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A Different View of Habeas: Interpreting AEDPA's "Adjudicated on the Merits" Clause When Habeas Corpus Is Understood as an Appellate Function of the Federal Courts

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A DIFFERENT VIEW OF HABEAS: INTERPRETING AEDPA'S "ADJUDICATED ON THE MERITS" CLAUSE WHEN HABEAS CORPUS IS UNDERSTOOD AS AN APPELLATE FUNCTION OF THE FEDERAL COURTS

*Margery I. Miller**

INTRODUCTION

Imagine a situation where an individual has been convicted of a crime in state court and sentenced to a term of incarceration. The prisoner challenges both his conviction and his sentence. Raising a federal claim in his state's appellate court, he claims the state trial court prevented defense counsel from inquiring into the description the eyewitness gave police, violating the accused's Sixth Amendment right to confront a witness against him.[1] Assuming the prisoner properly raised this issue in his state court's trial and appellate system, a state court may address this hypothetical prisoner's Sixth Amendment claim in three possible ways in a written decision.

First, the state appellate court may address the prisoner's Sixth Amendment challenge specifically and provide relevant federal precedent in denying the claim. In this situation, any subsequent court to hear the petitioner's claim will have a clear idea of why the state court decided as it did. Second, the state appellate court may issue an opinion that simply states, "Petitioner's claims are without merit, and are therefore denied." This scenario creates a question for

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1. This situation is hypothetical, but is loosely based on one of the claims in *Riley v. Goord*, No. 02 Civ. 5884_DC, 2003 WL 22966278, at *5-*6 (S.D.N.Y. Dec. 16, 2003). In *Riley*, the petitioner claimed that his Sixth Amendment rights were violated during a pretrial hearing where his attorney was "cut off" from effectively cross-examining a witness. *Id.* at *5. *Riley* may be distinguished from the hypothetical here, however, because in that case the petitioner waived his right to challenge this possible Sixth Amendment violation by pleading guilty to the charges against him. *Id.* at *5-*6. This Note's hypothetical assumes no guilty plea or other procedural grounds for the state court to have dismissed the petitioner's claim.

any subsequent reviewing court as to both why any or all of the prisoner's claims were denied, and whether the state court actually considered all of the prisoner's claims, including the Sixth Amendment claim in particular. Finally, a state appellate court may discuss some of a prisoner's claims in varying levels of detail, but completely fail to mention the prisoner's Sixth Amendment claim. In this last type of decision, any subsequent reviewing court would not know whether the state appellate court considered the prisoner's Sixth Amendment claim at all.

Regardless of how the state appellate court constructs its decision, the petitioner has the right to challenge his incarceration, even after exhausting his state appeals, by submitting a petition for a writ of habeas corpus ("habeas" or "habeas corpus") to a federal district court.[2] The writ of habeas corpus provides prisoners a forum to re-litigate their federal constitutional claims even where those claims have already been litigated in state court.[3] The ability of a state prisoner to petition a federal court for a writ of habeas corpus is an important way in which our criminal justice system protects the right of individuals to obtain relief when they have been unjustly imprisoned.[4] It is difficult to imagine how a federal court could adequately protect individuals' rights if that court is unsure whether

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2. The writ of habeas corpus is the traditional means by which individuals challenge a deprivation of their freedom in violation of law. *See* Larry W. Yackle, Federal Courts: Habeas Corpus 1 (2003). The writ is "best known as a mechanism for challenging the most egregious breaches of individual liberty." *Id.* Currently, the writ is most commonly employed by prisoners making "constitutional claims anchored in the procedural safeguards established by the Bill of Rights and applicable to state cases via the Fourteenth Amendment." *Id.* at 60. Federal habeas review courts are not typically concerned with claims of innocence or guilt. *See id.* at 59. Thus, the writ is not intended to address the appropriateness of a conviction, but should grant relief on "claims of constitutional violations occurring in the course of the underlying state criminal proceedings." Herrera v. Collins, 506 U.S. 390, 416 (1993); *see also* Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) (habeas is concerned "not [with] the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved"). To petition for a writ of habeas corpus, a prisoner must meet a variety of procedural and jurisdictional requirements. For example, the prisoner must be "in custody" in violation of federal law at the time his petition is filed. Yackle, *supra*, at 147. Additionally, the prisoner must have "exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 501 U.S. 722, 731 (1991). And finally, a prisoner must meet the appropriate filing deadlines noted in the habeas statutes. *See* Yackle, *supra*, at 166-67. For a short description of the process by which a state prisoner may bring his claim to a federal habeas court, see Claudia Wilner, Note, *"We Would Not Defer to that Which Did Not Exist": AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. Rev. 1442, 1444 n.15 (2002). Wilner bases her interpretation of AEDPA's "adjudicated on the merits" clause on a combination of factors, discussed *infra* note 177; however, this Note reaches its interpretation by viewing habeas corpus within the larger context of the federal judiciary's power of appellate review of state court decisions. *Id.*

3. *See* Wilner, *supra* note 2, at 1447.

4. Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 Duke L.J. 947, 967 (2000).

the state court that first heard the federal claims even considered those claims. The ability to grant a habeas petition allows federal courts to ensure that states are interpreting and applying federal law in a uniform and fair manner, but also protects the rights of individuals to obtain relief when they have been imprisoned unjustly. As the above hypothetical makes clear, the ability of a federal court to understand the decision of a state appellate court is a fundamental part of that federal court's ability to determine if the state both interpreted and applied federal law in a fair and just way.

The most recent changes to the scope of the writ of habeas corpus occurred with the passage of amendments to the habeas statutes in 1996 in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[5] In the AEDPA, Congress amended 28 U.S.C. § 2254(d) to place additional limits on the types of claims[6] that federal habeas review courts[7] may consider: AEDPA requires, inter alia, that an increased level of deference be given by federal habeas review courts to state court decisions regarding the federal constitutional question presented in the habeas petition.[8] As part of the AEDPA revisions, Congress provided that this increased level of deference would apply only to those cases that were "adjudicated on the merits."[9] Congress did not, however, define "adjudicated on the

5. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217 (codified as amended in scattered sections of 28 U.S.C.).

6. These limitations are not substantive in nature (i.e., Congress did not use AEDPA to forbid the writ of habeas corpus for all drug-related sentences or for claims based on the Sixth Amendment), but instead focus on the level of deference the federal habeas review courts must apply in reviewing a state court decision regarding a federal question. *See, e.g.*, Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 Am. J. Crim. L. 223, 226 (2002) ("AEDPA . . . amended habeas law to direct federal courts to accord extreme deference to state court determinations of federal law." (citation omitted)); Brittany Glidden, *When the State Is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. Rev. L. & Soc. Change 177, 180-81 (2002) ("Seeking to increase the efficiency of habeas and the finality of state decisions, Congress drafted § 2254(d), which gives state decisions significant deference."); Hoffstadt, *supra* note 4, at 950. Hoffstadt notes that,

> [b]y and large, [the Supreme Court and Congress] have restricted the writ by making it less available as a practical matter through the creation and expansion of procedural barriers to federal habeas review. They have rarely chosen to narrow the writ directly by limiting the types of federal constitutional claims that state petitioners can bring.

Id. (citation omitted). This Note does not address these limitations in any great detail except to acknowledge that they require federal habeas review courts to afford this higher level of deference to state court decisions. This Note's focus, instead, is on the process by which courts determine if they apply this new standard of deference, or the pre-AEDPA de novo standard of review. *See infra* note 134 and accompanying text.

7. The terms "habeas review court" or "habeas court" are used in this Note simply to refer to a federal district court that is reviewing a petition for a writ of habeas corpus.

8. *See supra* note 6.

9. *See infra* text accompanying note 124; Part I.C.2.

merits," and the Supreme Court has not provided a clear definition for the lower federal courts to apply.[10]

In evaluating habeas petitions under AEDPA, therefore, the lower federal courts have been left to determine for themselves whether a federal claim has been adjudicated on the merits in prior state proceedings,[11] a determination that has a significant impact on the ability of a state prisoner to ensure that his constitutional rights are being protected.[12] In most cases, the circuit courts debate and discuss the definition of "adjudicated on the merits" in terms of the standard of review federal courts must apply in reviewing state court decisions.[13] By focusing on the appropriate standard of review for federal courts to apply to state court decisions, the lower federal courts have not found a unified or effective means of understanding and/or applying AEDPA's new language regarding habeas review.[14] Instead, confusion and controversy over the language have led to a split among the circuit courts as to how the lower federal courts should apply the "adjudicated on the merits" clause of 28 U.S.C. § 2254(d) in practice.[15]

This Note argues that the federal courts' focus on the standard of review to be applied to state court decisions in habeas cases is the wrong approach to understanding the definition of "adjudicated on the merits." Further, this Note argues that the interpretation of

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10. *See infra* Parts I.C.2., II; *see also* Washington v. Schriver, 255 F.3d 45, 53 (2d Cir. 2001) (noting that the question of the meaning of "adjudicated on the merits" is "a difficult question that has divided the Courts of Appeals"); Dodson, *supra* note 6, at 227-28 n.26 (providing a comparison of many different circuit court cases and identifying their differences in how they interpret "adjudicated on the merits").

11. *See* Glidden, *supra* note 6, at 182 (commenting that "for every case that falls under AEDPA's domain, the federal habeas court initially must determine if the state court adjudicated each claim" but also noting that "[f]ederal courts have been unable to reach a consensus on what qualifies as an 'adjudication'" (citation omitted)).

12. *See infra* notes 132-35 and accompanying text.

13. *See generally infra* Part II. It is important to note here that, as will be mentioned repeatedly in this Note, the AEDPA amendments to the statute governing the writ of habeas corpus *did* create a new standard of review for federal courts to apply to certain state court decisions on habeas review. *See* 28 U.S.C. § 2254(d)(1),(2) (2000). The analysis and application of that new standard of review should be separate from the question of whether the state "adjudicated" a prisoner's federal claims "on the merits." Such separation, however, is less common than it should be among circuit court discussions of the AEPDA amendments. *See infra* note 150 and accompanying text.

14. *See infra* Part II (describing the current split between the circuits regarding how to correctly interpret and apply the "adjudicated on the merits" clause of the AEDPA habeas statute).

15. The majority of the circuit courts read the term "adjudicated on the merits" broadly, considering any claim not dismissed on procedural grounds to have been "adjudicated on the merits." *See infra* notes 147-49 and accompanying text. A minority of circuits has held that a state court's decision should not be considered "adjudicated on the merits" unless that state court provides indication in its opinion that it evaluated the federal claim by applying federal law. *See infra* note 163 and accompanying text.

"adjudicated on the merits" adopted by the majority of circuits is wrong because the majority considers any non-procedural basis for denial an "adjudication on the merits," even where the state court does not mention a federal claim in its opinion.[16] Instead, "adjudicated on the merits" under 28 U.S.C. § 2254(d) must be defined to encompass only those federal claims for which a state court has actually provided some explanation in its decision.

Commentators have articulated this Note's preferred definition of "adjudicated on the merits" and justified it based on factors such as the legislative intent of Congress in enacting the AEDPA, the specific language of the statute, and examination of possible approaches the Supreme Court might take based on its general approach to habeas cases.[17] In contrast, this Note takes a broader view of the writ of habeas corpus as an exercise of the federal judicial appellate review power granted to the federal judiciary.[18] This Note argues that federal habeas review should be viewed as an appeal under the federal judiciary's appellate jurisdiction rather than an independent civil process unrelated to the constitutional grant of power to the federal judiciary.[19] A habeas court is thus an appellate court with a role similar to that of the Supreme Court in its ability to grant direct review of federal claims that have been decided by a state court.[20] In fact, federal habeas courts are, according to some, surrogates for the Supreme Court, whose docket is too crowded to hear most of the federal claims raised by state prisoners.[21]

Thus, a comparison of habeas review to the well-established practice of Supreme Court direct review provides a compelling framework for understanding and interpreting "adjudicated on the merits" under 28 U.S.C. § 2254(d) of AEDPA. Employing this analogy, it will become apparent that "adjudicated on the merits" must mean that state courts have the opportunity to interpret and apply federal law to federal questions; where they fail to do so, a federal court must review any questions of federal law de novo.

