Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?

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Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?

EVAN TSEN LEE*

INTRODUCTION

The world of federal habeas corpus continues to be dominated by issues arising from Congress’s passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). One of AEDPA’s most notable innovations was § 2254(d), which effectively requires federal habeas courts to accord state court criminal convictions a sort of deference. The problem is that § 2254(d) is unusually ambiguous with respect to how much and what sort of deference is owed, and under what circumstances.

Pre-AEDPA Supreme Court decisions are of little or no help because the federal habeas statute never before contained anything like § 2254(d). The Supreme Court has started to resolve issues about how to

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2. See infra notes 64–66 and accompanying text. Section 2254(d) states:
   (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
   (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.

3. Note that § 2254(d) uses none of the terms traditionally employed in standard-of-review jurisprudence, such as “clearly erroneous,” “de novo,” “supported by substantial evidence,” or “clear and convincing evidence.”

4. Prior to the AEDPA, the Supreme Court had established a set of standards for review for federal habeas. Pure questions of law and so-called “mixed questions of law and fact” were to be reviewed on a de novo basis. Brown v. Allen, 344 U.S. 443, 507 (1953); see also Miller v. Fenton, 474 U.S. 104, 114 (1985) (holding that where the “relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact’s conclusions presumptive force”). State court findings of fact were to be accepted unless unsupported by substantial evidence. Brown, 344 U.S. at 506.

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interpret § 2254(d), but the wide variety of procedural permutations presented by federal habeas corpus review guarantees that important and difficult issues will continue to arise for years to come.

One of the most pressing issues is how federal habeas courts should review "silent" state court decisions—that is, summary affirmances or summary denials of relief, or opinions that dispose of whole claims in a perfunctory manner (e.g., "Petitioner's other claims are without merit"). The circuits are presently split on this question, and the Supreme Court has not formally undertaken to resolve the conflict. When the Supreme Court does take the issue head on, it will probably have to decide whether the reasonableness review required by the AEDPA refers to reasonableness of the state court's analysis or reasonableness of the state court's result. Technical as it may sound, this is a politically loaded question. If federal habeas courts are required to review the analysis of state court decisions for their reasonableness, then state court decisions that are silent as to their analysis cannot be reviewed on a deferential basis. Either such decisions would have to be reviewed de novo, or they would have to be "sent back" for the state court to articulate its analysis.

Those who feel aggrieved by the (perceived) frequency with which federal courts grant habeas relief will be antagonistic toward the possibility of de novo review, while those who believe state courts are already overburdened will strongly oppose any requirement that state appellate courts articulate their analysis in every criminal case. It is therefore not difficult to predict how the Supreme Court will eventually resolve the conflict. Indeed, as I will explain in the next section, the Court has (perhaps inadvertently) already foreshadowed the adoption of an approach whereby federal habeas courts review only the results, and not the analysis, of state court adjudications for reasonableness.

The first case in which the Court really took § 2254(d)(1) head on was Williams v. Taylor, 529 U.S. 362, 409-10 (2000) (holding that "unreasonable application" means something more than merely "incorrect" and that reasonableness is to be measured by an objective standard).

The great variety in procedural permutations mostly stems from the variety in appellate practices and opinion-writing habits of 50 state judiciaries.


See infra notes 13-16.

9. See infra Part I.A.

10. The Court could obviate the need to resolve this question if it decides that silent state court judgments are not "adjudicated on the merits" within the meaning of § 2254(d). In fact, the circuits are split on this question too. See infra notes 13-16. But it seems likely that the Supreme Court will hold that such judgments are "on the merits" so long as they have full preclusive effect, and I will assume that for purposes of this Article.

11. "Sent back" only in a manner of speaking. Federal habeas courts review the legality of custody simpliciter, and not the state court judgment per se, Fay v. Noia, 372 U.S. 391, 430 (1963), so technically speaking remand is impossible. The proper course in that situation is for the federal district court to grant relief with the proviso that relief will be stayed if the state court grants a new hearing.
In this Article I will argue that the Supreme Court should render this prediction incorrect. I will argue that “reasonableness of the result” review would be inconsistent with the intellectual history of federal habeas corpus reform efforts over the last forty years. Furthermore, review of results alone would be in tension with the text of the statute and would accord only a false sense of respect for state courts. However much political and practical sense a “reasonableness of the result” approach might seem to make, a “reasonableness of the analysis” standard represents a more faithful interpretation of the text, history, and structure of § 2254(d).

In Section I, I survey the circuit split with respect to silent state court judgments, as well as the Supreme Court decision that foreshadows adoption of the “reasonableness of results” approach. In Section II, I argue that “reasonableness of results” review would create a serious tension with the text of § 2254(d). In Sections III through V, I explain why the legislative, intellectual, and political history of federal habeas reform, as well as policy considerations, favor reasonableness review of state court analysis.

I. EXISTING DOCTRINE

A. THE CIRCUIT CONFLICT

The precise issue that divides the circuits is whether the “unreasonable application” clause of § 2254(d)(1) applies to state court judgments unaccompanied by opinion.

The category of “state court judgments unaccompanied by opinion” includes cases where the last state court summarily affirmed the conviction, summarily denied habeas relief (“postcard denials”), or wrote opinions that disposed of entire claims without explanation (“petitioner’s other claims are without merit”). I shall refer to these as “silent judgments.” Another category of cases, treated differently by some circuits, contains those state court opinions that refer to state law only—they do not discuss the federal constitutional dimensions of the relevant issues. I will refer to these as “partial opinions.” The First and Third Circuits treat silent judgments as not constituting “adjudications on the merits” within the meaning of § 2254(d), and therefore reviewable on a de novo basis. The Second, Fourth, Seventh, and Eleventh Circuits have held that silent judgments count as “adjudications on the merits,” and furthermore, that federal habeas courts are to review such judgments for

12. My proposal would treat partial opinions the same as silent judgments.
13. See Gruning v. DiPaolo, 311 F.3d 69, 71 (1st Cir. 2002); Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001); DiBenedetto v. Hall, 272 F.3d 1, 6-7 (1st Cir. 2001); Hameen v. Delaware, 212 F.3d 226, 247-48 (3d Cir. 2000).
the reasonableness of their results.\textsuperscript{14} One circuit, the Ninth, appears to have held that silent judgments are adjudications on the merits, but that de novo review applies nonetheless.\textsuperscript{15} Still another circuit, the Tenth, seems to be divided within itself on the matter of whether a silent judgment constitutes an adjudication on the merits.\textsuperscript{16} Meanwhile, the Second and Third Circuits have held that a partial opinion is not an "adjudication on the merits" and is therefore reviewable on a de novo basis.\textsuperscript{17}

B. \textit{YARBOROUGH V. ALVARADO}

The Supreme Court has not directly tackled the question of what review to accord silent state court judgments. However, last Term in \textit{Yarborough v. Alvarado}\textsuperscript{18} the Court may have foreshadowed its future approach in dealing with silent state court judgments. The issue was whether petitioner Alvarado was "in custody" within the meaning of \textit{Miranda v. Arizona}\textsuperscript{19} at the time he made certain incriminating statements.\textsuperscript{20} The Court noted that the test for determining custody evolved through a series of decisions culminating in \textit{Thompson v. Keohane}.\textsuperscript{21} The Court's opinion in \textit{Thompson} described a two-factor test for "custody": "[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."\textsuperscript{22} If the Supreme Court had regarded

