In Your Court: State Judicial Federalism in Capital Cases

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Constant state and federal interaction in capital punishment cases is strictly a modern phenomenon. It did not occur when capital punishment was in active use in the 1940s and 1950s.¹ By the time the Supreme Court had expanded both the scope of federal habeas review² and the substantive constitutional protections available to state criminal suspects and defendants,³ capital punishment as a practical matter had disappeared from sight. In

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1. From a peak of 199 executions in 1935, the rate of executions declined to zero by 1968.

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<th>Five Year Period</th>
<th>Average Yearly Number of Executions</th>
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<td>1935–39</td>
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the ten years since the reinstatement of capital punishment, a substantial body of state and federal capital cases has developed, most of them in the southern states and the corresponding federal courts.

These decisions document the many mechanisms state courts use in dealing with federal claims presented by capital defendants. As they confront such legal claims, state courts respond to tension arising from the independent state court adjudication of federal claims on the one hand and the nearly universal review of those decisions by the lower federal courts on the other. State courts resolve this tension most successfully—consistent with state objectives of efficiency, finality, and independence—in those cases which distinguish the merits of each federal claim from the power of each court to decide the merits. Courts that make this distinction tend to reflect upon their role in a federal system. This perspective requires both state and federal courts to grapple with issues of interactive federalism—the process of reconciling overlapping and contrary state and federal interests through a dialogue.

The extent to which state courts perceive local federal precedent as binding on them emerges as the pivotal question shaping their participation in the federal system. State courts which ignore lower federal court decisions in capital cases prevent a joint resolution of issues that advances both state and federal court interests. State courts that consider themselves bound by lower federal precedent

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4. The Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), ruled that the administration of then existing capital statutes was unconstitutional under the cruel and unusual punishment clause of the eighth amendment. In Gregg v. Georgia, 428 U.S. 153 (1976), and its companion cases, the Court found that revised capital statutes avoided many of the problems identified in Furman and ruled that several of the statutes were not unconstitutional under the eighth amendment.

5. As of May 1, 1986, there were about 1,700 people on death rows across the United States. The largest active death row populations were in Florida (231), Texas (221), California (177), Georgia (107), Alabama (82), Illinois (89), and Pennsylvania (83). Legal Defense Fund, Death Row, U.S.A. (May 1, 1986) [hereinafter cited as Death Row, U.S.A.]. The majority of states now have capital punishment statutes. Thirty-three states have imposed capital sentences, but only twelve states have executed anyone. Florida (15), Texas (11), Louisiana (7), and Georgia (6) have each executed more than four people.

6. Substantial exchange between the state and federal courts in capital cases occurs in the Eleventh Circuit (Florida, Georgia, and Alabama) and the Fifth Circuit (Louisiana, Mississippi, and Texas). The greater use of capital punishment in the South is not a modern phenomenon. "Over the period 1935 to 1969 . . . just on two-thirds of the executions performed in America were carried out in the southern states." F. Zimring & G. Hawkins, Capital Punishment and the American Agenda, ch. II (forthcoming, 1986–87).
foreclose many possible responses to federal claims, including those most likely to influence the federal courts. By contrast, some courts neither ignore nor automatically defer to lower courts. These courts make their own evaluation of the soundness of lower federal precedent and open a debate with the federal courts. Such courts will at times reject lower federal court views of federal law and rule to the contrary, with positive effects for all concerned.

Although difficult to document, state courts have begun to appreciate the virtues of a serious treatment of federal claims, even while considering the roles that should be played by state and federal courts. The lower federal courts have responded with greater respect for state court views of federal issues. That there should be any sort of "success" in the capital area is somewhat surprising. But a handful of capital cases show how cooperative efforts between courts can vindicate bedrock legal values. Capital punishment may or may not make a dent in the crime rate, but state court capital decisions increasingly demonstrate that state-federal relations can develop creatively, even in the worst circumstances.

Before we discuss specific state capital decisions, we diverge in Part I to lay out the complicated mechanics of capital review, including the reasons for extensive federal habeas review in the capital area. Part II considers state capital courts which deflect consideration of federal claims, while Part III surveys those courts which engage lower federal courts in discussing federal claims on their merits. In Part IV we respond to the suggestion that the capital cases are a world unto themselves, making it difficult to draw lessons outside of the capital area. We then sketch a case for the affirmative use of state judicial federalism—dealing creatively with federal claims—by state courts. We also consider the lessons these cases offer for current proposals for redefining the scope of federal habeas review.

7. The increasing willingness of state courts to deal with federal claims has been recognized in noncapital cases. McGowen, The View from an Inferior Court, 19 San Diego L. Rev. 659, 668–69 (1982); Remington, State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts, 44 Ohio St. L.J. 287, 287 (1983).

8. This essay assumes that implications for federalism in the capital process can be considered without addressing the crime control effects or the ultimate wisdom or error of capital punishment.
I. The Mechanics of Capital Review

State and federal actors in the capital process do not reconcile their interests in a single face to face negotiation. In reaching a decision as to whether the state may execute a person, the responsible judges, legislators, and executive officers make their choices over a goodly length of time. Defendants present claims to multiple tribunals in several separate proceedings.

A. State Direct and Collateral Review

After being convicted of a violation of state law, a defendant is sentenced and may then pursue direct appeal. Sometimes this involves as many as three different levels of review, with one or more intermediate state appellate courts hearing the case, followed by the highest state court. Some defendants seek rehearings from the state courts along the way. Finally, once the state courts have resolved the case to their satisfaction, the U.S. Supreme Court in its discretion has the power to correct any violation of federal law,\(^9\) normally constitutional law, that may have affected the conviction or sentence.\(^10\)

At this point the prisoner in state custody may resort to collateral proceedings in state court. These complementary or overlapping proceedings have various names and functions, many deriving from common law writs of habeas corpus and *error coram nobis*.\(^11\) The shared purpose of each of these collateral proceedings is to determine whether some error undermined the legitimacy of the original conviction or sentence. Out of a need for some finality in judgments, the range of errors that can lead to relief in collateral proceedings is narrower than the range of reversible error on direct appeal. The collateral tribunal will not readily overturn findings of fact and in some states will not consider certain issues not raised at trial or on appeal. On the other hand, a collateral tribunal does not adjudicate a mere subset of the claims heard by the original courts. Certain issues will arise in collateral proceedings that could not have been considered previously such as new evidence or the propriety of the procedures on direct review.

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11. The habeas corpus writ was traditionally used to attack the jurisdiction of the state over the person. See generally L. Yackle, *supra* note 2; Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966). *Error coram nobis* traditionally was used to attack convictions on the basis of new evidence.
On occasion the collateral state tribunal will have to make evidentiary findings in order to resolve some legal challenge to the fairness and adequacy of the conviction such as the alleged incompetence of counsel at trial or on appeal. Either party may seek review of the lower court decision on collateral review. Apart from limited fact-finding, state appellate courts conduct largely the same inquiry as the lower courts on collateral review.

A typical capital defendant will crisscross the state court system several times before exhausting all claims. Some tribunals, including the state's highest court, may hear the defendant's claims in a number of different capacities. Yet not all petitioners make orderly appearances. One proceeding need not end before another begins, and state courts have periodically consolidated various forms of collateral attack in one proceeding as a matter of judicial economy. Neither the petitioners nor the courts can tell, then, precisely how a capital case will wind through the state courts.

B. Federal Habeas: Evolving Doctrines

Federal courts have had the power to order the release of prisoners convicted under state law since the passage of the Habeas Corpus Act of 1867. The habeas corpus writ was historically used only to challenge jurisdiction, but under modern notions of federal habeas the federal district court will review the states courts' substantive determinations at the instance of the petitioner. The federal habeas court can only grant relief if it finds that a peti-

12. For example, after a Florida jury convicted Thomas Knight of murder and sentenced him to death, he made three successive appearances before the Florida Supreme Court over the course of five years. Knight v. State, 338 So. 2d 201 (Fla. 1976) (direct appeal); Knight v. State, 394 So. 2d 997 (Fla. 1981) (state habeas writ); Muhammad v. State, 426 So. 2d 533 (Fla. 1982) (motion under Fla. R. Crim. P. 3.850), cert. denied, 464 U.S. 865 (1983).

13. See, e.g., State v. Henry, 456 So. 2d 466, 468-70 (Fla. 1984) (motion to vacate stay of execution, two applications for writs of habeas corpus, and application for leave to file petition for writ of error coram nobis consolidated into single appeal).

14. Prior to that time the writ was used to challenge the legality of the executive's decision to detain a prisoner prior to conviction. See, e.g., Van Alstyne, A Critical Guide to Ex parte Mccardle, 15 Ariz. L. Rev. 229 (1973). The writ of habeas corpus has a constitutional foundation: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. See W. Duke, A Constitutional History of Habeas Corpus (1980).

15. L. Yackle, supra note 2; Saltzburg, Habeas Corpus: The Supreme Court and Congress, 44 Ohio St. L.J. 367 (1983).

16. The usual effect of granting relief is to give the state the opportunity to recharge, retry, or resentence the defendant.
PROTOTYPICAL CAPITAL REVIEW PROCEEDINGS

TRIAL-LEVEL COURT
Conviction and Sentence

INTERMEDIATE APPELLATE COURT

SUPREME COURT

U.S. SUPREME COURT

EXECUTION WARRANT SIGNED

TRIAL-LEVEL COURT
Collateral Proceeding Type A
Stay?

Merits?

INTERMEDIATE APPELLATE COURT

SUPREME COURT

U.S. SUPREME COURT

TRIAL-LEVEL COURT
Collateral Proceeding Type B

rehearing

rehearing

rehearing

U.S. DISTRICT COURT

for exhaustion

U.S. DISTRICT COURT
Federal Collateral Proceedings

Stay?

Merits?

U.S. COURT OF APPEALS

rehearing

Stay?

Merits?

U.S. SUPREME COURT

rehearing
*This chart portrays a single round of proceedings without accounting for any hearings that would occur after a retrial or resentencing. Type "A" and type "B" proceedings in state court refer to distinct forms of postconviction relief, such as habeas and *error coram nobis*. 
tioner was deprived of a right guaranteed under the U.S. Constitution or federal law.\textsuperscript{17}

The habeas court has no blanket authority to search for federal error. Its review must remain within bounds established by statute and by judicial construction of the relevant statutes. Federal habeas courts do not concern themselves with violations of state law. This means that a violation of state law alone will not provide a basis for federal relief. It also means that federal courts will defer to some state procedural rulings even where they affect federal interests. Where the state courts rely on an independent and adequate state procedural ground for refusing to address an alleged error of federal law, the federal courts normally must treat the state law ruling as controlling on the issue.\textsuperscript{18} This "procedural default" doctrine developed in part from deference to state adjudication of state law, and in part from respect for the state's desire for finality and orderly adjudication.\textsuperscript{19}

Federal courts have only limited capacity to determine issues of fact as opposed to issues of law. When a claim for relief turns on a particular issue of fact, a federal court may hold an evidentiary hearing; but any state court factual finding made on the record must be presumed correct unless the fact-finding procedures used by the state fall short of several objective standards now embodied in statute.\textsuperscript{20} Congress adopted the presumption of correctness in

\begin{itemize}
\item \textsuperscript{17} Brown v. Allen, 344 U.S. 443, 446–50 (1953). The primary statutory authority for federal habeas corpus proceedings now appears in 28 U.S.C. § 2254:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. Id. § 2254(a)(1977).