Part I provides general background about federal judicial review of state court decisions. It then discusses the evolution of Supreme Court direct review and general federal review of habeas petitions by state prisoners throughout history, and the role each plays in today's federal criminal system. Part II more specifically outlines the controversy at issue regarding the definition of "adjudicated on the merits." It first discusses the current analytical framework underlying

16. *See infra* Part II.A.1.

17. This is not an exhaustive list. See *infra* note 177 for additional discussion regarding the interpretation of "adjudicated on the merits."

18. *See infra* Part III.A.; *see also* notes 189-90, 193 and accompanying text.

19. *See generally* Part III.B.

20. *See infra* notes 189-90, 193 and accompanying text.

21. *See infra* note 193 and accompanying text.

the debate over interpreting "adjudicated on the merits," and provides an overview of the disagreement among circuits. It then illustrates the practical impact this interpretation has on the criminal justice system and the ability of individual defendants to challenge the constitutionality of their state convictions. Part III argues that the current analytical framework for understanding "adjudicated on the merits" has resulted in a majority of circuits applying the wrong interpretation of the phrase. Courts and commentators should instead view habeas corpus petitions within the larger context of the federal judiciary's powers of appellate review of state court decisions. Under this view, a federal claim in state court would be considered "adjudicated on the merits" only where the state court has provided some discussion of the federal claim in its decision.

I. FEDERAL REVIEW OF STATE COURT DECISIONS

In current practice, federal judicial review of state court decisions is primarily seen in the Supreme Court's power of direct review,[22] and in the lower federal courts' power to review habeas corpus petitions submitted by state prisoners.[23] Both provide the federal judiciary with the authority to review otherwise final state court decisions regarding questions of federal law. However, there is one key difference between them. Direct Supreme Court review is a well-accepted part of the larger array of the appellate powers of the federal judiciary granted by Article III.[24] On the other hand, the writ of habeas corpus is more controversial as an application of the federal appellate jurisdiction because it, in essence, allows the lower federal courts—rather than only the Supreme Court—to exercise this appellate power.[25]

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22. *See* Larry W. Yackle, Federal Courts 162 (2d ed. 2003) (stating that "by common account" the Supremacy Clause "contemplate[s] . . . that [state court] decisions will be subject to the discipline of a hierarchical appellate authority located in the 'one supreme Court' the Constitution makes mandatory" (citation omitted)). Yackle also discusses the Supreme Court's modern appellate jurisdiction. *Id.* at 165.

23. *See* Yackle, *supra* note 2, at 4 ("As a practical matter, . . . federal court action on habeas petitions from state prisoners has an undeniable appellate flavor."). Yackle does note, however, some disagreement with, or criticism of, this characterization of habeas corpus. *Id.* at 49. Yackle notes that following *Brown v. Allen*, 344 U.S. 443 (1953), "critics charged that the Court (mis)construed the habeas corpus statues to confer on lower federal courts an effective appellate jurisdiction to review state court judgments for error. . . . [Such] power exceeded the scope of appellate jurisdiction, conventionally understood." Yackle, *supra* note 2, at 49.

24. *See infra* note 67 and accompanying text.

25. *Compare* Barry Friedman, *A Tale of Two Habeas*, 73 Minn. L. Rev. 247, 335-38 (1988) (noting that concerns about considering habeas courts as appellate courts "derive generally from the awkward prospect of a 'lower' federal court, particularly a district court, reviewing the work of a state's highest court" but still advocating for a view of habeas courts as exercising appellate power), and James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum. L. Rev. 1997, 2055-56 (1992) (discussing the view of federal habeas

Thus, the history and scope of each of these different mechanisms by which federal courts review state court decisions on federal questions are typically discussed separately, both by courts and by commentators. That is, the writ of habeas corpus is rarely contemplated within the context of federal judicial review or the appellate power of the federal judiciary; quite the contrary is true of discussion about direct Supreme Court review.[26] This part looks at the history of both means of federal court review of state court decisions. A review of the history provides a foundation for this Note's argument that the well-established direct review analysis informs analysis of the meaning of "adjudicated on the merits" in the habeas corpus statute because both fall within the overall rubric of federal appellate review, as granted by Article III of the United States Constitution.

A. *Judicial Review in General*

The Supreme Court's appellate review power, now commonly called judicial review,[27] has been the subject of much commentary and controversy throughout American legal history.[28] Judicial review was originally established in Article III of the United States Constitution, which vests the "judicial Power" of the United States in "one supreme Court, and in such inferior Courts as the Congress may from time to

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as a limited "appeal as of right" that, "[a]s a substitute for federal direct appeal, . . . has never duplicated, but has always mirrored the scope of, Supreme Court review on direct appeal" (emphasis omitted)); *with* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 910 (1998) (criticizing the idea that any court other than the Supreme Court of the United States may have "appellate jurisdiction over both systems"). Scheidegger goes on to say that "[t]here was no presumption that the lower federal courts had a 'superintending' function over the state courts." *Id.*

26. *See* Friedman, *supra* note 25, at 261-73. Friedman discusses the dearth of commentary about habeas by pointing to the procedural and substantive justifications given by commentators for continued existence of the writ. *Id.* His article concludes, though, that habeas is better understood and justified when viewed as an appeal that operates within the federal system in much the same way as direct Supreme Court review. *Id.* at 331; *see also infra* Part III.B. (discussing habeas as an appellate function of the federal judiciary).

27. The term "judicial review" was evidently "an invention of law writers in the early twentieth century." David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 Duke L.J. 279, 280 n.2 (1992) (quoting Robert L. Clinton, *Marbury v. Madison* and Judicial Review 7 (1989)).

28. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 2-10 (1959). Professor Wechsler's paper is a reproduction of a speech given as the Oliver Wendell Holmes Lecture at the Harvard Law School on April 7, 1959. *Id.* at 1. In his introductory comments, Professor Wechsler noted discussions at Harvard among scholars such as Justice Jackson and Judge Learned Hand regarding "the role of courts in general and the Supreme Court in particular," in the few years prior to his lecture, and the broader attention being paid to the subject of judicial review and judicial supremacy in the greater academic community. *Id.*

time ordain and establish."[29] Article III then provides, in Section 2, that the federal judicial power "shall extend to all Cases, in Law and Equity, arising under this Constitution."[30] The Constitution further provides that the Supreme Court was to "have appellate Jurisdiction" over other cases, as regulated by Congress.[31] Thus, other than in the specific circumstances identified in the Constitution, the jurisdiction of the Supreme Court and of other federal courts is determined by Congress.[32] Moreover, the Supreme Court has appellate rather than original jurisdiction over those matters not explicitly mentioned in the Constitution.[33]

Article III does not specify the scope of the Supreme Court's appellate jurisdiction, or qualify the jurisdiction according to the type of court that originally decided the matter. There seems to be no reason, then, to limit the Court's appellate jurisdiction to "cases" or "controversies" originating only in federal courts.[34] Accordingly, the Supreme Court may exercise its appellate review power over questions of federal or constitutional law regardless of whether those questions were first considered in a lower federal court or in a state court.[35]

Despite this justification for allowing Supreme Court review of state court decisions regarding federal questions, such federal review of state judicial opinions clearly creates questions of federalism and the role of states in applying federal laws, as required by the Supremacy Clause.[36] The Supremacy Clause states that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[37] The Supremacy Clause obligates state courts to interpret the Constitution and enforce federal laws in the same way the federal judiciary would.[38] Some commentators believe, though, that federal judicial review power maintains the supremacy of federal law as the law of the United States because the federal judiciary should be the final and ultimate interpreter of those laws.[39] Indeed, the tension

29. U.S. Const. art. III, § 1.
30. U.S. Const. art. III, § 2.
31. *Id.*
32. *See* Jordan Steiker, *Habeas Exceptionalism*, 78 Tex. L. Rev. 1703, 1703 (2000).
33. *See* Yackle, *supra* note 22, at 157-62.
34. *Id.* at 162.
35. *See id.* at 157.
36. U.S. Const. art. VI, § 2.
37. *Id.*
38. *See* Yackle, *supra* note 22, at 162.
39. *See id.* at 165; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary,"* 78 Tex. L. Rev. 1513, 1523 (2000) (noting that the decisions of federal courts "cannot be subject to revision or supplantation by legislatures, executive officials, or even state

between the idea of dual judicial sovereignty and the appellate power of the federal judiciary to review state court decisions is a relatively common theme in current legal scholarship.[40]

Yet the idea of "judicial review" as a means for the federal government to evaluate or examine the acts of state officials—including acts of the states' judiciary branches—has been controversial since the early years of American history.[41] In particular, at its inception, the Court's assertion of its power to force the states' courts to follow its interpretation of the Constitution was most controversial.[42] Rather than focusing on the separation of powers or congressional supremacy over the judiciary, the controversy and debate centered on questions about federalism and states' rights.[43]

The Supreme Court, under Chief Justice Marshall, firmly established its appellate jurisdiction over state court decisions in two important cases between 1815 and 1825.[44] First, in *Martin v. Hunter's Lessee*,[45] the Marshall Court, in an opinion written by Justice Story, overturned the Virginia Supreme Court's 1814 holding that state and federal governments were independent of one another and parallel in

courts"); Liebman, *supra* note 25, at 2097 ("Federal law is supreme, as is federal adjudication of that law when mandated by Congress.").

40. *See, e.g.*, Friedman, *supra* note 25, at 335 (noting that one of the more common objections to habeas review is that it is an affront to notions of comity, which "concerns the respect that judges in coordinate judicial systems accord each other's work and the need to avoid one court system's interference in the work of another"); Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After* Williams v. Taylor*?*, 2001 Wis. L. Rev. 1493, 1509 (noting that the constitutional concerns inherent in interpretation of AEDPA's changes to the habeas statute "will continue to be a fundamental part of the long-running debate on whether federal habeas courts should defer to state courts on issues of federal law" (emphasis omitted)).

41. *See* Daniel A. Farber, *Judicial Review and its Alternatives: An American Tale*, 38 Wake Forest L. Rev. 415, 416 (2003).

42. *See id.* at 417.

43. *See id.*

44. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). Some commentators also include a third case, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), when discussing the Marshall Court's establishment of federal appellate jurisdiction over state court decisions. *See* Farber, *supra* note 41, at 431-32. In *Osborn*, the Marshall Court, in an opinion by Chief Justice Marshall, rejected a state claim of sovereign immunity. *See* 22 U.S. (9 Wheat.) at 848-49. Chief Justice Marshall's opinion argued that if states were immune from all federal suits they would be able to "attack[] the nation" and "arrest[] its progress at every step." *Id.* at 848. *Osborn* must be differentiated from *Martin* and *Cohens* for purposes of this analysis, though, because it involved the power of states to impose a fine or penalty on the federal government or federal officials. *Martin* and *Cohens*, in contrast, dealt with a question of which court's interpretation of a federal or constitutional question should be the "final" word. *Osborn* does, though, provide another example of the Marshall Court's overall endorsement of complete sovereignty by the Supreme Court over state courts. *See* Farber, *supra* note 41, at 431-32.

