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ADJUDICATED ON THE MERITS?: WHY THE AEDPA REQUIRES STATE COURTS TO EXHIBIT THEIR REASONING

EZRA SPILKE*

INTRODUCTION

According to Felix Frankfurter, "[it] is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[1] But, Frankfurter admonishes, the Court must, nevertheless, deal fairly with bad people by adhering to the law.[2]

Similarly, although most petitioners seeking a writ of habeas corpus have committed a crime at least as objectionable as the one for which they were convicted,[3] "the Constitution sometimes insulates the criminality of a few in order to protect the [liberty] of us all."[4] And so, for many years the federal writ of habeas corpus remained a vital last resort for persons in state custody whose liberty was unlawfully restrained by the states.[5] Particularly,

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1. United States v. Rabinowitz, 339 U.S. 56, 69 (1950)(Frankfurter, J., dissenting).

2. *See id.* ("[W]hile we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment.").

3. Please note the distinction between habeas corpus petitioners and criminal defendants or suspects. Criminal defendants are innocent until proven guilty and their guilt must be proven beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 64 (1970)(holding that the due process clause entitles a criminal defendant to a determination only upon proof of the facts underlying the crime that he is guilty beyond a reasonable doubt). Habeas petitioners, however, seek *post-conviction* relief. That is, they have already been convicted of and sentenced for committing a particular crime. Therefore, it would be exceptionally cynical of the criminal justice system to presume more than half of convicted criminals are not guilty.

4. Arizona v. Hicks, 480 U.S. 321, 329 (1987).

5. *See Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868)("The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom."); Bowen v. Johnston, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of habeas corpus is the precious

federal courts have used habeas corpus to vindicate the protections of liberty guaranteed by constitutionally-mandated criminal procedure when they have been threatened by state courts.[6]

However, the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") has insulated state courts from federal scrutiny of many of their omissions of duty relating to individual rights. Specifically, the AEDPA limits reversals of state court convictions to situations in which the decision is "contrary to, or involved an unreasonable application of . . . Federal law."[7] As the Supreme Court has indicated, the standard of review under the AEDPA is highly deferential to state courts.[8] Significantly, however, a federal court does not owe any AEDPA deference to a state court conviction and may review the claim de novo unless the petitioner's claim was "adjudicated on the merits"[9] in the state court.[10] Thus, when federal courts consider whether to apply the AEDPA standard of review or pre-AEDPA de novo review, they focus much of their attention on whether the habeas petitioner's criminal procedure claim has been adjudicated on the merits.[11]

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safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."); Waley v. Johnston, 316 U.S. 101, 105 (1942) (noting that the writ of habeas corpus is the final "means of preserving" a state prisoner's constitutional rights).

6. *See, e.g.*, Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring) ("I think the writ ought always to lie for claims of nonobservance of those procedures that, as so aptly described by Mr. Justice Cardozo in *Palko v. Connecticut*, are 'implicit in the concept of ordered liberty.'")(citation omitted).

7. 28 U.S.C. § 2254(d) (2000).

8. *See* Williams v. Taylor, 529 U.S. 362, 405-10 (2000) (O'Connor, J., Concurring)(disagreeing with Justice Steven's construction of AEDPA, which leaves the level of deference unchanged, and holding that "contrary to" means "opposite," and not plainly different, and that unreasonableness must be evaluated objectively); *see also* Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN'S L. REV. 615, 617-18 (2004) (arguing that the AEDPA standard is difficult to apply because it requires both fact-sensitive and politically-sensitive judgment).

9. 28 U.S.C. § 2254(d).

10. *See, e.g.*, Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004) (holding that if a state court did not decide a claim on the merits the issue is reviewed de novo).

11. *Compare* DiBenedetto v. Hall, 272 F.3d 1, 6 (1st Cir. 2001) (holding that a federal constitutional claim is not adjudicated on the merits if the state court did not in any way decide it even by reference to state court decisions dealing with that issue) *with* Gipson, 376 F.3d at 1196 (implying that the presumption with summary dismissals of federal claims is that the state court *did* reach the merits of the claim). *See generally* Sloane, *supra* note 8, at 618-19, 636-644 (discussing the numerous "permutations" of tests advanced by the federal circuits to determine if there was an "adjudication on the merits" when the state appellate court summarily dismisses the federal claim).

Discerning whether a claim has been adjudicated on the merits can be a controversial issue. Because of overloaded dockets, sandbagging defendants, or ignorance of criminal procedure, state court judges will, sometimes, summarily dismiss a criminal defendant's claim of procedural violation.[12] Without clearly defined reasoning, it is impossible to discern whether a state court's decision was arrived at through sound deliberation or on a whim. However, in most federal judicial circuits, such unreasoned dismissals of procedural claims are considered adjudications on the merits and are, therefore, subject to little scrutiny.[13]

This comment focuses on what adjudication means and suggests that subjecting unreasoned opinions to AEDPA deference is contrary to both the intent of the act and to the Supreme Court's interpretation of the act. Part I discusses the historical importance of habeas corpus from the nineteenth century to today. Part II addresses the problems with current habeas corpus jurisprudence and examines how it diverges from historical and legislative expectations. Part III proposes a new standard for determining when a state court has adjudicated a claim on the merits.

I. DE NOVO TO 'UNREASONABLE' AND 'CONTRARY': THE DEVELOPMENT OF HABEAS CORPUS JURISPRUDENCE

This section traces the development of the law of habeas corpus. An overview of the history of federal habeas corpus will demonstrate that the availability of relief afforded to those in state custody is dependent on the relationship between federal and state courts.[14]

A. From England to the Colonies

The English remedy of habeas corpus was originally a writ used to summon defendants into court.[15] By the mid-fourteenth

12. Summary dismissals, as the term is used herein, dispatch a defendant's claim without any stated reasoning. *See, e.g.*, Clanton v. United States, 284 F.3d 420, 426–27 (2d Cir. 2002) (discussing the rationale behind requiring specific findings of fact in support of summary dismissals). A summary dismissal may or may not address the particular procedural violation. For example, when a defendant seeks to exclude evidence because it was obtained in violation of his Fourth Amendment right against unreasonable search and seizure, it makes no difference whether the judge or magistrate dismisses "the defendant's Fourth Amendment claims" or "all of the defendant's claims."

13. *See infra* notes 84-92.

14. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4, at 27-36 (5th ed. 2001) (comparing federal habeas corpus with United States Supreme Court *certiorari* review).

15. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 4, 12, 17 (Greenwood Press 1980).

century, prisoners were petitioning courts for writs of habeas corpus to "examine the cause of the imprisonment."[16] By the eighteenth century, Sir William Blackstone had called habeas corpus "the most celebrated writ in the English law."[17]

The American writ of habeas corpus was, in turn, modeled after the English common law writ.[18] Although habeas corpus relief was originally believed not to apply in the colonies through English common law,[19] it was included in the first colonial charter.[20] Thereafter, many of the colonies provided habeas corpus relief by charter, statute, or common law.[21]

B. The Writ of Habeas Corpus in Early Federal Law

The United States Constitution prohibits Congress from suspending the writ of habeas corpus.[22] In 1789, Congress expressly granted federal courts the power to issue writs of habeas

16. *Id.* at 24-25. This early version of habeas corpus, known as *habeas corpus cum causa*, was a combination of habeas corpus with another writ which demanded of the sheriff the reason for the detention. *Id.* at 25. Thus, at this early date, courts had connected the notions of summoning a defendant from imprisonment and questioning the reason for his detention.