\textsuperscript{14} See Jenkins v. Artuz, 394 F.3d 284, 292 (2d Cir. 2002); Wright v. Sec'y for the Dep't of Corrs., 278 F.3d 1245, 1254-56 (11th Cir. 2002); Bell v. Jarvis, 236 F.3d 149, 175 (4th Cir. 2000); Hennon v. Cooper, 109 F.3d 330, 334-35 (7th Cir. 1997).
\textsuperscript{15} See Greene v. Lambert, 288 F.3d 1081, 1088-89 (9th Cir. 2002). A more recent case holds that a silent judgment, as an adjudication on the merits, is subject to independent review for "clear error." Luna v. Cambra, 306 F.3d 954, 959 (9th Cir. 2002). But, the "clear error" standard was specifically disapproved in the Supreme Court's opinion in \textit{Lockyer v. Andrade}, 538 U.S. 63, 77 (2003). The Ninth Circuit's most recent pronouncement reacts to \textit{Andrade} by saying that a federal habeas court conducts an independent review of the facts—but not the application of law to facts—for the limited purpose of determining whether the state court's application was "objectively unreasonable." See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).
\textsuperscript{16} Compare Duckett v. Mullin, 306 F.3d 982, 991 n.1 (10th Cir. 2002) (holding that silent judgments are not adjudicated on the merits) and Neill v. Gibson, 278 F.3d 1044, 1050-53 (10th Cir. 2001) with Aycox v. Little, 196 F.3d 1174, 1177 (10th Cir. 1999) (holding that silent judgments are adjudicated on the merits and reviewable for reasonableness of result).
\textsuperscript{17} See Rompilla v. Horn, 355 F.3d 233, 247 (3d Cir. 2004); Sellan v. Kuhlman, 261 F.3d 303, 310-14 (2d Cir. 2001). The Fifth Circuit analyzes a silent or partial state court opinion to decide whether it is "substantive" or "procedural," and if it is "substantive," it is an adjudication on the merits. See Neal v. Puckett, 239 F.3d 683, 686-87, 696 (5th Cir. 2001); Mercadel v. Cain, 179 F.3d 271, 274-75 (5th Cir. 1999).
\textsuperscript{18} 124 S. Ct. 2140 (2004).
\textsuperscript{19} 384 U.S. 436, 476-77 (1966).
\textsuperscript{20} \textit{Yarborough}, 124 S. Ct. at 2147. The California Court of Appeal addressed Alvarado's \textit{Miranda} claim in the unpublished portion of an opinion going under the name of his co-defendant. See People v. Soto, 1999 Daily J. D.A.R. 9571, 9573-75.
\textsuperscript{22} Id. at 112.
“unreasonable application...of clearly established Federal law” to mean “unreasonable” as judged by the state court’s analysis, the Court would have reviewed the state court opinion and ascertained precisely the manner in which the state court applied the two-factor Thompson test. However, Justice Kennedy’s opinion for a 5-4 majority did not inquire into the state court’s reasoning but instead constructed a sliding scale based on the specificity or generality of the governing legal test. This scale, in turn, would determine how “far off the mark” a state court’s ruling may be and still qualify as “not unreasonable” for purposes of § 2254(d)(1). The Court began by conducting its own de novo review of the custody issue: “Ignoring the deferential standard of § 2254(d)(1) for the moment, it can be said that fair-minded jurists could disagree over whether Alvarado was in custody.” In view of the closeness of this question, the state court’s determination that Alvarado was not in custody could not be deemed “unreasonable” (as the Ninth Circuit had found). Justice Kennedy explained:

The term ‘unreasonable’ is a ‘common term in the legal world and, accordingly, federal judges are familiar with its meaning.’ At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

After reviewing the facts surrounding the interrogation in detail, Justice Kennedy stated:

These differing indications lead us to hold that the state court’s application of our custody standard was reasonable. The Court of Appeals was nowhere close to the mark when it concluded otherwise. Although the question of what [constitutes] an ‘unreasonable application’ of law might be difficult in some cases, it is not difficult here. The custody test is general, and the state court’s application of our law fits within the matrix of our prior decisions. We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a de novo matter. ‘[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly.’

Let us take stock of the Alvarado majority’s approach. First, a court

23. Yarborough, 124 S. Ct. at 2149.
24. Id. (citation omitted).
25. Id. at 2150 (citation omitted). The first bracketed word in the quoted language (or something like it) appears to have been inadvertently omitted from the opinion.
conducting an "unreasonable application" review under § 2254(d)(1) must determine whether the legal standard clearly established by Supreme Court precedent is "specific," "general," or somewhere in between. This sliding scale determines how far off the mark a state court decision must be in order to qualify as "unreasonable." The more general the governing standard, the more leeway state courts must be given. Next, the court conducts a de novo review of the salient issue. The court then compares the state court's conclusion to its own de novo conclusion. If the state court's decision was correct, it is per se not unreasonable. If it is incorrect, the federal habeas court must then measure how far off the mark it was. If the governing legal standard is "general," then the state court's decision must be very far off the mark to be "unreasonable." If the governing legal standard is "specific," then the state court's decision need only be modestly off the mark to be "unreasonable." But that is not all; there is an important proviso to the second step. If the federal habeas court's de novo review reveals that the question is sufficiently close that "fair-minded jurists could disagree," then the state court decision is per se not unreasonable. Under those circumstances, it is impossible for the state court's decision to be sufficiently off the mark to be denominated "unreasonable," presumably because "the mark" is so large or amorphous that no result can be very far from it.

This test is logically bizarre at best, and incoherent at worst. The Alvarado Court, following the Court's opinion in Williams v. Taylor, denies that "unreasonable application" means "wrong" or "incorrect." That the state court decision might be incorrect is not enough to justify the grant of relief under § 2254(d)(1)—the decision must be "unreasonable." So far, so good. The Court then conducts a de novo review of the custody question, which must produce one of three conclusions: "in custody," "not in custody," or "too close to call" (i.e., sufficiently close that fair-minded jurists could disagree). On these facts, the Alvarado Court decided the custody question was "too close to call," meaning that it was per se not unreasonable. Fair enough. Suppose, however, that the Supreme Court's de novo review had culminated in a
finding that Alvarado was in custody. Presumably then the question is whether the state court’s finding of “not in custody” is impermissibly far off the mark. But what mark? Logically, the “mark” (in my hypothetical) is the Supreme Court’s de novo conclusion that Alvarado was in custody. So the question, if one takes the Alvarado methodology seriously, comes down to this: How far off the mark is an answer of “not in custody” when the correct answer is “in custody”?

This is like asking how far off the mark an answer of “on” is when the correct answer is “off.”

One might protest that I have forgotten about the first step of the Alvarado methodology, which is to ask whether the governing legal standard is “specific,” “general,” or “somewhere in between.” This step, it might be argued, prevents the inquiry from degenerating into logical absurdity. But does it? Let us suppose that the “custody” standard of Miranda, as articulated by Thompson v. Keohane, is “general.” This means the state court’s determination on the custody question must be very far off the mark in order to be denominated “unreasonable.” Now the ultimate question, reformulated to take into account the generality of the governing legal standard, is: “Is an answer of ‘not in custody’ very far off the mark when the correct answer is ‘in custody?’” Clearly, adding this step to the inquiry has not helped.

One might instead object to my statement that de novo review on a Miranda custody issue must always culminate in one of three conclusions: “in custody,” “not in custody,” or “too close to call.” Perhaps the Alvarado Court does not envision federal habeas courts ever reaching a conclusion of “in custody” or “not in custody.” Perhaps the Alvarado Court envisions de novo review only for the limited purpose of determining “too close to call” or “not too close to call” (i.e., sufficiently clear that fair-minded jurists could not disagree). We know what happens when the habeas court finds the question too close to call—the state court’s decision is per se not unreasonable. But what happens when the habeas court finds that the question is not too close to call? How can the habeas court then go on to determine whether the state court decision is too far off the mark? The reviewing court has not reached its own de novo conclusion about custody. In other words, under this methodology, there is no mark. One cannot ask a reviewing court to measure how far off the mark a previous decision was unless the reviewing court is permitted to identify a mark.

The Court cannot have its cake and eat it too. If the Court wants “unreasonable application” to pivot at least in part on results, then it must accept as a logical necessity that there will be at least some cases in

34. Indeed, one must wonder whether the Alvarado majority settled on “too close to call” precisely to avoid having to confront this logical trap.
35. Id. at 2149.
which "unreasonableness" equates to nothing more than "incorrectness." The Court cannot escape this hard logical truth by simply protesting that "unreasonableness" is different from "incorrectness." If the Court wants "unreasonableness" to be different from "incorrectness" in all cases, then it must move completely away from results as criteria for "unreasonableness" and toward something else, presumably the state court's reasoning.  

To this point I have tried to show why the "reasonableness of results" approach suggested by Alvarado is logically flawed. In the remainder of the article, I will make an affirmative argument for a "reasonableness of analysis" approach. The argument covers the text of § 2254(d), its legislative history, and finally its intellectual and political history.

II. TEXT

Congress added what is now § 2254(d) to the federal habeas corpus statute as part of the sweeping Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). It states:

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

(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.

Prior to Williams v. Taylor, the lower federal courts and academics pondered the phrase, "contrary to, or involved an unreasonable application of... Federal law." Some argued that this provision

37. Two other opinions from last Term behave as if "unreasonable application" means "unreasonable result." See Mitchell v. Esparza, 124 S. Ct. 7, 12 (2004) (per curiam); Yarborough v. Gentry, 540 U.S. 1, 4 (2003) (per curiam). In these brief opinions, the Court does not review the state courts' reasoning, but rather makes its own in-depth inquiry into the facts relative to the governing legal standard. In both cases, the Court reversed a Court of Appeals finding that the state court's decision was not an "unreasonable application" of Supreme Court precedent. The last sentence of a decision from the previous term, Early v. Packer, 537 U.S. 3, 11 (2002), also assumes that reasonableness of the result is what matters: "Even if we agreed with the Ninth Circuit majority... that there was jury coercion here, it is at least reasonable to conclude that there was not, which means that the state court's determination to that effect must stand." On the other hand, Williams v. Taylor, 529 U.S. 362, 389 (2000), reviews the reasonableness of the state court's analysis, as do Woodford v. Visciotti, 537 U.S. 19, 27 (2002) and Price v. Vincent, 538 U.S. 634, 643 (2003).


