# "WE WOULD NOT DEFER TO THAT WHICH DID NOT EXIST"[1]: AEDPA MEETS THE SILENT STATE COURT OPINION

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*The Antiterrorism and Effective Death Penalty Act (AEDPA), enacted in 1996, changed both federal habeas procedure and the relationship between federal and state courts. A new provision, § 2254(d), requires federal courts to defer to the legal conclusions of state courts unless those conclusions are "contrary to, or involved an unreasonable application of clearly established federal law." This deferential schema becomes problematic when, as often happens, a prisoner presents a federal constitutional claim to the state courts, but the state court opinions denying relief do not mention the federal claim. How can federal courts assess the reasonableness of a decision that may not exist? The circuit courts have proposed widely variant solutions to this problem, ranging from de novo review to an extreme deference to state court results. In this Note, Claudia Wilner argues that a federal court should not defer to a state court decision unless it is accompanied by an opinion that actually discusses the federal claim. After considering and rejecting the various circuit approaches to reviewing silent state court opinions, she proposes a new approach that balances Congressional intent, Supreme Court precedent, federalism concerns, and the interest of the prisoner seeking review.*

On April 24, 1996, Congress enacted what at least one commentator has termed "the most significant habeas reform since 1867,"[2] the Antiterrorism and Effective Death Penalty Act ("AEDPA").[3] Although scholars have attempted to minimize the extent of the changes wrought by AEDPA,[4] one thing has become clear: AEDPA "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus."[5] It does so (in part) by adding a new provision, § 2254(d), that forbids federal courts

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[1] Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1254 (11th Cir.), reh'g denied, 34 Fed. Appz. 393 (11th Cir. 2002), petition for cert. filed, U.S.L.W. (U.S. June 12, 2002) (No. 01-10832).

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[2] Kenneth Williams, The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It, 33 Conn. L. Rev. 919, 923 (2001).

[3] Pub. L. No. 104-32, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

[4] See, e.g., Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 Buff. L. Rev. 381, 441 (1996) (arguing from legislative history that § 2254(d) was not "a radical shift from settled law").

[5] Williams v. Taylor, 529 U.S. 362, 412 (2000) (O'Connor, J.).

from invalidating state court decisions unless those decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[6] Simply put, AEDPA demands increased federal court deference to state court decisions.

AEDPA's deferential schema presents many interpretive problems even where the state court issues a reasoned opinion rejecting on the merits a prisoner's federal constitutional claim. These interpretive problems are compounded when, as often happens, a prisoner presents a federal constitutional claim to the state courts,[7] but the state court opinions denying relief do not address the federal claim.[8] This Note addresses the following problem: How should a federal court determine whether a state court decision was "contrary to, or involved an unreasonable application of clearly established federal law" when the federal court has no basis for confidence that the state court decided the federal question?[9] Should federal courts be required to defer to that which may not exist?

This question has fractured the circuit courts, which have adopted wildly different answers ranging from refusing to apply § 2254(d)(1) at all (in the First and Third Circuits)[10] to adopting an extremely deferential "results-not-reasoning" approach (in the Fourth Circuit),[11] and covering a variety of positions in between.[12] Given the extent of the variance among the circuit courts, and the fact that the basic problem

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6 28 U.S.C. § 2254(d)(1) (2001). Section 2254(d)(2) deals with federal court treatment of state court factual determinations and is outside the scope of this Note.

7 This scenario assumes that the prisoner properly exhausted her federal constitutional claims and correctly followed state procedural rules. See infra notes 38-40 and accompanying text.

8 A state court opinion may fail to address a federal claim if the state court applies an inadequate procedural bar, see infra note 40, issues a summary denial, or writes an opinion dismissing the claim on state law grounds without citing to federal law or state court decisions that rely on federal law. See infra Part II.A.

9 This Note uses the words "decision," "decide," and "review" interchangeably to reference the entire deliberative process, including identifying the relevant law, applying it to the facts, arriving at a determination, and reducing that determination to judgment. See Black's Law Dictionary 414 (7th ed. 1999) (defining "decision" as "judicial determination after consideration of the facts and the law"). A decision need not be accompanied by an opinion. An opinion, however, provides evidence that a decision—in the full sense described here—was actually made.

10 See infra Part III.A.1.

11 The "results-not-reasoning" approach takes the position that, under the Antiterrorism and Effective Death Penalty Act (AEDPA), federal courts owe deference to state court results no matter the state court's (lack of) reasoning. See infra Part III.A.2.

12 See infra Parts III.A.3 and III.B.

is unlikely to change,[13] the Supreme Court probably will have to resolve the question.

This Note argues that the Supreme Court should not require a federal court to defer to a state court decision unless that decision is accompanied by an opinion that actually discusses the federal claim. Part I analyzes the changes made by AEDPA to the federal habeas regime and concludes that § 2254(d) created a quasi-appellate relationship between federal habeas and state courts, placing a new premium on the reasoning of state court decisions. Part II describes the silent opinion and analyzes its interface with § 2254(d)'s "unreasonable application" clause. It argues that when a federal court finds that a state court decision, unaccompanied by any explanatory reasoning, fails to follow clearly established federal law, that decision should be construed as an "unreasonable application" of federal law. In Part III, the Note turns to the various circuit court resolutions of the problem of how and whether to give deference to a silent state court decision. Rather than advocating for any of the circuit court approaches, the Note presents a new framework for de novo review that comports with principles of federalism and comity, Congress's intent in enacting AEDPA, and Supreme Court precedent.

## I

## CHANGES IN THE FEDERAL HABEAS CORPUS REGIME

AEDPA changed both federal habeas procedure and the nature of the relationship between federal and state courts.[14] This Part lays the groundwork for an exploration of those changes.[15] Part A summarizes federal habeas law and the federal-state relationship prior to AEDPA's enactment. Part B explains AEDPA's amendments to the

[13] Structural factors provide strong incentives for state courts to issue silent decisions. See infra note 65.

[14] See, e.g., Anthony G. Amsterdam, Foreword to Randy Hertz & James S. Liebman, 1 Federal Habeas Corpus Practice and Procedure, at v (4th ed. 2001) (describing complex interactions between AEDPA and prior habeas law).

[15] A brief description of the process by which a state prisoner gets to federal habeas court is in order. Before a state prisoner can file a federal habeas petition, she must twice wend her way through the state courts and navigate a series of complex procedural requirements. See infra notes 38-40 and accompanying text (discussing exhaustion and procedural default). In the first phase, known as the direct appeal, the prisoner litigates violations of her state and federal rights to which she objected during her trial and which are apparent in the trial record. The prisoner must appeal these claims to the state's highest court and then may file a petition for writ of certiorari to the United States Supreme Court. In the second phase, known as "state postconviction" or "state habeas," the prisoner files a collateral proceeding in a state trial or appellate court. Once again, the prisoner must appeal all the way to the state's highest court and may seek certiorari from the United States Supreme Court. Once these steps have been completed, the prisoner may file a federal habeas petition.

habeas statute, focusing on § 2254(d), and examines how AEDPA's deference requirement affects the federal-state relationship.

### *A. The Old Regime: Federal Habeas Corpus in the Pre-AEDPA World*[16]

The federal writ of habeas corpus occupies a unique and important position in American jurisprudence.[17] Imported from English common law[18] and incorporated into the United States Constitution,[19] the Great Writ has been available since 1867 to allow state prisoners a collateral[20] means to challenge the constitutionality of their convictions.[21] In 1953, the Supreme Court explicitly declared in *Brown v.*

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[16] This section does not purport to offer anything other than the barest sketch of relevant habeas corpus history and procedure. For historical accounts of the development of the writ, see generally Wright v. West, 505 U.S. 277, 285-93 (1992) (plurality opinion) (Thomas, J.); id. at 297-301 (O'Connor, J., concurring) (criticizing Justice Thomas's historical account); Fay v. Noia, 372 U.S. 391, 399-414 (1963); Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty (2001); Hertz & Liebman, supra note 14, at 5-85; Mark M. Arkin, The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners, 70 Tul. L. Rev. 1 (1995); Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 463-500 (1963); Alan Clarke, Habeas Corpus: The Historical Debate, 14 N.Y.L. Sch. J. Hum. Rts. 375 (1998); Clarke D. Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079 (1995); James S. Liebman, Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 2055-94 (1992); Michael O'Neill, Esq., On Reforming the Federal Writ of Habeas Corpus, 26 Seton Hall L. Rev. 1493, 1495-1528 (1996); Gary Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.-C.L. L. Rev. 579, 602-63 (1982). For detailed descriptions of habeas corpus procedure, see generally Hertz & Liebman, supra note 14; John H. Blume & David P. Voisin, An Introduction to Federal Habeas Corpus Practice & Procedure, 47 S.C. L. Rev. 271 (1996).

[17] As Justice Frankfurter wrote in Brown v. Allen, "[t]he 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." 344 U.S. 443, 512 (1953). Justice Frankfurter termed habeas corpus "the basic safeguard of freedom in the Anglo-American world." Id.

[18] Habeas corpus is "a writ antecedent to statute, and throwing its root deep into the genius of [English] common law. . . . It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I." Fay v. Noia, 372 U.S. at 400 (internal quotations omitted). Blackstone called it "the most celebrated writ in the English law." 3 William Blackstone, Commentaries *129.

[19] U.S. Const. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[20] This Note uses the terms "collateral" and "collateral review" to refer generically to state and federal postconviction proceedings. For a skeletal description of the criminal appeals process, see supra note 15.

[21] Habeas Corpus Act, 14 Stat. 385 (1867) (expanding scope of writ to "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States"). The writ had been available to federal prisoners since

*Allen* that under the habeas corpus statute, the writ guaranteed a state prisoner de novo review in federal court of her federal constitutional claims, even though the state court had already decided those claims against the prisoner.[22] Federal habeas corpus has generated controversy ever since.[23]

Much of the habeas debate centers on concerns of finality,[24] federalism,[25] and comity,[26] and the extent to which a prisoner's interest in fairness and justice should outweigh those concerns.[27] Federal habeas provides an exception to preclusion rules that are strictly enforced in

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the passage of the Judiciary Act of 1789, 1 Stat. 73 (authorizing habeas corpus for federal prisoners only).

22 *Brown*, 344 U.S. at 465, 506 (Frankfurter, J.) ("State 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."). Note, however, that *Brown* did not break new ground in this respect. See Wright v. West, 505 U.S. 277, 299-300 (1992) (plurality opinion) (O'Connor, J., concurring) (noting that Supreme Court implicitly reached *Brown*'s holding as early as 1902 and explicitly did so in 1924). The Supreme Court has never had the opportunity to decide whether state prisoners have a constitutional right to postconviction proceedings in state court. Cf. Case v. Nebraska, 381 U.S. 336 (1965) (granting certiorari to decide question of constitutional right to state postconviction proceedings, but vacating and remanding because state enacted statute providing for postconviction relief). Nevertheless, at least since *Brown v. Allen*, courts and legislators (including AEDPA's sponsors, see infra notes 89-90, 92-93 and accompanying text) have proceeded on the assumption that state prisoners are guaranteed one full review of their properly presented federal constitutional claims.

