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Functional Analysis of the Plain-Error Rule

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INTRODUCTION

In this article, I attempt to do two things at once. First, I attempt to analyze the Supreme Court's jurisdiction to conduct "plain-error" review of state court decisions. The plain-error issue merits consideration not only because of its intrinsic interest and arguable complexity, but also because the question whether the Supreme Court is authorized to engage in plain-error review is an open one that I would like to help resolve. My second objective, however, is the more important of the two. In the context of analyzing plain-error review, what I really want to do is analyze legal analysis itself. There are a variety of ways to approach legal problems, which can be usefully divided into two categories. One category strikes me as sensible, the other as silly. In the process of analyzing the plain-error issue, I hope to demonstrate which is which.

The plain-error issue raises fundamental questions about the scope of Supreme Court jurisdiction to review decisions of state courts. The Supreme Court appears to have authorized itself to correct plain errors of federal law that state courts have tolerated, even though procedural irregularities would otherwise deprive the Court of jurisdiction to consider the errors. Apparently, the Court reviews the errors because it considers them too important to disregard. As a technical matter, the Court's asserted plain-error power is curious because it has been exercised without explicit regard for certain federalism-based jurisdictional doctrines thought to circumscribe the proper scope of Supreme Court activity. When those doctrines are considered, they raise questions about the propriety of plain-error review. In fact, an impressive array of precedents can be marshalled in support of the proposition that the Supreme Court simply does not possess jurisdiction to engage in plain-error review. The same precedents, however, can be used to establish an equally strong case supporting Supreme Court jurisdiction to engage in plain-error review, and therein lies the problem.

Much of the legal analysis in opinions and articles constitutes nothing more than case manipulation. Legal precedents are cited, discussed, followed, or distinguished with considerable dexterity, and then the result is pronounced. This mode of analysis, which I term "precedential," proceeds from the assumption that, consistent with the doctrine of stare decisis, decided cases are authorities that compel the results in subsequent cases unless the subsequent cases can be distinguished from the precedents. However, precedents are indeterminate. They submit to such a broad range of interpretations that even a moderately skillful legal analyst can manipulate them to produce contrary re-

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sults. I try to illustrate this in the plain-error context by developing two lines of precedential arguments that reach contrary conclusions about the Supreme Court's plain-error jurisdiction. I believe that each line of argument is as good as the other and that no way exists, within a purely precedential framework, to determine the proper resolution of the plain-error issue—or of any legal issue. My primary motive is to illustrate the vacuous nature of precedential analysis, in the hope that this will reduce the frequency with which such analysis recurs.

Despite the inability of precedential analysis to resolve the plain-error problem, the Supreme Court can readily be shown to possess plain-error jurisdiction. I try to make such a showing using a mode of analysis that I term "functional." Functional analysis resists the suggestion that precedent is capable of compelling or precluding any result. Born of the legal-realist tradition, this mode of analysis embodies the belief that case results can be justified only by persuasive arguments indicating that the results advance specified objectives. Although many courts and commentators regularly engage in functional analysis, I do not understand why all legal analysis is not functional. Applying functional analysis to the prototypical plain-error case, I conclude that plain-error review is justified because it advances our federalism objectives more than they would be advanced in the absence of such review.

Part I of this article describes the Supreme Court's plain-error rule, discusses the context out of which it has emerged, and considers the significance of the rule. Part II contains, in essence, two legal briefs offering precedential justifications both for and against the plain-error rule. Part III contains a meaningful, functional analysis of the plain-error rule and concludes that the rule is justifiable because it sensibly advances desirable objectives.

Although people always will disagree about the desirability of particular objectives, or the degree to which a given result advances or frustrates those objectives, functional analysis is the most that we can hope for as an acceptable mechanism for resolving these disputes. As long as members of society disagree about goals and priorities, the actions of our legal system will necessarily reflect those disagreements. A mode of analysis that purports to be rooted in authoritative precedent tends to mask, rather than highlight, divergent social desires and thereby obscures the very factors that should be at the core of judicial decisionmaking. The value of functional analysis lies precisely in its refusal to justify results through recourse to any authority higher than the persuasiveness of the court's opinion. Viewed in this manner, functional analysis will convince some and agitate others, but that is the best that can be expected.

I. THE PLAIN-ERROR RULE

Rule 34.1(a) of the rules of the Supreme Court of the United States—the plain-error rule—authorizes the Supreme Court, in its discretion, to consider a plain error that is evident from the record before the Court, even if the error has not been presented in accordance with prescribed procedures.[1] If the matter is otherwise within the Court's jurisdiction, rule 34.1(a) permits the Court

1. Rule 34 states in part:

to correct an error "evident from the record."[2] The remainder of rule 34 specifies additional requirements for the form and content of briefs, such as inclusion of a table of contents and a table of authorities,[3] a summary of argument,[4] and a conclusion.[5] In addition, the rule prescribes page limitations[6] and specifies the manner in which citations to the record or to the appendix should be made.[7]

The context and content of rule 34 suggest that it is ministerial, not substantive. The Supreme Court, however, has used the rule to resolve serious substantive questions relating to the Court's constitutional and statutory jurisdiction. In *Vachon v. New Hampshire*[8] the Supreme Court relied upon the plain-error rule to justify the reversal of a criminal conviction on federal due process grounds[9] when the parties had not raised the pertinent due process argument in the lower courts.[10] Normally, the Supreme Court does not have jurisdiction to consider questions not raised below.[11] Accordingly, the Court has been accused of using the plain-error rule to expand the scope of its appellate jurisdiction.[12] Closer scrutiny of the *Vachon* decision illustrates the poten-

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1. A brief of an appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order here indicated:

(a) The questions presented for review, stated as required by [these rules]. The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. *At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its discretion to decide.*

SUP. CT. R. 34.1(a) (emphasis added). Authorization for plain-error review of criminal cases tried in the federal courts has long been recognized. *See* FED. R. CRIM. P. 52(b) (plain errors affecting substantial rights may be noticed even though not brought to court's attention).

2. SUP. CT. R. 34.1(a).
3. SUP. CT. R. 34.1(c).
4. SUP. CT. R. 34.1(h).
5. SUP. CT. R. 34.1(j).
6. SUP. CT. R. 34.3.
7. SUP. CT. R. 34.5.
8. 414 U.S. 478 (1974) (per curiam).
9. *Id.* at 479 n.3, 480.
10. *Id.* at 481 (Rehnquist, J., dissenting).
11. *See* Cardinale v. Louisiana, 394 U.S. 437, 438-39 (1969) (Supreme Court appellate jurisdiction over state court judgments limited by statute to federal issues raised, preserved, or passed upon by state court); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945) (same); Crowell v. Randell, 35 U.S. (10 Pet.) 368, 392 (1836) (same).
12. *See* Vachon v. New Hampshire, 414 U.S. at 481-84 (Rehnquist, J., with Burger, C.J. & White, J., dissenting) (resolution of federal issue inconsistent with congressional limitation on Supreme Court appellate jurisdiction); *see also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 130-32, 138-39 (2d ed. Supp. 1981) (Supreme Court's jurisdictional reliance on plain-error rule "was, at the least, strained") [hereinafter HART & WECHSLER].

It is possible to read *Vachon* as standing for only the limited proposition that when an issue is raised in the state courts, but not made one of the "questions presented for review" within the meaning of Supreme Court rule 34.1(a), the Supreme Court, nevertheless, may consider the question if it relates to a plain error. Such a modest reading of the case avoids the jurisdictional issues raised in the text, but it does not appear to fit the facts of the case. The Supreme Court reversed on the due process ground that the record lacked any evidence of one of the essential elements of the crime. Although the per curiam opinion stated that the appellant made sufficiency of the evidence arguments in the state courts, 414 U.S. at 478, the dissent pointed out that the appellant did not identify the arguments as constitutionally based. *Id.* at 482 (Rehnquist, J., with Burger, C.J. & White, J., dissenting). The dissenters viewed the evidentiary arguments as a state law claim, not a federal constitutional challenge. *Id.* Consequently, they gave the case the broader reading that raises the jurisdictional issues, *id.* at 481-84, as did the

tial jurisdictional problems.

In *Vachon* the owner of a "head shop" was convicted by a New Hampshire trial court of wilfully contributing to the delinquency of a minor, in violation of a New Hampshire statute, after a fourteen-year-old girl purchased from his store a twenty-five cent button bearing the slogan "Copulation not Masturbation."[13] The Supreme Court of New Hampshire affirmed the conviction,[14] but the United States Supreme Court reversed. It found that the record contained no evidence of "wilfulness," an essential element of the offense as defined by state law.[15]

Although due process requires proof of each element of a criminal offense,[16] Vachon never made to any court the wilfulness argument on which the Supreme Court relied, sua sponte, to reverse his conviction.[17] In the state trial court Vachon argued that, as a matter of state law, the statutory offense required proof that an adjudication of delinquency actually resulted from the allegedly criminal act.[18] He also argued that because the button was not obscene, the act of selling the button was constitutionally protected by the first amendment.[19] After his conviction by the trial court, Vachon renewed those arguments in the state supreme court, which rejected them and affirmed his conviction.[20] The state supreme court also ruled that, as a matter of state law, the "wilfulness" requirement of the statute merely required proof that the act complained of— sale of the button to a minor—was voluntary and intentional rather than mistaken or accidental and held that the evidence proved such wilfulness.[21] One dissenting justice of the state supreme court argued that the statute was unconstitutionally vague,[22] although Vachon himself had not challenged the statute on vagueness grounds.[23]

On appeal to the United States Supreme Court, Vachon made two arguments in his jurisdictional statement. First, he renewed his argument that the

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Court itself in subsequent cases. *See infra* note 41 (discussing Supreme Court opinions that read *Vachon* to permit plain-error review of issues not presented to state courts). Moreover, the commentators have given *Vachon* this broader reading, *see* HART & WECHSLER Supp., *supra*, at 130-32, and this is the reading that I am prepared to defend.

At the time *Vachon* was decided, the plain-error rule, which was then contained in Supreme Court rule 40(1)(d)(2), did not mention jurisdiction. The present incarnation of the rule, however, expressly provides that the Supreme Court may consider plain errors that are "otherwise within its jurisdiction to decide." SUP. CT. R. 34.1(a). Nevertheless, it is unlikely that the amendment is of any consequence here. Presumably, the Court considered the plain error reviewed in *Vachon* to be "otherwise within its jurisdiction to decide" even though the rule in effect at the time did not expressly contain such a restriction. Moreover, this article is designed, in part, to establish that the Court's review of the *Vachon* plain error was well within its constitutional and statutory jurisdiction, regardless of which formulation of the plain-error rule is considered. In my view, both the old and new versions of the rule have the same meaning, and both authorize the Supreme Court's actions in *Vachon*.

13. New Hampshire v. Vachon, 113 N.H. 239, 240-41, 306 A.2d 781, 783 (1973).

14. *Id.* at 243, 306 A.2d at 785.

15. 414 U.S. at 478-80.

16. Harris v. United States, 404 U.S. 1232, 1233 (1971); Thompson v. Louisville, 362 U.S. 199, 206 (1960); Fiske v. Kansas, 274 U.S. 380, 386-87 (1927).

17. *See* 414 U.S. at 481 (Rehnquist, J., with Burger, C.J. & White, J., dissenting).

18. 113 N.H. at 241, 306 A.2d at 783.

19. *Id.*, 306 A.2d at 783.

20. *Id.* at 241-42, 306 A.2d at 783-84.

21. *Id.* at 242, 306 A.2d at 784.

22. *Id.* at 243-44, 306 A.2d at 785 (Grimes, J., dissenting).

23. *See* Jurisdictional Statement at 5-6, Vachon v. New Hampshire, 414 U.S. 478 (1974).

button was not obscene[24] and asserted that the state had introduced no evidence of obscenity.[25] Second, Vachon argued that the statute was unconstitutionally vague.[26] In response to the jurisdictional statement, the state moved the Court to dismiss the appeal for want of a substantial federal question or, in the alternative, to affirm summarily Vachon's conviction.[27] The Supreme Court did not hear argument or receive briefs on the merits.[28] Instead, on the basis of the jurisdictional papers, the Court issued a per curiam opinion reversing the conviction on due process grounds because the state introduced no evidence that Vachon sold the button to a minor—a requirement that the Court found to be encompassed by the wilfulness provision of the statute.[29]

Justices Rehnquist and White and Chief Justice Burger dissented, arguing that because the issue had not been raised in the lower courts, the Supreme Court did not have jurisdiction to consider the due process sufficiency of the evidence of wilfulness.[30] The dissenters also argued that even if jurisdiction did exist, the Court had improperly supplanted its own construction of the wilfulness provision of the statute for that of the state supreme court by requiring proof that Vachon personally sold the button.[31]

The state moved for a rehearing, arguing that it had never received an opportunity to address the question of evidentiary sufficiency under the Supreme Court's construction of the New Hampshire statute.[32] The Supreme Court denied the motion.[33]

For reasons that are unclear, the Supreme Court handled the *Vachon* case in an unorthodox manner.[34] The second prong of the dissenting opinion is certainly correct; the Court did rewrite the New Hampshire statute by superimposing a "personally" requirement on the state supreme court's construction of the wilfulness provision. It is difficult to conceive of a theory of federalism permitting the Supreme Court of the United States to overrule a state supreme court on a question of state law.[35] Moreover, it is difficult to conceive of any legitimate function served by the Supreme Court's reconstruction of state law that could not have been accomplished through less suspect means, such as

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24. *Id.* at 7-11.

25. *Id.* at 10. Vachon cited *Thompson v. Louisville*, 326 U.S. 199 (1960), which permits reversal of a criminal conviction when the record contains "no evidence" of an essential element of the criminal offense. *Id.* at 206.

26. Jurisdictional Statement, *supra* note 23, at 11-15.

27. Appellee's Motion to Dismiss or Affirm, Vachon v. New Hampshire, 414 U.S. 478 (1974).

28. 414 U.S. at 487 (Rehnquist, J. with Burger, C.J. & White, J., dissenting).

29. 414 U.S. at 479-80.

30. *Id.* at 481-84.

31. *Id.* at 484-87.

32. Appellee's Motion for Rehearing, Vachon v. New Hampshire, 414 U.S. 478 (1974).

33. 415 U.S. 952 (1974).

34. Perhaps the Supreme Court was sufficiently skeptical about the constitutionality of the state statute, at least as applied to Vachon, that it wished to reverse the conviction, but was not skeptical enough to actually declare the statute unconstitutional.

35. *But see infra* notes 182-84 and accompanying text (citing cases). The most flattering interpretation that I can venture for the Court's action is that, in essence, it imposed a saving construction on the New Hampshire statute. In this regard, consider Professor Tushnet's suggestion that the Court did not rewrite the statute, but, in effect, held the New Hampshire statute unconstitutional as applied because Vachon's behavior was constitutionally protected. *See* Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U.L. REV. 775, 795-99 (1975).

invalidating the statute as applied. Yet, as striking as the Court's actions were in this regard, it is the first prong of the dissent's indictment that is of concern for present purposes.

The dissent emphasized that the due process ground upon which the majority based its reversal—the lack of sufficient evidence of wilfulness—was never asserted in the state courts.[36] As a matter of administrative preference, the Supreme Court normally declines to consider an issue not raised in the lower courts because initial lower-court consideration of the issue, as well as the development of a proper factual record, facilitates Supreme Court resolution of the issue.[37] When a case reaches the Supreme Court from a state court system, however, the restriction on resolving issues not raised below arguably becomes jurisdictional, rather than merely a matter of administrative preference.

