AEDPA's Wrecks: Comity, Finality, and Federalism

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Over the last decade, federal courts have internalized the idea that interpretations of the Antiterrorism and Effective Death Penalty Act (AEDPA) should disfavor habeas relief. This Article explores the strange legislative history surrounding AEDPA's passage and the resulting problems in using "comity," finality, and federalism" to express this interpretive mood. It demonstrates that such a simplistic reading of habeas reform is deeply misguided. Through the use of public choice and related models, the Article explores the roots of this interpretive problem. It ultimately rejects any attempt to characterize AEDPA by reference to legislative purpose.

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I. INTRODUCTION

Bearing the scars of a ferocious half-century battle over habeas reform,[1] the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) has become less a legal text than a force of nature.[2] Over the last decade, federal courts have internalized the idea that AEDPA's legislative history supports an interpretive mood disfavoring habeas relief.[3] In *(Michael) Williams v. Taylor*, the United States Supreme Court announced that Congress intended for AEDPA to vindicate "principles of comity, finality, and federalism,"[4] and that proposition, which signals the interpretive mood I discuss, has become a sacred

1. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 381 (1996).
2. Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214, 1217-26 (1996) (codified in part at 28 U.S.C. §§ 2244-2267 (2000)).
3. *See infra* Part IV.
4. 529 U.S. 420, 436 (2000).

cow of modern habeas jurisprudence.[5] In this Article, I argue that judges should not invoke this interpretive mood, which appears so prominently in AEDPA jurisprudence.[6]

In Part II, I present an abbreviated history of habeas corpus and explore the interests that are implicated by collateral review of criminal adjudication. I provide readers unfamiliar with habeas law enough background to follow Parts III and IV, but otherwise I concentrate on three propositions. First, a specific statutory formulation is as much a limit on any animating purpose as it is an endorsement of it. Second, comity and finality do not support a general interpretive presumption in favor of government respondents. Third, comity and finality are not always mutually reinforcing interests.

In Part III, I argue that, contrary to the pronouncements of the federal judiciary, the 104th Congress did not "intend" comity, finality, and federalism—at least not in any way meaningful to interpreters of legal texts. All statutory language resides somewhere on a spectrum of determinacy, and wherever on that spectrum a provision lies, faithful statutory interpreters must disfavor extrinsic evidence of meaning that is not reliable. Specifically, they must discount extrinsic evidence that involves flawed observations about collective intent. Given what we know about AEDPA's legislative history, there is little support for the argument that courts should interpret AEDPA's ambiguities with any particular purposes in mind.

Part IV details the prominent role that these purposes nonetheless play in restricting relief. I sample a cross section of cases involving the

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5. Many Supreme Court opinions endorse this position. *See, e.g.*, Day v. McDonough, 547 U.S. 198, 208 (2006) ("The considerations of comity, finality, and the expeditious handling of habeas proceedings . . . motivated AEDPA . . . ."); Rhines v. Weber, 544 U.S. 269, 273-74, 276 (2005) (appealing indirectly to comity, finality, and federalism); Mayle v. Felix, 545 U.S. 644, 663 (2005) ("Given AEDPA's 'finality' and 'federalism' concerns, it would be anomalous to allow relation back under Rule 15(c)(2) based on a broader reading of the words 'conduct, transaction, or occurrence' in federal habeas proceedings than in ordinary civil litigation." (citations omitted)); Pliler v. Ford, 542 U.S. 225, 239-40 (2004) (Breyer, J., dissenting) (understanding the majority's decision to rest upon accommodation of comity, finality, and federalism); Woodford v. Garceau, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to further the principles of comity, finality, and federalism." (citations and internal quotation marks omitted)); Duncan v. Walker, 533 U.S. 167, 178 (2001) ("Petitioner's interpretation of the statute is consistent with AEDPA's purpose to further the principles of comity, finality, and federalism." (internal quotation marks omitted)).

6. While habeas scholarship has been critical of the way federal courts decide questions of AEDPA construction, it has failed to scrutinize the interpretive method common to those decisions. *See* Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 547 (2006).

most heavily litigated AEDPA provisions: the statute of limitations in 28 U.S.C. § 2244(d) and the substantive limit on relief in 28 U.S.C. § 2254(d), both of which apply only to state prisoners. The sample reveals the frequency, magnitude, and commonality of interpretive error that I describe in Part III. The sample also reveals a more alarming problem—that offending courts are constructing provisions in ways that undermine the very purposes that federal decisions erroneously invoke.

Collectively, these oversights expose the federal judiciary's systematic mistreatment of the 104th Congress's legislative mood. Courts seek to effectuate purposes that the legislature did not have, and they construct statutes in ways that undermine the very comity and finality that they so reflexively cite. By uncritically parroting flawed descriptions of legislative purpose, federal courts—particularly United States Courts of Appeals—erect unintended obstacles to habeas relief with alarming regularity.

II. DEVELOPMENT OF THE MODERN HABEAS REGIME

"Habeas corpus" is a Latin instruction to "produce the body."[7] The writ's function is to test the legality of the detention of one in the custody of another,[8] and its common law pedigree reaches across the Atlantic.[9] It is guaranteed against suspension in the United States Constitution.[10]

Congress statutorily authorized habeas relief in the Judiciary Act of 1789, but only for prisoners in federal custody.[11] To help superintend Reconstruction, Congress made the writ available to state

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7. WILLIAM BLACKSTONE, 3 COMMENTARIES *131. The full name for what is now the modern habeas writ, ordering a prisoner to be produced for release from illegal confinement, is "habeas corpus ad subjiciendum." *See* BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

8. *See* McNally v. Hill, 293 U.S. 131, 136 (1934).

9. Blackstone traces the writ back to 1305, during the reign of King Edward I. Habeas corpus, however, is not defined in a statute or the Constitution. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 445 n.6 (1963). The Supreme Court has further stated that "[t]o ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn." *McNally*, 293 U.S. at 136 (cited in Bator, *supra*, at 445 n.6).

10. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

11. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

prisoners in 1867.[12] Over the next century, the Court slowly broadened the scope of relief.[13] Most trace the genesis of the modern habeas regime to *Brown v. Allen*, a 1953 decision holding that federal courts had statutory jurisdiction to examine the *merits* of constitutional questions adjudicated pursuant to competent state procedure.[14]

A federal habeas petition is formally a civil postconviction complaint, with the ranking institutional officer as the named defendant.[15] A prisoner may challenge the constitutionality of either his conviction or his punishment and must satisfy different standards depending on the identity of the custodial sovereign.[16] In what immediately follows, I sketch the relationship between habeas doctrine and the interests that supposedly give AEDPA meaning.

A. AEDPA and the Common Law

AEDPA's antiterrorism and habeas provisions were a legislative pairing occasioned by national tragedy.[17] In 1995, shortly after Timothy McVeigh detonated a bomb at the Murrah Federal Building in Oklahoma City, Congress hitched habeas reform to antiterrorist legislation that few legislators dared oppose.[18] AEDPA imposed or fortified several obstacles to habeas relief,[19] although its provisions were hastily ratified and poorly cohered.[20]

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12. *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 ("[T]he several courts of the United States . . . shall have the power to grant writs of habeas corpus in *all* cases where any person may be restrained of his or her liberty in violation of the constitution [sic] . . . ." (emphasis added)). Specifically, Congress eliminated a proviso in section 14 of the Judiciary Act of 1789 that effectively barred federal courts from hearing claims from state prisoners. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. at 82.

13. For example, in *Ex parte Siebold*, the Court sanctioned the writ as a vehicle to challenge detention pursuant to an unconstitutional statute. 100 U.S. 371, 376-77 (1879).

14. 344 U.S. 443, 458-59 (1953).

15. *See* Yackle, *supra* note 1, at 403.

16. Although they are beyond the scope of this Article, individuals subject to confinement by a nonstate, nonfederal jurisdiction may file a habeas petition under § 2241, unless otherwise barred by statute (as is the case with enemy combatants subject to the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006). Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.A.); Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, § 1005, 119 Stat. 2680, 2740-44 (codified in relevant part at 28 U.S.C.A. § 2241(e) (2006)).

17. *See* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 270 & n.62 (2006).

18. *See* 142 CONG. REC. H3614 (daily ed. Apr. 18, 1996) (statement of Rep. Pelosi) (acknowledging the Oklahoma City bombing as the impetus for AEDPA).

19. Based largely on the recommendations of a special committee chaired by ex-Justice Powell (Powell Committee), AEDPA also enacted an opt-in schedule of "unitary review" applicable to state capital offenders. A state qualifies for expedited unitary review by

AEDPA codified many rules that were originally formulated by the judiciary. In response to the Warren Court's aggressive use of the writ as a vehicle to reform criminal procedure,[21] the Burger and Rehnquist Courts created or strengthened certain obstacles to relief: (1) the *Teague* retroactivity bar, (2) procedural default, (3) exhaustion, and (4) limits on successive petitions. In what follows I briefly discuss these bars, and the statute of limitations that AEDPA created for the first time.[22]

1. *Teague* and AEDPA's Substantive Limit on Relief

The *Teague*-bar denies those seeking collateral relief the benefit of a "new rule" of constitutional law that existing precedent did not dictate, subject to certain exceptions.[23] AEDPA repackaged the

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providing effective postconviction counsel to indigent offenders. While the unitary review procedures are useful in interpreting AEDPA's other provisions, no states have effectively opted into it. I explain the capital opt-in regime at greater length *infra* Part III.A.2.

20. Justice Souter has famously remarked that "in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting." Lindh v. Murphy, 521 U.S. 320, 336 (1997).

21. *See* Brent E. Newton, *A Primer on Post-Conviction* Habeas Corpus *Review*, CHAMPION, June 2005, at 16, 17 (citing Barker v. Wingo, 407 U.S. 514 (1972); Stovall v. Denno, 388 U.S. 293 (1967); Pate v. Robinson, 383 U.S. 375 (1966); Townsend v. Sain, 372 U.S. 293 (1963)); Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 397-98 (1983).

22. I cannot discuss all of AEDPA's provisions here, but I briefly note two others to convey the uniform magnitude and direction of statutory change. First, AEDPA heightened and formalized deference to state fact finding. 28 U.S.C. § 2254(d)(2) (2000) bars relief on a factual challenge unless the state proceedings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented [there]." Section 2254(e)(1) provides that a state determination of fact is presumed correct and that a petitioner may defeat such a presumption only by clear and convincing evidence. Section 2254(e)(2) sets forth the standards for introducing new facts in federal proceedings. Prior to AEDPA, the habeas statute listed a set of criteria for establishing a factual presumption. *See id.* § 2254(d) (1994). AEDPA eliminates any conditions for the presumption of factual correctness. *See* Yackle, *supra* note 1, at 388. Second, AEDPA created the certificate of appealability (COA). Prior to 1996, state prisoners needed a federal judge to issue a certificate of probable cause stating that one or more claims warranted appellate review, but federal prisoners needed no such permission. 28 U.S.C. § 2253. Under § 2253, a district court judge, circuit court judge, or Supreme Court Justice must issue a COA before a federal or state prisoner may appeal a district court decision. *Id.* § 2253 (2000).

23. Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion). The first exception is a new substantive rule, *id.* at 311, such as a bar on executing mentally retarded offenders. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002). The second involves a watershed rule of criminal procedure made applicable to convictions on collateral review. Graham v. Collins, 506 U.S. 461, 478 (1993) (explaining that the exception is limited to "a small core of rules," which enhance accuracy and "requir[e] observance of those procedures that . . . are implicit in the concept of ordered liberty" (internal quotation marks omitted)).

Teague-bar,[24] formerly an interpretive rule of nonretroactivity, as a substantive limit on relief.[25]

If AEDPA was a legislative bargain, then its sine qua non was § 2254(d), the substantive limit on relief applicable to state prisoners.[26] Prior to AEDPA, federal courts reviewed federal claims simpliciter (the pre-AEDPA statute, however, did require deference to state factual findings).[27] AEDPA precludes relief for state prisoners challenging questions of law unless they show that the state decision "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."[28]

2. Procedural Default

A prisoner may "procedurally default" his claim if it is not raised properly in state proceedings.[29] The procedural bar also applies when a state court rejects a constitutional claim on an adequate and independent state procedural ground, and the prisoner must be "excused" in order to press a defaulted claim in federal habeas proceedings.[30] Under Warren Court jurisprudence, a default was

24. As a technical matter, *Teague* still exists, and it applies in retroactivity contexts that the stricter language of § 2254(d) does not.

25. *See* 28 U.S.C. § 2254(d)(1) (2000). Section 2254(d) operates as a modified retroactivity rule for state prisoners, although it is more restrictive than *Teague* in two ways. First, § 2254(d) bars relief unless a state decision is unreasonable in light of law that is "clearly established"; *Teague* required only that the state decision not be dictated by precedent. 489 U.S. at 301. Second, § 2254(d) limits the authority that "clearly establishe[s]" the relevant law to Supreme Court decisions; *Teague* allowed federal courts to look to circuit precedent. *See* 28 U.S.C. § 2254(d)(1); 489 U.S. at 293-310.

26. *See* 28 U.S.C. § 2254(d)(1).

27. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 730 (1991). I avoid the term *de novo* because it incorrectly implies that prior to AEDPA, federal courts reviewed the adjudication of state courts. They decided the petition without respect to what the state court did. *Id.* (citing Fay v. Noia, 372 U.S. 391, 430 (1963)).

28. 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" clearly established law if the state court either applies a rule contravening the controlling case law or if it arrives at a decision inconsistent with that of a prior decision with materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 404-05 (2000). A state court decision is an "unreasonable application" of Supreme Court precedent if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08 (internal quotation marks omitted). A state court unreasonably applies clearly established law if its application is "objectively unreasonable." *Id.* at 409; *see infra* Part IV.B.

29. Under *Fay v. Noia*, the Court held that a claim would be procedurally defaulted in the event that the litigant had deliberately bypassed the state procedure. 372 U.S. at 438-39. After *Fay*, the Supreme Court dramatically expanded the scope of the State's procedural default defense, ultimately requiring the petitioner to show "cause and prejudice" to excuse his default. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

30. *See Coleman*, 501 U.S. at 729.

excused unless the petitioner "deliberately bypassed" the state procedure.[31] The Burger Court heightened the showing necessary to excuse default to a "cause and prejudice" standard.[32] The Rehnquist Court expressly applied that heightened standard to defaults in all phases of state procedure, including appeals.[33] Some commentators have inaccurately alluded to AEDPA's codification of "procedural default,"[34] but AEDPA actually did little to alter existing default doctrine.[35]

3. Abuse of the Writ and Successive Petitions

Common law writ administration originally permitted filing of successive petitions.[36] To address the problem created by frivolous filings, the courts eventually made an "abuse of the writ" defense available to government respondents.[37] A successful abuse of the writ showing required a federal court to dismiss a successive petition containing claims that the petitioner either previously litigated or abusively failed to raise in his initial petition.[38] While Congress had acknowledged the abuse of the writ defense in the federal habeas

31. *See* Townsend v. Sain, 372 U.S. 293, 317 (1963); *Fay*, 372 U.S. at 438.

32. *Wainwright*, 433 U.S. at 87.

33. *Coleman*, 501 U.S. at 750.

34. *See, e.g.*, Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. U. L.Q. 1679, 1715 n.259 (2005); Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1408 n.152 (2006).

35. *See* Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 312 (2003). Section 2254(e)(2) sets forth the standard for obtaining an evidentiary hearing on defaulted facts and the unitary review provisions set forth the procedural default provisions applicable to opt-in states.

36. *See* McCleskey v. Zant, 499 U.S. 467, 479-80 (1991). The common law also did not treat denial as res judicata. *See, e.g.*, *id.* at 479 (citing *In re* Kopel, 148 F. 505, 506 (S.D.N.Y. 1906); *Ex parte* Kaine, 14 F. Cas. 78, 80 (C.C.S.D.N.Y. 1853) (No. 7597)); WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 386, at 570 (2d ed. San Francisco, Bancroft-Whitney Co. 1893). Finally, the common law barred appellate review. *See McCleskey*, 499 U.S. at 479-80.

37. *See* Price v. Johnston, 334 U.S. 266, 292-93 (1948); Wong Doo v. United States, 265 U.S. 239, 240-41 (1924); Salinger v. Loisel, 265 U.S. 224, 232 (1924). The rationale for refusing res judicata effect eroded after Congress created inferior federal courts and as appellate tribunals increasingly reviewed writ denials.

38. During the 1960s, the Court held that deliberate abandonment of a claim during a prior proceeding (the same standard as for default) was a ground for finding abuse. *See, e.g.*, Sanders v. United States, 373 U.S. 1, 18 (1963) ("Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.").

statute,[39] until 1996 that defense's content was defined by the judiciary.[40]

AEDPA reconstituted the abuse of the writ defense as a jurisdictional bar to most successive federal petitions. A federal court must now dismiss any claim brought by a state prisoner that has already been litigated in a previous federal habeas petition.[41] With two exceptions, a federal court must also dismiss *new* claims in a successive petition.[42] The first exception permits any prisoner—state or federal—to present a claim premised on a new rule of constitutional law that the Supreme Court has expressly made retroactive to cases on direct review.[43] The second, an actual innocence exception, applies differently depending on whether the petitioner is in state or federal custody.[44] AEDPA established a gatekeeping role for circuit courts,

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39. 28 U.S.C. § 2244 (2000). Congress amended § 2244 to govern successive federal petitions in 1966. A prisoner was foreclosed from relief if "the legality of [his] detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined." *Id.* § 2244 (Supp. V 1969). Section 2244 was therefore a qualified res judicata rule, although it dealt only with claims that were the subject of a prior federal challenge. *See* S. REP. NO. 89-1797, at 2 (1966), *cited in McCleskey*, 499 U.S. at 487. Congress later revised § 2244 to prohibit a successive petition unless (1) it urged a new ground for relief and (2) that claim was neither deliberately withheld in a prior petition nor an abuse of the writ. *See* 28 U.S.C. § 2244(b) (1994). *McCleskey* discusses the specific changes to the structure of the statute. 499 U.S. at 486-87. This statute did not extinguish the judge-made abuse of the writ doctrine, and, despite § 2244's express reference to "abuse of the writ," the term's content remained statutorily undefined. The meaning is generally understood to be that articulated in *Sanders*. 373 U.S. at 15-16 ("Controlling weight may be given to denial of a prior application for federal habeas corpus . . . relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." (footnote omitted)).

40. In 1991, the Rehnquist Court broadened the abuse of the writ defense by analogy to procedural default, imposing a "cause and prejudice" rule for new claims presented in successive petitions for both state and federal prisoners. *See McCleskey*, 499 U.S. at 493-94. In 1976, Congress approved the current Rules Governing Habeas Proceedings. Rule 9(b) provides that a "second or successive petition may be dismissed if . . . it fails to allege new . . . grounds for relief and the prior determination was on the merits or, if new . . . grounds are alleged . . . the failure of the petitioner to assert [them previously] constituted an abuse of the writ." 28 U.S.C. § 2254. Rule 9(b), like its statutory counterpart, did not define *abuse of the writ* and instead incorporated the term's meaning as set forth in *Sanders*. Rose v. Lundy, 455 U.S. 509, 521 (1982) (plurality opinion).

