

The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act’s Restrictions on Habeas Corpus Are Wrong

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I. INTRODUCTION

By filing a petition for a federal writ of habeas corpus, a prisoner initiates a legal proceeding collateral to the direct appeals process.¹ Federal statutes set forth the procedure and parameters of habeas corpus review.² The Antiterrorism and Effective Death Penalty Act (AEDPA) first signed into law by President Clinton in 1996,³ included significant cutbacks in the availability of federal writs of habeas corpus.⁴ This was by congressional design.⁵ Yet, despite the dire predictions,⁶ for most of the first decade of AEDPA’s reign, the door to habeas relief remained open.⁷

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1. See *Brecht v. Abrahamson*, 507 U.S. 619, 622–23, 633 (1993).

2. See, e.g., The First Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20 § 25, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1257); The Second Judiciary Act of 1867, Act of Feb. 5, 1867, ch. 13 §§ 755–766.

3. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2254–2255; 2261–2266 (2012); 21 U.S.C. § 3599; 18 U.S.C. § 3006A and FED. R. APP. P. 22).

4. See *id.*; see also *infra* notes 29–38 and accompanying text.

5. See *infra* notes 128–146 and accompanying text.

6. See, e.g., 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Kennedy) (stating that “what we have here is an undoing of the Federal Government’s rights to intervene in the State courts”). See Anthony G. Amsterdam, *Foreword* to RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* v (6th ed. 2011) (referring to AEDPA as “the atomic bomb” that shattered “the preexisting structure of habeas corpus law”). See generally James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 421–28 (2001) (reviewing rates of error and reversals in capital cases).

7. See generally ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 50 n.8 (2001) (discussing evidence that AEDPA was proving to add fewer additional restrictions than predicted); John H. Blume, *AEDPA: The “Hype” And The “Bite,”* 91 CORNELL L. REV. 259, 273–87 (2006) (pointing out and documenting that, up to that point, AEDPA did not make a significant difference). Cf. Lynn Adelman, *The Great Writ Diminished*, 35 NEW ENG. J. ON CRIM.

More recently, however, with little or no fanfare, much less an announcement that it was overturning its own precedent, the Supreme Court reinterpreted a key portion⁸ of the statute.⁹ Pursuant to this new interpretation, habeas corpus relief could become virtually unattainable.

During the Supreme Court's 2011–2012 Term, the Court denied habeas corpus relief to petitioners who demonstrated significant deprivations of constitutional rights.¹⁰ This article describes these rulings;¹¹ however, they are highly unlikely to be isolated cases. Rather, whether by evolution of doctrine or by reversal of precedent, the Court has obliterated the Great Writ in the arena of federal review of state court convictions.

At the root of recent obstacles to relief is the interpretation of a short, but key clause in AEDPA's amendments to 28 U.S.C. § 2254(d)(1). Pursuant to the statute, a federal court may only grant a writ if a state court's adjudication on the merits "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."¹² In *Williams v. Taylor*,¹³ the Supreme Court interpreted this provision, ruling that by enacting AEDPA, Congress meant to change the long-standing de novo standard of review.¹⁴ In other words, the *Williams* Court determined that under AEDPA, federal courts owed some amount of deference¹⁵ to the legal and factual findings of the state courts. The larger challenge for the *Williams* Court remained: How does a federal court decide whether a state court decision is contrary to, or an unreasonable application of, federal law?¹⁶ Does the "contrary to" clause apply to a different category of cases than those to which the "unreasonable application" clause applies?

& CIV. CONFINEMENT 3, 6 (2009) (noting that "[t]he grant rate is now so low that it can no longer be reasonably asserted that habeas corpus functions as 'the greatest of the safeguards of personal liberty embodied in the common law'"); Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 87–105 (2012) (presenting data that since Professor Blume's study in 2006, AEDPA's "bite" has gotten much worse and referring to the earlier post-AEDPA years as "a sort of AEDPA grace period").

8. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1) (prescribes one set of circumstances under which a federal court may grant relief to a state prisoner).

9. Reinterpreted contrary to its earlier interpretation. *See infra* Part II.B.

10. *See infra* Part III.D.

11. *See infra* Part III.D.

12. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, § 401(b)(1) (1996).

13. *Williams v. Taylor*, 529 U.S. 362 (2000).

14. *See Brown v. Allen*, 344 U.S. 443, 506–07 (1953). *Cf. Wright v. West*, 505 U.S. 277, 287 (1992) (claiming that *Brown* did not endorse de novo review as clearly as many believe).

15. The amended version of § 2254 does not use the word "deference." *See Williams*, 529 U.S. at 386 (Stevens, J., concurring).

