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RECONCEPTUALIZING FEDERAL HABEAS CORPUS FOR STATE PRISONERS: HOW SHOULD AEDPA'S STANDARD OF REVIEW OPERATE AFTER *WILLIAMS V. TAYLOR*?

ADAM N. STEINMAN*

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INTRODUCTION

The proper scope of federal habeas relief for state prisoners is essentially a question of how federal courts should enforce federal constitutional rights in the context of a state's criminal justice system. This question implicates the complex interaction between the federal courts, the states, and individuals. Efforts to conceptualize the federal habeas writ naturally address issues of federalism, as courts and commentators strive to balance the federal government's interest in enforcing federal rights with the state government's interest in the finality of its convictions. They also focus on the rights of the individual, analyzing the effect of federal habeas on the ability of individuals to assert the rights provided them under federal law. Topics impacting this debate include the parity (or lack of parity) between state courts and federal courts in enforcing federal constitutional rights, the need for comity towards state courts and decision-makers, the rights of state defendants to federal court consideration of their federal law claims, and the contours of the "Judicial Power" vested in the federal courts.[1]

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1. Among the foundational scholarship on the scope of federal habeas corpus is Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982). For comprehensive lists that include more recent scholarship, see Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 546 n.22 (1999); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 799 n.13 (1992).

Nowhere is the interface between state and federal institutions more directly implicated than in the "standard of review" that a federal court must apply in deciding whether to grant a writ of habeas corpus. Likewise, the standard of review fundamentally defines the scope of an individual defendant's access to a federal forum for asserting his federal rights. Understandably, then, what that standard should be has been the subject of vigorous debate. The most controversial topic has been whether federal habeas courts should defer to state courts on the interpretation and application of federal law. While this debate is a vibrant one that will surely continue, it is one that, at least from the Supreme Court's standpoint, is over. After the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) and its recent interpretation by the Supreme Court in *Williams v. Taylor*,[2] a federal court is no longer free to grant habeas relief based solely on its independent interpretation and application of federal law.[3] Under the provision of AEDPA codified at 28 U.S.C. § 2254(d)(1), a federal court presented with a habeas petition must defer to a state court's rejection of a petitioner's federal law claim unless the state court's "decision" is "contrary to, or involved an unreasonable application of, clearly established Federal law."[4]

In light of AEDPA and *Williams*, this Article aims to shift, or at least expand, the debate from the question of *whether* federal habeas courts must defer to state courts on pure issues of federal law, to the question of *how* federal habeas courts should defer. I focus on one of the critical issues left unaddressed by the *Williams* Court: In applying the new standard, must the federal habeas court review the state court's actual legal analysis; or must it review only the state court's ultimate conclusion that the petitioner is not entitled to relief, regardless of how the state court interpreted and applied federal law in reaching that conclusion? Put another way, does § 2254(d)(1) target the state court's "opinion," as in the written decision explaining the court's reasoning, or does it target the state court's "result," as in the actual order denying relief? This issue goes to the heart of how federal habeas courts should apply § 2254(d)(1)'s standard of review, and what the deferential standard of review is designed to accomplish.

I argue that § 2254(d)(1) bars federal habeas relief only when the actual reasoning articulated by the state court passes muster under the admittedly deferential standard of review. If the state court's actual reasoning is "contrary to" or "involves an unreasonable application of" established federal law, or if the state court fails to provide any basis for its denial of relief, then the federal habeas court may proceed to independently decide pure issues of federal law and its application. Part I of this Article

2. 529 U.S. 362 (2000).
3. *See infra* Part II.
4. 28 U.S.C. § 2254(d)(1) (Supp. V 2000).

surveys the history of the standard of review for federal habeas corpus, beginning with *Brown v. Allen*[5] in 1953 and culminating with Congress's passage of AEDPA in 1996. Part II examines the recent decision in *Williams*, the Supreme Court's first opportunity to construe and apply § 2254(d)(1), to assess what it did and did not resolve about the standard of review for federal habeas. Part III argues that § 2254(d)(1)'s standard of review should be read to preclude relief only where the state court's actual opinion reasonably applies federal law, *not* where the result reached by the state court could be deemed reasonable based on some other rationale that might have passed muster under the deferential standard. This approach would ensure that individuals receive one analytically sound adjudication of their federal law claims. It would also create a tangible incentive for state courts to adjudicate federal law claims thoroughly and explicitly, which may in the long run enhance overall enforcement of federal rights. Part IV argues that both the *Williams* decision and the text of AEDPA itself support this reading of § 2254(d)(1). Part V responds to possible criticisms of this reading. Part VI flags some important remaining issues concerning the application of § 2254(d)(1).

I. EVOLUTION OF THE STANDARD OF REVIEW FOR FEDERAL HABEAS PETITIONS BY STATE PRISONERS

This Part traces the development of the standard of review applied to state prisoner federal habeas corpus claims over the course of the last fifty years. Subpart A addresses *Brown v. Allen* and its adoption of a de novo standard of review for questions of federal law and its application to particular facts. Subpart B discusses the Supreme Court's decision in *Teague v. Lane* and the uncertainty it cast on *Brown*'s de novo standard. Subpart C examines how the Supreme Court wrestled with the effect of *Teague* on the standard of review for federal habeas. Subpart D describes Congress's enactment of a statutory standard of review with AEDPA.

A. Brown v. Allen *and the "Golden Age" of Federal Habeas Corpus*

The Supreme Court's 1953 decision in *Brown v. Allen* was a critical moment for federal habeas review of state court convictions.[6] *Brown* held

5. 344 U.S. 443 (1953).

6. The scope of federal habeas prior to 1953 has been the subject of vigorous debate among judges and scholars. There is no dispute that federal habeas cases from the 19th and early 20th centuries demonstrate that federal habeas relief was very difficult to obtain. *See, e.g.*, *Ex parte* Watkins, 28 U.S. 193, 209 (1830) (denying petition for writ of habeas corpus). But while some have read these cases to establish a fundamental limit on the scope of federal habeas relief, others have argued that these cases simply reflect the lack of *substantive* constitutional protections for criminal defendants at that time. *Compare*

that federal courts considering a state prisoner's habeas petition must review issues of federal constitutional law de novo, regardless of how the state court interpreted the relevant constitutional principles.[7] This de novo standard also applies to mixed questions of law and fact, that is, questions requiring the court to apply constitutional principles to a particular set of facts.[8]

Brown's adoption of de novo review kicked off a string of pro-defendant habeas rulings by the Supreme Court,[9] which some have called the "Golden Age" of federal habeas.[10] Although some criticized *Brown* as

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Bator, *supra* note 1, at 463-99, *with* Peller, *supra* note 1, at 623-50; *compare also* Wright v. West, 505 U.S. 277, 285-86 n.3 (1992) (plurality opinion) (stating that prior to 1953 "a prisoner seeking a writ of habeas corpus could challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody") *with id.* at 297-98 (O'Connor, J., concurring) ("While it is true that a state prisoner could not obtain the writ if he had been provided a full and fair hearing in the state courts, this rule governed the merits of a claim under the Due Process Clause. It was not a threshold bar to the consideration of *other* federal claims, because, with rare exceptions, there *were* no other federal claims available at the time."). *See generally* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 582-87 (1993).

7. *See Brown*, 344 U.S. at 506 ("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."); *see also id.* at 508 ("[N]o binding weight is to be attached to the State determination . . . . The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."); *id.* at 488 (Burton, J., concurring) ("[Justices Burton and Clark] also recognize the propriety of the considerations to which Mr. Justice Frankfurter invites the attention of a federal court when confronted with a petition for a writ of habeas corpus under the circumstances stated."); *id.* at 548-49 (Black, J., dissenting) ("I agree with the Court that the District Court had habeas corpus jurisdiction in all the cases including power to release either or all of the prisoners if held as a result of violation of constitutional rights."). Except for state court rulings on factual issues and adequate state law grounds, "the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*." *Id.* at 458.

8. Miller v. Fenton, 474 U.S. 104, 112 (1985) (holding that "a mixed questio[n] of fact and law" is "subject to plenary federal review") (quotation marks and citations omitted); *see also Brown*, 344 U.S. at 507.

> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

Id. (citation omitted).

9. *See* Townsend v. Sain, 372 U.S. 293, 313 (1963) (establishing the standard for obtaining an evidentiary hearing on federal habeas); Fay v. Noia, 372 U.S. 391, 439-41 (1963) (establishing the standard for when the failure to raise a federal issue in state court bars federal habeas relief); Sanders v. United States, 373 U.S. 1, 15-23 (1963) (establishing the standard for when the denial of a prior habeas petition bars the filing of a second or successive petition).

10. Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional*

allowing unwarranted relitigation of otherwise final state convictions,[11] several efforts to overrule *Brown* by statute were ultimately unsuccessful.[12] Thus, *Brown*'s holding that federal habeas courts must independently interpret and apply federal constitutional law survived. Even in the 1970s, as the Supreme Court began to cut back in other areas of habeas corpus law,[13] *Brown*'s standard of review with respect to federal legal issues remained untouched.

B. Teague v. Lane

The Supreme Court's 1989 decision in *Teague v. Lane*[14] called into question *Brown*'s de novo standard of review. In *Teague*, a state prisoner sought habeas relief based on the racial composition of his petit jury, including the prosecutor's use of peremptory strikes to exclude black jurors.[15] The petitioner relied on a rule of law first expressed in *Batson v. Kentucky*,[16] which was decided after his conviction became final.[17] He also sought to extend *Taylor v. Louisiana*'s[18] "fair cross section" requirement to the composition of his petit jury, even though *Taylor* had expressly limited its holding to the composition of the jury venire.[19] The *Teague* Court held that the petitioner could neither rely on *Batson* nor extend *Taylor*, because to do so would allow him to invoke a new rule of constitutional law that

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Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism, 1998 U. CHI. LEGAL F. 315, 324 (stating that *Townsend*, *Fay*, and *Sanders* "ushered in the 'Golden Age' of federal habeas for state prisoners"). *But cf.* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2065 (1992) (referring to the period from 1867 to 1891 as the "Golden Age of federal prisoner habeas corpus review").

11. *See, e.g.*, Bator, *supra* note 1, at 441.

12. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 423-43 (1996) (summarizing legislative proposals in the 1960s, 1970s, and 1980s).

13. Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977) (imposing a higher burden for federal habeas petitioners whose claims were procedurally defaulted in state court); Stone v. Powell, 428 U.S. 465, 494-95 (1976) (refusing to consider Fourth Amendment exclusionary rule claims on federal habeas); *see also* Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1709 n.29 (2000) (noting that the Court "significantly retreated from the landmark decisions of the early Warren Court that had secured robust habeas review of federal claims brought by state prisoners").

14. 489 U.S. 288 (1989).

15. *Id.* at 293.

16. 476 U.S. 79 (1986).

17. *Teague*, 489 U.S. at 294 ("Petitioner's first contention is that he should receive the benefit of our decision in *Batson* even though his conviction became final before *Batson* was decided.").

18. 419 U.S. 522 (1975).

19. *Teague*, 489 U.S. at 299 ("As we noted at the outset, *Taylor* expressly stated that the fair cross section requirement does not apply to the petit jury.").

had not been in effect at the time of his conviction.[20] Absent limited exceptions, new rules of constitutional law would not apply retroactively to a state prisoner's federal habeas petition.[21]

Thus, *Teague* was ostensibly a case about retroactivity. In articulating this non-retroactivity principle, however, Justice O'Connor's plurality opinion used language that suggested a more deferential standard of review for state court legal determinations. The plurality opined that a decision would be deemed to announce a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[22]

Teague's impact on the proper standard of review for federal habeas was not immediately clear, and courts and commentators recognized that *Teague* was subject to two very different readings.[23] Under the most narrow reading, *Teague* simply prohibited federal courts from granting habeas relief if the state prisoner's constitutional claim relied on a rule of constitutional law that had not been in effect at the time of conviction. *Batson* was a perfect example of a new rule. Not only did it announce a rule that had never existed before, but the rule it announced expressly overturned the rule that existed before.[24]

Under the broader reading of *Teague*, however, federal habeas relief would be unavailable if a state court applying federal law existing at the time of the prisoner's conviction could reasonably conclude that the prisoner was not entitled to relief. Habeas relief would be barred even if the federal court's independent interpretation and application of existing law would lead it to rule in the prisoner's favor. This reading of *Teague* would constitute a marked change from *Brown v. Allen*'s de novo standard of review, and for that very reason the *Teague* opinion was widely criticized.[25] Many lower federal courts, however, adopted this broad reading.[26]

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20. *Id.* at 295-96 ("Petitioner's conviction became final 2 1/2 years prior to *Batson*, thus depriving petitioner of any benefit from the rule announced in that case."); *id.* at 299 ("Petitioner nevertheless contends that the *ratio decidendi* of *Taylor* cannot be limited to the jury venire, and he urges adoption of a new rule. Because we hold that the rule urged by petitioner should not be applied retroactively to cases on collateral review, we decline to address petitioner's contention.").