17. WILLIAM BLACKSTONE, 2 COMMENTARIES 128-29 (Thomas M. Cooley ed., Chicago, Callaghan 3d ed. rev. 1884).

18. *See* Duker, *supra* note 15, at 6.

19. *See* BLACKSTONE, *supra* note 17, at 95-96 (describing the seventeenth century theory whereby England's "indigenous" laws, i.e. common law, did not apply in a colony when a Christian country conquers and colonizes the kingdom of an infidel).

20. *Id.* at 98.

21. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.2, at 843-44 (3d ed. 1999).

22. U.S. CONST. art. I, § 9, cl. 2. ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). It has been debated whether this provision was intended to make habeas corpus a constitutional guarantee or simply to acknowledge the writ as a statutory creation, enacted by Congress at its will. *Compare* CHEMERINSKY, *supra* note 21, at 844 ("[T]he Constitutional Convention prevented Congress from obstructing the state courts' ability to grant the writ, but did not try to create a federal constitutional right to habeas corpus.") *with* Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 455–65, 468 (1996) (surveying the history of the debates over the ratification of the Constitution and concluding that the states believed that the Suspension Clause was a constitutional guarantee). It is also interesting to note that when the habeas corpus clause was submitted to the Committee of Detail by South Carolina delegate Charles Pinckney, the clause read, "The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended . . . except upon the most urgent and pressing occasions . . . ." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 340-42, 438 (Max Farrand, ed., Yale Univ. Press 1966). The "expeditious and ample" language had been dropped by the time the clause was voted on eight days later. *Id.* at 435, 438.

corpus.[23] Originally this power extended only to federal prisoners, but did not extend to state prisoners.[24]

After the Civil War, Congress amended the habeas corpus act.[25] As amended, the act extended the federal habeas corpus power to reach free state prisoners.[26] Accordingly, Congress was motivated, at least in part, by its fear that, without federal oversight, southern states would abuse criminal processes to target freed slaves.[27] Thus, the Act of February 5, 1867 provided state prisoners with protection from unconstitutional detentions.[28]

In the 130 years between the 1867 amendment and the AEDPA, the development of the standard of review of state decisions underwent a slow but radical change. At first, an unconstitutional detention was found only when the detention was imposed by a court that lacked jurisdiction.[29] At the beginning of the twentieth century, the United States Supreme Court was still concerned with comity but was willing to broaden its concept of unconstitutional detentions.[30] However, even then it was clear

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23. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

24. CHEMERINSKY, *supra* note 21, at 844. *See Ex parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845) (holding that neither the Judiciary Act of 1789 nor Article III of the Constitution grants power to a judge to issue a writ of habeas corpus to summon a state prisoner for any reason other than to be used as a witness).

25. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241-54).

26. *See Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1867) (Chase, C.J.) (holding that the 1867 act "brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws"); DUKER, *supra* note 15, at 189-90 (stating that according to the unambiguous words of the statute, a state prisoner may petition for federal habeas corpus). The relevant language of the statute reads:

> [T]he several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may he restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.

14 Stat. at 385.

27. *See* CHEMERINSKY, *supra* note 21, at 845 (noting that the drafters designed the new habeas corpus provision to protect freed slaves from unconstitutional confinement).

28. 14 Stat. at 385.

29. *See, e.g., Ex parte* Siebold, 100 U.S. (10 Otto) 371, 375 (1879)(holding that the Court can only issue a writ of habeas corpus if the state court lacks jurisdiction and that "[m]ere error in the judgment or proceedings . . . constitutes no ground for the issue of the writ").

30. In two cases in particular, the Court, upon petitions to reverse convictions stemming from mob-dominated trials, indicated that the power to grant habeas corpus did not end with correcting procedural defects. In *Frank v. Magnum*, 237 U.S. 309 (1915), the prisoner brought a petition for habeas corpus after having been sentenced to death for murder. *Id.* at 311-12. The

that purely legal questions were to be determined de novo.[31]

By the time of the Warren Court, federal courts had greater powers of review over habeas petitions than they did on direct review.[32] In 1966, Congress clarified the standard of review of factual determinations required of federal courts on habeas petitions.[33] The 1966 amendments were silent as to the standard of review on legal decisions.[34] Thus, in light of the silence on the matter of state courts' legal error, the standard of review for decisions of law remained de novo.[35]

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prisoner's trial lasted four weeks, during which time he had the assistance of several attorneys. *Id.* at 312. Although the prisoner, a Jew, made a showing of mob influence, the state supreme court, after an evidentiary hearing, disagreed and affirmed the conviction. *Id.* at 312-14. Upon petition for habeas corpus, the Court found that the trial was not mob-dominated. *Id.* at 335. The Court did, however, go on to state that if the trial had been mob-dominated, that would amount to a denial of due process which would enable the Court to issue habeas corpus. *Id.* Eight years later, in *Moore v. Dempsey*, 261 U.S. 86 (1923), the Court was again faced with a mob-dominated trial. In *Moore*, a group of black men were convicted for the murder of a white man and sentenced to death. *Id.* at 90. After the prisoners' arrests, a mob marched to the jail in order to lynch them and were stopped only when town officials promised the mob that "law would be carried out." *Id.* at 88-89. According to the post-trial affidavits of a few of the witnesses, a number of black witnesses, two of whom were relied upon to establish the prisoners' guilt, were whipped and beaten until they promised to testify as to the prisoners' guilt. *Id.* at 89. The Court, while reaffirming "that the corrective process supplied by the State may be so adequate that interference by Habeas corpus ought not to be allowed," went on to hold that the courts of the United States must intervene when the entire trial was tainted and the state court did nothing to remedy it. *Id.* at 91-92. Thus, although the state courts may have jurisdiction, federal courts have a duty to secure constitutional rights.

31. *See* 1 HERTZ & LIEBMAN, *supra* note 14, at 66 (reconciling the disagreement between *Frank* and *Moore*, and concluding that by the time of the *Moore* decision the Court was persuaded that de novo review extended to mixed questions of law and fact).

32. *See* CHEMERINSKY, *supra* note 21, at 847 (stating that "the Warren Court greatly liberalized the availability of habeas corpus"); HERTZ & LIEBMAN, *supra* note 14, at 74 (claiming that in the mid-1960s, the Court expanded the scope of habeas corpus so that it was even less deferential than direct review).

33. After the 1966 amendments, Subsection 2254(d) read, "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus . . . , a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , shall be presumed to be correct . . . ." 28 U.S.C. § 2254(d) (1995).

34. *Id.*

35. *See* Cuyler v. Sullivan, 446 U.S. 335, 341 (1980) (holding that section 2254's deferential standard of review does not apply to the state court's conclusion of law because section 2254 applies only to findings of fact); Hance v. Zant, 696 F.2d 940, 946 (11th Cir. 1983) (stating that section 2254(d)'s standard of review does not apply to questions of law or to mixed questions of law and fact); HERTZ & LIEBMAN, *supra* note 14, at 45 (explaining that, pre-AEDPA, federal courts had always reviewed legal questions de novo).

C. Congress Urged to Reform

After the broadening of review powers by the Court in the mid-1960s,[36] the Court became more reluctant to construe habeas corpus so broadly, resulting in a gradual erosion of federal courts' ability to grant habeas relief.[37]

In addition to these judicial measures limiting the availability of habeas corpus, there were calls for legislative reform of habeas corpus,[38] calls not entirely unheeded by members of Congress.[39] Indeed, for years there had been criticism that death row inmates were abusing their right to obtain habeas corpus review in order to delay their executions.[40]

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36. *See supra* note 32 and accompanying text.

37. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 494-95 (1976) (holding that state violation of the exclusionary rule, whereby evidence gathered in violation of the Fourth Amendment cannot be used in a criminal trial stemming from the offense that the evidence would otherwise establish, is not grounds for habeas corpus because exclusion of evidence is not a constitutional mandate but a remedy to secure a constitutional guarantee); Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that habeas corpus petitioners cannot use new rules of criminal procedure created after their conviction was made final to challenge their convictions). *See also* CHEMERINSKY, *supra* note 21, at 847-48 (noting that the Burger and Rehnquist Courts have narrowed the availability of habeas corpus); HERTZ & LIEBMAN, *supra* note 14, at 16 (observing that the Rehnquist Court, having rolled back many of the Warren Court's habeas corpus reforms, indicated in several of its early 1990s decisions that it would continue to define habeas corpus relief narrowly).

38. *See, e.g.*, ABA, Criminal Justice Section, *Report to the House of Delegates* 1 (1989), *available at* http://www.abanet.org/legalservices/downloads /sclaid/115e.pdf (recommending reformative measures to Congress to decrease the amount of time death row inmates spend waiting to be executed by both limiting the number of habeas petitions available to prisoners and, at the same time, encouraging states to provide more effective defense counsel); Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoner Petitions in the Federal Courts 1980-1996* 9 (1997), *available at* http://www.ojp.usdoj.gov /bjs/pub/pdf/ppfc96.pdf (finding that, in 1995, 648 (or 21 percent) of state death row inmates had a habeas corpus petition active in federal courts); JUDICIAL CONFERENCE OF THE U.S., AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL 3 (Aug. 23, 1989), *reprinted in Habeas Corpus Revision Act of 1990: Hearing on H.R. 4737 Before the House Subcommittee on Courts, Intellectual Property, and the Administration of Justice*, 101st Cong. 44-52 (1990)[hereinafter *Hearings*] (statement of Hon. Lewis J. Powell) (proposing a change in the habeas corpus law concerning capital cases in conjunction with a program to encourage more effective assistance of counsel). *But see* Charlotte Low Allen, *Ending Abuse of Death Penalty Appeals*, WALL ST. J., May 14, 1990, at A16 (arguing that the findings of the Powell-chaired report indicating that habeas corpus petitions account for the bulk of the delay in executing death row inmates are best addressed by the Court and not the legislature).

39. H.R. REP. NO. 101-681(I), at 114 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6519 (stating that "[i]t is clear that a Congressional response is warranted"); CHEMERINSKY, *supra* note 21, at 848 (stating that, "[f]or many years," conservatives in Congress had attempted to limit habeas corpus relief).

40. *See, e.g.*, *Moore*, 261 U.S. at 93 (McReynolds, J., dissenting) ("The

After resisting reform for years, Congress was finally forced to act on April 19, 1995. The impetus to reform habeas corpus was set in motion that day by a car bomb that exploded in the Alfred P. Murrah Federal Building in downtown Oklahoma City, killing 168 men, women, and children.[41] Of central concern at the time was that the man convicted for the bombing, Timothy McVeigh, would file endless frivolous habeas corpus petitions to delay the date of his execution.[42] Because the crime McVeigh committed was so heinous, there can be little doubt the members of Congress who signed the act had the families of the victims in mind when they guaranteed that no such abuse of the writ would take place.[43]

D. The AEDPA

In 1996, Congress enacted the reforms necessary to ensure the speedy executions of convicts like McVeigh when it passed the AEDPA, amending section 2254 of title 28 by adding a new subsection (d).[44] The new subsection (d) provides that a state conviction will not be reversed by a federal court if the disputed issue was adjudicated on the merits unless the decision was contrary to federal law, resulted from an unreasonable application of federal law, or was based on an unreasonable determination of the facts by the state court.[45]

Four years after Congress passed the AEDPA, the United States Supreme Court acknowledged that the act had changed

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delays incident to enforcement of our criminal laws have become a national scandal and give serious alarm to those who observe"); H.R. REP. NO. 101-681(I), at 112-13 (noting that, according to "knowledgeable observers," death row inmates file frivolous petitions in order to avoid execution); Allen, *supra* note 38, at A16 (criticizing habeas corpus procedure for allowing prisoners to abuse the petition process in order to delay their executions); *Hearings*, *supra* note 38, at 48 (finding that rules governing abuse of habeas corpus had not been effective and proposing a change).

41. 142 CONG. REC. S3365-02, S3367 (daily ed. Apr. 16, 1996)(statement of Sen. Nickles).

42. *See, e.g.*, Pres. William J. Clinton, *60 Minutes* (CBS television broadcast, Apr. 23, 1995) *quoted in* Todd S. Purdum, *Clinton Seeks Broad Powers in Battle Against Terrorism*, N.Y. TIMES, Apr. 24, 1995, at A1 ("If [the Oklahoma City bombing] is not a crime for which capital punishment is called, I don't know what is"); 142 CONG. REC. S3368 (daily ed. Apr. 16, 1996) (statement of Sen. Nickles) (urging reform of habeas corpus so that the Oklahoma City bomber would not be able to use frivolous petitions to delay his execution).

43. *See* Press Release, Sen. James Inhofe, Inhofe Hails Passage of Anti-terrorism Bill (Apr. 17, 1996) *(on file with author)* (stating, a day after the Senate passed the bill, that passage of the bill is a tribute to the families of the victims and acknowledging the influence the families had on the bill).

44. AEDPA shifted the old 2254(d) to subsection (e) and added a new paragraph (d). Pub. L. No. 104-132, 112 Stat. 1214.

45. 28 U.S.C. § 2254(d) (2000).

"the role of federal habeas courts in reviewing petitions filed by state prisoners," placing new limitations on their ability to grant habeas relief.[46] According to Justice O'Connor's plurality opinion in *Williams v. Taylor*,[47] a state decision of law is not "contrary to" clearly established federal law unless "the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Court's]."[48] In short, for a state decision to offend AEDPA review, it must "be substantially different" from the Court's precedent.[49]

Regarding the second test in subsection 2254(d), a state court's application of legal principles to the facts of the case before it is an "unreasonable application" if the court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."[50] O'Connor refrained from defining "unreasonable" further, stating simply that it is more stringent than "incorrect."[51] Moreover, O'Connor stressed that the application must be objectively unreasonable.[52] Federal courts are thus restrained from substituting their subjective interpretations of federal law for the reasonable interpretation of a state court.[53] In short, the AEDPA drastically increased the amount of deference owed to the state, from very little deference on a de novo review[54] to the current, highly deferential standard.[55]

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46. *See Williams*, 529 U.S. at 403 (O'Connor, J., Concurring) (disagreeing with Stevens' construction of AEDPA which would leave habeas corpus jurisprudence unchanged).

47. 529 U.S. 362.

48. *Williams*, 529 U.S. at 405 (O'Connor, J., Concurring).

49. *Id.*

50. *Id.* at 413.

51. *Id.* at 410.

52. *Id.* at 409.

53. *See* J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 GEO. J.L. & PUB. POL'Y 109, 123 (2004) (stating that "objective" means a federal court reviewing a habeas corpus petition may not rely solely on its own independent judgment that the state court incorrectly applied federal law).

54. *See supra* notes 29-35 and accompanying text.