45. 14 U.S. (1 Wheat.) at 304.

their ability and jurisdiction to apply the Constitution.[46] Justice Story grounded his opinion in a broad view of the Constitution, noting that it was the supreme law over the citizens of the United States as well as each of the states and their branches of government individually.[47] The Court held that its appellate jurisdiction included the ability to set aside unconstitutional actions of state executive and legislative officials; its jurisdiction must, then, also include review of the decisions of the state judiciary branch.[48]

The Supreme Court reiterated this view five years later in *Cohens v. Virginia*.[49] There, Chief Justice Marshall claimed even more power for the national government and its Constitution.[50] Marshall declared that the states had only limited sovereignty, and that the federal judiciary was the most appropriate body to interpret federal law so that it would be consistently interpreted throughout the nation.[51] Thus the Marshall Court effectively subordinated state courts to the Supreme Court of the United States.[52] Moreover, the general structure established in those early days of the nation has generally remained in place and is seldom challenged.[53]

Another controversial aspect of judicial review is whether the inferior federal courts also have the appellate power to review decisions by state courts. Following the ratification of the Constitution, Congress established the lower federal courts in the Judiciary Act of 1789.[54] Through that seminal legislation, Congress established the circuit courts, which were granted both original and appellate jurisdiction, and the district courts, which were granted only original jurisdiction.[55] In addition, the circuit courts were initially not assigned judges and instead were staffed by either Supreme Court justices or by district court judges.[56] The Judiciary Act of 1789 granted, with some level of specificity, jurisdiction to the different

46. *Id.* at 362; *see also* Farber, *supra* note 41, at 426.
47. *Martin*, 14 U.S. (1 Wheat.) at 342-43; *see also* Farber, *supra* note 41, at 427.
48. *Martin*, 14 U.S. (1 Wheat.) at 343-44; *see also* Farber, *supra* note 41, at 427.
49. 19 U.S. (6 Wheat.) at 264.
50. Farber, *supra* note 41, at 428-29.
51. *Id.* at 429.
52. *Id.*
53. *Id.* at 417-20, 432.
54. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73 (codified as amended in scattered sections of 28 U.S.C.); Yackle, *supra* note 22, at 38. The discussion about creation of lower federal courts was a contentious one at the Constitutional Convention. A particular divide existed between those who believed the Constitution should include explicit directions for the creation of the lower federal courts, and those who felt the state courts already in operation should be the only inferior courts for the nation. *Id.* at 31. This disagreement is often said to have been resolved through the "Madisonian Compromise," which resulted in an agreement that the Constitution would allow Congress to create lower federal courts, but not require it. *Id.*
55. *See* ch. 20, 1 Stat. at 73; Yackle, *supra* note 22, at 38.
56. *See* ch. 20, 1 Stat. at 74-75; Yackle, *supra* note 22, at 38 & n.54.

federal courts.[57] It did not, however, provide the federal courts with the entire grant of power included in Article III.[58] The remainder of this part provides background about both direct review and the writ of habeas corpus.[59]

B. *Direct Review*

Federal review of state judgments on questions of federal law was first established by the Judiciary Act of 1789.[60] Congress specifically provided the Supreme Court with jurisdiction to review a civil judgment made by any of the lower federal courts or by a state judiciary's highest court.[61] This jurisdiction took the form of the writ of error, but did not include appellate jurisdiction over federal criminal cases.[62] More importantly, the 1789 Act only allowed Supreme Court review of "final" judgments made by the "highest" state court where the party making the federal claim lost in the prior proceedings.[63] Congress's initial grant of review existed in its general form until 1914.[64]

The Supreme Court's appellate jurisdiction to review state court decisions is currently governed by 28 U.S.C. § 1257.[65] Under 28 U.S.C. § 1257(a), the Supreme Court may review a final state court judgment

> where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the

57. *See* ch. 20, 1 Stat. at 76-92; Yackle, *supra* note 22, at 38-39. In particular, the jurisdictional assignments depended largely on the nature of the parties involved, such as the establishment of Supreme Court original jurisdiction for all cases in which a state was a party, and the establishment of federal jurisdiction for any federal court in diversity cases or cases where the United States was a party. Yackle, *supra* note 22, at 38-39. Important to this analysis, the Act also gave the Supreme Court and the inferior courts authority to consider habeas petitions submitted by individuals in federal custody. *Id.* at 39. The extension of the writ of habeas corpus to individuals in state custody is discussed *infra* Part I.C.

58. *See* Yackle, *supra* note 22, at 39. Yackle discusses specifically the failure of Congress to grant the lower federal courts general jurisdiction to hear cases involving federal questions. *Id.*

59. Because direct review is a more obvious and natural example of the Court's appellate power, greater emphasis is placed in this part on providing an explanation of the writ of habeas corpus within the context of federal judicial review powers.

60. *See* ch. 20, 1 Stat. at 81; Yackle, *supra* note 22, at 165.

61. *See* Yackle, *supra* note 22, at 40.

62. *See id.* at 40 & n.62. Although the Court did not have appellate jurisdiction over criminal cases, individuals held in federal custody could still appeal their incarceration to the Supreme Court through the writ of habeas corpus. *See infra* Part I.C.; *see also* Liebman, *supra* note 25, at 2058-59.

63. *See* Yackle, *supra* note 22, at 165.

64. *See id.*

65. *See* 28 U.S.C. § 1257 (2000); Yackle, *supra* note 22, at 165.

> Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.[66]

The scope of the Supreme Court's jurisdiction on direct review under 28 U.S.C. § 1257(a) is well-established.[67] However, this appellate function of the Court may only be triggered where two minimum conditions are met: (1) that a substantial federal claim was "either addressed by or properly presented to the state court that rendered the decision" in question,[68] and (2) that the state court issued a final judgment.[69]

To meet the first condition, the party making the federal claim must both present the question to the highest state court with jurisdiction to consider it and make the state court aware that the question is of a federal nature.[70] Parties raising a federal question must typically do so within the parameters of the procedural rules in the state where the case originated.[71] Where a state court is silent as to a federal claim, the Supreme Court assumes the challenging party failed to properly raise the issue. The challenging party has the burden of showing that the federal "issue was properly presented to that court," and "that the state court had 'a fair opportunity to address the federal question that is sought to be presented'" to the Supreme Court.[72]

To meet the second condition, the highest state court must have issued a final judgment regarding the federal question.[73] This was a strict requirement under the 1789 Act; however, more recently, the

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66. 28 U.S.C. § 1257(a).

67. *See, e.g.*, Adams v. Robertson, 520 U.S. 83, 86 (1997) ("[I]n reviewing state-court judgments under 28 U.S.C. § 1257 . . . we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review."); Webb v. Webb, 451 U.S. 493, 496-97 (1981) ("It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.").

68. *Adams*, 520 U.S. at 86; Yackle, *supra* note 22, at 165.

69. Yackle, *supra* note 22, at 165-66.

70. *Cardinale*, 394 U.S. at 438 (noting that the Supreme Court has "no jurisdiction unless a federal question was raised and decided in the state court below"); Yackle, *supra* note 22, at 165 (noting that in "present[ing] a federal question to the highest state court with jurisdiction to consider it" litigants "must make the state court aware of the federal character of the question").

71. *Adams*, 520 U.S. at 87 (noting that petitioners may either "establish that the claim was raised at the time and in the manner required by the state law" or they may "demonstrate that [they] presented the particular claim at issue . . . with fair precision and in due time" (internal quotations omitted)).

72. *Adams*, 520 U.S. at 86-87 (quoting *Webb*, 451 U.S. at 501); *see also* Michael J. Wahoske, *Raising and Preserving Federal Questions in State Court Cases*, Brief, Winter 1997, at 54-55 (providing an overview of the steps litigants should take to ensure their federal claim may be considered by the Supreme Court).

73. *See* Yackle, *supra* note 22, at 166.

Court has become a bit more flexible in its consideration of what constitutes a "final" judgment for purposes of establishing its appellate jurisdiction.[74] Some believe this flexibility has developed, despite its controversial nature, to allow the Court the opportunity "to examine federal claims at the time and in the posture best suited to maintaining the accuracy, uniformity, and supremacy of federal law."[75] This second condition also tends to be more contentious than the first because the desire to preserve the finality of a state court decision is an oft-cited element of arguments opposing federal review of such state court decisions.[76]

The Supreme Court typically justifies these two conditions by claiming that they better allow states to exercise their right and responsibility to interpret the Constitution and federal law.[77] That is, the Court requires federal questions to be brought before state courts because "in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality."[78] These conditions also provide a challenging party the opportunity to show it presented its federal question to the state court, and that the state court ignored it. In this way, a state court cannot escape direct review by the Supreme Court simply by ignoring a federal question.[79] Importantly, even where a state court has fulfilled this "decided" prong of the direct review standard, it remains up to the Supreme Court to determine whether the state court's interpretation and application of federal law was correct.[80]

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74. *See id.*

75. *Id.*; *see also* Caminker, *supra* note 39, at 1520.

76. *See e.g.*, Caminker, *supra* note 39, at 1523 ("Both scholars and the Court have declared that finality is one of the essential attributes of the judicial power vested in federal courts . . . .").

77. *See* Yackle, *supra* note 22, at 117-18 (noting that while state courts are not actually vested with "the judicial Power" granted to federal courts by Article III of the Constitution, the authority of the state courts to decide Article III types of cases, such as federal question cases, has never been challenged by the Supreme Court except where Congress has limited the state courts' authority by statute). In particular, Yackle reminds readers that the Madisonian Compromise, *see supra* note 54, was partially based on the idea that state courts were able (and allowed) to do Article III business. Yackle, *supra* note 22, at 118. Yackle also points to the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, which binds state judges to the Constitution and thus contemplates that those judges may adjudicate cases that involve federal and constitutional questions. *Id.*

78. Cardinale v. Louisiana, 394 U.S. 437, 439 (1969); *see also* Adams v. Robertson, 520 U.S. 83, 91 (1997).

79. *See* Wahoske, *supra* note 72, at 55 .

80. *See, e.g.*, *Adams*, 520 U.S. at 90-91; Webb v. Webb, 451 U.S. 493, 499-500 (1981). This idea of comity and providing state courts the opportunity to correct constitutional defects before the federal court reviews their decisions is also seen in discussions about habeas petitions, and, in particular, the exhaustion requirement. *See, e.g.*, Duncan v. Henry, 513 U.S. 364, 365 (1995); Anderson v. Harless, 459 U.S. 4,

Still, the Supreme Court provides each state with an incentive to maintain its power of independent review by requiring state courts to review any and all federal questions before the Court will hear and review those federal questions.[81] This incentive to the states is actually quite practical: Requiring an issue to be raised in state court allows a state to resolve a claim on some state law ground[82] and promotes "the creation of an adequate factual and legal record" should the need for federal review arise.[83]

C. *Habeas Corpus*

1. An Overview and History of "The Great Writ"

The writ of habeas corpus has been the subject of much discussion and debate throughout its history.[84] Generally, scholars accept that the federal writ of habeas corpus has provided federal prisoners the opportunity to challenge the constitutionality of their incarceration since the enactment of the Judiciary Act of 1789.[85] Despite the early flurry of jurisprudence reinforcing the federal judiciary's power to review state court decisions regarding federal or Constitutional questions,[86] the writ was not extended to state prisoners until 1867 with the passage of the Habeas Corpus Act.[87] Under the Act of 1867, the writ became available "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of

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6 (1982); Picard v. Connor, 404 U.S. 270, 275 (1971).

81. *See Webb*, 451 U.S. at 499-500.

82. A state may resolve a federal or constitutional question on independent and adequate state grounds, and thereby preclude a federal court from considering that question on appeal. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467 (1991); Ford v. Georgia, 498 U.S. 411 (1991); Harris v. Reed, 489 U.S. 255 (1989). More specifically, federal courts may not review habeas claims decided by a state court on state grounds that are "'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris*, 489 U.S. at 260. An exception to this rule, though, exists if the "last state court rendering a judgment" does not clearly state that its judgment is based on adequate and independent state grounds. *Id.* at 263. Typically, state procedural rules constitute adequate and independent state grounds, but only if those rules are "'firmly established and regularly followed.'" Garcia v. Lewis, 188 F.3d 71, 77 (2d Cir. 1999) (quoting *Ford*, 498 U.S. at 423-24). In making this determination, federal courts should defer to state court findings of procedural default where they are supported by "a 'fair or substantial basis' in state law." *Id.* Non-procedural grounds for decision—such as state constitutional grounds providing protections similar to those in the U.S. Constitution—may also be considered adequate and independent grounds for a state court decision regarding a question of federal law. *Id.* at 76 (citing Coleman v. Thompson, 501 U.S. 722, 729 (1991)).