16. The exact language in the statute is "an unreasonable application of, *clearly established* Federal law, *as determined by the Supreme Court of the United States.*" 28 U.S.C. § 2254(d)(1) (emphasis added). Here and in the remainder of this article, this clause will be articulated as "the unreasonable application of federal law" or "the unreasonable application clause."

And how does a court recognize when a state court makes an “unreasonable application of law?”

This article discusses the reasons why the interpretation or standard that defines the “unreasonable application” clause has proven to be most critical to the availability of habeas corpus relief.¹⁷ In recent decisions, the Supreme Court has announced that a state court’s ruling will only be deemed an unreasonable application of federal law if no fair-minded jurist could agree with it (the fair-minded jurist test).¹⁸ The Court’s own precedent and rulings do not promote the interests of justice. This article proposes replacing the standard with one that measures the incorrectness of the state court decision by asking whether an erroneous state court decision was “erroneous enough” so that continued deprivation of the petitioner’s liberty pursuant to such a decision outweighs the State’s interest in finality.¹⁹

Part II of this article provides background on the legal landscape. It summarizes the relevant pre-AEDPA state of the law and the evolution of AEDPA interpreting jurisprudence with regard to § 2254(d)(1). It also describes the jurisprudential path to the fair-minded jurist test. Part III focuses on the fair-minded jurist test. It sets forth its potential for injustice and discusses how it is inconsistent with the established function of the writ and even with the articulated goals of Congress when it passed AEDPA. Part III also argues that the fair-minded jurist test goes beyond deference and that respect or deference to state court decisions can be achieved without it. Part IV proposes a more just standard for the unreasonable application decision.

II. EVOLUTION OF THE LEGAL STANDARD FOR GRANTING A FEDERAL WRIT AFTER A STATE COURT CONVICTION

A. From Brown v. Allen to AEDPA

An understanding of the course of modern habeas corpus jurisprudence provides an important backdrop for the issues and proposals set forth in this article. The best place to start is *Brown v. Allen*.²⁰ In a 1953 concurring opinion, Justice Frankfurter laid out guidelines for the lower federal courts to follow when hearing requests for habeas relief from state court convictions.²¹ In Justice Frankfurter’s view, the federal district

17. See *infra* Part III.

18. See *Harrington v. Richter*, 131 S. Ct. 770 (2011).

19. See discussion *infra* Part IV.

20. 344 U.S. 443 (1953).

21. See *Brown v. Allen*, 344 U.S. 443, 497–514 (1953). The Judiciary Act of 1867 extended the right to seek federal habeas corpus relief to state court prisoners. See Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385. However, the judiciary did not offer a comprehensive interpretation of how the

court should conduct a de novo review of the state court's rulings on questions of law and mixed questions of law and fact.²² In other words, while the district judge should carefully examine the state court's reasoning and decision, the federal judge is obligated to independently decide questions of federal law and how they apply to a given set of facts by asking himself or herself, "Given my understanding of federal law, what do I believe is the correct decision?"

In the decades following *Brown*, controversy surrounded the issuing of federal writs of habeas corpus for state court prisoners.²³ The debate took various forms. While efforts at legislative reform were unsuccessful until 1996, the Supreme Court under Chief Justice Rehnquist handed down many decisions that dramatically curtailed the availability of federal habeas relief.²⁴

President Bill Clinton signed AEDPA into law in 1996.²⁵ Many believed that Congress transformed AEDPA from a long-debated reform to reality in response to the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City²⁶ and the arrest of Timothy McVeigh against whom the federal government sought the death penalty.²⁷ With regard to

lower federal courts should consider and adjudicate habeas corpus petitions until Justice Frankfurter's decision in *Brown*. See *Brown*, 344 U.S. at 497.

22. See *id.* at 508. Mixed questions are those that require a judgment of the legal significance of historical facts. See *id.* at 507.

23. See generally Daniel E. Lungren & Mark L. Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, 40 UCLA L. REV. 295 (1992); Kent Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 928-44 (1998) (tracing and criticizing the evolution of habeas corpus); see also Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). In the late 1980s former Justice Powell chaired a Commission created to consider habeas reform. The Commission's report contained a number of proposals, some of which found their way into AEDPA. See JUDICIAL CONFERENCE OF THE U.S., AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL 11 (1989), reprinted in *Habeas Corpus Legislation: Hearings on H.R. 4737, H.R. 1090, H.R. 1953, and H.R. 32584 Before the H. Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 46 (1990).

24. See, e.g., *Teague v. Lane*, 489 U.S. 288, 311 (1989) (holding that new rules of criminal procedure would not retroactively apply to cases on collateral review); *Wainwright v. Sykes*, 433 U.S. 72, 87-90 (1977) (holding that claims procedurally defaulted in state court could not be litigated in federal habeas absent a showing of cause and prejudice for the default); *Stone v. Powell*, 428 U.S. 465, 494-95 (1976) (holding that allegations of Fourth Amendment search and seizure violations no longer cognizable in federal habeas corpus).