41. 28 U.S.C. § 2244(b)(1) (2000).

42. *Id.* § 2244(b)(2)(A)-(B).

43. *Id.* § 2244(b)(2)(A).

44. State prisoners may bring claims with factual predicates that could not have been discovered through due diligence only if those facts, "proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.* § 2244(b)(2)(B). Section 2255 works the same way, except it

requiring that petitioners secure authorization from a circuit panel to file any successive petition.[45]

4. Exhaustion

Generally speaking, state prisoners must "exhaust" state judicial remedies before they apply for federal relief. Exhaustion was first formulated as a matter of discretion in *Ex parte Royall*,[46] but it quickly hardened into a fairly inflexible rule.[47] In 1948, Congress codified extant exhaustion doctrine.[48] Exhaustion is not a jurisdictional requirement, although courts sometimes treat it that way.[49] For an offender to exhaust a claim, he must fairly present its legal and factual bases in state court and must pursue all appeals to state appellate tribunals.[50] Prior to AEDPA, "mixed petitions," or petitions containing both exhausted and unexhausted claims, had to be dismissed for lack of exhaustion.[51]

AEDPA made two changes, each benefiting state respondents. First, prior to 1996, federal courts could discretionarily consider unexhausted claims.[52] AEDPA bars federal courts from considering unexhausted claims that are meritorious, but allows them to deny unexhausted claims that are frivolous.[53] Second, AEDPA imposed a clear statement rule requiring that for the state to waive the exhaustion requirement, it must expressly state its intent to do so.[54]

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contains no due diligence requirement. AEDPA narrowed the actual innocence "gateway" in two respects. Under *McCleskey*, prior to AEDPA, petitioners did not need to show cause for failing to present an innocence claim in a prior petition (or, in AEDPA terminology, show due diligence). *See* 499 U.S. at 494-95. And under *Schlup v. Delo*, prior to 1996, newly discovered evidence needed to demonstrate that innocence was "more likely than not," rather than satisfy AEDPA's stringent "clear and convincing" standard. 513 U.S. 298, 327 (1995).

45. 28 U.S.C. § 2244(b)(3).

46. *See* 117 U.S. 241, 251 (1886).

47. *See* Darr v. Burford, 339 U.S. 200, 210 & n.30 (1950) (discussing this evolution).

48. *Id.* Judge Parker, who chaired the committee examining the exhaustion provision, would have preferred another interpretation of the 1948 language that would have effectively precluded all federal review of state adjudications. *See* Yackle, *supra* note 21, at 411-12. The reviser's note states that "[t]his new section is declaratory of existing law as affirmed by the Supreme Court." H.R. REP. NO. 80-308, at A180 (1947).

49. *See* Yackle, *supra* note 21, at 415-18.

50. *See* O'Sullivan v. Boerckel, 526 U.S. 838, 842, 845 (1999).

51. *See* Rose v. Lundy, 455 U.S. 509, 522 (1982).

52. Granberry v. Greer, 481 U.S. 129, 131 (1987).

53. *See* 28 U.S.C. § 2254(b)(2) (2000). Federal courts retain the discretion to deny relief on the merits, despite the absence of exhaustion. This discretion was almost certainly retained because it allows federal courts to expeditiously dispose of unmeritorious claims without gratuitously requiring them to percolate through the state courts.

54. *Id.* § 2254(b)(3). This appears to overrule in part *Granberry*, 481 U.S. at 133.

5. Time Bars

AEDPA enacted a one-year statute of limitations for federal petitions.[55] The date on which the period commences depends on the nature of the claim asserted, but is generally the day the conviction and sentence become final on direct review.[56] The statute of limitations applicable to federal prisoners, also one year, appears in 28 U.S.C. § 2255.[57]

The statute of limitations is AEDPA's clearest expression of a finality interest, placing a temporal constraint on the ability of prisoners to challenge convictions.[58] Because the interest in having states consider claims first (comity) sometimes opposes the interest in adjudicating those claims quickly (finality), AEDPA tolls the statute of limitations during the pendency of state postconviction applications.[59]

B. Comity, Finality, and Federalism

I seek to make three points about the three purposes that are the subject of this Article. First, legislators understood the policy trade-offs that a particular statutory formulation involved, so AEDPA's text is as likely to limit a purpose as it is to express it.[60] Second, AEDPA jurisprudence has improperly abstracted comity, finality, and federalism to a level of generality that transforms those interests into a generalized presumption in favor of government respondents.[61] Third,

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55. 28 U.S.C. § 2244(d)(1).

56. Section 2244(d)(1) houses all of the trigger provisions:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. § 2244(d)(1)(A)-(D). These become important to my discussion *infra* Part IV.A.

57. 28 U.S.C. § 2255.

58. *See id.*; *id.* § 2244(d)(1).

59. *See id.* § 2244(d)(2).

60. *See* Yackle, *supra* note 1, at 417 n.121.

61. *See* Williams v. Taylor, 529 U.S. 420, 436 (2000).

because comity and finality can push in different directions, decisions will often promote one interest at the expense of the other.[62]

1. Finality

Habeas relief is collateral, and offenders seek it after their convictions have become final by the conclusion of direct review.[63] Any final punishment entails some epistemic and legal uncertainty.[64] Epistemic uncertainty is unavoidable in the sense that no court can actually be *certain* that a state of affairs—the crime and the requisite culpability for punishment—occurred.[65] Legal uncertainty persists if you believe that a legal ruling is correct *when* and only *because* a court says that it is.[66] Acceptance of uncertainty is essential to workable criminal justice administration because prisoners cannot be permitted to relitigate their convictions indefinitely.

Finality can compromise justice, so a desired state of finality implies a normative judgment about acceptable uncertainty.[67] For the same reason that criminal procedure cannot eliminate all uncertainty, our habeas law cannot logically be organized around any numeric concept of "correctness." Our legal regime instead ensures correctness by proxy of reliable procedure. Social acceptance of final judgment reflects the confidence in the institutions and procedures that produce it. Finality therefore matures as an interest only upon completion of some reliable quantum of process.[68]

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62. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 491 (1991).

63. *See* Goto v. Lane, 265 U.S. 393, 401-02 (1924). Of course, a "collateral" proceeding need not always involve a final judgment, but, in the habeas context, it usually does. The exception involves instances where habeas is asserted to challenge the custodial detention of a prisoner that was not convicted. The Guantanamo Bay litigation has involved several of these cases. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 511 (2004).

64. *See* Bator, *supra* note 9, at 446-47.

65. *See id.* at 447 ("A court cannot any more than any other human agency break down the barrier between appearance and reality. In short, the court can be wrong." (quoting Louis L. Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 966 (1957))).

66. *See* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 630-31 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608 (1958).

67. To illustrate my point using an extreme example, a regime that promoted finality at all costs would allow no postconviction review whatsoever.

68. Consider a state conviction that becomes final under AEDPA when the Supreme Court disposes of a direct appeal on certiorari or when the ninety-day certiorari period expires. In some states, a defendant may make typical habeas-type arguments (e.g., ineffectiveness of trial counsel) on direct appeal. In other states, that argument may not be available until a prisoner petitions for state postconviction relief. If finality is a threshold of

The general, directional observation that habeas reform promoted finality clarifies few of AEDPA's ambiguities. That insight might be more interpretively meaningful if Congress did not understand perfectly the interests with which finality competes. Where one interest obviously trades off with another, a specific textual formulation was as likely to represent a limit on an animating purpose as it is to represent an endorsement of it.

2. Comity and Federalism

When courts invoke comity and federalism, they frequently and improperly collapse two distinct concepts into a unitary interest in deference to state respondents.[69]

Comity is a concept that originated in international law.[70] Justice Gray wrote over a century ago: "The extent to which the law of one nation, as put in force within its territory . . . shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations'."[71] He continued, "'Comity' . . . is the recognition which one nation allows within its territory to . . . acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[72]

This concept took a circuitous route into habeas law.[73] The Constitution requires a state to give "full faith and credit" to the judicial rulings of another state.[74] The requirement that federal courts give preclusive effect to state rulings is, by contrast, imposed by the Act of May 26, 1790.[75] Courts limited the 1790 statute's sweeping language by reasoning that it merely applied extant principles of

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acceptable doubt that competent state procedure justifies, why does that interest depend, all other things being equal, on whether the claim is litigated on the direct appeal or on state postconviction review? I doubt that a satisfactory answer exists.

The conception of finality described herein reflects that of the intellectual movement that habeas reform incorporated. *See infra* Parts III.A, IV.C.

69. *See infra* Part III.

70. *See* United States *ex rel.* Trantino v. Hatrack, 563 F.2d 86, 103 (3d Cir. 1977) (Gibbons, J., concurring in part and dissenting in part).

71. Hilton v. Guyot, 159 U.S. 113, 163 (1895).

72. *Id.* at 163-64.

73. For a detailed discussion of this history, see *Trantino*, 563 F.2d at 101-04.

74. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

75. Ch. 11, 1 Stat. 122 (codified at 28 U.S.C. § 1738 (2000)).

international comity to the federal-state relationship.[76] None of this meant much for habeas until 1867, when Congress made the writ available to state prisoners.[77] Nineteen years later, in *Ex parte Royall*, the Court formulated the modern exhaustion requirement and in so doing, invoked the version of federal-state comity that was articulated as a limit to the 1790 Act.[78] Congress codified the exhaustion rule in 1948, and it remains a creature of statute today.[79]

Congress has incorporated common law doctrines that reflect comity, but it has never statutorily defined the term. As a result, there exists inevitable disagreement about what comity means. Despite such disagreement, the following statements seem indisputable. First, an interest in comity arises when a criminal judgment of a state court of competent jurisdiction becomes final.[80] Second, at least since *Brown v. Allen*, comity has not required categorical deference to a state court of competent jurisdiction.[81] Third, "Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief."[82]

While comity describes the deference one sovereign is to afford the judgments of another, federalism denotes authority diffused between state and national institutions.[83] Federalism, however, lacks any meaningful prescription.[84] Of course, the 104th Congress sought to balance federal intrusion into state criminal administration, but that conclusion implies nothing about what the proper balance is.[85] The

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76. *Ex parte* Royall, 117 U.S. 241, 250-54 (1886) (comparing the relationship of federal courts to state courts with their relationship to foreign nations).

77. *See supra* note 12 and accompanying text.

78. 117 U.S. at 253-54.

79. *See* 28 U.S.C. § 2254(b)-(c).

80. *See* D. Brian King, Note, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 N.Y.U. L. REV. 1373, 1407 (1989) ("[T]he granting of habeas relief . . . requires the federal courts to do great violence to comity by overturning the final judgment of a state court . . . .").

81. 344 U.S. 443 (1953).

82. O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999), *quoted in* Lawrence v. Florida, 127 S. Ct. 1079, 1088 (2007); Duncan v. Walker, 533 U.S. 167, 179 (2001); Williams v. Taylor, 529 U.S. 420, 437 (2000).

83. *See, e.g.*, Robert Justin Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 152-53 (2004) (arguing that constitutional federalism is a legislative phenomenon).

84. It is inaccurate to say that federalism is not a normative concept at all. Whether the interest is owned by a state or its citizens, the idea that the federal and state governments should share authority appears and persists in the various textual sources of constitutional power. *See, e.g.*, U.S. CONST. amend. X.

85. *See* Rhines v. Weber, 544 U.S. 269, 276 (2005) (stating that one of AEDPA's purposes is encouraging finality of state judgments).

observation that AEDPA promoted federalism is, at least in this respect, almost interpretively useless.[86]

Indeed, habeas interpretation has slowly reshaped textual and structural directives for shared authority into categorical mandates about how the sovereigns are actually to share it. For better or for worse, habeas decisions invoking federalism almost invariably do so in favor of state respondents.[87]

I have been unable to locate a habeas decision that carefully parses comity and federalism interests. The two terms describe different phenomena, but comity is by far the more clearly and frequently articulated interest.[88] I distinguish those two concepts only when the distinction matters.

3. Tension Between Purposes

Even though courts routinely cite comity and finality as mutually reinforcing interests, the two frequently oppose one another. The tension is apparent, for example, in the relationship between AEDPA's exhaustion provision and its statute of limitations.[89] The exhaustion requirement, perhaps the clearest expression of a comity interest, generally requires that state petitioners present the merits of their postconviction claims fully to state courts before a federal court will consider them.[90] The statute of limitations, the clearest expression of a finality interest, requires state offenders to file their federal petitions within one year of a final state court judgment, although the period is tolled while state petitions are "pending."[91]

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86. Federalism's prescriptive shortcomings have, at least in habeas cases, long been contested on the Court. In *Coleman v. Thompson*, the Court refused to infer a federal basis for a state summary appellate dismissal and therefore declined jurisdiction for want of a sufficient federal question. 501 U.S. 722, 750, 756-57 (1991). The opinion's preamble observed: "This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules [on federal habeas review]." *Id.* at 726. In dissent, Justice Blackmun chided the majority for assuming "that the purposes of federalism are advanced whenever a federal court refrains from reviewing an ambiguous state-court judgment." *Id.* at 759 (Blackmun, J., dissenting). He remarked that "[f]ederalism . . . has no inherent normative value: It does not, as the majority appears to assume, blindly protect the interests of States from any incursion by the federal courts." *Id.*

87. *See infra* Part IV.

88. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 83 (1977); Darr v. Burford, 339 U.S. 200, 204 (1950).

89. *See* 28 U.S.C. § 2254(b)-(c), 2244(d) (2000).

90. *Id.* § 2254(b). A federal court can, however, dismiss an unexhausted but facially nonmeritorious claim without remanding that claim to state court. *See id.* § 2244(b).

91. *Id.* § 2244(d)(1)-(2).

In other words, while exhaustion requires that state offenders litigate all collateral issues in state court before federal courts address them, the limitations bar caps the time available to do so. Federal courts might more expeditiously handle habeas cases without having to dismiss petitions containing unexhausted claims, but the interest in finality yielded to the interest in allowing states to decide all federal issues first.

III. AEDPA AND STATUTORY PURPOSE

AEDPA is a legal text, not a legislative impulse. Collective preferences do not translate frictionlessly into statutory language and the legislative process involves compromises that many voters never consider, let alone endorse.[92] Although AEDPA's language is indeterminate, many judges nevertheless decide cases consistent with what they consider an interpretively meaningful legislative mood.[93] This practice finds support neither in AEDPA's text nor in any theory of "legislative intent." In Part III.A I present the two tracks of legislative history that intersect at AEDPA. In Part III.B I explain why, in light of that material, widely accepted descriptions of Congress's intent are inaccurate.

At this point, I want to address what many consider to be a meaningful distinction between uses of legislative purpose—to defeat a plain meaning versus to provide extrinsic evidence as to what indeterminate text means. According to this reasoning, the former practice is wrong, but the latter is both commonplace and unavoidable.[94] Unfortunately, written laws do not conform to that wooden dichotomy; all statutory language lies somewhere on a continuum of determinacy. No matter where on the spectrum a provision sits, a rational statutory interpreter must disfavor unreliable evidence of textual meaning.[95]

A faithful statutory interpreter cannot legitimately effectuate perceived purposes where those perceived purposes involve flawed observations about collective intent. I remain agnostic as to a

92. *See, e.g.*, Yackle, *supra* note 1, at 426-27.

93. *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 178 (2001); Williams v. Taylor, 529 U.S. 420, 436 (2000).

94. *See* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:5, at 28-29 (7th ed. 2007) ("An overwhelming majority of judicial opinions considering statutory issues are written in the context of legislative intent.").

95. Algebraically phrased, perceived policy purposes merit interpretive consideration as a function of two variables—the determinacy of the contested text and the interpretive reliability of the purposes observed.

generally preferred method of statutory construction. I merely argue that however one feels about textualism in general, courts should discount the value of perceived congressional purposes as a means of interpreting AEDPA in particular.

A. AEDPA's Legislative History

AEDPA's legislative history is comprised of two discrete threads. The first, discussed in Part III.A.1, involves the substantive limit on relief from state custody—what is now 28 U.S.C. § 2254(d). The second, discussed in Part III.A.2, involves the procedural changes advanced by Senator Arlen Specter and an influential committee chaired by retired Associate Justice Lewis Powell.

1. The History of 28 U.S.C. § 2254(d)[96]

Section 2254(d) is the terminus of a five-decade legislative arc, bent to the will of shifting political coalitions.[97] The Warren-era reformers who sought to limit the writ's availability (restrictionists) became the Rehnquist-era defenders of the status quo, resisting Democratic initiatives to expand the scope of relief.[98] By supporting AEDPA, ardent restrictionists no doubt intended to shield state interests from federal incursion, but they sought decisive votes by moderating that purpose.[99]

In response to the 1867 Act—ratified to help superintend Reconstruction in the South—early restrictionists pursued two strategies, with the latter being less severe: (1) stripping federal courts of habeas jurisdiction over state decisions (jurisdiction-stripping) and (2) giving preclusive effect to state decisions touching on federal constitutional questions (preclusion).[100]

During the 1940s, a Judicial Conference of Senior Circuit Judges, chaired by Judge John J. Parker (the Parker Committee), drafted a model jurisdiction-stripping proposal.[101] Congress rejected it in favor

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96. Professor Larry W. Yackle has written three articles that together comprise an authoritative legislative history of habeas reform during the last half of the twentieth century. *See* Yackle, *supra* note 21, at 401-12; Yackle, *supra* note 1, at 422-43; Yackle, *supra* note 6, at 543-53.

97. *See* Yackle, *supra* note 1, at 422-43 (discussing the evolution of various restrictionist proposals).

98. *See* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2351-52, 2356 (1993).

99. *See* Yackle, *supra* note 6, at 555.

100. Bloom, *supra* note 34, at 1703.

101. *See* Yackle, *supra* note 98, at 2341.

of less severe procedural reform in 1948, although Judge Parker sought unsuccessfully to interpret the 1948 legislation as a jurisdiction-stripping statute.[102] *Brown v. Allen* repudiated Parker's position in 1953, affirming that federal courts could exercise independent judgment over federal constitutional questions adjudicated by a competent state court.[103] After *Brown*, most serious restrictionist efforts focused on preclusion, rather than on jurisdiction-stripping.[104] For the balance of the 1950s, restrictionists were unable to overcome the steadfast opposition of the defiant Senate majority leader, Lyndon B. Johnson.[105]

Subsequent preclusion proposals built on the scholarship of Professor Paul M. Bator, who believed that federal courts should not disturb convictions and sentences imposed pursuant to competent state process.[106] In a famous 1963 *Harvard Law Review* article, Professor Bator laid out his "full and fair" model for habeas corpus, which argued persuasively that federal courts should refrain from reviewing state adjudications that were not procedurally infirm.[107] Under this model, relief would not issue for prisoners whose claims may have been resolved in derogation of their constitutional rights.[108] In 1964, the Parker Committee backed a "full and fair" proposal,[109] and one

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102. *See id.*

103. 344 U.S. 443, 463-65 (1953).