\item \textsuperscript{18} Engle v. Isaac, 456 U.S. 107, 128–29 (1982); Wainwright v. Sykes, 433 U.S. 72, 81 (1977). The procedural bar, once recognized, will inhibit federal review of a federal claim unless the petitioner shows cause for failure to meet the procedural requirement and actual prejudice suffered because of the alleged federal error. The definitions of cause and prejudice have proven malleable. While contemporary objection rules qualify as an independent and adequate state procedural bar, state rules restricting the scope of direct and collateral review may not bar subsequent federal review.

\item \textsuperscript{19} In Engle v. Isaac, the Court explained that the procedural default bar developed in Sykes responded to the "special costs [of federal habeas writs] on our federal system." 456 U.S. at 128. The rule was developed to guarantee the trial court's opportunity to deal with errors, to ensure the state appellate courts' ability to "mend their own fences and avoid federal intrusion," and to protect the state's ability to enforce its procedural rules. Id. at 129.

\item \textsuperscript{20} The current rules regarding the presumed correctness of state factual findings are set forth in 28 U.S.C. § 2254(d). It provides that state factual
furtherance of federalism interests.21 In recent years, the Supreme Court has limited federal habeas review of certain types of claims, although the rationales and extent of these limitations are not yet clear.22

A federal court must also account for limits on when claims may be heard. A claim should not be raised too early: the rule of “exhaustion” directs the federal habeas courts to consider claims only after the state courts have had a chance to rule on them.23 Nor should the claim be asserted too late: a federal court will entertain a successive petition for habeas corpus (a petition other than the first petition) only under special circumstances first described in

determinations evidenced by written indicia “shall be presumed to be correct” unless one of eight enumerated exceptions is present. These exceptions include: (1) that the facts were not adequately resolved in state court; (2) that the hearing was not “full, fair, and adequate”; or (3) “that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination.” The presumption can be overcome by convincing evidence. These exceptions are based loosely on criteria found in Townsend v. Sain, 372 U.S. 293 (1963), which determined when a federal habeas court may hold an evidentiary hearing.

21. See Sumner v. Mata, 449 U.S. 539, 547 (1981) (“This interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts.”). Broad doctrines like “comity” and “federalism” generally must be supported by a more particular argument that makes sense of the result reached under the guise of the more general language. For instance, simple invocation of “federalism” will not help a federal court reach a sensible decision when classifying an issue as factual or legal. A court must base its fact/law distinction on a determination of which judicial actor is best positioned to decide the issue, and state courts must be deemed to be in the best position to decide matters of credibility of witnesses, competence to stand trial, and the like. See Miller v. Fenton, 106 S. Ct. 445 (1985).

22. For at least some types of federal claims, such as ineffective assistance of counsel, the petitioner must demonstrate some level of prejudice—a denial of fundamental fairness—suffered as a result of the alleged error. See, e.g., Strickland v. Washington, 466 U.S. 668, 696–98 (1984), Donnelly v. DeCristofofo, 416 U.S. 637, 642 (1974). In Stone v. Powell, 428 U.S. 465 (1976), the Court held claims relating to the exclusion of evidence under the fourth amendment not cognizable in federal habeas corpus. This can be seen as a presumption that breaches of the exclusionary rule never violate fundamental fairness.

23. The exhaustion requirement arose soon after federal courts were first given the power to grant habeas relief for persons convicted under state law. Ex parte Royall, 117 U.S. 241 (1886). This requirement is now reflected in 28 U.S.C. § 2254(b) & (c) (1977). In Rose v. Lundy, 455 U.S. 509 (1982), the Supreme Court created a rule of “total exhaustion” requiring a habeas court to dismiss any petition containing unexhausted claims. This difficult decision cannot be premised on concern with state interests because its sole impact lies with exhausted issues in mixed petitions. See Yackle, The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles, 44 Ohio St. L.J. 393, 424–31 (1983).
Sanders v. United States, and now embodied in a federal rule. Successive petitions may properly raise claims presented earlier where those claims were not ruled upon “on the merits.” New claims may be raised in the successive petition where the petitioner has shown that the failure to raise the claims was not “an abuse of the writ.”

C. Distinctive Features of Capital Habeas Review

While the brief survey of procedures above holds true for all post-conviction proceedings initiated by state prisoners, the picture is deceptively incomplete with regard to capital defendants. This section singles out the distinctive aspects of capital cases that have the most bearing upon relations between state and federal courts. Those aspects include universal federal review of capital cases, the role of nonjudicial state actors, and the extraordinary time pressures in these cases.

The most prominent feature distinguishing capital cases from more ordinary state convictions is that a federal court will almost certainly review every capital sentence at least one time. Even after the radical expansion of federal habeas corpus in recent decades, an extremely small proportion of noncapital criminal defendants file habeas petitions challenging their convictions or sentences. By contrast, the proportion of defendants sentenced

26. The meaning of “abuse of the writ” and its operation in terms of new law claims, particularly in successive capital petitions, presents a perfect example of the extraordinary complexity lurking beneath these seemingly simple rules. Reflecting the special history of habeas corpus, the successive petition rule evinces an obvious intention to introduce some finality to federal habeas while allowing the late introduction of meritorious claims that might be barred under strict rules of claim and issue preclusion. A legal mire is created when counsel explains a prior failure to raise an issue through the existence of new but retroactive law. Complicating matters yet further are the doctrines of ineffective assistance as they apply to failures to raise important claims. Perhaps any important constitutional claim not “new” enough to explain the failure to raise it on a prior habeas petition could be grounds for a finding of ineffective assistance of habeas counsel for failure to see and raise the claim. A system of civil law that indiscriminately allowed repeated suits on the same facts, based on new and developing legal theories, would collapse.
27. The yearly number of state criminal convictions can only be measured by the roughest of estimates. Figures from two states will provide some basis for
to death who file for federal habeas relief easily exceeds 90 percent.\textsuperscript{28} Furthermore, most capital petitioners do not seek review before just one federal tribunal. Appeals, requests for rehearings before circuit panels and circuit courts sitting en banc, petitions for certiorari, successive petitions, and emergency stays are pursued as a matter of course.

The impact of the federal presence in this area also appears in the success rate enjoyed by petitioners in capital cases.\textsuperscript{29} Petitioners sentenced to death obtain habeas relief at a rate disproportionate to their small share of the total number of petitions filed;\textsuperscript{30} a substantial portion of the cases in recent years in which the writ was granted were capital cases.

Extrapolation. Though a small proportion of convictions results from trial rather than plea bargain, Georgia tried and convicted persons of more than 3,000 felony counts in 1981 (4,037 counts including misdemeanors). Georgia Administrative Office of the Courts, Caseload Fiscal Year 1981 Disposition Report. In New York there were 34,113 criminal convictions in that same year. Olsen, Judicial Proposals to Limit the Jurisdictional Scope of Federal Post-Conviction Habeas Corpus Consideration of the Claims of State Prisoners, 31 Buffalo L. Rev. 301, 306 (1982). Such figures indicate that the number of federal petitions—around 8,000 a year—are but a fraction of the total number of state criminal convictions. Admin. Office United States Courts, 1984 Report 143 (8,349 habeas petitions by state prisoners in 1984). Moreover, this figure includes successive petitions and petitions challenging detention on grounds other than the invalidity of a conviction or sentence. Roughly 30 percent of the federal petitioners have applied at least once previously for federal relief. P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 15 (1979) (study based on random sample of petitions in six district courts and one court of appeals). The average number of federal habeas petitions per prisoner seems to be decreasing. See Resnik, Tiers, 57 S. Calif. L. Rev. 837, 943–46 (1984) (5.74 federal petitions per 100 prisoners—state or federal—in 1971; 2.68 petitions per 100 prisoners in 1983).

28. Of the approximately sixty persons executed after the reemergence of capital punishment, at most nine of them failed to file federal petitions. Four of the nine voluntary executions came within the first few years of the renewal of capital punishment. From December 1982 to April 1986 only five of the fifty-one persons executed chose not to contest the sentence. Death Row U.S.A., supra note 5, at 4. See generally, Greenberg, Capital Punishment as a System, 91 Yale L.J. 908 (1982).

29. It is difficult to obtain such statistics about the capital process. Very few capital actors keep any record on the operation of the capital system, dealing instead with each case as it arises. Capital actors that do keep statistics are reluctant to share statistics which betray any strength or weakness in their positions. In analyzing the capital process it would help to know such basic information as the amount of time cases spend at each level of the capital review system and the number of convictions and sentences overturned at each level.

30. The last available statistics released by the Administrative Office of the U.S. Courts concerning successful petitions from 1946 through 1957 showed 1.4\% of petitions leading to relief. More recent estimates of the success rate fell between 2.5 and 4\%. P. Robinson, supra note 27, at 23 (3.2\%); Wright & Sofraer, Federal Habeas Corpus for State Prisoners: The Allocation of Faci-Finding Re-
The two basic reasons for this more extensive review are the presence of counsel on collateral review and the special constitutional doctrines supporting a searching form of review. 31 The presence of counsel on collateral attack increases any petitioner's chances for success, 32 and capital defendants normally benefit from the advice of extraordinarily able and dedicated attorneys in the final phases of post-conviction review. 33

The nature of capital punishment jurisprudence also provides a basis for searching federal review. 34 The Supreme Court relied on unspecified notions of federalism in deferring to the judgment of state legislatures that capital punishment was a constitutionally valid punishment. 35 Yet the recognition that it is for each state to decide whether the penalty of death should be administered has been counterbalanced by the creation of a modern federal law of capital sentencing. The sentencing procedures in capital cases are built on federal principles and produce federal claims in virtually every capital case, including those without any constitutional

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31. See, e.g., Spaziano v. Florida, 104 S. Ct. 3154, 3160 (1984) ("We reaffirm our commitment to the demands of reliability in decisions involving death. . . ."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (Because of the qualitative difference in a sentence of death "there is a corresponding difference in the need for reliability in determination that death is the appropriate punishment in a specific case.").

32. According to one study, the presence of counsel raises the success rate from 3 to 12%. P. Robinson, supra note 27, at 58. This increase is explained in part by counsel's ability to screen out frivolous claims.

33. The contrast between counsel at trial and counsel on federal collateral attack gives a particular sharpness to claims of ineffective assistance.

34. The belief that "death is different" is not itself an explanation, but rather a conclusion which must be supported by specific premises. The finality of capital punishment is one of the most frequently mentioned reasons supporting this belief. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.").

35. See Gregg v. Georgia, 428 U.S. 153, 186-87 (1976) (opinion of Stewart, Powell & Stevens, JJ.) ("Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.").
claims stemming from the guilt/innocence phase of trial. The state
in a capital case must prove more than guilt beyond a reasonable
doubt: it must prove that the particular defendant falls into the
subgroup of aggravated cases deserving of the death penalty.36

Both the procedures and substance of the sentencing trial are
defined by the broad pronouncements of the Supreme Court. Because this area of capital law is distinctly federal, it provides the
federal habeas courts with a substantial interest and an area of
relative expertise in each case.37 The state court reviewing a capital
case, therefore, acts with the virtual certainty that if it grants no
relief to the defendant or petitioner, at least one federal court will
review the same claims and will likely weigh them with great
deliberation.