23 See, e.g., Bator, supra note 16, at 499-519 (criticizing *Brown* and arguing that federal habeas courts should not review substance of prisoner's claims unless state court denied full and fair opportunity to litigate them in state court); Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) (arguing that prisoners who received full and fair hearing in state court should not be entitled to habeas review unless they can show a fair probability of innocence); O'Neill, supra note 16, at 1529 (contending that pre-AEDPA state of federal habeas law was destructive to federalism and comity interests); see also Barry Friedman, A Tale of Two Habeas, 73 Minn. L. Rev. 247, 339 (1998) ("Habeas since *Brown* has been under consistent attack by state judges, state officials, commentators, and legislators.").

24 Finality refers to the principle that the criminal process must have an end. See Barry Friedman, Failed Enterprise: The Supreme Court's Habeas Reform, 83 Cal. L. Rev. 485, 489 (1995) (defining finality, federalism, and comity).

25 Federalism refers to the states' role, as sovereign authorities in a federal system, in adjudicating guilt, innocence, and claims of constitutional right, see id., and to the problems arguably created by lower federal courts' supervision of the states' highest courts. See Friedman, supra note 23, at 335.

26 Comity is the idea that judges in coordinate judicial systems should respect each others' work, so federal courts should not interfere with state court adjudications of federal constitutional claims. See Friedman, supra note 23, at 335.

27 See Friedman, supra note 24, at 545-46 (noting that "fairness, federalism and finality often are at war with one another"); see also O'Neill, supra note 16, at 1534-35 (arguing that federalism and comity concerns should outweigh fairness concerns); Larry W. Yackle, The Figure in the Carpet, 78 Tex. L. Rev. 1731, 1758-59 (2000) (arguing that fairness concerns should outweigh federalism and comity concerns).

other contexts;[28] it allows state prisoners to relitigate federal constitutional claims, even if those claims have already been fully litigated in state court. This relitigation protects vital interests of fairness and justice by providing a last avenue of relief for those who have been unjustly imprisoned in violation of their constitutional rights.[29] But it also conflicts with the states' interests in enforcing their own criminal laws, correcting their own mistakes, and disciplining their own state actors.[30] Relitigation also signals distrust of state judicial procedures and therefore, to some extent, it undermines the federalist principle that the states are coequal sovereigns, fully ready to abide by their constitutional duty to protect and enforce federal constitutional rights.[31]

Since 1948, the federal habeas corpus statute has included an exhaustion requirement, which furthers federalism and comity interests by giving state courts every possible opportunity to pass on the merits of federal constitutional claims before allowing federal court review.[32] However, prior to AEDPA, once a prisoner exhausted her claims, the

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[28] Brian M. Hoffstadt, How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus, 49 Duke L.J. 947, 994 (2000) ("Unlike most civil actions, habeas is not subject to the general rule of res judicata that would otherwise preclude a collateral attack on a state judgment of conviction."). Fourth Amendment claims are an exception to the exception; under the rule of Stone v. Powell, 428 U.S. 465, 481-82 (1976), a state prisoner cannot litigate a Fourth Amendment claim on federal habeas unless she can prove that the state courts denied her a full and fair opportunity to do so.

[29] Some courts and commentators have argued that federal habeas also furthers a federal interest in protecting a prisoner's right to litigate federal claims in federal forums. See, e.g., Fay v. Noia, 372 U.S. 391 (1963) (creating right for state prisoner to litigate procedurally defaulted claims in federal habeas, unless prisoner deliberately bypassed state procedural rules), overruled by Coleman v. Thompson, 501 U.S. 722 (1991); Henry M. Hart, Jr., The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 106-07 (1959) (describing principles that state prisoner should have right to litigate federal claims in federal court and that where Supreme Court denies certiorari on direct appeal, review should take place in federal habeas); Yackle, supra note 27, at 1769 (advocating return to Warren Court principles recognizing right to "litigate federal claims in federal court"). But others have disputed the idea that any such right exists. See Evan Tsen Lee, The Theories of Federal Habeas Corpus, 72 Wash. U. L.Q. 151, 191-92 (1994) (presenting historical argument against this theory); Joseph L. Hoffman & William J. Stuntz, 1993 Sup. Ct. Rev. 65, 81-85 (contesting right to litigate federal claims in federal court because there "is only one criminal justice system, enforcing one set of criminal procedure rights, and that system includes both state and federal courts").

[30] See, e.g., Bator, supra note 16, at 503-06 (arguing that, because of important federalism concerns, federal courts should not grant habeas relief where state provided full and fair process for reviewing federal constitutional claim).

[31] U.S. Const. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.").

[32] The Supreme Court first developed the exhaustion requirement in Ex parte Royall, 117 U.S. 241, 252-53 (1886), to address federalism and comity concerns; Congress codified it in 1948. The provision read:

statute placed no limitation on a federal court's ability to review legal claims de novo.[33] Thus, the old statute allowed a broad, expansive review in the federal courts as long as the state courts had an opportunity to decide an issue first.[34]

Some commentators argue that this statutory structure had the federalism balance about right.[35] After all, they argue, the Supremacy Clause itself contemplates that friction will arise between the state and federal systems,[36] and when it does, the federal system must prevail.[37] The Burger and Rehnquist Courts have had a different view, however.

Four doctrines, as developed by the Burger and Rehnquist Courts, have proved particularly devastating to state prisoners seeking habeas relief: exhaustion, procedural default, nonretroactivity, and harmless error. Under current exhaustion doctrine, a prisoner must

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(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(b)-(c) (2001).

33 Unless one of eight statutory exceptions applied, the old § 2254(d) mandated that federal courts presume state court factual findings to be correct. 28 U.S.C. § 2254(d) (1994) (amended 1996).

34 The expansion of the writ reached its apogee in a trio of cases in 1963. See Sanders v. United States, 373 U.S. 1, 16-17 (1963), overruled in part by McCleskey v. Zant, 499 U.S. 467, 495 (1991) (allowing state prisoner to present successive habeas petition unless state prisoner had deliberately abandoned claim at earlier stage); *Fay*, 372 U.S. at 438-40 (allowing prisoner to litigate procedurally defaulted claims unless prisoner "deliberately bypassed" state procedures), overruled by *Coleman*, 501 U.S. at 744-45; Townsend v. Sain, 372 U.S. 293 (holding that federal habeas courts must conduct evidentiary hearing where prisoner did not get full and fair opportunity to develop facts in state court unless prisoner deliberately bypassed state procedures), 311-13, 317-18 (1963), overruled by Keeney v. Tamayo-Reyes, 504 U.S. 1, 5-6, n.2 (1992).

35 See Yackle, supra note 27, at 1770.

36 U.S. Const., art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

37 See Friedman, supra note 24, at 535 ("[S]upremacy of federal law, after all, is the cost of a federal system."); see also *Ex parte Royall*, 117 U.S. at 253 (

> [W]hile it might appear unseemly that a prisoner, after conviction in a State court, should be set at liberty by a single judge on habeas corpus, there was no escape from the act of 1867, which invested such judge with power to discharge when the prisoner was restrained of his liberty in violation of a law of the United States.).

exhaust state remedies by presenting the "substance of his claim"[38] to the state's highest court, even if review in that court is discretionary.[39] Separate from exhaustion is the doctrine of procedural default, which bars prisoners from litigating claims in federal habeas proceedings if the state courts already dismissed the claims in reliance on an "adequate and independent" state procedural ground, such as a failure to make a timely objection.[40] In addition to these limitations on relief, a state prisoner must show that her claim is not barred by the nonretroactivity doctrine of *Teague v. Lane*, which holds that, unless one of two narrow exceptions applies, a federal habeas court may not adjudicate claims that would require the court to make a "new rule" of constitutional law.[41] Finally, even if a prisoner successfully surmounts these procedural hurdles and a federal court finds a constitutional violation, harmless error doctrine dictates that she will not get relief on most claims unless she can show that the constitutional violation had a "substantial and injurious effect or influence in determining the jury's

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[38] Vasquez v. Hillery, 474 U.S. 254, 258 (1986) (citing Picard v. Connor, 404 U.S. 270, 278 (1971)).

[39] See supra note 32. For a detailed description of exhaustion doctrine, see Hertz & Liebman, supra note 14, at 941-1007.

[40] The Supreme Court established the modern doctrine of procedural default in Wainwright v. Sykes, 433 U.S. 72, 84-87 (1977), and cemented it in Coleman v. Thompson, 501 U.S. 722, 750 (1991). For a partial list of the kinds of trial errors that can lead to a procedural default, see Hertz & Liebman, supra note 14, at 1133-34 n.2 (listing failure to comply with state procedural requirements for form, content, or timing of pretrial motions, trial objections, posttrial motions, etc.).

> Generally, federal courts will excuse a procedural default if a prisoner can show that: (1) the state ground was inadequate (for example, if the state applies a rule that is not regularly followed by the state courts, or that was not in place at the time of the procedural default); (2) the state ground was not "independent" (for example, if resolution of the state law question depends on federal constitutional law); (3) she has cause for the default and actual prejudice flowing from the alleged constitutional violation; or (4) application of the procedural bar would cause a fundamental miscarriage of justice. Each of these categories gives rise to its own complex body of law, which is beyond the scope of this Note. For an exhaustive account of the adequate and independent state ground doctrine, see generally Hertz & Liebman, supra note 14, at 1133-1240.

[41] The exceptions are (1) when the primary conduct underlying the conviction or sentence is protected by the Constitution; and (2) when the rule implicates principles of fundamental fairness "implicit in the concept of ordered liberty." Id. at 1116; see also Penry v. Lynaugh, 492 U.S. 302, 329-30 (1989) (placing rule that execution of persons with mental retardation violates Eighth Amendment into first exception). A "new rule" is one that would "break[ ] new ground impose[ ] a new obligation on the States or the Federal Government." Teague v. Lane, 489 U.S. 288, 310, 316 (1989).

verdict."[42] The Supreme Court justified all of these procedural rules by employing tropes of finality, federalism, and comity.[43]

Despite their propensity to erect ever-higher procedural barriers to relief, the Burger and Rehnquist Courts never seriously questioned the right (and duty) of federal courts to review de novo a state prisoner's properly presented federal constitutional claim.[44] From *Brown v. Allen* until the passage of AEDPA, federal courts deferred to state courts on the facts, but they always reviewed legal questions de novo.[45]

### *B. The New Regime: Federal Habeas After AEDPA*

AEDPA changed the landscape of federal habeas in important ways.[46] This Note focuses on the introduction of § 2254(d), which

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[42] Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). This standard is much stricter than the harmless error standard used on direct review, which requires the prosecution to prove that the error was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24 (1967). Few habeas petitioners can surmount harmless error review under *Brecht*. See *Brecht*, 507 U.S. at 628-29, 639 (holding that prosecutor's blatant comment on prisoner's post-*Miranda* silence did not have substantial and injurious effect on jury's verdict). However, harmless error analysis only applies to "trial errors," i.e. those errors that can be corrected by appropriate jury instructions, and does not apply to structural errors that undermine the fundamental fairness of the trial itself. See Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991) (distinguishing trial errors from structural errors).

[43] See, e.g., O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999) (creating strict exhaustion rule because comity "dictates that . . . state courts should have the first opportunity to review this claim and provide any necessary relief"); *Brecht*, 507 U.S. at 635 (justifying strict harmless error standard by reference to state's interest in finality, federalism, and comity); *Coleman*, 501 U.S. 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."); McCleskey v. Zant, 499 U.S. 467, 493 (1991) (stating that doctrine of procedural default is "designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time" and "seek[s] to vindicate the State's interest in the finality of its criminal judgments"); *Teague*, 489 U.S. at 309 (justifying nonretroactivity doctrine with finality-related ideas).

