WHEN THE STATE IS SILENT: AN ANALYSIS OF AEDPA'S ADJUDICATION REQUIREMENT

BRITTANY GLIDDEN*

INTRODUCTION

Ernest Sutton Bell was convicted of sexual misconduct following a closed criminal trial.[1] Despite Supreme Court precedent that on-the-record findings as to the necessity of closing a court proceeding are required before doing so[2] and a strong presumption that defendants have the constitutional right to a public trial,[3] the judge failed to make any explicit findings as to his reasons before closing the courtroom during Mr. Bell's trial.[4] After closing the courtroom, Mr. Bell was convicted based largely on an account by the sixteen-year-old victim.[5] The only members of the public present during her testimony were the victim's family and friends, who grew so vocal that the judge was forced to verbally reprimand them.[6] Mr. Bell appealed his conviction, claiming his right to a fair trial had been violated because he was convicted in a closed proceeding, making the

* Law Clerk to the Chief Judge James T. Giles, United States District Court for the Eastern District of Pennsylvania. J.D., 2002, New York University School of Law. I would like to thank the *Review of Law & Social Change* staff, especially Galia Benson-Amram, Peter Bibring, Anjana Malhotra, Cortney Lollar, and Jeremy Root for their editorial assistance. I would also like to thank Professor Anthony Amsterdam for his advice and example.

1. *See* Bell v. Jarvis (Bell II), 236 F.3d 149 (4th Cir. 2000) (en banc), *cert. denied sub nom.*, Bell v. Beck, 122 S. Ct. 74 (2001).

2. Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II), 478 U.S. 1, 13–14 (1986) ("[P]roceedings cannot be closed unless specific, on-the-record findings are made."); Waller v. Georgia, 467 U.S. 39, 48 (1984) (findings must be adequate to support closure and cannot be over-broad); Press-Enterprise Co. v. Superior Court of California (Press-Enterprise I), 464 U.S. 501, 510 (1984) (findings must be sufficient for appellate review and must demonstrate "an overriding interest . . . that closure is essential").

3. The Sixth Amendment guarantees the right to a public trial, stating: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI. The Supreme Court repeatedly has emphasized that a public trial "is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise II*, 478 U.S. at 7. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602–06 (1982) (public trial secures public's confidence in criminal justice system, and in particular, trial verdict); Gannett Co. v. DePasquale, 433 U.S. 368, 383 (1979) (finding that an open courtroom promotes fairness and the conscientious performance of all trial participants); *In re* Oliver, 333 U.S. 257, 270 (1948) (finding that a public trial acts as a safeguard for accused because the triers have a heightened sense of responsibility in performing their duties).

4. Following the objection by Mr. Bell's attorney, the judge merely responded, "we'll do it [close the courtroom] in the most discreet way possible so that the jury won't even notice . . . I don't see anything wrong with that." Bell v. Jarvis (Bell I), 198 F.3d 432, 438 (4th Cir. 1999), *vacated, Bell II*, 236 F.3d 149.

5. *Bell I*, 198 F.3d at 439.

6. *Id.* at 438–39.

issues and testimony in his case unavailable to public scrutiny. His claim was strong given the Supreme Court's previous ruling that a judge's failure to explicitly determine the necessity of closing a trial was considered an abuse of discretion[7] requiring *per se* reversal.[8] Despite the prevailing law, the North Carolina state trial court denied Mr. Bell's petition in a single sentence, stating that he had "failed to state a claim."[9] When he petitioned for further review, the state appellate court affirmed the decision in another single statement: "Petition for Writ of Certiorari is denied."[10]

Mr. Bell then requested habeas review from the federal courts, again raising a claim that he was denied a fair trial. The Fourth Circuit rejected Mr. Bell's petition, concluding that the state result was reasonable after analyzing the state court's determination of fact and law under a highly deferential standard of review. The Fourth Circuit searched to find any plausible reasoning that would uphold the state's perfunctory denial despite a strain on the natural reading of the facts and the law. In so doing, the court acknowledged that the Supreme Court requires explicit findings to be made on-the-record, but then proceeded to ignore this requirement by merely inferring that the trial judge had considered the defendant's interest in having an open proceeding as well as the witness's privacy interest.[11] The Fourth Circuit held that it was "indisputably appropriate" to close the trial proceedings with the facts in Mr. Bell's case, but based this conclusion on unfounded assumptions about the trial court's factual findings (as there were no such findings).[12] This conclusion was a break from Supreme Court and Fourth Circuit precedent; indeed, it seemed to create a new rule that,

7. *See In re* Charlotte Observer, 882 F.2d 850, 852–56 (4th Cir. 1989) (reversing closure order because of lack of judicial findings); *In re* Knight Publishing Co., 743 F.2d 231, 234–35 (4th Cir. 1984) (finding that after an objection is made, trial court must state its reasons for closure on-the-record or risk reversal).

8. The Supreme Court has found that failure to give a public trial is one of the rare instances where a structural error occurs. "Errors of this type are so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome." Neder v. United States, 527 U.S. 1, 7 (1999).

9. Bell v. Jarvis (Bell II), 236 F.3d 149, 176 (4th Cir. 2000) (en banc) (dissenting opinion), *cert. denied sub nom.*, Bell v. Beck, 122 S. Ct. 74 (2001).

10. *Id.*

11. *Id.* at 168. Here the only on-the-record finding considering the interests was a comment by the trial judge that the testimony was "delicate" in nature. *Id.* at 171. From this comment, the court concluded that the findings had been adequate, despite the detailed findings required by the Supreme Court. *Id.* at 170–71.

12. The court concluded that the trial judge had adequately considered alternatives, though it admitted there was no clear evidence of this consideration on-the-record. *Id.* at 169. Here the only on-the-record finding considering the interests of the witness in closing the trial and the defendant in keeping it open was a comment by the trial judge that the testimony was "delicate" in nature. *Id.* at 171. From this comment, the court concluded that the findings had been adequate, despite the detailed findings required by the Supreme Court. *Id.* at 170–71. The court also concluded that the trial judge had adequately considered alternatives, though it admitted there was no clear evidence of this consideration on-the-record. *Id.* at 169.

under certain circumstances, individual concerns so clearly outweigh the right to a public trial that explicit trial court findings no longer are obligatory.

The dissent in Mr. Bell's rehearing refused to use an outcome-driven interpretation of facts and law. After conducting an independent review of the trial record and the relevant Supreme Court precedent, the dissent concluded that explicit findings are required in order to close a criminal trial.[13] The dissent explained that it would be unreasonable to find that the trial court appropriately had made such determinations when the "trial judge held no hearing, made no findings, questioned no witnesses, knew of no specific threat to any witness, and based his decision on nothing more than the 'apparent delicate nature' of the testimony."[14] The dissent drew attention to the majority's creation of a new rule in closure law intended to support the state court's decision.[15] The dissenting judges would have reversed Mr. Bell's lower court conviction and granted him a new trial. Instead he will be in prison for life.

Perfunctory opinions,[16] which deny all of a petitioner's claims in a single sentence or statement, are common in state courts. Perfunctory opinions fail to explain how a state court reached its conclusion and fail to indicate that each individual claim was considered and decided. Federal habeas courts, which have the role of reviewing state court decisions for reasonableness, struggle to evaluate these unexplained rulings. Federal courts are required to defer to a state court's judgment, yet they can only guess at a lower court's reasoning when it is not set forth in an opinion.

Although perfunctory denials are not new, the passage of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") in 1996 created confusion around how to defer to them.[17] AEDPA was enacted following a century of debate among scholars, courts, and legislators regarding the scope and purpose of federal habeas review.[18] The Supreme Court expanded habeas review to state

13. *Id.* at 178.

14. *Id.* at 186.

15. *Id.* at 184–86.

16. I use the terms "perfunctory decision" and "summary denial" interchangeably throughout this article. Both terms refer to lower court decisions that deny claims without offering reasons for the denial.

17. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C. (1994 & Supp. V 1999)).

18. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (arguing that finality interests outweigh broad jurisdiction for federal habeas review and that review should only be applicable when the state did not conduct a "full and fair" adjudication); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988) (arguing that federal habeas review should be allowed for every federal claim of non-harmless federal error in the state court); Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (arguing that federal habeas review should be allowed when the state process is unjust and when innocence concerns exist); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992) (same); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 580 (1982) (arguing that due process requires federal

prisoners in the mid-1900s[19] and, at its high point, allowed a federal forum for the relitigation of any constitutional issue leading to incarceration.[20] As the number of applications multiplied,[21] the Supreme Court began enacting procedural restrictions in order to preclude many prisoners from receiving federal habeas review.[22] At the time AEDPA was enacted, federal courts conducted de novo review of state court constitutional decisions.[23] Seeking to

habeas for all constitutional claims); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985) (arguing that federal courts provide a superior forum for reviewing federal claims and that state courts have an institutional preference to undervalue federal interests). For an overview of competing theories about the scope and purpose of federal habeas review, see Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995); Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151 (1994).

19. Brown v. Allen, 344 U.S. 443 (1953) (expanding federal habeas review to constitutional issues that had occurred in state criminal trials). Congress widened federal habeas jurisdiction to allow constitutional claims brought by state prisoners in 1867. Act of Feb. 5, 1867, ch. 27, 14 Stat. 385. This expansion was the first civil rights law enacted after the Civil War. 142 CONG. REC. H3610 (1996) (statement of Sen. Berman). Before this act, the Judiciary Act of 1789 specifically precluded state prisoners from petitioning for federal habeas review, extending the writ only to federal prisoners. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

20. *See* Herbert Wechsler, *Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ*, 59 U. COLO. L. REV. 167, 179 (1988). At its high point, habeas jurisdiction allowed federal courts to consider more issues than the Supreme Court could examine on direct review. *See id.* (stating that federal habeas courts were allowed to review procedurally defaulted issues that were unavailable for consideration by the Supreme Court on direct review); *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 2.4d, at 72 (4th ed. 2001) (same).

21. During the 1960s, when jurisdiction was expanded, the Supreme Court's docket of habeas cases coming from state prisoners grew from 868 to 8423. Wechsler, *supra* note 20, at 180. This growth caused resentment among personnel in law enforcement and the federal court system, because habeas review became a long and costly process. *Id.*

22. Beginning in the 1970s, the Court precluded many prisoners from receiving federal habeas review by enacting procedural restrictions including: state procedural default, Wainwright v. Sykes, 433 U.S. 72, 87 (1977); elimination of review for most successive petitions, Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (requiring some colorable showing of factual innocence for review on a successive petition); a more deferential standard of harmless error, Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (finding an error would be considered harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict") (internal citation omitted); and the inapplicability of new constitutional rules to habeas petitions, Teague v. Lane, 489 U.S. 388, 311–12 (1989) (finding that, with limited exceptions, new constitutional rules cannot be applied to individuals having their claims reviewed through federal habeas corpus procedures). At least one commentator argues that by the 1990s, the federal courts already had begun to grant increased deference to the state courts simply by affirming state court decisions more frequently. *See* Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771, 1786 (2000).

23. HERTZ & LIEBMAN, *supra* note 20, § 2.4b, at 25–26. One of the reasons for the usage of de novo review of state decisions is that federal courts were seen as superior interpreters and protectors of an individual's federal rights. *Id.* at § 2.3, at 21 (finding habeas corpus to be "a remedy giving 'the final say' to the federal court as to whether or not 'State Supreme Courts have denied rights guaranteed by the United States Constitution'" and "a remedy designed 'to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'") (quoting Brown v. Allen, 344 U.S. 443, 500,

increase the efficiency of habeas and the finality of state decisions, Congress drafted § 2254(d), which gives state decisions significant deference. Section 2254(d) 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—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[24]

Section 2254(d) states that a federal court should conduct its review deferentially when a state court has "adjudicated" a claim and this process has "resulted in a decision."[25] In deciding whether to defer to a state court judgment, a reviewing court initially must assess if the claim before it actually was adjudicated at the state level. While a normal court opinion will discuss and rule on each of a petitioner's claims, perfunctory denials generally do not address individual issues. These unexplained decisions make it impossible to determine whether the state adjudicated a particular claim. Even if a reviewing court assumes that a state court did adjudicate a particular claim, it cannot properly review the state's judgment without knowing the factual or legal grounds for the decision. Thus, a federal court is left with two options: to review what it imagines the state's reasoning was or to substitute its own reasoning for the state's. However, neither of these possibilities fulfills the goal of review, which is to ensure that a judgment is not based on improper grounds.[26] Federal courts have struggled with this process, and consequently the courts have used a variety of approaches to deal with perfunctory opinions, differing in the degree of deference they grant to a state judgment.

This article argues that federal courts should review perfunctory state opinions de novo because granting deference in accordance with § 2254(d) to perfunctory state opinions cannot be done in a uniform or meaningful manner. This article bases its argument for de novo review on a statutory analysis of AEDPA in light of its general purpose and the process of federal habeas review it lays out. Part I describes and critiques the current circuit court responses to

---

510 (1953) (opinion of Frankfurter, J., for the Court); Reed v. Ross, 468 U.S. 1, 10 (1984) (internal quotation omitted)).