83. *Adams*, 520 U.S. at 91.

84. *See, e.g.*, Scheidegger, *supra* note 25, at 928 ("The history of habeas corpus has been vehemently debated and voluminously written about . . . .").

85. Wilner, *supra* note 2, at 1445 & n.21.

86. *See supra* note 44 and accompanying text.

87. Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (codified as amended in scattered sections of 28 U.S.C.).

any treaty or law of the United States."[88] This expansion of the writ to include state prisoners heralded the change and development of the writ that occurred during Reconstruction.[89]

In 1886, Justice Harlan revealed the Court's interpretation of the "true extent of the act of 1867."[90] In his decision for the Court on a state prisoner's habeas petition, he held that the federal courts had jurisdiction to review state court decisions on habeas review.[91] Further, Justice Harlan concluded that it was up to the federal court to determine the "time and mode" of their review of any criminal claim arising in state court that involved a constitutional or federal question.[92] Despite this generally broad view of the jurisdiction of the federal courts to review state court decisions on habeas review, the Court remained sensitive to Congress's concerns that any of the lower federal courts not act as a "statutorily mandated 'court of errors'" over the states' highest courts.[93] To address these concerns, Justice Harlan noted that the "mode" and "timing" of federal review should, as in a writ of error, only take place after "the State court[s] shall have finally acted upon the case."[94] Still, the writ of habeas corpus remained an option for state prisoners to challenge the constitutionality of their criminal sentences throughout the late nineteenth century, though the Court typically provided habeas review only in cases where a prisoner could not file a writ of error for direct review by the Court itself.[95] The Court seemed to abandon this preference in the early twentieth century.[96]

The modern history of habeas law is sometimes said to begin in 1953, when the Court, in *Brown v. Allen*, significantly broadened the scope of habeas review by establishing a standard of review to be used by federal courts in evaluating habeas petitions.[97] *Brown* marked the

88. Ch. 27, 14 Stat. at 385.

89. *See* Yackle, *supra* note 2, at 30.

90. *See* Liebman, *supra* note 25, at 2069 (internal quotation marks omitted).

91. *Ex parte* Royall, 117 U.S. 241, 249 (1886); *see also* Liebman, *supra* note 25, at 2069.

92. *Royall*, 117 U.S. at 251.

93. *See* Liebman, *supra* note 25, at 2069 (quoting *Royall*, 117 U.S. at 253).

94. *Royall*, 117 U.S. at 253; *see also* Liebman, *supra* note 25, at 2069 (discussing Justice Harlan's *Royall* opinion, and specifically his attempts to balance giving the federal courts discretion in reviewing federal claims first heard in state courts with the Congress's desire that the federal system not be given too much power over the state judiciaries).

95. *See* Liebman, *supra* note 25, at 2071.

96. *See id.* at 2077.

97. Brown v. Allen, 344 U.S. 443 (1953); *see also* Patrick E. Higginbotham, *Reflections on Reform of § 2254 Habeas Petitions*, 18 Hofstra L. Rev. 1005, 1008 (1990) ("The modern history of habeas law dates from the Supreme Court's 1953 decision in *Brown v. Allen*."); Wilner, *supra* note 2, at 1445-46 (noting that the *Brown* Court explicitly established that state prisoners were to receive de novo review of their federal claims in federal court, and as a result habeas "has generated controversy every since").

culmination of an expansion of the writ that had been building since 1867.[98] Legally, *Brown* altered the power of the federal judiciary to review state court decisions by specifically stating the standard of review a habeas review court was to apply.[99] Prior to *Brown*, the federal habeas review courts were allowed to review any federal claim de novo so long as the prisoner exhausted his state claims prior to bringing them in the federal system.[100] The Court in *Brown* held that, for purposes of federal review of state habeas petitions, the standard of review would depend on whether a habeas claim involved questions of fact, questions of law, or mixed questions of law and fact.[101] Under *Brown*, on habeas review, questions of law and mixed questions of law and fact received de novo review by federal habeas review courts, and questions of fact were presumed to be correct.[102] A petitioner could, however, rebut that presumption through a showing of clear and convincing evidence.[103]

The period leading up to the *Brown* decision ushered in a change in the purpose and scope of the writ. Habeas's earliest form differed both in scope and in significance from its current form.[104] Early in its history, habeas was primarily used to challenge the legality of executive detentions such as denials of bail or warrantless arrests.[105] In recent years, habeas has become a means for relitigating federal constitutional claims from not only state detentions, but state criminal convictions as well.[106] The writ currently allows federal courts to order a new trial for state prisoners whose incarceration violates

98. *See* Friedman, *supra* note 25, at 263-65; Higginbothan, *supra* note 97, at 1008.

99. *See* Wilner, *supra* note 2, at 1446 & n.22.

100. *See id.* at 1447-48 (interpreting this to allow "a broad, expansive review in the federal courts as long as the state courts had an opportunity to decide an issue first"). Other commentators, though, have interpreted the pre-*Brown* standard of review to have been much more limiting to state prisoners. *Cf.* Yackle, *supra* note 2, at 42-43. Yackle interprets the pre-*Brown* approach to federal review of state court decisions to

> put an end to federal habeas corpus for state convicts: All states offered convicts some means for addressing federal claims, and prisoners were often entitled to seek relief from state courts over and over again (albeit with no hope of success after the first attempt). Since there was never a time when state process was unavailable, there was never a time when prisoners could file habeas petitions in federal court.

Id. at 42-43; *see also* Hon. John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176-77 (1949) (discussing reasons for and against including specific language requiring petitioners to exhaust their state remedies in the habeas statute).

101. Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 Ohio St. L.J. 731, 735-36 (2002).

102. *See id.* at 735-36.

103. 28 U.S.C. § 2254(e)(1) (2000); *see also* Pettys, *supra* note 101, at 736 (noting that both before and following *Brown* findings of fact by state courts "are rebuttably presumed to be correct").

104. *See* Steiker, *supra* note 32, at 1725.

105. *See id.*

106. *See id.*

federal law.[107] The writ of habeas corpus applies to situations where errors in state court proceedings "undermine[d] confidence in the fundamental fairness of the state adjudication."[108]

After *Brown*, critics of federal review of state habeas corpus petitions attacked this new standard of review.[109] That is, commentary was commonly based on a feeling that de novo review by federal courts of state court decisions did not provide an appropriate balance of concern for finality, comity, and federalism with protection of prisoners' interests in fairness and justice.[110] The *Brown* Court's standard of review continues to apply to any habeas petition that does not fall within the new AEDPA standards.[111] And so the role of the federal judiciary in evaluating state court decisions is still important to and discussed in the case law today.

Even though the AEDPA legislation altered the scope of federal courts' habeas review power and the analysis applied to habeas petitions, theoretical questions about the goals and problems of habeas continue to dominate scholarly debate in much the same way such larger questions dominate scholarship about judicial review,[112] and direct Supreme Court review in particular.[113] For example, federal review of state court determinations of federal law is often claimed to conflict with state sovereignty. Article III of the U.S. Constitution identifies the federal judiciary as the final authority in questions of federal law, and the Supremacy Clause recognizes federal law as the supreme law of the land.[114] Nevertheless, states are bound to enforce federal law, and "principles of comity and federalism" suggest that their decisions receive some deference.[115] In addition, some critics of habeas review believe such review damages the judicial system's goal of promoting finality in court proceedings by allowing unnecessary relitigation of otherwise final convictions.[116] In particular, critics argue that habeas review decreases states' ability to

107. *See* Dodson, *supra* note 6, at 225.

108. Williams v. Taylor, 529 U.S. 362, 375 (2000).

109. *See, e.g.*, Friedman, *supra* note 25, at 271 ("Critics identify tensions caused by federal review of state criminal decisions and present those tensions as justification for cutting back the broad reach of habeas."); Steinman, *supra* note 40, at 1497-98 (providing a pro-defendant view of the impact of *Brown* but also noting that "some criticized *Brown* as allowing unwarranted relitigation of otherwise final state convictions").

110. *See* Wilner, *supra* note 2, at 1446-47.

111. AEDPA imposes a variety of new restrictions on the types of claims a federal habeas review court may hear. *See infra* Part I.C.2.

112. *See* Farber, *supra* note 41, at 417-19.

113. *See supra* notes 79-83 and accompanying text.

114. *See* Dodson, *supra* note 6, at 224-25; Yackle, *supra* note 22, at 118; *see also supra* notes 36-39 and accompanying text (discussing more generally some of the questions of federalism that arise when thinking about federal judicial review of state court decisions).

115. Dodson, *supra* note 6, at 225.

116. *See* Wilner, *supra* note 2, at 1447.

enforce their own criminal laws and punish their own citizens who break those laws.[117]

2. AEDPA and the "Adjudicated on the Merits" Requirement

The Antiterrorism and Effective Death Penalty Act,[118] passed in 1996, is the most recent alteration to habeas regulations. Congress passed AEDPA in response to the Oklahoma City bombing, and the legislation's primary focus was on "fighting terrorism both at home and abroad."[119] In fact, the vast majority of the Act is devoted to creating for law enforcement officers "tough new tools to stop terrorists before they strike and to bring them to justice if they do."[120] Included in this legislation, though, was a short section intended to "streamline Federal appeals for convicted criminals sentenced to the death penalty."[121] AEDPA created a new section of the habeas corpus statute that applies only to death penalty cases, requiring that defendants facing the death penalty receive competent counsel.[122] The legislation amended the rest of the habeas statute as well. Most important to this Note's analysis, AEDPA amended 28 U.S.C. § 2254(d), the statute regulating federal review of habeas petitions submitted by state prisoners.[123]

The section of the amended statute at issue here is 28 U.S.C. § 2254(d), which Congress amended in section 104(3) of AEDPA. The statute is divided into three parts. The first section (section (d) below) provides federal habeas courts with criteria for determining which habeas petitions should be considered under the new standard. The two subparts (sections (d)(1) and (d)(2) below) establish what that new, stricter standard should be. The statute 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—

117. *See id.*

118. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217 (codified as amended in scattered sections of 28 U.S.C.).

119. William J. Clinton, *Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, *in* 1 Public Papers of the Presidents of the United States: William J. Clinton 630, 630 (1997).

120. *Id.*

121. *Id.*

122. *See* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 Duke L.J. 1, 25 n.151 (1997) (discussing some of the additional requirements the AEDPA imposes on states in order to ensure defendants facing the death penalty receive competent counsel for any post-conviction proceedings).

123. 28 U.S.C. § 2254 (2000).

> (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.[124]

This section of AEDPA's amendments to habeas law has been referred to as the "key element of the 1996 reform of habeas corpus."[125] According to some, the effect of the congressional changes to the habeas statute was to officially enact into law the changes already incorporated into habeas procedure and jurisprudence by the federal judiciary.[126] By its terms, the statute creates a new, deferential standard with which federal habeas review courts must treat state court decisions on the federal issues raised in habeas petitions.[127] The goal of this deference was to decrease the number of habeas petitions flooding the federal system.[128] Importantly, the AEDPA limitations have not had this desired effect; instead there has been an increase in

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124. § 2254(d) (emphasis added).

