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THE NEW HABEAS CORPUS IN DEATH PENALTY CASES

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THE NEW HABEAS CORPUS IN DEATH PENALTY CASES

LARRY YACKLE*

This article offers a systematic examination of Chapter 154, United States Code, which establishes new rules and procedures to govern cases in which state prisoners under sentence of death file federal habeas corpus petitions challenging their convictions or sentences. Chapter 154 was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996. Yet its provisions were made applicable only in capital cases arising from states that adopted qualifying schemes for providing indigent death row prisoners with counsel in state postconviction proceedings. No state's system for supplying lawyers in state court won approval and, in consequence, Chapter 154 has been on hold for nearly twenty years. The Department of Justice recently revised the standards that state legal services programs must satisfy. This article proceeds from the premise that some states will secure certification that their schemes conform and focuses on the interpretation the provisions in Chapter 154 should receive in the cases to which they apply. At the time of enactment, the rules and procedures in Chapter 154 were commonly said to be favorable to states responding to habeas corpus petitions. This article contends that when they are interpreted sensibly and pragmatically, they turn out not to create especially state-friendly protocols for the conduct of capital habeas litigation. Other provisions in the 1996 Act and innovations since have largely stolen the show inasmuch as they subject all habeas cases, capital and noncapital alike, to essentially the same arrangements.

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INTRODUCTION

Federal habeas corpus for state prisoners, already a baffling labyrinth, is about to become still more intricate. The Department of Justice has promulgated a Final Rule¹ to implement Chapter 154 of Title 28, United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).² Chapter 154 establishes arrangements for federal habeas actions brought by state prisoners under sentence of death. At the time of enactment, these rules and procedures were commonly said to be “favorable to the state party.”³ Yet Chapter 154 specified that its provisions would apply only in capital cases arising from states that adopted qualifying schemes for providing indigent death row prisoners with counsel in state postconviction proceedings. No state’s program for supplying lawyers in state court won approval. In consequence, Chapter 154 has been on hold for nearly twenty years. The Final Rule revises the standards that states must satisfy. Some states will

1. Certification Process for State Capital Counsel Systems, 78 Fed. Reg. 58,183 (Sept. 23, 2013).

2. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

3. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

almost certainly obtain certification that their systems conform. And then, its hour come round at last, a new habeas corpus for death penalty cases will be born.

In this article, I bracket questions about the approval of state legal services programs and focus on the interpretation that Chapter 154 should receive in the cases to which it applies.⁴ The Court has discussed some provisions in dicta to the extent they bear on other elements of AEDPA. This article offers the first rigorous, systematic examination. I will argue that, when Chapter 154 provisions are interpreted sensibly and pragmatically, they do not create especially state-friendly protocols for the conduct of capital habeas litigation. Part I traces the roots of Chapter 154 to the 1989 report of an ad hoc committee of the Judicial Conference of the United States, chaired by Justice Powell. Part II describes the interpretive approach that should be taken to Chapter 154. Part III identifies the principal questions that will have to be addressed and offers workable answers.

If Congress had adopted the Powell Committee report as written in 1989 (and nothing else), capital litigation in the federal courts might have been significantly transformed by comparison to ordinary habeas adjudication. In the event, AEDPA made major changes in habeas law generally, codified in Chapter 153 of Title 28, United States Code, and tacked on a variant of the Committee's plan as Chapter 154. In the years since, Congress has adopted further legislation, while the Supreme Court has both elaborated its own habeas doctrines and delivered important interpretations of AEDPA's amendments to Chapter 153. These innovations have largely stolen the show inasmuch as they typically subject the run of habeas cases to rules and procedures the Powell Committee planned for capital cases alone. Chapter 154 will accelerate the pace at which capital litigation will have to be conducted. States that employ the death penalty thus retain an incentive to seek certification. Yet apart from timing rules, Chapter 154 will not entail restrictions on capital litigation in certified jurisdictions that are markedly different from the limits applicable to habeas cases generally, capital and noncapital alike.⁵

4. There is a rich literature on the professional services petitioners need in capital litigation and the most effective means of ensuring that those needs are met—including the voluminous body of comments the Department of Justice received in the rule-making process. *See generally* AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 923, 952 (2003). I do not address transitional issues that will arise if and when a certified state contends that Chapter 154 controls a case that was under way prior to certification.

5. I do not mean to suggest that the interpretations for which I contend would amount to good public policy. Far from it. In my view, most of current federal habeas corpus law is demonstrably *bad* policy and ought to be thoroughly rethought.

I. THE ORIGINS OF CHAPTER 154

In the middle years of the last century, critics complained that the federal courts' jurisdiction to entertain habeas corpus petitions from state convicts was both unnecessary and objectionable—unnecessary because state courts adequately enforced federal constitutional safeguards in criminal cases, objectionable because federal habeas adjudication compromised the finality of criminal judgments.⁶ Resistance to federal habeas intensified after many states adopted capital punishment statutes consistent with the demands of the Eighth Amendment.⁷ Critics contended that prisoners under sentence of death used federal habeas petitions not to press potentially meritorious challenges to their convictions or sentences, but only to postpone their execution.⁸ Congress considered numerous bills that would have curbed the writ.⁹ But nothing passed.

Chief Justice Rehnquist then took the initiative. He appointed a committee of the Judicial Conference, chaired by former Justice Lewis Powell, and charged it to explore alternative legislative options.¹⁰ The Powell Committee proceeded from the premise that existing statutes and precedents would remain in place.¹¹ But the Committee hoped Congress would adopt a freestanding package of recommendations to deal exclusively with three problems peculiar to capital cases: resources were wasted on emergency motions for stays of execution pending postconviction litigation; the process in capital cases was freighted with repetition and delays; and lawyers often came into cases too late to prepare and present federal claims properly.¹²

The Committee developed a plan to mandate stays routinely, to limit prisoners on death row to one opportunity for federal adjudication in most instances, and to expedite capital litigation by allowing only 180 days to file a federal petition. Congress had recently authorized federal courts to assign counsel in federal habeas proceedings.¹³ Yet the Committee doubted that providing attorneys

In this article, I lay aside my reservations about extant arrangements, take them as they stand, and consider whether Chapter 154 threatens to make things even worse.

6. See, e.g., U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS (1988), reprinted in 22 U. MICH. J.L. REFORM 901, 920, 975–78 (1989) (advancing these criticisms).

7. Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CALIF. L. REV. 2331, 2356 (1993).

8. *Id.* at 2351–52.

9. *Id.* at 2353–55, 2358–64 (describing the principal proposals).

10. See *id.* at 2367–68 (offering a fuller description of the events).

11. AD HOC COMM. ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT AND RECOMMENDATIONS [hereinafter POWELL COMMITTEE REPORT], reprinted in 135 CONG. REC. 24,694 (1989).

12. *Id.* at 24,694–95.

13. 18 U.S.C. § 3599(a)(2) (2012).

in federal court alone would be sufficient.¹⁴ Prisoners needed lawyers earlier—in state postconviction proceedings. The Committee did not recommend that Congress should compel the states to provide counsel at that stage. Instead, the idea was to condition the tight filing period and other adjustments in the process on a state's agreement to supply counsel voluntarily.¹⁵ This plan came to be known as the “opt-in” scheme inasmuch as an individual state had a choice—either to continue litigating capital cases in federal court under existing arrangements (equally applicable to noncapital cases) or to obtain the benefits of the Committee's different program for death penalty cases by providing indigents with counsel in previous proceedings in state court.

In the years following, Congress considered more bills, many of them incorporating aspects of the Powell Committee's program.¹⁶ Then, in 1996, Congress built elements of those bills into the sweeping revisions in habeas law enacted as AEDPA. The amendments to Chapter 153 often reproduced the Powell Committee's plan for death penalty cases. Nonetheless, Congress attached Chapter 154, which reflects the Committee's optional framework for capital litigation.¹⁷

Originally, the federal courts determined whether state mechanisms for supplying counsel in state court were sufficient to invoke Chapter 154. Some states sought approval, but none succeeded. The reasons varied, but in the main the courts faulted states for failing to commit the necessary resources to the enterprise.¹⁸ Members of Congress who had hoped that Chapter 154 would apply to cases from their states became frustrated and proposed legislation transferring the responsibility to certify state programs to be in compliance to the Attorney General.¹⁹ The USA PATRIOT Improvement and Reauthorization Act made that change in 2005.²⁰

14. POWELL COMMITTEE REPORT, *supra* note 11, at 24,695.

15. *Id.*

16. See Yackle, *supra* note 7, at 2370–73.

17. H.R. REP. NO. 104-23, at 8 (1995) (stating that Chapter 154 “enacts the core recommendation of the ‘Powell Committee’”).

18. See John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 276 (2006) (explaining that Chapter 154 was not triggered because of “the states’ refusal to pay the AEDPA freight”). For a survey, see generally Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 467 (2000).

19. Rep. Lungren of California explained that “the stubborn unwillingness of the circuit courts to approve state counsel appointment mechanisms” moved him, along with Senator Kyl of Arizona, to introduce The Streamlined Procedures Act of 2005, H.R. 3035, 109th Cong. (2005), S. 1088, 109th Cong. (2005). Daniel E. Lungren, *Reforming the Death Penalty’s Federal Habeas Corpus Process*, 2 J. INST. FOR ADVANCEMENT CRIM. JUST., Summer 2008, at 5, 7.

20. Pub. L. 109-177, § 507(b), 120 Stat. 192, 250 (2006); Lungren, *supra* note 19, at 9.

The Justice Department under President George W. Bush took considerable time to promulgate a rule detailing what states must do to win certification.²¹ A district court enjoined that rule on the ground that insufficient time had been allowed for comments.²² Further consideration was short-circuited when the Department under President Obama withdrew the Bush Administration rule and initiated another rule-making process, which produced the current Final Rule.²³ This rule, too, will undergo judicial review largely on procedural grounds.²⁴ Objections to the Final Rule will be resolved, and some states are bound to be certified.²⁵ A close examination of Chapter 154 is therefore in order.

II. THE INTERPRETIVE TASK AHEAD

The Supreme Court typically insists that the specific language in federal habeas statutes must be given effect.²⁶ This on the theory that the text signals the only policy that can be ascribed to Congress. Yet AEDPA provisions are notoriously opaque. It is an exaggerated formalism that assumes something to be true when no one genuinely believes it, in this instance that the people who drafted AEDPA and the members of Congress who voted it into law knew what they were doing.²⁷ They did not. They did not understand the habeas jurisprudence extant at the time or envision the effects new provisions would have. They did not construct an elegant web of mutually reinforcing provisions.²⁸ And they were not wordsmiths. They did not draw provisions carefully, but employed mystifying

21. Certification Process for State Capital Counsel Systems, 73 Fed. Reg. 75,327 (Dec. 11, 2008).

22. Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice, No. C 08-2649, 2009 WL 185423 (N.D. Cal. Jan. 20, 2009).

23. Certification Process for State Capital Counsel Systems, 76 Fed. Reg. 11,705 (Mar. 3, 2011). The Bush Administration rule failed to formulate standards for selecting counsel and setting their fees, instead contemplating that states would establish their own standards. 73 Fed. Reg. 75,331 (Dec. 11, 2008). The current Final Rule includes standards meant to ensure competent and properly compensated counsel in state court.

24. Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice, No. C 13-4517, 2014 WL 3908220 (N.D. Cal. Aug. 7, 2014) (enjoining implementation of the Final Rule until conflicts with the Administrative Procedure Act are resolved).

25. Arizona purported to apply for certification even before the Final Rule was published. Letter from Tom Horne, Ariz. Att'y Gen., to Eric H. Holder, Jr., Att'y Gen. of the United States (Apr. 18, 2013) (on file with the author).

26. *E.g.*, (Terry) Williams v. Taylor, 529 U.S. 362, 404 (2000).

27. *Cf.* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1611–13 (2012) (discussing Justice Scalia's claim that the Court must "assume that Congress picks its words with care").

28. *Cf.* McQuiggin v. Perkins, 133 S. Ct. 1924, 1939 (2013) (Scalia, J., dissenting) (comparing AEDPA's "intricate craftsmanship" with the gears of a Swiss watch).

language that has produced conceptual confusion and heroic practical problems.²⁹

The Court has acknowledged these facts of AEDPA life and has compensated by exercising judgment in the face of ambiguity. Historically, the justices have always adjusted habeas law without explicit warrant in positive statutes.³⁰ In part, they have relied on the writ's "equitable" heritage, incorporated in the general provisions conferring habeas jurisdiction and in the longstanding direction from Congress to deal with habeas petitions "as law and justice require."³¹ Much habeas corpus jurisprudence—established before and since 1996—takes what Congress has written as a point of departure, but nonetheless shoulders considerable judicial responsibility for the way things habeas should be.³² This is the approach that should be taken to Chapter 154.

To be sure, the Court purports always to assume that provisions in the 1996 Act changed preexisting habeas law—usually to prisoners'

29. AEDPA's proponents contended that the Act would make habeas corpus more efficient. *See, e.g.*, 141 CONG. REC. 14,524–25 (1995) (statement of Sen. Hatch) (explaining that the bill containing AEDPA would "reform . . . federal habeas corpus" by "correct[ing] some of the deficiencies" in current law). In actual experience, poorly conceived and drawn amendments to Chapter 153 increased the complexity of habeas law exponentially. Difficulties surfaced immediately, leading to years of litigation that continues to this day. Federal habeas corpus has become a jurisprudential Hydra, all the more vexing in that time, effort, and resources are squandered on procedural matters far removed from the merits of petitioners' federal claims. There is an extensive literature documenting this generalization. *See generally* NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 7 (2007); *see also* NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY 68, 71 (2011). There is an alternative background story—namely, that AEDPA was *meant* to create new procedural intricacies that state lawyers could exploit to defeat habeas attacks on criminal convictions and sentences, irrespective of the merits. In putting a question to a witness at a hearing in 2005, the former California attorney general boasted that his office "wrote the language which was adopted by the Congress" in 1996. *See Terrorist Death Penalty Enhancement Act of 2005 and the Streamlined Procedures Act of 2005: Hearings on H.R. 3060 and H.R. 3035 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the Comm. on the Judiciary*, 109th Cong. 119 (2005) (statement of Rep. Lungren).

30. *See* *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) (acknowledging the Court's "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged").

31. 28 U.S.C. § 2243 (2012); *accord* *Withrow v. Williams*, 507 U.S. 680, 715 (1993) (Scalia, J., dissenting in part). The best example is *Teague v. Lane*, which severely limits the claims that are cognizable in federal collateral proceedings without reference to any statutory provision even vaguely in point. 489 U.S. 288 (1989). In *Danforth v. Minnesota*, the Court nonetheless explained that "*Teague* is based on statutory authority." 552 U.S. 264, 278–79 (2008).

32. *E.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (explaining that it was necessary to create a rule for harmless error to be applied in habeas cases because Congress had established none by statute); *Rose v. Lundy*, 455 U.S. 509, 516–17 (1982) (justifying a rule for cases in which prisoners file petitions containing some claims that are ready for federal adjudication and some claims that are not on the ground that Congress had not anticipated the problem).

disadvantage.³³ The common explanation is the dubious notion that Congress generally meant AEDPA “to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases.”³⁴ Yet the Court’s decisions do not always favor the state, but, by contrast, sometimes preserve and protect previous arrangements that benefit habeas petitioners.³⁵ The task is to arrive at *sensible* interpretations the text can bear, but does not necessarily command.³⁶

The meaning ascribed to particular provisions must coordinate Chapter 154 with the larger habeas universe of which it is a part. No one supposes that Chapter 154 creates an entirely different, complete, self-contained set of arrangements for death penalty cases from covered states, which eclipses all other aspects of federal habeas law by negative implication.³⁷ Congress did not enact Chapter 154 in isolation, but alongside numerous amendments to Chapter 153 and against the backdrop of the Court’s body of habeas precedents, as well as the Powell Committee’s recommendations. Cases subject to Chapter 154 are also governed by Chapter 153,³⁸ and, in at least some respects, the Court’s own judgments about habeas practice survive even if AEDPA fails to incorporate them explicitly.³⁹

Squaring Chapter 154 with the rest of the habeas world would be a difficult assignment if that world had stood still these last twenty years. It has not. We have seen that the USA PATRIOT Act shifted responsibility for assessing state counsel systems to the Attorney

33. *E.g.*, (Terry) *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

34. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). *But see* Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 445 (2007) (challenging the idea that Congress consistently advanced any particular objectives); *cf.* Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court’s Criminal Docket*, 104 MICH. L. REV. 67, 84–87 (2005) (contending that the justices have voted along ideological lines in AEDPA cases).

35. *E.g.*, *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (concluding that the limitation period AEDPA establishes for habeas petitions admits of a previously recognized exception for cases in which prisoners present proof of actual innocence); *Panetti v. Quarterman*, 551 U.S. 930, 943–44 (2007) (retaining the pre-Act definition of “second or successive” petitions).

36. I do not mean to engage the jurisprudential debate over interpretive methodology generally, but only to argue that in this context courts should choose workable interpretations when a statutory text permits same.

37. *But cf.* RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 125 n.35 (6th ed. 2011) (floating the argument that since Chapter 154 applies to “cases arising under section 2254” its provisions supplement only those aspects of habeas law that are established by § 2254 and “substitute” for habeas rules and procedures ascribable to other elements of Chapter 153).

38. In *Lindh v. Murphy*, the Court recognized that 28 U.S.C. § 2264 “is explicit in applying” some provisions in Chapter 153 to capital cases controlled by Chapter 154, and described provisions in Chapter 153 as “applying to habeas cases generally, including cases under chapter 154.” 521 U.S. 320, 332, 334 (1997).