24. 28 U.S.C. § 2254(d) (Supp. V 1999).

25. 28 U.S.C. § 2254(d).

26. *See* Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (suggesting that the right to appeal exists and that depriving an individual of a right to appeal would "expose them to an unacceptable risk of erroneous conviction").

perfunctory state court decisions. Assuming that perfunctory state court decisions are adjudications, Part II examines whether it is possible to defer to unexplained decisions in a reasoned and consistent manner. This section concludes that deferring to these denials raises practical and constitutional concerns and is not consistent with Congress's intent in drafting § 2254(d). Part III argues that de novo review is the best response to perfunctory opinions and that a statutory analysis of AEDPA supports the use of de novo review.

I.
CIRCUIT COURT RESPONSES TO THE ADJUDICTATION REQUIREMENT

For every case that falls under AEDPA's domain, the federal habeas court initially must determine if the state court adjudicated each claim.[27] When a state court adjudicates a federal claim, § 2254(d) details the deference that a federal habeas court should grant to this determination.[28] If a federal issue was presented to the state court but not adjudicated, federal courts cannot apply § 2254(d), but instead can review the claim de novo.[29] Federal courts have been unable to reach a consensus on what qualifies as an "adjudication." Often the existence of a state decision on a particular claim is clear: the state court opinion gives a reasoned account of the federal issue and cites federal case law. When a state court issues a perfunctory denial, however, it does not indicate whether it

27. The state court also must determine if the adjudication was "on the merits." This article discusses only how the federal judiciary has dealt with the adjudication question and does not address the various responses to claims that were adjudicated on procedural grounds. Issues that were dismissed on procedural grounds in state court are often barred from habeas review in federal courts unless the petitioner can show good cause for the procedural default. If the claim can survive this bar, review should be conducted de novo, as the plain language of § 2254(d) excludes procedural adjudications from being accorded deference. Many federal courts examine procedural claims de novo. *See, e.g.*, Sellan v. Kuhlman, 261 F.3d 303 (2d Cir. 2001); Mercadel v. Cain, 179 F.3d 271 (5th Cir. 1999). There are other courts that review procedural claims using the standard in § 2254(d). *See, e.g.*, Onifer v. Tyszkiewicz, 255 F.3d 313, 316 (6th Cir.), *cert. denied*, 122 S. Ct. 292 (2001); Wright v. Sec'y for the Dept. of Corr., 278 F.3d 1245 (11th Cir. 2002).

The treatment of procedural adjudications is further complicated when state courts issue perfunctory opinions where it is often difficult to discern if the state court resolved the issue on procedural or substantive grounds. Some federal circuits have devised analyses to assist in the determination of whether an adjudication was based on procedural grounds. For example, the Fifth Circuit applied a three-prong test to assess grounds for decision:

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

Mercadel, 179 F.3d at 274.

28. 28 U.S.C. § 2254(d).

29. HERTZ & LIEBMAN, *supra* note 20, at § 32.2, at 1421–22 ("If a claim was not 'adjudicated on the merits' . . . a federal court is obliged to employ the traditional, pre-AEDPA standard of *de novo* review."); *see also, e.g.*, Hudson v. Hunt, 235 F.3d 892, 895 (4th Cir. 2000) ("Because the claim was not adjudicated on the merits, our review is de novo."); Miller v. Johnson, 200 F.3d 274, 281 (5th Cir.) (applying de novo review because "the state courts did adjudicate [petitioner]'s claims on the merits"), *cert. denied*, 531 U.S. 849 (2000).

considered any particular claim nor does it offer any reasoning or law to support the result.[30] The only grounds for believing that the court adjudicated a particular claim is that the state court needed to have done so to dispose of the case properly. Even when federal courts assume that perfunctory decisions constitute adjudications, they are uncertain of how to defer to a state result without access to the state's factual findings and legal reasoning.

Before examining how federal courts have addressed perfunctory decisions, it is useful to consider how a deferential review process normally functions. Deferential judicial review is designed to ascertain whether a lower court has acted within a permissible range of legal interpretations in reaching its conclusion.[31] This process differs from de novo review, where a reviewing court determines the legal issues without taking into account the lower court decision.[32] A court employing deferential review must look at the factual findings of the lower court and consider the court's application of the appropriate law.[33] Judge Posner defines the appellate court's question as: "[W]hether the judge exceeded the bounds of permissible choice in the circumstances, not what we would have done had we been in his shoes."[34] Generally, there is a range of decisions that qualify as acceptable to the higher court and only determinations outside this range will be overturned. AEDPA sets the scope of acceptable decisions for state courts broadly, establishing that a satisfactory decision is one that is not "contrary to" or an "unreasonable application" of federal law. This standard limits the situations where federal courts may reverse a state decision to those with the most egregious state court errors.[35] In adopting this standard,

30. In assessing the response of the circuit courts to unexplained state decisions, I rely most heavily on this type of situation—where the state opinion contains essentially no explanation for the decision. Most circuits have had the opportunity to address statement opinions, as it is a common practice of many state courts to issue summary denials. Alternatively, a state court decision may discuss state law yet fail to cite or rely upon any federal law in coming to a conclusion, leaving the federal issue unresolved. Circuits vary in their responses to the second situation, where there is some reasoning in the opinion, but not on the specific issue. A third category arises when a state court has relied upon state law that internally cites federal law.

31. To defer is defined as, "[T]o yield to the opinion of." BLACK'S LAW DICTIONARY 432 (7th ed., 1999). The federal courts employ a deferential standard when they review issues of fact for an "abuse of discretion." JOHN J. COUND, JACK H. FRIEDENTHAL, ARTHUR R. MILLER & JOHN E. SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS 1177 (7th ed., 1997) (quoting Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 385–91 (7th Cir. 1984)). Abuse of discretion is defined as: "An appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, or illegal." BLACK'S LAW DICTIONARY 10 (7th ed., 1999).

32. *See* BLACK'S LAW DICTIONARY 94 (7th ed., 1999) (defining appeal de novo as "[a]n appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings . . . .").

33. Deferential review focuses the "federal court [on] review[ing] the state court 'decision' that rejected the claim now advanced in the habeas corpus petition, rather than adjudicating those claims *independently* of the state court decision." HERTZ & LIEBMAN, *supra* note 20, § 32.3, at 1428 (discussing the process of deferential review under AEDPA) (footnotes omitted).

34. Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 385–91 (7th Cir. 1984) (Posner, J.), *quoted in* COUND ET AL., *supra* note 31, at 1177.

35. *See generally* HERTZ & LIEBMAN, *supra* note 20, § 32.2, at 1420–21 (discussing the intent

Congress sought to increase the efficiency of habeas review by decreasing the number of federal reversals and shortening the time it takes federal courts to review each habeas petition.[36]

When a state court has issued only a perfunctory denial, the federal habeas court must determine if an adjudication occurred, and if so, how to review the result in the absence of the state reasoning and factual findings. The courts of appeals are divided in their approaches to reviewing perfunctory state decisions under § 2254, and even within circuits, courts have vacillated between competing methods of review.[37] The federal courts have developed two general responses: Some circuits consider a perfunctory denial to be an adjudication of each claim raised by a petitioner, and other circuits do not. Those circuits in the latter category—courts that do not assume an adjudication has occurred absent a positive showing of consideration by the state—find that § 2254 is inapplicable to habeas review. Finding that no decision has been issued, these courts have determined that no deference is due and have reviewed the claim "de novo."

The former category includes courts that find any state denial, even if it is perfunctory, to be an adjudication of each claim. These circuits attempt to defer to the state result using the standard set forth in § 2254(d), yet struggle to do so meaningfully. Due to the uncertainty surrounding the basis for a state's conclusion, the federal court must find a way to assess if the state conclusion was reasonable under § 2254(d). A spectrum of responses exists in these courts, depending upon how much they allow their own conclusions to influence the analysis of the state result. Although courts fall all along this spectrum of deference, it is useful to think of them in two separate categories. 'Highly deferential' circuits look for any possible interpretation of the law and facts that will uphold a state decision. Generally, these courts do not put forth an independent analysis of the facts and the law. If any argument supporting the result exists, the highly deferential courts will ascribe this analysis to the state

---

of Congress to narrow the cases where the federal courts were allowed to overturn state decisions).

36. *See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 3 (1996) [hereinafter *Senate Hearings*] (remarks of Sen. Hatch, Chairman, S. Comm. on the Judiciary) (stating that the goal of habeas reform bill that became AEDPA was to "eliminate unnecessary delay," "maintain[] . . . the finality of the decisions of our State courts," and "get some effective resolution of the . . . lengthy, frivolous appeal problems.").

37. *Compare* Sellan v. Kuhlman, 261 F.3d 303 (2d Cir. 2001), *with* Washington v. Schriver, 255 F.3d 45 (2d Cir. 2001); *compare* Bell v. Jarvis (Bell II), 236 F.3d 149 (4th Cir. 2000) (en banc), *cert. denied sub nom.*, Bell v. Beck, 122 S. Ct. 74 (2001), *with* Bell v. Jarvis (Bell I), 198 F.3d 432 (4th Cir. 1999), *and* Cardwell v. Greene, 152 F.3d 331 (4th Cir. 1998); *compare* Doan v. Brigano, 237 F.3d 722 (6th Cir. 2001), *with* Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001); *compare* Hennon v. Cooper, 109 F.3d 330 (7th Cir. 1997), *with* Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996); *compare* Aycox v. Lytle, 196 F.3d 1174 (10th Cir. 1999), *with* Toles v. Gibson, 269 F.3d 1167 (10th Cir. 2001), *and* Jackson v. Oklahoma Dept. of Corr., No. 00-5018, 2001 WL 987595 (10th Cir. June 26, 2001) (unpublished opinion), *cert. denied*, 122 S. Ct. 1547 (2002); *compare* Wright v. Sec'y for the Dept. of Corr., 278 F.3d 1245 (11th Cir. 2002), *with* Romine v. Head, 253 F.3d 1349 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 1593 (2002).

court and uphold the outcome. 'Intermediate deference' circuits conduct an independent review of the record, and then use their own reasoning to examine the state result. These courts analyze the facts and law of the case without considering what the state result was. From their own conclusions, they determine if there is a reasonable basis for the state conclusion. Even if a reasonable basis exists, intermediate deference courts may not affirm the position if it appears unlikely or unreasonable that the state actually employed the necessary reasoning.

A. No Adjudication Occurred: No Deference to Unclear State Decisions

The First and Third Circuits[38] decline to assume that a state court adjudicated a federal claim unless there is some positive indication that this process occurred; they review each claim de novo. These circuits require a state court to write a "decision [that] makes its rationale (the legal rule it applied) at least minimally apparent"[39] in order to find that a claim was adjudicated. These courts acknowledge that AEDPA requires deference to state court determinations, but consider § 2254(d) inapplicable when no discussion of or citation to federal law exists.[40] When not subject to the provisions in § 2254(d), the courts find they must review the claim de novo, without consideration for the state result. The First Circuit succinctly states: "[W]e can hardly defer to the state court on an issue that the state court did not address."[41]

This application of de novo review initially arose in situations where the federal court had affirmative reasons to doubt that a state actually had adjudicated a particular claim. For example, in *Fortini v. Murphy*, the state court issued an opinion that addressed many of the petitioner's issues, but was silent regarding one of the constitutional claims.[42] The court inferred from this omission that the federal issue had never been decided[43] and reviewed the claim de novo.[44] Similarly, in *DiBenedetto v. Hall*, the state court opinion resolved each of the petitioner's claims, but "cited only [state] judicial decisions and did not discuss the federal constitutional claims."[45] The First Circuit found that when the state had not addressed a constitutional issue, the deferential standard did not apply.[46] Where there is positive doubt that a claim actually has been considered by a state court, even some circuits that apply deferential review to perfunctory

38. *See* Fortini v. Murphy, 257 F.3d 39 (1st Cir. 2001), *cert. denied*, 122 S. Ct. 1609 (2002); Hameen v. Delaware, 212 F.3d 226 (3d Cir. 2000), *cert. denied*, 532 U.S. 294 (2001).

39. Washington v. Schriver, 255 F.3d 45, 54 (2d Cir. 2001) (citing *Hameen*, 212 F.3d at 248).

40. *Hameen*, 212 F.3d at 248; *Fortini*, 257 F.3d at 47.

41. *Fortini*, 257 F.3d at 47.

42. *Id.* at 45.

43. Additionally in this case, the state did not argue that the state court had decided the claim, but instead argued that the petitioner failed to properly present his claim before the state court. *Id.*

44. *Id.* at 47.

45. 272 F.3d 1, 6 (1st Cir. 2001), *cert. denied*, 122 S. Ct. 1622 (2002).

