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ESSAY

THE CERTIORARI PROCESS AND STATE COURT DECISIONS

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INTRODUCTION

Many have said much about the United States Supreme Court's certiorari process. Repeat litigators, like seasoned fishing guides, know where and how to find the most promising lower court decisions for review by the Supreme Court.[1] But few of these guides seem to explore one source, in truth fifty sources, of potential candidates for review: the decisions of our fifty state supreme courts. In recent decades, the United States Supreme Court has reviewed a materially higher percentage of decisions from the federal courts of appeals than decisions from the state supreme courts.[2] The gap in review rates has consequences for litigants, courts, and the law, and may be worth the attention of the Court and the Supreme Court bar.

Each year, the Court receives upwards of 7,000 requests for review.[3] With high volume comes low success. Just one percent or so of the petitions takes the stage on the merits docket.[4] These dispiriting odds leave many practitioners in search of insights about what distinguishes the select few from the unselected many. No shortage of academic and

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[1] *Cf.* E. Barrett Prettyman, Jr., *Opposing Certiorari in the United States Supreme Court*, 61 VA. L. REV. 197, 197 (1975).

[2] *See infra* Part I, pp. 167–71.

[3] *Frequently Asked Questions*: *General Information*, SUPREME COURT OF THE U.S., https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/4SL7-HZMX].

[4] Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001–2015*, 61 VILL. L. REV. 795, 795 (2017).

empirical studies have scrutinized the process.[5] Through it all, few (if any) have noted the gap between state and federal court decisions on the Court's docket.

This Essay sets forth statistics that show a material preference for review of federal court cases over state court cases during the last dozen years. It addresses several potential causes of the discrepancy. And it identifies several consequences of underreviewing state court cases, particularly criminal cases.

I. Our Findings

First a word about methodology. Any comparison in this area requires two pieces of information: the number of opportunities the Court has to review state and federal court decisions and the number of times it takes up those opportunities. As to the first set of numbers, we rely on a database of certiorari petitions filed from the 2002 to 2014 Terms, a total of 94,044 petitions.[6] We separated the data by Term according to filing date. Petitions filed between October 1 of the Term and September 30 of the following year counted as petitions filed within the Term. Once separated, the petitions were subdivided by court of origin and paid or unpaid status.

The second set of numbers — how often the Supreme Court reviews state and federal courts — is more difficult to pin down. The federal courts publish a lot of information about the number of certiorari petitions filed and granted from federal courts,[7] but they do not publish the percentage of petitions granted from state courts. For that reason, this Essay relies on opinions issued rather than certiorari petitions granted over the same twelve-year period.[8]

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[5] *See, e.g.*, H. W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court (1991); Saul Brenner, *Granting Certiorari by the United States Supreme Court: An Overview of Social Science Studies*, 92 Law Libr. J. 193, 198 (2000); Feldman & Kappner, *supra* note 4; *Statistics*, SCOTUSblog, http://www.scotusblog.com/statistics/ [https://perma.cc/7U9V-W9JU].

[6] Database from Adam Feldman (2017) (on file with author). Adam Feldman generously agreed to share the data he collected for his own piece, Feldman & Kappner, *supra* note 4. His database provided the starting point for our analysis.

[7] *See, e.g.*, *Table B-2, Petitions for Review on Writ of Certiorari to the Supreme Court Commenced, Terminated, and Pending During the 12-Month Period Ending September 30, 2016*, Admin. Office of the U.S. Courts, http://www.uscourts.gov/sites/default/files/data_tables/jb_b2_0930.2016.pdf [https://perma.cc/W5UX-QKSN].

[8] To determine which opinions reviewed state court cases, we used Washington University Law's Supreme Court Database, *The Supreme Court Database*, Wash. Univ. Law, http://scdb.wustl.edu [https://perma.cc/79Z6-F8QL], in conjunction with the Court's year-end reports, *Chief Justice's Year-End Reports on the Federal Judiciary*, Supreme Court of the U.S., https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx [https://perma.cc/U7MU-WE3J].