125. Scheidegger, *supra* note 25, at 945.

126. *See* Yackle, *supra* note 2, at 56 ("[T]he Act's genuine purpose [was] to endorse and reinforce many of the Court's own efforts to curb the writ . . . ."); Tushnet & Yackle, *supra* note 122, at 21 (noting that "[t]he fact that the courts had already done most of what the Republican legislation [including AEDPA] sought to accomplish was largely irrelevant from a politician's point of view"). Tushnet and Yackle also note that AEDPA was politically popular "even if it accomplished little as a matter of law." *Id.* at 21; *see also* Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty 153 (2001) ("The Court has read AEDPA as a Congressional decision to accomplish its purpose of speeding up habeas litigation by rewriting the procedural rules while making no fundamental alteration in the existing role of the federal courts in inquiring into state capital convictions."). However, others disagree with this characterization of AEDPA as only minimally affecting habeas corpus. In particular, the Supreme Court rejected this view in *Williams v. Taylor*. 529 U.S. 362, 404 (2000) (O'Connor, J., concurring, but delivering the opinion of the Court for Part II (except as to the footnote)) ("It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved."). Importantly, in stating that Congress intended to alter the scope of habeas corpus, Justice O'Connor focused on the changes Congress made to the standard of review to be applied once it is clear a state prisoner's claim has been "adjudicated on the merits" by the state court. *Id.* The Court in *Williams* did not discuss the meaning of "adjudicated on the merits" in the AEDPA statute.

127. For example, Kent Scheidegger points to the floor debates in both houses during the passage of AEDPA, and observes that every member who spoke on the issue called the new habeas statute "a 'deference' standard." Scheidegger, *supra* note 25, at 945. This view of the AEDPA amendments has led to much discussion in the courts about the level of deference federal habeas review courts should give the decisions of state courts on federal questions. *See infra* notes 150-52.

128. U.S. Department of Justice, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000, at 3 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf.

habeas petitions filed by state prisoners following the 1996 enactment of AEDPA.[129]

A key passage of the statutory language, as amended by AEDPA, is the phrase "adjudicated on the merits."[130] According to the statutory language, a federal court reviewing a habeas claim must first question whether the claim was "adjudicated on the merits" in state court before it can apply the two subsections of the statute.[131] The implications of this determination are significant: If a claim was "adjudicated on the merits" by the state court, the AEDPA standard of review, and its limitations to the types of cases a court may consider, will apply.[132] Accordingly, the federal habeas review court may grant the habeas petition only if the case as tried in the state court system falls into one of the two subsections provided under AEDPA's 28 U.S.C. § 2254(d)(1) and (2). The strict terms of these subsections significantly limit the ability of prisoners to challenge their state convictions, and the federal habeas review court is required to give significant deference to a state court decision regarding any federal question.[133]

In contrast, if the claim was not "adjudicated on the merits," the circuits agree that a federal court should apply the pre-AEDPA

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129. *Id.* at 1, 4 (noting that there has been a 50% increase in the number of habeas petitions filed by state prisoners).

130. The question of how to interpret "adjudicated on the merits" is important not only to the determination by federal courts of the standard of review to be applied to prior state court decisions regarding the federal claim at issue. In addition, it plays an important role in current debate over the "meaning and role of habeas corpus in the criminal process, the perceived abuse of the writ by convicted criminals, and . . . the role of federal courts in state proceedings" more generally. William P. Welty, Comment, *"Adjudication on the Merits" Under the AEDPA*, 5 U. Pa. J. Const. L. 900, 904-05 (2003).

131. The practical effect of this determination is that it informs habeas review courts of the standard of review they are to apply to state court decisions on questions of federal law. *See, e.g.*, Cotto v. Herbert, 331 F.3d 217, 229 (2d Cir. 2003); Aycox v. Lytle, 196 F.3d 1174, 1176-77 (10th Cir. 1999); Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir. 1999).

132. *See Cotto*, 331 F.3d at 229 ("[T]he standard governing federal habeas review depends on whether petitioner's claim has been previously 'adjudicated on the merits' by a state court."). The *Cotto* court also noted that "'[t]he necessary predicate to [AEDPA's] deferential review [of the state court decision] is, of course, that petitioner's federal claim has been 'adjudicated on the merits' by the state court." *Id.* at 230 (quoting Aparicio v. Artuz, 269 F.3d 78, 93 (2d Cir. 2001)). The Fourth Circuit stated that "because [petitioner's] . . . claim was adjudicated on the merits by the . . . state court, our review is limited by the deferential standard of review set forth in § 2254(d)." Bell v. Jarvis, 236 F.3d 149, 157 (4th Cir. 2000) (en banc); *see also* Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001) ("AEDPA's strict standard of review only applies to a 'claim that was adjudicated on the merits in state court proceedings.'" (citing 28 U.S.C. § 2254(d))).

133. *See, e.g.*, *Fortini*, 257 F.3d at 47 (calling the AEDPA standard of review "strict"); *Bell*, 236 F.3d at 157 (calling the AEDPA standard of review "deferential"). In addition, the Supreme Court interpreted the two prongs of AEDPA review, § 2254(d)(1) and (2), in *Williams v. Taylor*. 529 U.S. 362 (2000).

standard of review to the claim.[134] Upon determination that a claim was not "adjudicated on the merits" by the state court system, a federal habeas review court will evaluate questions of law and mixed questions of law and fact de novo. Therefore, the federal court will not apply the increased deference to state court decisions required by the amended 28 U.S.C. § 2254(d)(1) and (2).[135]

Neither Congress nor the Supreme Court has established any clear explanation or interpretation of "adjudicated on the merits," and the circuit courts currently disagree as to how the federal courts should apply the "adjudicated on the merits" requirement in their habeas review analyses.[136] Part II discusses the circuits' different views of the definition and the implications of the dispute.

II. IMPLICATIONS OF AN UNRESOLVED STATUTORY INTERPRETATION

Since being amended by AEDPA in 1996, the habeas statute has been the source of controversy and discussion among scholars and in the federal habeas review courts as they struggle to interpret and apply what has been called a statute "notorious for its poor drafting."[137] Analysis of the Act's legislative history provides little insight into Congress's intended application in practice, except to indicate that Congress sought to narrow the scope of habeas review to reduce delays in achieving finality in criminal cases.[138] The lack of

134. *See, e.g.*, *Cotto*, 331 F.3d at 230 ("If a state court has not adjudicated the claim 'on the merits,' we apply the pre-AEDPA standards, and review *de novo* the state court disposition of the petitioner's federal constitutional claims."); McKenzie v. Smith, 326 F.3d 721, 726 (6th Cir. 2003), *cert. denied*, 134 S. Ct. 1145 (2004). Under pre-AEDPA habeas review, questions of law and mixed questions of law and fact received de novo review, and questions of fact were presumed to be correct, though a petitioner could rebut the presumption through a showing of clear and convincing evidence.

135. *See supra* notes 132, 134 and accompanying text.

136. *See* Monique Anne Gaylor, Note, *Postcards From The Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 Hofstra L. Rev. 1262, 1283 (2003) ("The Supreme Court has yet to directly address the issue of what quantum of articulated analysis is necessary to qualify a state court opinion for review under § 2254(d)(1)."); *see also supra* note 10 and accompanying text; *infra* Part II.

137. Yackle, *supra* note 2, at 57. In fact, in *Lindh v. Murphy*, which addressed the retroactivity portions of AEDPA, Justice Souter discussed the Act's entire chapter devoted to amending the habeas law. 521 U.S. 320, 336 (1997). He noted that "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Id.*; *see also infra* Part II.A. (discussing the controversy between circuits as to how to interpret § 2254(d) under AEDPA).

138. *See* Carrie M. Bowden, *The Need for Comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context After the Antiterrorism and Effective Death Penalty Act of 1996*, 60 Wash. & Lee L. Rev. 185, 214-15 (2003). Bowden goes on to describe the legislative history of what she calls the "deference provisions." *Id.* at 223. According to the record of the floor debate, the resulting legislation was the product of a hard-fought compromise between Senators Kyl and Hatch, who both seemed to be advocating for such strict limits to habeas that the

statutory language and little, if any, legislative guidance, opens the door to inconsistent interpretation among the circuits regarding which state court decisions constitute an "adjudication on the merits." Not surprisingly, the circuit courts are inconsistent in reviewing seemingly similar habeas petitions. A federal habeas petition may be considered "adjudicated on the merits" in one circuit, requiring application of the stricter AEDPA provisions, 28 U.S.C. § 2254(d)(1) and (2), to the federal court's review of that petition, while another circuit may consider a similar petition *not* adjudicated on the merits, rendering the pre-AEDPA standard of review applicable to that petition. This part discusses the disagreement among the circuits and attempts to clarify some of the ways in which this disagreement results in inconsistent treatment for individual petitioners.

A. *The Circuit Split*

Determination of whether a state court "adjudicated" a federal question "on the merits" is far less obvious and straightforward than it may seem. As a result, the circuit courts disagree as to how to define and apply "adjudicated on the merits" in practice, especially when a state court rules on a state prisoner's federal claim but does not mention that claim or any applicable federal law in its opinion. Some circuit courts have held that any non-procedural resolution of a federal claim in state court should be considered an adjudication "on the merits."[139] Other circuits disagree with this approach, and look to the actual decision by the state court to ensure that the state court discussed the federal claim and stated the federal law applicable to the claim.[140]

To understand how this situation arises in practice, recall the

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legislation would eliminate habeas review for state prisoners entirely, and Senator Biden, who advocated for elimination of deference language entirely. *Id.* at 223-25. Senator Hatch, noted that the intended result of his proposed language was to

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

Id. at 226 (citing 142 Cong. Rec. S3447 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch)). In its final version, the statute does not mention the word deference at all. 28 U.S.C. 2254(d). And President Clinton, in his remarks at the signing of the bill, emphasized that he "ha[d] signed th[e] bill because [he was] confident that the Federal courts [would] interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary." Clinton, *supra* note 119, at 631. Clinton then went on to say that the section of the bill codified as 28 U.S.C. § 2254(d) "would be subject to serious constitutional challenge if it were read to preclude the Federal courts from making an independent determination about 'what the law is' in cases within their jurisdiction." *Id.*

139. *See infra* Part II.A.1.

140. *See infra* Part II.A.2.

hypothetical prisoner introduced at the beginning of this Note, and the three possible decisions the state court might have handed down.[141] First, the state appellate court may address the petitioner's Sixth Amendment challenge specifically and provide relevant federal precedent in denying the claim. Second, the state appellate court may issue an opinion that mentions the claim but provides no reasoning for its decision. And third, a state court may discuss several of a petitioner's claims in varying levels of detail, but completely fail to mention the petitioner's Sixth Amendment claim at all.

As demonstrated in Part I, the way the federal judiciary interprets "adjudicated on the merits" informs the standard of review applied in evaluating state prisoners' federal habeas petitions in the different situations discussed above. Thus, where a state court clearly mentions a petitioner's federal claim and also discusses its reasoning for resolving the claim, the circuits agree that the claim has been "adjudicated on the merits."[142] The federal habeas review court must then apply the AEDPA standard under 28 U.S.C. § 2254(d)(1) and (2).[143] Under AEDPA, the federal habeas review court may only consider a claim that was adjudicated on the merits if it falls into one of those two narrow categories noted in the statute, a much stricter standard of review than in pre-AEDPA federal review.[144] As Judge Calabresi has put it,

> where a habeas petitioner's claims have received an "adjudicat[ion] on the merits" and, as a result of that adjudication, have been rejected by a State court, the AEDPA commands that federal courts yield to the state court decision, and do so even in some instances where that decision is legally incorrect. Federal courts must do this rather than undertake an independent, *de novo* review of the claim's merits.[145]

In this concurring opinion, Judge Calabresi captured the impact of the

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141. *See supra* Introduction.

142. Where a state discusses the federal law it considered and how that law applied to the facts of the case at hand, the federal review court may easily determine that the federal claim was "adjudicated on the merits," and thus the AEDPA standard of review would apply. *See* Glidden, *supra* note 6, at 182.

143. *See, e.g.*, Bell v. Jarvis, 236 F.3d 149, 157 (4th Cir. 2000) (en banc) (where defendant's federal claim is "adjudicated on the merits by the . . . state court, our review is limited by the deferential standard of review set forth in § 2254(d)").