Two possible limitations on the exercise of Supreme Court appellate jurisdiction exist with respect to issues not raised in the state courts. First, the Supreme Court has stated that its appellate jurisdiction is limited by statute to federal questions that the record reveals were both raised in and decided by state courts of last resort.[38] Second, as a constitutional matter, when a state procedural rule permits a state court of last resort to decline to consider issues not raised in a timely manner in the state court system, reliance on such a rule constitutes an independent state law basis for the judgment, which arguably deprives the Supreme Court of article III jurisdiction to consider the federal issue.[39] If the Supreme Court vacates a state court decision because of a plain error of federal law not raised in the state court system, the state court, applying its timely-presentation requirement, is free to reinstate its original decision. The litigant's failure to make timely presentation of the federal issue to the state court amounts to a procedural default sufficient to serve as a purely state law basis for the decision. Thus, the decision is immunized from further Supreme Court review because of the absence of any federal question.

The *Vachon* majority did not discuss the possible limitations on the Court's appellate jurisdiction. It did, however, indicate awareness of the problems posed, by citing the plain-error rule as authority for its exercise of jurisdiction.[40] In addition, the Court has continued to cite *Vachon*, which suggests that it is more than a mere aberration in the law of Supreme Court jurisdiction.[41]

Assuming that the jurisdictional problems surrounding the *Vachon* case are

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36. 414 U.S. at 478. The parties never even raised the issue in the Supreme Court. *Id.*

37. *See* Hill v. California, 401 U.S. 797, 805-06 (1971) (discussing policy reasons underlying requirement that issues be raised below); Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) (same).

38. *See, e.g.,* Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945); Crowell v. Randell, 35 U.S. (10 Pet.) 368, 392 (1836).

39. *See* Fay v. Noia, 372 U.S. 391, 463-68 (1963) (Harlan, J., dissenting) (adequate and independent state ground of decision, whether procedural or substantive, constitutionally bars Supreme Court review of state court judgment).

40. 414 U.S. at 479.

41. In Wood v. Georgia, 450 U.S. 261 (1981), the Court cited *Vachon* as authorizing the Supreme Court to consider plain errors of federal law regardless of whether the pertinent federal issues had been raised in the state courts. *Id.* at 265 n.5. In Webb v. Webb, 451 U.S. 493, 501 n.5 (1981), the majority cited both *Vachon* and *Wood* to illustrate that the Court has not at all times been of a single mind concerning the need for prior presentation of an issue to the state courts. In the same case, however, Justices Powell and Brennan read both *Vachon* and *Wood* to authorize squarely Supreme Court review of plain errors not challenged in the state courts. 451 U.S. at 502 (Powell, J., with Brennan, J. concurring).

real rather than illusory,[42] the Supreme Court's use of the plain-error rule to overcome them is quite significant. The Court saw no need to justify its exercise of jurisdiction through recourse to any of the doctrines it traditionally uses to engulf cases on the periphery of its appellate jurisdiction.[43] Rather, the Court's exclusive reliance on the plain-error rule was tantamount to a holding that the Supreme Court possessed jurisdiction simply because a plain error had been committed. The Supreme Court has construed "plain error" to mean a "serious error" that, if uncorrected, could result in a "miscarriage of justice."[44] Read for all that it is worth, therefore, *Vachon* stands for the proposition that the Supreme Court has inherent jurisdiction to correct serious errors of federal law and that nothing more than the presence of such an error is required to trigger the Court's appellate jurisdiction. Accordingly, the prototypical plain-error case is one in which the sole basis of Supreme Court appellate jurisdiction is the presence of a plain error of federal law that was not properly raised in the state courts.[45] Less extreme readings of *Vachon* are possible,[46] but the more expansive reading is the one that I am prepared to defend—first on precedential grounds and then on more meaningful functional grounds.

II. PRECEDENTIAL ARGUMENTS

The traditional mode of legal analysis requires courts to follow precedents they deem controlling.[47] In my view, however, within the range of options that are available to a judge as a political and practical matter, precedent does virtually nothing to constrain the judge's discretion. In this sense, precedent is infinitely manipulable. The only limitations on a judge's ability to establish that precedent supports a given result derive from limitations on the judge's own persuasive skills.[48] If my view concerning the manipulability of precedent

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42. *See infra* text accompanying notes 254-83 (suggesting seriousness of these problems is generally overstated).

43. *See infra* notes 47-240 (discussing doctrines).

44. United States v. Frady, 102 S. Ct. 1584, 1592 (1982); *see also* Connor v. Finch, 431 U.S. 407, 421 n.19 (1976) (Court has authority to recognize unassigned errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings") (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)); Lawn v. United States, 355 U.S. 339, 362 n.16 (1957) (Court recognizes plain error in exceptional circumstances); Sibbach v. Wilson & Co., 312 U.S. 1, 16 (1940) (Court recognizes plain errors of a "fundamental nature"); Weems v. United States, 217 U.S. 349, 362 (1909) (Court less reluctant to recognize plain error when constitutional right is claimed).

45. It is likely that such errors will be constitutional as they were in *Vachon*. *Cf.* Weems v. United States, 217 U.S. 349, 362 (1909) (when constitutional rights involved, Court less reluctant to review issues not raised below and to correct plain errors of law).

46. *See supra* note 12.

47. *See* 1 W. BLACKSTONE, COMMENTARIES *70 (precedents and rules must be followed unless flatly absurd and unjust); O.W. HOLMES, THE COMMON LAW 35 (1881) (new decisions follow syllogistically from existing precedents); *see also* United States v. Maine, 420 U.S. 515, 519, 522, 527-28 (1975) (prior cases dispose of issue raised by current dispute; doctrine of stare decisis powerful force in American jurisprudence); Laird v. Nelms, 406 U.S. 797, 802-03 (1972) (doctrine of stare decisis mandates that prior cases control in subsequent case raising same issue).

48. The manipulability of doctrine follows from observations made by the legal realists and others concerning the indeterminacy of legal rules. *See In re* J. P. Linahan, Inc., 138 F.2d 650, 652-53 (1943) (Frank, J.) (prejudices and preconceptions shared by society, as well as idiosyncratic sympathies of judge, find expression in society's legal system); J. FRANK, LAW AND THE MODERN MIND xiii, 115 (6th ed. 1963) (judges' temperament, training, biases, and predilections influence decisions); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 1-18, 393 (1960) (human psychology, particular circumstances, and inherent probabilities create nonuniform pattern of decisions); *cf.* Fuller,

is correct, equally strong precedential cases can be made for and against the Court's plain-error power. This section endeavors to make those cases.

A. THE PRECEDENTS PRECLUDE PLAIN-ERROR REVIEW

The decision of the Supreme Court in *Vachon* is unprecedented. It appears to authorize the Court to engage in plain-error review—review undertaken in derogation of state procedural rules solely because of the asserted importance of the error—without even discussing the serious problems that such review entails. When those problems are considered in conjunction with the controlling precedents, proper resolution of the plain-error issue becomes as free from doubt as any legal issue reasonably can be. Throughout our history, in case after case, the Supreme Court has reaffirmed its lack of jurisdiction to review federal questions that were not properly presented in the state courts. Thus, in *Crowell v. Randell*,[49] the touchstone case concerning Supreme Court review of state court decisions, Justice Story, after carefully considering every applicable precedent, was able to state for a unanimous Supreme Court:

> These are all the cases, it is believed, in which the construction of the twenty-fifth section of the Judiciary Act [authorizing the Supreme Court to review specified state court decisions] has been made matter of controversy; and they extend over a period of more than twenty-five years. They exhibit a uniformity of interpretation of that section, which has never been broken in upon . . . . The period seems now to have arrived in which the court should, upon a full review of all the cases, with a view to close, if possible, all future controversy on the point, reaffirm the interpretation which they have constantly maintained. It is, that to bring a case within the twenty-fifth section of the Judiciary Act, it must appear on the face of the record, 1st. That some one of the questions stated in that section did arise in the State Court . . . . 4th. *That it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the State Court to the case.*[50]

The Court found the proposition that it so forcefully asserted to have been originally established by Chief Justice Marshall in *Owings v. Norwood's*

American Legal Realism, 82 U. PA. L. REV. 429, 435-38 (1934) (judges often decide cases on policy grounds, then "wring" from legal doctrine a legally acceptable basis for decision).

The critical legal scholars have accepted and expanded upon the realists' observations concerning the indeterminacy of doctrine. *See* Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1384-88 (discussing failure of policy analysis, which was offered to meet realists' criticisms of indeterminacy of legal doctrine); *see also* Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669-1676-82 (1982) (contemporary critical legal scholars represent maturation of realists' exploration of legal incoherencies).

49. 35 U.S. (10 Pet.) 368 (1836).

50. *Id.* at 398 (emphasis added). Although the language in *Crowell* directly addresses the statute regulating Supreme Court jurisdiction, the statutory restrictions themselves have constitutional dimensions. *See infra* text accompanying note 78 (exceptions and regulations clause allows congressional limitation of Supreme Court jurisdiction).

Lessee, the first case to consider the issue,[51] and since then to have been followed consistently.[52] The cases decided from the period of *Crowell* into the modern era have adhered religiously to the principle that the Supreme Court lacks jurisdiction to review questions not raised in the state courts.[53] Although more than one hundred fifty Supreme Court decisions have addressed the issue since *Crowell* was decided,[54] not a single case has ever held that the Supreme Court may review an issue not properly presented to the state courts.[55]

The only exception is, of course, *Vachon*. To the extent that the three-page *Vachon* decision can be read to authorize plain-error review,[56] however, it is simply unpersuasive when measured against the overwhelming weight of contrary authority.[57] Therefore, any contention that the Supreme Court may review a federal question not properly presented to the state court solely because of the asserted importance of a federal issue involved in the case is wholly without merit. In fact, the argument is exactly backwards. Because the pertinent restrictions on Supreme Court appellate jurisdiction have constitutional, as well as statutory underpinnings, the more important the federal issue, the less likely it is that the Supreme Court has jurisdiction.

1. The Supreme Court Does Not Possess Article III Jurisdiction to Engage in Plain-Error Review

As a constitutional matter, the Supreme Court possesses only that jurisdiction granted to it by article III, and article III limits the jurisdiction of all federal courts to enumerated "cases" and "controversies."[58] Plain-error review

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51. 35 U.S. (10 Pet.) at 392-93 (citing Owings v. Norwood's Lessee, 9 U.S. (5 Cranch.) 344, 347-51 (1809)).

52. *See* 35 U.S. (10 Pet.) at 398 (noting consistent application of prior presentation requirement).

53. *See* Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945); *see also* Moore v. Illinois, 408 U.S. 786, 799 (1972) (due process issue not properly presented for review because not raised in state court).

54. The annotations in The United States Supreme Court Digest, under "Appeal and Error" §§ 410-42, reveal well over one hundred fifty cases that have reaffirmed the proposition asserted in *Crowell*. *See* 2 WEST'S UNITED STATES SUPREME COURT DIGEST *Appeal and Error* §§ 410-42 (1943) (citing cases).

55. The only cases, prior to *Vachon*, in which the failure to raise an issue in the state courts did not bar subsequent Supreme Court review were those cases in which the applicable state procedural rules were either "inadequate" or were not "independent" of the federal issue serving as the basis for Supreme Court jurisdiction. *See infra* notes 106-25 and accompanying text (discussing narrow and specific exceptions to prior-presentation rule). Although proponents of plain-error review assert that the applicable case holdings permit the Court to consider federal issues not raised below, *see infra* notes 201-23 and accompanying text, they misconstrue the cases on which they rely, *see infra* notes 126-40 and accompanying text.

56. A much more limited reading of *Vachon*, which makes it consistent with all of the precedents, is possible. *See supra* note 12.

57. Although subsequent cases have cited *Vachon*, they have done so in dicta. *See* Webb v. Webb, 451 U.S. 493, 501 n.5 (1981) (holding that writ of certiorari must be dismissed because federal issue not raised in or decided by state courts); Wood v. Georgia, 450 U.S. 261, 265 n.5 (1981) (holding that due process issue raised, but not decided below, and not raised on appeal or in petition for certiorari, should be remanded for consideration by trial court). No subsequent case has held that plain-error review is proper. Moreover, in each case that cited *Vachon*, there was an independent basis for Supreme Court jurisdiction. *See Webb*, 451 U.S. at 494 (jurisdiction based on full faith and credit claim raised in state court); *Wood*, 450 U.S. at 262, 264 (jurisdiction based on equal protection claim raised and decided in state court).

58. U.S. CONST. art. III, § 2 provides:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States*, and Treaties made, or which shall be made, under their

exceeds the scope of the Supreme Court's constitutional jurisdiction in two distinct ways. Plain-error cases do not present cases or controversies within the meaning of article III, and they do not accord proper respect to state procedural laws as required by the federalism limitations embodied in article III. Thus, the Supreme Court does not possess constitutional jurisdiction to engage in plain-error review.

Plain-error review exceeds the article III power of the Supreme Court to decide cases and controversies. Article III of the Constitution limits the jurisdiction of all federal courts, including the appellate jurisdiction of the Supreme Court, to "cases" and "controversies."[59] Since the earliest days of the nation, the Supreme Court has construed the case or controversy provision of article III to preclude the issuance by federal courts of advisory opinions—opinions that have no legal effect on the rights of the parties.[60] The issuance of advisory opinions is constitutionally prohibited because courts exceed the bounds of the judicial function in our tripartite system of government when they engage in unnecessary legal exposition.[61]

Supreme Court review of a plain error not raised in the state court exceeds the article III jurisdiction of the Supreme Court because the Supreme Court's decision is tantamount to an advisory opinion. When the decision of a state court rests on state law grounds that are both independent of any federal issue and adequate to support the judgment, the Supreme Court lacks jurisdiction to review the decision of the state court.[62] This is true because, in light of the state law basis for the decision, no ruling by the Supreme Court on the federal issue can change the outcome. Even if the state court disregarded or wrongly resolved a federal issue, its judgment nevertheless has to be affirmed on state law

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Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction*, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id. (emphasis added).

59. *Id.*

60. *See* "Correspondence of the Justices (1793)," 3 JOHNSTON, CORRESPONDENCES AND PUBLIC PAPERS OF JOHN JAY 486-89 (1891), *reprinted in* HART AND WECHSLER, *supra* note 12, at 64-66 (refusing requested advisory opinion on basis of framer's intent and negative inference drawn from constitutional provision permitting executive departments to render advisory opinions); *see also* Flast v. Cohen, 392 U.S. 83, 94-96 (1968) (advisory opinions represent improper exercise of judicial power); Muskrat v. United States, 219 U.S. 346, 361-62 (1910) (judicial power requires actual controversy between adverse litigants).

61. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-23 (1974) (consideration of constitutional issues in abstract—outside of context surrounding concrete injury—creates potential for abuse of judicial process and distortion of judicial role in relation to other branches); United States v. Richardson, 418 U.S. 166, 188-93 (1974) (consideration of legal issues in abstract would significantly alter allocation of power at national level with shift away from democratic form of government); Frothingham v. Mellon, 262 U.S. 447, 488-89 (1923) (judicial power to review acts of co-equal branches limited to cases brought by party suffering or in immediate danger of suffering direct injury); *see also* Spann, *Expository Justice*, 131 U. PA. L. REV. — (1983).

62. *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

grounds. Stated differently, the Supreme Court does not have article III jurisdiction because any action that it takes is merely advisory.[63]

Whenever plain-error review is at issue, there is of necessity an adequate and independent state law basis for the state court's decision. All state court systems have legitimate procedural rules, and the failure ever to present an issue to the state courts would, with virtual certainty, violate at least one such procedural rule with respect to that issue.[64] In essence, such procedural rules provide, as a matter of state law, that if an issue is not raised in the prescribed manner, it can never thereafter be raised; it is simply not an issue in the case. As long as the state procedural rule is a valid constitutional rule, the Supreme Court must honor it because the Court does not have the power to alter or excuse noncompliance with valid state laws.[65] The procedural default inherent in all plain-error cases, therefore, constitutes an adequate and independent state law basis for the decision and requires Supreme Court affirmance. Accordingly, if the Court considers the federal issue, even though it cannot change the outcome, it is engaged in the issuance of an unauthorized advisory opinion.

The Supreme Court adopted precisely this line of reasoning in *Herb v. Pitcairn*,[66] when it reaffirmed its lack of jurisdiction to consider federal issues in cases in which the judgment of the state court was supported by a valid state law.[67] The Court stated:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.[68]

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63. *See id.* at 126.