46. *Id.*

opinions will review the claim de novo.[47] The First and Third Circuits now extend de novo review to any case where the state court does not discuss a constitutional claim presented at the state level.[48]

In general, courts applying de novo review simply state that a claim was not adjudicated and move on to their analyses. For this reason, there are limited rationales to justify this approach in the case law. Some courts find support in the Supreme Court's decision in *Williams v. Taylor*,[49] which states that the review process requires the reviewing court to examine the "substance of the state court decision . . . in order to determine . . . whether the state court decision was 'contrary to' or involved an 'unreasonable interpretation' of federal law."[50] Another court reasoned that the language of § 2254(d) is unclear and therefore must be viewed within the context of Congress's intent.[51] This same court, citing AEDPA's general goal of promoting an efficient use of judicial resources, reasoned that the review process would be more efficient if state courts provided opinions of their decisions, rather than forcing federal courts to consider all the possible reasons a state court could have employed.[52]

---

47. *See, e.g.*, Jackson v. Oklahoma Dept. of Corr., No. 00-5018, 2001 WL 987595 (10th Cir. June 26, 2001) (unpublished opinion), *cert. denied*, 122 S. Ct. 1547 (2002) (allowing de novo review when positive doubt exists that an adjudication occurred); Doan v. Brigano, 237 F.3d 722 (6th Cir. 2001) (finding that when there is no explicit federal analysis, the federal court cannot assume that an adjudication occurred in an explained decision); Romine v. Head, 253 F.3d 1349, 1365 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 1593 (2002) (finding that the state court is owed no deference if there is a "grave risk" that the claim was not adjudicated). It is uncertain if *Romine*'s vague standard will remain active in the Eleventh Circuit as a subsequent case interpreted its holding very narrowly. *See* Wright v. Sec'y for the Dept. of Corr., 278 F.3d 1245, 1254 (11th Cir. 2002) (finding no "grave doubt" existed even when entire state decision was only two sentences, and applying full deference to state court ruling). For a review of the federal court responses to unexplained decisions in a variety of contexts, see Claudia Wilner, *"We would not defer to that which did not exist": AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. REV. (forthcoming Fall 2002).

48. *See* Brown v. Maloney, 267 F.3d 36, 40 (1st Cir. 2001) ("In the absence of reasoning on a holding from the state court on this issue, we cannot say the claim was 'adjudicated on the merits.'"), *cert. denied*, 122 S. Ct. 1371 (2002); Cochran v. Merrill, No. CIV. 01-86-B-S, 2001 WL 883639, at *6 (D. Me. Aug. 3, 2001) (recommendation of Kravchuk, Mag. J.) ("[T]he fact that the state courts failed to address Cochran's constitutional challenge does mean that the § 2254(d)'s 'strict standard of review' does not apply."); Bronshtein v. Horn, No. CIV. A. 99-2186, 2001 WL 767593, at *10 (E.D. Pa. July 5, 2001) (hearing claim that was decided on procedural grounds in state court and noting that, in the Third Circuit, "§ 2254(d) cannot apply unless the state court expressly explains the merits of a claim of a federal constitutional violation.").

49. 529 U.S. 362, 399 (2000).

50. Washington v. Schriver, 255 F.3d 45, 53 (2d Cir. 2001) (explaining support for de novo review and deferential review, and assessing claim arguendo under de novo review); *see also* Fortini v. Murphy 257 F.3d 39, 47 (1st Cir. 2001), *cert. denied*, 122 S.Ct. 1609 (2002) (citing *Williams* to support the argument that deference does not apply when the federal issue was not addressed); *Romine*, 253 F.3d at 1365 (citing *Williams* to support that deference does not apply when federal issue was not addressed).

51. *See Washington*, 255 F.3d at 54.

52. *Id.* ("[W]hen the state court decision provides some sense of its reasoning, it promotes an overall more efficient use of judicial resources and a speedier and more accurate resolution of habeas petitions."). *See infra* Part II.B & III.D for a more developed efficiency argument in

B. *The State Can Do No Wrong: Highly Deferential Review of Unclear State Decisions*

'Highly deferential' courts take an opposing view, reasoning that any determination should be treated as a full adjudication, whether or not the state court issued an explanation or explicit decision. The Second, Fourth, Eighth, and Eleventh Circuits[53] have adopted this view, emphasizing that there is no requirement that state courts write detailed analyses and refusing to "presume that a summary order is indicative of a cursory or haphazard review."[54] The Second Circuit summarized its unwillingness to evaluate each individual opinion: "[W]e are determining the reasonableness of the state courts' 'decision' . . . not grading their papers."[55]

Courts that are highly deferential to state decisions explain their position with a strict interpretation of AEDPA's language.[56] These courts rely explicitly on a dictionary definition of "adjudication" as "the formal giving or pronouncing of a judgment or decree in a court proceeding."[57] The argument emphasizes that the term adjudication focuses on the decision, not on the reasoning behind the decision.[58] These courts argue that § 2254(d) gives no indication that a state court must articulate its findings with any specific analytical thoroughness.[59] Highly deferential courts believe that this reading of the language, coupled with the explicit intent of Congress to increase the finality of state decisions, justifies deferring to state decisions whenever possible.[60] These courts rely almost

---

support of de novo review.

53. *See* Wright v. Sec'y for the Dept. of Corr., 278 F.3d 1245, 1254 (11th Cir. 2002) (finding that full deference should be given to the state court even when the entire petition was decided in two sentences); Sellan v. Kuhlman, 261 F.3d 303, 311–12 (2d Cir. 2001) (finding AEDPA does not require an explanation but only a decision); Bell v Jarvis (Bell II), 236 F.3d 149 (4th Cir. 2000) (en banc) (refusing to find that a brief decision is not an adjudication), *cert. denied sub nom.*, Bell v. Beck, 122 S. Ct. 74 (2001); James v. Bowersox, 187 F.3d 866 (8th Cir. 1999) (finding the summary nature of the opinion does not alter deferential review); Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998) (refusing to find that a brief decision is not an adjudication).

54. Wright v. Angelone, 151 F.3d at 157.

55. Cruz v. Miller, 255 F.3d 77, 86 (2d Cir. 2001).

56. Washington v. Schriver, 255 F.3d 45, 53 (2d Cir. 2001); *see also Sellan*, 261 F.3d at 311–12; Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir. 1998), *overruled by* Bell II, 236 F.3d 149 (4th Cir. 2000).

57. *Cardwell*, 152 F.3d at 339 (citing BLACK'S LAW DICTIONARY 42 (6th ed., 1990)); *see also Sellan*, 261 F.3d at 311 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 27 (1993) (defining adjudicate as "to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised; enter on the records of a court (a final judgment, order, or decree of sentence)")).

58. *Sellan*, 261 F.3d at 311.

59. *Id.* ("Nowhere does the statute make reference to the state court's process of reasoning."); Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002) ("The statutory language focuses on the result, not on the reasoning that led to the result, and nothing in that language requires the state court adjudication that has resulted in a decision to be accompanied by an opinion that explains the state court's rationale.").

60. Some courts also have supported the highly deferential approach with reference to Supreme Court precedent. At least one court has cited *Arizona v. Evans*, 514 U.S. 1 (1995), as

exclusively on a plain language analysis and do not carefully consider the ramifications of applying deferential review to perfunctory denials;[61] they merely state that deference is required without an explanation of how this can or does occur.

Even though highly deferential courts universally consider perfunctory denials to be adjudications, they still must determine how to review the legal basis of the decisions. While a federal court theoretically is required to look at a state court's rationale and analyze if it adequately follows Supreme Court precedent,[62] perfunctory denials make this analysis impossible. Courts employing the heightened deference inquiry cannot examine the state court's actual considerations to see whether they are reasonable; they can only guess potential reasons that the state court might have used in denying relief.[63] When conducting a highly deferential review, courts ask if there is *any* reasonable explanation for the state result and only will overturn a state decision that "exceeded the universe of plausible outcomes."[64]

---

illustrating that the Supreme Court has cautioned against the "unsatisfactory and intrusive practice of requiring state courts to clarify their decisions." Washington v. Schriver, 90 F. Supp. 2d 384, 386 (S.D.N.Y. 2000) (citing Arizona v. Evans, 514 U.S. 1, 7 (1995)). This court claimed that *Evans* indicates that "federal habeas review must be governed by the holding of the state court—not the form of its articulation." *Id.* *See also Sellan*, 261 F.3d at 312 (finding that federal habeas courts should not impose specific requirements for explanations) (citing Coleman v. Thompson, 501 U.S. 722, 739 (1991), to support the position that federal habeas courts should not "impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim."). *Arizona v. Evans*, which reaffirmed the ruling in *Michigan v. Long*, 463 U.S. 1032 (1983), presumptively allows federal courts to review state decisions absent a "plain statement" that the decision was based on "adequate and independent state grounds." 514 U.S. at 7, 8 n.2. This interpretation misreads *Evans*, which rules that if a federal court is uncertain about the grounds for a state decision, the uncertainty presumptively should be construed to allow federal review. Although the holding in *Evans* does not directly address deference, it stands for the proposition that when state decisions are unclear, federal courts should be able to reconsider the issues broadly. *Evans*' result does argue against piecing apart state decisions, but places the burden on the state court to make its reasoning clear in order to protect the decision from de novo review.

61. In many instances the federal court relies exclusively on a plain language review of § 2254(d) or a simple declaration that perfunctory decisions constitute adjudications. *See, e.g.*, *Sellan*, 261 F.3d at 312 ("[T]he plain meaning of § 2254(d) dictates our holding . . . ."); Bell v. Jarvis (Bell II), 236 F.3d 149, 158 (4th Cir. 2000) (en banc) ("[W]e may not presume that the summary order is indicative of a cursory or haphazard review of the petitioner's claims.") (internal citation omitted), *cert. denied sub nom.*, Bell v. Beck, 122 S. Ct. 74 (2001); James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999) ("[T]he summary nature of the . . . opinion does not affect this standard of review."). Several courts also have considered legislative intent and policy concerns. *See, e.g., Wright v. Sec'y for the Dept. of Corr.*, 278 F.3d at 1255 (stating "the plain language of § 2254(d) is enough . . . but we add another thought" and then reviewing the legislative intent behind AEDPA).

62. *See generally* 28 U.S.C. § 2254(d) (Supp. V 1999); *see also infra* Part II.A.

63. *See* Leonard N. Sosnov, *No Mere Error of State Law: When State Appellate Courts Deny Criminal Defendants Due Process*, 63 TENN. L. REV. 281, 299–300 (1996) (discussing various legal meanings that can be ascribed to a perfunctory state court opinion, and indicating the impossibility of determining which one is accurate).

64. Isaac v. Grider, No. 98-6376, 2000 WL 571959, at *4 (6th Cir. May 4, 2000)

Highly deferential courts craft a story that makes the state result justifiable. Claims arising during state post-conviction proceedings often involve multistep analyses; therefore, when a reviewing court is willing to reconsider each step deferentially, it becomes difficult to envision a scenario where the result cannot be deemed reasonable. This point is illustrated most clearly with Mr. Bell's case. Mr. Bell raised a Sixth Amendment[65] claim—the right to a public trial—in state post-conviction review and was denied relief. Without an opinion from the state, the federal habeas court was not certain what caused the lower court to deny relief. There are three possible substantive reasons why the state court could have denied Mr. Bell's claim: first, the state court could have found that no Sixth Amendment violation occurred; second, the state court could have determined that any Sixth Amendment violation did not prejudice the defendant;[66] and third, the state court could have found a prejudicial violation but then determined that the failure to raise it on appeal did not constitute ineffective assistance of counsel. Each of these factors could be a reasonable "explanation" for the state court's decision, but because the federal court is not required to identify the actual reason for the decision, the federal court has a wider scope in maneuvering to uphold the decision.

When a reviewing court begins with the goal of upholding the state denial, it has several opportunities to affirm the lower court, and each inquiry can be examined deferentially. Under deferential review, the reviewing court will find a Sixth Amendment violation did not occur, unless it is unreasonable to do so; it will find petitioner was not prejudiced by a violation, unless it is unreasonable to find no prejudice; finally the court will not consider the failure to raise the violation to be ineffective unless it falls outside of the § 2254(d) scope. This weighted analysis is what occurred in the majority analysis of Mr. Bell's case. Employing highly deferential review, the majority found that it was not unreasonable to assume that the state court had found no Sixth Amendment violation.[67] Alternatively, the majority asserted that even if a constitutional violation had occurred, the state court's denial of the claim would not have been unreasonable because it failed to prove ineffective assistance.[68] Through the creation of numerous opportunities to defer to the state, this method of review

(unpublished opinion) (noting that even though "Kentucky Supreme Court's cursory review is of little assistance in evaluating the petitioner's claim," the holding cannot be overturned if there is any plausible reasoning for the result.).

65. U.S. CONST. amend. VI.

66. The state court could not have found that a Sixth Amendment violation for failure to properly deny an individual their right to a public trial did not result in prejudice, as prejudice is presumed on this claim. *See supra* note 8 and accompanying text. However, I have included it as a possibility here because in most cases, the court would be required to conduct a prejudice analysis.

67. Bell v. Jarvis (Bell II), 236 F.3d 149, 167–75 (4th Cir. 2000) (en banc), *cert. denied sub nom.*, Bell v. Beck, 122 S. Ct. 74 (2001).