144. *See supra* note 124 and accompanying text. The Supreme Court clarified how § 2254(d)(1) and (2) apply to state petitioners' habeas claims in *Williams v. Taylor*. 529 U.S. 362 (2000). There, in a divided opinion, Justice O'Connor wrote for the Court only in Section II of the opinion, which provided definitions for both the "contrary to" and "unreasonable application" prongs of subsection (1) of the statute and further clarified application of subsection (2). *Id.* at 409-13. Justice Stevens wrote for the Court as to the rest of the opinion, however neither addressed how federal courts were to interpret the "adjudicated on the merits" provision of the statute. *Id.* at 367-99

145. Washington v. Schriver, 255 F.3d 45, 62 (2d Cir. 2001) (Calabresi, J., concurring).

AEDPA amendments to 28 U.S.C. § 2254(d): to demand federal deference to state court decisions, but only once it is clear the state had the opportunity to, and actually did, "adjudicate" a federal claim "on the merits."

It may seem that where the state court is completely silent as to a federal claim, it should be clear that the claim was not "adjudicated on the merits." However, in situations both where a state court is completely silent or where the state court provides only a nominal or perfunctory mention of a petitioner's properly presented federal claim, the circuits do not agree on how to interpret "adjudicated on the merits." In these cases, the circuit courts fall into two general factions.[146]

1. Majority View: A Decision Is Enough

The majority of circuits are results-focused: Where a state court has based its decision on non-procedural grounds, and has issued a judgment, that claim has been "adjudicated on the merits."[147] Thus, a state court decision may be an "adjudication on the merits" even where the state court has barely mentioned the federal issue, let alone identified the federal law it used to resolve the issue.[148] A claim would even be "adjudicated on the merits" where it was raised in the state court even if the state court never mentioned it.[149] Under this view, courts seem to skip analysis of whether a state claim was "adjudicated on the merits" and focus on a discussion and determination of the standard of review, or level of deference, they should apply to the state court decision.[150]

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146. The Second Circuit provided a good overview of these different views in *Washington v. Schriver*; however, it declined to decide which approach the Second Circuit would follow in that case. *Id.* at 53-55. In addition to the two general factions, the Sixth Circuit falls in the middle, and seems to still be working through its formulation of how to define "adjudicated on the merits." *See infra* Part II.C.

147. *See, e.g.*, Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001); Neal v. Puckett, 239 F.3d 683, 686, 696 (5th Cir. 2001) (defining "adjudication on the merits" to be "a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural"); *Bell*, 236 F.3d at 158-59; Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999) (holding that an "adjudication on the merits" is a substantive, rather than a procedural, resolution of a federal claim, and that a federal court must apply AEDPA deference to the result of a state court decision, even if the reasoning is not expressly stated).

148. *See* Steinman, *supra* note 40, at 1510-11; Welty, *supra* note 130, at 913.

149. *See, e.g.*, *Sellan*, 261 F.3d at 312 (holding that a federal habeas review court must follow the deferential standard of 28 U.S.C. § 2254(d)(1) and (2) even where the state court does not mention the federal claim or federal law in its opinion); *Aycox*, 196 F.3d at 1177 (holding that federal habeas courts are to consider the "result" of a state court's evaluation of a federal claim in determining whether the claim was "adjudicated on the merits," rather than the state court's application of the relevant federal law).

150. The Supreme Court in *Williams v. Taylor* also failed to explain how the federal courts were to apply the "unreasonable application" evaluation required by

For example, the Second Circuit explained that where the state court has not decided a federal claim on procedural grounds, the "federal habeas court must defer . . . to the state court's decision on the federal claim—even if the state court does not explicitly refer to either the federal claim or to relevant federal case law."[151] The Tenth Circuit agreed, holding that the federal habeas review court "owe[s] deference to the state court's *result*, even if its reasoning is not expressly stated."[152] The Tenth Circuit's discussion of deference exemplifies the confusion the AEDPA amendments have caused regarding the standard of review federal habeas review courts are to apply to state court decisions. The Tenth Circuit made this statement in *Aycox v. Lytle* while discussing the question of whether the defendant's claim was "adjudicated on the merits" in state court, and yet its focus was on the deference federal habeas review courts were to give a state court decision that did "not articulate a reasoned application of federal law to determined facts."[153] The *Aycox* court did not provide an answer as to how to interpret the phrase "adjudicated on the merits."[154]

Even though the courts seem to confuse the question of "adjudicated on the merits" with the interpretation of the standard of review to be applied under AEDPA to cases that were "adjudicated on the merits," some have articulated tests they use in determining if a claim was "adjudicated on the merits" in the state court. The Second Circuit considers a claim adjudicated on the merits when a state court "(1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment."[155] The Fifth Circuit has also developed a test to determine if a state court's decision is "on the merits."[156] That test requires consideration of

> (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether

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subsection (1) to a state court decision that was either silent as to the reasoning regarding a federal claim, or where the state court provided only a perfunctory opinion such as, "the claim is without merit." *See* Pettys, *supra* note 101, at 732, 735-36. As a result, lower courts confuse consideration of whether a silent or perfunctory state court decision was "adjudicated on the merits" with the question of how to determine if § 2254(d)(1)'s "unreasonable application" prong applies to those same decisions. This Note's analysis is limited to only the question of how to define "adjudicated on the merits" in a way that answers the question of whether a silent or perfunctory state court decision was "adjudicated on the merits." In some cases, however, the analyses overlap.

151. *Sellan*, 261 F.3d at 312.

152. *Aycox*, 196 F.3d at 1177.

153. *Id.*

154. *Id.*

155. Cotto v. Herbert, 331 F.3d 217, 230 (2d Cir. 2003) (internal citations omitted).

156. Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir. 1999).

> the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits.[157]

This test provides some guidance to lower federal courts in evaluating a state court opinion to determine whether it did "adjudicate" a federal claim "on the merits." It encourages the federal court to look at the case record, at similar cases in the state, or at the procedural posture of the case.[158] However, the test seems to restate the obvious without providing any actual criteria for a federal court to follow. For example, the test fails to clarify how the federal court should proceed if a state's courts typically provide only silent or perfunctory opinions on questions of federal law. Indeed, a federal court should not give that state's findings AEDPA deference simply because it is the general practice of the state.

In justifying the view that basically any judgment by a state court other than a denial on procedural grounds should be considered "adjudicated on the merits," this majority group of circuits often points to principles of federalism and respect for the state court decisions. For example, the Fourth Circuit stated that even in a case where the state court's decision is a summary order, the federal review court may not assume that order "is indicative of a cursory or haphazard review of [the] petitioner's claims."[159] Instead, the court noted that even such a summary order is still an "adjudication on the merits."[160] Therefore, the order must be "reviewed under the deferential provisions of 28 U.S.C. § 2254(d)(1)."[161]

Other courts look to the statutory language to justify their view of "adjudicated on the merits." The Seventh Circuit, for example, defended its definition of "adjudicated on the merits" by reasoning that "[n]othing in Section 2254(d) calls on state courts to fill their opinions with discussions that by their lights are unnecessary," just to

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157. *Id.* This test was adopted by the Second Circuit in *Sellan v. Kuhlman*. 261 F.3d 303, 314 (2d Cir. 2001).

158. Importantly, the third clause of the test seems to point federal courts toward the "adequate and independent state grounds" doctrine and allows them to forgive a silent or perfunctory state opinion on those grounds. See *supra* note 82 for a general description of the doctrine.

159. Bell v. Jarvis, 236 F.3d 149, 158 (4th Cir. 2000) (en banc).

160. *Id.*

161. *Id.* This case also illustrates the confusion regarding the order of analysis required under AEDPA and § 2254(d). The court focused its analysis on how a silent or summary state judgment would affect the federal court's ability to determine whether the state court's decision constituted an "unreasonable application" of federal law. *Id.* However, the plain language of the statute would require a state court to have adjudicated a claim on the merits regardless of which prong of § 2254(d) the federal court was then to consider. It is possible that the circuits that confuse this issue do so because they believe any non-procedural state court decision is a decision on the merits, and therefore AEDPA and the limits of § 2254(d)(1) or (2) would always apply. Thus, they seem to believe that they can ignore whether a state court adjudicated the petitioner's claim on the merits for purposes of determining which standard of review to apply to that state court's decision.

ensure the federal habeas review court will apply the post-AEDPA § 2254(d)(1) and (2)—a significantly narrower set of claims that may be reviewed—as opposed to the pre-AEDPA de novo standard of review for any federal claim raised.[162] The majority of circuits, then, promote application of the post-AEDPA deferential standard of review to any state court decision that included a federal claim, so long as that federal claim was not dismissed on procedural or state-law grounds.

2. The Minority View: The Reasoning Is Important, Too

The First and Third Circuits, on the other hand, hold that a state court decision is not "adjudicated on the merits" unless there is some indication that the state court applied federal law in reaching its result.[163] This view is sometimes called an opinion-focused approach because habeas relief is limited only where the state court opinion includes both a correct interpretation of the federal law and its reasonable application to the facts of the case at hand.[164]

These circuit courts typically will not assume consideration of the merits by a state court absent some evidence. For example, the First Circuit held that "[i]n the absence of reasoning on a holding from the state court on the issue, we cannot say the claim was 'adjudicated on the merits' within the meaning of 28 U.S.C. § 2254(d) . . . . '[W]e can hardly defer to the state court on an issue that the state court did not address.'"[165] Similarly, the Third Circuit has held that "when, although properly preserved by the defendant, the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential standards provided by AEDPA and explained in *Williams* do not apply."[166] Thus, these circuits apply the post-AEDPA deferential standard of review only to those state courts that discuss both a petitioner's federal claim and the federal law considered in analyzing the claim.

3. The Middle Ground

The Sixth Circuit is more closely aligned with the majority view; it strays, however, in its treatment of state court opinions that are absolutely silent as to the federal claim.[167] Where a state court issued

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162. Lindh v. Murphy, 96 F.3d 856, 874 (7th Cir. 1996).

163. *See* Glidden, *supra* note 6, at 185.

164. *See* Steinman, *supra* note 40, at 1510.

165. Brown v. Maloney, 267 F.3d 36, 40 (1st Cir. 2001), *cert. denied*, 535 U.S. 961 (2002) (quoting Fortini v. Murphy, 257 F.3d 39 (1st Cir. 2001)); *see also* Fryar v. Bissonette, 185 F. Supp. 2d 87, 90 (D. Mass. 2002) ("[W]hen a federal claim is properly presented to the state appellate court but not addressed by that court, the unreviewed federal claim must be considered *de novo* by the reviewing federal court.").

166. Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001).

167. Welty, *supra* note 130, at 919.

a summary order, the district court will apply AEDPA and the limits of 28 U.S.C. § 2254(d)(1) and (2), as the majority of circuits do, because it "can safely assume that the state court considered the merits" of a petitioner's claim.[168] The Sixth Circuit does not, however, require the state court's opinion to include an "extended discussion."[169] In contrast, where there are "no results, let alone reasoning" in a state court opinion, the Sixth Circuit—unlike the majority of the circuits—will apply pre-AEDPA analysis.[170] That is, the court will "exercise [its] independent judgment and review the claim *de novo*."[171] The Sixth Circuit, in taking this middle ground, attempts to strike a balance that allows the state courts to provide only limited reference to a federal claim, but still requires that it make some mention of the federal claim and federal law. Thus, the state court may issue a perfunctory judgment but not a silent one.