64. It is difficult to conceive of a situation in which the failure to present a federal issue to the state courts would not violate a state procedural rule and thereby exclude the issue from consideration in subsequent proceedings in the case. If such a situation did exist, however, there would be no state-law bar to Supreme Court consideration of the issue and no need for the Supreme Court to invoke the plain-error rule.

65. *See* Murdock v. Mayor of Memphis, 87 U.S. (20 Wall.) 590, 626 (1874); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 301-02 (1978) (Congress may lack power to authorize Supreme Court review of state court judgments of state law); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 499, 503 (1954) (Court has never had power to review state court decisions on questions of state law); *cf.* Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1859) (state and federal sovereigns are separate and distinct). *But see* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 356-60 (1816) (arguably overruling state supreme court on question of state law). *See also infra* note 182 (citing cases in which Supreme Court arguably overruled state courts on issue of state contract law).

66. 324 U.S. 117 (1945).

67. *Id.* at 125-26.

68. *Id.* (citations omitted); *see also* Henry v. Mississippi, 379 U.S. 443, 446-47 (1965) (Court declines

The dangers of advisory opinions highlight the perverse nature of plain-error review. Whenever a court expounds upon the meaning of federal law—especially constitutional law—the danger exists that the court will make a mistake, thereby causing private parties to tailor their behavior to an erroneous view of the Constitution and laws of the United States. In addition, there is a danger that the actions of the coordinate branches of government will be improperly constrained, thereby eroding the essence of separation of powers. Accordingly, advisory opinions are constitutionally unacceptable because they pose all the dangers of judicial exposition with none of the benefits. Because gratuitous exposition cannot aid the parties by altering the outcome, these dangers are incurred unnecessarily. Advocates of plain-error review assert that these considerations should be ignored when the federal issue is especially important or fundamental.[69] Yet, the more important the federal issue—the more widespread or fundamental the effect on private parties and coordinate branches of government—the graver become the dangers inherent in exposition. Therefore, it is precisely in plain-error cases that the advisory opinion restriction should be adhered to most closely. It is precisely in plain-error cases that the lack of Supreme Court constitutional jurisdiction is most apparent.[70]

Plain-error review violates the federalism limitations embodied in article III. *Herb v. Pitcairn* reveals yet another reason why plain-error review exceeds the scope of the Supreme Court's constitutional jurisdiction. Because plain-error review negates the effect of valid state procedural rules, it offends the requirements of federalism embodied in the Constitution.[71] Under our constitutional scheme of government, state courts—not the United States Supreme Court—are the final arbiters of state law, and the Supreme Court must give effect to state laws unless they are unconstitutional.[72] In exercising plain-error review, the Supreme Court, by hypothesis, is not prepared to declare the pertinent state procedural rules unconstitutional. If it were, the constitutionality of the procedural rules would itself pose a federal question sufficient to serve as the basis for Supreme Court review, and reliance on the plain-error rule to estab-

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review of state court judgments that rest on adequate and independent state law grounds, whether substantive or procedural).

69. *See infra* notes 191-200 and accompanying text.

70. Proponents of plain-error review argue that the issuance of an advisory opinion will not result from plain error-review because the Supreme Court will rely on the plain-error to reverse or vacate the state court judgment. *See infra* notes 148-55 and accompanying text. This argument is misdirected, however. It addresses a situation in which the state court judgment is reversed because the pertinent state procedural rule is unconstitutional as applied. By hypothesis, that cannot be the situation presented in plain-error cases.

In plain-error cases, the state procedural rule *must* be valid as applied. Otherwise there would be no need to rely on the plain-error rule for jurisdiction; the unconstitutionality of the procedural rule itself would serve as the basis for Supreme Court jurisdiction. Because the Supreme Court cannot constitutionally modify or disregard a valid state law, *see supra* note 65 (citing authority), it *cannot* reverse the state court judgment, and its opinion, therefore, is necessarily advisory.

To the extent that *Vachon* appears to be inconsistent with this principle, it is because *Vachon*—if properly decided—was not a plain-error case at all. Rather, it was a case in which the Supreme Court simply reversed on the basis of an unconstitutional application of a state procedural rule.

71. *See* Herb v. Pitcairn, 324 U.S. at 125-26 (partitioning of power between state and federal judicial systems requires that Supreme Court abstain from review of state court judgments that rest on adequate and independent state grounds).

72. *See supra* note 65 (citing authority).

lish Supreme Court jurisdiction would be unnecessary. Rather, in exercising plain-error review, the Supreme Court refuses to give effect to the applicable state procedural rules despite their validity. This is something that the constitutional concept of federalism does not permit.

The federalism limitation on Supreme Court jurisdiction was described most cogently by Justice Harlan in his opinion in *Fay v. Noia.*[73] After emphasizing that the rule prohibiting review of decisions supported by adequate and independent state grounds was constitutional, not statutory,[74] Justice Harlan went on to explain:

> For this court to go beyond the adequacy of the state ground and to review and determine the correctness of that ground on its merits would . . . be to assume full control over a State's procedures for the administration of its own criminal justice. This is and must be beyond our power if the federal system is to exist in substance as well as form. The right of the State to regulate its own procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing "substantive" laws governing other aspects of the conduct of those within its borders.[75]

Although Justice Harlan made these remarks in dissent in *Fay v. Noia*, the majority's disagreement with his views related only to the question whether the federalism limitations that he described applied to federal district courts on habeas corpus review. Every member of the *Fay* Court agreed that a procedural default would divest the Supreme Court of jurisdiction to review the decision of a state court on direct review.[76] Indeed, the bulk of the majority opinion consisted of elaborate efforts to distinguish habeas corpus review from direct review, so that habeas corpus actions could be freed from the federalism constraints that were uniformly recognized to limit the jurisdiction of the Supreme Court on direct review.[77] Accordingly, the Supreme Court lacks article III jurisdiction to engage in plain-error review because such review would violate the federalism limitations embodied in article III.

In sum, Supreme Court plain-error review raises two problems. The Court's asserted plain-error power necessarily entails issuance of advisory opinions. Moreover, plain-error review denies the effectiveness of valid state laws that the Supreme Court has no authority to disregard. Both of these problems are of constitutional dimensions, and both illustrate a distinct way in which plain-error review exceeds the scope of the Supreme Court's article III jurisdiction. An additional reason, however, supports the argument that plain-error review exceeds the Supreme Court's constitutional power. Not only is the constitutional jurisdiction of the Supreme Court limited by those provisions of article III that operate of their own force, but also, by virtue of the exceptions and regulations clause, it is limited by any statutory restrictions that Congress im-

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73. 372 U.S. 391, 463-68 (1963) (Harlan, J., with Clark & Stewart, JJ., dissenting).
74. *Id.* at 464.
75. *Id.* at 466-67.
76. *See id.* at 428-30.
77. *See id.* at 399-435. Because habeas corpus review is significantly different than direct Supreme Court review, plain-error advocates who argue that habeas corpus cases establish article III jurisdiction to engage in plain-error review, *see infra* notes 162-73, are unpersuasive.

poses on the Court's jurisdiction.[78] Congress has taken great pains to impose such restrictions in a manner that directly precludes plain-error review.

2. The Supreme Court Does Not Possess Statutory Jurisdiction to Engage in Plain-Error Review

As a statutory matter, the Supreme Court does not have jurisdiction to engage in plain-error review of cases decided by state courts. Both Congress and the Supreme Court itself have repeatedly emphasized that prior presentation of a federal question—not its mere presence in a case—is a prerequisite to Supreme Court review. This is true no matter how grave the consequences of adhering to prior-presentation rules. In those special circumstances when adequate regard for federal rights requires deviation from the prior-presentation requirement, two narrow and specific exceptions are available to excuse noncompliance with the requirement. Those exceptions, however, are exhaustive. Because neither exception extends to plain-error cases, the Supreme Court lacks statutory jurisdiction to review such cases.

Plain-error review conflicts with voluminous and consistent statutory precedent requiring prior presentation to the state court. The statutory provision governing Supreme Court jurisdiction to review state court decisions, section 1257 of the Judicial Code,[79] extends the Supreme Court's jurisdiction to only those cases in which an issue of federal law has been "drawn in question" or a federal title, right, privilege or immunity has been "specially set up or claimed."[80] From the outset, the Supreme Court construed these statutory restrictions on its jurisdiction to require an affirmative demonstration on the record of the state court proceedings that a federal question was both presented to and decided by the state court.[81] Modern cases have reaffirmed that proposi-

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78. Article III creates Supreme Court appellate jurisdiction in accordance with "such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2; *see supra* note 58 (quoting article III).

79. 28 U.S.C. § 1257 (1976) provides in part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or law of the United States, and the decision is in favor of its validity.
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Id.

The original statutory provision regulating Supreme Court review of state court decisions was § 25 of the Judiciary Act of 1789, 1 Stat. 73, 85-87. Accordingly, the early cases concerning the scope of Supreme Court review of state court decisions discuss that provision.

80. 28 U.S.C. § 1257 (1976).

81. *See, e.g.,* Maxwell v. Newbold, 59 U.S. (18 How.) 511, 514-16 (1855); Crowell v. Randell, 35 U.S. (10 Pet.) 368, 398 (1836); Fisher v. Cockerell, 30 U.S. (5 Pet.) 248, 255-56 (1831); Hickle v. Starke, 26 U.S. (1 Pet.) 94, 98 (1828).

tion.[82] Therefore, in a plain-error case in which the pertinent federal question has not been presented to the state courts, the statutory requirements for Supreme Court jurisdiction cannot be satisfied.

The cases supporting this proposition are not only explicit, but voluminous and consistent. The United States Supreme Court Digest refers to well over one hundred fifty cases reaffirming the proposition that the Supreme Court lacks jurisdiction to consider federal issues not properly presented to the state courts.[83] Commentators accept the proposition matter-of-factly.[84] In fact, prior to *Vachon*,[85] no case on point ever rejected the soundness of this fundamental proposition.

The strictness with which the Supreme Court has applied the prior-presentation requirement provides an additional indication of the high degree of seriousness that the Court accords the requirement. For example, the Court has applied the requirement even in cases in which the trial judge relied upon the federal issue in the opinion disposing of the case.[86] It is true that the cases so limiting the Court's jurisdiction relied upon a now-abandoned rule that the state court "record" did not include the trial court's opinion.[87] However, to the extent that those cases preclude state court dicta about a federal issue that the parties did not raise from serving as the basis for the Supreme Court's jurisdiction, those cases remain good law today.[88]

The requirement that the record demonstrate affirmatively that a federal question was raised and decided precludes review unless the Court is certain that the state court decided a federal question.[89] Thus, when the parties raise dispositive federal and state law issues, but it is not clear which law the state court relied upon in reaching its decision, the Supreme Court has held that it lacks jurisdiction.[90] Similarly, when the state court's opinion discusses both state and federal constitutional grounds, but it is not clear which constitution actually served as the basis for the court's decision, the Supreme Court has held that it lacks jurisdiction.[91] Even when the language of the state court opinion strongly suggests that a federal question was raised and decided by the

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82. *See* Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945); *see also* Moore v. Illinois, 408 U.S. 786, 799 (1972) (due process issue not properly presented for Supreme Court review because not raised in state court).

83. *See supra* note 54.

84. *See* HART & WECHSLER, *supra* note 12, at 531-38; M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 217 (1980).

85. *See supra* notes 34-37 and accompanying text (discussing unorthodox *Vachon* decision).

86. *See* Williams v. Norris, 25 U.S. (12 Wheat.) 117, 118-21 (1827); Inglee v. Coolidge, 15 U.S. (2 Wheat.) 363, 367-68 (1817).

87. *See Williams*, 25 U.S. at 118 (court's opinion not part of record); *Inglee*, 15 U.S. at 367-68 (same).

88. The Supreme Court possesses jurisdiction over cases decided by state courts only when a federal issue was actually decided, *see* Cardinale v. Louisiana, 394 U.S. 437, 438-39 (1969), or when resolution of the issue was necessary to the decision, Lynch v. New York *ex rel* Pierson, 293 U.S. 52, 54 (1934).

89. *See Lynch*, 293 U.S. at 54-55 (Supreme Court lacks jurisdiction when unclear whether state court decision based on state or federal law and when state ground sufficient to sustain decision); Adams v. Russell, 229 U.S. 353, 358-59 (1913) (same).

90. *See Lynch*, 293 U.S. at 54-55; *cf.* Phyle v. Duffy, 334 U.S. 431, 439-44 (1948) (Supreme Court lacks jurisdiction to review habeas corpus petition when not clear that lower court's denial of habeas relief did not rest on adequate state ground).

91. *See* Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 491-92 (1965); *cf.* Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 200-01 (1965) (vacating and remanding rather than dismissing for lack of jurisdiction).

state court, the Supreme Court has held the mere possibility that the decision could rest on nonfederal grounds sufficient to deprive it of jurisdiction.[92]

An indication of the importance of the prior-presentation requirement that is even more revealing than its strict interpretation has been the Court's willingness to accept the grave consequences that can result from its application. The case of *Williams v. Georgia*[93] provides a striking example. In *Williams* a Georgia jury that had been selected in a racially discriminatory manner convicted a black defendant of murdering a white person.[94] Although the names of both black and white individuals had been placed in the box from which the jury array was selected, the names of whites were on white tickets, and the names of blacks were on yellow tickets.[95] No blacks were selected to serve on the jury that convicted Williams.[96] After his conviction, Williams was sentenced to death.[97]

Although prior to the trial court's disposition of the *Williams* case the United States Supreme Court had declared the specific white ticket/yellow ticket practice unconstitutional,[98] Williams' court-appointed counsel failed to object to the racial composition of Williams' jury until after Williams' conviction.[99] When Williams' counsel finally did raise the constitutional claim, it was untimely and therefore not properly presented in accordance with Georgia's procedural rules.[100] Williams attempted to obtain Supreme Court review of his conviction based upon his jury discrimination claim.[101] The Supreme Court, noting the presence of the procedural default, declined to exercise jurisdiction,[102] but remanded to the Georgia Supreme Court for reconsideration in light of the extraordinary nature of the case.[103] On remand, however, the Georgia Supreme Court refused to reconsider the conviction,[104] and the United States Supreme Court was unable to prevent Williams' execution.[105]

Plain-error review does not fit within recognized exceptions to the prior-presentation requirement. When faced with countervailing considerations that outweigh even the interests in strict adherence to the prior-presentation requirement, courts excuse compliance with that requirement by applying one of two narrow and specific exceptions. The exceptions, however, are not a general license authorizing wholesale disregard of the rule. Rather, they are exhaustive. Neither exception contemplates anything resembling plain-error

92. *See* Black v. Cutter Laboratories, 351 U.S. 292, 297-300 (1956) (declining jurisdiction to review state court decision when possible to interpret opinion as involving only state law).
93. 349 U.S. 375 (1955).
94. *Id.* at 376-79.
95. *Id.* at 376.
96. *Id.* at 376-77.
97. *Id.* at 376.
98. *Id.* at 378 (citing Avery v. Georgia, 345 U.S. 559, 563 (1953)).
99. *Id.* at 377-80.
100. *Id.* at 382-83.
101. *Id.* at 380.
102. *Id.* at 388-89.
103. *Id.* at 391.
104. *See* 211 Ga. 763, 764, 88 S.E.2d 376, 377 (1955) (affirming conviction).
105. *See* 350 U.S. 950 (1956) (denying certiorari). The Supreme Court must have based its denial of certiorari on lack of jurisdiction. If the Court, in fact, had possessed jurisdiction but simply chose not to exercise it, its actions would have been unconscionable.

review, and this provides even more evidence that such review exceeds the scope of the Court's statutory jurisdiction.

