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Substantive Habeas

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SUBSTANTIVE HABEAS

KIMBERLY A. THOMAS*

Substantive Habeas identifies the U.S. Supreme Court's recent shift in its habeas jurisprudence from procedure to the substance of habeas review and explores the implications of this change.

For decades, the U.S. Supreme Court has attempted to control the flood of habeas corpus petitions by imposing procedural requirements on prisoners seeking to challenge constitutional error in their cases. These restrictive procedural rules have remained at the center of habeas decision making until recently.

Over the past few years, instead of further constraining the procedural gateway for habeas cases, the Supreme Court has shifted its focus to the substance of habeas. The result is a narrowing of the substantive window through which habeas petitioners must pass. This important shift to restrictive substantive habeas has not been explored in the scholarly literature and is changing the terms of habeas litigation.

This nascent move is not without ripple effects. To flesh out possible implications, Substantive Habeas posits a hypothetical habeas case that, under the Court's current restrictive substantive habeas law, turns procedural doctrine on its head and creates perverse incentives for state prisoners. What is missing from the Court's move to substantive habeas is a clear explanation of how the substantive and the procedural aspects of habeas fit together. Taking as a given that the Court has narrowed the procedural door to habeas relief, largely in the name of comity and federalism, Substantive Habeas suggests a complementary explanation for substantive habeas grounded in institutional capacity and expertise.

* Clinical Professor, University of Michigan Law School. I am indebted to my colleagues, especially David Moran and Paul Reingold, for helpful comments on earlier drafts. I am also grateful to Shira Gordon, Shannon Leitner, and Chris Schilling for excellent research assistance.

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INTRODUCTION

In habeas corpus, the terms of debate are shifting. For the past few decades, the U.S. Supreme Court's habeas jurisprudence for state inmates has largely focused on process. In the 1970s and 1980s, the Court imposed new procedural requirements on inmates that narrowed the federal courthouse door to review of the merits of inmates' claims. These procedural rules were expanded with the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"),¹ codified at 18 U.S.C. 2554, which significantly altered the rules for habeas corpus. Despite the fact that the most prominent section of AEDPA related to the substantive standard of review, and not procedure, habeas litigation continued to have an intense focus on process. Federal habeas cases brought by state prisoners have involved fights about who can have their habeas claims heard and the procedural barriers to federal court consideration, such as statutes of limitations and procedural defaults. This procedural story was told frequently both before and after the passage of AEDPA.² This

1. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C. § 2254 (2012)).

2. While AEDPA significantly revised habeas corpus law for all prisoners, the revisions were largely aimed at streamlining habeas corpus review in death penalty

procedural focus has been well documented, has been the subject of concern and commentary, and has largely defined much of the habeas law. The effect of this focus has been to limit the potential for state inmates to obtain habeas corpus relief through procedural bars that keep the federal courts from hearing the substance of their claims.

There is a change in the wind. Over the past few years, the Supreme Court has refocused habeas on the meaning and interpretation of the substantive standard of review and related substantive issues.³ In so doing, the Court has restricted the scope of federal court review of state cases that raise questions of constitutional law, largely by narrowly reading the language of AEDPA's substantive provisions.⁴ The Court has justified this move to restrictive substantive habeas by invoking comity and federalism.⁵ At the same time, the Court has not further closed—and perhaps has slightly cracked open—some procedural avenues for state prisoners filing habeas claims.⁶ In other words, habeas corpus law for state prisoners is shifting from a focus on procedure to a focus on a restrictive view of substantive habeas law.

This nascent move is not without ripple effects. To flesh out possible implications, this Article posits a hypothetical habeas case in which, under the Court's current restrictive substantive habeas law, a prisoner is arguably better off not following state procedural rules than properly raising his constitutional claims for prompt review by the state court. This hypothetical, if true, turns procedural doctrine—at least in a very limited circumstance—on its head and creates perverse incentives for state prisoners. A move to a focus on the substance of habeas could be consistent with the prior procedural focus, but the Court's current restrictive reading is not.

What is missing from the Court's decisions is a clear examination of how the substantive and the procedural aspects of habeas fit together and a way to prioritize these aspects of habeas when there might be a conflict between substantive and procedural doctrines. Assuming that the Court has narrowed the procedural door to habeas relief, largely in the name of comity and federalism, this Article finds

cases. See generally Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 1 (2002) (offering both a history and a harsh appraisal of death penalty habeas before and after AEDPA).

3. See *infra* Part II (noting that the passage of the AEDPA set the stage for a move to substantive habeas).

4. See *infra* Part II.C (chronicling the Court's recent narrowing of substantive review).

5. See *infra* Part III.B (critiquing the Court's comity and federalism narrative).

6. See *infra* Part II.C (observing the Court's possible softening on its earlier procedural habeas restrictions).

a complementary explanation for habeas grounded in institutional capacity and expertise. When substance and procedure run against each other, we should look to these values to guide choices in a way that is most consistent with pre-existing doctrines and the reality of habeas practice. When trade-offs arise, institutional capacity and expertise suggest that the federal courts should be allowed to examine substantive questions of federal law, while leaving interpretations of state procedural law to the state courts. For example, federal court review of state procedural rules is state-law dependent, and while rules exist to try to minimize the disruption to state courts, a federal court's interpretation of state law might unsettle expectations in other state cases.⁷ On the other hand, federal court review of state decisions on substantive federal law is based on an area where the federal courts have greater expertise—federal constitutional law—and only affect the case before the court. Ultimately, if the values of institutional capacity and expertise tap into our goals for habeas—which this Article asserts that they do—the Court can sensibly uphold its prior procedural limits, but a move to the most restrictive version of substantive habeas is misguided.

A few preliminary comments are necessary on the scope and focus of this Article. This Article discusses the litigation brought under 28 U.S.C. § 2254 in federal court on questions of federal law raised by state inmates.⁸ The “big” habeas story in terms of numbers and in terms of precedential cases are the state cases. State prisoners file the vast majority of habeas petitions.⁹ These state inmate cases invoke an

7. See *Harris v. Reed*, 489 U.S. 255, 264–65 (1989) (extending “to habeas review the ‘plain statement’ rule for determining whether a state court has relied on an adequate and independent state ground” and stating that “it would be more intrusive for a federal court to second-guess a state court’s determination of state law”); see also Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1154–55 (1986) (summarizing the relatively few available pre-AEDPA cases and noting that state courts seem to feel obliged to follow the Supreme Court’s determination that its state law was inadequate and reach the merits of federal claims in other similar cases).

8. Federal inmates can file habeas corpus petitions under 28 U.S.C. § 2255 (2012).

9. See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 165 (1961) (noting that in fiscal year 1961, state prisoners filed 906 habeas petitions in federal district courts); ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 116 (1960) (providing statistics and reporting significant increases in the number of state habeas petitions between the 1940s and 1960s as well as a significantly large number of state habeas petitions compared to federal habeas petitions over the same period); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 506 (1963) (discussing the “ever increasing flood of habeas petitions from state prisoners”); see also U.S. COURTS, CASELOAD STATISTICS 2010 30–31 (Mar 31, 2010) [hereinafter FEDERAL CASELOAD STATISTICS], available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/table>

arguably more complex mix of issues, including the balance between competing state and federal sovereigns.¹⁰ They have also garnered criticism from some federal judges and state authorities.¹¹ The criticism has not waned over time, although the rate of habeas petition filings by state inmates has, in fact, declined.¹²

This Article does not, throughout most of the piece, distinguish state inmates who are serving prison sentences from those sentenced to death. To the extent that different law applies to inmates sentenced to death, the Article focuses on the cases in which a death sentence is not imposed or, at least, the portion of death penalty cases that does not implicate separate capital punishment law.¹³ This choice is a pragmatic one. The habeas law developed by state inmates under death sentences, except as it relates to the specifics of capital punishment, applies to, and is used by, all state inmates in federal court.¹⁴ Death penalty cases are, admittedly, different in many respects. One striking difference is the likelihood of representation by an attorney—as opposed to pro se representation¹⁵—as well as the likelihood of either the sentence or

s/B07Mar10.pdf (showing 965 habeas petitions from federal prisoners and 6,444 habeas petitions from state prisoners).

10. See, e.g., NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* 108–21 (2011) (outlining a different treatment for federal inmate cases than for state inmate cases due to the differences between these types of cases, including the lack of need to consider the question of separate sovereigns as well as the lack of previous post-conviction review for federal inmates).

11. See, e.g., David G. Savage, *Something for Everyone: Lawyers See Things to Like in Habeas Review Decisions*, 86 ABA J. 34, 34 (2000) (noting state prosecutor complaints about federal judges reopening capital cases); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 719 & nn.90, 92–93 (2002) (citing separate statements made by Justice Powell and a circuit court judge that reflect judicial frustration with the volume of habeas cases); see also Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1638 (2003) (pointing out a fifty percent increase in habeas petitions filed by state inmates in federal court despite a less steep increase in the prisoner population).

12. See John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 286–87 (2006) (noting that the number of pending habeas petitions in federal courts has declined since at least 2001).

13. But see Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Corpus Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771, 1771 (2000) (“At least in our time, any meaningful discussion about habeas must take account of the relationship between habeas and the death penalty.”).

14. See NANCY J. KING ET AL., *FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS* 62 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> (explaining that capital habeas cases and non-capital habeas cases are governed by the same statutory provisions).

15. *Id.* (“The single most important difference is that all but 7% of death row filers have counsel to assist them in seeking federal habeas relief, while all but 7% of non-capital prisoners proceed pro se.”).

the conviction being reversed in habeas.¹⁶ Death penalty cases are not, in the end, the bulk of cases before the federal courts.¹⁷ This Article seeks to examine federal habeas practice as it affects the vast majority of state inmates.

To begin, the Article must offer contours to what is defined as “procedural” and “substantive” for habeas law. “Procedure” is used to describe the doctrines that determine whether a federal court can reach the merits of a federal claim raised by a state inmate.¹⁸ For example, these procedural mechanisms include exhaustion, or the requirement that the state prisoner raise the claim in any and all available state courts;¹⁹ a ban on “second or successive” petitions, or the high hurdle to file more than one habeas corpus application;²⁰ and the one-year statute of limitations.²¹ Also included is the adequate and independent state ground doctrine, which bars federal courts from deciding issues in which the state court based its decision on an “adequate” state rule that is independent of federal law.²²

The “substance” of habeas involves the question of whether there was a violation of federal law and therefore includes the interwoven issue of the standard of review used to determine the answer to that

16. *Id.* at 64 tbl.15 (comparing statistics in capital and non-capital cases). According to one 2007 study, capital litigants had a 12.4% chance of having relief granted on any claim (33 of 267 cases examined), while litigants not under a death sentence had a 0.35% chance of relief on any claim (7 of 1986 cases examined). *Id.* Other distinctions include the number of claims raised in the petition and the likelihood that the state will file an answer or motion in response. *Id.*

17. See, e.g., FEDERAL CASELOAD STATISTICS, *supra* note 9, at 31 tbl. B-7 (showing 6,444 habeas corpus petitions involving federal questions, i.e., state prisoners, and 186 habeas corpus death penalty cases).

18. See David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735, 738 (1994) (“[O]ne’s vision of the procedural mechanism of habeas is inevitably colored by one’s attitude toward the substantive rights that are the subject of habeas litigation.”).

19. See 28 U.S.C. § 2254(c) (2012) (“An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.”); see also *Picard v. Connor*, 404 U.S. 270, 275 (1971) (“It has been settled since *Ex parte Royall* that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus.” (citation omitted)).

20. 28 U.S.C. § 2244(b). Prior to the enactment of § 2244(b), courts reviewed the decision whether to consider a subsequent petition under an “abuse of the writ” standard. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 470, 489 (1991) (defining the “doctrine of abuse of the writ” and clarifying that the Court has not consistently applied it).

21. 28 U.S.C. § 2244(d)(1).

22. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (“This Court will not review a question of federal law decided by a state court if the decision . . . rests on a state law ground that is independent of the federal question and adequate to support the judgment.”). While this doctrine is often thought of merely as a procedural question, the Court will rely on a substantive or procedural state law basis to warrant protection from federal court interference. *Id.*

question.²³ Most commonly, this standard of review is whether the state court's determination was "contrary to, or involved an unreasonable application of, clearly established Federal law."²⁴ In the substance of habeas, this Article also includes the rules that determine which federal law applies to the claims raised. This means that substantive habeas includes the rules under *Teague v. Lane*,²⁵ which require that the U.S. Supreme Court decisions that were issued before the state inmate's conviction was "final" apply to the inmate, while those that were issued later do not.²⁶ These categories of substance and process are not entirely distinct, but they generally describe the way that habeas actually works.

Part I of this Article describes the habeas landscape as it existed until recently. It is a procedural story told frequently both before and after AEDPA's passage in 1996.²⁷

Part II lays out the shift that is taking place. It primarily examines Supreme Court decisions as the basis for the conclusion about the shift in habeas' focus, although this Part also considers cases from the lower federal courts as well as scholarly commentary on federal

23. See, e.g., Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 382 (1996) [hereinafter Yackle, *A Primer on the New Habeas Corpus Statute*] (quoting the "unreasonable application of . . . clearly established Federal law" language of AEDPA and stating that "[t]his new provision goes not to the process by which the federal courts adjudicate claims, but to the substance of the federal courts' judgment on the merits"). The most obvious alternative approach to substantive habeas is to consider it substantive only when the Court or Congress limits the actual types of claims that can be brought. See, e.g., Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 950 (2000) (noting that Congress and the Court "have restricted the writ by making it less available as a practical matter through the creation and expansion of procedural barriers to federal habeas review" and that "[t]hey have rarely chosen to narrow the writ directly by limiting the types of federal constitutional claims that state petitioners can bring"). The only clear example of this is *Stone v. Powell*, which held that Fourth Amendment claims are not cognizable in habeas proceedings. 428 U.S. 465, 481–82 (1976).

24. 28 U.S.C. § 2254(d)(1).

25. 489 U.S. 288 (1989).

26. 28 U.S.C. § 2254(d); *Teague*, 489 U.S. at 316; see Yackle, *A Primer on the New Habeas Corpus Statute*, *supra* note 23, at 382–83 (discussing § 2254(d) as a substantive provision and including the *Teague* line of cases as related to the provision).