A comparison between petitions filed and opinions issued requires an asterisk or two. The Court might consolidate more than one petition into a single case. That means "opinions issued" will underrepresent the number of petitions granted and decided on the merits. The Court also holds some petitions over for subsequent Terms[9] or grants petitions after its current argument calendar has filled, setting the cases for the following Term. That means the filing date of any petition will not necessarily correspond with the Term in which the Court issues its final opinion. And the Court grants some petitions without hearing the case or issuing a written opinion, such as a GVR order (grant, vacate, and remand), which occurs when the Court grants a petition, vacates the lower court decision, and remands the case for further consideration in light of a recent U.S. Supreme Court decision. That means there will be no opinion to account for this kind of granted petition.

But these factors should not sway the statistics too much. Consolidation occurs in state and federal cases. Because federal court cases make up the majority of the petitions filed and a significant majority of the cases on the Court's merits docket, consolidation is more likely to underrepresent the number of federal court petitions granted than the number of state court petitions granted. The holdover problem also should not materially impact the comparison. Any skewing that stems from these holdovers should even out over time. By reviewing the certiorari docket over a twelve-year period, we can mitigate any distortion caused by holdover mismatch. As for failing to account for GVRs and other orders without opinions, we have no sense of which way, if any way, they skew. But these are not the kinds of merits inquiries that this Essay considers, at any rate.[10]

The data show a material underrepresentation of state court decisions at the nation's High Court. On average, state court petitions represented about 22% of the certiorari petitions filed during the period (21.8% to be precise). Yet state court opinions made up 14.4% of the Court's merits docket in that period. To be concrete, if we assume the Court takes eighty cases in a Term, a random sampling of the filed petitions should yield an average of about seventeen to eighteen state court cases. Yet the average over the 2002–2014 Terms was about twelve. Under these assumptions, the Court missed five to six state court cases per year during this period, somewhere between 29% and 33% fewer than we would expect given the composition of the certiorari pool.

The data in more recent Terms suggests a greater disparity. In 2014, the Court reviewed state courts in just 7% of its opinions, generating a

[9] This happened, for example, in *Epic Sys. Corp. v. Lewis*, 137 S. Ct. 809 (2017) (mem.), for which the Court granted certiorari in its 2016 Term but set for a hearing in the 2017 Term. *See* Aaron R. Wegrzyn, *Waiting for Gorsuch: SCOTUS Kicks Important Class-Action Waiver Case to Next Term*, NAT'L L. REV. (Feb. 13, 2017), http://www.natlawreview.com/article/waiting-gorsuch-scotus-kicks-important-class-action-waiver-case-to-next-term [https://perma.cc/J9DG-ZHPJ].

[10] We excluded original jurisdiction cases from the pool.

percentage gap of nearly 16% and almost 70% fewer state court cases than random selection would predict. The 2013 Term was not far behind at 11% review, a 13% gap and 54% underrepresentation. In fact, 2002, the earliest Term studied, was the only period in which state court cases represented a larger share of opinions than their share of the petition pool. Tables 1, 2, and 3 summarize the results by Term.

Table 1: Percentage Gap Between State Court Petitions and Opinions

Term	Opinions Reviewing State Courts (Total Opinions)	Total Petitions Arising from State Court (Total Filed)	Gap (Total Filed– Total Opinions)	Paid Petitions Arising from State Court (Total Paid)	Gap in Paid Petitions (Total Paid– Total Opinions)
2014	7.1%	22.7%	15.6%	24.0%	16.9%
2013	10.7%	23.3%	12.6%	26.2%	15.5%
2012	16.5%	21.3%	4.8%	22.7%	6.2%
2011	14.3%	21.8%	7.5%	26.2%	11.9%
2010	11.9%	21.6%	9.7%	25.1%	13.2%
2009	12.0%	20.5%	8.5%	22.9%	10.9%
2008	18.1%	22.0%	3.9%	26.1%	8.0%
2007	16.4%	22.9%	6.5%	25.4%	9.0%
2006	8.0%	21.3%	13.3%	27.1%	19.1%
2005	18.4%	22.9%	4.5%	24.7%	6.3%
2004	16.3%	22.3%	6.1%	25.3%	9.0%
2003	11.3%	20.6%	9.4%	25.8%	14.5%
2002	26.2%	19.6%	-6.6%	21.9%	-4.3%
AVG	14.4%	21.8%	7.4%	24.9%	10.5%

