legislation from constitutional violations. A court may find that state immigration legislation encroaches on federal authority, or it may find that the relevant federal scheme encourages state cooperation.

A more internally consistent outcome would have been to find either that both sections 2(B) and 6 were preempted by federal law or that both sections were facially constitutional such that they could survive a preemptive challenge. Not one of the other opinions in the *Arizona* line of cases — from Judge Bolton of the District Court of Arizona to Justice Alito of the Supreme Court — upheld one of the sections while striking down the other. *Arizona*, far from being a definitive statement about the proper role of the states in immigration enforcement efforts, will generate future litigation as states continue to explore the precise contours of their police powers in immigration enforcement.

B. Habeas Corpus

Excuse of State Procedural Default. — For nearly forty years, one of the primary barriers facing state prisoners who seek to challenge their confinement in federal habeas court has been the adequate and independent state ground of procedural default. The current doctrine, roughly speaking, dictates that if a state court has ruled that a prisoner missed his chance to litigate a federal constitutional issue, the federal courts must respect that determination and let the conviction stand.[1] This principle, however, is subject to several narrow exceptions, including the rule from *Wainwright v. Sykes*[2] that a federal court may excuse procedural default and proceed to the merits of a claim upon a petitioner's showing of cause for, and prejudice resulting from, the default. One common basis for a finding of cause and prejudice is ineffectiveness of counsel. If a prisoner has inadvertently defaulted on a federal constitutional claim because of his trial or appellate counsel's incompetence, and that incompetence meets the standard of constitutional inadequacy set forth in *Strickland v. Washington*,[3] a federal habeas court will excuse the default and reach the merits of the claim.[4]

Last Term, in *Martinez v. Ryan*,[5] the Supreme Court opened up another narrow avenue through which state prisoners may revive defaulted constitutional claims, holding that ineffective assistance of counsel during *postconviction review* can serve as cause to excuse a defaulted claim of ineffective assistance of trial counsel if the postconviction proceeding was the first opportunity for the prisoner to raise

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[1] Coleman v. Thompson, 501 U.S. 722, 729 (1991).
[2] 433 U.S. 72 (1977).
[3] 466 U.S. 668 (1984).
[4] *See* Murray v. Carrier, 477 U.S. 478, 488–89 (1986).
[5] 132 S. Ct. 1309 (2012).

that claim.[6] There has never been a constitutional right to counsel in these proceedings, and that is still the law after *Martinez*: instead of addressing the constitutional question posed by the petitioner, the Court decided the case on the narrower procedural ground of cause and prejudice. But in seeking a middle ground, the Court may have overlooked the advantages of an alternative intermediate rule premised on the flexible doctrine of procedural due process.

Luis Mariano Martinez was convicted by an Arizona jury and sentenced to two consecutive life terms for sex with a minor.[7] During the pendency of his appeal, Martinez's state-appointed counsel — without notice to Martinez — initiated a state collateral proceeding pursuant to Arizona Rule of Criminal Procedure 32.4(a) by filing a Notice of Post-Conviction Relief.[8] While the rule requires that a petition detailing the asserted grounds for relief follow such filings, Martinez's lawyer instead filed a statement with the court claiming that she could "find no colorable claims."[9] The trial court gave Martinez forty-five days to file a petition of his own; this period lapsed, according to Martinez, before he was made aware of the need for pro se action.[10]

Eighteen months later, and assisted by new counsel, Martinez filed a second Notice of Post-Conviction Relief.[11] He followed this notice with a supporting petition alleging that his trial lawyer's incompetence had deprived him of his right to counsel in violation of the Sixth and Fourteenth Amendments.[12] The trial court dismissed Martinez's claim as both procedurally defaulted[13] and meritless.[14] On direct review, the Arizona Court of Appeals declined to reach the merits but agreed that Martinez had waived his constitutional challenge by failing to raise it during the first postconviction proceeding.[15] The Arizona Supreme Court denied review without opinion.[16]

Martinez filed a habeas petition in the U.S. District Court for the District of Arizona.[17] Martinez conceded that his procedural default would ordinarily prevent a habeas court from reaching the merits of his claim; however, he asserted that the ineffectiveness of his counsel

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[6] *Id.* at 1315.

[7] *Id.* at 1313.

