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AEDPA's 'Adjudication on the Merits' Requirement: Collateral Review, Federalism, and Comity

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AEDPA'S "ADJUDICATION ON THE MERITS" REQUIREMENT: COLLATERAL REVIEW, FEDERALISM, AND COMITY

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"[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."[1]

INTRODUCTION

The modern law of federal habeas corpus is a labyrinth of counterfactuals and arcane procedural hurdles that few state petitioners manage to navigate—as Justice Blackmun once wrote less charitably in dissent, "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."[2] The convoluted inquiries required arise from the need to reconcile three developments of the past four decades that remain in tension with one another: first, the Warren Court's expansion of federal habeas relief, identified with *Fay v. Noia* and its progeny;[3] second, the Burger and Rehnquist Courts' curtailment of that expansion, identified with *Wainwright v. Sykes*,[4] which partially overruled *Fay*,[5] and *Coleman v. Thompson*,[6] which fully overruled it;[7] and third, the Antiterrorism and Effective Death Penalty Act of 1996

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1 Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

2 Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

3 372 U.S. 391 (1963), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991); *see also* Wainwright v. Sykes, 433 U.S. 72 (1977); Sanders v. United States, 373 U.S. 1 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

4 433 U.S. 72 (1977).

5 *Id.* at 87–88.

6 501 U.S. 722 (1991).

7 *Id.* at 750.

(AEDPA).[8] AEDPA to a certain extent codified,[9] and to another extent modified,[10] judicial developments of the preceding four decades. By common consensus, it did a poor job in both respects. Because it "bears the influence of various bills that were fiercely debated for nearly forty years," its "arcane verbiage"[11] frequently generates difficult questions of statutory interpretation. Federal judges increasingly find themselves engaged in correspondingly tortuous exercises of statutory construction. Justice Souter, writing for the Court in *Lindh v. Murphy*,[12] captured the nucleus of the problem: "All we can say is that in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting."[13]

In this Comment, I suggest an answer to one of the multiple questions of AEDPA statutory interpretation: What does it mean for a state court to have "adjudicated" a habeas petitioner's federal claim "on the merits"? AEDPA directs federal habeas courts to extend a curious form of deference to decisions that resulted from state-court adjudications on the merits.[14] Title 28

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

[9] *See generally* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

[10] *Id.* at 22–46.

[11] Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 381 (1996); *see also* Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1868 (1997) ("As an amalgam of various drafts that Congress debated for almost forty years and cobbled together in response to political events, the AEDPA trumpets its complex history: many provisions are obscure and conflict with one another.").

[12] 521 U.S. 320 (1997).

[13] *Id.* at 336.

[14] 28 U.S.C. § 2254(d) (2000). Deference is something of a misnomer. *See* Williams v. Taylor, 529 U.S. 362, 387 n.13 (2000). Justice Stevens, in *Williams*, noted that § 2254 does not require deference "to state decisions, as if the Constitution means one thing in Wisconsin and another in Indiana. . . . [nor deference] after the fashion of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 . . . (1984), [which] depends on [congressional] delegation." *Id.* (quoting Lindh v. Murphy, 96 F.3d 856, 868 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997)). Still, § 2254 may be thought to require a form of deference insofar as it regulates the circumstances under which a federal court can issue habeas relief, viz., not when a state court's decision is erroneous, but only when it appears, in the independent judgment of a federal court, to be either "contrary to, or . . . an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States." *Williams*, 529 U.S. at 376 (quoting 28 U.S.C. § 2254(d)(1)). The phrase "standard of review" is probably a more accurate description of what § 2254(d)(1) prescribes.

U.S.C. § 2254(d)(1) divests federal courts of authority[15] to issue a writ of habeas corpus unless a state-court adjudication on the merits culminated "in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law as determined by the Supreme Court of the United States."[16] This text, to say the least, resists coherent exposition.[17] Even after *Williams v. Taylor*,[18] which sought to clarify the "contrary to" and "unreasonable application" clauses,[19] federal courts struggle to understand precisely what § 2254(d)(1) requires, to invest it with a meaning distinct from the catalogue of familiar standards of appellate review. For example, an unreasonable decision, the Second Circuit has suggested, must contain "[s]ome increment of incorrectness

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[15] By "authority," I mean power to award the relief requested, i.e., to issue the writ, not jurisdiction simpliciter. Section 2254 did not affect the latter. *See infra* notes 86–91 and accompanying text.

[16] 28 U.S.C. § 2254(d)(1).

[17] I do not focus in this Comment on the debate, which continues despite *Williams*, over the meaning of the "contrary to" and "unreasonable application" clauses except to emphasize that whatever their "correct" meaning in theory, their application in practice by federal judges confronted with diverse factual and mixed-fact-and-law scenarios will not be uniform. Inevitably, they will be informed to varying extents by responses to the factual stimuli of each case. *See* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269 (1997) ("[E]veryone commonly thought to be a Realist—Karl Llewellyn, Jerome Frank, Underhill Moore, Felix Cohen, Leon Green, Herman Oliphant, Walter Wheeler Cook, and Max Radin, among others—endorses the following descriptive claim about adjudication: in deciding cases, judges respond primarily to the stimulus of the facts."). For a recent thorough analysis of the meaning of the clauses, see generally Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE. L. REV. 677 (2003).

[18] 529 U.S. 362 (2000).

[19] In *Williams*, the Supreme Court sought to explain the "contrary to" and "unreasonable application" clauses of 28 U.S.C. § 2254(d)(1) and to provide guidance to lower federal courts engaged in collateral review of state court decisions. *See id.* at 403–13. Despite this effort, some view this portion of the opinion in *Williams* as less than helpful. *See, e.g.*, Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000) ("[W]e can only echo Justice O'Connor's virtually tautological statement that to permit habeas relief under the 'unreasonable application' phrase, a state court decision must be not only erroneous but also unreasonable."). Several commentators explored the meaning of section 2254(d) in advance of the Supreme Court's decision in *Williams*. *See, e.g.*, Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103 (1998); Sharad Sushil Khandelwal, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)*, 96 MICH. L. REV. 434 (1997); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C.§ 2254*, 110 HARV. L. REV. 1868 (1997).

beyond error[, but] the increment need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence.'"[20]

Whatever the merits of this formulation, it proves dauntingly difficult to apply. To find a state-court decision not wrong but unreasonably wrong, assuming this distinction makes sense in the first place,[21] involves a highly fact-sensitive—and, it should be emphasized, also highly politically sensitive—judgment. To render such a judgment will almost inevitably be to impugn the integrity or competence of state-court judges. The federal judiciary understandably hesitates to send this implicit message.[22] It is also unclear whether this standard provides real guidance. If a decision erroneously applies clearly established federal law, what increment of error renders that misapplication unreasonable? In practice, the answer at times must be: whatever increment of error a federal habeas court finds necessary to justify its decision to issue the writ in circumstances where justice manifestly requires it.[23]

Where a state court summarily dismisses a federal claim without citation or explanation, neither the text of § 2254(d), nor its construction in *Williams*, necessarily compels this result. Federal courts must extend AEDPA's tortuous standard of review only to state-court decisions that resulted from an "adjudication" of a habeas petitioner's claim "on the merits." In *Sellan v. Kuhlman*,[24] the Second Circuit held that a state court adjudicates a federal claim on the merits by reducing its disposition to a judgment "with res judicata effect, that is based

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[20] *Francis S.*, 221 F.3d at 111 (quoting Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 889 (3d Cir. 1999) (en banc)). *But see* Ides, *supra* note 17, at 690, 693–97 (arguing that the "wrong-but-reasonable" construction of the "unreasonable application" clause is inconsistent with both the statutory text and relevant legislative history).

[21] *See Williams*, 529 U.S. at 388–89.

[22] *See* Washington v. Schriver, 255 F.3d 45, 62 (2d Cir. 2001) (Calabresi, J., concurring) (noting the "highly undesirable" state of affairs "of having federal courts reviewing State court decisions on habeas frequently declare such decisions to be not just mistaken but also unreasonable").

[23] At other times, at least with regard to questions of the proper application of clearly established federal law to a particular set of facts, a state court may decide a question differently than its federal counterpart would have, but nonetheless in a manner that falls within some zone of objective "reasonableness." In that case the AEDPA standard arguably can be meaningfully applied. *See* Ides, *supra* note 17, at 691.

[24] 261 F.3d 303 (2d Cir. 2001).

on the substance of the claim advanced, rather than on . . . procedural, or other, ground[s]."[25] Every other federal circuit, with the possible exception of the First Circuit, has adopted some permutation of this view.[26] Notwithstanding this consensus, a summary dismissal of a federal claim by a state appellate court should not, in my view, be deemed an "adjudicat[ion] on the merits."

The few commentators to address this issue to date have analyzed it by first reviewing the often subtle distinctions between permutations of the *Sellan* rule adopted by the various federal circuits, and then assigning different interpretive weights to the textualism analyses, inferences of congressional intent, and statutory policy objectives raised by those circuits.[27] I agree with those who conclude that cursory dismissals of federal claims should not be deemed "adjudicat[ions] on the merits" under § 2254(d); they should receive de novo habeas review by a federal court.[28] And by no means do I discount the significance of the factors discussed by the federal circuit courts.

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[25] *Id.* at 311.

[26] *See* Chadwick v. Janecka, 312 F.3d 597, 605–06 (3d Cir. 2002); *accord* Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1254–55 (11th Cir. 2002); Neal v. Puckett, 239 F.3d 683, 686–87 (5th Cir. 2001); Bell v. Jarvis, 236 F.3d 149, 163 (4th Cir. 2000) (en banc); Harris v. Stovall, 212 F.3d 940, 943 (6th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174, 1177–78 (10th Cir. 1999); James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999); Delgado v. Lewis, 181 F.3d 1087, 1093 (9th Cir. 1999); Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).

[27] *See* Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223, 223 (2002) (arguing that textual analysis, recent jurisprudence, and policy considerations show that unexplained dismissals of federal claims should be afforded AEDPA deference); Brittany Glidden, *When the State is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. REV. L. & SOC. CHANGE 177, 181 (2002) (arguing that "federal courts should review perfunctory state opinions de novo because granting deference in accordance with § 2254(d) to perfunctory state opinions cannot be done in a uniform and meaningful manner"); William P. Welty, *"Adjudication on the Merits" Under the AEDPA*, 5 U. PA. J. CONST. L. 900, 925 (2003) (declining to endorse the approach of any particular federal circuit, but arguing that it is imperative that the Supreme Court "quickly and forcefully resolve" the question); Claudia Wilner, *"We Would Not Defer to That Which Did Not Exist": AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. REV. 1442, 1444, 1472–74 (2002) (arguing that unexplained summary dismissals should be analyzed under the "unreasonable application" clause, and "that even though a silent state court opinion is an 'adjudication on the merits' under § 2254(d), a federal court can and should review it de novo" because such an approach would comport with congressional intent, respect federalism and comity concerns, and discourage state courts from "mask[ing]" their failure to adjudicate federal claims with silence).

[28] *See* Glidden, *supra* note 27, at 181; Wilner, *supra* note 27, at 1473–74.

But these analyses, I believe, fail adequately to appreciate the *sui generis* role of habeas corpus in Anglo-American law and its constitutional stature within the American legal system.

It is often said that habeas corpus is not an appeal, and this assertion counts as a good reason to impose a host of procedural limitations on the writ, most prominently, the doctrines of exhaustion, procedural default, and the heightened standard of prejudice required to justify habeas relief based even on an acknowledged error.[29] But neither is federal habeas corpus a mere procedural irritant that impedes the efficient operation of state criminal justice systems. Nor is it simply another civil action that Congress can, without limitation, extend, withhold, modify, or otherwise tinker with as it sees fit. As Justice Frankfurter wrote:

> The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. . . . It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. . . . Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.[30]

Habeas corpus enjoys a unique status within our constitutional system, evinced by jurisprudence extending back

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[29] *See* 28 U.S.C. § 2254(b)(1)(A) (2000) (discussing the exhaustion requirement); Coleman v. Thompson, 501 U.S. 722, 729–30 (1991) (discussing the procedural default requirement). *Compare* Brecht v. Abrahamson, 507 U.S. 619, 631–32 & n.7 (1993) (holding that even where a federal habeas court finds error, it should grant relief only if that error "'had substantial and injurious effect or influence in determining the jury's verdict'") (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)), *with* Chapman v. California, 386 U.S. 18, 24 (1967) (holding that on direct appeal, trial error may only be disregarded if it is found to be "harmless beyond a reasonable doubt").