55. *See* Dunn v. Colleran, 247 F.3d 450, 457 (3d Cir. 2001) (stating that after AEDPA federal courts must give state courts' factual and legal determinations "greater deference than before"); 142 CONG. REC. S3454-01, at 3472 (daily ed. Apr. 16, 1996) (statement of Sen. Specter) (asserting that under AEDPA, federal courts will owe deference to state courts' decisions on the application of federal law to the facts); CHEMERINSKY, *supra* note 21, at 849 (noting that AEDPA narrows the scope of habeas corpus relief.)

E. The Silent State Opinion

AEDPA deference only applies, however, if the federal claim was "adjudicated on the merits" in state court.[56] If the federal claim was not adjudicated on the merits, the federal court reviews the claim de novo, since adjudication on the merits is necessary to the invocation of subsection 2254(d).[57]

For a number of years after the adoption of the AEDPA, federal courts relied on the silence of state court opinions as an indication that the court had not adjudicated the federal claim on the merits.[58] But, after the United States Supreme Court's decision in *Early v. Packer*,[59] many courts have interpreted the Supreme Court's stand on the issue to have been finally determined.[60] According to *Early*, a state court decision is not contrary to[61] federal law if the court neglected to cite Supreme Court cases; indeed, the state court need not even be aware of Supreme Court cases.[62]

II. RECENT CIRCUIT COURT CASES ARE DISCORDANT WITH THE AEDPA AND WITH THE SUPREME COURT

This section addresses the very real problem that encounters habeas corpus petitioners today, whereby a prisoner in state

56. *Gipson*, 376 F.3d at 1196; *see* Sloane, *supra* note 8, at 618 (stating that courts need not apply an "unreasonably wrong" standard to state court determinations of law when the court summarily dismisses a federal claim).

57. *Gipson*, 376 F.3d at 1196; *see* Sloane, *supra* note 8, at 619 (stating that cursory dismissals of federal claims should be reviewed de novo).

58. *See, e.g.*, Fortini v. Murphy, 257 F.3d 39, 43, 47 (1st Cir. 2001) (noting that since the state court did not address a constitutional issue in its opinion, it had not adjudicated that issue on the merits); Smith v. Massey, 235 F.3d 1259, 1264-65 (10th Cir. 2000) ("If a claim was not decided on the merits by the state courts . . . this court may exercise its independent judgment in deciding the claim. In doing so, this court reviews the federal district court's conclusions of law de novo and its findings of fact, if any, for clear error."); Weeks v. Angelone, 176 F.3d 249, 258 (4th Cir. 1999) ("When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, however, our review of questions of law and mixed questions of law and fact is de novo."); Moore v. Parke, 148 F.3d 705, 708 (7th Cir. 1998) (holding that because "the state courts did not address [petitioner's] sufficiency of the evidence argument on the merits . . . the new standard of review in AEDPA does not apply.")

59. 537 U.S. 3, 8 (2002).

60. *See, e.g.*, *Gipson*, 376 F.3d at 1196 (holding that silence of a state court's opinion on the federal issue does not necessarily mean the state court did not reach the merits of the issue).

61. Curiously, some courts misread *Early* as dealing with the "adjudication" clause. However, it clearly dealt only with the "contrary to" clause. *See, e.g.*, Harris v. Ward, No. Civ-02-624-F, 2003 WL 22995021, *16 (W.D. Okla. Nov. 12, 2003) (noting that *Early* addressed citation of federal cases only in the context of the "contrary to" clause).

62. *Early*, 537 U.S. at 8.

custody is completely denied review of his federal claim by a state court that has summarily dismissed that claim or, worse, has for some reason neglected to address it at all.[63] In order to appreciate the effect of such situations, one must first understand that the availability of habeas corpus is related to the standard of review the federal habeas court will use.[64]

Under the AEDPA, the state court proceedings must result in a decision that was either contrary to or based on an unreasonable application of Supreme Court precedent.[65] It is clear from the plain language of subsection (d), however, that not all state court adjudications are subject to the strict standards of review in subsection (d)(1). The threshold inquiry is whether the state court adjudicated the federal issue on the merits.[66] If not, then the federal issue is not reviewed under the restrictive AEDPA approach but under the pre-AEDPA, de novo standard of review.[67]

In many cases, a court's reasoning is plainly discernible from the written opinion. Determining whether the state court has adjudicated a federal claim on the merits becomes difficult, however, in situations where the state court's written opinion exhibits none of the court's reasoning regarding a federal issue properly raised before the court by the inmate petitioner.[68] In such

63. *See, e.g.*, William P. Welty, Comment, *"Adjudication on the Merits" Under the AEDPA*, 5 U. PA. J. CONST. L. 900, 905 (2003) (stating that valid federal claims are often overlooked or under-analyzed by state courts whose dismissals are reviewed under strict AEDPA standards).

64. *See* Sellan v. Kuhlman, 261 F.3d 303, 310 (2d Cir. 2001) (observing that determinations on whether AEDPA deference applies is "all but outcome-determinative").

65. 28 U.S.C. § 2254(d)(1) (2000).

66. *See* Sloane, *supra* note 8, at 651 (stating that section 2254(d) "requires the federal habeas court to determine as a threshold matter whether the state court decision on the federal claim in fact 'resulted' from an 'adjudication on the merits'"). *But see Sellan*, 261 F.3d at 308-09 (holding that the level of deference owed is the last in a series of threshold questions).

67. *See* Miranda v. Bennett, 322 F.3d 171, 178 (2d Cir. 2003) (holding that where it is impossible to discern the state court's conclusion on a federal issue, a federal court should not give AEDPA deference to that court's ruling); Rompilla v. Horn, 355 F.3d 233, 248 (3d Cir. 2004) (holding that if an examination of the state court opinion reveals the court did not decide a federal claim on the merits, then AEDPA does not apply); Oswald v. Bertrand, 374 F.3d 475, 477 (7th Cir. 2004) (holding that if a prisoner's claim was not adjudicated on the merits, then "the special deference to a state court's determinations that is prescribed by section 2254(d)(1) goes by the board"); *Gipson*, 376 F.3d at 1196 (holding that if the state court did not decide a federal issue on the merits, the section 2254(d)(1) deference requirements do not apply and the court will address the issue de novo); White v. Coplan, 296 F. Supp. 2d 46, 47 (D.N.H. 2003) (reviewing the constitutional claim de novo because there was no state court adjudication to which the federal habeas court could defer).

68. *See, e.g.*, *Gipson*, 376 F.3d at 1196 (holding that the state court had adjudicated a properly raised double jeopardy claim even though the court had

cases, most federal courts use a test or rather a presumption to determine whether a state court has addressed a federal claim.[69] The courts commonly impute hypothetical reasoning to the state courts in the absence of any reasoning in the written opinion, based solely upon the conclusion reached by the state court.[70] It is not a far leap, then, to conclude that the state court has "adjudicated" the claim on the merits. Thus, the federal habeas court almost invariably uses the AEDPA's heightened standard of review even when there has arguably been no adjudication on the merits, which, as the court in *Sellan v. Kuhlman*[71] stated, is tantamount to a denial of relief.[72]

A. *The Effect of* Early v. Packer *on the Meaning of "Adjudicated on the Merits"*

In 2002, the Supreme Court supposedly dealt a fatal blow to habeas corpus. In a *per curiam* opinion, the Court in *Early* held that a state court's failure to be aware of — let alone cite — Supreme Court precedent will not, alone, bring the decision outside the deferential AEDPA review.[73]

To some courts, *Early* vindicated their position that unreasoned opinions equaled adjudications.[74] It appears to many that *Early* reinforced the results-oriented approach that is suggested by the common usage of the phrase "adjudicated on the merits."[75] Under the results-oriented approach, the federal habeas

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not set forth its reasoning when dismissing that claim and had issued only a one-sentence dismissal without mentioning double jeopardy); *Gipson*, 376 F.3d at 1201 (Cassel, J., dissenting) (arguing that mentioning the other claims, based on state law, and excluding the federal claim was evidence the state court did not adjudicate the federal claim on the merits).