[8] Martinez v. Schriro, 623 F.3d 731, 733–34 (9th Cir. 2010).

[9] *Id.* at 734.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Arizona defendants are "precluded" from obtaining relief on any ground that "has been waived at trial, on appeal, or in any previous collateral proceeding." ARIZ. R. CRIM. P. 32.2(a)(3).

[14] *Schriro*, 623 F.3d at 734.

[15] *Id.*

[16] *Id.*

[17] *Martinez*, 132 S. Ct. at 1314.

during state collateral review should qualify as cause to excuse this default because the collateral proceeding was his first opportunity to raise the claim of ineffective trial counsel.[18] The district court denied Martinez's petition,[19] and the Ninth Circuit affirmed, agreeing that Supreme Court precedent did not support a right to postconviction counsel even on "first tier" review.[20] Without a constitutional right to counsel, there could be no cause and prejudice to excuse a default.[21]

The Supreme Court reversed.[22] Writing for the Court, Justice Kennedy[23] began by stressing the narrowness of the holding: while *Coleman v. Thompson*[24] had indeed "left open" the question of constitutional entitlement to adequate postconviction counsel, *Martinez* was "not the case" to answer that question.[25] Instead, the Court took the more modest step of holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[26]

The Court acknowledged the general rule, expressed in *Coleman*, that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as cause."[27] But initial-review collateral proceedings possess a "key difference,"[28] in that they are the prisoner's first opportunity to present his claims and thus are "in many ways the equivalent of a prisoner's direct appeal" with respect to the claim in question.[29] And so, just as the Court had previously held for direct appeals, the absence of effective counsel at this key stage would mean that "the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims."[30] These concerns are particularly salient when the underlying claim is for ineffective assistance of trial counsel, both because the imprisoned petitioner is "in no position to develop the evidentiary basis" for this fact-sensitive claim and because the right to effective trial counsel is "a bedrock principle in our justice system."[31]

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[18] *Id.* at 1314–15.

[19] Martinez v. Schriro, No. 08-785, 2008 WL 5220909, at *5 (D. Ariz. Dec. 12, 2008).

[20] *Schriro*, 623 F.3d at 743.

[21] *Id.*

[22] *Martinez*, 132 S. Ct. at 1321.

[23] Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan.

[24] 501 U.S. 722 (1991).

[25] *Martinez*, 132 S. Ct. at 1315.

[26] *Id.*

[27] *Id.* at 1316 (quoting Maples v. Thomas, 132 S. Ct. 912, 922 (2012)) (internal quotation marks omitted).

[28] *Id.*

[29] *Id.* at 1317.

[30] *Id.*

[31] *Id.*

After explaining its authority to promulgate equitable rules governing the situations in which federal courts may excuse procedural defaults,[32] the Court specified the two settings in which federal habeas review may revive defaulted ineffective assistance claims: first, when the state court appointed no counsel at the initial-review collateral proceeding, and second, in which appointed counsel was ineffective under the *Strickland* standard.[33] In both cases, the prisoner must also make a threshold showing that the underlying claim "has some merit."[34]

Next, responding to Justice Scalia's arguments in dissent, the Court offered some differences between its "equitable ruling" and the rejected "constitutional ruling" of a Sixth Amendment right to postconviction counsel, emphasizing primarily the lower costs and greater flexibility resulting from an equitable ruling.[35] The Court emphasized that it was limiting the rule to the circumstances of the present case: postconviction review of ineffective-trial-counsel claims in which the state has barred the petitioner from raising the claim on direct appeal.[36]

Finally, the Court rejected Arizona's argument that finding cause and prejudice on the basis of ineffective postconviction counsel would violate the Antiterrorism and Effective Death Penalty Act of 1996[37] (AEDPA), which provides that "the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief."[38] The Court did so by distinguishing "cause" from a "ground for relief"; excusing the default, after all, would not vacate Martinez's conviction but rather just provide him the opportunity to litigate his ineffectiveness claim in federal court.[39] The "ground for relief," if any, would be the underlying ineffectiveness of trial counsel claim.[40]

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[32] *Id.* at 1318 (citing McCleskey v. Zant, 499 U.S. 467, 490 (1991)).