40. See infra notes 80–87 and accompanying text.
confirmed the federal courts' authority to issue habeas relief in any case where the state court's decision violated federal law. On this interpretation, the phrase "contrary to" was controlling. It authorized relief in any case where, in the independent judgment of the federal court, the state court decision was incorrect under federal law. The phrase "unreasonable application of" was purely illustrative—it merely gave one example of how a state court decision might run afoul of federal law. Others argued that the phrases "contrary to" and "unreasonable application of" operated independently of one another. According to this theory, the phrase "contrary to" denoted pure questions of law, whereas "unreasonable application of" denoted mixed questions of law and fact (applications of law to fact). If a state court erred on a pure question of law, the federal court could grant habeas relief. If the state court erred during the process of applying the correct rule of law to the facts, the federal court could grant relief only if the application was "unreasonable" as well as erroneous. In Williams v. Taylor, Justice Stevens adopted the first interpretation but could not attract a fifth vote. Justice O'Connor's opinion for the Court adopted the second interpretation. Thus, when examining the phrase "unreasonable application of," we must consider its operation independently of the phrase "contrary to."

The question that immediately concerns us is whether "unreasonable application" refers to the result of state court adjudication or to the analytical process of state court adjudication. One problem with the "result" interpretation is its inability to account for the word "involved." The statute states that a federal court may grant relief if the state court's adjudication "resulted in a decision that... involved an unreasonable application of" federal law. The "decision" must "involve" an application of law to fact. The use of the term "involves" implies that a decision contains more than simply an application of law to fact. If Congress had meant for the term "decision" to mean "result," and if it had meant for "unreasonable" to modify "decision," it could easily have written, "resulted in a decision that was contrary to, or constituted an unreasonable application of" federal law. Alternatively, it could have said "represented an unreasonable application of" federal law. "Constituted" and "represented" are words of equivalence, whereas "involved" is a word that denotes a greater including a lesser. To put it in mathematical terms, this statute does not say "decision = application,"

41. See, e.g., Yackle, supra note 7, at 398-441.
42. See, e.g., Lee, supra note 7, at 110-11.
43. Id. at 110.
44. Id. at 110-11.
46. Id. at 404-09.
47. 28 U.S.C. § 2254(d)(1).
but rather "decision > application." To interpret "decision" and "application" as synonyms is to substitute one of those terms of equivalence for the word "involve."

This point becomes even clearer when one examines the relationship between (d)(1) and (d)(2). Between these two subsections, Congress made it clear that a "decision" has four parts to it. First, there is the ascertainment of the controlling rule or rules of law. Second, there is a determination of the facts. Third, there is an application of the controlling rule to the facts. Fourth, this application produces a result (disposition). The word "unreasonable" appears twice in § 2254(d), once modifying "application of... federal law" and once modifying "determination of the facts." If "unreasonable application of... federal law" means unreasonableness of the result, then subsection (d)(2) is rendered superfluous. Any decision "that was based on an unreasonable determination of the facts" will necessarily represent an unreasonable result. Indeed, there would have been no reason for Congress to separate § 2254(d) into two subsections if all Congress meant was to establish unreasonableness review of results.

The statute should be construed in a way that makes sense of the separation between (d)(1) and (d)(2). The assumption that appears to underlie this section is that federal judges would review the state courts' ascertainment of controlling rules de novo, the state courts' determination of facts for reasonableness, and the state courts' application of law to facts for reasonableness. As soon as one substitutes "result" for "application," then the latter two types of review collapse into one another. The "result" of a case is always a product of fact determination and application of law to fact. The only way to prevent these latter two types of review from collapsing into one another, and thereby rendering subsection (d)(2) surplusage, is to interpret the term "application" as meaning something like "analytical process" or "reasoning process" as separate from the end result.

For that matter, reading "unreasonable application" as "unreasonable result" would render the "contrary to" clause superfluous as well. The Supreme Court has defined "contrary to" as follows:

[A] state court decision is "contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."
According to this definition, "contrary to" encapsulates two situations—first, where the state court applies the wrong rule; and second, where the facts are on all fours with a Supreme Court decision and the state court comes out the wrong way. Now assume *arguendo* that we were to define "unreasonable application" as meaning "unreasonable result." The "contrary to" clause does no independent work in this scenario, for the result is always unreasonable when the state court applies the wrong rule in a non-harmless manner. By the same token, the result is always unreasonable when the state court decides a case indistinguishable from a Supreme Court precedent the opposite way.

Thus, if we read "unreasonable application" as meaning "unreasonable result," neither the "contrary to" nor "unreasonable determination of facts" clauses have any independent operation. Neither of them would provide a basis for relief not already provided by the "unreasonable application" clause. The majority in *Williams v. Taylor* rejected Justice Stevens' interpretation of "contrary to" for precisely the same type of reason—that it "saps the 'unreasonable application' clause of any meaning." The Court found any such interpretation untenable. "We must . . . if possible, give meaning to every clause of the statute," Justice O'Connor wrote for the Court. Interpreting "unreasonable application" as "unreasonable analytical process" is the only way for the Court to give meaning to every clause in § 2254(d).

In *Wright v. Secretary for the Department of Corrections,* an Eleventh Circuit panel's textual analysis of § 2254(d)(1) came to a contrary conclusion—that the federal court should review for reasonableness of result. To see where the panel went wrong, one must read a good deal of the analysis:

To start with, [petitioner] says that the district court should not have given the state court's decision any deference under § 2254(d)(1), because the rejection of this claim without any discussion of it does not amount to the claim having been "adjudicated on the merits" in the state court proceedings, which is a predicate for the application of § 2254(d)(1).

... [T]he question here is whether the state court's summary, which is to say unexplained, rejection of the federal constitutional issue qualifies as an adjudication under § 2254(d) so that it is entitled to deference....

... The plain language of § 2254(d)(1) requires only that the federal claim have been "adjudicated on the merits in State court proceedings" and have "resulted in a decision" that is neither contrary to nor

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53. 529 U.S. at 407.
54. *Id.*
55. 278 F.3d 1245, 1254–56 (11th Cir. 2002).
involves an unreasonable application of Supreme Court precedent. That is all the text of the provision requires.

A judicial decision and a judicial opinion are not the same thing. The chief responsibility of judges is to decide the case before them. They may, or may not, attempt to explain the decision in an opinion. The text of § 2254(d)(1) accepts this orthodox view. 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. . . .

To conclude otherwise on this issue would be writing into § 2254(d)(1) an additional requirement that Congress did not put there—a requirement that the state courts explain the rationale of their decisions. 6

The Wright Court may well be correct that a silent state court decision is capable of constituting an “adjudication on the merits.” 57 But whether or not Wright is correct on that score, it then jumps to the conclusion that, if there has been an adjudication on the merits, the federal habeas court must defer to any reasonable result of that adjudication, irrespective of the state court’s analysis. 58 The statute does not so state. It generally prohibits relief in any case that was “adjudicated on the merits” in state court, then recognizes a series of exceptions in subsections (1) and (2). One of those exceptions is if the adjudication “resulted in a decision that . . . involved an unreasonable application of, clearly established Federal law.” 59 If the decision did involve an unreasonable application of federal law, then the federal court is not to defer, even though the state court clearly did adjudicate the merits. 60

Three points need to be made. One is that the Wright Court appears to have analyzed the subsection (d)(1) in a vacuum, without regard to subsection (d)(2). If it had considered the structure and relationship of these subsections, it would have been forced to the conclusion that “application” of law to fact and “determination” of facts must be treated as separate parts of the decisional process leading to one end result. It would have realized that the statute does not envision collapsing the two into a single result, which would then be reviewed for reasonableness.

56. Id. at 1253–55 (emphasis added) (citations omitted).
57. Although it should be noted that two of the commentators insist that a decision without opinion is not an “adjudication on the merits.” See Britanny Glidden, When the State is Silent: An Analysis of AEDPA’s Adjudication Requirement, 27 N.Y.U. REV. L. & SOC. CHANGE 177, 205–07 (2001–2002); Adam Steinman, Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA’S Standard of Review Operate After Williams v. Taylor?, 2001 WIS. L. REV. 1493, 1529.
A third commentator makes a strong argument that an adjudication on the merits need not be accompanied by an opinion. 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. 1442, 1461–64 (2002).
58. 278 F.3d at 1255–56.
Second, the Wright Court was flatly incorrect to say that “the statutory language focuses on the result, not on the reasoning that led to the result.” The “application of federal law” that is “involved” in the decision clearly alludes to the state court’s reasoning process. Every application of law to fact constitutes a reasoning process. As the Supreme Court has already recognized in Williams v. Taylor, the “unreasonable application” clause denotes “mixed questions of law and fact,” each of which calls for an application of law to fact. The Wright opinion zeroes in on the word “decision” at the cost of ignoring the words “involved an unreasonable application of ... Federal law.” It is true that the phrase “resulted in a decision” calls attention to the result, but it is also true that the phrase “application of ... law” calls attention to the reasoning process. These two statements are easily reconciled when one realizes that the statute calls attention to the reasoning process as a distinct part of what brings about an end result.