21. *Id.* at 310 ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."); *id.* at 311-12 (describing two exceptions).

22. *Id.* at 301.

23. *See, e.g.*, Yackle, *supra* note 12, at 414-15 (noting that *Teague* could be read for two different propositions).

24. *Teague*, 489 U.S. at 294-95 (describing how *Batson* had overruled Swain v. Alabama, 380 U.S. 202 (1965)).

25. Friedman, *supra* note 1, at 823 (stating that *Teague* "slams shut the doors of the habeas court[s]"); Yackle, *supra* note 12, at 415 & n.116 (noting that the broad reading of

C. *The 1990s: A Tale of Two* Teagues

In two decisions issued the term following *Teague*, the Supreme Court seemed to adopt the more sweeping interpretation, effectively creating a deferential standard of review for issues of pure federal law. A habeas petition would be deemed to rely on a "new rule" under *Teague* unless "a state court considering [the petitioner's] claim at the time his conviction became final would have felt *compelled* by existing precedent to conclude that the rule . . . was required by the Constitution."[27] Thus, the Court read *Teague* to validate "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[28] None of these cases, however, directly addressed whether *Teague* had effectively overruled *Brown v. Allen*.

In *Wright v. West*,[29] the Court reexamined the meaning of *Teague* and the proper standard of review for federal habeas. In fact, the Court expressly amended its original grant of certiorari and instructed the parties to brief the following issue:

> In determining whether to grant a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?[30]

Despite the Court's apparent attempt to resolve this question once and for all, *Wright* was inconclusive. Only three justices, led by Justice Thomas, read *Teague* as establishing a more deferential standard of review. According to Justice Thomas, "a federal habeas court must defer to the state court's decision rejecting the [petitioner's] claim unless that decision is patently unreasonable."[31] He reasoned: "[I]f a state court has reasonably rejected the legal claim asserted by a habeas petitioner under existing law, then the claim seeks the benefit of a 'new' rule . . . and is therefore not cognizable on habeas under *Teague*."[32]

Teague "has evoked genuine alarm in the academic community" and citing articles).

26. *See* Friedman, *supra* note 2, at 800 (citing Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371 (1991)).

27. Saffle v. Parks, 494 U.S. 484, 488 (1990) (emphasis added).

28. Butler v. McKellar, 494 U.S. 407, 414 (1990) (citation omitted).

29. 505 U.S. 277 (1992).

30. Wright v. West, 502 U.S. 1021, 1021 (1991) (amending order).

31. *Wright*, 505 U.S. at 291 (Thomas, J., plurality opinion) (quotation marks and citation omitted).

32. *Id.*

Three other justices, led by Justice O'Connor (who had authored the *Teague* plurality), made clear that federal habeas courts must review questions of federal law and its application de novo, although it must do so according to the law that exists at the time the conviction becomes final:

> *Teague* did not establish a "deferential" standard of review of state court determinations of federal law. It did not establish a standard of review at all. Instead, *Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final. In *Teague*, we refused to give state prisoners the retroactive benefit of new rules of law, but we did *not* create any deferential standard of review with regard to old rules.[33]

Justice Kennedy cast a fourth vote in support of this narrower reading, agreeing with Justice O'Connor that *Teague* did not impose a deferential standard of review.[34]

Neither the three-justice Thomas view nor the four-justice O'Connor/Kennedy view was able to garner a majority from the two remaining Justices. Justice White declined to address the standard of review issue altogether.[35] Justice Souter did not explicitly address whether *Teague* had modified *Brown v. Allen*'s de novo standard, but his description of *Teague* seemed somewhat more akin to Justice Thomas's broader reading. Justice Souter noted that:

> [O]ur cases have recognized that the interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent.[36]

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33. *Id.* at 303-04 (O'Connor, J., concurring) (citations omitted).

34. *Id.* at 307 (Kennedy, J., concurring) ("*Teague* did not establish a deferential standard of review of state-court decisions of federal law."). [T]he existence of *Teague* provides added justification for retaining *de novo* review, not a reason to abandon it. *Teague* gives substantial assurance that habeas proceedings will not use a new rule to upset a state conviction that conformed to rules then existing. With this safeguard in place, recognizing the importance of finality, *de novo* review can be exercised within its proper sphere.
Id. at 309.

35. *Id.* at 297 (White, J., concurring).

36. *Id.* at 313 (Souter, J., concurring) (quotation marks and citation omitted).

Accordingly, he read *Teague* to hold that, in order for a defendant to obtain federal habeas relief, the "unlawfulness [of the conviction] must be *apparent*."[37] Even placing Justice Souter in the Thomas camp for head-counting purposes, *Wright* yielded a 4-4 tie.

Thus, *Wright* failed to resolve whether *Teague*'s non-retroactivity principle effectively imposed a deferential standard of review. Following *Wright*, however, the Supreme Court and lower federal courts continued to use language consistent with Justice Thomas's deferential version of *Teague*.[38]

D. AEDPA

To this point, only courts and commentators had spoken directly to the question of whether federal habeas courts must afford deference to a state court's interpretation or application of federal law. With the passage of AEDPA, however, Congress weighed in. Section 104(3) of AEDPA, codified at 28 U.S.C. § 2254(d)(1), provides:

> 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 . . . 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.[39]

This language seemed to require federal habeas courts to defer to a state court's interpretation and application of federal constitutional law as

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37. *Id.* (emphasis added).

38. Graham v. Collins, 506 U.S. 461, 467 (1993) (stating that federal habeas relief is appropriate only if "reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor") (quotation marks and citation omitted); O'Dell v. Netherland, 521 U.S. 151, 156 (1997) ("[W]e will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court."); Vuong v. Scott, 62 F.3d 673, 677 (5th Cir. 1995) ("The *Teague* principle seeks to validate good faith interpretations of existing precedents made by state courts . . . . Thus, unless reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor, we are barred from doing so now.") (quotation marks and citations omitted); *cf.* Steiker, *supra* note 13, at 1712 & n.51 (noting "that lower federal courts have aggressively invoked the nonretroactivity doctrine as a basis for denying relief (and in many cases, as a ground for not addressing the merits of a petitioner's constitutional claim)").

39. 28 U.S.C. § 2254(d)(1).

long as the state court's decision was reasonable, instead of reviewing such issues de novo as *Brown* had instructed. Nonetheless, many argued that § 2254(d)(1) maintained independent federal habeas review for issues of federal constitutional law.[40] Others argued that to construe § 2254(d)(1) to abrogate independent federal habeas review was unconstitutional.[41] Nearly four years after AEDPA's enactment, the Supreme Court addressed the issue.

II. *WILLIAMS V. TAYLOR*

The Supreme Court's 2000 decision in *Williams v. Taylor*[42] addressed two fundamental issues involving the standard of review for federal habeas. First, it addressed for the first time the proper construction of § 2254(d)(1), including whether or not § 2254(d)(1) abrogated de novo review of federal legal issues. Second, it returned to the meaning of *Teague*, seven years after *Wright* failed to resolve the issue.

A. The Williams *Opinions*

Mr. Williams had been sentenced to death for capital murder.[43] Following his conviction, he brought a state habeas corpus petition alleging that he received ineffective assistance of counsel.[44] When the Virginia

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40. Drinkard v. Johnson, 97 F.3d 751, 778-79 & n.7 (5th Cir. 1996) (Garza, J., dissenting) ("The Supreme Court has made clear that federal courts must undertake indcpendent, *de novo* review of state court habeas decisions on appeal. I am unwilling to depart from this unbroken line of Supreme Court precedent, especially since the language of § 2254(d)(1), as amended, does not demand it."); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 42-45 (1997) (predicting that § 2254(d)(1) will be read to codify the interpretation of *Teague* endorsed by Justice O'Connor in *Wright*); Yackle, *supra* note 12, at 383 ("[F]ederal adjudication remains independent [under § 2254(d)(1)]; it is just that the question on which independent federal judgment is brought to bear is whether, after adjudicating the merits of the claim, the state court reached the correct conclusion."); *see also* Chen, *supra* note 1, at 540 & n.16 (citing articles).

41. Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2467-68 (1998); Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 131-32 & n.110 (1998); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2550 (1998). *See generally* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 703, 836 (1998). For a description of the constitutional arguments, see *infra* Part II.B.

42. 529 U.S. 362.

43. *Id.* at 368, 370.

44. *Id.* at 370.

Supreme Court rejected his claim,[45] he filed a habeas corpus petition in federal district court pursuant to § 2254.[46] The district court granted Mr. Williams a writ of habeas corpus, but the Fourth Circuit reversed, finding that the Virginia Supreme Court's decision was not "contrary to" and did not involve an "unreasonable application" of clearly established federal law under § 2254(d)(1).[47] The United States Supreme Court granted certiorari.

The Supreme Court reversed the Fourth Circuit, issuing three opinions: one by Justice Stevens, one by Justice O'Connor, and a dissent by Chief Justice Rehnquist.[48] Various permutations of Justices joined in different portions of each opinion. Justice O'Connor's opinion garnered the majority with respect to the proper construction of § 2254(d)(1)—in particular, whether it limited independent federal habeas review for federal legal issues.[49] Justice Stevens delivered the opinion of the Court with respect to how § 2254(d)(1)'s standard of review applied to the particular decision issued by the Virginia Supreme Court in Mr. Williams's case.[50]

1. JUSTICE O'CONNOR'S MAJORITY

The O'Connor majority read § 2254(d)(1) to preclude federal habeas relief unless one of two conditions were satisfied: (1) the state court's decision rejecting the prisoner's constitutional claim was "*contrary to* . . . clearly established Federal law," or (2) the state court's decision "*involved an unreasonable application of* . . . clearly established Federal law."[51]

As to the first prong, a state court's decision is "contrary to" established federal law when the state court "applies a rule that contradicts the governing law set forth in our cases."[52] The state court's decision is also "contrary to" established law if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."[53] "[I]n either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's 'contrary to' clause."[54]

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45. *Id.* at 371-72.
46. *Id.* at 372.
47. *Id.* at 373-74.
48. *Id.* at 365-66.
49. *Id.* at 399-416. One footnote in Justice O'Connor's majority opinion did not garner a majority, because Justice Scalia did not join the opinion as to that footnote. *Id.*
50. *Id.* at 367-99. *See generally The Supreme Court 1999 Term—Leading Cases*, 114 HARV. L. REV. 319-29 (2000) (describing the decisions in *Williams*).
51. *Williams*, 529 U.S. at 404-05 (O'Connor, J.).
52. *Id.* at 405.
53. *Id.* at 406.
54. *Id.*

A state court's decision fails under the "unreasonable application" prong of § 2254(d)(1) if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case."[55] With respect to this prong, the Court made clear that a federal habeas court could no longer reject a state court's interpretation or application of federal constitutional law based simply on its de novo conclusion that relief should have been granted. It explained: "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[56] In other words, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[57] Thus, the O'Connor majority rejected the reasoning of a four-justice minority led by Justice Stevens, who would have construed § 2254(d)(1) to maintain de novo review by federal habeas courts.[58]

2. JUSTICE STEVENS'S MAJORITY

Justice Stevens authored the majority opinion applying § 2254(d)(1) to the particular decision issued by the Virginia Supreme Court in Mr. Williams's case. The Court found that Mr. Williams's ineffective assistance of counsel claim was governed by the rule set forth in *Strickland v. Washington*.[59] Under *Strickland*, an ineffective assistance claim has two elements: (1) "deficient performance"; that is, counsel's conduct must fall "below an objective standard of reasonableness," and (2) "prejudice"; that is, there must be a reasonable probability that the outcome would have been different had counsel performed properly.[60]

In applying § 2254(d)(1), the Court scrutinized the Virginia Supreme Court's opinion and found that it failed to pass muster for two reasons related to the "prejudice" prong of the *Strickland* test. First, the state court "mischaracterized" the *Strickland* rule because it incorrectly read two later Supreme Court cases, *Lockhart v. Fretwell*[61] and *Nix v. Whiteside*,[62] as

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55. *Id.* at 407-08.

56. *Id.* at 411.

57. *Id.* at 410.

58. *Id.* at 377-79, 388-90 (Stevens, J.). Although Justice Stevens's reasoning was ultimately based on statutory construction, he noted serious constitutional concerns that would result from a contrary reading. *Id.* at 378-79 ("A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.").

59. *Id.* at 390 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

60. *Strickland*, 466 U.S. at 687-88.