B. *Getting Lost in the Standard of Review*

The disagreement among the circuit courts depends on a view of habeas as an independent process within the criminal justice system. Indeed, most discussion about application of 28 U.S.C. § 2254(d), as amended by AEDPA, focuses on the courts' confusion over the standard of review that federal habeas review courts are to apply in cases where a state court provides only summary opinions or where the state court is silent.[172] Understandably, then, the circuit courts have focused their respective arguments for their interpretation of "adjudicated on the merits" on an attempt to identify the standard of review the federal courts are to apply to state court decisions in reviewing habeas petitions. As a result, many seem to miss the actual question at hand: whether the claim was actually "adjudicated on the merits" in state court. AEDPA does alter the standard of review to apply to state court decisions for purposes of habeas review under 28 U.S.C. § 2254(d)(1) and (2).[173] However, the approach of the majority of circuits places the cart before the horse: A court must *first* determine whether the claim being reviewed was "adjudicated on the merits," and only then will it apply some standard of review.[174]

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168. McKenzie v. Smith, 326 F.3d 721, 727 (6th Cir. 2003), *reh'g denied*, 326 F.3d 721 (2003).

169. Harris v. Stovall, 212 F.3d 940, 943 n.1 (6th Cir. 2000).

170. *McKenzie*, 326 F.3d at 727 (internal quotations and citations omitted).

171. *Id.* (internal citations omitted).

172. Much of the scholarly commentary surrounding this question focuses on the standard of review and tends to argue that it should be de novo for silent or summary state court decisions. *See infra* note 177.

173. *See supra* notes 13, 133 and accompanying text.

174. How to interpret and apply AEDPA's revised standard of review is also an important area of study. It is, however, a separate question from the one presented in this Note—a distinction many of the current cases and commentaries on the subject seem to ignore.

This confusion in the order of analysis creates a particular problem in cases where a state court barely mentions a federal claim or fails to mention it at all. A counter-intuitive result may occur where federal courts end up deferring to nothing. If the AEDPA amendments were intended to alter the standard of review federal courts should apply to every habeas petition, federal courts may ignore a potentially important federal claim regardless of whether the state court actually addressed that claim, simply because they are attempting to accord deference to the state court. That cannot be the purpose of setting the qualifications as to which claims should be deferred to, as AEDPA does.[175] This is especially true given that habeas review is simply a part of the greater judicial framework that emphasizes uniform and fair application of federal law.[176]

Thus the controversy surrounding the split between the circuits presents only part of the problem. Part III attempts to resolve this controversy by looking neither at the actual standard of review to be applied, nor at the legislative history of the specific AEDPA provisions as much of the commentary does.[177] Instead, Part III

175. The plain language of the statute indicates that the phrase "adjudicated on the merits" qualifies which claims are to receive the AEDPA standard of review rather than the pre-AEDPA de novo standard of review. *See* 28 U.S.C. § 2254(d) (2002); *see also* Williams v. Taylor, 529 U.S. 362, 379 (2000) (Stevens, J., dissenting as to Part II) ("A construction of AEDPA that would require the federal courts to cede [their authority to interpret federal law] to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.").

176. *See supra* notes 51, 75 and accompanying text.

177. Much commentary about the meaning of or interpretation of "adjudicated on the merits" under § 2254(d) encourages federal habeas review courts to apply a de novo (and thus pre-AEDPA) standard of review to state court decisions that are either perfunctory or silent. While this Note agrees with this general interpretation of "adjudicated on the merits," the justification for that interpretation focuses on taking a broader view of habeas corpus and thus does not address many of the analytical bases these commentators rely on. As many of these arguments are compelling, and provide additional support for the view expressed in this Note, a sampling of them is outlined briefly here.

First, much discussion surrounds the policy goals of habeas corpus as an independent process within the criminal justice system, and focuses on the need for habeas to strike a balance between maximizing state judicial independence and the need for finality but at the same time protecting individuals' constitutional rights. *See, e.g.*, Dodson, *supra* note 6, at 239-41 (providing a different view of "adjudicated on the merits" than the other commentators but basing his discussion on similar policy concerns); Gaylor, *supra* note 136, at 1289-91; Glidden, *supra* note 6, at 199-200; Welty, *supra* note 130, at 924; Wilner, *supra* note 2, at 1473-74. A second area of analysis in interpreting "adjudicated on the merits" focuses on the legislative history and intent of the Congress that enacted AEDPA. *See, e.g.*, Dodson, *supra* note 6, at 238; Glidden, *supra* note 6, at 208-10; Welty, *supra* note 130, at 925; Wilner, *supra* note 2, at 1459-60. Many commentators also look to the statutory language as a basis for explaining their interpretation of "adjudicated on the merits." *See, e.g.*, Dodson, *supra* note 6, at 230-35; Glidden, *supra* note 6, at 205-08; Wilner, *supra* note 2, at 1473. Finally, some analysis focuses on the Supreme Court and its likely interpretation of

discusses habeas corpus as part of the appellate function of the federal judiciary. In light of this approach, Part III then compares the use of "adjudicated on the merits" as a condition imposed on state court decisions for purposes of habeas review with use of the "addressed by, or properly presented to" condition imposed on state court decisions for purposes of direct Supreme Court review.[178] Based on this comparison, Part III concludes that "adjudicated on the merits" must be defined to mean that federal habeas review courts, in their appellate role, must only provide AEDPA deference to state court decisions that actually mention and reasonably rely on federal law.

III. THE BEST VIEW: A DIFFERENT FRAMEWORK FOR ALLOWING AEDPA DEFERENCE ONLY WHERE THE STATE HAS SPOKEN

A. *Similar Definition, Different Approach*

Part II introduced the existing controversy among the various circuit courts over how to interpret and apply "adjudicated on the merits" within the context of federal habeas review of state court decisions, and introduced a misplaced focus on the level of deference federal courts should give to state court decisions. This part argues that a better approach to understanding the application of "adjudicated on the merits" to the habeas review process is to view habeas within the larger context of federal judicial review power over state court decisions. Within that framework, the writ of habeas corpus is an appeal that is available for review of certain constitutional errors made in adjudications by state courts and may therefore be compared to the Supreme Court's ability to exercise its appellate jurisdiction on direct review.[179] Some even consider habeas review to

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"adjudicated on the merits" based on its approach in other habeas corpus cases. *See, e.g.*, Glidden, *supra* note 6, at 210-14; Gaylor, *supra* note 136, at 1283-85.

Some scholars also analyze "adjudicated on the merits" by comparing it to use of the same phrase for purposes of res judicata. *See* Dodson, *supra* note 6, at 232 n.48 (noting that while some courts, such as the Second Circuit, have "intimated that 'adjudicated on the merits' is a term of art which, whether used in the habeas corpus statute or in the law of res judicata, encompasses summary dispositions on the merits"). Dodson notes, however, that this argument is "shaky" for a variety of reasons, noting specifically that "courts have considered, and uniformly discarded, an interpretation of habeas corpus review that engenders state court decisions with res judicata effect on federal courts." *Id.*

178. *See supra* note 68 and accompanying text.

179. *See* Friedman, *supra* note 25, at 329-30 (noting that his view of habeas, "in which the habeas court is a surrogate for Supreme Court review, and . . . procedural rules governing access to habeas mirror those governing access to Supreme Court review," is a better and more straightforward way for courts to view habeas); Hoffstadt, *supra* note 4, at 993-98 (providing an overview of the "appellate model of habeas," which is "[g]rounded in legal pragmatism" and focuses on "how the federal habeas writ actually functions in the courts"); Liebman, *supra* note 25, at 2055-56 (discussing view of habeas as an appellate procedure and noting that "[a]s a *substitute* for federal direct appeal, habeas corpus has never duplicated, but has always mirrored

be a surrogate for the overburdened Supreme Court, which cannot provide direct review to all criminal cases that might merit additional review.[180] Thus, federal courts should look to the process by which a state case may be reviewed by the Supreme Court on direct review to better understand how to best interpret and apply the "adjudicated on the merits" clause of 28 U.S.C. § 2254(d).[181]

B. *Creating the Comparison: Habeas as an Appellate Function of the Federal Courts*

Habeas plays a vital role in a long-running conversation about congressional power over federal court jurisdiction.[182] The debate raises the question of how much freedom Congress should have in shaping the dimensions and scope of habeas.[183] Indeed, there are some who believe that an increasingly restrictive view of habeas by Congress and by the Court damages, rather than preserves, the federal system and the notions of individual civil rights that are the foundation of our criminal justice system.[184] Thus, the role habeas

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the scope of, Supreme Court review on direct appeal"). Unlike Friedman and Liebman, Hoffstadt does not endorse the appellate model of habeas. Hoffstadt, *supra* note 4, at 998. He does note, however, that "[t]he appellate model . . . closely represents how the federal writ currently functions today." *Id.*

There are also important differences between Supreme Court direct review of federal claims heard by state courts and habeas claims. The most important difference is the Supreme Court's role as the final arbiter of federal law under the Supremacy Clause. *See supra* notes 39, 44, 53 and accompanying text. Thus the Supreme Court will always exercise de novo review on questions of law or mixed questions it is presented with. On the contrary, Congress determines the standard of review a lower court should apply. *See supra* notes 57-58 and accompanying text. For purposes of this Note, the comparison illustrates the interplay between the federal and state courts for purposes of an appellate review. The standard of review may be different once the federal court is actually considering the case previously heard in the state court, but there is still a question of whether the conditions placed on a state court or on a petitioner should be the same in order to preserve the issue for federal review.

180. *See* Friedman, *supra* note 25, at 330-31.

181. *See supra* notes 68-79 and accompanying text.

182. *See* Hoffstadt, *supra* note 4, at 952 (noting that where Congress attempts to narrow the writ of habeas corpus, it will need to balance "the costs [habeas] imposes upon state sovereignty and upon the federal courts"); Steiker, *supra* note 32, at 1703.

183. *See* Steiker, *supra* note 32, at 1703. Importantly, the question of interpreting "adjudicated on the merits" is a very small part of this debate. Instead, the debate focuses on habeas generally and on the role habeas plays in our overall system of government and judicial review. This Note seeks to use the debate and its arguments in favor of habeas as a type of appellate review by the federal courts both to understand the inclusion of the phrase "adjudicated on the merits" in the habeas statute, and to develop an interpretation of the phrase based on the role of habeas within this larger context.

184. *See* J. Thomas Sullivan, *"Reforming" Federal Habeas Corpus: The Cost to Federalism; The Burden for Defense Counsel; and the Loss of Innocence*, 61 UMKC L. Rev. 291, 295 (1992).

plays in the overall scheme of the federal criminal system and in federal review of state court decisions cannot be understated.[185]

The role of the writ of habeas corpus in protecting important individual rights is a key reason for the existence of the writ at all.[186] That same goal of protecting individual rights lies at the core of Supreme Court review of state court decisions as established by the Marshall Court in the early 1800s.[187] The Supreme Court's jurisdiction to review state court decisions is rarely challenged. In fact, "commentators generally agree on the need for Supreme Court review of state court decisions ... [and] [e]ven among those commentators who argue that Congress *could* strip the Supreme Court of jurisdiction to hear certain cases, the strongly prevailing view is that Congress *should* not do so."[188]

The reasons for continued support of the federal judiciary's appellate review power over federal claims arising in state courts[189] also supports the extension of this power to any federal appellate review court, even where that review is provided through the consideration of a petition for writ of habeas corpus. That is, the Supreme Court is the primary provider of this appellate review, even if it is not able to provide adequate protection to individual defendants because of its overwhelming caseload.[190] Moreover, some believe criminal cases present additional and unique challenges to an appellate court and require additional fact-finding and other attention by any appellate court charged with reviewing the many constitutional claims that arise on appeal in a criminal case.[191] Thus, the argument goes, the Supreme Court does not have the time or the capacity to consider the countless factual situations and prior legal rulings that

185. *See* Steiker, *supra* note 32, at 1725.

186. *See* Bowden, *supra* note 138, at 212 (framing the role of habeas in protecting individual rights as a means for a sovereign to protect its people's liberty interests).