68. *Id.* at 175.

will uphold "unreasonable" decisions, and will only overturn decisions that have egregiously and unmistakably ignored federal law.

This procedure differs fundamentally from the review process of explained decisions required under § 2254(d). Under highly deferential review, federal courts always give state courts the benefit of the doubt, even when it appears unlikely that the state court actually made the conclusions the federal court ascribes to them. For example, in the Eighth Circuit case, *Closs v. Weber*,[69] the petitioner claimed that he suffered a due process violation when the state attempted to coerce him to take psychotropic medication—the state revoked Mr. Closs's parole for failing to take his medication. The Supreme Court has established that the due process clause provides inmates "a significant liberty interest in avoiding the unwanted administration"[70] of these drugs, and that this interest only can be overcome if the state affirmatively can establish the justification for the medication and the medical appropriateness of the drug.[71] In *Riggins v. Nevada*, the Supreme Court determined that due process is satisfied in such cases if "the [State] had demonstrated . . . that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of [petitioner's] own safety or the safety of others."[72] In *Riggins,* the Court refused to infer from a summary denial that the court had determined medication was justified since there were no explicitly findings made by the lower courts.[73] The *Closs* court faced a parallel situation—the state courts rejected Mr. Closs's due process claim without explanation.[74] The Eighth Circuit denied Mr. Closs's appeal, finding that, although the Supreme Court has created procedural protections for prisoners, the state court reasonably could have concluded that these protections did not apply to petitioner's circumstances.[75] The Eighth Circuit argued that Mr. Closs, in agreeing to generally abide by his parole terms, reasonably could have been considered to have consented to the medication.[76] However, the court failed to acknowledge that the parole agreement did not mention medication,[77] and that he was refusing all medications in the facility when he signed the agreement.[78] The Eighth

69. 238 F.3d 1018 (8th Cir. 2001).

70. Washington v. Harper, 494 U.S. 210, 221 (1990).

71. Riggins v. Nevada, 504 U.S. 127, 135 (1992).

72. *Id.*

73. *Id.* at 136–37.

74. *Closs*, 238 F.3d at 1020.

75. *Id.* at 1021.

76. *Id.*

77. The pertinent part of Mr. Closs's parole agreement required him to "begin and maintain psychological or psychiatric treatment at a facility or with a psychologist or psychiatrist approved by the [Parole] Board." Closs v. Weber, 87 F. Supp. 2d 921, 923 (D.S.D. 1999), *rev'd*, 238 F.3d 1018 (8th Cir. 2001).

78. At the time this agreement was signed, medical records noted that Mr. Closs "was refusing all medications at the penitentiary, but that he has been doing fairly well even while he has been off his meds." *Id.* at 923–24 (internal quotation omitted).

Circuit was willing to assume that the state court used the appropriate analysis, despite the fact that the court misread Supreme Court doctrine and used an entirely new interpretation of the law.[79] The result was "deference" to a state court opinion, but at the expense of an honest reading of precedent.

Courts proceeding under this type of highly deferential review transform the goal of deference into a practice of near universal affirmation of state court decisions,[80] openly stating that the scope of their consideration is limited to seeking a rationale to support the state judgment without drawing any independent conclusions themselves.[81] Very rarely will the federal court be unable to establish some possible explanation that makes the state decision "reasonable," meaning that these courts essentially will never reverse perfunctory state opinions.[82]

Although granting deference to perfunctory opinions on legal issues may be a fundamental alteration of the review process, granting deference to perfunctory opinions on factual issues is entirely conjecture. Typically a state post-conviction court makes new factual findings, including at least some finding on the failings of counsel.[83] A reviewing federal habeas court must review the state court's application of law to the facts, but simply cannot do so when no factual findings exist.[84] The habeas court is left to recreate the state decision by

79. Although consent has been raised as an exception to the requirement a specific findings to administer psychotropic medication, this consent must be informed and clear. *See* Riggins v. Nevada, 504 U.S. 127, 135 (1992) (finding that due process violation does not occur when an individual has consented to medication).

80. One commentator has argued that highly deferential review transforms the court from a neutral arbiter to an advocate for the state. *See* Wilner, *supra* note 47 (manuscript at Part III.A.2, on file with author).

81. *See* Bell v. Jarvis (Bell II), 236 F.3d 149, 167–75 (4th Cir. 2000) (en banc) (rejecting argument that federal courts reviewing habeas claims should draw their own conclusions, or explain their independent interpretation of the law or facts), *cert. denied sub nom.*, Bell v. Beck, 122 S. Ct. 74 (2001).

82. *See infra*, text accompanying notes 1–15. The majority opinion in *Bell* illustrates that courts using a highly deferential approach are willing to strain reason in order to uphold the state decision. In Mr. Bell's case, the Fourth Circuit believed that there was an explanation that could have justified the state's denial. However, these reasons were based on facts that did not exist in the record and on a reading of the law that was contrary to general consensus. The result was deference to a state court opinion, but at the expense of an honest reading of the case.

83. On post-conviction review, the state court usually will need to make an assessment of any claims that cannot be brought earlier in the trial. These include claims of ineffective assistance of counsel and certain claims of state misconduct. When reviewing these claims, new evidence usually will be put before the court under the assertion that *but for* the errors of counsel or the misconduct of the state, this evidence would have been presented at trial. This evidence can be as extensive as the evidence presented at the trial itself.

84. Without specific factual determinations by the state habeas court, there is no assessment of the validity of the new evidence and no indication as to whether the claims were rejected because there was no error or because there was an error but no prejudice resulted.

Usually when factual findings are unknown, the reviewing court can remand to the lower court for a more complete explanation of facts or law. *See* SEC v. Chenery Corp. 318 U.S. 80, 94–95 (1943). *See also* Herb v. Pitcairn, 324 U.S. 117, 127–28 (1945) (continuing case while waiting for clarification of ruling by state court). Federal courts conducting habeas review, however, are

independently reviewing the record and considering plausible factual findings.[85] In this recreation, the appellate court loses the benefits that extend from the trial court findings, including an assessment of witness credibility and an appraisal of the evidence.[86] Traditionally, appellate courts have been uncomfortable in the role of fact finder because of the high risk of inaccuracy.[87] However, when the lower court fails to issue factual findings, the habeas court must attempt to make these determinations.[88] In the habeas context, where the federal courts also are trying to grant deference to the lower courts, making factual determinations becomes increasingly complicated. A highly deferential court does not make factual determinations independent of the outcome at the trial level. It asks instead if there is any construction of the facts that would reasonably uphold the state's outcome. Factual findings are not meant to be determined with a specific outcome in mind, but rather are designed to be neutral elements to which the law is applied. By allowing two tiers of deference—on factual and legal bases—cases will be affirmed in situations where Congress may not have intended.[89]

The resulting process is no longer review but a reconstruction of the entire state court proceeding.[90] Having to make assessments of the facts and reasoning distorts the role of the reviewing court, which is designed to consider the state's application of law to fact[91] not to fill in a blank in the state's analysis in order to produce a desired result.

---

not allowed to remand to state courts.

85. Regardless of the degree of deference given to state opinions, all courts faced with perfunctory opinions review the case record and draw their own conclusions. *See Bell II*, 236 F.3d at 163 (finding that, even under heightened standard of deference, independent review of the record must occur; independently concluding, based on trial record, that trial judge had considered relevant factors at issue).

86. *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 114 (1985) (when an "issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court."). The Court explained why trial courts are in an advantageous position:

> Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases, the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . . How can we say the judge is wrong? We never saw the witnesses.

United States v. Oregon State Medical Soc'y, 343 U.S. 326, 339 (1952) (quoting Boyd v. Boyd, 169 N.E. 632, 634 (N.Y. 1930)).

87. *See, e.g.*, Thompson v. Keohane, 516 U.S. 99, 111 (1995) (finding that the trial court is "better positioned to make decisions [of fact]").

88. *See* HERTZ & LIEBMAN, *supra* note 20, § 2.4b, at 27–28 (explaining that where "there *is* no finding" from the state court, "a federal district court on habeas corpus will have to . . . make its own finding").

89. *See infra* Part III.A.

90. *See* Rose v. Lundy, 455 U.S. 509, 519 (1982) (emphasizing that an important purpose of the exhaustion rule is that "federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review").

91. The Supreme Court addressed the level of deference that should be granted to state decisions before AEDPA was issued. *See* Wright v. West, 505 U.S. 277 (1992) (confronting but not deciding the degree of deference that should be applied to state adjudications). In trying to determine the correct level of deference the Supreme Court asked the parties to brief the question,

C. The Middle Ground: Intermediate Deference to Unclear State Decisions

Several circuits apply an intermediate approach.[92] These courts also believe that a perfunctory decision is an adjudication that triggers deference under § 2254(d); however, they begin their analysis by "determin[ing] whether, in light of an *independent review* of the record and of the relevant federal law, the state court's resolution of a petitioner's claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law . . . .'"[93] By quoting the language of § 2254(d) and treating the claim as adjudicated, the courts appear to allot full deference to the state decision. However, courts applying intermediate deference make independent legal determinations (and, when necessary, factual findings) without considering the state result.[94] Although these courts indicate that this independent review is not "a full, de novo review,"[95] the two processes appear to be identical. Under both de novo and independent review, a federal court reviews the whole record and can determine the correct application of law to fact.[96] De novo courts then apply their own judgments, while intermediate courts use their determinations to assess the reasonableness of the state's decision. The process of independently drawing conclusions is especially important where factual findings are not present in a record. In these instances the federal habeas court makes determinations without regard for the state result, and its factual record may differ greatly from whatever the state had concluded, making the state's final result unreasonable. Some intermediate deference courts have acknowledged that without an opinion, the

---

"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?" Wright v. West, 502 U.S. 1021 (1991) (mem.) (granting certiorari and defining question for parties to address) (emphasis added). By framing the question in this manner, the Supreme Court implicitly acknowledged that looking at the result of the case was not sufficient, and that the application of law must be considered in order to properly review the decision.

92. *See, e.g.*, Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001); Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999), *vacated on other grounds*, 528 U.S. 1133 (2000); Aycox v. Lytle, 196 F.3d 1174 (10th Cir. 1999); Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997) (finding that federal court must determine that state court decision is "at least minimally consistent with the facts and circumstances of the case").

93. *Delgado*, 181 F.3d at 1091; *see also Aycox*, 196 F.3d at 1178 ("[W]e must uphold the state court's summary decision unless our independent review of the record and pertinent federal law persuades us" that it is outside of the deference granted in § 2254(d).). This is the same process that is used to determine if state decisions with explanations merit relief under AEDPA. *See* Van Tran v. Lindsey, 212 F.3d 1143, 1155 (9th Cir.) ("[W]e must first consider whether the state court erred; only after we have made that determination may we then consider whether any error involved an unreasonable application of controlling law within the meaning of § 2254(d)."), *cert. denied*, 531 U.S. 944 (2000); *see also infra* note 124.

94. *See Delgado*, 181 F.3d at 1091 n.3.

95. *Harris*, 212 F.3d at 943; *Aycox*, 196 F.3d at 1178; *see also Delgado*, 181 F.3d at 1091 n.3.

96. *See Van Tran*, 212 F.3d at 1155.

state court is at a higher risk of being overturned.[97] The Ninth Circuit explicitly has indicated that where "the state court did not make findings of fact [we might] grant[] less deference to the state court opinion."[98] The Seventh Circuit similarly acknowledged that a court will give "greater weight to thoughtfully reasoned [state court] decisions."[99] Other courts do not specifically express how they are reaching their decisions.

The opinions in *Bell v. Jarvis* illustrate the divergence between the intermediate and highly deferential approaches.[100] The majority in *Bell* employed a highly deferential review in order to conclude that closing Mr. Bell's criminal trial did not violate his Sixth Amendment rights. These judges were willing to assume that the state court had found the interests involved in the closure of Bell's trial to have been adequately balanced by the trial judge's unstated consideration and his assertion that testimony was "delicate."[101] As already noted, supporting the closing of a criminal trial through an "implicit finding" was counter to Supreme Court precedent[102] and was a new interpretation of closure requirements. Although it is *possible* that the Virginia District Court made this exact determination while considering Bell's claim, such a scenario appears extremely unlikely, especially given the court's failure to issue an opinion.[103] The dissent in *Bell* used intermediate deference to evaluate Mr. Bell's claim. These judges independently reviewed the law and facts of the claim without considering the state result. They first determined that Supreme Court precedent requires specific, on-the-record findings, and that where no such findings were made by the trial judge, a new trial should be granted.[104] After determining that the Virginia court result was contrary to their independent analysis, they considered whether the result was "unreasonable" under § 2254(d) and concluded that it was.[105] The dissent was unwilling to assume the state court applied an unlikely interpretation of law in order to uphold the state decision, finding, "The record suggests that the North Carolina courts most

97. *Aycox*, 196 F.3d at 1178 n.3 ("A state court's explanation of its reasoning would . . . diminish the risk that we might conclude the action unreasonable at law or under the facts at hand.").