25. See *Statement on Signing the Antiterrorism and Effective Death Penalty Act 1996*, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 24, 1996), available at <http://www.gpo.gov/fdsys/pkg/WCPD-1996-04-29/pdf/WCPD-1996-04-29-Pg719.pdf>.

26. The bombing resulted in the deaths of one hundred and sixty-eight people, including nineteen children. *Terror Hits Home: The Oklahoma City Bombing*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/famous-cases/oklahoma-city-bombing> (last visited Aug. 24, 2013).

27. *The Oklahoma City Bombing*, INDYSTAR, <http://www.indystar.com/viewart/99999999/NEWS06/110607007/RetroIndy-Oklahoma-City-Bombing> (last updated Jan. 9, 2013); see also 142 CONG. REC. H3599 (daily ed. Apr. 18, 1996) (statement of Rep. Pryce); 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Gekas) ("It took us a generation to convince the people on the left that we ought to have a workable, reassuring, predictable death penalty that would in-

the writ of habeas corpus filed after state court convictions, AEDPA made sweeping changes. For example, among other provisions, the new law imposed a one-year statute of limitations,²⁸ made it difficult for an inmate to file successive petitions,²⁹ and under certain circumstances, allowed for an even quicker resolution of petitions in death penalty cases.³⁰ However, the provision that struck most deeply at the heart of the spirit and history of habeas corpus was the movement away from de novo review. Proponents of AEDPA sought to eliminate the ability of a federal judge to set aside a state court conviction whenever he or she disagreed with the state court on a matter involving the application of federal law.³¹ They supported a requirement that federal courts give a degree of deference to the state courts' decisions.³²

How much deference or how to apply a deferential standard was ambiguously delineated in the final wording of AEDPA. The relevant language is contained in § 2254(d)(1):

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

exorably exact the punishment that was intended.”). While AEDPA contained numerous provisions not related to habeas corpus reforms such as assistance to victims of terrorism, international terrorism prohibitions; removal of alien terrorists, to name a few, many legislators saw the restrictions on habeas corpus it contained as an important and overdue step forward in accomplishing finality to criminal convictions and in the enforcement of the death penalty. *See* Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d) (2012); 142 CONG. REC. H3601 (statement of Rep. Solomon) (stating that “the [death penalty] provision alone is so important that it is more than sufficient justification for supporting this conference report today”). Massachusetts Congressman Joe Kennedy, on the other hand, resented the inclusion of habeas reform in the broad anti-terrorism bill. During debate, Kennedy lamented that he would be forced to vote “no” on an otherwise worthy bill because of what he deemed to be irreparable damage to constitutional rights under habeas corpus. *See* 142 CONG. REC. H3601 (statement of Rep. Kennedy) (“Habeas corpus has nothing to do with an antiterrorism bill.”); *see also* remarks of Congressman Watt of North Carolina 142 CONG. REC. H3602 (statement of Rep. Watt) (“[W]e cannot sacrifice our constitutional principles because we are angry at people for bombing.”); 141 CONG. REC. S7808-09 (daily ed. June 7, 1995) (statement of Sen. Kennedy) (complaining that AEDPA “goes far beyond terrorism and far beyond Federal prisoners” because it is wrong to sneak limits on access to habeas writs by state prisoners “into an antiterrorism bill that we all want to pass as quickly as possible”).

28. *See* 28 U.S.C. § 2244(d)(1).

29. *See* 28 U.S.C. § 2244(b).

30. *See* 28 U.S.C. § 2261.

31. *See infra* notes 130–45 and accompanying text.

32. *See infra* notes 130–45 and accompanying text. On the other side, legislators such as Delaware Senator Joseph Biden passionately opposed any move away from de novo review. *See* 141 CONG. REC. S7842 (daily ed. June 7, 1995) (arguing “this rule, the so-called rule of deference, turns habeas on its head. Placing primary responsibility for the Federal Constitution in the hands of State courts is a dramatic departure from this country’s historical principle, and that it is the Federal courts that should be the final arbiters of Federal law”).

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]³³

Predictably, the statutory language raised a good number of interpretation questions. For example: (1) Does the use of the word, “was” before “contrary to” mean that the federal court may only look to the state of the law at the time of the State court decision?³⁴ (2) What is the difference between a decision that was “contrary to” clearly established law and one that was “an unreasonable application of” clearly established law?³⁵ (3) What is the correct legal standard when the state court decision was not on the merits?³⁶ These questions and others have been answered by federal courts over the almost two decades since AEDPA’s enactment.³⁷ Most of these issues are beyond the scope of this article. Question two, however, which addresses jurisprudence regarding the meaning of AEDPA’s articulated legal standard, has central importance.