61. 506 U.S. 364 (1993).

imposing an additional requirement for *Strickland* prejudice.[63] The Supreme Court in *Williams* found that, contrary to the state court's reasoning, *Lockhart* and *Nix* had not modified the *Strickland* test.[64]

Second, *Williams* held that the Virginia Supreme Court's analysis of prejudice was unreasonable because "it failed to evaluate the totality of the available mitigation evidence" in assessing prejudice.[65] Justice Stevens noted that mitigating evidence, even if irrelevant to future dangerousness, might still have influenced the jury's appraisal of Williams's moral culpability. His opinion explained:

> Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case. The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.[66]

3. *TEAGUE* REVISITED

Williams also addressed the issue the Court had failed to resolve in *Wright*: had *Teague* overruled *Brown v. Allen*'s de novo standard of review? Through the opinions of Justice Stevens and Justice O'Connor, a majority of six justices rejected the broad reading of *Teague* urged by Justice Thomas in *Wright*.[67] Justice Stevens stressed that *Teague* was an anti-retroactivity rule, not one that required deference to all "reasonable good-faith interpretations" of federal law by state courts.[68] Justice O'Connor agreed, explaining that *Teague* allowed a federal court to grant habeas relief where it "conclude[s] in its independent judgment that the relevant state court had erred on a question of constitutional law or on a mixed constitutional question."[69]

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62. 475 U.S. 157 (1986).

63. *Williams*, 529 U.S. at 391-93. Under the state court's reading of *Lockhart* and *Nix*, a defendant must show not only that there is a reasonable probability of a different outcome had counsel performed adequately, but also that counsel's performance impaired the fairness of the proceeding. *See id.* at 393.

64. *Id.*

65. *Id.* at 397-98. Although Justice O'Connor concurred in Justice Stevens's application of § 2254(d)(1), she also set forth her own application § 2254(d)(1), which was not significantly different. She too noted that the state court's application of *Strickland* was unreasonable because the state court's decision "reveals an obvious failure to consider the totality of the omitted mitigation evidence." *Id.* at 416.

66. *Id.* at 398.

67. *See id.* at 383-84 (Stevens, J.); *id.* at 400-02 (O'Connor, J.).

68. *Id.* at 382-83 (Stevens, J.).

69. *Id.* at 402 (O'Connor, J.).

B. Williams*'s Impact on the Standard of Review for Federal Habeas Corpus*

The *Williams* case answered several important questions regarding the standard of review for federal habeas challenges to state court convictions. Its most significant impact involved AEDPA's statutory standard of review, which precludes federal habeas relief unless the state court's decision on that claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[70] The *Williams* court read this language to require a two-pronged inquiry. First, the federal habeas court must ask whether the state court decision was "contrary to" established law. The decision is contrary to established law if it either (a) fails to apply the correct Supreme Court rule for deciding the particular claim, or (b) arrives at a result different from that reached in a "materially indistinguishable" Supreme Court case.[71] Second, the federal habeas court must ask whether the state court decision "involved an unreasonable application" of established Supreme Court law. Even if the state court ruling is incorrect—that is, even if a federal court exercising independent judgment would reach a different conclusion—federal habeas relief is available only if the state court's application of established Supreme Court law is *unreasonable*.[72]

Requiring a federal habeas court to defer to a state court's reasonable application of federal law, even if it conflicts with the federal court's independent judgment, is a significant change from *Brown v. Allen*.[73]

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70. 28 U.S.C. § 2254(d)(1).

71. *Williams*, 529 U.S. at 404-05.

72. *Id.* at 405. *Williams* gives little explicit guidance on how courts should assess "unreasonableness." *See* Steiker, *supra* note 12, at 1728 ("[T]he most that can be said for [Justice O'Connor's] opinion is that it affirms the difference between 'unreasonable' and 'incorrect' applications of federal law without exploring the distinction in any helpful detail."). It did, however, emphasize that § 2254(d)(1)'s standard of review is an objective test, not a subjective one. *Williams* expressly rejected the Fourth Circuit's holding that a state adjudication is unreasonable only if it applied federal law in a way that "'reasonable jurists would all agree is unreasonable.'" *Williams*, 529 U.S. at 409 (quoting Green v. French, 143 F.3d 865, 870 (4th Cir. 1998)). It found that this "'all reasonable jurists' standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one." *Id.* at 410.

73. Professor Yackle has argued that § 2254(d)(1), even as construed by *Williams*, does not actually "require federal courts to 'defer' to previous state court judgments." Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1749 & n.111 (2000). Rather, "section 2254(d)(1) operates on federal court authority to 'grant' applications for habeas 'relief.'" *Id.* at 1750. This strikes me as a purely semantic distinction. Professor Yackle is correct, of course, that § 2254(d)(1) does not contain any form of the word "deference." But to the extent that a federal habeas court must deny "relief" based solely on a prior state court ruling, it is essentially being required to "defer" to that state court ruling. Because I see no meaningful difference between the two phrasings, I use both in this

However, *Williams*'s two-pronged approach is different from that urged by some commentators, who have argued that § 2254(d)(1) enacts a "global reasonableness" standard.[74] In particular, *Williams* demonstrates that reasonableness alone is *not* adequate under the "contrary to" prong of § 2254(d)(1). If a state court decision fails to apply the correct Supreme Court rule, and is therefore "contrary to" established law, then it does not matter whether the state court could have "reasonably" thought it was applying the correct rule. *Williams* found that the state court had "*erred* in holding that our decision in [*Lockhart*] modified or in some way supplanted the rule set down in *Strickland*."[75] The Court, therefore, concluded that the Virginia Supreme Court had not "analyzed the ineffective-assistance claim under the correct standard."[76] At no point did the Court ask whether it would have been "reasonable" to read *Lockhart* as modifying *Strickland*.

Williams also resolved whether *Teague v. Lane* constituted a judge-made standard of review or purely a rule of retroactivity. It rejected the notion that *Teague* had imposed a deferential standard of review that required federal habeas courts to defer to a state court's "reasonable good-faith interpretations" of federal law.[77] *Teague* prohibited only the retroactive application of new rules; it did not impose a new standard of review requiring deference to a state court's application and interpretation of existing rules. The practical effect of this ruling, however, is unclear. Now that Congress has spoken by enacting § 2254(d)(1), the continued role of the judge-made *Teague* doctrine remains to be seen.[78]

Although *Williams*'s impact on § 2254(d)(1) and *Teague* is unquestionably important, the Court left open many critical issues concerning the standard of review for federal habeas. In particular, *Williams* did not confront the serious constitutional implications of a deferential standard of review and its impact on the power of federal courts under Article III.[79] Some have argued that federal courts must be able to decide issues of federal law unencumbered by state court interpretations of

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Article.

74. Chen, *supra* note 1, at 572-73.

75. 529 U.S. at 391 (emphasis added).

76. *Id.* at 395.

77. Even after *Williams*, however, some lower federal courts have continued to apply the broad version of *Teague* to preclude federal habeas relief unless there was no reasonable reading of federal law that would justify denying relief. *See, e.g.*, Burdine v. Johnson, 231 F.3d 950, 953-55 (5th Cir. 2000), *vacated*, 262 F.3d 336 (5th Cir. 2001) (en banc), *petition for cert. filed*, 70 U.S.L.W. 3246 (U.S. Sept. 21, 2001) (No. 01-495).

78. *See infra* Part VI.

79. Steiker, *supra* note 13, at 1705 ("Notably absent in the majority's decision is any discussion of constitutional limits surrounding congressional control of federal court jurisdiction."); Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 HARV. L. REV. 1551, 1555 (2001) (noting that *Williams* did not consider whether imposing deferential review was constitutional).

federal law because Article III vests in the federal courts "judicial power [over] . . . cases . . . arising under this constitution [and] the laws of the United States."[80] Others have argued that § 2254(d)(1)'s limited focus on the law of the Supreme Court, rather than law developed in the federal courts of appeals, forces lower federal courts to violate their obligation under Article III to follow their own precedents: Even if the state court flatly ignores precedent in the governing circuit, a federal habeas court must defer unless that precedent has also been clearly established in the United States Supreme Court.[81] Finally, some have suggested that depriving federal habeas courts of independent review of legal issues could constitute a violation of the Suspension Clause.[82]

Because Justice O'Connor's opinion for the *Williams* Court is based quite explicitly on statutory construction,[83] such constitutional concerns theoretically remain open questions. Surely, these constitutional concerns will continue to be a fundamental part of the long-running debate on *whether* federal habeas courts should defer to state courts on issues of federal law. After *Williams*, however, § 2254(d)(1)'s deferential standard of review is, as a practical matter, here to stay. Thus, the debate must

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80. U.S. CONST. art. III, § 2; *see also* Liebman & Ryan, *supra* note 41, at 703, 836 (arguing that Article III requires that federal courts decide legal issues "independently, comprehensively, lawfully, finally, and effectually") (emphasis omitted); Metzler, *supra* note 41, at 2540 ("I agree that Congress may not compel the courts to speak a constitutional untruth."); *cf.* Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 646 (1991) ("The Constitution itself thus presumes parity among federal courts, but disparity between federal and state courts—at least where the question is which court may be given the last word on issues of federal law."). *But see* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888 (1998).

81. Jackson, *supra* note 41, at 2467-68.

> In evaluating the scope of "clearly established" law, the lower federal courts apparently must ignore final judgments entered by other district courts, or by the federal courts of appeals. Do these requirements—the clearly established standard and the rule that only Supreme Court decisions can meet that standard —intrude on the federal courts' function to say what the law is?

Id.; Lee, *supra* note 40, at 131-32 ("If the 'Supreme Court only' clause of section 2254(d) requires district courts to make an independent determination about whether the circuit has fairly interpreted Supreme Court case law, then it selectively suspends the doctrine of stare decisis. This is a potential violation of Article III . . . .").

82. Delgado v. Lewis, 223 F.3d 976, 980 (9th Cir. 2000) (noting that an overly broad reading of § 2254(d)(1) "would pose serious Suspension Clause difficulties"); Daniel Kanstroom, *Crying Wolf or a Dying Canary?*, 25 N.Y.U. REV. L. & SOC. CHANGE 435, 438 n.14 (1999) (book review) (noting that "AEDPA is extraordinarily far-ranging and implicates constitutional provisions from Article III to the Suspension Clause and the First and Fifth Amendments" and citing "unprecedented deference to state court factual and legal findings" as one of "AEDPA's main judicial review features").

83. *See Williams*, 529 U.S. at 404 (noting the "cardinal principle of statutory construction"); *see also id.* at 407 (relying on "the logical and natural fit of the neighboring 'unreasonable application' clause").

begin to shift to, or at least expand towards, the question of *how* federal courts should defer to state court rulings on pure issues of federal law.

III. OPINION-DEFERENCE OR RESULT-DEFERENCE?

When a federal habeas court reviews a state court's "decision" under § 2254(d)(1), what aspect of that decision should be the focus of review? Does the federal court review simply the state court's "result," by which I mean the state court's ultimate conclusion that there is no remediable claim under federal law? Or does it review the state court's "opinion," that is, the actual legal reasoning provided by the state court in support of its ruling?

The answer to this question will have a significant impact on how § 2254(d)(1)'s standard of review operates. If the federal habeas court must defer to the state court's "result," then relief would be barred so long as that result could be supported by some legal basis that is neither contrary to, nor an unreasonable application of, established law. This would essentially enact the broad reading of *Teague* that Justice Thomas endorsed in *Wright v. West*.[84] Under that approach, federal habeas relief is available only if "reasonable jurists hearing petitioner's claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor."[85] According to Justice Thomas, therefore, the actual reasoning relied on by the state court is irrelevant. I refer to this reading of § 2254(d)(1) as "result-deference."

If § 2254(d)(I) targets the state court's "opinion," then relief is barred only if the state court's actual reasoning is neither contrary to nor an unreasonable application of established law. This would be an intriguing middle ground between independent review and the broad reading of *Teague* espoused by Justice Thomas. Federal habeas review would target the analytic soundness of the state court's interpretation and application of federal law. If the state court's actual analysis identifies the correct rule of federal law and applies it reasonably, then federal habeas courts may not second-guess its ruling. If the state court's analysis fails to pass muster, then the federal habeas court would conduct its traditional independent review of the relevant legal issues. I refer to this reading of § 2254(d)(1) as "opinion-deference."

I will also examine an important corollary to the question of whether § 2254(d)(1) requires opinion-deference or result-deference: How should

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84. *Wright*, 505 U.S. at 291 (plurality opinion) (Thomas, J.).

85. *Graham*, 506 U.S. at 467 (quoting *Saffle*, 494 U.S. at 488); *see also O'Dell*, 521 U.S. at 156 ("[W]e will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court.").

§ 2254(d)(1) apply if the state court issues no opinion explaining how it interpreted and applied federal law? Because there would be no written opinion to scrutinize, the possibilities are either: (1) a state court that fails to articulate its reasoning receives no deference, meaning that a federal habeas court may conduct independent review of the legal issues; or (2) a state court that fails to articulate its reasoning will receive result-deference; that is, the ruling would preclude federal habeas relief as long as it can be supported by some legal basis that is neither contrary to nor an unreasonable application of established law.

I conclude that § 2254(d)(1) should be read to target the legal reasoning given by the state court, rather than its bare outcome. It should limit federal habeas review only where the state court writes an opinion that does an analytically sound job of adjudicating a prisoner's federal claim on the merits. Consistent with the Supreme Court's bifurcated reading of § 2254(d)(1) in *Williams*, a state court's reasoning would pass muster when the state court identifies the established rule and reasonably applies that rule to the facts.