A conviction is final after the last state court has issued its decision and the time for a petition for certiorari to the U.S. Supreme Court has expired. There are two narrow exceptions to this general rule. There is certainly a plausible argument that the *Teague* line of cases should be viewed as procedural, given that *Teague* provides the parameters of the substantive decision that is made, but once it is determined what law applies, *Teague* cases do not shape the application of that law to the facts of the case.

27. See Gary Peller, *In Defense of Federal Habeas Corpus Rerelitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 582 (1982) (criticizing the Burger Court's restrictions on the scope of habeas review); Ellyde Roko, *Finality, Habeas, Innocence, and the Death Penalty: Can Justice Be Done?*, 85 WASH. L. REV. 107, 120 (2010) (describing the Supreme Court's "laser-like focus on procedure" in its review of habeas cases to the detriment of the substantive issues).

habeas. The Court's move, however, is not merely to substantive habeas: the Court has shifted to a particular, restrictive view of substantive habeas.

Part III examines the implications of the Court's move to restrictive substantive habeas. Specifically, it analyzes the doctrinal twists created by this new focus and in light of the Court's existing priorities. This Part highlights an example of the Court's previous focus on proceduralism and argues its current move to restrictive substantive habeas might create irreconcilable and illogical conflicts.²⁸ Further, this Part considers the Court's reasons for shifting to substantive habeas and finds them insufficient to resolve this potential conflict.

In Part IV, this Article seeks to give a consistent path to the Court's decisions by highlighting a narrative, told before by the Court itself as well as scholars of expertise, that explains a shift to substantive habeas, although not the restrictive version adopted by the current Court. Seen in this light, the Court's move from procedural to substantive habeas conforms to an understanding of what the federal court can do well (and what it cannot). This rationale also acknowledges the ongoing reality of current habeas practice.

I. THE PROCEDURAL STORY AND THE REASONS BEHIND IT

The modern habeas story has been one of procedure, both before and after AEDPA.²⁹ The central questions of this procedural narrative have been: how wide and when should the door be open to federal court for state inmates? Answering this question involves determining, for example, what state inmates must do in state court to obtain later access to federal court, which implicates the doctrine of exhaustion, and whether the state court decided the case on federal law or on purely state law grounds, which implicates the doctrine of an adequate and independent state law basis.

28. Some scholars have characterized the Court's previous focus on proceduralism as "excessive." See, e.g., Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 315-16 (1998) (contrasting the traditional and modern critiques of excessive proceduralism).

29. See, e.g., Steiker, *supra* note 28, at 323-24 (noting the expansion of habeas, which resulted in a lack of procedural obstacles for state habeas defendants, after 1953 and prior to the passage of AEDPA); see also Christopher Q. Cutler, *Friendly Habeas Reform—Reconsidering a District Court's Threshold Role in the Appellate Habeas Process*, 43 WILLAMETTE L. REV. 281, 285-303 (2007) (describing the historical changes to habeas appellate procedure, from the writ, to statutory and judicial modifications); Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 DUKE L.J. 1, 6-18 (2008) (retelling the parallel history of habeas corpus reform and prisoner litigation reform).

A. *Historical Development of Habeas Procedure*

While federal courts have had jurisdiction to hear habeas corpus petitions of state inmates since 1867,³⁰ these inmates did not begin to frequently use the writ until decades later.³¹ For approximately eighty years, the Supreme Court sporadically engaged in habeas case review from state prisoners.³² At times, the Court's relatively sparse review may even have produced conflicting results.³³ During this time, the Court developed a number of doctrines that limited who should have access to the federal court and under what circumstances.³⁴ For example, the Court suggested that federal courts should give the state court an opportunity to determine federal questions before considering a writ of habeas corpus from a state prisoner on these issues—in other words, that state prisoners present their claims first to the state court.³⁵ In 1948, Congress codified the exhaustion doctrine.³⁶ These procedural rules were based, in part, on a perception by scholars and politicians, among others, that access to

30. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (“[T]he several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have 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, or of any treaty or law of the United States.”); see Bator, *supra* note 9, at 465, 474–77 (noting the “sparse legislative history” of the act granting federal courts review of state prisoners’ habeas petitions). See generally RICHARD H. FALLON, JR., ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1220–23 (6th ed. 2009) (discussing the historical debate about the proper scope of the writ in federal court).

31. KING & HOFFMANN, *supra* note 10, at 52 (noting that habeas review of state criminal cases in federal courts was relatively limited throughout the earliest decades of the twentieth century).

32. *Id.* at 54–55 (attributing the rise in federal review of state habeas cases to the Warren Court’s expansion of habeas corpus).

33. Compare *Frank v. Mangum*, 237 U.S. 309, 335 (1915) (denying habeas relief despite an angry mob dominating the courtroom atmosphere), with *Moore v. Dempsey*, 261 U.S. 86, 90–91 (1923) (citing *Mangum* but granting relief because the courtroom was infected with “an irresistible wave of public passion”). But see Eric M. Freedman, *Milestones in Habeas Corpus: Part II: Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1468–72 (2000) (stating *Frank v. Mangum* and *Moore v. Dempsey* shared “seemingly identical facts” although they “led to diametrically opposed results” and proposing that the two cases are consistent).

34. See Steiker, *supra* note 28, at 316 (listing “procedural default, non-retroactivity, exhaustion, and limitation on successive claims” as examples of procedural doctrines the Court has developed).

35. See *Ex parte Royall*, 117 U.S. 241, 252–53 (1886) (rejecting a habeas petition where the state trial court could consider the constitutional question and did not have an opportunity to consider it); Bator, *supra* note 9, at 478 (pointing to *Ex parte Royall* as an early exhaustion case); see also *Ex parte Hawk*, 321 U.S. 114, 117–18 (1944) (per curiam) (describing the circumstances under which the exhaustion doctrine is applicable).

36. 28 U.S.C. § 2254(b)–(c) (1994) (current version at 28 U.S.C. § 2254(b)–(c) (2012)).

the federal courts was too permissive.³⁷ While these procedural rules were being fleshed out, federal habeas courts reviewed questions of federal law and mixed questions of law and fact *de novo*.³⁸ Therefore, the real limits to federal court review—and the possible overturning of state court convictions—were the procedural hurdles in front of the federal courthouse door.

From the 1950s to 1970s, state inmates increasingly used federal habeas corpus petitions.³⁹ Some scholars attribute this increased use of the writ to Supreme Court decisions which, first, applied federal constitutional protections to state defendants⁴⁰ and, second, often permitted inmates acting in good faith to obtain federal review of their constitutional claims.⁴¹ For example, in *Fay v. Noia*,⁴² the Court determined that a state prisoner who did not “deliberately bypass[.]” state court procedures could still have his federal constitutional claim

37. See, e.g., Frank J. Remington, *Change in the Availability of Federal Habeas Corpus: Its Significance for State Prisoners and State Correctional Programs*, 85 MICH. L. REV. 570, 570–71 (1986) (noting state prisoners’ continued “dissatisfaction” with federal court access).

38. See *Townsend v. Sain*, 372 U.S. 293, 318 (1963) (“It is the district judge’s duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas. That was settled in *Brown v. Allen*.”), *overruled on other grounds by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Brown v. Allen*, 344 U.S. 443, 507 (1953) (Frankfurter, J., opinion) (explaining that questions of law and fact are reviewed under the district court judge’s “own judgment”); see also James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2011, 2021–26 (1992) (describing the pre-AEDPA *de novo* review of mixed questions of fact and law, which had been set out by the *Brown* Court, as “[t]he guts of the habeas corpus remedy,” but otherwise arguing for similar treatment of direct review to the Supreme Court and habeas).

39. See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 939–50 (1984) (documenting the increase in number of habeas and other prisoner cases, including civil rights cases, from the 1940s to the early 1980s and stating that in 1944, there were 1,312 total prisoner cases (3.4% of the federal docket); in 1963, there were 4,254 total prisoner filings (6.7% of the docket); and in 1983, there were 30,775 filings (12.7% of the docket), but noting that, due to increasing prison populations and other factors, the numbers are misleading); see also KING & HOFFMANN, *supra* note 10, at 54–60 (attributing the increase in federal review of state habeas cases to the Warren Court’s transformation of habeas corpus).

40. See KING & HOFFMANN, *supra* note 10, at 55 (describing the expansion of due process rights from the federal arena to the states); Liebman, *supra* note 38, at 2044 (suggesting due process protections in habeas proceedings were limited “until the incorporation movement of the 1940s–1960s”).

41. See, e.g., *Sanders v. United States*, 373 U.S. 1, 22–23 (1963) (allowing, in some circumstances, state inmates to file more than one habeas petition); *Townsend*, 372 U.S. at 314 (allowing federal courts to hold evidentiary hearings if state fact-finding is flawed); see also Steiker, *supra* note 28, at 324 (describing the “Golden Age” of state prisoner habeas as “establish[ing] a presumption in favor of petitioners seeking to avoid either state procedural defaults or bars to successive federal habeas petitions and . . . a relatively lenient standard for petitioners seeking to obtain hearings in federal court on disputed issues of fact” (internal quotation marks omitted)).

42. 372 U.S. 391 (1963), *overruled in part by* *Wainwright v. Sykes*, 433 U.S. 72 (1977).

heard in habeas.⁴³ These procedural doctrines attempted to balance concerns for finality, the proper role of the federal courts, and judicial economy with access to the federal courts by state prisoners who, through no fault of their own or due to their lack of understanding, had made procedural mistakes.⁴⁴

From the late 1970s to the early 1990s, the Court raised the procedural hurdles to federal habeas review. The Court constrained access to the federal courts through the use of procedural default, exhaustion, and other requirements.⁴⁵ For example, in *Wainwright v. Sykes*,⁴⁶ the Court revised its procedural default doctrine, determining that an inmate's default in state court would bar federal habeas review absent a showing of "cause" and "prejudice" or of a fundamental miscarriage of justice.⁴⁷ The Court stressed that deciding these procedural issues should, absent extraordinary circumstances, be a condition precedent to adjudication of the federal constitutional claim.⁴⁸ The Court justified these changes as reflecting respect for the finality of state court convictions,⁴⁹ federalism, and comity to the state courts.⁵⁰

B. Proceduralism in the AEDPA Era

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act, which addressed both the procedural and substantive rules of habeas. On the procedural side, Congress placed a one-year

43. *Id.* at 439 (using as a formulation for bypass whether there was "an intentional relinquishment or abandonment of a known right or privilege" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); see also *Wainwright v. Sykes*, 433 U.S. 72, 85 (1977) (acknowledging *Noia's* establishment of the "deliberate bypass" procedure (internal quotation marks omitted))).

44. *Cf. Resnik, supra* note 39, at 881–82 (remarking that, in *Fay v. Noia*, the federal courts were "[c]oncerned about equal treatment... and opted for revisionism, consistency, and federal substantive norm enforcement," and contrasting those values with the values of finality, economy, and deference to inmate decision making).

45. *Peller, supra* note 27, at 582 (criticizing the Burger Court's restrictions on the scope of habeas review).

46. 433 U.S. 72 (1977).

47. *Id.* at 86–88 (also rejecting the "sweeping language of *Fay v. Noia*").

48. See *Murray v. Carrier*, 477 U.S. 478, 494–96 (1986) (discussing the need for both cause and prejudice to be shown to overcome a procedural default, "at least in a habeas corpus proceeding challenging a state court conviction," and citing to "principles of comity and federalism").

49. See, e.g., *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (noting the Court's "enduring respect" for the finality of state court decisions).

50. See, e.g., *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (noting that the doctrine of comity promotes, in part, judicial efficiency); see also *Resnik, supra* note 39, at 889 ("In support of his opinion for the Court, Justice Rehnquist [in *Wainwright v. Sykes*] explained his views of procedure, his concerns about economy, finality, ritual, norm enforcement, first tier authority, and litigant autonomy.").

statute of limitations on the filing of federal habeas corpus;⁵¹ codified, with limited exceptions, the requirement that petitioners exhaust their state court claims;⁵² and created restrictions on “second or successive petitions.”⁵³ AEDPA also placed a higher hurdle to obtaining an evidentiary hearing in federal court, especially for petitioners who failed to develop facts in state court.⁵⁴ AEDPA’s procedural provisions were designed to speed up the process,⁵⁵ reduce perceived abuses,⁵⁶ and avoid repetitive frivolous filing.⁵⁷

Although AEDPA made procedural alterations, the change it made to the standard of review was a significant, if not the most significant, feature.⁵⁸ AEDPA eliminated the *de novo* standard of review for cases in which the state court had examined the federal claim.⁵⁹ Instead, federal courts were to grant habeas petitions of state cases that had been “adjudicated on the merits” only if the state court’s decision was “contrary to, or involved an unreasonable application of clearly established Federal law,”⁶⁰ or if it was “based on an unreasonable

51. 28 U.S.C. § 2244(d)(1) (2012).

52. *Id.* § 2254(b)–(c); *see also* *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (noting the limited circumstances under which a federal court will not enforce the exhaustion principle). While related to the federal courts’ treatment of exhaustion, 28 U.S.C. § 2254(b)(2), which permits the federal habeas court to deny unexhausted claims on the merits, is a significant exception to the increased focus on procedure. 28 U.S.C. § 2254(b)(2). Previously, these claims were generally dismissed without prejudice for the inmate to go back to state court. Unlike many of the other rules put in place, this provision encourages courts to move to substance, albeit only in the denial of claims.

53. 28 U.S.C. § 2244(b); *see also* *Felker v. Turpin*, 518 U.S. 651, 654, 664 (1996) (determining that the successive petition restrictions did not violate the Suspension Clause).

54. *See* 28 U.S.C. § 2254(e) (“[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”); *see also* *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (limiting development of the factual record in federal court); *infra* text accompanying notes 133–37 (discussing *Cullen*).

55. *See Rhines*, 544 U.S. at 276 (“One of the statute’s purposes is to ‘reduce delays in the execution of state and federal criminal sentences, particularly in capital cases.’” (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003))).

56. H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 944, 944 (describing the “unnecessary delay and abuse” in habeas filings).

57. *See generally* James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. 1063, 1080–82 (2008) (tracing concern over repetitive habeas applications from the mid-20th century to the passage of the AEDPA).