69. *See* Sloane, *supra* note 8, at 652-53 (finding that most federal circuits have adopted an analytical method whereby the court discerns from the face of the state court opinion whether the state court more likely than not adjudicated the federal claim on the merits).

70. *See id.* at 655-56 (suggesting that, in the absence of a discussion on the federal claim in state court opinions, some federal courts apply a legal fiction by imputing a hypothetical analytical process to the state court in order to examine the result under AEDPA).

71. *Sellan*, 261 F.3d at 303.

72. *Id.* at 310.

73. 537 U.S. at 8.

74. *See Gipson*, 376 F.3d at 1196, n.1 (concluding that the state court's discussion of the prisoner's state law, prosecutorial misconduct claims that arose from the same facts as his federal double jeopardy claim indicated an adjudication on the merits because *Early* does not require citation to Supreme Court cases).

75. *See Sellan*, 261 F.3d at 311 (endorsing the commonly understood meaning of the phrase "adjudicated on the merits" as "a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground").

court considers the petitioner's claim as presented to the state appellate court and then considers whether the dismissal of that claim was either an unreasonable application of or contrary to clearly established federal law.[76]

But those who thought *Early* heralded the arrival of unquestioned adjudication need only read the subordinate clause modifying the "citation" and "awareness" admonishment: "so long as neither the *reasoning* nor the result of the state-court decision contradicts them."[77] *Early* requires that federal habeas courts consider the reasoning behind state courts' dismissals of federal claims, as well as the results. Thus, the belief that state courts may abdicate their duty to provide the reasoning behind dismissals of federal issues is not only unsupported, but is, indeed, contradicted by the Court in *Early*.[78]

Likewise, a review of the decision in *Early*, which reversed the Ninth Circuit Court of Appeals, demonstrates that the Court did not excuse federal habeas courts from considering state courts' reasoning when determining whether the federal claim has been adjudicated on the merits. The Ninth Circuit began its AEDPA review of the petitioner's claim by observing that a state court's decision is contrary to clearly established federal law if it failed to apply the controlling Supreme Court authority.[79] Thus, since the California Appellate Court "failed to cite to any federal law, much less the controlling Supreme Court precedents," the Ninth Circuit held the decision to be contrary to federal law, as viewed under AEDPA.[80]

The United States Supreme Court, limited to the issue of whether failure to cite Supreme Court cases renders the state

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76. It is irrelevant, in scenarios such as these, whether the state court summarily dismissed the federal claim or did not address it whatsoever in the written opinion. If the federal issue was raised and the state court either ignored it or deemed it too frivolous to address, there is no other conclusion than finding that it was dismissed.

77. *Early*, 537 U.S. at 8 (emphasis added).

78. *See, e.g.*, Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997) (holding that federal courts need only review the outcome of the state court's adjudication, however deficient the discussion of the reasons for reaching that outcome are); Aycox v. Lytle, 196 F.3d 1174, 1178 (10th Cir. 1999) (holding that the court owes deference to only the state court's result even if its reasoning is not apparent from the written opinion); *Sellan*, 261 F.3d at 311 ("Nothing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process. Nowhere does the statute make reference to the state court's process of reasoning.")

79. Packer v. Hill, 291 F.3d 569, 578 (9th Cir. 2002). It is significant to note that the *Packer* court bypassed the threshold inquiry whereby the court determines whether the federal claim was adjudicated and holding that habeas relief is available "only if" the rulings violated the subsection (d)(1) standards. *Id.* at 577. The court seems to suggest that AEDPA deference applies regardless of whether it was adjudicated.

80. *Id.* at 578.

court's decision "contrary" to federal law, reversed the Ninth Circuit.[81] The Court held that, when determining whether a state court adjudication is contrary to federal law, the proper factors for federal courts to consider are the results and the reasoning of the state court, not citation to Supreme Court precedent.[82]

Early stops at forgiving state courts for their failure to cite Supreme Court cases and does not proceed further. *Early* does not compel state courts to include a discussion of the reasons that led them to dismiss federal claims. *Early* also does not instruct federal habeas courts what to examine in the absence of any reasoning in the state court's opinion. However, it is consistent with the holding of *Early* that habeas courts should not proceed under the AEDPA without some manifestation of the court's reasoning. In fact, *Early* encourages state courts of appeals to expressly provide the reasoning behind their dismissals of constitutional claims.

B. Current Approaches to the Threshold Question

1. The Presumption of Adjudication

Whereas the Supreme Court encourages federal courts to consider the reasoning behind state court dismissals of federal claims, most circuits have held that a federal court need only consider the result of the state court decision and not the reasoning, even after *Early*.[83] The Second,[84] Third,[85] Fourth,[86] Fifth,[87] Seventh,[88] Eighth,[89] Ninth,[90] Tenth,[91] and Eleventh[92]

81. *Early*, 537 U.S. at 8, 11.

82. *Id.* at 8.

83. *See infra* notes 84-92.

84. *See, e.g.*, *Sellan*, 261 F.3d at 311 (adopting the Fifth Circuit's analysis for determining whether a federal claim has been adjudicated on the merits in state court)

85. *See* Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002) (relying on Weeks v. Angelone, 528 U.S. 225 (2000), to reject the view that summary dismissals warrant de novo review). The Third Circuit's reliance on *Weeks* was misguided however. *See* Sloane, *supra* note 8, at 640 n.126 (indicating that the *Weeks* decision did not compel a broad construction of adjudication). The Court in *Weeks* never reached the issue of whether the state court had adjudicated the federal issue on the merits; instead, the Court independently found no constitutional violation. *Weeks*, 528 U.S. at 236.

86. *See* Bell v. Jarvis, 236 F.3d 149, 163 (4th Cir. 2000) (endorsing a results-oriented approach); *see also* Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir. 1998) (defining "adjudication," by relying on Black's Law Dictionary, as coming to a final determination).

87. *See* Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir. 1999) (articulating a three-part analysis to determine whether a federal claim has been adjudicated on the merits); *see also* Sloane, *supra* note 8, at 653 (criticizing the *Mercadel/Sellan* analysis as unlikely to produce an accurate result).

88. *See Hennon*, 109 F.3d at 334-35 (adopting a results-oriented analysis by finding that, since the AEDPA changed the relationship between state and

Circuits have adopted approaches that allow federal habeas courts to find an adjudication was made on the merits where the decision itself manifests little or no apparent reasoning.[93] Presumably, this rule applies regardless of whether the state courts include a discussion of the criminal procedure claim. In short, such an adjudication becomes equivalent to a final judgment with res judicata effect.[94]

Additionally, at least one circuit, the Tenth, has held that the petitioner bears the burden of showing that the federal issue was not adjudicated on the merits.[95] Although there is disagreement as to the quantum of evidence the petitioner must provide, the burden is, nevertheless, a difficult one to meet.[96]

These strict, results-oriented circuits presume that a state court, though silent, has satisfactorily addressed the disputed criminal procedure violation. Presumably, since federal courts review the results and not the reasoning of the state courts, they will apply AEDPA review to all dismissals of federal claims unless the state court explicitly states that it did not adjudicate that

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federal courts, state courts need not "articulate a rational path connecting the law and the evidence to the outcome").