B. *Williams v. Taylor and the Supreme Court’s 2000 Analysis*

The first and still controlling case interpreting AEDPA’s standard of proof language was *Williams v. Taylor*.³⁸ The *Williams* Court was divided in its understanding of what Congress intended and what the Constitution required. Justice Stevens insisted that Congress did not intend to require all federal courts to defer to state judges’ interpretations of federal law.³⁹ Justice O’Connor, however, writing for the majority on this issue, disagreed.⁴⁰ Along with Justices Rehnquist, Kennedy, Thomas, and Scalia, Justice O’Connor embraced the idea that Congress intended a significant change in the standard to be applied by federal courts, including some degree of deference.⁴¹ Justice O’Connor’s opinion is cited as

33. 28 U.S.C. § 2254(d)(1).

34. The Supreme Court recently decided in *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011), that the correct reference was to established law as of the date of the state court decision.

35. See *Williams v. Taylor*, 529 U.S. 362, 405–09 (2000).

36. See *Porter v. McCollum*, 558 U.S. 30, 39 (2009).

37. See, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) (ruling that the federal habeas court may only rely on the record that was before the state court).

38. See generally Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 698–712 (2003) (providing extensive description of *Williams*).

39. See *Williams*, 529 U.S. at 377. Justices Souter, Ginsburg, and Breyer joined Justice Stevens. Justice Stevens argued that without an unambiguous statement from Congress, the Court would be wrong to settle upon a construction of AEDPA that would require the federal judiciary to cede its Article III independent responsibility to say what the law is to the several States. *Id.* at 378.

40. See *id.* at 399–410.

41. In *Wright v. West*, 505 U.S. 277, 300 (1992), Justice O’Connor wrote a concurring opinion, in which she firmly rejected the notion that federal judges hearing habeas corpus petitions were required to defer to the State court based upon the Court’s precedent in *Brown*. See *supra* notes 20–22 and accompanying text. However, in *Williams*, Justice O’Connor wrote that the AEDPA amend-

the definitive judicial interpretation of § 2254(d)(1),⁴² and the analysis contained therein is a key element in this article's thesis.

Lower federal courts naturally issued numerous opinions interpreting the new standard between 1966, when Congress enacted AEDPA, and 2000, when the Court decided *Williams*.⁴³ With one important caveat, Justice O'Connor chose the Fourth Circuit's interpretation as her model.⁴⁴ Under this view, the "contrary to" clause applies to circumstances different from those to which the "unreasonable application" clause applies.⁴⁵ A state court decision is contrary to clearly established federal law when it erroneously decides a question of pure law contrary to Supreme Court precedent or if it applies the correct Supreme Court precedent to facts indistinguishable from those in relevant precedent and reaches a different conclusion.⁴⁶ A state court decision is an unreasonable application of clearly established federal law when, though choosing and accurately stating the correct precedent, it unreasonably applies that precedent to the facts under consideration.⁴⁷ With regard to the latter clause, the obvious follow-up question is, What constitutes an unreasonable application of law to a set of facts? In her response to this question, Justice O'Connor disagreed with the Fourth Circuit.⁴⁸

How a court is to measure or determine whether a state court has unreasonably applied federal law is the most significant question in the

ments could neither be ignored nor made ineffectual and the *Brown* de novo or independent review standard was a thing of the past. See *Williams*, 529 U.S. at 402–05.

42. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Carey v. Musladin*, 549 U.S. 70, 74 (2006); Blume, *supra* note 7, at 292.

43. See, e.g., *Drinkard v. Johnson*, 97 F.3d 751, 767–68 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997); *O'Brien v. Dubois*, 145 F.3d 16, 23–24 (1st Cir. 1998); *Matteo v. Superintendent*, 171 F.3d 877, 889, 888–90 (3d Cir. 1999).

44. See *Williams*, 529 U.S. at 405. Although *Williams* came out of the Fourth Circuit, the Circuit had previously ruled on AEDPA's standard of review in *Green v. French*, 143 F.3d 865 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090 (1999), *overruled by Williams*, 529 U.S. 362 (2000).

45. *Williams*, 529 U.S. at 405.

46. See *id.* at 405–06. As a basic illustration, imagine that on the merits, a state court has denied a defendant's claim that he was not advised of his rights prior to custodial interrogation. The federal court may grant a writ of habeas corpus if the state court failed to apply the law of *Miranda v. Arizona*, 384 U.S. 426 (1966), misunderstood *Miranda*, or applied *Miranda* to facts virtually identical to those in *Miranda* but reached a different result.