98. *Delgado*, 181 F.3d at 1091 n.3.

99. Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997) (quoting Lindh v. Murphy, 96 F.3d 856, 877 (7th Cir. 1996)).

100. Bell v. Jarvis (Bell II), 236 F.3d 149 (4th Cir. 2000) (en banc), *cert. denied sub nom.*, Bell v. Beck, 122 S. Ct. 74 (2001).

101. *Id.* at 171–72.

102. This example is an extreme illustration of highly deferential review. It is possible that even a court using heightened deference could have reversed the Virginia decision, as many would consider even this interpretation to be "unreasonable." However, the fact that such a conclusion is possible under highly deferential review merits concern.

103. It is more likely that the Virginia Court never considered the merits of the claim, either because the court overlooked the issue or dismissed it as being procedurally barred since it was not raised on direct appeal. *See* VA. CODE ANN. § 8.01-654 (B)(2) (Michie 2001).

104. *Bell II*, 236 F.3d at 178.

105. *Id.* at 180–81.

likely followed legal principles directly contrary to those mandated by the Supreme Court."[106]

In reaching its conclusion in *Bell*, the dissent expressed frustration at having to guess at the state court's reasoning, stating, "[W]e simply do not know what governing legal principles (if any) formed the basis of the state courts' rejection of Bell's ineffective assistance claim."[107] In a similar context, the Supreme Court has acknowledged the difficulty of reconstructing the reasoning of lower courts, stating that when a state court issues "an unexplained order (by which we mean an order whose text or accompanying opinion does not disclose the reason for the judgment) . . . [a]ttributing a reason is . . . both difficult and artificial."[108]

Reading the case law, it is difficult to ascertain the exact degree of deference that these intermediate courts apply. This difficulty results from the arbitrary manner in which intermediate courts reach their determinations. Under the intermediate framework, the federal court must assess the state court's rationale, an examination that cannot be guided except by guesswork and instinct. As a result of this subjective inquiry, whether or not the state court decision is upheld will turn in part on the willingness or desire of the habeas court to believe that the state employed a reasonable rationale. In addition to creating a sense of haphazardness, as Part II discusses, the reviewing court is not able to grant deference in the manner intended by § 2254(d). As the Supreme Court explained in *Williams v. Taylor*,[109] it is necessary to examine the actual state reasoning in order to assess the reasonableness of the decision.[110]

II.
CAN DEFERENCE WORK?

A review of the case law establishes that a majority of circuit courts interpret a perfunctory denial as an adjudication of all claims.[111] Once courts accept that an adjudication has occurred, courts focus on *how* to apply the deferential standard they've chosen (whether it be intermediate or highly deferential) to the state court's perfunctory opinions. Even assuming that an adjudication has occurred, it is not obvious that it is possible to grant the standard of deference required by § 2254(d) to unexplained decisions. In *Williams v. Taylor*, the Supreme Court explained the analysis that should occur under § 2254(d) through a close examination of the state court opinion and

106. *Id.* at 181.

107. *Id.*

108. Ylst v. Nunnemaker, 501 U.S. 797, 802–03 (1991) (finding it difficult to decide if an "adequate and independent" state grounds existed for state denial).

109. 529 U.S. 362 (2000).

110. *See infra* Part III.A.

111. *See supra* notes 53 & 92 (cataloging that the Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits interpret a perfunctory denial as an adjudication).

reasoning.[112] Because the state's reasoning is lacking in perfunctory denials, those courts attempting to grant deference to a perfunctory decision are unable accurately to assess the state court rationales. As described in Part I.C., the federal courts do not act uniformly, but instead apply extremely varying degrees of deference to state court judgments. After examining the viability of using deferential review this section argues that, as currently interpreted by the Supreme Court, the deference accorded to state decisions under § 2254(d) cannot be properly applied to summary denials.

A. Language Concerns

Courts adhering to the position that perfunctory decisions merit deferential review base their methodology solely on the plain language of § 2254(d). Relying mainly on dictionary definitions,[113] these courts hold that a summary dismissal is an adjudication and that § 2254(d) indicates that all adjudications require deference. However, while deferential courts rely on plain language to make this initial determination, these courts do not explain how to make their application of deference to perfunctory denials consistent with the deference given to explained opinions. The language of § 2254(d) makes no distinction between summary decisions and well-reasoned ones, indicating that all "adjudications" should be subject to the same standard of review: State court "decisions that are unreasonable . . . or contrary to" existing Supreme Court precedent should be overturned.[114] The terms "unreasonable" and "contrary" have elastic meanings and must be further clarified in order to be employed uniformly.[115] Once these terms are given meaning, however, the structure of § 2254(d) requires that they be applied equally to all adjudications, regardless of their form.

In *Williams v. Taylor*, the Supreme Court defined the level of deference that § 2254(d) requires.[116] The Court explained that a decision was "contrary to" established law when "the state court arrives at a conclusion opposite to that reached by this Court on a question of law . . . [or] the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours."[117] To make this determination, the Court encouraged reviewing courts to examine the legal rule on which the decision is based.[118] The Court further explained that a state decision was

112. 529 U.S. 362, 402–13 (2000).

113. *See supra* Part I.B.

114. Additionally, there is no indication that Congress intended to grant heightened deference to perfunctory decisions. Indeed the legislative history makes no comment concerning how federal courts should review perfunctory denials, raising speculation that Congress intended for these judgments to be governed by a different degree of deference.

115. *See generally Williams*, 529 U.S. 362 (providing summary of competing interpretations of § 2254(d)); HERTZ & LIEBMAN, *supra* note 20, § 32.3, at 1435–36 (same).

116. 529 U.S. 362.

117. *Id.* at 405 (O'Connor, J., for the majority).

118. *Id.*

"unreasonable" when "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."[119] The Court asserted that determining the reasonableness of a state decision involves examining the legal conclusions and factual findings made in a case in order to assess the "state court's application of clearly established federal law."[120]

The Supreme Court offered *Williams* as a clarification of the deference to be afforded to state decisions by federal courts under § 2254(d). The standards of deference are meant to apply whether the decisions written are fully explained orders or simply summary dismissals. Circuit courts are having a difficult time applying this standard to perfunctory opinions because the standard elucidated in *Williams* is dependent on a reviewing court having access to the actual reasoning of a state court. In *Williams,* the majority engaged in a detailed analysis of the state court findings and reasonings.[121] The justices considered the explanation offered by the lower court and ultimately granted relief because the state reasoning was "contrary to" Supreme Court precedent and was an "unreasonable" application of that precedent.[122] The *Williams* review is built on an examination of the reasoning and an assessment of its compliance with existing Supreme Court law. Without access to the reasoning of the lower court, federal habeas courts understandably have been floundering for a clear method to review the state result.

In fact, granting deference under § 2254(d) in accordance with *Williams* is simply impossible when there is not even a minimal explanation of the state's reasoning. Some circuits are plainly not using the *Williams* definition of "unreasonable." The highly deferential circuits, in which the federal habeas court will uphold the decision if there is *any possible* legal argument that supports the state conclusion, in effect have redefined "unreasonable" in § 2254(d) to include only decisions where there is no possible legal explanation. Under *Williams,* when a federal court finds a state's given reasoning to be unacceptable, the federal court applies de novo review and does not require the court to search for an alternative basis to uphold a state result. Habeas scholars Hertz and Liebman have suggested that Chief Justice Rehnquist advocated for such an approach in his opinion in *Williams*, finding that he would not have overturned the state because their result could be justified under the facts in the case.[123] The *Williams* majority rejected Rehnquist's approach and overturned the state opinion, indicating their unwillingness to offer alternative methods by which a decision could be supported.[124]

---

119. *Id.* at 413.
120. *Id.* at 409.
121. *Id.* at 397–99 (Stevens, J., for the majority).
122. *Id.*
123. HERTZ & LIEBMAN, *supra* note 20, § 32.2, at 1428.
124. *Id.*

A more subtle divergence from *Williams* occurs in the circuits employing intermediate deference. Intermediate circuits conduct an independent review of the facts and the law, draw conclusions regarding the claims raised, and then compare these conclusions with the state result.[125] However, *Williams* focuses a reviewing court's analysis on the actual reasoning of the court, while intermediate deference courts are still guessing at the content of this reasoning. As the Supreme Court previously has noted in a discussion of unexplained state decisions, "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent."[126]Due to the absence of a state court analysis, intermediate scrutiny may be the most similar substitute for *Williams* review. Although the state courts are receiving something similar to *Williams* review, the results still diverge because courts reviewing summary denials unknowingly misconstrue the analysis of the state court, wrongly overturning or upholding the state court's decisions. Thus, under intermediate scrutiny, the state court perfunctory opinions will often receive more or less deference than a fully explained opinion would have under *Williams*. Although the use of intermediate deference is much closer to the deference the Supreme Court required in *Williams*, it still provides only a hit and miss substitute for actual review.

If § 2254(d) requires that deference be applied equally to all state decisions, then the differences between the *Williams* deference standard and the standards employed to address perfunctory decisions are irreconcilable. While the Supreme Court could overrule *Williams* and create a standard that could be applied to reasoned as well as perfunctory decisions, this proposed course is troublesome.[127] The Supreme Court repeatedly has endorsed *Williams*,[128] and overruling it would require a major shift in AEDPA jurisprudence.[129]

---

125. The Supreme Court has reviewed state court decisions subject to AEDPA by performing a two-part inquiry: first, reviewing the claim on the merits, and second, assessing if the state court decision falls within the acceptable realm of deference. *See, e.g.*, Penry v. Johnson, 532 U.S. 782 (2001); Weeks v. Angelone, 528 U.S. 225, 234–37 (2000); Williams v. Taylor, 529 U.S. 362 (2000).

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

127. One ramification of this course of action is that the federal court would be forced to uphold a state decision decided on incorrect grounds (in an explained decision) and therefore, erroneous in the federal court's opinion. Deference to the *result* would require a federal court to uphold the decision if it was in any way legally justifiable, even if the state court had not employed justifiable reasons. This system of review would lead to the upholding of unreasonable and unsound state decisions. Deference to such opinions cannot be justified by asserting that the state court system is adequate, but can only be supported through emphasizing finality interests.

128. *See, e.g.*, *Penry*, 532 U.S. at 792; Tyler v. Cain, 533 U.S. 656, 664 (2001); Glover v. United States, 531 U.S. 198, 198 (2001).

129. A search of Westlaw citation references for *Williams* reveals that, as of March 29, 2002, 1474 cases have cited it positively, relying on its result or reasoning in their own analyses. Only twenty-one courts have cited *Williams* negatively, trying to distinguish it from the case at hand or directly criticizing its reasoning.

Additionally, allowing deference often enables a federal court to control the result of their review. Because of the likelihood that both factual and legal findings will need to be determined, the reviewing court may construe both the facts and the legal reasoning as it chooses: either in a manner that upholds the state decision or in a manner that denies it. Allowing states to continue issuing perfunctory opinions causes delay and inefficiency in the capital system.

B. Efficiency Concerns

One of the major goals of AEDPA was to increase the efficiency of the habeas review process.[130] Interpreting § 2254(d) as only requiring a state result, and not necessitating explanatory reasoning, may appear to encourage this efficiency by allowing for expedited deferential review. However, when it comes to review of perfunctory denials, the opposite is true: When a federal habeas court reviews an unexplained state order, the process of attempting to assess this decision is extremely slow and cumbersome. If factual findings are omitted, the federal court must review the entire record and create independent factual findings to assess the state court determination. Records for cases on habeas review typically contain thousands of pages of motions and transcripts. The federal judge must consider each piece of information carefully if she has no indication of what the state judge relied upon in coming to a result. Performing this review requires an extraordinary amount of time and distorts the normal habeas procedures, where courts are required to defer to state factual findings.[131]

Encouraging state courts to submit decisions that enumerate their factual findings would greatly expedite the review process in federal courts.[132] Assuming that a state court actually considered and dismissed each claim in reaching its summary decisions, the only burden placed on the state court by requiring explanatory opinions is to make its consideration of the factual and legal issues explicit. Requiring full explanations both ensures that a state court actually has reviewed each claim and allows a federal court to review the state court's determination more quickly and accurately. The Supreme Court has stated that a habeas court should have "a complete record to aid the federal courts in their review" because it expedites the review process and furthers

---

130. *See Senate Hearings*, *supra* note 36, at 3 (remarks of Sen. Hatch, Chairman, S. Comm. on the Judiciary) (stating that the goals of habeas reform bill that became AEDPA were to "eliminate unnecessary delay" and to "get some effective resolution of . . . these lengthy, frivolous appeal problems."); *see also* Duncan v. Walker, 533 U.S. 167, 178 (2001) (stating that "AEDPA's purpose [is] to further the principles of comity, finality, and federalism") (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000)).

131. 28 U.S.C. § 2254(e)(1) (Supp. V 1999) ("[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.").

132. It is reasonable to assume that state courts would respond by issuing clarified decisions. The Supreme Court has made this same assumption when applying the rebuttable presumption that a state court decision was not based on "adequate and independent state grounds" absent a "clear statement" by the state court. *See* Coleman v. Thompson, 501 U.S. 722 (1991).