[30] Brown v. Allen, 344 U.S. 443, 512 (1953) (Frankfurter, J., concurring); *see also* Rasul v. Bush, 124 S. Ct. 2686, 2692 (2004) (emphasizing the unique historical and constitutional status of habeas corpus); Johnson v. Eisentrager, 339 U.S. 763, 798 (1950) (Black, J., dissenting) ("Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress."); *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325–26 (1867).

hundreds of years and, of course, by the Suspension Clause.[31] The proper interpretation of § 2254(d) should be informed by an appreciation of that status.

The argument advanced in this Comment relies on three premises. First, the text of § 2254(d) is ambiguous—equally legitimate canons of statutory construction could be invoked to justify contrary conclusions about its meaning. Second, because of that ambiguity, an alternative construction of § 2254(d) would be equally—if not more—plausible, given the nature, history, and jurisprudence of habeas corpus in the United States. Third and finally, this alternative, which would not consider a cursory dismissal of a federal claim to be an adjudication on the merits, but would rather require some manifestation, however minimal, of the state court's adjudicatory process in order for AEDPA deference to apply—whether by citing federal law, citing state law that applies federal law, or simply articulating a rationale consistent with federal law—would be the better one. Not only would it better serve the values of comity, federalism, and judicial efficiency; more significantly, it would better preserve the integrity of the *sui generis* mechanism of habeas corpus in Anglo-American law. It would also spare federal courts the convoluted, and often needless, counterfactual inquiries that can in practice preclude the vindication of those rights where their violation has led to an unlawful confinement.

Part I explores the origins of habeas corpus, reviews its development relative to the states following the Civil War, and briefly notes the countervailing trends that culminated in AEDPA. Part II canvasses and appraises the competing interpretations of "adjudicated on the merits." Part III argues that the "manifest adjudication" construction of 28 U.S.C. § 2254(d) exhibits greater fidelity to the jurisprudential integrity of habeas corpus. It then distinguishes the four scenarios presented by cursory state-court judgments and considers which construction of § 2254(d) better serves the federalism, comity,

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[31] U.S. CONST. art. I, § 9, cl. 2; *see* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2661 (2004) (Scalia, J., dissenting) ("The two ideas central to Blackstone's understanding [of freedom from unlawful imprisonment]—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses.").

and judicial efficiency concerns that, at least nominally, motivated AEDPA's habeas reforms.

Habeas corpus remains a vital safeguard of personal liberty within our legal system; one of the paramount constitutional mechanisms by which, as Madison wrote, "a double security arises to the rights of the people."[32] We should acknowledge and seek to ameliorate problems raised by the Great Writ's abuse by persons incarcerated pursuant to state judgments. But the integrity of habeas corpus need not be compromised by judicial construction of an ambiguous statutory provision in a manner arguably inconsistent with the writ's jurisprudential import and status within our constitutional framework.

I. FEDERAL HABEAS CORPUS FOR PERSONS IN STATE CUSTODY

A. *Common Law Jurisprudential Origins*

The current statutes giving federal courts authority to issue the writ, whatever else they seek to accomplish, do not purport to redefine habeas corpus,[33] and therefore, "recourse must be had to the common law, from which the term was drawn, and to the decisions of [the Supreme] Court interpreting and applying the common law principles which define its use when authorized by the statute."[34] Habeas corpus literally means "you have the body."[35] Like the other prerogative writs at common law (e.g., mandamus, certiorari), it originated as a simple command from the Crown to a subordinate directing that person to take some action: for example, to produce a person confined so that he may testify (*habeas corpus ad testificandum*), or be tried (*habeas corpus ad prosequendum*).[36] Ultimately, the common law courts

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[32] THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NO. 84, at 577 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (extolling the writ of habeas corpus as a principal bulwark of personal liberty that the Constitution would ensure even in the absence of a bill of rights).

[33] As a constitutional matter, it is not clear that Congress could statutorily redefine the meaning of habeas corpus. *See infra* notes 53–55 and accompanying text.

[34] McNally v. Hill, 293 U.S. 131, 136 (1934).

[35] BLACK'S LAW DICTIONARY 709 (6th ed. 1990); LARRY W. YACKLE, FEDERAL COURTS 485 (2d ed. 2003) (citing II POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 593 n.4 (1898)).

[36] *See* BLACK'S LAW DICTIONARY 709 (6th ed. 1990); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 130 (1768) (U. Chicago ed. 1979). *See*

adapted these writs to serve judicial, rather than executive or administrative, purposes.[37] The Great Writ, "the most celebrated writ in English law,"[38] in Blackstone's words, refers to the writ of habeas corpus *ad subjiciendum*,[39] which courts at common law "directed to the person detaining another, . . . commanding him to produce the body of the prisoner, with the day and cause of his caption and detention."[40]

Today, limitations on or expansions of the writ—its jurisdictional reach and substantive scope—often connote limitations on or expansions of federal power relative to the states. At common law, needless to say, the writ bore no relation to the uniquely American federalism and comity concerns that preoccupy modern jurists and commentators.[41] The common-law courts issued the writ to obtain the presence of persons initially brought before local jurisdictions or ecclesiastical courts, and later, to thwart injunctions issued by the Lord Chancellor.[42] Before the merger of law and equity, the writ served to secure the appearance of, and thereby to release, persons detained by the Chancellor, typically for violating his injunction not to sue at common law.[43] In its origin, therefore, habeas corpus had no relation to appellate review.[44] It constituted a procedural device in the arsenal of the common-law courts for testing the reason for, and later the legality of, a person's detention. The only

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generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12–63 (1980) (giving an overview of the English origins of habeas corpus).

[37] THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 57, 173 (5th ed. 1956).

[38] BLACKSTONE, *supra* note 36, at 102.

[39] Stone v. Powell, 428 U.S. 465, 474–75 n.6 (1976) (citing *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807)).

[40] BLACKSTONE, *supra* note 36, at 131; *see also* BLACK'S LAW DICTIONARY 709.

[41] *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (analyzing the history and use of federal habeas corpus in the United States).

[42] *See* DUKER, *supra* note 36, at 27, 33–35. Initially, the common law courts used the writ to protect their jurisdiction from infringement by a variety of other tribunals. By the time of *Chambers's Case*, 79 Eng. Rep. 717 (K.B. 1629), however, "[t]he questioning of the validity of commitments, previously an incidental effect of the writ, . . . became the major object." DUKER, *supra* note 36, at 46.

[43] PLUCKNETT, *supra* note 37, at 57.

[44] *See* William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 430 n.45 (1961) (noting that the equation of "habeas corpus jurisdiction with direct Supreme Court appellate review is of recent vintage," and ascribing this error to *Brown v. Allen*, 344 U.S. 443 (1953)).

questions cognizable on habeas were those that could justify release of the incarcerated person.[45] The common-law courts did not review the Chancellor's exercise of equitable power; they issued the writ to open the prison doors and secure the appearance of a person.

B. Inheritance in the United States and the Suspension Clause

The American colonies knew the writ of habeas corpus, albeit in different forms, as part of their jurisprudential inheritance, and "the common-law writ of habeas corpus was in operation in all thirteen of the British colonies that rebelled in 1776."[46] This raises the vital constitutional question of what, precisely, the Suspension Clause guarantees. It provides that "[t]he 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."[47] Two common textual observations inform, but fall far short of resolving, its meaning. First, the Clause appears to presuppose the existence of the writ, and speak only to the circumstances under which it may be suspended. Second, because it appears in Article I, it presumably limits the power of Congress.[48] It does not imply that Article III federal courts, first brought into existence by the Constitution and Judiciary Act of 1789, would enjoy common-law authority to issue the writ. Nor, however, does it necessarily imply the contrary.

Absent dispositive textual evidence, scholars have looked for evidence of original intent in the framing and ratification debates.[49] But most concede that these sources, too, provide scant guidance.[50] They speak almost exclusively to the

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[45] *See* McNally v. Hill, 293 U.S. 131, 136–38 nn.1–4 (1934); *see also* DUKER, *supra* note 36, at 42.

[46] DUKER, *supra* note 36, at 115; *see also id.* at 99–115 (surveying the writ's history in each of the colonies).

[47] U.S. CONST. art. I, § 9, cl. 2.

[48] Only once has the President's authority to suspend the writ been considered. *See Ex parte* Merrymen, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (concluding that only Congress, not the President, can suspend the writ); *see also* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2660-61 (2004) (Scalia, J., dissenting) ("Absent suspension [by Congress], . . . the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge.").

[49] *See* Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 455–57 (1996).

[50] *Id.* at 455.

circumstances, if any, which could or should justify suspension.[51] Early cases prove similarly sparse and uninformative, in part because incarceration did not become the standard form of criminal punishment until the early to mid-nineteenth century.[52] Nonetheless, at least two views predominate. On one, the Suspension Clause guarantees only state judicial authority to issue the writ to prisoners in federal custody.[53] On another, assuming only that Congress elects to establish inferior Article III courts, the Clause constitutes a source of self-executing federal judicial power to issue the writ.[54] Still another view, espoused by Justice Scalia among other contemporaries, holds that the Clause regulates congressional power to suspend the

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[51] *See* YACKLE, *supra* note 35, at 487. *But see* Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 146 (1952); Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451 (1996) (arguing that we can infer from this silence that the participants in the framing and ratification of the Constitution presupposed the existence of the writ). For two analyses of the evidence that reach contrary conclusions, see DUKER, *supra* note 36, at 126–56; ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 12–19 (2001).

[52] *See* Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 10–11 (1995).

[53] *See, e.g.*, DUKER, *supra* note 36, at 126–35; Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509–10 (1987).

[54] *See* Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 607; *see also* FREEDMAN, *supra* note 51, at 19 (concluding that the Suspension Clause contemplated that both federal and state courts would enjoy authority to issue the writ to release persons in both state and federal custody). Professor Freedman argued that the prevailing wisdom relies on a mistaken reading of Chief Justice Marshall's seminal decision in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). In fact, Congress gave the federal courts authority to issue the writ on behalf of prisoners in state custody by the Judiciary Act of 1789, and the Suspension Clause protects that right. *See* FREEDMAN, *supra* note 51, at 2–4, 9–19. For a similar reading of *Ex parte Bollman*, suggesting that Chief Justice Marshall may have assumed only that the Suspension Clause would not be "self-enforcing" vis-à-vis the federal courts, see Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 975–76 (1998) (arguing that even if the Suspension Clause did not originally contemplate federal jurisdiction to review the legality of custody pursuant to state judgments, "the classic solution of Henry Hart affords a persuasive method for vindicating the Suspension Clause: once habeas jurisdiction has been conferred, the constitutionality of its withdrawal can be reviewed, and general jurisdictional grants—like the federal habeas corpus statute and the federal question jurisdiction statute—confer authority to review the constitutionality of limitations on jurisdiction") (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387–88, 1396–98 (1953) and Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 n.23 (1994) (Scalia, J., concurring in part and concurring in the judgment)).

writ only if Congress elects to confer that authority on the federal courts in the first place; it does not prevent Congress from eliminating federal judicial authority to issue the writ altogether.[55] The Supreme Court has carefully avoided resolving the original meaning of the Suspension Clause, instead employing it as an interpretive device, via the canon of constitutional doubt, to tip the balance in favor of constructions of ambiguous statutes that avoid Suspension Clause concerns.[56]

Yet we need not accept a particularly robust view of the original intent of the authors of the Suspension Clause in order to appreciate the constitutional concerns raised by congressional limitations on or modifications of the writ relative to persons incarcerated pursuant to a state-court judgment. First, whatever the original meaning of the Suspension Clause, the Fourteenth Amendment arguably incorporated the privilege of habeas corpus against the states.[57] Just as the Amendment reoriented much of the initial focus of the Bill of Rights from federal infringement of states' rights to state infringement of individual rights, it also modified the import of the Suspension Clause, making its existence as a remedy for persons in state custody indispensable to the newly paramount concern with state infringement of the federal rights of citizens.[58] Second, even if we reject this theory, the statutory existence of federal habeas corpus jurisdiction remains. Arguably, Congress can extend or withhold this jurisdiction. It does not follow that if

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[55] *See* INS v. St. Cyr, 533 U.S. 289, 337–38 (2001) (Scalia, J., dissenting); *but see* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2660–74 (2004) (Scalia, J., dissenting) (extolling the Suspension Clause in a distinct context and arguably implying a contrary view). Without unnecessarily digressing far into the Suspension Clause debate, I would note that it seems implausible that the Constitution would regulate Congress's authority to suspend something that need not exist in the first place or enshrine a protection against suspension of a privilege that can be revoked absolutely.