47. *Williams*, 529 U.S. at 407. Using the illustration in note 46, *supra*, the writ might be granted when the State court (1) applied *Miranda* (2) to facts different from the *Miranda* facts, (3) demonstrated a sound understanding of *Miranda* but (4) unreasonably applied *Miranda* to these different facts. Unfortunately, the courts' analysis of the unreasonable application clause is somewhat more complicated. In *Green*, the Fourth Circuit held that this clause also applied to two additional circumstances: when the State court unreasonably extends a legal principle from Supreme Court precedent to a new context; or unreasonably refuses to extend that principle to a new context. *Green*, 143 F.3d at 870. In *Williams*, Justice O'Connor saw no need to approve or disapprove of that portion of the Fourth Circuit's analysis. See *Williams*, 529 U.S. at 408–09 (concluding that "today's case does not require us to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)").

48. See *Williams*, 529 U.S. at 409.

implementation of AEDPA and its potential as a barrier to the interests of justice.⁴⁹ This is not an overstatement. Many habeas corpus petitions call for the application of the “contrary to” clause. Far more, however, fall within the purview of the “unreasonable application” clause. This makes sense. A state court might be expected to cite to the correct Supreme Court case assuming the federal issue has been correctly identified. Applying law to facts, however, is a subjective task that more easily lends itself to differing viewpoints. Thus, the standard for determining reasonableness has far reaching implications for state prisoners seeking redress in the federal courts. The legal story ending with the Supreme Court’s current and highly restrictive articulation of that standard began in *Williams*.

In *Williams*, Justice O’Connor defined “unreasonable application” by instructing federal courts to “ask whether the state court’s application of clearly established federal law was objectively unreasonable.”⁵⁰ Insisting on an objective standard, she rejected the definition adopted by the Fourth Circuit.⁵¹ The Fourth Circuit determined that an unreasonable application of federal law meant that the state has applied federal law “in a manner that reasonable jurists would all agree is unreasonable.”⁵² Justice O’Connor believed that this standard or test was erroneous⁵³ because it would lead to a finding of reasonableness if even one jurist had applied federal law in the same manner as the state court had⁵⁴ as long as said jurist was a reasonable jurist.⁵⁵ According to Justice O’Connor, this add-

49. See *Matteo v. Superintendent*, 171 F.3d 877, 889 (3d Cir. 1999) (noting with alarm that an erroneous standard for unreasonable application such as the fair-minded jurist test “would doubtless lead to the denial of virtually all petitions”).

50. See *Williams*, 529 U.S. at 409 (emphasis added).

51. See *id.* at 409–10. The Fifth Circuit endorsed this test as well. See *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997).

52. *Williams*, 529 U.S. at 377 (citing *Williams v. Taylor*, 163 F.3d 860 (4th Cir. 1998)); See also *Green v. French*, 143 F.3d 865 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090 (1999), *overruled by Williams*, 529 U.S. 362.

53. *Williams*, 529 U.S. at 409. *Accord* *Penry v. Johnson*, 532 U.S. 782, 793 (2001) (reiterating that *Williams* rejected the standard of “unreasonable ‘only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect’” (citation omitted)); see also *Ides*, *supra* note 38, at 746 (discussing how the *Williams* Court “rejected the Fourth Circuit’s ‘reasonable jurists would all agree standard’”). Justice O’Connor surmised that the Fourth Circuit adopted the reasonable-jurist test out of understandable confusion. She suggested that the circuit may have confused the inquiry with the *Teague* standard for deciding if a new decision actually creates a new rule for retroactivity purposes. See *Williams*, 529 U.S. at 409 (citing *Lambrix v. Singletary*, 520 U.S. 518 (1997)). See generally HERTZ & LIEBMAN, *supra* note 6, at 1789.

54. See *Williams*, 529 U.S. at 410. In his concurring opinion, Justice Stevens agreed that the Fourth Circuit’s unreasonable application test was flawed. See *id.* at 377–78 (stating “the statute says nothing about ‘reasonable judges,’ presumably because all, or virtually all, such judges occasionally commit error; they make decisions that in retrospect may be characterized as ‘unreasonable’”).