"judicial administration."[133] As one federal circuit judge explained, "Requiring explicit on-the-record findings is not a meaningless formality. This requirement forces trial courts to weigh the evidence . . . in a systematic fashion, thereby ensuring that . . . [a defendant's rights are not violated] after [a] perfunctory dismissal."[134] If a state court opinion fully explains its reasoning, a federal court can review the decision under the § 2254(d) standards set forth in *Williams*. Without access to even a hint of the state court's reasoning, a federal court never can adequately assess if the decision had a "reasonable" basis for its conclusion.

In addition, many state courts are currently rewarded for their failure to issue reasoned decisions since it minimizes the likelihood of reversal by insulating that decision from close scrutiny.[135] As state courts have an interest in being affirmed at the habeas level, this limited review grants an incentive to state courts not to explain their reasoning. When state courts fail to enumerate their reasonings, the burden is merely passed on to the federal courts, which are not positioned to make such determinations.[136] State courts should not be granted a windfall—in the form of almost total deference—for the failure to explain their reasoning. Rather, when an opinion does not clearly confront a federal issue, it should be construed as an implied waiver by the state[137] and deference should not be granted without some indication of the state court's reason for rejecting the claim. Under this scheme, the state courts would bear a greater risk of being overturned unless they began to issue adequate opinions, thereby maximizing the informed and accurate review, and placing the burden on the party most able to confront it.

C. Constitutional Concerns

Beyond the functional concerns regarding deference, viewing a perfunctory decision as an adjudication raises due process concerns when there is a possibility that a properly raised constitutional claim did not receive legal review. In light of the risk that state court review is inadequate or biased, or that constitu-

133. *See* Rose v. Lundy, 455 U.S. 509, 519 (1982) (stressing that an important purpose of the exhaustion rule is to create a record in order to facilitate review).

134. Bell v. Jarvis (Bell II), 236 F.3d 149, 185 (4th Cir. 2000) (en banc) (dissenting opinion), *cert. denied sub nom.*, Bell v. Beck, 122 S. Ct. 74 (2001).

135. Federal habeas courts that apply deference to unexplained state court decisions assume that the state court considered the claim, applied the correct standard of law, and did not base the decision on any clearly erroneous factual findings. These assumptions protect the reviewing court from attacking any mistakes the state court may have made that would have rendered the decision unreasonable. For example, state courts sometimes misquote legal standards or apply the incorrect law. These errors will not be discovered and corrected in an unexplained decision, whereas they would be if the reasoning in the opinion was available.

136. *See supra* notes 86–87 and accompanying text.

137. Using an implied waiver parallels the way the Supreme Court has dealt with matters that could have been decided on an "independent and adequate state ground." When the state court is not explicit about its reasoning, no assumption will be made concerning what reasoning was applied. *See infra* Part III.D.

tional claims are neglected as a result of inadequate state procedures, a reading of § 2254(d) that assumes perfunctory denials constitute full and meaningful adjudications raises concerns about AEDPA's constitutionality.

The belief that any individual with a constitutional claim is entitled to an opportunity for legal review is a fundamental tenet of American jurisprudence, historically regarded as essential to the preservation of our basic legal rights.[138] The drafters of AEDPA did not intend to remove this individual right to a meaningful review on constitutional claims.[139] Although Congress considered

---

138. Chief Justice Marshall expounded the importance of this protection in *Marbury v. Madison*:

> If [an individual] has a right, and the right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection .... The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. (1 Cranch) 137, 162–63 (1803).

In order to determine if a violation has occurred, and what remedy is appropriate, individuals must seek a judicial adjudication. If some individuals are not extended judicial review, it follows from Marshall's reasoning that their fundamental protections have been unacceptably compromised. This reasoning comports with the historical view that remedies are not explicitly included in the Constitution because "to the framers, [a] special provision for constitutional remedies probably appeared unnecessary[.] [T]he Constitution presupposed a going legal system, with ample remedial mechanisms, in which constitutional guarantees would be implemented." RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 849–50 (4th ed. 1996) (citing Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991)); *accord* Bell v. Hood, 327 U.S. 678, 684 (1946) ("[I]t is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."). In general, courts have assumed the principle that when an individual properly raises a violation of her rights, she is entitled to an adjudication on the merits of her claims. *See generally* Organization for a Better Austin v. Keefe, 402 U.S. 415, 423 (1971) (assuming that each litigant must be afforded at least "one bite at the apple"); Angel v. Bullington, 330 U.S. 183, 203 (1947) (finding that litigants may be afforded at least "one bite at the cherry" and may be entitled to more where interests of justice apply); Rose v. Lundy, 455 U.S. 509, 522 (1982) (determining that prisoner has a "right to relief" on a properly raised claim).

Additionally, the belief that "one bite at the apple" is required for each individual's claim is supported by the doctrines of res judicata and collateral estoppel. These doctrines preclude an individual from reasserting a claim that has already been litigated and gone to judgment. *See generally* RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 1091 (2d ed. 1995). While these doctrines are invoked to bar repetitive review, they implicitly protect an individual's right to obtain determination of a claim "on the merits." An individual can continue to raise a claim until the issue is actually litigated and has received a final judgment.

139. Although Congress could have eliminated any federal review, such proposals were put forth and soundly rejected. Senator Kyl raised this proposal during Senate debate about AEDPA, proffering an amendment that stated, "an application for a writ of habeas corpus ... shall not be entertained by a court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." *See* 141 CONG. REC. 15044–45 (1995). The amendment did not have enough support to go to a vote. *Id.* at 15054.

expediency and deference to be important goals, deference was necessarily applicable only to matters determined by the state. Congress did not intend to prevent federal courts from fully considering a properly raised claim that a state court had not addressed.[140] When a state court fails to adjudicate a constitutional issue, it violates the petitioner's due process rights. These neglected claims need to be subject to federal court review to ensure that due process rights do not become meaningless.

As many commentators have observed, federal courts need to oversee state adjudications because the risk of state courts failing to address constitutional claims is high.[141] Individuals who have studied state habeas procedures to determine if petitioners receive a thorough and meaningful review have found that state processes fail to perform a full analysis of each petitioner's claims.[142] These studies have revealed that "in too many states, the state habeas process is merely perfunctory," and therefore " reliance . . . on state courts is misplaced."[143] The best assessment of the correctness of state court adjudications may be the federal judiciary itself: Forty percent of capital sentences between 1978 and 1995 were overturned on federal habeas review because of constitutional violations.[144]

The unreliability of state court adjudications results in part from many states having enacted procedures that severely compromise an individual's ability to receive meaningful review. For example, in many states, the trial court habeas review is not independent; the court simply adopts findings identical to those submitted by the prosecutor.[145] Access to review is also a problem. In Texas,

---

140. *See infra* Part III.

141. *See* James S. Liebman, Jeffrey Fagan, Valerie West, & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1848 (2000) (reprinting portion of A BROKEN SYSTEM, *infra* note 143) (finding that only some states have meaningful post-conviction review); *see generally* Kenneth Williams, *The Anti-Terrorism and Effective Death Penalty Act: What's Wrong With It and How to Fix It*, 33 CONN. L. REV. 919 (2001).

142. Williams, *supra* note 141, at 927–28.

143. *Id.*

144. JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at 648–68 (2000), *available at* http://justice.policy.net/jpreport/finrep.PDF (cataloging the statistics of reversible error found in capital cases over the study period and concluding that the system is so filled with error that the reliability of any capital conviction is extremely questionable).

145. One recent study revealed "that the trial court's findings were identical to those submitted by the prosecutor in 83.7% of the cases examined." TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 127, *available at* http://www.texasdefender.org/study/study.html (in "Chapter 8: The Myth of Meaningful Appellate Review"). This practice also occurs in Alabama. *See* EQUAL JUSTICE INITIATIVE OF ALABAMA, ALABAMA CAPITAL POST-CONVICTION MANUAL 263 (3d ed. 1998) ("In many [post-conviction] capital cases, Alabama trial courts sign a proposed order which the Attorney General's Office has drafted."); *see also* Weeks v. State, 568 So.2d 864, 865 (Ala. Crim. App. 1989) (finding that the trial court had adopted the State's proposed findings and warning "that courts should be reluctant to adopt verbatim the findings of fact and conclusions of law prepared by the prevailing party"). The Supreme Court has condemned the practice of adopting findings verbatim:

We all know what has happened. Many courts simply decide the case in favor of the

state law requires death row prisoners to file habeas petitions while their direct review petitions are still pending.[146] This requirement is problematic if the petitioner desires to make an ineffective assistance of counsel claim because "the inmate is put in the awkward position of challenging the effectiveness of counsel who is still representing him."[147] Also, if a habeas petition is not filed within the stated time period, no review will be given, even if the prisoner seeking review is not mentally competent.[148] These procedures highlight a few of the barriers to fair review in some state courts and illustrate why there is a high risk that constitutional claims have not actually been reviewed and why there is a need for federal attention.

Additionally, a glance at history confirms that during certain periods state courts have failed to adequately protect the constitutional rights of citizens.[149]

> plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge.

United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 n.4 (1964). *See also* Anderson v. Bessemer, 470 U.S. 564, 572 (1985) (recalling criticism of "courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record").

Another indication of this cursory review is found at the appellate level—the Texas Court of Criminal Appeals almost never substantively reviews cases and adopted the findings and legal conclusions of the lower court in 92.7% of the cases examined. *See* Williams, *supra* note 141, at 931 (showing that clerk of Texas Court of Criminal Appeals reported that between September 1, 1995 and August 31, 2000, the Court of Criminal Appeals substantively reviewed only six of 329 applications for writ of habeas corpus); *see also* TEXAS DEFENDER SERVICE, *supra*, at 126.

146. *See* TEX. CRIM. PROC. CODE ANN. Art 11.071 § 4(a) (West 2001).

147. Williams, *supra* note 141, at 929.

148. *Id.* (citing Ex Parte Mines, 26 S.E. 3d 910, 914–15 (Tex. Crim. App. 2000)).

149. Habeas review serves, in part, to protect individuals from decisions based on state biases or interests of individual state judges. Acknowledgment that state court judges may be influenced by local sentiment or self-interest extends back to the writing of the Constitution. *See* THE FEDERALIST NO. 81, at 547 (Alexander Hamilton) (Jacob Cooke ed., 1961) ("The prevalency of a local spirit" "state judges, holding their office during pleasure, or from year to year [who are] too little independent to be relied upon for the inflexible execution of the national laws."). The Supreme Court expounded on the necessity of reviewing state court adjudications to adequately interpret federal law in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816). In this seminal case, the Supreme Court held that a state court could not refuse to enforce a Supreme Court mandate, and accordingly, that to deny the right to direct a state decision would deny the federal courts authority to remedy a violation of constitutional rights. *Id.*at 319–21. A famous passage from Justice Story's opinion indicates the constitutional necessity of federal review:

> [A]dmitting that the judges of the state courts are, and always will be, as of much learning, integrity, and wisdom, as those of the state courts (which we cheerfully admit) does not aid the argument [that they cannot be reviewed] . . . . The Constitution has presumed (whether rightly or wrongly do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, control, or be supposed to obstruct or control, the regular administration of justice.

Id. at 346–47. Protection against biases performs an increasingly vital role in light of the population seeking habeas relief. State criminal trials are disproportionately conducted against impoverished individuals and individuals of color. *See* Furman v. Georgia, 408 U.S. 238 (1972) (acknowledging that the use of capital punishment has been inextricably linked with racial bias and quoting Justice Department statistic that since 1930, 405 of the 455 individuals sentenced to death

Habeas jurisdiction initially was expanded to state prisoners in 1867,[150] following the unconstitutional trials and detentions of many African Americans. In the 1950s, the Supreme Court's expansion of federal review[151] coincided with southern state court judges' hostility to the claims of African American litigants, many of whom were arrested for protesting civil rights violations.[152] Although these time periods highlight unmistakable instances of state bias, many scholars believe that state courts are always subject to interests that prevent the adequate protection of federal rights.[153]

In *Ylst v. Nunnemaker*, the Court held that unexplained state orders do not "convey *anything* as to the reason for the decision."[154] Although it is possible that a state court considered all constitutional claims and rejected them on the merits, with perfunctory opinions there is no assurance that this process occurred. As a result of the uncertainty surrounding whether the state court actually adjudicated a federal claim and the impossibility of assessing how frequently state courts actually "miss" federal claims, we cannot know the number of individuals who are losing their right to review on constitutional

---

for rape were black); *see also* Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 511–12 (1994) (finding that, since 1972, more than 70% of the individuals executed in Alabama, Mississippi, and Georgia have been black). A historical glance confirms that these groups consistently have had their constitutional rights violated and have been treated illegally. *See generally* Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817 (1998). In many areas, however, these populations still are underrepresented politically, and judges further marginalize the constitutional rights of individuals within these groups in order to gain political support from the majority. Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1827 (2000) [hereinafter Bright, *Elected Judges*]. Judges seeking reelection have a personal interest in ensuring local application of the death penalty or other notorious criminal laws in order to appear "tough on crime" to the electorate. *See* Williams, *supra* note 141, at 928. Judges have even been known to campaign on platforms promising increased use of the death penalty and an end to continual appeals. *Id.* at 929. Studies have illustrated that judges become less likely to overturn criminal cases in election years and more likely to override jury sentences of life. Multiple examples also indicate that in certain jurisdictions, release of an individual may directly lead to a political loss. *See* Bright, *Elected Judges*, *supra*, at 1827–28.