The third point is that the Wright opinion is misleading on the subject of what it means for a federal court to “defer” under § 2254(d)(1). The court stated: “[T]he question here is whether the state court’s summary, which is to say unexplicated, rejection of the federal constitutional issue qualifies as an adjudication under § 2254(d) so that it is entitled to deference.” This makes it sound as if, once the federal court determines that the state court adjudicated the merits, the federal court is supposed to then engage in some unspecified measure of ad hoc deference to the state court’s decision. The statute neither mandates nor permits anything of the sort. Upon a finding that the state court has adjudicated the merits, the statute then prohibits any grant of relief, subject to the exceptions laid out in subsections (1) and (2). Subsection (1) creates an exception for decisions involving an “unreasonable” application of federal law, and subsection (2) creates an exception for decisions based on an “unreasonable” determination of facts. Congress did not make exceptions for decisions involving “incorrect” applications of federal law or decisions based on “incorrect” determinations of the facts. The statute thus preserves a certain zone in which state courts can be wrong but federal relief nonetheless may not issue. We may colloquially refer to this zone as creating a type of deference. But whatever “deference” is mandated by § 2254(d)(1) is already built into the “unreasonable application of law” test. This phrase calls for deference in the sense that the reviewing court is to withhold relief even

61. 278 F.3d at 1255.
64. Wright, 278 F.3d at 1254.
when the state court decision is incorrect, so long as it is not "unreasonable." There is no warrant for any other form of "deference," and particularly not for any ad hoc deference to state court handiwork.66

III. LEGISLATIVE HISTORY

The legislative history of § 2254(d) in large part begins with Professor Paul Bator’s 1963 article entitled, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners.67 Bator, one of the most ardent followers of the so-called “Legal Process” school of thought,68 argued that federal courts should have authority to grant habeas relief on the basis of claims previously adjudicated by state courts—but only to the degree that the state courts failed to accord such claims a “full and fair” hearing.69 Picking up on the Realist premise that legal indeterminacy makes it impossible to know whether any given outcome is truly correct, Bator argued that the federal habeas courts should ask not whether the state court’s decision was right or wrong, but only whether its decisional process assured “a reasoned probability that the facts were correctly found and the law correctly applied.”70 As Professor Yackle points out, Bator’s “full and fair” formulation attempted to import principles of preclusion law into the law of habeas corpus.71 Bator’s formulation would form the core of numerous attempts to revise federal habeas law over the next thirty years.72

On June 17, 1963, shortly after Bator’s article was published, the Committee on Habeas Corpus proposed an amendment to pending habeas legislation. The Committee, composed of five circuit judges, proposed that state court findings of fact be presumed correct unless at least one of seven extenuating circumstances was present. Among the

66. Larry Yackle made this point when the statute was first enacted. See Yackle, supra note 7, at 413.
68. On the “Legal Process” school generally, see infra Part IV.
69. Bator probably got the “full and fair” formulation from Ex parte Hawk, 321 U.S. 114, 118 (1944) (citations omitted):
Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court’s decision, a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated. But when resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, a federal court should entertain his petition for habeas corpus, else he would be remediless. In such a case he should proceed in the federal district court before resorting to this Court by petition for habeas corpus.

70. Bator, supra note 67, at 455.
71. Yackle, supra note 7, at 424.
72. See infra Part IV.
seven circumstances was "that the applicant did not receive a full and fair
hearing in the state court proceeding." The proposal was never enacted.
In 1973, Senator Roman Hruska proposed legislation that would have
required federal habeas courts to give "conclusive weight" to previous
state judgments, provided that petitioners were given "an adequate
opportunity to have full and fair consideration" of their claims in state
court. The bill never reached the Senate floor.

The Reagan Administration continued the push for a "full and fair"
plan, but it was no longer Professor Bator's version. According to
Professor Yackle, the need for political acceptability drove the
administration to redefine "full and fair":

[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.

It is important to note that this proposal broke with its "full and fair"
predecessors in at least two ways. First, it moved very far away from
principles of preclusion law. Federal habeas courts would not have been
required to confine their examination to the formal adequacy of state
court process; they would have been authorized to grant relief if the state
court had acted unreasonably in determining the law or facts, or in
applying the law to the facts. Second, and equally importantly, a key
portion of the proposal broke entirely with the ideology of the "Legal
Process" school that had animated Bator's work. By authorizing relief in
cases where the state court's "disposition resulting from its application of
the law to the facts" was unreasonable, the proposal explicitly focused on
results. Even more relevant to our present purposes, the proposal specified that the federal court was to gauge the reasonableness of the
state court's "disposition," not the reasonableness of its "application of
the law to the facts." But the Reagan Administration was unable to get
this or similar proposals enacted into law.

cited Bator's article. See id. at 380.
75. Id. at 426.
76. The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the
77. Id.
78. Id.
79. Yackle, supra note 7, at 428.
In 1991, Representative Henry Hyde offered a bill containing something similar to the original "full and fair" plan, but the Judicial Conference would not accept it. Hyde then withdrew his original proposal and offered a substitute containing the following provision:

An adjudication of a claim in State proceedings is full and fair within the meaning of this section . . . unless the adjudication—

(1) was conducted in a manner inconsistent with the procedural requirements of Federal law that are applicable to the State proceeding;

(2) was contrary to or involved an arbitrary or unreasonable interpretation or application of clearly established Federal law; or

(3) involved an arbitrary or unreasonable determination of the facts in light of the evidence presented.

As Professor Yackle emphasizes, this proposal was significantly different from the original "full and fair" proposal it supplanted. "It is true that the Judicial Conference was unhappy with the full and fair standard until we offered an amendment which covers more than just procedural reasonableness," Hyde admitted. Indeed, the proposal authorized relief if the state court adjudication "was contrary to . . . clearly established Federal law," an inquiry having nothing to do with procedural reasonableness. But it would be a mistake to assume that the phrase "involved an arbitrary or unreasonable interpretation or application of clearly established Federal law" had nothing do to with procedural reasonableness. Subsection (3) included the phrase "involved an arbitrary or unreasonable determination of the facts." Thus, the proposal clearly contemplated the "reasonableness" review of law application separate from the "reasonableness" review of fact determination. Unlike the Reagan Administration proposal, it did not authorize "reasonableness" review for the "disposition" of law application. This must mean that federal courts were to review the process of law application (and the process of fact determination) for reasonableness. Indeed, if "unreasonable application of Federal law" and "unreasonable determination of the facts" meant unreasonable result, they would be totally redundant. Although it is true that the Hyde substitute permitted the federal courts to review for more than just procedural reasonableness, it hardly did away with considerations of procedural reasonableness. In the end, the Hyde substitute was rejected.

80. Id. at 430-31.
82. Yackle, supra note 7, at 431.
85. Id.
86. Id.
by the House.\textsuperscript{87}

In 1995, Representative Christopher Cox proposed legislation that borrowed heavily from the Hyde substitute:

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 decided on the merits in State proceedings unless the adjudication of the claim—

(1) resulted in a decision that was based on an arbitrary or unreasonable interpretation of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States;

(2) resulted in a decision that was based on an arbitrary or unreasonable application to the facts of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; or

(3) resulted in a decision that was based on an arbitrary or unreasonable determination of the facts in light of the evidence presented in the State proceeding.\textsuperscript{88}

This proposal did not include subsection (1) of the Hyde substitute, addressed to “procedural requirements” of federal law. Nor did it retain the “full and fair” phrase, which had already been rendered surplusage in the Hyde substitute because of the enumeration of specific exceptions. In other respects, however, the Cox proposal was similar to the Hyde substitute.

Following the demise of the Cox proposal, Senators Orrin Hatch and Arlen Specter co-sponsored a bill that split the ideological difference between them concerning relitigation of claims in federal habeas proceedings.\textsuperscript{89} This, finally, is the proposal that became the habeas corpus portion of the Antiterrorism and Effective Death Penalty Act of 1996, including § 2254(d).\textsuperscript{90} The Hatch-Specter proposal took the same generic structure of the Cox proposal, but there was one notable difference. Hatch-Specter reached back to the Hyde substitute for the phrase involved “[an] unreasonable . . . application of clearly established Federal law.”\textsuperscript{91} This, of course, is the language now in question. Does it call for the “reasonableness” review of state court decisions (results) or of state court analytical processes?

The contemporaneous statements of the proposal’s authors are

\textsuperscript{87} Yackle, \textit{supra} note 7, at 432.
\textsuperscript{88} 141 CONG. REC. H1424 (daily ed. Feb. 8, 1995).
\textsuperscript{89} Senator John Kyl complimented the Hatch-Specter proposal for making it more difficult for prisoners to press claims in federal court, but criticized the proposal for failing to bar prisoners from federal court altogether. Yackle, \textit{supra} note 7, at 399 (citing 141 CONG. REC. S7829 (daily ed. June 7, 1995) (statement of Sen. Kyl)).
\textsuperscript{90} Yackle, \textit{supra} note 7, at 436.
notable mostly for their banality. Senator Hatch said of § 2254(d): "[T]his standard essentially gives the Federal court the authority to review, de novo, whether the State court decided the claim in contravention of Federal law." This suggests free review, but in the same statement, Hatch interpreted his own remarks:

What does this mean? It means that if the State court reasonably applied Federal law, its decision must be upheld. Why is this a problematic standard? After all, Federal habeas review exists to correct fundamental defects in the law. After the State court has reasonably applied Federal law it is hard to say that a fundamental defect exists.