58. *See* Yackle, *A Primer on the New Habeas Corpus Statute*, *supra* note 23, at 382 (stating that the AEDPA standard of review commanded the “lion’s share of attention”); *see also* Dan Poulson, Note, *Suspension for Beginners: Ex parte Bollman and the Unconstitutionality of the 1996 Antiterrorism and Effective Death Penalty Act*, 35 HASTINGS CONST. L.Q. 373, 386 (2008) (stating that in 18 U.S.C. 2254(d)(1), “AEDPA radically departed from some of the most well-established principles of habeas review”).

59. *But see* Liebman, *supra* note 38, at 2011, 2021–26 (describing the pre-AEDPA *de novo* standard of review as “the guts of the habeas corpus remedy” and discussing cases applying that standard).

60. 28 U.S.C. § 2254(d) (2012).

determination of the facts in light of the evidence presented in the [s]tate court proceeding.”⁶¹ The legislative history surrounding this section does not clearly show the origins or goal of this language; however, Congress knew it would result in a reduction of review by the federal courts.⁶² These provisions laid the groundwork for a focus on the merits of habeas claims. In fact, perhaps the current shift to substantive habeas is unsurprising: the foundation was laid almost twenty years ago.

The procedural provisions have, however, had staying power at center stage. Even with AEDPA’s significant change to the substantive standard, the Court focused on interpreting the procedural provisions of the statute.⁶³ Under the statute of limitations, for example, the Court interpreted when a state post-conviction petition is “pending”⁶⁴ and “properly filed”⁶⁵ so that the one-year statute of limitations is tolled, and when equitable tolling applies.⁶⁶ The Court has also interpreted the provision relating to second and successive habeas petitions⁶⁷ as well as the meaning of exhaustion of state court remedies.⁶⁸

61. *Id.* § 2254(d)(2).

62. See Yackle, *A Primer on the New Habeas Corpus Statute*, *supra* note 23, at 398–99 (indicating that several U.S. senators thought that § 2254(d) would reduce “frivolous appeals” and “make it more difficult for state prisoners to press federal claims in the federal district courts”); see also Muhammad Usman Faridi, Comment, *Streamlining Habeas Corpus While Undermining Judicial Review: How 28 U.S.C. § 2254(d)(1) Violates the Constitution*, 19 ST. THOMAS L. REV. 361, 376–78 (2006) (quoting excerpts of the congressional debate on AEDPA and describing it as not shedding any “real light” on the change in the standard of review); Terrell J. Iandiorio, Comment, *Federal Postconviction Relief and 28 U.S.C. § 2255(4): Are State Court Decisions “Facts”?*, 71 U. CHI. L. REV. 1141, 1157–58 (2004) (reviewing AEDPA’s congressional testimony and concluding that Congress was not concerned with habeas relief but, rather, with capital cases).

63. See Ellyde Roko, *Finality, Habeas, Innocence, and the Death Penalty: Can Justice Be Done?*, 85 WASH. L. REV. 107, 120 (2010) (describing the Supreme Court’s “laser-like focus on procedure” in its review of habeas cases).

64. See *Lawrence v. Florida*, 549 U.S. 327, 329, 337 (2007) (determining that § 2244(d)(2)’s one-year statute of limitations is not tolled during the time between a final state court judgment on a state post-conviction motion and the filing of a U.S. Supreme Court petition for certiorari); *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (interpreting § 2244(d)(2) to mean that a state post-conviction case is pending “until the application has achieved final resolution through the State’s post-conviction procedures”).

65. See *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (finding a state court petition that was untimely was not “properly filed” and therefore that the petitioner was “not entitled to . . . tolling under § 2244(d)(2)” (internal quotation marks omitted)).

66. See *Holland v. Florida*, 560 U.S. 631, 649 (2010) (affirming that AEDPA’s statute of limitations was subject to equitable tolling); *Lawrence*, 549 U.S. at 336 (assuming but not deciding that equitable tolling was available if petitioner shows that “(1) he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way” and prevented timely filing” (quoting *Pace*, 544 U.S. at 418)).

67. See *Burton v. Stewart*, 549 U.S. 147, 157 (2007) (per curiam) (holding that a district court did not have jurisdiction to hear a successive petition because the relevant U.S. court of appeals had not authorized filing of a “second and successive”

Through its cases restricting procedural avenues for habeas relief, the Court tried to encourage state courts to develop post-conviction procedures to which the federal courts would defer,⁶⁹ efficiently resolve habeas cases, and give due deference to state law and state court rulings.⁷⁰ This last goal relates to comity to the state courts and reflects a desire to leave the state courts to their own affairs in a federalist system of government.⁷¹ While these narratives have dominated the Court's cases, scholars examining habeas have put forth a multiplicity of views.⁷²

petition, as required by 28 U.S.C. § 2244(b)(3)); *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (determining that a successive petition based on retroactive law, under 28 U.S.C. § 2244(b)(2)(A), may only be filed when the Supreme Court holds that the new rule is retroactively applicable); *see also Calderon v. Thompson*, 523 U.S. 538, 542, 554 (1998) (determining that the federal circuit court abused its discretion in recalling the mandate even though it complied with the AEDPA by ruling based on the initial, rather than a successive, petition).

68. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 847–48 (1999) (holding that state inmates must file for discretionary relief in the state court of last resort to satisfy the exhaustion requirement).

69. *See KING & HOFFMANN*, *supra* note 10, at 49 (“[T]he ridiculously low success rate of noncapital habeas petitioners today is linked with the dramatic expansion of state judicial review of federal claims between the 1960s and the 1980s—a structural change that habeas review actually helped to bring about.”); *see also id.* at 67 (“Expansive habeas review . . . spurred the states to create new and improved avenues for judicial review where convicted defendants could litigate claims in state court based on that federal law[.]”).

70. *Compare Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (stating that a trial in state court should be the “a decisive and portentous event[, and to] . . . the greatest extent possible all issues which bear on [the charges brought] should be determined in [that] proceeding”), *with id.* at 111 (Brennan, J., dissenting) (defending a contrary decision on these grounds by stating that “[a] regime of federal habeas corpus jurisdiction that permits the reopening of state procedural defaults does not invalidate any state procedural rule as such; [the state’s] courts remain entirely free to enforce their own rules as they choose, and to deny any and all state rights and remedies to a defendant who fails to comply with applicable state procedure” (footnote omitted)). For a substantive version of this, *see Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011), which describes one requirement for post-conviction federal review as “difficult to meet” and a “highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt” (citation omitted) (internal quotation marks omitted).

71. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (citing the goal of comity). The Court has defined comity as respect for state court functions that leaves the state courts free from federal intrusion and emphasized comity's central role in avoiding conflicts between the state and federal governments. *Younger v. Harris*, 401 U.S. 37, 44 (1971)); *see also Norlynn Blocker*, Comment, *An Exercise in Comity: Exhaustion of State Remedies in Federal Habeas Corpus Proceedings*, 35 BAYLOR L. REV. 497, 506 (1983) (explaining the origins of comity and its importance to federalism).

The Supreme Court rediscovered the importance of comity in a series of cases restricting collateral attack on the racial composition of grand juries. *See Wainwright*, 433 U.S. at 84 (citing *Francis v. Henderson*, 425 U.S. 536, 538–39 (1976)); *see also* Stephen A. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367, 384 & n.142 (1983) (outlining the line of cases requiring cause and prejudice to overcome procedural default).

72. Some scholars have focused on the process available to state inmates. *See, e.g., Bator*, *supra* note 9, at 443–44 (suggesting a lesser role for the federal habeas

Before moving on, this Article briefly considers a few possible explanations for why the Court has focused on process for so long. One possible reason is the nature of post-conviction cases. Many cases involve the mere application of set habeas law to a particular case. Habeas cases that focus on the application of a constitutional protection—for example, whether or not counsel was ineffective in a given case—are not solely cases about the interpretation of habeas statutes.⁷³ They are also cases that go to the actual claims raised on habeas.⁷⁴ These cases, therefore, do not surface as cases about the scope or interpretation of habeas, and result in construing the field of relevant cases more narrowly.⁷⁵ In this light, the focus on procedure makes particular sense in the pre-AEDPA era, when federal courts reviewed legal questions and mixed questions of fact

court where the state courts have provided a full forum for resolution of the legal claim). Others have emphasized concern about convictions of innocent defendants. *See, e.g.,* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142–43 (1971) (contemplating innocence in habeas cases where parties are seeking collateral relief). Still others have advocated for habeas as a vehicle for structural reform. These scholars would drastically limit the claims that are cognizable in habeas and use the resources that are freed up to fix other structural problems, such as indigent criminal defenses and repeated violations of criminal defendants' rights. *See, e.g.,* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 791 (2009) (proposing that the federal government invest resources in improving government-sponsored defense services); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 3–4 (2010) (refocusing habeas relief from an individual perspective to an eye to “systemic criminal justice reforms”).

73. AEDPA requires that the federal courts apply “clearly established” U.S. Supreme Court case law. 28 U.S.C. § 2254(d) (2012). Therefore, the Court has a limited opportunity to develop criminal constitutional law in habeas cases. *See* *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011) (limiting “clearly established Federal law” to include only Supreme Court cases decided before an inmate’s state court adjudication (internal quotation marks omitted)); *Teague v. Lane*, 489 U.S. 288, 316 (1989) (limiting the law that can be used by prisoners after their direct appeal).

74. This is particularly true of the scores of unpublished habeas denials. *See, e.g.,* *Clark v. Epps*, 359 F. App’x. 481, 487 (5th Cir. 2009) (per curiam) (affirming a denial of habeas because the introduction of improper testimony did not improperly influence the jury and therefore did not constitute ineffective assistance of counsel); *Sam v. Hartley*, 359 F. App’x. 12, 14, 21–22 (10th Cir. 2009) (affirming a denial of habeas because, among other things, the petitioner’s trial counsel’s failure to investigate certain witnesses and the crime scene did not prejudice the petitioner); *see also* *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (per curiam) (finding that the Court’s prior law did not clearly establish that ineffective assistance of counsel was given when the attorney appeared by speaker phone for the defendant’s no contest plea).

75. Some cases clarify and interpret a provision of AEDPA and then go on to address the claims on the merits. *See, e.g.,* *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (interpreting AEDPA and then addressing ineffective assistance of counsel claim). In *Wiggins*, the Court found, on the performance prong of *Strickland v. Washington*, that an unreasonable application of *Strickland* had occurred; however, the meat of its opinion focused on determining whether or not the petitioner’s trial counsel violated *Strickland* by failing to investigate the client’s case. *See id.* at 533–34 (citing *Strickland v. Washington*, 466 U.S. 688, 690–91 (1984)).

and law de novo.⁷⁶ As a result, lower federal court substantive decisions did not raise issues of federal habeas statutory interpretation.

Additionally, the Court is less likely to take cases in which the AEDPA's interpretive issues are clearly resolved because cases that focus merely on whether the writ should have been granted do not answer systemic questions.⁷⁷ Instead, these cases are more likely to apply the law to the peculiar facts of the case. These features of habeas law may help explain why the Court, before AEDPA, significantly reviewed procedural questions and continued to do so after AEDPA.

C. *Effects of Proceduralism*

The focus on proceduralism is not without its critics.⁷⁸ Proceduralism has costs for coherence, litigants, courts, and even the very goals that motivated it. These procedural cases gave rise to habeas doctrines that are, at best, convoluted and difficult to understand.⁷⁹ The complexity of habeas procedure is exacerbated because, as mentioned earlier, state inmates who are not subject to capital sentences rarely have a lawyer representing them in federal habeas.⁸⁰ This means that state prisoners may initially mis-present the issues for the federal courts' consideration and may omit important aspects of the argument or ramifications of their positions. As a result, the federal courts are commanded to impose these procedural barriers, yet also feel constrained to take into account the lack of

76. See, e.g., *Miller v. Fenton*, 474 U.S. 104, 112, 115 (1985) (stating that voluntariness of confession is a legal question entitled to plenary review).

77. See SUP. CT. R. 10 (cautioning that review is "rarely granted" when the error is "misapplication of a properly stated rule of law").

78. See Steiker, *supra* note 28, at 315–16 (critiquing the "overproceduralism" of postconviction litigation). But see Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 139–40 (2012) (arguing for procedural due process as a method for enhanced review beyond what AEDPA provides).

79. See Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1738 (2000) ("The Court's current doctrine is notoriously complex, confusing if not confused."); see also *Brecht v. Abrahamson*, 507 U.S. 619, 649 (1993) (White, J., dissenting) ("Our habeas jurisprudence is taking on the appearance of a confused patchwork in which different constitutional rights are treated according to their status.").

80. See Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 46 (2004) (noting that most inmates are pro se, and "rationalize" their errors due to illiteracy and lack of counsel); Jessica Feerman, "The Power of the Pen": *Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 HARV. C.R.-C.L. L. REV. 369, 369–70 (2006) (explaining that, in addition to barriers created by indigency and illiteracy, prisoners' full access to courts is constrained by their dependence on prison legal resources).

counsel.⁸¹ And, to the extent that pro se cases are used as examples for later decisions, these cases do not make reliably good law.

Further, the cost of proceduralism to inmates is high. The procedural hurdles slow many pro se inmates who navigate habeas without the assistance of counsel.⁸² In a recent study, researchers found that 13.3% of cases included at least one procedurally defaulted claim, 10.9% of cases were dismissed as unexhausted, 21.7% of cases were dismissed as time barred, and only 0.35% of cases were granted relief on any claim.⁸³ This frustration of inmates is intentional. Yet, it is not without important systemic implications because inmates come to perceive the criminal system as a cruel and unjust game in which the courts avoid hearing their claims, no matter how meritorious.⁸⁴

The Court's obsession with habeas proceduralism has also exhausted litigants and judges. Congress, in AEDPA, attempted to prioritize efficiency over proceduralism for its own sake.⁸⁵ Federal courts have also attempted to circumvent the arcane and unintelligible world of proceduralism. For example, the courts, in the name of judicial economy, may skip an examination of procedural default—a threshold question in habeas review—and move directly to the merits of the case to avoid the procedural quagmire.⁸⁶

81. See, e.g., *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring) (“[T]he allegations of a pro se litigant’s complaint are to be held ‘to less stringent standards than formal pleadings drafted by lawyers.’” (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam))); see Feierman, *supra* note 80, at 385–86 (suggesting a possible answer in enhanced legal education and library access for prisoners).