39. *McQuiggin*, 133 S. Ct. at 1931–32 (making this point in the case of the judicially fashioned “miscarriage of justice” exception to procedural bar rules).

General.⁴⁰ That Act also made changes in the Chapter 153 provision on stays of execution and adjusted the timetables for federal court action on applications for habeas relief in death penalty cases subject to Chapter 154.⁴¹ Most important, in an astonishing number of full-dress opinions, the Supreme Court has elaborated both on its own habeas doctrines and on the amendments AEDPA made to Chapter 153.

Tracing the influence of the Powell Committee presents a unique challenge. There is no gainsaying that the Committee provided the general model for Chapter 154, nor that many provisions in the statute plainly stem from analog elements of the Committee's plan. It will often make perfect sense, accordingly, to interpret Chapter 154 provisions to effectuate the Committee's recommendations. Recall, however, that the Committee assumed that habeas law would remain as it was in 1989 save for the changes its own proposals would make.⁴² The Committee did not reckon with the amendments to Chapter 153 that would be adopted along with Chapter 154, far less the changes the PATRIOT Act would make later. Nor could the Committee foresee the course and implications of the Supreme Court's decisions in habeas cases.⁴³

We will see that, in some respects, Chapter 154 refashions the Committee's plan to correspond to changes in Chapter 153 and the march of decisional habeas law. In some instances, moreover, there are differences between the Powell Committee's stated objectives and the text of its own recommendations. Indeed, the Committee was at times surprisingly dense in failing to see that the terms of a recommendation, if taken literally, would actually frustrate its goals.⁴⁴ There, too, Chapter 154 can and should be read to embrace more serviceable alternatives. At all events, when provisions in Chapter 154 depart from the Powell Committee, the reasons are not self-evident. It may be that Chapter 154 rejects the Committee's guidance in whole or in part, but that inference is not compelled. Different terms may be the product of drafting protocols, clumsy efforts to polish, oversight, ignorance, or (so often with respect to AEDPA) plain bad grammar.

40. See *supra* note 20 and accompanying text.

41. See *infra* text accompanying notes 51, 237.

42. See *supra* note 11 and accompanying text.

43. The surprising development of the *Teague* doctrine is a prime illustration. The progenitor decision, *Teague v. Lane*, 489 U.S. 288 (1989), was handed down on February 22, 1989. The Committee Report was dated August 23, 1989, and obviously had been formulated over the preceding months. The Committee could not have digested the Court's decision, far less anticipated what the *Teague* doctrine would grow to be in the years ahead.

44. See *infra* text accompanying notes 113–15.

The interpretations I offer in this article are not ineluctable. Some, indeed, may seem improbable at first glance. But they are defensible as plausible readings of the text. To appraise them, one must ask whether they are any less so than the competing alternatives. We are not obliged to make the worst of this law when there are justifiable ways to make the best of it.

III. THE PARTICULARS OF CHAPTER 154

A. *Stays of Execution*

Chapter 154 addresses stays of execution in 28 U.S.C. § 2262. Once counsel is appointed to represent a prisoner in state postconviction proceedings, § 2262(a) mandates that the prisoner's execution "shall be stayed upon application to any court that would have jurisdiction" to entertain a federal habeas petition. Under § 2262(b), a stay "granted pursuant to [§ 2262(a)]" expires under any of three conditions: the prisoner fails to file a timely petition for federal habeas relief; the prisoner forgoes the opportunity to seek habeas relief; or the prisoner files a seasonable petition, but either "fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review." If "one of [these] conditions . . . has occurred," § 2262(c) specifies that "no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b)."

Section 2262 should be interpreted to implement the best of the Powell Committee's ideas—namely, the elimination of stressful litigation over stays.⁴⁵ A troubling pattern had developed. State authorities scheduled executions before prisoners had begun, far less completed, efforts to upset their convictions or sentences in postconviction proceedings. Prisoners responded with motions for stays in state court, federal court, or both. State authorities resisted. And everyone was consumed with and by emergency proceedings that sometimes stretched into the eleventh hour. The judges on the Committee had no taste for late-night sessions conducted over the telephone with the lives of petitioners in the balance.

None of this wear and tear on the parties and the courts was necessary. According to the Committee, prisoners, for their part, were content to postpone legal action that might fail and clear the

45. POWELL COMMITTEE REPORT, *supra* note 11, at 24,695.

way for their execution.⁴⁶ State authorities, for theirs, set execution dates primarily to prod reluctant prisoners into action.⁴⁷ The Committee's answer was to encourage prisoners to pursue postconviction relief via the 180-day filing period for initiating federal habeas proceedings.⁴⁸ State authorities then would be less inclined to fix early execution dates. If they did so anyway, the Committee proposed that a stay should be "a matter of right," albeit a stay should expire if the prisoner suffered a denial of relief after the "completion of district court and court of appeals review," as well as any subsequent Supreme Court proceedings.⁴⁹

The Committee recommended that an additional mandatory stay should be available only in cases of a certain kind—specifically, cases in which state authorities unlawfully prevented prisoners from presenting claims earlier and cases in which prisoners advanced claims based on new rules of law applicable in habeas actions or claims supported by a "factual predicate that could not have been discovered through the exercise of reasonable diligence" and was "sufficient . . . to undermine the court's confidence in the jury's determination of guilt on the offence . . . for which the death penalty was imposed."⁵⁰ In this, the Committee's proposal was similar to the text Congress would later enact as § 2244(b) to govern all second or successive habeas petitions and would incorporate by reference in § 2262.

A proper interpretation of § 2262 must account for related elements of habeas law with which this new provision coexists. For our purposes, a brief summary will suffice. The provision that § 2262 explicitly incorporates, 28 U.S.C. § 2244(b), is an AEDPA amendment to Chapter 153, ostensibly meant to confine second or successive habeas petitions to the most deserving cases, both capital and noncapital. Under § 2244(b)(3)(A), a prisoner who wishes to file such a petition at the district level must first obtain leave from the appropriate circuit court of appeals. Under § 2244(b)(2)(A)–(B), a second or successive application can be considered only if the prisoner advances a claim based on a "new rule of constitutional law" that is enforceable in federal collateral proceedings or a claim grounded in a "factual predicate" that "could not have been discovered previously through the exercise of due diligence" and is "sufficient to establish by clear and convincing evidence that, but for

46. *Id.*

47. *Id.* at 24,694.

48. *Id.* at 24,695.

49. *Id.* at 24,697.

50. *Id.*

constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”

A general provision on stays in Chapter 153, 28 U.S.C. § 2251, grants federal courts discretion to stay state proceedings against a prisoner to ensure that federal adjudication can proceed. In 2005, the USA PATRIOT Act revised § 2251, while leaving § 2262 untouched.⁵¹ Section 2251(a)(1) authorizes a federal judge before whom a habeas corpus proceeding is “pending” to stay any state action against the prisoner. Section 2251(a)(2) specifies that a “habeas corpus proceeding is not pending until the application [for habeas relief] is filed.” Yet recognizing that a prisoner under sentence of death needs a stay to allow time to develop a petition, § 2251(a)(3) authorizes a court “that would have jurisdiction” to entertain a habeas application to issue a stay of execution as soon as the prisoner asks for assigned counsel. Section 2251 fixes no standard to guide the court’s discretion, but the Supreme Court has held that a stay should usually be granted if necessary to examine a prisoner’s first petition and that a stay can be granted for purposes of a second or successive application when there are “substantial grounds for relief.”⁵² A discretionary pre-petition stay can extend no longer than ninety days after counsel is appointed. A prisoner who obtains a ninety-day stay under § 2251(a)(3) may seek another stay at the end of that time, provided that, by then, he or she has filed a habeas petition that initiates a “pending” proceeding and thus engages the separate authorization for stays established by § 2251(a)(1).

1. *Mandatory stays*

Section 2262 in Chapter 154 supplements § 2251 in Chapter 153 by making stays in death penalty cases mandatory rather than discretionary. This is in keeping with the Powell Committee’s plan largely to defuse litigation over stays while death-sentenced prisoners pursue postconviction relief.⁵³ As soon as Chapter 154 is brought into play by the appointment of counsel, § 2262(a) directs that an execution “shall be stayed” upon the prisoner’s application to any court that “would have jurisdiction” to entertain a federal habeas petition.⁵⁴

The provisions in § 2262(b) for the expiration of a mandatory stay also track the Powell Committee program, which equally

51. See *supra* text accompanying note 41.

52. *Bowersox v. Williams*, 517 U.S. 345, 346 (1996) (per curiam) (dealing with a second or successive petition); *Lonchar v. Thomas*, 517 U.S. 314, 325 (1996).

53. POWELL COMMITTEE REPORT, *supra* note 11, at 24,695.

54. See *infra* notes 185–86 and accompanying text (discussing the link between the appointment of counsel and the 180-day filing period for a habeas application identifying the prisoner’s claims).

contemplated that a stay should terminate if the prisoner fails to file a timely habeas petition, waives the chance to pursue a postconviction challenge, or suffers a denial of relief.⁵⁵ The language § 2262(b)(3) employs to describe this last condition departs from the text of the Powell Committee's proposal, which spelled out in detail that a mandatory stay holds through the normal appellate process.⁵⁶ Recall that § 2262(b)(3) specifies the denial of relief "in the district court or at any subsequent stage of review." But it would be nonsense to conclude that a mandatory stay disappears as soon as an inferior federal court reaches an unfavorable decision.

In the postconviction context, the judgment of a district or circuit court is not conventionally final until it is sustained on direct review or the time for seeking review has expired.⁵⁷ The general federal statutes governing the jurisdiction of the circuit courts and the Supreme Court contemplate that a district court decision is open to reexamination on appeal in the ordinary course.⁵⁸ Section 2262(b)(3) obviously does not repeal those statutes expressly and cannot do so implicitly by negative inference.⁵⁹ Moreover, an attempt to insulate a district court judgment from appellate superintendence would evoke constitutional objections—including, but not limited to, Congress' authority to restrict the Supreme Court's jurisdiction established by Article III.⁶⁰

It is far more satisfying to read § 2262(b)(3) as an attempt to state the Powell Committee's program more economically—that is, to mean that a mandatory stay expires if and when relief is denied by final action up the federal ladder. The idea is not that a mandatory stay expires the moment a district court denies relief and that appellate review is foreclosed or irrelevant. It is that a mandatory stay dissolves when a denial of relief by any federal court in the hierarchy becomes *final* and thus authoritative, either by operation of law when no appellate review is sought or by ultimate decision in the Supreme Court. This understanding fully accounts for the disjunctive "or" in

55. POWELL COMMITTEE REPORT, *supra* note 11, at 24,697.

56. See *supra* text accompanying note 49.

57. *Clay v. United States*, 537 U.S. 522, 527 (2003); see *infra* note 189 and accompanying text (discussing the same understanding of final state court judgments).

58. See 28 U.S.C. §§ 1254, 1291 (2012).

59. See *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 314 (2001) (applying this general rule in the habeas context).

60. See *Felker v. Turpin*, 518 U.S. 651, 661–62 (1996) (construing a limitation on the Court's appellate jurisdiction to leave original jurisdiction in place and thus avoiding any question under Article III); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1505 (2000) (arguing that the "inferior" character of federal courts necessarily contemplates supervisory authority in the Supreme Court).

the text. A stay *can* expire on the strength of a denial of relief by a district court *or* another court further up the line, but only when the relevant decision becomes final.

In one respect, § 2262(b)(3) adds a condition the Powell Committee did not recommend—namely, a stay of execution expires if a docketed habeas petition “fails to make a substantial showing of the denial of a Federal right.” This “substantial showing” formulation should be interpreted to contemplate only the modest requirement that the petition contain a non-frivolous claim. If a “substantial showing” were read to demand more, federal courts would necessarily have to entertain litigation over its proper application, if and when state authorities complain. That, in turn, would be inconsistent with the essential point of § 2262 to *avoid* distracting fights over stays.⁶¹

It would be untenable to read the “substantial showing” formulation as it is used in § 2262(b)(3) to have the same meaning it has been given elsewhere—for example, in 28 U.S.C. § 2253(c)(2), where it describes the standard a prisoner must meet to appeal from a negative district court judgment.⁶² The “substantial showing” test has never been a good fit in that context. On its face, it suggests that a prisoner must establish that his or her claim is meritorious when, by hypothesis, the district court has already found it wanting. The Court has forced it to fit, however, by holding that a prisoner makes the necessary “substantial showing” if “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner.”⁶³

The appearance in § 2262(b)(3) of language that also appears in § 2253(c)(2) is best understood as either the unknowing use of a phrase that has acquired special meaning in another context or a mistake born of the drafters’ failure to distinguish two quite different situations. Here, the business at hand is not to determine whether it is worthwhile for a circuit court to review a district court judgment for

61. Any conditions on the continuation of a stay obviously undercut the Powell Committee’s objective to eliminate litigation over stays. The 180-day rule, for example, can be enforced in its own right. It was neither necessary nor prudent to make the timeliness of a petition a condition for the continuation of a stay of execution, thus making a motion to rescind a stay the occasion for adjudicating filing-period issues by proxy. Then again, if the 180-day rule induces prisoners to apply for federal habeas relief as soon as possible, the states will have no reason to set execution dates and stays will be unnecessary—which, again, was the Committee’s plan.

62. The only textual difference is that § 2253(c)(2) demands a substantial showing of the denial of a “constitutional” rather than a “Federal” right. The Supreme Court has finessed the limit of appeals to substantial constitutional issues. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (permitting appellate consideration of substantial contentions regarding nonconstitutional habeas law).

63. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack*, 529 U.S. at 475).

error. The task is to determine whether a petition has enough potential merit to warrant consideration by a district court in the first instance, thus to justify extending a stay of execution. Any door-keeping standard at this stage must be low. Otherwise, the working premise would again be put at risk—that is, the premise that a prisoner should have one opportunity to pursue state and federal relief without the distractions and costs of litigation over a stay of execution necessary to make it possible. The precedents treating discretionary stays issued under § 2251 identify no standard at all and, at most, require only a colorable claim.⁶⁴ If litigation over stays is to be avoided in capital cases subject to Chapter 154, the “substantial showing” standard in § 2262(b)(3) can be no more demanding and, indeed, should be less.⁶⁵

Reading § 2262(b)(3) to require only the assertion of a non-frivolous claim comports with the pleading rules for habeas corpus petitions generally, including applications subject to Chapter 154. Rule 4 of the Rules Governing § 2254 Cases instructs a district court to dismiss an initial petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief.”⁶⁶ The Supreme Court has explained that a petition may be dismissed summarily only if the allegations are “vague,” or “conclusory,” or “palpably incredible,” or “patently frivolous or false.”⁶⁷ If a petition clears this modest hurdle, the court must order

64. See *McFarland v. Scott*, 512 U.S. 849, 860 (1994) (O’Connor, J., dissenting in part). The test for determining whether a complaint is sufficient to invoke federal-question jurisdiction under 28 U.S.C. § 1331 is also famously generous. See *Bell v. Hood*, 327 U.S. 678, 682–83 (1946) (explaining that jurisdiction is sustained unless the federal issue is “wholly insubstantial and frivolous”).

65. The Court held in *Martinez v. Ryan*, that a prisoner’s procedural default in state court may be excused on the ground that counsel rendered ineffective assistance in state postconviction proceedings if, *inter alia*, the claim that counsel was ineffective is “substantial.” 132 S. Ct. 1309, 1320–21 (2012). The Court explained that a claim is “substantial” in that context if it has “some merit.” *Id.* Recognizing, perhaps, that the “substantial” term brings to mind the test for approving an appeal, the Court cited *Miller-El* as “cf.” authority, thus signaling that “substantial” does not necessarily have the same meaning in both places. See also *id.* at 1322 n.2 (Scalia, J., dissenting) (reading the Court to say that a claim is “substantial” in default cases if it has “at least some merit”).

66. The reference in Rule 4 to a prisoner’s entitlement to “relief” opens the argument that Rule 4, too, like the Court’s interpretation of the “substantial showing” phrase in § 2253(c)(2), requires consideration of whether some habeas corpus statute might bar federal habeas relief even with respect to a claim the federal court regards as meritorious. Yet when Rule 4 and § 2253 were originally adopted, a meritorious claim and an entitlement to relief were synonymous. It is only recently that the Court has expanded the idea of an entitlement to relief to cover compliance with statutes that sometimes limit a federal court’s authority to order a prisoner’s release despite the merits of a claim.

67. *Blackledge v. Allison*, 431 U.S. 63, 75–76 (1977).

the respondent to file an answer, which then joins the issues for adjudication. Together, § 2262 and Rule 4 establish a workable scheme: A prisoner who wishes to challenge a conviction or death sentence is entitled to a stay of execution on request. If the prisoner then files a timely petition sufficient to avoid summary dismissal, the stay will persist through all stages of the litigation to follow.

2. *Multiple stays*

Section 2262(c) provides that, if any of the conditions in § 2262(b) occurs, “no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).”⁶⁸ This provision, too, follows the Powell Committee.⁶⁹ If a mandatory stay has just expired, it would scarcely make sense that a federal court should immediately be required to issue another one in its place, no questions asked. Then again, it makes a great deal of sense that a further stay should be available in some circumstances. Section 2262(c) can and should be read to allow for same.

