1995

Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting

Matthew L. Anderson

Note

Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting

Matthew L. Anderson

"[I]t is state remedies that are to be exhausted, not state prisoners."[1]

Freddie Richardson, a state prisoner in Texas, unsuccessfully appealed his criminal conviction through the Texas state courts' direct appeal system.[2] Relegated to launching a collateral attack on the judgment, Richardson filed a petition for habeas corpus[3] in federal district court three years after his

1. Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 441 (1983) (citing Parker v. Ellis, 362 U.S. 574, 582 (1960) (Warren, C.J., dissenting)).

2. Richardson v. Procunier, 762 F.2d 429, 429 (5th Cir. 1985). A Texas district court convicted Richardson on January 14, 1981, for aggravated robbery. *Id.* On appeal, Richardson argued that his conviction rested on evidence gathered during an illegal arrest and on unduly suggestive pretrial identification. *Id.* at 430. The Court of Appeals for the Third Supreme Judicial District of Texas, the final court available to Richardson as a matter of right in Texas's direct appeal process, affirmed his conviction. *Id.* at 429-30 (describing state's criminal appeals procedure).

After a conviction is rendered final on direct appeal, a prisoner can only collaterally attack the conviction by challenging the legality of the prisoner's confinement, not the prisoner's guilt or innocence. NATIONAL CENTER FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 1 & n.2 (1994). Typically, after the conviction is rendered final, a state offers the prisoner the opportunity to petition the state court as a matter of right for post-conviction or habeas corpus relief. If denied, the prisoner can then request the state's highest court to exercise its powers of discretionary review to hear the claims. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 726-27 (1991) (describing prisoner's procedural path after final judgment in Virginia); Dolny v. Erickson, 32 F.3d 381, 382 (8th Cir. 1994) (describing prisoner's procedural path after final judgment in Minnesota), *cert. denied*, 115 S. Ct. 902 (1995). In Richardson's case, Texas did not offer an appeal as a matter of right after final judgment was entered, but instead offered only an appeal for discretionary review from the state's highest court. *Richardson*, 762 F.2d at 430 (describing state's criminal appeals process).

3. A petition for federal habeas corpus relief is a civil suit available to persons claiming that the state has detained them in violation of constitutional or federal law. Fay v. Noia, 372 U.S. 391, 423-24 & n.34 (1963), *overruled on*

original conviction.[4] Richardson, however, had failed to petition the state's highest court, the Texas Court of Criminal Appeals, for its purely discretionary review.[5] Despite the discretionary nature of the state court's review, the federal district court dismissed Richardson's petition for failing to exhaust state remedies before requesting federal relief.[6] A year later, the Fifth Circuit Court of Appeals affirmed the district court's dismissal.[7] The Fifth Circuit sent Richardson's case back to the Texas court system without analyzing the state court's interest in re-hearing his claims, the judicial system's interest in efficiency, or Richardson's interest in speedy relief.[8]

Whether another federal court would review a case like Richardson's depends largely on how strictly the court interprets the exhaustion doctrine of habeas corpus.[9] This doctrine, codified in 28 U.S.C. § 2254,[10] directs federal courts to refuse to consider habeas petitions from state prisoners until the prison-

---

other grounds by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), *and* Coleman v. Thompson, 501 U.S. 722 (1991), *and* Wainwright v. Sykes, 433 U.S. 72 (1977); NATIONAL CENTER FOR STATE COURTS, *supra* note 2, at 1. The suit is a collateral attack on the state court's otherwise final judgment. *Id.* at 1 n.2. Types of relief available in federal court include ordering the resentencing of the prisoner, reclassifying the prisoner's conviction, or granting a retrial. Joseph Turitz & John van Loben Sels, *Habeas Relief for State Prisoners*, 82 GEO. L.J. 1300, 1344 (1994). As a last resort, a federal court may order the unconditional release of the prisoner. *Id.* at 1344-45.

4. *Richardson*, 762 F.2d at 430. Richardson filed his federal habeas corpus petition on February 29, 1984. *Id.*

5. *Id.* Despite his failure to petition the state's highest court for discretionary review, Richardson had raised the same claims on direct review of his conviction as those he raised in his petition for federal habeas corpus relief. *Id.* The state courts, therefore, had an opportunity to hear Richardson's claims.

6. *Id.* Unlike the first appeal on direct review, the review by the Texas Court of Criminal Appeals is not a matter of right. *Id.* (citing TEX. R. CRIM. APP. P. 302(b)).

7. *Id.*

8. The Fifth Circuit dismissed Richardson's petition solely on the basis of his failure to petition the state court for discretionary review. *Id.* at 429-32.

9. Whether the federal court reviews a case like Richardson's also depends on state law. This Note focuses on procedural situations where an appeal to the state's highest court for discretionary review is not time barred.

10. 28 U.S.C. § 2254 (1988) provides in part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this

ers have exhausted all state remedies.[11] Although exhaustion of state remedies is a well-established condition precedent to state prisoners' seeking federal relief,[12] federal courts disagree as to what constitutes "exhaustion of state remedies" sufficient to allow federal court review.[13] In particular, the courts differ on whether the exhaustion doctrine requires a state prisoner to file a petition for *discretionary* post-conviction relief with the state's supreme court[14] before requesting review from a federal court.[15]

This Note encourages the federal courts to adopt a guided, flexible approach to determine when the availability of discretionary state supreme court review requires dismissal of federal habeas petitions from state prisoners. Part I describes the development of the exhaustion doctrine and outlines previous attempts by federal courts to address whether they must require prisoners to petition state supreme courts for discretionary review. Part II critiques the federal courts' attempts to address this issue and asserts that many federal decisions undermine the foundations of the exhaustion doctrine by diminishing state courts' interests, judicial efficiency, and prisoners' patience and resources. Part III proposes a guided approach that relies on the federal courts' exercise of discretion to balance and advance the various goals of the exhaustion doctrine. This approach serves the interests of federal courts, state courts, and state prisoners

---

section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

11. *Id.*

12. *See, e.g.*, Granberry v. Greer, 481 U.S. 129, 136 (1987) (unanimous) (referring to the "the general rule of exhaustion"); Picard v. Connor, 404 U.S. 270, 275 (1971) (stating that requiring exhaustion of state remedies has been settled since 1886).

13. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 546 (1982) (Stevens, J., dissenting) (noting federal courts' confusion regarding habeas corpus); *see also* JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 310 (Supp. 1993) (noting uncertainty among federal courts regarding habeas corpus).

14. Although states' highest courts often have different names, this Note refers to the state's highest court as the state supreme court unless discussing a particular state court by name.

15. *See* Dolny v. Erickson, 32 F.3d 381, 383-84 (8th Cir. 1994) (noting disagreement among circuit courts on this issue), *cert. denied*, 115 S. Ct. 902 (1995); LIEBMAN & HERTZ, *supra* note 13, at 310 (describing majority view that prisoner need not pursue discretionary state appellate review). Some courts require petitioners to seek discretionary relief in state court even if it is highly likely that the state court will deny relief. *See, e.g.*, Jennison v. Goldsmith, 940 F.2d 1308, 1311 (9th Cir. 1991) (requiring habeas petitioner to return to state court even though state supreme court had expressed lack of interest in habeas petitions).

better than a rigid, mechanical rule requiring prisoners to petition state supreme courts in all instances.

I. HABEAS CORPUS RELIEF AND THE EVOLUTION OF THE EXHAUSTION DOCTRINE

The framers of the Constitution regarded habeas corpus, often described as the "Great Writ,"[16] as an important restraint on government power. Accordingly, they ensured that it received constitutional protection: "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."[17] Originally, the writ of habeas corpus was available in federal courts only to federal prisoners,[18] but in 1867 Congress extended the federal courts' power to grant habeas relief to state prisoners.[19] The writ of habeas corpus provided the only federal remedy available to state prisoners incarcerated in violation of the United States Constitution.[20] In 1886, the Supreme Court mod-

16. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 399-403 (1963) (describing habeas corpus), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), *and* Coleman v. Thompson, 501 U.S. 722 (1991), *and* Wainwright v. Sykes, 433 U.S. 72 (1977); Turitz & van Loben Sels, *supra* note 3, at 1300 n.2711 (same).

17. U.S. CONST. art. I, § 9, cl. 2.

18. *Fay*, 372 U.S. at 409. Through the Judiciary Act of 1789, Congress granted the federal courts the power to issue writs of habeas corpus to federal prisoners, not to state prisoners. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73.

19. Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2241(c)(3) (1988)); *Fay*, 372 U.S. at 409.

20. Turitz & van Loben Sels, *supra* note 3, at 1300-01. Acknowledging that in form habeas corpus is merely a "mode of procedure," Justice Brennan described the history of habeas corpus as "inextricably intertwined" with the development of personal liberty:

> For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a [person's] imprisonment: [I]f the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.

Fay, 372 U.S. at 401-02.

Under 28 U.S.C. § 2254(a), the writ of habeas corpus technically extends to violations of federal law in addition to constitutional violations:

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

28 U.S.C. § 2254(a) (1988). Nevertheless, the courts still require "allegations . . . of a substantial constitutional denial," even for federal prisoners. *Fay*, 372 U.S. at 412.

ified state prisoners' right to seek federal habeas corpus relief by establishing the exhaustion requirement,[21] which instructed federal courts to refrain from ruling on habeas claims until state courts had ruled on them. Congress codified this requirement in 1948.[22] Today, 28 U.S.C. § 2254 instructs a federal court to refuse a state prisoner's petition for habeas relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State."[23] A court must find that a prisoner has *not* exhausted state remedies "if [the prisoner] has the right under the law of the State to raise, by any available procedure, the question presented."[24]

Despite the definitive language of 28 U.S.C. § 2254, federal courts have never regarded the doctrine as limiting their jurisdiction over habeas petitions.[25] Habeas petitions inherently concern issues of federal law.[26] By retaining jurisdiction, federal courts ensure uniformity in federal law.[27] Because federal courts always retain jurisdiction to consider habeas petitions, exhaustion creates only a question of timing. Thus, the exhaustion doctrine determines not whether, but *when* a federal court

21. *Ex parte* Royall, 117 U.S. 241, 251-52 (1886) (instructing federal courts to refrain from ruling on habeas claims until state courts could rule on them); *see also* Castille v. Peoples, 489 U.S. 346, 349 (1989) (noting exhaustion requirement declared in *Royall*); Rose v. Lundy, 455 U.S. 509, 515 (1982) (same); *Fay*, 372 U.S. at 418 (same); Lawrence D. Levit, *Habeas Corpus and the Exhaustion Doctrine:* Daye *Lights Dark Corner of the Law*, 50 BROOK. L. REV. 565, 568 (describing exhaustion requirement created by courts as a "prudential curb on the exercise of judicial power"). In *Royall*, a state prisoner appealed to the federal courts for habeas corpus relief before the state courts had brought him to trial. 117 U.S. at 245. The Court held that federal courts have jurisdiction over state prisoners' petitions for habeas corpus simply because the prisoner is in custody under the authority of the state, but that federal courts should exercise forbearance and avoid interfering with a state court's process. *Id.* at 252-53. The Court affirmed the circuit court's dismissal of the prisoner's petition because the circuit court would not have granted relief even if it knew it had jurisdiction. *Id.* at 254.

22. Currently codified at 28 U.S.C. § 2254 (1988). *See Castille*, 489 U.S. at 349 (noting codification in 1948); *Rose*, 455 U.S. at 515 (same). Congress "simply codified the common law." Lawrence S. Hirsh, Note, *State Waiver of the Exhaustion Requirement in Habeas Corpus Cases*, 52 GEO. WASH. L. REV. 419, 422 (1984).

23. 28 U.S.C. § 2254(b) (1988).

24. *Id.* § 2254(c).