[56] *See, e.g.*, *INS*, 533 U.S. at 299–300; United States v. Hayman, 342 U.S. 205, 223 (1952). *See generally* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341, 345–48 (1936) (Brandeis, J., concurring) (explaining the canon of constitutional doubt).

[57] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 175–76 (1998).

[58] *See generally id.* (arguing that the Fourteenth Amendment fundamentally transformed the nature of the rights enumerated in the Bill of Rights, repackaging what were originally structural protections against federal aggrandizement of power as protections for individuals against governmental power generally, and in particular, that of the states); Jordan Steiker, *Incorporating the Suspension Clause*, 92 MICH. L. REV. 862 (1994).

Congress chooses to extend it, it can also modify the *sui generis* meaning of habeas corpus by rendering it, in effect, an awkward form of federal appellate review of state-court judgments. The writ, in nature and import, remains "antecedent to statute, and throwing its root deep into the genius of our common law."[59]

Under all but the most restrictive view of the Suspension Clause, then, the question remains whether Congress can leave federal jurisdiction to issue the writ of habeas corpus intact but, in effect if not name, conflate its meaning with appellate review. That proposition is highly doubtful, for it relies on the so-called "greater power" syllogism, that

> [I]f a unit of government (typically Congress) enjoys a "greater" (encompassing) power to take or forbear some significant action, it follows as a logical imperative that it also enjoys a "lesser" (subset) power to take or forbear some less sweeping action . . . . [But] [t]ypically, the power said to be the "greater" does exist, but the power said to be the "lesser" is not (as a logical matter) a subset power at all. Instead, it is a different (though related) power.[60]

This fallacy applies in the context of limits on federal habeas jurisdiction relative to the states. Congress arguably retains the power to extend or withhold from the federal courts habeas jurisdiction over persons in state custody. It does not follow, however, that Congress may extend that jurisdiction, but then redefine habeas corpus in a manner that threatens its unique status as a collateral remedy for protecting and vindicating the right to freedom from unlawful confinement. The major historical point that matters here is that habeas corpus is emphatically not—in its origins or nature—an appeal. Judicial construction of AEDPA's habeas provisions should respect this distinction.

C. *Transformation and Reorientation: The Evolution of the Writ Relative to the States*

By conventional account, Congress first authorized the federal courts to grant habeas relief to prisoners in state custody

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[59] Fay v. Noia, 372 U.S. 391, 400 (1963) (citations omitted); *see also* Rasul v. Bush, 124 S. Ct. 2686, 2692 (2004).

[60] YACKLE, *supra* note 35, at 8–9.

after the Civil War.[61] Some scholars contest this view.[62] But it suffices to note that Congress unambiguously supplied the federal courts with power to grant the writ to persons in state custody in 1867.[63] That same year, the Supreme Court declared that habeas corpus guards against "every possible case of privation of liberty contrary to the Constitution, treaties, or laws,"[64] and in the intervening 150 years before AEDPA, it has proved an invaluable tool for protecting—and admittedly also elaborating—constitutional rights. Notwithstanding judicial and statutory modifications since 1867, most procedural, federal habeas jurisdiction, and the corresponding right it confers on persons in state custody, remains available today.

The federal courts seldom invoked it, however, until the celebrated 1923 case of *Moore v. Dempsey*.[65] Eight years earlier, in *Frank v. Mangum*,[66] Justice Holmes's powerful dissent from the denial of federal habeas corpus, after a state trial conducted in an atmosphere permeated by anti-Semitism and the threat of imminent mob violence in the event of an acquittal, set the stage for a more robust application of the writ. Holmes emphasized that habeas corpus "cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."[67] The majority in *Frank*, while declining to issue the writ on the facts, agreed with Justice Holmes on the law, affirming that "it is open to the courts of the United States upon an application for a writ of habeas corpus to look beyond forms and inquire into the very substance of the matter."[68]

In *Brown v. Allen*,[69] the Court explained that despite the unavoidable appellate overtones of habeas corpus, a federal

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[61] Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385; *see* Williams v. Taylor, 529 U.S. 362, 374–75 n.7 (2000); DANIEL J. MEADOR, HABEAS CORPUS AND MAGNA CARTA 56 (1966). *See generally* DUKER, *supra* note 36, at 181–211 (discussing the history of federal habeas for persons in state custody).

[62] *See* FREEDMAN, *supra* note 51, at 12–19; Paschal, *supra* note 54, at 607.

[63] Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385.

[64] *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325–26 (1867).

[65] 261 U.S. 86 (1923).

[66] 237 U.S. 309 (1915).

[67] *Id.* at 346 (Holmes, J., dissenting).

[68] *Id.* at 331; *see also* Moore v. Dempsey, 261 U.S. 86, 90–92 (1923).

[69] 344 U.S. 443 (1953).

court's role on habeas consists not in a review of the state court's judgment, still less in an inquiry into the petitioner's guilt or innocence.[70] It consists in a direct appraisal of the merits of the petitioner's claim that he or she has been unlawfully confined.[71] Justice Frankfurter, concurring, posited that "[s]tate adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide."[72] In *Fay v. Noia*,[73] Justice Brennan further clarified that:

> [W]hile our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction . . . is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter*. . . . Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.[74]

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[70] *Id.* at 463–65; *see also id.* at 506 (Frankfurter, J., concurring). Professor Freedman persuasively argued that *Brown* did not work any radical change in the law or concept of federal habeas corpus and that neither the Court nor the general public perceived it that way at the time. *See* FREEDMAN, *supra* note 51, at 95–143. In particular, in *Brown*, contrary to the views expressed in a well-known article by Professor Paul M. Bator, "[t]he question of whether or not the federal courts should, in Bator's words, 're-determine the merits of federal constitutional questions decided in state criminal proceedings' was not a point of contention. No one doubted that, as had been clear since *Frank*, or, at the very least since *Moore*, this was precisely their role." *Id.* at 96 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 500 (1963)) (footnotes omitted). The majority of sitting Supreme Court justices evidently agree. *See* McCleskey v. Zant, 499 U.S. 467, 478–80 (1991) (Opinion of Kennedy, J., joined by five other members of the Court); *see also* Wright v. West, 505 U.S. 277, 299–300 (1992) (plurality opinion) (O'Connor, J., concurring).

[71] *See Brown*, 344 U.S. at 465 (explaining that when a district court rules on a habeas corpus application, it "is not an act of judicial clemency but a protection against illegal custody").

[72] *Id.* at 506 (Frankfurter, J., concurring). Taken literally, Justice Frankfurter's view could be thought to preclude AEDPA deference entirely. But the standard of review mandated by 28 U.S.C. § 2254(d)(1) does not require federal courts to accept state-court adjudications as "binding," only as entitled to deference.

[73] 372 U.S. 391 (1963).

[74] *Id.* at 430–31; *see also id.* at 423–24 (observing the "traditional characterization of the writ of habeas corpus as an original . . . civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom") (footnote omitted). *See generally* Lee, *supra* note 19, at 107 (describing the intellectual tension between the theoretical nature of habeas corpus as an original civil action and its practical

For that reason, doctrines of preclusion and the full faith and credit statute, 28 U.S.C. § 1738, do not apply to federal habeas proceedings,[75] a corollary of the common-law rule that "res judicata did not attach to a court's denial of habeas relief."[76] In the 1960s, federal habeas corpus became a principal procedural vehicle for vindicating federal rights infringed by the states, particularly in the context of state trials infected by racial prejudice and the burgeoning field of constitutional criminal procedure.[77] Substantively, the incorporation doctrine made federal constitutional rights enforceable against the states; procedurally, habeas corpus provided the vehicle to vindicate those rights.[78]

Even after the Burger and Rehnquist Courts began to curtail federal habeas corpus in the name of comity and federalism,[79] the essential principle articulated in *Fay*—that federal habeas corpus is neither an appeal from nor a review of a state judgment, but an original civil action[80]—remained

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appellate character in the context of the review of the legality of a state prisoner's custody); Tushnet & Yackle, *supra* note 9, at 403 (same).

[75] *Fay*, 372 U.S. at 423 (emphasizing "the familiar principle that res judicata is inapplicable in habeas proceedings"); *see also* Smith v. Yeager, 393 U.S. 122, 124–25 (1968); DUKER, *supra* note 36, at 6; *cf.* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 485 n.27 (1982) (holding full faith and credit not applicable in habeas corpus proceedings); Sanders v. United States, 373 U.S. 1, 8, 14–15 (1963) (noting the same in the context of a § 2255 motion, the analogue to habeas corpus for prisoners in federal custody pursuant to a federal criminal conviction, and collecting cases).

[76] McClesky v. Zant, 499 U.S. 467, 479 (1991); *see also* Wright v. West, 505 U.S. 277, 299–300 (1992) (O'Connor, J., concurring); Salinger v. Loisel, 265 U.S. 224, 230 (1924) ("At common law, the doctrine of res judicata did not extend to a decision on habeas corpus refusing to discharge the prisoner.") (citing Carter v. McClaughry, 183 U.S. 365, 378 (1902), and *Ex parte* Spencer, 228 U.S. 652, 658 (1913)).

[77] *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041 (1977); *see also* YACKLE, *supra* note 35, at 494 ("By the middle 1960s, habeas corpus proceedings under the authority of § 2241 and § 2254 had become the procedural analog of the Warren Court's innovations in criminal procedure, providing the federal machinery for bringing new constitutional values to bear in concrete cases.").

[78] *See* William J. Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 424 (1961).

[79] *See* Coleman v. Thompson, 501 U.S. 722, 730 (1991) ("In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism."); *see also id.* at 758 (Blackmun J., dissenting) ("Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests [to support its holding].").

[80] *See supra* note 73–75 and accompanying text.

theoretically intact. In *Wainwright v. Sykes*,[81] the Court overruled *Fay*'s "deliberate bypass" rule in the context of a petitioner's failure to object contemporaneously to the admission of an allegedly inadmissible confession.[82] But it did not revise *Fay*'s articulation of the scope of federal habeas. To the contrary, the Court explicitly reaffirmed it:

> [S]ince *Brown v. Allen*, 344 U.S. 443 (1953), it has been the rule that the federal habeas petitioner who claims he is detained . . . in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in state proceedings. This rule of *Brown v. Allen* is in no way changed by our holding today.[83]

And in *Coleman v. Thompson*,[84] which established the modern normative framework for federal habeas jurisprudence, viz., a paramount concern with the values of federalism and comity,[85] the Court nonetheless reiterated that unlike direct review pursuant to 28 U.S.C. § 1257, where the Court reviews a state court's "*judgment*," in a federal habeas corpus action pursuant to 28 U.S.C. § 2254, a federal district or circuit court "must decide whether the petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.' The court does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*."[86] Habeas corpus is an original civil action, not an appeal, and to conflate them threatens a unique feature of Anglo-American law.

D. Conclusion

The collateral nature of federal habeas corpus remains its theoretical bedrock, whatever the Suspension Clause guaranteed in 1789.[87] If federal habeas continues to mean anything for a person incarcerated pursuant to a state-court judgment, it is

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[81] 433 U.S. 72 (1977).

[82] *Id.* at 85.

[83] *Id.* at 87.

[84] 501 U.S. 722 (1991).

[85] *See id.* at 726 ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus.").

[86] *Id.* at 730 (citing *Fay v. Noia*, 372 U.S. 391, 430 (1963)).

[87] *See supra* notes 47–55 and accompanying text.

that if that person claims to be in custody in violation of the "Constitution, laws or treaties of the United States," it must be open to a federal habeas court to look beyond or behind the form of the state proceedings and inquire into the substance—that is, into the merits—of the petitioner's federal claim. Comity and the avoidance of duplicative judicial work may counsel some deference to the state court's resolution of a federal claim,[88] particularly if that resolution is inextricably intertwined with questions of fact. But if the state court did not adjudicate a federal claim on the merits, then comity applies differently or not at all. If the state court declined to adjudicate a federal claim on the merits because of a state procedural rule, comity applies not to the substance of the court's decision but to respect for the integrity of and values served by that procedural rule.[89] If the state court declined to adjudicate a claim on the merits because it either failed to perceive or misperceived the nature of a federal question, we need to ask more precisely what comity means in this distinct context, and why it should or should not be extended.[90]

Despite the constriction of federal habeas corpus in recent decades, the principle proclaimed by Justice Holmes in his dissent in *Frank*—that a federal habeas court must look beyond the form of the state proceedings and inquire into the cause (and constitutionality) of the petitioner's detention—remains the touchstone of federal habeas corpus. Without it, the distinction between habeas corpus and appellate review becomes nebulous. It is undoubtedly a curious concept. In practice, of course, a federal court reviewing the legality of a state's incarceration of a habeas petitioner must in some sense review the judgment that

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[88] *See* Frank v. Magnum, 237 U.S. 309, 329 (1915) ("[W]here, as here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him.").