Initially, the general prohibition on further stays should be read to apply only to additional mandatory stays issued under the authority of § 2262(a)—not to stays issued in the court’s discretion under § 2251.⁷⁰ The text of § 2262(c) is general, referring loosely to “a stay of execution in the case.” Yet the context is specific. Section 2262(c) appears in a provision of Chapter 154 dealing with mandatory stays and specifies the full consequences when a mandatory stay expires under § 2262(b)—namely, the prisoner is no longer entitled to a stay on simple application to a federal court. Nothing in § 2262(c) expressly disclaims a federal court’s independent authority under § 2251. One can read § 2262(c) to affect that authority only by drawing an unnecessary negative inference. It is far more sensible to interpret all the elements of § 2262, including § 2262(c), to deal with the Powell Committee’s plan for mandatory stays. It follows that a prisoner whose § 2262(a) mandatory stay expires may obtain a later § 2251 stay, provided the court deems it warranted.

68. It should be noncontroversial that § 2262(c) has only to do with a case in which a stay previously issued as a matter of right has expired under one of the conditions listed in § 2262(b), which explicitly deals only with a mandatory stay “granted pursuant to [§ 2262(a)].” Section 2262(c) has nothing to say about a case in which a prisoner previously secured a stay that was authorized (but not required) under § 2251.

69. POWELL COMMITTEE REPORT, *supra* note 11, at 24,697.

70. See *supra* text accompanying notes 51–52.

Section 2262(c) should be interpreted to make another stay mandatory when a prisoner advances a second or successive application. The text is explicit on this point. When one mandatory stay expires pursuant to § 2262(b), a future stay is barred *unless* the petitioner obtains circuit court approval for a second or successive habeas petition under § 2244(b). Put the other way, another stay *can* issue if the prisoner *does* secure approval for a second or successive application.⁷¹ Because leave to file such a petition is an exception to the rule governing mandatory stays, the fair inference is that a stay made possible by the exception is itself a matter of right. To interpret the exception to allow only for a discretionary stay would again be to read § 2262(b) to affect the court's authority under § 2251—without textual support.

This last interpretation is consistent with the Powell Committee model on which § 2262 is based. True, the Committee envisioned one meaningful opportunity for postconviction review and discouraged multiple applications for federal relief.⁷² Yet the Committee expressly approved a “mandatory” stay for subsequent proceedings, provided a prisoner satisfies standards similar to the conditions for a second or successive petition under § 2244(b).⁷³

It would be infeasible to withhold a stay until a prisoner actually goes to a circuit court and returns with leave to file a second or successive application. Section 2262(c) should therefore be read to mandate a stay from the district court while a prisoner seeks permission from a circuit court. The resulting arrangement is cumbersome, but no more arduous when Chapter 154 is in play than in the run of habeas cases. In most instances, the circuit court will deny the prisoner's request to file another petition, and the stay will dissolve at that point. If, however, the prisoner is allowed to press a second or successive application, the stay should cover those proceedings through to final resolution at the appellate level. Of course, a prisoner seeking approval for a second or successive application also may seek and secure a stay of execution under § 2251, either after such a petition is filed or before, pursuant to § 2251(a)(3).⁷⁴

71. A prisoner's first request for a mandatory stay under § 2262(a) need not be for purposes of a first application for habeas relief. A prisoner who is not threatened with immediate execution when he or she is considering an initial federal petition needs no stay at that time, but may face execution later and thus may request a stay for the first time in connection with a second or successive petition.

72. POWELL COMMITTEE REPORT, *supra* note 11, at 24,697.

73. *Id.*

74. See *supra* notes 51–52 and accompanying text.

In the end, § 2262 in Chapter 154 combines with § 2251 in Chapter 153 to establish a coherent scheme for stays of execution in capital cases. Under § 2262, a pre-petition stay is guaranteed and typically remains operative until the conclusion of federal litigation at all levels. A mandatory stay expires if the prisoner fails to file a timely, non-frivolous habeas petition or suffers a final denial of habeas relief. Thereafter, the prisoner is generally no longer entitled to a stay as a matter of right. There is an exception, however, if the prisoner seeks leave to advance a second or successive federal petition under § 2244(b). If the prisoner obtains permission, the mandatory stay remains in place while any further habeas action is adjudicated. A prisoner under sentence of death may also secure a stay of execution issued under the authority of § 2251. A discretionary stay does not expire by operation of law when one of the conditions in § 2262(b) occurs. Nor is a court's authority to grant multiple discretionary stays affected by the general language in § 2262(c).

This understanding is consistent with the text Congress wrote into law—both, in 1996, when AEDPA introduced § 2262 and § 2244(b), and, in 2005, when the USA PATRIOT Act reworked § 2251 regarding discretionary stays. The resulting scheme is needlessly complicated, to be sure. The relevant statutes were written at different times by different sets of drafters who failed to appreciate fully either the need for stays of execution at the various stages of capital cases or the time and resources that can be wasted in fights over stays rather than the merits of petitioners' claims. Yet, interpreted this way, the statutes governing stays promise to work, thus to implement the Powell Committee's attractive vision. When Chapter 154 comes into play, the days of costly, agonizing litigation over stays of execution should be over.

B. Amendments

Chapter 154 provides, in 28 U.S.C. § 2266(b)(3)(B), that “[n]o amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).” This provision has no antecedents in the Powell Committee. The challenge, then, is to determine the most satisfying way to fit § 2266(b)(3)(B) into the law governing amendments in habeas corpus cases generally.

Again, a summary will do. Under 28 U.S.C. § 2242, a longstanding component of habeas law not amended by AEDPA, habeas petitions “may be amended or supplemented as provided in the rules of procedure applicable to civil actions.” Rule 15(a) of the Federal Rules of Civil Procedure provides that pleadings may be amended “once as a matter of course” within twenty-one days of service or, if a responsive pleading is required, within twenty-one days after the response or service of a motion to dismiss under Rule 12. Thereafter, amendments require consent or leave of court. Amendments relate back to the date of the original pleading, provided the original and amended pleadings arose out of “the [same] conduct, transaction, or occurrence. . . .”⁷⁵

Nothing in § 2266(b)(3)(B) purports to change the arrangements for amendments prior to the respondent’s answer. But with respect to later amendments, this provision, like § 2262(c) on stays of execution, borrows from § 2244(b), the provision in Chapter 153 pertaining to second or successive applications for federal habeas relief.⁷⁶

It is not obvious what we should make of § 2266(b)(3)(B). Its location among timetables for federal action may be probative.⁷⁷ It may be that this provision reinforces the 180-day filing period for capital habeas petitions. Amendments can effectively extend the clock if they are accepted after the filing period has run and relate back to the date of the original petition. The AEDPA drafters may have worried that prisoners would smuggle tardy allegations into amendments after the clock has expired.⁷⁸ In 1996, concerns along those lines may have appeared realistic because, by some accounts, the “conduct, transaction, or occurrence” to which an amendment related back was the entirety of the state criminal prosecution that produced a prisoner’s conviction and sentence.⁷⁹ Virtually any allegation challenging the conviction or sentence would arise from an event defined so broadly.

In this instance, however, as in so many others, subsequent developments have largely eliminated any threat to the habeas filing period. The Supreme Court has held that an amendment to a habeas

75. FED. R. CIV. P. 15(c)(1)(B).

76. See *supra* text accompanying note 71.

77. See *infra* notes 235–38 and accompanying text (treating other aspects of § 2266).

78. The (unsuccessful) Streamlined Procedures Act of 2005 included a proposed change in the rules governing amendments. *Terrorist Death Penalty Enhancement Act of 2005 and the Streamlined Procedures Act of 2005: Hearings on H.R. 3060 and H.R. 3035 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the Comm. on the Judiciary*, 109th Cong. 28, 54, 63, 65–66 (2005). The hearings suggested that proponents were concerned that amendments would defeat the filing period for habeas cases generally. By then, however, this provision in AEDPA was already in place.

79. *E.g.*, *Ellzey v. United States*, 324 F.3d 521, 525–27 (7th Cir. 2003).

petition arises from the same “conduct, transaction, or occurrence” only if the claim contained in the amendment is grounded in the “same core facts” as the claims in the original petition.⁸⁰ Section 2266(b)(3)(B) is redundant if it incorporates the standards governing second or successive petitions to head off unseasonable habeas claims. Stiff standards governing amendments are no longer needed now that most amendments would not relate back even if they were accepted.

The choice of the standards in § 2244(b) is curious. By their nature, amendments do not entail additional suits and all the inefficiencies and delays that attend piecemeal litigation. Those are the problems that explain the stringent criteria for second or successive petitions. Amendments, by contrast, make the best of an initial application for federal relief. Barring most amendments at the post-answer stage only forces prisoners to resort to second or successive petitions, which then add to and prolong litigation in capital cases subject to Chapter 154.⁸¹

It is manifest that § 2266(b)(3)(B) does (unwisely) introduce the standards for second or successive petitions into the amendment context. But we need not live with the complex mechanics entailed in the operation of § 2244(b) in its own precincts. There, a prisoner who wishes to advance a new claim in a second or successive petition must first obtain permission from the court of appeals. By contrast to § 2262(a) on stays of execution (which contemplates action in the court of appeals), § 2266(b)(3)(B) refers only to the “grounds specified in section 2244(b).” Accordingly, § 2266(b)(3)(B) can and should be read to authorize a district court entertaining an amendment motion itself to apply the standards for second or successive applications. This interpretation makes sense, albeit within a questionable larger plan for amendments. The language in § 2266(b)(3)(B) may restrict the reasons a district court can accept for an amendment post-answer, but it need not be read to funnel the petitioner’s motion to the appellate level.

80. *Mayle v. Felix*, 545 U.S. 644, 657 (2005).

81. Claims that can be advanced in amendments under § 2266(b)(3)(B) because they meet one of the standards in § 2244(b) are likely to rest on new factual allegations and thus will not have the benefit of the relation-back feature in Rule 15. This being so, counseled and knowledgeable petitioners are unlikely to offer such claims via amendments for the purpose of meeting the filing deadline.

The restriction on amendments in § 2266(b)(3)(B), however inscrutable, does count as a state-friendly element of Chapter 154 that is absent from habeas litigation generally. Prisoners under sentence of death in covered jurisdictions will be pressed to sharpen their allegations before the respondent answers. States hoping to elude federal claims on procedural grounds may regard this as a reason for obtaining certification.

C. The Scope of Federal Adjudication

The only provision in Chapter 154 addressing the substance of federal court adjudication is 28 U.S.C. § 2264. Section 2264(a) states that a federal district court entertaining a petition “shall only consider” a claim that was “raised and decided on the merits” in state court, “unless the failure to raise the claim properly” was: (1) “the result of State action in violation of the Constitution or laws of the United States;” (2) “the result of the Supreme Court’s recognition of a new Federal right that is made retroactively applicable;” or (3) “based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.”⁸² Section 2264(b) states that “[f]ollowing review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.”⁸³

We will see that § 2264 is best understood to address cases in which death row prisoners present claims the state courts refuse to entertain because of procedural default in state court. On this occasion, the AEDPA drafters substantially rejected a key recommendation of the Powell Committee. In the Committee’s view, death penalty litigation was too often delayed because federal habeas courts postponed federal adjudication until prisoners first exhausted their remedies in state court.⁸⁴ The Committee recommended that, in some circumstances, a federal court entertaining a capital habeas case from a covered jurisdiction should not wait for a claim to be presented to the state courts, but should promptly conduct any hearing necessary to complete the record and then should itself determine the merits.

Section 2264 should be read to contemplate that state courts will continue to have the first opportunity to examine federal claims. This interpretation reconciles § 2264 with settled habeas rules and procedures like the exhaustion doctrine and also with innovations in

82. See *infra* notes 144–53 and accompanying text.

83. See *infra* text accompanying notes 122, 171.

84. POWELL COMMITTEE REPORT, *supra* note 11, at 24,694.

general habeas law introduced by AEDPA's amendments to Chapter 153—as they have developed since by dint of Supreme Court decisions. The Powell Committee recommendation would have changed habeas practice significantly, albeit not, in this instance, always to favor the state in habeas litigation. The statute Congress enacted is largely favorable to the state, but, once again, in ways that equally protect state interests in cases not subject to Chapter 154.

Here, too, a summary of relevant arrangements is necessary. Under longstanding precedents and a codification of those precedents in 1948, 28 U.S.C. § 2254(b)–(c),⁸⁵ a prisoner seeking federal habeas relief must first exhaust state court opportunities to vindicate a federal claim.⁸⁶ If, at the time a petition for federal habeas relief is filed, the state concerned offers an effective means of adjudicating a claim, a federal district court will typically dismiss the claim without prejudice to another federal petition presenting the claim after state remedies have been exhausted.⁸⁷ The prisoner's responsibility is to give the state courts an opportunity to pass on the claim; whether the state courts address the claim is their own affair.⁸⁸ If a filing period will expire before the prisoner can return to federal court, the federal court may hold federal proceedings in abeyance while the prisoner litigates a claim in state court—provided the prisoner shows “cause” for failing to exhaust state remedies with respect to all claims in the first instance.⁸⁹

Pursuant to the “total exhaustion” rule established by the Supreme Court, if a prisoner files a federal petition containing both a claim previously presented to the state courts and a claim the state courts have had no chance to address, the federal court will decline to consider either claim.⁹⁰ The prisoner may withdraw both claims, take the premature claim to state court, and return to federal court when both claims are ready for federal consideration.⁹¹ Or the prisoner may secure prompt federal adjudication of the mature claim by deleting only the premature claim. If the prisoner follows this

85. See H.R. REP. NO. 80-808, at A180 (1947) (stating that these provisions were “declaratory of existing law as affirmed by the Supreme Court”).

86. See *Bowen v. Johnston*, 306 U.S. 19, 26–27 (1939) (explaining that the exhaustion doctrine “is not one defining power but one which relates to the appropriate exercise of power”).

87. See *Slayton v. Smith*, 404 U.S. 53, 54 (1971) (per curiam) (explaining that dismissal is usually the appropriate disposition).

88. See *Smith v. Digmon*, 434 U.S. 332, 333–34 (1978) (per curiam) (explaining that it makes no difference whether the state courts addressed a claim).

89. See *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005) (explaining that it would be an abuse of discretion to deny a stay in these circumstances).

90. See *Rose v. Lundy*, 455 U.S. 509, 510 (1982) (holding that a “mixed” petition should be dismissed in its entirety).

91. See *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (per curiam).

second course, exhausts state remedies with respect to the deleted claim, and later advances that claim in another application for federal relief, that petition can be entertained only under the conditions specified in § 2244(b) for second or successive applications.⁹²

Under precedents never codified, a prisoner's claim may be foreclosed in federal habeas because of procedural default in state court.⁹³ State courts may decline to entertain a federal claim if the prisoner failed to raise it at the time and in the manner prescribed by state law. Out of respect for state arrangements, a federal habeas court will also turn the prisoner away—provided the basis of the state court decision constitutes an adequate and independent state ground that would insulate the state judgment from Supreme Court jurisdiction if the case were before the Court on direct review.⁹⁴ If the state law basis of decision is adequate and independent, the federal claim is foreclosed—unless the prisoner shows “cause” for the procedural default in state court and resulting “prejudice,” or the prisoner brings his or her case within a “miscarriage of justice” exception by making a “credible showing of actual innocence.”⁹⁵

For these purposes, a prisoner demonstrates “cause” if, at the time a claim might have been raised in state court its factual or legal basis was not “reasonably available,” if state authorities made counsel's compliance with state procedures “impracticable,” or if counsel's failure to comply constituted ineffective assistance (usually) in the constitutional sense.⁹⁶ Proof of “prejudice” overlaps with the elements of a meritorious claim inasmuch as “prejudice” is shown if the federal error that went uncorrected in state court “so infected the entire trial that the resulting conviction” was unfair.⁹⁷ A prisoner who challenges his or her conviction invokes the “miscarriage of justice” exception by presenting new evidence demonstrating that it is “more likely than not that no reasonable juror” who saw the evidence “would have” voted to convict.⁹⁸ A prisoner who attacks only a death sentence does so by presenting “clear and convincing” evidence showing that “but for a constitutional error,” no “reasonable juror” would have found the petitioner eligible for the death penalty.⁹⁹

92. *Id.* (confirming a suggestion in *Lundy*).

93. *See* *Wainwright v. Sykes*, 433 U.S. 72, 89–91 (1977).

94. *Id.* at 81–83; *see* *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (reaffirming this point).

95. *See* *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013) (amplifying the “miscarriage of justice” exception); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (articulating these categories).

96. *Murray*, 477 U.S. at 488.

97. *United States v. Frady*, 456 U.S. 152, 169 (1982); *see* *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (acknowledging the convergence of “prejudice” and the demonstration of a meritorious claim).

98. *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995).

99. *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992).

The Supreme Court has read 28 U.S.C. § 2254(d), a provision in Chapter 153 amended by AEDPA, to mean that if a state court rejected a federal claim on the merits, a federal habeas court typically cannot hold its own evidentiary hearing, but must examine the claim on the basis of the record as it was in state court and cannot grant relief unless (roughly speaking) the state decision was not only incorrect, but also unreasonable.¹⁰⁰ The Court itself must defer to a “reasonable” state court merits decision when the Court entertains a case in a habeas posture.¹⁰¹ For purposes of § 2254(d), a state court adjudicated a claim on the merits if the court rejected the claim “based on the intrinsic right and wrong of the matter.”¹⁰² If the state court simply overlooked the claim, § 2254(d) is inapplicable, and the federal court will examine the claim *de novo*.¹⁰³

Finally, the Court has held that under another AEDPA amendment to Chapter 153, 28 U.S.C. § 2254(e), a federal court must “presume” that factual determinations reached by state courts are correct and is usually barred from holding an evidentiary hearing if the prisoner failed to develop the facts in state court.¹⁰⁴ A prisoner is responsible for inadequate fact development in state court unless the prisoner demonstrates that he or she diligently attempted to bring the facts to light but was prevented from doing so.¹⁰⁵

1. *The exhaustion doctrine generally*

The Powell Committee proposed that a district court should “determine the sufficiency of the evidentiary record . . . based on the claims actually presented and litigated in the state courts except when the prisoner [could] show that the failure to raise or develop a claim in the state courts” fit one of the three exceptions the AEDPA drafters later inserted in § 2264(a).¹⁰⁶ The Committee specified that the federal court would “conduct any requested evidentiary hearing necessary to complete the record” and then “rule on the merits of the claims properly before it.”¹⁰⁷

100. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (reading § 2254(d) alone largely to foreclose federal evidentiary hearings); (Terry) *Williams v. Taylor*, 529 U.S. 362, 411 (2000) (explaining that a state decision the federal court regards as erroneous may nonetheless bar federal habeas relief).