[44] The standard-of-review question briefly arose in 1992 when Justice Thomas, writing for a three-judge plurality in *Wright v. West*, invited the Court to impose reasonableness review of mixed questions. 505 U.S. 277, 294 (1992) (plurality opinion). Six justices refused this invitation. As Justice O'Connor wrote, "We have [not] held in the past that . . . a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." Id. at 305 (O'Connor, J., concurring); see also id. at 309 (Kennedy, J., concurring) ("I would not interpret *Teague* as calling into question the settled principle that mixed questions are subject to plenary review on federal habeas corpus."). The standard-of-review question did not arise again until AEDPA's enactment.

[45] See Miller v. Fenton, 474 U.S. 104, 112 (1985).

[46] Among the changes, Congress tightened the exhaustion requirement, § 2254(b); imposed a one-year statute of limitations for the filing of habeas corpus petitions, § 2244(d); strictly limited the circumstances under which a federal court may conduct an evidentiary hearing, § 2254(e)(2); banned successive petitions unless a prisoner can meet one of two

prohibits federal courts, in most circumstances,[47] from engaging in de novo review of a state prisoner's claims. This section provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> (1) 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.[48]

Many questions surround the operation of this provision. Some are definitional: for example, what is the meaning of "adjudication on the merits"[49] or "unreasonable application"?[50] Others concern the scope of federal court review, like whether a federal habeas court should make an independent determination of the existence of a constitutional violation,[51] or whether a federal habeas court should consider only the result, and not the reasoning, of a state court decision.[52]

The Supreme Court has not decided these questions, but it did clarify some of § 2254(d)'s most basic elements in a recent opinion,

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very narrow exceptions, § 2244(b); placed new limits on appellate review, § 2253(b)-(c); and created a new chapter specifically devoted to the adjudication of capital cases, §§ 2261-66. 28 U.S.C. §§ 2244, 2253-54, 2261-66. These changes are beyond the scope of this Note.

[47] Under § 2254(d), a federal court still may conduct de novo review if the state court applied an inadequate procedural bar to a state prisoner's claim. See infra note 68.

[48] § 2254(d). At first, courts and commentators disputed the meaning of this provision. Some saw (or wanted to see) it as retaining de novo review. See, e.g., Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc) ("Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails."), rev'd on other grounds, 521 U.S. 320 (1997). Others thought that § 2254(d) radically restricted federal habeas review. See, e.g., Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996) ("[W]e can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists."); Kent S. Scheidegger, Habeas Corpus, Relitigation and the Legislative Power, 98 Colum. L. Rev. 888, 890 (1998) ("Enactment of this landmark reform has touched off a mad scramble to try to somehow salvage de novo review despite its repudiation by Congress."). As it turned out, § 2254(d) did significantly alter federal habeas review, though not as dramatically as some predicted. See Van Tran v. Lindsey, 212 F.3d 1143, 1153 (9th Cir.), cert. denied, 531 U.S. 944 (2000) (describing Supreme Court's approach as occupying "middle ground" because it "rejected the arguments of those who contended that an independent determination of prejudicial error by a federal court was sufficient and of those who argued for the overly deferential 'reasonable jurists' standard").

[49] See infra Part III.A.1.

[50] See infra Part II.B.

[51] See infra notes 124-27 and accompanying text. A closely related question, which this Note does not address, concerns whether the § 2254(d) inquiry functions as a threshold question (like *Teague* nonretroactivity) or a bar to relief (like harmless error).

[52] See infra notes 130-33 and accompanying text.

*Williams v. Taylor*.[53] Under *Williams*, a state court decision is "contrary to" clearly established federal law if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if it confronts a set of facts materially indistinguishable from a relevant Supreme Court precedent and yet arrives at a different result.[54] A state court decision is an "unreasonable application of" clearly established federal law if it correctly identifies the governing legal rule but unreasonably applies it to the facts of a particular case.[55] The "clearly established federal law" requirement limits the universe of applicable law to the holdings, and not the dicta, of the United States Supreme Court.[56] Importantly, an unreasonable decision is different from a merely incorrect or erroneous decision; a state court's decision can be wrong but still be reasonable.[57]

Section 2254(d) thus changed federal habeas review in two important ways: First, it created a deferential standard of review based on reasonableness;[58] second, it strictly limited the universe of applicable law to the holdings of the Supreme Court.

In making this shift, § 2254(d) does more than simply make it more difficult for federal courts to grant habeas petitions from state prisoners. This provision changes the very nature of the relationship between federal habeas courts and state courts. Prior to AEDPA, the Supreme Court required federal courts to honor state procedural rules

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53 Williams v. Taylor, 529 U.S. 362 (2000). *Williams* was a fractured opinion, in which Justice O'Connor wrote for the Court on the question of § 2254(d)'s *interpretation*, but Justice Stevens wrote for the Court on the question of § 2254(d)'s *application*. *Williams* has a companion case, also captioned *Williams v. Taylor*, which interprets the standard for obtaining evidentiary hearings under 28 U.S.C. § 2254(e)(2). See generally Williams v. Taylor, 529 U.S. 420 (2000).

54 *Williams*, 529 U.S. at 405.

55 Id. at 409.

56 Id. at 412.

57 Id. The Supreme Court did not further define the meaning of "unreasonable" other than to say that the state court decision must be "objectively unreasonable," id. at 409, and to reject the Fourth and Fifth Circuit's "subjective" approach, which would have granted relief only when the state court applied federal law "in a manner that reasonable jurists would all agree is unreasonable." Id. at 409-10. Although the circuit courts have struggled to define unreasonableness, see infra note 77, some courts have denied habeas relief when they found that the state court's decision was wrong, but not unreasonably so. See, e.g., Sellan v. Kuhlman, 261 F.3d 303, 310, 315-17 (2d Cir. 2001) (stating that although court would have found petitioner's appellate counsel constitutionally ineffective for failing to raise meritorious state law claim, state court was not unreasonable in determining that appellate counsel was not constitutionally ineffective because she had strategic reason for failing to raise claim).

58 Noting that the "contrary to" and "unreasonable application" clauses must be given independent meaning, Justice O'Connor explicitly rejected the portion of Justice Stevens' opinion advocating de novo review. *Williams*, 529 U.S. at 403-04. In the *Williams* scenario, however, the state court issued an opinion.

as adequate and independent state grounds for denying relief[59] and it forbade habeas courts from instituting new rules of constitutional law.[60] Nevertheless, under the old statute, once a claim surmounted procedural obstacles and a federal court faced it squarely on the merits, the federal court owed no allegiance to the state court legal determinations.[61] Federal habeas—at least with respect to questions of law—was viewed as an entirely separate proceeding; it was as if the state court determination did not exist. After AEDPA, all that changed.

The fact that a federal court must review and defer to the state court decision places a new premium on the state court's reasoning.[62] A federal court now must scrutinize what the state court actually did: What were the facts; what law did the state court choose; how did it apply the law to the facts; and were its choices reasonable? With all this focus on the forum below, the federal habeas court no longer acts like the independent court of old, but instead has acquired a quasi-appellate relationship to the state court, most analogous to an appellate court's role in applying clear error and abuse of discretion standards.[63] This quasi-appellate structure becomes problematic when a federal court must review a silent state court opinion.

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[59] See supra note 40 and accompanying text.

[60] See supra note 41 and accompanying text.

[61] See supra note 45 and accompanying text.

[62] Judge Guido Calabresi has argued that "AEDPA runs the risk of imposing a heavy, and sometimes unwanted and unmanageable, burden on State courts" because it "require[s] extremely busy State court judges to figure out what can be very complicated questions of federal law at the pain of having a defendant incorrectly stay in prison should the State court decision of these complex questions turn out to be mistaken (but not unreasonably so)." Washington v. Schriver, 255 F.3d 45, 62 (2d Cir. 2001) (Calabresi, J., concurring). See also *Williams*, 529 U.S. at 391-99 (Stevens, J.) (applying § 2254(d) to state court decision and relying heavily on state court's reasoning to reach conclusion that decision was both "contrary to" and "unreasonable application of clearly established federal law"); id. at 413-16 (O'Connor, J., concurring) (same).

[63] These doctrines provide a close analogue because they require federal appellate courts to accord deference to district court determinations on questions of law. See Van Tran v. Lindsey, 212 F.3d 1143, 1151-53 & n.14 (9th Cir.) (searching for analogues to reasonableness review under AEDPA, rejecting administrative agency and qualified immunity doctrines, and deciding that best analogy to accommodate federalism concerns is "clear error" doctrine governing appellate review of district courts in context of mandamus petitions and "law of the case"), cert. denied, 531 U.S. 944 (2000); James S. Liebman & William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking That Article III and the Supremacy Clause Demand of the Federal Courts, 98 Colum. L. Rev. 696, 882 (1998) (describing § 2254(d) inquiry as "a manifestly appellate determination"). Of course, the analogy is not perfect because lower federal courts do not have direct authority over state courts. See Hoffstadt, supra note 28, at 998 (noting that "while the analogy between federal habeas and direct appeal is a strong one, it is not perfect," in part because "habeas review is conducted by courts of a different sovereign").

## II
## THE PROBLEM: ENTER THE SILENT STATE COURT OPINION

Silent opinions[64] have always been a feature of state courts' resolutions of prisoners' claims in both direct and collateral proceedings.[65]

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This conception of an appellate-like relationship between federal habeas courts and state courts differs from the "appellate model" of federal habeas proposed by some commentators. See generally Friedman, supra note 23; Liebman, supra note 16. Prior to AEDPA, advocates of the appellate model contended that federal habeas courts acted as surrogates for the Supreme Court, providing the direct review of criminal convictions that the Supreme Court could not because of docket constraints. See Friedman, supra note 23, at 254 (classifying habeas review in federal district court as "surrogate[ ] for the United States Supreme Court . . . executing appellate jurisdiction over state criminal proceedings"); Liebman, supra note 16, at 2055 (stating that federal habeas corpus provides "a *limited* and *substitute* federal writ of error or appeal as of right"). This Note does not argue that federal habeas is intended to substitute for direct review by the Supreme Court; it simply observes that the duty of scrutinizing state court opinions imposed by AEDPA on federal habeas courts seems most analogous to the role of an appellate court in reviewing a lower court decision for clear error or abuse of discretion.

64 A "silent opinion" is a decision that is unaccompanied by explanatory reasoning, either because the state court applies an inadequate procedural bar, see supra note 40, because it denies the petition summarily, or because it resolves a federal claim on substantive state law grounds without reference to federal constitutional law. See infra notes 68-70 and accompanying text.

65 It is difficult to quantify the percentage of state court opinions that remain silent as to at least one federal claim because not all states release statistics distinguishing summary denials from reasoned ones, and not all summary denials dispose of properly presented federal constitutional claims. In addition, without access to the briefs and petitions actually filed by state prisoners, it is impossible to quantify how often a prisoner raises a federal constitutional claim that goes unresolved by the state courts. But the incidence of silent opinions is probably quite high. For instance, in fiscal year 1999-2000, Wisconsin issued written opinions in only thirty-nine percent of its criminal appeals, and California disposed of about twenty percent of its criminal appeals without issuing a written opinion. See 2001 Court of Appeals—Case Load Statistics, http://www.courts.state.wi.us/html/ca/CA01_AR.htm (last visited April 5, 2002); Judicial Council of Cal., Dispositions of Appeals Fiscal Years 1998-99 and 1999-2000, in 2001 Annual Report, http://www.courtinfo.ca.gov/reference/documents/csr2001.pdf; see also Victor E. Flango & Patricia McKenna, 31 Cal. W. L. Rev. 237, 272 (1995) (conducting empirical study of federal habeas corpus proceedings in four states and noting that "state courts typically do not give reasons for denial").