The participation of state legislatures and executives in the
capital area, like universal federal review, reminds state courts
that they do not act alone in these cases. State legislatures partici-
bate to an unaccustomed degree in capital cases because of the
frequency with which many of them amend their capital punish-
ment statutes. This often is necessary to keep pace with the shifting
requirements of federal constitutional law.38

The executive sets the date of execution by signing a warrant and
has complete discretion when to sign it.39 The executive can also
commute the sentence. While governors have this power in non-
capital cases, capital defendants routinely request clemency and
receive it in a notable number of cases.40 Despite the regularized

36. Id. at 198 (opinion of Stewart, Powell & Stevens, JJ.) (referring to the new
Georgia statute and noting that “No longer should there be ‘no meaningful basis
for distinguishing the few cases in which [the death penalty] is imposed from the
many cases in which it is not.’”) (quoting Furman v. Georgia, 408 U.S. 238, 313
(1972) (White, J., concurring)). Professor Kaplan argues that the notion of
innocence in capital cases extends to guilty defendants not deserving of execution.

37. When federal courts grant habeas relief requiring resentencing, they do not
reject the entire state determination. This limited relief has the appearance of a
compromise position.

38. See Note, The Death Penalty and Federalism: Eighth Amendment Con-
straints on the Allocation of State Decisionmaking Power, 35 Stan. L. Rev. 787
(1983).

39. It is possible to imagine clemency determinations administered in a manner
that might offend the Constitution. For instance, a governor might base pardons
upon racial considerations or the identity of counsel.

40. Forty-three capital defendants have had their sentences commuted by
governors between 1973 and May 1, 1986 (including commutations by the gov-
ernor of Texas resulting from favorable court decisions), compared with 56
executions over the same period. See DEATH ROW U.S.A., supra note 5, at 1.
procedures employed in some states, commutation too is an essentially discretionary decision.

Finally, capital cases stand apart from other criminal cases because of the extraordinary time pressures. A warrant authorizing the execution of a prisoner normally lasts a short period, perhaps only thirty days. Petitioners often do not file a collateral attack until the warrant has been signed\footnote{Due to the limited resources for collateral attack, skilled counsel tend to enter the proceedings only after the warrant has been signed.} so that a court has only a matter of days or even hours to decide whether to stay execution.\footnote{Given the time pressures and controversial nature of the penalty, it is not surprising that some judges, both state and federal, feel an obligation to pursue these cases with special vigor.} Federal courts frequently hear claims within hours of the time that the state courts have acted. During the last few days remaining on a warrant, courts may even appear to be acting simultaneously. It is not unusual for a prisoner to pass through five or more separate procedural stages, including a round of last-minute stays and requests for clemency, in the final days before a scheduled execution.

Furthermore, capital cases are unusually visible. While the details of proceedings receive extensive media coverage in the first few cases to pass through each state’s courts and in an occasional infamous case, virtually every capital case receives some coverage, even during the collateral phase. The public concern is reflected in activities like candlelight vigils.

Once again, these factors contribute to an inevitable awareness among state courts of the interactive quality of this system. Where state and federal courts make their rulings on the claims of one petitioner concurrently, there is not the salve of intervening months or years to ease any conflict of interests.

II. State Capital Courts Evading Federal Claims

We turn now to state court decisions produced within the intricate system of capital review. The cases surveyed in this section share a common bond. In these cases, state courts confronted with a federal legal claim attempt to avert subsequent conflict with a federal court. They do so through a number of different techniques: some ignore the claim, others invoke a state procedural bar that avoids a hearing on the merits, others settle the claim as a factual issue or as an issue of state law, and still others treat it as
a federal claim but ignore the precedents of the lower federal courts. Each technique assumes that if a federal court enters a case and makes a pronouncement on the federal issue, the state court has no effective way to express disagreement and provoke continued debate on that particular point. Great effort goes into excluding the federal courts from the review process where state courts presume that federal courts have an overwhelming power to define the state courts' institutional role.

Even when faced with a federal claim, it is proper in some cases for a state court to base a decision on factual rulings or state procedural or substantive grounds. The court's intent is therefore a relevant element to be unearthed in the reading of each case. Where a state court takes action intended to exclude the federal courts from participation in the case, proper state grounds have been turned to improper ends. Intent is an elusive factor, however, because very few courts explicitly discuss the entire capital review system; in particular they rarely discuss the role of the lower federal courts. Each state court's perspective must be inferred from its actions.

Actions which reveal intent come at several points of decision. For each federal claim, a state court must decide whether to consider it on the merits or not, whether to frame it as an issue of fact, state law, or federal law; and what authority to rely upon in deciding the issue. The court must also keep in mind what other courts have done in the case and what other courts might do with their decision.  

A. Federal Claims Ignored or Inadequately Considered

The expanded modern notion of federal habeas review developed in part in response to the "federalism vacuum" created by state courts that refused to deal adequately with federal claims. Even with the presence of extensive federal review of federal claims in capital cases many state courts continue to ignore, misunderstand, or inadequately consider federal claims.

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43. State courts act with the knowledge that the doctrines limiting federal discretion to review are defined primarily by the type of decision the state court has made—such as procedural bar due to failure to object at trial—and only secondarily by the adequacy of the state court's decision.

State courts which simply ignore valid federal claims place a substantial burden on the lower federal courts. Tension arises when a federal court grants relief on issues that the state court hardly considered. Other courts, while they do not ignore federal claims, do not give them the attention they are plainly due. Examples of such failures abound; more than one commentator has noted the indifferent response of Georgia courts to federal claims and federal court action.45 In many cases indifference leads to inadequate consideration of complex yet valid claims; the court in Downs v. State46 briskly rejected a substantial claim that the defendant was represented in his death defense on a contingent fee arrangement.47

Behavior such as this is hard to explain. A fundamental error of federal law appears in the case, and state courts let it pass untouched to the federal courts. If state courts desire finality for their convictions, complete inaction serves their purposes poorly. Perhaps inaction is an outgrowth of habits formed in noncapital cases where there is a substantial probability that a state court decision will go unquestioned. Indeed, such cases may result from

46. 453 So. 2d 1102, 1109 (Fla. 1984).
47. The court in Downs saw no need to cite any authority in the course of a brief paragraph concluding that there was no showing of prejudice in this case. Id. at 1109. Yet contingent fees in criminal cases have been widely repudiated and are illegal in a number of states. See Zauderer v. Office of Discip. Counsel, 105 S. Ct. 2265, 2272 (1984) (noting contingent fees in criminal cases illegal under Ohio law); Cappel v. Adams, 434 F.2d 1278 (5th Cir. 1970) (referring to history of invalidity of contingent fees in criminal cases); United States v. Oregon State Bar, 385 F. Supp. 507 (D. Or. 1974) (Oregon law); Nolan v. Foreman, 665 F.2d 738, 740 n.5 (9th Cir. 1982) (Texas law). The American Bar Association Model Code of Professional Responsibility prohibits contingent fee arrangements in criminal cases, DR 2-106(C)(4)(1979), as do the new Model Rules of Professional Conduct. See Rule 1.5. The court in Magwood v. State, in ruling upon a substantial claim based on the nonreviewability under Alabama law of a trial court’s determination of the sanity of a defendant at time of execution, did not cite extensive precedent or any federal law, but merely recited the state statutory provision. 426 So. 2d 918 (Ala. Crim. App. 1982), aff’d, Ex parte Magwood, 426 So. 2d 929 (Ala. 1983), on error coram nobis, Magwood v. State, 449 So. 2d 1267 (Ala. Crim. App. 1984). Cf. State v. Poree, 386 So. 2d 1331, 1334 (La. 1980) (noncapital murder case) (access by defendant to evidence on questions of sanity required by due process); State v. Roy, 395 So. 2d 664 (La. 1981) (noncapital murder case reversing conviction for lack of evidence of sanity). The Supreme Court has now recognized the federal right to a judicial determination of sanity before execution. Ford v. Wainright, No. 85-5542 (U.S. June 26, 1986).
simple negligence rather than any agenda with regard to the federal courts. Yet one must suspect that the state courts often wish to pass the buck on a difficult or controversial issue and leave its resolution, and the blame for the decision, to the federal habeas courts.

B. State Procedural Barriers

State courts often decide not to consider the merits of a federal claim because the claimant has not presented it in accordance with state procedures. These procedural rules usually require certain kinds of issues to be raised at trial or on direct appeal.

Federal law recognizes that state courts should not be compelled to behave exactly like federal courts, even while ruling on federal claims. In order to prevent this from happening, federal habeas courts will respect certain state procedural bars even though the merits of the claim might otherwise be heard. State procedural limits would be meaningless without some federal deference. Once the state court has relied on a procedural default as a basis for denying relief, the federal habeas court asks only whether the state prisoner failed to meet an adequate procedural requirement, and whether the requirement deserves federal recognition.

State procedural defaults represent a power easily abused. Taken to extremes the doctrine would empower state courts to vitiate federal habeas review by establishing harsh procedural requirements. The federal courts, therefore, do not hesitate to rule that some state procedural bars are inadequate or otherwise not binding on them.

48. In Collins v. State, 261 Ark. 195, 211–23, 548 S.W.2d 106, 121–22, cert. denied, 434 U.S. 878 (1977), the state did not conduct proportionality review even though at the time such review might have been viewed as a constitutional requirement. The intent seems to have been benign due to the absence of other capital cases for comparison. The federal court later sent the case back to the state courts for successive proportionality review based on the willingness of the highest state court to conduct such review in subsequent cases. Collins v. Lockhart, 707 F.2d 341 (8th Cir. 1983), cert. denied, 106 S. Ct. 546 (1985).

49. See Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977); Francois v. Wainwright, 741 F.2d 1275, 1281–82 (11th Cir. 1984); Holcomb v. Murphy, 701 F.2d 1307 (10th Cir.), cert. denied, 463 U.S. 1211 (1983); Breest v. Perrin, 655 F.2d 1 (1st Cir.), cert. denied, 454 U.S. 1059 (1981). The procedural bar doctrine, because it calls on federal courts to recognize state procedures to some appropriate extent while applying federal substantive law, might be characterized as a mirror image of the Erie doctrine. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Just as the progeny of Erie struggled to distinguish substance from procedure, so the law of procedural bar seeks to separate genuine procedural rules from those which accomplish little except for barring a hearing on the merits.
Where the federal courts do not defer to a procedural requirement, the invocation of that requirement by a state court has much the same effect as ignoring the claim entirely. The federal courts will address the issue without the benefit of the state's view. But the question of intent is less vexing in these cases than where claims are ignored because the state courts have some putative justification for not addressing the merits.

Oftentimes a state will utilize a procedure limiting state review without any apparent awareness of the possible involvement of the federal court. In *Gilliard v. State*, the Mississippi Supreme Court, dealing with a petitioner's *error coram nobis* writ, held that the petitioner could not frame his claim as a violation of federal law in order to raise a question already settled on direct appeal as a matter of state law. This seems to be a straightforward attempt to prevent what in essence would be duplicative proceedings in state court.