25. *Castille*, 489 U.S. at 349 (noting that exhaustion requirement is not jurisdictional, but presumes prisoner must exhaust state remedies); Granberry v. Greer, 481 U.S. 129, 131 (1987); *Fay*, 372 U.S. at 418.

26. *See* 28 U.S.C. § 2254(a).

27. Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 999, 1022 (1985) (emphasizing importance of retaining federal forum for habeas petitions).

will consider a habeas corpus petition.[28] A federal court, therefore, uses the underlying purposes of the exhaustion doctrine to support its approach for determining when to consider petitions from state prisoners.

A. The Exhaustion Doctrine's Underlying Purposes: Comity and Judicial Efficiency

Originally, the Supreme Court intended the exhaustion requirement to provide for federal and state courts what comity provided for foreign nations: namely, respect for each other's authority and interests.[29] Requiring exhaustion of state remedies furthers state court interests by ensuring that state courts retain a role in interpreting and enforcing federal law,[30] by protecting the federal and state judicial systems from unnecessary friction,[31] and by promoting finality of state court judgments.[32] In addition, by requiring state habeas petitioners to bring federal claims in state courts, the exhaustion requirement encourages state courts to become familiar with and knowledgeable about federal law.[33]

Historically, the Supreme Court gave the federal writ of habeas corpus for state prisoners an extremely broad interpretation.[34] In the Court's view, the writ provided the federal courts with the authority to hear state prisoners' claims at any time, and to grant relief for any constitutional violations regardless of

---

28. *Fay*, 372 U.S. at 418 ("This qualification plainly stemmed from consideration of comity rather than power, and envisaged only the postponement, not the relinquishment, of federal habeas corpus jurisdiction."); Yackle, *supra* note 27, at 1050 ("Properly conceived, exhaustion determines only the timing of a habeas petition; it has nothing to do with the federal courts' subject matter jurisdiction."); Yackle, *supra* note 1, at 393.

29. *Ex parte* Hawk, 321 U.S. 114, 117 (1944) (per curiam); *Ex parte* Royall, 117 U.S. 241, 252 (1886); *see Castille*, 489 U.S. at 349; Harris v. Reed, 489 U.S. 255, 268-69 (1989) (O'Connor, J., concurring); *Fay*, 372 U.S. at 418; Hirsh, *supra* note 22, at 420, 422, 423, 427; Levit, *supra* note 21, at 567-68.

30. Rose v. Lundy, 455 U.S. 509, 518 (1982); Hirsh, *supra* note 22, at 421-22.

31. *Rose*, 455 U.S. at 518; Hirsh, *supra* note 22, at 421-22.

32. *See* Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 Minn. L. Rev. 1015, 1016 (1993) (noting problem of delays that exist before finality of criminal judgments).

33. *Rose*, 455 U.S. at 519.

34. Fay v. Noia, 372 U.S. 391, 417 (1963) (discussing historical perception that courts should broadly construe the legislation granting federal courts' power to hear habeas petitions from state prisoners), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), *and* Coleman v. Thompson, 501 U.S. 722 (1991), *and* Wainwright v. Sykes, 433 U.S. 72 (1977).

the states' laws or procedures.[35] Because the writ could potentially intrude into state courts and state criminal justice systems,[36] the Supreme Court created the self-imposed exhaustion requirement.[37] The Court, however, regarded the exhaustion requirement as flexible and discretionary.[38] Writing for the Court in *Hensley v. Municipal Court*,[39] Justice Brennan emphasized the Court's commitment to maintaining the flexibility of habeas corpus: "[W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements. The demand for speed, flexibility, and simplicity is clearly evident in our decisions concerning the exhaustion doctrine . . . ."[40] Most importantly, the Supreme Court viewed the exhaustion requirement as a tool available to federal courts for the benefit of state

35. *Id.*

36. *See* Harris v. Reed, 489 U.S. 255, 267 (1989) (Stevens, J., concurring) (referring to federal habeas as an "intrusion into state affairs"); *id.* at 282 (Kennedy, J., dissenting) ("[F]ederal habeas review itself . . . intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."); *Ex parte* Hawk, 321 U.S. 114, 117 (1944) (per curiam) (noting that federal court activities in habeas corpus "interfere with the administration of justice in the state courts"); *Ex parte* Royall, 117 U.S. 241, 253 (1886) (noting "unseemly" appearance of federal judges setting prisoners free after conviction by state courts). *But see Fay*, 372 U.S. at 440 (noting that the "availability . . . of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest in the enforcement of criminal justice or procedure").

37. *Royall*, 117 U.S. at 251; *see also* Levit, *supra* note 21, at 567-70 & n.26 (discussing Supreme Court's role in development of exhaustion doctrine).

38. Granberry v. Greer, 481 U.S. 129, 136 (1987) (unanimous) (noting that general requirement of exhaustion of state remedies is not rigid and inflexible); *Fay*, 372 U.S. at 438 ("[D]iscretion was the flexible concept employed by the federal courts in developing the exhaustion rule."); *Royall*, 117 U.S. at 251 (noting that federal court's discretion is guided by relations between federal and state courts). *But see* Rose v. Lundy, 455 U.S. 509, 522 (1982) (holding "that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims"); *id.* at 546 (Stevens, J., dissenting) (criticizing the Court for adopting an "inflexible, mechanical rule").

39. 411 U.S. 345 (1973).

40. *Id.* at 350.

courts[41] that would ease any tensions created by the Great Writ's intrusiveness.[42]

The Supreme Court also intended the exhaustion doctrine to increase judicial efficiency.[43] By requiring exhaustion of state remedies, federal courts encourage state courts to make, develop, and document factual and legal findings involved in prisoners' petitions.[44] In addition, requiring exhaustion fosters an orderly process for habeas appeals by forcing prisoners to pursue all the remedies in one forum before pursuing remedies in another and by allowing prisoners to make only one transition between the two forums.[45] Moreover, as prisoners work through the process, they may abandon habeas claims if state courts provide sufficient relief, or they may refine and clarify their habeas petitions through additional state court appeals, thereby reducing or eliminating the federal courts' duties.[46] Judicial efficiency benefits state and federal courts[47] as well as prisoners,

41. *See* Castille v. Peoples, 489 U.S. 346, 349 (1989) (unanimous) (stating that the exhaustion doctrine is rooted in the desire of federal courts to protect the state courts' role in developing and interpreting federal law); *see also Rose*, 455 U.S. at 518-19 (noting exhaustion doctrine's underlying principle of protecting state courts' role in developing federal law). The Court in *Rose v. Lundy* argued that state courts benefit from federal courts "rigorously enforc[ing a] total exhaustion rule" because rigorous enforcement gives state courts the first opportunity to review claims of constitutional mistakes, allowing state courts to become more familiar and comfortable with constitutional issues. 455 U.S. at 518-19.

42. *See* Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam); Satterwhite v. Lynaugh, 886 F.2d 90, 92 (5th Cir. 1989) (per curiam); Carter v. Estelle, 677 F.2d 427, 441 (5th Cir. 1982) ("The exhaustion requirement was the response to an inevitable tension between state and federal interests created by the historical importance of the Great Writ . . . ."), *cert. denied*, 460 U.S. 1056 (1983).

43. Harris v. Reed, 489 U.S. 255, 269 (1989) (O'Connor, J., concurring); *Rose*, 455 U.S. at 519 (noting that state courts create complete factual records that facilitate federal review).

44. *Harris*, 489 U.S. at 269 (O'Connor, J., concurring) (citing *Rose*, 455 U.S. at 518-19).

45. LIEBMAN & HERTZ, *supra* note 13, at 299-300 (discussing efficiency theories of exhaustion doctrine).

46. *Id.* In addition, the exhaustion doctrine could deplete the prisoner's resources, patience, or desire before reaching federal court, thereby relieving the federal courts' duties.

47. *See Rose*, 455 U.S. at 519-20 (noting judicial efficiency interests in exhaustion considerations); Laura S. Schnell, Comment, *State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions*, 50 U. CHI. L. REV. 354, 366-68 (1983) (noting judicial concern over resources consumed in reviewing habeas corpus petitions); *see also Harris*, 489 U.S. at 269 (1989) (O'Connor, J., concurring) ("[T]he rule furthers the interest in the efficiency of federal habeas corpus, by assuring that, in general, the factual and legal bases

who prefer to have their claims heard and resolved as quickly as possible.[48]

Finally, some federal courts enforce the exhaustion requirement because they perceive that state prisoners inundate federal courts with frivolous habeas petitions[49] (even though the proportion of federal habeas petitions from state prisoners has actually decreased since 1968).[50] The image of federal courts flooded with meritless petitions, coupled with certain justifications for the exhaustion requirement, has led some federal courts to interpret the exhaustion requirement as a strict barrier to federal relief.[51]

B. Approaches to Enforcing the Exhaustion Doctrine

Federal courts repeatedly face a difficult issue: to what extent must a state prisoner exhaust state remedies before seeking federal habeas corpus relief?[52] The federal courts look to the Supreme Court, as well as to the underlying purposes of the exhaustion doctrine, to determine whether a particular petition

---

surrounding a petitioner's constitutional claim or claims will have been developed in a prior adjudication.").

48. *See Rose*, 455 U.S. at 520 ("The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims."). The exhaustion requirement, however, often increases the number of litigation steps a prisoner must take before resolution of his claims and thus delays the remedy of constitutional violations. Liebman & Hertz, *supra* note 13, at 299 n.31. For some prisoners, however, particularly those on death row, prolonging the process furthers their interests in putting off execution. *See* Norlynn Blocker, Comment, *An Exercise in Comity: Exhaustion of State Remedies in Federal Habeas Corpus Proceedings*, 35 Baylor L. Rev. 497, 508 (1983).

49. *See Harris*, 489 U.S. at 282 n.6 (Kennedy, J., dissenting) (noting number of habeas corpus petitions filed by state prisoners).

50. National Center for State Courts, *supra* note 2, at 10-11, 13-14. In 1968 there were 168,211 state prisoners in the United States. *Id.* at 14. That same year the federal courts received approximately 6500 petitions for habeas corpus relief from state prisoners. *Id.* By 1989, the state prison population had nearly quadrupled to 653,392, yet the number of habeas petitions from state prisoners only increased to approximately 10,500. *Id.* Had the number of petitions increased proportionately with the state prison population, the federal courts would have received over 27,000 petitions in 1989.

51. *See, e.g.*, *Rose*, 455 U.S. at 520 ("Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court . . . ."); *see also* Lay, *supra* note 32, at 1018 ("[T]he Court has . . . created procedural hurdles that make the writ less accessible to litigants . . . ."); Yackle, *supra* note 1, at 394 ("[T]he federal courts' discretion in exhaustion cases is gradually being replaced by a set of rigid rules . . . .").

52. *See* Castille v. Peoples, 489 U.S. 346, 349-50 (1989) (quoting Wainwright v. Sykes, 433 U.S. 72, 78 (1977)).

has sufficiently fulfilled the requirements of 28 U.S.C. § 2254. The federal courts have taken varying approaches to this issue.

