fault-based approach); Justin Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071, 2071–72 (2014) (arguing that recent cases suggest a move to a greater focus on the fairness of procedures rather than innocence).

concern is not directly about underlying rights violations. The animating worry is not whether a prisoner was convicted after, say, the improper concealment of evidence under *Brady v. Maryland*[9] or an inappropriate jury-selection process under *Batson v. Kentucky*.[10] Instead, the concern is that the prisoner has had no real chance to present such claims to a court and have them fairly adjudicated.[11] If a state prisoner has not had a full and fair opportunity to have federal claims considered, there are equitable gateways that permit the prisoner to bypass the procedural and substantive restrictions on the scope of federal habeas review and get the underlying federal claims fully considered in federal court.[12] These equitable gateways offer powerful paths to more meaningful federal review of state-court criminal convictions.

But litigants and courts generally underestimate the potential these gateways offer, with the result that habeas litigation does not focus on them as often as it should. On the contrary, many courts and litigants think of these gateways as quite narrow. The reason is partly historical. Fair consideration doctrines are often traced back to Justice Jackson's separate opinion in *Brown v. Allen*[13] criticizing federal review of state-court criminal convictions. Focusing on the importance of finality and the inevitable conflict with states that results from federal review, Justice Jackson opined that federal courts should typically not entertain habeas petitions.[14] But he carved out a narrow exception to that prohibition: he would have permitted federal review if a petitioner "shows that although the law allows a remedy, he was actually improperly obstructed from making a record upon which the question could be presented."[15] Stated differently, Justice Jackson thought federal habeas review was appropriate if a state prisoner had been unfairly prevented from fully presenting his federal claims earlier.

Professor Paul Bator built on Justice Jackson's fair consideration idea in a famous 1963 law review article.[16] Like Jackson, Bator argued that a state prisoner should have a full and fair opportunity to have his federal claims considered in state court.[17] Also like Jackson, Bator made this argument in the context of arguing for a

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9. 373 U.S. 83 (1963).

10. 476 U.S. 79 (1986).

11. Of course, the lack of a real opportunity to have federal claims considered is problematic precisely *because* the system wants to stop the underlying rights violations. But the equitable concern about fair consideration is agnostic about whether a rights violation has occurred in any given case. The goal is to ensure that federal claims are fairly considered so that rights violations will be corrected when they do occur.

12. *See infra* Part II.

13. 344 U.S. 443, 532 (1953) (Jackson, J., concurring).

14. *Id.* at 534–45.

15. *Id.* at 545. Justice Jackson also had one other exception: if the petition raised a jurisdictional question involving federal law on which the state law allowed no access to its courts. *See id.*

16. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

17. Professor Bator referred to fair consideration problems as "failures of process," noting that the relevant question is "whether the processes previously employed for

narrowing of the scope of federal habeas review.[18] In the 1960s, federal habeas courts often relitigated claims that had been previously adjudicated and decided against the petitioners in state court.[19] Bator argued that such relitigation was inefficient and also undermined the state's interest in the finality of its criminal convictions: in his view, one and only one opportunity to have federal claims considered was sufficient.[20] Experts who favored reducing federal-court review regularly cited Professor Bator's article and Justice Jackson's language, while liberals shunned the fair consideration approach, arguing instead for theories that supported broader approaches to federal habeas review.[21]

As the Supreme Court took its conservative turn in the 1970s and 1980s, it adopted much of Professor Bator's approach, citing his article to support contractions in the scope of federal habeas review.[22] When Congress further restricted federal habeas review in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),[23] it also incorporated fair consideration ideas. That Statute imposed many obstacles to habeas review, both procedural and substantive. Alongside those obstacles, the Statute carved out exceptions for cases in which state courts had not provided one real opportunity for the adjudication of federal claims.[24] But those exceptions have seemed narrow to most habeas lawyers who rightly perceive AEDPA as erecting a maze of obstacles to federal habeas review.[25] More generally, many litigants and judges today understandably perceive the equitable gateways provided by the fair consideration approach as narrow precisely because that approach has long been championed by people whose aim has been to constrict the scope of habeas review.[26]

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determination of questions of fact and law were fairly and rationally adapted to that task." *See id.* at 455.

18. *See id.*

19. *See Brown*, 344 U.S. at 466–532 (providing for de novo review of legal claims raised in federal habeas petitions); *see also* Townsend v. Sain, 372 U.S. 293, 312 (1963) (creating a preference for evidentiary hearings in federal court and noting that "the power of inquiry on federal habeas corpus is plenary").

20. *See* Bator, *supra* note 16, at 444–53 (1963).

21. *See* Primus, *supra* note 3, at 4 (collecting the different approaches).

22. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 309–10 (1989); Wainwright v. Sykes, 433 U.S. 72, 77 (1977); Stone v. Powell, 428 U.S. 465, 493 (1976).

23. 28 U.S.C. §§ 2241–66 (1996).

24. *See infra* Part II.

25. *See, e.g.*, Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled With The AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 78 (2005) ("[T]he current federal habeas corpus system is not unlike a maze filled with wrong turns, funhouse mirrors, and dead ends that one must try to navigate before attaining the evermore elusive goal of meaningful federal habeas review."); Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313, 318 (1999) (describing federal habeas as a "maze of procedural barriers"); 15 No. 14, CRIM. PRAC. REP. 2, *For Habeas Corpus, to be "Held" is to be "Made"* (July 2001) (noting that "habeas corpus rules have long presented a maze of traps for the unwary").

26. *See, e.g.*, Davila v. Davis, 137 S. Ct. 2058, 2061 (2017) (describing as "narrow" the Supreme Court's exceptions to the procedural default bar); Sawyer v. Whitley,

Much has changed, though, since Justice Jackson and Professor Bator wrote about fair consideration. States have now adopted Byzantine postconviction processes of their own—processes that often create only sham opportunities for prisoners to raise federal claims.[27] In particular, what prevents prisoners from raising their claims is often not a single state rule but the interaction of multiple state rules and procedures in nonobvious ways, such that what, on paper, looks like a process allowing the adjudication of federal claims is, in reality, nothing of the kind.[28] The Supreme Court recently recognized that, in light of these complex state procedures, it must look at how state postconviction processes operate in practice to determine whether litigants have real opportunities, rather than merely theoretical ones, to have their federal claims considered.[29]

The Supreme Court's willingness to look at how multiple state postconviction procedures interact in practice to determine whether state prisoners have realistic opportunities to have their federal claims considered is potentially revolutionary. It opens the door to arguments about systematic ways in which state procedures unfairly burden state prisoners' abilities to raise federal claims. In this Article, I argue that advocates and courts should capitalize on these opportunities to broaden courts' understanding of fair consideration and provide a roadmap for how they might do it.

This Article proceeds in three parts. In Part I, I offer a brief overview of the federal habeas review system for state-court criminal convictions, including a description of the many procedural and substantive roadblocks that state prisoners encounter when attempting to obtain relief. In Part II, I explore the fair consideration doctrine's equitable gateways and explain how concerns about a lack of access to adequate state processes often motivate federal courts to look past obstacles to federal habeas review. As Part II explains, a state prisoner's lack of access to the state courts often results from an overly complicated state procedural regime or even state misconduct. On other occasions, however, the lack of access arises from causes that are not the state's doing: a prisoner who suffers from a severe mental defect or an unforeseen medical emergency might be unable to present federal claims to a

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505 U.S. 333, 358 (1992) (Blackmun, J., concurring) ("This Term has witnessed the continued narrowing of the avenues of relief available to federal habeas petitioners seeking redress of their constitutional claims."); Reinhardt, *supra* note 25, at 317 (describing the "increasingly strict" fair consideration tests adopted by the Rehnquist Court).

27. *See* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 447–52 (2017) (discussing problems in state postconviction regimes); Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75, 96–105 (2017) (discussing the evolution of state postconviction review systems in the states and explaining how states have created complicated procedural regimes that often do not give prisoners a real opportunity to raise their federal claims).

28. *See id.*

29. *See* Martinez v. Ryan, 566 U.S. 1, 17 (2012) (permitting a state prisoner to bypass procedural restrictions on federal habeas review because the state postconviction procedures, considered together, effectively did not permit him to raise his ineffective-assistance-of-trial-counsel claim in the state courts); *see also* Trevino v. Thaler, 569 U.S. 413, 417 (2013) (extending the holding in *Martinez* to a state in which the same problematic procedures existed as a de facto matter).

state adjudicator. So long as the reason why the prisoner did not have an adequate opportunity to present those claims is external and not fairly attributable to the prisoner, the equitable principles of fair consideration apply.

Part III then explores how litigants can and should use the animating principles behind these equitable gateways to broaden procedural bypasses and inform the standard of review for merits determinations in federal court. I argue that state prisoners often fail to highlight fair consideration failures in ways that could broaden the scope and impact of federal habeas review, and I offer some concrete suggestions for ways to expand upon already-existing fair consideration gateways. If federal habeas review is to serve as a check against fundamental unfairness in state-court processes, it is time to reconsider how these equitable gateways apply in today's world with today's state postconviction review systems.

I. AN OVERVIEW OF THE OBSTACLES TO FEDERAL HABEAS REVIEW

The writ of habeas corpus permits a prisoner to file a civil action in federal court asking a judge to order the warden of the prison where he or she is being held—the one who has ("habeas") the prisoner's body ("corpus")—to release the prisoner from unlawful custody.[30] Originally, the writ was available only before conviction and only to establish that sufficient legal cause existed for a prisoner's detention.[31] A court of competent jurisdiction determined guilt or innocence, and habeas corpus was not intended to disturb that. Legal errors were to be corrected on appeal, and "the Great Writ" was designed to protect against detention by the arbitrary will of a public official without sufficient legal cause.[32]

After the Civil War, Congress and the Supreme Court were concerned about state abuse of the criminal process to systematically violate some citizens' rights and wrongfully imprison disfavored minority community members and those sympathetic to them.[33] To protect against wrongful convictions and unfair state criminal procedures, Congress gave the federal courts jurisdiction to entertain postconviction habeas corpus petitions from state prisoners who claimed that their convictions were obtained in violation of their federal constitutional rights.[34]

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30. *See Ex parte Watkins*, 28 U.S. 193, 195 (1830).

31. Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1101 (1995).

32. *Id.*

33. *See, e.g.*, William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 426 (1961) ("In 1867, Congress was anticipating Southern resistance to Reconstruction and to the implementation of the post-war constitutional Amendments."); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 752 (1987) (describing congressional concern about Southern state policies); *see also* Forsythe, *supra* note 31, at 1112 (discussing the congressional records).

34. *See* Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385 (codified at 28 U.S.C. §§ 2241–54 (2006)).

Today, the vast majority of federal habeas petitions are postconviction petitions filed by state prisoners.[35] Initially, postconviction federal habeas review of state prisoners' constitutional claims was de novo, and there were few procedural obstacles to obtaining relief.[36] But with the incorporation of the criminal-procedure provisions of the Bill of Rights in the 1960s and the draconian sentences that came with the War on Drugs, federal habeas dockets exploded.[37] Concerns about federalism, finality, and conservation of judicial resources led Congress and the federal courts to create a number of procedural and substantive obstacles to federal habeas review. In Section I.A, I will explore the procedural barriers that state prisoners face when they seek federal habeas relief. Section I.B will then discuss the substantive obstacles.

A. Procedural Obstacles to Review

Many state criminal defendants have no semblance of a fair process to determine their guilt or innocence. They are processed through structurally ineffective systems populated by underfunded and overworked criminal defense attorneys,[38] prosecutors whose incentives often are to obtain convictions and appear tough on crime rather than pursue just results,[39] and overwhelmed trial court judges who are focused on docket management and often indifferent to the systemic mistreatment of poor people of color.[40] To avoid reckoning with these failures, states often rely on (and even distort) state procedural rules to reject defendants' constitutional claims.[41]

Sadly, these problems typically are not fixed at the state appellate or postconviction levels. Appellate courts often rely on those same state procedural rules to avoid addressing preserved federal claims.[42] When they do address federal claims, they often reject them summarily on the merits in terse, one-line orders or

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35. *See* NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 48 (2011) ("By far the most common version of habeas corpus encountered in the federal courts today is the review of state criminal cases...."); KING REPORT, *supra* note 2, at 1 (noting that 1 out of every 14 civil cases filed in federal district courts is a habeas petition filed by a state prisoner).

36. *See* Brown v. Allen, 344 U.S. 443 (1953).

37. *See* JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 96, 99 (1988).

38. *E.g.*, Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM, *supra* note 4, at 121.

39. *See, e.g.*, John F. Pfaff, *Prosecutorial Guidelines*, *in* 3 ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM, *supra* note 4 at 101, 102–06.

40. *See* Primus, *supra* note 27, at 91–92.

41. *See, e.g.*, Lee v. Kemna, 534 U.S. 362, 365–66 (2002) (examining Missouri's distortion of two state procedural rules to prevent a defendant from presenting witnesses to support his alibi defense); *see also* Primus, *supra* note 27, at 84–95 (documenting how states use procedural rules to avoid constitutional challenges).

42. *See, e.g.*, *Lee*, 534 U.S. at 366 (discussing the state appellate courts' reliance on procedural rules to avoid addressing the petitioner's federal claims).

opinions.[43] And many federal claims are not adequately preserved for appellate review. When criminal defense attorneys fail to object to constitutional problems at the trial level, courts deem the claims waived on appeal.[44] And most states are quite hostile to claims of deficient trial attorney performance, relegating those claims to later stages of postconviction litigation when defendants won't have attorneys to help raise them.[45]

When these state prisoners turn to the federal habeas courts for help, they quickly learn that Congress and the Supreme Court have erected a complicated maze of procedural obstacles that they must navigate, often without the assistance of counsel, to have their constitutional claims considered in federal court. One wrong procedural step means a prisoner's claims are thrown out of federal court altogether. In fact, federal judges now dismiss a majority of state prisoners' habeas claims on procedural grounds.[46]

Four obstacles in particular—the statute of limitations, exhaustion requirement, procedural default doctrine, and successive petition barrier—ensure that most state prisoners' claims are never considered on the merits in federal court.

1. Statute of Limitations

To promote states' interests in finality, Congress created a statute of limitations, requiring state prisoners to file their applications for a writ of habeas corpus within one year from the date on which their state judgments became final at the conclusion of the direct appellate process.[47] Although the one-year statute of limitations is statutorily tolled when timely filed state postconviction petitions are pending,[48] many prisoners fail to file on time.[49] According to one empirical study, federal district courts dismissed 22% of habeas petitions in noncapital cases as time-barred.[50]

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43. *See* Harrington v. Richter, 562 U.S. 86, 99 (2011) (discussing the frequency of such summary dispositions).

44. *See, e.g.*, United States v. Olano, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar . . . than that a constitutional right . . . may be forfeited in criminal . . . cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (internal quotations omitted)).

45. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 686–97 (2007) (discussing this trend).

46. *See* KING REPORT, *supra* note 2, at 6.

47. *See* 28 U.S.C. § 2244(d) (1996). Section (d)(1) also discusses three other potential, less common triggering dates for the statute of limitations: the date on which a state-created impediment to filing is removed if the state-created impediment prevented the state prisoner from filing; the date on which the Supreme Court recognizes a new right and deems it retroactively applicable to cases on collateral review; and the date on which a state prisoner discovers the factual predicate of a claim if the facts could not have been discovered earlier through the exercise of due diligence. *Id.*

48. 28 U.S.C. § 2244(d)(2) (1996).

49. *See* KING REPORT, supra note 2, at 6.

50. *Id.*

2. Exhaustion Requirement

The exhaustion doctrine requires state prisoners to present any constitutional claims that they want to raise in their federal habeas petitions to the highest state court first.[51] The doctrine is grounded in the idea that the federal courts should respect their state counterparts and give the state the first opportunity to correct any mistake or injustice.[52] If a state prisoner comes into federal court with a federal claim that has not been properly presented to the highest state court, and the prisoner still has a right under state law to raise the claim in state court, the federal court will deem the claim unexhausted.[53] The federal court will dismiss the claim without prejudice to permit the prisoner to present it to the state courts first, though it may deny the claim on the merits if it is obviously frivolous.[54]

If a state prisoner files a "mixed" federal habeas corpus petition—one that contains exhausted and unexhausted claims—the federal court must dismiss the petition.[55] The Supreme Court adopted this "total exhaustion" requirement to avoid piecemeal litigation of state prisoners' claims.[56] A state prisoner whose mixed petition is dismissed may return to state court to exhaust the claims and then return to federal court with a totally exhausted petition (assuming that doing so does not create a statute of limitations problem).[57] Alternatively, a state prisoner who has filed a mixed petition may opt to drop the unexhausted claims and amend the habeas petition to present only the exhausted claims.[58]

3. Procedural Default Doctrine

Procedural default and exhaustion are doctrinal cousins. If a state prisoner fails to take advantage of an available opportunity to litigate a claim in state court, the problem is a failure to exhaust. But, if a state prisoner failed to pursue an opportunity to present the claim to the state courts at an earlier time and that procedural avenue is no longer available under state law, the prisoner has procedurally defaulted—or waived—the underlying claim.[59] Similarly, if a state prisoner attempts to raise a federal constitutional claim in state court, but the state courts refuse to consider the claim because the prisoner failed to raise it properly under the state's procedural rules, the federal court will deem the claim procedurally defaulted and will refuse to consider the merits of the underlying constitutional claim out of respect for the state's procedural regime.[60] The state-court determination that the prisoner failed to properly present the constitutional claim

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51. *See* 28 U.S.C. § 2254(b)–(c) (1996); Rose v. Lundy, 455 U.S. 509, 510 (1982).
52. *See, e.g.*, Rhines v. Weber, 544 U.S. 269, 273 (2005) ("[T]he interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claims.").
53. *See, e.g.*, *id.* at 274.
54. *See id.*; *see also* 28 U.S.C. § 2254(b)–(c).
55. *See Rose*, 455 U.S. at 510.
56. *See id.* at 520.
57. *See Rhines*, 544 U.S. at 274–75.
58. *See Rose*, 455 U.S. at 520.
59. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977).
60. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 491–92 (1986).

under state procedural rules is deemed an adequate and independent state-law ground justifying the denial of relief.[61]

4. Successive Petition Barrier

Citing concerns about abusive litigation tactics, the problem of piecemeal litigation, and the lack of any end to litigation, Congress enacted a presumptive prohibition on filing more than one federal habeas corpus petition.[62] Under AEDPA, any claim that a state prisoner presents in a second or successive habeas petition must be dismissed by the federal court unless the claim (a) relies on a new rule of law that the Supreme Court has deemed retroactively applicable or (b) relies on new facts that the state prisoner could not have discovered before and the new facts establish by clear and convincing evidence that the state prisoner is innocent.[63] Even if a state prisoner claims to fall within one of those two narrow exceptions, the prisoner must first get permission to file a successive petition from a three-judge panel of the Circuit Court of Appeals.[64] One empirical study noted that about 7% of noncapital habeas petitions filed in district court were dismissed as successive (and that study did not include petitions dismissed as successive by the courts of appeals, which are likely to be the majority of dismissals given the procedural filing requirement).[65]

The vast majority of state prisoners have to navigate these complicated procedural obstacles alone because the Supreme Court has never held that prisoners have a constitutional right to the assistance of counsel in postconviction proceedings.[66] It is not surprising that, according to one empirical study, these four procedural doctrines were responsible for the dismissal of approximately 53% of state prisoners' noncapital federal habeas claims in district courts.[67]

B. Substantive Obstacles to Review

The rare state prisoner who successfully manages to run this procedural gauntlet faces a merits review process that has become so deferential to the State that relief remains virtually unattainable. The Supreme Court has dramatically limited the scope of federal habeas review by refusing to address certain kinds of constitutional claims, deeming them not cognizable in habeas proceedings. In addition, Congress and the Court have made it difficult for state prisoners to expand

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61. *See, e.g.*, *Sykes*, 433 U.S. at 81 (discussing the adequate and independent state-ground doctrine).