101. *See Brown v. Payton*, 544 U.S. 133, 148–49 (2005) (Breyer, J., concurring) (explaining that a result favorable to a petitioner might have been warranted if the case had come up on direct review).

102. *Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013).

103. *Id.* at 1097–98.

104. (Michael) *Williams v. Taylor*, 529 U.S. 420, 424 (2000) (interpreting § 2254(e)(2)).

105. *Id.* at 432.

106. POWELL COMMITTEE REPORT, *supra* note 11, at 24,698.

107. *Id.* In this instance, the genetic connection between a provision in Chapter 154 and the Powell Committee plan is especially clear. The third exception

In accompanying commentary, the Committee explained that this plan would abrogate the exhaustion requirement with respect to some claims.¹⁰⁸ If a claim was “actually presented and litigated” in state court, state remedies were exhausted and immediate federal adjudication would entail no departure from conventional doctrine.¹⁰⁹ But if a federal court was to adjudicate a claim the prisoner had failed to “raise or develop” in state court, and the state courts might be willing to consider it, the exhaustion requirement had to be relaxed.¹¹⁰ That was the Committee’s proposal for a claim that fit one of the exceptions. Put explicitly, if the prisoner failed to exhaust state remedies for one of those three reasons, the federal habeas court should not send the prisoner back to state court.¹¹¹ Nor should the federal court *permit* the prisoner to go back. Instead, the federal court should itself complete the record and determine whether the claim was meritorious.¹¹²

The Powell Committee’s program was problematic. Discarding the exhaustion doctrine with respect to any claims would have sacrificed all the values generally said to be served by requiring prisoners first to present their claims in state court—for example, avoiding interference with available, or even ongoing, state proceedings and ensuring that state courts have the opportunity to correct their own errors of federal law.¹¹³ Abandoning exhaustion would also have been at odds with the general project to foster improved state court proceedings in which death row prisoners, aided by appointed counsel, would have a better chance to resolve their federal claims. We will see that the Committee itself proposed that the 180-day filing period for petitions subject to Chapter 154 should allow for state court litigation in advance of federal habeas.¹¹⁴

Moreover, the Committee proposed to discard the exhaustion requirement with respect to claims regarding which exhaustion may be most justified. The three exceptions do not capture circumstances

described in § 2264(a) carries forward errors in the Committee recommendation. Presumably, the idea is that the claim itself, not the prisoner’s “failure to raise” the claim, is based on new evidence. Moreover, an exception for cases in which the factual predicate could “not” have been discovered through the exercise of due diligence inexplicably makes the prisoner’s efforts irrelevant. *See infra* note 153.

108. POWELL COMMITTEE REPORT, *supra* note 11, at 24,698.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. The Committee suggested that the states would “prefer to see post-conviction litigation go forward in capital cases,” even at the expense of “a minor subordination of their interest[s].” *Id.*

114. *See infra* notes 174–75 and accompanying text.

in which it would be a waste of time for the prisoner to return to state court. They describe conditions under which the state courts might well understand the prisoner's inability to raise a claim earlier and thus make a state channel available. Indeed, the state courts might be receptive to the substance of a claim that, for example, rests on newly discovered evidence.¹¹⁵

By contrast to the Powell Committee program, § 2264 should be interpreted to preserve the exhaustion doctrine and its corollaries—that is, a federal habeas court typically must dismiss a claim if it has not been presented in the state courts and those courts are open to receive it; a prisoner who suffers dismissal for want of exhaustion may return to federal court when no state court avenue is available; and the exhaustion requirement is satisfied if a claim was presented to the state courts even if the state courts declined to consider it. These familiar propositions not only retain an important role for state courts in postconviction litigation. They conform to other developments in habeas law that the Powell Committee did not anticipate.

Recall again that the Committee adopted its plan in 1989 and assumed that other aspects of existing law would remain in place. In that context, it was feasible to propose that, to save time in some capital cases, a federal court should relax the usual requirement that a prisoner first seek relief in state court. Then, in 1996, AEDPA's adoption of § 2254(d) and § 2254(e) significantly limited a federal court's authority to hold its own hearing and examine a federal claim *de novo* in the wake of an unfavorable determination in state court. It would have been strange if AEDPA had adopted the Powell Committee's plan for abandoning the exhaustion requirement in some death penalty cases, thus eliminating a prisoner's responsibility (and ability) to obtain state court determinations on which § 2254(d) and § 2254(e) would depend. The text of § 2264 does not compel such an odd conclusion, but rather lends itself to an interpretation that preserves the general exhaustion doctrine intact.

Section 2264(a) initially states that a federal habeas court "shall only" consider a claim that was "raised and decided on the merits" in state court. This much is plainly consistent with the exhaustion doctrine. If a claim was presented to the state courts and they

115. The Committee plan would have been difficult to administer. A litigant is generally master of the claims he or she wishes to press, and it is not obvious that a federal court can disallow a prisoner to withdraw a claim, far less prevent the prisoner from taking the claim to state courts willing to receive it. The Anti-Injunction Act typically bars a federal court from interfering with pending proceedings in state court. 28 U.S.C. § 2283 (2012).

responded by deciding it on the merits, state avenues for litigation have been exhausted and the claim is ready for federal consideration.

The Court has held that a state court adjudicated a claim “on the merits” within the meaning of § 2254(d) if the court evaluated the claim “based on the intrinsic right and wrong of the matter.”¹¹⁶ It does not follow that the same formulation necessarily carries the same meaning in § 2264(a).¹¹⁷ But in this instance consistent usage makes sense. Indeed, the “on the merits” formulations in the two provisions can easily be understood to reinforce each other—the one specifying the kind of state court action that triggers federal deference to a state court’s result, the other explaining that a federal court will typically examine cases in which the state court has been asked to do, and has done, what is necessary to summon the respect that § 2254(d) mandates. If the state court decision was not on the merits, the federal court, now proceeding under § 2254(e), will typically presume that any relevant facts the state court found are accurate and will deny a hearing if the facts did not come out for reasons ascribable to the prisoner. Here again, it is significant that the 180-day filing period is suspended while a prisoner presses state courts to consider a federal claim.¹¹⁸

The general rule stated in § 2264(a), that is, that a federal court will “only” adjudicate a claim the state courts were willing to entertain when it was raised, holds “unless the failure to raise the claim properly” is explained by one of the exceptions listed in § 2264(a)(1)–(3). The content of the exceptions is taken from the Powell Committee, where the exceptions identified circumstances in which a prisoner failed to exhaust state remedies but nonetheless should be entitled to immediate federal adjudication of the merits.¹¹⁹ We have said that the three exceptions are ill-suited for that task inasmuch as they actually describe claims the state courts may be open to entertain.¹²⁰ The exceptions are intelligible, however, if they are understood to signify claims the state courts *should* be willing to consider, but nonetheless turn away because of the prisoner’s default in earlier state proceedings. If such claims are foreclosed in federal court, it is not because the prisoner has failed to exhaust state

116. See *supra* notes 102–03 and accompanying text.

117. See *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501–05 (2001) (explaining that “on the merits” is not a term of art with a settled meaning).

118. See *infra* notes 174–75 and accompanying text.

119. See *supra* note 111 and accompanying text.

120. See *supra* text accompanying note 115.

remedies, but because the federal courts give effect to state procedural grounds of decision.¹²¹

There is an argument for reading § 2264 to discard the exhaustion requirement, but it falls well short of an inescapable command. Under § 2264(b), a district court is to “rule” on claims “properly before” the court “[f]ollowing review subject to subsections (a), (d), and (e) of section 2254.”¹²² That list of § 2254 subsections omits subsections (b) and (c), which codified the general exhaustion doctrine in 1948.¹²³ The Court has acknowledged the possible inference that a federal court is to determine the merits of a claim without regard to the usual requirement that state remedies must first be exhausted.¹²⁴

But, in this instance, the *expressio unius est exclusio alterius* canon is even weaker than usual. Consider, first, that § 2264(b) does not list each of the other subsections in § 2254, thus arguably highlighting the omission of subsections (b) and (c) having to do with exhaustion. Instead, § 2264(b) lists three subsections, (a), (d), and (e), and leaves out all the others—including (b) and (c), but also subsections (f), (g), (h), and (i). So the textual wrinkle searching for an explanation is not the negative choice to omit subsections (b) and (c), but the

121. The Powell Committee contended that “exhaustion is futile in the great majority of cases” because “of the existence of state procedural default rules.” POWELL COMMITTEE REPORT, *supra* note 11, at 24,698. But, of course, if the state courts are not open to a claim because of a prisoner’s failure to comply with state procedural law earlier, the exhaustion requirement is not “futile,” but satisfied; because of the prisoner’s default, there is no currently available avenue for litigating the claim in state court. On its face, § 2264(a) appears to allow for only two categories of claims—those the state courts decided on the merits and those they refused to consider because of the prisoner’s earlier default. Yet there are other claims the state courts had the chance to address, but claims they overlooked or disregarded. Notice that the Powell Committee stated that a federal court should consider a claim that was “actually raised and litigated” in state court—thus not (necessarily) “decided.” In all candor, the Chapter 154 drafters probably did not conceive that state courts might simply brush off claims brought to their attention. In any event, the affirmative statement that a federal court shall “only” entertain a claim that was decided on the merits need not be read to disclaim consideration of a claim that was raised by the prisoner but ignored by the state court. It would be nonsense to box a claim out of federal court because of a state court’s oversight. And it would be perverse to encourage state courts to thwart claims by disregarding them when they are properly presented. One can read § 2264(a) that way only by drawing a negative inference that is clearly rebutted by a much more plausible alternative: The modifier “only” distinguishes between claims the state courts were willing to entertain and decide and claims they found state law reasons to avoid. It does not foreclose federal adjudication of a claim regarding which state remedies have been exhausted for reasons other than default.

122. The Court has explained that the subsections (d) and (e) to which § 2264(b) refers are the provisions AEDPA adopted with those headings, not the provisions that bore the same designations previously. *Lindh v. Murphy*, 521 U.S. 320, 332 (1997).

123. See *supra* note 85 and accompanying text.

124. *Lindh*, 521 U.S. at 333 (assuming this interpretation for purposes of analysis).

affirmative selection of subsections (a), (d), and (e). There is a perfectly plausible reason for stating that district courts are to address claims in Chapter 154 cases in light of subsections (d) and (e)—namely, to clarify that those particular subsections apply to cases pending on the date of enactment.¹²⁵

Note, too, that the subsections in § 2254 at issue, subsections (b) and (c), were themselves amended by AEDPA in ways that serve state interests. For example, under one amendment, codified at § 2254(b)(3), the respondent in a habeas action cannot be “deemed to have waived the exhaustion requirement” unless counsel surrenders the point “expressly.” That adjustment ensures that state courts will not lose the chance to examine federal claims through some error or oversight. It would make no sense to read AEDPA to enact § 2254(b)(3) to govern all habeas cases and then, in the next breath, to eliminate the exhaustion doctrine wholesale in capital cases subject to Chapter 154.¹²⁶

Consider, next, that § 2264(b) instructs the district court to “rule” on claims without reference to ruling “on the merits.” A federal court can “rule” on a claim by dismissing it for failure to comply with the exhaustion requirement—again without prejudice to another try when state opportunities for adjudicating the claim are no longer available.¹²⁷ The Powell Committee *did* specify that a federal court should rule “on the merits” of a claim.¹²⁸ That was in keeping with the Committee’s plan to eschew exhaustion in some cases.¹²⁹ In the alternative, § 2264(b) can be read to contemplate ruling on the substance of a claim, but still to accommodate dismissal for want of exhaustion. The text instructs the district court to rule on claims “properly before it,” which ordinarily do not include claims the state courts are willing to entertain. The Powell Committee, too, would

125. *Id.* at 335. The Court explained in *Lindh* that independent language in Chapter 154 made its provisions applicable to cases already under way (provided the prerequisites for triggering this optional chapter were satisfied). In the absence of similar language on the temporal reach of amendments to Chapter 153, AEDPA’s provisions affecting that chapter were applicable only prospectively.

126. In *Lindh*, the Court also cited the AEDPA amendment codified in § 2254(b)(2), authorizing district courts to deny a claim on the merits “notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.” *Id.* at 333 n.7. Inasmuch as that amendment permits immediate federal adjudication when the door to state court is ostensibly open, its existence does not greatly strengthen the case for reading § 2264(b) to accommodate the exhaustion requirement.

127. *Cf. Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013) (explaining that a state court can “decide” a claim for purposes of judicial review without deciding it “on the merits” for purposes of § 2254(d)).

128. POWELL COMMITTEE REPORT, *supra* note 11, at 24,698.

129. *See supra* note 108 and accompanying text.

have had the federal court deal with claims “properly before it.”¹³⁰ Then again, under the Committee’s plan, some premature claims would be “properly” before the court. The points we have just made explain why § 2264 should not be read to adopt that view.

2. *The total exhaustion rule*

Section 2264 should be interpreted to discard the “total” exhaustion rule, which has it that if any claim in a multi-claim federal petition is premature, the district court cannot consider other claims that are ready for federal adjudication.¹³¹ Abrogation of “total” exhaustion rests comfortably with the text. We have seen that the language in § 2264(a) restricting a federal court to claims that were “raised and decided on the merits in the State courts” comports with the general exhaustion requirement in that it makes no provision for immediate adjudication of premature claims. On the positive side, this same language is consistent with federal consideration of claims the state courts have had an opportunity to address. Moreover, under § 2264(b), a federal court is to rule on claims “properly before it”—which can easily be understood to mean claims regarding which state remedies have been exhausted.

Understanding § 2264 to abandon the total exhaustion rule does not depend on a negative inference from the omission of § 2254(b)–(c) from § 2264(b). The total exhaustion idea has no foundation in the general exhaustion doctrine historically, far less in its codification in 1948. The Supreme Court established the total exhaustion rule to deal with cases Congress had not anticipated—namely, cases in which prisoners file federal petitions containing both mature and premature claims.¹³² Total exhaustion is actually in tension with the general exhaustion doctrine. It posits a claim or claims the state courts have had a chance to address and still requires a federal court to postpone the exercise of jurisdiction.

There are independent policy reasons for resolving any ambiguity in favor of interpreting § 2264 to repudiate the total exhaustion rule. The rule exacerbates the tensions between the general exhaustion requirement and the filing periods AEDPA introduces for seeking federal habeas relief. We will see below that an amendment to

130. POWELL COMMITTEE REPORT, *supra* note 11, at 24,698.

131. See *supra* notes 90–92 and accompanying text.

132. *Rose v. Lundy*, 455 U.S. 509, 516–17 (1982). The Powell Committee explained that its program contemplated “a change in the exhaustion doctrine as articulated in *Rose v. Lundy*.” POWELL COMMITTEE REPORT, *supra* note 11, at 24,698. Then again, the Committee may have cited *Lundy* only for its boilerplate recitation of the exhaustion doctrine generally.

Chapter 153 creates a one-year statute of limitation for habeas cases generally. The Supreme Court has held that the one-year period is tolled while a prisoner pursues postconviction relief in state court, but not while a habeas petition is pending in federal court.¹³³ So a prisoner may lodge a multi-claim federal petition within the filing period, the district court may take some time to decide whether the exhaustion doctrine has been satisfied, and then, under the total exhaustion rule, the court must dismiss the entire petition if there is an available avenue for litigating a single claim in state court. By this time, most of the year allowed has gone by, and the prisoner is challenged to go to state court, exhaust state remedies with respect to that claim, and get back to federal court before the clock runs out.

The 180-day filing period Chapter 154 establishes for capital cases underscores this practical point. If nothing mitigated the pressure, prisoners under sentence of death would have much greater difficulty in both satisfying the exhaustion requirement and meeting the applicable filing deadline. The consequences would be severe. Very likely, prisoners would be unable to please both masters, and potentially meritorious claims would be boxed out of federal court. It makes sense, then, that § 2264 should abrogate the total exhaustion rule in death penalty cases—an interpretation the text of this provision will easily bear. In the case of a multi-claim federal petition, the federal court should readily adjudicate mature claims and decline to consider only claims that are premature. The prisoner should then be entitled to exhaust state remedies with respect to premature claims and renew them in federal court when they are ready.