89. *See* James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999) (holding that "the summary nature of the [state court's] opinion does not affect this standard of review"); *accord* Brown v. Luebbers, 371 F.3d 458, 462 (8th Cir. 2004) (citing James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999).

90. *See* Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999) (applying AEDPA analysis to decisions for which the state court did not provide a basis).

91. *See Aycox*, 196 F.3d at 1177-78 (holding that petitioners have the burden of production, whereby they must bring forward evidence that the state court did not consider the federal claim, and that federal habeas courts owe deference to the state court's result notwithstanding absence of expressly stated reasoning); *Gipson*, 376 F.3d at 1196 (applying *Aycox* and requiring the petitioner to produce evidence of the state court's failure to address the federal aspects of the petitioner's appeal when the state court failed to even mention that claim). The burden of production imposed in *Aycox* makes it possible that a state court opinion that fails to mention the prisoner's constitutional claim would nevertheless receive AEDPA deference absent the production of any evidence of the state court's failure to address the issue. This burden brings the Tenth Circuit more in line with the Fourth and Seventh Circuits than with the Second and Fifth Circuits.

92. *See* Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1254 (11th Cir. 2002) (holding that an unexplained rejection of a federal issue qualifies as adjudication and is entitled to AEDPA deference).

93. *See* Sloane, *supra* note 8, at 619 n.26 (collecting cases).

94. *See, e.g.*, *Sellan*, 261 F.3d at 311 (holding that an adjudication on the merits is equivalent to a final decision with res judicata effect).

95. *See Gipson*, 376 F.3d at 1196 (holding that there must be some indication to suggest that the state court did not reach the merits of the federal claim when there is no mention of that claim in that opinion).

96. *Gipson*, 376 F.3d at 1200 (Cassell, J., dissenting) (finding sufficient indicia that the state court did not reach the merits of a claim since the state court opinion addressed state law claims that arose from the same occurrences as the federal claim but failed to mention the federal claim).

claim on the merits. This violates the plain language of the AEDPA, which asserts that only claims actually adjudicated on the merits are to be reviewed under subsection (d)(1).

2. The Mercadel/Sellan *Test*

Unlike the other circuits adopting the broad construction of "adjudication," the *Mercadel/Sellan* test, adopted by the Second and Fifth Circuits, is an analytical approach rather than a presumption.[97] The relevant factors are:

> (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state courts' opinions suggest reliance upon procedural grounds rather than a determination on the merits.[98]

A federal court may use this analysis to determine whether a state court has more likely than not actually addressed the disputed issue instead of simply presuming it did.[99] This approach, however, does not mend the constitutional flaws inherent in the presumptive approach used by other circuits.

The constitutional problem is two-fold. First, what state courts have done in similar cases does not illuminate a later court's or panel's reasoning.[100] Without a basis for believing that the state court dismissed a federal claim on its substance, state courts can insulate themselves from federal court scrutiny by silently dismissing the claim. If the state court is assured that its decision will receive AEDPA deference regardless of the court's actual consideration of the issue, then it has no incentive to reach the issue.

Second, since the *Mercadel* approach uses precious judicial resources on only a threshold issue, federal courts seldom employ it.[101] Instead of evaluating the federal claim under AEDPA deference, federal courts wishing to avoid using the *Mercadel*

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97. The *Sellan* court found that "adjudicated on the merits" means that the state appellate court had reached a decision on the substance of the claim rather than on a procedural or other ground. 261 F.3d at 311. Therefore, the three-part analysis is meant to determine whether the decision was reached based on the substance of the claim.

98. *Mercadel*, 179 F.3d at 274.

99. *See* Sloane, *supra* note 8, at 655-56 (indicating that the *Mercadel* test, among others, imputes hypothetical reasoning to the state court to determine whether it is likely that the court adjudicated the claim on the merits).

100. *See id.* at 653-54 (questioning whether the *Mercadel/Sellan* approach can reliably indicate that a state court's boilerplate dismissal was not an adjudication on the merits).

101. *Id.* at 654.

analysis can dismiss the claim de novo and state that the result would have been the same under AEDPA deference.[102]

3. The First Circuit and Calabresi Approaches

The First Circuit Court of Appeals is the only court to adopt a narrow construction of the phrase "adjudicated on the merits."[103] Hence, in *Dibenedetto v. Hall*,[104] the First Circuit found that a federal claim warrants discussion if its dismissal is going to be reviewed under the AEDPA.[105] The circuit has since reaffirmed this view in the wake of *Early*.[106]

In a concurring opinion in *Washington v. Schriver*,[107] Judge Calabresi of the Second Circuit proposed a similar approach, whereby the AEDPA would not apply unless the state court had expressly mentioned the claim's federal aspects.[108] Calabresi reasoned that state courts will thereby be given a linguistic device to control judicial resources.[109] If the court wants AEDPA deference, it need only refer to the law governing a petitioner's federal claims.[110] On the other hand, if the state court wants to avoid addressing federal claims, it can do so by remaining silent on the federal claim, thereby signaling to federal courts that the AEDPA does not apply.[111] According to Judge Calabresi, this approach is in line with notions of state sovereignty because it gives state courts more control of their dockets than do tests or presumptions.[112]

This rule poses problems of its own, however. Consider a state court that neglects to refer to the federal aspects of a properly raised claim in its written opinion, yet satisfactorily

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102. *See id.* (suggesting that courts seldom analyze the issue of adjudication and, instead, claim that the outcome would be the same whether given deference or reviewed de novo). For further criticism of the *Mercadel* analysis, see *id.* at 654-57 (adding that notions of comity are not implicated when a federal claim has merit but the state court neglected to address it).

103. *Id.* at 619.

104. 272 F.3d 1 (1st Cir. 2001).

105. *Id.* at 7.

106. Norton v. Spencer, 351 F.3d 1, 5 n.1 (1st Cir. 2003) (finding that *Early* does not preclude de novo review of unarticulated state court dismissals).

107. 255 F.3d 45, 61-65 (2d Cir. 2001) (Calabresi, J., concurring).

108. *Id.* at 61-62.

109. *Id.* at 63.

110. *Id.* Because *Washington* was decided before the Supreme Court decided *Early* the suggestion that state courts should mention federal law is too narrow in light of the Supreme Court's express pardon for failing to be aware of Supreme Court precedent. But since the Supreme Court urges federal habeas courts to consider the state court's discussion of the federal claim — in addition to its result — it would likely be permissible to require state courts to refer to the underlying doctrine compelling the dismissal of a federal claim.

111. *Washington*, 255 F.3d at 63.

112. *Id.*

addresses the claim. Whereas federal courts currently allow the party opposing a petition for habeas corpus to rebut the finding of non-adjudication, under the Calabresi rule, non-adjudication would be an irrebuttable presumption where the opinion is silent.[113]

III. CHANGING THE STANDARDS FOR DETERMINING ADJUDICATION

This comment first suggests that the results-oriented approach is inconsistent with the AEDPA and with *Early*. Thus, the federal habeas courts should look to the reasoning behind the state court adjudication, with the burden falling on state courts to show that their dismissals of constitutional claims are not arbitrary or capricious.[114] Second, this comment proposes standards of adjudication that may be adopted by courts.