[33] *Id.* The rule, read literally, does not apply in cases where a defendant's retained counsel nonetheless failed to meet the *Strickland* standard, but it seems likely that default would also be excused in these cases. *Cf.* Cuyler v. Sullivan, 446 U.S. 335, 344–45 (1980) ("Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.").

[34] *Martinez*, 132 S. Ct. at 1318.

[35] *Id.*; *see id.* at 1319–20.

[36] *Id.*

[37] Pub. L. No. 104–132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[38] *Martinez*, 132 S. Ct. at 1320 (quoting 28 U.S.C. § 2254(i) (2006)) (internal quotation marks omitted).

[39] *Id.*

[40] *Id.* However, the Court's interpretation creates some doubt as to exactly what Congress meant in enacting § 2254(i). It is difficult to imagine that any court would ever have deemed ineffective postconviction counsel a "ground for relief" as the *Martinez* court construed that term.

Having enunciated the new standard for when ineffective postconviction counsel would be cause for forgiving a procedural default, the Court reversed the Court of Appeals and remanded on the question of whether Martinez was entitled to habeas review under the new rule.[41]

Justice Scalia penned a sharply worded dissent, which Justice Thomas joined. Noting the majority's ostensible commitment to restraint and comity, Justice Scalia asserted that the Court's equitable holding was, in practical effect, "precisely the same" as a new constitutional rule.[42] Contrary to the majority's claims of narrowness, Justice Scalia predicted that the holding would soon transgress its purportedly limited circumstances: first, by extending to claims that "*by their nature* can only be brought on collateral review"[43] as well as those claims that the state has "deliberately cho[sen]" to move "outside of the direct-appeal process,"[44] and second, by applying to other types of claims inherently limited to collateral review, including newly discovered prosecutorial misconduct or exculpatory evidence.[45]

Even if limited to present circumstances, Justice Scalia argued, the majority's holding would have "essentially the same practical consequences as a holding that collateral-review counsel is constitutionally required."[46] States will, in practical if not legal effect, "*always* be forced to litigate in federal habeas, for *all* defaulted ineffective-assistance-of-trial-counsel claims," either the underlying claim (where the state has not appointed postconviction counsel) or the adequacy of postconviction counsel (where it has).[47] The majority's holding would thus eviscerate procedural default, the states' "*principal escape route* from federal habeas."[48]

Justice Scalia went on to attack the majority's holding as a departure from precedent and from *Coleman* in particular.[49] Prior to *Martinez*, courts could not excuse default unless attributable to an "objective factor *external* to the defense";[50] an attorney's mistakes could qualify only when they "amount[ed] to *constitutionally ineffective* assistance of counsel," because then the "error is imputed to the State . . . , render-

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[41] *Id.* at 1321.

[42] *Id.* (Scalia, J., dissenting).

[43] *Id.* at 1322 n.1.

[44] *Id.* at 1321 n.1 (quoting *id.* at 1318 (majority opinion)).

[45] *Id.* at 1321 (citing Brady v. Maryland, 373 U.S. 83 (1963)).

[46] *Id.* at 1322; *see id.* at 1321–22.

[47] *Id.* at 1323.

[48] *Id.* (citing NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 45–49 (2007) [hereinafter VANDERBILT-NCSC STUDY], *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf; ADMIN. OFFICE OF THE U.S. COURTS, HABEAS CORPUS PETITIONS DISPOSED OF PROCEDURALLY DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2011 (available in Clerk of Court's case file)).

[49] *Id.* at 1324.

[50] *Id.* (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (emphasis added)).

ing the error external to the petitioner."[51] In effectively decoupling the cause-and-prejudice test from the constitutional requirement, the majority failed to give due consideration to stare decisis.[52]

Finally, Justice Scalia briefly faced the question on which the majority had demurred: whether the Constitution guarantees a freestanding right to effective counsel in initial-review collateral proceedings.[53] For him, this was an easy question: the Court's prior decisions "clearly foreclosed" any such rule.[54] Those cases "announc[ed] a *categorical* rule"[55] that there was no right to counsel on postconviction review, even though the Court in each case had known "full well that a collateral proceeding may present the first opportunity for a prisoner to raise a constitutional claim."[56]