82. A slow process that requires absolute exhaustion has ramifications for both prisoners and the courts. For prisoners, a slow process means that only those prisoners serving lengthy sentences will ever contemplate habeas relief, and those who do file for relief will feel obligated to raise weaker post-conviction claims in addition to their stronger claims. See KING & HOFFMANN, *supra* note 10, at 80 (“[F]ederal courts actually take longer to resolve habeas petitions today than they did before the 1996 AEDPA statutory reforms that were designed to shorten the process.”).

83. *Id.* at 79 tbl.4.1; see also KING, ET AL., *supra* note 14, at 52 (providing statistics for post-AEDPA habeas litigation in federal courts, including an estimated rate of relief of less than one percent for non-capital cases); Thomas C. O’Byrant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 300–01 (2006) (providing a personal account of the challenges and frustrations of litigating pro se from the inside of a Florida jail cell).

84. See Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 350 (2006) [hereinafter Stevenson, *Confronting Mass Imprisonment*] (“[M]ost prisoners’ complaints about wrongful convictions, illegal sentences, and other errors for which there is a constitutional remedy are never addressed on the merits.”).

85. See 28 U.S.C. § 2254(b)(2) (2012) (allowing federal courts to deny a habeas petition on the merits, even if the prisoner failed to exhaust state court remedies).

86. See, e.g., *Simpson v. Warren*, 662 F. Supp. 2d 835, 846 (E.D. Mich. 2009) (“[T]he Court finds that the procedural issue is complex and the interests of judicial

Restrictive proceduralism does not even always respect the goals it sets out to achieve. Habeas procedural litigation undeniably involves the federal courts mucking around in state procedural law. Federal courts, for example, determine whether states consistently apply their procedural rules and scrutinize the exceptions that state courts make to these rules⁸⁷ as well as whether or not the state court rules give defendants a full opportunity to litigate their claims.⁸⁸ In other words, a focus on proceduralism does not prevent the federal courts from making significant interpretations of *state* law. It is a myth that focusing on limiting the number of inmates who enter through the door is *necessarily* respectful of the state courts' autonomy to determine their own rules and decide their own cases.

II. THE SUPREME COURT'S RECENT SHIFT TO RESTRICTIVE SUBSTANTIVE HABEAS

The passage of AEDPA set the stage for a move to substantive habeas, but its passage did not immediately create this shift. Instead, the shift has materialized through recent Supreme Court cases that, to a great extent, focus on the substantive questions that AEDPA highlighted or created. Moreover, the Court's move is not only to substantive habeas, but also toward a restrictive substantive habeas.⁸⁹

A. AEDPA's New Standard of Review

The origins of the shift to a non-procedural approach to habeas are found in AEDPA. However, AEDPA did not accomplish this shift by itself. As mentioned above, AEDPA's language narrowed both the substantive and the procedural avenues to habeas corpus relief. On the substantive side, AEDPA altered the standard by which the federal courts examined questions of law and mixed questions of law and

economy are best served by addressing the merits of Petitioner's claims."), *aff'd*, 475 F. App'x 51 (6th Cir. 2012).

87. See, e.g., *Conner v. Hall*, 645 F.3d 1277, 1291 (11th Cir. 2011) (finding Georgia's miscarriage of justice exception was inconsistently applied and therefore incapable of barring federal review).

88. See *Hampton v. Wyant*, 296 F.3d 560, 563 (7th Cir. 2002) (listing the circuit's three considerations for a court to find a "full and fair opportunity to litigate"—namely, (1) the inmate must plead and argue a factual basis for a constitutional violation "(2) the state court has carefully and thoroughly analyzed the facts and (3) applied the proper constitutional case law to the facts").

89. This move to restrictive substantive habeas review may have constitutional implications. For example, some have argued that § 2254(d) violates the Suspension Clause and interferes with Article III powers of the federal courts. See, e.g., *Faridi*, *supra* note 62, at 364 (arguing that § 2254's new "contrary to, or . . . an unreasonable application of, clearly established Federal law" standard infringes on federal courts' powers of judicial review (internal quotation marks omitted)); see also *Williams v. Taylor*, 529 U.S. 420, 440 (2000) (declining to address the constitutionality of § 2254).

fact. Prior to AEDPA's passage, the federal courts reviewed both types of questions de novo.⁹⁰ Under AEDPA, the federal courts were limited to granting relief on cases that were "adjudicated on the merits" to situations in which the state court decision was "contrary to" or "an unreasonable application of clearly established Federal law."⁹¹

Despite the shift in language in both the procedural and substantive aspects of habeas, at least some scholars believed that the Court had already done the most significant procedural "reforms" prior to the passage of AEDPA.⁹² Other scholars echoed the limited impact of AEDPA on the substantive side, suggesting that the "unreasonable application" language had little actual effect on the federal courts' decisions.⁹³

After AEDPA, the federal circuit courts put forth divergent understandings of this standard of review language. The Supreme Court construed the language in *Williams v. Taylor*,⁹⁴ holding that relief could only be granted if the state court decision was "contrary to" or "an unreasonable application of" U.S. Supreme Court precedent.⁹⁵ An "unreasonable application" of federal law occurs when the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case."⁹⁶ A decision is "contrary to" federal law "if the state court applies a rule that contradicts the governing law" or "confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the Court's] precedent."⁹⁷

90. Liebman, *supra* note 38, at 2014.

91. 28 U.S.C. § 2254(d) (2012).

92. See, e.g., Blume, *supra* note 12, at 271 (summarizing the Court's procedural decisions prior to AEDPA).

93. See, e.g., Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 950-52, 959 (1998) (maintaining that the "unreasonable application" language was designed to encourage federal courts to defer to the states and limit habeas remedies, as well as that the AEDPA "supplements," rather than "supplant[s]," Supreme Court precedent in this area (internal quotation marks omitted)); cf. James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking That Article III and the Supremacy Clause Demand of the Federal Courts*, 98 COLUM. L. REV. 696, 867 (1998) (arguing, in response, that the "unreasonable application" phrase only matters in situations without clearly established law).

94. 529 U.S. 362 (2000).

95. *Id.* at 407-08.

96. *Id.*

97. *Id.* at 405-06. Justice Stevens, in a four Justice opinion, argued that restricting the substantive standard of review conflicted with a federal court's duty under Article III to declare the meaning of the Constitution. *Id.* at 378-79 (plurality opinion).

B. *Post-AEDPA Stasis After Williams v. Taylor*

Over the next ten years, the Court, with a few exceptions, did not focus on interpreting the “unreasonable application” provision but, instead, relied on per curiam opinions to define the contours of AEDPA’s language.⁹⁸ The exceptions are worth noting. For example, in *Yarborough v. Alvarado*,⁹⁹ the Court explained that courts are more likely to be deemed “reasonable” when interpreting general rules than specific ones.¹⁰⁰ The Court also decided a few cases where it found an unreasonable application of law.¹⁰¹ In *Schriro v. Landrigan*,¹⁰² the Court may have signaled its future interest in restricting substantive habeas.¹⁰³

In light of this fairly minimal guidance from the Supreme Court, lower courts interpreted and applied AEDPA language in various ways. For example, the U.S. Court of Appeals for the Second Circuit was robust in developing *Williams v. Taylor*. The Second Circuit reiterated that an unreasonable application “must be not only erroneous but also unreasonable. Some increment of incorrectness beyond error is required.”¹⁰⁴ The court then cautioned that “the

98. See *McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (per curiam) (reversing the U.S. Court of Appeals for the Ninth Circuit and finding that a state supreme court’s rejection of defendant’s insufficiency of the evidence claim was not an unreasonable application of federal law); *Middleton v. McNeil*, 541 U.S. 433, 437–39 (2004) (per curiam) (determining, without briefing or oral argument, that the state court opinion was not unreasonable when it acknowledged faulty jury instructions and did not “ignor[e]” them as the Ninth Circuit had claimed (alteration in original)); *Woodford v. Viscioiti*, 537 U.S. 19, 21, 24, 27 (2002) (per curiam) (reversing the Ninth Circuit and concluding that, even though it may not have made the same determination as the state court, the state court’s decision was nevertheless not “unreasonable” under the AEDPA (internal quotation marks omitted)); see also *Porter v. McCollum*, 558 U.S. 30, 44 (2009) (per curiam) (finding that the state court’s failure to give appropriate weight to pertinent facts was an unreasonable application of the *Strickland* standard in light of the mitigation evidence adduced in the post-conviction hearing).

99. 541 U.S. 652 (2004).

100. See *id.* at 664 (reasoning that the application of general rules requires judgment and that the meaning of general rules can emerge over time).

101. See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 934–35 (2007) (holding that a state’s finding of competency was an unreasonable application of *Ford v. Wainwright*, 477 U.S. 399 (1986), in light of the process the state court used to deny defendant to be heard on the issue of competency); *Rompilla v. Beard*, 545 U.S. 374, 390–93 (2005) (explaining that the state court’s failure to find a *Strickland* violation when counsel failed to go to the courthouse to look at a publicly available file was an unreasonable application and warranted relief); *Wiggins v. Smith*, 539 U.S. 510, 534–35, 538 (2003) (holding that a state court decision based on a clear factual error was an unreasonable application of *Strickland*).

102. 550 U.S. 465 (2007).

103. See *id.* at 473 (stating that AEDPA’s “unreasonable” standard is “a substantially higher threshold” for obtaining relief than the pre-AEDPA standard of review); see also *Woodford*, 537 U.S. at 24 (“[AEDPA] demands that state-court decisions be given the benefit of the doubt.”).

104. *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000).

increment [of incorrectness] need not be great.”¹⁰⁵ The Second Circuit’s subsequent cases developed what “increment of incorrectness” is needed to warrant an “unreasonable application.”¹⁰⁶

Similarly, the U.S. Court of Appeals for the Ninth Circuit developed its own interpretation of “objectively unreasonable.” The Ninth Circuit has stated “a judgment is objectively unreasonable when it is clearly erroneous.”¹⁰⁷ The Ninth Circuit has further explained that a conviction must stand unless it leaves the court with a “definite and firm conviction that an error has been committed.”¹⁰⁸ In the years following, the court expanded and interpreted what cases rose to this level.¹⁰⁹

One ultimately unconvincing reason that the Supreme Court is only now turning to substantive habeas is that, until now, these issues were not ripe for review. It is possible that the Court did not have a case before it that was an appropriate vehicle for deciding these substantive questions, but this reason seems unlikely. There have been a plethora of cases that posed interpretative questions regarding the substantive provisions of habeas law since AEDPA’s passage.¹¹⁰ As

105. *Id.*

106. *See, e.g.,* Ramchair v. Conway, 601 F.3d 66, 69 (2d Cir. 2010); Wilson v. Mazzuca, 570 F.3d 490, 493 (2d Cir. 2009); Brinson v. Walker, 547 F.3d 387, 389 (2d Cir. 2008); Hanson v. Phillips, 442 F.3d 789, 791 (2d Cir. 2006); Cox v. Donnelly, 432 F.3d 388, 390–91 (2d Cir. 2005) (per curiam); Gersten v. Senkowski, 426 F.3d 588, 615 (2d Cir. 2005); Henry v. Poole, 409 F.3d 48, 52 (2d Cir. 2005); Jackson v. Edwards, 404 F.3d 612, 615 (2d Cir. 2005); Brown v. Keane, 355 F.3d 82, 84–85 (2d Cir. 2004); Torres v. Berbarry, 340 F.3d 63, 64 (2d Cir. 2003); Cotto v. Herbert, 331 F.3d 217, 258 (2d Cir. 2003); Ryan v. Miller, 303 F.3d 231, 234 (2d Cir. 2002); Jenkins v. Artuz, 294 F.3d 284, 286–87 (2d Cir. 2002); Davis v. Strack, 270 F.3d 111, 116 (2d Cir. 2001); Lainfiesta v. Artuz, 253 F.3d 151, 156, 158 (2d Cir. 2001); Boyette v. Lefevre, 246 F.3d 76, 80 (2d Cir. 2001); Lindstadt v. Keane, 239 F.3d 191, 193 (2d Cir. 2001).

107. Shackleford v. Hubbard, 234 F.3d 1072, 1077 (9th Cir. 2000).

108. *See* Gunn v. Ignacio, 263 F.3d 965, 969 (9th Cir. 2001).

109. *See, e.g.,* Maxwell v. Roe, 606 F.3d 561, 565 (9th Cir. 2010); Slovik v. Yates, 556 F.3d 747, 749 (9th Cir. 2009); Burdge v. Belleque, 290 F. App’x 73, 79 (9th Cir. 2008); Anderson v. Terhune, 516 F.3d 781, 784 (9th Cir. 2008) (en banc); Parle v. Runnels, 505 F.3d 922, 924 (9th Cir. 2007); Winzer v. Hall, 494 F.3d 1192, 1194 (9th Cir. 2007); Boyd v. Newland, 467 F.3d 1139, 1142 (9th Cir. 2006); Gautt v. Lewis, 489 F.3d 993, 998 (9th Cir. 2007); Davis v. Woodford, 446 F.3d 957, 958 (9th Cir. 2006); Nelson v. Washington, 172 F. App’x 748, 749 (9th Cir. 2006); Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005); Brown v. Palmateer, 379 F.3d 1089, 1090 (9th Cir. 2004); Taylor v. Maddox, 366 F.3d 992, 996, 1017–18 (9th Cir. 2004); Chia v. Cambra, 360 F.3d 997, 999 (9th Cir. 2002); Riley v. Payne, 352 F.3d 1313, 1315 (9th Cir. 2003); Nunes v. Mueller, 350 F.3d 1045, 1049 (9th Cir. 2003); Himes v. Thompson, 336 F.3d 848, 850 (9th Cir. 2003); Lewis v. Lewis, 321 F.3d 824, 826 (9th Cir. 2003); Bradley v. Duncan, 315 F.3d 1091, 1094 (9th Cir. 2002); Greene v. Lambert, 288 F.3d 1081, 1084 (9th Cir. 2002); McCoy v. Stewart, 282 F.3d 626, 633 (9th Cir. 2002).