62. 28 U.S.C. § 2244(b)(1)–(2) (1996).

63. *Id.*

64. *Id.* § 2244(b)(3).

65. KING REPORT, *supra* note 2, at 6.

66. *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 and we decline to so hold today." (citation omitted)); *see also* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion).

67. *See* KING REPORT, *supra* note 2, at 6. And, as discussed *supra* Subsection I.A.4, that likely understates the percentage of cases dismissed on procedural grounds given that it does not account for the petitions dismissed as successive by courts of appeals.

the factual record in federal court through evidentiary hearings, created a presumption that state-court factual findings are correct, and imposed highly deferential standards of review whenever a state has already adjudicated the merits of a claim.

1. Limits on Cognizable Claims

The Supreme Court has placed multiple limits on what kinds of federal claims are cognizable in habeas petitions filed by state prisoners. First, in *Stone v. Powell*, the Supreme Court held that state prisoners may not raise Fourth Amendment challenges in federal habeas proceedings if they had a full and fair opportunity to raise those challenges in state court.[68] The exclusionary rule exists to deter police officers from committing constitutional violations, and the Court deemed the additional deterrence achieved by applying the exclusionary rule at the habeas stage not sufficient to overcome the government interests in finality, conservation of resources, and federalism.[69]

Additionally, in *Reed v. Farley*, the Court held that not all violations of state prisoners' federal statutory rights will be cognizable in federal habeas proceedings.[70] Only federal statutory errors that amount to "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure" will be heard.[71] In *Reed v. Farley*, the Court deemed a violation of the federal interstate compact on detainers not fundamental enough to merit federal consideration.[72]

2. Evidentiary Hearings

Under AEDPA, federal courts may not hold evidentiary hearings on claims that a state prisoner failed to develop in the state courts unless the prisoner can show by clear and convincing evidence that he or she is innocent and can also show that the claim relies on either a new rule of law that the Supreme Court has deemed retroactively applicable or new facts that could not have been discovered before.[73] The Supreme Court has interpreted AEDPA to limit federal habeas review in most cases to the factual record created in the state courts.[74] As a result, evidentiary

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68. *See* 428 U.S. 465, 481–82 (1976).

69. *Id.* at 486–95.

70. *See* 512 U.S. 339, 342 (1994).

71. *Id.* at 348 (quoting Hill v. United States, 368 U.S. 424 (1962)).

72. 512 U.S. 339, 342 (1994). *Teague v. Lane*, 489 U.S. 288, 316 (1989), also imposes a limit on the cognizability of federal claims. After *Teague*, if the U.S. Supreme Court recognizes a new federal right after a state prisoner's direct appellate process has concluded, that state prisoner presumptively is not entitled to raise a claim in federal habeas predicated on a purported violation of that new federal right. There are two narrow exceptions to this presumption, both of which illustrate to differing degrees the Court's focus on equitable innocence gateways. Because I am focused here on the fair consideration gateways, I will not address *Teague* further. For a discussion of how innocence animates the *Teague* exceptions, see Litman, *supra* note 7, at 433–37.

73. 28 U.S.C. § 2254(e)(2) (1996).

74. *See* Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

hearings in federal court are quite rare.[75] Typically, when federal courts review state prisoners' claims on the merits, they do so on the basis of limited state factual records.[76]

3. Presumption of Correctness with Respect to State Factual Findings

Out of respect for state factfinding procedures, Congress requires federal habeas courts to presume that any determination of fact that a state court makes is correct.[77] To overcome that presumption, the prisoner must show by clear and convincing evidence that the state court's factual determination was wrong.[78] Given how rare evidentiary hearings are in federal court, most attempts to rebut a state court's factual findings are limited to an often-anemic state evidentiary record. The presumption of correctness is therefore quite difficult to overcome.

4. Deferential Standards of Review

Section 2254(d) of AEDPA famously implemented a highly deferential standard of review in federal court for claims previously adjudicated on the merits in the states.[79] A federal habeas court may only grant a prisoner relief if the prior state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" or if the state court's legal determination "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[80] As the Supreme Court has explained, it is not enough if the state court's determination of the facts or application of the law was clearly erroneous.[81] Rather, the state court's determination must have been patently unreasonable and "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[82] And, even if a habeas petitioner is able to show that the state court ignored clearly binding federal precedent or applied it in a patently unreasonable way, the prisoner will not get relief unless the error is deemed harmful, meaning that it had a substantial and injurious effect or influence on the jury's verdict.[83]

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75. *See* KING REPORT, *supra* note 2, at 5 (noting that, post-AEDPA, evidentiary hearings were granted in only 0.41% of noncapital cases).

76. *See, e.g.*, *id.* (emphasizing that "most habeas cases continue to be concluded without evidentiary hearings or discovery in [federal] district court").

77. *See* 28 U.S.C. § 2254(e)(1) (1996).

78. *Id.*

79. *See id.* § 2254(d).

80. *Id.*

81. Williams v. Taylor, 529 U.S. 362, 411 (2000).

82. Harrington v. Richter, 562 U.S. 86, 103 (2011). A plethora of law review articles criticize the Supreme Court's narrow interpretation of the substantive scope of federal habeas review. *See, e.g.*, Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1224–29 (2015); Judith L. Ritter, *The Voice of Reason – Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Corpus are Wrong*, 37 SEATTLE U. L. REV. 55, 70–86 (2013).

83. *See* Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993).

For all of these reasons, even a habeas petitioner who successfully navigates the procedural complexities has less than a 0.3% chance of winning on the merits.[84] Many experts believe that federal habeas doctrine is convoluted, incoherent, and not worth the amount of time and judicial energy spent on it,[85] while others complain that we have lost sight of the historic function of the Great Writ to remedy injustice and check abuses of government power.[86] Perhaps most damning, some federal judges lament that current habeas law requires them "to place their stamp of approval on constitutional error."[87] While procedural and substantive obstacles pose challenges, the animating principles of the equitable exceptions to these barriers reveal possible ways to expand the scope and impact of federal habeas review of state prisoners' claims.

II. FAIR CONSIDERATION DOCTRINE'S EQUITABLE GATEWAYS

Hidden in the procedural and substantive morass of federal habeas doctrine is a consistent equitable thread. When a federal court believes that a state prisoner has not had a full and fair opportunity to present his or her claims and have them fairly considered, it is more likely to bypass the procedural and substantive barriers to relief. To be sure, this practice is not universal. Though some federal judges are more willing to close the federal courthouse doors to habeas petitioners than others, when federal courts, including the Supreme Court, bypass procedural and substantive obstacles to review, they often cite concerns about ensuring that criminal defendants are able to have their federal claims fairly considered by at least one court.[88] Even if there are no sure formulas for procuring more expansive federal habeas review, there are clear indications about what sorts of claims are more likely to succeed.

Federal habeas review has historically been about ensuring that states provide criminal defendants a full and fair opportunity to have their federal claims adjudicated. After all, it was a concern about state hostility to newly created federal rights that first led Congress to give federal courts the power to entertain habeas petitions filed by state prisoners.[89] Supreme Court Justices who are typically quite hostile to expansive federal habeas review of state convictions have agreed that federal courts should review claims alleging a lack of available state processes for vindicating federal rights.[90] As Professor Bator explained it, the states have a

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84. *See* KING REPORT, *supra* note 2, at 9. The chances in capital cases are higher at 12.4%. *Id.*

85. *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 793 (2009).

86. *See, e.g.*, Primus, *supra* note 3, at 13–16 (collecting sources).

87. Adelman, *supra* note 3; *see* Reinhardt, *supra* note 82, at 1221 (describing how the federal courts have "embarked on a path designed to render constitutional rulings by state courts nearly unreviewable by the federal judiciary").

88. *See, e.g.*, Trevino v. Thaler, 569 U.S. 413, 425–28 (2013); Martinez v. Ryan, 566 U.S. 1, 10–14 (2012); Maples v. Thomas, 565 U.S. 266 (2012); Holland v. Florida, 560 U.S. 631 (2010).

89. *See supra* note 33.

90. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 532–48 (1953) (Jackson, J., concurring in the result).

responsibility under the Due Process Clause "to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case," and if they fail to do so, "the due process clause itself demands that its conclusions of fact or law should not be respected."[91]

More broadly, federal courts have been willing to look past procedural defects in state prisoners' petitions if those defects resulted from some unforeseen external obstacles (whether state created or not) that prevented prisoners who were otherwise diligently pursuing their rights from complying with the procedural rules.[92] In those circumstances, the federal court bypasses the procedural restrictions on equitable grounds, because the prisoners, through no fault of their own, have never had a full and fair opportunity to have the federal claims considered.

Similarly, when conducting a merits analysis, federal courts have been willing to evaluate claims that they otherwise would not have entertained when those claims were not fully and fairly considered by the state courts. The federal courts have been more willing to have evidentiary hearings and look past presumptions of correctness when the petitioner has not been able to develop a factual record in state court.[93] And some federal judges will give less deference to state-court determinations that were reached based on less than a full and fair airing of the underlying federal claims.[94]

In short, the federal courts have permitted state prisoners to bypass procedural obstacles to habeas review and obtain more rigorous and less deferential merits review when there is a demonstrated process failure in the state or some objective factor external to the state prisoner that has prevented that prisoner from obtaining a full and fair review of his or her federal claims.