150. Forsythe, *supra* note 18, at 1081.

151. Brown v. Allen, 344 U.S. 443 (1953) (expanding federal habeas review to all state prisoners for any constitutional claim arising from trial).

152. Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 889 (1994) (insisting that a broad construction of federal habeas jurisdiction was necessary to prevent blatant violations of federal law in the state courts).

153. Commentators who raise this concern indicate that state judges might not have the same incentives as federal judges to vigorously protect federal claims. *See, e.g.*, Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

154. 501 U.S. 797, 803 (1991).

matters. This risk, whether small or large, creates a probability that the statute is unconstitutional and requires that the petitioner be given an opportunity for a full review in federal habeas.

III.
AN ARGUMENT FOR DE NOVO REVIEW

As a result of these practical and constitutional concerns, § 2254(d) should not be interpreted to require federal court deference to state courts when the existence of an actual state adjudication of a federal right is uncertain. When ambiguity exists, the issue should be reviewed de novo by the federal court. In addition to the practical and constitutional issues supporting de novo review, this portion of the article will show that the statutory text and background of AEDPA also support an interpretation of § 2254(d) that would require de novo review of perfunctory decisions: Sections A and B argue that the language and legislative history of § 2254(d) support de novo review; section C argues that allowing federal courts to review these issues de novo comports with Supreme Court precedent; and section D draws an analogy to the "adequate and independent state ground" doctrine in order to determine how federal courts should address ambiguous state court opinions.

A. The Language of § 2254(d) Supports De Novo Review

As already discussed, interpreting § 2254(d) so that all perfunctory denials are adjudications is untenable because it is practically impossible to defer to unexplained decisions and because deferring to such opinions in the federal courts creates a potential due process violations. Courts generally assume that legislators do not enact statutes that would require federal judges to engage in impossible tasks.[155] When practical and constitutional issues lurk in a piece of legislation, courts will examine the statute to determine if these problems can be avoided by another "fairly possible" reading of the language.[156] The analysis of

155. This presumption is strong in the common law tradition. Lord Blackmun summarized:

> [T]he golden rule is right . . . that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been [such].

River Wear Comm'rs v. Adamson, 2 App. Cas. 743, 764 (House of Lords, 1877) (opinion of Lord Blackmun), *quoted in* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 516 (2d ed. 1995).

156. Legislators and the judiciary share the duty to protect and interpret the Constitution. As a result, courts assume "that the legislature is loathe to come close to enacting unconstitutional . . . statutes." When a statute is ambiguous, courts will seek to interpret it restrictively to avoid constitutional problems. ESKRIDGE & FRICKEY, *supra* note 155, at 675. This canon of statutory interpretation is well-established in the precedents of the Court:

> The settled canon for construing statutes wherein constitutional questions may lurk was stated in *Machinists v. Street*. . . . 'When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a

§ 2254(d) must be conducted in light of these accepted rules of statutory interpretation.

In § 2254(d) the legislators required that deference be given to "any claim that was adjudicated on the merits in state court . . . unless the adjudication . . . resulted in a decision that was . . . unreasonable." The meanings of the words "adjudication" and "decision" in AEDPA are unclear. They are used in a variety of contexts, both as common language and in a technical legal sense. When there is uncertainty as to the legislators' meaning, the Court looks to interpretive canons and the effects of various constructions to determine a statute's meaning.[157]

Typically it is assumed that when a word has been used by a court of law in a particular manner, Congress intended that meaning to apply in subsequent legislation.[158] However, when a term has been used in more than one way, no assumption can be made regarding Congress's intended usage. Therefore, even though the terms "decision" and "adjudication" each have been used for the final judgment of a case,[159] such a construction cannot be conclusively subscribed to them as they also have been used to define the legal process and the determinations made in applying fact to law. Congress's intended definition is uncertain.[160] *Black's Law Dictionary* defines adjudication as "the legal *process* of resolving a dispute."[161] Similarly, *The American Heritage Dictionary* defines adjudicate as "to hear and settle (a case) by judicial procedure."[162] Thus, common usage of the term "adjudication" implicitly involves not only the result, but how that result was reached. The most common understanding of the word "adjudication" involves knowing the resolution as well as the legal reasoning supporting the resolution through the issuance of an opinion.[163] Such an

---

cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided.'

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 510 (1979) (dissenting opinion, but same standard quoted and used by majority) (internal citations omitted).

In the interpretation of AEDPA, the Court has relied on the avoidance doctrine. *See* INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible' we are obligated to construe the statute to avoid such problems.") (internal citation omitted). *St. Cyr* details the usage of the constitutional avoidance doctrine in the Court's history. *Id.* at 299–300 & n.12.

157. *See* ESKRIDGE & FRICKEY, *supra* note 155, at 634 (generally explaining the use of interpretive canons).

158. *See id.* at 637 (stating maxim that "[w]here Congress uses terms that have accumulated a settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (quoting NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981)).

159. *See supra* Part I.B.

160. Terms must have accumulated a "settled meaning" in order for Congress' intent to be inferred from their usage. *See* ESKRIDGE & FRICKEY, *supra* note 155, at 637.

161. BLACK'S LAW DICTIONARY 42 (7th ed. 1999) (emphasis added).

162. THE AMERICAN HERITAGE DICTIONARY 11 (3d ed. 1994).

163. Although opinions are not issued in every case, cases decided without opinions are rare.

explanation is expected and the failure to provide it has been heavily criticized by reviewing courts.[164] Because of the plain language use of the term, it can be assumed that Congress, in drafting AEDPA, assumed that an "adjudication" in the state court would include a written opinion or decision.

Further support for this position is derived from the definition the Supreme Court gives the term "adjudication on the merits" in a different context. In a recent case, *Semtek International Inc. v. Lockheed Martin Corp.*,[165] the Supreme Court decided the issue of whether the term "judgment on the merits" resulted in a claim-preclusive effect; the Court held that the term has gradually undergone change and that "it is no longer true that a judgment 'on the merits' is necessarily a judgment entitled to claim-preclusive effect and there are a number of reasons for believing that the phrase 'adjudication on the merits' does not bear that meaning . . . ."[166] Under this interpretation, when a court's decision does not specifically consider each claim, it would not be valid to assume each distinct issue had been decided. Therefore, when a summary decision is issued, no assumption can be made regarding whether any particular claim has been adjudicated. While habeas can be distinguished from this context—because each claim must be decided to properly dismiss a petition—*Semtek* demonstrates the confusion that has surrounded the term "adjudication" and that could have surrounded Congress's application.

Congress's belief that an explanatory opinion would exist is supported further by the common usage of the term "decision." *Black's Law Dictionary*[167]

In federal court, Rule 52(a) of the Federal Rules of Civil Procedure requires that findings of fact and law be issued in any non-jury case. *See* FED. R. CIV. PROC. 52(a) ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately the conclusions of law thereon . . . ."). Many states do not require opinions to be issued in every case, but the vast majority do result in opinions. *See* JUDICIAL COUNCIL OF CALIFORNIA, COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 1990–1991 THROUGH 1999–2000, at 32 tbl.12, *available at* http://www.courtinfo.ca.gov/reference/documents/csr2001.pdf (finding that 84% of criminal appeals result in opinions, with another 12% of criminal appeals resulting in the filing of a record which may contain oral transcripts of findings of fact and law), *cited in* Wilner, *supra* note 47.

164. *See, e.g.*, Ponte v. Real, 471 U.S. 491, 522 n.21 (1985) (Marshall, J. & Brennan, J., dissenting) ("This Court is often called on to strike difficult balances between individual rights and institutional needs, but by precipitately rushing into voids left by lower courts, the Court decreases the likelihood that the balance at which it arrives will properly account for all the interests and available options."). Professors Gellhorn, Byse, and Strauss' analysis of the problem also was cited approvingly by members of the Court:

> [A]n advocate's hypothesis that a[] . . . decision-maker *did in fact* conclude thus-and-such because the record shows that he *could reasonably have concluded* thus-and-such, is not likely to be highly impressive. The courts prefer to appraise the validity of an order by examining the grounds *shown by the record* to have been the basis of decision.

WALTER GELLHORN, CLARK BYSE & PETER L. STRAUSS, ADMINISTRATIVE LAW: CASES AND COMMENTS 361 (7th ed., 1979), *quoted in* Ponte v. Real, 471 U.S. at 508–09 (Marshall J. & Brennan, J., dissenting).

165. 537 U.S. 497 (2001).

166. *Id.* at 503.

167. BLACK'S LAW DICTIONARY 407 (6th ed., 1990).

acknowledges that while "'decision' is not necessarily synonymous with 'opinion' . . . the two words are sometimes used interchangeably." Under the Federal Rules of Civil Procedure, courts have found a distinction between the terms "judgment" and "decision."[168] Commentators Wright, Miller and Kane clarify this difference: "The decision consists of the court's findings of fact and conclusions of law; the rendition of the judgment is the pronouncement of that decision and the act that gives it legal effect."[169] That Congress believed an opinion would be available for review by federal habeas courts is implicit in the statute.[170] Section 2254(d) states that the federal courts must review the state reasoning and application of law found in the state "decision." As indicated earlier, the nature of review that Congress directed is not possible without some minimal explication of the application of law to fact.[171] Thus, in requiring an "adjudication" to occur and a "decision" to result in order for deference to apply, the statute necessarily must be based on an assumption that an explanatory opinion would exist.

B. Congress Intended to Preserve the Right to One Full Adjudication of Constitutional Rights

The legislative history of AEDPA is consistent with a reading of § 2254(d) that allows de novo review. While a primary goal of AEDPA was preserving the finality of state decisions by removing the traditional de novo review standard, this interest was not enough put the right to a full legal adjudication at risk. The drafters of AEDPA had no intention of removing an individual's right to review, explicitly stating that AEDPA's "goal is to reform the current procedures and practices in order to streamline Federal litigation by ensuring that habeas corpus petitioners have one fair opportunity to present their Federal claims to the Federal courts . . . ."[172] In support of this idea, the Chairman of the Senate Committee on the Judiciary, Senator Orrin Hatch stated, "I firmly believe that

168. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D, § 2651 (3d ed. 1998) ("[T]he decision of the Court and the judgment to be entered thereon are not the same thing under the Federal Rules of Civil Procedure.") (citing Winkelman v. General Motors Corp., 48 F. Supp. 490, 494 (S.D.N.Y. 1942)).

169. WRIGHT ET AL., *supra* note 168, § 2651; *see also* Wilcox v. Sway, 160 P.2d 154, 155 (1945) (stating that a decision is the findings of fact and conclusions of law which must be in writing and filed with the clerk). Under this interpretation, a state order that did not explain, even minimally, its application of the law would not constitute a "decision."

170. Comments made during the Congressional debates about AEDPA also support this belief. For example, Representative Conyers, a ranking member of the Committee on the Judiciary and a supporter of AEDPA, expressed the understanding that the federal courts would have adequate information from the lower courts. During debate in the House he stated, "We are asking for a deference . . . to State court decisions; not that it cannot be overcome . . . . Why should the Federal courts go back and review all of these matters over and over again . . . if they have a *clear record* in front of them?" 42 CONG. REC. 4611 (1996) (emphasis added).

171. *See supra* Part II.A.

172. H.R. REP. NO. 103-470, at 1 (1994).

the writ is necessary to ensure that innocent people are protected from illegal imprisonment."[173]

For more than fifty years before the ratification of AEDPA, proposals seeking to reform federal habeas corpus had circulated through Congress.[174] Though many of these proposals essentially sought to eradicate federal review, at a minimum, federal courts always were permitted to grant relief if the state had not afforded a "full and fair" process.[175] A fair process was defined as one that assured "a reasoned probability that the facts were correctly found and the law correctly applied."[176] Although none of these initiatives ultimately was successful, it is useful to examine the assumptions that the parties held through the ongoing legislative debates. Legislators seeking to limit habeas corpus as well as those seeking to uphold it assumed that under AEDPA, federal courts would be able to examine the state court's findings of fact and application of law.[177]

The assumption that a federal court would be able to examine the state court's rationale appears throughout AEDPA's legislative history. During much of the debate surrounding AEDPA, the "full and fair" language remained in the bill, indicating that the state adjudication of each claim could be examined in federal habeas review.[178] The language was finally removed as a concession to opponents of the bill, who feared it would prevent any possible federal review if the state court process was found to be fair.[179] The removal of the "full and fair" language was meant to demonstrate that federal courts would be able to review the state reasoning as well as procedure. The alteration did not signal a legislative break from the view that a federal court could review state court factual

173. *Senate Hearings*, *supra* note 36, at 2.