Table 2: Underrepresentation of State Courts for All Petitions

Term	Expected State Court Opinions (Total Filed * Actual Opinions Issued)	Actual State Court Opinions	Missing Opinions (Expected–Actual)	Underrepresentation (Missing Opinions / Expected State Court Opinions)
2014	15.9	5	10.9	68.5%
2013	17.5	8	9.5	54.2%
2012	16.8	13	3.8	22.7%
2011	16.8	11	5.8	34.5%
2010	18.1	10	8.1	44.9%
2009	18.9	11	7.9	41.7%
2008	18.3	15	3.3	17.9%
2007	16.7	12	4.7	28.2%
2006	16.0	6	10.0	62.4%
2005	19.9	16	3.9	19.7%
2004	17.8	13	4.8	27.1%
2003	16.5	9	7.5	45.4%
2002	16.5	22	-5.5	-33.6%
AVG	17.4	11.6	5.7	33.4%

Table 3: Underrepresentation of State Courts for Paid Petitions

Term	Expected State Court Opinions	Actual State Court Opinions	Missing Opinions	Underrepresentation
2014	16.8	5	11.8	70.2%
2013	19.7	8	11.7	59.3%
2012	17.9	13	4.9	27.5%
2011	20.2	11	9.2	45.5%
2010	21.1	10	11.1	52.6%
2009	21.1	11	10.1	47.8%
2008	21.7	15	6.7	30.8%
2007	18.5	12	6.5	35.3%
2006	20.3	6	14.3	70.5%
2005	21.5	16	5.5	25.5%
2004	20.2	13	7.2	35.8%
2003	20.6	9	11.6	56.4%
2002	18.4	22	-3.6	-19.6%
AVG	19.8	11.6	8.2	41.3%

By every measure, the data show a consistent underrepresentation of state courts in merits opinions involving argued cases.

The same cannot be said of summary reversals, for what it is worth. According to a report by the American Bar Association, 33% of all summary reversals from 2011 to 2015 came from state courts.[11] Assuming a relatively consistent composition of the petition pool (of around 22% state court cases), that suggests the Court is *more* likely to grant a state court petition when it comes to summary reversal. Keep in mind that this data set is small. The Court typically does not issue many such reversals a Term, and the numbers vary widely from Term to Term. Over the 2011 to 2015 Terms, the Court issued from five to twelve such reversals, which translates to around two to four state court summary reversals — about one more than the petition pool would predict.

II. POTENTIAL CAUSES

Let's return to the argument docket — the focus of this Essay. Why do state court decisions comprise a smaller portion of the Supreme Court's argument docket than random selection suggests they should?

One potential explanation comes from state law itself. A state court case may present a poor vehicle for deciding a federal question in a dual-claim case — one in which the claimant raises a federal *and* state ground for relief — because an independent state ground might justify the court's decision, insulating the federal ground from review.[12] While this explanation might have had some force before 1983, when the Court decided *Michigan v. Long*,[13] it seems less plausible today. *Michigan v. Long* noted that federal courts may assume a decision rests on federal (not state) grounds in a dual-claim case as long as it "fairly appears to rest primarily on federal law, or to be interwoven with the federal law."[14] Because "fair[] appear[ances]" are often difficult to discern by a different court — the U.S. Supreme Court — *Michigan v. Long* created a clear-statement rule: one that places the onus on the state courts to spell out expressly that a decision relies on an adequate and independent state ground.[15] In the absence of such a clear statement, the Court assumes

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[11] Ryan J. Watson, *The Supreme Court's Summary Docket: Highlights, Trends, and Statistics*, AM. BAR ASS'N (Aug. 23, 2016), http://apps.americanbar.org/litigation/committees/appellate/articles/summer2016-0816-supreme-court-summary-docket-highlights-trends-statistics.html [https://perma.cc/6SCN-VEP4] (reporting 14 state-court summary reversals out of 42 cases, for an average of 33%).

[12] The Supreme Court retains jurisdiction to review a state court's decision on a question of federal law, but it cannot review a state court's decision on a question of purely state law. *See* 28 U.S.C. § 1257 (2012).

[13] 463 U.S. 1032 (1983).

[14] *Id.* at 1040–41.