The numerous cases relating to indigent counsel this Term[57] indicate that there is still truth to one commentator's statement thirty-five years ago that "the law governing basic aspects of [ineffectiveness] claims remains in an unsettled and transitional stage."[58] But despite the uniform focus of the parties and amici, the majority declined to answer the constitutional question for which it had granted certiorari.[59] Presumably, the Court's retreat to its equitable powers was animated by constitutional avoidance: a constitutional holding would likely have rendered infirm the federal postconviction review process prescribed by Congress in § 2255.[60] But if the Court sought a moderate holding, it might have done well to consider a middle-ground constitutional rule. Specifically, the Court could have held that the Due Process Clause of the Fourteenth Amendment requires that state habeas petitioners have *some* meaningful opportunity to challenge the adequacy of

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[51] *Id.*

[52] *Id.* at 1325.

[53] *Id.* at 1326–27.

[54] *Id.* at 1326 (citing Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Murray v. Giarratano, 492 U.S. 1, 10 (1989)).

[55] *Id.*

[56] *Id.* (citing *Giarratano*, 492 U.S. at 24 (Stevens, J., dissenting); Brief for Respondents at 29 n.8, *Giarratano*, 492 U.S. 1 (No. 88-411); Brief for Respondent at 11 n.5, *Finley*, 481 U.S. 551 (No. 85-2099)).

[57] Besides *Martinez*, see *Missouri v. Frye*, 132 S. Ct. 1399 (2012), *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Maples v. Thomas*, 132 S. Ct. 912 (2012).

[58] James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 443 (1977).

[59] *See* Petition for Writ of Certiorari at i, *Martinez*, 132 S. Ct. 1309 (No. 10-1001).

[60] *See* 28 U.S.C. § 2255(g) (2006 & Supp. III 2009) (allowing, but not requiring, courts to appoint counsel for postconviction review); *cf.* Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) ("The [constitutional avoidance canon] seeks in part to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections."). The constitutional validity of § 2255 under the petitioner's rule was clearly on the minds of at least one Justice: it was the basis of the very first question at oral argument. *See* Transcript of Oral Argument at 4, *Martinez*, 132 S. Ct. 1309 (No. 10-1001).

their trial counsel, including, if not a guarantee of effective counsel, then at least the opportunity to have competent counsel appointed if the circumstances call for it.

The Court's equitable holding, which leaves postconviction petitioners without any constitutional protection, is problematic as both a theoretical and a practical matter. From a theoretical standpoint, effective trial counsel is unique among defendants' textually enumerated rights in that one's first opportunity to obtain a remedy comes during direct appeal or, more commonly, collateral review.[61] Claims of a coerced confession or illegally obtained evidence, for example, may be vigorously litigated at trial, where the Constitution guarantees effective counsel. By contrast, if some baseline procedure for review of ineffective assistance claims is not constitutionally mandated, then the right to trial counsel is left alone among the criminal procedure amendments as a right without a constitutionally guaranteed remedy.[62]

Practically, the Court's rule may not do much to benefit defendants because there is little chance a noncapital petitioner will enjoy the assistance of counsel on federal habeas review, and so — putting parity debates[63] to the side — there is little reason to believe he will fare any better in federal court than he did in state court.[64] The prevalence of ineffective assistance claims indicates that this is no small concern.[65] As Justice O'Connor wrote in 1984: "Ineffective-assistance-of-counsel claims are becoming as much a part of state and federal habeas corpus

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[61] Many states do not allow prisoners to raise ineffective assistance claims on direct appeal. *See* Brief for the States of Wisconsin et al. as Amici Curiae Supporting Respondent at 25–26, *Martinez*, 132 U.S. 1309 (No. 10-1001) (identifying six states that require or permit ineffectiveness claims to be brought on direct appeal, and stating that "[t]he other States generally require ineffective-assistance claims to be raised in what Petitioner calls a 'first tier' collateral proceeding"). But even in states that offer defendants the choice between direct or collateral attacks on trial counsel's effectiveness, the nature of the claim relegates it, as a practical matter, to collateral review in almost all cases. *See* Kimmelman v. Morrison, 477 U.S. 365, 378 (1986).

[62] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy . . . .").

[63] *Compare* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977), *with* Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 215 (1983).