174. Professor Yackle extensively documented the fifty years of debate surrounding habeas reform. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 422–43 (1996).

175. Yackle, *supra* note 174, at 424.

176. *Id.* (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963)).

177. *See id.* at 427–32. Because definitions of "full and fair" review by proponents of habeas reform generally included a detailed assessment of the state adjudication, one proposed bill clarified what federal courts could review:

> [A] state adjudication would be full and fair in the sense of the proposed subsection (d) if: (i) the claim at issue was actually considered and decided on the merits in state proceedings; (ii) the factual determination of the state court, the disposition resulting from its application of the law to the facts, and its view of the applicable rule of federal law were reasonable; (iii) the adjudication was consistent with the procedural requirements of federal law; and (iv) there is no new evidence of substantial importance which could not reasonably have been produced at the time of the state adjudication and no subsequent change of law of substantial importance has occurred.

Id. (citing *The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the S. Comm. on the Judiciary*, 97th Cong., 2d Sess. 98 (1982) (analysis of bill text)).

178. Yackle, *supra* note 174, at 427–32. *See also Senate Hearings*, *supra* note 36, at 88 (describing leading proposal that included this language).

179. Yackle, *supra* note 174, at 431–32, 436.

findings and legal conclusions.[180] As Professor Yackle argues in his summary of AEDPA's legislative history, the bill proponents were seeking deference to state courts, but did not expect that deference to be acquiescence.[181] Without a doubt, deference to the state courts was only expected to occur when a claim had actually been considered, reasoned, and decided at the state level.[182]

Consequently, enacting a standard that, absent any fault of the petitioners, allows federal courts to defer to perfunctory state court opinions, thereby causing constitutional claims to lose any meaningful review, is counter to the stated purposes and intentions of Congress.

C. The Supreme Court Has Not Allowed AEDPA to Prevent One Review of Federal Rights

Since the passage of AEDPA, the Supreme Court has carefully protected the right of petitioners to have at least one meaningful opportunity for review of constitutional claims. Habeas scholars Hertz and Liebman have concluded that "[t]he Court is very reluctant to interpret AEDPA to deny a habeas corpus petitioner . . . at least 'one full bite'—*i.e.*, at least one meaningful opportunity for postconviction review in [any federal court]—and, in order to produce that outcome, is willing to forgo a literal interpretation of AEDPA's language and read in pre-existing, judge-made habeas corpus doctrine . . . ."[183] After reviewing numerous post-AEDPA cases, Hertz and Liebman determine that "[t]he Court's decisions evidence the majority's rejection of the view . . . that doubts about the meaning of AEDPA's ambiguous provisions should usually or presumptively be resolved in favor of interpreting the statute to limit habeas corpus review or relief."[184] Supreme Court cases involving the outer reaches of AEDPA exemplify this proposition.[185]

---

180. Indeed, the strongest critic of the bill, Senator Joseph R. Biden, Jr., indicated that AEDPA still permitted review of state proceedings. While he felt that AEDPA in its current form left essentially no power to review state decisions to federal courts, he stated that the bill was essentially the same as rejected past "full and fair" proposals that had allowed federal courts to grant relief only if the state adjudication was flawed. *Senate Hearings*, *supra* note 36, at 21–22 (statement of Sen. Biden).

181. Yackle, *supra* note 174, at 439.

182. Rep. Chris Cox, stating that federal review was "duplicative" and was a "second bite at the apple" indicates the assumption that this review already would be taking place at the state level. 141 CONG. REC. 4111–12 (1995).

183. HERTZ & LIEBMAN, *supra* note 20, § 3.2, at 118 (citations omitted).

184. *Id.*, § 3.2, at 120 .

185. *See* Hohn v. United States, 524 U.S. 236 (1998) (holding that Supreme Court can review circuit court's denials of certificates of appealabilty following district court's denial of petitioner's habeas petition, even though the statute declares the circuit court denial to be final); Felker v. Turpin, 518 U.S. 681 (1996) (finding that even though AEDPA did not provide any method for the Supreme Court to review circuit court denials of certificate of appealability for successive or second petitions, the statute did not remove the Court's original jurisdiction to review these determinations).

In one of the first cases reviewed after AEDPA was enacted, *Lindh v. Murphy*,[186] the Supreme Court rejected the view that any ambiguity in AEDPA should be resolved in favor of further limiting habeas review. The question before the Court was whether AEDPA applied to cases pending on habeas review when the statute was enacted.[187] The Court indicated its refusal to presume Congress intended for AEDPA to function as restrictively as possible. In finding that cases filed before AEDPA's approval would be governed by the less deferential pre-AEDPA law, the Court overruled the Seventh Circuit holding that a narrow interpretation should be presumed due to Congress's intent to limit federal habeas review.[188]

In preserving habeas jurisdiction despite AEDPA's limiting intent, the Supreme Court has relied upon the historic purposes and use of the writ. In the recent case, *INS v. St. Cyr*, the Court reviewed the meaning of AEDPA's § 401(e), "Elimination of Custody Review by Habeas Corpus,"[189] to determine if federal courts were deprived of the jurisdiction to review aliens' habeas petitions.[190] Despite the seemingly clear intent of Congress to remove this power, the Court relied upon "the historical use of habeas corpus to remedy unlawful executive action"[191] in order to reach its conclusion that habeas jurisdiction remained vested in the federal courts. The Court emphasized that constitutional issues would arise if § 401(e) was interpreted as ending a longstanding use of the writ.[192] Relying upon the historic principles in *Michael Williams v. Taylor*,[193] the Supreme Court interpreted AEDPA's standard for obtaining a federal evidentiary hearing. The Court found that prisoners who had attempted to establish facts but had been prevented from doing so by the state courts were not precluded from receiving an evidentiary hearing on habeas review. In rendering the decision, the Court explicitly rejected the argument that AEDPA's goals of comity and finality must cause the interpretation to allow state deference. The justices emphasized that their interpretation must be guided not only by federalism, but also by "[f]ederal habeas corpus principles . . . [and] the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts."[194]

186. 521 U.S. 320 (1997).

187. *Id.* at 322–23.

188. *Id.* at 336–37, *rev'g* 96 F.3d 856, 863 (7th Cir. 1996) (applying AEDPA after analyzing legislative intent and concluding that "Congress obviously wanted to *ensure* that [AEDPA's limitations] extended to as many cases as possible").

189. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, § 401(e) (1996).

190. 533 U.S. 289 (2001).

191. *St. Cyr*, 533 U.S. at 303.

192. *Id.* at 303–05.

193. 529 U.S. 420 (2000).

194. *Id.* at 436.

In another line of cases interpreting AEDPA's successive petition limitations, the Supreme Court has forgone the plain language of AEDPA in order to extend review to petitioners. In *Stewart v. Martinez-Villareal*,[195] the Supreme Court decided whether a petitioner whose initial habeas petition had been denied as premature was subject to AEDPA's limitations for second or successive petitions in his following attempt to seek review. In order to allow review of the claim, the Court had to overcome a provision of § 2244(b)(1) of AEDPA, which states: "A claim *presented* in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."[196] The Court found that a literal reading of the provision would create an unjust result where the "petitioner does not receive an adjudication of his claim,"[197] and thus determined that this was "not a 'second or successive petition'" under the law.[198] The Court affirmed and further expanded this principle in *Slack v. McDaniel*,[199] finding that when a claim initially is "unadjudicated on its merits and dismissed . . . [it] is not a second or successive petition."[200] In *Slack*, the petitioner's prior habeas application had been dismissed as unexhausted. The Court again refused to allow procedural hurdles to prevent a petitioner from receiving a meaningful federal review, stating, "The writ of habeas corpus plays a vital role in protecting constitutional rights."[201] The conclusions in both *Slack* and *Stewart* were reached over vigorous dissents stating that Congress had unambiguously and purposefully denied federal review in these situations.[202]

Adopting deferential review for perfunctory state decisions would place the right to receive one meaningful review of constitutional claims into question. Thus far, Supreme Court cases interpreting AEDPA have indicated the hesitancy of the Court to produce such an outcome. The Court's protective stance toward allowing federal review is not new; one illustration of where the Court previously has sought to ensure federal claim review is the "independent and adequate" state grounds doctrine.

195. 523 U.S. 637 (1998).

196. 28 U.S.C. § 2244(b)(1) (Supp. V 1999) (emphasis added).

197. *Martinez-Villareal*, 523 U.S. at 645.

198. *Id.*

199. 529 U.S. 473 (2000).

200. *Id.* at 486.

201. *Id.* at 483.

202. *Martinez-Villareal*, 523 U.S. at 646 (Scalia, J., dissenting) ("The Court today flouts the unmistakable language of the statute . . . [to avoid a result that] was entirely the purpose of the statute to change."); *Slack*, 529 U.S. at 490–93 (Scalia, J., dissenting in part) (finding that Court's reading misconstrues the natural reading and purpose of the statute).

D. The Supreme Court Has Previously Refused to Assume a State Decision Was Based on Grounds that Would Preclude Federal Review

In *Michigan v. Long*,[203] the Supreme Court confronted the issue of how federal courts should handle ambiguous state court decisions by addressing what should occur when it is unclear whether the state court based its decision on state or federal law.[204] This determination controls whether or not a federal court can review the state court decision: When a federal issue is implicated, review is possible, but when the case is decided on state grounds, there is no federal review. The independent and adequate state ground doctrine asserts that when a state "clearly and expressly [relied] on an independent and adequate state ground, federal courts are divested of jurisdiction to review the issue."[205] Although the Supreme Court could have held that reviewing courts could assume that the result is based on state grounds (precluding federal review) or try to determine the actual basis for the decision, the Court decided that placing the burden on the states to clarify their decision is a more reasonable solution than having appellate courts guess at the state court's rationale.[206] Thus, the Court, in choosing to construe the ambiguity in favor of allowing federal review, took a protectionist stand with regard to federal rights.

In *Coleman v. Thompson*,[207] the Supreme Court discussed the adequate and independent doctrine in the habeas context. *Coleman* ruled that if a decision declared in a "plain statement" that it relied on a state ground then the federal court could not reach the merits of the issue.[208] This doctrine declines to attribute particular explanations to a state court opinion when the opinion is unclear on its face, refusing to preclude federal habeas review in cases where the state court opinion gives "the federal court . . . good reason to question . . . the ground for the decision."[209] In *Coleman*, the Supreme Court emphasizes that its decision is based on efficiency concerns. Examining the history of the doctrine, the Supreme Court declared that "prior to [the presumption], when faced with ambiguous state court decisions, this Court had adopted various inconsistent and unsatisfactory solutions."[210] "In order to minimize the costs associated with resolving ambiguities in state court decisions," the Court created a bright line rule that increases the efficiency of the federal court review: the rebuttable presumption that absent a clear statement of state grounds, federal review is

203. 463 U.S. 1032 (1983).

204. *Id.*

205. *See* Harris v. Reed, 489 U.S. 255, 266 (1989) (finding a habeas petition not precluded where state court's explanation fell "short of an explicit reliance on a state law ground"); *see also* Arizona v. Evans, 514 U.S. 1, 6–10 (1995) (no adequate and independent state grounds when state court did not issue a plain statement of reliance); *Michigan v. Long*, 463 U.S. at 1041.

206. *Harris*, 489 U.S. at 266.

207. 501 U.S. 722 (1991).

208. *Id.* at 729.

209. *Id.* at 739.

210. *Id.* at 732.

possible.[211] The Court found that the "errors in those small number of cases" where an explanation was lacking (but independent grounds existed) were outweighed by the increase in efficiency.[212]

In determining the proper standard of review under AEDPA for perfunctory state decisions, the courts should follow the approach taken in the adequate and independent state grounds doctrine. Allowing federal review when uncertainty exists would prevent the use of inconsistent and unsatisfactory adjudications. Additionally, allowing a presumption that the state did not adjudicate the issue absent a minimal explanation creates an efficient rule, and gives notice to the state courts of what is required for deference from federal courts. Finally, a clear rule will protect individual federal rights and encourage state courts to issue more thoughtful opinions.

CONCLUSION

The proposition that individuals who have carefully abided by state and federal procedures might never receive review of their constitutional claims threatens every individual's fundamental constitutional protections. AEDPA does not require that deference be given when there is no certainty a claim has been adjudicated in the state court. Procedural assumptions cannot justify foreclosing preservation of individual constitutional rights and liberties. These constitutional protections cannot be compromised simply because some judges on a state court do not feel like writing a reasoned opinion. In order to ensure meaningful protection of basic rights, courts should interpret AEDPA to permit de novo review. AEDPA has met its goal of restricting reversals of state court convictions; courts need not strain the statutory language to further eliminate review. For many individuals, de novo review will mean the difference between life and death. For Mr. Bell, it would have assured him a new trial, where his conviction could have been reviewed impartially and fully, in line with his constitutional rights.

211. *Id.* at 733.
212. *Id.* at 737–38.