[15] *See id.*

that federal law, not state law, governs the decision and thus assumes that it may review the decision.[16]

All of this makes the possibility of an independent state ground far less likely than it once was in a dual-claim case. If a state court clarifies that its decision rests on state law, there is no reason to file a petition for certiorari, and presumably practitioners, even semi-experienced practitioners, will not file one. But if a state court fails to clarify the source of its decision, *Michigan v. Long* allows the Court to assume that a federal basis for review exists. Many state courts interpret their state constitutional provisions in lock step with analogous federal guarantees, further limiting the possibility that an independent state ground might exist in a dual-claim case.[17] Independent state grounds, or potential confusion over whether an independent state ground exists, thus do not offer an adequate explanation for the underrepresentation of state court decisions today.[18]

Alternatively, one could argue that for some issues, federal court review is the only option. A dispute about patent law, most notably, may arise only in federal court and may come from just one federal court of appeals: the Federal Circuit. Still other federal issues usually, if not invariably, arise in federal courts. Consider disputes about the Federal Sentencing Guidelines or administrative law, among other staples of the federal courts. But these realities affect the *number* of certiorari petitions filed from the federal courts; they do not explain why the U.S. Supreme Court grants a higher *percentage* of petitions from the federal courts than the state courts. And in any event, state courts too have an array of unique federal issues arising out of defenses to state lawsuits and challenges to state laws. If the Court is looking for different flavors of cases, the states offer plenty of selections.

Still, not all petitions are created equal, offering another potential explanation. Paid petitions made up over 85% of the Court's certiorari

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[16] *See id.*

[17] *See* Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190 (1991). For a discussion of similar studies, see MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM, 88–96 (1999).

[18] This explanation may fail to account for another reality. *Michigan v. Long* comes into play in dual-claim cases only when the state supreme court grants relief to the individual against the government. When a state supreme court denies relief to the individual in a dual-claim case, the ruling never turns solely on state law; the state court still must independently reject the federal claim. In deciding which dual-claim petitions to grant in cases in which the individual wins, some Justices still may sympathize with the philosophy expressed in Justice Stevens's *Michigan v. Long* dissent — that the Court should not worry when a state court overprotects constitutional rights in a dual-claim case, no matter whether the state court grounds the ruling in state or federal law. *See Long*, 463 U.S. 1067–69 (Stevens, J., dissenting).

grants during the relevant period.[19] Paid petitions usually come with lawyers, while unpaid petitions usually do not. And better petitions often make better certiorari candidates. But all of this does not explain the underrepresentation of state courts. Compare the percentage of paid petitions that arise from state courts with the opinions reviewing state court cases, and the underrepresentation of the state courts becomes starker. State court petitions represent a *larger* share of paid petitions than of petitions at large — on average, about 25% rather than 22%. Using paid petitions as the relevant benchmark thus makes the average underrepresentation of state courts higher — a little over 40%. A higher success rate for paid petitions in the end does not explain the underrepresentation of state court petitions.

Perhaps the nature of a state court case — arising in one sovereign's court system — minimizes the incentive for extrajurisdictional research. By contrast, an advocate in a Sixth Circuit case, for example, has every reason to look at decisions from other intermediate courts in the *same* court system. Perhaps, then, counsel in state court cases have less reason to do research about federal issues outside of that state court system, leading to fewer state court decisions that identify federal law splits in authority.[20] Anything is possible. But this explanation seems unlikely. The main impetus for failing to perform research outside the relevant appellate court usually turns on resources. And that problem haunts the state and federal courts in many classes of cases — and presumably affects them equally.

Another possibility is that the elite members of the Supreme Court bar, including the growing number of law schools with Supreme Court clinics, focus their searches for certiorari prospects on the federal courts of appeals while devoting fewer resources to mining state court decisions for promising candidates for review. That was assuredly true fifteen years ago when one of us was still practicing law. And if that remains true today, that factor helps to explain the statistics. Surely experience and effective briefing, including the comfort of known and dependably strong advocates, improve the odds of review.[21] But all of this suggests a missed opportunity. The fifty state supreme courts present fertile

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[19] We reach this number by averaging the percentage of paid petitions reported for each Term in the Court's annual reports. *See, e.g.*, JOHN G. ROBERTS, JR., 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY, https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf [https://perma.cc/TVQ9-65GP].