The first exception to the prior-presentation requirement is available when the state procedural rule that has been violated itself raises a federal question sufficient to serve as the basis for Supreme Court review. In such circumstances, the state law basis for the decision is not "independent" of the federal issue, and the Supreme Court, therefore, has jurisdiction to consider the federal claim. For example, in *Brown v. Western Ry. of Alabama*[106] the plaintiff filed suit in a state court seeking damages under a federal statute for personal injuries sustained as a result of the defendant railroad's alleged negligence.[107] The state court dismissed the complaint because the plaintiff had not made allegations of negligence with the degree of specificity required under state procedural law.[108] The United States Supreme Court exercised jurisdiction and reversed, despite the state law basis for the decision under review.[109] The Court held that the rules of pleading that controlled state-created rights could not preclude the Supreme Court from interpreting a complaint that asserted a federally-created right.[110] In essence, the Court held that the state procedural rule was not sufficiently independent of the federal right so as to defeat Supreme Court jurisdiction.

The Supreme Court issued a similar ruling in *Davis v. Wechsler*, [111] in which the state court also attempted to defeat a federal claim by asserting the litigant's noncompliance with a state procedural rule.[112] In reversing the state court's decision, Justice Holmes stated:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, *when plainly and reasonably made*, is not to be defeated under the name of local practice . . . . This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.[113]

Justice Holmes' directive that assertions of federal rights must be "plainly and reasonably made" indicates that the independence exception to the prior-presentation requirement does not authorize plain-error review. Although state procedural rules can become so entangled with the procedures inherent in the assertion of federal rights that they lose their independence, this occurs only when the federal claim is "plainly and reasonably made."[114] The independence exception does not, therefore, purport to govern plain-error cases in which the parties never even present their federal claims to the state courts.

The second exception to the prior-presentation requirement is available when the state procedural rule that has been violated is not adequate to sup-

106. 338 U.S. 294 (1949).
107. *Id.* at 294.
108. *Id.* at 295-96.
109. *Id.* at 299.
110. *Id.* at 296-97.
111. 263 U.S. 22 (1923).
112. *See id.* at 23-24 (defendant objected to jurisdiction on basis of federal venue rules, but state court held objection waived, under state procedural law, by appearance).
113. *Id.* at 24 (citations omitted; emphasis added).
114. *Id.*

port the state court judgment. A procedural rule is inadequate if the rule is itself unconstitutional or if it is not a genuine state rule of procedure. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*[115] the Supreme Court exercised jurisdiction over a federal claim that the state court had rejected because the plaintiff had failed to raise it in the manner prescribed by state procedural law.[116] Because it was impossible for the plaintiff to have complied with the pertinent procedural rule, the Supreme Court declared the rule unconstitutional as applied and reversed the state court decision.[117]

In *NAACP v. Alabama ex rel. Patterson*[118] an Alabama trial court issued a contempt citation against the NAACP for refusing to produce its membership lists in the course of pending litigation.[119] The NAACP unsuccessfully sought review in the Alabama Supreme Court.[120] In its denial of certiorari, the Alabama court ruled that as a matter of state law, mandamus rather than certiorari was the proper route to follow in seeking relief.[121] Despite the state law basis for the decision under review, the United States Supreme Court exercised jurisdiction.[122] It held that the state procedural rule the Alabama Supreme Court relied on was so novel that it could not genuinely be viewed as adequate to preclude Supreme Court jurisdiction when the petitioner had proceeded in justifiable reliance on prior state court decisions.[123]

Neither prong of the adequacy exception applies to plain-error cases. Plain-error review does not depend upon a finding that the state's prior-presentation rules are either unconstitutional or nongenuine. Rather, plain-error review is based upon the view that the Supreme Court, in sufficiently important cases, can ignore noncompliance with state procedural rules, even if those rules are completely genuine and constitutional. Proponents of plain-error review refer to the independence and adequacy exceptions to the prior-presentation requirement as if they were broad, general licenses authorizing Supreme Court review in the Court's unbridled discretion.[124] The exceptions, however, are nothing of the sort. Each of the cases on which the plain-error proponents rely fits neatly into one of the categories discussed above, and none of those cases authorize Supreme Court review beyond the confines of the two specific exceptions that have been discussed.

Nothing could make the exhaustive nature of the two exceptions more clear than the Supreme Court's decision in *Williams v. Georgia*.[125] If the exceptions were nonexclusive, or flexible enough to encompass cases beyond those to which they are specifically addressed, certainly the Court would have found an exception to be applicable rather than acquiesce in the constitutionally offensive execution of a man convicted of a capital offense by a jury selected in a

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115. 281 U.S. 673 (1930).

116. *Id.* at 678-79. The state court refused to hear the plaintiff's claim because the plaintiff did not first seek an administrative remedy. *Id.*

117. *Id.* The Supreme Court found that no administrative remedy was available to the plaintiff. *Id.*

118. 357 U.S. 449 (1958).

119. *Id.* at 453.

120. *Id.* at 454.

121. *Id.* at 455.

122. The NAACP argued that it had a constitutional right to maintain the secrecy of its membership lists to prevent harassment of its members. *Id.* at 462.

123. *Id.* at 457-58.

124. *See infra* notes 224-40 and accompanying text (discussing exceptions).

125. 349 U.S. 375 (1955).

racially discriminatory manner. Because the two exceptions that do exist to the prior-presentation requirement are narrow and specific, they did not authorize the Supreme Court to save Williams' life. Likewise, they do not authorize it to engage in plain-error review.

Cases cited in support of plain-error review actually represent examples of the traditional exceptions to the prior-presentation requirement. Cases construing section 1257 to require prior state court presentation as a prerequisite to Supreme Court jurisdiction are noteworthy not only for their volume, but also for their consistency.[126] Nevertheless, the plain-error advocates argue that several cases authorize Supreme Court review in the absence of prior state court presentation.[127] Even if the cases stood for the proposition that they are offered to support, their small number is far from sufficient to offset the contrary cases, which outnumber the plain-error advocates' offerings by more than a factor of twenty.[128] In reality, however, none of the cited cases actually supports plain-error review. Rather, each case holding is better explained in a manner that is consistent with the traditional prior-presentation requirement.

Three categories of cases are advanced to illustrate situations in which the Supreme Court exercises jurisdiction in the absence of prior state court presentation of the federal issue. The first includes cases in which the Court is claimed to have taken judicial notice of federal issues never raised by the parties or addressed by the state courts.[129] It is true that language in one of these cases refers to judicial notice,[130] but extraneous language in a judicial opinion should not be confused with its holding. These cases held that when circumstances indicated that the parties and the state court all understood that a federal constitutional case was being adjudicated, the Supreme Court was not deprived of jurisdiction simply because the complaint did not make specific reference to the United States Constitution.[131]

The second category of cases in which proponents of plain-error review seek refuge includes cases in which the federal issue was "necessarily decided" even though it was never raised by the parties or discussed by the state courts.[132] Imprecise judicial language might be read to suggest the decisions are broader than they really are.[133] Again, however, each decision is better explained as

126. *See supra* text accompanying notes 83-85 (noting volume of cases construing § 1257 to require prior presentation).

127. *See infra* text accompanying notes 204-22.

128. By my count, the plain-error advocates rely on seven cases. *See infra* notes 204-22 and accompanying text. As I have noted, there are well over one hundred fifty cases reaffirming the traditional proposition. *See supra* note 54.

129. *See infra* text accompanying notes 204-09 (discussing Supreme Court's review of federal issues under theory akin to judicial notice).

130. *See* Bridge Proprietors v. Hoboken Co., 68 U.S. (1 Wall.) 116, 142 (1863) (if one can take judicial notice of anything, it is the Constitution).

131. *See* Furman v. Nichol, 75 U.S. (8 Wall.) 44, 56 (1868) (constitutional provision in dispute need not be stated in pleadings if it is explicitly or implicitly clear from record that constitutional issue arose and was decided by state court); Bridge Proprietors v. Hoboken Co., 68 U.S. (1 Wall.) 116, 142-43 (1863) (same).

132. *See infra* text accompanying notes 210-17.

133. *See* Eureka Lake & Yuba Canal Co. v. Superior Court, 116 U.S. 410, 415-16 (1886) (language suggesting that mere possibility that federal issue was decided sufficient to establish Supreme Court jurisdiction).

one in which the parties and the state courts intended to adjudicate a federal right, but failed in some technical respect to evidence their intent in the record.[134]

The final category consists of a single case, *St. Louis, I. Mt. & S. Ry. v. Starbird*,[135] which is cited for the proposition that the Supreme Court can exercise jurisdiction over federal questions not raised in the state courts simply because the federal questions are obvious.[136] The reason, however, that the Supreme Court was able to review the *Starbird* case had nothing to do with the obviousness of the federal issue. Rather, an earlier decision of the state supreme court, which held that all cases falling into the category in which *Starbird* fell would be treated as controlled by federal law,[137] rendered inconsequential the failure of the parties and the state courts to address the federal issue.[138] The United States Supreme Court recognized this prior decison when it exercised jurisdiction.[139] Accordingly, *Starbird* is a case in which, despite outward appearances, the state court did resolve the federal issue and thereby provided a jurisdictional base for Supreme Court review.

In a final effort to escape the force of the two centuries of cases whose holdings preclude plain-error review, the proponents simply assert that all of those cases are inapposite because they were addressed to ordinary situations rather than to the special situations in which plain errors are involved.[140] The Supreme Court has never articulated a distinction between special and ordinary cases for the purpose of determining its jurisdiction to review decisions of state courts. Assertion of the purported special nature of plain-error cases amounts to nothing more than a tacit admission that two hundred years of precedent does not provide an ounce of support for plain-error review.

In conclusion, the language of section 1257 requires that a federal question be raised in the state courts as a prerequisite to Supreme Court jurisdiction—a requirement that must be ignored if the Court is to exercise plain-error review. An overwhelming number of decided cases have established and reaffirmed that the language of the statutory restriction on the Supreme Court's jurisdiction means precisely what it says. Although two exceptions to the prior-presentation requirement exist, those exceptions are both specific and exhaustive, and neither permits plain-error review. All these considerations indicate that if *Vachon* was intended to authorize plain-error review, it was simply wrongly decided. We have endured for quite some time without plain-error review, and we certainly can continue to do so. Therefore, like article III itself, section

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134. *See* Murray v. Charleston, 96 U.S. 432, 441-42 (1877) (Supreme Court had jurisdiction when clear that federal issue raised and decided although not "formally" raised); *cf.* Eureka Lake & Yuba Canal Co. v. Superior Court, 116 U.S. at 415-16 (implying that state court simply did not pay serious attention to federal issue).

135. 243 U.S. 592 (1917).

136. *See infra* text accompanying notes 218-22. Although the Court cites other cases to support its holding, 243 U.S. at 600-01, none of those cases fairly can be read as "obviousness" cases. Rather they fall into the "necessarily decided" category.

137. *See* St. Louis, I. Mt. & S. Ry. v. Faulkner, 111 Ark. 430, 433, 164 S.W. 763, 764 (1914) (recognizing that federal law controlled liability of carriers of interstate rail shipments).

138. *See* 243 U.S. at 597 (state court must be held to have known that federal law controlled).

139. *See id.* at 597 n.1 (citing state supreme court case that held federal law controlling).

140. *See infra* text accompanying note 191-92.

1257 of the Judicial Code prohibits the Supreme Court from exercising plain-error review of state court decisions.

B. THE PRECEDENTS PERMIT PLAIN-ERROR REVIEW

In *Vachon v. New Hampshire*[141] the Supreme Court authorized plain-error review of state court decisions as a necessary incident to its primary function of protecting constitutional rights. *Marbury v. Madison*[142] compels the Court to measure all subsidiary legal requirements against the provisions of the Constitution in order to determine the validity of those requirements,[143] and *Vachon* follows quite naturally from *Marbury*'s command. The holding is direct, simple, and to the point. In those instances in which a federal right is at stake—a right so important that it qualifies for plain-error protection—the Supreme Court's obligation to protect that right cannot be defeated by a mere technical rule designed to serve purposes of lesser importance.

The attempt by opponents of plain-error review to recast the *Vachon* decision as revolutionary and controversial misses the mark. The Supreme Court created the prior-presentation requirement and carefully refined it, over a two hundred year period, along one clearly illuminated path that leads directly to *Vachon*. Accordingly, the asserted controversy in which the opponents of plain-error review are so eager to wallow simply does not exist. The decision is easily justified through resort to the applicable authorities.

In their reliance on historical precedents, the opponents of plain-error review ignore three central facts. First, none of the precedents that they invoke address the special circumstances present in plain-error cases. Second, those precedents most closely on point can be explained only under a theory that authorizes plain-error review. And third, other precedents, which they fail to consider adequately, not only authorize plain-error review, but require it as a matter of constitutional compulsion. Properly understood, the precedents—all of them—plainly authorize plain-error review. This is true as a matter of both constitutional and statutory law.

1. The Supreme Court Possesses Article III Jurisdiction To Correct Plain Errors of Law

Article III of the Constitution extends the appellate jurisdiction of the Supreme Court to cases arising under the Constitution and laws of the United States.[144] This permits the Supreme Court to review federal questions in cases decided by state courts.[145] Therefore, the mere presence in a case of a plain error of federal law committed by a state court is sufficient to trigger the article III jurisdiction of the Supreme Court. Admittedly, language in a variety of Supreme Court opinions suggests that prior presentation of a federal question, rather than its mere presence in a case, is essential to the establishment of

141. 414 U.S. 478 (1974) (per curiam).
142. 5 U.S. (1 Cranch) 137 (1803).
143. *Id.* at 177-80.
144. *See supra* note 58 (quoting article III).
145. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 339-51 (1816).

Supreme Court jurisdiction.[146] However, such language does not refer to the Court's article III jurisdiction, but only to its statutory jurisdiction—a topic that is discussed below.[147] The decided cases provide ample support for the proposition that the Supreme Court possesses article III jurisdiction to engage in plain-error review.

The Supreme Court has never held that it lacks article III jurisdiction to engage in plain-error review. The Supreme Court has never held, or even suggested, that article III precludes it from reviewing a federal question that was genuinely presented by a case simply because the question was not raised in state court.[148] Although time and manner of presentation may affect the desirability of entertaining a particular federal claim, there is no basis for concluding that a preference for orderly procedures rises to the level of constitutional compulsion. No case has ever held that it does, and such a conclusion would be at odds with the language of article III itself, which extends the appellate jurisdiction of the Supreme Court to *all* cases arising under the Constitution and laws of the United States—without any mention of mode of presentation.[149]

The closest that the Supreme Court has come to holding that article III precludes Supreme Court consideration of federal questions not raised in the state court system is its holding in *Herb v. Pitcairn.*[150] There the Court held that it did not possess article III jurisdiction to resolve a federal question if, because of an independent *substantive* state law basis for the decision under review, resolution of the federal question could not affect the outcome of the case.[151] Under such circumstances, Supreme Court consideration of the federal question would result in the issuance of an advisory opinion, which the case-or-controversy limitation of article III prohibits.[152] That rationale is wholly inapplicable, however, to plain-error cases.

By hypothesis, Supreme Court correction of a plain error will change the result; it will require either reversal or vacation of the state court judgment.

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146. *See, e.g.*, Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (Supreme Court lacks appellate jurisdiction unless federal question raised and decided in state court); Mellon v. O'Neil, 275 U.S. 212, 214-15 (1927) (federal question must be raised and expressly or necessarily decided by state court); Whitney v. California, 274 U.S. 357, 360 (1927) (same).

147. *See infra* notes 185-240 and accompanying text. Arguably, a statutory limitation on the jurisdiction of federal courts also amounts to an article III limitation, because article III grants jurisdiction only "with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art III, § 2; *see supra* note 58 (quoting article III) and text accompanying note 78 (Supreme Court's constitutional appellate jurisdiction defined by congressionally imposed statutory limitations). This section treats as constitutional limitations on federal court jurisdiction only limitations having a constitutional basis independent of that derived from congressional exceptions and regulations. The effect of congressional restrictions is discussed *infra* at text accompanying notes 185-240. It should be noted, however, that the power of Congress under the exceptions and regulations clause is not itself without limitation. *See generally* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), *reprinted in* HART & WECHSLER, *supra* note 12, at 330-61.