Structural factors provide strong incentives for state courts to issue silent opinions. Overburdened state judicial systems issue postcard denials because they simply lack the resources to write a full opinion in every case. In collateral proceedings in some states, where the original trial judge often adjudicates the state habeas petition, the judge can deny many claims without legal analysis based on his memory of the trial. See, e.g., Holloway v. State, CR00-1400, 2002 WL 126964, at *2 (Ala. Crim. App. Feb. 1, 2002) (remanding for specific factual findings, but not legal analysis, where state postconviction judge, who had also supervised trial, summarily dismissed ineffective assistance of counsel claim based on his recollection of trial). In some states, the assistant attorney general arguing the case for the state provides the trial judge with a detailed proposed order, resolving all claims against the prisoner; the trial judge often adopts this order wholesale. See, e.g., Weeks v. State, 568 So. 2d 864, 865 (Ala. Crim. App. 1989) (noting "circuit court's verbatim adop-

Prior to AEDPA, however, these opinions did not matter to federal habeas courts because they did not have to review state court reasoning; federal habeas courts decided legal and mixed questions de novo.[66] In contrast, under AEDPA's § 2254(d), silent opinions present a problem: Section 2254(d) requires the federal court to assess the state court's reasoning, but the federal court cannot perform this inquiry when the state court's reasoning is not apparent and may not exist at all. This Part lays the groundwork for the analysis that will be presented in Part III by exploring the uneasy interface between silent state court opinions and § 2254(d)'s deference requirement. Part II.A identifies three types of silent state court opinions and explains why they create a problem for federal habeas courts. Part II.B argues that, based on its statutory text and legislative history, § 2254(d) does not preclude a de novo approach to reviewing the silent state court opinion.

### *A. The Problem of the Silent Opinion*

There are three main circumstances in which a state court might fail to issue an opinion with respect to a prisoner's properly presented federal constitutional claim. First, a state court might apply an inadequate procedural bar[67] to deny review of a claim.[68] Second, a court may summarily deny a petition.[69] Third, a state court might issue an

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tion of the State's proposed findings of fact and conclusions of law" and issuing "a caution" against this practice); Goad v. State, 839 S.W.2d 749, 751 (Mo. App. 1992) (finding no error where trial court adopted verbatim state's proposed order before prisoner timely filed his order, but noting that "preferable practice" is for court to prepare its own order "so as to better insure that all issues raised are addressed and that erroneous allegations of a fact or law made in a state's motion are not incorporated in a court order"); State v. Stewart, CA-76268, 2000 WL 776988, at *3 (Ohio App. June 15, 2000) (observing that trial court adopted verbatim proposed order submitted by state). Because state attorneys generally lack expertise in federal constitutional law, but have a great deal of familiarity with state criminal law, these opinions are particularly likely to resolve federal constitutional issues without discussing federal law.

66 See supra notes 45-46 and accompanying text.

67 For a definition, see supra note 40.

68 See, e.g., Walker v. Gibson, 228 F.3d 1217, 1231-32 & n.6 (10th Cir. 2000) (explaining that state court did not review claim on merits because it applied inadequate procedural bar). The deferential standard of § 2254(d) does not apply to this category of silent opinions because when a state applies an inadequate procedural bar, it by definition did not issue an "adjudication on the merits" for purposes of § 2254(d). Id.; Moore v. Parke, 148 F.3d 705, 708 (7th Cir. 1998) (same).

69 See, e.g., Sellan v. Kuhlman, 261 F.3d 303, 308 (2d Cir. 2001) (noting that federal court had no state court opinion to review because New York lower court summarily denied Sellan's petition and higher courts refused him leave to appeal); Delgado v. Lewis, 181 F.3d 1087, 1091 n.2 (9th Cir. 1998) [hereinafter *Delgado I*] (explaining that federal court had no state court opinion to review because California Court of Appeals affirmed Delgado's conviction without opinion, California Supreme Court summarily denied re-

opinion that rejects a petitioner's claim on state law grounds, ignoring the federal constitutional claim altogether.[70] Although these different categories of silent opinions may raise different questions about what happened at the state level, from the perspective of the federal habeas court they present the same problem. Specifically, *Williams* requires a federal court to review whether the state court identified the appropriate "clearly established federal law" and whether the state court reasonably applied the law to the facts.[71] The circuit courts agree that a federal court cannot perform this analysis in the face of a silent record.[72] The kind of analysis a federal court should conduct instead, however, remains a hotly contested question.[73]

### B. *Interpreting § 2254(d)'s "Unreasonable Application" Clause as Applied to Silent State Court Opinions*[74]

Unfortunately, the text of § 2254(d) provides little guidance as to how a federal court should treat the silent state court opin-

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view, and California Supreme Court denied state habeas petition without issuing opinion), vacated by 528 U.S. 1133 (2000), aff'd on remand, 223 F.3d 976 (9th Cir. 2000) [hereinafter *Delgado II*]. A typical summary denial might read, "The petition filed on [date] is denied for failure to state a claim upon which relief can be granted." See, e.g., Bell v. Jarvis, 236 F.3d 149, 158, 176 (4th Cir. 2000) (en banc), cert. denied, 122 S.Ct. 74 (2001) (quoting two summary denials). In a variant on the summary denial, courts sometimes write opinions on some claims, but summarily deny other claims, stating something like "the court has considered Petitioner's remaining claims and finds them to be without merit." See, e.g., Lakin v. Stine, 151 F. Supp. 2d 824, 826 (E.D. Mich. 2001) (noting this practice).

70 See Aparicio v. Artuz, 269 F.3d 78, 94 (2d Cir. 2001) (noting that New York court denied relief on ineffective assistance of counsel claim "without mentioning the Sixth Amendment or relevant case law"); Doan v. Brigano, 237 F.3d 722, 729-30 (6th Cir. 2001) (recounting that even though Doan raised Sixth Amendment claim in his brief, Ohio state court "did not address" it and "did not even identify in its opinion that Doan had a federal constitutional right to a fair and impartial jury," instead denying relief pursuant to state evidentiary rules).

71 See supra notes 54-57 and accompanying text.

72 See, e.g., Bacon v. Lee, 225 F.3d 470, 478 (4th Cir. 2000) ("[B]ecause we have no indication of how the state court applied federal law to the facts, we must necessarily perform our own review of the record." (internal quotations and alterations omitted)); *Delgado II*, 223 F.3d at 981 ("Our examination of the state court's decision is impeded in this case because no rationale for its conclusion was supplied. Thus, we cannot perform our evaluation under the models suggested by Justice O'Connor in *Williams*.").

73 See infra Part III.

74 Silent state court opinions do not fit comfortably into the "contrary to" clause because that clause is reserved for instances where the state court applied law that is "diametrically different," "opposite in character or nature," and "mutually opposed" to Supreme Court precedent. Williams v. Taylor, 529 U.S. 362, 406 (2000) (O'Connor, J.). In most cases, the federal court will not know enough about what happened at the state level to be able to assert that the state court misunderstood the law to this extent. See also infra note 111 (discussing reasons why Supreme Court will not endorse approach of Eleventh Circuit, which reviews some types of silent state court opinions under "contrary to" clause).

ion.[75] A federal court faced with a silent state court opinion must go through a two-step process of adjudication. First, the federal court must decide whether the denial constituted an "adjudication on the merits"—that it was not dismissed on procedural grounds[76]—and then it must undertake the reasonableness inquiry. Once the federal court decides that there was no procedural basis for the state court denial, however, its job becomes very difficult, if not impossible. The language of § 2254(d) appears to assume that the federal court will have before it an opinion that at least mentions what law the state court applied; nowhere does the statute explain how, in the absence of any clue from the state court, or any evidence that a state court applied federal law at all, the federal court should decide whether an "unreasonable application" of federal law occurred. In the context of a silent opinion, the meaning of "unreasonable application" is unclear.[77]

Courts have split in numerous ways over whether and how to apply the phrase "unreasonable application" to a silent state court opinion. Some courts have determined not to apply it at all;[78] some have applied it to certain types of silent opinions but not others;[79] some have determined that the phrase mandates an approach of extreme

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[75] As the Supreme Court famously remarked about AEDPA, "[I]n a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." Lindh v. Murphy, 521 U.S. 320, 336 (1997).

[76] Some debate exists as to whether a silent state court opinion can constitute an "adjudicat[ion] on the merits" for purposes of § 2254(d), and some courts have decided that it cannot. See infra Part III.A.1; Brittany Glidden, When the State is Silent: An Analysis of AEDPA's Adjudication Requirement, 27 N.Y.U. Rev. L. & Soc. Change 177 (2001-2002). However, this Note takes the position that "adjudicated on the merits" is a term of art that means "not dismissed on procedural grounds." See Part III.A.1. For a description of procedural bars, see supra note 40 and accompanying text.

[77] In fact, the "unreasonable application" clause produces problems of definition and interpretation even when applied to standard state court opinions. See, e.g., Francis v. Stone, 221 F.3d 100, 109 n.12 (2d Cir. 2000) ("Justice O'Connor took some comfort in the fact that 'unreasonable' is 'a common term in the legal world and, accordingly, federal judges are familiar with its meaning.' . . . The difficulty, of course, is that we are familiar with its many meanings in the different contexts in which the word (or its antonym) is used." (quoting *Williams*, 529 U.S. at 410)); *Williams* 529 U.S. at 410 ("The term 'unreasonable' is no doubt difficult to define."). Before *Williams*, the circuits had split over the meaning of "unreasonable application." See supra note 48. And even after *Williams*, the circuit courts have produced several different definitions of unreasonableness. See, e.g., *Francis*, 221 F.3d at 111 (defining unreasonableness as "some increment of uncorrectness beyond error" but cautioning that "the increment need not be great"); Van Tran v. Lindsey, 212 F.3d 1143, 1152 (9th Cir. 2000), cert. denied, 531 U.S. 944 (2000) (deciding that "unreasonableness" is synonymous with "clear error"); Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997) (defining unreasonable decision as not "minimally consistent with the facts and circumstances of the case"). The fact that circuit courts cannot agree on how to identify an "unreasonable application" in a standard opinion further underscores the ambiguity of the phrase as applied to silent opinions.

[78] See infra Part III.A.1.

[79] See infra Part III.A.3.

deference in all situations;[80] and some have carved out a position in the middle.[81] The breadth and variety of circuit court "solutions" to this problem is itself evidence of § 2254(d)'s ambiguity.