[89] *See* Coleman v. Thompson, 501 U.S. 722, 729–32 (1991); Wainwright v. Sykes, 433 U.S. 72, 87–91 (1977).

[90] Comity connotes a number of different values and meanings, some of which remain in tension with one another. For example, comity implies respect for the finality of a state court decision, but it also implies that state courts, equally with their federal counterparts, can and will fairly adjudicate federal questions. The construction of 28 U.S.C. § 2254(d) may well be influenced by which of these meanings we have in mind in considering the question.

put him there. But the collateral nature of habeas corpus review remains a peculiar feature of Anglo-American law firmly rooted in history, intimately tied to the protection of personal liberty in the American constitutional framework, and indelibly enshrined in state and federal jurisprudence, not least by the Suspension Clause.[91] To conflate appellate review of a judgment with habeas review of the lawfulness of custody would be to disregard the Great Writ's distinctive jurisprudential import.

The Court therefore should avoid, and in general has avoided, rulings that threaten to produce that result. But Congress, like the Burger and Rehnquist Courts, evidently felt, in Justice Blackmun's words, "exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings;" and AEDPA can accordingly be understood, in part, as the legislative analogue to the Court's "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of federal constitutional claims."[92]

AEDPA reformed, but did not purport to eliminate or redefine, federal habeas corpus. In fact, the Senate rejected an amendment offered by Senator Kyl that would have all but eliminated federal habeas "review" of state judgments.[93] Instead, AEDPA seeks to make federal habeas corpus more efficient in "two basic ways: directly, by setting time limits on various litigation steps, and indirectly, by providing" a new standard of review, now codified at 28 U.S.C. § 2254(d)(1).[94] The former seems to be counterproductive insofar as it encourages state prisoners immediately to file, and hence to flood the federal courts with, habeas petitions, lest the statute of limitations foreclose their right to file in the future.[95] The latter, depending on its judicial construction, threatens to modify the jurisprudential nature and import of habeas corpus. It is in this regard that defining "adjudicated on the merits" can become particularly significant.

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[91] U.S. CONST. art. I, § 9, cl. 2.

[92] *Coleman*, 501 U.S. at 758–59 (Blackmun, J., dissenting).

[93] 141 CONG. REC. S7835, S7849 (1995) (statement of Sen. Hatch); *see* Yackle, *supra* note 11, at 398–401 (providing a summary of the floor debate).

[94] FREEDMAN, *supra* note 51, at 153.

[95] I owe this observation to Judge Gerard E. Lynch.

II. DEFINING THE PROBLEM: FEDERAL HABEAS CORPUS "REVIEW" AFTER AEDPA

In 1996, after some forty years of debate, Congress enacted AEDPA.[96] Notwithstanding significant procedural changes designed to enhance the efficient resolution of federal habeas claims, AEDPA did not purport to deprive the federal courts of habeas corpus jurisdiction, nor even to diminish that jurisdiction.[97] Instead, as Professor Yackle explains, § 2254(d) shifted the focus of the federal courts' merits analysis by mandating that it take "the state court adjudication as the baseline—that is, as the object of the federal courts' exercise of independent judgment."[98]

> Under § 2254(d), a federal court is not to take up a claim as though it were writing on a clean slate, perhaps mentioning a previous state court judgment in passing. By contrast, the federal court is to begin with the work already done on the claim in state court and ask, first and foremost, whether the state arrived at the correct outcome. In this way, the federal court takes serious account (but not controlling account) of the best available thinking on the claim at bar—the prior adjudication of that claim in state court.[99]

Where a state court adjudicates a federal claim on the merits, that is, AEDPA prescribes the standard of review to be applied to the result of that adjudication. Rather than review the petitioner's federal claim de novo, a federal habeas court reviews the result of the state court's adjudication on that federal claim under the AEDPA standard. Hence, "when the state court has addressed the federal constitutional issue, it is its ultimate outcome, and not its rationalization, which is the

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[96] *See* Yackle, *supra* note 11, at 381.

[97] Williams v. Taylor, 529 U.S. 362, 378 (2000) ("The inquiry mandated by the amendment relates to the way in which a federal habeas court exercises its duty to decide constitutional questions; [it] does not alter the underlying grant of jurisdiction in § 2254(a).") (citations omitted); *see also* Yackle, *supra* note 11, at 398 (emphasizing that "[b]y its explicit terms, § 2254(d) presupposes the basic habeas jurisdiction established by the 1867 Act" and that the proponents of AEDPA "expressly disclaimed any purposes to touch the habeas jurisdiction").

[98] Yackle, *supra* note 11, at 442.

[99] *Id.* at 383; *accord* Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002); Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) (observing that the statutory text of § 2254(d) focuses on the result rather than the reasoning process of the state court).

focus."[100] Section 2254(d)(1) thereby avoids compromising the integrity of a federal court's independent judgment on federal law.[101] A federal habeas court continues to exercise independent judgment on federal issues, but its jurisdiction to issue the writ, its remedial power, no longer extends to every case in which its analysis would have differed from that of the state court. The desirability of this restrictive modification of the operation of federal habeas corpus remains highly debatable. But it does comport with federal habeas corpus's traditional role as a device to prevent unlawful confinements, not to correct errors of federal law per se.

This shift in the object of federal judicial judgment, however, self-evidently makes the question whether the state court adjudicated a federal claim on the merits critical. A state court decision based on an adjudication supplies the baseline, the *conditio sine qua non*, for the application of § 2254(d)(1)'s tortuous standard of review. Absent a decision that resulted from an adjudication on the merits, the federal court must review the merits of the habeas petitioner's constitutional claims de novo.[102] That which does not exist, as many federal circuits courts have said, cannot be reviewed under any standard.[103]

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[100] Dibenedetto v. Hall, 272 F.3d 1, 6 (1st Cir. 2001).

[101] Yackle, *supra* note 11, at 383 ("[F]ederal [habeas] adjudication remains independent; it is just that the question on which independent federal judgment is brought to bear is whether, after adjudicating the merits of the claim, the state court reached the correct conclusion."). Indeed, as Professor Yackle observed, the contrary understanding, making "the [federal] district court's decision-making power . . . contingent on the quality of the previous state court judgment," would raise non-trivial constitutional concerns. *Id.* at 446. It would mean that, by § 2254(d), Congress purported, not to interfere with the *object* of the federal court's review, but rather to *condition* the federal court's independent judgment on matters of federal law. This proposition has been, according to most views, foreclosed by *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *See also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 222–24 (1995). Justice Stevens cautioned against this view in *Williams*, 529 U.S. at 378–79, where he emphasized that

> [w]hen federal judges exercise their federal-question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." At the core of this power is the federal courts' independent responsibility—independent from the coequal branches in the Federal Government, and independent from the separate authority of the several states—to interpret federal law.

Id. (citations omitted).

[102] *See* Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001).

[103] *See, e.g.*, Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1254 (11th Cir. 2002).

Where no adjudication exists, a federal court must reorient its review to focus on the traditional habeas inquiry into the legality under federal law of the petitioner's detention itself, applying the pre-AEDPA, de novo standard.[104]

Still, it would be unrealistic, even counterproductive, not to acknowledge that a federal habeas petitioner will often appeal his or her conviction on any, even remotely, plausible federal ground. State courts therefore will at times—not unjustifiably and in the interest of judicial efficiency—decline to address in detail each federal ground raised. Instead, they will dispose of some claims with a boilerplate phrase summarily dismissing those claims not specifically addressed as "without merit." This practice raises difficult questions: Can, and if so should, a federal court consider summary dispositions like this to be adjudications on the merits such that § 2254(d)(1)'s standard applies? Does a state court adjudicate a federal claim on the merits if it neglects to cite or apply federal law, or to rely on state court precedents that cite or apply federal law, or to otherwise indicate that it understood and analyzed any properly preserved federal claims on the merits? On the one hand, we have no reason to assume that a decision dismissing federal claims as "without merit" does *not* constitute "adjudication" of those claims. But absent affirmative evidence in either direction, the question becomes how federal courts exercising habeas, not appellate, jurisdiction should analyze such cursory state-court decisions. In *Washington v. Schriver*,[105] the Second Circuit succinctly staked out competing answers to this question.[106]

A. Adjudication on the Merits as Reduction to a Judgment with Res Judicata Effect

The predominant, if not consensus, position equates "adjudicated on the merits" with "decided by a judicial officer on

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[104] *Id.* at 1253–54; *see also Fortini*, 257 F.3d at 47; Schoenberger v. Russell, 290 F.3d 831, 842–43 (6th Cir. 2002) (collecting cases).

[105] 255 F.3d 45 (2d Cir. 2001), *withdrawing* 240 F.3d 101 (2001).

[106] *Id.* at 52–55 (explaining the competing positions but declining to decide the issue because it would not affect the resolution of the petitioner's federal claim). This decision superseded a prior one by the same panel, which had reached and resolved the question in favor of the position ultimately rejected by the Second Circuit in *Sellan v. Kuhlman*, 261 F.3d 303, 311–12 (2d Cir. 2001). *See* Washington v. Schriver, 240 F.3d 101, 107–10 (2001), *withdrawn*, 255 F.3d 45 (2d Cir. 2001).

the merits and reduced to a judgment accordingly."[107] This view has several purported virtues. First, it appears to comport with the new mode of federal habeas review established by AEDPA, viz., that a federal court should take the state court's decision, not the analytic process by which it reached that decision, as the baseline for its independent review. "[W]e are determining the reasonableness of the state courts' 'decision,'" the Second Circuit remarked somewhat glibly, "not grading their papers."[108] This does not mean that the state court's adjudicatory process becomes irrelevant; only that, ultimately, the result, not the quality of the state court's reasoning, must be the object of independent federal judgment. While "sound reasoning will enhance the likelihood that a state court's ruling will be determined to be a 'reasonable application' of Supreme Court law, deficient reasoning will not preclude AEDPA deference, at least in the absence of an analysis so flawed as to undermine confidence that the constitutional claim has been fairly adjudicated."[109] Second, the predominant construction may further the value of comity in the sense that it allegedly deters "federal court supervision of the states' criminal processes and increase[s] deference to state judicial decisions," and in the same vein, heeds the Supreme Court's counsel against requiring state courts to use "'particular language in every case in which a state prisoner presents a federal claim.'"[110] Finally, it may be thought to furnish the appropriate textual analysis to the extent that the definition of adjudication in Black's Law Dictionary and the familiar meaning of "adjudicated on the merits" in the res judicata context suggest that this word should receive the same meaning in the habeas context.[111]

In *Sellan v. Kuhlman*,[112] in which the Second Circuit adopted the predominant construction of "adjudicated on the merits,"[113] Chief Judge Walker expanded on these themes. The court noted at the outset that "whether AEDPA deference

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[107] *Washington*, 255 F.3d at 53.

[108] Cruz v. Miller, 255 F.3d 77, 86 (2d Cir. 2001); *accord Wright*, 278 F.3d at 1255; Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).

[109] *Cruz*, 255 F.3d at 86 (citations omitted).

[110] *Washington*, 255 F.3d at 53 (quoting Coleman v. Thompson, 501 U.S. 722, 739 (1991)); *cf.* Arizona v. Evans, 514 U.S. 1, 7 (1995).

[111] *Washington*, 255 F.3d at 53.

[112] 261 F.3d 303 (2d Cir. 2001).

[113] *Id.* at 311.

applies here is all but outcome-determinative."[114] In the main, it justified its conclusion as a simple textual analysis, as have other circuits.[115] It said that "'[a]djudicated on the merits' has a well-settled meaning: 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."[116] The court acknowledged that a state court's reference to federal law, whether directly or by way of a state decision citing relevant federal precedents, would facilitate a federal habeas court's analysis.[117] But it disclaimed any license from Congress absolving the federal courts from performing that analysis in the absence of indicia of the state court's reasoning process.[118]

The Second Circuit panel in *Sellan* also went out of its way to reject the position of Judge Calabresi, who, concurring in *Washington v. Schriver*,[119] had urged that 28 U.S.C. § 2254(d) be construed such that "AEDPA deference does not apply where a State court has rejected a petitioner's claim without expressly mentioning its federal aspects."[120] This construction, Judge Calabresi argued, would "enable[] State courts *to choose* whether or not they wish to take on the burden [of deciding federal, and particularly difficult constitutional, issues] and be deferred to."[121] It would advance the goals of comity and federalism by giving state courts a signaling device by which they could either command deference or elect to avoid passing on federal issues, leaving them for federal habeas courts to decide de novo. Because the text of § 2254(d) could bear this construction, in Judge Calabresi's view, it should be adopted as the one that best "comports with" the spirit underlying the AEDPA.[122]

The *Sellan* panel disagreed with Judge Calabresi's proposal for two principal reasons: First, it might encourage defendants

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[114] *Id.* at 310.