148. *Cf.* Fay v. Noia, 372 U.S. 391, 463-68 (1963) (Harlan, J., dissenting) (arguing that Supreme Court lacks constitutional jurisdiction to review federal issues not raised in state court, but failing to persuade a majority of court).

149. *See supra* note 58 (quoting article III).

150. 324 U.S. 117 (1945).

151. *Id.* at 125-26.

152. *Id.*; *see also* Fay v. Noia, 372 U.S. 391, 463-68 (1963) (Harlan, J., with Clark & Stewart, JJ., dissenting).

This proposition is clearly indicated by *Vachon*, in which the Supreme Court invoked the plain-error rule to reverse a criminal conviction that otherwise would have been left standing.[153] In addition, the Supreme Court has squarely held that the advisory opinion rationale of article III has no application when only a state *procedural* default is at issue—as is always the case in the plain-error context. In discussing the constitutional significance of the distinction, the Supreme Court, in *Henry v. Mississippi*,[154] stated:

> But it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand . . . . Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions. These justifications have no application where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.[155]

Consequently, in not a single instance has the Supreme Court held or stated that because of a procedural default it lacks constitutional jurisdiction to review a state court decision.

Supreme Court precedent indicates that the Court possesses article III jurisdiction to engage in plain-error review. Not only has the Supreme Court never held that it lacks article III jurisdiction to consider questions of federal law not presented to the state courts, but certain holdings of the Court affirmatively indicate that it does possess such jurisdiction. Prior to 1836 the Supreme Court customarily resolved federal questions in cases on appeal from state courts, even when the federal questions were never raised before the state courts. Thus, in *Willson v. Black-bird Creek Marsh Co.*[156] Chief Justice Marshall, referring to this category of cases, stated for a unanimous court:

> This Court has repeatedly decided in favor of its jurisdiction in such cases. Martin vs. Hunter's lessee, Miller vs. Nichols, and Williams vs. Norris, are expressly in point. They establish, as far as precedents can establish any thing, that it is not necessary to state in terms on the record, that the constitution or a law of the United States was drawn in question.[157]

Similarly, in *Davis v. Packard*[158] the Court stated:

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153. *See* 414 U.S. at 478-80 (conviction reversed on due process grounds when Supreme Court noticed lack of evidence as to element of crime).

154. 379 U.S. 443 (1965).

155. *Id.* at 446-47 (citations omitted).

156. 27 U.S. (2 Pet.) 245 (1829).

157. *Id.* at 250-51 (citations omitted).

158. 31 U.S. (6 Pet.) 41 (1832).

> It has also been settled, that in order to give jurisdiction to this court . . . , it is not necessary that the record should state in terms that an act of congress was, in point of fact, drawn in question. It is sufficient, if it appears from the record, that an act of congress was applicable to the case, and was misconstrued, or the decision in the state court was against the privilege or exemption specially set up under such statute.[159]

These cases leave little doubt that article III authorizes Supreme Court review of federal questions regardless of state court presentation. It is true that in 1836 the Court began to demand, in ordinary cases, prior state-court presentation as a prerequisite to Supreme Court review.[160] It expressly did so, however, as a statutory requirement and in no way undermined the vitality of its earlier decisions establishing constitutional jurisdiction to consider federal questions raised for the first time on appeal.[161]

The law of federal habeas corpus provides more modern support for the existence of article III jurisdiction. The writ of habeas corpus is available, at the behest of individuals held in custody pursuant to state court judgments, to test the constitutionality of their convictions.[162] Accordingly, the writ permits a federal district court to do, on post-conviction review, what the Supreme Court does on direct review—resolve claims that the state court committed an error of federal law. The article III grant of jurisdiction to consider cases arising under the Constitution and laws of the United States is precisely the same with respect to a habeas court as it is with respect to the Supreme Court.[163] Certainly, the Supreme Court has as much power as a federal district court to correct errors of federal law. Therefore, the decisions of the Supreme Court construing the scope of article III in the context of habeas corpus apply with equal force to the Supreme Court's jurisdiction on direct review.

The federal law of habeas corpus is permeated with procedural requirements relating to the time and manner in which federal claims must be presented in state court to secure federal court review.[164] In fact, those requirements are identical to the mode-of-presentation prerequisite to Supreme Court consideration of federal questions on direct review, in that both normally preclude consideration of claimed errors of federal law not first properly raised in the state court system.[165] However, the Supreme Court has taken great pains to

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159. *Id.* at 48 (citations omitted).

160. *See* Crowell v. Randell, 35 U.S. (10 Pet.) 368, 398 (1836) (Supreme Court lacks statutory jurisdiction to review federal issue in state court decision unless it appears from record or "necessary intendment" that federal issue raised and decided in state court); *see also* Maxwell v. Newbold, 59 U.S. (18 How.) 511, 515-16 (1855) (same).

161. *See supra* note 160 (citing cases).

162. 28 U.S.C. § 2254 (1976).

163. *See supra* note 58 (quoting article III).

164. For example, a prisoner ordinarily must exhaust all state remedies before a federal court will grant habeas corpus relief. 28 U.S.C. § 2254(b), (c) (1976); *see* Rose v. Lundy, 102 S. Ct. 1198, 1201-05 (1982) (discussing exhaustion requirement). Failure to follow state procedural rules bars federal court review unless "cause" and "actual prejudice" are demonstrated. *See* Engle v. Isaac, 102 S. Ct. 1558, 1572 (1982); Francis v. Henderson, 425 U.S. 536, 542 (1975).

165. *Compare* Rose v. Lundy, 102 S. Ct. 1198, 1201-05 (1982) (in federal habeas corpus proceeding, prisoner must exhaust state remedies before pressing federal constitutional claim in federal court) *with* Crowell v. Randell, 35 U.S. (10 Pet.) 368, 398 (1836) (on direct appeal, it must appear from record or "necessary intendment" that federal issue was raised and decided in state court).

stress that the state court presentation requirement is not a constitutionally-based jurisdictional requirement.

In the landmark case *Fay v. Noia*,[166] the Court explicitly considered and rejected, over the strong objection of Justice Harlan,[167] the suggestion that considerations of federalism deprive the federal courts of constitutional jurisdiction to consider federal claims not properly raised in the state courts.[168] The Court's holding was more than a casual assertion of a collateral jurisdictional principle. Rather, the length and vigor of the debate on the issue[169] demonstrates that the Supreme Court majority wished to establish unequivocally that, despite expressions of administrative expediency embodied in less potent doctrines, article III of the Constitution does not make presentation of a federal claim to the state courts a prerequisite to the existence of federal court jurisdiction to entertain such claims. Recent Supreme Court decisions have eroded the force of *Fay v. Noia* in some respects. For example, *Wainwright v. Sykes*[170] rejected "sweeping language" in *Fay v. Noia* that would make federal habeas review generally available in the absence of a knowing and deliberate waiver of the federal claim.[171] Nevertheless, the Court has reaffirmed the proposition that in habeas cases there is no constitutional bar against federal court consideration of issues not raised in the state court system.[172] Because precisely the same article III "arising under" language applies to both habeas and direct Supreme Court review, article III establishes constitutional jurisdiction to consider claims not presented to the state courts, whether those claims arise in a habeas court or in the Supreme Court on direct review.[173]

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166. 372 U.S. 391 (1963).

167. *See supra* notes 73-75 and accompanying text (discussing Harlan's dissent).

168. *See* 372 U.S. at 415-35 (reviewing historical accommodation between state and federal courts in administration of federal habeas corpus and finding comity, rather than federal judicial power, as basis for deference to states).

169. Approximately one-half of the majority opinion focuses on whether federal courts have power under article III to consider claims not properly raised in the state courts. Parts II and III of the opinion conduct an exhaustive historical review of relevant cases. *See id.* at 415-35. In addition, Justice Harlan's dissent focuses almost entirely on the issue. *See id.* at 463-68 (Harlan, J., with Clark & Stewart, JJ., dissenting) (constitutional argument against Supreme Court review of state court judgment based on adequate and independent state grounds).

170. 433 U.S. 72 (1977).

171. *Id.* at 87-90 (1977) (discarding *Fay v. Noia* "deliberate bypass" standard in favor of "cause and actual prejudice" standard); *see also* United States v. Frady, 102 S. Ct. 1584, 1594 (1982) (reaffirming "cause and actual prejudice" standard and elaborating upon meaning of "actual prejudice"); Engle v. Isaac, 102 S. Ct. 1558, 1575 (1982) (reaffirming same standard and elaborating on meaning of "cause").

172. *See* Wainwright v. Sykes, 433 U.S. at 81-85 (Supreme Court has jurisdiction to hear habeas claim even when prisoner failed to comply with state procedure; but Court imposes state exhaustion requirement as matter of comity); Francis v. Henderson, 425 U.S. 536, 538-39 (1976) (same).

173. It is worth considering why no explicit affirmation of constitutional jurisdiction exists with respect to direct Supreme Court review that is analogous to the *Fay v. Noia* affirmation of constitutional jurisdiction for habeas review. The reason is that no occasion has yet arisen calling for an opinion expressly upholding the Supreme Court's constitutional jurisdiction to disregard state court procedural defaults.

Unlike the circumstances surrounding *Fay v. Noia*, which, in light of Justice Harlan's dissent, required the Court to address the issue of jurisdiction on a constitutional level, the circumstances surrounding the Court's consideration of its jurisdiction on direct review have permitted resolution of the pertinent issues on statutory grounds. Accordingly, consistent with the Court's long-standing practice of avoiding unnecessary resolution of constitutional issues, *see* Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (discussing avoidance doctrine), the Court has relied on a panoply of statutory requirements and exceptions, *see infra* text accompanying notes 185-240 (discussing Supreme Court's statutory jurisdiction to correct plain errors of federal law), to set the boundaries of its

Supreme Court precedent indicates that the Constitution requires plain-error review of federal issues not raised in state court. The Supreme Court, as we have seen, has never held that the Constitution precludes it from considering federal questions not raised in the state courts, and the decided cases most directly on point affirmatively establish constitutional jurisdiction to consider such questions. Additional cases, moreover, indicate that the Constitution not only authorizes Supreme Court consideration of federal questions not raised in the state court, but in the plain-error context, requires such consideration.

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*[174] the Supreme Court held that the failure to present a federal claim to the state courts in the proper manner could not preclude Supreme Court consideration of that claim on direct review when such preclusion would deny the plaintiff adequate protection of the asserted federal claim.[175] The Court ruled that its obligation to protect the litigant's due process rights compelled this result.[176] As a result, the Supreme Court found not only constitutional jurisdiction to disregard the plaintiff's failure to raise its federal claim as prescribed in the state court, but a constitutional obligation to do so.

The facts of *Brinkerhoff-Faris* were extreme. The complexity of the state's procedural rules made it difficult—although not impossible—to raise the pertinent federal claim in the manner prescribed by the state supreme court.[177] It is

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jurisdiction on direct review. It would, therefore, be completely unwarranted to draw from the absence of a case directly on point any inference limiting the scope of the Court's constitutional jurisdiction.

In Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), the first case to consider the scope of the Court's jurisdiction under what was, in essence, its present jurisdictional statute, the Court carefully limited its consideration to the statutory issues necessary to resolve the case. It expressly declined to rule on the scope of the Court's constitutional jurisdiction. *Id.* at 633. Since that time the Court has continued to resolve questions relating to the scope of its jurisdiction through recourse to the jurisdictional statute rather than the Constitution. For the purpose of ascertaining the existence of constitutional jurisdiction, *Fay v. Noia* is analytically identical to direct Supreme Court review cases. It unmistakably establishes constitutional jurisdiction to correct plain errors of federal law, even if they were not properly raised in the state courts.

174. 281 U.S. 673 (1930).

175. *Id.* at 679.

176. *Id.* at 678. *See generally* M. REDISH, *supra* note 84, at 218-19 (constitutional concern for due process required Court to hear federal claim not presented in state court); Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 959-62 (1965) (constitutional concern for due process required reversal of state court decision based on procedural default).

177. In *Brinkerhoff-Faris* the state supreme court refused to consider the plaintiff's claim that the value of its stock had been assessed for tax purposes in an unconstitutionally discriminatory manner. 281 U.S. at 674-75. The court based its refusal on the ground that the plaintiff had failed to exhaust the administrative remedies available before the State Tax Commission. *Id.* at 675-78. The United States Supreme Court invalidated the exhaustion requirement as applied on due process grounds because it viewed an earlier state supreme court decision, Laclede Land & Improvement Co. v. State Tax Comm'n, 295 Mo. 298, 243 S.W. 887 (1922), as rendering futile any recourse to the Tax Commission. 281 U.S. at 676-77. Because *Laclede* held that the Tax Commission did not possess jurisdiction to reassess the value of stock similar to the plaintiff's, it was unrealistic to expect the plaintiff to seek relief from the Tax Commission. *Id.* at 678-79. Indeed, the state supreme court itself overruled *Laclede* when it imposed the exhaustion requirement in *Brinkerhoff-Faris*. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 323 Mo. 180, 193, 19 S.W.2d 746, 751 (1929).

An extremely cautious litigant could have complied with the *Brinkerhoff-Faris* exhaustion requirement notwithstanding *Laclede*. The United States Supreme Court viewed exhaustion as futile because it read *Laclede* to preclude the Tax Commission from granting *any* relief. 281 U.S. 678-79. *Laclede* could have been interpreted, however, to permit the Tax Commission to advise other state agencies to reassess property that the Tax Commission could not reassess itself. *See Laclede*, 295 Mo. at 303-05, 243 S.W. at 888-89 (Tax Commission may advise other boards and ensure that assessment laws are enforced). Presumably, if Brinkerhoff-Faris had requested an advisory ruling from the Tax Commis-

but a small step, however, from the due process compulsion to disregard the procedural default in *Brinkerhoff-Faris* to the analogous obligation to disregard procedural defaults involving plain errors of federal law. As the Supreme Court has held, the very essence of a plain error is its fundamental or constitutional gravity.[178] Accordingly, the due process considerations that require the Supreme Court to overlook a litigant's failure to negotiate an overly elaborate maze of state procedural rules also require the Court to overlook a state court's failure to detect and correct its own plain errors. Judicial preference for orderly adherence to procedural rules had to yield to the greater need to protect federal rights in *Brinkerhoff-Faris*. Similarly, the preference for prior state court presentation of federal claims also must yield to the greater need to protect federal rights important enough to qualify for protection under the plain-error doctrine.

Not surprisingly, the Supreme Court has always recognized an obligation to overcome technical impediments that stand in the way of correcting plain errors of federal law. As Justice Holmes stated for a unanimous Court in *Rogers v. Alabama*,[179] "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."[180] The sentiment expressed in that 1903 opinion is the same sentiment that underlies the modern plain-error rule.

Moreover, the Court customarily overlooks lesser doctrines of law in order to protect important federal rights, such as those encompassed by the plain-error rule. For example, it is well settled that state courts have the final say in resolving questions of state law, such as whether a given set of facts gives rise to the existence of a contract or how a contract is to be construed.[181] On numerous occasions, however, the Supreme Court has overruled state supreme court decisions concerning the existence or construction of a contract when it deemed such drastic measures necessary to protect rights arising under the contract clause of the Constitution.[182] Similarly, the Court has recognized its power to review state court judgments regarding the existence of state-created property rights when necessary to prevent impairment of those rights in viola-

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sion, it would have exhausted available administrative remedies, and the constitutional question would have been properly presented under state law. If the Supreme Court perceived such a reconciliation between *Brinkerhoff-Faris* and *Laclede*, it apparently viewed the degree of precision with which *Laclede* would have had to have been interpreted as too demanding to survive due process scrutiny.

178. *See supra* note 44 (citing cases).

179. 192 U.S. 226 (1904).

180. *Id.* at 230.

181. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) (state court renders final determination as to severability of contract provision); Saver v. City of New York, 206 U.S. 536, 548-49 (1906) (state court renders final determination of terms and extent of contract); *see also* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875) (Supreme Court lacks jurisdiction to review state court interpretation of state law); *cf. supra* note 65 and accompanying text (discussing extent of Supreme Court jurisdiction to review state procedural law). *See generally* HART & WECHSLER, *supra* note 12, at 439-526 (discussing Supreme Court review of state court decisions based on substantive law).

182. *See* Muhlker v. New York & Harlem R.R., 197 U.S. 544, 570 (1905) (reversing state court determination that constructing elevated railroad tracks did not infringe contractually obtained easement to air and light); Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436, 443 (1861) (reversing state court determination that bank charter not contract); *cf.* Larson v. South Dakota, 278 U.S. 429, 433 (1929) (contract clause authorizes independent Supreme Court review of contract).

tion of the due process clause.[183] In fact, the Supreme Court has even overruled a state supreme court's interpretation of its own state constitution to resolve a federal question relating to the compact clause of the Constitution.[184] If the Court's obligation to protect federal rights compels it to disregard state court substantive rulings of law that affect the core of the state's sovereignty, certainly the Court's obligation to protect rights as important as those encompassed by the plain-error rule require it to disregard the customary preference for prior state-court presentation that, by comparison, amounts to little more than a procedural nicety.

In light of the Supreme Court decisions that have established the boundaries of article III federal court jurisdiction, no convincing argument can be made to defeat the existence of Supreme Court constitutional jurisdiction to consider federal questions not raised in the state court system. Neither the advisory opinion restriction on federal court jurisdiction nor notions of federalism that arguably are incorporated into article III divest the Supreme Court of constitutional jurisdiction to correct plain errors of federal law, regardless of how these errors are presented to the Court. Moreover, the importance of the federal rights that plain errors abridge compels the Supreme Court to disregard procedural impediments to the protection of those rights. If there are any limitations on the Supreme Court's jurisdiction to correct plain errors of federal law, they must derive from statutory, rather than constitutional, restrictions on the Court's power. Supreme Court construction of the governing statutory provision, however, reveals that no such restrictions exist.

2. The Supreme Court Possesses Statutory Jurisdiction to Correct Plain Errors of Law

Supreme Court review of state court decisions is governed by section 1257 of the Judicial Code.[185] That provision authorizes Supreme Court review of final decisions of state courts of last resort subject only to one limitation: the decision under review must implicate a federal question.[186] The language of the statute says nothing about the stage of proceedings at which the federal question must be raised, or who should raise the question—the parties or the Court sua sponte.[187] The statutory language requires only that the federal question be "drawn in question" by the case or "specially set up or claimed."[188] Because all plain-error cases necessarily draw in question a federal right, they automatically satisfy the statutory language.

By judicial gloss, the Supreme Court has added to this statutory language an

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183. *See, e.g.,* Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42-43 (1944) (reviewing state probate law to ensure no taking of property without due process); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540-41, 543 (1930) (reviewing state franchise law to ensure no due process violation); Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651, 653-54, 656-57 (1927) (reviewing state law governing navigable waters to ensure no due process violation).

184. *See* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 28-32 (1951) (Supreme Court reviewed state constitution and concluded that state had power to enter into interstate compact despite contrary state supreme court ruling).

185. *See supra* note 79 (quoting § 1257).

186. *Id.*; Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875).

187. *See supra* note 79 (quoting § 1257).

188. *Id.*

additional requirement concerning time and manner of presentation. In ordinary cases the federal question must be presented to the state court system in the mannner prescribed by the state courts.[189] However, in the extraordinary cases in which plain errors of federal law have been committed, the Court has dispensed with its own procedural requirement. It has done so to safeguard important federal rights.[190] It is difficult to see how *not* adding gloss to a statute can be viewed as beyond the Court's statutory jurisdiction. This is especially true given numerous other Supreme Court precedents authorizing the Court to review state court decisions despite procedural defaults.

Precedents governing ordinary cases do not apply in the special circumstances characteristic of plain-error cases. The opponents of plain-error review point to a long string of Supreme Court cases to support their argument that prior state court presentation is a prerequisite to Supreme Court review.[191] All the cases on which they rely, however, are inapposite because they involve ordinary claims arising under ordinary circumstances. Not one of those cases discusses the special considerations that are present when plain errors are involved. A plain error is not simply a garden variety mistake of law neglected by a lower court. Rather, it is a serious error—almost always of constitutional dimensions—that, if uncorrected, would result not merely in an unfortunate outcome, but in what the Supreme Court has termed a "miscarriage of justice."[192] For this reason, precedents governing the everyday presentation of legal issues to the Supreme Court do not directly govern procedures in plain-error cases.

In the one decision that did squarely address the question of what procedures govern plain-error cases, *Vachon v. New Hampshire*,[193] the Court chose not to apply the customary prior-presentation requirement.[194] Rather, the Court explicitly relied upon the plain error rule as authority for deviating from normal procedures.[195] Because prior-presentation requirements are designed primarily for administrative convenience,[196] the Court held that fundamental constitutional principles outweigh those administrative requirements.[197]

Due process precludes mechanical adherence to customary procedural rules when federal rights outweigh administrative or procedural concerns.[198] If the Constitution requires the Court to disregard a procedural default, a statute that purported to divest the Supreme Court of jurisdiction after a procedural de-

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189. *See supra* note 160 (citing cases that recognize prior-presentation requirement).

190. *Vachon* is, of course, such an extraordinary case. *See also* Webb v. Webb, 451 U.S. 493, 502 (1981) (Powell, J. concurring) (Supreme Court has jurisdiction to review plain error to prevent fundamental unfairness or infringement of important federal right); Wood v. Georgia, 450 U.S. 261, 265 & n.5 (1981) (same).

191. *See supra* notes 81-82 and accompanying text.

192. United States v. Frady, 102 S. Ct. 1584, 1592 (1982); *see supra* note 44 and accompanying text (discussing standard for plain-error review).

193. 414 U.S. 478 (1978).

194. *Id.* at 478-80.

195. *Id.* at 479.

196. *See supra* note 37 and accompanying text.

197. 414 U.S. at 478-80.

198. *See supra* note 174-84 and accompanying text (discussing constitutional basis for plain-error rule).

fault, of course, would be unconstitutional. Therefore, rather than strain the language of section 1257 to accommodate a reading that would ultimately prove unconstitutional, the Court construed the statute to permit what the Constitution requires. Contrary to the suggestion of those who oppose plain-error review,[199] such a construction is hardly revolutionary or unprecedented; it completely accords with established principles of statutory interpretation.[200]

Plain-error review is consistent with the Supreme Court's long-standing construction of section 1257. Not only is a reading of section 1257 that authorizes plain-error review consistent with the canons of statutory construction, it is also consistent with the many Supreme Court decisions construing that section. Although the statute requires a federal question to be "drawn in question" or "specially set up or claimed" in the state court as a prerequisite to Supreme Court review,[201] those phrases are terms of art whose meanings in no sense preclude plain-error review. *Crowell v. Randell*,[202] the 1836 case that formalized the prior-presentation requirement, itself refused to make the requirement absolute. It held that a federal question was adequately invoked "if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to have induced the judgment."[203] Since that time the Court has been quite liberal in finding the requisite "necessary intendment" when the pertinent federal question was salient or important.

The Court often reviews federal questions not raised in the state courts under a theory akin to that of judicial notice. For example, in cases such as *Furman v. Nichol*[204] and *Bridge Proprietors v. Hoboken Co.*[205] the Supreme Court exercised its appellate jurisdiction to review federal constitutional questions that it deemed to be raised by the cases under review.[206] Although the parties never raised the federal questions below, and the state courts never addressed them, the Supreme Court inferred the presence of constitutional issues after independently examining the records.[207] Justifying its actions in *Bridge Proprietors*, the Court stated:

> If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say [it] in words . . . .[208]

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199. *See supra* text accompanying notes 49-55 (arguing that *Vachon* is unprincipled exception to general rule).

200. *See* Crowell v. Benson, 285 U.S. 22, 76 (1932) (Brandeis, J., dissenting) (Court should construe statute to avoid unconstitutional application).

201. *See supra* note 79 (quoting § 1257).

202. 35 U.S. (10 Pet.) 368 (1836).

203. *Id.* at 398.

204. 75 U.S. (8 Wall.) 44 (1868).

205. 68 U.S. (1 Wall.) 116 (1863).

206. 75 U.S. (8 Wall.) at 49; 68 U.S. (1 Wall.) at 141-42.

207. 75 U.S. (8 Wall.) at 49; 68 U.S. (1 Wall.) at 141-44.

The Court used similar language in *Furman v. Nichol*.[209]

On other occasions the Court reviews federal questions not raised in the state courts by relying on an expansive view of when a federal issue is "necessarily" implicated by the state court decision under review. In *Murray v. Charleston*[210] the plaintiff, a municipal stockholder, challenged the city's imposition of a personal property tax on interest payments the city owed him.[211] The plaintiff raised no federal claims, the state court addressed no federal issues, and the case could easily have been decided by the state court on state law grounds relating to proper construction of the tax statute.[212] Nevertheless, the Supreme Court exercised its appellate jurisdiction, reasoning that the state court's decision had necessarily considered the federal constitutionality of the tax.[213] The Court deemed its conclusion "too plain for argument"[214] and cited *Bridge Proprietors* and *Furman v. Nichol* as its authority.[215]

Sometimes the Court is even more direct. In *Eureka Lake & Yuba Canal Co. v. Superior Court*[216] the Court resolved a constitutional question never presented to or addressed by the state court because, after independently reviewing the record, the Supreme Court concluded that it was "possible" that the federal question at issue fell into the "necessarily decided" category.[217] Such a possibility is always present in plain-error cases.

Finally, the Supreme Court sometimes reviews a federal issue not raised below when the federal issue is so obvious that the Court is willing to impute recognition of that issue to the state courts. In *St. Louis, I. Mt. & S. Ry. v. Starbird*,[218] for example, the Court reviewed the validity of an interstate shipping contract under federal law even though the parties and the state court had treated the case as a common-law contract action and had never addressed any federal issues.[219] The Court addressed the federal questions because federal statutes so pervasively governed interstate shipping contracts that the federal issues simply could not be overlooked.[220] This was true despite the failure of the parties and lower court to raise those issues.[221] The Court cited precedent that conclusively established its power of appellate review in such cases.[222]

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208. 68 U.S. (1 Wall.) at 142.

209. 75 U.S. (8 Wall.) at 57 ("[a]ll courts take notice, without pleading, of the Constitution of the United States").

210. 96 U.S. 432 (1877).

211. *Id.* at 433.

212. *Id.* at 439-41.

213. *Id.* at 442.

214. *Id.*

215. *Id. See also* Columbia Water Power Co. v. Columbia Elec. Street Ry. Light and Power Co., 172 U.S. 475, 488-89 (1898) (federal question necessarily implicated in record); Kaukana Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254, 269-71 (1891) (same).

216. 116 U.S. 410 (1886).

217. *Id.* at 416.

218. 243 U.S. 592 (1917).

219. *Id.* at 594.

220. *Id.* at 597.

221. *Id.* at 599-602.

222. *Id.* at 600-01 (citing cases). The Court's reliance on these cases refutes the suggestion made *supra* in the text accompanying notes 135-39, that *Starbird* is merely an isolated aberration.

In an effort to support the claimed unanimity of decisions precluding plain-error review, the opponents of such review argue that in all of the cases discussed in this section, the state courts and the parties really were thinking about federal issues, even though they never told anyone about it. *See*

The pattern that emerges from these cases is unmistakable. The Supreme Court exercises appellate jurisdiction when it views a federal issue as so important or so salient that the parties and the state courts should not have overlooked it. The "drawn in question" and "specially set up or claimed" provisions of section 1257 do not have the ominous, literal meaning the opponents of plain-error review ascribe to them.[223] Instead, like most legal provisions, they are specialized terms flexible enough to permit just results. The similarity between Supreme Court review in the cases cited above and Supreme Court review in the plain-error context is striking. The Court permits review in both instances precisely because the federal issues are too obvious and too important to ignore. Accordingly, the plain-error rule fits quite comfortably within the Court's long-standing construction of section 1257.

Plain-error review fits within the traditional exceptions to the prior-presentation requirement. Although several cases suggest that prior presentation is a statutory jurisdictional requirement,[224] many recognized exceptions to that jurisdictional requirement exist. These exceptions are designed to enhance Supreme Court protection of federal rights. The plain-error rule is most sensibly viewed as simply another exception, designed to serve precisely the same function.

The asserted jurisdictional basis for prior-presentation rules is that disregard of state procedural rules constitutes a state law basis for the decision under review that the Supreme Court should respect, even though the case involves a federal question.[225] Not all state law bases for decision preclude the exercise of Supreme Court jurisdiction, however. Only those state law grounds that are both "independent" of the federal question and "adequate" to support the judgment divest the Supreme Court of jurisdiction.[226]

In the plain-error context the issue before the Court is whether a federal right is so important that it should outweigh a state's interest in proper procedures—something that itself is a question of federal law.[227] Thus, it is difficult to see how the state procedural ground for decision could ever be deemed independent of that federal question. Moreover, because the "independent" and "adequate" requirements are cumulative,[228] even if a procedural ground could conceivably be independent in the plain-error context, it would still have to be

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supra text accompanying notes 126-40. In making this argument, however, opponents of plain-error review forget their own argument that the federal issue must be presented *on the record. See supra* text accompanying notes 79-105.

Their attempt to distinguish *Starbird* is equally unavailing. They argue that the state supreme court in *Starbird* tacitly considered a federal issue not raised by the parties or discussed in the opinion. *See supra* text accompanying notes 135-39. Their only basis for this argument is that the court had spotted a similar federal issue in an earlier, although completely unrelated, case. *Id.* The argument is sheer fantasy, especially since the *Starbird* opinion did not even mention the earlier case.

223. *See supra* text accompanying notes 79-82.

224. *See supra* note 38 (citing cases).

225. *See* Fay v. Noia, 372 U.S. 391, 463-68 (Harlan, J., with Clark & Stewart, JJ., dissenting).

226. Henry v. Mississippi, 379 U.S. 443, 446 (1965); Radio Station WOW v. Johnson, 326 U.S. 120, 129 (1945); Herb v. Pitcairn, 324 U.S. 117, 125 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

227. *See* Henry v. Mississippi, 379 U.S. 443, 447 (1965) (question whether default in state procedural rule precludes Supreme Court jurisdiction of federal question is itself federal question); *see also* M. REDISH, *supra* note 84, at 217-18 (same).

228. See cases cited *supra* note 226.

adequate to divest the Supreme Court of jurisdiction. The term adequate has come to embody numerous exceptions to the ordinary prior-presentation restriction on Supreme Court jurisdiction.

A procedural default cannot preclude Supreme Court review if the procedural rule involved itself violates federal law. In such a case the state procedural ground is inadequate because the state law upon which it is based is unconstitutional.[229] Because a plain error, by definition, is so important that the need to correct it outweighs the desire to adhere to orderly procedures,[230] a state procedural rule that refused to yield to this balance would be unconstitutional as applied.[231] As such, the procedural ground would not be adequate and could not divest the Supreme Court of jurisdiction.

Even if application of the procedural rule is not so egregious as to be unconstitutional, a separate line of Supreme Court precedents establishes that a state rule that frustrates an important federal claim is, nevertheless, "inadequate" to preclude Supreme Court review. In his often-cited opinion in *Davis v. Wechsler*,[232] Justice Holmes, speaking for a unanimous Court, stated:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . . . If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds . . . . This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.[233]

The Court went on to disregard a procedural default, even though it was not prepared to hold the state procedural rule unconstitutional as a violation of due process.[234]

Another array of adequacy exceptions exists when the circumstances suggest that the state court may be applying its procedural rule in a manner intended to circumvent federal rights. The Supreme Court has found a state rule "inadequate" when its formulation or application was suspiciously novel[235] or applied with "pointless severity,"[236] or when adherence to the rule was either an "arid ritual"[237] or did not serve a "legitimate state interest."[238] The Court cre-

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229. Michel v. Louisiana, 350 U.S. 91, 93-95 (1955); Reece v. Georgia, 350 U.S. 85, 89 (1955).