104. In fact, Parker model texts may have been introduced as many as six times. Motion for Leave To File Brief & Brief Amici Curiae of Benjamin R. Civiletti et al. in Support of the Respondent, Wright v. West, 505 U.S. 277 (1992) (No. 91-542), 1992 U.S. S. Ct. Briefs LEXIS 193, at *22.

105. *See* Yackle, *supra* note 98, at 2344 n.55.

106. *See* Bator, *supra* note 9, at 466.

107. *Id.* at 455. Bator probably got the "full and fair" term from *Ex parte Hawk*, which stated:

> Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. But where resort to state court remedies has *failed to afford a full and fair adjudication of the federal contentions raised*, either because the state affords no remedy or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, a federal court should entertain his petition for habeas corpus, else he would be remediless. In such a case he should proceed in the federal district court before resorting to this Court by petition for habeas corpus.

321 U.S. 114, 118 (1944) (citations omitted) (emphasis added).

108. *See* Bator, *supra* note 9, at 466. Professor Bator was not proposing reform; his article was primarily an assessment of the meaning of the Suspension Clause and the extant habeas statute.

109. The specific Parker Committee bill would have restricted federal habeas jurisdiction to the consideration of those federal questions that (1) were not yet raised and

such proposal reappeared alongside jurisdiction-stripping provisions in the 1968 Omnibus Crime Control and Safe Streets Act.[110] None of these bills garnered the necessary votes.[111]

By 1973, an ambitious Nixon Assistant Attorney General, William H. Rehnquist, emerged as a vocal restrictionist.[112] Senator Roman Hruska introduced the Justice Department's "full and fair" proposal, but it never reached the Senate floor.[113] Restrictionists followed Rehnquist into the courts, seeking via litigation what they had, for several decades, been unable to obtain in Congress.[114] The shift in institutional focus was shrewd, as the Court imposed several nonstatutory obstacles to relief during Rehnquist's judicial tenure.[115] These obstacles included more stringent rules for abuse of the writ, procedural default, and exhaustion, as well as the *Teague* retroactivity bar.[116]

Although they retained "full and fair" terminology, Reagan-era restrictionists moderated the centerpiece of Bator's model—emphasis on state process.[117] The Reagan Justice Department altered the proposed statutory commentary to state that, despite "full and fair" language, habeas relief would remain available to correct even procedurally sound state adjudication.[118] Republicans introduced a number of these proposals[119] and, although two of them passed the Senate, all ultimately failed.[120]

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determined, (2) were not afforded a fair and adequate opportunity to be raised and determined, and (3) were not capable of being subsequently raised and determined by a state court. *Applications for Writs of Habeas Corpus and Post Review of Sentences in the United States Courts*, 33 F.R.D. 363, 369-70 (1963).

110. The Republicans again tried to resuscitate the Parker model text in 1968 and paired it with provisions that would withdraw federal courts' subject matter jurisdiction over claims by state prisoners entirely. S. 917, 90th Cong. § 702 (1968) ("[N]either the Supreme Court nor any inferior court ordained and established by Congress . . . shall have jurisdiction to reverse, vacate, or modify any [final] judgment of a State court . . . ."). The attempt to append these provisions to the Omnibus Crime Control and Safe Streets Act inspired substantial opposition, and they were withdrawn. Yackle, *supra* note 1, at 425 (citing 119 CONG. REC. 2221 (1973); 114 CONG. REC. 11234, 14181-84 (1968)). Senators Ervin and McClellan sponsored this language. S. 917.

111. Yackle, *supra* note 1, at 425.

112. *See id.* (citing Letter from William H. Rehnquist, Assistant Attorney General, to J. Edward Lumbard, Circuit Judge (Aug. 20, 1971)).

113. Yackle, *supra* note 1, at 425-26.

114. *See supra* Part II.A.

115. Yackle, *supra* note 98, at 2355-57.

116. *Id.* at 2355-57, 2382.

117. Yackle, *supra* note 1, at 426-28.

118. *See id.* at 427-28.

119. *See id.* at 427 n.152 (citing *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong.

The most restrictive approaches provoked not only Democratic responses, but also more moderate Republican bills. Senator Arlen Specter introduced legislation, discussed in Part III.A.2, that omitted any "full and fair" language and preserved broader federal authority to reconsider constitutional questions competently adjudicated in state court.[121] More heavily emphasizing the interest in finality than in comity, Specter did not seek to radically alter the preclusive effect of state decisions.[122] Before AEDPA, Senator Specter managed to push his reform model through the Senate once, but it perished in conference.[123]

In 1991, Republican House Manager Henry Hyde introduced an amendment to a Democratic habeas reform bill.[124] The Hyde Amendment stipulated that state adjudication was not "full and fair" if it "was contrary to or involved an arbitrary or unreasonable interpretation or application of clearly established Federal law" or if it "involved an arbitrary or unreasonable determination of the facts in light of the evidence presented."[125] This "unreasonableness" phrasing now appears in § 2254(d).[126] The Hyde Amendment failed in spite of its less restrictive overtures, as the House passed a Democratic proposal that omitted the "full and fair" formulation entirely.[127]

Just as legislative efforts to restrict the writ's availability were approaching futility, two significant developments broke the half-century congressional standoff. In 1994, Newt Gingrich and his

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153-54 (1991) (statement of Andrew G. McBride, Assoc. Deputy Att'y Gen., Dep't of Justice); H.R. REP. NO. 102-242, 394 (1991)).

120. *See* Yackle, *supra* note 1, at 427-28 (citing S. 1763, 98th Cong. (1984)); 137 CONG. REC. S8660-61 (daily ed. June 26, 1991). One proposal read, "[A] state adjudication would be full and fair . . . if . . . the factual determination of the state court, the disposition resulting from its application of the law to the facts, and its view of the applicable rule of federal law were reasonable." *The Habeas Corpus Reform Act of 1982*: Hearing on S. 2216 Before the S. Comm. on the Judiciary, 97th Cong. 98 (1982) (analysis of bill text).

121. Yackle, *supra* note 1, at 429-30 (citing H.R. 5269, 101st Cong. (1990); H.R. REP. NO. 101-681 (1990)).

122. I discuss Senator Specter's purposes at greater length *infra* Part III.A.2.

123. *See* S. 19, 102d Cong. (1991); 137 CONG. REC. S620 (daily ed. Jan 14, 1991); *see also* Yackle, *supra* note 1, at 430 (noting the Specter bill's failure to emerge from conference).

124. Yackle, *supra* note 1, at 430-32.

125. 137 CONG. REC. H7996 (daily ed. Oct. 17, 1991).

126. 28 U.S.C. § 2254(d)(1)-(2) (2000).

127. *See* Yackle, *supra* note 1, at 432 (citing H.R. 3371, 102d Cong. (1991)). That Democratic proposal met with the same fate as its Republican counterparts, falling victim to a Senate filibuster after it emerged from conference. Unsuccessful cloture votes can be found at 138 CONG. REC. S3943-44 (daily ed. Mar. 19, 1992), and 137 CONG. REC. S18615-16 (daily ed. Nov. 27, 1991).

"Contract with America" Republicans seized control of Congress.[128] And in 1995, the Oklahoma City bombing created a political climate that allowed Republicans to append habeas reform to antiterrorism legislation.[129]

In the 104th Congress, Representative Christopher Cox introduced a House amendment to a Republican-sponsored bill that contained no "full and fair" language, but otherwise tracked the Hyde Amendment's structure.[130] The Cox Amendment forthrightly stated that relief would not be granted except in three general circumstances, and one such circumstance was an arbitrary or unreasonable decision on questions of federal constitutional rights.[131] Facing accusations that his amendment was a disguised "full and fair" provision, Representative Cox's response clarified two things. First, he emphasized that unreasonable—not just arbitrary—decisions could be overturned.[132] Second, he denied any intent to compound the procedural obstacles elsewhere in the legislation.[133] These moderating clarifications captured the decisive votes in the House.[134]

Despite the success of the Cox Amendment, AEDPA ultimately incorporated the Senate bill, S. 623, which was even less restrictive.[135] Senator Orrin Hatch had submitted a "full and fair" proposal,[136] but he needed Senator Specter's thirty-four votes for more moderate procedural reform.[137] The two developed a compromise bill,[138]

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128. *See* Yackle, *supra* note 1, at 433.

129. *See supra* note 18 and accompanying text.

130. The Cox Amendment read:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was decided on the merits in State proceedings unless the adjudication of the claim—(1) resulted in a decision that was based on an arbitrary or unreasonable interpretation of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; (2) resulted in a decision that was based on an arbitrary or unreasonable application to the facts of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; or (3) resulted in a decision that was based on an arbitrary or unreasonable determination of the facts in light of the evidence presented in the State proceeding.

141 CONG. REC. H1424 (daily ed. Feb. 8, 1995).

131. *Id.* The reference to "arbitrary" state court decisions was dropped when a similar bill was introduced into the Senate. *See* S. 623, 104th Cong. § 5 (1995).

132. *See* 141 CONG. REC. H1426 (daily ed. Feb. 8, 1995).

133. *See id.*

134. *See* Yackle, *supra* note 1, at 435.

135. *Id.* at 435-37.

136. *See* S. 3, 104th Cong. § 508 (1995).

137. *See* Yackle, *supra* note 1, at 435-36.

discussed immediately below, and Hatch deactivated his proposal.[139] The compromise bill abandoned Hatch's "full and fair" formulation.[140]

After forging a Republican coalition for the substantive limit on relief, the Republican-controlled Senate Judiciary Committee tasked its staff lawyers to draft the rest of the legislation.[141] The drafters pored through fifty years of failed bills and Supreme Court language, cobbling together various restrictive formulations.[142] The drafters did not solicit meaningful input from Democratic lawyers, nor did the process yield many reliable legislative artifacts, such as committee hearings.[143] When it arrived for floor debate, S. 623 combined Specter's procedural reform, discussed in Part III.A.2, with the substantive limit on relief that is now § 2254(d).[144] The Senate antiterrorism bill, S. 735, simply annexed S. 623.[145]

Like the Cox Amendment, S. 735 omitted a "full and fair" formulation and allowed federal courts to exercise independent judgment on federal constitutional questions.[146] Senator Biden balked, suspecting that the "unreasonableness" standard was a disguised "full and fair" rule.[147] He sought and obtained express assurances that it was not.[148] The quantum of deference state decisions are owed under § 2254(d) is impossible to glean from his exchanges with the sponsors, or from President Clinton's signing statement, but the *direction* of the concession is unmistakable.[149] By eliminating the controversial

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138. *See* S. 623, 104th Cong. (1995).

139. *See* Yackle, *supra* note 1, at 435-36.

140. *Id.* at 436.

141. *See* Yackle, *supra* note 6, at 546.

142. *See id.*

143. *See id.*

144. *See id.*; 28 U.S.C. § 2254(d) (2000).

145. *See* Yackle, *supra* note 6, at 546.

146. S. 735, 104th Cong. § 704 (1995). Mindful of Rep. Cox's explanation of "arbitrary or unreasonable" and faithful to a rule against surplusage, the compromise bill dropped the reference to "arbitrary" state decisions, leaving no doubt that the unreasonableness of a state decision would be the touchstone of any federal relief. After eliminating the "arbitrary" verbiage, the Hatch/Specter proposal was able to incorporate the interpretation and application provisions in a single provision. *See* 28 U.S.C. § 2254(d)(1).

147. *See* Yackle, *supra* note 1, at 438-39 & n.187; *see also* 141 CONG. REC. S7843 (daily ed. June 7, 1995) (statement of Sen. Biden) ("[T]hrough the years we have fought . . . over the so-called full and fair standard. . . . This provision suggested by my Republican friends essentially [is] the same thing . . . .").

148. *See* Yackle, *supra* note 1, at 439-40 (characterizing Sen. Specter's clarification of deference as "flexible").

149. Senator Hatch insisted the proposal did not require federal "deference" to any procedurally adequate state adjudication. In other words, all Hatch's statement does is clarify that the federal judiciary retains some authority to review the merits of state decisions involving constitutions, but it does not clarify how much. He has said, in the same breath,

reference to "arbitrary" decisions present in the Cox Amendment and by assuring skeptics that the "unreasonableness" standard did not impose the same limit implied by first-generation "full and fair" proposals, the sponsors moderated § 2254(d) to get S. 735 through the Senate.[150]

Figure 1 summarizes the legislative events influencing the language that now appears in § 2254(d). Although this subpart serves primarily to predicate those that follow, at least one observation about the summary jumps off of the page. Every time a restrictionist coalition sought decisive votes in either house of Congress, it had to moderate its proposed substantive limit on relief.

Figure 1

Proposal	Description	Change from Legislative Predecessor
1964 Parker Proposal/1968 Omnibus Crime Act/Nixon Administration Proposals	"Full and fair" models that restrict review of procedurally adequate state adjudications	Shifts focus from jurisdiction-stripping to preclusion proposal
Reagan Administration Proposals	"Full and fair" language with independent review preserved in commentary	Carves out authority for independent review in commentary
Hyde Amendment	"Full and fair" language with independent review preserved in the enumerated exceptions	Moves guarantee of independent review into statutory text
Cox Amendment	Substantive equivalent of Hyde Amendment, no "full and fair" language	Construes "arbitrary or unreasonable" to establish "reasonableness" as the touchstone of deference
Hatch/Specter Proposal	Same as Cox Amendment, eliminating reference to arbitrary state proceedings	Eliminates "arbitrary"

that "this standard essentially gives the Federal court the authority to review [decisions] de novo," and that if "the State court has reasonably applied Federal law it is hard to say that a [sufficient] defect exists." 141 CONG. REC. S7848 (daily ed. June 7, 1995). Senator Specter's remarks are no more enlightening. *Id.* S7481-82. These seemingly conflicting formulations—de novo and reasonableness—tell us very little about the quantum of deference § 2254 prescribes. President Clinton's signing statement is also uninformative, stating that he expected courts to construe § 2254 to preserve "independent [f]ederal court review of constitutional claims." Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630-31 (Apr. 24, 1996).

150. *See* Yackle, *supra* note 1, at 438-41.

2. The History of Procedural Limits on Relief

In 1989, Chief Justice Rehnquist chartered a committee chaired by retired Associate Justice Lewis Powell (Powell Committee) to consider "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality in capital cases in which the prisoner had or had been offered counsel."[151] Subsequent reform proposals, both Democratic and Republican, usually packaged the Powell Committee proposal with various other reform measures.[152]

Under the Federal Constitution, defendants must have effective counsel on trial and appeal.[153] Under federal statute, offenders are entitled to counsel in federal postconviction proceedings.[154] There is no federal requirement that offenders have effective counsel during any state collateral review. The Powell Committee determined that the absence of effective counsel in state postconviction proceedings compounds problems stemming from a capital offender's natural preference for protracted litigation.[155] The centerpiece of the Powell

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151. *Judicial Conference of the U.S., Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases, Comm. Rep. and Proposal* 3 (Aug. 23, 1989), *reprinted in Habeas Corpus Legislation: Hearings on H.R. 4737 H.R. 1090, H.R. 1953, and H.R. 32584 Before the H. Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 46 (1990) (internal quotation marks omitted) [hereinafter *Powell Committee Report*].

152. *See, e.g.*, S. 635, 102d Cong. (1991); H.R. 1400, 102d Cong. (1991).

153.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI; *see also* Gideon v. Wainwright 372 U.S. 344-45 (1963) (requiring effective assistance at trial); Douglas v. California, 372 U.S. 353, 356 (1963) (requiring effective assistance on appeal).

154. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4393-94, *repealed by* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 192, 231 ("[Indigent capital defendants in federal habeas cases] shall be entitled to the appointment of one or more attorneys . . . .").

155. The *Powell Committee Report* states that there are

> serious problems with the present system of collateral review. These may be broadly characterized under the heading of unnecessary delay and repetition. The lack of coordination between the federal and state legal systems often results in inefficient and unnecessary steps in the course of litigation. Prisoners . . . often spend significant time moving back and forth between the federal and state systems in the process of exhausting state remedies.
>
> . . . .
>
> The Committee's proposal is aimed at achieving this goal: Capital cases should be subject to one complete and fair course of collateral review in the state

Committee recommendations was therefore a quid pro quo for death penalty states—provide effective postconviction counsel during state proceedings and, in return, qualify for expedited review (unitary review).[156] The Powell Committee assumed that federal courts would retain broad authority to review the merits of federal claims[157] and that every litigant would get one full round of competently represented federal postconviction litigation.[158]

The Powell Committee assumed that states would have a natural incentive to provide effective counsel because states would prefer unitary review. Aside from a single case in Arizona,[159] no state has ever opted into the unitary review procedures because the Senate stapled the Powell Committee recommendations to "ordinary" (nonunitary) procedural rules that were almost as favorable to state respondents as were the unitary review provisions.[160] Unitary review therefore offers states little incremental benefit. By pairing unitary review with such restrictive run-of-the-mill provisions, Congress gutted the quid pro quo at the heart of the Powell Committee opt-in recommendations.[161]

The nonopt-in procedural provisions (those not limited to capital prisoners in qualified states) first appeared in the House and Senate bills for the Comprehensive Violent Crime Control Act.[162] With respect to these provisions, Arlen Specter emerged as the pivotal figure

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> and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant. When this review has concluded, litigation should end.

Powell Committee Report, *supra* note 151, at 47, 51.

156. *Id.* at 50-53.

157. *See* Yackle, *supra* note 1, at 428 n.155.

158. The *Powell Committee Report* expressly states that "[t]his subchapter rests on the assumption that every state prisoner under capital sentence should have one opportunity for full state and federal post-conviction review before being subject to execution." *Powell Committee Report*, *supra* note 151, at 60.

159. *See* Spears v. Stewart, 283 F.3d 992 (9th Cir. 2002).

160. *See* Blume, *supra* note 17, at 260 ("Today, almost nine years after AEDPA came into effect, not a single state has successfully opted in to the special capital case procedures that AEDPA's drafters were so proud of.").

161. The Patriot Act has shifted certificatory responsibilities to the Attorney General. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 507, 120 Stat. 192, 250 (2006) (codified at 28 U.S.C.A. § 2265(c)). As of this Article's publication date, that change has not produced any additional opt-ins.

162. H.R. 3371, 102d Cong., tit. XI (1991); S. 1241, 102d Cong., tit. XI (1991); S. 1151, 102d Cong., tit. II (1991); S. 19, 102d Cong. (1991); S. 1225, 101st Cong., tit. II (1989); H.R. 2709, 101st Cong., tit. VI (1989). In the 101st Congress, the habeas provisions were dropped in the Conference Report. Yackle, *supra* note 1, at 430. The 102d Congress conference bill incorporated the House provisions, but the legislation did not pass. *Id.* at 432.

in the post-Powell Committee era. Even though he could not convince the 103rd Congress to consider formally his reform proposal, he would later enroll S. 623 as the "Federal Habeas Corpus Reform Act" in the 104th Congress and, together with Senator Hatch, would build the legislative coalition necessary to pass it.[163]

In drafting his proposal, Senator Specter was far more concerned with the finality of criminal punishment than he was with comity. Although he was satisfied with the "unreasonableness" standard that had achieved a legislative consensus in the parallel debate over the substantive limit to be placed on relief, he had explicitly opposed substantive limits on relief during the early 1990s.[164] The Specter camp's reform objectives were two-fold: to implement the Powell Committee recommendations and to codify the non-*Teague* procedural obstacles to relief discussed in Part II.A.[165]

B. AEDPA and Congressional Purpose

The proposition that the 104th Congress "intended" comity, finality, and federalism is not useful to interpreters of AEDPA's text; nor is the abstract idea that AEDPA expresses some "restrictionist" mood. That is not to say that certain legislators did not have precisely such motives, but it is to say that such observed preferences are not reliable evidence of what AEDPA should mean to an interpreter of statutory text.