Because AEDPA's statutory text is unclear as applied to silent state court opinions, we should look to the intent of Congress—insofar as Congress had any discernible intent—for guidance in interpreting its strictures.[82] In considering congressional intent, however, it is important to keep in mind the circumstances surrounding AEDPA's enactment. AEDPA was a hastily drafted statute, enacted as part of a highly politicized legislative response to the Oklahoma City bombing in 1995.[83] This tragic event offered AEDPA's drafters an opportunity to capture the votes of those who were opposed to habeas reform but who could not afford to oppose the massively popular antiterrorism legislation.[84]

In passing AEDPA, Congress had multiple goals. Certainly one aim was to curb what AEDPA's drafters saw as abuses of the writ by death-row prisoners and individual federal judges.[85] The introduction of a statute of limitations and the strict limits on successive petitions

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[80] See infra Part III.A.2.

[81] See infra Part III.A.4.

[82] Unfortunately, AEDPA generated little legislative history and nothing that speaks directly to the issue of silent opinions. AEDPA spawned exactly one official document, the Conference Committee Report. H.R. Conf. Rep. No. 104-518 (1996) [hereinafter CCR]. This Note relies on that report, as well as statements made by legislators during floor debates in both houses. This Note recognizes that at least two justices, Justice Thomas and Justice Scalia, eschew the use of legislative history to inform statutory interpretation. See generally Antonin Scalia, Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation 17 (Amy Gutmann ed., 1997). However, a majority of the Court finds legislative history helpful when the plain meaning of a statute is unclear. See, e.g., *Williams*, 529 U.S. at 378 n.10, 408 n.* (using legislative history to interpret AEDPA).

[83] Michael B. Slade, Note, Democracy in the Details: A Plea for Substance over Form in Statutory Interpretation, 37 Harv. J. on Legis. 187, 229-31 (2000) (describing relationship between Oklahoma City bombing and AEDPA).

[84] See, e.g., 142 Cong. Rec. S3681-02 (daily ed. Apr. 18, 1996) (statement of Sen. Wellstone) (stating that he is "still profoundly opposed" to habeas corpus provisions, but he will vote for bill because "[t]here is much in this bill that is good, that will address concerns Minnesotans have expressed to me"). Prior to the bombing, AEDPA's drafters had been attempting to enact habeas reform legislation, without success, for over forty years. Yackle, supra note 4, at 423-32 (describing unsuccessful attempts to enact habeas reform dating from mid-1940's and continuing until passage of AEDPA).

[85] The Conference Committee report explains AEDPA's purposes as follows:

> This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases. It sets a one year limitation on an application for a habeas writ and revises the procedures for consideration of a writ in federal court. It provides for the exhaustion of state remedies and requires deference to the determinations of state courts that are neither "contrary to," nor an "unreasonable application of," clearly established federal law.

support this goal. Congress also wanted to increase deference to state court decisions. Section 2254(d)(1) furthers this goal.

But Congress had another objective as well: to retain meaningful federal court oversight of state court decisions on federal constitutional questions. This goal is reflected in one major change Congress chose *not* to make to the prior habeas statute. Congress explicitly rejected an amendment that would have allowed federal review only where the state court provided an unfair process for litigating federal constitutional claims.[86] The amendment effectively would have ended federal court review of the substance of state court determinations.[87] By choosing to preserve substantive federal court review, Congress signaled that it wanted the federal courts to continue their longstanding practice of protecting prisoners' federal constitutional rights where the state courts failed to do so.

Legislative history reveals that AEDPA intended to adjust the balance between state and federal courts, not strip prisoners of their right to meaningful review of their federal constitutional claims.[88] In enacting AEDPA, Congress assumed that a state prisoner reaches fed-

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CCR, supra note 82, at 111. The Joint Explanatory Statement of the Conference Committee Report contains two additional paragraphs, but they refer to the special habeas provisions for capital cases, 28 U.S.C. §§ 2261-66 (2001), and are not relevant to this Note. See CCR, supra. note 82. AEDPA's supporters made no secret of the fact that they wished to streamline habeas procedures so that convicted murderers could be executed faster. See, e.g., 142 Cong. Rec. S3471 (daily ed. Apr. 17, 1996) (statement of Sen. Specter) (bemoaning "periods of lengthy delay in carrying out death sentences"); 142 Cong. Rec. H3606 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde) ("[I]n death penalty cases, it normally takes 8 years to exhaust the appeals. It is ridiculous, 8 years is ridiculous; 15 and 17 years is even more so.").

[86] 141 Cong. Rec. S7828-29, S7849 (daily ed. June 7, 1995) (amendment of Sen. Kyl) ( Notwithstanding any other provision of law, an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment or order of a State court shall not be entertained by a court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention.).

[87] See id. at S7829. The real purpose of the Kyl Amendment was to end federal habeas corpus. Senator Kyl characterized his amendment this way: "A State court prisoner adjudicates his claims in the State court. The only time the state prisoner can go to a Federal court is from an ultimate appeal to the U.S. Supreme Court." Id.; see also Yackle, supra note 4, at 399-400 (explaining that Kyl Amendment would have left most state prisoners with only one federal forum, appellate review by Supreme Court, and that Congress "fully appreciated this point" when they rejected it).

[88] See, e.g., H.R. Conf. Rep. No. 104-23, at 9 (1995) (emphasizing that Congress wanted to "curb the lengthy delays in filing . . . while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner"); 142 Cong. Rec. S3471 (daily ed. Apr. 17, 1996) (statement of Sen. Specter) ("[Habeas corpus] has been an indispensable safeguard of constitutional rights in this country . . . . Unfortunately, the Federal courts have gone too far in habeas corpus cases.").

eral court only after numerous rounds of review in state court.[89] Congress wanted to encourage vigorous litigation of federal constitutional claims in the state courts and to minimize the extent to which the federal courts provide the primary forum for adjudicating state prisoners' federal constitutional claims.[90] Congress saw reasonableness review as the best way to shift the balance because it allows the federal courts to catch serious constitutional violations while deterring relitigation of properly decided claims;[91] it furthers the goal of giving state prisoners one, but only one, opportunity for review.[92] Congress never intended that a prisoner receive less than one full review.[93]

The interests at stake are very different when the state courts do not issue an opinion respecting a prisoner's federal constitutional

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89 See, e.g., 142 Cong. Rec. S3446 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) ("Federal habeas review does not take place until well after conviction and numerous rounds of direct and collateral review.").

90 See id. at S3447 (statement of Sen. Hatch) (

> Our proposed standard simply 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.).

91 See id. at S3475 (statement of Sen. Biden) ("If a Federal court concludes the State court violated the Federal Constitution, that, to me, is by definition—by definition—an unreasonable application of the Federal law, and, therefore, Federal habeas corpus would be able to be granted."); id. at S3471 (statement of Sen. Specter) ("I think in a Federal habeas corpus proceeding, if the court thinks it is unreasonable, it will be able to overturn the decision, notwithstanding a standard that is really not as precise as it ought to be."); id. at S3446 (statement of Sen. Hatch) ("This is a wholly appropriate standard. It enables the Federal court to overturn State court decisions that clearly contravene Federal law. Indeed, this standard essentially gives the Federal court the authority to review, de novo, whether the State court decided the claim in contravention of Federal law.").

92 Senator Kennedy characterized § 2254(d) as providing "one bite at the apple," but he argued that one bite was not enough to protect the rights of the wrongly convicted. Id. at S3458; see also 142 Cong. Rec. S3376 (daily ed. Apr. 16, 1996) (statement of Sen. Gorton) (describing purpose of § 2254(d) as "not to deny a right of appeal, but in effect—except under extraordinary circumstances—to give only a single bite at the apple through the Federal court system").

93 See 142 Cong. Rec. S3458 (daily ed. Apr. 17, 1996) (statement of Sen. Gorton). During the floor debates, some legislators opposed AEDPA's reasonableness requirement on the grounds that it would "eviscerate" federal court review. See, e.g., id. (statement of Sen. Kennedy) ("It eviscerates the ancient Writ of Habeas Corpus, denying death row inmates the opportunity to obtain even one meaningful Federal review of the constitutionality of their convictions."). AEDPA's sponsors would counter this view by insisting that they fully intended the federal courts to review state court decisions. 141 Cong. Rec. S7826 (daily ed. June 7, 1995) (statement of Sen. Hatch) ("There are many bright people who think that . . . we do not need Federal habeas corpus. But I am not arguing that position. We have provided for protection of Federal habeas corpus, but we do it one time and that is it . . . ."). Representative McCollum justified § 2254(d) by asking, "Why should the Federal courts go back and review all of these matters over and over again . . . *if they have a clear record in front of them*?" 142 Cong. Rec. H2183 (daily ed. Mar. 13, 1996) (emphasis added).

claim. This is because, in the absence of an opinion, the federal courts have no assurance that the state courts actually reviewed and decided the claim and no basis for evaluating the reasonableness of the decision. Neither the language of § 2254(d) nor the legislative history forecloses de novo review in this situation.

## III
## SILENT STATE COURT OPINIONS IN FEDERAL HABEAS COURTS: WHAT DO FEDERALISM AND COMITY REQUIRE?

The question of how to address a silent state court opinion has fractured the circuit courts. Nevertheless, some clear divisions have emerged, centering around two main questions:[94] whether a silent state court opinion counts as an "adjudication on the merits" for purposes of § 2254(d) and whether the federal court should make an independent determination of the merits of a prisoner's claim.[95] This Part analyzes the major approaches with an eye towards developing a workable solution that takes into account Congressional intent, Supreme Court precedent, and the duty of federal courts to decide constitutional questions. Part III.A considers and rejects the de novo approach advocated by the First and Third Circuits, the "results-not-reasoning" approach adopted by the Fourth Circuit, the split approach employed by the Tenth and Eleventh Circuits, and the intermediate deference approach used by the Second and Ninth Circuits.[96] Part III.B presents a new solution that provides for de novo review while comporting with Supreme Court precedent, Congress's intent in enacting AEDPA, and principles of federalism.

### *A. Four Faulty Solutions*

#### *1. The De Novo Approach of the First, Third, and Tenth Circuits: No "Adjudication," No Deference*

The First, Third, and Tenth Circuits conduct de novo review of silent state court opinions because they have decided that a silent state court opinion is not an "adjudication on the merits" for purposes of § 2254(d).[97] The First Circuit has provided the clearest statement of

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[94] Also dividing the circuits is the question of how to define unreasonableness. See supra note 48. A lengthy discussion of this debate is outside the scope of this Note.

[95] The latter question is not specific to silent state court decisions. See supra note 48.

[96] As of this writing, the Fifth, Sixth, and Seventh Circuits have not articulated a defined approach to reviewing silent state court opinions.

[97] See DiBenedetto v. Hall, 272 F.3d 1, 5-6 (1st Cir. 2001) (reviewing de novo Sixth and Fourteenth Amendment prosecutorial misconduct claim because state court opinions cited only state evidentiary law); Hameen v. Delaware, 212 F.3d 226, 247 (3d Cir. 2000) (reviewing de novo claim that "double counting" of aggravating circumstances violated Eighth

the rationale behind this approach. It determined that the "critical point" of § 2254(d) is the "adjudication on the merits clause," stressed that it should be applied separately to each individual claim, and concluded, "[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."[98] Driving this approach is an admission of the frustrating impossibility of the situation: "AEDPA imposes a requirement of deference to state court decisions, but we can hardly defer to the state court on an issue that the state court did not address."[99]

Notwithstanding the sparse reasoning employed by these courts, this approach has powerful arguments in its favor. In *Washington v. Schriver*,[100] the Second Circuit cited many of them. According to the Second Circuit, at least six Justices in *Williams v. Taylor* decided that federal courts should examine the substance of the state court opinion to determine whether to apply the "contrary to" or "unreasonable application" clause.[101] That analysis cannot take place unless the federal court can identify the legal rule applied by the state court, which leads to the conclusion that there is no "adjudication" unless the state court made its rationale "at least minimally apparent."[102] Additionally, the

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Amendment; state court opinion did not mention federal law). The Tenth Circuit also follows this approach for some types of silent opinions. See Neill v. Gibson, 278 F.3d 1044, 1053 (10th Cir. 2001) (reviewing Eighth Amendment jury instruction claim de novo because, although prisoner presented Eighth Amendment question, state court opinion resolved claim pursuant to state law).