110. *See, e.g.,* McCambridge v. Hall, 303 F.3d 24, 36 (1st Cir. 2002) (en banc) (“The increment need not necessarily be great, but it must be great enough to make the decision unreasonable in the independent and objective judgment of the federal court.”); Gardner v. Johnson, 247 F.3d 551, 560 (5th Cir. 2001) (stating that

noted above, the Second and Ninth Circuit engaged in interpretation of AEDPA's unreasonable application language.¹¹¹ When the Supreme Court perceived that the lower courts had gone too far, the Court issued perfunctory reversals based on its belief that the state court decision was not an unreasonable application of law.¹¹² Only now has the Court reached out to squarely address these issues.

C. *Current Court: Narrowing in Practice*

Over the past few years, the Supreme Court's attention has returned to the substance of habeas.¹¹³ In a string of recent cases, the Court has accomplished the narrow substantive review that was only made possible by the changed language of AEDPA. These recent cases have expanded the number of inmate petitions subject to substantive review and severely restricted the substantive scope of federal court review.

In *Renico v. Lett*,¹¹⁴ the Court started to narrow (or clarified Congress's intent to narrow) the standard of review.¹¹⁵ In support, the Court cited *Williams v. Taylor* and other cases that referenced "deference" given to state court's determinations.¹¹⁶ The Court gave additional deference to state courts depending on the nature of the claim, stating, "[t]he more general the rule at issue—and thus the greater the potential for reasoned disagreement among fair-minded

reversing a state court is appropriate when the state court "applies the correct legal rule" in a "patently incorrect" manner); *Mendiola v. Schomig*, 224 F.3d 589, 591–92 (7th Cir. 2000) (stating that "[w]hen the constitutional standard is flexible, and the state court takes the rule seriously and produces an answer within the range of defensible positions, § 2254(d)(1) requires the federal court to deny the petition"); *Valdez v. Ward*, 219 F.3d 1222, 1230 (10th Cir. 2000) ("[T]he fact that one court or even a few courts have applied the precedent in the same manner to close facts does not make the state court decision reasonable.").

111. See *supra* notes 104–09 and accompanying text (describing the Second and Ninth Circuits' interpretations and listing cases).

112. See, e.g., *Middleton v. McNeil*, 541 U.S. 433, 437–39 (2004) (per curiam) (reversing, without briefing or argument, the Ninth Circuit because the state court opinion was not unreasonable).

113. To be sure, the Court has not abandoned deciding procedural questions. See, e.g., *Wall v. Kholi*, 131 S. Ct. 1278, 1281–82 (2011) (finding that petitioner's motion to reduce his sentence tolled the statute of limitations and, therefore, that his habeas petition was timely); *Walker v. Martin*, 131 S. Ct. 1120, 1124, 1131 (2011) (determining that a California timeliness rule was an adequate and independent grounds for its decision and reversing the Ninth Circuit's subsequent grant of the habeas corpus petition).

114. 130 S. Ct. 1855 (2010).

115. *Id.* at 1862.

116. *Id.* (citing *Williams v. Taylor*, 529 U.S. 362, 409–10 (2000), and other cases). Justice Stevens, writing for the dissenting Justices, objected that AEDPA's language does not require "deference." *Id.* at 1876 (Stevens, J., dissenting). Other than these references and citation to the statute, the majority did not expound on the rationale for deferential review.

judges—the more leeway [state] courts have in reaching outcomes in case-by-case determinations.”¹¹⁷ In *Lett*, the petitioner had raised a double jeopardy claim.¹¹⁸ The state court of last resort determined that the trial court had exercised “sound discretion.”¹¹⁹ The U.S. Supreme Court concluded that the state court decision was not “unreasonable” in light of the general standard the state court was applying.¹²⁰

The following year, in *Harrington v. Richter*,¹²¹ the Court expanded on the concept of “deference” to state courts that it had discussed in *Lett*.¹²² *Richter* addressed whether summary state court orders deciding constitutional claims, but providing no reasoning, would be reviewed under an “unreasonable application” or de novo standard.¹²³ The Court found that “unreasonable application” review was appropriate.¹²⁴ *Richter* involved an allegation of ineffective assistance of counsel under *Strickland v. Washington*,¹²⁵ and the Court emphasized the particular deference due where state courts applied a “general” legal standard.¹²⁶ Citing the same language from earlier opinions that was cited in *Lett*, the Court then expanded on the meaning of “unreasonable application” review.¹²⁷ It concluded that the “state court must be granted deference and latitude,” that the AEDPA standard is “difficult to meet,” and that AEDPA is only satisfied when the state court is “so lacking in justification that there [is] an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.”¹²⁸ The Court’s

117. *Id.* at 1864 (majority opinion) (alterations in original) (internal quotation marks omitted) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

118. *Id.* at 1861–62.

119. *Id.* at 1861 (internal quotation marks omitted).

120. *Id.* at 1864.

121. 131 S. Ct. 770 (2011).

122. *See, e.g., id.* at 786 (stating that “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable”); *cf. Bator, supra* note 9, at 489 (suggesting that the thoroughness of the state decision making process may have been relevant to the Court in deciding when a case is suitable for federal intervention).

123. *Richter*, 131 S. Ct. at 784–85. The question of what deference to give to a state’s unspoken or unreasoned opinion has received a fair amount of commentary since the passage of AEDPA. *See, e.g.,* Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223, 227 n.26, 241 (2002) (listing circuit court cases disagreeing on the meaning of adjudication under the AEDPA and later proposing that AEDPA deference be conditioned on an expressed federal rationale citing federal law).

124. *Richter*, 131 S. Ct. at 786.

125. 466 U.S. 668 (1984).

126. *Richter*, 131 S. Ct. at 783, 788.

127. *Id.*

128. *Id.* at 785–87. Because the state court in *Richter* did not explain its decision, the Court stated that “a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court’s decision” and evaluate whether “fairminded jurists could disagree” with these hypothetical reasons for the state court’s decision. *Id.* at 786; *see* *Metrish v. Lancaster*, 133 S. Ct. 1781, 1784–85

decision simultaneously expanded the number of cases in which federal courts will review state court decisions under the AEDPA “unreasonable application” standard, while making that review more deferential than before.¹²⁹

In embracing a narrow version of substantive review, the Court pointed to “familiar” reasons—respect for the state court’s “good-faith attempts to honor constitutional rights,” the state’s interest in concluding litigation, and the state’s power to punish offenders.¹³⁰ The Court asserted that deferential substantive review complemented the procedural default doctrine and kept state courts as the “principal forum for asserting constitutional challenges.”¹³¹ The Court also embraced the view that habeas should be reserved to “guard against extreme malfunctions in the state criminal justice systems, [and] not . . . substitute for ordinary error correction through appeal.”¹³²

The same term, in *Cullen v. Pinholster*,¹³³ the Supreme Court held “that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”¹³⁴ In

(2013) (reversing grant of habeas petition by the U.S. Court of Appeals for the Sixth Circuit because the petition did not meet AEDPA’s “unreasonable application, of clearly established Federal law” standard); Marceau, *supra* note 78, at 88 (construing *Richter* as “in favor of substantially curtailing federal courts’ authority to overturn a state conviction or sentence”); Daniel J. O’Brien, *Heeding Congress’s Message: The United States Supreme Court Bars Federal Courthouse Doors to Habeas Relief Against All but Irrational State Court Decisions, and Oftentimes Doubly So*, 24 FED. SENT’G REP. 320 (2012) (stating that *Richter* was a turning point in the Court’s application of habeas review); Amy Knight Burns, Note, *Counterfactual Contradictions: Interpretive Error in the Analysis of AEDPA*, 65 STAN. L. REV. 203, 220 (2013) (acknowledging that a habeas petition must “show that there was no reasonable basis for the state court to deny relief” (quoting *Richter*, 131 S. Ct. at 784) (internal quotation marks omitted)).

129. See, e.g., O’Brien, *supra* note 128, at 320 (stating that the Court has “driven home the point with unmistakable clarity” that significant deference is to be given to the state court, even when these courts provide no explanation for their rejection of the federal claim).

130. See *Richter*, 131 S. Ct. at 787 (citing cases in which the Court upheld procedural bars to federal court review of state inmates’ constitutional claims).

131. *Id.*

132. *Id.* at 786 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)) (internal quotation marks omitted). Comparatively, some scholars have advanced habeas as something akin to appellate review of federal issues decided in state court. See, e.g., Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036 (1977) (discussing the benefits of dialogue between state and federal courts that led to reforms of criminal procedure under the Warren Court); Hoffstadt, *supra* note 23, at 971 (explaining that habeas is the only meaningful opportunity for federal court review of defective state court adjudications); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 997 (1985) (discussing the inability of defendants to remove to federal court); see also Peller, *supra* note 27, at 666 (highlighting concerns about the effect of electoral politics on state court judges).

133. 131 S. Ct. 1388 (2011).

134. *Id.* at 1398.

other words, “evidence later introduced in federal court is irrelevant to § 2254(d)(1) review.”¹³⁵ The Court gave some substance to the legislative intent behind AEDPA, stating—without citing legislative history or prior AEDPA opinions—that “the broader context of the statute as a whole . . . demonstrates Congress’ intent to channel prisoners’ claims first to the state court.”¹³⁶ The Court also repeated *Richter*’s “difficult to meet” language and determined that Pinholster’s ineffective assistance of counsel claim did not surmount the “high threshold” for habeas relief.¹³⁷

In *Johnson v. Williams*,¹³⁸ a follow-up case to *Richter*, the Court held that federal claims that were not explicitly addressed by the state court—even if the state court decided other claims—were entitled to a rebuttable presumption that the claims were “adjudicated on the merits” and, therefore, subject to § 2254(d) ’s deferential review.¹³⁹

The next term, in *White v. Woodall*,¹⁴⁰ the Court revisited the question of what is “clearly established” law, reiterating that the federal courts must focus on the Court ’s prior holdings and reversing a grant of habeas based on what the Court deemed was not “squarely established” law.¹⁴¹

The Court has been applying the constraints laid out in these cases to expand the reach of deferential review, deny habeas, and overturn

135. *Id.* at 1400. *Pinholster* can arguably be seen as focusing on a procedural, instead of a substantive, question. On its face, whether an evidentiary hearing is held appears to be a procedural question. However, the Court has linked the deference given to the substance of state court decisions to the question of when a hearing can occur. Specifically, the district court has discretion to hold an evidentiary hearing and 28 U.S.C. § 2254(e)(2) focuses that discretion. See 28 U.S.C. § 2254(e)(2) (2012) (stating a court “shall not” hold a hearing unless the petitioner satisfies certain criteria). The federal courts’ discretion was also cabined because they must consider “the deferential standards prescribed by § 2254 . . . in deciding whether an evidentiary hearing is appropriate.” *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). But *Pinholster* barred consideration of federal court evidence in the substantive determination under 28 USC 2254(d)(1).

136. *Pinholster*, 131 S. Ct. at 1398–99 (internal quotation marks omitted). The *Pinholster* Court was also forced to explain possible inconsistencies between *Williams v. Taylor*, which it said only addressed whether § 2254(e)(2), not § 2254(d)(1), barred an evidentiary hearing, as well as the more recent case of *Schriro v. Landrigan*, which directed federal courts account for the deferential AEDPA standard when determining whether to grant an evidentiary hearing. *Id.* at 1399–1400; see also *Schriro*, 550 U.S. at 474 (interpreting AEDPA’s requirements for granting evidentiary hearings); (Michael) *Williams v. Taylor*, 529 U.S. 420 (2000).

137. *Pinholster*, 131 S. Ct. at 1398, 1402–03.

138. 133 S. Ct. 1088 (2013).

139. *Id.* at 1091–92.

140. 134 S. Ct. 1697 (2014).

141. *Id.* at 1706 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)) (internal quotation marks omitted).

grants of habeas by the federal courts of appeal.¹⁴² One motivation for the Court's recent enthusiasm for clarifying substantive habeas standards may be a belief that the lower federal courts have been applying AEDPA's standard too laxly. In any case, the Court is reversing federal appellate courts that, as the Court sees it, exceed the tight constraints the Court has placed on habeas relief.¹⁴³ For example, in reversing a grant of habeas in *Parker v. Matthews*,¹⁴⁴ the Court looked to the Kentucky state court's unexplained decision on the federal question, applied a deferential review of this unexplained decision, and chastened the U.S. Court of Appeals for the Sixth Circuit for looking at its own precedent to determine reasonableness.¹⁴⁵

By contrast, the current Court has been less active in interpreting procedural provisions and, to the extent that it is addressing these cases, seems to be easing slightly on its earlier restrictions on procedural habeas. For example, the Court recently held that the one-year statute of limitations period was subject to equitable tolling.¹⁴⁶ Similarly, while the Court recently upheld prior law allowing the federal court of appeals to *sua sponte* raise a statute of limitations bar,¹⁴⁷ it later found that an appellate court erroneously did so where the state had waived the defense.¹⁴⁸ Consistent with the relaxation of habeas proceduralism, the Court has begun to ease its procedural default rules for inmates raising ineffective assistance of counsel claims. In states where those claims must be raised in a state post-conviction petition¹⁴⁹ or states that deny "a meaningful opportunity" to litigate an ineffectiveness claim on direct appeal,¹⁵⁰ the Court now allows the lack of post-conviction counsel, or even the

142. See *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011) (holding that habeas courts must apply the substantive federal law in effect at the time of the last reasoned state court decision, further limiting their ability to apply more recent Supreme Court precedent to inmates' cases and even when their cases are still on direct appeal).

143. See, e.g., *Woodall*, 134 S. Ct. at 1707 (reversing a Sixth Circuit habeas grant); *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011) (per curiam) (finding that there was no unreasonable application of law and reversing—for the third time—the Ninth Circuit's decision).

144. 132 S. Ct. 2148 (2012) (per curiam).

145. *Id.* at 2153–56.

146. *Holland v. Florida*, 560 U.S. 631, 634 (2010).

147. See *Day v. McDonough*, 547 U.S. 198, 202 (2006) (affirming the habeas petition dismissal for untimeliness).

148. See *Wood v. Milyard*, 132 S. Ct. 1826, 1835 (2012) (concluding the circuit court should have reached the merits of the case where the government chose not to address an "arguable" statute of limitations defense").