A. Bypassing Procedural Obstacles to Review

For each of the procedural obstacles outlined above, the Supreme Court and lower federal courts have relied on equitable doctrines to carve out exceptions—ways petitioners can bypass those procedural obstacles—when state prisoners have not had a full and fair opportunity to litigate their federal claims.

1. Statute of Limitations

The one-year statute of limitations that Congress created in AEDPA has proved to be a formidable procedural obstacle for many prisoners seeking federal habeas review.[95] But, in *Holland v. Florida*, the Supreme Court recognized that state prisoners could toll that one-year statute of limitations on equitable grounds if they could demonstrate that they had been pursuing their rights diligently and that some

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91. Bator, *supra* note 16, at 456; *see also* Marceau, *supra* note 8, at 2071–72 (arguing that recent cases suggest "a potential shift" in the Supreme Court's focus to prioritize a consideration of the fairness of state procedures).

92. *See infra* Subsection II.A.

93. *See infra* Subsection II.B.

94. *See infra* Subsection II.B.

95. *See* KING REPORT, *supra* note 2, at 6 (noting that 22% of noncapital habeas petitions were dismissed as time barred).

extraordinary circumstance beyond their control interfered with the ability to timely file a petition.[96]

A state's failure to provide prisoners with access to the necessary resources to timely file their pleadings is a frequently invoked circumstance to justify equitable tolling. For example, federal courts have held that prisoners are entitled to equitable tolling when their inability to file on time is the result of the state (1) denying a prisoner reasonable access to the law library;[97] (2) failing to maintain legal materials about AEDPA in the prison library;[98] (3) denying a prisoner reasonable access to his legal files;[99] (4) affirmatively misleading a prisoner about the available time he has left;[100] (5) affirmatively misleading a prisoner to file the wrong document or to file in the wrong court or at the wrong time;[101] or (6) substantially delaying the mailing of the prisoner's court filings or the notice of a state-court decision on them.[102] In all of these circumstances, state action prevents the prisoner from complying with the statute of limitations, thus ensuring that the prisoner will not have a full and fair opportunity to present the federal claims.

In addition to state action that prevents timely filing, some federal courts will also equitably toll the statute of limitations when something external to both a state and a prisoner has prevented the prisoner from being able to get fair consideration of his or her federal claims in court. For example, federal courts toll the statute when a prisoner suffers from an extreme medical condition, whether physical or psychiatric, which interfered with the ability to file federal claims on time.[103] Egregious misconduct by a state prisoner's attorney, such as failing to perform basic legal research, failing to meet with or respond to client communications, or affirmatively misleading a state prisoner about the time restrictions, may lead to equitable tolling as well.[104]

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96. Holland v. Florida, 560 U.S. 631, 649–52 (2010).

97. *See, e.g.*, Sossa v. Diaz, 729 F.3d 1225, 1235 (9th Cir. 2013).

98. *See, e.g.*, Pabon v. Mahanoy, 654 F.3d 385, 400–01 (3d Cir. 2011); Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) (per curiam).

99. *See, e.g.*, Socha v. Boughton, 763 F.3d 674 (7th Cir. 2014); Lott v. Mueller, 304 F.3d 918 (9th Cir. 2002).

100. *See, e.g.*, Pliler v. Ford, 542 U.S. 225, 234 (2004).

101. *See, e.g.*, Spottsville v. Terry, 476 F.3d 1241, 1245–46 (11th Cir. 2007).

102. *See, e.g.*, Drew v. Dep't of Corr., 297 F.3d 1278, 1288 (11th Cir. 2002); United States *ex rel.* Willhite v. Walls, 241 F. Supp. 2d 882, 888 (N.D. Ill. 2003).

103. *See, e.g.*, Harper v. Ercole, 648 F.3d 132, 137 (2d Cir. 2011) (noting that "medical conditions, whether physical or psychiatric, can manifest extraordinary circumstances, depending on the facts presented"); Forbess v. Franke, 749 F.3d 837 (9th Cir. 2014); Bolarinwa v. Williams, 593 F.3d 226, 231 (2d Cir. 2010); *see also* Hunter v. Ferrell, 587 F.3d 1304, 1309–10 (11th Cir. 2009) (recognizing that severe intellectual disability may be sufficient to warrant equitable tolling).

104. *See, e.g.*, Holland v. Florida, 560 U.S. 631, 651 (2010). The Supreme Court has made it clear that "a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." *Id.* at 651–52 (internal quotations omitted); *see also* Lawrence v. Florida, 549 U.S. 327, 336–37 (2007). It must be a "serious instance[] of attorney misconduct." *Holland*, 560 U.S. at 652; *see also* Luna v. Kernan, 784 F.3d 640, 647 (9th Cir. 2015) ("[A]ffirmatively

In short, when state prisoners are otherwise diligently attempting to vindicate their rights and an extraordinary, external factor prevents them from having their claims fairly considered, the statute of limitations will not prevent federal habeas review.[105]

2. Exhaustion Requirement

Citing equitable concerns about fair consideration, Congress and the federal courts have created procedural mechanisms to permit state prisoners to bypass, or at the very least soften, the total-exhaustion requirement. First, AEDPA provides that a state prisoner need not exhaust the remedies available in state court if the state does not provide a realistic and effective procedural mechanism for considering the prisoner's federal claims.[106] The state may not create remedies that are so confusing, numerous, intricate, or ineffective that state prisoners cannot be expected to comply with them.[107] Nor must prisoners pursue state remedies that are only theoretically but not actually available to them.[108] For example, excessive state-court delay in considering a claim may render the state process ineffective.[109] If pursuing state procedural remedies is pointless, the state has failed to provide a full and fair forum for adjudicating prisoners' federal claims. This failure permits the state prisoner to bypass procedural obstacles to review in federal court.

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misleading a petitioner to believe that a timely petition has been or will soon be filed can constitute egregious professional misconduct."); Ross v. Varano, 712 F.3d 784, 803–04 (3d Cir. 2013) (finding extreme neglect sufficient for equitable tolling when attorney missed deadlines, failed to communicate with client, and gave misleading statements to client); Dillon v. Conway, 642 F.3d 358 (2d Cir. 2011) (finding attorney miscalculation coupled with deeply misleading statements to client sufficient for equitable tolling).

105. In some circumstances, these external obstacles may lead the federal court to restart the one-year statute of limitations instead of relying on equitable tolling. *See supra* note 47.

106. 28 U.S.C. §§ 2254(b)(1)(B)(i)–(ii) (1996).

107. *See, e.g.*, Marino v. Ragen, 332 U.S. 561, 565–70 (1947) (Rutledge, J., concurring). Nor must a prisoner pursue a state remedy that is already foreclosed by state law. Lynce v. Mathis, 519 U.S. 433, 436 n.4 (1997) (noting that petitioner could bypass the exhaustion requirement because the Florida Supreme Court had previously rejected the very same challenge and there was no reason to believe that it would have decided petitioner's case differently).

108. *See, e.g.*, Harris v. DeRobertis, 932 F.2d 619, 621–22 (7th Cir. 1991) (noting that there was a state statute that permitted untimely filing upon showing that the delay was not due to the prisoner's "culpable negligence," but emphasizing that there was not a single published opinion in which the State had found that standard satisfied in more than 40 years).

109. *See, e.g.*, Phillips v. White, 851 F.3d 567, 576 (6th Cir. 2017) (noting that an inordinate delay in adjudicating claims can render the state-court process ineffective); Taylor v. Hargett, 27 F.3d 483, 485 (10th Cir. 1994) (noting that a delay of more than two years in state appellate processes is presumptively sufficient to deem the state remedy futile and excuse exhaustion); Harris v. Champion, 938 F.2d 1062, 1066–69 (10th Cir. 1991) (noting that a state prisoner who has already waited two years for his state-appointed appellate defender to file a brief and is told by the defender's office that it will be another two years before any brief is filed, has no effective appellate remedy).

In addition, the federal courts have also developed the stay and abeyance procedure, which is grounded in equitable principles, to soften the impact of the exhaustion requirement's total-exhaustion rule.[110] When a state prisoner files a mixed petition containing some exhausted claims and at least one unexhausted claim, the stay and abeyance procedure permits the federal court to consider whether the prisoner has "good cause" for the failure to have presented the unexhausted claims to the state courts.[111] If there is good cause, the claims are potentially meritorious, and if there is no indication that the prisoner was intentionally delaying consideration of the claims, the federal court need not dismiss the habeas petition under the total-exhaustion rule.[112] Instead, the federal court should stay the proceedings, hold the petition with the exhausted claims in abeyance, and permit the state prisoner to go back to exhaust the unexhausted claims in state court.[113] Upon the prisoner's return, the federal court will permit the state prisoner to amend the petition to include the previously-unexhausted-but-now-exhausted claims.[114]

This procedure prevents the exhaustion process from causing a state prisoner to run afoul of the one-year statute of limitations. Without the stay and abeyance procedure, the entire time that the federal court spent considering the initial mixed petition would count against the prisoner's statute of limitations.[115] The Supreme Court recognized the importance of the stay and abeyance procedure in *Rhines v. Weber*, noting that it would be unjust to force a state prisoner to "run the risk of forever losing [the] opportunity for any federal review" when there are good reasons why that prisoner did not present the claims earlier to the state courts.[116]

Federal courts have found "good cause" to justify use of the stay and abeyance procedure when an objective factor, not fairly attributable to the petitioner, caused the failure to exhaust.[117] When a state's procedural rules are so complicated that a state prisoner could be reasonably confused about whether a state filing is timely, the Supreme Court has noted that there is good cause for filing prematurely in federal court to protect the underlying federal claims.[118] Some lower federal courts have held that ineffective assistance of postconviction counsel qualifies as good cause for filing a stay and abeyance petition.[119] Others have found that a

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110. *See* Rhines v. Weber, 544 U.S. 269, 277–79 (2005).

111. *See id.* at 278.