1. The Supreme Court's Approaches to the Exhaustion Doctrine: Rigidity and Flexibility

When faced with exhaustion doctrine issues, the Supreme Court has acted inconsistently, demonstrating both a willingness to enforce the exhaustion doctrine with mechanical rigidity[53] and a commitment to retaining flexibility and discretion in enforcing the exhaustion rule.[54] In 1981, the Supreme Court rigidly enforced the exhaustion doctrine in *Duckworth v. Serrano*.[55] In *Duckworth*, the prisoner failed to present his constitutional claim to the state courts.[56] The Seventh Circuit, however, refused to dismiss the petition on exhaustion grounds because "in view of the clear violation of [the prisoner's] rights and in the interest of judicial economy, there was no reason to await the state court's consideration of the issue."[57] The

53. *See, e.g.*, Anderson v. Harless, 459 U.S. 4, 7-8 (1982) (per curiam) (holding that state remedies were not exhausted through direct appeals process even though Sixth Circuit found that prisoner's constitutional arguments " 'were self-evident' " to state courts (quoting Harless v. Anderson, 664 F.2d 610, 612 (6th Cir. 1982))); *Rose*, 455 U.S. at 521-22 (holding that federal courts must dismiss habeas petitions from state prisoners containing both exhausted and unexhausted claims unless the prisoner deletes the unexhausted claims at the risk of forfeiting them); Duckworth v. Serrano, 454 U.S. 1, 4 (1981) (per curiam) (refusing to allow federal courts to dismiss unexhausted habeas petitions even though prisoner's incarceration results from "obvious constitutional errors"); *see also* Coleman v. Thompson, 501 U.S. 722, 758-59 (1991) (Blackmun, J., dissenting) ("[T]he Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal [habeas corpus] claims."); Lawrence Herman, *Foreword: Errors of Comity?*, 44 OHIO ST. L.J. 269, 270 & n.12 (1983) (citing *Rose* as exemplifying Supreme Court's narrowing of federal habeas corpus); Yackle, *supra* note 27, at 994 & n.15 (providing pre-*Rose v. Lundy* examples of procedural barriers the Court erected to impede state prisoners' access to federal habeas corpus).

54. *See, e.g.*, Granberry v. Greer, 481 U.S. 129, 131, 134 (1987) (unanimous) (holding that federal appellate court has discretion to refuse state prosecutor's defense on grounds of nonexhaustion when that defense was not raised in the district court); Hensley v. Municipal Court, 411 U.S. 345, 349-50 (1973) (noting the Court's commitment to maintaining the exhaustion doctrine's flexibility); Frisbie v. Collins, 342 U.S. 519, 520-21 (1952) (unanimous) ("[The exhaustion doctrine] is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances."); *cf.* Harris v. Reed, 489 U.S. 255, 268 (1989) (O'Connor, J., concurring) (noting federal courts' duty to "assess the likelihood" that state court would hear the prisoner's habeas claim when determining availability of state court remedies).

55. 454 U.S. 1 (1981) (per curiam).

56. *Id.* at 2.

57. *Id.* (quotations omitted).

Supreme Court reversed the Seventh Circuit, holding that federal courts should not make exceptions to the exhaustion doctrine even for "obvious constitutional errors."[58]

The Supreme Court's 1982 decision, *Rose v. Lundy*,[59] epitomized this rigid approach.[60] In *Rose*, the Supreme Court instructed federal courts to dismiss state habeas corpus petitions containing both exhausted and unexhausted claims.[61] The Court stated that strict enforcement of the exhaustion requirement furthered the purposes of exhaustion, and promoted the various state, federal, and prisoner interests involved, by providing state courts with ample opportunity to correct constitutional violations and by ensuring consolidation of prisoners' multiple claims.[62]

---

58. *Id.* at 4.

59. 455 U.S. 509 (1982).

60. *See id.* at 546 (Stevens, J., dissenting) ("The inflexible, mechanical rule the Court adopts today arbitrarily denies district judges the kind of authority they need . . . ."). In *Rose*, the majority supported "[a] rigorously enforced total exhaustion rule," *id.* at 518, that required a federal court to dismiss a prisoner's entire petition if it contained any unexhausted claims. *Id.* at 522. A federal court cannot, therefore, address a petitioner's claims that have been exhausted if they are in a petition with unexhausted claims.

Justice Blackmun criticized the Court's decision for using the exhaustion doctrine "as 'a blunderbuss to shatter the attempt at litigation of constitutional claims.'" *Id.* at 523 (Blackmun, J., concurring in the judgment) (quoting Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973)). Justice Blackmun further argued that "the 'total exhaustion' rule . . . operates as a trap for the uneducated and indigent *pro se* prisoner-applicant; that it delays the resolution of claims that are not frivolous; and that it tends to increase, rather than to alleviate, the caseload burdens on both state and federal courts." *Id.* at 522.

Likewise, Justice Stevens criticized the consequences of the Court's decision:

> If my appraisal of respondent's exhausted claims is incorrect—if the trial actually was fundamentally unfair to the respondent—postponing relief until another round of review in the state and federal judicial systems has been completed is truly outrageous. The unnecessary delay will make it more difficult for the prosecutor to obtain a conviction on retrial if respondent is in fact guilty; if he is innocent, requiring him to languish in jail because he made a pleading error is callous indeed.

Id. at 545 (Stevens, J., dissenting); *see also* Yackle, *supra* note 1, at 425-27 (arguing that "[n]one of [the majority's] arguments justifies the total exhaustion rule").

It is important to note that the Court's approach in *Rose* concerns a situation where the state raised the exhaustion defense, 455 U.S. at 513, as opposed to the Court's approach in *Granberry v. Greer*, where the state failed to raise, or chose not to raise, the exhaustion defense. 481 U.S. 129, 130 (1987).

61. *Rose*, 455 U.S. at 510.

62. *Id.* at 518-22; *see also supra* notes 29-51 and accompanying text (discussing underlying purposes of exhaustion doctrine). In *Rose*, the Court reasoned that a "rigorously enforced total exhaustion rule" provides state courts with every possible opportunity to correct a constitutional error. 455 U.S. at

In the same year the Supreme Court decided *Rose*, it also decided *Anderson v. Harless*.[63] In *Anderson*, both the federal district court and the Sixth Circuit found that the state prisoner exhausted state claims for habeas relief through direct appeal of his conviction, even though the prisoner could have collaterally attacked his conviction in state court.[64] Both courts concluded that the prisoner had adequately presented the issue to the state courts because his habeas claims were " 'self-evident' " in his direct state court appeal.[65] The Supreme Court, however, rejected the "self-evident" nature of his claims and found that the prisoner had not exhausted state remedies because state procedures allowed him to present his claims in state court.[66]

Despite the Court's apparently rigid approach in *Rose* and *Anderson*, in other cases the Court has committed itself to the exhaustion doctrine's roots of flexibility. Even in *Rose*, the Court acknowledged the intended discretionary and flexible nature of the exhaustion doctrine.[67] In fact, the Court relied on *Rose* in *Granberry v. Greer*,[68] in which the Court emphatically reinforced the federal courts' power to exercise discretion when considering the exhaustion requirement.[69] Specifically, the Court

518-19. In addition, the Court believed that strictly enforcing the exhaustion doctrine would promote judicial efficiency by forcing a prisoner to consolidate his claims into one federal petition accompanied by a complete factual record developed through the state-court process. *Id.* at 519-20; *see also supra* notes 43-47 and accompanying text (discussing judicial efficiency benefits of exhaustion doctrine). Finally, the Court considered the state prisoner's interests in speedy relief and concluded that strictly enforcing the exhaustion requirement furthers those interests because only one petition reaches the federal court; as a result, the federal court "will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review." *Rose*, 455 U.S. at 520; *see also supra* note 48 and accompanying text (discussing relationship between exhaustion doctrine and prisoners' interests).

63. 459 U.S. 4 (1982) (per curiam).

64. *Id.* at 8.

65. *Id.* at 7 (quoting Harless v. Anderson, 664 F.2d 610, 612 (6th Cir. 1982)).

66. *Id.* at 8.

67. Rose v. Lundy, 455 U.S. 509, 515 (1982) (describing how federal courts should exercise their discretion in determining whether to dismiss a petition for failure to exhaust state remedies) (quoting *Ex parte* Royall, 117 U.S. 241, 251 (1886)).

68. 481 U.S. 129, 133 (1987) (unanimous) ("[T]he history of the exhaustion doctrine, as recently reviewed in [*Rose*], points in the direction of a middle course.") (citations omitted).

69. *Id.* at 131. In *Granberry*, the state failed to raise the exhaustion defense before the federal district court. *Id.* at 130. The prisoner appealed the district court's ruling to the Court of Appeals for the Seventh Circuit on the merits; only then did the state argue that the court should dismiss the petition for failure to exhaust state remedies. *Id.* The Supreme Court vacated the Sev-

instructed federal courts to balance the various interests involved on a case-by-case basis to determine whether allowing the state to waive the exhaustion requirement would further the interest in comity.[70]

The Court revealed a similar commitment to flexibility in *Frisbie v. Collins*.[71] In *Frisbie*, a unanimous Supreme Court expressly authorized federal district courts to "deviate" from the exhaustion doctrine in situations requiring "prompt federal intervention."[72] Although *Rose* did not allow the federal courts to exercise discretion to serve the interests of the state prisoner, the decisions in *Granberry* and *Frisbie* unequivocally demonstrate the Court's historical and continuing commitment to discretion in habeas corpus jurisprudence.

2. The Federal Courts' Approaches when Discretionary Review in the State Supreme Court Remains Available

The federal courts disagree over whether a state prisoner has sufficiently exhausted state remedies when discretionary re-

---

enth Circuit's order dismissing the petition on exhaustion grounds and remanded the case, instructing the court of appeals to weigh the various interests involved to determine whether to address the prisoner's claims. *Id.* at 131, 134-36; *see also supra* notes 29-51 and accompanying text (discussing foundational principles of exhaustion doctrine).

Unlike in *Rose*, where the Court strictly enforced the exhaustion requirement, in *Granberry* the state failed to raise the exhaustion defense in federal district court. In both cases, the prisoner had not technically exhausted state remedies, yet the Court allowed considerable discretion to hear claims when the state did not object, but refused such discretion when the state objected. This distinction fails to account for the federal and judicial interests at stake in the exhaustion doctrine because it makes federal judicial review dependent on the actions of the state's lawyer.

70. *Granberry*, 481 U.S. at 131, 134. The Court considered three possible methods of determining "[h]ow an appellate court ought to handle a nonexhausted habeas petition when the State has not raised this objection in the district court." *Id.* at 134. One extreme position the Court considered was treating the state's failure to raise the issue as a procedural bar against the state from raising the issue on appeal. *Id.* The other extreme was treating "nonexhaustion as an inflexible bar to consideration of the merits of the petition by the federal court" and dismissing the petition. *Id.* The third method, which the Court adopted, was exercising discretion on a case-by-case basis to determine whether dismissal or hearing the prisoner's claims, despite nonexhaustion, better serves justice. *Id.* at 131, 133.

71. 342 U.S. 519 (1952).

72. *Id.* at 521-22. Although the Court regarded the facts in *Frisbie* as a unique example of a situation requiring a prompt federal hearing, it left to the federal courts' discretion the determination of whether future situations require prompt intervention. *Id.* at 521-22.

view by the state's highest court remains available.[73] The Supreme Court has encountered this issue,[74] but has never resolved it.[75] As a result, federal courts have adopted a variety of approaches to this issue, making the availability of federal court review for state prisoners dependent upon jurisdictional lines.

a. *The Rigid Approach: Requiring Absolute Exhaustion*

Some federal courts have interpreted 28 U.S.C. § 2254 and Supreme Court decisions such as *Rose v. Lundy* to require dismissal of a state prisoner's habeas petition when the prisoner has not pursued *all* remedies that the state offers.[76] Under this

73. *Compare* Silverburg v. Evitts, 993 F.2d 124, 126-27 (6th Cir. 1993) (requiring petition for discretionary review for exhaustion purposes despite state supreme court dicta and unpublished Sixth Circuit precedent to the contrary); Jennison v. Goldsmith, 940 F.2d 1308, 1310-11 (9th Cir. 1991) (per curiam) (stating that prisoners must exhaust discretionary review under 28 U.S.C. § 2254); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988) (per curiam) (finding state remedies unexhausted because prisoner failed to petition state supreme court for discretionary review); Richardson v. Procunier, 762 F.2d 429, 431-32 (5th Cir. 1985) (holding claims unexhausted so long as truly discretionary appellate review exists) *and* Batchelor v. Cupp, 693 F.2d 859, 862-64 (9th Cir. 1982) (requiring affirmative or "passive" exhaustion of discretionary review under § 2254), *cert. denied*, 463 U.S. 1212 (1983) *with* Hull v. Freeman, 932 F.2d 159, 164-65 (3d Cir. 1991) (stating that untimely petitions to state supreme court were sufficient to satisfy exhaustion doctrine); Elmore v. Foltz, 768 F.2d 773, 775 (6th Cir. 1985) (holding petitioner's claims exhausted despite failure to petition state supreme court because prisoner wrote letter to the state supreme court requesting review) *and* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 439 (3d Cir. 1982) (stating that untimely petitions to state supreme court were sufficient to satisfy exhaustion doctrine) *and with* Dolny v. Erickson, 32 F.3d 381, 383-84 (8th Cir. 1994) (stating that filing for discretionary review unnecessary for exhaustion purposes), *cert. denied*, 115 S. Ct. 902 (1995); Buck v. Green, 743 F.2d 1567, 1569 (11th Cir. 1984) (stating prisoner not required to petition state supreme court for certiorari for exhaustion purposes); Smith v. White, 719 F.2d 390, 391-92 (11th Cir. 1983) (stating that petition for discretionary review to certain state supreme courts not required to satisfy exhaustion requirement) *and* Williams v. Wainwright, 452 F.2d 775, 776-77 (5th Cir. 1971) (regarding Florida prisoner's claims exhausted despite failure to petition state supreme court for discretionary review).