98 *DiBenedetto*, 272 F.3d at 6; see also Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001) ( [B]y its own terms § 2254(d) applies only to claims already 'adjudicated on the merits in State court proceedings.' It follows then that when, although properly preserved by the defendant, the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential standards provided by AEDPA and explained in *Williams* do not apply.);

see also *Hameen*, 212 F.3d at 247 (holding that because "we cannot say that the Delaware Supreme Court took into account controlling Supreme Court decisions," claim was not "adjudicated on the merits" within meaning of AEDPA).

99 Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001).

100 255 F.3d 45, 53-55 (2001). In *Washington*, the Second Circuit laid out the arguments on both sides, but did not decide the issue because it was not outcome determinative in that case. Id. at 55. The panel's refusal to decide the issue prompted Judge Calabresi's sprightly concurrence. See supra note 62. Two months later, the Second Circuit rejected this view in an opinion that responded to Judge Calabresi's concurrence but did not address the arguments raised in *Washington*'s majority opinion. See Sellan v. Kuhlman, 261 F.3d 303, 311-14 (2001).

101 *Washington*, 255 F.3d at 53-54.

102 Id. at 54. In a footnote, the Second Circuit also suggested that the de novo approach finds support in Justice Thomas's opinion in Wright v. West, 505 U.S. 277 (1992) (plurality opinion), which Congress may have intended to codify with § 2254(d). *Washington*, 255

Second Circuit argued that the statutory language is unclear; the de novo approach is supported by practical considerations, such as efficiency and accuracy; and the de novo approach furthers federalism and comity interests because the state court's explanation of its reasoning reduces the risk that a federal court will have to call the state court "unreasonable."[103] Finally, the Second Circuit analogized to the procedural default doctrine, which directs that a federal habeas court should give a silent state court opinion no effect.[104]

Despite these arguments, however, this Note concludes that the de novo approach, as articulated by the First and Third Circuits, is inconsistent with both Supreme Court precedent and Congressional intent. The First and Third Circuits' interpretation of the "adjudicated on the merits" clause conflicts with Supreme Court doctrine in several respects. For one, the Supreme Court usually presumes that when Congress employs a commonly used term like "adjudicated on the merits," it intends that term to retain its ordinary meaning.[105] In federal habeas litigation, the phrase "adjudicated on the merits" arises regularly in procedural default doctrine, which ordinarily divides cases into two classes: adjudications on the merits and dismissals on procedural grounds.[106] At least in the absence of countervailing evidence, current Supreme Court doctrine favors a presumption that by employing the term "adjudicated on the merits," Congress intended to capture all decisions except denials on procedural grounds.

The First and Third Circuits' interpretation of "adjudicated on the merits" also conflicts with Supreme Court doctrine in the closely

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F.3d at 54 n.5 ("Justice Thomas's conception of deference in *Wright* arguably appears to contemplate deferring to a reasoned state court explication of a federal claim.").

[103] *Washington*, 255 F.3d at 54.

[104] Id. (citing Ylst v. Nunnemaker, 501 U.S. 797, 802-04 (1991) (procedural default case)). In *Ylst*, the Court held that the plain statement rule, which holds that federal courts must presume a state court reached the merits of a federal question unless the state court says otherwise, does not apply to summary denials. See id. at 802. Under *Ylst*, a federal habeas court must "look through" the summary denial to the last reasoned state court opinion, applying a presumption which gives the summary opinion "no effect." *Ylst*, 501 U.S. at 804 & n.3. The logic of *Ylst* may suggest that a federal habeas court should give a silent state court decision "no effect" by according it no deference.

[105] Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); Hertz & Liebman, supra note 14, at 1422 & n.4 ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947))

[106] See Miller v. Johnson, 200 F.3d 274, 281 (5th Cir.), cert. denied, 531 U.S. 849 (2000) ("In the context of federal habeas proceedings, a resolution (or adjudication) on the merits is a term of art that refers to whether a court's disposition of the case was substantive, as opposed to procedural."); Hertz & Liebman, supra note 14, at 1422 (recognizing distinction in these terms).

related area of exhaustion.[107] In the exhaustion context, federal courts routinely deal with silent state court decisions, and they construe those decisions as denials on the merits, even in the face of strong evidence that a state court did not decide a federal claim at all.[108] It is true that in other contexts, the Supreme Court has not always characterized a silent state court decision as an adjudication on the merits.[109] Nevertheless, because the exhaustion and silent state court opinion problems are so similar, it makes sense to borrow from exhaustion doctrine and construe silent state court decisions as "adjudicated on the merits" for purposes of § 2254(d).

There is also a practical reason for rejecting the approach of the First and Third Circuits. Because of the way § 2254(d) is structured,[110] if a silent state court decision is construed as not "adjudicated on the merits," the "clearly established federal law" requirement does not apply to it. As a consequence, the federal court may look beyond the holdings of the Supreme Court and grant habeas relief based on Supreme Court dicta and lower federal court precedent. In these circuits, AEDPA has no effect as applied to silent state court opinions.[111] It seems doubtful that Congress could have intended, and that the Supreme Court would endorse, such a result.

### 2. *The Fourth Circuit: Too Much Deference*

At the opposite end of the spectrum is the "results-not-reasoning" approach of the Fourth Circuit, which accords extreme deference

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107 The exhaustion and silent state court opinion problems are closely related because, in both situations, the federal court confronts a scenario in which the state court failed to rule on a properly presented federal constitutional claim.

108 See Castille v. Peoples, 489 U.S. 346, 351 (1989) (characterizing claim that "has been presented as of right but ignored" as "impliedly rejected" on its merits); Smith v. Digmon, 434 U.S. 332, 333-34 (1978) (per curiam) (holding that prisoner had met exhaustion requirement even though state court decision "ignore[d]" federal constitutional claim). Of course, the prisoner must have presented the claim properly to the state courts. See supra notes 38-39 and accompanying text.

109 For example, despite the plain statement rule, a silent state court decision cannot revive a prisoner's procedurally defaulted claim. *Ylst*, 501 U.S. at 803.

110 For the full text, see supra note 48 and accompanying text.

111 For this reason, the Eleventh Circuit's approach is also unsatisfactory. The Eleventh Circuit classifies the silent state court decision as "contrary to . . . clearly established federal law" (and necessarily, then, an "adjudication on the merits"), but ends up in the same place as these circuits: adjudicating the case under circuit and district court precedent. See Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1255-56 (11th Cir. 2002) (applying Eleventh Circuit precedent to claim because failing to cite controlling federal law "is tantamount" to applying contrary law). The federal court is free to apply circuit precedent under this reasoning, because once the court determines that the state court decision is "contrary to . . . clearly established federal law," the strictures of § 2254(d) are satisfied. The court must then determine whether the prisoner is "in custody in violation of the Constitution" under § 2254(a), an inquiry to which no choice-of-law requirement applies.

to silent state court opinions. In *Bell v. Jarvis*,[112] the Fourth Circuit held that federal courts faced with a silent state court opinion should not make an independent determination of the merits of the claim before deciding whether the state court's result is reasonable.[113] The *Bell* court relied heavily on the contention that the "resulted in a decision" language of § 2254(d) signifies that a federal habeas court need not, and indeed should not, inquire into the reasonableness of the state court's reasoning.[114] The court contended that making an independent determination was essentially indistinguishable from conducting pre-AEDPA de novo review and therefore inconsistent with both § 2254(d) and the Supreme Court's opinion in *Williams*.[115] Therefore, the court decided, when reviewing a summary state court decision, a federal court must "independently review the record and applicable law," but it should not make an independent determination of whether a constitutional violation occurred first. Further, it must "remain always mindful of the limited nature of [its] inquiry."[116]

The Fourth Circuit's approach is unsound in several important respects. First, the Fourth Circuit is wrong to imply that *Williams* stands for the proposition that de novo review is inappropriate in every case.[117] *Williams* interpreted § 2254(d)(1) as applied to a prisoner who received a complete review and detailed opinions from the

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112 236 F.3d 149 (4th Cir.) (en banc), cert. denied, 122 S. Ct. 74 (2001).

113 Id. at 159-60. Prior to its decision in *Bell*, the Fourth Circuit had repeatedly held that in the case of a summary state court denial, a federal court must make an independent determination of whether a constitutional violation had occurred before deciding whether the deferential standard of § 2254(d)(1) barred relief. See Green v. Catoe, 220 F.3d 220, 223 (4th Cir. 2000) ("Because the state court decision fails to articulate any rationale for its adverse determination . . . , we cannot review that Court's 'application of clearly established Federal law,' but must independently ascertain whether the record reveals a violation of [a constitutional right]."); accord Bacon v. Lee, 225 F.3d 470, 478 (4th Cir. 2000); Baker v. Corcoran, 220 F.3d 276, 291 (4th Cir. 2000); Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir. 1998); Wright v. Angelone, 151 F.3d 151, 156-57 (4th Cir. 1998). In *Bell*, the en banc Fourth Circuit explicitly overruled this approach. *Bell*, 236 F.3d at 160.

114 *Bell*, 236 F.3d at 159-60.

115 Id. at 158-59. The Fourth Circuit conveniently failed to mention that, under its old approach, if the federal court found a constitutional violation, it went on to consider whether the state court's ultimate result was reasonable. Id. at 177 (Motz, J., dissenting).

116 Id. at 163, 166. The decision is not a model of clarity. For example, the Court did not provide a clear explanation of its "independent[ ] review of the record and applicable law," other than to say that it "must be distinguished" from making an independent determination on the merits of a claim. Id. at 163. The court simply explained,

> [W]e must uphold the state court's summary decision unless our independent review of the record and pertinent federal law persuades us that its result contravenes or unreasonably applies clearly established federal law. . . . Our review is in fact deferential because we cannot grant relief unless the state court's *result* is legally or factually unreasonable.

Id. (citing Aycox v. Lytle, 196 F.3d 1174, 1178 (10th Cir. 1999)).

117 Cf. *Bell*, 236 F.3d at 160.

state courts.[118] *Williams* does not foreclose, and in fact provides support for, a de novo approach when the state court is silent with respect to a federal claim.[119]

Second, the "results-not-reasoning" logic, on which the Fourth Circuit grounds its approach, has serious flaws. The Fourth Circuit's logic has its genesis in a Seventh Circuit decision written by Judge Posner, *Hennon v. Cooper*.[120] *Hennon* held that, in order to avoid "plac[ing] the federal court in just the kind of tutelary relation to the state courts that the recent amendments [we]re designed to end," federal courts should defer to state court results without inquiring into the state court's reasoning.[121] Judge Posner wrote that examining the state court's reasoning would be inappropriate because a "federal court in a habeas corpus proceeding cannot remand the case to the state appellate court for a clarification of that court's opinion; all it can do is order a new trial, though the defendant may have been the victim not of any constitutional error but merely of a failure of judicial articulateness."[122] This idea has captivated the circuit courts, many of which follow *Hennon* in at least some circumstances.[123]

The problem with this logic is that it assumes that a federal habeas court has no options but to defer blindly to the state court decision or else grant habeas relief. But of course the court has another option: It can and should make an independent determination

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118 *Williams*, 529 U.S. at 391-99 (reviewing state court opinion).