A. Methodology

My approach to these issues concentrates on two inquiries that have shaped prior efforts to conceptualize the role of federal habeas. The first focuses on the individual and asks: to what extent does a particular model of federal habeas protect the federal rights of a state defendant? Different theories of habeas entail more or less enforcement of those rights by the federal courts. At the less-enforcement end of the spectrum is Professor Bator's "fair process" model, under which federal habeas affords relief only where the defendant has been denied a full and fair opportunity to litigate his or her federal claims in state court.[86] From the defendant's standpoint, the only protection Professor Bator's model provides is to ensure that he or she has access to fair process in state court. At the more-enforcement end of the spectrum is the "federal forum" model supported by Professor Yackle[87] and the "appellate" model urged by Professor Friedman.[88] These models generally allow state defendants to raise

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86. *See* Bator, *supra* note 1, at 451.

87. Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 997 (1985) ("[I]t is essential that postconviction habeas be available to ensure the choice of a federal forum . . . .").

88. *See* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 253-54 (1988).

> The Article's thesis is that the Court expanded the scope of the writ of habeas corpus in *Brown* because the Court recognized that it no longer could shoulder the burden on direct review of scrutinizing constitutional claims arising in state criminal proceedings. Accordingly, the federal habeas courts were to act as

substantive issues of federal law on federal habeas and to receive independent review of legal questions by federal habeas courts.[89]

The second inquiry focuses on the state system itself—how does a particular model of federal habeas impact the behavior of state institutions in enforcing federal rights? Debates over the proper scope of federal habeas frequently questions whether a given theory of habeas will make state courts more or less attentive to defendants' federal claims. Indeed, some judges and commentators have argued that the very purpose of federal habeas is to "deter" state courts from under-enforcing constitutional rights.[90]

Following this tradition, my analysis of § 2254(d)(1) undertakes these same two inquiries. First, 1 explore how the choice between opinion-deference and result-deference impacts the scope of protection federal habeas affords an individual with a federal claim. Second, I assess how either reading of § 2254(d)(1) will affect the behavior of state courts in their enforcement of federal rights.

It is equally important, however, to clarify what I am *not* doing. It is not my goal to argue as a general matter what the proper role of federal habeas should be, or as a specific matter whether federal habeas courts should defer to state court rulings on pure questions of federal law. *Williams*'s construction of § 2254(d)(1) establishes that, at least for now, federal habeas courts must defer to state court interpretations of federal law. Thus, this Part aims to analyze and reconceptualize federal habeas in light of § 2254(d)(1) and *Williams*, in the hope that it may shed some light on how the new standard of review will operate. Also, my analysis of

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> surrogates for the United States Supreme Court through habeas review, in effect exercising appellate jurisdiction over state criminal proceedings.

Id.

89. Another prominent model is the "innocence" model. Under this theory, first articulated by Judge Friendly and later endorsed by Professors Hoffman and Stuntz, the level of scrutiny varies depending on whether the defendant can make a viable showing that he is innocent. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 69. For articles summarizing the numerous "models" of federal habeas corpus, see Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1813 (1991); Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 983-1003 (2000); Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 152-54 (1994); David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735, 743-786; Yackle, *supra* note 73, at 1756.

90. Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting) ("[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."); Joseph L. Hoffman, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 175-85; Lee, *supra* note 89, at 154; *see also infra* Part III.C.

§ 2254(d)(1) is deliberately neutral on two of the more controversial issues underlying the debate over the proper scope of federal habeas vis-à-vis state courts. First, I take no position on the constitutional implications of federal habeas, either in terms of Article III or the Suspension Clause. Second, I take no position on the question of parity; my arguments are not based on any assumption about whether or not state courts are as good as, better than, or worse than federal courts at enforcing federal rights.[91]

B. Impact on Individual Defendants: Opinion-Deference Ensures that Some Court Will Consider the Defendant's Claim in an Analytically Sound Manner

From the defendant's standpoint, any post-*Williams* reading of § 2254(d)(1) provides less than the absolute right to raise federal claims de novo on federal habeas. Opinion-deference, however, will ensure one (and only one) independent adjudication of the defendant's claim that is analytically sound under established law.[92] If the state court's reasoning passes muster, then § 2254(d)(1) would bar federal habeas relief; a defendant could not relitigate the issue on federal habeas because the state court has already provided a sound adjudication of his or her federal claim. However, if the state court's reasoning fails to correctly identify or reasonably apply governing federal law, then § 2254(d)(1) would not bar relief; a defendant would be entitled to independent review on federal habeas because the state proceedings failed to provide an analytically sound adjudication.

A result-deference reading of § 2254(d)(1), on the other hand, would not guarantee an analytically sound disposition of a defendant's federal claims. Deferring to the state court's result, as opposed to its actual legal analysis, means that a defendant's federal claim could be rejected even though no court, state or federal, undertook the analysis required by the Supreme Court for adjudicating such claims. Suppose that the state court

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91. For some key articles debating "parity" between state and federal courts, see Amar, *supra* note 80, at 646; Bator, *supra* note 1, at 506-12; Neuborne, *supra* note 1, at 1106; Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 813 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions."). *See generally* Lee, *supra* note 89, at 155, 193 n.174 (listing parity articles).

92. To be more precise, it will ensure that a *diligent* defendant will receive an analytically sound adjudication of his or her federal claim on the merits. A defendant who has procedurally defaulted his or her claim (and cannot show cause and prejudice for the default) would still be precluded from a merits review on federal habeas. *See Wainwright*, 433 U.S. at 87-88 (requiring a defendant who procedurally defaults a claim in state court to establish "cause and prejudice" in order to raise the claim on federal habeas).

rejects a defendant's federal claim based on Ground A. Ground A, however, is either contrary to or unreasonably applies clearly established Supreme Court precedent, which dictates that the viability of the defendant's claim depends on Ground B. Under opinion-deference, the federal habeas court could independently assess whether Ground B supports the constitutional claim, an inquiry that was never made in state court. Under a result-deference approach to § 2254(d)(1), however, the federal habeas court's inquiry would be limited to whether a court could have reasonably denied relief because of Ground B. Accordingly, neither the state court nor the federal court will have independently assessed whether Ground B actually justifies denying the claim on the merits.

Here is a more concrete example. Imagine a defendant who claims that he received ineffective assistance of counsel on appeal. The state court denies the claim on the basis that a defendant is only entitled to effective assistance of counsel at trial, *not* on direct appeal. It is well-established, of course, that a defendant is entitled to effective assistance of appellate counsel.[93] Under an opinion-deference reading of § 2254(d)(1), the federal habeas court would find this state court decision "contrary to or an unreasonable application of" established federal law, and proceed to independently decide whether the defendant did or did not receive effective assistance on appeal. Under a result-deference reading of § 2254(d)(1), however, the federal habeas court would be required to deny relief as long as some court could reasonably conclude that the defendant received effective assistance. In that situation, no court, state or federal, would have made what is clearly the dispositive inquiry: whether appellate counsel provided constitutionally effective assistance. Even if one assumes "parity" between state courts and federal courts in deciding this issue for a particular defendant, adequate enforcement of the defendant's federal rights would seem to demand that *some* court has independently considered the issue. Yet, under a result-deference reading of § 2254(d)(1), it is possible that a defendant will not receive independent consideration from any court.

1. "SUBSTANTIVE FAIR PROCESS"

Thus, an opinion-deference reading of § 2254(d)(1) empowers federal habeas courts to correct analytically unsound decisions by state courts without entitling all defendants to de novo relitigation of federal legal issues. Such a conception of federal habeas has yet to be articulated, either by judges or academics. Ironically, the closest scholarly analogy may be Professor Bator's "fair process" model, which is typically associated with the bare minimum level of federal habeas protection. Professor Bator

93. Evitts v. Lucey, 469 U.S. 387, 396 (1985).

argued that federal habeas review should be available only where the state court failed to afford the defendant "a process fairly and rationally adapted to the task of finding the facts and applying the law."[94] Opinion-deference would essentially add a substantive dimension to Bator's requirement of fair process. It would embrace the notion that part of a fair adjudication is sound legal analysis that identifies and reasonably applies the established legal principles.

Professor Bator would likely object to this expansion of "fair process." His fair process test allows relief only for the most egregious state court deficiencies: a judge who was bribed, a defendant who was tortured to plead guilty, a mob-dominated trial, or complete deprivation of counsel.[95] The federal habeas court's initial inquiry would never target "whether substantive error of fact or law occurred."[96]

On closer inspection, however, "substantive" fair process is not entirely inconsistent with Professor Bator's view of federal habeas. He wrote: "[I]t is always an appropriate inquiry whether previous process was meaningful process, that is, *whether the conditions and tools of inquiry were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied.*"[97] Where the state court fails to identify the correct legal rule or fails to apply the correct rule in a reasonable manner, the "probability" that "the law [was] correctly applied" drops dramatically. The state court has, quite literally, failed to use the proper "tools of inquiry."

Thus, truly "fair" process has a substantive element. It would be hollow indeed to declare that a state court's disposition of a defendant's federal claim was fair if that ruling was not even based on a sound reading of federal law. An opinion-deference reading of § 2254(d)(1) recognizes this substantive dimension by preserving independent federal habeas review where the state court's decision did not reliably interpret and apply the governing federal law principles.

2. ANALOGY: ABUSE OF DISCRETION REVIEW ON DIRECT APPEAL

An opinion-deference reading of § 2254(d)(1) would be analogous to deferential review in the context of a direct appeal. Under deferential appellate review, *how* the lower court reaches its decision is critical. For example, when an appellate court reviews a lower court's decision for abuse of discretion, it must determine whether the lower court considered

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94. Bator, *supra* note 1, at 455.
95. *Id.* at 455, 458.
96. *Id.* at 455.
97. *Id.*

the appropriate factors.[98] To do so, it must review the actual analysis given by the lower court. If the lower court fails to consider the proper factors or relies on impermissible factors, then that decision constitutes an abuse of discretion, even if a lower court could have reached the same ultimate result if it had applied the proper factors.[99]

Thus, abuse of discretion review indicates that where a lower court's *actual* reasoning warrants reversal under a deferential standard of review, it is irrelevant that the court's ultimate outcome could have been reached by permissible reasoning. Likewise, where a state court's reasoning fails to satisfy § 2254(d)(1)'s deferential standard of review, it should be irrelevant that some reasonable, albeit incorrect, application of federal law might have supported the outcome. The reason for this approach is manifest: where a lower court's actual reasoning fails to pass muster, there is no way to know whether it would have reached the same decision had it based its decision on the correct factors. Justice O'Connor recognized this very problem in *Williams*, stating: "It is impossible to determine, however, the extent to which the Virginia Supreme Court's error with respect to its reading of *Lockhart* affected its ultimate finding that Williams suffered no prejudice."[100]

3. COROLLARY: WHAT IF THE STATE COURT ISSUES NO OPINION?

Assuming that an opinion-deference reading of § 2254(d)(1) is adopted, it is not entirely clear how a federal habeas court should review a state court that fails to write an opinion. It is possible that a state court that issues only a summary order reached its conclusion in an analytically sound manner. But it is also possible that such a court misunderstood the governing legal standards or applied them unreasonably. Where the state court issues a summary ruling, there is no way for the federal habeas court to know how the state court interpreted and applied federal law. As a practical matter, then, a state court that withholds its legal reasoning would thwart the very review that an opinion-deference reading of § 2254(d)(1)

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98. *See* Johnson v. United States, 398 A.2d 354, 365 (D.C. 1979) ("The court reviewing the decision for an abuse of discretion must determine 'whether the decision maker failed to consider a relevant factor, whether he relied upon an improper factor, and whether the reasons given reasonably support the conclusion.'") (quoting Note, *Perfecting the Partnership: Structuring the Judicial Control of Administrative Determinations of Questions of Law*, 31 VAND. L. REV. 91, 95 (1978)).

99. *See* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 54-55, 59 (2000) (citing Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 645-56 (1971) and Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169).

100. *Williams*, 529 U.S. at 414 (O'Connor, J.).

would require—the federal habeas court would be unable to determine whether the state court applied the correct legal rule or whether that application was reasonable.

If § 2254(d)(1) is construed to ensure individuals an analytically sound adjudication of their federal claims, then the safest course would be to withhold deference where the state court fails to write an opinion setting forth its legal reasoning. Without a written opinion, the federal habeas court could never be sure that the state court's analysis correctly identified and reasonably applied established federal law. Accordingly, independent review of summary rulings would be required in order to guarantee one sound adjudication of a defendant's federal claim.

This approach to § 2254(d)(1) is also consistent with deferential review on direct appeal. Where a decision is to be governed by particular factors, the failure of a trial court to articulate how it applied those factors may constitute an abuse of discretion.[101] In *United States v. Taylor*, the Supreme Court reviewed a lower court's ruling under the Speedy Trial Act. Such rulings, although they may be set aside only for an abuse of discretion, are governed by specific statutorily-designated factors.[102] The Court explained:

> Where, as here, Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review. Only then can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent . . . .[103]

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101. *See, e.g.*, United States v. Taylor, 487 U.S. 326, 335-37 (1988).

102. *Id.* at 336.