187. *See supra* Part I.B.; *see also* Barry Friedman, Pas de Deux: *The Supreme Court and the Habeas Courts*, 66 S. Cal. L. Rev. 2467, 2481 (1993). Friedman notes that one of the key functions of Supreme Court direct review of state court decisions as established by *Martin v. Hunter's Lessee* is that it "can ensure the vindication of federal rights." *Id.* Friedman also observes that Supreme Court direct review not only helps to protect the rights granted to individuals by the Constitution, but it "assures the supremacy of federal law," and "ensur[es] that federal law is uniform." *Id.* at 2481.

188. *See* Friedman, *supra* note 187, at 2480. Friedman provides two sources for those desiring additional information about the value and efficacy of maintaining Supreme Court jurisdiction to review state court decisions. *Id.* at n.62.

189. *See id.* at 2482 (noting "the importance of the opportunity to see review in the Supreme Court of the United States with regard to federal issues resolved in state court proceedings").

190. *See* Friedman, *supra* note 25, at 330-31; Liebman, *supra* note 25, at 2055.

191. Friedman provides nine reasons that criminal cases are special and potentially more difficult to review in an appellate court. He then points to the reasons the Supreme Court may not be best able to handle this appellate role. Friedman, *supra* note 187, at 2485-92.

arise in each criminal appeal.[192] Consequently, it is the role of the habeas review courts to provide those important review functions on behalf of the Supreme Court; habeas review courts are, in this way, surrogates for direct Supreme Court review.[193]

This view is not entirely surprising because direct review and habeas play similar roles in the federal criminal system as two means for prisoners to request review of claims of unconstitutional incarceration.[194] Although the actual review that may be available to prisoners may differ under habeas and direct review, both still provide review for prisoners whose cases fall into certain categories. Both, in that sense, continue to play the same appellate role in the criminal system because they are called on to review the decision of another court.[195]

Viewing habeas review in its appellate function within the broader context of the federal judiciary also provides a better understanding of how habeas is able to achieve its more general goals. First, by looking at the purpose and role of habeas and "adjudicated on the merits" in light of an understanding of the incentive structure provided to state courts in the Supreme Court's direct review processes, the federal judiciary will be able to avoid the much-criticized possibility that they will have to force state courts to draft their opinions in certain ways.[196] The method of evaluating whether a federal claim was "drawn in question" in state courts is well-established, and provides state courts with the opportunity to rule on federal questions, while ensuring that these claims are heard. When habeas is viewed through this framework, states should not feel that the federal courts are asking them to change their behavior. Instead the states might better understand that, as with cases that are challenged on direct review, the states have an opportunity to decide constitutional questions. Where state courts fail to take advantage of this opportunity—whether by

192. *See id.* at 2491.

193. *See id.* at 2482 (arguing that "habeas courts serve as a surrogate for Supreme Court review"). Friedman notes:

> [I]t is apparent that criminal cases present a situation in which no argument can plausibly be advanced that Supreme Court review is adequate to ensure supremacy or uniformity, or to vindicate federal rights. If these goals are important, and there seems little quarrel that they are, the habeas courts remain the likely—if not the only—possibility for success.

Id. at 2491-92.

194. Liebman, *supra* note 25, at 2005.

195. *Id.* at 2009.

196. Coleman v. Thompson, 501 U.S. 722, 739 (1991) (instructing lower federal courts that the federal judiciary "has no power to tell state courts how they must write their opinions"), *reh'g denied*, 501 U.S. 1277 (1991). Under direct review, however, the Supreme Court does not tell state courts how to write their opinions. Instead, the Court provides a means for a petitioner to show that where the state is silent or provides only a summary opinion, his federal claim was properly raised but was simply ignored by the state. *See* Adams v. Robertson, 520 U.S. 83, 87 (1997); Wahoske, *supra* note 72.

actually failing to consider a constitutional claim or by failing to mention that they considered it—federal habeas review courts will then step in to ensure that individuals' constitutional claims are being examined.

The federal judiciary was also created to establish and maintain a unified body of federal law.[197] The Supreme Court is responsible for overseeing this goal. However, its docket is far too crowded to hear even a fraction of the federal criminal claims that are raised by state prisoners.[198] Where the lower federal courts are acting as surrogates for the Supreme Court in reviewing these matters, and where Congress has limited that review under AEDPA to allow application only of Supreme Court precedent, the federal judiciary is better able to maintain its role as final arbiter of federal law. Further, where the lower federal courts are acting as surrogates for the Supreme Court, questions of federalism and comity are no different than they are for direct review by the Supreme Court.[199]

C. *Defining "Adjudicated on the Merits"*

"Adjudicated on the merits" must be defined by considering how habeas fits into this larger context of federal judicial review and also how the goals of habeas are best met. In particular, it is helpful to look more closely at the "adjudicated on the merits" part of the habeas statute in comparison with direct review's provision that a state court must have had a "fair opportunity to address the federal question."[200] This comparison provides a valuable perspective because habeas and direct review share many of the same challenges.[201] Further, the Supreme Court's view that state courts should have the opportunity to address a federal question before the question may be heard by a federal court is well established.[202] The Court's views thus provide insight into how it might view "adjudicated on the merits" if it is faced with the issue.

This comparison illustrates that the majority of circuits are wrong in their interpretation of "adjudicated on the merits" under 28 U.S.C. § 2254(d). Instead, a federal habeas court reviewing a state claim should consider the claim "adjudicated on the merits" only if the state court, in its opinion, has actually mentioned both the federal claim and the federal law the court applied in resolving the question so that it is clear to any reviewing court that the federal claim was truly addressed. Justifications for this definition closely parallel those

197. *See* Friedman, *supra* note 25, at 331.
198. *See id.*
199. *See id.*
200. *See Adams*, 520 U.S. at 86-87 (quoting Webb v. Webb, 451 U.S. 493, 501 (1981)).
201. *See supra* Part I.A.-B.
202. *See supra* note 67 and accompanying text.

justifications given by the Court for the "fair opportunity to address the federal question" prong of direct Supreme Court review.

For example, one reason silent or perfunctory state court opinions should not be considered "adjudicated on the merits" is that such a standard provides state courts with no reason ever to address a federal question raised by a state petitioner. A process in which the federal court will have to defer to a state court decision regardless of whether the decision actually considered the federal question actually provides state courts with an incentive *not* to consider the federal claim. That is not to say that state judicial systems do not take their duty to interpret the Constitution seriously. However, the Supreme Court has been clear that in order for a claim to be brought on direct review, states should first have a "fair opportunity to address the federal question" because it gives state courts their chance to act as independent interpreters of federal law.[203] The same reasoning applies to lower federal courts when they act in an appellate function, which they do on habeas review. Thus states should also have the opportunity to address a petitioner's federal claims:

> A reading of the AEDPA under which AEDPA deference does not apply where a State court has rejected a petitioner's claim without expressly mentioning its federal aspects allows State courts . . . *to choose* whether or not they wish to take on the burden and be deferred to . . . . Under this interpretation, State courts that wish fully to evaluate federal claims need only indicate that they have done so, and their decisions will be deferred to. Conversely, State courts that believe that their energy and resources are better employed elsewhere can remain silent without . . . being treated as if they have given the in depth consideration that AEDPA deference implicates.[204]

Judge Calabresi's description of the incentives provided to state courts to seize their opportunity to interpret and apply federal law indicates that federal habeas review courts may review silent or summary state court opinions de novo without taking from those state courts any of their power under the federal system.[205] This is one reason that silent or summary state decisions must not be considered "adjudicated on the merits," as state courts that provide only silent or summary opinions have provided no indication that they seized their opportunity.

The "fair opportunity to address the federal question" condition of direct Supreme Court review is also justified on the grounds that it provides states with the opportunity to justify their decisions on

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203. *See Adams*, 520 U.S. at 91; Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

204. Washington v. Schriver, 255 F.3d 45, 63 (2d Cir. 2001) (Calabresi, J., concurring).

205. *Id.*

adequate and independent state grounds.[206] The idea that states have an opportunity to justify decisions that may be considered federal questions on adequate and independent state grounds also applies in habeas review,[207] and provides another reason a state court decision should not be considered "adjudicated on the merits" where it is silent, or a summary order.

In general, state procedural default is a common "adequate and independent state ground" that will preclude federal courts from reviewing state court decisions on habeas review.[208] Yet, in cases where there was no procedural default, states should also have the opportunity to prosecute criminals under state laws, even where those laws overlap with federal laws. States are given the opportunity to enforce their own criminal laws and prosecute their own citizens for crimes committed in-state.[209] However, where a federal claim is brought that has not been resolved based on an "adequate and independent state ground," the prisoner has a right to have that claim litigated.[210] In a habeas context, then, where a state court has not mentioned the federal claim or the adequate and independent state law ground its decision was based on, there is no way for a federal court reviewing the petition to know if the prisoner's claim was actually considered on its merits under federal law. That decision cannot be considered "adjudicated on the merits" because the state court did not apply either federal law or its own laws. Instead, such a claim must be heard by some court to protect interests of fairness and justice, and it should be heard under a de novo standard of review, as if it had not ever been heard by the state. This treatment is only available under the pre-AEDPA standard.

Finally, on a more practical level, the Supreme Court has noted that one reason to encourage states to actually discuss their resolution of a federal question is that this discussion provides an appellate court with a more complete record.[211] In fact, the Supreme Court, in *Williams v. Taylor*, noted that federal habeas review courts should determine which clause of 28 U.S.C. § 2254(d) to apply by examining the state court decision—a task that cannot be accomplished where the state has provided no legal reasoning or discussion in its

206. *Adams*, 520 U.S. at 90-91.

207. Federal courts generally may not review habeas claims decided by a state court on state grounds that are "independent of the merits of the federal claim and an adequate basis for the court's decision." Harris v. Reed, 489 U.S. 255, 260 (1989) (citations and internal quotations omitted). Review is allowed, however, if the "last state court rendering a judgment" does not clearly state that its judgment is based on adequate and independent state grounds. *Id.* at 263.

208. *See supra* note 82 and accompanying text.

209. *See* Wilner, *supra* note 2, at 1447.

210. *See* Wilner, *supra* note 2, at 1447 n.29.

211. Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

decision.[212] The Court has also noted that when a state court's decision is "'an unexplained order (by which we mean an order whose text or accompanying opinion does not disclose the reason for the judgment)... , attributing a reason is... both difficult and artificial.'"[213] Thus, when habeas review is viewed as an appellate function of the judiciary, it is clear that a silent or summary state court decision should not be considered "adjudicated on the merits" because there is, in those situations, no record to which the appellate court may consider or defer. And, importantly, because most habeas petitions are handled pro se, availability of a record would be even more important to a reviewing court that will be asked to consider questions raised by a petitioner who may not have a clear or complete understanding of the criminal procedures in his state.

CONCLUSION

Despite the view of the majority of circuit courts, silent or summary state court decisions should not be considered "adjudicated on the merits." The writ of habeas corpus, and 28 U.S.C. § 2254 in particular, provide appellate review to state prisoners claiming their constitutional rights have been violated and that they are therefore being held in custody illegally. The federal system is structured so that even though the states have independent sovereignty and are bound to apply and enforce federal law, the federal courts are the final arbiters of how that law is to be interpreted, and whether it has been interpreted correctly in any given case. Federal habeas courts fall within this larger picture of federal judicial review power, and so the principles upon which that power is built should be considered in determining how habeas processes should work and how the habeas statute should be interpreted. Thus, "adjudicated on the merits" under 28 U.S.C. § 2254 must be defined to encompass state court decisions on only those federal claims for which a state court has actually provided some explanation of its decision. To define "adjudicated on the merits" as the majority of circuits do is to remove a crucial means of protecting the important individual rights our Constitution provides.

212. Williams v. Taylor, 529 U.S. 362, 406 (2000) (O'Connor, J., concurring, but delivering the opinion of the Court for Part II (except as to the footnote)); *see also* Washington v. Schriver, 255 F.3d 45, 53-54 (2d Cir. 2001).

213. *Washington*, 255 F.3d at 54 (quoting Ylst v. Nunnemaker, 501 U.S. 797, 802-03 (1991)).