149. See, e.g., *Martinez v. Ryan*, 132 S. Ct. 1309, 1313, 1315 (2012) (indicating that Arizona does not allow such claims to be brought on direct review and allowing a petitioner to show "cause" to overcome procedural default when there is an "[i]nadequate assistance of counsel at initial-review collateral proceedings").

150. *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013).

failures of post-conviction counsel, to provide cause to excuse the default of an ineffectiveness claim.¹⁵¹

In summary, the Court, both before and after passage of AEDPA, has constrained state prisoners' access to federal court by creating significant procedural barriers,¹⁵² and it has also answered many of the pressing procedural questions left open by the AEDPA. Despite these barriers, state inmates have persisted in their pursuit of federal review and, at least in some cases, have surmounted the procedural hurdles, albeit in smaller percentages than before AEDPA.¹⁵³ In the past few years, and over a relatively short period of time, the Court has refocused its attention on the substantive provisions governing habeas review, in contrast to its previous focus on restricting the procedural avenues of habeas petitioners.¹⁵⁴ This substantive review has constrained the lower federal courts' ability to review state court convictions for constitutional error. The Court can, and has, defined AEDPA in a way that forces federal courts to deny habeas even when the state court is wrong,¹⁵⁵ has summarily denied a claim without giving a reason,¹⁵⁶ has implicitly denied a federal claim by denying other claims in the appeal,¹⁵⁷ or has failed to apply significant changes in constitutional law.¹⁵⁸ Thus, the Court has expanded the number of inmate petitions subject to substantive review and severely restricted the substantive scope of federal court review.

151. *Id.*; see also *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977) (laying out the cause and prejudice requirements to overcome procedural default).

152. See *Resnik*, *supra* note 39, at 872, 874 ("Complex procedural schemes may also evidence beliefs about the importance or difficulty of a category of cases to be decided. . . . Alternatively, those hostile to the rights may create so cumbersome a procedure as to make rights enforcement extraordinary difficult. . . . [C]ontemporary federal habeas corpus has become a law of closure, of complex procedural obstacles that preclude adjudication on the merits. Current case law is dominated by announcements of new procedural requirements or refinements of those already in place.").

153. According to one study, in 16% of capital cases and 1.7% of non-capital cases, a petitioner overcame procedural default on at least one claim. *KING ET AL.*, *supra* note 14, at 48; see also *KING & HOFFMAN*, *supra* note 10, at 69 fig.4.1 (showing a sharp decline in the number of habeas filings relative to the population growth in state prisons between 1950 and 2009).

154. See, e.g., *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011).

155. See *Williams v. Taylor*, 529 U.S. 362, 406 (2000) ("Although the state-court decision may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case, the decision is not 'mutually opposed' to *Strickland* itself.").

156. See *Harrington v. Richter*, 131 S. Ct. 770, 784–85 (2011).

157. See *Johnson v. Williams*, 133 S. Ct. 1088, 1098–99 (2013).

158. See *Greene*, 132 S. Ct. at 45.

III. SUBSTANTIVE HABEAS IN SEARCH OF A LOGICAL LIMIT

Just after the passage of AEDPA, Larry Yackle suggested that an understanding of AEDPA's substantive language would have to account for the procedural limits imposed on habeas petitioners so that a coherent system could emerge.¹⁵⁹ In addition to the theoretical or political goals the Court embraces for habeas, the Court's interpretations should be logically consistent with prior doctrine. The Court's current direction fails to account for Professor Yackle's early, and telling, observation. Part III discusses the current Court's failure, in its move to restrictive substantive habeas, to account for prior doctrine or the realities of practice.

A. *Making Procedural Default Attractive?: The Triumph of Restrictive Substantive Habeas Over Procedural Habeas*

This Section briefly surveys the goals and limitations of procedural default, one arm of the Court's prior procedural habeas focus, because they create a backdrop for the Court's current cases. This Section also discusses an example of an illogical effect of the Court's prior emphasis on proceduralism combined with its current enthusiasm for restrictive substantive habeas. The example is telling not because it occurs frequently: it most certainly does not. Instead, the example highlights the real world possibility that the current direction of habeas doctrine does not adequately account for all of the pieces of the habeas puzzle.

Procedural default requires petitioners to present their claims to state courts, in compliance with state requirements, in order to be permitted to have these claims later reviewed by the federal courts.¹⁶⁰ In the mid-20th century, some Justices on the Court promoted the use of state procedural rules to parse good petitions from bad petitions¹⁶¹ because, in part, of fear that perpetual relitigation of

159. See Yackle, *A Primer on the New Habeas Corpus Statute*, *supra* note 23, at 384 ("Those procedural measures would be unintelligible if § 2254(d) undermined the federal courts' authority to determine the merits of claims when they are presented seasonably and in a proper procedural posture.").

160. See *Fay v. Noia*, 372 U.S. 391, 399 (1963) (describing procedural default as a "doctrine under which state procedural defaults are held to constitute an adequate and independent state law barring direct Supreme Court review"), *overruled in part by* *Wainwright v. Sykes*, 433 U.S. 72 (1977).

161. See *Brown v. Allen*, 344 U.S. 443, 503 (1953) (opinion of Frankfurter, J.) ("Normally rights under the Federal Constitution may be waived at the trial, and may likewise be waived by failure to assert such errors on appeal." (citation omitted)); see also *id.* at 544 (Jackson, J., concurring) (proposing the "observance of procedural safeguards" to separate meritorious petitions for habeas corpus from those that are "frivolous," "unintelligible," and "meaningless").

factual issues detracted from the great writ.¹⁶² At its core, procedural default is designed to cabin the reach of federal habeas.

After initially treating procedural default as a complete bar to review, the Court then backed away from this position, describing such use as “unsound in principle.”¹⁶³ In the 1970s, however, the Court began to endorse the use of procedural default to bar review of constitutional violations when a state prisoner failed to adhere to state procedural rules.¹⁶⁴ The result of an inmate’s failure to comply with these state rules was the “default,” or the federal court’s refusal to rule on the merits.¹⁶⁵ This trend has had staying power. The Court has grounded the requirement in federalism principles, prioritizing state courts’ autonomy over determination of federal questions.¹⁶⁶ More generally, the Court deems that “[f]ederal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.”¹⁶⁷

The two exceptions to procedural default are narrow in theory and perhaps narrower in fact. First, petitioners can overcome procedural default if they show cause for the default and prejudice.¹⁶⁸ Second, petitioners can overcome procedural default if, essentially, they can show that they are likely factually innocent.¹⁶⁹

162. See, e.g., *Price v. Johnston*, 334 U.S. 266, 301 (1948) (Jackson, J., dissenting) (expressing frustration with inmates’ increased access to, and potential abuse of, post-conviction remedies).

163. *Fay*, 372 U.S. at 434.

164. See *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

165. *Fay*, 372 U.S. at 399.

166. See Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 265, 269–74, 280–81 (1989) (offering historical and other background on the elevation of state procedural rules in habeas corpus before arguing that such a transition is a form of illegitimate jurisdictional abstention); see also *Murray v. Carrier*, 477 U.S. 478, 518 (1986) (Brennan, J., dissenting) (stating that federal court should abstain from review only after weighing those interests against the interests in favor of federal review). But see *Walker v. Martin*, 131 S. Ct. 1120, 1130 (2011) (mentioning explicitly “this Court’s repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights”).

167. *Engle v. Isaac*, 456 U.S. 107, 128 (1982); see also *Coleman v. Thompson*, 501 U.S. 722, 748 (1991) (“These costs are particularly high . . . when a state prisoner, through a procedural default, prevents adjudication of his constitutional claims in state court.”).

168. A petitioner can show cause, for example, if he shows an “objective factor external to the defense” that prevented compliance. *Murray*, 477 U.S. at 488; see *Wainwright*, 433 U.S. at 90–91; see also *Reed v. Ross*, 468 U.S. 1, 16 (1984) (applying the cause and prejudice analysis and finding “cause” for failure to raise a novel claim under the state’s procedural rules).

169. The failure to excuse the default must result in a “fundamental miscarriage of justice.” *Engle*, 456 U.S. at 135. This exception has been applied to allow an excuse from procedural default for petitioners who can show that a constitutional

Many petitioners fall into the procedural default trap, despite their best efforts.¹⁷⁰ Petitioners try, but often fail, to jump through the required hurdles of state procedure. Following state procedural rules is even more difficult for unrepresented petitioners, who form the vast majority of habeas petitioners, as well as for the vast majority of petitioners who pursue state post-conviction relief.¹⁷¹ In practice, the number of petitioners who surmount procedural hurdles and subsequently succeed on their claims is exceedingly low.¹⁷² In sum, procedural default is a lasting and central piece of the Court's previous focus on proceduralism.

1. Hypothetical example of two inmates: One who follows procedural rules and one who does not.

Next, this Article highlights one way in which the Court's move to restrictive substantive habeas could change things for a subset of claims in a way that distorts the goals of procedural default. The hypothetical pushes the Court's restrictive substantive habeas to its logical limits and tests it against existing procedural doctrine. The hypothetical demonstrates that, given the Court's current doctrinal moves, the Court has created a situation where prisoners are arguably better off by defaulting their claims in some instances instead of following state procedural rules.

Consider the following example:¹⁷³ State inmate A, "Alex," and his state lawyers follow all of the procedural rules. Alex raises a claim of

violation has likely resulted in the conviction of an innocent person. *Murray*, 477 U.S. at 496; see *House v. Bell*, 547 U.S. 518, 536–37 (2006).

170. See KING ET AL., *supra* note 14, at 48 (revealing that procedural default is a basis for 53% of rejections in capital cases and 13% of rejections in non-capital cases).

171. See Feierman, *supra* note 80, at 369, 371 (noting the use of jailhouse lawyers to assist with constitutional claims).

172. See KING, ET AL., *supra* note 14, at 9 ("In 28% of the capital cases and in 42% of non-capital cases that terminated without either transfer to another district or a grant of relief, the district court dismissed all claims without reaching the merits."); see also Resnik, *supra* note 39, at 952 n.523 (citing reports that showed that "1.8% [of petitions filed] resulted in any type of release of the petitioner" and less than 5% of petitioners obtained relief).

173. This possible habeas conundrum became apparent when I represented an inmate in federal habeas litigation and the relevant federal claim should have been raised on direct appeal, but instead it was raised in a post-conviction motion. In that case, which was not as clear-cut as my hypothetical, the Sixth Circuit upheld the district court's grant of habeas relief. *Guilmette v. Howes*, 577 F. Supp. 2d 904, 906 (E.D. Mich. 2008), *aff'd en banc*, 624 F.3d 286 (6th Cir. 2010).

The Supreme Court itself has only deepened the possible tension highlighted by the hypothetical in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). In both cases, the Court asserted that the failure to raise ineffective assistance of counsel claims in post-conviction trial court, where that is the first opportunity to raise that claim, can provide the cause to excuse procedural default. *Trevino*, 133 S. Ct. at 1914–15; *Martinez*, 132 S. Ct. at 1315. The hypothetical

ineffective assistance of trial counsel,¹⁷⁴ among other claims, in his direct appeal in state court.¹⁷⁵ The state intermediate appellate court denies the ineffective assistance claim on the merits, finding that there was neither deficient performance nor prejudice.¹⁷⁶ The state's highest court denies discretionary review. Now, assume inmate B, "Brian," has exactly the same ineffective assistance of counsel claim as Alex, but Brian and his lawyers fail to raise claims in a timely way under state rules. Brian fails to raise the ineffectiveness claim in his direct appeal; instead, he raises it in a state collateral petition.¹⁷⁷ The state post-conviction court determines that Brian did not comply with the state rule that requires the claim to be litigated on direct appeal.¹⁷⁸

example in this Article is based on a claim raised, or not raised, on direct appeal. Yet, under *Martinez* and *Trevino*, the same logic will also hold true for ineffective assistance of counsel claims that are properly raised in a first state post-conviction petition.

For purposes of the example, the Article assumes that other habeas rules not mentioned, such as the one-year statute of limitations, *see* 28 U.S.C. § 2244(d) (2012), have been satisfied.

174. *See Strickland v. Washington*, 466 U.S. 668, 675 (1984) (establishing the standard for ineffective assistance of counsel claims).

175. Some states permit or require raising ineffective assistance of counsel for record claims, and even some non-record claims, on direct appeal. Brensike Primus, *supra* note 72, at 19, 20 n.114 (discussing procedural requirements that on-the-record claims of ineffective assistance be raised on direct appeal in Illinois and New York; procedural rules in Michigan and Oklahoma requiring ineffective assistance to be raised on direct appeal; and Idaho's forty-two day time limit to file factual and legal challenges to the sentence and conviction in capital cases as requiring ineffective assistance claims to be filed before they can be discovered); *see also Bray v. Andrews*, 640 F.3d 731, 736 (6th Cir. 2011) (describing Ohio law as restricting direct appeal review to evidence within the trial court's record but allowing the admission of external evidence through a state post-conviction hearing); Thomas M. Place, *Recent Post Conviction Developments*, 81 PA. B. ASS'N Q. 110, 118 (2010) (describing a court decision rejecting the argument that counsel on direct appeal was not ineffective for failing to raise a non-record based claim on direct appeal); Joel M. Schumm & James A. Garrard, *Recent Developments in Indiana Criminal Law and Procedure*, 33 IND. L. REV. 1197, 1229, 1232 (2000) (discussing a state court decision that clarifies when litigants should raise ineffectiveness on direct appeal—namely, that counsel are permitted to raise claims on post-conviction if not raised on direct appeal). *Compare* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 614 & n.116 (2009) (citing courts that denied raising ineffective assistance of counsel on direct appeal because the claim was not based on the record), *with Martinez*, 132 S. Ct. at 1313 (stating that Arizona law requires raising ineffectiveness of trial counsel in a collateral post-conviction proceeding), *and Hodge v. Haerberlin*, 579 F.3d 627, 643 (6th Cir. 2009) (detailing that Kentucky law required ineffective assistance of counsel to be raised via collateral appeal, but forbid relitigation of issues raised and rejected on direct appeal).