112. *See id.*

113. *See id.*

114. *See id.*

115. *See* Duncan v. Walker, 533 U.S. 167 (2001) (holding that the time during which an initial federal habeas petition is pending in federal court does not toll the statute of limitations).

116. 544 U.S. at 275.

117. *See* Whitley v. Ercole, 509 F. Supp. 2d 410, 417–18 (S.D.N.Y. 2007) (collecting cases); Riner v. Crawford, 415 F. Supp. 2d 1207, 1209–10 (D. Nev. 2006) (same).

118. *See* Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005).

119. *See, e.g.*, Blake v. Baker, 745 F.3d 977, 983–84 (9th Cir. 2014). *But see* Rhines v. Weber, 408 F. Supp. 2d 844, 848 (D.S.D. 2005) (noting that district courts "have split on whether alleged ineffective assistance of post-conviction counsel constitutes good cause for failure to exhaust claims in state proceedings").

prisoner's severe mental illness may provide good cause for a failure to exhaust.[120] What all of these cases have in common is an understanding that something external to the state prisoner has interfered with the ability to comply with the exhaustion requirement and, as a result, no court has fairly considered the prisoner's underlying federal claims.

3. Procedural Default Doctrine

There are two exceptions to the procedural default doctrine that are grounded in equitable concepts about ensuring that state prisoners have a realistic opportunity to present their federal claims in state court. One exception focuses on the adequacy of the state procedures themselves[121] while the other focuses on objective, external factors that might have prevented a particular state prisoner from complying with a state's procedural rules.[122]

As with the exhaustion doctrine, if a state's procedural regime does not give state prisoners a realistic opportunity to present their federal claims in state court, the federal court may deem those state procedures inadequate to bar federal consideration of defaulted claims.[123] A state's procedural rules can be inadequate because they violate due process,[124] unduly burden a state prisoner's attempts to raise federal challenges,[125] are inconsistently applied,[126] or are applied in novel and unforeseen ways.[127] Adequacy challenges can be based on the application of one state procedural rule or a combination of different rules.[128] They can be facial challenges to a state procedural rule across cases or as-applied challenges that object to the way a facially legitimate state procedural rule was applied in a particular case.[129] They can be predicated on rules that exist on the books or de facto procedural rules that exist in state practice.[130] Ultimately, adequacy doctrine judges the legitimacy of the state procedures themselves and asks if they provided a realistic, full, and fair opportunity for state prisoners to have their federal claims considered.

Cause and prejudice, on the other hand, is an equitable exception that focuses on the state prisoners and asks whether they had a legitimate excuse for failing to comply with legitimate state procedures.[131] State prisoners who failed to comply with state procedural rules can still have their federal claims considered on the merits in federal court if they can show cause (meaning an objective factor

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120. *See, e.g.*, Shotwell v. Lamarque, No. 104CV06496OWWTAGHC, 2005 WL 1556296, at *2 (E.D. Cal. June 24, 2005).

121. *See, e.g.*, Lee v. Kemna, 534 U.S. 362, 376 (2002).

122. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 84–85 (1977).

123. *See, e.g.*, *Lee*, 534 U.S. at 381–88.

124. *See, e.g.*, Reece v. Georgia, 350 U.S. 85, 89–90 (1955).

125. *See, e.g.*, *Lee*, 534 U.S. at 381–88.

126. *See, e.g.*, Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

127. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457–58 (1958).

128. *See generally* Primus, *supra* note 27 (describing the history of and different approaches to adequacy doctrine).

129. *See id.*

130. *See id.*

131. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977).

external to the prisoner) for failing to comply with the state's procedural regime and prejudice to the outcome of their case.[132]

The Supreme Court has recognized a number of cause grounds including interference by state officials that made compliance with the state procedural rules impracticable,[133] the discovery of a factual or legal basis for a claim that was not reasonably available at the time of the default,[134] ineffective assistance of counsel in violation of the Sixth Amendment,[135] ineffective assistance of initial postconviction counsel for failing to raise a substantial ineffective-assistance-of-trial-counsel (IATC) claim in a jurisdiction that requires such claims to be raised in postconviction proceedings,[136] the failure of a state to provide its prisoners with postconviction counsel to raise substantial IATC claims when those claims must be raised in postconviction proceedings,[137] and constructive or actual abandonment by a postconviction attorney.[138]

In *Martinez v. Ryan*, the Supreme Court emphasized the equitable concerns that animate these cause categories.[139] It noted that ineffective performance by trial, appellate, and some state postconviction counsel can be cause to excuse a default, because "if the attorney appointed by the State . . . is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims."[140]

4. Successive Petition Barrier

The federal courts have created two different equitable workarounds to address claims raised in successive petitions when the state prisoner has not yet had a full and fair opportunity to have federal claims considered. First, the courts have restricted the definition of what constitutes a "successive" petition subject to the ban. If a state prisoner has a legitimate excuse for failing to have raised the claim in a prior habeas petition (something external to the prisoner that may have prevented the development of the claim), the circuit courts may deem the second-in-time petition not successive.[141]

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132. *See id.*
133. *See* Brown v. Allen, 344 U.S. 443, 485–86 (1953).
134. *See* Reed v. Ross, 468 U.S. 1, 16 (1984).
135. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986).
136. *See* Martinez v. Ryan, 566 U.S. 1, 17 (2012).
137. *See id.*
138. *See* Maples v. Thomas, 565 U.S. 266, 271 (2012).
139. 566 U.S. at 13–14.
140. *Id.* at 11.
141. *See, e.g.*, Benchoff v. Colleran, 404 F.3d 812, 817 (3d Cir. 2005) (noting that the pre-AEDPA abuse of the writ standard is still used by a majority of federal circuits to determine whether a second-in-time habeas petition is a successive petition under AEDPA, and noting that a petition is considered an abuse of the writ (and therefore successive) where the subsequent-in-time petition raises a habeas claim that could have been raised in an earlier petition and there is not a legitimate excuse for the failure to do so); *see also* Burton v. Stewart, 549 U.S. 147, 153 (2007) (assuming without deciding that the "legitimate excuse" test is appropriate for determining whether a petition is "second or successive").

For example, consider a situation discussed in *Panetti v. Quarterman*:[142] suppose a capital habeas petitioner is sane at the time of his conviction and sentence and at the time when he files his initial federal habeas petition, but he later develops a mental illness and becomes legally insane. If he files a second-in-time federal habeas petition challenging the constitutionality of executing a mentally ill person, the federal court should not deem the petition successive. As the Supreme Court explained, the claim was not ripe at the time when the first habeas petition was filed (because he was perfectly sane at that time), and the prisoner should not have to "run the risk" of "forever losing [the] opportunity for any federal review" of the claim.[143] Lower federal courts agree and have prevented a second-in-time petition from being deemed successive when the claim at issue could not have been presented in an earlier petition because it is based on law or facts that arose after the prior habeas proceedings.[144]

Additionally, federal courts are sometimes willing to use Federal Rule of Civil Procedure 60(b) to reopen a prior federal habeas petition on equitable grounds, which effectively shields the state prisoner from running into the successive petition barrier. Rule 60(b) permits federal courts to set aside a prior judgment based on equitable considerations ranging from legal mistakes to newly discovered evidence to misconduct by an adverse party.[145] Some courts have described Rule 60(b) as providing the federal courts with a "grand reservoir of equitable power to do justice in a particular case."[146]

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142. 551 U.S. 930 (2007).

143. *See id.* at 945–46 (internal quotations omitted).

144. *See, e.g.*, Leal Garcia v. Quarterman, 573 F.3d 214, 222–24 (5th Cir. 2009) (noting that a claim predicated on a presidential declaration that was issued after a prisoner's first petition was denied was not successive); *In re* Cain, 137 F.3d 234, 236 (5th Cir. 1998) (finding that a second-in-time petition challenging the denial of good-time credits was not successive because the disciplinary action that the prison board took occurred after the first petition was adjudicated).

145. Rule 60(b) permits a court to

> relieve a party . . . from a final judgment order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial . . . ; (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

FED. R. CIV. P. 60(b).

146. *See, e.g.*, Cox v. Horn, 757 F.3d 113, 122 (3d Cir. 2014); Phelps v. Alameida, 569 F.3d 1120, 1135 (9th Cir. 2009); Matarese v. LeFevre, 801 F.2d 98, 106 (2d Cir. 1986); D'Ambrosio v. Bagley, 688 F. Supp. 2d 709, 733 (N.D. Ohio 2010); Winslow v. Portuondo, 699 F. Supp. 2d 337, 341 (E.D.N.Y. 2009); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 233–34 (1995) (describing Rule 60(b) as a rule that "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work

In the habeas context, the Supreme Court has explained that Rule 60(b) motions cannot be used to present new claims for relief on habeas, but they are procedural vehicles that habeas petitioners can use to reopen already-raised claims under exceptional circumstances.[147] And some lower federal courts have been willing to reconsider prior decisions to throw a claim out on procedural grounds when the state prisoner can show that there is an "extraordinary circumstance"[148] that would justify granting the prisoner relief from the operation of the procedural barrier.[149] Those extraordinary circumstances often sound in fair consideration concerns.

In short, when state prisoners are prevented from presenting their federal claims fully in court—either because of state misconduct or the intervention of some external factor that they could not control—federal courts are often willing to rely on equitable concepts of fairness to bypass the procedural restrictions and permit the petitioners to raise their federal claims.

B. Obtaining More Rigorous and Less Deferential Merits Review

Many of the limits on the scope of federal habeas review and the deference shown to state-court judgments in federal habeas proceedings may disappear when there was no full and fair adjudication of a state prisoner's claims in state-court proceedings.