[115] *See, e.g.*, Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1254–55 (11th Cir. 2002).

[116] *Sellan*, 261 F.3d at 311.

[117] *Id.* at 311–12.

[118] *Id.*

[119] *See* Washington v. Schriver, 255 F.3d 45, 61–65 (2d Cir. 2001) (Calabresi, J., concurring), *withdrawing* 240 F.3d 101 (2001).

[120] *Id.* at 63.

[121] *Id.*

[122] *Id.* at 63–64.

to sandbag, "to press their federal claims in state court in an essentially cursory manner—just enough to exhaust state remedies and to avoid default or waiver . . . with the hope that the state court will not 'refer to' or engage in any lengthy discussion of their federal claims, thus entitling the prisoner to *de novo*" federal habeas review.[123] Second, the Supremacy Clause mandates that state courts address properly presented federal claims; it does not permit them to choose whether to leave federal questions to federal courts on habeas review.[124] The former reason strikes me as questionable at best; a risky and ill-advised defense strategy at worst. The latter reason, however, strikes me as clearly correct: State courts must decide properly presented federal questions. The Constitution does not permit them to choose. Furthermore, the idea that federal courts should give state judges a choice—either decide the difficult federal questions, thereby insulating your decisions from federal habeas scrutiny, or deliberately avoid deciding them, passing them on to federal courts (presumably) better equipped to handle them—also may seem somewhat condescending.

At the same time, it is far from clear that the *Sellan* rule avoids the Supremacy Clause problem, for it raises a distinct, but equally practical, concern. If a state court declines manifestly to decide a question under the correct federal standard, then under *Sellan*, federal courts must presume that the court addressed the question, provided only that the state court did not dispose of it on a procedural ground. State judges, by declining to address federal questions and dismissing them as one among many claims either unpreserved for appellate review or without merit, could therefore enjoy the benefit of deference without the burden of actually adjudicating a federal claim. This, too, could enable and perhaps even encourage state judges to avoid their responsibility properly to adjudicate federal constitutional issues under the Supremacy Clause, particularly in circumstances where vindicating a federal right despite the defendant's guilt of an incendiary crime would be politically unpopular.

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[123] *Sellan*, 261 F.3d at 313–14.

[124] *Id.* at 314.

B. *Adjudicated on the Merits as Manifest Analysis of Federal Claims*

With the possible exception of the First Circuit,[125] all of the federal circuits have, with minor variations, embraced in substance if not form, the construction of § 2254(d) articulated in *Sellan*.[126] The alternative construction canvassed in *Washington*, but adopted to date by no court, takes as its point of departure the Supreme Court's decision in *Williams v. Taylor*.[127] There, a plurality held that the "contrary to" and "unreasonable application" clauses have distinct meanings:

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[125] In *DiBenedetto v. Hall*, 272 F.3d 1 (1st Cir. 2001), the First Circuit said that "[i]f the state court has not decided the federal constitutional claim (even by reference to state court decisions dealing with federal constitutional issues), then we cannot say that the constitutional claim was 'adjudicated on the merits' within the meaning of § 2254 and therefore entitled to the deferential review prescribed in subsection (d)." *Id.* at 6. But in that case, the Supreme Court of Massachusetts manifestly resolved the petitioner's claims on the basis of state law. *See id.* at 5–6. The court then cited *Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000), for the proposition that pre-AEDPA review applies where a state court decision manifestly rests on state statutory construction. *DiBenedetto*, 272 F.3d at 6–7. Similarly, in *Fortini v. Murphy*, 257 F.3d 39, 47 (1st Cir. 2001), the First Circuit refused to apply § 2254(d)(1) where the habeas petitioner raised a federal constitutional claim, but the state court resolved the issue against him on the basis of Massachusetts evidentiary law. The clear application of state law to a federal claim cannot be equated with a summary or cursory dismissal of a federal claim. In the latter case, a federal court must make some assumption, absent evidence one way or the other, about whether the state court tacitly applied governing federal law. It is therefore not clear that the First Circuit has affirmatively decided that a cursory dismissal does not merit AEDPA review. *Cf.* McCambridge v. Hall, 303 F.3d 24 (1st Cir. 2002). The *McCambridge* court stated:

> If there is a federal or state case that explicitly says that the state adheres to a standard that is more favorable to defendants than the federal standard (and it is correct in its characterization of the law), we will presume the federal law adjudication to be subsumed within the state law adjudication.

Id. at 35. *But see* Clifford v. Chandler, 333 F.3d 724 (6th Cir. 2003) (characterizing the First Circuit's views, and the Third Circuit's holding in *Hameen*, as applicable to cursory decisions that "fail[] to even mention" the federal claim altogether).

[126] *See supra* notes 24–25 and accompanying text. In *Chadwick v. Janecka*, 312 F.3d 597 (3d Cir. 2002), the Third Circuit suggested that the Supreme Court has implicitly approved this construction, *see id.* at 606, because *Weeks v. Angelone*, 528 U.S. 225 (2000), affirmed the Fourth Circuit's treatment of a summary dismissal of one of forty-seven assignments of error presented to the Virginia Supreme Court. *Weeks* did not address the issue, however, and the Court, after finding the petitioner's claims without merit, merely said in dicta that "it follows *a fortiori* that the adjudication of the Supreme Court of Virginia affirming petitioner's conviction and sentence neither was 'contrary to,' nor involved an 'unreasonable application of,' any of our decisions." *Weeks*, 528 U.S. at 237.

[127] 529 U.S. 362 (2000).

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state 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.[128]

No fewer than six—and possibly all—of the justices in *Williams* implied that to determine which § 2254(d)(1) clause to apply, and then to apply the clause so identified, requires analysis of the state court's decision. Because this process "cannot be performed if the state court decision does not identify in some fashion the legal rule through which the result was reached," an "'adjudication' only takes place when the state court decision makes its rationale (the legal rule it applied) at least minimally apparent."[129] That does not mean a state court must use particular language. It must, however, either (1) cite or apply federal law, (2) cite or apply state law that in turn cites or applies federal law, or at a minimum, (3) otherwise manifest its fidelity to or application of the correct rule prescribed by federal law.[130] Note that the third of these possibilities does not exclude the possibility of an adjudication by a cursory state-court decision, provided the state court's *decision*, the object of a federal court's review under § 2254(d), is manifestly correct; but in that event, it hardly matters whether the decision is reviewed under § 2254(d)(1) or de novo.

Like the construction adopted in *Sellan*, this alternative reading may be thought to possess several virtues. First, it enables or facilitates the *Williams* analysis. Second, it promotes Congress's intent to reduce delay in the resolution of federal

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[128] *Id.* at 412–13.

[129] Washington v. Schriver, 255 F.3d 45, 53–54 (2d Cir. 2001); *see also* Washington v. Schriver, 240 F.3d 101, 108–09 (2d Cir. 2001), *withdrawn*, 255 F.3d 45 (2d Cir. 2001). This is not strictly accurate: A cursory state court opinion that denies relief under circumstances where Supreme Court precedent clearly requires it would be either "contrary to" or "an unreasonable application of" that precedent. Hence, at times, the process mandated by § 2254(d)(1) can be performed even where a state court does not make the legal rule it applied minimally apparent. In effect, in such cases it is the state court's failure to apply the right legal rule that is, not just minimally, but glaringly apparent.

[130] *See Washington*, 240 F.3d at 108 n.4.

habeas petitions by "obviat[ing] the need for the sometimes complicated analysis that arises when a federal habeas court cannot determine whether a state court decided a claim on substantive or procedural grounds."[131] Third, it furthers the values of comity because it diminishes the risk that a federal court will misconstrue the basis on which a state court decided a federal claim and then find that (misconstrued) decision to be unreasonable or contrary to clearly established federal law,[132] a message that hardly furthers the mutual respect among the federal and state judiciaries that lies at the foundation of comity. Finally, under an equally plausible reading of the text, which, consistent with a well-established principle of statutory construction,[133] would give distinct meanings to the words "judgment," "decision," and "adjudication," all of which appear in § 2254(d), it would respect "Congress's admonition that AEDPA's deferent standards of review only apply 'with respect to any claim that was adjudicated on the merits in State court proceedings.'"[134]

C. *Potential Ambiguities and Intermediate Positions*

In both *Washington* and *Sellan*, the Second Circuit suggested that the Third Circuit, in *Hameen v. Delaware*, had adopted this alternative construction, thus giving rise to a circuit split.[135] In *Hameen*, the Third Circuit found that even though the state court relied on *Gregg v. Georgia*[136] to reject a habeas petitioner's Eighth Amendment claim, because *Gregg* had not been addressed to the specific question raised by that claim, the state court had not adjudicated that question on the merits. Judge Greenberg explained that:

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131 *Washington*, 255 F.3d at 54.

132 *See id.* (citing Aycox v. Lytle, 196 F.3d 1174, 1178 n.3 (10th Cir. 1999)).

133 *See, e.g.*, *Williams*, 529 U.S. at 404 (plurality opinion of O'Connor, J.) ("It is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute.") (quotation marks omitted); *see also id.* at 405 ("The Court of Appeals for the Fourth Circuit properly accorded both the 'contrary to' and 'unreasonable application' clauses *independent* meaning.") (emphasis added).

134 *Washington*, 240 F.3d at 108, 110 (quoting 28 U.S.C. § 2254(d)).

135 *See* Sellan v. Kuhlman, 261 F.3d 303, 313 n.5 (2d Cir. 2001) (citing Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000)); *Washington*, 255 F.3d at 53 (same).

136 428 U.S. 153 (1976).

> [N]otwithstanding the Delaware court's reliance on *Gregg*, . . . it did not pass on [the habeas petitioner's] Eighth Amendment constitutional duplicative aggravating circumstances argument, even though it had the opportunity to do so. Accordingly, we cannot say that the Delaware Supreme Court took into account controlling Supreme Court decisions. This point is critical because under the AEDPA the limitation on the granting of an application for a writ of habeas corpus is only "with respect to any claim that was adjudicated on the merits in State court proceedings." Hence we exercise pre-AEDPA independent judgment on the duplicative aggravating circumstances claim.[137]

Subsequently, however, the Third Circuit distinguished *Hameen* and two subsequent cases that apparently applied the same rule. It remarked that those cases "stand for the proposition that, if an examination of the opinions of the state court shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply."[138] Equally, a number of circuits distinguish between the application of § 2254(d) to cursory dispositions, on the one hand, and to no disposition at all, on the other—although it remains unclear whether a plausible analytic method can meaningfully draw this distinction in a uniform manner.[139] The same distinction (or ambiguity) may be discerned in the opinions of other circuits.[140] Some commentators have also identified certain intermediate positions in the decisions of some circuits and drawn more refined distinctions that lie in the middle of the spectrum between the two positions staked out in *Washington*.[141]

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[137] Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000).

[138] Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002).

[139] *See* Schoenberger v. Russell, 290 F.3d 831, 838–39 (6th Cir. 2002) (Keith, J., concurring).

[140] *See generally* DiBenedetto v. Hall, 272 F.3d 1 (1st Cir. 2001); LaFevers v. Gibson, 182 F.3d 705, 711 (10th Cir. 1999) (holding that where it is apparent that the state court failed to adjudicate a federal claim even summarily, that claim has not been "adjudicated on the merits," and § 2254(d)(1) does not apply); Mercadel v. Cain, 179 F.3d 271 (5th Cir. 1999).

[141] *See* Glidden, *supra* note 27, at 193–95 (describing the "intermediate deference" employed by some circuits); Welty, *supra* note 27, at 914–22 (surveying and categorizing the approaches of the federal circuits differently); Wilner, *supra* note 27, at 1461–72 (ascribing distinct positions to the First, Third, and Tenth Circuits (no deference), the Fourth Circuit (total deference), the Tenth and Eleventh Circuits (varying levels of deference depending on whether the state court

None of these positions, however, challenge *Sellan*'s foundational logic.