3. *Procedural default in state court*

Section 2264 should be interpreted essentially to endorse the Supreme Court's decisions on the federal consequences of a prisoner's procedural default in state court. Some of the basic cases were in place when AEDPA was enacted, but the Court has continued to shape its doctrine since 1996. Moreover, the Court has often read provisions in Chapter 153 to restrict the circumstances in which federal courts can reach the merits, thus arriving, here again, at arrangements for all habeas cases that, apart from these developments, § 2264 might have reserved for capital cases alone.¹³⁴

The text of § 2264 accommodates the elements of the Court's analysis. Recall that the initial questions are matters of state law: The

133. See *infra* note 215 and accompanying text.

134. See *supra* notes 100–01 and accompanying text.

prisoner must have failed to raise a federal claim at the time and in the manner prescribed by state law, and, for that reason, the state courts refused (or clearly would refuse) to address the claim. Section 2264(a) states that a federal court can entertain only a claim that was “raised and decided on the merits in the State courts,”¹³⁵ then creates exceptions for cases in which the prisoner failed to raise a claim “properly.” No stretch of the imagination is necessary to interpret “properly” in this context to mean in conformity with state procedural rules. Moreover, since compliance with state procedures is a state law question, it is perfectly reasonable to understand that, at this point, § 2264(a) addresses cases in which the exhaustion doctrine is satisfied, but only because of the state courts’ unwillingness to consider a claim in light of a prisoner’s default in earlier state proceedings.

Section 2264 could not sensibly dispense with these state law issues. If it did, this provision would have to entail its own independent body of federal standards for the conduct of litigation in state court. Federal habeas courts would have to formulate that federal law and hold prisoners and counsel to it (in state court) on pain of forfeiting the opportunity to advance claims in federal court. The consequence could only be nontrivial adjustments in state criminal procedure as state courts and counsel ensure that both state and federal procedural rules are followed. It is scarcely reasonable to read federal interference with state arrangements into § 2264 without explicit textual warrant. Consider, too, that if a prisoner failed only to comply with federal procedures ascribed to § 2264, but state courts were open to entertain a claim in light of state procedural law, the disposition in federal court would be controlled by the exhaustion doctrine. There would be a currently available state court way to litigate the claim.

Following threshold state issues, the first federal question under the Court’s default doctrine is whether the state procedural basis for declining to adjudicate a claim constitutes an adequate and independent state law ground of decision. This aspect of default doctrine, too, is applicable in Chapter 154 cases, unless it is eclipsed by the text. It is not disclaimed explicitly, and a stretch of the imagination *would* be required to interpret silence in § 2264 to abandon so established a doctrine by negative implication. The Warren Court once banished the adequate state ground doctrine from habeas corpus on the theory that federal habeas courts do not

135. We have defused any suggestion that claims the state courts ignored are foreclosed. *See supra* note 121 and accompanying text.

review state court judgments for error and thus are not required to defer to state decisions that rest on state law alone.¹³⁶ But the Rehnquist Court resurrected the adequate state ground doctrine in habeas, and, ever since, the Court has maintained its place in the federal law of default.¹³⁷

If a state procedural ground for declining to entertain a federal question is inadequate, *ceteris paribus* a federal habeas court may itself take up the claim. The rationale for this aspect of default doctrine is noncontroversial. If, for example, the state courts refused to address a potentially meritorious federal claim on the strength of an arbitrary or inconsistently applied procedural rule, it would hardly make sense to say that the resulting state judgment, grounded in state law, forecloses federal adjudication of the federal claim.¹³⁸ Now then, the standard for adequacy has never been prisoner-friendly, and decisions since 1996 have dropped the bar increasingly low.¹³⁹ The point here is that § 2264 sets it no lower for capital cases subject to Chapter 154.

More commonly, state law grounds are adequate and thus typically forestall federal habeas adjudication.¹⁴⁰ Yet there are exceptions. The Court recognizes that there are some good reasons why the state courts should overlook default, and reasons why, if the state courts decline, federal courts should be open. These exceptions go under familiar headings—namely, cases in which prisoners show “cause and prejudice” or “actual innocence.” Section 2264(a)(1)–(3) does not employ these same headings. Yet before we leap to the conclusion

136. *Fay v. Noia*, 372 U.S. 391, 429–31 (1963).

137. *Walker v. Martin*, 131 S. Ct. 1120, 1130–31 (2011) (reaffirming the doctrine); *Wainwright v. Sykes*, 433 U.S. 72, 81–83 (1977) (reviving the doctrine in habeas cases); *see Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (explaining that the adequate state ground doctrine applies in habeas by analogy). Critics of the (unsuccessful) Streamlined Procedures Act read it to contemplate changes in the Court’s default doctrine in general and in this aspect of that doctrine in particular. *See, e.g., Terrorist Death Penalty Enhancement Act of 2005 and the Streamlined Procedures Act of 2005: Hearing on H.R. 3060 and H.R. 3035 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 98, 106 (2005) (statement of Bernard E. Harcourt); *Streamlined Procedures Act of 2005: Hearing on H.R. 3035 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 295 (2005) (statement of Seth P. Waxman). Congress ultimately adopted some ideas from the SPA, notably the transfer of authority to certify state programs for providing counsel to the Attorney General. But nothing touching default doctrine emerged from committee.

138. *E.g., Lee v. Kemna*, 534 U.S. 362, 366 (2002) (concluding that a state court’s application of a state rule was inadequate to bar habeas adjudication of a federal claim).

139. *See, e.g., Beard v. Kindler*, 558 U.S. 53, 60 (2009) (holding that a state rule that allows for state court discretion may be adequate to foreclose habeas adjudication even though it is obviously applied inconsistently).

140. *See, e.g., Kemna*, 534 U.S. at 375–76 (explaining as much).

that this provision in Chapter 154 sweeps away a large share of the Supreme Court's habeas jurisprudence—much of it meant to circumscribe federal adjudication in capital cases—we should ask whether the specific text commands that result or, instead, will bear an interpretation more in line with existing case law.

On examination, § 2264 can and should be read largely to codify the exceptions the Supreme Court has identified, albeit under different names. Indeed, the Court has already gone a goodly way toward this conclusion. Notice initially that the exceptions specified in § 2264(a)(1)–(3) are triggered by a prisoner's "failure" to raise a federal claim in state court. The Court has interpreted similar language in another AEDPA amendment to Chapter 153—28 U.S.C. § 2254(e)(2). In that context, the Court has explained that a prisoner "failed" to develop the factual basis of a claim in state court if he or she was responsible for poor fact-finding.¹⁴¹ If, however, the prisoner made a "diligent search for evidence" supporting the claim, but was unsuccessful for some reason beyond his or her control, the prisoner did not "fail" to develop the facts within the meaning of § 2254(e)(2) and need not meet the standards that would apply if diligence had not been exercised.¹⁴² Equally here, § 2264(a) should be understood to contemplate a want of diligence on the prisoner's part, in the absence of which there was no "failure" to raise the claim in state court and, accordingly, there is no occasion for consulting the standards in § 2264(a)(1)–(3).¹⁴³

If a prisoner did not diligently attempt to comply with state law, the three exceptions specified in § 2264(a)(1)–(3) come into play. The first of these, described in § 2264(a)(1), captures cases in which the prisoner's failure to raise a claim in state court is explained by the state's violation of the Constitution or other federal law. This grouping covers most of the instances in which the Court has found "cause" for prisoners' failure to comply with state procedural rules—for example, when state authorities interfered with a prisoner's access to the courts,¹⁴⁴ when prosecutors withheld exculpatory evidence,¹⁴⁵

141. (Michael) Williams v. Taylor, 529 U.S. 420, 424 (2000).

142. *Id.* at 435.

143. Herein another reason for interpreting § 2264(a) to permit federal adjudication of a claim a prisoner presented to the state courts only to see it ignored. *See supra* note 121.

144. *E.g., Ex parte Hull*, 312 U.S. 546 (1941) (invalidating the practice of screening prisoner petitions for judicial review).

145. *Banks v. Dretke*, 540 U.S. 668, 690 (2004).

when prosecutors or other state officials concealed facts supporting claims,¹⁴⁶ and when default was due to ineffective assistance of counsel.¹⁴⁷

The second exception, defined in § 2264(a)(2), attends to cases in which a prisoner should be forgiven for failing to anticipate the emergence of a “new Federal right” that is “retroactively applicable” in collateral proceedings. This grouping also has analogs in existing case law, though the Court expects a prisoner to foresee most legal developments.¹⁴⁸ Section 2264(a)(2) is more prisoner-friendly than the Court’s doctrine inasmuch as it reaches any new rule claim that is enforceable in federal habeas. Still, the affected class is marginal. Under independent precedents, claims based on new rules are rarely cognizable, whether or not they were raised seasonably in state court.¹⁴⁹

The third exception, described in § 2264(a)(3), excuses default when the factual predicate of a claim “could not have been discovered through the exercise of due diligence” in time for state or federal postconviction proceedings.¹⁵⁰ This category, too, overlaps with the circumstances in which “cause” can be found under the Court’s decisions—namely, when the factual basis of a claim was not “reasonably available.”¹⁵¹ The Court has interpreted identical language in § 2254(e)(2)(A)(ii) to mean new evidence that “did not exist” to *be* discovered when the prisoner was in state court.¹⁵² This exception in § 2264(a)(3) thus complements the threshold requirement that default was due to the prisoner’s “failure” to raise the claim. If the prisoner was diligent, but the factual predicate of the claim still was not discovered, a federal court can adjudicate the merits without reaching this exception. If the prisoner was not diligent, the court must turn to this exception and determine whether the prisoner’s neglect made any difference. If not—if the

146. *Amadeo v. Zant*, 486 U.S. 214, 223–24 (1988).

147. See *supra* note 96 and accompanying text. In *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013), the Court held that, if an application for state postconviction relief was a prisoner’s first realistic opportunity to advance a claim of ineffective assistance at trial, counsel’s (nonconstitutional) ineffectiveness in failing to raise the claim at the postconviction stage can constitute “cause.” If the issue were presented in a death penalty case subject to Chapter 154, the Court should hold that effective assistance is constitutionally mandated in “initial-review collateral proceedings,” and, accordingly, that counsel’s default falls within § 2264(a)(1).

148. *Engle v. Isaac*, 456 U.S. 107, 134 (1982) (holding that a prisoner must advance a novel claim if a basis for it is available and other counsel have perceived the claim and pressed it in other cases).

149. *Teague v. Lane*, 489 U.S. 288, 316 (1989) (at once expanding what counts as a “new” rule for habeas purposes and restricting the enforceability of “new” rules in federal collateral proceedings).

150. This is the best understanding of the grammatically flawed text. See *supra* note 107.

151. See *supra* note 96 and accompanying text.

152. (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

facts could not have been discovered anyway—then, too, the federal court can entertain the claim.¹⁵³

Nothing in § 2264 corresponds expressly to the usual requirement that prisoners demonstrate not only “cause” for default in state court, but “prejudice” flowing from the federal error that went uncorrected. There are reasons why § 2264 might discard the “prejudice” prong of existing doctrine. The “prejudice” requirement has rarely figured greatly in the Court’s analysis of default cases and, indeed, has typically floated into the elements of prisoners’ substantive claims.¹⁵⁴ Nevertheless, in keeping with the project to reconcile Chapter 154 with habeas law generally, we should not lightly infer that this or any aspect of default doctrine has been jettisoned by negative implication. To the extent “prejudice” is a distinct consideration, § 2264 should be read to contemplate that it must be demonstrated in capital cases subject to Chapter 154, just as in other habeas cases.

Section 2264 is also ambiguous regarding the last element of conventional default doctrine—namely, the “miscarriage of justice” exception. If a constitutional violation in state court probably resulted in the conviction of “one who is actually innocent,” a federal habeas court can overlook default and reach the merits “even in the absence of a showing of cause”¹⁵⁵ Just as § 2264 should *not* be read to relax the “prejudice” requirement for death row prisoners, this provision in Chapter 154 *should* be read to accommodate the

153. The Court adopted this understanding of the opening paragraph of § 2254(e)(2), § 2254(e)(2)(A)(ii), and the interplay between the two in (*Michael Williams*). It must be said, however, that the Court’s interpretation of § 2254(e)(2)(A)(ii) needlessly complicates the interpretation of similar language when it appears elsewhere. *See infra* note 160. The drafters almost certainly meant to hold a prisoner responsible for attempting to develop facts supporting their claims in state court and thus to forestall federal habeas adjudication if a prisoner did not make a serious effort. Accordingly, they should have allowed federal consideration of evidence that *could* have been discovered via a diligent effort—rather than evidence that *could not* have been discovered even if the prisoner had been diligent. *Cf.* 28 U.S.C. § 2244(d)(1)(D) (2012) (starting AEDPA’s general filing period on the date the factual basis of a claim “could have been discovered through the exercise of due diligence”). Of course, if evidence would have escaped detection no matter what a prisoner did in state court, it makes sense that the evidence should be heard in federal court when it comes to light. But it makes no sense to limit federal court proceedings to evidence of that kind alone—a point the Court plainly appreciated in (*Michael Williams*). The explanation for the text of § 2254(e)(2)(A)(ii) is scrivener’s error. More vexing still, this error by the AEDPA drafters was apparently a negligent adoption of careless language in the Powell Committee plan. *See supra* note 107.

154. *See supra* note 97 and accompanying text. The obvious example is a claim that counsel delivered ineffective assistance, which entails both poor performance and resulting “prejudice.” *See* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 684–85 (1990) (appraising “prejudice” as a feature of default doctrine and as an element of a meritorious Sixth Amendment claim).

155. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). *See supra* text accompanying note 98.

longstanding safety valve for cases in which innocent individuals may have been convicted of capital crimes.

A credible showing of actual innocence creates a “gateway” to federal adjudication not only when the Court’s own default doctrine would otherwise bar a claim, but also when a statute appears on its face to foreclose a claim without making provision for “probable innocence” cases.¹⁵⁶ The Court has held that this exception survives AEDPA and operates unless a statutory provision in Chapter 153 contains a “clear command” countering a federal court’s discretion.¹⁵⁷ There is no obvious reason why the same door should not be open when a provision in Chapter 154 is invoked. A statute may expressly “modify” the “miscarriage of justice” exception. But when a statute is silent regarding this important idea, the proper inference is not that the exception is repudiated, but just the opposite.¹⁵⁸

This conclusion is fortified by other AEDPA provisions in both Chapter 153 and Chapter 154. Recall that § 2262 explicitly contemplates that stays of execution are available, even mandated, when prisoners secure approval to file second or successive applications for federal relief under § 2244(b).¹⁵⁹ Under § 2244(b)(2), in turn, a claim that was omitted from a prior federal petition usually must be dismissed, but can be entertained if “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence”¹⁶⁰ and there is “clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” Plainly, then, § 2262 and § 2244(b)(2) allow for a second or successive federal petition when a prisoner offers new evidence that draws his or her guilt into serious question. If AEDPA makes that policy choice when a prisoner has defaulted with respect to one federal petition and wants to return to the well, it is implausible that AEDPA makes no similar allowance for a prisoner

156. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1935 (2013).

157. *Id.* (holding that a showing of actual innocence is an exception to the limitation period established by 28 U.S.C. § 2244(d)(1)); *see infra* note 233 and accompanying text.

158. *McQuiggin*, 133 S. Ct. at 1935 n.3.

159. *See supra* note 71 and accompanying text.

160. This language is virtually the same as the language in § 2254(e)(2)(A)(ii), which the Court has held to contemplate evidence that could not have been discovered earlier because it did not yet exist. That interpretation was helpful in reaching a workable understanding of the occasions when federal evidentiary hearings may be held. Yet it is far too narrow to govern whether claims can be advanced in second or successive federal petitions.

who defaulted with respect to previous proceedings in state court and then offers a claim in an initial application for federal habeas relief.¹⁶¹

The content of § 2264(a)(1)–(3) is clearly derived from the Powell Committee, which used these categories to identify circumstances explaining prisoners' failure to exhaust state remedies.¹⁶² Elaborating its program for stays of execution, however, the Committee said that some death row prisoners would be able to advance second or successive federal petitions for the purpose of presenting newly discovered evidence that undermines confidence in "the jury's determination of guilt."¹⁶³

There are also constitutional considerations. The Court has described the "miscarriage of justice" exception as an "equitable" safeguard.¹⁶⁴ Yet the gravity of the concern that an innocent might suffer suggests a constitutional footing. Actual (factual) innocence may be an independent basis for federal habeas corpus relief.¹⁶⁵ In any event, it is sensible to avoid constitutional issues by interpreting § 2264's failure to disclaim the "miscarriage of justice" element of default doctrine as a signal that this provision in Chapter 154 presupposes it.

Section 2264 should similarly be interpreted to preserve the understanding that prisoners who are shown to be ineligible for a death sentence can be regarded as innocent in a different way. In the Court's terminology, they are "innocent of the death penalty."¹⁶⁶ Accordingly, if a prisoner shows "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty," default is excused and a federal court can reach the merits of a claim.¹⁶⁷ The Powell Committee also proposed that prisoners should be able to attack their death sentences as well as their convictions, so long as they did so in initial

161. The precise language in § 2244(b)(2) is a modification of the innocence exception that does not displace the exception in its conventional form where it continues to operate without alteration. *McQuiggin*, 133 S. Ct. at 1933.

162. See *supra* note 111 and accompanying text.

163. POWELL COMMITTEE REPORT, *supra* note 11, at 24,697.

164. *McQuiggin*, 133 S. Ct. at 1931.

165. The Court has famously assumed for purposes of decision that it would be unconstitutional to execute a prisoner who makes a "truly persuasive demonstration of 'actual innocence'" and "there [is] no state avenue open to process such a claim." *Herrera v. Collins*, 506 U.S. 390, 417 (1993); see also *In re Davis*, 557 U.S. 952, 952 (2009) (accepting original habeas jurisdiction and transferring a case to a district court with instructions to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence").

166. *Sawyer v. Whitley*, 505 U.S. 333, 343 (1992) (internal quotation marks omitted).