On the other hand, some state courts narrow the range of issues reviewable in state court with evident intent to leave issues to the lower federal courts for original consideration. The Florida Supreme Court in *Witt v. State*, in response to the perceived intrusiveness of federal review, established a rule that fundamental legal changes would be a ground for state collateral relief only when those changes came from the Florida Supreme Court or the U.S. Supreme Court. Since *Witt* was not decided on a state procedural ground recognized as a bar in federal court, the court conceded that the issues would remain open for federal review. The Florida court in effect seceded from the process of resolving federal claims. The decision seems poorly suited to accomplish

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50. 446 So. 2d 590 (Miss. 1984).
52. Federal district courts occasionally express the desire to secede from the process as well. These judges complain that a single federal trial judge has no place questioning the determination of an entire state court system. See *Wallace v. Kemp*, 581 F. Supp. 1471, 1473 (N.D. Ga. 1984) (“Most United States district court judges dislike their role in state prisoner habeas actions as much as state trial and appellate judges dislike the concept of one federal judge reviewing the opinions of at least nine state judges.”), *rev'd*, 757 F.2d 1102 (11th Cir. 1985); *Ruffin v. Zant*, 591 F. Supp. 1136 (S.D. Ga. 1984), *rev'd sub nom.* *Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985). This response does not account for the special perspective brought to federal issues by a federal court. See *Amar*, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B. U. L. Rev. 205, 231–38 (1985) (textual analysis showing that article III provisions create structural superiority of federal judges in considering federal law); *Neuborne*, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977). Nor does the position taken by district court judges confront the need for some ongoing federal
anything for the state other than expressing a blanket hostility towards the federal presence in capital cases.

Even where federal courts recognize a particular procedural default, such as a failure to object at trial, many state courts reach the merits anyway. That power lies within their discretion.\textsuperscript{53} Alabama provides by rule that courts reviewing capital cases should reach claims rising to the level of plain error even if the issues were not preserved.\textsuperscript{54} Other courts have gone out of their way to ignore a possible bar to raising constitutional issues in capital appeals, whether direct or collateral.\textsuperscript{55}

It is entirely appropriate for state courts to suspend their procedural requirements in capital cases containing complex claims, often based on changing law. Realistically, they must also consider that petitioners with such claims will fare well in their attempts to demonstrate the cause of default and the prejudice caused by the alleged error. In other words, federal courts will likely disregard the default in such cases and reach the merits.

Notwithstanding the vagaries of federal recognition of procedural bars, state courts commonly rely upon them in capital cases.\textsuperscript{56} Whatever the purpose of using procedural default, it achieves one goal consistently: it allows a state court to avoid a discussion of the

\textsuperscript{53} In Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984), \textit{cert. denied}, 105 S. Ct. 816 (1985), the Georgia Supreme Court reached the issue of prejudicial prosecutorial argument at sentencing even though the defendant had not objected at trial. The court reached the merits after noting the procedural problem in passing. \textit{See also} State v. Babin, 319 So. 2d 367, 374–75 (La. 1975) (Discretion should be exercised in favor of disclosure to lessen the possible conflict with federal constitutional guarantees, i.e., sixth amendment right to cross-examine, "permit[ting] effective impeachment by inconsistent statement of a prosecution witness." The state court’s discretion is then subject to review on direct appeal. Thus, "[u]nless the state court affords an adequate remedy for its vindication, the federal courts will.").

\textsuperscript{54} This rule was not followed in the recent case of \textit{Ex parte} Harrell, 470 So. 2d 1309 (Ala. 1985), \textit{affg} Harrell v. State, 470 S.W.2d 1303 (1984), \textit{cert. denied}, 106 S. Ct. 269 (1985). A long dissent criticized the Court and suggested that the Court might be waiting for a federal habeas court to deal with the issue.

\textsuperscript{55} The California Supreme Court on rehearing in People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983), granted relief on a claim raised by \textit{amicus} counsel but not by defendant's counsel, who deemed the issue too insignificant to raise on appeal. \textit{Id.} at 875 n.3, 671 P.2d at 823 n.3, 196 Cal. Rptr. at 319 n.3. The court made no finding of whether or not the error was harmless, as pointed out by the sharp dissent.

\textsuperscript{56} \textit{See}, e.g., Pruett v. Thigpen, 444 So. 2d 819 (Miss. 1984); Hill v. State, 432 So. 2d 427 (Miss.), \textit{cert. denied}, 464 U.S. 977 (1983).
merits. Defaults also promote procedural regularity on the part of capital defendants, but there will be procedural irregularities as long as there are attorneys with inadequate foresight, and as long as state and federal capital law remains in flux.

Preventing federal review is the objective achieved least consistently of all. When successful, the state courts in these cases do constrain federal participation; it is a more active response than ignoring the claim entirely. But there is always a risk that federal courts may find cause and prejudice, or disagree that the defendant actually failed to raise the issue adequately, or refuse to recognize a particular type of procedural requirement.

C. Resolving Federal Claims as a Matter of State Law

The state court can shift a federal claim into areas of special state competence shielded from federal review. These areas include factual findings and rulings based on state substantive law. Federal courts presume the correctness of state factual findings and consider themselves bound by state interpretations of state law. Yet the power to settle such questions does not include the power to decide whether the factual or state law ruling completely disposes of an issue. A factual finding may only be a subsidiary issue within a larger question controlled by federal law, and the federal court can decide the weight to place on established facts.

The state court cases surveyed in this section attempt to transform one form of power into another. The state courts attempt to equate the power to decide an issue of fact or state law with the power to ascribe controlling weight to that issue. By attempting this transformation, state courts expose the limited reach of their undisputed areas of special competence. We first describe bold state court behavior concerning factual findings. The second and third subsections deal with interpretations of state law, those that lead state courts both to deny and grant relief.

1. STRESSING FACTS

Congress and the Supreme Court have long recognized the fact-finding expertise of state courts, and rules call for lower federal courts to defer to state courts in this area. In Jones v. State\(^{57}\) the Florida Supreme Court encouraged the lower state courts to hold

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57. 446 So. 2d 1059 (Fla. 1984).
evidentiary hearings on claims of ineffective assistance so that their conclusions would not be reviewed by the U.S. district courts. The court pointed out that many questions could be resolved on the basis of facts and state courts were free to claim this power as their own. Lower state courts were admonished to hold evidentiary hearings even where not necessary to resolve the claim.58

Yet even when utilized to the fullest extent possible, the presumed correctness of factual findings offers limited advantages to the state courts. Some press beyond the statute to lay claim to a special role in classifying issues as factual or legal. One court asserted that where claims involve many factual determinations, the choice of a legal standard and the application of a standard by a state court deserve special deference.59

The states’ dominant role as fact finder can be used not only to anticipate a federal holding, but also to reexamine a previous federal holding. In Lokos v. State,60 the court heard an appeal from a retrial necessitated by the grant of federal habeas relief on grounds of incompetence to stand trial.61 The court confronted the question of whether a confession made three months before trial

58. Id. at 1063. See also State v. Henry, 456 So. 2d 466, 468 (Fla. 1984) (per curiam) (expanding suggestion that trial court hold evidentiary hearings for all colorable issues raised in a state 3.850 motion); Riley v. State, 433 So. 2d 976, 982–83 (Fla. 1983) (Boyd, J., dissenting).

59. See Knight v. State, 394 So. 2d 997, 1003 (Fla. 1981) (After rejecting Fifth Circuit legal standard regarding ineffective assistance in favor of standard used by District of Columbia Circuit and applying that legal standard to facts of case, court noted that “our findings from these records must now be presumed correct.”). On habeas, the federal court sent the issue back to the state court without taking up the challenge offered by the state court in accepting the legal standard of the D.C. Circuit Court of Appeals. Knight v. Wainwright, 399 F. Supp. 1143 (S.D. Fla. 1981). On reconsideration the state court engaged in an identical analysis without citing the local circuit view of ineffective assistance. Muhammad v. State, 426 So. 2d 533 (Fla. 1982).

60. 434 So. 2d 818 (Ala. Crim. App. 1982), aff’d sub nom. Ex parte Lokos, 434 So. 2d 831 (Ala. 1983). The case was originally tried in 1964, and its longevity may have colored the state decisions.

61. The retrial was conducted in front of a judge who had written a letter to the parole board objecting to the defendant’s possible release. On appeal of the new conviction the middle appellate court never explained in any detail the grounds for the previous federal writ. In dealing with the defendant’s mental condition at the time of confession given shortly before the original trial, the court noted “that the federal court . . . considered virtually the same evidence . . . and found it insufficient to establish appellant’s competency to stand trial in 1964.” 434 So. 2d at 824. But the state court went on to consider evidence, not introduced at the voluntariness hearing before the trial court, and concluded that “[h]ad the [federal court] had the benefit of this testimony, we believe this case would not be again before this court today.” Id.
was admissible at the new trial. After recognizing that the court was "bound by the finding of the Fifth Circuit in 1980 that Lokos was incompetent to consult with his attorney and stand trial in [February] 1964," the court still found it conceivable that Lokos could have been competent to make a confession in December 1963.

Clouded and contradictory logic supported this conclusion. According to an expert witness, the defendant's condition was one that "can go into remission and then reappear," and the court found that this fact alone "supports an inference that [the defendant's] condition worsened from the time that he made the statements in question to the time of the first trial." The court then observed that another witness testified at the second trial that the defendant's condition was much improved in 1981 over what it had been in 1955. Because that change "could have occurred between 1955 . . . and December 1963" and because "[o]ther than the evidence of . . . incompetence to stand trial in February 1964, there was little evidence from which the trial court could have concluded that Lokos was in the grip of his disease at the time of making inculpatory statements," the court reached the stunning conclusion that there was a reasonable basis to conclude that the defendant's December 1963 confession was voluntary. Thus the Alabama Supreme Court used its power to determine facts offensively to limit the federal habeas decision to the narrowest possible basis.

As these cases suggest, the statutory presumption of correctness only settles the easy questions of state and federal interaction on factual issues. State courts normally should determine the credibility of witnesses, the impartiality of a juror, or similar factual issues, but the state courts repeatedly insist that their power over facts extends further. The effort usually is in vain since they have no clear dominion in assigning relative importance to facts or in applying facts to law.

62. Id. at 834.
63. In the same vein, the court concludes that testimony from the first trial was admissible at the second. The court concluded that "[b]ecause we are considering the testimony not to determine Lokos's mental competence at the time it was given but its effect on the present jury, the conclusion of the federal court is not controlling here." Id. at 835.
64. Id. at 834.
65. Id.
66. Id.
67. Id.
2. RETROACTIVE READINGS OF STATE LAW

State law will not completely settle the validity of a conviction or sentence where federal law creates an alternative ground for relief.\(^{68}\) State law may then foreclose relief only if the federal claim turns on a subsidiary state law question. State courts faced with such composite legal claims might be inclined to resolve claims as a matter of state law because of their authority to interpret state law. But the power to define state law only works prospectively: a current interpretation of state law does not decide whether a federal requirement was met under the past operation of state law. The past is out of reach unless the state lawgiver reinterprets the past operation of state law.

In *Songer v. State*,\(^{69}\) the Florida court misread state law and its prior decisions. The petitioner claimed that Florida courts had prevented him from presenting relevant mitigating evidence not enumerated in the capital sentencing statute. (Federal law required that a capital defendant be able to present all relevant evidence in mitigation of the crime during the sentencing phase of trial.) Songer’s claim was based upon statutory language as well as an apparently authoritative prior state court ruling.\(^{70}\) Despite the court’s attempt in *Songer* to read its prior decision narrowly, any reasonable reading of the earlier decision and state statutory law confirms that the nonstatutory mitigating evidence was inadmissible.\(^{71}\)

A slightly different form of retroactivity appears in *Young v. State*\(^{72}\) where the court heard a direct appeal on a retrial after federal relief had been granted on the first sentence. Because the

\(^{68}\) Where the state law standard is less exacting than its federal counterpart, the potential for conflict is present but is avoided in cases in which the court grants relief. *See* Zant v. Gaddis, 247 Ga. 717, 279 S.E.2d 219, *cert. denied*, 454 U.S. 1037 (1981) (relief would be granted under either state or federal standard, even though state standard is less rigorous than federal).