D. Conclusion

Where a state petitioner's claim arguably has merit, the practical difference between the predominant view and the alternative articulated in *Washington* is non-trivial. Under the predominant standard, a federal claim does not, strictly speaking, receive federal scrutiny; only the state court's decision, the result of a tacit or hypothetical adjudication, receives federal scrutiny—and then only under the tortuous standard of review prescribed by 28 U.S.C. § 2254(d)(1), as interpreted by a plurality in *Williams*. Under the alternative view, a federal claim not addressed by the state court, whether constitutional, statutory, or treaty-based,[142] receives de novo review, at least as to issues of law. This, as both pluralities in *Williams* agreed, had been the clear rule before AEDPA.[143] The construction of § 2254(d) applicable to summary dismissals of federal claims by state courts therefore may well be outcome-determinative in "hard cases."[144]

III. CONSTRUING § 2254(d): TEXTUALISM, FIDELITY TO THE CORPUS JURIS, AND POLICY

A. Textualism

The predominant construction of § 2254(d)'s "adjudicated on the merits" requirement purports to be grounded in, if not

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addressed a federal issue in state law terms or not at all), and the Second and Ninth Circuits (intermediate deference)).

[142] 28 U.S.C. § 2254(a) (2000) (authorizing federal courts to grant the writ to a petitioner "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States").

[143] *See* Williams v. Taylor, 529 U.S. 362, 378, 383–84 (2000) (Opinion of Stevens, J.) (quoting Wright v. West, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring)); *id.* at 402 (Opinion of O'Connor, J.).

[144] *See* Sellan v. Kuhlman, 261 F.3d 303, 310 (2d Cir. 2001) (noting that because the petitioner's ineffective-assistance-of-counsel claim "is quite strong," and therefore, that "were we to review [the petitioner's] Sixth Amendment claim *de novo*, we might well be inclined to grant the writ"). By "hard cases," I have in mind Ronald Dworkin's denomination of cases in which no manifest rule on which all reasonable jurists would agree clearly resolves the issue raised one way or another. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977).

dictated by, the plain meaning of the statutory text.[145] This is misleading. The text has no plain meaning. To reach the construction adopted by most circuits, certain canons of statutory interpretation must be invoked, for example, that "[w]hen Congress uses a term of art . . . we presume that it speaks consistently with the commonly understood meaning of the term;"[146] others must be ignored, for example, that we must "give effect, if possible, to every clause and word of a statute."[147] Llewellyn famously pointed out that different canons of statutory construction can be invoked to justify different interpretive processes, culminating, at times, in contrary conclusions.[148] It could therefore easily have been emphasized, as indeed a different panel of the Second Circuit did in the withdrawn *Washington v. Schriver* decision, that because § 2254(d) refers to a "judgment," an "adjudicat[ion]," and a "decision," federal courts should not lightly treat these words synonymously.[149] The *Sellan* interpretation of § 2254(d) does that. It fails to give independent meaning to the word "adjudicated," because it equates "adjudicated on the merits" with "decided on the merits," thereby reading out of the statutory provision the condition precedent to the application of § 2254(d)(1). Another plain reading of § 2254(d) could, with equal plausibility, yield the contrary conclusion—that "[a]n *adjudication* is not itself a *decision.* A decision is the *result* of an adjudication. An adjudication, accordingly, is something more than a disposition that concludes judicial consideration of a claim. It is a decision-making process for *reaching* a dispositive judgment."[150]

The sequence of the text of § 2241(d) also strongly suggests that a federal habeas court should first determine whether a state court did adjudicate a federal claim "on the merits," and only upon reaching an affirmative conclusion to that question,

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[145] *See, e.g.*, Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1254–55 (11th Cir. 2002); *Sellan*, 261 F.3d at 312; Bell v. Jarvis, 236 F.3d 149, 160 (4th Cir. 2000); Aycox v. Little, 196 F.3d 1174, 1177 (10th Cir. 1999).

[146] *Sellan*, 261 F.3d at 311.

[147] Montclair v. Ramsdell, 107 U.S. 147, 152 (1882).

[148] *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

[149] Washington v. Schriver, 240 F.3d 101, 108 (2d Cir. 2001), *withdrawn*, 255 F.3d 45 (2d Cir. 2001).

[150] YACKLE, *supra* note 35, at 557 n.378; *see also* Yackle, *supra* note 11, at 420 nn.128–30.

address whether the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[151] In *Sellan*, by contrast, the Second Circuit began with the "threshold" inquiry whether the petitioner's ineffective assistance of counsel claim stated a violation of "clearly established Federal law."[152] This seems to be incorrect, as it imports AEDPA's newfangled standard of review into the context of habeas review of state court convictions that do *not* meet the conditions precedent to the application of § 2254(d).

But the problem with the predominant textual construction runs deeper. In *Sellan*, the Second Circuit said that "'[a]djudicated on the merits' has a well-settled meaning: 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."[153] Recall, however, that general principles of preclusion, including res judicata, have never applied in the ordinary course in the habeas context. It would therefore seem, at the very least, incongruous to import into the habeas context a principle of preclusion that, as a matter of both history and precedent, had theretofore been out of place. It should not be assumed, without evidence, that Congress intended to interpose radical changes to the concept of habeas corpus. To the contrary, despite the perceived radical changes wrought by AEDPA, the statute "takes the preexisting habeas landscape as its baseline."[154] The Supreme Court repeatedly has emphasized that ambiguous statutes must be construed "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law [and thus] to make sense rather than nonsense of the *corpus juris*."[155] The text of § 2254(d) therefore does not admit of a single "plain meaning." Its meaning depends in the first instance on which canons of statutory construction a court elects to apply and which to ignore. The canon invoked in

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[151] 28 U.S.C. § 2254(d)(1) (2000).

[152] Sellan v. Kuhlman, 261 F.3d 303, 308–09 (2d Cir. 2001).

[153] *Id.* at 311.

[154] Yackle, *supra* note 11, at 381; *see also id.* at 398 ("By its explicit terms, § 2254(d) presupposes the basic habeas jurisdiction established by the 1867 Act, now codified in § 2241 and reaffirmed in § 2254(a).").

[155] W. Va. Univ. Hosp. v. Casey, 499 U.S. 83, 100–01 (1991).

support of the predominant construction—that Congress must be presumed to speak consistently—seems questionable in the context of habeas corpus, for the res judicata meaning of "adjudicated on the merits" has, historically and jurisprudentially, not applied on habeas.

Because the text of § 2254(d) is ambiguous, courts must look elsewhere to inform its meaning. To be sure, as many circuits have observed, nothing in this provision requires federal courts to appraise the reasoning process of a state court.[156] Independent federal judgment under § 2254(d)(1) is brought to bear on the result of an adjudication rather than the analytic processes of the adjudication. But this confuses matters. The preceding observation applies to a § 2254(d)(1) analysis. In that context, a court must appraise the merits of the petitioner's claim under the "contrary to" and "unreasonable application" clauses by reference to the result reached, not by scrutiny of the state court's analysis. The question under consideration, however, is whether § 2254(d)(1) should apply *at all* in the absence of at least some indicia of an adjudication of the federal question. To decide *that* question by invoking the results-not-reasoning mantra is circular. It assumes the fact in question: that the federal court has already determined that the state court did adjudicate the petitioner's federal claim on the merits.

B. Fidelity to the Corpus Juris

To construe § 2254(d) properly requires that ambiguities be resolved in a manner that "fits most logically and comfortably into the body of both previously and subsequently enacted law [and thus] make[s] sense rather than nonsense of the *corpus juris*."[157] To repeat, habeas corpus is emphatically not, in its origins or nature, an appeal. Judicial constructions of AEDPA's habeas provisions should respect this distinction. Consistent with the Supreme Court's general approach, we need not assume any particular theory about the original meaning of the Suspension Clause. It suffices to appreciate that the Clause should inform the construction of an ambiguous habeas statute and that the canon of constitutional doubt counsels against a

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[156] *E.g.*, Bell v. Jarvis, 236 F.3d 149, 159–60 (4th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999).

[157] *Casey*, 499 U.S. at 100–01.

restrictive construction that could raise Suspension Clause concerns. Also, after the Civil War Amendments' reorientation of federal and state power, the further nationalization of power in the wake of the New Deal, and the expansion of the scope of constitutional rights and liberties, particularly in criminal procedure, associated with the heyday of the Warren Court, the vital role of habeas corpus as the Great Writ of Liberty today falls squarely within the province of the federal judiciary. An "originalist" interpretation of the Suspension Clause, then, far from respecting the elusive intention of the Framers, may well damage that intention: to enshrine a bulwark against encroachments upon personal liberty by the political branches of the federal government.[158] Recall that the Clause is located in Article I, section 9, of the Constitution, which enumerates limits on congressional power. Deference to "congressional intent" in this context, as the presumed will of the majority, may thus be misguided—assuming it can be discerned, which is doubtful.[159]

Habeas corpus, as a legal device, also should not be analyzed in isolation from the political system in which it operates. The Constitution, as we know, does not establish a simple system of democracy as mere majoritarian rule. Its structure seeks to

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[158] *See* Johnson v. Eisentrager, 339 U.S. 763, 798 (1950) (Black, J., dissenting) ("Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress.").

[159] Tellingly, both proponents of the predominant view of "adjudicated on the merits" and those who would prefer an alternative reading tend to invoke two pieces of legislative history. First, Senator Hatch's statement that AEDPA would "simply end[] the improper review of State court decisions. After all, State courts are required to uphold the Constitution and to faithfully apply Federal laws. There is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts," 142 CONG. REC. S3446–47 (1996). Senator Hyde discussed how, by deferring to "State courts' legal decisions if they are not contrary to established Supreme Court precedent," the judicial system would "avoid relitigating endlessly the same issues"). 142 CONG. REC. H2247, 2249 (1996). *Compare* Sellan v. Kuhlman, 261 F.3d 303, 314 (2d Cir. 2001), *with* Washington v. Schriver, 255 F.3d 45, 62 (2d Cir. 2001) (Calabresi, J., concurring) (invoking Senator Hatch's statement in support of differing conclusions). The reason is that these statements presume rather than explain an "adjudication on the merits" by the state courts. They simply do not inform the question whether a silent or cursory state-court decision should be considered an "adjudication on the merits" such that to conduct federal habeas review would be to "virtually retry cases that have been properly adjudicated by our State courts." Senator Hatch's statement, that is, begs the question what it means for a case to have been "properly adjudicated." Equally, Senator Hyde's remarks presume that federal habeas review would involve "relitigation," which of course presupposes an initial litigation.

protect individuals against the "tyranny of the majority" threatened by unmitigated majoritarian rule, against which John Stuart Mill famously warned.[160] Habeas corpus is one of the devices that safeguards individuals against that tyranny, as its jurisprudential evolution attests.[161] As a judicial device to test the legality of convictions, it has historically held an esteemed place in the arsenal of political and legal mechanisms by which majoritarian and autocratic abuses have been averted in Anglo-American legal systems.[162] In England, "a steady stream of legislation restricting the scope of *habeas corpus*," and subsequently, abuses by the Star Chamber and other executive acts, culminated in the Habeas Corpus Act of 1679.[163] In the justly celebrated *Bushell's Case*, for example, the petitioner, one of the jurors who refused to convict William Penn for assembly and speech allegedly subversive of the doctrines of the established Anglican Church, successfully invoked the writ to challenge his detention.[164] Chief Justice Vaughan extolled the writ as "the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it."[165] In the United States, federal habeas corpus served as the device to test the legality of congressional and state action in the aftermath of the Civil War.[166] And the evolution of the modern writ in the twentieth century—particularly its development in response to mob-dominated trials and other due process violations—likewise attests to its role in countering majoritarian abuses.[167]

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[160] JOHN STUART MILL, ON LIBERTY 4 (Elizabeth Rapaport ed. 1978) (1859).

[161] *See* Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 402–34 (1998).

[162] *Id.* at 380.

[163] PLUCKNETT, *supra* note 37, at 57.

[164] Bushell's Case, 124 Eng. Rep. 1006–07 (C.P. 1670); *see* DUKER, *supra* note 36, at 53–54.

[165] Bushell's Case, 124 Eng. Rep. at 1007.

[166] *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) (challenging the Military Reconstruction Act after arrest for the publication of editorials critical of congressionally imposed martial law in the South); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 94–95 (1868).

[167] In the aftermath of the terrorist attacks of September 11, 2001, it is of course no coincidence that habeas corpus has been the principal mechanism by which individuals and proponents of civil liberties have sought to challenge the legality of executive detention imposed in the name of the "War on Terrorism." *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004); Padilla v. Rumsfeld, 124 S. Ct. 2711 (2004).