1. Expansion in Cognizable Claims

Even as the Supreme Court was removing Fourth Amendment search and seizure claims from federal habeas review in *Stone v. Powell*, it was careful to note that only those Fourth Amendment claims that had been fully and fairly litigated in state courts would not be readjudicated in federal habeas proceedings.[150] If petitioners can show that their search and seizure rights were violated and that the state courts did not provide an adequate forum for litigating the Fourth Amendment challenge, the federal court will consider the claims on habeas.[151]

Federal courts have refused to bar federal review when a state prisoner had a constitutionally ineffective trial or appellate attorney who failed to properly present a Fourth Amendment claim.[152] Federal courts have also deemed state-court processes inadequate to bar federal review of Fourth Amendment claims when the state provided no realistic opportunity to raise a Fourth Amendment challenge.[153] The inquiry into whether there was a full and fair opportunity to litigate a Fourth Amendment claim in state court resembles the equitable inquiries that animate the

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inequity") (quoting Hazel–Atlas Glass Co. v. Hartford–Empire Co., 322 U.S. 238, 244 (1944)).

147. Gonzalez v. Crosby, 545 U.S. 524, 531 (2005).

148. *Id.* at 538.

149. *See, e.g.*, *Cox*, 757 F.3d at 122–24; *Phelps*, 569 F.3d at 1135–40.

150. 428 U.S. 465, 494 (1976).

151. *See* RANDY HERTZ & JAMES S. LIEBMAN, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 27.3 (7th ed. 2017) (collecting cases).

152. *See* Kimmelman v. Morrison, 477 U.S. 365, 378 (1986).

153. *See, e.g.*, Monroe v. Davis, 712 F.3d 1106, 1114 (7th Cir. 2013).

exceptions to the procedural barriers to review. If the reason why a prisoner could not present a Fourth Amendment claim in the state courts would satisfy the cause standard under procedural default, the prisoner probably did not have a full and fair opportunity to present the claim. And if the state procedures would fail an adequacy review under the exhaustion and procedural default doctrines, they will probably also be inadequate to bar federal consideration of a Fourth Amendment challenge.[154]

Similarly, even as the Court in *Reed v. Farley*[155] was limiting the number of federal statutory claims that would be cognizable on habeas, it was careful to note that a statutory error that is "inconsistent with the rudimentary demands of fair procedure" will be heard.[156] If the state court fails to provide basic, fair procedures for vindicating federal statutory rights, the federal courts will entertain those claims.[157]

2. Evidentiary Hearings

In *Williams v. Taylor*, the Supreme Court held that AEPDA's restrictions on the availability of evidentiary hearings only apply when a state prisoner is at fault for failing to develop a record in state court.[158] The Court noted that a state prisoner "is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance."[159] This fault-based inquiry relies on reasoning similar to that underlying the equitable exceptions to procedural barriers to review. If the state processes are inadequate or some unforeseen factor external to the state prisoner prevented him from having an opportunity to fully and fairly develop the record in state court, AEDPA should not stand in the way of a federal evidentiary hearing. And once a state prisoner walks through the equitable opening created by *Williams*[160] and AEDPA's restrictions on evidentiary hearings no longer apply, Supreme Court precedent often *requires* federal evidentiary hearings.[161]

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154. *See, e.g.*, Machacek v. Hofbauer, 213 F.3d 947, 952 (6th Cir. 2000) (noting that a Fourth Amendment claim should be heard if the state procedural mechanism, in the abstract, did not permit the state prisoner to raise a Fourth Amendment claim or if the state prisoner's presentation of the claim "was in fact frustrated" because of a failure in the state procedural system).

155. 512 U.S. 339 (1994).

156. *Id.* at 348 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

157. *Id.*

158. 529 U.S. 420, 431–32 (2000). This case involves a petitioner named Michael Williams and should not be confused with *Williams v. Taylor*, 529 U.S. 362 (2000), decided the same term, involving a petitioner named Terry Williams. Both are habeas cases, but Michael Williams's case involved a question about evidentiary hearings whereas Terry Williams's case involved a discussion of the standard of review under 28 U.S.C. § 2254(d)(1).

159. *Id.* at 432.

160. *Id.* at 420.

161. Without the restrictions of AEDPA, *Townsend v. Sain*, 372 U.S. 293, 312 (1963), requires a federal evidentiary hearing "[w]here the facts are in dispute . . . [and] the habeas applicant did not receive a full and fair evidentiary hearing in a state court . . . ." The *Townsend* Court listed six circumstances where federal evidentiary hearings were required:

(1) the merits of the factual dispute were not resolved in the state hearing;

(2) the state factual determination is not fairly supported by the record as a

3. Deferential Standards of Review and the Presumption of Correctness

The deferential standards of review in AEDPA are only triggered when the underlying federal claim at issue "was adjudicated on the merits in State court proceedings."[162] If there was no prior state-court adjudication of the claim, and the state prisoner is able to overcome any procedural obstacles to federal habeas review, the federal court's review of the claim will be de novo.[163] The difference between de novo review and the deferential review of § 2254(d) is vast. To obtain relief under § 2254(d) a habeas petitioner must often show that the state-court decision was so unreasonable that "no fairminded jurist" could have reached the conclusion that the state reached.[164] That is a tough standard to meet. As a result, a lot hinges on whether the federal courts think that a claim was adjudicated on the merits in state-court proceedings.

Similarly, the deference given to a state court's factual findings in § 2254(e)(1), which contains the presumption of correctness, only applies when the state court has made a "determination of a factual issue."[165] Thus, it is important to consider when the state court has made a factual determination that is entitled to deference.

The federal courts have uniformly held that a state-court decision is not an "adjudication on the merits" deserving of § 2254(d) deference when the decision (1) rested on procedural grounds, (2) failed to address the federal claim because it was not presented to the state court, or (3) failed to address a particular aspect of the federal claim because the state court resolved the claim on other grounds.[166] In short,

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

Id. at 313. The Supreme Court later removed the fifth requirement (when the material facts were not adequately developed at the state-court hearing) in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992) (noting that if a prisoner failed to adequately develop facts at a state hearing, the prisoner must demonstrate cause and prejudice to get a federal evidentiary hearing). AEDPA later displaced *Keeney*. *See* 28 U.S.C. § 2254(e)(2) (1996). But, when AEDPA does not apply because the prisoner is not at fault for the failure to develop the record in state court, the remaining *Townsend* requirements still exist and often require federal evidentiary hearings. *See, e.g.*, Schriro v. Landrigan, 550 U.S. 465, 473 (2007) (noting that AEDPA did not change the deference that federal courts have to grant evidentiary hearings outside of the narrow circumstance where the defendant is at fault for the failure to have developed the record in state court).

162. 28 U.S.C. § 2254(d) (1996).

163. *See* Cone v. Bell, 556 U.S. 449, 472 (2009).

164. Harrington v. Richter, 562 U.S. 86, 103 (2011).

165. 28 U.S.C. § 2254(e)(1) (1996).

166. *See* HERTZ & LIEBMAN, *supra* note 151, § 32.2 (collecting cases). Of course, if a state prisoner never presented the claim to the state courts, he or she will likely have to overcome an exhaustion or procedural default problem in federal court.

if the state never considered a claim, and habeas is the prisoner's first real opportunity to present a federal claim, § 2254(d) deference will not apply.

Even when the state addressed a prisoner's federal claim, if the state's factfinding procedures were inadequate (meaning that the state prisoner did not have a full and fair opportunity to develop the facts to support the claim), some federal courts will not defer to the state's decision. Instead, they will deem the inadequate procedures sufficient to overcome AEDPA's presumption that the state factfinding was correct and analyze the prisoner's federal claims under a de novo standard rather than a deferential one.

For example, some federal courts have held that there has been no actual adjudication of a claim on the merits when state prisoners have not had a full and fair opportunity to develop evidence in support of the claim.[167] As the Fourth Circuit has explained, when the state courts refuse to give a prisoner an evidentiary hearing when such a hearing is necessary to develop the facts of the claim, and the state then denies the claim summarily without addressing serious factual issues raised in the pleadings, that is tantamount to never having adjudicated the claim in the first instance.[168] Without an adjudication on the merits, the deferential standards of § 2254(d) no longer apply, and the federal court will review the prisoner's claim de novo.[169]

Other federal courts have deemed state factfinding predicated on inadequate state procedures patently unreasonable under § 2254(d)(2).[170] The Ninth Circuit has noted that "where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, 'the fact-finding process itself is deficient' and not entitled to deference."[171] Having determined that the state court's determinations of fact were unreasonable, the

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167. *See, e.g.*, Gordon v. Braxton, 780 F.3d 196, 202 (4th Cir. 2015); *see also* Morva v. Zook, 821 F.3d 517, 527 (4th Cir. 2016) (noting that "[a] claim is not adjudicated on the merits when the state court makes its decision on a materially incomplete record" and emphasizing that "[a] record may be materially incomplete when a state court unreasonably refuses to permit further development of the facts of a claim" (quoting Gordon v. Braxton, 780 F.3d 196, 202 (4th Cir. 2015))). *But see* Ballinger v. Prelesnik, 709 F.3d 558, 560–62 (6th Cir. 2013) (holding that the state court's failure to grant an evidentiary hearing did not mean that the state court had failed to adjudicate the claim on the merits and noting that "[i]t is now clear that a state-court adjudication, even when unaccompanied by an explanation, is presumed to be on the merits" (citing *Harrington*, 562 U.S at 98–99)).

168. *See Gordon*, 780 F.3d at 202–04; *see also* Winston v. Pearson, 683 F.3d 489, 497 (4th Cir. 2012) (holding that the state court had not adjudicated petitioner's claims when it "deni[ed] . . . discovery and an evidentiary hearing[,] produc[ing] an adjudication of 'a claim that was materially incomplete'" (citation omitted)).

169. *Gordon*, 780 F.3d at 202.

170. *See, e.g.*, Hurles v. Ryan, 752 F.3d 768, 790–91 (9th Cir. 2014); *see also* Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. REV. 953, 984–86 (2012). *But see* Valdez v. Cockrell, 274 F.3d 941, 942 (5th Cir. 2001) (holding that a full and fair hearing in the state is not a prerequisite for § 2254(d) deference).