74. *See, e.g.*, Harris v. Reed, 489 U.S. 255, 257 (1989) (describing prisoner's procedural path that did not include petition to the state supreme court). In *Harris*, the Court considered the state remedies exhausted because "petitioner did raise his . . . claim in state court," even though the prisoner did not raise the claim in the state supreme court and was not procedurally barred from doing so. *Id.* at 263 n.9.

75. *Cf.* Rose v. Lundy, 455 U.S. 509, 523-24 & n.1 (1982) (Blackmun, J., concurring in the judgment) (noting precedential support for exhaustion doctrine not requiring states to provide every opportunity to review prisoners' claims).

76. *Silverburg*, 993 F.2d at 126-27 (requiring petition to state supreme court for discretionary review despite state court's dicta that state court of ap-

approach, state prisoners who have not pursued all state remedies must either return to state court to exhaust all of their claims or proceed in federal court with only their exhausted claims by deleting the unexhausted claims from their petitions.[77] By deleting unexhausted claims, prisoners forfeit future federal review of those claims.[78]

The Fifth Circuit took this approach in *Richardson v. Procunier*.[79] In *Richardson*, the court held that the petitioner failed to exhaust state remedies because he did not petition for discretionary review in the state's highest court,[80] yet the court expressly refused to consider whether such a petition would have been a futile act.[81] Likewise, the Sixth Circuit recently

---

peals' decisions were final for exhaustion purposes); *Jennison*, 940 F.2d at 1310-11 (stating that because discretionary state review is available, it must be exhausted); Russell v. Rolfs, 893 F.2d 1033, 1042 (9th Cir. 1990) (Kozinski, J., dissenting) ("[W]hen a petitioner has not previously presented his claims to the state's highest court, a procedure is 'available' for purposes of the exhaustion requirement even if it is discretionary and contingent.") (citing *Batchelor*, 693 F.2d at 863), *cert. denied*, 501 U.S. 1260 (1991); *Richardson*, 762 F.2d at 430 (requiring petition to state's highest court despite fact that review was only discretionary and not a matter of right); Williams v. Duckworth, 724 F.2d 1439, 1441 (7th Cir.) ("Claims that can still be presented to the [state supreme court] are not exhausted."), *cert. denied*, 469 U.S. 841 (1984).

77. *Rose*, 455 U.S. at 520-21. In this regard, Justice O'Connor did not command a majority in *Rose v. Lundy*, yet the practical effect has resulted in state prisoners abandoning unexhausted claims to pursue exhausted claims. *See* Turitz & van Loben Sels, *supra* note 3, at 1315 n.2753 (listing cases where state prisoners waived unexhausted claims).

78. Prisoners would forfeit their chance to have federal review of their deleted claims because courts consider the filing of subsequent petitions containing the same claims to be an abuse of the writ of habeas corpus. *Rose*, 455 U.S. at 521 (stating that abuse of the writ consists of deliberately abandoning a ground for relief in an original petition, then raising that ground for relief in a subsequent petition) (quoting Sanders v. United States, 373 U.S. 1, 18 (1963)); *see* Turitz & van Loben Sels, *supra* note 3, at 1315 & n.2753. *But see id.* at 1316 & n.2754 (noting that some federal courts provide prisoner a continuance to exhaust claims). Although the *Rose* plurality's view arguably offends the foundational principles of the exhaustion doctrine, this issue is beyond the scope of this Note. For an analysis of this issue, see Yackle, *supra* note 1, at 425-27 (characterizing plurality's decision as unsupportable in light of principles underlying the exhaustion doctrine).

79. 762 F.2d 429 (5th Cir. 1985).

80. *Id.* at 431-32. *But see* Williams v. Wainwright, 452 F.2d 775, 777 (5th Cir. 1971) (holding that Florida prisoner not required to petition for discretionary review in state supreme court when state court was very likely to deny review because of the limited jurisdiction of the state court).

81. 762 F.2d at 432. The Fifth Circuit declined to decide whether a petition for discretionary review under Texas law would be "futile" because "such a determination . . . would often be no more than an attempt at reading the subjective mind of [the state's court]." *Id.*

held that a state prisoner failed to exhaust state remedies because he never petitioned the Kentucky Supreme Court for discretionary review, despite the state court's declaration that filing for discretionary review was unnecessary to exhaust state remedies.[82] The Ninth Circuit also followed this rigid approach.[83]

In requiring absolute exhaustion, these circuits typically point to the importance of the state's role in adjudicating and interpreting federal law.[84] By requiring a prisoner to apply for discretionary review from the state supreme court, these circuits attempt to ensure that states have the opportunity to participate in the development of federal and constitutional law.[85] These circuits also favor the federal courts' interest in judicial efficiency.[86] By returning petitions to the state courts, the federal courts force the states to expend additional resources and effort to hear or deny the prisoners' claims.[87] These state court expenditures reduce the federal courts' duties because the additional procedural steps either deplete prisoners' resources or narrow their claims, making the federal courts' decisions relatively easy.[88]

By forcing prisoners to return to state courts, federal courts also put the prisoners' claims at risk of dismissal under the "pro-

82. Silverburg v. Evitts, 993 F.2d 126, 126-27. In *Silverburg*, the prisoner relied on Freeman v. Commonwealth, 697 S.W.2d 133 (Ky. 1985), and an unpublished opinion of the Sixth Circuit, Taylor v. Montgomery, 915 F.2d 1573 (6th Cir. 1990) (tbl.), both of which held that a decision by the Kentucky Court of Appeals denying post-conviction relief constituted exhaustion of state remedies without appealing to the state supreme court. 993 F.2d at 126-27. *But cf.* Elmore v. Foltz, 768 F.2d 773, 775-76 (6th Cir. 1985) (holding that writing letter to state supreme court satisfies exhaustion requirement despite available procedure to file motion for new trial).

83. Jennison v. Goldsmith, 940 F.2d 1308, 1311 (9th Cir. 1991) (per curiam) (stating that state supreme court cannot shirk constitutional duties by declaring state remedies exhausted by state appellate court's decision); *see also* Batchelor v. Cupp, 693 F.2d 859, 863 (9th Cir. 1982) (noting state supreme court's duties to interpret federal law), *cert. denied*, 463 U.S. 1212 (1983).

84. *See Jennison*, 940 F.2d at 1311 (noting state courts' responsibility to enforce Constitution) (quoting *Batchelor*, 693 F.2d at 862); *Richardson*, 762 F.2d at 430-31 (supporting the state courts' role in developing constitutional law) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)); *see also Ex parte* Royall, 117 U.S. 241, 251 (1886) (noting that state courts are "equally bound" to enforce and protect the Constitution).

85. *See supra* note 30 and accompanying text (discussing exhaustion doctrine's underlying purposes of comity).

86. *Jennison*, 940 F.2d at 1311 (citing *Batchelor*, 693 F.2d at 862); *Richardson*, 762 F.2d at 432.

87. LIEBMAN & HERTZ, *supra* note 13, at 298-300.

88. *Id.* at 299-300.

cedural default" or "independent and adequate state ground" doctrine.[89] According to this doctrine, if a state court denies a prisoner's habeas petition because the prisoner failed to meet the state's procedural requirements for seeking relief, the federal court cannot provide relief.[90] For example, a prisoner could petition a federal court for habeas relief, which the court could refuse because the prisoner never petitioned the state supreme court. Then, while the prisoner prepares to petition the state supreme court, the state's statute of limitations could expire, leading the state supreme court ultimately to reject the prisoner's petition as untimely. If this prisoner then attempts again to seek federal relief, the federal court must deny it because of this procedural default, regardless of the prisoner's unconstitutional confinement.[91]

---

89. If a state prisoner fails to file a timely petition it may result in a procedural default judgment against the prisoner. Under the procedural default doctrine of habeas corpus law,

> [i]f the petitioner fails to present [the petition] to the state court in the manner prescribed by the state court's procedural rules, the state court may decline to address the claim on the basis of that procedural default. Furthermore, as long as the procedural default rests upon "adequate and independent state grounds," the petitioner is generally barred from obtaining federal habeas review of the defaulted claim. Federal habeas courts will presume that no adequate and independent state ground exists only when the state court's decision "fairly appears to rest primarily on federal law or to be interwoven with federal law" and when "the adequacy and independence of any possible state law ground is not clear from the face of the opinion."

Turitz & van Loben Sels, *supra* note 3, at 1316-17 (footnotes omitted); *see also* Coleman v. Thompson, 501 U.S. 722, 724 (1991) ("The doctrine applies . . . to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement."); Wainwright v. Sykes, 433 U.S. 72, 89-91 (1977) (requiring federal courts to follow state contemporaneous objection rules in habeas proceedings); Lay, *supra* note 32, at 131-40 (discussing harsh consequences of procedural default standard). *But see* Harris v. Reed, 489 U.S. 255, 263 n.9 (1989) (avoiding harsh procedural default standard to habeas petitioner's claims because petitioner had raised claims in state court, but not state supreme court).

By returning the prisoner to the state supreme court, therefore, the federal court jeopardizes the ability of the prisoner to bring the claim in federal court if the prisoner is unable to file a timely petition in state court. If the federal court did not require the prisoner to petition the state supreme court, the prisoner could satisfy both the exhaustion doctrine and the procedural default doctrine by raising the claim in the state appellate court.

90. *Coleman*, 501 U.S. at 729-30.

91. *Id.* For example, in *Silverburg v. Evitts*, the Sixth Circuit declared the state's remedies unexhausted because the prisoner had not requested discretionary review with the state supreme court. 993 F.2d 124, 127 (6th Cir. 1993). The Sixth Circuit stated, "Ordinarily we would dismiss without prejudice so that petitioner could pursue his state court remedies. Here, however, petitioner's claims are procedurally barred under Kentucky law . . . ." *Id.* (citation

b. *The Cosmetic Approach: Requiring the Appearance of Exhaustion*

Other circuits refrain from strictly enforcing the exhaustion requirement whenever the state supreme court had some opportunity to review the prisoner's claims, even if that opportunity was procedurally defective. Most notably, the Third Circuit determined that a state prisoner exhausted available state remedies by filing an *untimely* petition for state supreme court review.[92] Likewise, the Sixth Circuit held that although a state prisoner failed to seek discretionary review, he exhausted all available state remedies by writing a letter to the state supreme court, thus notifying the court of his claim.[93]

Thus, instead of exercising discretion to allow state prisoners to bypass the discretionary review of the state supreme court in limited circumstances, these circuits declare petitions exhausted when the state supreme courts had an opportunity to review prisoners' claims, even if the opportunity was hollow. Moreover, by forcing prisoners to return to the state court process, these circuits, like those adopting the rigid approach, put the prisoners' claims at risk of the procedural default doctrine.[94]

c. *The Passive Approach: Declaring Petitions for Discretionary Review Unnecessary*

A third approach of the federal courts declares the state prisoner's claim exhausted after the state's post-conviction appellate court denies the prisoner relief. The Eighth and Eleventh Circuits champion this approach,[95] characterizing the

omitted). As a result, the court dismissed the prisoner's claims for failing to exhaust state remedies while acknowledging that exhaustion was impossible. *Id.* In effect, the Sixth Circuit decided that the prisoner's claims would never receive federal review.