55. Justice O’Connor provided a good example in *Drinkard* where the Fifth Circuit labeled a state court decision not unreasonable because the circuit panel itself was in disagreement (2–1 split) on the mixed issue of law and fact. See *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997).

ed an inappropriate element of subjectivity to the analysis.⁵⁶ While her rejection of the Fourth Circuit's test was straightforward, her prescription for the correct test was far less so. Designating "objectively unreasonable" as the proper standard did little more than beg the question: What makes a decision objectively unreasonable? The imperfect nature of her prescription was not lost on Justice O'Connor.⁵⁷ She admitted that "'unreasonable' is difficult to define."⁵⁸ She was not concerned, however, commenting that "it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning."⁵⁹ This was a bit of a punt. However, Justice O'Connor believed it sufficient for deciding *Williams*.⁶⁰ In sum, the *Williams* majority's interpretation of the amendments to § 2254(d)(1) was that Congress intended a degree of deference from the federal courts; a writ could only be granted when a State court used an incorrect legal standard (pure questions of law) or unreasonably applied federal law (to mixed questions); and courts are to judge unreasonableness using an objective standard.⁶¹

C. Post-Williams Jurisprudence

1. Adapting to the Standard

Lower federal courts tested the usefulness of the Supreme Court's interpretation of § 2254(d)(1) in *Williams*.⁶² If the lower courts were

56. See *Williams*, 529 U.S. at 409–10.

57. See Steven Semeraro, *A Reasoning-Process Review Model for Federal Habeas Corpus*, 94 J. CRIM. L. & CRIMINOLOGY 897, 923 (2003–04) (arguing that the "objective-reasonableness standard . . . leaves the lower federal courts at sea without a compass to guide their course"). Professor Semeraro makes the case that an objective analysis of reasonableness necessarily must include looking to the actual views of respected judges. See *id.* at 924. Absent this, he argues that the analysis becomes the subjective opinion of a federal habeas judge. See *id.*; see also Adelman, *supra* note 7, at 16–19.

58. *Williams*, 529 U.S. at 410; see also *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (stating in an opinion by Justice Kennedy, concurred with by Justice O'Connor, that "the question of what an 'unreasonable application' of law might be is difficult in some cases").

59. *Williams*, 529 U.S. at 410. As this article examines in Part IV *infra*, reasonableness is a common legal term, but therein might lie part of the problem. It may be wrong and worse, even unjust, to blindly borrow the definition from one legal context (negligence, for instance) for use in another (right to habeas corpus relief from an erroneous state court ruling).

60. The majority for whom she was writing reversed the circuit's denial of relief. It found that the Virginia Supreme Court's decision on the merits was both contrary to and an unreasonable application of federal law. *Williams*, 529 U.S. at 413.

61. See *id.* at 399–410.

62. After *Williams*, the Supreme Court did not have difficulty with the standard. Professor John Blume observed in 2006 that "[s]ince *Williams v. Taylor*, the Court has—for the most part—gravitated toward a talismanic formulation of § 2254(d), which it incants before moving on to the merits of the petitioner's claims." Blume, *supra* note 7, at 293. See, e.g., *Penry v. Johnson*, 532 U.S. 782, 784 (2001) (finding the Texas court's decision objectively unreasonable without explaining how it measured unreasonableness). For a discussion of *Williams* and its application in the years immediately following it, see generally Ides, *supra* note 38, at 709–58.

struggling with the standard, most did not say so. The courts routinely restated Justice O'Connor's prescription that they smoke out "objectively unreasonable" state court applications of federal law and then made a decision—unreasonable or not unreasonable—providing a rationale sounding very much like they would have when courts were doing their former job of independently deciding if the state court's decision was correct or incorrect.⁶³

This is not to say that the circuit courts did not attempt to refine the *Williams* definition of "unreasonable application." Many did, likely because "objectively unreasonable" was far from self-defining. For example, shortly after the Court decided *Williams*, the Second Circuit noted Justice O'Connor's reassurance to habeas courts that federal judges were already familiar with the concept of unreasonableness.⁶⁴ However, the Second Circuit felt less than reassured and pointed out that the term has different meanings in different contexts, lamenting the fact that "we have no experience in determining when a state court has made an unreasonable application of constitutional law, as expounded by the Supreme Court."⁶⁵ Consequently, the Second Circuit crafted a refinement, holding that "the increment need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence.' We do not believe AEDPA restricted federal habeas corpus to that extent."⁶⁶ Other circuits described the measurement process somewhat differently. For example, a Fifth Circuit panel determined that a state court decision is objectively unreasonable when it is "so patently incorrect as to be unreasonable,"⁶⁷ a seemingly more deferential standard than the Second Circuit's standard. The Sixth and Seventh Circuits also strived for a measure of how erroneous a state court's application of federal law must be to be deemed unreasonable with the former describing that point as one "so arbitrary, unsupported, or offensive to existing precedent, as to fall outside the realm of plausible credible outcomes."⁶⁸