That said, were Congress, the majoritarian branch of the federal government, to enact a provision unambiguously foreclosing habeas review in certain circumstances, federal courts would be required either to abide by that mandate or, depending on its substance and details, declare it unconstitutional. But it has not; the text of § 2254(d) is ambiguous. For this reason, it should be construed, to the extent consistent with its text, to conform to the venerable corpus juris of the writ. The twin principles embodied in this jurisprudence relevant to the question under consideration are, first, that habeas corpus is not an appeal, and second, that it has traditionally served as a *sui generis* judicial device for the vindication of personal liberty and, in the United States, the constitutional rights that protect that liberty. To define "[a]djudicated on the merits" to mean no more than "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,"[168] inadequately considers both principles. Res judicata, full faith and credit, and similar principles have never applied in the ordinary course in the context of habeas corpus. By permitting an opaque decision "resolving" a prisoner's federal constitutional claims to limit federal habeas review of the legality of his or her detention, the predominant interpretation tends to deny persons, not "relitigation" of paramount constitutional issues adjudicated by a state court, but any meaningful habeas consideration of those issues at all. These observations, I believe, militate in favor of an alternative interpretation of "adjudicated on the merits" that would authorize AEDPA's standard of review only in cases in which some manifestation of a prior state-court adjudication can be found. This alternative, upon analysis, would also further, rather than hinder, the values of comity, federalism, and judicial efficiency, the policy objectives that proponents of the predominant construction tend to invoke in support of their position.

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[168] Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) (citing Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501–02 (2001)).

C. *Some Thoughts on Comity, Judicial Efficiency, and Federalism*

The federal circuit courts typically resolve the construction of § 2254(d) by reference to the alleged plain meaning of its text. Almost as an afterthought, they say that this construction more effectively furthers the objectives of AEDPA's habeas provisions. Those objectives fall into three broad categories: comity, judicial efficiency, and federalism. To facilitate their consideration, it will be useful to distinguish four postures in which a federal habeas court may find itself where a person in state custody pursuant to a state court judgment raises a federal claim: (1) the state court correctly perceives the federal issue and manifestly decides it, correctly or not, on the merits; (2) the state court, in the federal court's view, misperceives or misunderstands the federal issue but manifestly decides that misconceived issue on the merits; (3) the state court fails to perceive the federal issue at all; and (4) the state court perceives the federal question but finds it frivolous or otherwise so meritless that the court declines to address it expressly. In each of these scenarios, § 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."

In the first scenario, the federal habeas court's role is clear. It must examine the decision that resulted from the state court's adjudication and decide whether that decision is "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States."[169] The court must, as a formal matter, appraise the result of the state court's adjudication rather than its reasoning. But as many federal circuit courts have observed, some manifestation of the court's adjudicatory process—whether by citing or applying federal law, or citing or applying state law that, in turn, cites federal law—greatly facilitates the federal habeas court's task.[170] It reduces the risk that the federal court will misunderstand the basis of the state court's decision and then find it "unreasonable" or "contrary to . . . clearly established

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[169] 28 U.S.C. § 2254(d)(1) (2000).

[170] *See, e.g.*, *Sellan*, 261 F.3d at 311; Aycox v. Lytle, 196 F.3d 1174, 1178 n.3 (10th Cir. 1999).

Federal law" on that mistaken basis. Still, because habeas corpus is not an appeal—because its purpose is emphatically not to correct technical errors but to secure the freedom from unlawful confinement by providing a vehicle to challenge the legal basis for detention—if the state court reached the right result by an incorrect adjudication, it makes sense that a federal habeas court lacks authority to issue the writ. Equally, in the second scenario, while the federal habeas court may well note its disagreement with the state court's perception or analysis of a federal issue, because a manifest "adjudication on the merits" has been conducted, the question, in the final analysis, remains whether the *decision* of the state court nonetheless forecloses habeas relief because, even though based on an incorrect adjudication, the decision itself is neither contrary to nor an unreasonable application of "clearly established [f]ederal law as determined by the Supreme Court of the United States." The statute, in short, regulates relief rather than jurisdiction.

Now consider the latter two scenarios. In practice, they will be difficult, if not impossible, to distinguish. In both cases the state court will have dismissed outstanding claims, including any federal claims not apparent from the face of the opinion, as "without merit" or by some similar cursory disposition.[171] For that reason, whether AEDPA's regulation of habeas relief controls will be recondite. A federal habeas court must adopt some method to determine whether the state court (tacitly) "adjudicated" any (recondite) federal claims "on the merits." Three potential approaches exist: First, the court could adopt a presumption against an "adjudication on the merits" and therefore review the federal claims under the pre-AEDPA, de novo, standard. Second, it could adopt a presumption in favor of an "adjudication on the merits" and therefore apply § 2254(d)(1)

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[171] If the petitioner's submissions in state court fail to raise the federal issue or "fairly present" it, then the issue will be either procedurally defaulted or unexhausted. In that event, different considerations apply. *See* Cox v. Miller, 296 F.3d 89, 99–100 (2d Cir. 2002); *see also* Fluellen v. Walker, 41 Fed. Appx. 497, 500 n. 1 (2d Cir. 2002). In *Fluellen*, the court observed unacknowledged tension between the Second Circuit's decision in *Sellan* and dicta in *Rudenko v. Costello*, 286 F.3d 51, 71 (2d Cir. 2002), *withdrawn on other grounds*, 322 F.3d 168 (2d Cir. 2003), insofar as *Rudenko* said that where a state appellate court "reject[s] in bulk undiscussed—and perhaps unlisted—claims by stating that they [a]re 'either' meritless 'or' procedurally barred . . . no AEDPA deference by the district court on these claims [i]s warranted." *Id.*

regardless of the state-court decision's manifestation vel non of an "adjudication on the merits." Third, it could adopt some test or analytic method by which to try to ascertain whether, even though no adjudication on the merits appears from the face of the opinion, the state court more likely than not did adjudicate the federal claim or claims at issue on the merits. The second of these approaches would read the "adjudicated on the merits" condition entirely out of the statute. That would be untenable, both as a matter of statutory construction and fidelity to the purpose of federal habeas corpus review of state judgments of conviction, to test the legality of the basis for confinement. Most federal circuits have therefore adopted the third approach.

In *Mercadel v. Cain*,[172] for example, the Fifth Circuit articulated a test for determining whether a state-court decision that does not mention a federal claim nonetheless "adjudicated" that claim "on the merits":

> [W]e determine whether a state court's disposition of a petitioner's claim is on the merits by considering:
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> (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.[173]

The Second Circuit adopted this test verbatim in *Sellan v. Kuhlman*.[174] Considered in light of the comity and judicial efficiency concerns that purportedly animated this oft-laborious investigation, the *Mercadel* test raises some curious questions.

First, it is far from clear that this method will produce an accurate result. Why should what one state court did, at one time, on the basis of one particular set of facts, be a good indicium of what another state court did, at another time, on the basis of a different set of facts? The state judiciary is not a monolith. Different judges engage different issues differently. Some will give short shrift to a federal issue even though their colleagues, in another case, would consider the same issue in depth. *Mercadel* would require federal courts to divine, in the

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[172] 179 F.3d 271 (5th Cir. 1999).

[173] *Id.* at 274.

[174] 261 F.3d at 314.

absence of direct evidence, what a state appellate-court panel thought when it ruled on a particular criminal appeal. It strains credulity that an analysis of prior state-law cases will disclose whether the panel's boilerplate dismissal "either unpreserved for appellate review or without merit" means that it did or did not adjudicate a certain conceivable federal claim "on the merits."[175]

Second, and from the standpoint of judicial efficiency, more critically, it should come as no surprise that federal courts seldom actually engage in the *Mercadel* analysis. It takes time that would be far better spent simply analyzing the substantive merits of the federal claim. Typically, federal courts therefore elide the issue, saying that they need not decide whether the state court adjudicated the federal claim on the merits because resolution of the issue would be the same whether analyzed under § 2254(d)(1) or de novo.[176] This makes sense. Why should a federal court waste judicial time and resources delving into a voluminous corpus of state-court decisions on constitutional criminal procedure if the federal claim at issue manifestly fails on the merits?

Third, the assumption that comity demands the *Mercadel* or some similar analysis bears reconsideration. Most federal courts have held that where a state court manifestly misperceives the federal issue, the actual federal issue has not been adjudicated on the merits for purposes of § 2254(d)(1).[177] If misperception of a federal question calls for pre-AEDPA review on the unadjudicated claim, why should failure to perceive the existence of a federal question at all merit AEDPA review? Of course, when a state court summarily dismisses remaining claims, federal or not, as "without merit," we do not know whether it failed to perceive a federal question or perceived the question but found it so frivolous or meritless as to be unworthy of discussion. But in either case, a compelling rationale for pre-AEDPA (de novo) review exists: If the state court genuinely failed to

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[175] Concededly, if the "history of the case" (for example, the state-court appellate briefs of the parties) provides genuine insight into what federal issues were raised, the *Mercadel* analysis may be both more plausible and more efficient. *See Mercadel*, 179 F.3d at 274.

[176] *E.g.*, *Cox*, 296 F.3d at 101.

[177] Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002); Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000); *see also* DiBenedetto v. Hall, 272 F.3d 1, 6–7 (1st Cir. 2001); LaFevers v. Gibson, 182 F.3d 705, 711 (10th Cir. 1999); *Mercadel*, 179 F.3d at 275–76.

perceive the federal issue, then it should be reviewed de novo, because, first, if misperception calls for pre-AEDPA review, a fortiori does non-perception;[178] and second, failure to perceive the federal issue cannot plausibly be equated with an adjudication on the merits of that issue. By contrast, if the state court *did* perceive the federal issue, but found it unworthy of comment, then the rationale for applying § 2254(d)(1)'s tortuous standard of review is weak. Either the federal issue is, in fact, meritless, in which case a federal court can, equally and far more efficiently, simply reaffirm that appraisal without being compelled to engage in the convoluted epistemic analysis articulated in *Mercadel*; or it is not, in which case we should reconsider why and how comity should apply here.

In this regard courts frequently cite Senator Hatch's statement that AEDPA

> [s]imply ends the improper review of State court decisions. After all, State courts are required to uphold the Constitution and to faithfully apply Federal laws. There is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts.[179]

Representative Hyde remarked to similar effect that AEDPA's standard of review ensures that the courts will "avoid relitigating endlessly the same issues."[180] But if a federal issue is not meritless, and the state court did not address it at all, then it is far from clear that a federal court shows comity to a state court by imputing, per *Mercadel* or by some similar method, a variety of hypothetical analytic processes to that court, by which

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[178] Because *Teague v. Lane*, 489 U.S. 288, 297–99 (1989), already delimits the scope of habeas to clearly established rules of federal law, it makes little sense to construe § 2254(d)(1) to further constrain the scope of review to cases in which the state court did not even acknowledge, still less apply, those clearly established laws. Before AEDPA, a federal district court could not grant the writ simply because it would have construed a federal claim differently, provided that the issue could be characterized as "'susceptible to debate among reasonable minds.'" Wright v. West, 505 U.S. 277, 291 (1992) (quoting Butler v. McKeller, 494 U.S. 407, 415 (1990)). After AEDPA, the *Sellan* construction of § 2254(d) would, according to some views, require an interpretation of federal law "'so far off the mark as to suggest judicial incompetence'" or a lack of integrity. Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000) (quoting Matteo v. Superintendent, 171 F.3d 877, 889 (3d Cir. 1999) (en banc)).

[179] 142 CONG. REC. S3446–47 (1996) (statement of Sen. Hatch).

[180] 142 CONG. REC. H2247–49 (1996) (statement of Rep. Hyde).

it presumably arrived at the result being reviewed, and then, if the federal court disagrees with that result, being required, per *Williams*, to label it either "'contrary to'" or "'involv[ing] an unreasonable application of . . . clearly established Federal law.'"[181] That judgment may imply incompetence at best; a lack of integrity or fairness at worst. Yet that is what the *Mercadel* analysis would compel a federal court to say in order to issue the writ where federal law, in the federal court's view, requires it, and the state court's decision failed to mention the meritorious federal issue. To say that the state court erred, as all courts do at times, by failing to perceive, for example, an important federal issue raised or implied but perhaps not well briefed by the parties, shows more respect for the state court than to impute to it an "unreasonable" analytic process.