103. *Id.* at 336-37; *see also* United Nat'l Ins. Co. v. R & D Latex Corp., 141 F.3d 916, 919 (9th Cir. 1998) ("[M]eaningful appellate review for abuse of discretion is foreclosed when the district court fails to articulate its reasoning."); Edwards v. City of Houston, 78 F.3d 983, 1000 (5th Cir. 1996) ("While normally we review a finding of timeliness under the abuse of discretion standard, when the district court fails to articulate reasons for its ultimate determination as to timeliness, we must review this factor *de novo*."); *cf.* Nathan Katz Realty, L.L.C. v. NLRB, 251 F.3d 981, 994 (D.C. Cir. 2001) (reviewing agency action) ("That the Board has broad discretion is of no import. To state the standard of review is not to offer a reason. If the Board chooses to exercise its discretion, it must explain its action, and its explanation must reflect reasoned decisionmaking."). It is true that, in the pure appellate context, an appellate court will usually remand such a case so the lower court may reconsider the issue and articulate how it applied the relevant factors. In the habeas context, such a remand would not be possible because a federal habeas petition is an independent cause of action, not merely a direct appeal from a state court judgment. Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997) (noting that "[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"). The treatment of summary

Likewise, a state court's ruling on a defendant's federal constitutional claim is governed by specific factors, namely, the specific rules of law relevant to that constitutional claim. If the state court fails to indicate how (or whether) it applied those rules of law, review is impossible.

C. Impact on State Courts: Opinion-Deference Gives State Courts an Incentive to Examine Federal Law Claims Carefully and Thoroughly

Another implication to consider in interpreting § 2254(d)(1) is how it will influence state courts in their enforcement of federal rights. Adopting an opinion-deference reading of § 2254(d)(1) will create an incentive for state courts to thoroughly consider federal claims raised by individuals in its criminal justice system. This incentive exists because, if the state court both identifies the correct rule of law and reasonably applies that rule, then a federal habeas court will not be able to second-guess the state court's ruling. The state court will know that, by doing an analytically sound job of deciding a federal law claim, it will insulate its decision from federal habeas review. The state court will also know that, if its opinion is inadequate, then the federal court may consider the defendant's constitutional claim independently and may effectively "reverse" the state court's ruling by granting a writ of habeas corpus.

The notion that federal habeas influences how state courts act is not new. As early as the 1960s, Justice Harlan noted the "deterrence purpose"[104] that federal habeas serves, and wrote that "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[105] This language has been quoted often in Supreme Court opinions,[106] and Justice Harlan's view of habeas has gained support in scholarly circles as well.[107] According to this

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lower court rulings in the appellate context is nonetheless instructive because it indicates that a lower court decision cannot pass muster under a deferential standard of review unless there is some way to determine how it applied the required factors.

104. *Desist*, 394 U.S. at 263, 265 (Harlan, J., dissenting).

105. *Id.* at 262-63; *see also* Mackey v. United States, 401 U.S. 667, 687 (1971) (Harlan, J., dissenting) ("The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark.").

106. Brecht v. Abrahamson, 507 U.S. 619, 648 (1993) (White, J., dissenting); *Saffle*, 494 U.S. at 488; *Teague*, 489 U.S. at 306; *see also* Hoffmann, *supra* note 90, at 175-80 (arguing that *Teague* signals an endorsement of a "deterrence" theory of federal habeas).

107. *See* Lee, *supra* note 89, at 154; *see also* Hoffmann, *supra* note 90, at 175-80 (arguing that the Supreme Court's precedent is consistent with a deterrence theory of habeas); Hoffstadt, *supra* note 89, at 986 (describing "the deterrence model").

"deterrence" theory, federal habeas operates as a much-needed "stick" that threatens to vacate a state's criminal convictions if the state fails to enforce federal rights.[108]

Others, however, have questioned the impact of federal habeas review on state court behavior. Chief Justice Rehnquist openly doubted whether expanded habeas relief has any effect on state court enforcement of federal rights, because state courts were already oath-bound to "their Article VI duty to uphold the Constitution."[109] Professor Bator argued that the prospect of federal habeas review could actually have a detrimental effect on the adjudication of federal claims in state court:

> I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.[110]

It may be impossible to demonstrate as an empirical matter how federal habeas relief ultimately impacts state courts' treatment of federal constitutional claims. Analytically, however, it is fair to say that allowing independent habeas review of all federal legal issues does not necessarily provide the strongest incentive for state courts to address federal constitutional claims thoroughly. Under *Brown v. Allen*'s de novo standard, federal habeas was all "stick" and no "carrot." State courts received no benefit if they did an analytically solid job of interpreting federal constitutional law but nonetheless under-enforced federal rights. Where federal habeas courts reviewed such issues de novo, whether a state conviction would stand was completely independent of how diligently the state court had attempted to apply federal constitutional law. If the federal court agreed that there was no constitutional violation, then the conviction would stand. If it disagreed, then the conviction would be vacated. In either case, it would not matter whether the state court undertook its task carelessly, indifferently, thoroughly, or deliberately.

A result-deference reading of § 2254(d)(1) would have this same flaw. Just like de novo review, how the state court actually interpreted federal law would be irrelevant. As long as there exists some reasonable

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108. Some have argued that, historically, federal habeas focused more on the behavior of state executive officials than judges. *See, e.g.*, Amar, *supra* note 80, at 649 ("It is not clear that federal habeas was about federal court review of state judges, rather than state executives . . . ."). Because § 2254(d)(1) by its terms scrutinizes the decisions of state courts, its effect on court behavior is the focus of this Article.

109. *Brecht*, 507 U.S. at 636.

110. Bator, *supra* note 1, at 451.

application of federal law supportive of the state court's ultimate result, § 2254(d)(1) would preclude relief, *regardless* of how the state court reached its result. It would draw no distinction between (1) a state court that diligently applied established federal law, and (2) a state court that failed to do so but nonetheless lucked into a result that *could* have been supported by a reasonable application of established law. Even a state court that flagrantly ignored the governing law could thwart independent federal habeas review.[111] Thus, a result-deference reading of § 2254(d)(1) would not create any additional incentive for state courts to do a thorough job interpreting and applying federal law. Although it would surely make it harder to obtain federal habeas relief, a result-deference reading would do nothing to encourage state courts to adjudicate federal claims with greater care.

1. MORE THAN JUST "DETERRENCE"

Unlike both result-deference and independent review, an opinion-deference reading of § 2254(d)(1) offers state courts a tangible "carrot" to do an analytically adequate job interpreting federal law. By requiring the federal habeas court to scrutinize the state court's actual reasoning, it would reward those state courts that do a thorough job by barring federal habeas relief if the state court's interpretation and application of federal law is analytically sound.

In this way, the opinion-deference approach is consistent with a theory put forth by Professor Althouse, who argues that state courts should be "exploited, encouraged, and improved" in their capacity to protect federal rights, and that doctrine defining the role of federal courts "can serve as a mechanism for utilizing state courts and encouraging them to further the enforcement of rights."[112] If § 2254(d)(1) is read to reward state courts when they interpret and apply federal law in an analytically solid manner, then they will be encouraged to undertake this task more deliberately. This encouragement may, in the long run, enhance the enforcement of federal rights overall because state courts will play a more meaningful role in the process.[113] Neither independent review nor result-deference creates such

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111. This was also the case under Justice Thomas's reading of *Teague*. Because the burden was on the habeas petitioner to show that "reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor," *Graham*, 506 U.S. at 467, Justice Thomas's version of *Teague* barred relief no matter how unsound the state court's actual reasoning.

112. Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 956 (1991); *see also* Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1211 (1994) (noting that the "Myth of Parity" can act "as [an] incentive").

113. *See* Althouse, *Tapping the State Court Resource*, *supra* note 112, at 961.

> [A]s long as the state courts are good enough, even if they fall short of parity,

an incentive for state courts.[114]

The opinion-deference reading of § 2254(d)(1) also resonates with "dialectical federalism," a theory of federal habeas first articulated by Professors Cover and Aleinikoff.[115] This theory views federal habeas as creating a dialogue between the state courts and the lower federal courts about the proper interpretation and application of Supreme Court law as applied to the state criminal justice system.[116] Under de novo review, however, the federal habeas court held an institutional advantage because, for any particular constitutional claim, the federal habeas court always had the last word.[117] An opinion-deference reading of § 2254(d)(1) could be read as shifting the terms of this dialogue to give state courts a stronger incentive to participate. If the state court does an analytically solid job, then the federal habeas court cannot overrule it. To adopt a result-deference reading, however, would undermine this dialogue. As deference would be required regardless of whether the state court did an analytically solid job, there would be no incentive for the state court to participate in this dialogue. Indeed, when many feared that *Teague* would be given the broad interpretation later endorsed by Justice Thomas, commentators warned that such a reading would cause a "loss of the federal-state dialogue."[118]

> the interest in enforcing rights supports allocating some federal questions to state court in order . . . to take advantage of the plentiful state courts, training them to handle rights claims routinely, as they arise in context.

Id.; *cf.* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1488 (1987) (noting "the federal interest in effectively functioning states").

114. *See supra* Part III.C.

115. *See* Cover & Aleinikoff, *supra* note 1.

116. *Id.* at 1048-54.

117. Although the state court would be bound to follow a federal court's granting of a habeas writ in a particular case, state courts would retain the capacity to ignore the holdings of lower federal courts in future cases. *Id.* at 1053 ("Clearly, state courts are not bound to respect the doctrinal statements of the inferior federal tribunals insofar as they understand those statements not to be compelled by the Supreme Court."); *see also* Ann Althouse, *Saying What Rights Are—In and Out of Context*, 1991 WIS. L. REV. 929, 941-42.

> This dialogue differs from the dialogue of nine Supreme Court Justices or twelve jurors, in which the participants must reach a consensus. The federal judges simply speak second and override the state judges whenever they want, regardless of what the state judges think. It may seem disingenuous to call this a dialogue. Cover and Aleinikoff shore up the weak spot in their argument by pointing out that the federal judge's view, although undeniably dictating the outcome in any particular case, does not create a binding precedent (as a Supreme Court decision would).

Id. (footnotes omitted).

118. Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 1027 (1991). In one sense, of course, *any* deference by federal habeas courts on pure issues of federal law potentially undermines the role of federal courts in this dialogue. If federal habeas courts

2. COROLLARY: WHAT IF THE STATE COURT ISSUES NO OPINION?

An opinion-deference reading of § 2254(d)(1) would encourage state courts to do an analytically sound job of enforcing federal rights and, more generally, to participate meaningfully in a federal-state dialogue about the rights of defendants in the criminal justice system. This incentive occurs precisely because deference is contingent on whether the state court's actual reasoning passes analytical muster under § 2254(d)(1).[119] It follows that, to preserve this incentive, a state court that fails to write an opinion articulating how it interpreted and applied federal law should not receive deference under § 2254(d)(1). If summary decisions receive result-deference, but written opinions receive more rigorous opinion-deference, then a state court that explains its legal reasoning would only constrain the ability of federal habeas courts to deny habeas relief pursuant to § 2254(d)(1). This would profoundly undermine any incentive for state courts to openly participate in constitutional adjudication.

Discouraging state courts from issuing opinions explaining their legal reasoning is not a desirable result. As numerous commentators have recognized, opinions are an integral part of the legal process.[120] To decide cases without writing an opinion reduces judicial responsibility and impairs both the development of law and the consistency of judicial decision-making.[121] It also makes judges more susceptible to deciding cases based

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are limited to asking whether the state court decision is analytically sound, as opposed to whether it is correct, they might not be speaking directly on the relevant legal issues. Chen, *supra* note 1, at 626 ("Because a federal habeas court's decision under § 2254(d)(1) is not about the underlying substantive constitutional law decision by the state court, but involves a determination of whether the latter's decision was reasonable, the federal court may not pronounce what the law is."). However, it remains an open question whether a federal habeas court must first address the legal issues independently, and only then apply the deferential standard. *See infra* Part VI. This could allow them to still participate fully in the dialogue, even if their ability to grant relief is constrained.

119. *See supra* Part III.C.

120. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978) ("By and large it seems clear that the fairness and effectiveness of adjudication are promoted by reasoned opinions."); 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, 575 (1981) ("The reasoned, published appellate opinion is the centerpiece of the American judiciary's work."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-16 (1959) (noting that providing a "reasoned explanation" is "intrinsic to judicial action").