171. *Hurles*, 752 F.3d at 790.

federal court considers the prisoner's federal claims de novo, supplementing the state-court record through a federal evidentiary hearing when appropriate.[172]

Finally, some federal courts will recast the prisoner's claim as a new claim supported by new evidence that has not been raised before in the state.[173] If a state prisoner had no real opportunity to present evidence in support of a claim in state court (either because the state-court processes would not permit it or because the prisoner had an ineffective lawyer who failed to try), Justice Breyer has suggested that the federal courts should deem the claim a new claim not previously adjudicated on the merits in the state.[174] As he put it, "[a] claim without any evidence to support it might as well be no claim at all."[175]

Even if some evidence was presented in the state courts to support the claim, if the state prisoner later discovers a substantial amount of new evidence, it might be enough to "fundamentally alter" the nature of the claim and cause a federal court to characterize the claim as new.[176] The new claim, not having been raised in state court, will be procedurally defaulted, but deficient state procedures may make the state procedural default inadequate to bar federal review.[177] Alternatively, the ineffectiveness of state postconviction counsel in failing to develop record evidence in the state courts may be "cause" to excuse the prisoner's procedural default.[178] Either way, after bypassing the procedural default, the prisoner's claims will be reviewed de novo in federal court.[179]

These are three approaches lower federal courts have taken to bypass the deferential standards of review in AEDPA and review state prisoners' claims de novo because the state's merits determination was based on an inadequate state process. Each of these approaches is motivated by an equitable concern about ensuring that state prisoners have a full and fair opportunity to present their federal claims and have them considered by the state courts.

Even the harmless error doctrine, as articulated in *Brecht v. Abrahamson*,[180] has an equitable exception. In a footnote in the *Brecht* decision, the Supreme Court noted that it was not

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172. *Id.* at 778.

173. *See, e.g.*, Dickens v. Ryan, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc) (relying on cases relating to exhaustion doctrine to hold that new evidence will render a claim unexhausted and therefore "new" if it "fundamentally alter[s]" the previously exhausted claim). *But see* Escamilla v. Stephens, 749 F.3d 380, 395 (5th Cir. 2014) (agreeing with that standard but noting that new evidence does not "fundamentally alter" a claim if it "merely provided additional evidentiary support for [a] claim that was already presented and adjudicated in the state court proceedings").

174. Gallow v. Cooper, 570 U.S. 933, 933 (2013) (statement of Breyer, J. with whom Sotomayor, J. joins respecting the denial of the petition for writ of certiorari).

175. *Id.*

176. *See Dickens*, 740 F.3d at 1319.

177. *See supra* notes 123–130 and accompanying text.

178. *See* Martinez v. Ryan, 566 U.S. 1, 17 (2012).

179. *See Dickens*, 740 F.3d at 1321.

180. 507 U.S. 619, 637–38 (1993).

> foreclos[ing] the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief even if it did not substantially influence the jury's verdict.[181]

Thus, even as it was imposing an additional hurdle to obtaining habeas relief, the Supreme Court was careful to provide a bypass for prisoners whose trials were infected by especially egregious errors that compromised their opportunities to have their federal claims fairly considered.

III. EXPANDING EQUITABLE GATEWAYS

Federal courts should be more explicit about their willingness to cut through the red tape of habeas doctrine and grant relief when they believe state prisoners have not had a fair opportunity to have their federal claims considered. And habeas petitioners arguing for broader procedural bypasses and more expansive merits review should explicitly cast arguments in fair consideration terms when those concepts are applicable to their claims.

Currently, state prisoners who never had their federal claims fully and fairly considered in state court often fail to paint a complete picture of the systemic state-process failures that stood in their way.[182] This should not be surprising. Right now, there is no constitutional right to federal habeas counsel.[183] Most state prisoners are indigent and cannot afford to hire federal habeas counsel.[184] They either must proceed pro se or rely on pro bono assistance that typically comes from large law firms or legal institutions that do not focus on criminal cases.[185] The attorneys who take on these cases are typically reputable generalist lawyers, but habeas litigation is often not their area of expertise, and they typically lack any deep experience with

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181. *Id.* at 638 n.9.

182. I reviewed a randomly selected sample of 100 petitions for writs of habeas corpus in federal district courts filed by state prisoners. Not a single one raised a systemic state-process failure even though such claims were potentially available to a number of the petitioners. For example, several prisoners who were raising defaulted ineffective-assistance-of-trial-counsel claims came from states that require prisoners to raise ineffective-assistance-of-trial-counsel claims in state postconviction proceedings but do not provide prisoners with attorneys to raise those claims. Yet, none of these prisoners highlighted that practice as a systemic state problem. *See, e.g.*, Shipman v. Ryan, CV-08212-DLR (D. Ariz. Oct. 17, 2017); Saintlot v. Jones, CV-00494-SPC-MRM (M.D. Fla. Aug. 17, 2015).

183. 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 and we decline to so hold today." (citation omitted)); *see also* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion).

184. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 179023 DEFENSE COUNSEL IN CRIMINAL CASES (2000) (noting that more than 80% of American criminal defendants are indigent).

185. *See* Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 860 (2013) (explaining how prisoners "must petition non-profit organizations, law school clinics, or law firms to take their cases pro bono").

state postconviction regimes.[186] As a result, they might not understand the varied ways in which states create and implement postconviction review systems that routinely and effectively prevent state prisoners from having their federal claims fully considered. The state prisoners who proceed pro se certainly do not have access to this information.

Not knowing about the systemic procedural failures in the state, most state prisoners focus on their individual circumstances when trying to get around procedural and substantive obstacles to review.[187] They offer excuses for why they did not comply with procedural rules or why they were not at fault for failing to develop a sufficient factual record in state court.

For example, a habeas petitioner might argue that he was never given a postconviction attorney to raise his trial attorney's ineffectiveness, so he has "cause" to excuse his failure to raise the trial attorney's ineffectiveness.[188] But, if that state prisoner comes from a state that relegates IATC claims to state postconviction review and then routinely refuses to provide state prisoners with counsel at that stage, there is a *systemic* problem in the state.[189] The structure and practice in that state court system effectively prevents prisoners from ever being able to challenge their trial attorneys' performance. That claim is not getting raised as often as it should. The more localized excuses are known to the petitioners and their pro bono counsel and are easier to raise, but they are less likely to motivate a federal court to grant relief because they do not demonstrate an extraordinary or far-reaching fair consideration problem. They also are not as effective at catalyzing change because they provide only indirect feedback to the offending states.

Consider the difference between the two equitable exceptions to the procedural default doctrine: first, cause and prejudice, and second, adequacy. Under a cause-and-prejudice analysis, the question is whether the petitioner is at fault for the procedural noncompliance.[190] A finding of cause and prejudice to excuse a default does not send any direct message to the offending state. It merely recognizes that the petitioner has an excuse sufficient to justify bypassing an otherwise-acceptable state procedural regime. In contrast, a finding that the state's procedures are inadequate begins a dialogue between the federal and state courts about the legitimacy of the state process.[191] If the federal court tells a state directly that its

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186. *See, e.g.*, Maples v. Thomas, 565 U.S. 266, 270–71 (2012) (describing one such situation). There are, of course, exceptions to this rule. Some law firms have brought experienced public defenders in to create their pro bono programs and train their attorneys. *See* Carol S. Steiker, Keynote Address, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2710 (2013) (describing some of these law firms). And prisoners lucky enough to be represented by law school clinics at good schools often get excellent representation. *See* Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1796 (2016) (discussing these clinics).

187. *See* Primus, *supra* note 27, at 109.

188. *See* cases collected *supra* note 182.

189. *See id.*

190. *See* Wainwright v. Sykes, 433 U.S. 72, 77 (1977).

191. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977).

procedures inadequately protect federal rights, it puts the state on notice and gives the state an incentive to fix the problem or face more federal habeas grants in the future.[192]

Habeas petitioners should ask federal courts to consider how state procedural systems are structured and force them to confront the broader questions about whether state prisoners are given a realistic opportunity to have their federal claims considered. And federal courts should use their equitable discretion to bypass procedural and substantive obstacles to review and send a clear message back to the offending state that prisoners from that state will continue to receive more favorable federal habeas review until the state revises its procedures to give prisoners a full and fair opportunity to present federal claims. If the state still refuses to modify its procedures, federal courts can issue a stronger, constitutionally based response by finding systemic violations of due process or the right to counsel in that state.[193]

Academics, law students, and practitioners can be helpful in this effort by writing about systemic problems in state postconviction regimes.[194] Highlighting state-process failures in different states will identify potential arguments for habeas petitioners to raise and give them legal authority to cite in support of their arguments.

Petitioners should also try to broaden established equitable inroads by applying procedural bypasses obtained in one area of habeas to other obstacles to habeas relief.[195] Consider the Supreme Court's decisions in *Martinez v. Ryan*[196] and *Trevino v. Thaler*.[197] In these cases, the Supreme Court held that there is cause to excuse a state prisoner's procedural default for failing to raise a substantial IATC claim whenever state law requires prisoners to raise IATC claims in initial state postconviction proceedings and the state fails to provide prisoners with effective counsel to help them raise the claims at that stage.[198] The equitable principles

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192. *See generally* Primus, *supra* notes 3, 27 (discussing the benefits of a structural approach to state procedural problems).

193. *See* Alper, *supra* note 185 (arguing that *Martinez* and *Maples* might be first steps toward a constitutional right to postconviction counsel); Wiseman, *supra* note 170, at 992–1005 (arguing that prisoners who don't get full factual development in the state may have claims under the Suspension or Due Process Clauses).