167. *Id.* at 348.

applications for federal relief.¹⁶⁸ Of course, § 2264 governs first petitions and thus, in light of its basis in the Committee plan, will bear the interpretation that new evidence going to eligibility for a capital sentence can be considered.

Experience over the years has brought the Supreme Court to the conclusion that default doctrine, for all its rigidity, must still allow for the occasional case in which it becomes plain late in the process that a prisoner was erroneously given a death sentence. Section 2264 can be read to override the Court's conclusion only by drawing a negative inference from silence. It is that kind of barren formalism bereft of sound judgment that has in the past made habeas law the tragedy it so often is. We need not make the same mistake in construing Chapter 154.¹⁶⁹

Finally, the Court has held that if a prisoner overcomes procedural default in state court, a federal district court can adjudicate the relevant claim *de novo*.¹⁷⁰ Here again, § 2264 conforms to the Court's doctrine. For if one of the explanations for default in state court described in § 2264(a)(1)–(3) is established, § 2264(b) instructs the federal court to “rule” on the claim that now is “properly before it.” We saw previously that ruling on a claim can mean a procedural disposition, the obvious example being dismissal for failure to exhaust state remedies.¹⁷¹ But with respect to a claim that fits one of the categories in § 2264(a)(1)–(3), a ruling on substance is easily covered.

It is true that, on this reading, the federal court will adjudicate the merits of a claim without reference to any previous state court action that would activate § 2254(d) or 2254(e). Yet interpreting § 2264(a)(1)–(3) to address procedural default cases is not inconsistent with those provisions in the way that reading § 2264(a)(1)–(3) to adopt the Powell Committee's plan to abandon the exhaustion doctrine clearly would be. Eliminating exhaustion in the cases described in § 2264(a)(1)–(3) would prevent prisoners from generating state determinations of law or fact on which § 2254(d) and § 2254(e) might operate. Taking those cases as instances of procedural default in state court contemplates that the state courts are unwilling to listen to a prisoner's arguments or

168. POWELL COMMITTEE REPORT, *supra* note 11, at 24,697–98.

169. The Judicial Conference recommended an amendment to the Powell Committee program, which would have permitted second or successive petitions challenging the “appropriateness” of a death sentence. AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL 3 (1989).

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

171. *See supra* text accompanying note 127.

allegations. Since there is no way to obtain state determinations that might engage § 2254(d) and § 2254(e), federal adjudication without reference to previous state court proceedings is unavoidable.

According to this account, § 2264 rejects the Powell Committee's proposal to abrogate the exhaustion doctrine with respect to some claims the state courts may be willing to entertain. By contrast, § 2264 preserves the exhaustion requirement generally for all claims and discards only the "total exhaustion" rule, which would complicate implementation of the 180-day filing period established by Chapter 154. A federal court is generally restricted to examining claims the state courts were asked to decide, and did decide, on the merits. In those cases, consistent with § 2254(d), the court typically cannot hold a hearing to determine the facts underlying a claim, but must work with the factual record made in state court and, into the bargain, must defer to a state court's decision unless it was unreasonable.¹⁷² If the state courts were presented with a claim, but overlooked it, state remedies have been exhausted, and the federal court can treat the claim *de novo*, albeit § 2254(e) may cabin the court's authority to investigate the facts. If the state courts declined, or clearly would decline, to entertain a claim because of the prisoner's failure to comply with state procedural rules, the federal court must determine whether the state court application of state law counts as an adequate and independent ground of decision. If it does, the federal court will consult § 2264(a)(1)–(3), which roughly parallels the tests the Supreme Court has established for determining whether federal adjudication should equally be barred. If a claim survives that analysis, the federal court will entertain it *de novo*—again subject to § 2254(e).

Here again, Chapter 154 places important limits on federal courts adjudicating capital habeas cases, but those limits are largely the same as the restrictions Congress and the Supreme Court have now imposed in all cases, both capital and noncapital.

D. Timing Rules

Chapter 154 chiefly addresses the pace of capital habeas litigation in 28 U.S.C. § 2263, which establishes a filing period for petitions by death row prisoners in certified states. Under § 2263(a), an application for habeas relief "must be filed" in a district court "not

172. See *supra* text accompanying notes 100–01.

later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.” Under § 2263(b), the 180-day filing period is “tolled”: (1) “from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition”—if the prisoner seeks direct review in the Supreme Court following the affirmance of his or her sentence on appeal in state court; (2) “from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition;” and (3) “during an additional period not to exceed 30 days”—if the prisoner shows “good cause” for an “extension.”

These timing rules for capital cases coexist with the rules for all habeas petitions challenging state criminal judgments, established by AEDPA’s amendments to Chapter 153. Under 28 U.S.C. § 2244(d)(1), “[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.” This limitation period runs from the latest of four dates: (A) “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;” (B) “the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed;” (C) “the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;” and (D) “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” Under § 2244(d)(2), the filing period is tolled for the time “during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.”

The Powell Committee recommended a statute providing that a habeas petition “must be filed . . . within 180 days from the filing in the appropriate state court of record of an order” appointing counsel for state postconviction proceedings.¹⁷³ That period was to be “tolled”: “[f]rom the date that a petition for certiorari is filed in the Supreme Court until . . . final disposition of the petition”—if the prisoner “seeks review of a capital sentence” after direct review in the state “court of last resort,” and [d]uring “any period in which a state prisoner . . . has a properly filed request for post-conviction review

173. POWELL COMMITTEE REPORT, *supra* note 11, at 24,697.

pending before a state court”—provided “all state filing rules are met in a timely manner.”¹⁷⁴ Tolling was to continue “from the date that the . . . prisoner initially files for post-conviction review until final disposition . . . by the highest court of the State,” but not “during the pendency of a petition for certiorari before the Supreme Court following such State post-conviction review.”¹⁷⁵ The Committee also recommended that extensions “not to exceed 60 days” should be available on a showing of “good cause.”¹⁷⁶

In the Chapter 154 cases to come, the challenge will be to make peace between § 2263 and the limitation period in § 2244(d)(1) for habeas cases generally, as well as the Powell Committee plan for capital litigation. One thing is inescapable: § 2263 establishes a filing period for death penalty cases that is only half as long as the period in § 2244(d)(1). When the AEDPA drafters wrote provisions applicable to all habeas actions, they made one year the basic policy. But then they added Chapter 154, which took the 180-day rule from the Powell Committee. The Committee, in turn, had framed its recommendation when there was no fixed filing period for habeas petitions in federal court. Within that vacuum, the Committee justified the choice of 180 days on two grounds. One was that some filing period was needed to encourage prisoners under sentence of death to pursue postconviction relief.¹⁷⁷ The other was that a 180-day period was feasible because prisoners facing death would have lawyers to assist them.¹⁷⁸

One may question whether the Powell Committee appreciated what a brief filing period would mean for the prisoners and lawyers affected. Practitioners need time to clear their schedules for the tasks entailed in capital litigation. When they do break free from other responsibilities, they must study the existing record, investigate extra-record events and circumstances, identify potentially viable claims, locate witnesses (often experts in capital cases), and marshal the evidence and available arguments. All this, of course, is for purposes of applications for postconviction relief in state court—the proceedings for which the states must supply counsel. Accordingly, it will be surprising if attorneys do not use up the lion’s share of 180 days preparing and filing petitions for state relief, leaving little time for the petitions to which the 180-day rule actually applies—habeas

174. *Id.* at 24,694, 24,697.

175. *Id.* at 24,697.

176. *Id.*

177. *Id.*

178. *Id.* at 24,697–98.

corpus applications in federal court. The federal courts may not appoint counsel for federal habeas actions until state proceedings are nearly complete.¹⁷⁹ So the lawyers who must meet the 180-day deadline by filing properly prepared federal petitions will be extremely hard pressed to do so.

It is too late to complain that the Powell Committee failed to see that 180 days would be insufficient or to resist the plain language in § 2263, which makes the basic 180-day rule law. Yet we can be open to interpretations that reduce the harm § 2263 certainly will visit on capital cases. The point of instituting a filing period is only to encourage prisoners who might otherwise be disinclined to pursue postconviction relief seasonably. The idea is not to turn capital habeas litigation into an exercise in arithmetic. Nor is it to manufacture dismissals for default.¹⁸⁰

1. *The nature of the filing period*

At the threshold, § 2263(a) should be interpreted as a nonjurisdictional limitation period rather than a constraint on a district court's subject matter jurisdiction. There is no justification for reading this provision to be jurisdictional; the consequences would be dramatic and entirely unjustified. Jurisdictional restrictions are exempt from ordinary default doctrine and thus can be raised at any stage; parties have no capacity to consent to jurisdiction; courts are obliged to address jurisdiction requirements *sua sponte* and have no authority to relax them even in compelling circumstances.¹⁸¹

It is settled that § 2244(d)(1) in Chapter 153 is not jurisdictional, but establishes only a statute of limitation.¹⁸² The text of § 2263 is drawn differently. There is no explicit reference to a "period of limitation." Instead, § 2263(a) states that an application "must be filed" within 180 days—here borrowing from the Powell Committee almost verbatim. Yet there is no reason to think that this formulation imposes a jurisdictional requirement where § 2244(d)(1) does not. A

179. One of the Chapter 154 provisions describing the states' responsibilities, § 2261(d), bars the appointment of an attorney who appeared at the trial in state court, except by special request, and it is not at all clear that lawyers who represented prisoners on direct review will be assigned to continue. Indeed, there are good reasons for introducing new counsel to make a fresh start in postconviction proceedings. See Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1131 (1999) (explaining potential ethical dilemmas).

180. See POWELL COMMITTEE REPORT, *supra* note 11, at 24,697 (explicitly disclaiming any such purpose).

181. See *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (rehearsing these familiar points in the habeas context).

182. *Day v. McDonough*, 547 U.S. 198, 213 (2006).

door-keeping rule is jurisdictional only if Congress “clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional.”¹⁸³ The “must be filed” phrase falls well short of the exacting text that has been read to foreclose federal adjudicative power in other contexts.¹⁸⁴ Moreover, § 2263 itself describes the 180-day rule as a “time requirement” and even as a “time period”—terms that fall even further from the jurisdictional mark. The “tolling” provisions are also consistent with a statute of limitations. Hard jurisdictional mandates typically do not come with tolling rules, but statutes of limitation very often do.

2. *Computation*

Some play in the joints should be found in computations of the 180-day period. To begin, the date on which the clock begins to tick (the date of “final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review”) should be interpreted to presuppose that counsel has been appointed for the prisoner. This understanding reconciles § 2263(a) with 28 U.S.C. § 2261, which makes all the provisions in Chapter 154 applicable in a case “only” if the prisoner has been supplied with counsel pursuant to a mechanism certified by the Attorney General.¹⁸⁵

To be sure, the text of § 2263(a) departs from the Powell Committee recommendation, which ran the 180-day period from the date of a state court “order” appointing counsel to invoke Chapter 154 in a prisoner’s case. Yet the coherence of the scheme the Committee envisioned for death penalty cases collapses if death row prisoners are held to a filing period that runs, and may run out, before counsel enters the picture. Section 2263(a) plainly implements the Committee’s plan in this key respect and should be understood, accordingly, also to recognize that the appointment of

183. *Gonzalez*, 132 S. Ct. at 648 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)).

184. Under 28 U.S.C. § 2107, for example, “no appeal shall bring any judgment . . . of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment” See *Bowles v. Russell*, 551 U.S. 205, 205–06 (2007) (holding that § 2107 is jurisdictional).

185. As originally enacted, 28 U.S.C. § 2265(c) delayed the 180-day period until counsel received a trial transcript. That provision did not survive the USA PATRIOT Act amendments in 2005. There is no evidence to suggest that its omission was significant. The amendments so completely altered § 2265, chiefly by shifting responsibility for approving state counsel programs to the Attorney General, that some matters thought to be details doubtless fell through the cracks.

counsel naturally must precede the start of a filing period that is likely to be satisfied only with appointed counsel's help.¹⁸⁶

Sadly, § 2263(a)'s baseline for computing the 180-day filing period cannot be read to adopt the conventional understanding of a "final" state judgment. By traditional account, a state judgment becomes final only when proceedings in the Supreme Court itself are completed. So, for example, the baseline in § 2244(d)(1)(A) for computing the general one-year filing period for federal habeas petitions is "the date on which the [state] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The § 2244(d)(1)(A) clock thus starts well after direct review in state court comes to an end—when the Supreme Court disposes of a petition for certiorari challenging a conviction or sentence approved by the state appellate courts on direct review or, if a prisoner fails to file a petition for certiorari in the Supreme Court, when the time for doing so expires.¹⁸⁷

By contrast, § 2263(a) runs the 180-day filing period for death penalty cases from the "final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." That text is similar to the language in § 2263(b)(2), which tolls the 180-day period. The Supreme Court has said (in dicta) that, for purposes of § 2263(b)(2), the "final State court disposition" of a petition for state postconviction relief is the date on which the proceedings end in *state* court.¹⁸⁸ We will see in a moment that the Court's observation regarding § 2263(b)(2) is questionable. If, then, the textual parallel with § 2263(b)(2) were the only basis for reading § 2263(a) to start the 180-day clock so early, we might open our minds to the possibility that the "final State court disposition" formulation in § 2263(a) does not arrive until the Supreme Court denies certiorari or the time for seeking certiorari runs out—that is, that the starting point for the 180-day clock in death penalty cases is the same as the starting point for the one-year clock that governs all habeas actions. But there is more. The tolling provision in § 2263(b)(1) explicitly suspends the 180-day period for proceedings in the Supreme Court following direct review in the state courts. If the baseline for starting the § 2263(a) clock is not

186. *See supra* text accompanying note 54 (noting that § 2262 also entitles a prisoner to a stay of execution as soon as counsel is appointed for state proceedings). The Final Rule responds to this point by defining the "appointment" of counsel as the "provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review."

187. *Clay v. United States*, 537 U.S. 522, 527 (2003).

188. *Lawrence v. Florida*, 549 U.S. 327, 334 (2007).

the conclusion of direct review in state court, it would be hard to account for dealing with subsequent Supreme Court proceedings in a tolling provision.

If the analysis goes no further than this, § 2263(a) will hold death row prisoners to a filing period that not only ends earlier, but starts sooner, than the filing period that all petitioners face under § 2244(d)(1). But, of course, the analysis does not end here, but rather shifts to an examination of the tolling provisions in § 2263(b).

3. *Tolling for Supreme Court proceedings*

The first provision on tolling the 180-day filing period, § 2263(b)(1), should be interpreted to give death-sentenced prisoners the same amount of time to go to the Supreme Court on direct review that § 2244(d)(1)(A) grants prisoners in habeas cases not subject to Chapter 154. Section 2244(d)(1)(A) creates time for the Supreme Court by postponing the baseline date for its (longer) clock. Section 2263(b)(1) suspends the 180-day count from the “date that a petition for certiorari is filed . . . until the date of final disposition,” thus performing the same function by tolling a (shorter) clock that otherwise would be running.

You will say that even if the effect of stopping the clock after it has started approaches the effect of postponing its start in the first place, the amount of time prisoners are allowed under the two provisions cannot be precisely the same. By its explicit text, § 2263(b)(1) appears to let the clock run during the time a prisoner is considering and developing a certiorari petition but has yet to file it. On examination, however, the apparent difference disappears. Withhold judgment on this for the moment.

The larger point is that, while the basic Chapter 154 limitation provision in § 2263(a) does not embrace the conventional definition of a final state court judgment (that is, the date on which the Supreme Court disposes of a petition for certiorari or there is no longer time to file one), the tolling provision in § 2263(b)(1) *does*. True, § 2263(b)(1) refers explicitly to the date on which a certiorari petition is “filed” and thus is open to the interpretation that it stops the clock only if a prisoner actually requests certiorari. Recall that, by contrast, § 2244(d)(1)(A) expressly addresses cases in which certiorari is not sought by fixing the baseline for its limitation period as the expiration of the time for seeking Supreme Court review. But this textual difference is not dispositive. The Court has set the *expressio unius* canon aside in an analogous case. The limitation period prescribed in 28 U.S.C. § 2255(f)(1) (for a motion attacking a

federal conviction or sentence) starts the clock when the judgment is “final,” without mention of direct review. Yet the Court has held that, in parity with the explicit text of § 2244(d)(1)(A), a federal judgment is “final” for purposes of § 2255(f)(1) only when the Supreme Court acts on a certiorari petition or the time for filing one runs out.¹⁸⁹ There are good reasons for maintaining a uniform definition of a “final” judgment and for doubting that § 2263(b)(1) adopts a different understanding by omission alone.¹⁹⁰

It makes sense that the definition of finality incorporates the time allowed to pursue direct review in the Supreme Court even if no certiorari petition is actually filed. The law allows state prisoners a limited amount of time to assess the advisability of going to the Supreme Court to challenge a state court judgment. Prisoners cannot be said to be dilatory for using that time in an effort to make wise decisions. Both § 2244(d)(1)(A) and § 2263(b)(1) respect prisoners’ right to request Supreme Court review. Both should also respect their entitlement to weigh matters carefully before they do.

Reading § 2263(b)(1) to toll the 180-day period only if prisoners actually file certiorari petitions would produce bad results. Primarily, it would enhance the pressure on death row inmates, forcing them to find time within the 180-day allotment to consider direct review along with the pursuit of state postconviction and federal habeas relief. All prisoners would find it more difficult to identify and press potentially meritorious claims; some would surely miss the 180-day deadline and forfeit the chance to get to federal habeas. Prisoners who understand that the clock stops only if Supreme Court review is actually sought would have an incentive to file certiorari petitions simply to gain more time. Knowledgeable prisoners who deliberate over filing certiorari petitions and conclude in the end that the effort would be wasted might still file anyway, again only to stop the clock governing access to habeas corpus.