121. Chen, *supra* note 1, at 625 (noting that "explicit deliberation" by courts is valuable for the development of legal principles and for judicial accountability); Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 765-84 (1995) (describing the importance of judicial opinions to the development of law, stare decisis, and the legitimacy of the judicial process); Reynolds & Richman, *supra* note 120, at 575 ("Because opinions make law, these explanations must be

on a general reaction to the type of case rather than on the actual merits of the particular claim presented. Professors Reynolds and Richman have noted that judges who can avoid writing precedential opinions are more likely to rule based on such a "conditioned response."[122] Accordingly, to encourage opinion-writing by state courts is to enhance those courts' abilities to enforce federal rights, consistent with the general view of federal courts expressed by Professor Althouse.[123] Making a written opinion a prerequisite for deference under § 2254(d)(1) also bolsters the dialectical view of federal habeas expressed by Professors Cover and Aleinikoff. An opinion is the means by which a state court would participate in a dialogue about federal rights; and therefore, by encouraging state courts to issue such opinions, that dialogue will be enhanced.[124]

D. Federal Habeas Under an Opinion-Deference Reading of Section 2254(d)(1)

For these reasons, whether § 2254(d)(1) bars federal habeas relief should depend on the actual reasoning provided by the state court. If the state court's reasoning is either "contrary to" or "involve[s] an unreasonable application of" federal law, then the federal court is "unconstrained by § 2254(d)(1)"[125] and must proceed to make an independent assessment of the legal issues. The federal habeas court should not inquire whether *some* reasonable application of the correct rule of law *could* have justified denying relief.

Nor should a state court receive deference if it fails to provide *any* legal analysis to support its ruling. In that situation as well, the federal court should be free to decide the constitutional issues independently, free

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readily accessible to interested persons.").

122. Reynolds & Richman, *supra* note 120, at 623-24 ("[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 judge to justify a decision to the public is one way to minimize that danger.").

123. As a general matter, encouraging state courts to articulate their reasoning when considering federal claims would also ameliorate other problems relevant to federal review of state court rulings. As litigation in the Supreme Court over the 2000 presidential election demonstrates, *how* a state court reaches its decision is often critical to whether the decision passes muster under federal law. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (remanding for Florida Supreme Court to articulate the precise basis for its decision). *But cf.* Bush v. Gore, 531 U.S. 98, 111 (2000) (reversing despite the Florida Supreme Court's subsequent explanation on remand).

124. Thus, adopting an opinion-deference reading of § 2254(d)(1) would alleviate two concerns articulated by Professor Chen, who argued in a pre-*Williams* article that § 2254(d)(1) "might diminish state courts' incentive to fully articulate their reasoning" and "reduce[] the opportunity" for a dialogue between federal and state courts. Chen, *supra* note 1, at 625, 627.

125. *Williams*, 529 U.S. at 404, 406.

from § 2254(d)(1)'s deferential standard. 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.

This opinion-deference reading of § 2254(d)(1) strikes a sensible balance between *Brown v. Allen*'s de novo review and Justice Thomas's result-deference review.[126] Although it no longer assures a defendant the absolute right to relitigate federal claims via a federal habeas petition, it does ensure that a defendant will receive one analytically sound disposition of those claims. It also gives state courts a real incentive to take their obligation to enforce federal rights seriously, whereas a result-deference reading could actually encourage state courts to address federal claims summarily.

IV. DOES EXISTING LAW SUPPORT AN OPINION-DEFERENCE READING OF SECTION 2254(d)(1)?

To this point, my analysis of § 2254(d)(1) has been, for lack of a better word, academic. However persuasive (or unpersuasive) one finds this analysis, a court deciding how § 2254(d)(1) should be applied will do more than merely decide which reading it prefers as a matter of policy or theoretical coherence.[127] Courts will analyze existing case law on

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126. *Cf.* Michael Williams v. Taylor, 529 U.S. 420, 436 (2000) (noting that the scope of federal habeas involves a "delicate balance" between the states and the federal courts).

127. To date, the federal appellate courts have given conflicting indications with respect to whether § 2254(d)(1) requires opinion-deference or result-deference. For cases endorsing result-deference, see Santellan v. Cockrell, 271 F.3d 190, 193 (5th Cir. 2001) ("The statute compels federal courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning."); Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) ("Nowhere does [§ 2254(d)(1)] make reference to the state court's process of reasoning."); Bell v. Jarvis, 236 F.3d 149, 159 (4th Cir. 2000) (en banc) ("[T]he criterion of a reasonable determination for purposes of § 2254(d) is not whether the state court decision is well reasoned, but whether the determination is at least minimally consistent with the facts and circumstances of the case.") (quotation marks and citations omitted); *Hennon*, 109 F.3d at 335 ("It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is whether the determination is at least minimally consistent with the facts and circumstances of the case.").

For cases endorsing opinion-deference, see Lindh v. Murphy, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997):

> By posing the question whether the state court's treatment was "unreasonable," § 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject . . . . When the subject is painted in shades of grey, rather than in contrasting colors, a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment.

Id.; *see also* Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001) ("AEDPA imposes a requirement of deference to state court decisions, but we can hardly defer to the state court

§ 2254(d)(1) and examine the text and structure of AEDPA in order to discern Congress's intent in enacting the new standard of review. Such an analysis also supports the proposition that § 2254(d)(1) requires deference only to the actual reasoning relied on by the state court, as opposed to its bare result. Opinion-deference fits comfortably with both the Supreme Court's decision in *Williams* and with the text and structure of AEDPA itself.

A. Williams v. Taylor

Williams does not expressly address whether § 2254(d)(1) targets the state court's actual legal reasoning or merely its bare result. However, the approach of the *Williams* Court is consistent only with a reading of § 2254(d)(1) that requires opinion-deference. This is borne out by the Court's treatment of both prongs of the § 2254(d)(1) analysis. In applying the "contrary to" prong, *Williams* held: "A state-court decision will certainly be contrary to our clearly established precedent if the state court

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on an issue that the state court did not address."); Doan v. Brigano, 237 F.3d 722, 730-31 (6th Cir. 2001):

> Because the Ohio Court of Appeals did not even identify in its opinion that Doan had a federal constitutional right to a fair and impartial jury that considers in its deliberations only the evidence presented against him at trial, the "unreasonable application" prong of § 2254(d)(1) does not govern our analysis. The Ohio Court of Appeals did not, as the Supreme Court [in *Williams*] defined an unreasonable application, correctly identify the governing legal principle only to unreasonably apply that principle to the particular facts of the case at hand. On the contrary, the Ohio Court of Appeals completely failed to identify Doan's Sixth Amendment rights in its analysis.

Id. (citations omitted); Campbell v. Rice, 265 F.3d 878, 889-90 (9th Cir. 2001):

> Under *Williams*, we must discern "the correct legal rule" according to clearly established Supreme Court law and then look to see if the state appellate court applied that rule in Campbell's case . . . . By applying the "adverse effect" standard to the facts of Campbell's case instead of the "correct legal rule" set forth in *Holloway*, the California Court of Appeal rendered a decision that was "contrary to" clearly established United States Supreme Court law.

Id.; Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000) ("[W]e cannot say that the Delaware Supreme Court took into account controlling Supreme Court decisions . . . . Hence, we exercise pre-AEDPA independent judgment on the duplicative aggravating circumstances claim."); Neelley v. Nagle, 138 F.3d 917, 926-27 (11th Cir. 1998):

> [T]he [state] court contravened the Supreme Court's command that evidence must be analyzed collectively, not item by item, for *Bagley* materiality. The DeKalb County circuit court, the only Alabama court to have written on this point, analyzed each letter for its likely individual effect on the outcome of the trial, but did not analyze the letters' collective effect. This piecemeal approach is "contrary to" clearly established federal law; therefore, we must independently consider the merits of Neelley's claim.

Id. (citations omitted).

applies a rule that contradicts the governing law set forth in our cases."[128] This inquiry necessarily targets the state court's reasoning, not merely its outcome, because what "rule" a state court "applie[d]" can only be determined by reference to the legal analysis it provides.[129]

Indeed, the Court gave an example involving the "rule" established by *Strickland v. Washington*.[130] Under *Strickland*, a lawyer provides constitutionally ineffective assistance of counsel if his or her deficient performance causes a "*reasonable probability* that . . . the result of the proceeding would have been different."[131] Applying § 2254(d)(1) to the *Strickland* example, the *Williams* Court reasoned:

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a *preponderance of the evidence* that the result of his criminal proceeding would have been different, . . . a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.[132]

In other words, if established Supreme Court law requires standard A (reasonable probability), but the state court incorrectly uses standard B (preponderance of the evidence), then § 2254(d)(1) does not bar independent federal habeas review. The only way to know whether the state court applied standard A or standard B is to examine the state court's actual legal analysis. Moreover, the *Williams* Court did not indicate that a state court that had applied an incorrect standard could still preclude federal habeas relief as long as it *could* have reasonably denied relief under the correct standard. Rather, once the federal court concludes that the state court's actual reasoning failed to apply the governing rule of law, federal habeas review is "unconstrained by § 2254(d)(1)."[133] This approach flatly contradicts a result-deference reading.

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

129. Under *Williams*, a state court decision is also "contrary to" established law if the state court reaches a result that is different from a "materially indistinguishable" Supreme Court case. *Id.* at 406. Although this inquiry admittedly scrutinizes the ultimate result reached by the state court, it does not suggest that § 2254(d)(1) defers to "results" rather than "opinions." As binding precedent, such a case would necessarily constitute a "rule" that those "materially indistinguishable" facts amount to a constitutional violation. Furthermore, a result that is contrary to an indistinguishable Supreme Court case could never be reached by a reasonable application of established Supreme Court precedent because that precedent would mandate the opposite result.

130. *Williams*, 529 U.S. at 405-06.

131. *Strickland*, 466 U.S. at 694 (emphasis added).

132. *Williams*, 529 U.S. at 405-06 (emphasis added).

133. *Id.* at 406.

With respect to the "unreasonable application" prong, *Williams* held that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the *state court's* application of clearly established federal law was objectively unreasonable."[134] The Court did not require federal courts to ask whether some objectively reasonable application of federal law, not articulated or relied on by the state court, might support the state court's conclusion. Thus, in applying § 2254(d)(1), *Williams* concluded that "[t]he Virginia Supreme Court's *own analysis* of prejudice"[135] was unreasonable because it "failed to evaluate the totality of the available mitigation evidence."[136] In particular, the state court's opinion "did not entertain [the] possibility" that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty."[137] The *Williams* Court neither asked whether some reasonable analysis might have supported the state court's ultimate conclusion, nor did it inquire whether a state court that had evaluated the available mitigation evidence could reasonably reject Williams's ineffective assistance claim. It surely did not suggest that every objectively reasonable court would conclude that the attorney's failure to present mitigating evidence was prejudicial under the circumstances presented in *Williams*. Rather, it found that the particular reasoning on which the state court actually based its conclusion was unreasonable.

In addition, an opinion-deference reading is supported by the *Williams* Court's bifurcation of § 2254(d)(1) into a rule-identification prong ("contrary to") and a rule-application prong ("unreasonable application of"). Federal habeas courts do not defer to a state court's reasonable but incorrect *identification* of the established rule, but they must defer to a state court's reasonable but incorrect *application* of the established rule.[138] This further suggests that § 2254(d)(1) focuses not on the bare outcome, but rather on the process by which the state court interprets and applies federal law. That process requires state courts first to get the rule right and then to reasonably apply it.

Also confirming this reading is *Williams*'s recognition that there is still a place for federal habeas review that is "unconstrained" by § 2254(d)(1).[139] In other words, federal habeas review is now a two-step process: first, the federal habeas court must ask whether § 2254(d)(1) bars relief (which is itself a two-step process); second, if § 2254(d)(1) does not bar relief, then the court must proceed to an "unconstrained" consideration

134. *Id.* at 409 (emphasis added).
135. *Id.* at 397 (emphasis added).
136. *Id.*
137. *Id.* at 398.
138. *See supra* Part II.B.
139. *Williams*, 529 U.S. at 406.

of the merits of the petitioner's claim. However, if § 2254(d)(1) required deference to the bare result reached by the state court, then the first step would be so onerous that there would be no need for a second step. If the state court's rejection of a federal claim could not be justified by *any* reasonable application of federal law, then that claim is necessarily meritorious—there would be no need for a separate "unconstrained" review. Thus, *Williams*'s understanding that "unconstrained" federal habeas review is required when a state court's ruling fails to pass muster is fundamentally inconsistent with a result-deference reading of § 2254(d)(1).

It follows from *Williams* that when a state court neglects to articulate the reasoning underlying its resolution of a petitioner's claim, its decision is not entitled to any deference. The fact that *Williams* closely scrutinized the Virginia Supreme Court's actual legal analysis strongly indicates that state courts should not be able to avoid such scrutiny by withholding their legal reasoning. To hold otherwise would, as explained above, encourage state courts to issue summary opinions with no legal analysis.[140] Therefore, in light of *Williams*, § 2254(d)(1) must be read to bar habeas relief *only* where the state court articulates a legal basis for its ruling that reasonably applies the established rule of constitutional law.[141]

B. AEDPA

Any statutory analysis of § 2254(d)(1) will inevitably attempt to divine Congress's intent in enacting that provision. Unfortunately, as many have recognized, AEDPA generally and § 2254(d)(1) specifically are not well-drafted and fail to reflect clearly what Congress intended.[142] There are, however, inferences that may be drawn from the text and structure of § 2254(d)(1). Most important to the opinion-deference versus result-deference debate is the fact that the statute requires deference *only* where the defendant's claim has been "adjudicated on the merits in [s]tate court."[143]

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140. *See supra* Part III.C.2.