A. Expressed Reasoning as Condition Precedent

The requirement to examine the reasoning of a state court decision is the soundest way to guarantee the viability of habeas corpus as a meaningful protector of individual rights. The view that federal courts must review both the reasons for as well as the results of a state court's decision has been rejected in the habeas context by a number of jurists.[115] Notably, Judges Easterbrook and Posner, both of the Seventh Circuit, have rejected this view by analogizing habeas review to review of administrative decisions.[116] When federal courts review administrative decisions, they consider not only the outcome, but the rationale behind the outcome as well.[117] Judges Easterbrook and Posner argue that imposing this requirement on state courts is inappropriate because of the changes in the relationship between state and federal courts

113. A different panel of the Second Circuit Court of Appeals later addressed Calabresi's approach and rejected it. *Sellan*, 261 F.3d at 313-4.

114. Under this scheme, there is no penalty imposed on a state court for abdicating its responsibility to supply reasoning. There is an incentive to rationalize a court's decision, however: the heightened AEDPA standard of review.

115. *E.g.*, *Hennon*, 109 F.3d at 335 (rejecting an approach whereby state courts are forced to articulate "a rational path connecting the law and the evidence to the outcome"); Cole v. Young, 817 F.2d 412, 433 (7th Cir. 1987) (Easterbrook, J., dissenting) (noting, in a pre-AEDPA habeas case, that the doctrine whereby administrative agencies must explain why they did not follow their precedents has never been applied to courts).

116. *See supra* note 115.

117. *See* Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)) (holding that administrative agencies must offer an explanation for their "actions including a 'rational connection between the facts found and the choice made'").

brought on by passage of AEDPA and because of larger issues of federalism.[118]

These concerns are misplaced, however. First, it is clear from the language of the AEDPA that the federalism argument does not fit in the habeas context.[119] As stated above, habeas corpus review applies constitutional criminal procedure protections developed by the United States Supreme Courts to state courts. Although it is both proper and necessary for states to develop their own criminal procedure protections, state courts may not provide any less protection than that afforded by the United States Constitution, as interpreted by the Supreme Court. Therefore, it is unsurprising that the AEDPA only makes violations of "established Supreme Court precedent" reversible upon habeas corpus review. Because federal habeas courts review only the federal constitutional aspects of a claim, state courts cannot embellish on "established Supreme Court precedent." Thus, any "subtle changes"[120] to that precedent will add nothing to the interpretation of the law.

It is also wrong to assume that because the AEDPA changed the "tutelary relation[ship]"[121] between state and federal courts, state courts are not bound to announce the reasons behind their decisions. Granted, the drafters of the AEDPA had state sovereignty in mind when they developed the strict standards of review of state court decisions,[122] but allowing state courts to make decisions without providing rational reasons for them does not further those goals.

1. Support in Early

Although the Supreme Court has never addressed the issue, dictum in *Early* indicates that the Court would not limit its

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118. In a pre-AEDPA case, Judge Easterbrook found the administrative agency analogy unfitting because, unlike administrative agencies, courts develop the law by making subtle changes, "many unarticulated or even denied." *Cole*, 817 F.2d at 433 (Easterbrook, J., dissenting). In a case decided after the AEDPA was passed but before *Williams* was decided, then Chief Judge Posner, writing for the court, rejected requiring state courts to articulate their reasoning before being deferred to because the AEDPA sought to end federal court supervision of state courts. *Hennon*, 109 F.3d at 335.

119. *See* Sloane, *supra* note 8, at 656-57 (noting that federal habeas courts further none of the purposes of federalism or comity by deferring to silent state court opinions). Sloane then notes that federal courts show more respect to state courts by examining a claim the state court did not adjudicate than by imputing hypothetical analysis to the state court. *Id.* at 657.

120. *Cole*, 817 F.2d at 433 (Easterbrook, J., dissenting).

121. *Hennon*, 109 F.3d at 335.

122. *See* 142 CONG. REC. S3706-01, S3706 (daily ed. Apr. 19, 1996) (statement of Sen. Gorton) (noting with disapproval that one federal district court judge can find the entire appellate system of a state in violation of the Constitution).

definition of adjudication to the results of a state court's opinion.[123] In *Early*, the Supreme Court rejected the Ninth Circuit's emphasis on citation to Supreme Court precedent as a factor in determining whether a state court decision was contrary to federal law. The Court held that even ignorance of Supreme Court precedent would not indicate that the state court's adjudication was contrary to federal law.[124] The Court held that the aspects of the state court's adjudication pertinent to determining whether its decision is discordant with federal law are the results and the reasoning of the decision, not citation to Supreme Court cases.[125] Although the Court's endorsement of reasoning as a relevant factor arises in the context of a "contrary to" inquiry, it suggests that the Court's concept of "adjudicated" includes, as a necessary component, an apparent rational and reasoned basis underpinning the result. Assuming the threshold issue must be satisfied before section 2254(d) operates,[126] it is axiomatic that if the reasoning behind a court's decision is relevant to the operative clauses of section 2254(d) (i.e., the "contrary to" and "unreasonable application" clauses), it must be relevant to the threshold issue as well (i.e., "adjudication").[127]

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123. Although the Supreme Court has never made explication of reasoning a condition of review, the Court has always encouraged state courts to reason thoroughly:

> As long ago as 1953, the Court stressed the importance of a state court 'opinion specifically setting forth its reasons that there has been no denial of due process of law.' And the Court's post-1996 cases, though not requiring a state court to cite federal precedent, have praised those state courts that have thoroughly analyzed federal law. Although the approach proposed here would impose a new formal requirement to cite and thoroughly analyze federal authority, it does not impose an obligation the value of which should come as a surprise to state courts.

Steven Semeraro, *Criminal Law: A Reasoning-Process Review Model for Federal Habeas Corpus*, 94 J. CRIM. L. & CRIMINOLOGY 897, 937 (2004) (footnotes omitted).

124. *Early*, 537 U.S. at 8.

125. *Id.*

126. The threshold issue, of course, is whether the claim was adjudicated on the merits. Some courts even refer to the "adjudication" requirement as a condition precedent. *E.g.*, Brown v. Luebbers, 371 F.3d 458, 460 (8th Cir. 2004) (stating that adjudication is the condition precedent to application of the deferential AEDPA standard to a petitioner's claim); *see also* Cotto v. Herbert, 331 F.3d 217, 229-30 (2d Cir. 2003) ("[T]he standard governing federal habeas review depends on whether petitioner's claim has been previously 'adjudicated on the merits' by a state court.").

127. The Supreme Court's admonishment to examine the rational underpinnings of state court decisions when reasoning is apparent does not suggest that the Court would find that the absence of apparent reasoning precludes the operation of section 2254(d). However, the Court has never considered the effect of the absence of reasoning on the operation of section 2254(d). Moreover, whatever the Court's hostility to placing any requirements

2. To not require explicit reasoning would render AEDPA meaningless and give states too much freedom

Allowing federal habeas courts to analyze state court decisions under AEDPA regardless of the presence of reasoning in the decision would render the adjudication on the merits clause meaningless. The adjudication requirement was meant to guarantee that habeas courts defer to only thoughtfully rendered decisions. If all decisions, careless or otherwise, were subject to the AEDPA's outcome-determinative standard of review, the adjudication clause would be meaningless. Since the United States Supreme Court prefers to give meaning to every clause of a statute,[128] ignoring the adjudication clause is almost certainly improper.[129]

It would be shocking to suggest that a state court might rest its decision on the outcome of a coin toss. But under current interpretation in a majority of the federal circuits, a decision so decided would still receive deference under the standards set forth in AEDPA, assuming, of course, the court did not announce its capricious methods.[130] Since nothing stops state courts from acting arbitrarily, yet silently, the requirement that the claim be adjudicated on the merits before its dismissal is granted AEDPA deference is rendered meaningless.[131]

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on state courts, according to the plain meaning of AEDPA section 2245(d) does not operate unless there was an adjudication.