\(^{70}\) Cooper v. State, 336 So. 2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977). In Cooper the court stated that the sole issue in capital sentencing “is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding.” *Id.* at 1139. Cooper was decided before Lockett v. Ohio, 438 U.S. 586 (1978) (capital defendant has constitutional right to present all mitigating evidence at sentencing).


federal court had ruled that there was insufficient evidence to establish a necessary aggravating circumstance at sentencing, the defendant claimed that a new death sentence would violate double jeopardy.\textsuperscript{73} In ruling upon this claim, the state court incorrectly decided that the earlier federal opinion had not truly been based on a question of the constitutional sufficiency of the evidence because the federal court did not cite to the key relevant Supreme Court opinion.\textsuperscript{74} Instead, it said that the federal court had considered the evidence of aggravating circumstances insufficient as a matter of state law. The state court proceeded to correct that apparent misconception of state law and to find no double jeopardy bar.

When the case returned to the federal courts, the district court agreed that there was no double jeopardy bar, but the circuit court reversed. A scrupulous reading of the prior federal opinion demonstrated that the court indeed had based its decision on the constitutional sufficiency of the evidence rather than on state law. Therefore, the defendant could not be retried. The state opinion in \textit{Young v. State} went beyond efforts to reshape state law in light of the dictates of federal law. It was a faulty effort to construe the basis of a federal holding, concluding that it had been based on state law.

While a state court cannot be content solely with conforming present state law to federal requirements, there seems to be no level on which retroactive interpretation of state law works for the state courts. If a state court intends to bar federal review, it is unlikely to succeed because, in doctrinal terms, federal courts are likely to view such rereading of state law as fundamentally unfair. If a court intends to shift responsibility for a case to the federal courts, this approach fails because federal relief will likely make explicit reference to the requirements of state law. Finally, if state courts seek respect and independence, they certainly will not receive it where federal courts must second-guess their handling of state law.

3. STATE LAW BEYOND FEDERAL MINIMUM

In some states, particularly California, the state courts have taken such a strong position in reading capital cases that the lower federal


courts have had no opportunity to comment on federal constitutional issues. When the state repeatedly resolves cases on state grounds more protective of individual rights than the federal constitutional standard, the federal courts have little role to play, and that role is easily circumscribed. The state may create new rights, rely on special state statutory provisions, or read cases extremely broadly. There are also cases in which a state court, while not self-consciously going beyond federal law in analyzing constitutional claims, nonetheless creates broad state authority which surpasses by any objective measure the standards required by the Supreme Court.

It is hard to envision an extensive role in such cases for federal

75. See People v. Easley, 34 Cal. 3d 858, 888, 671 P. 2d 813, 832, 196 Cal. Rptr. 309, 328 (1983) (Richardson, J., dissenting) (145 capital cases filed with California Supreme Court since 1977, only 20 decided, penalty reversed in 18). As of Jan. 1, 1986, the California Supreme Court had decided 49 capital cases and reversed in 46. See L.A. Times, Jan. 1, 1986, at A22.

76. Increased federal constitutionalization of capital law leads some states to meet only the constitutional minimums and discourages independent state legal protections. Here the federal standards are viewed less like minimum standards and more like an array of model statutory provisions which must be met by the state legislature and courts.


78. California courts emphasize that the federal constitution provides the minimum due process protections. See, e.g., People v. McJimison, 135 Cal. App. 3d 873, 185 Cal. Rptr. 605 (1982) (noncapital murder case finding double jeopardy where Supreme Court would not); State v. Neil, 457 So. 2d 481 (Fla. 1984) (noncapital case dealing with jury bias where court clearly had capital cases in mind).

79. In People v. Chadd, 28 Cal. 3d 739, 621 P. 2d 837, 170 Cal. Rptr. 798 (1981), the court rejected a guilty plea, despite long-standing California law, on the grounds that a capital defendant could not plead guilty unless his counsel approved, and that he must have counsel to make a guilty plea. The court found that the state had valid reasons to limit guilty pleas in capital cases in light of "the larger public interest at stake in pleas of guilty to capital offenses." Id. at 747–48, 621 P.2d at 841, 170 Cal. Rptr. at 802.

80. People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979) (A new California standard for ineffective assistance applied to both appointed and hired counsel. The standard requires counsel "to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, appellant must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." Id. at 160, 599 P.2d at 597, 158 Cal. Rptr. at 291 (quoting People v. Pope, 23 Cal. 3d 412, 425, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979)).

habeas review: there is an inverted quality to the interchange between state and federal courts where the federal courts honor the states' prerogative to provide extraordinary procedures for capital cases. For example, in *Massie v. Sumner*, the Ninth Circuit held that a capital defendant who pled guilty and was sentenced to death could not waive the automatic appeal to the California Supreme Court provided by state law in light of California's interest in accuracy and fairness of its capital proceedings.

This approach demonstrates the extent to which the state courts could control the outcome in each case. But state courts may not always want to control outcomes in this manner because it requires that they exceed federal minimums. These cases allow no exchange with lower federal courts, although they might stimulate some debate with the U.S. Supreme Court over the proper contours of federal law.

D. Ignoring the Lower Federal Courts

State courts in many cases reach the merits of federal legal issues and cite freely to Supreme Court authority. Notably absent from these cases are references to the views of the lower federal courts. State courts respond to a disembodied version of federal law when they pay attention to Supreme Court pronouncements without lower federal court interpretations and elaborations of those cases. Thus the state courts taking this route deflect a conflict with lower federal courts just as if they had avoided reaching the merits.

State capital cases deal with isolated Supreme Court cases in two different ways. First, there are cases in which a Supreme Court case acts as a starting point. A petitioner might argue that a particular Supreme Court case, as applied to the facts or the existing statutory scheme, invalidates the conviction or sentence. The state court can answer the claim through an elementary exercise of legal reasoning, comparing the federal precedent to the case before it and deciding whether it controls the outcome. While the

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82. 624 F.2d 72 (9th Cir.), *cert. denied*, 449 U.S. 1103 (1980).
83. California courts also use the responsibility in interpreting federal claims in the capital area left to states by the Supreme Court.
85. In *Harris v. State*, 352 So. 2d 479 (Ala. 1977), the Alabama Supreme Court argued at length, with multiple dissents, over the question whether a mandatory death provision in the Alabama statute could survive Roberts *v.* Louisiana, 428 U.S. 325 (1976). Each state court opinion focuses carefully upon the text of the Supreme Court case.
Supreme Court case may be criticized,\textsuperscript{86} it serves as a manageable source of positive law.

Another type of state decision uses Supreme Court precedent to bolster a position adopted in ruling upon some unconventional legal claim.\textsuperscript{87} The casual reference to Supreme Court cases merely indicates that the court’s resolution of the issue lies above the constitutional minimum. Beyond that point the state courts are perfectly able to reach their own conclusions about federal constitutional law,\textsuperscript{88} although not all of these cases can be considered a decision of federal law.\textsuperscript{89}

Use of Supreme Court precedent, even in isolation, appears to differ from the state court strategies surveyed earlier because the state court actually addresses the merits of a claim based on federal law. The differences, however, do not run deep. Like methods of deciding federal claims on procedural, factual, or state law grounds, the use of disembodied Supreme Court precedent avoids a struggle with the lower federal courts over the meaning of federal law and the ability to shape that meaning. The refusal to engage lower federal courts is most striking where a state court has declared federal law to be relevant to the outcome.

Reliance on Supreme Court cases answers few of the unsettling

\textsuperscript{86} See Brown v. Wainwright, 392 So. 2d 1327, 1333, n.17 (Fla. 1981) (complaining that Supreme Court changes course so often that state court has to take exceptional—and even improper—measures to evaluate old cases under new standards).

\textsuperscript{87} State courts can also make implicit points about the lower federal courts when they use Supreme Court law to demonstrate the validity of a position taken in a prior case by the state court. See, e.g., Downs v. State, 453 So. 2d 1102, 1106, 1109 n.2 (Fla. 1984) (noting that Supreme Court had sided with Florida against Eleventh Circuit in enunciating standards for effective counsel; court concluded that its prior cases were so close to new Supreme Court standard that they need not be reconsidered).


\textsuperscript{89} Often these cases rely ultimately on state authority or on independent and unsupported analysis. For example, in Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), \textit{on habeas review}, Ford v. Strickland, 696 F.2d 804 (11th Cir.) (en banc), \textit{cert. denied}, 464 U.S. 865 (1983), the Florida Supreme Court flatly rejected a strong constitutional challenge to its practice of receiving nonrecord information about defendants, citing Supreme Court cases and state cases but relying in the end on a Kentucky case drawing a wholly untenable distinction between nonrecord information received at trial and nonrecord information received on review. See Note, \textit{Ex parte Information and the Appellate Review of Capital Sentences}, 60 N.Y.U.L. Rev. 104 (1985) (sharply criticizing Brown and Ford).
questions raised by the relationship between the high state courts and the lower federal habeas courts. State courts do not question whether they must follow the Supreme Court on federal questions. 90 If it were equally clear that state courts were constitutionally obligated to follow lower federal court decisions on federal constitutional issues, the task of evaluating and explaining state court performance would be simple. On substantive determinations, the measure of state court success would be the number of times it followed or anticipated the decision of a federal court: in other words, the most successful state court would be the court "reversed" the least. On questions of institutional competence, the state court could not claim a role with regard to federal law beyond that of implementing federal law as defined by federal courts.

A state court taking this perspective would be wise to avoid conflict with federal courts on federal questions, at least if it hoped to retain some control over the finality of its convictions. 91 It would use mechanisms, such as those canvassed in this section, characteristic of a subordinate court protecting itself from review on appeal. 92

Yet the duty of state courts to follow lower federal court pronouncements on federal law remains the central ambiguity in post-conviction proceedings. There is no sound basis for asserting any strict constitutional duty of that type. 93 It is remarkable that

90. Cohen v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). The state courts often seem to view the legal world as the Supreme Court on one hand and the lower courts, including both the state and lower federal courts, on the other. The Florida Supreme Court in Valle v. State, 474 So. 2d 796 (Fla. 1985), referred to the "Supreme Court and the lower courts, this Court included," but did not distinguish between high state and lower federal courts. Id. at 801. Cf. Coulter v. State, 438 So. 2d 336, 346 (Ala. Crim. App. 1982) (reading of state law in light of Supreme Court case, citing law from "other jurisdictions" but not citing lower federal courts).

91. Such courts would not be alone in assuming the determinative role of federal courts, for federalism is often analyzed from the perspective of federal actors.


93. The extent to which lower federal opinions should bind states as a legal matter is a necessarily open question. See, e.g., Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1053 (1977) ("Clearly, state courts are not bound to respect the doctrinal statements of the inferior federal tribunals so far as they understand those statements not to be compelled by the Supreme Court."); United States ex rel. Reis v. Wainwright, 525 F.2d 1269 (5th Cir. 1976) (federal court acknowledging that it could grant
some state courts keep sight of this fact even where patterns of review threaten to obscure it. This absence of duty presents an opportunity for cooperation rather than any requirement of cooperation. The analysis of this actual relationship between the state and lower federal habeas courts is more complex and interesting than examining whether state courts follow binding precedent, such as Supreme Court opinions. The lack of restrictions on the way state courts must deal with the federal habeas courts means that any evaluation of state court behavior must explore a whole series of questions, including the state court’s perception of its own role in collateral review. This and related questions will guide our exploration of state court cases in the next section.