Canonically presented in Hart and Sacks's legal process scholarship,[166] purposivism is an interpretative practice strongly identified with the Warren Court and post-New Deal jurisprudence.[167] Purposivism admits to the bounded nature of human knowledge and foresight—to the idea that Congress cannot anticipate all questions of interpretation and application that arise under a statute.[168] A

163. Yackle, *supra* note 1, at 435-36.

164. 139 CONG. REC. S15738 (daily ed. Nov. 16, 1993) (statement of Sen. Specter).

165. Yackle, *supra* note 1, at 440-42.

166. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1410-17 (1994) (explaining an interpretive method whereby courts determine a statute's objective purpose on the assumption the statute was formulated by reasonable legislators acting reasonably).

167. *See* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 408 (2005) (noting the prevalence of purposivism on the early Warren Court); Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 456 (2005) ("From the 1950s until the 1970s . . . the interpretive conventions associated with [purposivism] dominated American jurisprudence.").

168. Nelson, *supra* note 167, at 458.

purposivist judge, therefore, implements statutory text in light of the enacting Congress's generalized intent, seeking to promote the "spirit" of the law.[169] "New textualists," such as Associate Justice Antonin Scalia and Judge Frank Easterbrook, provide the modern counterpoint to Warren-era purposivism, rejecting the idea that statutory text is mere evidence of a legislative purpose that a judge is to effectuate.[170] For new textualists, the statutory text *is* the law.[171]

I do not stake out a position in this debate. I assume, arguendo, that under certain conditions a court may legitimately effectuate an atextual statutory purpose. I do this in part because I doubt the clean distinction between textualism and purposivism that my brief summary might suggest.[172] More importantly, however, my self-imposed neutrality allows me to focus on the narrower argument that courts abuse purposivist method as they interpret and apply AEDPA. Specifically, I maintain that (1) atextual purposes cannot, by definition, be evident from AEDPA's text; (2) extrinsic evidence of AEDPA's purposes is unusually sparse; (3) habeas outcomes are subject to several evaluative criteria, a circumstance that impairs preference aggregation; (4) agenda control weakens the correlation between textual outcomes and majority purpose; and (5) the most credible theories of legislative intent—"marginal legislator" models—belie favored generalizations about AEDPA's purposes.

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169. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

170. *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part) ("The principle of our democratic system is not that each legislature enacts a purpose, independent of the language in a statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshot by expanding or ignoring the statutory language as changing circumstances require."); NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 294 (7th Cir. 1992) (Easterbrook, J.) ("We must determine what Congress meant *by what it enacted*, not what Senators and Representatives said, thought, wished, or hoped."); Walton v. United Consumers Club, Inc., 786 F.2d 303, 310 (7th Cir. 1986) (Easterbrook, J.) ("The invocation of disembodied purposes, reasons cut loose from language, is a sure way to frustrate rather than implement [statutory] texts."); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 256, 258-61 (David M. O'Brien ed., 2d ed. 2004) ("The text of the statute—and not the intent of those who voted for or signed it—is the law.").

171. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM L. REV. 70, 74-75 (2006) ("Textualists give precedence to *semantic context*. . . ."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 4 (2006) ("Textualists . . . purport to use extratextual factors only *before* arriving at a statute's clear meaning, and never to contradict that clear meaning.").

172. *See* Manning, *supra* note 171, at 78-91.

1. Textual Constraints

Some statutes expressly authorize courts to effectuate their purposes. For example, the Age Discrimination in Employment Act provides that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."[173] The Religious Land Use and Institutionalized Persons Act states that it be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[174] AEDPA contains no such statutory directive; if AEDPA authorizes courts to effectuate comity, finality, and federalism in habeas cases, then its text does not furnish that authority. AEDPA's provisions express a "general purpose" to restrict the writ, but AEDPA does not authorize judges to exceed the textual limits on that restriction.[175] AEDPA's substantive standard for relief embodies the classic tension between a statute's general purpose and that of its intrinsic limitation. In Justice Scalia's colloquial phrasing:

> [T]he limitations in a statute adopted by the legislature are as much a part of its purpose as is the general purpose . . . . No legislature pursues a general purpose at all costs; there are always some limitations, "We're willing to do it up to here, but no further." And so to look at the broad purpose . . . is simply to beg the question. It's to assume the answer. It's to assume that the limitation was not intended because it would limit the purpose, but that's the whole issue.[176]

A legislative purpose is like a geometric vector.[177] Its value is represented by direction (a preference) and length (an intensity).[178] While a provision's text might disclose a particular purpose's direction,

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173. 29 U.S.C. § 626(c) (2000).

174. 42 U.S.C. § 2000cc-3(g) (2000).

175. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101-108, 110 Stat. 1214, 1217-26.

176. Video: Justices Breyer and Scalia Converse on the Constitution (American Constitution Society for Law and Policy 2006), *available at* http://www.acslaw.org/node/3909; *see also* Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed . . . is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

177. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63 (1988) ("[L]aw is like a vector. It has length as well as direction. We must find both, or we know nothing of value. To find length we must take account of objectives, of means chosen, and of stopping places identified.").

178. *See id.*

its length—and therefore value—can only be known by reference to the value of the other purposes with which it competes.

AEDPA's text can tell judges which purposes compete, but not which ones win. The "essence of legislative choice" involves the various ways institutional bodies limit certain objectives to accommodate others.[179] The best evidence of the length of the various vectors—the interpretive value of a "purpose"—is the text of the statute itself. If one were to accept that the legislature in fact agreed on certain purposes, the text of the statute does not explain how those purposes reciprocally limit one another. By citing to generalized purposes, courts decide the relative intensities of competing purposes where the legislature has declined to do so.[180]

2. Evidentiary Constraints

If statutory text cannot self-disclose the proper balance between competing purposes, the question becomes whether another interpretive theory authorizes judges to effectuate some of those purposes but not others. Intentionalist theories often require, as an evidentiary predicate, information about the preferences of many group members.[181] Without evidence of legislators' preferences, judges can only guess as to how to aggregate them.[182] AEDPA's legislative history lacks evidence sufficient to extract a generalized purpose to promote comity, finality, and federalism.

During § 2254(d)'s five-decade gestation, those advocating a limit on relief conceived of it varyingly as a bar to federal jurisdiction, a rule of claim preclusion, and a substantive limit on relief.[183] Although the 104th Congress surely housed supporters of each type of restriction, there is no record of who or how many favored which one—let alone with what intensity. The only evidence we do have is that the marginal legislators seemed to favor the most moderate forms.[184] Various high-profile sponsors and opponents conducted an exercised debate on the chamber floors, but such exchanges reveal little about why *other* legislators may have voted for a particular formulation.

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179. *See id.*

180. *See id.* at 63-64.

181. *See* WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND STATUTORY INTERPRETATION 216-17 (2000).

182. *See id.*

183. *See supra* Part III.A.1.

184. *See infra* Part III.B.5.

Even more troublesome is the interpretive practice of cross-applying § 2254(d)'s (erroneously) inferred purpose to other AEDPA provisions. Senator Specter's procedural reforms, for example, were simply not formulated to promote comity or federalism; they were designed to expedite litigation.[185] Similarly, the Powell Committee opt-in regime was designed expressly to expedite review and, correspondingly, to encourage states to provide competent counsel for capital offenders during state postconviction proceedings.[186] Courts should not treat other reform threads as consistent with the purposes of § 2254(d). Otherwise, there is no basis for reading them as authority for effectuating atextual interests in comity and federalism.

3. Multi-Peaked Preferences

"Public choice" scholarship, a branch of economic theory analyzing how decision-making groups select among competing alternatives, has struck at purposivism's core. Public choice theory's fundamental insight, which derives from Kenneth Arrow's famous "Impossibility Theorem,"[187] is that groups do not necessarily have stable, determinate preferences.[188] Arrow's theory applies even if we assume, counterfactually, that we know the specific preferences of the individual legislators.

Arrow's insight has to do with the intransitivity of group preferences. *Transitive* preference ordering exhibits familiar inequalities—if a person prefers Outcome *A* to Outcome *B* and also

185. *See supra* Part III.A.2.

186. *See supra* notes 157-164 and accompanying text.

187. Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328, 339-46 (1950). It was originally popularized in his 1951 book, *Social Choice and Individual Values*. Arrow was a Nobel Prize-winning economist, and his theorem exhibits a degree of logical rigor that is not appropriate for this discussion. Specifically, Arrow shows that no voting system can satisfy a certain set of criteria when voters can choose from more than two options. *Id.* at 340. These criteria are (1) unrestricted domain or universality, (2) nonimposition or citizen sovereignty, (3) nondictatorship, (4) monotonicity, and (5) the independence of irrelevant alternatives. *Id.* at 336-39. Without going into burdensome detail that does not aid my discussion, suffice it to say that Arrow's theorem shows that if there are at least two people and at least three options to choose from, there is no voting system, or system aggregating individual preferences, that can satisfy all of these conditions. *Id.* at 342. The theory may also be set forth symbolically, although reproducing that algebra here would needlessly confuse the reader.

188. This assumes that preference is expressed as majority rule. One might argue that preference could contain a rule of unanimity, or any other decision threshold. I use majority rule because it is most frequently assumed by the public choice literature and most consistent with our instincts about what appropriate "legislative intent" would look like.

prefers Outcome *B* to Outcome *C*, then that person prefers *A* to *C*.[189] *Intransitive* preference ordering means that a group might prefer *A* to *B* and *B* to *C*, but not *A* to *C*.[190] Preferences are unstable when a group prefers at least one alternative to each potential outcome. This condition is called a *Condorcet cycle*, and the group "decides" on an outcome when a procedural rule interrupts the cycle, not because the legislature "prefers" an outcome to all others.[191]

There exists an imperfect fit between this descriptive theory and observed legislative behavior.[192] There is, nevertheless, an academic consensus on the conditions under which legislative outcomes are unlikely to represent a stable collective preference.[193] AEDPA's legislative history exhibits two of the most important: (1) multi-peaked preference schedules (discussed in this subpart) and (2) agenda manipulation (discussed in the one that follows).

If each legislator's preference involved only a single, shared criterion—e.g., the degree of deference accorded state decisions—then

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189. *See* KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 26 (1997).

190. *See id.* at 27 n.7. Imagine a group of friends wants to watch one of three baseball games. You have got an Angels fan, a Braves fan, and a Cubs fan. Consider what the group will watch, given the following preferences:

The Angels fan:	$A > B > C$
The Braves fan:	$B > C > A$
The Cubs fan:	$C > A > B$

If the group is watching the Angels, then a majority will rather watch the Cubs. If the group is watching the Braves, then the majority will prefer the Angels. Finally, if the group is watching the Cubs, then the majority will prefer the Braves. No matter what game the group is watching, a majority will always favor changing the channel. More abstractly, the group cannot be said to "prefer" one outcome to another; the optimal solution always depends on the status quo.

191. *See generally id.* at 49-56 (explaining Condorcet cycles in greater detail).

192. For a sample of empirical studies, see John A. Ferejohn et al., *Toward a Theory of Legislative Decision*, *in* GAME THEORY AND POLITICAL SCIENCE 165, 171-74 (Peter C. Ordeshook ed., 1978); Morris P. Fiorina & Charles R. Plott, *Committee Decisions Under Majority Rule: An Experimental Study*, 72 AM. POL. SCI. REV. 575, 590-92 (1978). More recently, theoretical models have also called into question the universality of Arrow's conclusions. *See, e.g.*, *infra* note 194 and accompanying text (discussing Duncan Black's single-peaked preference exception). Even in instances where preferences are multi-peaked, a number of models have indicated that outcomes will cluster around foci that, while not Condorcet winners, reflect strong majority preferences. Again, avoiding math that unnecessarily complicates my point, the major mathematical values that undermine Arrovian instability include the "uncovered set" (an outcome that defeats all other outcomes in no more than a two-step comparison), the "yolk" (the multidimensional space consisting of the media of all legislators' preferred outcomes), and the "strong point" (the outcome that defeats most others in pairwise comparison). *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 432-33 (1988) (citing relevant public choice literature).

193. *See, e.g.*, Arrow, *supra* note 187, at 329 & n.2.

legislative intransitivity would not merit much discussion. Each legislator might prefer a different level of deference, but, because each would adjudge the outcome by the same metric, the group's collective preference will be transitive. Such "single-peaked" preferences are most amenable to generalizations involving "congressional purpose."

To be precise, in order to qualify as a single-peaked preference, not only must individual voters share a single evaluative criterion, but each must also prefer results closer to their ideal outcome over results that are further away from it (see Figure 2). Where individual preferences are single-peaked, a legislature prefers the median outcome because that value prevails against all alternatives in pairwise comparisons.[194]

Figure 2[195]

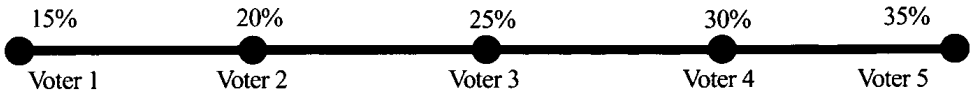

Figure 2 is a spatial representation of a single-peaked, five-voter preference set. Assume (counterfactually) the conditions specified above—that habeas rules are single-peaked, with the only evaluative criteria being the degree to which an outcome promotes deference to state adjudications. If Voter 1 prefers 15% deference, Voter 2 20%, Voter 3 25%, Voter 4 30%, and Voter 5 35%, then the group will adopt the preferences of Voter 3—the median voter—and the moderate deference outcome will prevail.[196] At any deference less than 25%, Voter 3 will cast her ballot with Voters 4 and 5. At any deference greater than 25%, she will side with Voters 1 and 2. The preference for the median outcome is stable, and the outcome is a Condorcet winner, a result that will prevail in every pairwise comparison.[197]

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194. This exception involving single-peaked preferences is most closely associated with Duncan Black. *See* DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS 14-25 (1958); Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23, 26-27 (1948).

195. The numbers do not stand for anything; they are just a set designed to show a median preference.

196. In the model of pairwise comparisons, Rule *C* defeats *A* by a margin of 4-1 or 3-2 (depending on how voter *B* votes); Rule *C* defeats *B* by a margin of 3-2; Rule *C* defeats *D* by a margin of 3-2; and Rule *C* defeats *E* by a margin of 4-1 or 3-2 (depending on how voter *D* votes).

197. Imagine, for example, that you are voting on cars instead of baseball games. If the preferences are single-peaked, then there is a single criterion for each voter. In this scenario, for example, the voters might each vote based on the size of the car and nothing

As the historical account in Part III.A demonstrates, preferences for habeas reform are classically multi-peaked. Preference criteria include desired levels of: deference to state courts, deference to state executive decisions, adjudicatory expedience, accuracy of guilt determinations, confidence in capital sentencing, deterrence, incentives for state criminal procedure, and "victim's rights."[198] The favored judicial phrase, "comity, finality, and federalism" itself betrays a multi-peaked preference problem.[199] The notion that the 104th Congress had any purposes beyond those bound by AEDPA's text flies in the face of what we know about the various criteria used to evaluate reform.

4. Agenda Distortion

Public choice theory suggests another basis for skepticism about the presence of atextual purposes: agenda control.[200] Whereas multi-peaked preferences indicate that a legislative preference would cycle until a procedure ended deliberation, agenda distortion is the Arrovian smoking gun.[201] Such distortion was particularly pronounced in the 104th Congress.

On June 7, 1995, Senator Biden introduced two different amendments to the bill as it was debated on the Senate floor.[202] The first sought to limit the scope of reform to federal prisoners.[203] The

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else. Of course, each voter might have a different size preference (one might prefer small cars, another large), but the group may be said to have an aggregated preference if that preference is measured by reference to a single variable. Each person prefers a particular size, and her utility for the ordering increases as the resolution approaches that ideal size and it decreases as the resolution moves away from it.

198. *See supra* Part III.A.

199. As a technical matter, the existence of multiple goals does not automatically mean that a group's preferences are multi-peaked or that cycling among different policy proposals would occur in the absence of agenda control. But with *so many* objectives involved, the likelihood that preferences are not multi-peaked is very low.

200. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983) ("It is fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support.").

201. In instances where motion and amendment protocol produces Condorcet winners, generalizations about legislative intent, and mood, may be more persuasive. Because of the possibility of many preference peaks in a number of dimensions, however, the likelihood that AEDPA deliberations produced a Condorcet winner is extraordinarily unlikely. If we know that there is probably no Condorcet winner, an important question involves whether there is some other reason to look to anything other than the text as evidence of congressional meaning. The more extreme the evidence of agenda control over a statutory formulation that is unlikely to be a Condorcet winner, the less persuasive the interpretive appeals to the idea of some legislative will.

202. 141 CONG. REC. S7805, S7840 (daily ed. June 7, 1995).

203. *Id.* at S7806.

Senate voted 67-28 to table the amendment for subsequent consideration.[204] At that point, Senator Biden introduced an amendment that would have eliminated deference to state determination of constitutional questions.[205] The Senate tabled that amendment by a much narrower 53-46 majority.[206] The bill was sent to conference on the understanding that certain amendments would get an up-or-down vote when the bill returned. When it emerged from committee, however, Senate motions to recommit it—and thereby to reconsider the language that the latter Biden Amendment proposed—were rejected by very narrow margins.[207]

These votes did not reflect a substantive endorsement of all conference bill provisions, but instead the political reality that further changes would imprudently delay ratification of high-profile antiterrorist legislation. Senator Lincoln Chafee stated, for example:

> During debate [of the conference report], a number of motions to recommit the legislation to conference were offered. I voted against all of them—*even those with which I agree on the substance*. . . . Sending the bill back . . . would reopen the legislation to countless changes that the House might, in turn, demand that the Senate accept.[208]

Other Senators expressed similar sentiments.[209] Failure to recommit the post-conference bill, which included all of the antiterrorism provisions, did not reflect a legislative consensus on all of its habeas reform provisions.

To extract a coherent purpose above and apart from that text is to ignore the procedural realities of the bill's consideration in the 104th Congress. Whether the agenda distortion was deliberate or inadvertent, the legislative history reveals that specific consideration of many habeas provisions, in the form of an up or down vote, was disabled by the votes to table the Biden Amendments.

5. The Median Legislator

The more sophisticated intentionalist theories do not attribute uniform purposes and preference intensities to all legislators—nobody

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204. *Id.* at S7808.

205. *See id.* at S7840, S7842.

206. *Id.* at S7849-50.

207. *See* 142 CONG. REC. S3434-35, S3438, S3447-48, S3450, S3460, S3475 (daily ed. Apr. 17, 1996); 142 CONG. REC. S3381 (daily ed. Apr. 16, 1996).