92. Hull v. Freeman, 932 F.2d 159, 164 (3d Cir. 1991) (accepting an untimely motion on direct appeal as sufficient for exhaustion) (citing Bond v. Fulcomer, 864 F.2d 306, 309 (3d Cir. 1989)); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 439 (3d Cir. 1982) (same).

93. Elmore v. Foltz, 768 F.2d 773, 774-75 (6th Cir. 1985). The petitioner's letter complied with the state's procedural mechanisms allowing indigent inmates to seek review. *Id.* at 775.

94. *See supra* notes 89-91 and accompanying text (discussing hazards associated with procedural default doctrine).

95. *See* Dolny v. Erickson, 32 F.3d 381, 384 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995); Buck v. Green, 743 F.2d 1567, 1569 (11th Cir. 1984); Smith v. White, 719 F.2d 390, 392 (11th Cir. 1983) (per curiam); *see also* Williams v. Wainwright, 452 F.2d 775, 777 (5th Cir. 1971) (stating that limited discretionary review procedure in Florida's supreme court offered "no practical remedy that [the prisoner] was required to exhaust").

possibility that the state supreme court will actually grant review of a prisoner's claims as remote.[96] These circuits reason that the interests of comity and judicial efficiency prevent federal courts from dismissing the prisoners' claims, because dismissing the claims would result in additional work for state courts and repetitive work for the federal courts if the prisoner returns to the federal system after exhausting state remedies.[97]

These circuits interpret 28 U.S.C. § 2254(c), which states that the prisoner must exhaust all remedies available "if he has the right under the law of the State to raise . . . the question presented,"[98] to mean that the prisoner must exhaust state procedures available only *as a matter of right*.[99] If a state court

96. *Dolny*, 32 F.3d at 384 (stating that prisoner's right of review in the state supreme court was "unquestionably restricted" because the state court grants less than 25% of all petitions for review, including non-habeas petitions); *Buck*, 743 F.2d at 1569 (stating that prisoner not required to petition for certiorari because state's supreme court had limited jurisdiction) (quoting *Williams*, 452 F.2d at 777); *see also* Harris v. Reed, 489 U.S. 255, 268 (1989) (O'Connor, J., concurring) ("Thus, in determining whether a remedy for a particular constitutional claim is 'available,' the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim.").

97. *Dolny*, 32 F.3d at 384; *Buck*, 743 F.2d at 1569 (quoting *Williams*, 452 F.2d at 777). The Eighth and Eleventh Circuits, however, construe judicial efficiency in light of the state court's interests in not being burdened with petitions for relief when the courts are not designed to address them. *Dolny*, 32 F.3d at 384 (quoting *Buck*, 743 F.2d at 1569 (quoting *Williams*, 452 F.2d at 777)).

98. 28 U.S.C. § 2254(c) (1988).

99. *See Dolny*, 32 F.3d at 384 (reasoning that " '[t]he right . . . to raise' an issue referred to in § 2254 means more than a mere opportunity to seek leave to present an issue" (omission in original)); *see also* LIEBMAN & HERTZ, *supra* note 13, at 310 n.22 ("[T]he federal definition [of exhaustion] apparently 'pegs' exhaustion to completion of those appellate procedures that, under state law, are 'as of right' and not merely discretionary."). In formulating its rule that prisoners need not petition state supreme courts for discretionary review to exhaust state remedies, the Eighth Circuit reasoned by analogy to *Fay v. Noia*, which held that state prisoners were not required to petition the U.S. Supreme Court for discretionary review on direct appeal before filing for habeas corpus relief. *See, e.g.*, *Dolny*, 32 F.3d at 384 (citing *Fay*, 372 U.S. 391, 435 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), *and* Coleman v. Thompson, 501 U.S. 722 (1991), *and* Wainwright v. Sykes, 433 U.S. 72 (1977)). In *Fay*, the Court noted that direct review in the Supreme Court " 'is not a matter of right, but of sound judicial discretion' " and held, therefore, that petition for review in Supreme Court was not required before filing for habeas corpus review. 372 U.S. at 436 (quoting SUP. CT. R. 19(1)). The Court justified its holding in *Fay* by stating:

> [T]he requirement [that prisoners must petition the Supreme Court for discretionary review of a state supreme court ruling before filing for habeas corpus] has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes. The goal of prompt and fair criminal justice has been

would review the petitioner's claims on a discretionary basis and need not reach the merits of the claim, it is not an appeal as of right, and the exhaustion doctrine accordingly does not require the prisoner to exhaust discretionary review before filing a federal habeas corpus petition.[100] By not forcing the prisoner to return to state court, these circuits do not subject the prisoner's claims to risks associated with the procedural default doctrine.[101]

II. FAVORING EASE OF APPLICATION OF THE EXHAUSTION DOCTRINE OVER PROMOTING THE PURPOSES OF THE EXHAUSTION DOCTRINE

Each of the three above approaches to the exhaustion doctrine is subject to attack for failing to accommodate notions of comity and judicial efficiency, the underlying purposes of the exhaustion doctrine.[102] This failure stems from confusion over the Supreme Court's mixed messages in *Rose v. Lundy* and *Granberry v. Greer*.[103] Despite affirming the historical commitment to maintaining flexibility in those cases, the Supreme Court also demonstrated its willingness to turn its back on the exhaustion doctrine's flexible nature and to develop rigid approaches to resolve exhaustion problems.[104] *Rose v. Lundy*, for

---

> impeded because in the overwhelming number of cases the applications [fail to meet the factors determining whether the Court will grant discretionary review]. And the demands upon our time in the examination and decision of the large volume of petitions which fail to meet that test have unwarrantably taxed the resources of this Court. Indeed, it has happened that counsel on oral argument has confessed that the record was insufficient to justify our consideration . . . but that he had felt compelled to make the futile time-consuming application in order to qualify for proceeding in a Federal District Court on habeas corpus to make a proper record.

372 U.S. at 437 (citing Bullock v. South Carolina, 365 U.S. 292 (1961) (per curiam)), *overruling* Darr v. Burford, 339 U.S. 200 (1950), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), *and* Coleman v. Thompson, 501 U.S. 722 (1991), *and* Wainwright v. Sykes, 433 U.S. 72 (1977).

100. LIEBMAN & HERTZ, *supra* note 13, at 310 n.22.

101. *See supra* notes 89-91 and accompanying text (discussing risks associated with the procedural default doctrine).

102. *See supra* notes 29-51 and accompanying text (discussing exhaustion doctrine's underlying purposes of comity and judicial efficiency).

103. *See supra* notes 53-72 and accompanying text (discussing the seemingly different approaches to the exhaustion doctrine that the Supreme Court follows).

104. *See* Herman, *supra* note 53, at 270 (noting Supreme Court's narrowing of federal habeas statute); Lay, *supra* note 32, at 1018 (criticizing Supreme Court's "procedural hurdles" making writs less accessible); Frank J. Remington,

example, implicitly called for federal courts to abandon the previous notions of flexibility and efficiency associated with the exhaustion doctrine.[105] Unable to decipher the Supreme Court's interpretation of 28 U.S.C. § 2254, the federal courts have turned to unproductive rigidity, insincere procedural cosmetics, and unnecessary acquiescence when considering the exhaustion doctrine. These misguided approaches fail to meet the exhaustion doctrine's underlying purposes of comity between federal and state courts and judicial efficiency.

A. The Rigid Approach: Exhaust Remedies Regardless of Comity and Efficiency

The Fifth and Ninth Circuits champion a rigid approach to the exhaustion doctrine when a state prisoner who seeks federal habeas relief has not petitioned the state supreme court for discretionary review.[106] These circuits rely on an analysis similar to the Supreme Court's analysis in *Rose v. Lundy*.[107] Nonethe-

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) ("It is more difficult today than it was a decade ago for a state prisoner to persuade a federal court to review the propriety of his state court conviction or sentence."); Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 Ohio St. L.J. 337, 355 (1983) (discussing Supreme Court's decisions limiting availability of habeas relief); J. Thomas Sullivan, *"Reforming" Federal Habeas Corpus: The Cost to Federalism; the Burden for Defense Counsel; and the Loss of Innocence*, 61 UMKC L. Rev. 291, 327 (1992) (noting that Supreme Court streamlined federal habeas corpus "at the expense of access to federal district courts for state inmates"); Yackle, *supra* note 1, at 394 (noting erosion of federal judicial discretion as Court imposes more rigid rules).

105. *See* Lay, *supra* note 32, at 1029-30 (noting that dismissal is mandatory and arguing that procedures required to determine exhaustion are inefficient); *see also* Yackle, *supra* note 1, at 424 (noting inefficiencies associated with returning petition to state court for failing to exhaust state remedies).

106. *See supra* notes 76-91 and accompanying text (discussing rigid approach to the exhaustion doctrine based on interpretation of 28 U.S.C. § 2254 that requires a petition for discretionary review if prisoner has right to petition the state court, regardless of whether actual review is as a matter of right).

107. *See, e.g.*, Richardson v. Procunier, 762 F.2d 429, 430-31 (5th Cir. 1985) (citing Rose v. Lundy, 455 U.S. 509 (1982), as guiding precedent). Following *Rose*, the Fifth Circuit in *Richardson* strictly enforced the exhaustion requirement against a prisoner who had failed to petition his state's supreme court for discretionary review under the guise that rigorous enforcement of the exhaustion requirement would benefit the states. *Id.*

Interestingly, the Ninth Circuit in *Batchelor v. Cupp* held that the prisoner must return to state court to petition the state supreme court for discretionary review, despite the fact that the state urged the court to consider the claims exhausted after reaching the state appellate court level. 693 F.2d 859, 861-62 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983). *Batchelor*, therefore, is analogous to *Granberry v. Greer*, in which the state did not object to the pris-

less, this approach fails to promote the exhaustion doctrine's underlying purposes.[108]

By rigidly enforcing the exhaustion requirement in cases where state prisoners have not filed for discretionary review with the state's highest court, the federal courts actually undermine the exhaustion doctrine's foundational notions of comity.[109] The state courts have ample opportunity to control and dictate their criminal justice systems through a full round of direct appeals and at least one collateral appeal at the state appellate court level before the prisoner applies for federal habeas review.[110] Furthermore, state supreme courts typically prefer not to hear a prisoner's habeas petition based on federal law because they feel overburdened with habeas petitions.[111] In contrast, federal courts have a greater interest in habeas cases, because federal courts determine the ultimate outcomes of issues concerning federal statutory and constitutional law.[112] Ac-

---

oner's claims on the basis of exhaustion. *See Granberry*, 481 U.S. 129, 130-31 (1987); *supra* notes 69-70 and accompanying text (discussing *Granberry*). Unlike *Granberry*, in which the Court directed lower federal courts to exercise discretion when the state fails to raise the exhaustion defense, 481 U.S. at 134-36, the Ninth Circuit still favored strictly enforcing the exhaustion doctrine in *Batchelor*, 693 F.2d at 861-62.

108. Yackle, *supra* note 1, at 394 ("[A] set of rigid rules . . . fails to serve the doctrine's rationales and, indeed, threatens to create greater friction between the federal and state courts."); *id.* at 400-01 ("[T]he introduction of rigid rules . . . promises to frustrate the very interests the doctrine was designed to protect.").