141. Moreover, in reaching its conclusion that the state court's opinion was unreasonable, *Williams* emphasized the fact that the state court's opinion "failed even to mention the sole argument in mitigation that trial counsel did advance," and "did not entertain [the] possibility" that certain mitigating evidence might have altered the jury's choice of punishment. *Williams*, 529 U.S. at 398. If a state court's failure to mention one facet of a claim renders its ruling unreasonable, then a fortiori, a state court's failure to provide any analysis must be unreasonable as well under § 2254(d)(1).

142. *Lindh*, 521 U.S. at 336 ("[I]n a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting."); Chen, *supra* note 1, at 56 (noting "the poor drafting of [§ 2254(d)(1)]"); Yackle, *supra* note 12, at 381 ("The new law is not well drafted.").

143. 28 U.S.C. § 2254(d).

This requirement supports an opinion-deference reading for several reasons. First, the fact that § 2254(d)(1) is contingent on the state court having adjudicated the claim on the merits suggests that its purpose relates to the adequacy of that merits-adjudication.[144] A result-deference reading of § 2254(d)(1) would review the state court's merits-adjudication only in the most superficial sense. In reality, the soundness of the state court's analysis of the merits would be irrelevant, so long as some reasonable basis for denying relief can be conjured up after the fact. An opinion-deference reading, on the other hand, would target the adequacy of the state court's "adjudication on the merits" by scrutinizing the analytical soundness of that adjudication.

Second, it is fair to read the "adjudicated on the merits" requirement as itself requiring the state court to articulate its reasoning. It has long been recognized that a written opinion explaining the court's reasoning is a traditional part of constitutional adjudication.[145] There is every reason to think that issuance of an opinion explaining the state court's reasoning is part of what Congress wanted state courts to do in "adjudicat[ing]" a defendant's constitutional claims "on the merits."[146]

Finally, the "adjudicated on the merits" requirement refutes two theories that might otherwise be invoked to support a result-deference reading of § 2254(d)(1). This requirement is fundamentally inconsistent with the theory that § 2254(d)(1) reflected Congress's desire to enact Justice Thomas's version of *Teague*.[147] Under Justice Thomas's reading, *Teague* could bar relief regardless of whether the state court had adjudicated the defendant's federal claim on the merits. Because Justice

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144. *See* Yackle, *supra* note 12, at 420-21 ("An 'adjudication' is not a result (a disposition), but a process by which a result is reached.").

145. Reynolds & Richman, *supra* note 120, at 575 ("The reasoned, published appellate opinion is the centerpiece of the American judiciary's work."); Wechsler, *supra* note 120, at 15-16 (noting that providing a "reasoned explanation" is "intrinsic to judicial action").

146. *Hameen*, 212 F.3d at 248.

> [W]e cannot say that the Delaware Supreme Court took into account controlling Supreme Court decisions. This point is critical because under the AEDPA the limitation on the granting of an application for a writ of habeas corpus is only "with respect to any claim that was adjudicated on the merits in State court proceedings." Hence we exercise pre-AEDPA independent judgment . . . .

Id.; *see also* Washington v. Schriver, 255 F.3d 45, 53-54 (2d Cir. 2001) (noting one "approach would find that unexplained, summary dismissals of federal claims are not 'adjudicat[ions] on the merits'" and stating that this approach is consistent with "the view of at least six justices in *Williams v. Taylor* that the substance of the state court decision should be examined in order to determine which clause of § 2254(d)(1) to apply and whether the state court decision was 'contrary to' or involved an 'unreasonable application of' federal law") (footnotes omitted).

147. *See* Yackle, *supra* note 12, at 415 ("[S]ome, I dare say, will read [§ 2254(d)(1)] to endorse Justice Thomas' twist on *Teague*.").

Thomas's *Teague* opinion was derived from an expanded notion of retroactivity, it barred relief even if the state court had never reached the merits.[148]

Likewise, the "adjudicated on the merits" requirement is inconsistent with the theory that federal habeas corpus is designed to remedy only flagrant constitutional violations. This is, of course, a theory of limited federal habeas that some have espoused.[149] Whatever the merits of this view of federal habeas, it is not one that § 2254(d)(1) can be coherently read to support. If it were truly the case that federal habeas is designed only to remedy obvious constitutional violations, then it would make no sense to limit deference, as § 2254(d)(1) does, to cases where the state court actually adjudicated the merits.

V. CRITIQUES OF OPINION-DEFERENCE

For the reasons I have explained above, § 2254(d)(1) should be read to require deference only where the state court has written an opinion that correctly identifies the established rules of federal law and reasonably applies them. I will now address some of the criticisms that either have been or will likely be lodged against an opinion-deference reading of § 2254(d)(1).

A. Judge Posner's Critique

Judge Posner addressed some of the issues relevant to the opinion-deference versus result-deference debate in *Hennon v. Cooper*, in which the court was called upon to decide if § 2254(d)(1) applies where the state court's discussion of the petitioner's federal claim is "perfunctory."[150] He endorsed a result-deference reading of § 2254(d)(1), holding that even an inadequate state court ruling would bar relief if the result is "minimally consistent with the facts and circumstances of the case."[151] Judge Posner

148. *Cf.* Yackle, *supra* note 73, at 1755 (implying that *Teague* applied regardless of whether there was an adjudication on the merits).

149. *See, e.g.*, *Wright*, 505 U.S. at 292 (Thomas, J.) (plurality opinion) (stating that federal habeas corpus is intended "only to guard against extreme malfunctions in the state criminal justice systems") (quotation marks and citation omitted).

150. 109 F.3d 330, 334-35 (7th Cir. 1997).

151. *Id.* at 335 ("It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is whether the determination is at least minimally consistent with the facts and circumstances of the case."). *But see Lindh*, 96 F.3d at 871 ("By posing the question whether the state court's treatment was 'unreasonable,' § 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject.").

expressly rejected the argument that "the criterion of a reasonable determination is whether it is well reasoned":[152]

> [That reading of § 2254(d)(1)] would place the federal court in just the kind of tutelary relation to the state courts that the recent amendments are designed to end. It would be less appropriate than in the parallel area of administrative review, where the court can remand the case to the administrative agency for a better articulation of its grounds. 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.[153]

Judge Posner's analysis makes two points relevant to the opinion-deference versus result-deference debate. First, he suggests that even an opinion-deference reading would give federal habeas courts too much license, contrary to AEDPA's goal of liberating state courts from "tutelary" supervision by federal courts.[154] Second, he asserts that, because the federal habeas court may not remand for clarification of the state court's reasoning, a habeas petitioner might get relief without even establishing a constitutional violation.[155]

The second point is the most fundamentally flawed. Interpreting § 2254(d)(1) to bar relief only when the state court articulates its reasoning would not allow a defendant to obtain habeas relief simply by showing a "failure of judicial articulateness" rather than an actual constitutional violation. To obtain federal habeas relief, a petitioner must always prove a violation of federal law.[156] The only issue under § 2254(d)(1) is whether a state court's prior ruling should operate to completely bar federal courts from even considering a prisoner's constitutional claim. Thus, a "failure of judicial articulateness," standing alone, will never be grounds for granting relief. It may, however, prevent a state court from enjoying the

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

153. *Id.* (citations omitted).

154. *Id.*

155. *Id.*

156. 28 U.S.C. § 2241(c)(3) (1994) ("The writ of habeas corpus shall not extend to a prisoner *unless* . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . . ") (emphasis added); 28 U.S.C. § 2254(a) (1994) (providing that federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only* on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States") (emphasis added).

automatic bar to relief that would have applied if the state court had articulated a reasonable basis for rejecting the prisoner's claim.

Judge Posner's reliance on Congress's apparent desire to eliminate the "tutelary relationship" between the state courts and federal habeas courts is also insufficient. To be sure, § 2254(d)(1) (as construed by *Williams*) affords more deference to state courts than *Brown v. Allen* did, but the question is, *how much* deference? It is not enough to say that AEDPA was motivated in part by a desire to make federal habeas courts defer to state courts and, therefore, the statute must be construed at every turn to maximize the amount of federal deference.[157] Indeed, Professors Tushnet and Yackle have identified the dangers in giving too broad a reading to a statute that, like AEDPA, was motivated by such a symbolic purpose.[158] Thus, the challenge facing courts after *Williams* is to delineate the circumstances under which a state court ruling should completely preclude federal habeas courts from deciding pure issues of federal law. As explained above, the most coherent and sensible approach is that § 2254(d)(1) precludes relief only where the state court actually issues an opinion that reasonably applies the established rule of constitutional law.

Expanding on Judge Posner's concern that an opinion-deference reading of § 2254(d)(1) would place federal habeas courts in "tutelary" supervision over state courts, some federal courts have suggested that there is something inherently unseemly about scrutinizing a state court's actual reasoning. One court recently stated:

> Telling state courts when and how to write opinions to accompany their decisions is no way to promote comity.

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157. Tushnet & Yackle, *supra* note 40, at 47 (warning that courts should not simply "embed Congress's mood in the statute books"); Lee, *supra* note 41, at 136.

> Of course, the AEDPA largely owes its existence to long-standing Republican dissatisfaction with lower federal courts' general treatment of habeas petitions from state prisoners . . . . It would be a grave mistake, however, to assume that every question of interpretation concerning the AEDPA must automatically be resolved in favor of the construction that treats petitioners most harshly.

Id. In fact, the Supreme Court expressly rejected this kind of sweeping interpretive approach in the context of another AEDPA provision. In response to the state's argument that AEDPA precludes an evidentiary hearing even if the federal habeas petitioner had diligently sought to develop a record in state court, the Court wrote: "We are not persuaded by the Commonwealth's further argument that anything less than a no-fault understanding of the opening clause is contrary to AEDPA's purpose to further the principles of comity, finality, and federalism." *Williams*, 529 U.S. at 436. Noting that the scope of federal habeas involves a "delicate balance," the Court found that "[i]t is consistent with these principles to give effect to Congress' intent to avoid unneeded evidentiary hearings in federal habeas corpus, while recognizing the statute does not equate prisoners who exercise diligence in pursuing their claims with those who do not." *Id.*

158. Tushnet & Yackle, *supra* note 40, at 4 ("Real laws must take consequences into account, and, we suggest, symbolic statutes rarely do so in a sensible way.").

> Requiring state courts to put forward rationales for their decisions so that federal courts can examine their thinking smacks of a "grading papers" approach that is outmoded in the post-AEDPA era.[159]

The notion that federal habeas courts cross into forbidden territory when they "examine the[] thinking" of state courts is unfounded. At the very least, this concern is impossible to reconcile with the Supreme Court's decision in *Williams*, which subjected the reasoning of the Virginia Supreme Court to extremely thorough examination.[160] More importantly, an opinion-deference reading of § 2254(d)(1) does not in fact require state courts to write opinions a certain way. They remain free to write opinions however they choose (or not at all). Opinion-deference simply offers state courts a tangible benefit if they *do* write an opinion that soundly interprets and applies governing federal law.

AEDPA itself demonstrates that there is nothing wrong with making reduced federal habeas scrutiny contingent on a demonstration that the state's enforcement of federal rights is adequate. AEDPA's capital punishment provisions, for example, constrain the latitude that federal courts have in reviewing state death sentences, *provided* that a state "opts in" by providing enhanced protections for capital defendants, such as the appointment of counsel for state collateral review.[161] In other words, if a state shows a serious commitment to handling federal law claims itself, then Congress will limit the degree of intrusion on federal habeas. An opinion-deference reading of § 2254(d)(1) could be viewed as a similar program to limit federal habeas review where the state system has done an adequate job of adjudicating the individual's federal claims. Like the capital punishment provisions, § 2254(d)(1) gives state courts a concrete incentive to improve their treatment of federal claims in the context of their criminal justice system.

Therefore, far from subjugating the state courts, an opinion-deference reading of § 2254(d)(1) will likely bolster the position of state courts by encouraging them to deliberately consider questions of federal law that impact the criminal justice system.[162] The more that state courts issue well-reasoned opinions on federal law issues, the more they will be accepted as

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159. Wright v. Sec'y for Dep't of Corr., No. 00-11105, 2002 U.S. App. LEXIS 372 at *24 (11th Cir. Jan. 11, 2002) (citing *Hennon*, 109 F.3d at 335); *see also Santellan*, 271 F.3d at 193 ("[W]e are determining the reasonableness of the state court's decision, not grading their papers.") (quotation marks and citation omitted); *Sellan*, 261 F.3d at 312 ("[W]e have no power to tell state courts how they must write their opinions.") (quotation marks and citation omitted).

160. *See supra* Parts II & IV.A.

161. 28 U.S.C. § 2261 (Supp. V 2000); *see also* Yackle, *supra* note 12, at 393.