[64] Similarly, and contrary to Justice Scalia's dire predictions, it seems unlikely that prisoners who have forfeited an ineffectiveness claim because of incompetent or nonexistent counsel will, within AEDPA's one-year limitations period, *see* 28 U.S.C. § 2244(d)(1) (2006), raise the claim on their own. Martinez attempted to revive his claim only after obtaining pro bono representation through the nonprofit Arizona Justice Project. Email from Robert Bartels, Counsel for Petitioner (July 3, 2012, 1:24 PM) (on file with the Harvard Law School Library). But a prisoner's acquiring new representation at a successive postconviction proceeding is the exception and not the rule, particularly for noncapital defendants who attract less attention from pro bono groups. *Id.*

[65] One empirical study found that prisoners brought claims of ineffective trial or appellate counsel in just over half of the noncapital habeas cases for which information was available. VANDERBILT-NCSC STUDY, *supra* note 48, at 28.

proceedings as the bailiffs' call to order in those courts."[66] Much of this volume, no doubt, consists of meritless claims attributable to the distrust criminal defendants almost uniformly hold toward their appointed counsel.[67] But the poor state of indigent defense across the country[68] suggests that a substantial number of these claims may have merit.[69] For these reasons, a constitutional rule — even if short of a full guarantee of competent counsel — seems desirable.

There is ample precedent for the proposition that, even where the Sixth Amendment does not apply, the Due Process Clause requires safeguards that may in certain cases include appointment of competent counsel. Prior to *Gideon v. Wainwright*,[70] courts employed just such a flexible approach in state criminal cases.[71] Courts weighed a variety of factors, including "the gravity of the crime[,] . . . the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto,"[72] when deciding whether appointed counsel was necessary.[73] An intermediate standard in the postconviction counsel

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[66] McKaskle v. Vela, 464 U.S. 1053, 1056 (1984) (O'Connor, J., dissenting from denial of certiorari).

[67] *See* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1241 (1975) (citing empirical and anecdotal evidence that criminal defendants, as a group, do not view public defenders as being "on their side"); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 474 (1982) ("That many clients are suspicious of, sometimes even hostile towards, their defenders has been repeatedly documented."); *id.* at 474 n.1 (collecting sources).

[68] *See, e.g.*, STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, at 7 (2004), *available at* https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/gideons_broken_promise.html; Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1039 (2006).

[69] *But see* Joseph L. Hoffmann & Nancy J. King, Essay, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 811 (2009) (citing VANDERBILT-NCSC STUDY, *supra* note 48, at 28, 56) (noting that, out of the roughly half of 2384 noncapital habeas cases examined that raised ineffective counsel claims, federal courts granted relief in only one, which was later reversed). Of course there are many reasons this low success rate might not reflect a lack of merit to the claims — not least of which is the fact that most petitioners have no counsel for their habeas challenges. *See* VANDERBILT-NCSC STUDY, *supra* note 48, at 23 ("Overall, 92.3% (2202) of the [noncapital habeas] cases involved no petitioner's counsel.").

[70] 372 U.S. 335 (1963).

[71] *See* Betts v. Brady, 316 U.S. 455, 462 (1942), *overruled by Gideon*, 372 U.S. 335 ("The [Due Process Clause] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case.").

[72] Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948) (footnotes omitted).

[73] Of course, the Court has since rejected such an intermediate approach in both the trial and appellate settings, albeit for reasons that are doctrinally distinguishable from the postconviction context. *See Gideon*, 372 U.S. at 342 (rejecting an intermediate approach in trial setting by incorporating the Sixth Amendment against the states); Douglas v. California, 372 U.S. 353, 357–58 (1963) (rejecting an intermediate approach on appeal based on equal protection and due process).

setting, while necessarily difficult to articulate precisely, could operate in much the same way. Courts would test an asserted denial "by an appraisal of the totality of the facts in a given case,"[74] applying the factors from the Court's pre-*Gideon* jurisprudence with the additional factor of the substantiality of the ineffective-trial-counsel claim.[75]

Counterintuitively, constitutionalizing the postconviction process in this way could lead to *greater* deference and finality than the Court's equitable holding. Most states appoint counsel in some but not all postconviction proceedings.[76] Under *Martinez*'s equitable rule, when a state has failed to appoint counsel, the reviewing court does not ask why; it simply excuses the default and proceeds to the merits of the ineffective-trial-counsel claim. Currently, then, state law governs the question of whether counsel is necessary and is thus unreviewable by a federal court. But if a state's choice of whether to appoint counsel were treated as a matter of federal constitutional law, a habeas court could review the merits of that decision and, quite likely, afford substantial deference to the state court's ruling.[77]