194. *See, e.g.*, Claire V. Madill, *Disentangling Michigan Court Rule 6.502(G)(2): The "New Evidence" Exception to the Ban on Successive Motions for Relief from Judgment Does Not Contain a Discoverability Requirement*, 113 MICH. L. REV. 1427 (2015) (describing the ways in which a Michigan State postconviction rule and a Michigan Supreme Court case interact to prevent postconviction claims predicated on new evidence from being considered in state courts, and suggesting that federal habeas courts might find the procedural interaction an inadequate procedural ground to bar federal habeas review).

195. When analogizing between doctrines it is, of course, important to be careful that litigants do not ratchet up the required showing that petitioners have to make to pass through equitable gateways. For example, courts have held that "good cause" to justify the use of the stay and abeyance procedure does not require the same showing of "extraordinary circumstances" as in other contexts. *See, e.g.*, Jackson v. Roe, 425 F.3d 654, 661–62 (9th Cir. 2005).

196. 566 U.S. 1 (2012).

197. 569 U.S. 413 (2013).

198. *Martinez*, 566 U.S. at 14; *Trevino*, 569 U.S. at 423–29.

animating the Supreme Court's holdings in *Martinez* and *Trevino* have potential implications for other habeas doctrines, like equitable tolling. If a state creates a particularly complicated set of procedural requirements about the time periods for filing state postconviction petitions and then fails to give indigent prisoners counsel to help them navigate those procedural barriers, the prisoners who get trapped in the resulting catch-22 face the same unfairness that motivated the Supreme Court to find a way around the procedural default doctrine in *Martinez* and *Trevino*.[199]

Martinez and *Trevino* also provide support to state prisoners who want to supplement IATC claims that were previously raised in state postconviction proceedings but were not adequately supported due to their pro se status or the ineffective representation of a postconviction attorney.[200] If equitable concerns permit state prisoners to bypass a complete failure to raise IATC claims, they certainly should permit prisoners to supplement a claim that was improperly raised by ineffective postconviction attorneys or by pro se prisoners who, because they were never given access to an attorney, failed to support their IATC claim with enough factual evidence.[201]

More generally, when faced with § 2254(d)'s deferential standards of review and § 2254(e)(1)'s presumption of correctness on factual determinations, habeas litigants should try to expand the equitable inroads that some circuits have already created. Litigants should argue that the state processes were sufficiently inadequate that the state-court decision should not be considered an adjudication on the merits or that the factual findings underlying the state-court determination should

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199. *See* Grissette v. Westbrooks, No. 3:11–0245, 2013 WL 494093, at *3 (M.D. Tenn. Feb. 8, 2013) (applying *Martinez* and *Maples* to equitable tolling but finding no *Strickland* prejudice to warrant tolling in the instant case); *see also* Harper v. Ercole, 648 F.3d 132, 137 (2d Cir. 2011) (noting that the extraordinary circumstances requirement in equitable tolling doctrine "refers not to the uniqueness of a party's circumstances, but rather to the severity of the obstacle impeding compliance with a limitations period"); Marceau, *supra* note 8, at 2164–68. *But see* Lombardo v. United States, 860 F.3d 547, 557–58 (7th Cir. 2017) (recognizing the force of the argument that *Martinez* applies to equitable tolling, but refusing to apply *Martinez* because of the tension it would create with the Supreme Court's statements that garden-variety claims of neglect do not warrant equitable tolling).

200. *See Martinez*, 566 U.S. at 13–14; *Trevino*, 569 U.S. at 423.

201. *See, e.g.*, Gregg v. Raemisch, No. 16–cv–00173–CMA–MEH, 2018 WL 447351, at *5 (D. Colo. Jan. 17, 2018) ("It would not serve the equitable rationale of *Martinez* to conclude that the state court's decision that [the defendant's] inartfully pled pro se claim was 'vague and conclusory' constituted a decision on the merits."); *see also supra* notes 170–176. Once out of the constraints of § 2254(d), state prisoners with underdeveloped factual records due to ineffective postconviction counsel should rely on *Martinez* to contend that they are not at fault for the failure to develop the record and thus should get an evidentiary hearing. *See, e.g.*, Jones v. Ryan, CV-01-00592-TUC-TMB, 2017 WL 264500, at *19 (D. Ariz. Jan. 20, 2017) (holding that when a state prisoner's "procedural default is excused under *Martinez*, he is by extension not at fault for failing to develop the claim under § 2254(e)(2)"). Alternatively, federal courts could stay habeas petitions filed by prisoners who did not adequately develop their state records due to the ineffectiveness of their state postconviction counsel and allow them to return to state court for further factual development. *See* Jennifer Utrecht, Pinholster*'s Hostility to Victims of Ineffective State Habeas Counsel*, 114 MICH. L. REV. 137, 161 (2015) (advocating such an approach).

be deemed unreasonable and the resulting determination not subject to deference. Once out of the constraints of § 2254(d), petitioners should rely on *Williams v. Taylor*[202] to contend that they were not at fault for failing to develop the facts in state court and argue for federal evidentiary hearings to expand their factual records. Obtaining a federal evidentiary hearing to expand the state-court record dramatically increases the likelihood of obtaining habeas relief. According to one empirical study, obtaining an evidentiary hearing in federal court was associated with a 21%–32% increase in the likelihood of obtaining relief.[203]

Finally, habeas petitioners who want to use these equitable gateways to get more meaningful review should situate their claims in the language and history of the fair consideration doctrine. A prisoner whose severe mental illness prevented him from timely filing his petition should argue that the illness interfered with his chance to have his federal claims presented to any court. That prisoner should cite Professor Bator,[204] Justice Jackson,[205] and cases like *Martinez*[206] and *Trevino*[207] to demonstrate that one important overarching goal of federal habeas review is to ensure that prisoners have one full and fair chance to have their federal claims considered. If the federal habeas court views the mental illness as an external obstacle that interfered with the petitioner's ability to obtain a full and fair review of his federal claims, it is more likely to consider bypassing procedural and substantive restrictions on federal habeas review.

These are just a few examples of ways that federal courts and litigants could rely on the equitable strands within the habeas doctrinal morass to open the federal-courthouse doors to more state prisoners' claims. Of course, more robust federal habeas review does not necessarily mean that more state prisoners will obtain more habeas relief. Some of the underlying constitutional issues that state prisoners often raise—like IATC—contain standards that are particularly difficult for criminal defendants to meet.[208] But, as it currently stands, federal courts almost never address those constitutional standards in state cases.[209] They avoid doing so by procedurally foreclosing the claims or saying that the state courts' determination was not patently unreasonable such that they need not address whether the state's application of the underlying constitutional standard was right or wrong.[210]

Deferential-review standards and procedural obstacles to review effectively freeze out federal development of these underlying constitutional standards, at least as applied to state prisoners' cases. That is problematic for a couple of reasons. First, there is reason to believe that some states are systematically underenforcing and violating criminal defendants' rights to counsel (as well as some

202. 529 U.S. 420, 434–35 (2000).
203. KING REPORT, *supra* note 2, at 10.
204. Bator, *supra* note 16, at 456–57.
205. *See* Brown v. Allen, 344 U.S. 443, 545 (1953) (Jackson, J., concurring).
206. Martinez v. Ryan, 566 U.S. 1, 13–14 (2012).
207. Trevino v. Thaler, 569 U.S. 413, 425–27 (2013).
208. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).
209. *See* KING REPORT, *supra* note 2, at 6, 9.
210. *See id.*

other rights).[211] Without robust federal-court review, there is unlikely to be much of a check on rogue state behavior.[212]

Additionally, violations of some of these rights—like the right to effective assistance of counsel or the right to obtain material, exculpatory evidence pretrial—are typically discovered and addressed only at the postconviction stage.[213] As a result, federal habeas is the only real opportunity for federal courts to discuss and develop the scope of these rights in state cases. As some scholars have noted, federal courts bring a unique and important perspective to defining the content and scope of federal rights, and we should encourage federal and state courts to engage in a dialogue about the proper scope of federal rights.[214]

If litigants situate their arguments in the language, history, and evolution of equitable doctrines about ensuring fair consideration, they are more likely to get robust federal habeas review while simultaneously catalyzing states to provide more realistic opportunities for state prisoners to present their federal claims in state court. Perhaps it will result in more grants of federal habeas review as well. At the very least, it will permit federal courts to be a part of shaping the content and scope of federal rights as they apply to state criminal justice systems. Obviously, working toward obtaining more robust federal-court review will not solve all the problems with the current structure of federal habeas review of state-court criminal convictions, but it is a start.

CONCLUSION

For decades, scholars and judges have agreed that state prisoners should be entitled to one full and fair opportunity to have their federal claims considered. That is why fair consideration equitable gateways pierce through the otherwise-complicated morass that is federal habeas review. It is time for litigants and federal courts to return to those equitable principles and think about how to expand their application in light of the current structure of state postconviction regimes.

Litigants need to expose those states that are using complicated and confusing state postconviction procedures to avoid redressing constitutional violations. And federal courts need to step in and ensure that states are providing prisoners with a full and fair opportunity to have their federal claims developed and considered. States that are not giving prisoners a fair opportunity to develop factual records to support their federal claims should not get deference in federal courts. And when state prisoners come into federal court claiming that their constitutional rights were violated and that they have not yet had a chance to have their constitutional claims fully and fairly considered through no fault of their own, the

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211. *See, e.g.*, Primus, *supra* note 3 (describing these problems).

212. After all, the Supreme Court has a limited ability to take cases on certiorari at the conclusion of direct review.

213. *See* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 605 (2009) ("While most states have statutes permitting motions for a new trial based on newly discovered evidence, or permitting challenges to fact-based constitutional claims such as ineffective assistance or Brady claims, those proceedings are almost always collateral proceedings; they are not a part of the direct appeal process.").

214. *See, e.g.*, Cover & Aleinikoff, *supra* note 191.

federal courts should listen. Perhaps then we can increase the scope of federal habeas review of state criminal convictions, one equitable gateway at a time.

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