119 The six-judge majority in *Williams* carefully scrutinized the Virginia state courts' *reasoning* in order to arrive at their decision and rejected the approach of the dissent, which would have granted deference to the state court's *result*. See id. (Stevens, J.); id. at 413-16 (O'Connor, J., concurring); id. at 418-19 (Rehnquist, C.J., dissenting); see also Adam N. Steinman, Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After *Williams v. Taylor*?, 2001 Wis. L. Rev. 1493, 1525-28 (presenting additional arguments). A rule prohibiting de novo review of silent state court opinions would thus grant less scrutiny to silent state court decisions than to explicated ones. Such a rule would create perverse incentives to state courts to avoid deciding federal constitutional questions and disguise their avoidance with silence. See infra notes 68-69 and accompanying text.

120 109 F.3d 330 (7th Cir. 1997).

121 Id. at 335.

122 Id. For a critique of this passage, see Steinman, supra note 119, at 1531-32.

123 See, e.g., Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) ("Nothing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process."); Neal v. Puckett, 239 F.3d 683, 696 (5th Cir.) ("[W]e do not interpret AEDPA in such a way that would require a federal habeas court to order a new sentencing hearing solely because it finds the state court's written opinion unsatisfactory."), reh'g granted, 264 F.3d 1149 (2001); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999) ("[W]e owe deference to the state court's *result* even if its reasoning is not expressly stated."); Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002) ("The statutory language focuses on the result, not on the reasoning that led to the result, and nothing in that language requires the state court adjudication that has resulted in a decision to be accompanied by an opinion that explains the state court's rationale.").

of the merits of the prisoner's constitutional claim.[124] When the state does not provide reasoning in support of its decision, an independent determination of the merits of the claim is crucial. It is, at a minimum, necessary to provide a benchmark for evaluating the reasonableness of the state court's result.[125] More importantly, "[a]t some point in the judicial process, even a person convicted of heinous crimes deserves a rigorous and complete analysis of his constitutional claims."[126] This is so because "in many cases" a thorough review exposes clear (and unreasonable) constitutional error in decisions that may appear reasonable upon cursory evaluation.[127]

The Fourth Circuit's approach goes far beyond the deferential scheme designed by Congress.[128] In enacting AEDPA, Congress intended to reduce federal court discretion to grant habeas petitions in circumstances where a prisoner received a complete review of her claims in state court, but Congress did not intend to eliminate meaningful federal court review when the prisoner did not receive a full review in state court.[129] The Fourth Circuit approach does not provide meaningful review because it prohibits federal courts from establishing a baseline from which to evaluate the reasonableness of state court results. Courts employing this approach do not directly assess whether a constitutional violation occurred; instead, they search the record for any possible factual and legal theory that could justify a holding that the state court was reasonable, even though incorrect.[130]

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124 See, e.g., *Delgado I*, 181 F.3d 1087, 1091 (9th Cir. 1998), vacated on other grounds, 528 U.S. 1133 (2000) (noting that conducting an independent review of the law is "not the equivalent of applying a *de novo* standard of review" but merely "provides the method for ascertaining whether the state court's resolution of the case" was unreasonable); see also Steinman, supra note 119, at 1513 (arguing that independent review of silent state court decisions is necessary to provide "one (and only one) independent adjudication of the defendant's claim that is analytically sound under established law").

125 Bell v. Jarvis, 236 F.3d 149, 183 (4th Cir.) (en banc), cert. denied, 122 S. Ct. 74 (2001) (Motz, J., dissenting) (noting that although federal courts have "no business" reversing state decisions that are "close to the mark," federal courts must "find the mark when the state court fails to do so") (internal quotations omitted).

126 Id.

127 Id.

128 As the Ninth Circuit articulated in an early opinion, "AEDPA does not 'compel' federal courts to turn an amaurotic eye to state court proceedings, nor to rubberstamp unexplained state court decisions without regard to whether they are contrary to clearly established Federal law as determined by the Supreme Court. Indeed, true cooperative federalism demands a more nuanced approach." *Delgado I*, 181 F.3d at 1093.

129 See supra notes 86-93 and accompanying text.

130 See *Bell*, 236 F.3d at 183-86 (Motz, J., dissenting) (describing majority's "post hoc creation of a record" to "take the place of the missing findings"); see also Closs v. Weber, 238 F.3d 1018, 1021-22 (8th Cir. 2001) (using similar approach to review claim that state violated due process by revoking prisoner's parole without providing procedural protections and suggesting several rationales state court "could have" used to decide that clearly

However, it is the job of a state's attorney general, not a federal court of appeals, to invent arguments in support of upholding a state court's unexplained decision. Congress did not intend the federal courts to apply such extreme deference to state court results.

### 3. *The Split Approach: A Distinction Without a Difference*

The Tenth and Eleventh Circuits distinguish between types of silent opinions, engaging in de novo review where the state court addresses a federal constitutional issue solely in state law terms but conducting deferential review of summary denials.[131] The rationale for distinguishing between the two kinds of silence is that, in the absence of countervailing evidence, a federal court has no reason to presume that the state court failed to apply governing law.[132] In addition, these circuits argue that federal courts should not insult state courts by telling them how to write their opinions.[133] These arguments, however, should not outweigh a state prisoner's important interest in receiving one complete review of her federal constitutional claims.

There is no inherent reason to believe that a state court issuing a summary denial has actually decided every federal issue properly presented by the petitioner. Even when state courts issue full opin-

established due process rules did not apply to petitioner); see also Steinman, supra note 119, at 1524 ("A federal habeas court should not be forced to speculate whether some reasonable, although incorrect, interpretation or application of federal law might have supported the state court's summary result.").

131 Compare Neill v. Gibson, 278 F.3d 1044, 1053 (10th Cir. 2001) (reviewing Eighth Amendment jury instruction claim de novo because, although prisoner presented Eighth Amendment question, state court opinion did not address Eighth Amendment in resolving claim), with Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999) (deferring to summary dismissal of prisoner's claim); compare Romine v. Head, 253 F.3d 1349, 1353 (11th Cir. 2001) (conducting de novo review of Sixth Amendment claim where prosecutor encouraged jury to apply biblical law at sentencing; three-sentence-long state court opinion cited only state law and did not discuss any rule of federal law, and state's brief said it was "difficult to fault" state court for not applying federal law, so Court had "grave doubt that the Georgia Supreme Court applied federal law at all"), cert. denied, 122 S. Ct. 1593 (2002), with Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1254 (11th Cir.) (deferring to state court result and distinguishing *Romine* on grounds that in case of summary denial, it had no "grave doubt" that state court failed to decide federal question), reh'g denied, 34 Fed. Appx. 393 (11th Cir. 2002), petition for cert. filed, U.S.L.W. (U.S. June 12, 2002) (NO. 01-10832).

132 See *Aycox*, 196 F.3d at 1177; *Wright*, 278 F.3d at 1254.

133 *Wright*, 278 F.3d at 1255 ("Telling state courts when and how to write opinions to accompany their decisions is no way to promote comity."). Or, as the Second Circuit tartly expressed, "[W]e are determining the reasonableness of the state court's 'decision,' not grading their papers." Cruz v. Miller, 255 F.3d 77, 86 (2d Cir. 2001) (citation omitted); see also Coleman v. Thompson, 501 U.S. 722, 739 (1991) ("We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim.").

ions, they frequently deny federal constitutional claims on state law grounds without once alluding to federal law.[134] The reasons for the omissions are varied: Some state judges may not understand some federal constitutional issues,[135] some might simply prefer not to spend their time wrestling with difficult constitutional questions,[136] and nearly all face political pressures making it highly undesirable for them to grant relief on a federal constitutional claim.[137] These factors do not vanish merely because the court chooses not to write an opinion. Furthermore, as commentators have noted, judges tend to take less care in their decisionmaking when they do not have to explain their decisions to the public in the form of a written opinion.[138] There

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134 See supra note 65.

135 Federal circuit court opinions are replete with examples of state court opinions that simply got the law very wrong. See, e.g., Morales v. Portuondo, 154 F. Supp. 2d 706 (S.D.N.Y. 2001) (granting habeas relief where New York courts used hearsay rules to prohibit petitioner from presenting evidence of innocence; state court decision was contrary to Supreme Court precedent holding that under Due Process Clause, state courts must allow defendants to present exculpatory evidence notwithstanding hearsay rules.); Wanatee v. Ault, 101 F. Supp. 2d 1189, 1197 (N.D. Iowa 2000) (granting habeas relief on petitioner's claim that he suffered ineffective assistance of counsel during *plea bargaining* stage; state court decision was contrary to clearly established federal law because it applied standards relevant to ineffective assistance at *trial*), aff'd, 259 F.3d 700 (8th Cir. 2001); see also Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1121-22 (1977) (arguing that federal judiciary is more technically competent than state judiciary because more elite and better-paid federal system attracts greater competition for fewer spots, has appointments process focused on professional competence, and secures smarter law clerks).

136 See supra note 62 (describing increased and possibly unwanted burden AEDPA imposes on state courts); cf. Kirk J. Henderson, Thanks, but No Thanks: State Supreme Courts' Attempts to Remove Themselves from the Federal Habeas Exhaustion Requirement, 51 Case W. Res. L. Rev. 201, 203-06 (2000) (arguing that Supreme Court's exhaustion doctrine impairs federalism and comity concerns by imposing unwanted work on state supreme courts and detailing efforts of Arizona, North Carolina, and Pennsylvania Supreme Courts to excuse themselves from exhaustion requirement). Judge Calabresi would not apply AEDPA deference unless the state expressly addresses the federal aspects of a claim, thus allowing state courts "*to choose* whether or not they wish to take on the burden and be deferred to." Washington v. Schriver, 255 F.3d 45, 63 (2d Cir. 2001) (Calabresi, J., concurring).

137 See generally Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759 (1995) (demonstrating that in states with elected judiciary, judges significantly underenforce federal constitutional rights because of overwhelming political pressure to be tough on crime); James S. Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030, 2112 n.197 (2000) (same, providing extensive list of sources). This Note does not suggest that state courts willfully ignore federal constitutional claims on a regular basis. But even the Supreme Court has recognized that sometimes state courts "choose[ ] to ignore" federal claims that have been presented to them. Smith v. Digmon, 434 U.S. 332, 333-34 (1978) (per curiam).

138 See William L. Reynolds & William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev. 573, 623-24 (1981) ("[T]here is a danger of a judge developing a conditioned response to the surface characteristics of certain classes of recurrent and annoying litigation. Requiring a

is certainly no more reason to trust that a state court decided a federal claim in the context of a summary denial than there is in the context of an obvious lacuna in an opinion.