208. 142 CONG. REC. S3463 (daily ed. Apr. 17, 1996) (emphasis added). He concluded by saying that he considered many of the provisions to be amenable to future legislative consideration. *See id.*

209. *E.g.*, 142 CONG. REC. S3465 (daily ed. Apr. 17, 1996) (statement of Sen. Dodd).

believes that all voters identically value a common purpose. These theories instead treat the legislature's purpose as that of the median (or "marginal") legislator.[210] Marginal preferences are easy enough to identify in an idealized preference schedule, such as that appearing in Figure 2. Identifying the marginal preference in a group comprised of the Senate, the House, and the President, however, is a task of mind-boggling evidentiary and computational difficulty. Even in instances where there exists robust evidence of pivotal legislators' intent, the theoretical problem of identifying a global marginal preference severely diminishes intentionalist arguments. I explain the computational problem in the paragraph that immediately follows, but I seek less to expose intentionalist theory's conceptual cracks than I do to show that, with respect to AEDPA, its commonly accepted conclusion is incorrect, even on its premises.

The constitutional rule of bicameralism and presentment does not require that 536 people assemble in a room and vote on a preferred outcome.[211] Instead, bills generally go in and out of chamber committees, onto the floor, to conference committee, back to each chamber of Congress for more debate on the floor, and then to the President.[212] If the President vetoes the bill, parts of the chamber consideration process reset, and the Constitution requires a supermajority preference.[213] Subgroups make delegated decisions at each level of the deliberative hierarchy, those nested decisions are rarely revisited, and votes thereon are infrequently recorded. I refer to the problem of attributing congressional intent to a marginal subgroup member as the "problem of incorporated margins." Intentionalist theories depend not only on unrealistic assumptions about evidence, but also on problematic attribution of incorporated margins. Pivotal legislators include marginal committee members, the marginal majority party member (in each house), the marginal House member, the marginal Senator, the marginal conference committee member, and

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210. *See* KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 263 (1991) (containing the orthodox theory's statement that "[l]egislative choices in salient policy domains are median choices" (emphasis omitted)). The difference between the "median" and "marginal" legislator is unimportant for simple majoritarian legislative rules. Where an outcome requires a supermajority, however, the marginal and median legislators will not be the same. To the extent that these intentionalist theories are grounded in the notion that a group's collective intent derives from the outcome, as interpreted by those whose vote is necessary to pass it, the intent is really that of the "marginal" legislator.

211. *See* 1 CONG. QUARTERLY, INC., GUIDE TO CONGRESS 469 (5th ed. 2000).

212. *See id.*

213. *See id.*

the President.[214] Each phase of deliberation reflects the intent of a marginal deliberator, and extracting a global legislative preference margin from these values runs headlong into serious incorporated margins problems.[215] Therefore, even when they are premised on superb *evidence* of legislative preference, marginal legislator models yield no conclusion more precise than an educated guess.

As I explained above, I do not want to get sidetracked with the conceptual problem of incorporated margins—a flawed interpretive theory may nonetheless be superior to its alternatives. In what follows, I instead assume the intentionalist premise that courts may legitimately effectuate a loosely defined marginal preference as a "legislative purpose." Based on available evidence, however, judges are effectuating the wrong preferences. If AEDPA's purposes are pegged to the preferences of decisive Senators in the 104th Congress—an intentionalist definition I defend in the following paragraph—then courts are incorrectly interpreting the available evidence.

For a variety of reasons, the most viable intentionalist theories of AEDPA must define its legislative purposes by reference to S. 735's marginal supporters in the Senate. First, Arlen Specter's Senate coalition was discrete and decisive.[216] The restrictionist courtship of Specter's votes produced the best evidence of the concessions necessary for habeas reform. Second, there is next to no useful evidence of marginal preferences in the House material. Third, the marginal preference of a Senate *committee member* cannot control without the approval of a marginal senator in a floor vote, but the converse is not true.[217] Fourth, if "legislative intent" theories enjoy a popular legitimacy that their more proceduralist counterparts lack, then the marginal senator is a better proxy for social preferences than are other pivotal legislators.[218] Finally, the decisive legislator is the favored proxy for legislative intent in the legal literature, and that focus is, in turn, consistent with other intentionalist models for group rule-making bodies.[219]

Under the marginal legislator model, the evidence that is available belies precisely the legislative purposes that courts frequently invoke, in at least three respects. First, the decisive Senate contingent

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214. *See* KREHBIEL, *supra* note 210.

215. *Id.*

216. *See supra* Part III.A.1.

217. *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1230 (2006).

218. *See id.* at 1231.

219. *See id.* at 1231 & n.55.

did not care about comity and federalism—it was concerned exclusively with promoting the finality of criminal convictions.[220] That camp, led by Senator Specter, openly opposed substantive limits on relief.[221] Senator Specter convinced Strom Thurmond and other restrictionists in the 101st Congress to replace their "full and fair" proposal with Specter's procedural reform, leaving the substantive standard for relief unchanged.[222] That modified proposal passed the Senate but died in conference.[223] Support for the Specter proposal persisted through the 103d Congress—where it got thirty-four votes—but it never again passed the Senate.[224] Senator Orrin Hatch introduced a familiar "full and fair" proposal at the inception of the 104th Congress, but quickly realized that he needed to compromise with Senator Specter to forge a majority reform coalition.[225] Senator Hatch then deactivated his bill and enrolled, along with Senator Specter, what is now AEDPA's habeas reform.[226] It is clear both that the decisive Republican votes disfavored any substantive limit and that, to the extent they signed on to the unreasonableness standard, they did not have any restrictionist "purposes" beyond the limit's text. If one were to hypothesize the "purpose" of the Specter camp—at least with respect to § 2254(d)—it would *favor* relief in close cases.

Second, there is no analogous evidence of marginal preferences available for the House, but the deliberation involving the House companion bill, H.R. 3, contained language indicative of a compromise similar to that achieved in the Senate.[227] The bill was originally enrolled without any substantive limit on relief, but Representative Cox introduced his amendment, discussed in Part III.A.1.[228] Under that amendment, a state decision would survive habeas review unless it were arbitrary or unreasonable.[229] The Cox amendment passed the House only after its sponsor emphasized the disjunctive character of the "arbitrary or unreasonable" standard, effectively nullifying the legal effect of the word "arbitrary."[230] One cannot say with certainty that the decisive House legislators were "not interested" in H.R. 3's substantive

220. *See supra* notes 162-164 and accompanying text.
221. *See* discussion *supra* note 162.
222. *See supra* notes 162-164 and accompanying text.
223. *See supra* note 162 and accompanying text.
224. *See supra* note 163 and accompanying text.
225. *See supra* note 163 and accompanying text.
226. *See supra* note 163 and accompanying text.
227. *See supra* notes 130-134 and accompanying text.
228. *See supra* note 130 and accompanying text.
229. *See supra* note 130 and accompanying text.
230. *See supra* notes 132-134 and accompanying text.

limits on relief. But the views of the decisive voters in the House were, at best, indeterminate because the marginal voters supported the Cox amendment only after its meaning was severely moderated by its sponsors. At the very least, the marginal House members rejected any purpose that would transform the "unreasonableness" requirement into an "arbitrariness" one.[231]

Finally, the preferences of the marginal Senator dominated those of the marginal House member. S. 735's substantive limit on relief survived conference; the Cox amendment did not.[232] Even if one erroneously believes the Cox amendment authorized a more restrictive provision than its text expresses, that interpretation was rejected in favor of the Senate language on three separate occasions—in conference, upon return to the House in committee, and then in the final floor vote.[233] Even if one assumes the legitimacy of intentionalist theories, their computational plausibility, and the sufficiency of available evidence, that evidence simply does not support the proposition that the 104th Congress authorized courts to effectuate comity, finality, and federalism. If anything, the evidence suggests precisely the opposite directive.

IV. HOW AEDPA'S PURPOSES DISTORT HABEAS DOCTRINE

Whereas Part III argues that perceived policy purposes are rather illegible guides to AEDPA's meaning, Part IV explores the role they nonetheless play in restricting relief.[234] A topically exhaustive survey of affected doctrine better suits a treatise than an article, so I sample a cross-section of cases involving the most heavily litigated AEDPA provisions: the statute of limitations in § 2244(d) and the substantive limit on relief in § 2254(d), both of which apply only to state prisoners.[235] These two provisions are the two statutory changes that are most frequently interpreted or applied during the course of federal habeas proceedings involving state prisoners.

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231. *See supra* notes 132-134 and accompanying text.

232. *See supra* notes 135-145 and accompanying text.

233. *See supra* Part III.A.1.

234. AEDPA's purposes are not *invariably* invoked to deny relief. For example, a number of circuits continue to apply *Brecht v. Abrahamson* on collateral review because that pre-AEDPA standard of harmless state trial error already accommodated the interests AEDPA expresses. *See* 507 U.S. 619, 622 (1993); *see also* Fry v. Pliler, 127 S. Ct. 2321, 2327 (2007) (affirming the Ninth Circuit's application of the *Brecht* standard of review).

235. 28 U.S.C. §§ 2244(d), 2254(d) (2000). I choose two provisions applicable to state prisoners because provisions applicable to federal prisoners do not implicate comity, the examination of which is crucial to my discussion. Federal prisoners are subject to a statute of limitations, but that provision appears in § 2255.

The sample reveals the commonality of interpretive errors, which includes: (1) transforming an observation about legislative mood into a mandate about how much a *specific provision* promotes it and (2) reducing perceived interests to generalized presumptions favoring state parties. Twisting the concept of legislative mood into knots, offending courts not only obstruct relief, but they also undermine the very government interests they reflexively invoke on that mood's behalf.

A. Comity, Finality, and the Federal Rules of Civil Procedure

A habeas petition is formally a civil complaint, and the pleadings must generally conform to the Federal Rules of Civil Procedure (Civil Rules).[236] In its answer, a government respondent must plead affirmative habeas defenses, including nonexhaustion, nonretroactivity, procedural default, and the statute of limitations.[237] Although many of these defenses are now statutory, almost all of them have common law origins.[238] The exception is the statute of limitations, which AEDPA created for the first time.[239] Under § 2244(d)(1), a state prisoner generally has a year from when his conviction becomes final to file his federal habeas petition, and § 2244(d)(2) tolls that limitations period while any properly filed state postconviction application remains pending.[240]

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236. Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules) provides: "[T]he [Civil Rules], to the extent that they are not inconsistent with [the Habeas Rules], may be applied to a [habeas] proceeding." 28 U.S.C. § 2254 app. (Supp. IV 2004). Civil Rule 81(a)(2), in turn, states: "[The Civil Rules] are applicable to . . . habeas corpus [proceedings] . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions." FED. R. CIV. P. 81(a)(2).

237. *See* 28 U.S.C. § 2254 app. (Rule 5(b) of the Rules Governing Section 2254 Cases in the United States District Courts). Abuse of the writ is not an AEDPA defense. It has been replaced by the "motion for authorization" requirements in § 2244(b)(3). Courts do not have jurisdiction to consider successive habeas petitions without such authorization, so Congress effectively transformed the abuse of the writ defense into a qualified jurisdictional bar on successive petitions.

238. *See* Granberry v. Greer, 481 U.S. 129, 133 (1987) (asserting that exhaustion was a common law doctrine before codification). *But see* Day v. McDonough, 547 U.S. 198, 215 (2006) (Scalia, J., dissenting) (disputing the majority's assertion that procedural default and retroactivity have roots in common law).

239. *See Day*, 547 U.S. at 214 ("Historically, there [wa]s no statute of limitations governing federal habeas. . . ." (internal quotation marks omitted)).

240. Section 2244(d)(1) sets forth a series of four "trigger dates," the dates on which the limitations period commences. Section 2244(d)(1)(A) actually sets forth the trigger date commencing the limitations period on the date a state conviction becomes final. Section 2244(d)(2) tolls the limitations period while an application for state postconviction or other

The significance of the time bar is difficult to overstate, and it is at issue in the vast majority of post-AEDPA cases.[241] State prisoners have no federal right to counsel while they seek state postconviction relief,[242] and so the limitations period frequently expires simply because a prisoner cannot efficiently navigate the byzantine process of state postconviction review pro se.[243] Time-barring meritorious claims under such circumstances can be particularly harsh, but harsh time bars are not dispositions unique to habeas law. In part to soften what can be otherwise inflexible timetables, the Civil Rules classify statutes of limitations as affirmative defenses, which are subject to exceptions, forfeiture, "defenses to defenses," and other applicable pleading rules.[244]

1. The Relationship Between the Civil and Habeas Rules

All habeas proceedings initiated by state prisoners are governed by the Civil Rules and by the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules).[245] The Civil Rules contain a comprehensive framework for litigating and adjudicating affirmative defenses.[246] Under Civil Rule 8(c), affirmative defenses—including limitations—must be pleaded expressly.[247] Civil Rule 8(b) requires that the answer present any limitations defense.[248] Habeas Rule 5(b) aligns the pleading requirements for habeas answers with those of the Civil Rules, stipulating that a state's answer "*must* state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of

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state collateral review is pending. 28 U.S.C. § 2244(d)(1)-(d)(2) (2000); *cf.* Duncan v. Walker, 533 U.S. 167, 172-73 (2001) (determining that the pendency of a federal postconviction application does not toll the limitations period).

241. *See* 19 JOHN H. BLUME ET AL., FEDERAL HABEAS CORPUS UPDATE § II-A, at 129-330 (2007), *available at* http://www.capdefnet.org/hat/contents/fhc_update/update.htm.

242. *See* Murray v. Giarratano, 492 U.S. 1, 3-4 (1989) (plurality opinion) (applying the rule to capital cases).

243. *See, e.g.*, Lawrence v. Florida, 127 S. Ct. 1079, 1090 (2007) (Ginsburg, J., dissenting).

244. *See* FED. R. CIV. P. 8(c), 12(b), 15(a); 61A AM. JUR. 2D *Pleading* § 377 (1999); 71 C.J.S. *Pleading* § 161 (2000).

245. There is also a set of Habeas Rules applicable to § 2255 petitions, but, because I do not discuss those extensively, when I use the term *Habeas Rules*, I mean only the set of rules applicable to proceeding under § 2254.

246. *See* FED. R. CIV. P. 8(c).

247. *Id.*

248. *See id.* R. 8(b).

limitations."[249] Under the Civil Rules, any omitted limitations argument is forfeited.[250] It is ordinarily considered an abuse of discretion to impose defenses sua sponte.[251]

The Civil Rules apply in habeas proceedings unless a textual directive—in the form of a statutory provision or Habeas Rule—instructs courts otherwise.[252] AEDPA's time bar for state prisoners sets forth rules for computing federal deadlines, but it is otherwise presented as an ordinary statute of limitations.[253] Congress knew how to alter the pleading status of a state defense, because AEDPA did it twice.[254] Contrary to previous practice and under the revised § 2254(b)(3), a state's exhaustion defense is nonforfeitable in the absence of express waiver.[255] Also, AEDPA reconstituted the "abuse of the writ" defense as a rule of jurisdiction, adjudicated on a motion for authorization to file a successive petition.[256] AEDPA was silent as to any deviation from the ordinary pleading status of the state's limitations defense.

2. AEDPA and the Statute of Limitations Defense

In a series of pre-AEDPA decisions, the Court authorized federal judges, in the interest of comity, to abrogate state forfeiture of certain defenses (exhaustion and procedural default), depart from the Civil Rules, and impose those bars to relief sua sponte.[257] Civil Rule

249. 28 U.S.C. § 2254 app. (Supp. IV 2004) (emphasis added). Habeas Rule 4 does authorize a judge to dismiss a defective petition prior to the State's answer, but in *Day* the district court dismissed the petition after Florida answered. Day v. McDonough, 547 U.S. 198, 203 (2006).

250. *See* FED. R. CIV. P. 12(b).

251. *Cf. Day*, 547 U.S. at 205 ("[C]ourts are under no *obligation* to raise the time bar *sua sponte*.").

252. *See supra* note 236 and accompanying text.

253. Although I discuss only the limitations provision applicable to state prisoners in nonopt-in states, AEDPA actually contained three different limitations provisions. *See* 28 U.S.C. § 2244(d) (2000) (describing the limitations period applicable to state prisoners in nonopt-in states); *id.* § 2255 ¶ 6 (describing the limitations period applicable to federal prisoners); *id.* § 2263 (describing the limitations period applicable to state prisoners in opt-in states).

254. *See id.* §§ 2244(b)(3), 2254(b)(3).

255. *See id.* § 2254(b)(3).

256. *See id.* § 2244 (b)(3).

257. *See* Trest v. Cain, 522 U.S. 87, 89 (1997) (holding that courts were not *required* to impose a procedural bar sua sponte); Granberry v. Greer, 481 U.S. 129, 133-34 (1987) (holding that an appellate court may raise sua sponte petitioner's failure to exhaust state remedies). Even though the Supreme Court has never affirmed federal courts' authority to raise procedural default sua sponte, such authority is recognized in every regional circuit. *See, e.g.*, Sowell v. Bradshaw, 372 F.3d 821, 830 (6th Cir. 2004); Vang v. Nevada, 329 F.3d 1069, 1073 (9th Cir. 2003); United States v. Wiseman, 297 F.3d 975, 979 (10th Cir. 2002);

81(a)(2) continues to authorize these exceptions textually because the pleading requirements for exhaustion and default had not "heretofore conformed to the practice in civil actions."[258] Unlike exhaustion and procedural default, however, AEDPA's statute of limitations has no such equitable pedigree. In fact, in the exercise of their equitable authority, courts had never created anything resembling a limitations defense—not even laches.[259]

The Civil Rules are clear on this score—a limitations defense is adjudicated under ordinary civil pleading practice unless a statute or a rule instructs otherwise.[260] No such textual directive appears in AEDPA or the Habeas Rules. Nevertheless, after AEDPA, the circuits divided on whether the Civil Rules controlled pleading of the limitations defense.[261] If the Civil Rules did not control, then a court could abrogate a state forfeiture and impose the time bar sua sponte, just as with the exhaustion and default defenses.[262] Circuits that authorized district courts to time bar petitions sua sponte did so to effectuate what they perceived to be AEDPA's purposes: comity, finality, and federalism.[263] These circuit decisions reflected the increasing prominence of this purposivist logic in the Court's AEDPA limitations cases, which now number in the double-digits.[264]

Sweger v. Chesney, 294 F.3d 506, 520 (3d Cir. 2002); Moon v. Head, 285 F.3d 1301, 1315 n.17 (11th Cir. 2002); King v. Kemna, 266 F.3d 816, 822 (8th Cir. 2001) (en banc); Yeatts v. Angelone, 166 F.3d 255, 261 (4th Cir. 1999); Rosario v. United States, 164 F.3d 729, 732 (2d Cir. 1998); Magouirk v. Phillips, 144 F.3d 348, 358 (5th Cir. 1998); Kurzawa v. Jordan, 146 F.3d 435, 440 (7th Cir. 1998); Brewer v. Marshall, 119 F.3d 993, 999 (1st Cir. 1997).