128. United States v. Menasche, 348 U.S. 528, 538-9 (1955) (quoting Township of Montclair v. Ramsdell, 107 U.S. (17 Otto) 147, 152 (1883)) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'").

129. Some courts continue to defer to summary dispositions, however, by determining that a proper adjudication is unconnected to underlying reasoning. *E.g.*, *Sellan*, 261 F.3d at 311-12. According to these courts, adjudication is rather "a decision finally resolving the parties' claims, with res judicata effect." *Id.* at 311; *accord Bell*, 236 F.3d at 157-58. Simply finding that summary dismissals are no less adjudications than reasoned decisions does not cure the statutory defect. Because there is no way to distinguish unreasoned opinions from unadjudicated opinions, it is likely that even unadjudicated dismissals will be deferred to under AEDPA, which directly conflicts with the adjudication requirement.

130. One assumes that even courts that interpret "adjudication" broadly would balk at giving the statement, "We flipped a coin," AEDPA-deference.

131. Whereas the opinions of other Circuits seem to acknowledge that there are some situations in which the AEDPA would not apply, in *Hennon*, Judge Posner seems to argue that all dispositions are adjudications and are thus subject to AEDPA deference. *Hennon*, 109 F.3d at 335. However, in *Oswald*, Judge Posner acknowledges that there are situations for which the AEDPA does not apply, for example, when the state court has not reached the merits of a constitutional error. 374 F.3d at 477. How, then, would courts distinguish unadjudicated claims from adjudicated claims? The answer seems to be that there is no distinction.

B. Defining "Reasoning"

1. Plain Meaning

According to Merriam Webster's Dictionary, "reasoning" is defined as the use of reason. The noun "reason" derives from the Latin verb "reri," which means "to think" or "to calculate." Of course, any action a person makes requires thought in the strictest sense. But reason in the legal context means finding an explanation for a course of conduct or thought. It connotes a struggle between alternatives.[132] If state courts are going to make their decisions meaningful, they should announce the reasons for their holdings.

2. Analogy to Administrative Agencies

In the interest of clarity, federal courts have urged administrative courts to express their reasoning.[133] Although analogies have been made between habeas review and administrative review, the suggestion that state courts should be held to that standard has specifically been rejected.[134] However, the benefits of requiring exhibited reasoning as a prerequisite for AEDPA review far outweigh the burden.

In the administrative review context, the Seventh Circuit has stated that the reviewing court will not be able to assess the reasonableness of the agency's choice if the agency does not make a rational connection between the facts and the choice.[135] The rational connection test is a prerequisite to review by the federal court. Habeas courts are similarly charged to assess the reasonableness (or consonance with federal law) of state court determinations. One can then conclude that it is no less impossible to assess the reasonableness of a state court's decision when it does not exhibit the reasons behind its choices.[136] Thus, in

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132. In the criminal procedure context, the alternatives are "the defendant's rights have been violated and the error was not harmless" and "the defendant's rights have not been violated or have been violated, but harmlessly".

133. *E.g.*, Madison Gas & Elec. Co. v. E.P.A., 25 F.3d 526, 529 (7th Cir. 1994) (stating that the administrative body must exhibit the reasons for its choices, otherwise the reviewing court cannot assess the reasonableness of those choices).

134. *See supra* note 118. It is interesting to note that while most courts look at the reasoning to inform the "adjudication" issue, in *Hennon* Chief Judge Posner considered the reasoning more useful for the "unreasonable application" issue. 109 F.3d at 334-5. Judge Posner may have adopted this notion from his administrative agency opinions in which he argued that agencies must exhibit the reasons for their choices in order for the reviewing court to assess the reasonableness of the choice. *Madison Gas*, 25 F.3d at 529.

135. *Madison Gas*, 25 F.3d at 529.

136. Neither is the rational connection test overly burdensome—it is,

all cases, federal habeas courts should only defer to a state court's determination when there is a rational connection between the facts of the petitioner's claim and its dismissal.[137]

Even if a state court determines that the constitutional claim is frivolous, the state court should still manifest that it has applied the rule to the facts and has held that the rule does not proscribe the conduct described by the facts.[138]

IV. CONCLUSION

Congress doubtlessly intended the AEDPA to limit the availability of the great writ.[139] However, the AEDPA did not change the role of federal courts upon habeas review—overseeing state courts that apply constitutional criminal procedure.[140] State courts must still protect constitutional guarantees. Indeed, the AEDPA gave state courts more responsibility to do so insofar as federal courts can only strike down egregious constitutional errors.[141] However, the trend in the circuits toward a broad interpretation of "adjudication," although possibly in line with the

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according to Judge Posner, an "undemanding standard." *Id.*

137. At a minimum, the recitation of facts alone should not be enough to exhibit a rational connection. Similarly, the enunciation of a rule should not be interpreted on review as an indication that the court has made a determination based on a reasoning process. A reasoning process involves some application of facts (though unsupported by the manifest weight of the evidence) to a rule (though wrongly determined). This is the only way in which federal courts will be certain to determine whether the adjudication was either unreasonable in light of the facts of the case or contrary to established Supreme Court precedent.

138. For example, consider a case in which the habeas petitioner had objected to the inclusion of his confession at trial on Fifth Amendment grounds. The prisoner claims that his confession was obtained without the interrogating officer having warned the prisoner of his right to remain silent. The most significant evidence at trial was a videotaped confession in which the prisoner was asked several times whether he wanted an attorney and in which he was told that his statements would be used against him in court. Concluding that his trial objection and appealable grounds were without basis the appellate court summarily dismisses the constitutional claim along with 49 other claims, all based on state law, all equally frivolous. All the court need do is express its opinion that the prisoner was not deprived of his Fifth Amendment rights because he had been warned explicitly. This would satisfy the rational connection test.

139. Section 2254(d) echoes some of the Burger and Rehnquist Courts' most fatal blows to Warren-era expansions. *See generally* Stone v. Powell, 428 U.S. 465, 494-95 (1976) (exempting violations of the exclusionary rule from habeas protection).

140. *Contra Hennon*, 109 F.3d at 335 ("It would place the federal court in just the kind of tutelary relation to the state courts that the [AEDPA is] designed to end.")

141. Such errors are defined by AEDPA as decisions that are unreasonable applications of clearly established federal law or decisions that are contrary to clearly established federal law. 28 U.S.C. § 2254 (d) (2000).

wishes of Congress,[142] has led to confusion at best, and abdication at worst, by federal courts hearing habeas corpus petitions under a presumption that any disposition amounts to an adjudication, since under such a presumption all summary dismissals are subject to the fatal AEDPA standards.

Now, state courts have little incentive to examine the merits of defendants' claims of constitutional violations. In the long run, this delegitimizes state courts' role as protectors of constitutional rights. Ironically, lawmakers supporting AEDPA claimed that the AEDPA would reclaim some of the state courts' importance.[143]

142. For instance, during the floor debates on AEDPA, Senator Arlen Specter expressed his fear that too rigid an adjudication requirement has led to "excessive formalism and delay." 142 CONG. REC. S3454-01, S3471 (1996) (daily ed. Apr. 19, 1996) (statement of Sen. Spector).

143. *See supra* note 122 and accompanying text.