109. Blocker, *supra* note 48, at 508 ("Strict mechanical adherence to the exhaustion requirement does not always protect state interests and is, in fact, often more destructive than solicitous of the doctrine of comity."); *see also* Yackle, *supra* note 1, at 400-01 (arguing that federal courts must have "sound reasons" for requiring prompt federal review).

110. Such an active state role adequately serves the interests of federalism, making the rigid enforcement of the exhaustion doctrine unnecessary. *See* Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1095 (1970) ("Generally, the interests which underlie the [exhaustion] rule are compelling only with respect to appellate, not collateral, processes. It is the appellate process which most directly provides the higher state courts an opportunity to supervise trial courts and facilitate uniform application of the law.").

111. *See* Lay, *supra* note 32, at 1028-29 (discussing states' efforts to reduce habeas petitions); *cf.* Yackle, *supra* note 27, at 1010 (noting that state courts resent federal courts that "undertak[e] to second-guess judgments . . . affirmed by the states' highest courts").

112. *See* Evan T. Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 172 (1994) ("[O]ne must find 'irresistible' the . . . proposition that every state criminal defendant has a right to litigate federal claims in a federal forum."); *see also* Yackle, *supra* note 27, at 1022 ("[T]here is a national interest in the correct and uniform interpretation of federal law.").

cordingly, when a federal court returns a prisoner's habeas petition to state court, the federal court adds to the state court's docket only to satisfy a mere perfunctory procedural requirement that inevitably results in the prisoner's return to federal court.[113] Moreover, the cases the federal court adds to the state docket are those that the state court has least interest in hearing.[114]

In addition, state supreme courts consider the federal courts' strict enforcement of the exhaustion doctrine patronizing.[115] When a single federal district court judge substantively

113. *See* Dolny v. Erickson, 32 F.3d 381, 384 (8th Cir. 1994) (noting that dismissing claims for failure to petition state supreme courts for discretionary review produces "fruitless and burdensome petitions" for state courts), *cert. denied*, 115 S. Ct. 902 (1995); *see also* Rose v. Lundy, 455 U.S. 509, 522 (1982) (Blackmun, J., concurring in the judgment) (noting that rigidly enforcing the exhaustion rule "tends to increase, rather than to alleviate, the caseload burdens on both state and federal courts"); Levit, *supra* note 21, at 593 n.171 ("State court resources are obviously conserved when a petitioner does not have to return to state court to relitigate.").

114. *See, e.g.*, Silverburg v. Evitts, 993 F.2d 124, 126 (6th Cir. 1993) (noting the Kentucky Supreme Court's hostility to petitions filed for discretionary review merely to meet exhaustion requirements for federal courts); Jennison v. Goldsmith, 940 F.2d 1308, 1309 (9th Cir. 1991) (per curiam) (noting Arizona Supreme Court's preference to avoid hearing state habeas cases) (citing Arizona v. Sandon, 777 P.2d 220, 221 (Ariz. 1989) (en banc)); Yackle, *supra* note 1, at 423 ("A doctrine that puts the state courts to meaningless litigation can claim precious little basis in the notion of comity. Orderly state procedures are not so much disrupted as abused, the state courts' participation in the enforcement of federal law not so much frustrated as coerced."); *see also* Lee, *supra* note 112, at 158 (arguing that state courts' knowledge that federal courts determine the ultimate outcome in habeas petitions undermines the state courts' sense of responsibility).

115. One of the reasons cited for the strict enforcement of the exhaustion requirement is encouraging state courts to become comfortable with and knowledgeable about federal law. *See supra* note 33 and accompanying text (noting that familiarizing state courts with federal constitutional and statutory law is an underlying purpose of exhaustion doctrine). Yet federal courts "can hardly say in one breath that the state courts are fully capable of adjudicating federal claims and in the next that they are so inexperienced that federal treatment of issues . . . must be delayed while they sharpen their skills." Yackle, *supra* note 1, at 428.

Another reason advanced for rigidly enforcing the exhaustion doctrine is that the diligent efforts of state courts can increase the efficiency of federal courts by developing a full record and refining legal issues. *See supra* notes 43-48 and accompanying text (discussing judicial efficiency as an underlying purpose of exhaustion doctrine); Hirsh, *supra* note 22, at 428 (arguing that state courts can correct errors of state and federal law). Professor Yackle notes the patronizing quality of this justification for the rigid enforcement of the exhaustion doctrine:

> Federal review is not deferred to allow the state courts to assist the federal courts in the exercise of their independent habeas jurisdic-

overrules a state court decision, the federal judge's decision may humiliate the state judges who labored to reach the state court's decision.[116] Accordingly, when a federal court automatically refuses to hear a state prisoner's habeas petition until the prisoner presents it to the state supreme court for discretionary review, the state court has very little incentive to hear the case.

Finally, rigidly dismissing state prisoners' habeas corpus petitions because the prisoners did not petition the state supreme courts for discretionary review fails to further the exhaustion doctrine's purpose of enhancing judicial efficiency. Despite the resources that state courts expend to handle returned petitions, the prisoner returns to federal court, where the federal court must again determine whether the prisoner exhausted state remedies. Both state and federal courts desire judicial efficiency,[117] but by forcing the prisoner back into the state court process, federal courts increase the workload of the state courts.[118] Because the exhaustion requirement is only an issue of timing,[119] the state courts know habeas petitions eventually reach the federal courts.[120] By returning the petition to state court, the federal court only increases the time required to

---

> tion. . . . State courts might take offense if the Justices should instruct the lower federal courts to stay their hand regarding federal claims, because they stand to benefit from preliminary state review—as though the state courts were stalking horses to be used by federal judges anxious to conserve their own efforts in habeas cases.

Yackle, *supra* note 1, at 430.

116. Remington, *supra* note 104, at 292 (noting that historically state court judges feel annoyed when a single federal judge overturns their decisions); *see also* Larry W. Yackle, *The Reagan Administration's Habeas Corpus Proposal*, 68 IOWA L. REV. 609, 609 (1983) (identifying the disruptive effect collateral review has on state courts).

117. *See Rose*, 455 U.S. at 519 (noting judicial interests in efficiency underlying exhaustion doctrine); Schnell, *supra* note 47, at 367 ("Concern for the amount of judicial resources consumed by review of habeas corpus petitions continues to be strong." (citation omitted)).

118. *See supra* note 113 and accompanying text (discussing increased burden on state courts resulting from dismissing habeas petition for failure to exhaust discretionary state remedies).

119. *See supra* notes 25, 28 and accompanying text (noting that exhaustion of state remedies does not affect jurisdiction, but rather timing of federal review).

120. *See* Harris v. Reed, 489 U.S. 255, 269-70 (1989) (O'Connor, J., concurring) (noting "judicial ping-pong" that results from requiring habeas petitioners to return to state court); *Rose*, 455 U.S. at 527-28 (Blackmun, J., concurring in the judgment) (noting that petitions dismissed for failure to exhaust state remedies eventually return to federal court).

resolve the prisoner's habeas petition, and this delay detrimentally affects the state's interest in finality of judgment.[121]

Forcing the prisoner to return to state court also detrimentally affects the prisoner's interest in obtaining relief from unconstitutional confinement as soon as possible.[122] State prisoners often endure years of litigation in federal and state courts before the courts decide the merits of their habeas claims.[123] For example, after failing to have his conviction overturned in state courts, the petitioner in *Buck v. Green*[124] endured ten additional years of imprisonment until the Eleventh Circuit finally vacated the judgment.[125] Had the Eleventh Circuit returned the petitioner's claim for failing to petition the state supreme court for discretionary review, the petitioner's unconstitutional confinement would have lasted even longer.[126]

Forcing the prisoner back into the state court process also detrimentally affects the federal courts' interests in efficiency.[127] By rigidly enforcing the exhaustion doctrine without leaving room for appropriate discretion, federal courts dramatically increase their own workload.[128] Statistically, habeas petitions are

---

121. By requiring prisoners to return to state courts to exhaust their claims and then petition the federal court again, the habeas process involves unnecessary duplication. Lee, *supra* note 112, at 158. Such duplication squanders economic and judicial resources. *Id.*

122. *See supra* note 48 and accompanying text (discussing prisoners' interests at stake in exhaustion doctrine).

123. Yackle, *supra* note 116, at 636 n.120.

124. 743 F.2d 1567 (11th Cir. 1984).

125. *See* Buck v. Green, 874 F.2d 1578, 1581 (11th Cir. 1989) (vacating judgment against prisoner). The prisoner had first contested his conviction collaterally in state court in 1979. Buck v. State, 259 S.E.2d 493, 495 (Ga. Ct. App. 1979) (rejecting collateral attack).

126. *Buck*, 743 F.2d at 1569 (11th Cir. 1984) (finding state remedies exhausted despite petitioner's failure to petition state supreme court for discretionary review).

127. Blindly forcing the prisoner to return to state court is not efficient for state courts or federal courts:

> State court resources are obviously conserved when a petitioner does not have to return to state court to relitigate. Additionally, federal court resources are conserved in those instances in which the petitioner eventually would have returned to federal court. If the petitioner's claim is without merit, additional litigation should be avoided; if the petitioner has a valid claim, it is unsound to refuse to render a decision on the merits and require a return to state court without a compelling justification while the petitioner remains unconstitutionally confined.

Levit, *supra* note 21, at 593 n.171.

128. Determining whether a prisoner exhausted available state remedies consumes scarce federal judicial resources. Anderson v. Harless, 459 U.S. 4, 8 (1982) (Stevens, J., dissenting) ("Few issues consume as much of the scarce time

extremely fast, cheap decisions for an individual court.[129] Requiring federal courts to return petitioners to state court merely to fulfill an often needless procedural step increases the federal courts' workload and costs, because the prisoner almost always returns to federal court.[130]

B. The Cosmetic Approach: Appear Exhausted Despite Harms to Comity and Efficiency

The cosmetic approach of the Third and Sixth Circuits also fails to further the interests of the exhaustion doctrine.[131] This approach considers prisoners' claims exhausted when the prisoners filed untimely or ineffective petitions for review with the state supreme courts.[132] In effect, when the opportunity for a timely petition has lapsed, this approach requires prisoners to file untimely state court petitions to fulfill the exhaustion requirement. Such untimely petitions, however, subject the claims to the "cause and prejudice" test of the procedural default doctrine.[133] Thus, although the cosmetic approach may promote procedural purity, it also leaves open the possibility that the state court will deny the prisoner's untimely or impractical petition on adequate and independent state grounds, thus barring the federal court from ever hearing the prisoner's claims.[134]

---

of federal judges as the question whether a state prisoner adequately exhausted his state remedies."). Yet, requiring the prisoner to return to state court merely to have the state supreme court reject a petition for discretionary review in order for the federal claim to be "technically exhausted" results in the loss of more federal judicial resources. Rose v. Lundy, 455 U.S. 509, 527 (1982) (Blackmun, J., concurring in the judgment) ("If the district court must . . . dismiss the . . . petition until all grounds for relief have been exhausted, the prisoner will likely return to federal court eventually, thereby necessitating duplicative examination of the record.").

129. *See* Hirsch, *supra* note 22, at 428 n.64 (citing evidence that courts dismiss virtually all federal habeas petitions prior to trial and that state prisoners account for small fraction of the total filings in federal district courts). Although state prisoners may account for a dramatic increase in litigation in federal courts, "the increase has been attributable largely to [civil rights violations] litigation rather than to section 2254 challenges to state court convictions." Remington, *supra* note 104, at 292.

130. *See Anderson*, 459 U.S. at 8 (Stevens, J., dissenting).

131. *See supra* notes 93-94 and accompanying text (outlining cosmetic approach).

132. *See supra* notes 92-94 and accompanying text (discussing cosmetic approach).