162. *See supra* Part III.C.

co-equal interpreters of federal law. But when state courts summarily reject federal constitutional claims, it creates an appearance that they are giving such claims short shrift. The fact that there is such a vigorous debate over "parity" demonstrates that many hold this perception of state courts.[163]

B. The "Presumption" Critique

A critic of opinion-deference might also make the following argument: Even if the state court's "opinion" would not pass muster under § 2254(d)(1), a federal habeas court should presume that the state court would have adopted whatever reasonable reading of federal law would have supported its ultimate outcome. Such a presumption would mandate a result-deference approach to § 2254(d)(1). It would require federal habeas courts to inquire whether there exists any reasonable reading of established law that could support the state court's ruling and then assume that the state court would have adopted that reasoning if it had been aware of it.

This presumption is unwarranted for a number of reasons. As an initial matter, it has no textual support. The federal habeas corpus statute creates presumptions in other contexts,[164] and yet nothing in § 2254(d)(1) suggests a congressional intent to impose such a presumption for purposes of that provision. But this presumption theory has far more troubling implications. Obviously, where the state court's dismissal of the defendant's claim is the correct result, § 2254(d)(1) is irrelevant because the defendant would not prevail even under independent federal review. But where the state court's dismissal is not only incorrect, but is based on analytically unsound reasoning, the question is whether the federal habeas court should presume that the state court would have adopted a reading of federal law that, although incorrect, would have been a reasonable application of established federal law. Such a presumption would treat state courts as inherently *hostile* to the enforcement of federal rights, presuming that they would adopt any reasoning that would excuse them from enforcing federal norms. In other words, federal habeas courts would be required to assume that state courts would do all they can to *avoid* enforcing federal rights. This hardly treats state courts as co-equal interpreters of federal law.[165]

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163. *See generally* Lee, *supra* note 89, at 193 n.174 (listing articles discussing parity).

164. *See, e.g.*, 28 U.S.C. § 2254(e)(1) (Supp. V 2000) ("[A] determination of a factual issue made by a State court shall be *presumed* to be correct. The applicant shall have the burden of rebutting the *presumption* of correctness by clear and convincing evidence.") (emphasis added).

165. *Cf. Miller*, 474 U.S. at 112 (stating that federal courts should give "great weight to the considered conclusions of a *coequal* state judiciary") (emphasis added).

C. The Epistemological Critique

Finally, an opinion-deference reading of § 2254(d)(1) might be subject to a criticism of federal habeas that was first articulated by Professor Bator in response to *Brown v. Allen*. He argued against broad federal habeas review of state convictions on the ground that there is no way to know for sure whether *any* court has truly reached the "correct" resolution of a legal claim. He wrote:

> Assuming that there "exists," in an ultimate sense, a "correct" decision of a question of law, we can never be assured that any particular tribunal has in the past made it . . . . Surely, then, it is naive and confusing to think of detention as lawful only if the previous tribunal's proceedings were "correct" in this ultimate sense.[166]

In other words, given that we can never conclusively determine whether the state court or the federal habeas court actually has the "right answer" regarding a particular claim, there must be a compelling reason for upsetting the state court's initial ruling.[167]

Bator's surprisingly post-modern[168] sensibility actually *supports* an opinion-deference reading of § 2254(d)(1). Even if we can never truly know whether the federal habeas will reach the "correct" result, we should be particularly wary of the state court's conclusion where it fails either to identify the governing rule of law or to reasonably apply that rule to the facts of the case. In that situation, we should allow independent federal habeas review *not* because we are certain that the federal court will reach the right result, but because the state court's inability to articulate an analytically sound basis for its ruling means that the federal habeas court is more likely to reach the right result.

VI. REMAINING ISSUES

In exploring whether § 2254(d)(1) targets the state court's "opinion" or the state court's "result," I have attempted to address one aspect of how the new deferential standard of review for federal habeas will operate.

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166. Bator, *supra* note 1, at 447.

167. *See id.* ("[T]he concept of 'freedom from error' must eventually include a notion that some complex of institutional processes is empowered definitively to *establish* whether or not there was error, even though in the very nature of things no such processes can give us ultimate assurances . . . .").

168. *Cf.* Phoebe A. Haddon, *Rethinking The Jury*, 3 WM. & MARY BILL OF RTS. J. 29, 64 (1994) (noting "the post modern claim that there is no objective right answer").

Numerous thorny questions remain, however, and I will briefly flag three of them here.

One outstanding issue is the sequence that a federal court should follow in reviewing a state court decision under § 2254(d)(1). Specifically, should the federal court *first* address the federal claim independently and *second* ask whether the state court's decision bars relief under § 2254(d)(1)?[169] Or may it immediately ask whether the state court's decision passes muster and, if so, deny relief without ever considering the claim independently? The sequence should not affect whether a particular habeas petitioner ultimately receives relief (if § 2254(d)(1) bars relief, then it will bar relief regardless of whether the court addresses it first or second). The sequence may, however, affect the extent to which lower federal courts are able to develop federal law related to state criminal justice systems.[170] If federal habeas courts routinely uphold state court convictions because they are supported by reasonable state court opinions, without ever addressing the legal issues independently, then federal habeas courts will have no part in the "dialogue" over federal rights.[171]

A similar issue has arisen in other contexts. The doctrine of qualified immunity, for example, immunizes state officials from monetary liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[172]

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169. Yackle argues that the federal habeas court should first decide the issue independently and then ask whether the state court's decision passes muster under § 2254(d)(1). *See* Yackle, *supra* note 73, at 1754.

170. This very question was the subject of a recent case before the en banc Fourth Circuit. *See Bell*, 236 F.3d 149. *Compare id.* at 162 n.10:

> Today, we hold that a federal court conclusion that a state court has "erred" in its opinion on a "close" case is not required. A federal habeas court may determine that the issue is "close," and therefore not unreasonable, without rendering an opinion as to whether it would reach the same conclusion if presented with the identical issue on direct appeal or by way of a § 2255 application.

with id. at 177 (Motz, J., dissenting):

> [W]e must (1) ascertain what law the Supreme Court has established as to the constitutional right to a public trial and effective assistance of counsel, (2) "independently ascertain whether the record reveals a violation" of these constitutional rights—i.e., whether the state court erred in denying the writ, and finally (3) determine if the state court decision—if erroneous—is also contrary to, or involves an unreasonable application of, clearly established law as determined by the Supreme Court. The majority omits completely the second part of this analysis.

171. Admittedly, the federal habeas court's review of the issues would not bind subsequent state courts, because § 2254(d)(1) examines only whether the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by *the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added).

172. Wilson v. Layne, 526 U.S. 603, 609 (1999) (quotation marks and citation

In this area, the Supreme Court has urged that federal courts first address the constitutional issue independently, and second, decide whether the law was clearly established, for purposes of qualified immunity.[173] This approach allows federal courts to continue to develop federal law, even though qualified immunity might ultimately bar relief.[174] In the context of *Teague*, however, a federal habeas court must first address whether *Teague* bars relief and only then address the merits of the petitioner's claim.[175] Commentators have criticized this approach to *Teague* precisely because it could stifle development of federal law relating to state criminal justice systems.[176]

Another issue is this: assuming that § 2254(d)(1) is read to target the state court's actual reasoning, it might not always be clear where to look for that reasoning. Suppose, for example, that the state's highest court summarily rejects a defendant's elaim, but a lower state court has written an opinion on it. This scenario is similar to that faced by the Supreme Court when it must determine whether a state eourt judgment rested on a state law "procedural bar" that would preclude considering the merits on federal habeas.[177] In that context, where the state's highest court does not indicate whether its decision was based on a state law bar, the Supreme Court may "look through" to a lower state court that does provide reasoning.[178] Likewise, a federal habeas court applying § 2254(d)(1) might be able to look through to a lower state court opinion that articulates how it applied federal law.

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omitted).

173. *Id.* ("A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual eonstitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.") (quotation marks and citation omitted); *see also* County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) ("[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.").

174. *Cf.* John M.M. Greabe, Mirabile Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 410 (1999) (noting that allowing courts to bypass the merits would tend "if not to 'freeze' constitutional law, then at least to retard its growth through civil rights damages actions").

175. Caspari v. Bohlen, 510 U.S. 383, 389 (1994).

176. *See, e.g.*, Friedman, *supra* note 1, at 800-01. *But see* Patrick E. Higginbotham, *Notes on* Teague, 66 S. CAL. L. REV. 2433, 2450-51 (1993).

177. "When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court." Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) (citing Murray v. Carrier, 477 U.S. 478, 485-492 (1986); *Wainwright*, 433 U.S. at 87-88).

178. *Nunnemaker*, 501 U.S. at 803 (creating a "presumption" that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground").

Arguably the most critical issue that will face the federal courts in applying § 2254(d)(1) is how that provision interacts with, displaces, or incorporates certain aspects of the *Teague* anti-retroactivity doctrine. As explained above, § 2254(d)(1) is broader than *Teague* in some respects, but it is narrower than *Teague* in others. It is broader than *Teague*, because (1) it requires deference to a state court's reasonable, but incorrect, application of established federal law, and (2) only Supreme Court law (*not* circuit law) is relevant to whether the state court's ruling passes muster. Section 2254(d)(1) is narrower than *Teague*, however, because it affects habeas review *only* where the state court has adjudicated the claim on the merits, whereas *Teague* applied regardless.

Nonetheless, § 2254(d)(1) and *Teague* are closely related. As Justice Stevens recognized, "[t]he antiretroactivity rule recognized in *Teague*, which prohibits reliance on 'new rules,' is the functional equivalent of a statutory provision commanding exclusive reliance on 'clearly established law.'"[179] This overlap potentially implicates several issues. One issue is whether § 2254(d)(1) should be read to abrogate *Teague* altogether because it covers much of the same territory that *Teague* did.[180] Another issue is whether § 2254(d)(1) should be read to incorporate the court-made exceptions to *Teague*'s retroactivity bar.[181] For example, *Teague* applied only to new rules of criminal procedure; therefore, it did not bar retroactive application of new *substantive* rules.[182] *Teague* also contained

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179. *Williams*, 529 U.S. at 379 (Stevens, J.).

> With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1). The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.

Id. at 412 (O'Connor, J.) (citations omitted).

180. Chen, *supra* note 1, at 589-90 ("*Teague* cannot possibly operate side by side with [§ 2254(d)(1)]."); Yackle, *supra* note 12, at 415-16 ("The ostensible similarities between *Teague* and § 2254(d) being conceded, however, the only thing that follows for sure is that the two cannot function in tandem . . . . The questions that *Teague* and the statute contemplate overlap too much to make any such seriatim analysis a sensible exercise."); Yackle, *supra* note 73, at 1755 ("There is an argument, then, that section 2254(d)(1) occupies the field in which *Teague* has operated, borrowing from *Teague* only 'slight[ly]' and displacing that doctrine in all other respects. I don't read *Terry Williams* to foreclose that result."). Because *Teague*'s retroactivity bar was never constitutionally required, see Higginbotham, *supra* note 176, at 2441 (citing James S. Liebman, *More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 558 n.110, 628 & n.480 (1991)), this view is a plausible one.

181. Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1884-85 (1997) (considering whether § 2254(d)(1) incorporates the *Teague* exceptions).

182. Bousley v. United States, 523 U.S. 614, 620 (1998) ("*Teague* by its terms applies only to procedural rules."); Murr v. United States, 200 F.3d 895, 905 (6th Cir.

an exception for "watershed" procedural rules that "implicat[e] the fundamental fairness and accuracy of the criminal proceeding."[183] If § 2254(d)(1) is read to incorporate these exceptions, then a petitioner may be able to invoke certain new rules even if the state court's decision was consistent with the law that was "established" at the time of conviction.

VII. CONCLUSION

I argue that § 2254(d)(1) bars federal habeas relief *only* where the state court articulates its legal analysis and that analysis reasonably applies the established rule of constitutional law. If the state court fails to do so, then the federal court may proceed to decide issues of federal constitutional law independently. Accordingly, the federal habeas court's inquiry under § 2254(d)(1) must focus on the state court's actual opinion. Where the state court issues an opinion, the habeas court must apply the two-pronged analysis set forth in *Williams*: 1) did the state court apply the correct rule of law, and 2) was that application reasonable? Where that reasoning fails *Williams*'s two-pronged test, or where the state court fails to explain its reasoning, the federal habeas court must decide the legal issues independently, as was the case prior to AEDPA under *Brown v. Allen*.

There is no question that the Supreme Court's construction of § 2254(d)(1) in *Williams* entails some deference to state courts, even on pure issues of federal law and its application. But *Williams* is just the beginning of the debate over *how* federal courts should apply § 2254(d)(1) in reviewing state court rulings. Although it is a significant change from the prior regime of de novo review, § 2254(d)(1) does not require federal habeas courts to completely abdicate their responsibility to interpret and apply federal law. Where the state court fails to reasonably apply clearly established federal law, or provides no legal basis whatsoever for denying relief, the federal court's obligation to interpret and apply federal law must come to the fore.

2000) ("[I]f the new case announces a substantive rule, *Teague* does not apply.") (citing *Bousley*).

183. *O'Dell*, 521 U.S. at 157 (quotation marks and citation omitted). *Teague* also created an exception for new rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* (quotation marks and citation omitted).

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