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

231. *See supra* notes 174-84 and accompanying text (arguing that Constitution requires plain-error review).

232. 263 U.S. 22 (1923).

233. *Id.* at 24-25 (citations omitted).

234. *Id.*; *see also* Brown v. Western Ry. of Alabama, 338 U.S. 294, 298-99 (1949) (quoting *Davis v. Wechsler*).

235. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457-58 (1958) (novel state law requirement of appeal by mandamus rather than certiorari not adequate to preclude Supreme Court review).

236. *See* Rogers v. Alabama, 192 U.S. 226, 229-31 (1904) (state rule against prolixity in pleadings inadequate to defeat federal claim based on racial discrimination in jury pool).

237. *See* Staub v. City of Baxley, 355 U.S. 313, 320 (1958) (state rule requiring party to specify particular clause of challenged ordinance inadequate to defeat first amendment claim).

238. *See* Henry v. Mississippi, 379 U.S. 443, 447 (1965) (dictum) (state rule requiring contemporane-

ated these exceptions to the adequacy of a state procedural ground to permit review when some danger existed that the state courts would not vigorously protect the federal rights at stake. Plain-error cases pose precisely the same danger. As the name of the doctrine suggests, plain errors are not only serious errors, but conspicuous ones.[239] Although it is understandable that a pro se litigant or a party represented by only marginally competent counsel would fail to perfect a federal claim, state court judges—especially judges of the highest state courts—have no excuse for not detecting and honoring the federal claim. Accordingly, any case involving the unexplained failure of a state court to protect a serious and salient federal right necessarily raises suspicions that render the state procedural ground inadequate. Thus, because state procedural rules applied in a plain-error context can be neither adequate nor independent, they cannot divest the Supreme Court of its jurisdiction under section 1257.

No one doubts that in the absence of an independent and adequate state ground the Supreme Court possesses jurisdiction to review state court decisions when a litigant presents a federal question to the state court, but the state court neglects or declines to address it.[240] In essence, plain-error cases are analytically identical to those cases, and Supreme Court jurisdiction is equally present. Because of the salience of the federal right that serves as the basis for invoking the plain-error rule, it is as if the state court had been informed of, yet chose to ignore, the federal claim. Consequently, the Supreme Court possesses jurisdiction over such cases just as surely as it does over other cases in which the state court chooses to ignore a federal right.

In summary, the language of section 1257 permits the Supreme Court to undertake plain-error review, and none of the decided cases undermine the Court's statutory jurisdiction to engage in such review. Rather, the applicable precedents support the Court's plain-error jurisdiction. Because plain errors

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ous objection inadequate to defeat fourth amendment claim unless rule as applied serves legitimate state interest).

The Court has also found state procedural rules inadequate when under the circumstances no reasonable opportunity existed to raise the federal claim, *see* Reece v. Georgia, 350 U.S. 85, 89-90 (1955) (state rule requiring objection to discrimination in grand jury before return of indictment inadequate to defeat fourteenth amendment claim), and when the state rule lacked "fair and substantial support" under prior state court decisions, *see* Ward v. Love County, 253 U.S. 17, 22 (1920) (state rule precluding recovery of voluntary tax payments inadequate to defeat federal claim).

In addition, the Court has created a discretion exception to the adequacy of state grounds for decision. Under this exception, a state procedural rule is inadequate when the state court had broad discretion in determining whether to apply the rule and the rule's application was facially discriminatory. Williams v. Georgia, 349 U.S. 375, 383, 389 (1955). It should be emphasized that *Williams* is the same case that the opponents of plain-error review rely upon to show that we will tolerate consequences as harsh as execution rather than excuse the failure to comply with state procedural rules. *See supra* text accompanying notes 93-105. Their reliance on that case, however, is truly bizarre. The Supreme Court *did* have jurisdiction to save Williams' life, by virtue of the very discretion exception that it created for precisely that purpose in the *Williams* case itself. It was that discretion jurisdiction that permitted the Supreme Court to remand the case to the Georgia Supreme Court for reconsideration, 349 U.S. 375, 391 (1955), rather than dismiss the case for lack of jurisdiction. The reason that the Court chose to dismiss Williams' subsequent petition for certiorari, 355 U.S. 858 (1957), remains a mystery of modern jurisprudence. But it in no way demonstrates that the Court lacked jurisdiction to save Williams' life.

239. United States v. Frady, 102 S. Ct. 1584, 1592 (1982).

240. *See* Konigsberg v. State Bar, 353 U.S. 252, 254-58 (1957); Williams v. Kaiser 323 U.S. 471, 477-79 (1945). When the basis for the state court decision *might* rest upon nonfederal grounds, the question of the Supreme Court's jurisdiction is not so free from doubt. *Compare* Stembridge v. Georgia, 343 U.S. 541, 547-48 (1952) (Court has no jurisdiction) *with* Minnesota v. National Tea Co., 309 U.S. 551, 555-57 (1940) (Court at least has jurisdiction to remand for clarification).

are, by definition, both salient and important, plain-error cases fall into the categories of cases in which the Supreme Court is authorized to take judicial notice of federal law or to deem the federal issues necessarily decided by the state courts and thus reviewable. In addition, a state court's failure to consider a federal right important enough to merit plain-error protection renders the state court's action sufficiently suspect to warrant heightened Supreme Court scrutiny. Accordingly, the state law basis for a plain-error case is neither independent of the federal question nor adequate to preclude Supreme Court review within the meaning of the decided cases. Therefore, like article III, section 1257 of the Judicial Code authorizes the Supreme Court to engage in plain-error review of state court decisions.

III. FUNCTIONAL ANALYSIS OF THE PLAIN ERROR RULE

A. THE CASE FOR FUNCTIONAL ANALYSIS

A comparison of the competing arguments made in Part II illustrates the inability of precedential analysis to provide satisfactory solutions to legal problems. Each side made its assertions, but they were like two ships passing in the night. Each set of arguments embarked from a different starting point and proceeded along its own course. Although the two sides occasionally exchanged potshots, they never really engaged each other.

I chose a structure and form for each set of arguments that was calculated to lead to the desired result. But neither approach can meaningfully be termed more correct than the other. Readers comfortable with definitional analysis of legal terms and close adherence to precedent are likely to be attracted to the arguments made against plain-error review, while those impressed by more expansive characterization of case holdings are likely to be attracted to the arguments in favor of such review. More demanding readers, however, will be unsatisfied by both sets of arguments because both fail to justify their conclusions in terms of anything meaningful. The characterizations that can be imposed upon selected case holdings have no significance in the absence of a connection with some functional objective. The problem with precedential analysis is that it fails to make such a connection.[241]

It is better to analyze legal issues in terms of the functions that the pertinent doctrines are designed to serve. Legal doctrines do not simply exist; they exist for a purpose. Accordingly, resolution of a legal issue in a way that serves the purpose of the pertinent doctrine is preferable to a resolution that frustrates it. It follows, therefore, that legal analysis should attempt to identify the function of the doctrine at issue and then determine what result best serves that function.[242]

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241. It is possible, of course, to evaluate precedents in terms of the statements that they make about the functions to be served by the legal doctrines under consideration. Such use of precedent is in many respects unobjectionable, but most precedential analysis is not of this quality. Rather, as the arguments and cases considered thus far illustrate, standard legal analysis treats case results and statutory language as if they had some meaning independent of the underlying policy functions that generated them.

242. For present purposes, what I term "functional" analysis does not differ markedly form the types of policy analysis advocated by many traditional legal scholars. For a sampling of approaches to policy analysis, see H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 125-28, 162-68 (tent. ed. 1958); Fuller, *supra* note 48, at 431-38; Lasswell and

Functional analysis is complicated by the fact that legal doctrines rarely serve one isolated function. Rather, they tend to accommodate competing social policies. The contract doctrine of consideration, for example, does not serve the sole function of limiting legal enforcement to bargained-for exchanges. As dilution of consideration requirements over time suggests, the doctrine is more accurately characterized as one that balances competing societal desires.[243] On the one hand, we wish to reserve our legal enforcement resources for promises that are part of a bargained-for exchange because they are likely to be economically useful to society. On the other hand, we wish to protect reliance on promises under certain circumstances even though they were not a traditional bargained-for exchange. The doctrine of consideration reflects the way in which we have balanced those competing interests up until now.[244] A judge who understands the conflict is likely to analyze a contract case better than one who has merely memorized the requirements of the doctrine and mastered the art of culling precedents that have factual similarities.[245] Understanding competing policy choices leads naturally to functional, rather than precedential, analysis.

As I have indicated, functional analysis proceeds in two stages. First, the analyst identifies the policy functions served by the legal doctrine under consideration. Next, he or she balances the competing interests and explains why, in terms of the facts presented, the result selected advances those functions. This process requires both adoption of a position in the underlying policy debate and defense of that position through persuasive argumentation.[246] As a result, functional analysis has two clear advantages over precedential analysis. First, it highlights, rather than masks, the balancing process inherent in legal decisionmaking. This permits greater public scrutiny of the decisionmaking process and greater comprehension of the significance of decisions that are made. Second, because the bases of a decision are disclosed, the decision is more likely than a precedential decision to command the proper degree of deference.

The degree of deference to which a legal decision is entitled properly depends upon its persuasiveness. Because functional analysis in no way depends upon the invocation of authority, the persuasiveness of a functional decision is not artificially enhanced by an observer's attraction to the security of authority. Accordingly, it is possible to disagree legitimately with a functional decision by challenging either of the two grounds upon which it is based. First, the specified objective can be challenged as the wrong objective. A critic may sim-

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McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 203-06 (1943). The differences that do exist between my functional analysis and their "policy" analysis are embryonic and unimportant to the present discussion.

243. The rise and fall of the consideration-based concept of contract is chronicled in G. GILMORE, THE DEATH OF CONTRACT (1974).

244. It is, of course, possible to specify other competing interests at stake, such as business expediency versus morality.

245. Indeed, it is difficult to see how a judge could decide which factual similarities were important without reaching some prior conclusion concerning the competing functions at issue.

246. I have argued elsewhere that this is the essence of the judicial function. *See* Spann, *supra* note 61.

ply identify the competing policies differently.[247] Second, the result can be challenged because it frustrates, rather than facilitates, realization of the desired objective. A critic may simply balance the competing policies differently.[248] Far from being shortcomings of functional analysis, however, these vulnerabilities comprise its greatest asset.

The reason that legitimate disagreement about proper application of legal doctrines is possible is that legitimately conflicting policies lie beneath those doctrines. By focusing attention on the underlying policy differences, functional analysis generates healthy public debate. Moreover, explanation of a decision in functional terms provides information to the public concerning the relative importance of competing policies at particular stages of our social development.[249] This in turn permits proponents of various policies to take appropriate actions in response to the decision.[250] In fact, it is likely that the debate facilitated by functional analysis is of more long-term importance than resolution of the particular case at issue.[251]

The problem with precedential analysis is that it suppresses meaningful public debate. Asserting that cases are controlled by precedent precludes the need for explicit balancing of competing policies. As a result, precedential decisions tend not to be justified in terms of the policy choices that make them significant. Often, they are barely justified at all. Their correctness is simply asserted through the invocation of authority. The intrusion of authority into the justification process reduces the willingness of observers to challenge particular decisions. Moreover, the consequent masking of judicial discretion inherent in such a decisionmaking process enhances the artificial deference likely to be accorded a decision. The precedential judiciary is portrayed as a passive, reactive institution that does little more than turn the handle of the stare decisis machine. There is no mention that the very same judiciary created the precedents being employed and possesses the power to manipulate or overrule them. Of course, precedential analysis can generate debate over which of two or more lines of conflicting precedent is controlling. Unless such debate addresses the competing policies at issue, however, it is unimportant.[252]

Precedential analysis can be counterproductive because it masks when it should illuminate, but that does not mean that precedent itself is useless. De-

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247. For an example of the view that contract cases have nothing to do with economic efficiency but relate solely to questions of morality, see C. FRIED, CONTRACT AS A PROMISE (1981).

248. Assuming that one agrees that the objective of contract law should be to maximize efficiency, the question whether enforcement of the contract ultimately maximizes efficiency will almost always be subject to debate.

249. Again, I view such public education as the essence of the judicial function. *See* Spann, *supra* note 61. For example, in the mid-1950's society was told by the Supreme Court that the principle of equality, which society purported to espouse, outweighed all of its policies favoring segregated public education. *See* Brown v. Board of Education, 347 U.S. 483 (1954) (declaring unconstitutional "separate but equal" school systems). Apparently, however, at that stage of our development, society was not ready to be told that its equality principle outweighed its policies opposing interracial marriage. *See* Naim v. Naim, 350 U.S. 891 (1955) (per curiam) (mem.) (refusing to invalidate state court decision upholding miscegenation statute), *vacating and remanding* 197 Va. 80, 87 S.E.2d 749 (1955), *motion den.* 350 U.S. 985 (1956).

250. Some may wish to gloat; some may wish to plan revolt; some may lobby for legislation; others may take an extended vacation.

251. *See* Spann, *supra* note 61.

252. *See supra* note 241.

cided cases are useful aids to functional analysis. They can illuminate factors that otherwise might not be apparent and illustrate consequences of particular resolutions that otherwise might not be considered. In addition, the opinions in prior cases can contain persuasive arguments to support their results. It is only the use of precedent as authority that is objectionable because it deflects attention from meaningful policy concerns.[253]

This is illustrated by the present debate. Realistically, the question whether the Supreme Court should exercise plain-error review turns on how we feel about federalism—the proper balance of our conflicting desires for federal protection of federal rights on the one hand and state autonomy on the other. Yet, neither of the lines of argument developed in Part II had much to say about federalism, and even when the term was mentioned, treatment of the doctrine was superficial. The arguments made bold assertions about the proper inferences to be drawn from cases without satisfactorily explaining whether they were or were not on point. Neither line of argument directly considered the proper relation between states and the federal government. A better-reasoned analysis would result from explicit consideration of the policies embodied in the concept of federalism.

B. FUNCTIONAL JUSTIFICATIONS

The plain-error rule permits the Supreme Court on direct review to protect federal rights—generally constitutional rights—that otherwise would be ignored. Yet because the rule negates the effect of state laws governing procedures in the state court system, its application offends policies favoring state autonomy, which also have constitutional stature. Nevertheless, those competing policies, properly balanced, should be resolved in favor of permitting plain-error review because that resolution is most consistent with our present views of federalism.[254]

1. The Policy Objectives Behind Plain Error Review

The first stage of functional analysis requires identification of the policy objectives sought to be advanced through application of a legal doctrine. The plain-error rule is merely a component of a larger complex of laws governing Supreme Court review of state court decisions.[255] The purpose of those laws is to establish the level of Supreme Court oversight of state court decisions involving federal rights that is proper within our system of federalism.[256] Ac-

253. *Id.*

254. My colleague Professor Tushnet has chastised me for asserting that plain-error review is consistent with "our" views of federalism. He suggests that what I really mean is that plain-error review is consistent with "my" views of federalism. He adds that use of the term "our" is a rhetorical strategy of argumentation designed to win reader sympathy at the outset by suggesting the existence of shared values, and that such techniques might have been appropriate in Part II—where I purport to do nothing more than make arguments—but not in Part III—where I purport to do something more meaningful. Professor Tushnet is certainly correct. My only defense is that I genuinely believe that "we"—at least a majority of us—agree with "me."

255. *See* HART & WECHSLER, *supra* note 12, at 500-21 (discussing legal doctrines that shape role of courts with respect to relationship between state and federal law); M. REDISH, *supra* note 84, at 205-31 (same). *See generally* Hill, *supra* note 176.

256. See authorities cited *supra* note 255.

cordingly, the plain-error rule is best understood as a device for furthering the underlying objectives of federalism.