If these remarks were less than illuminating, the remarks of Senator Specter were no more instructive. "So there still is latitude for the Federal judge to disagree with the determination made by the State court judge," he said. The most that can be gleaned from Hatch's and Specter's comments is that they envisioned the availability of federal relief in the event of some kind of basic failure by the state courts. Hatch referred to "fundamental defect"; Specter spoke of "miscarriages of justice." Neither of these is necessarily inconsistent with either reasonableness review for results or reasonableness review for analytical processes. "Fundamental defect" sounds vaguely process-based, while "miscarriage of justice" sounds more bottom-line. But an unreasonable result can be described as "fundamentally defective," and a profound breakdown in the application of law to facts could certainly be called a "miscarriage of justice." Thus, the floor debates are inconclusive. But the fact that Hatch-Specter lifted the phrase involved "[an] unreasonable... application of clearly established Federal law" from the Hyde substitute is highly significant because of the Hyde substitute's evident concern for the reasonableness of the law application process. So, although the legislative history is hardly unambiguous, the best evidence supports review for the reasonableness of the state court's analytical process in applying the law to the facts.

IV. INTELLECTUAL AND POLITICAL HISTORY

The legislative history just recited bristles with references to Professor Bator's "full and fair" thesis, first articulated in his 1963 article,
Finality in Criminal Law and Federal Habeas Corpus for State Prisoners. As the thesis holds that federal habeas courts should not relitigate federal constitutional claims unless they were denied a full and fair hearing in state court. As Professor Yackle points out, this comes quite close to a preclusion doctrine, which in turn explains why liberals bear such antagonism toward it. If the “full and fair” program were law, petitioners could not raise their federal claims in federal court unless there had been some monstrous corruption of the state court process, such as a mob-dominated trial, bribery of the judge, or a guilty plea produced by torture.

As we have just seen, there have been many conservatives throughout the years who favored just such a rule, or something very close to it. The Parker proposal was obviously akin to the Bator thesis, as was the Hruska proposal. Years later, Representative Hyde’s original proposal was also clearly the progeny of Bator’s thesis. Those antagonistic to the “full and fair” thesis are unquestionably correct to point out that Congress never approved any of its iterations. Liberals and moderates always raised enough concern about “full and fair” to prevent it from being codified. There is simply no plausible argument that AEDPA and its new § 2254(d) codifies the norm that federal courts may hear federal claims only when they were denied a full and fair hearing in state court.

It is, however, quite another thing to say that the rejection of the “full and fair” thesis proper also represents the rejection of the larger intellectual movement out of which the thesis grew. If one looks carefully at the succession of reform proposals through the years, a pattern emerges. Conservatives want to limit the relitigation of federal claims to some subset of cases where state court process went off the rails. At first, they argue for something very like Bator’s vision of the calamitous abridgement of process—essentially, where the Due Process Clause itself
is violated, or where the defendant has been rendered constitutionally inadequate assistance of counsel, or where the state court completely lacked jurisdiction. But these conservative advocates fail to gain sufficient support for a formulation so restrictive, and succeeding generations of conservatives gradually loosen the restrictions. The Reagan Administration proposal does not confine the federal court’s review to whether there has been an opportunity to be heard, but rather expands review to include the reasonableness of the disposition, given the law and facts. After unsuccessfully pushing the original “full and fair” thesis, Hyde offers a substitute that goes even farther than the Reagan Administration proposal. Hyde’s substitute expands federal court review to the reasonableness of the “interpretation and application,” not just the “disposition.” Cox’s proposal would have authorized relief for a petitioner who demonstrated that the state court decision was based on an unreasonable application of federal law. Finally, Hatch-Specter becomes law and authorizes review for a decision that “involves an unreasonable application” of federal law.

Although the line is not entirely unbroken, one sees a succession of conservative-backed proposals to focus federal habeas review on the process of the state court. In the beginning, the notion of what constitutes “process” is very narrow. Out of a need to win broader approval, the proposers eventually accept a much broader notion of what constitutes state court process, including the state court’s analysis. So, although it is certainly true that the Congress that enacted the AEDPA rejected Bator’s “full and fair” thesis, it is anything but clear that it rejected the general process orientation of which Bator’s scholarship was so characteristic. On the contrary, it appears that most of the succeeding generations of conservative sponsors sought to preserve as much of that process orientation as was consistent with winning sufficient moderate support for enactment.

Why should it matter whether those who supported Hatch-Specter embraced the general “Legal Process” approach in the habeas corpus area? The answer is simple: it is virtually inconceivable that anyone moved by the Legal Process credo would want the availability of federal habeas relief to turn on the reasonableness of the state court’s result rather than on the reasonableness of its analysis. One of the basic premises of the Legal Process approach, and Bator’s main premise, was that, in the real world, human inquiry can only ever approximate metaphysical truth. We cannot ever know for sure whether a person is

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107. “[W]e can never absolutely recreate past phenomena and thus can never have final certainty as to their existence . . . .” Bator, supra note 67, at 447.
truly guilty or innocent—we can only establish the best process for approximating this truth and then abide by whatever result the process reaches. That was precisely Bator's argument, and it explains why he advocated for federal court review to focus on the adequacy of the process rather than the ultimate correctness of the result.

It is highly doubtful that Bator would have been any more enthusiastic about federal courts reviewing for the "reasonableness" of the result than for the "correctness" of it. How can a court gauge the reasonableness of a result without reaching an independent judgment about the ultimate Truth, then measuring how close the result below comes to this independent judgment? Since Bator and other Legal Process mavens had little confidence in the ability of any court to discover the actual Truth, it would make no sense for them to support review of the result for reasonableness. Those within the process tradition flatly rejected the notion that only results mattered. Bator's mentor, Henry Hart, once wrote that when the Legal Realists held that "[i]t is not what the judges say which is important but what they do," this was tantamount to the "monstrous conclusion that reason and argument, the conscious search for justice, are vain." In other words, without reason, there is no justice.

Bator's focus on reasoning instead of results was perfectly in line with the beliefs of others in the Legal Process movement. One of Bator's predecessors in the movement, fellow Harvard Law School professor Lon Fuller, once stated that judicial activity is predicated on reason—it "cannot be... talked about meaningfully, except in terms of reasons that give rise to it." Henry Hart and Albert Sacks, in their famous set of unfinished teaching materials named *The Legal Process*, urged the study of reasoning in judicial opinions. They insisted that it was important to look "not only to the rightness or wrongness of the particular result but to the validity of the process by which the court arrived at it."

According to legal historian Neil Duxbury, Hart and Sacks believed that

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108. According to Professor Bator:

Our analysis of the purposes of the habeas corpus jurisdiction must, thus, come to terms with the possibility of error inherent in any process. The task of assuring legality is to define and create a set of arrangements and procedures which provide a reasoned and acceptable probability that justice will be done, that the facts found will be "true" and the law applied "correct."

Bator, supra note 67, at 448.

109. At least one other commentator has made this observation. See Steinman, supra note 57, at 1535.


"the presence or absence of reasoned elaboration in a judicial decision is the primary indication of whether or not it is sound." Indeed, the very phrase "reasoned elaboration" captures one of the essential tenets of the Legal Process credo. "Reasoned Elaboration... came to summarize those ideals and standards," wrote legal historian G. Edward White. Nothing was more important to Bator's view of the craft of judging than reason. As Charles Fried wrote upon Bator's untimely death, "above all he had one subject: the law as reason and reasonableness."

My point is not that Paul Bator's first choice would have been in favor of federal habeas review of state court analytical process for reasonableness. He wanted to restrict review to whether the state had given an adequately represented petitioner a meaningful opportunity to be heard by a court of competent jurisdiction. This was his "full and fair" thesis. Denied this option, however, Bator would clearly have chosen review for the reasonableness of the state court's analytical process. More specifically, if Bator (or most other Legal Process adherents) had been forced to elect between reasonableness review of the result or reasonableness review of the state court's reasoning process, there is no question he and they would have chosen the latter.

So long as the reasoning process was analytically reputable—that is, so long as the state court sincerely considered the applicable norms in light of the facts supported by the record—the federal court should deny relief, no matter what the result. This is a simple logical extension of Bator's thesis.