While providing defendants significantly more protection than the Court's equitable holding, an intermediate due process approach would also promote many of the virtues of moderation which doubtless contributed to the Court's reluctance to confer a full guarantee of effective counsel. First and foremost, this approach would do little to upset federal and state postconviction procedures already in place. In accordance with the Court's recent statement that "[t]he State . . . has more flexibility in deciding what procedures are needed in the context of postconviction relief,"[78] the rule would find facially compliant the great majority of states that already have procedures in place. These include systems in which postconviction counsel is appointed as a

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[74] *Betts*, 316 U.S. at 462.

[75] An analogous factor figured into California's procedures for assigning appellate counsel to indigent defendants prior to the Court's creation of a categorical right to counsel. *See, e.g.*, People v. Hyde, 331 P.2d 42, 43 (Cal. 1958) ("[A]ppellate courts . . . should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court.").

[76] *See* sources cited *infra* notes 79–82.

[77] *Cf.* 28 U.S.C. § 2254(d) (2006) (barring habeas relief unless the state's ruling was legally or factually "unreasonable"). It is not clear that threshold determinations of the need for counsel would qualify as a "claim . . . adjudicated on the merits" so as to entitle them to respect under § 2254(d). But even prior to AEDPA, the Court gave great deference to state court applications of law to fact, and this practice would likely extend to state threshold determinations of whether postconviction counsel is constitutionally required. *Cf.* Williams v. Taylor, 529 U.S. 362, 379–80 (2000) (suggesting that Congress saw § 2254(d) as a "congruent concept[]," *id.* at 380, with the Court's existing habeas jurisprudence).

[78] Dist. Att'y's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2320 (2009).

matter of course,[79] after the prisoner has shown his claim is nonfrivolous,[80] when an evidentiary hearing or discovery is necessary,[81] or at the discretion of the trial court or public defender.[82] In fact, only one state — Georgia — provides no counsel whatsoever in postconviction proceedings.[83] In the federal system, the constitutionality of § 2255 would likewise be preserved, with the rule simply putting teeth into the statute's existing provision that judges appoint counsel for federal postconviction review when "the interests of justice so require."[84]

Second, instituting a flexible, intermediate right would be consistent with the historical pattern of incremental change by which the right to effective counsel has developed.[85] State and federal courts, like the Supreme Court in *Martinez*, have been reluctant to make giant leaps in the doctrine governing the right to counsel. It is not hard to see why: as a matter of both federalism and separation of powers, courts are appropriately hesitant to impose large new burdens on the public fisc. More moderate constitutional rules, like the one Justice Powell proposed in *Argersinger v. Hamlin*,[86] permit gradual and organic growth and produce the virtues of experimentation and flexibility.

An intermediate due process approach would present its own dilemmas. The most obvious is that a case-by-case analysis would be difficult to administer. But the Sixth Amendment, beyond categorically requiring the appointment of counsel, presents no bright line of its own: the *Strickland* standard "has a substantial range of reasonable applications"[87] and has proven challenging for lower courts to apply.[88]

A due process approach could also create challenges for defendants if the courts appoint counsel only upon some showing of merit. Prisoners largely lack the expertise to formulate effective legal arguments, and their confinement severely limits their ability to develop a factual

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79 *See, e.g.*, ALASKA STAT. § 18.85.100(c) (2010); ARIZ. R. CRIM. P. 32.4(c)(2); CONN. GEN. STAT. ANN. § 51-296(a) (West 2005); ME. R. CRIM. P. 69, 70(c); N.C. GEN. STAT. § 7A-451(a)(2) (2007); N.J. CT. R. 3:22-6(b); R.I. GEN. LAWS § 10-9.1-5 (1997); TENN. CODE ANN. § 8-14-205 (West 2002).

80 *See, e.g.*, KAN. STAT. ANN. § 22-4506 (West 1995); N.M. DIST. CT. R. CRIM. P. 5-802; Jensen v. State, 688 N.W.2d 374, 378 (N.D. 2004).