Federalism is a conceptual term connoting the degree of comity and mutual respect thought to be necessary for harmonious relations between the federal and state governments in a system in which each retains its own sovereignty. Perhaps the most famous discussion of the concept appears in Justice Black's majority opinion in *Younger v. Harris*.[257] It describes federalism as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.[258]

As the quoted language indicates, the objective of federalism-based legal doctrines is preservation of a delicate balance between state and federal interests. The proper balance often is difficult to maintain because of the intensity with which each of the competing interests is asserted. That each interest has a legitimate claim to constitutional stature increases the importance of striking the proper balance.

Although the competing interests can be difficult to balance, they are relatively easy to identify within the context of the plain-error rule. The plain-error rule is triggered when a federal right is threatened because it was not asserted in accordance with prescribed state procedures.[259] If the Court does not apply the rule to permit review, the federal right will be denied. If, however, the Court applies the rule to permit review, the integrity of state procedural laws will be undermined. Thus, the competing interests are the need to protect federal rights and the need to prevent unnecessary interference with state autonomy.

The need to protect federal rights is of manifest importance. *Marbury v.*

257. 401 U.S. 37 (1971).
258. *Id.* at 44-45.
259. *See supra* text following note 1.

Madison[260] established that the courts must ensure that all governmental actions conform to the dictates of the Constitution.[261] State governments as well as the federal government are bound to respect constitutional rights.[262] The supremacy clause requires state courts to honor even federal statutory rights.[263] Our desire to protect federal rights is so great that states are not only subject to federal law, but state courts are also affirmatively required to protect rights created by federal law.[264]

Despite the existence of state court concurrent jurisdiction over federal claims, the federal judiciary has traditionally been viewed as possessing the special competence and sensitivity required to make it the primary guardian of federal rights.[265] This preferred status of the federal judiciary stems in large measure from distrust of state courts dating back to the post-Civil War reconstruction period when both substantive federal rights and federal court jurisdiction to protect those rights were greatly expanded through enactment of the Civil War amendments and implementing legislation.[266] It is apparent, therefore, that our policy favoring federal court protection of federal rights is a particularly strong one. It is firmly rooted in both our history and our Constitution.

The competing interest in preventing unnecessary interference with state autonomy is also generally viewed as a strong one, rooted in both history and the Constitution. Whenever the Supreme Court exercises review notwithstanding a state court procedural default, it offends our policy of respect for state sovereignty in two distinct ways. First, Supreme Court intervention implies that state court protection of federal rights has been inadequate, thereby calling into question the competence or sincerity of state courts. Although distrust of state courts was originally well-founded, the Supreme Court recently has stated that suspicions about state court willingness to protect federal rights are no longer warranted.[267]

Second, when the Supreme Court overlooks a state court procedural default, it arguably denies effect to a legitimate state law in a way that is wholly inconsistent with our belief in separate spheres of sovereignty embodied in the con-

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260. 5 U.S. (1 Cranch) 137 (1803).

261. *Id.* at 177.

262. *See* U.S. CONST., art. VI, cl. 2 (supremacy clause); *see also* Malloy v. Hogan, 378 U.S. 1, 4-11 (1964) (protection against self-incrimination applies to states); Cantwell v. Connecticut, 310 U.S. 296, 303-07 (1940) (protection of free speech applies to states).

263. *See* Testa v. Katt, 330 U.S. 386, 389-94 (1947).

264. *Id.*

265. *See generally* Newborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that significant functional and institutional differences between state and federal courts make latter better able to protect constitutional rights).

266. *See* U.S. CONST., amends. XIII, XIV and XV; 42 U.S.C. § 1981 (1976) (equal rights under law); 42 U.S.C. § 1982 (1976 & Supp. V 1981) (property rights); 42 U.S.C. § 1983 (1976 & Supp. V 1981) (civil action for deprivation of rights); 42 U.S.C. § 1985 (1976 & Supp. V 1981) (civil action for conspiracy to violate rights); 18 U.S.C. § 241 (1976) (conspiracy to violate civil rights constitutes federal crime); 18 U.S.C. § 242 (1976) (wilful deprivation of rights constitutes federal crime). For a thorough discussion of the political debates concerning the necessity for federal jurisdiction over rights granted by the post-Civil War amendments and legislation, see Monell v. New York City Dep't of Social Services, 436 U.S. 658, 665-89 (1978); Monroe v. Pape, 365 U.S. 167, 170-87 (1961). *See generally* G. GUNTHER, CONSTITUTIONAL LAW 974-75 (10th ed. 1980) (historical background of reconstruction era law); R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 36 (1947) (discussion of Civil War amendments and statutes).

267. *See* Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976).

cept of federalism. On a practical level, exercise of Supreme Court review despite the procedural default reduces the incentive for parties to comply with state procedural rules by eliminating the major cost of noncompliance—sacrifice of the federal right. On a more theoretical level, Supreme Court review completely negates a state law. The state law requires a litigant to raise his or her federal claim in the proper manner if he or she wants the courts to consider it. Exercise of Supreme Court review says he or she need not do so because the Court will ignore that state law. Such an action by the Supreme Court is unobjectionable if the Court is prepared to hold the state law unconstitutional as applied. The plain-error doctrine, however, disregards even those state procedural laws that the Court is not willing to declare unconstitutional. This is curious because the Court has formulated the "adequate and independent state ground" doctrine of Supreme Court review specifically to prevent the negation of state laws that can result from application of the plain-error rule. Although the Constitution contains no specifically applicable language, its structure compels some degree of respect for state sovereignty and freedom from federal interference.[268] Therefore, both of the competing policies implicated by application of the plain-error rule are important ones that merit careful consideration.

2. Balancing the Competing Interests

The second stage of functional analysis requires a balancing of the competing interests implicated by the legal doctrine under consideration to determine how the doctrine should be properly applied to the facts at issue. Because of the overriding importance of the federal rights that, by definition, are at stake in plain-error cases, our policy favoring federal court protection of federal rights outweighs our policy favoring deference to state procedural rules. Therefore, the Supreme Court has jurisdiction to review plain errors of federal law, despite state court procedural defaults.

The Supreme Court has not precisely defined the term "plain error," but it has indicated that a plain error is serious enough to result in a "miscarriage of justice" if not corrected.[269] That characterization predetermines the outcome of the policy balancing necessary to proper resolution of the plain-error issue. If an error is sufficiently grave to fall into the "miscarriage of justice" category, protection of the interest offended by the error is sufficiently important to outweigh our reluctance to interfere with state procedural autonomy, at least in those isolated instances in which plain errors are present. To date, Supreme Court invocation of the plain-error rule has been extremely rare.[270] Therefore, although the failure to apply the rule could have harsh consequences for the

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268. *See* U.S. CONST., amend. X (reserving to states residue of power not delegated to federal government); National League of Cities v. Usery, 426 U.S. 833, 840-52 (1976) (federal law cannot interfere with integral functions of state government). *But see* EEOC v. Wyoming, 51 U.S.L.W. 4219, 4220-24 (U.S. Mar. 2, 1983) (severely limiting scope of protections from federal regulation accorded states under tenth amendment).

269. *See supra* note 44 (plain-error review limited to serious and obvious errors).

270. The first time the Court explicitly invoked the plain-error rule to justify review of a state court decision was in Vachon v. New Hampshire, 414 U.S. 478 (1974). Since *Vachon* the plain-error rule has been used only once to justify federal review of a state court decision. Wood v. Georgia, 450 U.S. 261, 265 n.5 (1981); *cf.* Webb v. Webb, 451 U.S. 493, 502 (1981) (Powell, J., concurring) (joining *Webb* Court's opinion with understanding that it does not depart from plain-error rule).

litigant whose rights are at stake, application of the rule in those few cases to which it pertains would have little effect on the overall operation of the state procedural scheme.

The pattern that emerges from consideration of other aspects of the law governing Supreme Court review of state court decisions further tilts the balance in favor of the plain-error rule. Although the Supreme Court has found limits on its jurisdiction when a state court decision is supported by adequate and independent state grounds,[271] those limits are not absolute. In fact, the basic restriction is perforated with exceptions.[272] Although none of the exceptions alone legitimizes plain-error review, they collectively provide strong evidence of the manner in which contemporary society has balanced its interest in protecting federal rights against its interest in preserving state autonomy.

First, the mere existence of so many exceptions requires one to view the asserted policy favoring state autonomy with some skepticism. If the policy is truly as important as we proclaim it to be, why do we find it necessary to deviate from the policy so frequently? Second, that we have institutionalized our frequent deviations by elevating them to the level of formal doctrines of law suggests that cases presenting the need to subordinate state autonomy to our policy favoring protection of federal rights are far from sporadic or aberrational. Rather, the existence of these doctrines indicates that many such cases have arisen in the past and that we contemplate the continued occurrence of such cases in the future.

Third, the circumstances surrounding Supreme Court articulation of the many exceptions that exist to the "adequate and independent state ground" restriction are similar in one important respect. They suggest that we still do not trust state courts to protect important federal rights adequately. In virtually all of the cases giving rise to the various exceptions, the state court assumes the role of an unsympathetic guardian that considers federal rights to be little more than obstacles to the achievement of some state purpose.[273] Serious institutional reasons exist to distrust state courts,[274] and despite contrary rhetoric,[275] the Supreme Court still seems to view state courts with suspicion.[276] If state courts, in fact, issue procedural decisions to mask hostility to federal rights, our policy favoring respect for state court procedural autonomy ceases to be a factor in the balancing process. As a result, the balance shifts dramatically toward protection of federal rights because there is very little to offset our interest in such protection. We have no cognizable interest in nurturing veiled

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271. *See supra* note 226 and accompanying text (discussing "adequate and independent state ground" restriction on Supreme Court jurisdiction).

272. *See* HART & WECHSLER, *supra* note 12, at 544-46 (discussing exceptions to "adequate and independent state ground" doctrine); M. REDISH, *supra* note 84, at 216-31 (same). *See generally* Hill, *supra* note 176.

273. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457 (1958) ("novel" procedural requirements used by state court to thwart protection of civil rights); Williams v. Georgia, 349 U.S. 375 (1955) (implying that state court more interested in convicting defendant than ending state-sanctioned racial discrimination).

274. *See* Newborne, *supra* note 265, at 1115-30 (discussing institutional characteristics of state courts).

275. *See* Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976) (suggesting state courts no longer deserving of distrust).

276. *See* Vachon v. New Hampshire, 414 U.S. 478 (1974).

hostility to federal rights. When the state court has chosen to disregard a federal right that is sufficiently salient and important to qualify for plain-error protection, one should question the state court's motives. By hypothesis, the state court has not given the federal right as much protection as the Supreme Court believes that it merits. Because the question of how much protection a federal right merits is itself a question of federal law,[277] the Supreme Court's determination must necessarily prevail.[278]

Although it is relatively easy in the context of the plain-error rule to resolve the competing interests in favor of Supreme Court review, application of the rule is, nevertheless, doctrinally awkward. It puts the Supreme Court in the position of disregarding a state procedural law, held by the state court to be controlling, without invalidating that law. In fact, the very same awkwardness exists whenever the Court exercises review after having deemed a state procedural rule to be inadequate under one of the numerous exceptions to the "adequate and independent state ground" restriction discussed above.[279] The awkwardness, however, is easily eliminated. When the Supreme Court disregards a state procedural rule to protect a federal right, in effect it holds the procedural rule unconstitutional as applied. Because the competing interests weigh heavily in favor of the federal right in both the plain-error and inadequate-state-ground contexts, the Constitution can be said to compel disregard of the state procedural rule. It is true that the Supreme Court has not explicitly justified its exercise of jurisdiction in terms of constitutional compulsion. That is unfortunate, but it is hardly significant. Constitutional justification does exist, and that is all that matters.[280]

The same observation also disposes of any separation-of-powers objection that could be raised to the exercise of plain-error jurisdiction. It is possible to read section 1257[281] as conditioning Supreme Court jurisdiction on prior state court presentation of the pertinent federal issue. However, because the statute contains no prior-presentation requirement,[282] this reading is somewhat strained. Moreover, the available case support for this reading cannot be taken at face value because it comes from the same Supreme Court that has declined to so read the statute in creating the numerous exceptions to the prior-

277. *See supra* note 227 and accompanying text (question whether federal right outweighs state interest in proper procedure is itself federal question).

278. For another analysis suggesting that the degree of interference with a federal right should determine how much deference to accord state procedural rules see Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187.

279. *See supra* text accompanying notes 224-38 (discussing exceptions to "adequate and independent state ground" doctrine).

280. Application of a state procedural rule in a particular context can be viewed as unconstitutional either because it violates the due process clause or the supremacy clause. If, under particular circumstances, application of the procedural rule does not provide an adequate opportunity to raise the federal claim, the rule is unconstitutional as applied because it violates the claimant's due process rights. If, under the circumstances, application of the procedural rule will unduly interfere with congressional desires for Supreme Court review, embodied in § 1257, the rule is unconstitutional as applied because it violates the supremacy clause. One's preference between the two theories is likely to turn on one's views about separation of powers. Those who believe that the judiciary should balance the competing interests should be attracted to a due process analysis, while those who favor congressional balancing should prefer a supremacy clause analysis.

281. *See supra* note 79 (quoting § 1257).

282. *Id.*

presentation rule. Assuming, however, that the statute could properly be read to prohibit Supreme Court jurisdiction over cases involving procedural defaults, the statute would simply be unconstitutional because it would interfere with the Supreme Court's ability to protect federal rights. Separation-of-powers problems never arise because the Supreme Court has the ultimate authority to determine what the Constitution requires.[283]

Properly balanced, the competing policies implicated by the plain-error rule favor finding Supreme Court jurisdiction to correct plain errors of federal law. This is true even if those errors were not raised in the state court system. The function of the plain-error rule is to strike the proper federalism balance. As evidenced by other facets of the law governing Supreme Court review, that balance is properly struck under the contemporary societal conception of "Our Federalism" when the Supreme Court exercises jurisdiction over what it determines to be a plain error of federal law. Accordingly, despite whatever conclusions might result from precedential analysis, a more meaningful, functional analysis supports the plain-error rule.

CONCLUSION

I have argued that functional analysis is preferable to precedential analysis because precedent is too susceptible to manipulation to yield reliable results. Functional analysis, however, is also subject to manipulation. One can easily disagree with the function said to be served by a legal doctrine or with the degree to which a particular result serves or frustrates that function. In addition, because the essence of functional analysis consists of striking the proper balance between competing policy considerations, one can always disagree with the way that any particular balance has been struck.

If functional and precedential analysis are equally manipulable, two questions naturally arise. The first is why functional is preferable to precedential analysis. The answer is that functional analysis is more honest. By refusing to invoke authority, functional analysis does not artificially enhance the degree of deference to be accorded the result. Functional analysis asserts nothing more than that the result serves the specified function for the enumerated reasons. Justifying a result in such a manner not only highlights the areas in which the offered justification is vulnerable, but also invites challenge by the very exposure of such vulnerability. This, in turn, facilitates public debate about legal issues, which is probably of greater long-term importance than resolution of particular cases.

The second question is more significant. Beneath the surface of a mode of analysis that ultimately rests on nothing more than the subjective desire to serve a particular function in a particular context, lurks the question whether a

283. Cooper v. Aaron, 358 U.S. 1, 18 (1958). *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

A more serious separation-of-powers argument can be made that questions the scope of *Marbury*. It may be that, despite their constitutional stature, federalism conflicts are better resolved by an elected legislature than by a nonelected judiciary. In my view, this turns on whether concerns about federalism fall into that category of matters for which the dangers of legislative tyranny outweigh the dangers of judicial tyranny. *See* Spann, *supra*, note 61. Resolution of that question is, however, beyond the scope of the present discussion.

given result would not be better justified on some more meaningful level of analysis. If, as I suspect, one can never draw the distinctions necessary to offer authoritative justifications, no more meaningful level of analysis can exist. The propriety of any result can rest upon nothing more than the persuasiveness of the analysis offered to support it. Because persuasive skills are both widely available and easily exploited, such a conclusion can be unsettling. Ultimately, however, because of the manipulability of all analysis, the problem may be an inescapable one.