III. State Capital Courts Engaging Lower Federal Courts

The state courts whose cases are surveyed in this section reach the merits of claims and decide them after dealing in some manner with lower federal court decisions. The distinguishing mark of these cases is their variety. That variety is spawned by state courts which assume a duty, along with the federal courts, to shape the meaning of federal law and the extent of the authority exercised by various interpreters of that law. They do not decide cases simply by forming a view about an issue and comparing it to the federal court view. They take the further complicating step of deciding what to do about possible disagreements.

The highest state courts are in a peculiar position in reviewing capital cases. In these cases the highest state courts as a practical matter straddle the roles of lower and highest courts. Judges on the highest state courts may and often do decide federal claims without reference to lower federal court decisions. But, like the decisions of a lower court, state capital decisions are likely to be reviewed by federal habeas courts. Maintaining the distinction between the court’s own view of the merits, and the possible outcomes in light of the federal role, allows the state court to mix the attributes of lower and highest courts. State courts may choose for themselves when and how to account for the federal court viewpoint.

habeas writ but that its decision would not bind Florida state courts); Cooper v. State, 631 S.W.2d 508, 514 (Tex. Crim. App. 1982) (noncapital case in which court observes that, “[T]hough this court is not bound by the constitutional interpretation of the Fifth Circuit . . . we agree with the decision reached by that court”) (citing Flores v. State, 487 S.W.2d 122 (Tex. Crim. App. 1972)).
Many state capital courts appear to be unaware of the crucial distinction between the power to decide the merits of federal questions and the breadth of argument that can be used in deciding those questions. We begin, therefore, with an overview of the ways state courts deal with lower federal court decisions while resolving federal claims. We then consider the frequent failure to distinguish these perspectives.

A. Dealing with the Lower Federal Courts

State courts cite to lower federal precedent in a variety of ways. Sometimes it seems that the state court treats lower federal authority as binding. 94 More frequently, state courts cite lower federal authority without indicating whether that authority is binding or carries any special weight. 95 In other cases the state court clearly states or indicates that it does not view the local federal opinions as binding. 96

When local federal authority supports the state court's own conclusion, there is no reason not to cite the federal authority since a federal court would reach the same result. The state court can signal its views about the weight of federal authority through something as simple as citation form. One recent Florida case cited to lower federal court authority as persuasive rather than binding precedent by using the citation forms “accord” and “see also” for the federal cases. 97

Giving federal cases nonbinding status has true consequences for the state only where it recognizes a conflict between its view and the local federal circuit or district court view on a question of federal law. There are at least five positions the state court can choose in this situation. As described earlier, the state court can ignore the federal cases, or discuss the federal merits without addressing the relationship between the courts. We now consider three additional postures. First, a court can recognize the conflict and then hold flatly contrary to the federal position, risking federal

94. See, e.g., Hill v. State, 432 So. 2d 427, 442 (Miss. 1983) (citing Fifth Circuit case and apparently treating it as binding authority).
97. Valle v. State, 474 So. 2d 796, 800 (Fla. 1985). The “compare” citation would also readily distinguish views of federal courts, local or otherwise. See also Hopson v. State, 352 So. 2d 506, 507 (Ala. 1977) (noncapital case using lower federal court precedent to “test” result reached).
habeas relief in that specific case. Second, rather than rejecting the federal view, a state court may wish to follow federal precedent while explaining any disagreement. This position may avoid delay and frustrations when the lower federal courts follow their own precedents and grant habeas relief. Finally, the state court can simply follow clear lower federal precedent.

The Georgia Supreme Court has on occasion taken the first of these last three postures by discussing local lower federal cases and openly rejecting the federal position. The response would prove self-destructive if it were employed too often. The federal courts would routinely block the stated desire of the state courts to carry out punishments imposed at trial. Yet on a selective basis a court might broadcast its disagreement with the federal courts on certain issues in order to invite the lower federal courts to reconsider or refine their earlier holdings. Like a split among the federal circuits, disagreement highlights the issue for possible review by the Supreme Court. Departing from local federal precedent would be most effective where it adds to existing disagreement among federal courts.

Where the state view conflicts with lower federal court authority, the state court may recognize the federal position, express its own views, and yet follow the federal rule so as to avoid an unnecessary wait while the petitioner seeks federal collateral review. In Ex Parte Singleton, the Alabama Supreme Court recognized the local circuit law, expressed an independent position, and then acted in recognition of universal federal review. The Alabama court noted a recent Eleventh Circuit ruling on an issue and then distinguished the case before it. The state court addressed the federal standard to avoid "an unnecessary waste of time," because "the federal district courts are bound to follow [the Eleventh Circuit precedent]." In other words, the court applied the federal precedent mainly as a matter of judicial administration.

98. Young v. Ricketts, 242 Ga. 559, 250 S.E.2d 404 (1978) (citing Fifth Circuit inexcusable neglect standard; curtly rejects and criticizes logic of federal position); Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984) (on challenge of prosecutorial argument at sentencing, state court evaluates and disagrees with four Eleventh Circuit cases, three of which were pending on rehearing en banc at that time, noting that "we do not agree that bombastic or grandiloquent argument is unconstitutional"); Knight v. State, 394 So. 2d 997 (Fla. 1981) (rejects Fifth Circuit ineffective assistance standard in favor of D.C. Circuit).


100. Id. at 446–47. In observing that the federal district courts would be bound by circuit precedent, the state court suggested that it might follow a circuit view
The least productive technique available to state courts on federal issues is to mischaracterize federal precedent or to make unlikely extensions of the holdings. Federal courts will respond by granting relief without answering legitimate state concerns. Where state and federal courts disagree, the true power of the state court lies in persuasive argument. Thorough analysis of relevant authority must propel a successful state effort to participate in establishing its own place as an interpreter of federal law. As state courts come to address federal claims out of a sense of constitutional duty, it would be reasonable to expect greater responsiveness from lower federal courts to the positions taken by the state courts on federal claims.

Where state courts squarely address federal claims, federal law should benefit from the perspective of state interpreters. Therefore, the last of the postures mentioned earlier, mute obedience to lower federal precedent, should not be favored because it weakens the influence of the state perspective. It is puzzling that state courts would ever adopt this posture. Yet silence is common when state courts encounter pertinent lower federal court decisions.

This section has reviewed instances where state courts have recognized lower federal cases in resolving federal questions. The next section explores the exceptional cases where state courts go beyond resolving the merits of federal questions and in explicit terms discusses the interaction between the two judicial systems.

B. Explicit Consideration of Federal Relations

An unseasoned reader of state appellate opinions in capital cases would be struck by the rarity of explicit discussions of federalism but not that of a single district judge. Cf. Meador, Straightening Out Federal Review of State Criminal Cases, 44 Ohio St. L.J. 273 (1983) (suggesting new process of direct review of state court judgments utilizing three or five member panels of the federal circuit courts).


102. If it is fair to judge the state court by its use of federal precedent, then it is equally fair to judge the federal court by the presence of citations to state authority, particularly to discussions in the case under consideration. Citation to state authority on federal claims is even rarer than state citation of lower federal courts.

103. State courts occasionally refer to federalism values without explicitly raising the issue. Sometimes courts complain that a retrial is years from the date of the crime and that the punishment has not yet been carried out. See, e.g., Spivey v. State, 253 Ga. 187, 319 S.E.2d 420, 425 (1984) (retried after federal grant of
or reference to the roles played by the state and federal courts.\footnote{104} There is no want of opportunities. Particularly when a case reappears in state court after the granting of federal relief, such discussion would be pertinent to the decision and would not be an advisory opinion.

Perhaps this silence results from a reluctance to declare forthrightly that state courts may contradict federal courts on matters of special federal concern. Whatever the reason for the reticence, abandoning it could work to the advantage of state courts. More open discussion by state courts of the role played by federal habeas courts would further influence the lower federal courts. But the success of this approach depends on a scrupulous separation of the administrative functions from the interpretive functions of a court.

The state courts have not used discussion of institutional roles to full effect. For instance, the Florida Supreme Court has explained several of its decisions in institutional terms that only reveal their problematic nature. In \textit{Witt v. State}\footnote{105} the Florida court suggested that the state should cut back on the hearing of federal issues on collateral review because of the existence of intrusive federal collateral review. The decision was calculated to chide the federal courts and to express the state court’s view of its own role in the federal system. In Florida a petitioner in collateral proceedings must present a claim that could not have been raised at trial or on appeal, such as a claim based upon a recent change in the law by the Florida Supreme Court or the U.S. Supreme Court. The Florida court rejected the idea that a fundamental legal doctrine or change first recognized by the lower federal courts would be grounds for seeking state collateral review. The court did not decide the case in pursuit of independent state policy, but for largely retaliatory reasons.\footnote{106}

\footnote{104} The best example of this phenomenon may be Texas, where more than two hundred persons were on death row and eleven have been executed as of May 1, 1986. \textit{See Death Row U.S.A.}, \textit{supra} note 5, at 4. The Fifth Circuit and the federal district courts in Texas have had no shortage of federal habeas petitions from petitioners sentenced to die by the Texas state courts. Yet one would be hard pressed to find a Texas capital decision which has self-consciously assessed its role in resolving federal claims. The same holds true for North Carolina and other states.

\footnote{105} 387 So. 2d 922 (Fla), \textit{cert. denied}, 449 U.S. 1067 (1980).

\footnote{106} \textit{Id.} at 931 n.1 (England, J., concurring) (“Obviously, the Court has no control over federal district court judges who may grant review in post-conviction relief or habeas corpus proceedings. Knowing no practical way to avoid that
In *Jones v. State*, the Florida Supreme Court discussed the U.S. Supreme Court decision in *Sumner v. Mata* and emphasized to all Florida courts the limited reviewability in federal court of state factual findings. The court quoted the entire text of section 2254(d) and encouraged lower courts to hold evidentiary hearings, noting pointedly that "the United States district courts believe they are mandated to hold a hearing" in the absence of a state hearing. In response to the unwelcome spectre of "leav[ing] the factual finding . . . to the federal courts," the Florida Supreme Court suggested "even when not legally required, that trial courts conduct, in most instances, evidentiary hearings on this type of issue." This result is bitter and sweet. The possibility of federal review prompted a merits consideration and the generation of additional record evidence, but the reason for enthusiastic fact-finding leaves the impartiality of the fact finder open to doubt.

The most frequent references to federalism and to the lower federal courts in the capital area are in lone concurrences and dissents. A fair number of these concurrences and dissents have a quirky quality. One concurring judge, arguing that the court should have heard the merits of a federal claim, noted that "[t]he past thirty years have shown us that Federal Habeas Corpus is a shibboleth to open or close State prison doors. In the hope of economy of judicial work I would prefer to ruminate and prolong gestation, but my brethren would proceed instanter and place the offspring on the doorstep of the [state supreme court] for further nurture." He proceeded to mention Socrates, Kant, Hume, and

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result, I acknowledge that reality in the belief, nonetheless, that multiple reviews within the state court system are inimical to an effective criminal justice system.