It could be argued that, if the federal court cannot ascertain the state court's reasoning process, Bator would then have wanted the federal court to review the result for reasonableness. I think this unlikely. The thrust of Bator's thesis is that, in a world with epistemological limits, the only valid way to evaluate a result is to evaluate the process by which the result was reached. If Court #2 wants to evaluate Court #1's result, it will examine the methods by which Court #1 took evidence, heard argument, found facts, and applied controlling norms to those facts. If

113. Id. at 664.
116. "What is... so hard for me to grasp is why the existence of habeas to cure failure of state process justifies its present reach to cases where there has not been such a failure of process." Bator, supra note 67, at 552.
117. The entire tenor of Bator's argument rested upon the apotheosis of reason over result.
118. In his 1963 article Bator stated:
    I have said that, presumptively, a process fairly and rationally adapted to the task of finding the facts and applying the law should not be repeated. This suggests that it is always an appropriate inquiry whether previous process was meaningful process, that is, whether the conditions and tools of inquiry were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied.
Bator, supra note 67, at 455.
those methods were acceptable in some sense, if they surmounted a given threshold of methodological validity, then the result was to be accepted. The only other way to evaluate Court #1’s result is to develop an independent conclusion about the case, with no direct reference to Court #1’s process, and then to determine whether Court #1’s result falls within a tolerable radius surrounding this independent conclusion. From the process perspective, this makes little sense. In the absence of any reason to think that Court #2’s methodology is superior to Court #1’s, then there is no reason to test Court #1’s result against Court #2’s result. As a matter of first principles, someone like Professor Bator would have dismissed the value of Court #2’s review if the reasoning process of Court #1 were unknowable. There is no reason to think Court #2 could do a better job in reaching its own result, and so it should not try. Otherwise, what is to prevent the infinite regress into Courts #3, #4, #5, and so on?

In the words of Professor Bator:

After all, there is no ultimate guarantee that any tribunal arrived at the correct result; the conclusions of a habeas corpus court, or of any number of habeas corpus courts, that the facts were X and that on X facts Y law applies are not infallible; if the existence vel non of mistake determines the lawfulness of the judgment, there can be no escape from a literally endless relitigation of the merits because the possibility of mistake always exists.\[119\]

But those who believed in the normative primacy of reasoned elaboration would have recognized two overriding reasons to permit Court #2’s independent review where Court #1’s reasoning process is undisclosed and unknowable. Simply put, those in the Legal Process tradition believed in nothing more strongly than the duty of a court to give reasons for its actions.\[120\] This belief is relevant to the issue at hand in two ways. First, the principle of reasoned elaboration would strongly disapprove of depriving one’s liberty without any explanation. If the state courts chose not to give any explanation, then the principle of reasoned elaboration would favor independent review on the part of the federal court, which would then articulate its analysis. Second, to deny Court #2 any review of Court #1’s work on the ground that Court #1 did not disclose its reasoning is to reward Court #1 for failing to give reasons. Denying review would be to insulate the very decisions that are most suspect in the Legal Process universe—those made purely by fiat. In a case where the state court’s reasoning process was undisclosed, Bator and like thinkers would have seen little or no value in review of the result for reasonableness. They would have seen value in federal de novo review, not because it would be likely to reach a superior result, but simply because it would encourage state courts to give their reasons.

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\[119\] Bator, supra note 67, at 447.
\[120\] Duxbury, supra note 112, at 663–64.
Before moving into a thoroughgoing policy discussion, however, something should be said about the political history of habeas corpus reform. Many, if not most, law-and-order conservatives in Congress embraced not only Bator's "full and fair" thesis in particular, but Legal Process philosophy in general.121 Doubtless they embraced these ideas for a variety of reasons, but largely they saw Legal Process as a powerful tool for criticizing the "liberal activism" of the Warren Court.122 The Legal Process philosophy was associated with academics of great reputation at Harvard and Columbia, many of whom were themselves political liberals, yet who had expressed serious reservations about the Warren Court's methodology.123 These academics preached the importance of craft, process, and intellectual integrity in judicial decisionmaking. No Legal Process scholarship had greater visibility than Professor Herbert Wechsler's Toward Neutral Principles of Constitutional Law,124 in which he confessed that he could not see how Brown v. Board of Education125 or the "white primary" decisions could be considered principled. Another high-visibility member of the Legal Process set was Professor Alexander Bickel, whose book The Supreme Court and the Idea of Progress criticized the Court for betting on the future rather than sticking to the Constitution and the precedents before it.126 In an earlier book, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, Bickel had advocated the use of the so-called justiciability doctrines (standing, mootness, and ripeness) to duck controversial cases that might have resulted in unprincipled decisions.127 Bickel's arguments generally appealed to such conservatives as President Richard Nixon appointed to the Supreme Court.128

121. These are the conservatives George Will refers to as the "democratic due process" faction. See supra note 102.
128. See William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on
I do not claim that all conservatives on Capitol Hill had read the writings of Herbert Wechsler, Alexander Bickel, or Paul Bator, but there is no doubt that criticism of the Warren Court on grounds of unprincipled decisionmaking and shoddy craft resonated deeply with the types of conservatives who for more than thirty years called for habeas corpus reform. They saw liberal federal judges undoing the work of state courts simply because these judges wanted to reach results more consistent with their then-modern views of shared blame for criminality and the possibilities of rehabilitation. 129 Conservatives were angered over this perceived result orientation of federal habeas courts. Litigation had to be allowed to reach a state of repose; convicts could not be given an unlimited number of bites at the apple. Federal courts could not be permitted consistently to undo the handiwork of state courts that had conscientiously applied controlling federal law to the facts of the cases before them. The process had to mean something. This is why Bator’s “full and fair” plan became the centerpiece of conservative reform efforts for almost three decades.

It would be more than ironic if conservatives now were to advocate review for reasonableness of the result rather than review for reasonableness of the process. If conservatives were to take that position now, it would cast grave doubt on the sincerity of thirty years of arguments by conservative habeas reform advocates, who insisted that the federal courts should concern themselves almost exclusively with the quality of the state court’s processes rather than with the result. As I have already pointed out, there is nothing in the statute’s text that requires an interpretation in favor of review for reasonableness of the result—indeed, quite the opposite.130 In the absence of some overriding policy reason, which I shall examine in the next section, the only plausible reason for favoring review for reasonableness of the result would be general antipathy toward prisoners.131 But such a stance lacks principle. The principled position for conservatives would be to embrace review for reasonableness of the process because such a doctrine would dovetail with the process orientation of their reform proposals since the early 1960s.

Some circuit decisions embracing review for reasonableness of the result have offered a contrary appraisal of AEDPA’s political history.


130. See supra Part II.

131. See infra Part V.
Judge Posner's opinion for the panel in *Hennon v. Cooper* considers and rejects review for reasonableness of the state court's analytical process:

[We] do not think the approach is correct. It would place the federal court in just the kind of tutelary relation to the state courts that the recent amendments are designed to end. It would be less appropriate than in the parallel area of administrative review, where the court can remand the case to the administrative agency for a better articulation of its grounds. . . . A federal court in a habeas corpus proceeding cannot remand the case to the state appellate court for a clarification of that court's opinion; all it can do is order a new trial, though the defendant may have been the victim not of any constitutional error but merely of a failure of judicial articulateness.'

In this passage, the *Hennon* court raises two points, one about the relationship between federal habeas courts and state courts, and the other about the possibility of improvident grants of relief brought about by the federal court's inability to ask for clarification of state courts' opinions.

Let us first examine the point about not wanting to create the image of federal courts "tutoring" state courts on what constitutes proper legal analysis. The court in *Wright v. Secretary for Department of Corrections* put the point most sharply:

Telling state courts when and how to write opinions to accompany their decisions is no way to promote comity. Requiring state courts to put forward rationales for their decisions so that federal courts can examine their thinking smacks of a "grading papers" approach that is outmoded in the post-AEDPA era.

There is undoubtedly some truth to this assertion as a matter of political history. Many members of Congress who voted for AEDPA obviously felt that federal courts were acting too brusquely in conducting habeas review. The problem is that this particular political sentiment does not favor review for reasonableness of the result over review for reasonableness of the analysis. This requires some explanation.

Let us assume for the moment that the sentiment expressed in the passages quoted above represents a principle that must be honored during the interpretation of AEDPA. What is the content of that principle? The quoted passage invokes the metaphor of an instructor correcting or evaluating the work of a student. The federal habeas courts, it is said, may not act as if they occupy the position of the instructor. Of course, this is only a metaphor; state courts do not actually enroll in classes taught by federal courts. What, then, is the principle behind the metaphor?

132. 109 F.3d 330, 335 (7th Cir. 1997).
133. 278 F.3d 1245, 1255 (11th Cir. 2002) (citing *Hennon*, 109 F.3d at 335). For similar language, see *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001).
134. See supra note 92.
Assume for the moment that § 2254(d) embodies a principle militating against federal court evaluation of state court work product. This principle is arguably bolstered by the fact that federal habeas courts do not formally review state judgments. Federal habeas corpus tests the legality of the petitioner's custody *simpliciter*, which distinguishes it from a direct appeal.\(^\text{135}\) Review for reasonableness of the state court's analytical process constitutes an evaluation of the state court's work, runs the argument, and so the Supreme Court should be disinclined to interpret § 2254(d) in that way. But what about review for reasonableness of the result? Does this not also constitute an evaluation of the state court's work? I do not see how it can be otherwise. The only difference is that, when a federal court finds a state court's analysis to be unreasonable, it implies that the state court has poor academic skills, whereas when it finds the state court's result to be unreasonable, it implies that the state court has poor judgment. I cannot imagine that the members of Congress who voted for the AEDPA would have thought the second preferable to the first. There are plenty of state judges who would gladly admit to their deficiencies as scholars, but not many who would happily confess to having poor judgment.