To require state courts to disclose some manifestation of an adjudication of federal issues therefore would further, not impede, the values of comity and judicial efficiency. If the state court never mentioned the federal claim at all, and it turns out to be meritorious, it is difficult to see how this constitutes "relitigat[ion]," in Representative Hyde's words, or the inappropriate power "virtually [to] retry cases that have been properly adjudicated by our State courts," in Senator Hatch's.[182] The rationale of 28 U.S.C. § 2254(d) is that where a state court already has analyzed a federal issue, it may be appropriate, as a matter of comity, and efficient, as a matter of avoiding duplicative judicial analysis, to defer to the result of that analysis. But if the state court simply says that remaining claims, including whatever federal claims the petitioner may have raised, are either unpreserved for appellate review or without merit, extending deference to the state court's analysis serves neither of these purposes. It is also not clear that redundant consideration of federal issues is an evil to be avoided. Cover and Aleinkoff, for example, have argued forcefully that

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[181] 529 U.S. 362, 403–13 (2000) (quoting 28 U.S.C. § 2254(d)(i) (1994)) (emphasis omitted).

[182] 141 CONG. REC. S3446–02, 3447 (1996) (statement of Sen. Hatch). *Cf.* Arizona v. Evans, 514 U.S. 1, 9 (1995) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.") (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

this redundancy, and the attendant dialogue between federal and state courts, constitutes a principal value of the dialectical federalism created by federal habeas review of state court judgments.[183]

Comity is based on the presumption of parity: that state judges, equally with their federal counterparts, can and will fully and fairly adjudicate federal questions. The rationale for AEDPA deference under § 2244(d)(1) dissolves if the state court either elects not to reach a federal question or neglects to apply federal law. A federal court does not show a lack of respect for a state court by passing on a question the state court did not adjudicate; to the contrary, as emphasized, it may well evince disrespect by imputing some hypothetical analytic process to the state court and then classifying the result of that process as unreasonable or contrary to clearly established federal law in order to be able to grant habeas relief in appropriate circumstances. State defendants will only be inclined to "sandbag," as the *Sellan* court suggested,[184] if parity is indeed a "myth."[185] *Sellan* denies that, as do the statements of Representative Hyde and Senator Hatch.[186] To encourage the reality rather than the mere presumption of parity, the judicial construction of an ambiguous statutory provision should, to the greatest extent consistent with its text, hold state courts to the obligation, "equally with the courts of the Union, . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States."[187] To paraphrase Justice Brennan, "[t]he state judiciaries, responsible equally with the federal courts to secure [federal] rights, should be encouraged to vindicate them. A self-fashioned abdication by the federal courts of their habeas corpus jurisdiction in cases where state prisoners are denied state relief [in the absence of any articulation or

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[183] *See generally* Cover & Aleinikoff, *supra* note 77.

[184] Sellan v. Kuhlman, 261 F.3d 303, 313–14 (2d Cir. 2001).

[185] *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

[186] *See Sellan*, 261 F.3d at 314; 142 CONG. REC. S3446-47 (1996) (statement of Sen. Hatch); 142 CONG. REC. H2247–49 (1996) (statement of Rep. Hyde).

[187] Robb v. Connolly, 111 U.S. 624, 637 (1884); *see also* Arizona v. Evans, 514 U.S. 1, 8 (1995) ("State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution.").

mention of the governing federal law] would not provide that encouragement."[188]

This is not to suggest that state judges must use particular language. It is only to say that if they do not, they will not enjoy the presumption that the decision has been "adjudicated on the merits," and hence § 2241(d)(1)'s curious standard of review will not apply to the result of that adjudication. Were federal courts to require some manifestation of an adjudication before applying § 2254(d)(1), this would, at once, encourage state courts to undertake the constitutional review required of them by the Supremacy Clause, and at the same time save federal judicial resources by avoiding the needless *Mercadel*-type analyses necessitated by the predominant *Sellan* view. In short, to say that federal claims are either unpreserved or without merit is, at least in meritorious cases, to displace work onto federal courts that the Supremacy Clause requires state courts to perform. And in non-meritorious cases, the application of § 2254(d)(1) will make little difference. Federal courts will find it easier and more efficient to reach and resolve the merits than to engage in the prolonged process of, first, conducting the tortuous epistemic investigation demanded by *Mercadel* to divine whether the state court adjudicated a given issue on the merits; and second, deciding whether that tacitly or hypothetically adjudicated claim passes muster under the equally tortuous § 2254(d)(1) standard of review, as interpreted by a plurality in *Williams v. Taylor*.[189]

It may be objected that the requirement of "some manifestation" is an empty formalism: State courts may simply be encouraged to add the word "federal," or to cite a federal case or two, before inserting the boilerplate phrase disposing of remaining claims as without merit. The point, however, is not to demand such empty formalisms, and state courts need not and, I believe, will not waste time analyzing manifestly frivolous claims or ensuring that their opinions bear the formalistic hallmarks of an adjudication simply in order to receive more deferential habeas review. Again, if the claims *are* frivolous, then how the state courts dispose of them—whether by a manifest adjudication on the merits or by a cursory disposition—will be inconsequential. Federal courts can, equally and far more

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[188] Brennan, *supra* note 78, at 442.

[189] 529 U.S. 362, 385–86 (2000).

efficiently, simply reaffirm that appraisal under a de novo standard: If the claim fails under a de novo standard, a fortiori it fails under § 2254(d)(1). But in hard cases, the law should not enable state courts to shield their decisions from scrutiny by declining to engage in a manifest analysis of properly presented federal constitutional claims. It is precisely in such cases that state courts should, so to speak, "show their work." That work, the state court's analysis, supplies the justification under AEDPA for mandating that a federal habeas court defer, to some degree, to the result of the state court's adjudication, for "[i]n this way, the federal court takes serious account (but not controlling account) of the best available thinking on the claim at bar—the prior adjudication of that claim in state court."[190] By contrast, if a state court declines manifestly to adjudicate a federal claim, then no "best available thinking on the claim at bar" exists. It makes little sense to circumscribe a federal court's ability to analyze a federal question based on the *absence* of a state court analysis. That could, in effect, discourage state courts from analyzing difficult federal questions precisely in those situations in which their analyses would be most valuable, while needlessly limiting the authority of federal courts to contribute to federal constitutional jurisprudence.

The question of federalism's bearing, if any, on the construction of § 2254(d) remains. Notwithstanding the "new federalism" and its exhortation in recent political and legal rhetoric,[191] federalism is not an independent value or end in itself; it is a means to a number of political and legal objectives, two of which dominate the discourse. First, by dispersing power between the federal and state governments, federalism helps to prevent the aggrandizement of power in any one seat of government. Second, by enabling diverse systems of law and

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[190] Yackle, *supra* note 11, at 383; *accord* Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002); *Sellan*, 261 F.3d at 311 (observing that the statutory text of § 2254(d) focuses on the result rather than the reasoning process of the state court).

[191] In general, the "new federalism" identifies trends in Supreme Court jurisprudence that empower the states or reinvigorate a robust conception of states' rights, often at the expense of federal (and particularly congressional) authority. *See, e.g.*, Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); Marci A. Hamilton, *Nine Shibboleths of the New Federalism*, 47 WAYNE L. REV. 931 (2001); Mark Tushnet, *What is the Supreme Court's New Federalism?*, 25 OKLA. CITY U. L. REV. 927 (2000).

policy to subsist within a common national polity, it permits constructive experimentation. In Justice Brandeis's well-known dictum: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[192] In the habeas context, however, this latter value has no place. States can, of course, implement different systems of criminal procedure, and experimentation in this regard may well be valuable. But while state procedural rules that promote efficiency or finality, for example, therefore merit deference under prevailing Supreme Court precedent,[193] constitutional and federal law delimit the scope of experimentation on matters of substance, i.e., "the merits." Justice Stevens is undoubtedly correct that § 2254(d)(1) does not, and constitutionally cannot, require deference to state decisions in the sense that "the Constitution means one thing in Wisconsin and another in Indiana."[194]

Federal habeas corpus therefore must remain capable of performing its paramount function—to vindicate the right to personal liberty where violations of federal and constitutional rights have led to an unlawful confinement pursuant to a state-court judgment—despite variations in state laws and the composition or quality of state judiciaries. "We prize our federalism," Justice Brennan wrote, "because of the proved contributions of our federal structure towards securing individual liberty."[195] The construction of § 2254(d) should be

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[192] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). *But see* Edward L. Rubin & Malcom Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing that this value inheres in decentralization, not federalism per se).

[193] *See* Coleman v. Thompson, 501 U.S. 722, 759 (1991); Wainwright v. Sykes, 433 U.S. 72 (1977).

[194] *Williams*, 529 U.S. at 387 n.13 (internal quotation marks and citations omitted). What it does appear to mean, however, is that a federal court's authority to grant habeas relief on the same federal claim may differ depending on the nature of the state court's decision.

[195] Brennan, *supra* note 78, at 442; *see also* THE FEDERALIST NO. 51, 351 (James Madison) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 84, at 577 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (extolling the writ of habeas corpus as a principal bulwark of personal liberty that the Constitution would ensure even in the absence of a bill of rights).

informed by this substantive objective of federalism, not by the mere invocation of its name or the mantra of states' rights.[196]

CONCLUSION

In her 1994 James Madison Lecture at New York University School of Law, Judge Betty B. Fletcher observed that in the context of capital punishment, habeas jurisprudence tends to waste an extraordinary amount of judicial resources, while simultaneously hindering, rather than enabling or facilitating, the ability of a federal habeas court to perform its mandate:

> To the rational mind, it is surely apparent that the system has it backward. The intense effort and resources are concentrated at the wrong end. We have inadequate representation at the trial level, which erodes the capacity of judges and juries to acquit the innocent and to save from death those who deserve less punishment; we have prolonged review processes that more often than not deflect attention from the real issues of fair trial and possible innocence to arcane examination of technical bars.[197]

This observation applies, *mutatis mutandis*, to the construction of 28 U.S.C. § 2254(d). Not only does the prevailing interpretation and application of that provision threaten to

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[196] Habeas corpus "review," unlike direct appellate review of state-court judgments by the Supreme Court of state-court judgments, to which the independent-and-adequate-state-ground rule applies, does not threaten to produce an unconstitutional advisory opinion or to interfere with a state's implementation of its own law. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

> The essential difference is that the Supreme Court, on direct review, can only reverse and remand [a case] to the state courts. It cannot secure the prisoner's release directly, and it is from this deficiency in power that the problem arises of advisory opinion or invasion of the [s]tate's legal preserve. Since the federal habeas corpus court does not function under any such limitation on its power, it is confronted by no such dilemma.

Brennan, *supra* note 78, at 436. Hence, the constitutional and other ills, real or perceived, that may arise were federal courts to review state-court judgments in disregard of the independent-and-adequate-state-ground rule not only do not apply in the federal habeas context, the opposite effect obtains: Because habeas corpus can only release the prisoner and compel a retrial, it encourages state courts to apply federal law accurately while at the same time enabling them to elaborate and develop state law independently. Ordering the discharge and retrial of a person does not require a federal habeas court to pass or trespass on a state court's right to interpret state law. It respects that law within the confines of overarching constitutional norms.

[197] Betty B. Fletcher, *The Death Penalty in America*, 70 N.Y.U. L. REV. 811, 826 (1994).

modify a critical *sui generis* privilege in the American constitutional system, it compels federal courts to engage in arcane, and often needless, technical analyses that can preclude the vindication or clarification of constitutional rights. AEDPA's habeas provisions, designed to streamline the habeas process and avert federal scrutiny of state-court "adjudications on the merits," in practice frequently prolong that process and lead federal courts to scrutinize state-court decisions at length in order to adhere to the Byzantine requirements mandated by AEDPA and Supreme Court precedent.

AEDPA's habeas provisions therefore prove to be needless and counterproductive in this regard, even measured against their purported objectives of federalism, comity, and judicial efficiency. But until Congress modifies those provisions—and assuming, as seems likely, that the Supreme Court will not find them constitutionally infirm—the viability, meaningfulness, and efficiency of federal habeas corpus can be preserved to some extent by reducing the circumstances under which the tortuous standard of review prescribed by § 2254(d)(1) applies, by limiting it to those cases in which a true adjudication on the merits took place. Because textual analysis of § 2254(d) bears equally well the alternative construction articulated in *Washington*, because the jurisprudence and history of federal habeas corpus support it, and because it better serves the values of federalism, comity, and judicial efficiency, that construction of § 2254(d) should, I believe, be reconsidered. Nothing could be clearer than the right of, indeed imperative for, federal courts to interpret ambiguous statutes in a manner that comports with precedent, history, and the constitutional values that undergird "Our Federalism."[198]

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[198] Younger v. Harris, 401 U.S. 37 (1971); *see* Press Release, Statement of President William Jefferson Clinton on Anti-Terrorism Bill Signing 2–3 (Apr. 24, 1996), 1996 WL 203049 ("I am confident that the Federal courts will interpret these provisions . . . to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary. . . . I expect that the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read [§ 2254(d)] to permit independent Federal court review of constitutional claims").