107. 446 So. 2d 1059 (Fla. 1984).
109. 446 So. 2d at 1063.
110. Id.
111. It is unclear what effect such a practice would have on federal review. While diminished reviewability seems most likely, it is also possible that better factual records would leave the federal courts in a better position to apply one of the exceptions to section 2254.
the *lex talionis* in his argument. 114 Even where these concurring and dissenting opinions highlight with compelling logic a weakness in the court's position, the lack of response by the majority shows the extent to which federalism is discussed as an argument of last resort, and not as a workaday notion in considering and deciding federal issues. 115

One exemplary proponent of the need to reflect on institutional roles in a federal system is Justice Robertson of the Mississippi Supreme Court. In a series of opinions, most in dissents or concurrences joined by a large minority of the court, Justice Robertson has set forth a responsible and well-articulated perspective on the troubled relationship between courts in the capital review context.

In *Evans v. State*, 116 a majority of the court interpreted the state *error coram nobis* statute to allow consideration only of issues that could not have been raised on appeal, and reached the decision without mention of federal courts or the state courts' participation in the federal system. Justice Robertson condemned the holding as inconsistent with the responsibilities of the court as an interpreter and protector of federal rights. He argued that state courts are first in the chronology of typical post-conviction challenges, but not in a position inferior to the lower federal courts. Given the exhaustion rule recognized by federal courts, the states have the largest share of responsibility in enforcing federal law in most capital cases because they hear the claims first and should identify most of those with merit. The exhaustion rule should be understood, he continued, as a strong suggestion that some state court hear the merits

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114. 352 So. 2d at 479.

115. Some state court opinions show an unawareness that other judicial actors or the public at large might be following the decision. These opinions seem to be written for a private audience, and are difficult to read without a prior familiarity with the facts and legal arguments in the particular case. This constitutes more than a mere stylistic difference from the more self-contained federal opinions.

of every federal claim unless an exceptionally strong state policy dictates otherwise.

In *Pruett v. Thigpen*, Justice Robertson explored the consequences of state court attempts to deny the impact of federal law and to exclude the federal courts from participation in capital cases. The majority refused to address the merits of a claim because of a defendant’s alleged waiver. Robertson reviewed the recent history of capital punishment in Mississippi and noted that petitioners in each of the first seven capital cases to reach federal court had obtained new trials or sentences. From this he concluded that a state only frustrates its own capital punishment policy by failing to act as a court of last resort with regard to federal claims, instead passing them along to federal courts without due consideration. Delays and repetitious claims would be less common, he said, if state courts would help to flesh out the new and unsettled mandates of the U.S. Supreme Court regarding guided discretion in capital sentencing.

The remarkable aspect of these opinions is not the outcome they endorse. Rather, it is in the energetic embrace of responsibility as a lawgiver and the recognition that the dual responsibilities of state and federal courts do not demean the state courts. This perspective, an attractive and plausible one, maintains that where the state courts make a full-fledged effort to interpret and apply federal law, giving due regard to the persuasive authority of lower federal court holdings, conflict between state and federal courts will not arise very often even though federal courts are likely to have a hand in every case.

IV. Assessing State Capital Cases

State capital cases offer lessons about the administration of capital laws and comparative information about different states. But these cases may provide a poor model for analyzing relations between state and lower federal courts. If state capital courts seek special agendas in capital cases, those cases may have little to say about state and federal habeas court relations in areas with fewer undercurrents.

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117. 444 So. 2d 819 (Miss. 1984) (Robertson, J., concurring). See also Gilliard v. State, 446 So. 2d 590, 594 (Miss. 1984) (Robertson, J., concurring) (would deny writ on merits rather than on procedural grounds).
118. 444 So. 2d at 834 n.9.
119. Id. at 833.
We begin this section by explaining the primary goals we believe the state courts seek in the capital cases: finality in each case, efficiency for the system, attaining the legislative goals in passing capital statutes, and maintaining the independence of the state courts. We then identify the advantages for state courts in taking an interactive approach to federal claims. Finally, we draw conclusions from these state cases regarding the role of federal habeas courts, and consider current federal legislative initiatives to alter federal habeas review.

A. The Relevance of State Capital Decisions

We have already considered some of the exceptional elements in capital review, such as special procedures and unique substantive law. Nobody could question the extraordinary nature of capital cases: perhaps the courts operate so differently in capital cases that they throw no light on state-federal interaction. In particular, there may be unique motives at work in capital review.

Recent commentary has suggested that none of the actors in the capital process truly desire to see executions carried out.\textsuperscript{130} If it is true that capital punishment is popular only as an abstract proposition, then each court would try to avoid responsibility for preventing executions.\textsuperscript{121} State appellate courts are in an excellent position both to “pass back” and “pass on” the responsibility for particular capital cases. They can pass the decision back to the jury and prior courts that have considered the case, and they can rely on the likely subsequent role of the federal courts.\textsuperscript{122}

We do not think that most state capital courts behave according to this sort of hidden agenda. We reject this view of the aims of the state capital courts for three reasons. First, as a general matter we find conspiracy theories of law, particularly as they apply to courts, too convenient.\textsuperscript{123}

\textsuperscript{120} F. ZIMRING & G. HAWKINS, supra note 6, ch. 5, passim.

\textsuperscript{121} F. ZIMRING & G. HAWKINS, supra note 6. In this view each court plays a game of “chicken” by allowing the capital process to proceed, assuming that other actors in the capital process will be the ones to “turn aside” and prevent actual executions.

\textsuperscript{122} F. ZIMRING & G. HAWKINS, supra note 6, ch. 5 (federal courts act as “the primary execution management instrument in the American governmental organization”).

\textsuperscript{123} Hidden agenda theories are, by their nature, difficult to fully refute. Zimring and Hawkins may overestimate the moral scruples of many people, including state judges, regarding the death penalty. A number of state judges have been outspoken proponents of capital punishment. Former Chief Justice
Second, it is easy to forget that capital defendants present their claims in the same legal forum as other criminal and civil litigants. The capital actors must work within the bounds of the established legal system with its rules, procedures, institutions, and logic. As for the court, judges repeatedly decide cases according to law, and are expected to do so. Judges often pride themselves on their ability to perform their judicial function in the face of controversy. In short, habits and aspirations have their effects.

Finally, in the capital decisions the courts proclaim their goals both explicitly and implicitly. These express and apparent values include efficiency in handling the array of death cases, and finality in the determination of each case. In the capital area state courts also seek independence from the federal courts, perhaps due to the extensive federal role in the area. These goals are consistent with the general function of the courts, and there is little reason to doubt that these are in fact their primary goals. We think that the frustration and even anger expressed by capital courts in Georgia, Florida, and elsewhere is sincere. Moreover, we think the use of evasive procedural techniques to limit federal review of a federal claim reflects this frustration, and not an underlying hope that it is the federal courts that will actually halt executions.

There is another end to the spectrum of ulterior motives in capital cases: the state courts may desire to carry out a scheme of punishment created by the legislature without close regard for the legal difficulties present in individual cases. Again, too, we reject this characterization of state court behavior in most cases. The state capital cases show more effort than would be expected were the judges simply trying to expedite executions.

Even if state capital courts operate, knowingly or otherwise, with hidden motives, the state capital decisions may nonetheless offer lessons that apply beyond the capital area. Whatever the hidden agenda of each of the actors, state and federal courts will have different agendas in capital cases, just as they often have different agendas in noncapital areas. The difference in priorities

H.E. Nichols of the Georgia Supreme Court campaigned vigorously for the reinstatement and broad application of the death penalty. Donohue, supra note 45, at 64 n.231.

124. The extreme complexity of the capital area may lead courts to rely more heavily on established legal rules and procedures.

125. Cover & Aleinikoff, supra note 93, at 1047–52 (comparing “utopian” vision of federal courts with “realist” vision of state courts). Federal courts may desire to interpret federal law free of unreasonable time restraints and political
and approach may be more important for lessons about the judicial relationship than the precise content of those differences. The capital cases will be relevant wherever state and federal courts have sharply opposed objectives that must be reconciled as each does its duty.

Extensive federal review may be the driving force behind much of the state court behavior described in this paper. Pervasive federal habeas review is likely to keep the state courts mindful of the federal presence. Distinctive features of capital cases thus may make the cases all the more relevant for examining patterns of conflict resolution.

B. *The Case for State Judicial Federalism*

The complex relationship between high state and federal habeas courts in the capital area falls within a loose theoretical framework that can be described as “interactive” federalism. The joint role in deciding federal claims, the nearly universal involvement of both courts in every case, and the ambiguous jurisprudential relationship create a complex situation where the ends sought by each actor can only be obtained when the behavior and goals of the other actor are kept in mind.

The lessons in these cases cannot be framed in terms of a static and clear-cut division of responsibility over portions of capital cases. Theories of federalism often resemble cartography—the mapping of large areas for state and federal sovereignty—and recently the trend has been to shrink the federal portion of the map, to urge the federal government to leave the states alone.

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pressure, and may also wish to avoid any appearance of ratifying the state’s capital punishment policy through regular involvement; the state courts may seek prompt resolution of cases they have already adjudicated, and will hope to avoid any appearance of illegitimate decisions.


But a complete theory of federalism must encompass something far more complex than the division of territory. It must acknowledge that in many areas both the federal government and the states have legitimate interests, so that federalism is better seen as a set of working rules for coexistence than as a dividing line between sovereigns.\textsuperscript{128} The capital cases provide a paradigm of cooperative federalism.

The majority of capital cases stray far from any ideal in joint state and federal resolution of issues. State capital courts have often sought their goals by avoiding direct exchange with the federal courts. Yet efforts to deflect consideration of federal claims frequently fail. Federal habeas courts have enough discretion to reach the merits of these claims in most of the cases, and the federal court then operates without guidance from the state decision. This occurs because the state court has offered no guidance and expressed no firm position on the federal claims. In these cases it is hard to discern any cooperative effort, and both courts lose an opportunity to obtain their own ends as a result.

Paradoxically, the range of capital cases suggests that state courts achieve their stated goals best when they address federal claims on the merits.\textsuperscript{129} This approach leads to a more efficient

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Reagan, in his First Inaugural Address (Jan. 20, 1981), noted his “intention to curb the size and influence of the federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people.” President’s Inaugural Address, 1 Reagan Pub. Papers 2 (Jan. 20, 1981). This “bright line” tendency is also clear in President Reagan’s budget message to Congress in January 1983 where he observed that “[t]he overall efficiency of Government in the United States can also be improved by a more rational sorting out of governmental responsibilities among the various levels of government—Federal, State, and local—in our Federal system, and eliminating or limiting overlapping and duplication.” President Reagan’s Budget Address to Congress (Jan. 31, 1983), reprinted in Budget of United States Government Fiscal Year 1985 at M19.

\textsuperscript{128} Scholars have noted that federalism concerns take shape not only in the static balance of state and federal domains, but in the dialectical nature of the federal collateral review process. Cover & Aleinikoff, supra note 93, at 1046–67. Many of the observations made by Cover and Aleinikoff about the federal habeas process do not necessarily apply to review of capital cases by federal courts because of the virtually universal federal consideration of these cases. Nevertheless, their insights provide important conceptual groundwork for almost any discussion of federal habeas corpus.