The text of § 2263(b)(1) is in substance identical to the text of the analog Powell Committee recommendation. If it were clear that the Committee proposed to toll the 180-day clock only if a certiorari petition is actually filed, that history would cut against reading § 2263(b)(1) to toll for the period when certiorari may be pursued

189. *Clay*, 537 U.S. at 527.

190. The Court said in *Clay* that Congress might have mentioned the expiration of the time for seeking Supreme Court review in § 2244(d)(1)(A) to avoid any suggestion that the finality of a state judgment for federal purposes might turn on the peculiarities of state law. *Id.* at 530–31. That reason for special clarity is unnecessary with respect to § 2263(b)(1), which expressly deals with proceedings in the Supreme Court.

but, in fact, ultimately is not. But the Powell Committee said only that a prisoner “risks losing the right to file” a habeas corpus petition in federal court “[u]nless the . . . prisoner actively litigates his case after his conviction and capital sentence have become final on direct appeal”¹⁹¹ Since a state judgment is not conventionally “final on direct appeal” until the time for seeking certiorari expires, the Committee’s insistence that prisoners should “actively” litigate after that date easily bears the interpretation that only the affirmative pursuit of postconviction relief is demanded.¹⁹²

Recall that the Powell Committee crafted the language that appears in § 2263(b)(1) in contemplation that the filing period would begin when a state court appointed counsel, without regard for the date of a final judgment on the prisoner’s claims.¹⁹³ In that context, it may have appeared sensible to handle direct review in the Supreme Court with a tolling provision. The AEDPA drafters obviously thought it was preferable to account for direct review by adopting the conventional definition of a final judgment as the baseline for a filing period governing federal habeas. That is what they did in § 2244(d)(1)(A). Then, however, the drafters attached the Powell Committee’s plan for death penalty cases without pausing to adjust the Committee’s means of dealing with Supreme Court proceedings on direct review. Only a willful insistence on the letter of these provisions could produce an interpretation of § 2263(b)(1) that defies the uniform understanding of what counts as a final judgment. The far better, pragmatic interpretation is that the textual differences here are the product of poor drafting and that AEDPA adopts the account of final judgments most clearly articulated in § 2244(d)(1)(A), but also embodied in § 2263(b)(1).

Return now to the ostensible difference between the mechanisms § 2244(d)(1) and § 2263 employ to account for direct review in the Supreme Court. The use of tolling in § 2263 does suggest that prisoners will be charged for the time before they actually file a certiorari petition. Yet, as we have seen, the text can and should be read to suspend the 180-day period until the expiration of the time for requesting Supreme Court review. If, in the case of a prisoner who decides against going to the Supreme Court, § 2263(b)(1) tolls the filing period until the time for seeking direct review expires,

191. POWELL COMMITTEE REPORT, *supra* note 11, at 24,697–98.

192. *See id.* at 24,698 (explaining that the idea was “to encourage litigants to initiate the post-conviction review process and to keep it moving from stage to stage”). Of course, it is also perfectly sensible to say that a prisoner who uses the time permitted for a certiorari petition to evaluate his or her position is “actively” litigating.

193. *See supra* text accompanying note 173.

there is no reason why, in the case of a prisoner who decides to pursue direct review, the time used to make that decision should count against the 180-day clock. The same policies are implicated, and the same pragmatic interpretation should obtain. The baseline for the limitation period in § 2244(d)(1)(A) and the tolling provision in § 2263(b)(1) therefore allow prisoners the same amount of time to apply for direct review in the Supreme Court after their convictions and sentences are affirmed in state court.

Under § 2263(b)(1), the 180-day clock unquestionably stops when a certiorari petition is “filed” in the Supreme Court. A petition should be understood to be “filed” for these purposes when it is received in the clerk’s office. The Court has explained that an application for state postconviction relief is “filed” within the meaning of § 2244(d)(2) when “it is delivered to, and accepted by, the appropriate court officer.”¹⁹⁴ The same interpretation should be placed on the identical term in § 2263(b)(1). Once again, consistent usage is not a given. But there is no warrant for thinking these two provisions adopt different definitions, and a single account of the term “filed” produces attractive results.

According to this understanding of “filed,” a certiorari petition initiates tolling irrespective of any conditions that may justify its dismissal. Satisfaction of filing conditions goes to the different question whether a petition is “properly” filed. The Court has held that an application for state postconviction relief is “properly” filed for purposes of § 2244(d)(2) if “its delivery and acceptance are in compliance with the applicable laws and rules governing filings”—which “usually prescribe . . . the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.”¹⁹⁵ Section 2263(b)(1) does not specify that a certiorari petition must be “properly” filed to stop the 180-day clock, and that modifier need not be read into it.¹⁹⁶

This is not to rely on the very textual literalism this article disclaims, only to explain that one need not fight the text of § 2263(b)(1) to arrive at an interpretation that avoids mischief. If certiorari petitions had to comply with filing conditions to qualify for tolling, prisoners who lodge petitions in the Supreme Court in the

194. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that a state petition is “filed” even if it contains a claim that is procedurally barred).

195. *Id.* at 8; *see Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005) (holding that an untimely application for state relief is not “properly” filed).

196. The Powell Committee also had it that the filing period should be tolled from the date a petition for certiorari is “filed” without more. *See supra* text accompanying note 173.

belief that the federal habeas clock will be suspended might find at some point that the clock has been running all the while, because their petitions are dismissed for failure to satisfy some such condition. As a hedge against that possibility, prisoners would have to file federal habeas petitions immediately—to stop the 180-day clock if their certiorari petitions have not done so.¹⁹⁷ That course of action, in turn, would put prisoners, respondents, and courts through simultaneous litigation in two places (the Supreme Court and a federal district court) for the sole purpose of reducing the risk that federal habeas adjudication will be lost because of the limitation period in § 2263.

Reading § 2263(b)(1) to be satisfied with any certiorari petition creates greater certainty that the 180-day period is tolled and thus defuses the inefficiency attending parallel actions. Yet it opens another potential problem. Prisoners might concoct certiorari petitions that fail to comply with filing conditions for the sole purpose of suspending the habeas clock. That problem, however, is comparatively tractable. In most cases, petitions to the Supreme Court will meet applicable conditions. After all, petitions that do not will be dismissed summarily. In cases in which prisoners appear to be using demonstrably flawed or untimely certiorari petitions merely to toll the filing period for federal habeas (if any there are), respondents can complain (if they like), and federal habeas courts can decide whether the limitation period in § 2263 warrants dismissal.¹⁹⁸

Finally, the conclusion of the tolling period prescribed by § 2263(b)(1), that is, the “date of final disposition of the petition,” should be interpreted to allow time for more proceedings in state court. Usually, the “final” disposition will be the summary denial of a petition for certiorari. When the Court grants review, it will be the Court’s judgment and implementing order. If the Court does not affirm in all respects, it typically vacates the judgment and remands to the state courts in contemplation of further proceedings there. In those circumstances, tolling should continue while the state courts respond and during the time required (and allowed) for pursuing Supreme Court review of the new state court decision.

197. *Pace*, 544 U.S. at 416 (suggesting this tactic to a prisoner who fears that an application for state postconviction relief will not toll the general federal habeas limitation period under § 2244(d)(2)).

198. This interpretation would not reproduce the arrangements for encouraging expeditious petitions that preceded AEDPA. Under former § 2254 Rule 9(a), a federal habeas court was authorized, but not required, to dismiss a petition if it appeared that the state had been “prejudiced in its ability to respond.”

The “final disposition of the petition” formulation, too, is borrowed from the Powell Committee.¹⁹⁹ The Committee did not address cases in which certiorari is granted, far less the consequences for the limitation period of a decision sending a case back to state court. Yet the point of tolling at this stage is to ensure that prisoners have the opportunity to pursue direct review in the Court in advance of petitioning for a writ of habeas corpus. It would make no sense to force prisoners who are successful on direct review in the Supreme Court and find themselves back in state court nonetheless to file immediate federal habeas petitions lest they forfeit the chance to apply for habeas relief in due course. It often happens that prisoners who win a Supreme Court order vacating a state judgment retain federal claims they wish to vindicate in federal habeas. Both the Powell Committee report and the text of § 2263(b)(1) can bear the commonsense interpretation that prisoners in that position have time to do so.²⁰⁰

4. *Tolling for state postconviction proceedings*

The tolling period in § 2263(b)(2) runs from “the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition.” This is another occasion when the AEDPA drafters eschewed troublesome conditions in the Powell Committee’s plan, and consequentially their product lends itself to a more appealing interpretation. The Committee had it that only a “properly filed” state petition should stop the clock and then only if state filing requirements were met.²⁰¹ Section 2263(b)(2) omits both the “properly” modifier and any explicit requirement that state filing rules must be satisfied seasonably.²⁰² Accordingly, § 2263(b)(2) can and should be read to mean that any postconviction petition in state court stops the 180-day clock, even if it fails to meet conditions fixed by state law.

The policy argument for reading § 2263(b)(2) to ignore state filing conditions is stronger than the argument we just examined regarding § 2263(b)(1) for tolling while direct review is pursued in the Supreme

199. POWELL COMMITTEE REPORT, *supra* note 11, at 24,697.

200. A new state court decision reaffirming a conviction or sentence should start a new 180-day clock under § 2263(a). That new clock should be tolled for the time required to seek Supreme Court review of the new state judgment.

201. *See supra* text accompanying note 174.

202. This section also leaves out any express statement that the proceeding in state court must be “pending”—a condition that does appear in § 2244(d)(2). The “pending” requirement has presented interpretive questions. *See, e.g., Evans v. Chavis*, 546 U.S. 189, 192 (2006) (worrying through the peculiar arrangements for collateral review in California).

Court. The costs of insisting on a “properly filed” application in this instance would be much higher. Prisoners need not seek certiorari in the Supreme Court as a prerequisite to applying to a district court for a writ of habeas corpus, and, again, many may recognize that the effort is futile. In § 2263(b)(1) cases, then, the problem with inviting litigation in two places at once is diminished for prisoners who are willing to forgo certiorari petitions. Prisoners are, however, obliged to pursue any avenues available to test their federal claims in state court in advance of federal habeas. So, in § 2263(b)(2) cases, the problem of spawning multiple actions is acute. Prisoners concerned that an application for state postconviction relief may not stop the federal clock can protect themselves only by going to state court and federal habeas at the same time. Here again, it makes sense to let any “filed” petition suffice and to deal ad hoc with petitions that fail state law conditions.

Identifying the conclusion of the tolling period established by § 2263(b)(2) entails a reprise of previous arguments regarding the baseline date in § 2263(a), which starts the 180-day filing period in the first place, as well as the tolling period created by § 2263(b)(1). Recall that the Court has already said (in dicta) that § 2263(b)(2) restarts the clock with the disposition of a state postconviction petition in state court. But an authoritative interpretation demands a closer look.

To begin, a “final State court disposition” within the meaning of § 2263(b)(2) should be interpreted to allow for review in the state appellate courts. There is, of course, an *expressio unius* counter. Unlike § 2263(a), § 2263(b)(2) contains no explicit reference to the “expiration of the time for seeking . . . review.” But it would make no sense to leave the state appellate courts out, and the text of § 2263(b)(2) can be read to embrace the conventional account of when a judgment is “final”—namely, when appellate review, or the chance to seek appellate review, is over. The Powell Committee plainly contemplated that “final disposition” of a state postconviction petition would be rendered only by “the highest court of the State.”²⁰³ If there were some reason why § 2263(b)(2) might make a trial court decision alone sufficient, the failure to deal with the state appellate courts explicitly might be significant. But there is no such reason.

State trial court decisions are always tentative while they are subject to reversal further up the state judicial hierarchy. That is why prisoners must exhaust state appellate means of correcting trial court judgments in postconviction proceedings before they can apply for federal habeas relief—that is, to give all the organs of state judicial

203. POWELL COMMITTEE REPORT, *supra* note 11, at 24,697.

power the opportunity to make controlling decisions. Moreover, if the 180-day filing period were not tolled for the time it takes to seek direct review in state court, here again knowledgeable prisoners would be forced to file parallel federal habeas petitions. Then, if the state appellate courts sustain federal claims, the time, effort, and resources spent hurrying petitioners to federal court will have been wasted.

Both prisoners and state authorities depend on the state appellate courts to provide the state's authoritative judgments on issues that affect later federal habeas proceedings. If state trial courts decide in prisoners' favor, state authorities will want to test their judgments in the state appellate courts, and it is only sensible that the federal habeas clock should be suspended for that purpose. Otherwise, prisoners would suffer the loss of precious time as they contend with state appellate proceedings for which they are not responsible and simultaneously press on to federal court. Consider, too, that trial court decisions against prisoners may contain errors that state authorities wish to correct in the state appellate courts.²⁰⁴

Section 2263(b)(2) should also be interpreted to toll the 180-day filing period while prisoners or state authorities seek Supreme Court review of state appellate decisions rendered in state postconviction proceedings. This again is only to read § 2263(b)(2) to adopt the traditional definition of a "final" judgment. To be sure, the textual counter is stronger than the usual *expressio unius* argument, that is, that § 2263(b)(1) expressly refers to Supreme Court review of convictions and sentences while § 2263(b)(2) does not. We said earlier that the treatment of Supreme Court proceedings under § 2263(b)(1) makes it implausible to interpret "final State court affirmance" in § 2263(a) to adopt the conventional account of finality, thus to accommodate the pursuit of Supreme Court review or the expiration of the time for filing a certiorari petition. The same argument suggests that "final State court disposition" in § 2263(b)(2) also means the end of state court proceedings alone.

It is also true that the Powell Committee explicitly recommended that tolling should not apply "during the pendency of a petition for certiorari before the Supreme Court following . . . state post-conviction review."²⁰⁵ The Committee explained that prisoners would not be disadvantaged, because "all issues raised in state post-conviction review can be carried forward in a section 2254 petition

204. For example, a trial court might reject a claim on the merits when procedural grounds are available, employ a flawed analysis of the merits, or reach erroneous factual findings.

205. POWELL COMMITTEE REPORT, *supra* note 11, at 24,697.

and ultimately presented to the Supreme Court” on review of habeas judgments reached by the federal district and circuit courts.²⁰⁶ Moreover, according to the Committee, the Supreme Court rarely grants certiorari at this stage, anyway.²⁰⁷

Nevertheless, reading § 2263(b)(2) to permit time for Supreme Court review of state postconviction judgments *is* consistent with the traditional definition of finality and is therefore supported by all the familiar arguments for uniformity. Moreover, it is far from clear that this provision endorses the Powell Committee’s recommendation. Section 2263(b)(2) does not contain the Committee’s express disclaimer of tolling at this stage, but, again, employs language (“final State court disposition”) that, standing alone, can be read to embrace the normal account of finality.

There are good reasons why AEDPA may have rejected the Powell Committee’s advice and better reasons why a sound interpretation of § 2263(b)(2) today should allow for tolling at this juncture. The Committee assumed what is no longer true. In 1989, federal claims litigated unsuccessfully in state postconviction proceedings could usually be considered afresh in federal habeas corpus. Now, by contrast, the federal courts’ authority to adjudicate claims, particularly their ability to determine the underlying facts, has been drastically curtailed. The Supreme Court’s capacity to examine claims on review of federal habeas judgments has also been curbed.²⁰⁸ But, if certiorari is granted to review state court judgments rendered in state postconviction proceedings, the Court has more freedom of action.²⁰⁹ For this reason, the Court may now be more willing than it was in the past to accept cases in this posture, and withholding tolling for Supreme Court review would have very real costs.²¹⁰

Under § 2263(b)(2), the 180-day filing period is tolled from the date the “first” petition for state postconviction relief is filed. The modifier “first” appears in no similar tolling provision. It is not in

206. *Id.* at 24,698.

207. *Id.*

208. *See supra* notes 100–01 and accompanying text.

209. *See Lawrence v. Florida*, 549 U.S. 327, 343 n.7 (2007) (Ginsburg, J., dissenting) (noting that § 2254(d) has no bearing on cases coming up from the state courts).

210. The Court held in *Lawrence* that the tolling provision for habeas cases generally, § 2244(d)(2), does not suspend the ordinary one-year limitation period for the time during which prisoners seek Supreme Court review of state judgments at the postconviction stage. *Lawrence*, 549 U.S. at 337. In so doing, the Court addressed some of the arguments described in the text. But *Lawrence* does not control the meaning of § 2263(b)(2). Section 2244(d)(2) tolls while an application “for State post-conviction or other collateral review” is pending. The Court read that language to be limited to state proceedings, thus to exclude proceedings in the Supreme Court. *Cf. infra* text accompanying note 216.

§ 2244(d)(2), nor in the Powell Committee's corresponding recommendation. Once again, the task is to identify an interpretation that is workable in practice and still true to the text—here in term “first.”

Tolling *should* cover more than a single application in state court. Chapter 154 plainly assumes (and fortifies) the general rule that state prisoners must exhaust available state means of litigating their federal claims before going to federal court. In a nontrivial number of cases, prisoners can satisfy the exhaustion doctrine only by pursuing state relief more than once. State courts may be open to entertain claims that were not raised previously. And if state law offers another opportunity for postconviction litigation, it follows that the prisoner must use it and, concomitantly, that the prisoner should have time to do so. Inasmuch as the clock for cases subject to Chapter 154 is already short, and almost certain to have been largely consumed the first time through, tolling for another state application is a virtual necessity.