It might be argued that review for reasonableness of the result is more appropriate precisely because it constitutes an evaluation of the state court's judgment. Judgment is the essence of judging, and therefore (the argument would go) state judges do not so much mind having their judgment questioned. Exercising judgment, after all, is their job. They do not like being evaluated on their scholarly performance because (the argument would continue) writing opinions is not really the essence of their job. To return to the tutorial metaphor for a moment, an art student doesn't so much mind being graded on the artfulness of his work, but will resent being graded on how he arranges the paintbrushes in his palette.

This argument does not resonate with me at all. Writing opinions is *not* a frivolous or tangential part of judging. Reasoning and giving reasons are integral parts of the judicial function.\(^\text{136}\) They are a big part of what separates judicial action from brute fiat. Imagine how a judge feels when she carefully writes an opinion documenting her reasoning process, and the reviewing court then overturns the result as "unreasonable" without so much as a comment about or acknowledgment of her reasoning process. No one likes having his or her work picked apart in


\(^{136}\) "Reasoned elaboration"—the process of explaining how general norms apply to specific situations—was a central credo of the Legal Process school. See, e.g., Duxbury, *supra* note 112, at 638–39 (noting that Alex Bickel and Harry Wellington believed that reasoned elaboration was the Supreme Court's "real strength"); Richard H. Fallon, Jr., *Reflections on the Hart & Wechsler Paradigm*, 47 *VAND. L. REV.* 953, 966 (1994) (asserting that "[r]eason and reasoned elaboration are the stuff of the judicial process").
public, but it is hardly obvious why having one's analysis brushed aside as irrelevant is preferable.\textsuperscript{37}

There is no doubt that many supporters of the AEDPA wanted the statute to serve as a rebuke to what they perceived as arrogant liberal federal judges who had run roughshod over state criminal convictions since the heady days of the Warren Court.\textsuperscript{38} Some of this sentiment frankly grew out of the social conservative antipathy toward prisoners.\textsuperscript{39} For better or worse, the judiciary cannot use "antipathy toward prisoners" as an interpretive principle, since it has no logical limits and therefore provides no guidance. (Imagine an "interpretive principle" stating that all ambiguities in the statute shall be resolved against the prisoner. This would be the equivalent of saying that all ambiguities in the Federal Employee Liability Act should be resolved in favor of the plaintiff because Congress was motivated to enact FELA by a sympathy for injured employees!).

As I have just discussed, however, some supporters of AEDPA were not motivated by antipathy toward prisoners alone. They were motivated by a sense, articulated superbly by Professor Bator, that there must be finality in criminal proceedings, and that federal judges do not have a corner on Truth or Good Judgment.\textsuperscript{40} Therefore, the only justification for collateral federal review is to ensure that the process was sound. Although, as the result of political compromise, AEDPA conceptualizes "process" much more broadly than did Professor Bator, the same basic principle unmistakably underlies § 2254(d). It is this principle—that the review of state court decisions focus on process rather than on result—that can, and should, serve as an interpretive norm in this area.

The \textit{Hennon} court's second argument was that review for reasonableness of the analysis would lead to cases in which federal courts granted relief merely because the state court had expressed itself inarticulately.\textsuperscript{41} It is fair to ask why a federal habeas court should review the reasonableness of the state court's analysis in a case where the state court's result is reasonable on its face. Let us suppose a state court affirms a conviction, and that the affirmance seems reasonable. All we can mean by this is that the reviewing court can conceive of at least one valid rationale to support the result. Let us further suppose that the state

\begin{itemize}
  \item \textsuperscript{137} The old saying among academics is that the worst fate for one's scholarship is not to be criticized, but ignored.
  \item \textsuperscript{138} Yackle, \textit{supra} note 105, at 2349–57 (chronicling the "conservative backlash" against the criminal procedure decisions of the Warren Court and the resulting "law-and-order" movement that helped propel Nixon to the presidency).
  \item \textsuperscript{139} \textit{Id.} at 2349 ("The crime rate [in the 1960s] was rising, people were frightened, and society needed someone or something to blame."). Yackle notes that this feeling continued through the Reagan and first Bush administration. \textit{Id.} at 2351–53.
  \item \textsuperscript{140} Steinman, \textit{supra} note 57, at 1535.
  \item \textsuperscript{141} \textit{Hennon v. Cooper}, 109 F.3d 330, 334–35 (7th Cir. 1997).
\end{itemize}
court has written an opinion explaining its decision, and that the explanation is objectively unreasonable, which is to say that the state court has relied upon an invalid rationale. Why should a federal habeas court issue relief in such a case, given that all the state court must do is to disavow its original opinion and write a new one adopting the federal habeas court's valid rationale?  

The answer is simply that the federal habeas court cannot know whether the state court would continue to affirm the conviction if it could not do so on its original grounds. It may well be that the state court does not think the federal habeas court's rationale valid. Told that its original rationale is impermissible, the state court may conclude that there is no valid ground to sustain the conviction, even if the federal habeas court thinks one exists. I am willing to concede that this scenario will be fairly uncommon. The state court will usually reinstate its original judgment based on the ground identified by the federal court as being valid. But the statistical rarity of this situation does not make it futile for federal courts to grant relief. The state courts must be given an opportunity to overturn convictions they now think unsupportable on any valid ground, even if they would not often exercise that opportunity. It would be truly arrogant for federal courts simply to assume that state judges wish for their decisions to be upheld on grounds they themselves would not think valid.

V. POLICY CONSIDERATIONS

The most obvious policy objection to my argument is that it will force already overworked state appellate courts to write opinions. I am well aware that an integral part of appellate courts' response to caseload pressures has been an increasing use of summary dispositions, including summary affirmances of denials of relief in state habeas proceedings. It is also true that this trend would trouble scholars in the Legal Process tradition, for the duty of reasoned elaboration was a large part of what separated legitimate judicial power from brute fiat. But federal habeas review for reasonableness of the process would not come close to requiring opinions in all state criminal appeals. Such a rule merely creates an incentive for state courts to write opinions in those cases where they feel deference from federal courts is most important. Where the state court has documented its analysis in an opinion, the federal court could grant relief only if it concludes that the state court's analytical process is objectively unreasonable. Where the state court has left its analysis undocumented, the federal court would not automatically

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142. I am indebted to Anne Lackey for this point.
144. See supra Part IV (discussing reasoned elaboration).
remand the case to state court for an opinion—indeed, a federal habeas court has no authority for any such remand. The federal court would simply perform a de novo review of the decision.

So let it be clear that I would not require anything of state courts that is not already required of them. They are already required to follow federal law, but they are not required to write opinions justifying their decisions. The pending question is what sort of review a federal habeas court ought to perform if the state court chooses not to write. If the state court wishes to take advantage of the "unreasonable application" clause of § 2254(d)(1), it can write; if not, then not. Some may still complain that this is tantamount to requiring state courts to write because, it might be said, of course all judges want their decisions reviewed as deferentially as possible. I am unmoved by this argument. The statute establishes a sort of quid pro quo: if state courts want their law application reviewed deferentially, then they owe the reviewing court an explanation of what they did. In spirit, this is entirely reminiscent of the more famous quid pro quo in AEDPA—a fast track for death penalty cases if states step up to the plate with adequate appointment and compensation programs for trial counsel.

There is another context in which the Supreme Court has been untroubled by the notion of conditioning federal review on the voluntary actions of state courts. When a state court judgment is supported by a state law ground that is independent from any federal question and adequate in itself to support the judgment, the Supreme Court lacks jurisdiction to review it. In the real world, however, it is often difficult to determine whether the asserted state law ground is truly independent of federal law. Often the state court's opinion will recite that it is based

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145. See Hennon, 109 F.3d at 335.
147. Cf. Steinman, supra note 57, at 1533 (asserting that the capital provisions of AEDPA show "that there is nothing wrong with making reduced federal habeas scrutiny contingent on a demonstration that the state's enforcement of federal rights is adequate").
148. 28 U.S.C. §§ 2261-2266, enacted as an integral part of AEDPA, establish a regime under which states may qualify for expedited federal habeas review of capital convictions and sentences if they establish a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State.... The rule of court or statute must provide standards of competency for the appointment of such counsel.
Id at § 2261(b). This constitutes an incentive for states to provide adequate counsel for previous capital defendants.
149. See Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. Memphis, 87 U.S. 590, 636 (1874).
150. For cases illustrating the difficulty of dealing with ambiguity in state court opinions, see for example Delaware v. Prouse, 440 U.S. 648 (1979), and Minnesota v. National Tea Company, 309 U.S. 551, 555 (1940).
on state law as well as federal law, and yet the analysis will discuss only federal cases. How is the Supreme Court to treat such cases? In some instances, the Court vacated the judgment and remanded to the state supreme court for a statement of whether the case was decided on state or federal grounds. The objection to this practice was that it placed the burden on the state court to demonstrate the presence or absence of federal jurisdiction. In *Michigan v. Long*, the Court settled on a different practice. From that point on, the Court stated, it would assume the presence of federal jurisdiction if it "fairly appeared" from the state court's opinion that the decision was based primarily on federal law. Justice O'Connor's majority opinion explained that this left matters in the hands of the state court. If the state court wanted to ensure that the United States Supreme Court would not review the judgment, it needed only to state clearly in its opinion that the judgment was based purely on a state law ground. The Supreme Court would take the state court at its word.