133. *See supra* notes 89-91, 94 and accompanying text (discussing risks associated with procedural default doctrine).

134. *See supra* note 94 and accompanying text (discussing risk to state prisoners of returning to state court to exhaust unavailable state remedies due to procedural default doctrine).

Although it allows more flexibility and discretion than the rigid approach, the cosmetic approach unnecessarily complicates the decision-making process with legal fiction, allowing circuit courts to shirk responsibility for their discretion.

Furthermore, the legal fiction that an untimely petition to a state's highest court exhausts the remedy available in that court[135] serves no practical function and fulfills no purpose of the exhaustion doctrine.[136] In fact, relying on this legal fiction undermines the notions of comity, jeopardizes society's confidence in the judicial system as a whole, and exacerbates judicial inefficiency.

By allowing untimely petitions to satisfy the exhaustion requirement, federal courts undermine notions of comity by sending mixed messages to the state courts. They express a willingness to enforce the exhaustion doctrine to protect a state's interests, yet they do not require prisoners to exhaust state remedies in a timely or effective fashion. As a result, the state courts' rejections of prisoners' untimely and obscure petitions serve only to rubber stamp the federal court's decision to hear the prisoner's petition despite the actual failure to exhaust state remedies.[137] This approach also undermines society's confidence in the judicial system by diluting the incentive for state prisoners to file timely and effective petitions for discretionary relief.[138] Finally, this approach exacerbates judicial inefficiency because state courts must review ineffective and untimely peti-

135. *See, e.g.*, Hull v. Freeman, 932 F.2d 159, 164 (3d Cir. 1991) ("[T]he petitioner's mere 'presentment of an untimely petition to the state's highest court represent[ed] substantial compliance with the . . . exhaustion requirement.'" (quoting Bond v. Fulcomer, 864 F.2d 306, 309 (3d Cir. 1989)).

136. In effect, this approach regards the state supreme court's refusal to hear an untimely or ineffective petition as satisfaction of the state court's interests that the exhaustion doctrine supposedly protects. *Id.* at 164-65; *cf.* Elmore v. Foltz, 768 F.2d 773, 775-76 (6th Cir. 1985) (holding that a "letter request" raising "obscure" issues to Michigan Supreme Court satisfied exhaustion requirement).

137. In reality, the federal courts exercise their discretion to review prisoners' claims despite a lack of "technical" exhaustion. The federal courts, however, disguise their discretion through analytical acrobatics by declaring that the prisoners in fact exhausted their claims by petitioning for discretionary review that was no longer available. In other words, the state prisoner exhausts "available" state remedies by petitioning for relief that is *unavailable*.

138. Coleman v. Thompson, 501 U.S. 722, 731-32 (1991) (noting the risk that prisoners could simply default on state remedies as a method of exhaustion, thereby depriving state courts of timely and practical opportunities to hear claims).

tions, and those petitions that survive the procedural default doctrine ultimately return to federal court.[139]

Although this approach allows more room for flexibility than the rigid approach, it is flexibility without reason. It sacrifices judicial sincerity and promotes confusion. The fact that prisoners must file untimely petitions belittles the state courts' timing requirements, solely to procedurally "purify" petitions for federal court.

C. The Passive Approach: Sacrifice Comity for Efficiency

The approach recently favored by the Eighth and Eleventh Circuits completely disregards the prisoner's failure to petition the state's supreme court for discretionary review before filing a federal habeas corpus petition.[140] Although this approach exemplifies those courts' willingness to exercise discretion to hear technically unexhausted petitions, these circuits have failed to provide the proper analytical framework necessary for guiding the federal courts' discretion.[141]

The Eighth Circuit in *Dolny v. Erickson*,[142] for example, relied too heavily on the limited availability of relief in the state's supreme court.[143] After reviewing the Minnesota Supreme Court's statistical record, the Eighth Circuit characterized the Minnesota Supreme Court as unwilling to grant discretionary review of habeas petitions, and then declared that petitioning

139. *See supra* notes 113, 118 and accompanying text (noting judicial inefficiencies in returning petitions to state courts only to have the state prisoner return later to federal court).

140. *See supra* notes 95-101 and accompanying text (discussing passive approach).

141. *See, e.g.*, Dolny v. Erickson, 32 F.3d 381, 383-84 (8th Cir. 1994) (holding that prisoner did not need to petition for discretionary review when such a petition was now precluded by state time limits), *cert. denied*, 115 S. Ct. 902 (1995).

142. 32 F.3d 381 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995). The Eighth Circuit explicitly followed the reasoning of the Eleventh Circuit in Buck v. Green, 743 F.2d 1567, 1569 (11th Cir. 1984), rather than the rigid approach of the Ninth Circuit in Jennison v. Goldsmith, 940 F.2d 1308, 1310 (9th Cir. 1991) (per curiam), or the Fifth Circuit in Richardson v. Procunier, 762 F.2d 429, 431-32 (5th Cir. 1985). *Dolny*, 32 F.3d at 384.

143. *See supra* note 96 and accompanying text (discussing Eighth and Eleventh Circuits' view that limited availability of discretionary review in state supreme courts supports hearing habeas claims in federal court). Availability of relief in state courts is one factor federal courts should balance in determining exhaustion, *see* Harris v. Reed, 489 U.S. 255, 268 (1989) (O'Connor, J., concurring), but other interests are also important. *See infra* part III.A (discussing state, federal, judicial, and prisoner interests).

that state's supreme court is *always* unnecessary.[144] Because the availability of review in state supreme courts may fluctuate,[145] and because federal courts disagree about the state courts' degree of availability,[146] the Eighth Circuit's reliance on the scarcity of discretionary review of habeas petitions by a state court is unfounded. In addition, allowing prisoners to circumvent the state supreme court's discretionary review does not necessarily improve judicial efficiency, because the state supreme court could grant relief in some instances, thereby reducing the federal courts' workload.[147]

The *Dolny* court's decision also undermines notions of comity because it fails to balance other interests at stake in determining whether a federal court should exercise its discretion to review a technically unexhausted petition. Although the *Dolny* court considered the state court's interest in hearing habeas petitions generally, it failed to consider the state's interests in the instant case.[148] The Eighth Circuit provided state prisoners a direct route to federal court that bypasses the state supreme court.[149] This direct route virtually obliterated any opportunity for the state supreme court to influence its state's habeas process or to increase protection of federal rights within the state,[150] because it left state prisoners with little incentive to

144. *Dolny*, 32 F.3d at 384.

145. Changes in court rules, statutes, and even state constitutions often determine the scope of a state court's discretion to review cases. *See, e.g., Richardson*, 762 F.2d at 431 n.1 (noting that a constitutional amendment in Florida gave the Florida Supreme Court broader discretion); *see also Dolny*, 32 F.3d at 384 & n.5 (referencing Minnesota's rules of appellate procedure that establish criteria to guide the Minnesota Supreme Court's exercise of discretionary review).

146. *Compare Dolny*, 32 F.3d at 384 & n.5 (describing availability of discretionary review based on rules of appellate procedure as "[l]imited") *with Richardson*, 762 F.2d at 431-32 (describing similar criteria as providing "broad discretion").

147. *But see Dolny*, 32 F.3d at 384 (noting that Minnesota Supreme Court grants review to less than 25% of all petitions for review, including non-habeas petitions).

148. *See id.* (analyzing reasons why dismissing petition for failure to exhaust would burden state supreme court, but failing to discuss any interest state court may have in ruling on the merits of prisoner's claims).

149. *Id.* ("[W]hen a petitioner has presented his claims to the State's Court of Appeals, [he] need not . . . [seek] discretionary review prior to requesting federal habeas relief.").

150. *See* Harris v. Reed, 489 U.S. 255, 267 (1989) (Stevens, J., concurring) (noting possibility that state courts would provide more protection to prisoners than federal courts).

petition the state supreme court.[151] In addition, a blanket rule declaring petitions to state supreme courts unnecessary for exhaustion purposes leaves the state courts with statutory authority to exercise discretion in granting review of habeas petitions from state prisoners, but without any practical opportunity to exercise that discretion. Furthermore, allowing prisoners to circumvent the state supreme court immediately reduces that court's influence over the state's intermediate courts of appeals.[152]

III. RETURNING TO THE EXHAUSTION DOCTRINE'S PURPOSES

Instead of adopting the approaches in *Richardson v. Procunier*[153] and *Dolny v. Erickson*,[154] which exacerbate judicial inefficiencies and impede comity between federal and state courts, the federal courts should adopt a guided case-by-case balancing test when deciding whether state prisoners have exhausted state remedies. Under this balancing test, federal courts would exercise discretion by balancing the four interests that the exhaustion doctrine's purposes implicate within guidelines for typical substantive situations in habeas petitions. This balancing approach would successfully accommodate the exhaustion doctrine's purposes and expectations while retaining fairness and flexibility in the habeas corpus system, much like the Supreme Court's approach in *Granberry v. Greer*.[155]

---

151. Of course, prisoners believing the state supreme court is more likely to provide relief than federal courts have an incentive to petition for discretionary review. Conventional wisdom, however, is that federal courts are more receptive to federal and constitutional issues and exercise more independent judgment. *See* Yackle, *supra* note 27, at 1022-24 (distinguishing the interests of federal and state judges); Yackle, *supra* note 116, at 616-17 (arguing that federal judges are less concerned about guilt or innocence than state counterparts); *see also* Blocker, *supra* note 48, at 507 ("[I]t should not be forgotten that the state itself, in every habeas corpus proceeding, is first and foremost dedicated to advancing its own interests."). In addition, prisoners on death row have an incentive to petition state courts for discretionary review in order to postpone execution. *Id.* at 508.

152. *See supra* note 150 and accompanying text (noting that state supreme court could provide more protection under state law than provided under federal law).

153. 762 F.2d 429 (5th Cir. 1985).

154. 32 F.3d 381 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995).

155. 481 U.S. 129, 134-36 (1987); *see supra* notes 68-70 and accompanying text (discussing the Court's flexible approach in *Granberry*); *see also* Frisbie v. Collins, 342 U.S. 519, 521 (1952) (noting that exhaustion requirement is flexible enough to allow federal courts to "deviate from it and grant relief in special circumstances").

A. The Flexible Approach: Exercising Judicial Discretion to Enhance Comity and Increase Efficiency

Instead of creating rigid, mechanical rules or relying on procedural cosmetics to justify decisions, the federal courts should embrace the discretion inherent in the exhaustion doctrine[156] and use it, within guidelines discussed below, to further the purposes of the exhaustion doctrine. Upon a motion by the state prosecutor to dismiss a state prisoner's federal habeas corpus petition,[157] where the prisoner has not properly petitioned[158] the state supreme court for discretionary review,[159] a federal court should presume that the state remedies are unexhausted. This presumption would be overcome if the court's analysis of the four interests derived from the underlying purposes of the exhaustion doctrine suggested that another state review is unnecessary. The four interests are the state court's interest in hearing the claim, the judicial system's interest in efficiency, the federal court's interest in hearing the claim, and the prisoner's interest in speedy review.

Situational guidelines based on the substantive content of the petition should determine the relative weight of each interest. Most habeas petitions from state prisoners fall into one of three situations. The first situation involves a petitioner questioning the constitutionality of the state's exercise of its authority under color of state law. These cases typically involve questioning the constitutional validity of the state's statutory law[160] or calling for federal review of a state judge's or law en-

156. *See supra* notes 38-40 and accompanying text (discussing Supreme Court's commitment to interpreting the exhaustion doctrine as a flexible rule).

157. If the state fails to raise the issue of exhaustion or waives the exhaustion defense, the Supreme Court has instructed federal courts to exercise discretion in determining whether to hear habeas petitions on a case-by-case basis. *See Granberry*, 481 U.S. at 131, 133; *supra* notes 69-70 and accompanying text (discussing *Granberry*).