258. FED. R. CIV. P. 81(a)(2).

259. Former § 2254 Rule 9(a) introduced laches into habeas law for the first time, *see* 28 U.S.C. § 2254 app. (2000), but Rule 9 has been amended to do no more than cross-reference the successive petition proceedings set forth in § 2244(b)(3). *Id.* (Supp. IV 2004).

260. FED. R. CIV. P. 81(a)(2).

261. *See* Day v. McDonough, 547 U.S. 198, 205 (2006).

262. FED. R. CIV. P. 81(a)(2); *see* cases cited *supra* note 257.

263. Again, judges can, under § 2254 Rule 4, time-bar petitions sua sponte before the State's answer.

264. *See, e.g.*, Lawrence v. Florida, 127 S. Ct. 1079, 1083 (2007) (holding that § 2244(d)(2) does not toll the limitations period while a petition for certiorari on a denial of state postconviction review is pending); *Day*, 547 U.S. at 209 (ruling that a federal court may impose the time bar sua sponte); Evans v. Chavis, 546 U.S. 189, 195-96 (2006) (considering whether delay in filing state notices of appeal time-barred the petition); Mayle v. Felix, 545 U.S. 644, 662-63 (2005) (stating that a claim does not "relate back" under FED. R. CIV. P. 15(c)(2) when it asserts a new ground for relief supported by facts that differ from those present in the original pleading); Dodd v. United States, 545 U.S. 353, 359-60 (2005) (holding that the § 2255 limitations period commences on the date on which the Supreme Court initially recognized the new right, not the date on which it was made retroactive); Johnson v. United States, 544 U.S. 295, 310 (2005) (holding that vacatur of a prior state enhancing conviction is a fact that could trigger the one-year limitations period); Pliler v. Ford, 542 U.S. 225, 231 (2004) (holding that a federal court does not have to warn a pro se

3. *Day v. McDonough*

The Supreme Court resolved the issue in *Day v. McDonough*.[265] Florida prisoner Day filed a federal petition and Florida's answer expressly conceded its timeliness.[266] The district court nonetheless time-barred the petition sua sponte, and the United States Court of Appeals for the Eleventh Circuit affirmed, stating that: "When it enacted AEDPA, Congress ... promote[d] comity, finality, and federalism, and ... [the] statute of limitations [is] the principal tool to [promote finality] .... Our decision [to impose the bar sua sponte] fulfills the purposes of AEDPA by enforcing its limitation period."[267] The Eleventh Circuit's rationale provoked a terse rejoinder from Day: "Congress did not enact 'comity, federalism and finality'; it enacted AEDPA."[268]

Writing for the Court, Justice Ginsburg ruled in favor of Florida, authorizing district courts to depart from the ordinary operation of the Civil Rules.[269] The Court identified no textual conflict between the Habeas and Civil Rules. Instead, addressing the Habeas Rules' requirement that the State's answer plead any limitations defense, the Court held that "[t]he considerations of comity, finality, and the expeditious handling of habeas proceedings that motivated AEDPA ... counsel against an excessively rigid or formal approach to [the limitations defense] in Habeas Rule 5."[270]

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petitioner that if his petition is dismissed for want of exhaustion of certain claims, then others may be barred when he returns to federal court); Carey v. Saffold, 536 U.S. 214, 219-220 (2002) (holding that an application for state collateral review is pending until final resolution of postconviction procedures); Duncan v. Walker, 533 U.S. 167, 172 (2001) (holding that a federal habeas petition does not toll the statutory limitations period); Artuz v. Bennett, 531 U.S. 4, 8 (2000) (defining an application for state postconviction or other collateral review as "'properly filed'" when "it is delivered to, and accepted by, the appropriate court officer for placement into the official record.").

265. 547 U.S. 198 (2006). In the interest of full disclosure, the author worked on much of the briefing in the *Day* case.

266. *Id.* at 203. The petition's timeliness was the subject of another circuit split, later resolved in *Lawrence*, 127 S. Ct. at 1083.

267. Day v. Crosby, 391 F.3d 1192, 1194-95 (11th Cir. 2004) (citations omitted), *aff'd sub nom.* Day v. McDonough, 547 U.S. 198 (2006).

268. Brief for the Petitioner at 31, Day v. Crosby, *decided sub nom.* Day v. McDonough, 547 U.S. 198 (2006) (No. 04-1324).

269. *Day*, 547 U.S. at 209-10.

270. *See id.* at 208. In this excerpt Justice Ginsburg is restating the State's argument, but she expressly states that she agrees with it in the following paragraph.

4. *Day*'s Misuse of Congressional Purpose

Justice Scalia, joined by Justices Thomas and Breyer, dissented, and *Day* is a fascinating case in part because of the Court's highly unusual alignment. In his *Day* dissent, Scalia's textualism dominated the structural interest in federalism he typically vindicates on collateral review.[271] Courts cannot depart from the Civil Rules, he reasoned, based solely on a characterization of AEDPA's purposes; Civil Rule 81(a)(2) simply does not authorize it.[272] The arguments Justice Scalia makes in dissent are familiar, many of them variations on methodological problems that Part III explains. I present three specific objections to the majority opinion, each a representative error common to post-AEDPA decisions.

First, the *Day* majority soft-pedals both internal and external limits on the finality interest expressed in the time bar.[273] That interest is qualified internally, containing exceptions for tolling, new evidence, new constitutional rules, and equitable filing obstacles.[274] Which purpose controls—the general purpose expressed by creating the defense or the purpose expressed by limiting it?[275] And even if the "purpose" of the limitations defense were not internally qualified, it is still circumscribed by the other "general purposes" that pleadings disputes implicate, including the preservation of adversarial, rather than inquisitorial, adjudication.

Second, *Day* effectuates comity and finality only as generalized substantive presumptions in favor of state respondents.[276] Comity and finality, however, are reasonably precise terms that ill-suit the decisions that they are often invoked to explain, including *Day*.[277] As a puzzled Justice Scalia explained, "If comity and finality did not compel any [pre-AEDPA] time limitation . . . it follows *a fortiori* that they do not compel making a legislatively created, forfeitable time limitation *nonforfeitable*."[278]

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271. *See id.* at 212-19 (Scalia, J., dissenting).

272. *See id.*

273. *See id.* at 208 n.8 (majority opinion).

274. *See* 28 U.S.C. § 2244(d)(1)(B)-(D), (d)(2) (2000).

275. *See supra* Part III.B.1.

276. Many of AEDPA's supporters did intend the statute as a comprehensive rebuke of the Warren Court's intrusion on state adjudications, and much of that contempt derived from a general hostility to those accused or convicted of a crime. *See* Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L.J. 283, 310 (2004). None of these impulses, however, are useful as interpretive principles. *See id.* Congress cannot direct courts to interpret ambiguities to favor particular parties. *See id.*

277. *See supra* Part II.B.

278. *Day*, 547 U.S. at 214 (Scalia, J., dissenting).

Congress vindicated finality by imposing a short limitations period; not by authorizing courts to impose it sua sponte. When AEDPA promoted policy interests by altering pleading requirements, it did so expressly: it made the nonexhaustion defense unforfeitable in the absence of an express waiver, and it reconstituted the abuse of the writ defense as a jurisdictional rule for successive petitions.[279] Additionally, Habeas Rule 4 was revised (becoming Rule 5) to allow defenses to be imposed sua sponte—but only before the State's Answer.[280] *Day* promotes finality along a margin (pleading) that Congress either did not consider or that it rejected.[281]

The idea that *Day* promotes comity is even more perplexing.[282] "Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief."[283] Unlike exhaustion, procedural default, or retroactivity, all of which honor the parity of state judiciaries, a state's direct interest in the limitations defense is as a *litigant*—a capacity ill-suited for comity analysis.[284] And even if the concept did encompass the interests of a state qua litigant, how does abrogating a state's forfeiture advance comity?[285] Moreover, if the comity Congress intended resembles that embraced by Professor Bator's Legal Process model—and Part IV.C explains why it does—then that interest attaches only upon the completion of "full and fair" state process. But Professor Bator considered interests in comity and finality negligible

279. *See* 28 U.S.C. §§ 2244(b)(3), 2254(b)(3).

280. Rule 4 authorizes federal district courts to dismiss, before the State answers, habeas petitions "[i]f it plainly appears . . . that the petitioner is not entitled to relief." *Id.* § 2254 app. (Supp. IV 2004).

281. *Cf.* Cooey v. Strickland, 479 F.3d 412, 421 (6th Cir. 2007) (quoting Nelson v. Campbell, 541 U.S. 637, 646 (2004) (discussing the implications of congressional purpose at the "'margins of habeas'")).

282. The only part of § 2244(d) that promotes comity is the tolling provision, which suspends the limitations period while prisoners litigate state postconviction applications.

283. O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999).

284. Exhaustion accords a state court the first opportunity to rule on a petition's merits, procedural default requires that litigants adhere to state judicial procedure, and the *Teague* bar insulates state decisions from Monday morning quarterbacking made possible by constitutional rulings postdating the state ruling.

285. *See* Day v. McDonough, 547 U.S. 198, 217-18 (2006) (Scalia, J., dissenting) ("There are many reasons why the State may wish to disregard the statute of limitations, including the simple belief that it would be unfair to impose the limitations defense on a particular defendant. On the Court's reasoning, a district court would not abuse its discretion in overriding the State's conscious waiver of the defense in order to protect such "values beyond the concerns of the parties." (internal quotation marks omitted)).

where offenders lack adequate access to counsel.[286] Where state petitioners are time-barred because they had no lawyer to steer them through state postconviction review, a process-oriented comity interest would disfavor *Day*'s holding.

Third, and most importantly, in *Day*, the Court implied an exception to the plain language of Habeas Rule 5, which requires state respondents to plead limitations and, in conjunction with the Civil Rules, forfeit that defense if it fails to do so.[287] As Part III explains, the weight a court affords to perceived congressional intent should reflect both the contested text's determinacy and the interpretive reliability of the purposes the court identifies. *Day* involves a question for which the text of enacted law is fairly determinate.[288] Where the text of enacted rules and the well-established meaning of a statute of limitations are readily available indicia of statutory meaning, interpretive recourse to AEDPA's general purposes is inappropriate.

In *Jones v. Bock*, a recently decided Prison Litigation Reform Act case, a unanimous Court remarked:

> In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns. . . . "Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts."[289]

Of course, the Court did not (and could not) cite *Day* for such a proposition. As the stark contrast between *Day* and *Bock* demonstrates, AEDPA remains conspicuously exempt from the Court's broader interpretive treatment of legislative purpose.

B. 28 U.S.C. § 2254(d)

The most heavily litigated AEDPA provision is 28 U.S.C. § 2254(d), the "limit on relief" applicable to state petitioners, which provides:

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286. *See* Bator, *supra* note 9, at 458.

287. *Day*, 547 U.S. at 209-10 (majority opinion); *see supra* notes 249-251 and accompanying text.

288. *See* discussion *supra* note 236.

289. 127 S. Ct. 910, 919-20 (2007) (internal quotation marks omitted) (citing Hill v. McDonough, 126 S. Ct. 2096, 2098 (2006); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)).

> An application for a writ of habeas corpus on behalf of a [state prisoner] shall not be granted with respect to any claim that was *adjudicated on the merits* in State court proceedings unless the adjudication of the claim—(1) *resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[290]

Many § 2254(d) decisions reduce to context-specific judgments about whether a state court found facts or applied federal law unreasonably.[291] I instead focus on issues of statutory construction to avoid the criticism that my position reduces to a subjective assessment of what resolution of mixed fact-law questions is reasonable. I examine both the limits on relief in § 2254(d)(1) and (2), as well as the globally applicable condition for that limit.

1. "Unreasonable Application" and *(Terry) Williams v. Taylor*

In April 2000, the Supreme Court issued two AEDPA opinions captioned *Williams v. Taylor*.[292] *(Michael) Williams v. Taylor* was primarily a § 2254(e)(2) case, and is noteworthy in part for declaring that "AEDPA's purpose [is] to further the principles of comity, finality, and federalism."[293] *(Terry) Williams v. Taylor*, decided the same day, determined how federal courts apply § 2254(d)(1).[294]

Terry Williams received a capital sentence in Virginia.[295] On state postconviction review, Williams argued that his lawyer's performance was constitutionally ineffective under *Strickland v. Washington*.[296] Under *Strickland*, a Sixth Amendment violation occurs where: (1) counsel's performance falls below an objective standard of professional reasonableness and (2) the offender is prejudiced thereby.[297] The Virginia Supreme Court determined that his counsel's

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290. 28 U.S.C. § 2254(d) (2000) (emphasis added).

291. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 407 (2000).

292. 529 U.S. 420 (2000); 529 U.S. 362 (2000).

293. 529 U.S. at 436. Ironically, *(Michael) Williams* is a case where the Supreme Court admonished lower courts that the principles of comity, finality, and federalism did not require a result unfavorable to the petitioner.

294. 529 U.S. at 379-90 (plurality opinion).

295. *Id.* at 368 (majority opinion).

296. *Id.* at 390-91 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

297. *See Strickland*, 466 U.S. at 687, 691.

performance was not deficient, and it did not decide prejudice.[298] The federal district court granted partial relief, but the United States Court of Appeals for the Fourth Circuit reversed, holding that Virginia's application of *Strickland* was not unreasonable.[299] The Fourth Circuit defined "unreasonableness" as a result that "reasonable jurists would all agree is unreasonable."[300] A lengthy explanation of the Court's holdings would add little to existing scholarship, so I focus on its treatment of a familiar phenomenon: the idea that statutorily expressed purposes self-disclose how much courts should promote them.[301]

Prior to *(Terry) Williams*, the United States Courts of Appeals for the Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits had defined as "unreasonable" an application that all reasonable jurists would consider unreasonable.[302] Functionally, that standard precluded relief where any jurist—state or federal—had ever applied precedent in a manner consistent with the contested state decision.[303] When the Fifth Circuit inaugurated the "all reasonable jurists" standard in *Drinkard v. Johnson*, it stated:

> [G]iven the statutory language, *and in the light of legislative history that unequivocally establishes that Congress meant to enact deferential standards*, we hold that an application of law to facts is *unreasonable only* when . . . a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.[304]

Concurring circuits endorsed not only *Drinkard*'s holding, but its emphasis on Congress's "unequivocal" legislative intent.[305] The United

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298. Williams v. Warden of the Mecklenburg Corr. Ctr., 487 S.E.2d 194, 200 (Va. 1997), *rev'd sub nom.* Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000).

299. *Williams*, 529 U.S. at 372-74.

300. Williams v. Taylor, 163 F.3d 860, 870 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000).

301. *See Williams*, 529 U.S. at 409-13.

302. *See* Roberts v. Ward, No. 98-6066, 1999 WL 162751, at *4 (10th Cir. Mar. 25, 1999); Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir. 1998); Green v. French, 143 F.3d 865, 870 (4th Cir. 1998); Neelley v. Nagle, 138 F.3d 917, 924 (11th Cir. 1998); Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), *overruled on other grounds by* United States v. Carter, 117 F.3d 262 (5th Cir. 1997). *(Terry) Williams* overruled all of these cases.

303. *See, e.g.*, *Drinkard*, 97 F.3d at 767-68.

304. *Id.* at 769 (emphasis added).

305. For example, in *Neelley v. Nagel*, the Eleventh Circuit expressly endorsed the reasoning in *Drinkard* and imposed an "all reasonable jurists" standard. *See* 138 F.3d at 924 ("We find this reasoning persuasive and adopt the Fifth Circuit's standard."). When the Fourth Circuit announced its "all reasonable jurists" standard for unreasonableness, it block quoted *Drinkard*'s observation that the legislature "unequivocally" intended deferential standards. *See Green*, 143 F.3d at 870.

States Courts of Appeals for the First, Third, and Eighth Circuits rejected the "all reasonable jurists" standard.[306]

Although Justice Stevens announced most of the *(Terry) Williams* decision, Justice O'Connor announced the Court's interpretation of § 2254(d)(1).[307] First, the Court held that the "contrary to" and "unreasonable application of" clauses had distinct meanings.[308] Second, the Court repudiated the "no reasonable jurist" standard.[309] "Unreasonable application" is an ambiguous phrase, and an interpreter must consult extrinsic evidence of statutory meaning. Divergent interpretation of the "unreasonable application" clause therefore reflects considerable disagreement over the value of that extrinsic evidence, including AEDPA's perceived purposes. The majority's § 2254(d)(1) interpretation halves the difference between two more extreme views of legislative purpose embodied in the positions of Justice Stevens and the "all reasonable jurists" jurisdictions.[310] While both extremes agreed that Congress intended to restrict the writ's availability, they disagreed over how much Congress intended to restrict it. *Drinkard* and its progeny—the "all reasonable jurist" decisions—inferred a maximal restriction. Justice Stevens, on the other hand, considered Congress's intent accomplished by establishing the state decision, rather than the federal petition, as the object of habeas inquiry.[311] The majority dismissed Justice Stevens' position as a form of de novo review incompatible with congressional intent to limit relief.[312]

The Court, however, also repudiated *Drinkard*'s notion that the restrictive purposes expressed in the statute were unqualified.[313] The Court emphasized that *Drinkard* improperly predicated the § 2254(d)(1) inquiry on reasonable jurists, rather than on reasonable decisions—the term the provision actually contains.[314] Congress did

306. *See* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.3, at 1589-90 (5th ed. 2005).

307. Williams v. Taylor, 529 U.S. 362, 402-13 (2000).

308. *See id.* at 405-07.

309. *See id.* at 409-13.

310. *See id.*

311. He concluded that AEDPA does not require deference "to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody [or capital sentence] violates the Constitution, that independent judgment should prevail." *Id.* at 389 (plurality opinion).

312. *See id.* at 403-04 (majority opinion).

313. *See id.* at 409-10.

314. *See id.*

not intend to foreclose relief, the Court noted, simply because a single state or federal jurist had previously applied precedent in a manner consistent with the state decision.[315] Instead, the Court held, the writ should issue if the state decision was "objectively unreasonable."[316] With Justice O'Connor writing for five Justices and Justice Stevens writing for four,[317] *(Terry) Williams* rejected *Drinkard*'s analysis of legislative history *unanimously*.[318]

The nature of the circuits' disagreement prior to *(Terry) Williams* is representative of many disagreements over § 2254(d) that persist today. As the following subparts demonstrate, when confronted with that provision's ambiguous language, intermediate federal appellate courts will often stake out positions based on varied readings of congressional intent.

2. Litigating § 2254(d) in the Wake of *(Terry) Williams*

A "postcard denial" is summary disposition without a rationale—something akin to "The petitioner's claims are without merit," or its more tersely worded cousin, "Denied."[319] Such denials can mask deficient state adjudication, and their varied treatment by the federal courts reflects both different conceptions of comity and different readings of legislative purpose. A postcard denial implicates both § 2254(d)'s limit on relief and the condition for it: i.e., both whether § 2254(d)(1) requires a federal court to scrutinize the reasonableness of something other than the state court's result and whether a state decision is an "adjudication on the merits."

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315. *See id.*

316. *Id.* at 409. The Supreme Court has defined "unreasonability" as "objectively unreasonable," a feat of syntactic brevity that accomplishes both paradox and tautology in only two words. *See id.* The Court may be forgiven, however, because *(Terry) Williams* was less about what the "unreasonable application" clause means than what it does not.