[20] The Court more frequently grants cases that implicate a split in authority between two or more courts. Evan Bernick, *The Circuit Splits Are Out There — And the Court Should Resolve Them*, FEDERALIST SOC'Y 36 (Aug. 13, 2015), https://fedsoc.org/commentary/publications/the-circuit-splits-are-out-there-and-the-court-should-resolve-them [https://perma.cc/TL2H-UBF3] (indicating that Chief Justice Roberts emphasized that "circuit splits are far and away the most important consideration in deciding whether to grant cert petitions").

[21] *See* Harvard Law School, *Associate Justice Elena Kagan Speaks with Dean Martha Minow*, at 48:15–52:23, YOUTUBE (Sept. 14, 2015), https://www.youtube.com/watch?v=fWJkCDJMGH4 (explaining the benefits of an experienced Supreme Court bar).

fields for certiorari prospects, and enterprising appellate advocates might wish to take that reality into account in their prospecting efforts.

The current audience for certiorari petitions also shares a federal court vantage point. All but one of the Justices hails from a federal circuit court and not one of them is an alum of a state court. That experience may make the Justices more familiar with federal judges than with state court judges, perhaps making them more likely to appreciate a majority or dissenting opinion by a known rather than an unknown judge or an opinion from a known rather than a less well-known court. Familiarity may breed confidence in some certiorari petitions over others. While the role of U.S. Supreme Court law clerks in recommending certiorari grants is vastly overstated, these clerks hail almost exclusively from federal court clerkships, perhaps creating a similar dynamic.

Up to now, we have assumed that the Court unintentionally grants certiorari in fewer state court cases. But perhaps that is not the case. State court decisions usually cover fewer people than federal circuit court decisions. A mistake from a federal circuit court often will have a greater impact based on the breadth of its jurisdiction. Not always, of course, as a comparison between the geographic scope of decisions of the California Supreme Court and the First Circuit confirms.[22] But the reach of most decisions of the federal courts of appeals may increase the Court's inclination to review them.

State courts also do not labor under the same Article III limitations as federal courts. State courts may issue advisory opinions, resolve unripe cases, or put aside the imperative of standing.[23] Not so if the U.S. Supreme Court reviews the case. The Court may prefer to review federal issues arising from the federal courts of appeals, which must honor these constitutional limitations on the power of all federal courts. So too with state court procedures that have no parallel in the federal court system and may prompt hesitation to use state court cases as vehicles for review. Most Justices, we suspect, take the view that they make more mistakes by granting rather than denying petitions. State procedural idiosyncrasies offer one more reason to hesitate.

What of another possibility? Does the U.S. Supreme Court review fewer state court cases as a way of signaling respect for the state courts?

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[22] Roughly speaking, the California Supreme Court serves California's 39.54 million residents, whereas the First Circuit serves the 13.94 million residents of Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island combined. U.S. Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, AM. FACTFINDER (Dec. 2017), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&prodType=table [https://perma.cc/92QN-A3JK]; *see also About the Court*, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, http://www.ca1.uscourts.gov/about-court [https://perma.cc/TMJ3-8EKH].

[23] *See* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 263–64 (1990).

Our system of federalism creates separate and overlapping powers between the states and the national government. Perhaps the national high court has come to see infrequent review of state court decisions as a comity-inspired way to respect those boundaries.[24]

If so, it is not obvious that diminished review of state court decisions achieves its intended goal. The question is: "What counts as respect?"[25] Is it not possible that increased engagement between the U.S. Supreme Court and the state high courts will increase respect for the state courts and increase their influence in developing federal constitutional law? The U.S. Supreme Court has the power to transform the idea of a single court or judge into the law of land. It can vindicate dissenting judges or corroborate conclusions of the majority, all on a national platform. The harder the issue, the more valuable it would seem to increase the number of courts that might contribute a solution. Lessening the state courts' role in that ongoing conversation not only creates the risk of a missed solution, but it also lessens their profile in the process. How is that healthy, or for that matter, respectful? All in all, additional review of state court decisions is likely to *promote* the importance of state courts and state court judges, not to demote the role of state courts in the federal system.