81 *See* KY. R. CRIM. P. 11.42(5); LA. CODE CRIM. PROC. ANN. art. 930.7(C) (1990); MICH. R. CRIM. P. 6.505(A); S.C. R. CIV. P. 71.1(d).

82 *See, e.g.*, ALA. CODE § 15-12-23 (2010); ARK. R. CRIM. P. 37.3(b); IDAHO CODE ANN. § 19-4904 (2004); IND. R. POST CONVICTION REMEDIES 1 § 9(a); MASS. R. CRIM. P. 30(c)(5); NEB. REV. STAT. ANN. § 29-3004 (West 2009); WASH. R. APP. PROC. 16.15(h).

83 Brief for the States of Wisconsin et al. as *Amici Curiae* Supporting Respondent, *supra* note 61, at 26 (citing Gibson v. Turpin, 513 S.E.2d 186 (Ga. 1999)).

84 18 U.S.C. § 3006A(a)(2) (2006).

85 *See* Strazzella, *supra* note 58, at 443.

86 407 U.S. 25, 47 (1972) (Powell, J., concurring in the result).

87 Harrington v. Richter, 131 S. Ct. 770, 778 (2011).

88 *See* Person v. United States, No. CIV.A.2:05-CV-0033, 2005 WL 2137854, at *3 (S. D. W. Va. Sept. 1, 2005).

record.[89] But ineffective assistance of counsel, more than most other constitutional defenses, is "visible to laymen,"[90] and if a system requiring a threshold showing is less than ideal from the defendant's perspective, it is at least no worse than the cause-and-prejudice regime created by *Martinez*, under which the prisoner must convince a federal judge *both* that his ineffective-trial-counsel claim is "substantial" *and* that his postconviction counsel fell below the *Strickland* standard.

In sum, an intermediate constitutional holding would have allowed the *Martinez* majority to guarantee defendants a real opportunity to challenge the adequacy of trial counsel without imposing upon the states the burden of a full Sixth Amendment right to guaranteed counsel at postconviction review. Such a compromise might have proven an attractive alternative to the middle road the Court took with the cause-and-prejudice approach.

III. FEDERAL STATUTES AND REGULATIONS

A. Patent Act of 1952

Patentable Subject Matter. — The Supreme Court's line of precedent regarding patentable subject matter under § 101 of the Patent Act[1] has historically yielded some of its most enduring, yet most complex patent law jurisprudence.[2] Recently, however, § 101 has come under fire in academic circles for its various perceived inadequacies in the patentable subject matter context, with scholars arguing that other provisions of the Patent Act are better suited for the patentable subject matter analysis, if one is even needed at all.[3] Last Term, in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*,[4] the Supreme Court invalidated a series of process claims involving diagnostic methods under § 101 as directed to mere laws of nature.[5] In doing so, the

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[89] *See* Jackson v. State, 732 So. 2d 187, 190 (Miss. 1999).

[90] Strazzella, *supra* note 58, at 464.

[1] Patent Act of 1952, 35 U.S.C. §§ 1–376 (2006 & Supp. V 2011). Under § 101, "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." *Id.* § 101.

[2] *See generally, e.g.*, Bilski v. Kappos, 130 S. Ct. 3218 (2010); Diamond v. Chakrabarty, 447 U.S. 303 (1980). The Justices certainly recognize its complexity. *See* Transcript of Oral Argument at 14, Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289 (2012) (No. 10-1150).

[3] *See, e.g.*, Dennis Crouch & Robert P. Merges, *Operating Efficiently Post-*Bilski *by Ordering Patent Doctrine Decision-Making*, 25 BERKELEY TECH. L.J. 1673, 1674 (2010); Michael Risch, *Everything Is Patentable*, 75 TENN. L. REV. 591, 647–48 (2008). *But see* Rebecca S. Eisenberg, *Wisdom of the Ages or Dead-Hand Control? Patentable Subject Matter for Diagnostic Methods After* In re Bilski, 3 CASE W. RES. J.L. TECH. & INTERNET 1, 64 (2012) ("[P]atentable subject matter limitations are not redundant to these other doctrines.").

[4] 132 S. Ct. 1289 (2012).

[5] *Id.* at 1294.