Chapter 154 acknowledges that, under certain conditions, prisoners also may file second or successive federal petitions. Recall that the provision on stays of execution expressly promises stays when prisoners satisfy the conditions for multiple federal applications.²¹¹ By hypothesis, then, some prisoners who have exhausted state avenues for adjudicating federal claims and have pursued federal habeas relief once will be in a position to press additional claims in new federal applications. The claims in these circumstances are likely to be fact-sensitive.²¹² Since prisoners are required to pursue available state court opportunities to develop the facts, they will invariably request hearings in state postconviction proceedings. State court hearings, in turn, will typically be the only opportunities prisoners have to present new evidence. Again, prisoners will need time to use state proceedings well, and tolling for that purpose will be essential. In a system that contemplates multiple federal habeas petitions, a limitation period is unintelligible if it runs relentlessly from the conclusion of direct review in state court, with time out only for direct review in the Supreme Court and a single petition for state postconviction relief.

There is an interpretation that allows tolling for more than one state application, but still respects the modifier “first” in § 2263(b)(2). It is this. Section 2263(b)(2) does not occupy the field but complements the tolling provision in § 2244(d)(2) for habeas

211. See *supra* text accompanying note 71.

212. See *supra* note 81.

cases generally. That general tolling provision in Chapter 153 is comparatively restrictive. It demands that an application for state relief be not only filed, but “properly filed” and “pending.” But it does not specify that a qualifying state petition must be a prisoner’s first. True, § 2244(d)(2) ties its tolling rule to a limitation period “under this subsection”—presumably meaning § 2244(d). But we have seen that provisions in Chapter 153 apply to cases subject to Chapter 154. It is possible, then, to read § 2244(d)(2) to operate in death penalty cases from covered states and to toll *any* federal habeas limitation period for *any* “properly filed” postconviction application “pending” in state court.²¹³

The two tolling provisions, § 2263(b)(2) and § 2244(d)(2), thus work in tandem. In the subset of cases subject to Chapter 154, § 2263(b)(2) tolls the 180-day period from the date that a prisoner’s “first” state petition for postconviction relief is “filed” until final disposition. Here, too, an application is “filed” even if it is subject to dismissal for failure to comport with state filing conditions. This arrangement is sensible to avoid distracting threshold arguments, the better to accelerate litigation in capital cases. Then, if the prisoner is in a position to file a second or successive state petition, he or she can secure the necessary tolling via § 2244(d)(2). In that event, only a petition that is “properly filed” and “pending” will do. The attempt to speed capital cases along has failed in the special circumstances of a second or successive state petition, so tolling is governed by the ordinary arrangements prescribed in § 2244(d)(2).

This is not to contend that the AEDPA drafters thought tolling matters through in this way or, indeed, that they thought tolling matters through at all. It is perfectly clear that they failed to appreciate the need for tolling in the various circumstances that arise. Probably they inserted the “first” term in § 2263(b)(2) with the naïve intent to restrict tolling in death penalty cases to a single state petition, without recognizing that such a rule would be untenable. Yet the point of the exercise is not to discover and effectuate what anyone actually meant this term

213. The tolling provisions in § 2263(b)(1) and § 2263(b)(2) are linked to the 180-day rule in § 2263(a) in the sense that § 2263(a) establishes the limitation period for cases subject to Chapter 154, and the tolling provisions applicable to that filing period, too, operate only when Chapter 154 is triggered. But nothing in Chapter 154 makes these timing rules exclusive of the rules for all habeas cases residing in Chapter 153. By contrast, Chapter 154 makes it clear on various occasions that the death penalty cases to which its provisions apply are also governed by the general body of habeas law captured in Chapter 153. *See supra* note 38 and accompanying text.

to mean, but to arrive at a workable interpretation that makes peace with the text Congress enacted into law.²¹⁴

There is no plausible way to interpret § 2263(b)(2) to toll the 180-day filing period while a habeas petition is before a federal court. This is regrettable. The Supreme Court has held that the general tolling provision in § 2244(d)(2) does not stop the one-year clock established by § 2244(d)(1).²¹⁵ The result has been ugly. A prisoner who files a habeas application in federal court within the limitation period still can be turned out if the district court later dismisses on curable procedural grounds—for example, a failure to exhaust state remedies. At that point, there may be little or no time to correct the error and resume federal habeas proceedings. A prisoner who worries that lodging a federal petition will not stop the clock must file a simultaneous postconviction petition in state court—in hopes that one application or the other will achieve the necessary tolling. Once again, a habeas provision ostensibly meant to expedite litigation ends up inviting a multiplicity of suits.

One is tempted to contend that § 2263(b)(2) does stop the clock for federal proceedings even if § 2244(d)(2) does not. Section 2244(d)(2) provides for tolling while an “application for State post-conviction or other collateral review” is “pending.” The Court has read the term “State” to modify both “post-conviction” and “other collateral review,” with the consequence that § 2244(d)(2) tolls only for proceedings in state court and not for the time a habeas petition is pending in a federal court.²¹⁶ Under § 2263(b)(2), however, a petition that initiates tolling is one seeking “post-conviction review or other collateral relief.” The “State” modifier does not appear, inviting the *expressio unius* interpretation that § 2263(b)(2) tolls the filing period for federal habeas as well as for state postconviction proceedings.

Trouble is, we have just seen that the rest of § 2263(b)(2) plainly cuts the other way. Tolling continues “until the final State court disposition of such petition.” It seems clear that “such petition” cannot be a federal petition, but rather must be an application for state relief. The language § 2263(b)(2) employs is different from the text of § 2244(d)(2), but the meaning is inescapably the same. This is an occasion when we must forgo an attractive interpretation of Chapter 154 and bow to the text as written. The costs will be heavy.

214. Alternatively, equity can accommodate cases in which tolling is necessary for a second or successive state petition. See *infra* text accompanying note 223.

215. *Duncan v. Walker*, 533 U.S. 167 (2001).

216. *Id.* at 181–82. The relevant Powell Committee recommendation specified a “request for post-conviction review pending before a state court.” See *supra* note 174 and accompanying text.

The short 180-day clock vastly increases the chances that time will run out while a federal court decides whether a habeas petition can be entertained. Some of the pressure can be relieved by holding federal petitions in abeyance while prisoners exhaust state court remedies—provided “cause” is shown for failing to satisfy the exhaustion doctrine in the first instance.²¹⁷ That arrangement is not optimal. But it may answer in some cases. The repeal of the “total exhaustion” rule in § 2264 will also mitigate these difficulties, though not enough to be satisfying.²¹⁸

A third tolling provision, § 2263(b)(3), authorizes a district court to give a prisoner additional time, “not to exceed 30 days,” if the prisoner moves for “an extension” in the district court “that would have jurisdiction over the case upon the filing of a habeas corpus application” and shows “good cause” for “the failure to file the . . . application within the time period established by this section.” This provision follows the relevant Powell Committee recommendation, albeit the Committee proposed that extensions of sixty days should be permissible.²¹⁹ The Committee explained that the “good cause” standard is meant for cases in which “counsel experiences some difficulty in filing” a habeas petition within the 180-day period.²²⁰ Nothing suggests that § 2263(b)(3) uses “good cause” to enact a more structured, doctrinal test.²²¹ The sensible reading, then, is that this provision enables district courts to examine extension motions ad hoc and to exercise judgment—subject to appellate review for an abuse of discretion.²²²

5. *Equitable tolling*

Section 2263 should be read to contemplate tolling the 180-day limitation period not only as Congress has provided in § 2263(b), but also as courts may determine on equitable grounds. A limitation period is subject to equitable tolling unless the language of the statute, or the context in which it operates, dislodges the default position. Neither § 2244(d), which fixes a one-year filing period for

217. See *supra* text accompanying note 89.

218. See *supra* text accompanying notes 131–33.

219. See *supra* note 176 and accompanying text.

220. POWELL COMMITTEE REPORT, *supra* note 11, at 24,698.

221. See *supra* text accompanying note 96 (describing the unique definition the Supreme Court has assigned to “cause” in habeas cases in which prisoners fail to satisfy state procedural rules for litigating federal claims). Cf. *Rhines v. Weber*, 544 U.S. 269, 279 (2005) (Stevens, J., concurring) (reading the “good cause” standard for staying a federal petition while state remedies are exhausted not to be a “strict and inflexible requirement”).

222. See *supra* text accompanying note 198.

habeas cases generally, nor § 2263, which governs death penalty cases subject to Chapter 154, explicitly forestalls equitable tolling. The Supreme Court has held that the limitation period in § 2244(d) can be equitably tolled.²²³ The same conclusion should be reached regarding § 2263.

There is, of course, an *expressio unius* argument that, by legislating certain occasions for tolling, § 2263(b) forecloses additional judicial tolling. The Court rejected a similar argument with respect to § 2244(d). There, the Court explained that the pertinent provisions in § 2244(d)(1), paragraphs (B)–(D), do not toll the one-year clock after it has started, but rather specify when the clock begins ticking in the first place.²²⁴ As we have seen, § 2263 prescribes only one beginning date for the 180-day filing period, together with three express tolling provisions. This, however, is a distinction without a difference. A statute that restarts a limitation period is the functional equivalent of a tolling provision; the two forms reflect only drafting techniques.²²⁵

The Court has acknowledged that § 2244(d)(2) is an explicit tolling provision and nonetheless rejected the possibility that it precludes equitable tolling of the one-year limitation period in § 2244(d)(1).²²⁶ Prisoners must exhaust state remedies before applying for federal habeas, and § 2244(d)(2) allows them time to do so.²²⁷ That explanation works as well with respect to the tolling provision in § 2263(b)(2), which also largely ensures that prisoners can exhaust state postconviction remedies.

Tolling under § 2263(b)(1) cannot be explained on the same basis inasmuch as it extends to proceedings in the Supreme Court, which prisoners have no obligation to pursue prior to federal habeas. Yet there is another, independent reason for an express provision tolling the 180-day limitation period while a prisoner petitions for certiorari. As we have seen, § 2263(b)(1) effectuates the familiar understanding that a state court judgment is final only when the Supreme Court disposes of a certiorari petition or the time for filing a petition expires.²²⁸ But for § 2263(b)(1), the provision in § 2263(a) starting the 180-day clock when a state court affirms a conviction and sentence might have suggested that § 2263 abandons the traditional definition of finality. Just as § 2263(b) ensures (via statutory tolling) that the conventional definition is preserved, § 2263(b) equally

223. *Holland v. Florida*, 560 U.S. 631, 641 (2010).

224. *Id.* at 647–48.

225. *Id.* at 661 (Scalia, J., dissenting).

226. *Id.* at 649 (majority opinion).

227. *Id.* at 648–49.

228. *See supra* text accompanying note 190.

clarifies (also via statutory tolling) that prisoners have time to go to the Supreme Court if they choose to do so.

Nor should the provision for a thirty-day extension under § 2263(b)(3) be read to preempt equitable tolling. An extension, too, may be linked to the exhaustion requirement—for example, when state proceedings are concluded only a short time before the 180-day limitation period is due to expire. And, here again, there is an independent reason for singling out authority for an extension. Following the Powell Committee, § 2263(b)(3) simply accommodates cases in which counsel needs a bit more time to prepare and file a habeas petition. Nothing in § 2263 (but silence) supports the argument that brief extensions for “good cause” occupy the field to the exclusion of equitable tolling.²²⁹

The conditions that justify equitable tolling in habeas cases cannot very well be specified. The point is that courts have authority to examine cases ad hoc, and the judgments required will not be easy. The burden will be relieved a bit in cases governed by § 2244(d)(1), inasmuch as paragraphs (B)–(D) already allow more time in compelling circumstances—namely, when state authorities have impeded a prisoner’s ability to file a timely habeas petition, when the Supreme Court recognizes a novel claim that is cognizable in federal collateral proceedings, and when new evidence is discovered to support a more conventional claim. Courts will perforce have more responsibility in cases subject to § 2263, in which those scenarios are not covered by statutory tolling provisions. But circumstances that Congress has identified as justifying more time in general habeas litigation should inform the conditions that courts conclude warrant equitable tolling in death penalty cases subject to Chapter 154. We would scarcely infer that by placing paragraphs (B)–(D) in § 2244(d)(1), and omitting similar provisions from § 2263, Congress has signaled that equitable tolling should not be allowed when the same or similar circumstances appear in § 2263 cases.²³⁰ Quite the opposite.²³¹

229. This is not to say that explanations that count as “good cause” for an extension cannot overlap with justifications for equitable tolling. It is only to say that the conditions that satisfy the “good cause” standard for extremely brief extensions of an already-accelerated filing period in capital cases can scarcely capture anyone’s idea of all the circumstances in which equity warrants allowing more time.

230. In *Holland v. Florida*, the Court cited *Young v. United States*, 535 U.S. 43, 53 (2002), for the proposition that an express statutory tolling provision does not necessarily foreclose equitable tolling. 560 U.S. 631, 648 (2010).

231. See *Holland*, 560 U.S. at 663 n.3 (Scalia, J., dissenting) (noting that the Court had not suggested that “any of § 2244(d)’s exceptions go beyond what equity would have allowed”).

6. *Equitable exceptions*

Just as the 180-day rule should be interpreted to allow for equitable tolling, it also should be understood to accommodate equitable exceptions. Procedural restrictions on federal habeas have long given way where their application would result in a “miscarriage of justice.”²³² We have seen that this exception opens the door to the federal courts in the absence of a clear statutory prohibition. The Supreme Court has held that a prisoner who makes a credible showing of actual innocence need not satisfy the one-year limitation period established by § 2244(d)(1).²³³ Nothing in § 2263 disclaims the “miscarriage of justice” exception. Accordingly, § 2263 should be given a similar interpretation. Consistent with the precedents in other default contexts, this exception to the 180-day filing period should also operate if a prisoner shows that he or she is ineligible for the death penalty.²³⁴

7. *Timetables for federal adjudication*

In addition to the timing rules in § 2263 for initiating federal habeas proceedings, Chapter 154 contains timetables for the adjudication of habeas corpus cases once they arrive in federal court. Under 28 U.S.C. § 2266, district and circuit courts alike must give death penalty cases from covered states priority over “all noncapital matters.” The “general congestion” of a court’s calendar is no excuse for “delay.”²³⁵ District courts typically must render judgments within 450 days after a petition is filed; circuit courts generally must reach final determinations within 120 days after the reply brief. Various provisions specify precisely how these timetables are to be computed and account for foreseeable contingencies.

The Powell Committee proposed nothing along these lines. One suspects that the judges who sat on the Committee did not regard poor case management in the federal courts as a significant contributing cause of delays in capital litigation. Congress instructs federal courts on the way to administer their dockets in other ways and in other contexts. Yet, by comparison, § 2266 is micromanagement in an especially single-minded form. The federal courts are notoriously overbooked and understaffed. District courts can recruit magistrate judges to service in the first instance, and

232. See *supra* text accompanying note 95.

233. *McQuiggen v. Perkins*, 133 S. Ct. 1924, 1934 (2013).

234. See *supra* text accompanying note 167.

235. 28 U.S.C. § 2266(b)(1)(C)(iii) (2012).

circuit courts have staff lawyers to help them digest appeals. Still, the courts will be taxed to keep to the new timetables.

The pragmatic answer is an interpretation of § 2266 to be hortatory, serving as a guide to federal courts processing capital habeas cases but imposing no routinely enforceable strictures. The courts have taken this approach to AEDPA amendments to Chapter 153 that presume to set timetables for judicial determinations.²³⁶ They can and should develop similar arrangements to cope with § 2266. If the problems with implementing § 2266 prove to be insurmountable, Congress may relent. Indeed, Congress has already done so. As originally enacted, § 2266 allowed district courts only 180 days to reach decisions; the USA PATRIOT Act extended the period to 450 days.²³⁷ In the background, of course, lie constitutional objections to time limits that interfere with the judicial function.²³⁸

The timing rules in Chapter 154 will impose a hectic schedule on capital habeas litigation. Yet these rules are open to pragmatic interpretations that make the best of a poorly conceived scheme. The 180-day rule is not jurisdictional, but rather establishes a limitation period subject to both statutory and equitable tolling. The 180-day clock is stopped during the same periods for which the general one-year limitation period in Chapter 153 is either postponed or suspended in all habeas actions. Substantially parallel arrangements for noncapital cases do not deprive Chapter 154 of significance. There is an enormous difference between six months and a full year—a difference that is magnified inasmuch as capital cases are invariably more complex and justly time-consuming. Yet sensible tolling can and should mitigate some of the difficulties that will arise.

236. *Gray-Bey v. United States*, 201 F.3d 866, 867–68 (7th Cir. 2000) (collecting circuit precedents).

237. *See supra* text accompanying note 41.

238. *See Miller v. French*, 530 U.S. 327, 349–50 (2000) (acknowledging as much); *see also Nken v. Holder*, 556 U.S. 418, 427 (2009) (explaining that federal courts need flexibility to avoid “justice on the fly”). *See generally* William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 805 (1997) (contending that the timetables in § 2266 are suspect on these grounds).

CONCLUSION

It will not be long now before Chapter 154 will become applicable to capital habeas cases from some states. I have grappled in this article with the principal interpretive questions that will have to be addressed. I have contended that most of the provisions in Chapter 154 are best understood to contemplate arrangements for capital litigation that roughly approximate the rules and procedures that AEDPA's amendments to Chapter 153 and the Supreme Court's decisions have already established across the board. The long gestation period for the new habeas corpus in death penalty cases has meant that it will be born into a different world on which it will have modest impact.