III. Potential Consequences of the Current Disparity

The Court's apparent hesitation when it comes to state cases has consequences. When the Court fails to engage state courts in the same way it engages the federal courts, it leaves additional space for error at the state court level. Because state courts, by one count, handle 95% of the civil and criminal cases in the country,[26] that is not inconsequential. The risks are particularly acute with respect to criminal law, arguably the work with the greatest impact on the individuals involved. To give one example, the California court system resolved over five million criminal cases in 2015.[27]

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[24] Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (forthcoming June 2018) (manuscript at 199–200) (on file with authors).

[25] *Id.* at 200.

[26] R. LaFountain et al., Nat'l Ctr. for State Courts, Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads, at iv (2010), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx [https://perma.cc/5N2X-R4TE].

[27] Judicial Council of Cal., 2015 Court Statistics Report: Statewide Caseload Trends 2004–2005 Through 2013–2014, at xv (2015), http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf [https://perma.cc/7VN5-YJ97].

Diminished review of state court criminal cases that present federal constitutional claims disadvantages state criminal defendants.[28] After direct review of a criminal case ends, the defendant may file a petition for habeas corpus relief in federal court.[29] But in the last twenty years, the hurdles for obtaining this type of collateral relief have grown considerably. AEDPA, known in full as the Antiterrorism and Effective Death Penalty Act of 1996,[30] requires federal habeas courts to ask not whether a constitutional violation occurred in a defendant's case, but whether any state court error was unreasonable.[31] That's a lofty bar, and most defendants rarely come close because most state court decisions, right or wrong, are reasonable.[32] The upshot is this: there is a much greater chance that the federal courts will side with the state in a habeas case.

That's also a problem, relatively speaking. Federal court criminal defendants also face some of the same AEDPA limitations on their petitions for collateral relief, known as § 2255 petitions.[33] If the U.S. Supreme Court is apt to hear more federal court certiorari petitions arising from direct appeals of criminal convictions than similarly situated state court petitions, that reality favors the federal criminal defendant — to an even greater extent than AEDPA already requires. Any justification for disparate treatment of two criminal defendants raising potentially identical claims under the same U.S. Constitution escapes us.

Diminished state court review affects not just the defendant but the prosecution, too. Although prosecutors appeal less frequently and have fewer opportunities to appeal, they have no remedy beyond direct review when a state court makes an error. That is to say, while criminal defendants confront added deference to state court decisions when they file a habeas petition, there is nothing for the state to confront because no such option exists. If the state court makes a mistake that favors the defendant and the U.S. Supreme Court fails to review it, the case is over,

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[28] These defendants face additional hurdles, including: procedural barriers, 28 U.S.C. § 2254(b) (2012), deferential standards of review, *id.* § 2254(d), bars on retroactive application of new precedent, Teague v. Lane, 489 U.S. 288, 310 (1989), limited opportunities to introduce new facts into the proceeding, Cullen v. Pinholster, 563 U.S. 170, 180–81 (2011), and a more stringent harmless error test, Brecht v. Abrahamson, 507 U.S. 619, 638 (1993).

[29] 28 U.S.C. § 2254.

[30] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code).

[31] 28 U.S.C. § 2254(d)(1).

[32] Even pre-AEDPA, prisoners prevailed in only 3.2% of habeas cases, with only 1.8% obtaining release. Carol G. Kaplan, *Habeas Corpus — Federal Review of State Prisoner Petitions,* BUREAU JUST. STAT. (Mar. 1, 1984), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=3457 [https://perma.cc/YG2C-L7HK].

[33] 28 U.S.C. § 2255.

and the law stands until the Court (or the state supreme court) acts to change it.[34]

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One data point suggests change could be afoot. During the most recent Term, the 2016 Term, the Court's certiorari grants for the first time in a while kept pace with the percentage of state court petitions in the pool, with 23% coming from state courts.[35] Jurists, litigants, and law — both state and federal — will benefit if the trend continues. A highly functioning system for developing federal constitutional law should maximize the participation of all players in the system and give all parties an equal chance at review in the U.S. Supreme Court.

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[34] *See, e.g.*, Kansas v. Carr, 136 S. Ct. 633, 641 (2016) ("When we correct a state court's federal errors, *we return power to the State, and to its people.*" (quoting Kansas v. Marsh, 548 U.S. 163, 184 (2006) (Scalia, J., concurring))).

[35] Analysis of Cert Pool Data (June 5, 2017) (on file with author); CERT POOL, http://certpool.com [https://perma.cc/4YEV-RFZ4].

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