158. Failure to petition a state court properly includes failure to make timely and appropriate filings that are necessary to obtain effective relief.

159. Because the prisoner's claims are not "technically" exhausted—and the state objects on that ground—the federal court should initially favor dismissing the petition, *see Granberry*, 481 U.S. at 131, unless the prisoner demonstrates that the balance of interests involved weighs in favor of immediate federal review. The fact that the state did not choose the federal forum also favors a presumption of non-exhaustion.

160. Federal courts should be more inclined to dismiss a petition disputing the constitutionality of a state law to provide the state court an opportunity to interpret its own state's law. Because federal courts must adhere to state

forcement officer's misconduct.[161] The federal court in these cases should dismiss the petition for failure to exhaust state remedies in order to respect the state court's interest in interpreting and enforcing state law, and to respect the state court's authority over state judges and officers.[162] Because the federal court does not lose jurisdiction to hear the claims, but only delays considering them, the federal court should allow the state court the opportunity to exercise its authority over state law.[163]

The second situation involves petitioners seeking federal review of a purely federal constitutional or statutory law issue.[164] In these cases, the federal court should normally favor hearing

---

supreme court interpretations of state statutes, the state court's interest is extremely great.

161. *See, e.g.*, Anderson v. Harless, 459 U.S. 4, 5 (1982) (per curiam) (concerning prisoner's claim challenging trial court's jury instruction distinguishing second degree murder and manslaughter under state law); Rose v. Lundy, 455 U.S. 509, 511 (1982) (concerning prisoner's request for habeas relief based on improper jury instructions, improper denial of right to confrontation, and prosecutor's misconduct); Fay v. Noia, 372 U.S. 391, 394 (1963) (concerning prisoner's allegations that state actors procured his confession through coercion), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), *and* Coleman v. Thompson, 501 U.S. 722 (1991), *and* Wainwright v. Sykes, 433 U.S. 72 (1977); Thompson v. Missouri Bd. of Parole, 929 F.2d 396, 398 (8th Cir. 1991) (concerning prisoner's challenge to state's statute regarding discharge from parole); Satterwhite v. Lynaugh, 886 F.2d 90, 91 (5th Cir. 1989) (per curiam) (concerning prisoner's challenge to state court's decision allowing trial court bailiff to testify during trial); Buck v. Green, 743 F.2d 1567, 1568 (11th Cir. 1984) (concerning state prisoner's challenge regarding county's method of jury selection).

162. State courts are likely to be most interested in federal law when it implicates state officials and thus are likely to exercise their discretion to grant review. *But see* Levit, *supra* note 21, at 595 (arguing that federal courts fail to correct constitutional errors because they are unreasonably reluctant to overturn state court decisions concerning a state judge's conduct out of deference to state courts).

The flexible, balancing approach accommodates situations involving clear constitutional violations by allowing federal courts to weigh the prisoner's interests as well as the interests of the state courts. If the constitutional violation is particularly egregious or obvious, the federal court may determine that the prisoner's interests in speedy relief outweigh the state's interests in supervising its judges.

163. *See supra* notes 25, 28 and accompanying text (noting that the exhaustion doctrine presents an issue of timing rather than jurisdiction).

164. *See, e.g.*, Harris v. Reed, 489 U.S. 255, 258 (1989) (concerning prisoner's ineffective-assistance-of-counsel claim); Duckworth v. Serrano, 454 U.S. 1, 2 (1981) (per curiam) (same); Hensley v. Municipal Court, 411 U.S. 345, 345-46 (1973) (concerning prisoner's First and Fourteenth Amendment claims); Dolny v. Erickson, 32 F.3d 381, 382 (8th Cir. 1994) (concerning prisoner's claims based on the Sixth Amendment's Confrontation Clause), *cert. denied*, 115 S. Ct. 902 (1995); Carter v. Estelle, 677 F.2d 427, 429 (5th Cir. 1982) (concerning prisoner's double jeopardy claim), *cert. denied*, 460 U.S. 1056 (1983).

the prisoner's claim unless the state shows prejudice or a particularly important state court interest in hearing the claim. Typically, the state's interest is minimal because the claim does not involve state statutory law or judicial misconduct. The claim is also likely to reach federal court eventually.[165] Because the prisoner's interest lies in speedy relief,[166] the balance of interests weighs in favor of resolving the issue quickly in federal court.

The third situation involves petitioners sentenced to death.[167] In capital punishment cases, the federal court should favor dismissing the petition for failure to exhaust state remedies. Because the death penalty is particularly controversial, the state court has a heightened interest in maintaining a voice in the development of habeas law in this area. The state supreme court is also more likely to grant discretionary review of capital cases than it is for other types of cases.[168] The federal court's interests in preventing unconstitutional executions also favor enforcing the exhaustion requirement strictly in death penalty situations to ensure that courts leave no constitutional stone unturned and no procedural irregularity unexamined.[169] Furthermore, prisoners facing the death penalty usually seek review in all possible fora and are thus unlikely to forego petitioning the state court for discretionary review.[170]

In general, federal courts using these three situational guidelines could more easily balance the exhaustion doctrine's

165. *See supra* note 120 and accompanying text (noting that prisoners' claims, if unsuccessful in state court's discretionary review, eventually reach federal court).

166. *See supra* notes 48, 122-126 and accompanying text (discussing typical prisoner's interest in obtaining relief as soon as possible).

167. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 726-27 (1991) (concerning prisoner's request for habeas relief after receiving death sentence).

168. Discretionary review is more likely because state courts recognize the inherent seriousness of the punishment, have an interest in playing a role in capital punishment law, and are probably divided on capital punishment issues.

169. *See* Lay, *supra* note 32, at 1017 (discussing importance of ensuring "studied examination" of death sentences for constitutional violations).

170. Death row prisoners typically pursue any available opportunity for relief and thus would petition the state supreme court for discretionary review on their own volition. They may, however, bypass the state supreme court in an effort to persuade the federal court to dismiss their petition, sending them back to state courts, prolonging the habeas process, and postponing execution. *See, e.g.*, Blocker, *supra* note 48, at 508 (discussing Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982), in which the state prisoner requested the federal court to dismiss his habeas petition for failing to exhaust state remedies as tactic to delay execution).

four underlying interests and thus further the doctrine's purposes.[171] Once the federal court categorizes the prisoner's claims, exercising its discretion does not require the blind rigidity,[172] insincere reliance on legal fictions,[173] or unsupported passiveness[174] on which the present federal court approaches rely. If the situational guidelines fail to account for the exhaustion doctrine's foundational purposes, however, due to the unique circumstances of a particular case, the federal court retains the discretionary power and flexibility to deviate from the guidelines in order to compensate for those unique circumstances.[175]

B. Determining the Appropriate Balance: Case Studies

The proposed balancing approach would lead to the same outcomes as the Fifth and Eighth Circuits reached in *Richardson v. Procunier*[176] and *Dolny v. Erickson*,[177] but would provide a stronger basis for the results. In *Richardson*, the prisoner's claim concerned an illegal arrest, implicating the conduct of the state's law enforcement officers.[178] Instead of mechanically dismissing the prisoner's claims for failing to jump through the proper procedural hoops, the court should have justified its decision on the basis that the state court's interest in exercising its supervisory role over state judicial and law enforcement officers exceeded the prisoner's interest in speedy relief and the judiciary's interest in efficiency.[179]

In *Dolny*, by contrast, the Eighth Circuit recognized that state courts have no interest in "fruitless and burdensome peti-

171. *See supra* notes 29-51 and accompanying text (discussing underlying purposes of the exhaustion doctrine).

172. *See supra* notes 76-88, 106-130 and accompanying text (discussing and critiquing rigid approach).

173. *See supra* notes 92-93, 131-139 and accompanying text (discussing and critiquing cosmetic approach).

174. *See supra* notes 94-100, 140-152 and accompanying text (discussing and critiquing passive approach).

175. *See supra* notes 70-74 and accompanying text (discussing Supreme Court's recognition of federal courts' power to exercise discretion).

176. 762 F.2d 429 (5th Cir. 1985); *see supra* notes 76-91, 106-130 and accompanying text (discussing rigid approach adopted in *Richardson*).

177. 32 F.3d 381 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995); *see supra* notes 95-101, 140-152 and accompanying text (discussing passive approach adopted in *Dolny*).

178. *See supra* note 2 (describing Richardson's claims).

179. *See supra* notes 160-163 and accompanying text (discussing cases involving state official misconduct in which state interests outweigh federal court's and prisoner's interests).

tions."[180] Under the proposed test, however, the court would have acknowledged that state remedies were presumptively not exhausted because the prisoner failed to petition the state supreme court for discretionary review.[181] Nonetheless, under the proposed rule, the court should have exercised its discretion to hear the case because the state's interest was slight and the claim did not contest state law or judicial misconduct.[182] In addition, because the petition concerned only federal law,[183] the court would have decided to hear the case in order to avoid expenditure of additional state court costs and possible duplication of federal court efforts.[184] Finally, the court would have recognized the prisoner's interest in having the claim resolved as quickly as possible in order to conserve the prisoner's personal resources,[185] avoid potential procedural defaults in state court,[186] and, most importantly, obtain potential relief.[187]

In short, the proposed approach would mark a significant improvement over each of the current federal circuit approaches. The proposed approach would appropriately recognize federal courts' discretion, unlike the Third and Sixth Circuits' cosmetic approach.[188] Moreover, the proposed analysis would also improve judicial efficiency and respect state courts more than the Fifth and Ninth Circuits' rigid approach.[189] Finally, the proposed analysis would not allow petitioners to bypass state

180. *Dolny*, 32 F.3d at 384; *see also supra* notes 109-121 and accompanying text (discussing lack of state interest in returned habeas petitions).

181. *See supra* note 159 and accompanying text (stating that federal courts should presume state remedies are unexhausted when prisoner has not filed for discretionary state court review).

182. *Dolny*, 32 F.3d at 382-83. The prisoner based his collateral attack on the relationship between the Constitution and a federal rule of evidence, not state law. *Id.* at 385-86.

183. *See supra* notes 164-166 and accompanying text (discussing weight of interests involved in petitions concerning solely federal law issues).

184. *See supra* notes 43-47 and accompanying text (discussing federal and state courts' interest in judicial efficiency).

185. *See supra* notes 46, 48, 123-126 and accompanying text (discussing limited resources of state prisoners and burdens imposed by time-consuming appeals).

186. *See supra* notes 89-91 and accompanying text (discussing procedural default doctrine).

187. *See supra* note 151 and accompanying text (discussing prisoner's perceived likelihood of relief in federal court compared with state court).

188. *See supra* notes 92-93, 131-139 and accompanying text (discussing and critiquing cosmetic approach).

189. *See supra* notes 76-88, 106-130 and accompanying text (discussing and critiquing rigid approach).

supreme courts *carte blanche*, as the Eighth Circuit's laissez-faire approach does.[190]

CONCLUSION

The circuit courts' attempts to create a process for determining whether to hear a state prisoner's petition for federal habeas relief has resulted in confusion. This confusion, in turn, results in some federal courts discouraging prisoners from petitioning the state's supreme court for discretionary review and other federal courts requiring prisoners to return to state courts and risk procedural default. Most importantly, the federal courts' approaches fail to promote the foundational purposes of the exhaustion doctrine.

Directing federal courts to exercise guided discretion by analyzing the situational pattern of prisoners' petitions and balancing the interests involved will improve the handling of state prisoners' habeas petitions. This analysis will result in more consistent interpretations of the exhaustion doctrine among federal courts, thereby reducing the inconsistent treatment of state prisoners. Most importantly, the proposed rule fulfills the basic principles of the exhaustion doctrine, reaffirms the federal courts' flexibility, and promotes judicial efficiency in both federal and state courts.

190. *See supra* notes 95-100, 140-152 and accompanying text (discussing and critiquing passive approach).