63. See, e.g., *Stephens v. Hall*, 407 F.3d 1195, 1201–06 (11th Cir. 2005).

64. See *Francis v. Stone*, 221 F.3d 100, 109 (2d Cir. 2000) (citing *Williams*, 529 U.S. at 365).

65. See *id.* at 109 n.12.

66. *Id.* at 111 (quoting *Matteo v. Superintendent*, 171 F.3d 877, 889 (3d Cir. 1999)). The Court found that the New York court's decision was not objectively unreasonable despite the fact that "only a small increment beyond error is needed to meet the standard of 'objectively unreasonable.'" *Id.* at 113. Subsequent Second Circuit decisions followed the *Francis v. Stone* standard. See, e.g., *Sellan v. Kuhlman*, 261 F.3d 303, 315 (2d Cir. 2001); *Henry v. Poole*, 409 F.3d 48, 68 (2d Cir. 2005). The Court of Appeals for the First Circuit fashioned a similar standard. See *DeBurgo v. St. Amand*, 587 F.3d 61, 67 (1st Cir. 2009).

67. *Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001). *Cf. id.* at 565 (Jolly, J., concurring) (complaining that "[t]he majority's analysis here is a tautology—it simply substitutes one protean phrase (patently incorrect application) for another (unreasonable application)" and that "[i]n the end, the majority's lengthy journey to define 'unreasonable' is a circular one, and we are left at the point at which we started").

68. See *Awkai v. Mitchell*, 613 F.3d 629, 638 (6th Cir. 2010)

And the Seventh Circuit described it as one “well outside the boundaries of permissible differences of opinion.”⁶⁹ In an early Ninth Circuit post-*Williams* case, the Court determined that the “clear error” standard, which requires a “definite and firm conviction” of the incorrectness of the state court’s decision, was the best fit.⁷⁰ However shortly thereafter, the Supreme Court emphatically rejected the use of that analogy.⁷¹

Virtually all of the early post-*Williams* court of appeals’ opinions echoed Justice O’Connor’s position of rejecting what may be referred to as the “all reasonable jurists” test of unreasonableness. For example, the Tenth Circuit, understanding this and citing *Williams*, held that “the fact that one or even a few courts have applied precedent in the same manner . . . does not make it ‘reasonable.’”⁷² On the other hand in 2003, in an opinion seemingly at odds with *Williams*, the Eighth Circuit stated that “different federal courts may resolve the questions before us differently. This diversity of opinion alone suggests the [state court] did not unreasonably apply [federal law].”⁷³

2. Quiet Shift Toward the Reasonable Jurist Test?

The Supreme Court’s 2004 decision in *Yarborough v. Alvarado*⁷⁴ contained particularly significant reasoning. First, Justice Kennedy, writing for the Court, added a gloss or dimension to the “objectively unreasonable” analysis when he postulated that whether an application of law is unreasonable might depend upon whether the legal rule being applied is a specific or general rule.⁷⁵ The issue for the habeas court in *Alvarado*

69. See *Collins v. Gaetz*, 612 F.3d 574, 585 (7th Cir. 2010). In an earlier decision, a Seventh Circuit panel described unreasonableness as “not within the range of defensible positions.” *Mendiola v. Schomig*, 224 F.3d 589, 591–92 (7th Cir. 2000). These various articulations make one wonder how literally they should be taken. For instance, in comparing the articulated standard in *Collins* with the one in *Mendiola*, the *Collins* court was more deferential to the state by requiring the petitioner to show that the state court’s decision was not merely outside of the range of acceptable positions, but *well* outside that range.

70. See *Tran v. Lindsay*, 212 F.3d 1143, 1153 (9th Cir. 2000).

71. See *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (stating that “[t]he Ninth Circuit made an initial error in its ‘unreasonable application’ analysis The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness”). Accord *Stephens v. Hall*, 407 F.3d 1195, 1202 (11th Cir. 2005). Cf. *Ides*, *supra* note 38, at 740–48 (criticizing the reasoning in *Lockyer*).

72. *Valdez v. Ward*, 219 F.3d 1222, 1230 (10th Cir. 2000); see also *Payne v. Massey*, 339 F.3d 1194, 1198 (10th Cir. 2003) (holding that “the petitioner need not show that all reasonable jurists would disagree with the state court’s decision”).

73. *Williams v. Bowersox*, 340 F.3d 667, 672 (8th Cir. 2003).