176. *See Strickland*, 466 U.S. at 687 (explaining that, to prove an ineffective assistance of counsel claim, a petitioner must prove first, "that counsel's performance was deficient," and second, "that the deficient performance prejudiced the defense").

177. *See* DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS 3* (2013) (describing how state post-conviction motions are generally available only for claims which were not or could not have been raised at trial or on direct appeal).

178. *See, e.g.,* MICH. COMP. LAWS SERV. § 6.508 (LexisNexis 2007) (stating a court "may not grant relief" if the defendant "alleges grounds . . . which could have been

Brian also raises a separate claim of ineffectiveness of appellate counsel for failing to raise the ineffectiveness of trial counsel claim.¹⁷⁹ This claim is not defaulted because the post-conviction petition is Brian's first opportunity to raise the ineffectiveness of his appellate counsel.¹⁸⁰ For Brian to show ineffective assistance of appellate counsel, like for ineffective assistance of trial counsel, he must show that counsel's performance was deficient and that this deficient performance prejudiced him.¹⁸¹ Appellate counsel is bound to be an "active advocate" for the inmate and bring significant errors to the court's attention.¹⁸² The state post-conviction court also denies this claim. The state appellate courts decline to hear Brian's case, and, therefore, the state trial court is the last opinion on his claim.¹⁸³

2. Hypothetical examples of two inmates: Are the results skewed in federal court?

Now, fast forward to federal court. Alex and Brian both file a federal habeas petition under 28 U.S.C. § 2254, seeking new trials based on their trial attorneys' alleged ineffective assistance of counsel.

First, consider Alex's petition, which is handled by the relatively straightforward application of the Supreme Court's restrictive substantive habeas doctrine.

raised on appeal from the conviction" unless certain exceptions are met); N.Y. CRIM. PROC. § 440.10(2)(c) (McKinney 2005) (denying relief when a defendant "unjustifiabl[y]" fails to raise an issue on direct appeal); OKLA. STAT. ANN. tit. 22, ch. 18, App. R. 3.11 (West 2003) (generally refusing to allow defendant to bring claims regarding matters not presented at trial); see also Brensike Primus, *supra* note 72, at 20 n.114 (describing relevant rules in several states); Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 Ky. L.J. 301, 308–12 (2009–2010) (explaining that "[s]tates have moved claims of ineffectiveness of trial counsel from direct appeal to the post-conviction process principally because the basis for the claim may not appear on the record even where new counsel is appointed or retained for direct appeal").

179. See, e.g., *Evitts v. Lucey*, 469 U.S. 387, 395–97 (1985) (construing the right to effective assistance of counsel on appeal); see also *Smith v. Murray*, 477 U.S. 527, 536 (1986) (addressing an ineffective assistance of appellate counsel claim).

180. See, e.g., *Edwards v. Carpenter*, 529 U.S. 446, 452–53 (2000) (finding that a petitioner who uses a claim, such as ineffective assistance of appellate counsel, in habeas as "cause" to excuse procedural default must either properly raise that claim in state court or, if raised in federal court, must demonstrate an excuse for procedural default); see also *Murray v. Carrier*, 477 U.S. 478, 489 (1986) (requiring that a claim be independently raised in state court before using it as "cause" to excuse procedural default).

181. See *Strickland*, 466 U.S. at 687, 692, 694 (setting the standard for effective assistance of counsel as requiring performance below the range of competence as well as a demonstration of prejudice).

182. *Evitts*, 469 U.S. at 393–94.

183. See *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.").

Step 1: The federal court can examine the merits of the petition because Alex and his attorneys properly presented his claims to the state court. Therefore there is no procedural default.¹⁸⁴

Step 2: The federal district court reviews the merits of the case and assesses whether the state court made an “unreasonable application” of “clearly established” Supreme Court law.¹⁸⁵ This review, under the Court’s recent line of cases, is “difficult to meet,” and the federal court must grant the state court “deference and latitude.”¹⁸⁶ Even if the federal court disagrees with the state court’s conclusion and analysis, the federal court should deny the habeas petition unless the state court’s decision was “unreasonable.”¹⁸⁷ Assume, for purposes of this example, that the lawyer was ineffective but that, due to the increasingly strict standard of review, the court denies the claim.¹⁸⁸ Under restrictive substantive habeas, the thumb is on the scale to deny the claim, even if, under *de novo* review, the federal court would have found that the claim had merit.

Next, examine what happens to the second inmate, Brian, who failed to raise his ineffectiveness claim on direct appeal and instead raised it—too late—in state post-conviction proceedings.

Step 1: The federal court asks the threshold question of whether the inmate has procedurally defaulted his claim.¹⁸⁹ The federal district court will look at the state court’s determination that Brian did not comply with state rules that required his ineffective assistance of trial counsel claim be raised on direct appeal and will find that Brian has procedurally defaulted this claim.

Step 2: The federal court will then examine whether there is a permissible exception to applying the procedural default doctrine.¹⁹⁰ In this case, Brian will argue that he has shown cause to excuse his procedural default because of his appellate attorney’s

184. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991) (discussing procedural default as a bar to federal court review of claims).

185. 28 U.S.C. § 2254(d)(1) (2012).

186. See *Harrington v. Richter*, 131 S. Ct. 770, 785–86 (2011).

187. See *id.* at 778 (“AEDPA’s unreasonableness standard is not a test of the confidence of a federal habeas court in the conclusion it would reach as a *de novo* matter. Even a strong case for relief does not make the state court’s contrary conclusion unreasonable.”).

188. See *supra*, Part II.C.

189. See *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (“When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court.”).

190. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (excusing procedural default when the prisoner can demonstrate cause and actual prejudice or where denying his claim would result in “a fundamental miscarriage of justice”); *Wainwright v. Sykes*, 433 U.S. 72, 87, 90–91 (1977).

ineffectiveness.¹⁹¹ The federal district court will then review whether appellate counsel was ineffective to determine whether there is a reason for the procedural default.¹⁹² This is a threshold legal question governed by procedural default doctrine, not 28 U.S.C. § 2254, so the district court will make this determination *de novo*.¹⁹³ It might be assumed that, because the state court actually reached the merits of the appellate counsel claim, the federal court should apply AEDPA “deference” to the state court’s adjudication of this claim. However, nothing in the statutory language dictates this application. The petitioner is not seeking habeas relief on the appellate counsel claim; rather, he is seeking relief on the ineffectiveness of his trial counsel. Instead, the federal court is engaging in a review of cause and prejudice to overcome procedural default, a determination that comes prior to assessing the merits of the petitioner’s claim.¹⁹⁴ Therefore, for the purpose of determining whether Brian has shown cause, the federal court can arguably review the ineffective assistance of appellate counsel claim *de novo*.

To show ineffective assistance of appellate counsel, a petitioner must demonstrate that his appellate counsel failed to raise a meritorious claim that would affect the outcome of the appeal.¹⁹⁵ Therefore, the federal court must also examine (*de novo*) the underlying ineffective assistance of *trial* counsel claim that the appellate attorney failed to raise.¹⁹⁶ The example assumes that trial counsel was ineffective. Therefore, assume that the federal court finds that trial counsel’s performance was deficient in a way that

191. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (holding that ineffective assistance of counsel can establish cause to excuse procedural default); *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (same). The prejudice inquiries under ineffective assistance of counsel claims and under procedural default essentially track each other. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (explaining that for a defendant to challenge a conviction based on ineffective assistance of counsel, the prejudice prong requires a defendant to show that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable”); *Wainwright*, 433 U.S. at 87, 91 (discussing the prejudice rule laid out in *Francis v. Henderson*, 425 U.S. 536, 542 (1976), and finding a lack of prejudice due to the other evidence of guilt).

192. See *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012).

193. *Id.*

194. See *Carrier*, 477 U.S. at 494–96 (requiring both cause and prejudice to be shown to overcome procedural default).

195. See, e.g., *Burton v. Renico*, 391 F.3d 764, 783 (6th Cir. 2004) (“In sum, the failure of Burton’s counsel on direct appeal to raise Burton’s various procedurally defaulted claims does not rise to the level of constitutionally ineffective assistance of counsel necessary to overcome procedural default because none of Burton’s claims seem meritorious.”).

196. See, e.g., *Coleman v. Metrish*, 476 F. Supp. 2d 721, 732–33 (E.D. Mich. 2007) (finding no ineffective assistance of appellate counsel for failure to raise an issue on appeal because that issue “lacked merit” at trial).

prejudiced the defendant at trial and that appellate counsel's failure to raise this claim was constitutionally ineffective.¹⁹⁷ This means that there is both cause and prejudice to overcome a procedural default.¹⁹⁸

Step 3: Now that the procedural default doctrine does not bar the federal court from examining the merits of the petition, the district court will evaluate Brian's claims. As the state court did not "adjudicate" these claims "on the merits,"¹⁹⁹ the federal court will review his claims de novo.²⁰⁰ The outcome here ought to be predictable based on the federal court's examination of the exact same claims for purposes of cause and prejudice. The federal court will find that Brian has shown ineffective assistance of trial counsel (and appellate counsel) and will grant conditional habeas relief.

What happened under the application of the procedural default doctrine and the Court's new restrictive substantive habeas? In sum, Brian, who failed to properly present his claims to the state court, was able to have his petition granted, whereas Alex, who "did everything right" in state court, had his petition denied due to the standard of review, especially due to the sharp teeth that the Supreme Court has recently given to the AEDPA language.²⁰¹ The more deference the Court gives to the state court's adjudication of the substance of federal constitutional claims, the wider the potential gap. While this example was possible previously, the Supreme Court's "super deference" from *Lett*, *Richter*, and other cases exacerbates the inconsistency.²⁰² This hypothetical, if true, turns the procedural

197. In fact, the likelihood of overcoming procedural default based on ineffective assistance of appellate counsel is slim. In a 2007 study, procedural default was overcome in 37 out of 265 non-capital cases, and, in at least some cases, the court reached the claims merely for judicial economy. KING ET AL., *supra* note 14, at 48–49. In capital cases, a procedural default defense was rejected in at least one of 1 of 58 cases, although there is no explanation why the default was excused. *Id.* at 48.

198. See *Wainwright v. Sykes*, 433 U.S. 72, 90–91 (1977) (requiring a state prisoner to show cause and prejudice to bypass a procedural default); see also *Smith v. Robbins*, 528 U.S. 259, 285–86 (2000) (requiring a defendant demonstrate that appellate counsel was deficient, first, by showing appellate counsel made objectively unreasonable choices, and then by demonstrating a reasonable probability that the absence of a merits brief caused his failure on appeal).

199. 28 U.S.C. § 2254(d) (2012).

200. See *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (explaining that the Court will "reweigh the evidence in aggravation against the totality of available mitigating evidence").

201. See, e.g., *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (stating that "AEDPA demands more" and that its requirements are purposefully "difficult to meet").

202. *Stone v. Powell* provides another early example of the paradox created by narrowing or eliminating substantive review. In *Powell*, the Court prohibited habeas review of Fourth Amendment claims where the state conducted "full and fair litigation" of the issues. 428 U.S. 465, 494 (1976). A petitioner who properly raises his Fourth Amendment claim in state trial court will be unable to file a habeas petition on this claim. *Id.* A petitioner who did not raise the claim, however, and

default doctrine, at least in limited circumstances, on its head and creates perverse incentives for state prisoners. The example is helpful not because it defines a large class of actual habeas cases—although it might—but because it exposes the illogic in the Court's restrictive version of procedural and substantive habeas.

B. Comity and Federalism: Redux

In its move to restrictive substantive habeas, the Court has made parallel overtures to what it did while moving to restrict procedural avenues for prisoners. To the extent that the Court has explained its rationale for restrictive substantive habeas, the Court has indicated that it is deferring to the state courts' substantive decisions and adhering to principles of comity and federalism. The Court is valuing state courts' decision making authority in a federalist system and the finality of state court convictions.²⁰³ The Court may also be taking cues from a view of habeas corpus history that asserts that the federal courts had no place reviewing state court substantive decision making, even if the decisions were wrong.²⁰⁴

This comity and federalism narrative has limits, however. There is an inherent tension in the Court's emphasis on deference to the state courts. Procedural default doctrine calls for the federal courts to acknowledge and support independent rules of state procedure. The Court's restrictive habeas doctrine calls for the federal courts to defer to state courts' adjudication of federal constitutional claims. The above example highlights that, at least in some cases, these perhaps independently sensible impulses clash. The Court's narrative does not give guidance to courts on how to prioritize between deference to state law procedural rules and state court decisions on questions of federal law.²⁰⁵ Further, comity and federalism fail to give contour the appropriate set of cases for habeas review and, possibly, relief.²⁰⁶

asserts ineffective assistance of trial counsel for the failure to raise the Fourth Amendment claim will be able to enter the federal courthouse door and may succeed in obtaining relief. *See, e.g.*, *Northrop v. Trippett*, 265 F.3d 372, 378 (6th Cir. 2001) (noting that "a habeas petitioner may assert a Sixth Amendment claim based on his counsel's failure to move for the suppression of evidence that should be excluded under the Fourth Amendment").

203. *Richter*, 131 S. Ct. at 787 (citing cases in which the Court upheld procedural bars to federal court review of state inmates' constitutional claims).

204. *Id.* at 786 ("[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." (internal quotation marks omitted)); Bator, *supra* note 9, at 466 ("[S]ubstantive error on the part of a court of competent jurisdiction does not render a detention 'illegal' for purposes of habeas corpus[.]").

205. For example, one option is to prioritize giving deference to state procedural rules based on the repeated application of these rules in case after case over giving

One response to the example of the potential conflict between proceduralism and restrictive substantive habeas is to assert that the Court has not gone too far and, instead, that it has not gone *far enough* to limit federal review of the substance of habeas petitions. Another possible response would be to apply the Court's tightly construed, deferential AEDPA standard when the Court assesses questions of federal law for purposes of the procedural default determination²⁰⁷ or for the merits determination once cause and prejudice have been found. This type of reading would be contrived for both approaches because procedural default is an equitable doctrine not bound by AEDPA.²⁰⁸ To give "deference" on the procedural default determination contradicts uncontested and sensible law: the Court has been clear that the question of whether there is a procedural default is a question of federal law.²⁰⁹ Further, these formulations would be nonsensical because there is no state court substantive decision to which the federal courts could defer, even under the current expansive reading of what is a state court "adjudicat[ion] on the merits."²¹⁰ Further, the lack of a parallel *de novo* standard for both the default inquiry and the merits inquiry could result, at least intellectually, in the finding of ineffective assistance of counsel for purposes of cause, but the denial of the never-before decided substantive claim under some case law-created deference doctrine. This approach, ungrounded in the habeas statutory scheme or procedural default doctrine, makes little sense.