More importantly, from the perspective of the federal habeas court whose duty is to decide the questions presented to it in accordance with AEDPA and the Constitution, the problems posed by summary denials and other silent opinions are the same. First, in the absence of a reasoned state court opinion, the federal court has no point of reference from which to make the reasonableness determination. Second, federal habeas requires that every prisoner get one full review of her properly presented claims;[139] if this review does not take place in state court, then the federal court must provide it. But, without a reasoned state court opinion, the federal court can have no assurance that the state court ever reviewed the federal claim at all. In two important respects, then, the distinction between different kinds of silence is ultimately a distinction without a difference.

### *4. Intermediate Deference in the Second and Ninth Circuits*

The approaches of the Second and Ninth Circuits, the most defensible of the current circuit court solutions, is characterized by an intermediate level of deference.[140] Although their approaches are somewhat different, both circuits first perform an independent analysis to determine whether a constitutional violation occurred.[141] If so, these circuits go on to decide whether the deferential standard of § 2254(d)(1) bars relief.[142]

This approach avoids some of the serious problems caused by the approaches of other circuits: Unlike that of the First and Third Circuits,[143] this approach does not involve a complicated interpretation of "adjudication on the merits," nor does it step outside the "clearly established federal law" requirement; unlike that of the Fourth Cir-

judge to justify a decision to the public is one way to minimize that danger."); Steinman, supra note 119, at 1522-23 ("To decide cases without writing an opinion reduces judicial responsibility and impairs . . . the consistency of judicial decision-making.").

139 See supra notes 88-93 and accompanying text.

140 The Second Circuit holds that summary denials and other silent opinions are "adjudications on the merits." Morris v. Reynolds, 264 F.3d 38, 46 (2d Cir. 2001). The Ninth Circuit has not explicitly addressed the issue. See generally *Delgado II*, 223 F.3d 976 (9th Cir. 2000) (not addressing whether summary state denial qualifies as "adjudication on the merits," but applying AEDPA deference).

141 See *Morris*, 264 F.3d at 50 (determining that petitioner's Fifth Amendment rights under Double Jeopardy Clause were violated); *Delgado II*, 223 F.3d at 990-91 (determining that petitioner's Sixth Amendment right to effective assistance of counsel was violated).

142 See *Morris*, 264 F.3d at 51 (holding that state rule was contrary to clearly established federal law and granting writ).

143 See supra Part III.A.1.

cuit,[144] this approach retains a baseline from which to make the reasonableness decision; and unlike that of the Tenth and Eleventh Circuits,[145] this approach does not involve making unjustified distinctions between different kinds of summary opinions. The Ninth Circuit in particular has spent much energy in mapping out a middle ground to accommodate both the interest of the prisoner in obtaining one complete review of her federal constitutional claims and the federalism and comity concerns animating AEDPA.[146]

Nevertheless, this approach is not ideal, because it does not adequately protect prisoners who may have experienced serious violations of their constitutional rights. This is because under § 2254(d) a federal court evaluates not the reasonableness of the outcome, but the reasonableness of the state court's application of law to facts. The Supreme Court's opinion in *Williams v. Taylor* illustrates this point. In *Williams*, the Court determined that the Virginia Supreme Court's decision was "contrary to" clearly established federal law because it wrongly modified the *Strickland* standard, and it was "an unreasonable application of" clearly established federal law because it did not take into account the totality of mitigating evidence.[147] The Supreme Court granted relief, not because Mr. Williams presented more compelling facts than other prisoners who claim ineffectiveness but because the state court decision denying relief was incorrect, and because it applied the wrong law and thus did not merit deference.

However, without an extensive state court opinion, the Supreme Court would have had no idea that the Virginia Supreme Court misapplied the law in that manner. If the Supreme Court had no state court opinion to review and had it employed the intermediate deference approach of the Second and Ninth Circuits, it would have assumed that the state court applied the correct governing law. It is likely that the Supreme Court would have concluded that the Virginia Supreme Court was incorrect, but not unreasonable, in determining that Mr. Williams suffered no prejudice from his attorney's ineffectiveness. The approaches of the Second and Ninth Circuits would have been inadequate to protect Mr. Williams's rights, as they are generally inadequate to protect the rights of prisoners in circumstances where it is not necessarily apparent that an erroneous state court re-

144 See supra Part III.A.2.

145 See supra Part III.A.3.

146 See generally *Delgado II*, 223 F.3d at 981 (applying principles of *Tran* to silent state court opinion); Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir.) (presenting exhaustive defense of intermediate deference approach to case where state court issued opinion), cert. denied, 531 U.S. 944 (2000).

147 Williams v. Taylor, 529 U.S. 362, 397 (2000) (Stevens, J.).

sult, unaccompanied by supporting reasoning, is also unreasonable in the sense contemplated by § 2254(d).

### *B. A Preferable Alternative*

This Note argues that a better approach is to conclude 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. By staying within the structure of § 2254(d), this approach avoids the problems generated by de novo review as conducted in the First and Third Circuits. Because it defines a silent state court decision as an "adjudication on the merits," this approach is consistent with Supreme Court precedent in the areas of procedural default and exhaustion. More important, this approach retains the clearly established federal law requirement. It therefore honors Congress's intent to constrain the scope of federal habeas review.

The alternative de novo approach starts with an articulation of the basic problem that transpires when § 2254(d) meets the silent state court opinion: Section 2254(d) requires a federal court to determine whether a state court decision is "contrary to, or an unreasonable application of clearly established federal law," but in the absence of an opinion, a federal court cannot tell what federal law the state court applied or whether the state court applied federal law at all.[148] In this context, "[a]ttributing a reason [for the state court's decision] is therefore both difficult and artificial."[149] It is also unnecessary.

De novo review is not foreclosed by statute. The plain language of AEDPA's "unreasonable application" provision is unclear with respect to silent state court decisions.[150] Therefore, it is appropriate to consult legislative history to determine how Congress would have intended a federal court to review a silent state court decision. In fact, the Congressional assumptions underlying AEDPA's enactment—that prisoners would continue to receive many rounds of review in state court and "one bite" in federal court—suggest that de novo review is

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148 See Delgado I, 181 F.3d 1087, 1091 (9th Cir. 1999) ("Unfortunately, when a state court does not articulate the rationale for its determination, a review of that court's 'application' of clearly established federal law is not possible."). Indeed, the circuit courts have expressed some disagreement over precisely which test to apply in the absence of a state court decision. Compare Doan v. Brigano, 237 F.3d 722, 730-31 (6th Cir. 2001) (holding that "unreasonable application" clause cannot apply in context of silent state court opinion and adjudicating claim under "contrary to" clause) with Bell v. Jarvis, 236 F.3d 149 (4th Cir.) (en banc) (applying "unreasonable application" clause to silent state court decision), cert. denied, 122 S. Ct. 74 (2001) and *Delgado II*, 223 F.3d at 982 (applying neither clause, and instead determining whether state court decision was "objectively reasonable").

149 Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

150 See supra notes 74-77 and accompanying text.

the appropriate standard for a federal court to apply to a silent state court opinion.[151] A proper understanding of § 2254(d)—one that takes into account congressional intent—would hold that if a state court result is incorrect as a matter of clearly established Supreme Court precedent, and the state court provides no reasoning to explain why its decision could be construed as reasonable, that decision constitutes an "unreasonable application" of clearly established federal law under § 2254(d).

De novo review does not contravene AEDPA's federalism and comity goals.[152] The Supreme Court recently considered the extent to which federalism and comity concerns outweigh a prisoner's interest in review; importantly, the Court decided that deference has its limits:

> Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. . . . It is consistent with these principles to give effect to Congress' intent . . . while recognizing the statute does not equate prisoners who exercise diligence in pursuing their claims with those who do not. . . . [C]omity is not served by saying a prisoner "has failed to develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent effort.[153]

Similar logic suggests that, in a case where a prisoner properly presents her federal constitutional claim to the state court but the state court does not issue an opinion with respect to the claim, it would be inappropriate to apply AEDPA's deferential standard of review. Federalism and comity concerns reach their end when a state

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151 See supra notes 88-93 and accompanying text.

152 See Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (stating that when Supreme Court must "fill[ ] the gaps of the habeas corpus statute, . . . we look first to the considerations underlying our habeas jurisprudence, and then determine whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefits of its application on collateral review"). In fact, de novo review of silent state court opinions may enhance federalism and comity because it eliminates the need for federal courts to deconstruct the trial record and guess at what the state court might have done. Cf. Arizona v. Evans, 514 U.S. 1, 7 (1995) (applauding "plain statement rule" because it obviates "unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court"); Friedman, supra note 24, at 537-40 (arguing that rule inviting federal courts to "tear apart state records" impairs federalism values).

153 Williams v. Taylor, 529 U.S. 420, 436-37 (2000). *Williams* involved a situation in which the state prevented a prisoner from timely developing the facts in his case. Id. at 430. The Court held that § 2254(e)(2), which bars the federal court from considering facts that the prisoner "failed to develop" in state court, did not apply to Mr. Williams because he had worked diligently to develop the record. Id. at 430 (construing 28 U.S.C. § 2254(e)(2) (2001) and holding that "failed to develop" means "lack of diligence in developing the claims"). Therefore, it was inappropriate to apply AEDPA's stringent requirements to this particular prisoner's case. Id.

court has every opportunity to explain its decision on the merits, but it does not.

Finally, de novo review fulfills important policy concerns. A rule requiring federal courts to defer to silent state court decisions simply encourages state courts to avoid deciding federal constitutional claims and to mask that avoidance with silence.[154] Such a rule raises the very real risk that many state prisoners will go through numerous rounds of review, but never have their federal constitutional claims considered on the merits. That risk is unsupportable when life and liberty depend on such a review.

## CONCLUSION

Prior to AEDPA, federal courts did not have to worry about silent state court decisions because they reviewed habeas petitions de novo. Since the advent of § 2254(d), however, silent state court decisions have created a problem for the federal habeas courts that must review them and determine whether they are reasonable. Federal circuit courts cannot agree on how federal courts should review silent state court opinions, and they have proposed widely variant solutions to the problem. Yet none of the current solutions adequately balances the intent of Congress in enacting AEDPA, Supreme Court precedent, federalism concerns, and the interests of the prisoner seeking review. After considering and rejecting the four main approaches to the problem, this Note proposes a new approach that appropriately balances competing concerns by situating de novo review within the constraints of § 2254(d).

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[154] See Delgado II, 223 F.3d 976, 982 (9th Cir. 2000) ("[S]tate court judgments can be insulated from habeas review in federal courts simply by failing to provide any reasoned explanation for the disposition."). But see Sellan v. Kuhlman, 261 F.3d 303, 313-14 (2d Cir. 2001) (arguing that de novo review would encourage prisoners to present federal claims in cursory manner to state courts in hopes that state court would not notice them, thus preserving de novo review; this practice "would have the practical effect of shunting serious arguments as to state claims to state court, and serious arguments as to federal claims to federal court, and would thus be at odds with the animating spirit of AEDPA, which respects the state court's adjudication of *all* claims"). The Second Circuit's concern is misplaced for several reasons. First, exhaustion rules ensure that prisoners state their claims with sufficient specificity so that a state court can identify them. Second, because prisoners must exhaust their facts as well as their law, they have a strategic interest in presenting to the state courts any federal claims that need factual development. Third, the slim chance of prevailing on any claim in any forum creates an incentive for prisoners to highlight their strongest claims no matter the forum. Fourth, most prisoners in state postconviction proceedings lack both legal counsel and the sophisticated legal knowledge to make the kind of fine distinctions the Second Circuit suggests.