The rule of *Michigan v. Long* is susceptible to precisely the same objection that could be made against my proposal. The major premise of the objection is that all courts want to avoid review of their judgments, or, failing that, they want the most deferential review possible. The minor premise is that conditioning the existence or level of review on the state court's willingness to explain itself is to place a burden on the state court. The objection then concludes that rules like that of *Michigan v. Long* or my proposal in fact constitute requirements that state courts give reasons for their decisions. There is no real choice here, the argument runs, for a state court will feel compelled to do whatever is necessary to ensure the most deferential review of its work.

In *Michigan v. Long*, the Supreme Court showed no concern for this argument, nor should it have. The objection assumes that state courts are somehow entitled to have their decisions immunized from federal court review. If they were in fact entitled to such treatment, then the argument would have considerable force. But a state supreme court has no entitlement to avoid Supreme Court review of its decisions, and state courts are not generally entitled to deferential review under § 2254(d). The word "deference" is conspicuously absent from the provision. What the provision says is that federal courts may not grant relief unless the state court's decision is contrary to or involves an unreasonable

155. *Id.* at 1041.
156. *Id.*
157. *Id.*
application of federal law.\textsuperscript{158} Even if we assume \textit{arguendo} that the prohibition on relief in the absence of these circumstances constitutes a "deference" of sorts, it does not apply unless the federal court can ascertain the state court's "application of federal law" to the facts. If the state court makes it possible for the federal court to ascertain that analytical process, and if the analysis is objectively reasonable, then perhaps it can be said that it becomes entitled to have its judgment stand. But not until then.

One might object to the \textit{Michigan v. Long} analogy on the ground that the burden on a state court is less in the \textit{Michigan v. Long} situation than in the \$ 2254(d) situation. In the former situation, all that is required of a state supreme court is one sentence stating, in effect, "We have rested this decision entirely on state grounds." According to \textit{Long}, this will insulate the opinion from United States Supreme Court review.\textsuperscript{159} By contrast, under my interpretation of \$ 2254(d), the state court's application of law to fact will be reviewed de novo unless the state court writes an opinion disclosing its analytical process. But how much heavier is this burden, really? In the majority of criminal appeals, a state appellate court could care less what standard of review is applied to its judgment, for the simple reason that, in the majority of criminal cases, the defendant is obviously guilty and has no plausible claims that non-harmless federal constitutional violations were committed at trial. In these "slam dunk" cases, the state appellate court has no real incentive to write. Federal habeas relief will not be forthcoming whether the federal court reviews the decision de novo or for reasonableness.

It is only in the cases where the standard of review may well make a difference that the state court will feel impelled to write. In these cases, it is hardly necessary for the state court to write something that could be mistaken for an entry in the \textit{United States Reports}. To begin with, the court need write only on the claims it considers not to be "slam dunks," for those are the only claims as to which deferential review makes any difference. Next, the opinion can be entirely free of roman numeral headings, rhetorical flourishes, graceful transition sentences, and chain citations. For each non-slam dunk claim, the court need only state the rule it understands to be controlling and one or two sentences explaining why that rule compels the result. The federal habeas court may think these conclusions mistaken, but unless it finds that these explanations "objectively unreasonable," it may not grant relief.\textsuperscript{160}

To recapitulate, under my interpretation of \$ 2254(d)(1), state appellate courts will write opinions only in truly contestable cases, and

\begin{footnotesize}
\textsuperscript{158} 28 U.S.C. \$ 2254(d)(1).
\textsuperscript{159} \textit{Long}, 463 U.S. at 1039-40.
\end{footnotesize}
even then, only with respect to the truly contestable claims therein. The opinions need merely be skeletal; they simply have to disclose enough information for the federal court to make out the general outlines of the reasoning process. In most cases, these spartan opinions would be little more than cut-and-paste versions of bench memoranda written by clerks or staffers to prepare the judges for oral argument. This is hardly a burden.

Another potential objection to my interpretation is that it will add to the burden of federal judges. Because state courts would continue not to write opinions in many cases, under my proposal, federal habeas courts would be obligated to conduct de novo review of those judgments. This will add an intolerable burden to the already overworked federal district and circuit courts, it might be argued. Federal judges should not have to plough through the endless minutia of factbound state criminal appeals. In such cases, they should be able to take a quick look at the merits to see that no substantial injustice has been done, and then deny relief.

I have little doubt that this comports with the views of many laypeople, but it obviously cannot be squared with the well-established obligations of federal courts operating under deferential standards of review. Even if federal habeas courts were to review for the reasonableness of results, they would be required to roll up their sleeves and master all the legal and factual details of the case. A federal court reviewing a judgment according to a deferential standard is no more free to ignore the details of a case than a criminal jury operating under the "reasonable doubt" standard is free to ignore aspects of the prosecutor's argument. A deferential standard of review is most certainly not license to take shortcuts.

**CONCLUSION**

The time is coming when the Supreme Court will have to decide, as a formal matter, whether § 2254(d)(1)'s "unreasonable application" clause refers to the unreasonableness of the state court's result or the unreasonableness of its analysis. A large share of state criminal dispositions become final with no opinion. Another large percentage of final judgments is accompanied by opinions that decide at least some dispositive federal constitutional issues without explanation.\footnote{161. See Wilner, *supra* note 57, at 1454 n.65 (although the statistics are somewhat inaccessible, "the incidence of silent opinions is probably quite high."). Wilner cites statistics from California and Wisconsin as examples. She further theorizes that, "[s]tructural factors provide strong incentives for state courts to issue silent opinions." *Id.*} A small, but important, percentage of state criminal judgments could be characterized as reasonable in result but unreasonable in analysis. All of these cases present the issue of whether it is the unreasonableness of

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161. See Wilner, *supra* note 57, at 1454 n.65 (although the statistics are somewhat inaccessible, "the incidence of silent opinions is probably quite high."). Wilner cites statistics from California and Wisconsin as examples. She further theorizes that, "[s]tructural factors provide strong incentives for state courts to issue silent opinions." *Id.*
result or unreasonableness of analysis that matters, and the circuits are split.

In Yarborough v. Alvarado, the Court has indicated that it may be headed toward adopting the unreasonableness-of-results approach.\(^{162}\) One can only hope that the Court will catch itself in time. Because of its essential illogic, the unreasonableness-of-results approach means trouble down the line. It is simply not possible for a habeas court to determine "how far off the mark" a state court decision of "not in custody" is from the correct decision of "in custody."\(^ {163}\) Different circuits will react differently to this impossible demand, and the Supreme Court will end up with the very problem it faces today. Worse yet, the unreasonableness-of-results approach is in tension with the text and structure of the statute. Whatever public relations shortcomings the reasonableness-of-analysis approach might suffer, it is clearly the better alternative.

There would be a valuable collateral benefit to choosing review for reasonableness of analysis. The world of federal habeas corpus could use a dose of Enlightenment values. It is easy to become cynical about federal habeas corpus because the players are so polarized. Certainly since the Warren Court, social conservatives have wanted to restrict federal habeas corpus and left-liberals have reacted defensively. The realpolitik of federal habeas corpus seems ever-present and all too clear. It is almost as if the legal profession has lost its capacity to evaluate doctrines and decisions by any means other than whether they will make relief more or less available. Our thinking about habeas corpus has become largely result-oriented, which makes it especially important that the rules not be result-oriented.

Review for reasonableness of analysis would make an important statement about the institution of federal habeas corpus. It would help reassure us that reason and reasoning still matter. The preferred dictionary definition of reason as a verb is "to think coherently and logically; to draw inferences or conclusions from facts known or assumed."\(^{164}\) The preferred dictionary definition of reason as a noun is "an explanation or justification of an act, idea, etc."\(^ {165}\) We need to be reminded of the importance of coherent and logical thinking in habeas adjudication. We need to be reminded of how important it is for courts to explain and justify acts of coercion, including refusals to grant relief from convictions.\(^ {166}\) I do not say that results are unimportant or irrelevant, only

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163. See supra Part I.B.
165. Id.
166. By this I do not mean that state courts must write opinions. People who have been deprived
that the pendulum has swung too far in that direction. It is time for the Supreme Court to make it clear that there is a place for reason in federal habeas corpus.

of their liberty deserve an explanation from some court, whether state or federal. Under my proposal, if the state court does not write, the federal court conducts an independent de novo review of the federal questions. This review generally produces an opinion of some kind, even if unpublished.