IV. RECLAIMING SUBSTANTIVE HABEAS

As illustrated above, there may be times when the Court's newly energized deference to state substantive determinations undermines its previous enthusiasm for respecting state procedural rules.

deference to state court determinations of federal law because doing so would resolve more cases more easily.

206. To the extent the Court articulates a rationale, it only harkens to a footnote in a concurrence from a 1979 case which adopts the view that habeas is not a substitute for appellate review but a mechanism to correct "extreme malfunctions" of the state justice systems. *Richter*, 131 S. Ct. at 786 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)).

207. In other words, the analysis of whether cause and prejudice exist would not be examined *de novo* but, instead, with some sort of new "deference."

208. See *Martinez v. Ryan*, 132 S. Ct. 1309, 1318–20 (2012) (contrasting equitable doctrine of procedural default with AEDPA).

209. See *Lee v. Kemna*, 534 U.S. 362, 375 (2002) ("[T]he adequacy of state procedural bars to the assertion of federal questions, . . . is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965))).

210. 28 U.S.C. § 2254(d) (2012) (requiring state court "adjudicat[ion] on the merits" to be an unreasonable application of clearly established Supreme Court law).

Accordingly, Part IV considers what priorities should be given when the restrictive substantive habeas does not fit with the prior procedural restrictions. Taking the Court's emphasis on comity and federalism as a given, Part IV concludes that federal courts, at least when pressed to defer to state procedural decisions or state substantive decisions, should defer on procedural points and re-open their ability to review decisions of substantive federal law. A number of reasons support shifting towards substantive review, including arguments about federal court expertise and the effect on prisoners' sense of fair play. The Court's desire to defer to state courts can focus the scope of review, yet habeas courts can alternatively look to other values, such as relative institutional capacity and expertise, to shape habeas doctrine.

Federal court expertise is a value with deep and established roots in federal habeas doctrine and can give a coherent rationale for a focus on substantive habeas. Habeas review has, at least in the past, been justified on grounds of the federal courts' expertise.²¹¹ "[F]ederal judges have special expertise in the federal issues that regularly arise in habeas corpus proceeding[s]."²¹² In other words, federal courts are more familiar with, and better at determining, questions of federal law²¹³ and state courts are more familiar with, and better at determining, questions of state law.²¹⁴ As Second Circuit Judge Guido Calabresi forcefully stated, "The intermediate courts of any state have other things that they must be more concerned with. They are not experts on federal law and, with great respect to them, they are not good at it."²¹⁵ It may also be true that federal courts are less practiced

211. See *Jackson*, 443 U.S. at 336 n.9 (Stevens, J., concurring).

212. *Id.*

213. *Id.*; see Brensike Primus, *supra* note 72, at 17 (describing the majority view among legal scholars that federal judges are "more expert than their state counterparts" on federal issues and "more able to apply uniform interpretations of federal law").

214. See Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 CAL. L. REV. 1125, 1197-98 (2005) (suggesting that one benefit of initial state review is state courts' greater expertise in state law and procedure).

215. Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1293 n.*, 1304 (2003). *But see* *Rose v. Lundy*, 455 U.S. 509, 519 (1982) ("As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues."). This expertise theory is, of course, one possible understanding of the pre-AEDPA standard of review for habeas, which allowed the federal courts to review de novo questions of law and mixed questions of fact and law. Compare *Townsend v. Sain*, 372 U.S. 293, 318 (1963) ("It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas. That was settled in *Brown v. Allen*["]"), *overruled on other grounds by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and *Brown v. Allen*, 344 U.S. 443, 506 (1953)

and skilled at determining questions of state law.²¹⁶ And state courts are less practiced, and skilled, at determining questions of federal law.²¹⁷ Although by no means the only or even the dominant theme in habeas case law, the expertise of federal courts is a consistent strand.

Federal courts are well equipped to examine substantive state court law and to determine whether it is adequate and independent, but they are less equipped to examine state procedural rules. For a federal court to assess a state's procedural rules, the federal court has to learn state court rules that could be fortuitously similar to federal rules or entirely different. For example, to determine whether state court procedural rules are "adequate" and "independent" requires not only an understanding of the letter of the law and interpretative case law, but also more idiosyncratic aspects of the law, such as an understanding of the "usual" practice of state courts.²¹⁸

A move to non-restrictive substantive habeas, while maintaining procedural deference, also has the potential for avoiding disruption of the state court adjudicative process. If a federal court determines that, in a given case, it will overrule a state court on a question of federal substantive law, its decision will upset that one case but is unlikely to have any ripple effect. On the other hand, a federal court's finding that a state court's procedural rule is not adequate or

(opinion of Frankfurter, J.) (establishing that federal courts conduct plenary review on questions of law considered by the state court), *with* 28 U.S.C. § 2254(d)(1) (requiring state court adjudications to be "contrary to" or an "unreasonable application" of clearly established law).

216. *See, e.g.*, Childers v. Floyd, 642 F.3d 953, 968 (11th Cir. 2011) (en banc) (referring, with disapproval, to the potential that federal courts in habeas review might "decide the merits of claims using state law, with which the state courts are likely more familiar"), *vacated*, 133 S. Ct. 1452 (2013); Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 567 (2006) (expressing frustration with how federal courts must use "scarce resources" to assessing the adequacy of state procedural rules).

217. Calabresi, *supra* note 215, at 1304; *see also* Brensike Primus, *supra* note 72, at 11 (noting that state courts, faced with overwhelming caseloads and little federal oversight, have "incentive[s] to cut corners").

218. To determine whether a state rule is adequate and independent, federal courts inquire into whether a state court regularly follows the state procedural rule. *See* Ford v. Georgia, 498 U.S. 411, 423–24 (1991) (determining that a state procedural default is not an "adequate and independent" state ground barring federal review unless the rule was "firmly established and regularly followed" (internal quotation marks omitted)); *see also* Walker v. Martin, 131 S. Ct. 1120, 1130 (2011) ("A state ground . . . may be found inadequate when discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law." (internal quotation marks omitted)); James v. Kentucky, 466 U.S. 341, 345–47 (1984) (holding that a state rule requiring a defendant requesting a particular jury charge to label the request as one for an "instruction[]" and not an "admonition[]" had not been consistently applied); Rogers v. Alabama, 192 U.S. 226, 230 (1904) (finding a state rule striking a two-page motion to quash an indictment inadequate because it was prolix).

independent will affect not only the current case before the federal court, but potentially all other similarly situated state court cases.²¹⁹ These procedural decisions are not usually interwoven with the facts of the specific case; instead, state courts apply them to a variety of factual circumstances.²²⁰

Adopting (or returning to) non-restrictive substantive habeas would have other expressive benefits that work with, instead of fight against, the reality of habeas corpus. At present, scores of desperate, mostly pro se, inmates file Hail Mary habeas petitions. The Court's attempts to narrow the avenues to habeas may have deterred some inmates, but large numbers keep coming.²²¹ It will be interesting to see whether the move to restrictive substantive habeas will have any effect on filing numbers in federal court. One real possibility is that it will not since a tougher standard of substantive review means that it is less likely that a prisoner's habeas petition will be granted. Yet, the chance of a petition being granted before this shift, especially for a non-death penalty case, was already infinitesimal.²²² State inmates serving long sentences will continue to file habeas petitions even with a heightened substantive standard, and federal district court judges will continue to have to review these petitions. Accordingly, to the

219. See, e.g., *Lee v. Kemna*, 534 U.S. 362, 366, 381 (2002) (finding that a rule requiring that a motion for a continuance be written and accompanied by an affidavit was an inadequate bar to habeas review where an oral motion satisfied the rule's purpose); *Hatfield v. Ballard*, 878 F. Supp. 2d 633, 654–54 (S.D. W. Va. 2012) (citing *Lee* in finding a state procedural doctrine of “invited error” was inadequate to bar federal review in the case because it was an “exorbitant application” of the rule); *Fong v. Poole*, 522 F. Supp. 2d 642, 653, 655 (S.D.N.Y. 2007) (relying on *Lee* in granting a habeas petition because the prisoner had substantially complied with the contemporaneous objection rule).

220. See, e.g., *Wood v. Milyard*, 721 F.3d 1190, 1193–94 (10th Cir. 2013) (stating that while Colorado courts apparently retroactively apply a state procedural rule to litigants like the petitioner, that application would not be adequate to bar habeas court consideration of federal claims that did not comply with this rule).

221. See KING & HOFFMAN, *supra* note 10, at 70 (“Between 1970 and 2006, the number of petitions filed for every [10,000] prisoners plummeted from [500] to less than 150. From the perspective of federal judges and the states’ attorneys who had to respond to these petitions, the total number of petitions continued to grow, each year surpassing the number filed the year before.”).

The tenacity, persistence, and, perhaps, desperation of prisoners—for whom habeas is the only possible way out from under a long sentence—is seldom discussed and largely underestimated. Certainly, setting more roadblocks to being considered will weed out some prisoners’ petitions. This persistence is also seemingly why a shift to focusing only on innocence in habeas would ultimately prove frustrating to the courts: if innocence is the hurdle through which petitioners must jump, then habeas petitioners will assert their innocence. See John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 460 (2011) (arguing that severe limiting the exceptions to noncapital habeas applications would not produce a reduction in the number of petitions).

222. See KING, ET AL., *supra* note 14, at 64 tbl.15 (showing courts granted relief of any kind in only 0.35% of non-capital cases and 12.4% of the time in capital cases).

extent that the Court wishes to lower the number of petitions within the system, restrictive substantive habeas is probably not the answer.

To an inmate, a restrictive habeas regime—one in which the federal court hypothesizes about the state court's possible reasons for denial of the federal claim and then finds those made-up reasons sufficiently sound—is preposterous. As an initial matter, the mental gymnastics of the Court's recent cases are incomprehensible to a number of prisoners.²²³ *Harrington v. Richter* and *Johnson v. Williams*, in particular, require a level of abstract reasoning that may be beyond the capacity of many inmates.²²⁴ Literally, it looks like the court is just doing hocus-pocus to deny petitions.

Beyond the mental gymnastics required, non-restrictive habeas requires the Court to focus on a particular claim, and particular language in the review of that claim, as well as determine the merits of the claim. This actual look at the substance of an inmate's claim, whether granted or denied, may help promote the inmate's perception of the legitimacy of the legal system and the fairness of the courts that are reviewing his case.²²⁵ In essence, a move to non-restrictive substantive habeas would give unrepresented inmates an

223. See, e.g., ELIZABETH GREENBERG ET AL., LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 13 fig.2-2 (2007), available at <http://nces.ed.gov/pubs2007/2007473.pdf> (showing that, in 2003, 50% or more of prisoners scored "below basic" or "basic" on all three literacy scales used); see also CAROLINE WOLF HARLOW, EDUCATION AND CORRECTIONAL POPULATIONS, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS 2 tbl.1 (2003), available at <http://www.bjs.gov/content/pub/pdf/ecp.pdf> (reporting that, of state prison inmates, 39.7% had some high school education or less, 28.5% had a General Educational Development certificate (GED), and 20.5% had a high school diploma).

224. Both cases look beyond the state court's actual decision and have the federal court hypothesize post-hoc rationalization of the state court's decision, only to then evaluate the reasons that the federal court just imagined. See *Johnson v. Williams*, 133 S. Ct. 1088, 1094–96 (2013) ("Although *Richter* itself concerned a state-court order that did not address any of the defendant's claims, we see no reason why the *Richter* presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims. . . . [F]ederal courts have no authority to impose mandatory opinion-writing standards on state courts. . . . When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits[.]" (citation omitted)); *Harrington v. Richter*, 131 S. Ct. 770, 784–85 (2011) ("[R]equiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition. The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed. . . . When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits . . .").

225. See, e.g., Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 215–16 (2012) ("[P]rocedures are legitimate when they are neutral, accurate, consistent, trustworthy, and fair—when they provide opportunities for error correction and for interested parties to be heard.").

opportunity to describe what they see as the unjustness of their cases, instead of feeling as if the federal courts are trying to deprive them of an opportunity to have their claims heard.²²⁶ Of course, moving to a non-restrictive view of habeas is constrained by the procedural barriers that inmates must surmount to even enter the federal courthouse door. Yet, these inmates who navigate the procedural obstacles can file habeas petitions²²⁷ that state the merits of their claims and tell the stories of their cases. And, while not welcome by inmates, even denials of the writ must engage with the merits of the claim and the state court's opinion. The "unreasonable application" language can be constraining, but it is not suffocating.

CONCLUSION

After decades of focus on the procedural intricacies of federal habeas corpus practice, the U.S. Supreme Court has recently tightened substantive review of state court decisions. This notable shift to a restrictive substantive reading of habeas is not costless and was made without sufficiently noting pre-existing law, approaches and theories of habeas, and practice. This Article highlights a story—previously told by the Court and scholars—of federal court expertise on federal law, which explains a shift to substantive habeas and describes a sensible approach to when federal courts should defer to state decision makers if and when procedural and substantive doctrines clash. In this explanation, the shift from procedural to substantive habeas conforms to an understanding of what a federal court can do well (and what it cannot) and fulfills other beneficial functions. In the end, based on this rationale, the Article finds merit in the Court's move to focusing on substantive habeas but also brings to light flaws in the restrictiveness of the Court's current doctrine.

226. See Stevenson, *Confronting Mass Imprisonment*, *supra* note 84, at 350 (outlining several barriers to relief that can preclude inmates' claims being addressed on the merits).

227. In practice, it is usually the inmate himself or herself that is filing the pleading. *Duncan v. Walker*, 533 U.S. 167, 191 (2001) (Breyer, J., dissenting) (providing the results of a study that showed that 93% of federal habeas petitions were filed pro se).