317. Chief Justice Rehnquist, joined by Justices Thomas and Scalia, dissented in part. *Id.* at 416-19 (Rehnquist, C.J., dissenting). All three of them, however, joined Justice O'Connor's construction of § 2254(d)(1). *Id.* at 402-13 (majority opinion).

318. *See id.* at 374-90, 409-10.

319. The summary denial could not only represent an unarticulated rejection of the federal claim on its merits, but could also be premised on an inadequate state procedural bar or independent state substantive grounds. *See, e.g.*, Aparicio v. Artuz, 269 F.3d 78, 94 (2d Cir. 2001) (scrutinizing the denial of state relief on an ineffective assistance of counsel claim "without mentioning the Sixth Amendment or relevant case law"); Walker v. Gibson, 228 F.3d 1217, 1231-32 & n.6 (10th Cir. 2000) (applying an inadequate procedural bar), *abrogated by* Neill v. Gibson, 278 F.3d 1044 (10th Cir. 2001).

a. "Adjudicated on the Merits"

Is a postcard denial an adjudication on the merits?[320] If it is not, then § 2254(d)(1) and (2) do not apply and a federal court conducts pre-AEDPA review of the petition simpliciter. The circuits are split on this question, and much of the disagreement is about congressional intent and the meaning of comity.[321]

A postcard denial does not satisfy the merits-adjudication condition in the First, Third, and Sixth Circuits.[322] In the rest of the circuits that have decided the issue, a postcard denial is a merits adjudication and subjects the petition to § 2254(d)'s limits on relief.[323] In those jurisdictions that have held that a postcard denial is a merits adjudication, the Fourth, Seventh, Eighth, and Eleventh Circuits review the state decision under the framework § 2254(d) imposes.[324] The Second and Fifth Circuits conduct a three-part test to determine whether the disposition was "substantive," in which case a postcard denial will satisfy the merits-adjudication condition.[325] A postcard denial is a merits adjudication in the Ninth Circuit, but the limit on relief is somewhat relaxed.[326]

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320. *Compare* Maples v. Stegall, 340 F.3d 433, 436 (6th Cir. 2003) ("Where . . . the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply."), *with* Wright v. Sec'y for Dep't of Corrs., 278 F.3d 1245, 1253-54 (11th Cir. 2002) ("[T]he summary nature of a state court's decision does not lessen the deference that it is due."); Sellan v. Kuhlman, 261 F.3d 303, 311-12 (2d Cir. 2001) ("Nothing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process."); Bell v. Jarvis, 236 F.3d 149, 157 (4th Cir. 2000) (en banc) (finding a postcard denial of the petitioner's claim of ineffective assistance of counsel an adjudication on the merits); James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999) (holding that the court's decision was an adjudication on the merits after the state court held that the petitioner's claim was "without merit").

321. *See* Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223, 230 (2002); Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN'S L. REV. 615, 642-43 (2004); Tsen Lee, *supra* note 276, at 284; Monique Anne Gaylor, Note, *Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 HOFSTRA L. REV. 1263, 1264-65 (2003); 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, 1457-58 (2002).

322. *See Maples*, 340 F.3d at 436; Gruning v. DiPaolo, 311 F.3d 69, 71 (1st Cir. 2002); Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001).

323. *See* cases cited *infra* notes 324-326.

324. *Wright*, 278 F.3d at 1254-56; *Bell*, 236 F.3d at 157-58; *Bowersox*, 187 F.3d at 869; Hennon v. Cooper, 109 F.3d 330, 334-35 (7th Cir. 1997).

325. *See Sellan*, 261 F.3d at 314; Mercadel v. Cain, 179 F.3d 271, 274-75 (5th Cir. 1999).

326. *See* Luna v. Cambra, 306 F.3d 954, 960-61 (9th Cir.) (holding that a silent judgment, as an adjudication on the merits, is independently reviewed for clear error), *amended by* 311 F.3d 928 (9th Cir. 2002); *see also* Himes v. Thompson, 336 F.3d 848, 853

The textual arguments on both sides are credible. On the one hand, "adjudication on the merits" is an established legal term describing an issue "decided by a judicial officer on the merits and reduced to judgment accordingly."[327] An unarticulated decision on a federal claim, *if it is on the merits*, surely qualifies under such a definition. On the other hand, postcard denials do not always disclose whether the state denied the federal claim on the merits at all.[328] I call attention to these textual arguments only to underscore their inconclusiveness, and so that I may instead discuss how interpretation of the merits-adjudication condition implicates congressional intent and the meaning of comity.

In *Wright v. Secretary for the Department of Corrections*, the Eleventh Circuit summarized the purposivist case for treating postcard denials as merits adjudications:

> Reading into the statute a requirement that state courts spell out their rationale would run counter to the main thrust of the [AEDPA amendments]. *Those amendments*, including the one that resulted in § 2254(d), *plainly were intended to require greater federal court deference to state court decisions and to promote more federal-state judicial comity. Telling state courts when and how to write opinions to accompany their decisions is no way to promote comity.* Requiring state courts to put forward rationales for their decisions so that federal courts can examine their thinking smacks of a "grading papers" approach that is outmoded in the post-AEDPA era.... In § 2254(d) Congress meant to, and did, mandate deference to state court adjudications on the merits of federal constitutional issues, and a decision that does not rest on procedural grounds alone is an adjudication on the merits regardless of the form in which it is expressed.[329]

Riffing on a familiar theme, *Wright* observes a comity interest in the substantive limit on relief and attributes an identical limit to the condition for it. Because the merits-adjudication condition expresses

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(9th Cir. 2003) (reviewing a merits adjudication independently for objective unreasonableness).

327. Washington v. Schriver, 255 F.3d 45, 53 (2d Cir. 2001) (internal quotation marks omitted).

328. As I mentioned, some circuits have developed tests to screen out unarticulated procedural denials. *See supra* note 325 and accompanying text.

329. 278 F.3d 1245, 1255-56 (11th Cir. 2002) (emphasis added). *Wright* also presented textual arguments in favor of its interpretation.

an identical comity interest, so the argument goes, federal courts should deem postcard denials to be in satisfaction of that condition.[330]

First, *Wright* ignores the inherent tension between conditional language and the condition itself; there is no reason to believe the two share a common purpose. A generous interpreter of § 2254(d) might observe that the purposes animating the limit on relief and the purposes animating the condition for it are unrelated. A more intuitive interpreter, however, would observe that the two oppose one another. The merits-adjudication condition creates a statutory double negative—it is a limit on a limit. It expresses, by definition, interests opposed to those expressed in § 2254(d)(1) and (2). By cross-applying the purpose of the limit to the condition for it, the Eleventh Circuit seems exactly wrong.

Second, treating postcard denials as merits adjudications does not promote comity with any precision. Comity does not supply a broad interpretive presumption favoring state respondents,[331] and *Wright* seems to reduce the interest in comity to just such a directive.[332] More sophisticated conceptions of comity, premised on sovereign parity,[333] would not allow federal courts to casually infer that unexplained state decisions are "on the merits."[334] As a practical matter, such inferences allow federal courts to assess a hypothetical federal rationale, even though the state decision may have simply failed to articulate what is, in actuality, a procedural disposition.[335] To the extent that Professor Bator's model fairly describes the comity that the 104th Congress intended—a proposition I defend in Part IV.C—treating postcard denials as merits adjudications undermines that objective. Professor

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330. *See, e.g.*, Ponnapula v. Spitzer, 297 F.3d 172, 181 (2d Cir. 2002) ("[N]othing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process. For obvious reasons of comity, we apply the same standard of deference to determine whether a state court has decided an issue of state law on the merits." (citation and internal quotation marks omitted)).

331. *See supra* Part II.B.

332. *See* discussion *supra* note 276. None of these impulses, however, are useful as interpretive principles. Congress cannot direct courts to interpret ambiguities to favor particular parties.

333. *See* William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961) ("The state judiciaries, responsible equally with the federal courts to secure [federal] rights, should be encouraged to vindicate them. A self-fashioned abdication by the federal courts of their habeas corpus jurisdiction in cases where state prisoners are denied state relief [in the absence of any articulation or mention of the governing federal law] would not provide that encouragement.").

334. There is nothing in AEDPA's legislative history that suggests Congress ever considered this question. *See* Dodson, *supra* note 321, at 238.

335. *See* Gaylor, *supra* note 321, at 1290.

Bator believed that federal courts should be in the business only of ensuring the integrity of the state adjudicatory *process*, not results.[336] His emphasis on process would hardly support a presumption that state courts had decided federal questions.

b. Reasoning or Results

Postcard denials also touch on the broader disagreement about whether § 2254(d)(1) requires scrutiny only of a state decision's *result*, rather than its reasoning. Although postcard denials force that issue because federal courts cannot scrutinize unmemorialized reasoning, it arises whenever a state's articulated logic is defective. To phrase the question another way, does § 2254(d)(1) bar relief when a state court's reasoning is either "contrary to" or an "unreasonable application of" clearly established federal law, but the state court's result is not?

By 2003, the Second, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits all held, with slightly varied rationales, that § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses should be applied only to the *result* of a state decision.[337] The Ninth Circuit likewise held that federal courts were to focus on the result, but envisioned some lesser deference than § 2254(d)(1) specifies.[338] At that time, the circuits that reviewed postcard denials de novo (the First and Third) did not even reach the "results versus reasoning" question because, in those jurisdictions, unarticulated opinions were not merits adjudications.[339] Until 2007, the Supreme Court had never expressly addressed whether § 2254(d)'s logical operand is a state decision's result or its reasoning.[340]

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336. *See infra* Part IV.C.

337. *See, e.g.*, Reid v. True, 349 F.3d 788, 799 (4th Cir. 2003); Neal v. Puckett, 286 F.3d 230, 244 (5th Cir. 2002); Wright v. Sec'y for Dep't of Corrs., 278 F.3d 1245, 1255 (11th Cir. 2002); Cruz v. Miller, 255 F.3d 77, 86 (2d Cir. 2001); Harris v. Stovall, 212 F.3d 940, 943 (6th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999); Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997). I exclude the Eighth Circuit from this discussion because I cannot identify a consistent pre-*Wiggins* approach to this question. *Compare* James v. Bowersox, 187 F.3d 866 (8th Cir. 1999) (holding that the brevity of a state court opinion does not affect the propriety of outcome-based review), *and* Long v. Humphrey, 184 F.3d 758 (8th Cir. 1999) (adopting the Third Circuit's result-based test regarding deference to state court habeas decisions), *with* Lomholt v. Iowa, 327 F.3d 748 (8th Cir. 2003) (holding that the proper test involves evaluating the reasonableness of the state court's analysis).

338. *See* Himes v. Thompson, 336 F.3d 848, 852-54 (9th Cir. 2003).

339. *See supra* note 322 and accompanying text.

340. In *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007), the Court held that "[w]hen a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254 (d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires." *Id.* at 2858. This

The colorful opinions refusing to scrutinize state reasoning invited quotation, and concurring circuits obliged. Seventh Circuit Chief Judge Richard Posner wrote an influential opinion stating that federal scrutiny of state reasoning "would place the federal court in just the kind of tutelary relation to the state courts that the [AEDPA was] designed to end."[341] An oft-cited Second Circuit opinion states that "we are determining the reasonableness of the state courts' 'decision[s],' not grading their papers."[342] The Fifth Circuit has observed that "[AEDPA] compels federal courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning."[343] Before 2003, the rhetoric of "tutelage" and "grading papers" captivated many courts, and the law in most of the circuits converged accordingly.[344]

Since 2003, the Supreme Court has issued two ineffective assistance opinions—*Rompilla v. Beard*[345] and *Wiggins v. Smith*[346]—that logically (but not expressly) seem to abrogate the result-oriented precedent. In *Wiggins* and *Rompilla*, the state courts did not find objectively deficient assistance and failed to reach *Strickland*'s second prong, prejudice.[347] In both cases, the Supreme Court found the state decision unreasonable as to the first *Strickland* prong and then reviewed prejudice de novo.[348] Because neither Supreme Court decision explains why the Court reviewed prejudice de novo, they

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ruling, which reversed the Fifth Circuit, is consistent with the idea that the Supreme Court takes a more nuanced approach than do the lower courts to AEDPA interpretation. *See id.* at 2854 (invoking AEDPA's purposes but granting relief on a claim that a petitioner was incompetent to be executed).

341. *See Hennon*, 109 F.3d at 334-35. This language subsequently appears in the jurisprudence of the Second, Fourth, Ninth, and Eleventh Circuits. Parker v. Sec'y for Dep't of Corrs., 331 F.3d 764, 785 (11th Cir. 2003); Hernandez v. Small, 282 F.3d 1132, 1140 (9th Cir. 2002); Sellan v. Kuhlman, 261 F.3d 303, 312-13 (2d Cir. 2001); Bell v. Jarvis, 236 F.3d 149, 159 (4th Cir. 2000).

342. Cruz v. Miller, 255 F.3d 77, 86 (2d Cir. 2001) (citation omitted). This language subsequently appears in the jurisprudence of the Fifth and Ninth Circuits. Merced v. McGrath, 426 F.3d 1076, 1081 (9th Cir. 2005); Santellan v. Cockrell, 271 F.3d 190, 193 (5th Cir. 2001).

343. *Santellan*, 271 F.3d at 193-94.

344. *See supra* notes 341-343 and accompanying text.

345. 545 U.S. 374 (2005).

346. 539 U.S. 510 (2003).

347. *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534.

348. In *Wiggins*, the Supreme Court held: "In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis." 539 U.S. at 534. Similarly, in *Rompilla*, the Court stated, "Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo* . . . ." 545 U.S. at 390 (citation omitted).

enjoy uncertain treatment in the regional courts of appeal. Lower courts apply the formal holding to § 2254(d) review of *Strickland* claims, but have not acknowledged the broader interpretive implications that those two cases have.[349]

For the most part, result-oriented jurisdictions have crafted various ways to avoid reading *Rompilla* and *Wiggins* as rejections of that approach. For example, the Sixth Circuit has interpreted those two cases as holding that, under similar fact patterns, state decisions do not satisfy the merits-adjudication condition.[350] The leading treatise on habeas law seems to adopt this view.[351] But *Rompilla* and *Wiggins* simply cannot be read that way. The merits-adjudication condition turns on whether the state court decided a *claim* on the merits, not an *element*.[352] Both *Wiggins* and *Rompilla* applied de novo review to *Strickland*'s prejudice prong *only after* analyzing the first prong under the § 2254(d)(1) framework.[353] Because § 2254(d) imposes limits on *claims* adjudicated on the merits and because *Wiggins* and *Rompilla* applied those limits to the first *Strickland* prong, the Court necessarily considered the state court to have decided the *Strickland* claims on the merits in both cases.[354] Other result-oriented circuits avoid the implications of *Wiggins* and *Rompilla* by reading them as narrow ineffective assistance rulings—that a state's failure to articulate its disposition of one ineffective assistance element subjects the other

349. *See, e.g.*, Blanton v. Quarterman, 489 F. Supp. 2d 621, 654-55 (W.D. Tex. 2007).

350. *See, e.g.*, Maldonado v. Wilson, 416 F.3d 470, 476 (6th Cir. 2005) (characterizing *Maples* as a ruling that the claim was not adjudicated on the merits, even though the state court in *Maples* decided the first *Strickland* prong); *see also* Davis v. Sec'y for the Dep't of Corrs., 341 F.3d 1310, 1313 (11th Cir. 2003) (casting the *Wiggins* fact pattern as a failure of state courts to adjudicate the merits).

351. HERTZ & LIEBMAN, *supra* note 306, § 32.3, at 1600 & n.41, attributes *Rompilla*'s de novo review of prejudice to the state's failure to adjudicate a claim on the merits, but that rationale is unpersuasive. The condition for applying the § 2254(d) rules is that a *claim* be adjudicated on the merits. Both *Rompilla* and *Wiggins* necessarily considered the state decision and adjudication on the merits because both Court decisions applied 2254(d) to the ineffective assistance element. Hertz and Liebman therefore advance a logical impossibility because a state denial of a federal *claim* cannot simultaneously be a merits and a nonmerits adjudication.

352. *See* 28 U.S.C. § 2254 (2000).

353. *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534.

354. *See, e.g.*, Rolan v. Vaughn, 445 F.3d 671, 678 (3d Cir. 2006) ("On appellate review of Rolan's PCRA petition, the Pennsylvania Superior Court concluded that Rolan was not prejudiced .... A court can choose to address the prejudice prong before the ineffectiveness prong and reject an ineffectiveness claim solely on the ground that the defendant was not prejudiced. Here, because the PCRA appellate court found that Vargas was not willing to testify at the guilt phase of Rolan's trial, its decision to deny habeas relief on that basis constituted an adjudication on the merits." (citation omitted)).

element to de novo review in federal court.[355] Still other decisions short-circuit the question by noting that an outcome does not change depending on whether a federal court scrutinizes an element under § 2254(d)(1) or adjudicates the claim de novo.[356]

Only the Second Circuit, in *Jimenez v. Walker*, has openly acknowledged the problem that *Wiggins* and *Rompilla* pose for result-oriented jurisdictions:

> [A] federal court may grant the writ under AEDPA if the adjudication of the discussed elements was objectively unreasonable and the adjudication of the undiscussed elements was simply erroneous.... This is not to necessarily endorse the rule of *Wiggins* and *Boyette*. Indeed, one might well question why the extent of the state court's explanation changes the nature of federal habeas review as constrained by § 2254(d). Rather, § 2254(d)(1) might best be read as being satisfied by a finding of unreasonable error as to any one element of a federal claim, regardless of how many elements the state court discussed. After all, § 2254(d)(1) speaks of a decision that "involved an" unreasonable application of law, not a decision that "consists entirely of" unreasonable applications of law.[357]

Under the Second Circuit's reading, the substantive limits on relief in § 2254(d) become inoperative upon an unreasonable application of federal law to any element, and then a federal court reviews the remaining elements de novo.[358] As the panel notes, that reasoning comports with the text of § 2254(d)(1), which does not bar relief when the state adjudication resulted in a decision "*involving* an unreasonable

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355. *See, e.g.*, Higgins v. Renico, 470 F.3d 624, 630 (6th Cir. 2006); Honeycutt v. Roper, 426 F.3d 957, 961 (8th Cir. 2005); Canaan v. McBride, 395 F.3d 376, 382-83 (7th Cir. 2005).

356. *See, e.g.*, Spears v. Greiner, 459 F.3d 200, 204 (2d Cir. 2006) ("It is unnecessary in this case to decide whether to afford AEDPA deference to the decision of the Appellate Division because, even applying a *de novo* review standard, we find that the petitioner has failed to establish any violation of federal law."), *cert. denied*, 127 S. Ct. 951 (2007); Joseph v. Coyle, 469 F.3d 441, 460 n.14 (6th Cir. 2006) ("The state court appears to have (briefly) addressed both *Strickland* prongs with respect to the failure to object to the jury instructions, but only the performance prong with respect to the failure to object to the indictment. Thus, the AEDPA standard applies to these analyses but not to the *Strickland* prejudice issue with respect to the failure to object to the indictment. Nevertheless, because Joseph's claim succeeds under either de novo or AEDPA review, for the sake of simplicity we conduct the entire analysis under the § 2254(d)(1) standard." (citation omitted)), *cert. denied*, 127 S. Ct. 1827 (2007).