\textsuperscript{129} Chief Justice Robert Sheran of the Minnesota Supreme Court noted that “[i]n the relationship between the federal courts and the state courts, the most effective way of avoiding reluctant federal action to correct problems occurring in the states is for state courts to take the initiative and deal with those problems in aggressive and constructive ways.” 13 The Third Branch 7 (Mar. 1981) (interview with then Chief Justice Sheran, chairman of the Conference of Chief Justices).
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resolution of cases as each set of courts tends to deal with each issue less often. In such cases the state court makes an "opening proposal" to the federal habeas court, and the federal court must respond. Once it encounters a "complete" state decision that sets out an independent position on federal claims and reviews all relevant authorities, the federal court cannot conclude that the state court did not realize that the federal authority existed. By placing the federal habeas courts in this responsive posture, the state courts claim the leading role in capital cases.

This approach takes advantage of the limited role played by the lower federal courts and of the opportunity created by the apparent nonbinding effect of lower federal court habeas decisions on states within their jurisdiction. State courts can use the tension arising from the exceptional nature of capital punishment and from the presence of nearly universal federal habeas review to encourage respect from the federal courts and to earn deference through forthright consideration of the merits of federal claims. This affirmative response also calls on state courts to seek a richer form of "independence," one that combines the power to dispose of cases with the power to articulate legal principles in a way that influences future cases. If a state wishes to avoid subservience to federal courts, it must take a long view and do what it can to influence federal issues even while deciding individual cases.

It is the state courts that have the power to choose objectives and tactics that benefit both state and federal interests. If the ultimate goals of the system include (1) a proper and just resolution of each case and (2) an independent and powerful voice for state courts, then the suggested approach to federal claims benefits both courts involved in the transaction. This approach satisfies the concern for individual justice represented by federal habeas review because issues will tend to be resolved more frequently on the merits, and the merits will receive fuller consideration by both courts. The "federalism" goal of a functional dual system is advanced by the stronger position taken by the state court.  

If this affirmative position benefits the state capital courts, why

130. There may be virtues for state courts in persistent dialogue on federal issues in capital cases whatever the ends they seek. By resolving a federal claim under the state view, and distinguishing it from the local federal view, the state can shift the blame for delay onto the federal court. Where the state court follows the local federal law and grants relief, it can do so under the institutional "pressure" of likely federal relief. Finally, the use of a broader range of authority would allow state courts to diffuse the responsibility in each case.
have they not taken it more frequently? One of the reasons is the difficulty in acting for a long-term goal such as increased influence over federal claims in capital as well as noncapital cases. Also, the inherent social and legal tensions at work in the capital cases may lead the judges to resort to procedure instead of facing substantive issues.\textsuperscript{131}

The state capital decisions suggest the looseness of the working rules that should apply to areas of interactive federalism. State and federal actors should recognize the competence of federal or state government to make certain determinations, and these areas of competence are already widely accepted. It is more important to recognize the need for many questions to be resolved by a dialogue between both courts where each decision maker must depend on the cooperation of the other to achieve a desired end.

We suggest that federalism may produce the best government when it reduces to a minimum the occasions when one legitimate objective blocks the attainment of another. Because the complete dominance of federal or state interests would make such blockages the norm, a healthy interactive system should leave open in most instances the question of which participant has the power to decide whose competence extends how far.\textsuperscript{132}

C. Current Initiatives to Limit
Federal Habeas Review

The variables of state court behavior operate along with one constant: the rules defining federal habeas review. In light of our mixed assessment of the interaction between state and federal courts in the capital area, it is relevant to ask whether a change in the federal rules might improve things. Familiarity with present state court tendencies helps to answer the question by predicting how a modified system might work. We consider several current proposals for redefining the proper scope of federal habeas review in light of the state capital cases.

Congress has for the past few terms debated a set of proposals for limiting federal habeas review, and the role of federal courts in


\textsuperscript{132} These principles of cooperative federalism do not require state courts to agree with the local lower federal court position or to subordinate themselves to those courts. A working federalism is achieved so long as the distinction between the state court position and the federal position is maintained.
capital cases has entered the debate. The current bill codifies a version of the procedural bar rule and modifies the exhaustion rule and the presumption of correctness in the current statute. The bill also contains a statute of limitations preventing petitioners from applying for a writ of habeas corpus more than one year after either the exhaustion of state remedies or the appearance of new law or new facts. Finally, the bill would bar federal relief based on any claim that has been fully and fairly adjudicated in state proceedings.

The present operation of the capital cases offers no strong reason to support or oppose the statute of limitations. The limitation period begins to run only after state exhaustion, so it normally would not impair the ability of a petitioner to be heard in federal court. Federal petitions in capital cases are generally filed soon after an authoritative ruling on state collateral review.

One feature shared by the limitations period and the proposed change in the procedural bar rule raises a theme discussed earlier. Each provision allows the petitioner to explain a failure to follow proper procedures by showing that the claim is based upon "new law" recognized by the Supreme Court. The requirement that the

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134. The bill contains other provisions dealing with petitions by federal prisoners and procedures for appeal by a petitioner. The proposal removes some exceptions to the presumption of correctness. Similarly, the new procedural bar rule restricts the federal courts' ability to monitor the legitimacy of particular uses of procedural bars. We have found no evidence that state courts themselves are dissatisfied with the current exceptions to the presumption of correctness or current limits on the procedural default rule.

135. There is one possible basis for concern. The limitation period might be interpreted to begin for each claim after a state ruling, rather than for a petition as a whole after the last state ruling on the last issue in the petition. Because the "clock" for each claim might begin to run at a different time, the petitioner would have to violate either the total exhaustion rule (prohibiting a mixture of exhausted and unexhausted claims in a federal petition) or the rules governing successive petitions (requiring a petitioner who has filed previously to explain the failure to raise the new issue in the original petition). The federal courts presumably would avoid an unjust result by creating an appropriate exception to the total exhaustion rule or the successive petition rules.
new law come from the Supreme Court calls into question whether pronouncements of lower federal courts are truly part of federal law. Just like the use of disembodied Supreme Court precedent by state courts intent upon ignoring the lower federal courts, these provisions rely upon a thin concept of the proper sources of federal law.\textsuperscript{136}

The proposal barring federal recognition of any claim adjudicated in state court is the most destructive of the proposals embodied in the bill and the most inconsistent with the experience gained in capital cases. The proposal rests upon the twin assumptions that there is no need for federal courts to hear federal claims raised in habeas and that the present pattern of interaction creates undue tension between state and federal courts.

The assertion that there is little need for federal courts to hear federal claims in habeas does not find confirmation in the capital cases. The most obvious value in redundant consideration of claims is a lesser risk of error.\textsuperscript{137} Further, the presence of two courts does not mean their functions are duplicative. The capital cases show that state courts may influence and are influenced by the federal courts. Each court gains from the different starting point of the other.

State courts have produced an extraordinarily broad range of responses to federal claims. While some have plainly been inadequate, the presence of universal federal review has prompted an uneven trend towards more thorough treatment of federal issues, including an awareness of the decisions of lower federal courts. Yet state courts have not “arrived” as co-equal enforcers of federal law. The positive changes described have been mixed with more troubling signs, and heightened sensitivity to federal law among state courts is a trend recent enough to counsel caution before removing one of the prime forces behind this change.\textsuperscript{138}

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\item 136. Indeed, a better proposal might also encompass the rulings on federal law of at least the highest level of state courts, for those rulings are also legitimate sources of federal law. The current bill asks petitioners to anticipate all lower court pronouncements on federal law but excuses a failure to anticipate the Supreme Court.
\item 137. This is not to say that duplication provides an unambiguous gain. See Bator, \textit{Finality in Criminal Law in Federal Habeas Corpus for State Prisoners}, 76 Harv. L. Rev. 441 (1963).
\item 138. See Remington, \textit{supra} note 7, at 287. In a similar vein, Justice Blackmun has suggested in the context of section 1983 that increased willingness of state courts to vindicate individual and civil rights is not alone sufficient to commit all such claims to state courts “not only for the present, but for the future.” Black-
Indeed, there are constitutional reasons and practical reasons always to consider federal courts as the institution best positioned to enforce federal law, even where full state cooperation is both essential and expected.\textsuperscript{39}

The second assumption underlying the proposed legislation, that undue strain on state and federal relations is caused by federal habeas review at current levels, is equally ill-founded. It must be remembered that capital punishment, an unusually divisive area, accounts for a small percentage of the total number of federal habeas petitions and that the overall success rate for federal petitions remains low, about 3 percent.

More importantly, the state court decisions suggest that the tension caused by capital cases has been a creative tension. State courts have responded to federal review by either abdicating to the federal courts, excluding federal courts, or by joint effort with federal courts punctuated by disagreement. The first response is unlikely to predominate because it disserves a state desiring prompt punishment for crimes. As for the second response, the lower federal courts may to some extent reassert their presence after an attempted exclusion, and it cannot be assumed that state courts will in bad faith obstruct the statutorily mandated role of the federal habeas courts. If a prediction can be made at this point, the most positive of the state court responses to the present form of federal participation in capital cases will ultimately become the most common as well.

Proponents of this current legislation seek to avoid all forms of tension, but many of the virtues of federal review can only exist where there is a tension between state and federal interests. Certainly tension can be removed by constriction of the federal court role. Yet restricted review by federal courts assures that a small class of cases will receive searching federal analysis. It would be more in keeping with a vision of the proper federal role as one of exceptional review to support cautious exercise of a broad discretion, rather than virtually automatic exercise of a limited discretion. Contrary to the desire to define a proper federal role in which habeas courts act as a court of exceptional review, under the

\textsuperscript{39} See Amar, supra note 52, at 231–28.
current proposals many cases will not fall within the discretion of the federal courts at all.

V. Conclusions

The capital cases show great diversity in the way that different state courts, and different courts within each state, handle federal claims in capital cases. This diversity, even in an area whose shape and existence has turned largely on proclamations of the Supreme Court, reinforces the notion that the states play the leading role in defining the law in this area. The perception that state courts in the end control the capital process is reinforced by a close examination of individual state decisions. In the long run it is the states that must take the lead in considering federal claims if those claims are to be given their full due. 140

The state courts have less success in establishing a firm and independent voice in the resolution of federal claims when they evade the merits of federal claims. State courts are likely to have more success on their own terms when they confront the federal issues with an awareness of the distinction between the merits of each claim and the reviewing role played by both state and federal courts.

Finally, it is important to ask whether the capital defendant also benefits from interactive federalism. There is a tension between the desire for a just and efficient capital review system, including better accommodation between state and federal courts, and the desire for a system which leads to the minimum number of executions, or to the longest delay from the time of conviction to execution, or to the highest rate of relief barring the imposition of the sentence. A relationship that will result in the more complete consideration of federal claims in capital cases may well lead to faster resolution of individual cases and less opportunity for appeal and delay. But the virtues for individual defendants will be substantial, first among them the more likely consideration of substantial federal claims on their merits. 141 In the end, the state courts should become the most frequent protector of federal rights.

140. Coming to respect the state role has been a process of learning for the federal courts. Federal courts which have dealt repeatedly with federal habeas in capital cases have recognized the practical limits on their review of state decisions. Federal courts are ultimately limited by the fact that the state retains final power to retry, resentence, or amend its own laws.

141. Many of the goals for a sound capital review system have little to do with
Most issues of federalism present broad theoretical questions of whether the state and federal governments should both be involved in a given area. In capital punishment cases there is no question that the two court systems are both involved. As in any area of joint interest, here federalism must be made to work—the question of whether federalism should work has already been decided. These cases therefore present one of the clearest moments of functional federalism in American law. The lessons for those parts of the federal system in which both actors have a substantial voice will outlast the policy choices regarding capital punishment.