357. 458 F.3d 130, 143 & n.12 (2d Cir. 2006). Note that the ellipses take the quotation from the text of the decision to the associated footnote 12, although the meaning of the passage is not in any way altered.

358. *Id.*

application of state law."[359] When a state decision unreasonably applies federal law to an element of a federal claim, the writ does not automatically issue—the petitioner must still show a constitutional violation.

Jimenez awkwardly explains that its decision "is not to necessarily endorse the rule of *Wiggins*."[360] But a circuit court does not "endorse" Supreme Court holdings; it follows them. That thinly veiled barb, however, does explain why the *Jimenez* decision is that of a reluctant textualist. The begrudging statutory construction appears driven mostly by the panel's undisguised contempt for the idea that a "state court's explanation changes the nature of federal habeas review as constrained by § 2254(d)."[361] *Jimenez* therefore suggests that element-by-element scrutiny of a state disposition is consistent with the result-oriented principle that § 2254(d) does not require scrutiny of a state decision's reasoning.

The distinction between element-by-element analysis and scrutiny of a state decision's reasoning is illusory. *Atkins* claims, *Strickland* claims, *Brady* violations, and other theories of relief do not enjoy some meaning beyond the elements that define them. Elements furnish the structure for reasoned relief or denial thereof; they are logical conditions for a favorable disposition. Contrary to the forced distinction in *Jimenez*, to scrutinize each condition on which relief is denied *is* to scrutinize the reasoning of a state court. After *Wiggins* and *Rompilla*, it is logically impossible that only the state's result is to be scrutinized under § 2254(d). If *Wiggins* and *Rompilla* were screening merely for the unreasonableness of a result, the Court would have lifted the § 2254(d) bar only if an adverse decision on *every* element would be unreasonable.[362]

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359. 28 U.S.C. § 2254(d)(1) (2000).

360. *Jimenez*, 458 F.3d at 143 n.12.

361. *Id.*

362. The only other acknowledgements appear scattered across concurring opinions in several circuits. *See, e.g.*, Weaver v. Bowersox 438 F.3d 832, 842 (8th Cir. 2006) (Bye, J., concurring in result) ("A careful side-by side examination of the claims Weaver made in state court and the Missouri Supreme Court's opinion addressing those claims convinces me the latter ignored what Weaver referred to then as his 'War On Drugs' argument, and what the Court refers to now as categories (3) and (5) of Weaver's claim, that is, the 'War On Drugs' argument as well as the statements designed to appeal to the emotions of the jury."); Allen v. Lee, 366 F.3d 319, 343 n.3 (4th Cir. 2004) (en banc) (Gregory, J., concurring) ("Having found that the *analysis* employed by the state court was unreasonable, we could not properly deny relief under § 2254(d) on the basis that the *result* of the state court proceeding was not unreasonable. Such a conclusion would necessarily be premised on reasoning that was *not* relied on by the state court. Reasoning that the state court could have—but did not—employ must be evaluated de novo, without applying the deferential standard prescribed by

Aside from the *Jimenez* panel, no other federal appellate court has cited *Wiggins* for anything other than its specific holding—that if a state court decides less than all potentially dispositive elements of a claim, then the undecided elements are reviewed de novo. No other court has interpreted *Wiggins* and *Rompilla* as a broader rebuke of a result-oriented approach, either for decisions that do discuss every element, or for postcard denials, which undertake analyses of no elements at all.

In fact, the Fifth Circuit, which is in many respects a habeas bellwether, has reaffirmed its commitment to a result-oriented interpretation: "AEDPA's purpose [is] to further the principles of comity, finality, and federalism.... Accordingly, § 2254(d) permits a federal habeas court to review only a state court's decision, and not the written opinion explaining that decision."[363] After *Wiggins* and *Rompilla*, and with growing recognition that the plain text of § 2254(d) does not limit relief when a state decision *involves* an unreasonable application of state law, AEDPA's purposes have assumed a larger explanatory role in result-oriented jurisdictions.[364] If such general observations about congressional purpose are interpretively useless (and I obviously believe that they are), then they

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§ 2254(d)(1). The *Wiggins* Court explained that § 2254 deference to a state court finding is simply not possible in these circumstances because 'the State court made no such finding.'" (citation omitted)).

363. St. Aubin v. Quarterman, 470 F.3d 1096, 1100 (5th Cir. 2006) (internal quotation marks omitted); *see also* Neal v. Puckett, 286 F.3d 230, 245-46 (5th Cir. 2002) (en banc) ("On the other hand, this process-oriented view has been rejected by other circuits and challenged by Chief Judge Posner of the Seventh Circuit. In his view, scrutinizing state courts' methods of reasoning 'would place the federal court in just the kind of tutelary relation to the state courts that the [AEDPA was] designed to end.' Similarly, we do not interpret AEDPA in such a way that would require a federal habeas court to order a new sentencing hearing solely because it finds the state court's written opinion unsatisfactory. It seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision." (quoting Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997)).

364. *See, e.g.*, Garcia v. Quarterman, 454 F.3d 441, 444 (5th Cir. 2006) ("Moreover, our circuit precedent provides that '"a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision."' (quoting Pondexter v. Dretke, 346 F.3d 142, 148 (5th Cir. 2003))); Jackson v. Dretke, 181 F. App'x 400, 404 (5th Cir. 2006) ("It is the ultimate legal conclusion reached by the state court, not every step of its reasoning process, that should be tested for unreasonableness."); Virgil v. Dretke, 446 F.3d 598, 604 (5th Cir. 2006) ("Because we review only the reasonableness of a state court's ultimate decision, the AEDPA inquiry is not altered when, as in this case, state habeas relief is denied without a written opinion. In this situation, we assume 'that the state court applied the proper "clearly established Federal law,"' and then determine 'whether its decision was "contrary to"' or 'an objectively unreasonable application of that law.'" (footnotes omitted)).

must yield to Supreme Court precedent and to more reliable evidence of statutory meaning.[365]

C. Professor Paul Bator and Legal Process

If courts firmly believe that they enjoy authority to effectuate atextual legislative purposes, then one would expect to observe a judicial preoccupation with what those purposes mean.[366] Yet recitation of AEDPA's purposes is as banal as it is frequent.[367] The reflexive purpose-based interpretation of AEDPA I have assailed actually defeats any comity and finality that Congress might have intended.[368]

1. Comity, Finality, and "Full and Fair" Adjudications

"Legal Process" emerged in the 1950s as a powerful critique of the legal realism ascendant during the first half of the century.

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365. Another related thread of § 2254(d)(1) decisions exposes a more subtle interpretive inconsistency. If construction of indeterminate text must effectuate congressional purposes, one would expect to observe a sort of interpretive path dependence. Whether a given construction promotes congressional intent would turn, in part, on prior construction of neighboring statutory language. Purposivist habeas decisions, however, do not exhibit such path dependence. Instead, by seeking to effectuate certain interests in textual isolation, courts can undermine how effectively the broader statutory scheme—as constructed by prior decisions—vindicates those very interests. The statutory construction of § 2254(d) illustrates this phenomenon nicely. That provision first states a global condition—that a state decision be "adjudicated on the merits"—and then limits relief when that condition is satisfied. Courts have restrictively constructed both the condition and the limit in the textually isolated manner described above, creating incentives for institutional actors that undermine the very comity those decisions invoke. A pro-comity interpretation of the merits adjudication condition applies the § 2254(d)(1) and (2) limits to state denials that fail even to articulate a federal basis of decision. And a pro-comity interpretation of the limits themselves actually accords greater deference to state decisions that do not expressly address elements of a constitutional claim. As a result, however, the less state decisions say, the more deference they get. Whatever comity means, it does not mean that. Comity might not require a federal court to scrutinize every "jot" of a state decision's reasoning, but what conception of comity would relieve the state of providing any reasoning at all? The proposition that comity is vindicated by such a rule begs the question of what, exactly, courts consider comity to mean. In Part IV.C.3, I reject the notion that comity, whatever it means, is meant to excuse explanatory failures on the part of state courts.

366. Part III argues that under the legislative conditions surrounding AEDPA's passage, they do not.

367. *Day v. McDonough* shows that the Supreme Court is not entirely innocent, but, on the whole, it is a problem most acute in the lower federal courts. That is, however, more than problem enough. Certiorari is not a writ of error, and, even when it does grant certiorari, the unanimity-driven Roberts Court will tend towards narrow doctrinal rulings, not towards broad interpretive rebukes.

368. Recall that, in Part III, I argued that AEDPA had no meaningful "legislative intent."

Professor Paul Bator, the intellectual patriarch of modern habeas reform, was part of the Legal Process movement.[369] The movement was a call to interpretive neutrality in statutory construction, and it famously described legislators as "reasonable persons pursuing reasonable purposes reasonably."[370] To neutrally effectuate legislative purposes, the theory goes, a court must provide "reasoned elaboration" of its result.[371] Professors Henry Hart and Albert Sacks, the movement's most famous exponents, insisted that the correctness of judicial activity was established by the soundness of its method, rather than by its result.[372] Hart's and Sack's unpublished Legal Process material has been lauded as "the most influential book not produced in movable type since Gutenberg."[373] The current Supreme Court remains deeply committed to the idea of judicial neutrality at the movement's core, that legal outcomes should not depend on the identity of the jurist.[374]

I suspect my point is already evident. Professor Bator would be aghast at the irony of post-AEDPA jurisprudence—that the perceived purposes of "full and fair" derivatives now excuse state courts from explanatory failures.[375]

He would have disagreed with the dominant construction of every issue examined in this Part. For example, he considered federal restraint inappropriate where an offender lacked adequate access to a lawyer.[376] The limitations period frequently expires simply because state prisoners do not have access to postconviction counsel,[377] and he

369. *See* HART & SACKS, *supra* note 166.

370. *See id.*

371. *See id.* at 1374-80.

372. *See* Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 993 (1999).

373. J.D. Hyman, *Constitutional Jurisprudence and the Teaching of Constitutional Law*, 28 STAN. L. REV. 1271, 1286 n.70 (1976) (reviewing GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (9th ed. 1975)); *see* Steven Graines & Justin Wyatt, *The Rehnquist Court, Legal Process Theory, and* McCleskey v. Kemp, 28 AM. J. CRIM. L. 1, 4 (2000).

374. *See* Graines & Wyatt, *supra* note 373, at 4 & n.9; *see also* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 421 (2d ed. 1995) (defining the primary elements of Legal Process theory as (1) the purposiveness of law as a result of legislative process, (2) the commitment to neutrality, and (3) institutional competence).

375. *See* Tsen Lee, *supra* note 276, at 303 ("Since Bator and other Legal Process mavens had little confidence in the ability of any court to discover the actual Truth, it would make no sense for them to support review of the result for reasonableness. Those within the process tradition flatly rejected the notion that only results mattered.").

376. *See* Bator, *supra* note 9, at 458.

377. *See id.*

would never have considered comity and finality to weigh in favor of imposing that bar sua sponte.

Moreover, faithful to his Legal Process roots, he emphasized the significance of judicial method over results.[378] The prevailing interpretations of § 2254(d)—both with respect to the merits-adjudication condition and the substantive limit on relief—invert that emphasis.[379] Professor Bator believed that human inquiry was subject to epistemic limits.[380] No court can achieve metaphysical truth, he reasoned, so habeas review should be scaled to reflect the adequacy of state process, which includes the state's reasons for deciding cases.[381] Professor Bator argued that federal courts should exercise jurisdiction where state courts have not applied law in a manner rationally adapted to that task.[382] Lon Fuller, a prominent Legal Process contemporary, wrote, "[J]udicial [activity] cannot be . . . talked about meaningfully, except in terms of the reasons that give rise to it."[383]

2. Did Congress "Intend" a Legal Process Rule

Suffice it to say that if the legislature did intend the forms of comity and finality expressed in earlier "full and fair" proposals, then the flaws of post-AEDPA statutory construction are obvious enough. "Full and fair" proposals were legislative artifacts of a legal movement that would have never evaluated the reasonableness of judicial activity

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378. *See id.* at 454.

379. The common theme in the § 2254(d) litigation—both as to the merits-adjudication condition and the substantive limit on relief—is that "comity" relieves state courts from various explanatory burdens. Under the merits-adjudication condition, in most circuits, unarticulated state decisions enjoy presumptions about what they actually decided. And, after a decision is treated as a merits adjudication, comity is again invoked to focus on the result, rather than the reasoning, of the state decision.

380. *See* Bator, *supra* note 9, at 446-47.

381. *See id.*

382. *See id.* at 454 ("[I]f one set of institutions has been granted the task of finding the facts and applying the law and does so in a manner rationally adapted to the task, in the absence of institutional or functional reasons to the contrary we should accept a presumption against mere repetition of the process on the alleged ground that, after all, error *could* have occurred.").

383. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 386 (1946). Some will respond that the § 2254(d) decisions do not relieve a state from having to reason to a result; those decisions simply do not require states to memorialize that reasoning. Professor Bator, however, would have rejected a presumption that state courts had applied law correctly where there exists a reasoned basis for doing so. *See* Bator, *supra* note 9, at 522 ("The issue is not whether the jurisdiction should be abolished but whether its expansion to cases where there is no reasoned basis to suspect failure to provide a rational trial of the federal question, before an unbiased tribunal and through fair procedures, is justified.").

by reference to its result rather than its method.[384] The more difficult question, however, is whether the 104th Congress incorporated the intent of its "full and fair" predecessors.

To put the question more precisely: When Congress passed AEDPA, did it intend to abandon Bator's emphasis on "reasoned elaboration" and procedural adequacy? The history of legislative reform, already detailed in Part III, indicates that it did not.[385]

The first "full and fair" bills derived directly from Professor Bator's scholarship.[386] Each successive proposal moderated the substantive limit on review to attract marginal legislative support.[387] These proposals always encountered resistance not because they would have made the writ available to correct failures of state process, but because the writ would have been available *only* in such circumstances.[388] "Full and fair" language was a *limit* on independent review.[389] What moderates sought and restrictionists ceded was the extent of that limit—the *exclusivity* of procedural review. Moderates did not disfavor scrutiny of state process and reasoning, but instead held out for increments of federal authority to independently review results.[390]

Through the Nixon administration, conservative reform proposals were usually pure "full and fair" models, lacking a meaningful role for independent review of state decisions.[391] The Reagan Justice Department's failed "full and fair" model proposal gave only a half-hearted nod to independent review in the statutory commentary.[392]

The Hyde Amendment, introduced in 1991, contained important structural changes to its "full and fair" antecedents.[393] The Amendment provided that a state adjudication would not be considered "full and fair" if it "was contrary to or involved an arbitrary or unreasonable interpretation or application of clearly established Federal Law" or if it "involved an arbitrary or unreasonable determination of the facts in

384. Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 663-64 (1993) (stating that those in the Legal Process school affirmed nothing more strongly than the belief that a court must explain its reasoning).

385. *See supra* Part III.A.

386. *See supra* Part III.A.

387. *See supra* Part III.A.

388. *See supra* Part III.A.

389. *See supra* Part III.A.

390. *See supra* Part III.A.

391. *See supra* notes 106-112 and accompanying text.

392. *See supra* notes 117-120 and accompanying text.

393. *See supra* Part III.A.

light of the evidence presented."[394] Under the Hyde Amendment, the writ issued when a decision involved an unreasonable application of clearly established federal law *because* such applications were not "full and fair."[395]

The Cox Amendment, introduced to the 104th House of Representatives, would have authorized relief for any decision that "was based" on an unreasonable application of state law.[396] The Cox proposal tracked the structure of the Hyde Amendment, but omitted the "full and fair" language *because it was considered redundant in light of the enumerated exceptions*—specifically, the exception for unreasonable applications of state law.[397] AEDPA ultimately incorporated the structure and phrasing of the Cox Amendment.[398] And if the Cox proposal eliminated the "full and fair" terminology because the "unreasonable application" clause rendered it redundant, then "unreasonable application" must include the failures of state process and reasoned elaboration that "full and fair" models contemplated.[399]

Recall that Senator Hatch introduced a familiar "full and fair" Senate proposal at the beginning of the First Session of the 104th Congress: "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 has been fully and fairly adjudicated in State proceedings."[400] Hatch's proposal, however, yielded to a Hatch/Specter compromise, S. 623 (and later S. 735), and that compromise bill reformulated the § 2254(d) amendments.[401] AEDPA reached back to the Hyde Amendment for its "unreasonable application" clause, which was, in the 104th Congress, believed to include review of state process and reasoning.[402]

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394. *See* 137 CONG. REC. H7996 (daily ed. Oct. 17, 1991).

395. *See id.*

396. *See supra* notes 130-133 and accompanying text.

397. Tsen Lee, *supra* note 276, at 299.

398. *See* Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214 (1996) (codified in part at 28 U.S.C. §§ 2244-2267 (2000)).

399. Even if early "full and fair" proposals would have implied narrow scrutiny of a state decision's reasoning, the meaning of "process," which was the object of scrutiny in "full and fair" formulations, had broadened significantly by the mid 1990s. *See* Tsen Lee, *supra* note 276, at 302 ("Out of a need to win broader approval, the proposers eventually accept a much broader notion of what constitutes state court process, including the state court's analysis.").

400. S. 3, 104th Cong. § 508 (1995).

401. *See supra* text accompanying notes 144-145.

402. *See supra* notes 396-397 and accompanying text.

The deactivation of the Hatch proposal and subsequent enrollment of the Hatch/Specter compromise bill did no more than concede an increment of independent review, retaining for federal courts all authority that they would have enjoyed under prior "full and fair" proposals.[403] There is nothing radical about such a reading, which seems to explain the presence of the word "involved" in § 2254(d)(1). It is difficult to imagine how a claim adjudicated on the merits could be examined to determine whether it *involved* an unreasonable application of federal law without scrutinizing a state court's reasoning. Evidence that Congress intended a comity variant that eliminated a federal court's authority to examine a state court's reasoning is nonexistent.

V. CONCLUSION

Whatever the role for perceived congressional purposes in statutory interpretation, courts—as faithful interpreters of legal texts—may legitimately rely on that perception only to the extent that it is accurate. Based on what we know about AEDPA, the 104th Congress had no interpretively meaningful purposes beyond the words it ratified. In the interest of dispassionate argumentation, I have deliberately avoided reference to the gravity of the rights considered in federal habeas proceedings. My criticism would nonetheless be incomplete without mentioning that cavalier AEDPA interpretation trivializes criminal punishment. "Comity, finality, and federalism" is now the favored idiom for erroneously invoking a legislative mood; it has become the means by which courts express an illegitimate hostility towards exacting standards of criminal procedure.

403. *See* Tsen Lee, *supra* note 276, at 302 ("[I]t appears that most of the succeeding generations of conservative sponsors sought to preserve as much of that process orientation as was consistent with winning sufficient moderate support for enactment.").

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