74. *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

75. See *id.* at 664. This dimension to the analysis caught on and was used by the Court in later cases. See, e.g., *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (finding that, “because the . . . standard is a general standard, a state court has even more latitude”); *Renico v. Lett*, 130 S. Ct. 1855, 1864 (2010); *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). But see *Renico*, 130 S. Ct. at 1875 (Stevens, J., dissenting) (arguing that “the fact that the substantive legal standard applied by the state court ‘is a general one’ has no bearing on the standard of review”).

was the state court's ruling on whether Alvarado was in custody for *Miranda* purposes when he gave a statement to the police.⁷⁶ Justice Kennedy categorized the *Miranda* custody test⁷⁷ as a general rule and held that "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."⁷⁸ Thus, when a state court applied a general rule, as opposed to a specific Supreme Court precedent, there is a broader range of reasonable applications—a greater likelihood that it will deserve deference when reviewed by a federal court. Second and most pertinent to this paper, Justice Kennedy seemingly endorsed in dictum the "reasonable jurists" test for objective unreasonableness. As part of his rationale for reversing the Ninth Circuit's granting of a writ, Justice Kennedy mentioned that "fairminded jurists could disagree over whether Alvarado was in custody."⁷⁹

Before examining whether this signified a shift in § 2254 (d)(1) interpretation, it is helpful to address why this language from *Alvarado* is dictum. To begin with, the Court had no need to apply the unreasonable application test to at least half of the state court's holding given that the Court believed it to be correct and deserving of validation even under de novo review.⁸⁰ While the Court did not say the same in so many words about the remaining part of the state's holding,⁸¹ it implied that it saw the state's viewpoint as the correct one.⁸² Given the favorable view that the Court had of the state court's decision, it became unnecessary for the Court to struggle with the test for objective unreasonableness. Moreover, the Court's exact language is, "[i]gnoring the deferential standard of § 2254(d)(1) for the moment, it can be said that fair-minded jurists could

76. *Alvarado*, 541 U.S. at 659. The police are only required to advise a suspect of his or her *Miranda* rights if the suspect will be subjected to custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

77. The test is whether a reasonable person under the circumstances would have felt free to terminate the interrogation and leave. *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

78. *Alvarado*, 541 U.S. at 664 (construing *Wright v. West*, 505 U.S. 277, 308–09 (1992) (Kennedy, J., concurring)). According to Justice Kennedy in *Alvarado*, "If a legal rule is specific, the range may be narrow Other rules are more general, and their meaning must emerge in application over the course of time." *Id.* "Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity." *Id.* at 664.

79. *See id.*

80. *See id.* at 668. Alvarado argued that despite the fact that he voluntarily came to the police station and was interviewed in a non-coercive or even friendly manner, due to his age and lack of prior interactions with police, a reasonable person in his situation would not have felt free to leave. *See id.* at 659–60. As to Alvarado's claim about the relevance of his lack of prior criminal history, the Court said that even under de novo review, the state court's ruling should be undisturbed. *See id.* at 668.

81. The remaining part is the issue of the relevance of Alvarado's young age. *See id.* at 659–60.

82. *See id.* at 665 (finding that it was not a difficult case and that the Ninth Circuit, which found that the state court was objectively unreasonable, "was nowhere close to the mark").

disagree over whether Alvarado was in custody.”⁸³ While puzzling, this statement suggests that the Court disassociated its reference to fair-minded jurists from the unreasonable application clause of § 2254.

Eventually, the Court would utilize the reasonable jurist⁸⁴ test in a more straightforward way.⁸⁵ In the meantime, while the Court later cited *Alvarado* in a number of § 2254(d)(1) opinions, it was more often for the principle that applying a general rule as opposed to a narrow one broadens the range of reasonableness.⁸⁶ It was not clear, however, that the Court was operating pursuant to the notion that a state court decision was not unreasonable as long as a reasonable or fair-minded jurist might see it the same way. Any shift to the reasonable jurist standard took form in *Richter*.⁸⁷

In *Richter*, the Supreme Court reversed the Ninth Circuit Court of Appeals’ decision to grant a writ to convicted murderer, Joshua Richter.⁸⁸ With little if any fanfare, writing for the Court, Justice Kennedy used the reasonable jurist standard as his measure of objective unreasonableness.⁸⁹ Admittedly, the lack of fanfare might partially be explained by the fact that any objective unreasonableness analysis took a back seat to a different but important and open question of law. When the California Supreme Court denied Richter’s appeal, it did so in a one sentence summary order.⁹⁰ How to apply § 2254(d)(1) dictates to a federal court’s review of a state’s summary order, was a sticky question. Section 2254 requires the federal court to decide whether a state court’s decision was “contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States,”⁹¹ but how could the federal court make such a determination where the state court simply issued a summary order—one that says nothing more than “petition denied?”⁹² Should § 2254(d)(1) apply under those circumstances?

83. *Id.* at 664.

84. The terms “reasonable jurist” and “fair-minded jurist” seem to be used interchangeably in case law and should be considered synonymous here as well.

85. See discussion of *Richter* *infra* Part II.C.2.

86. See, e.g., *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *Renico v. Lett*, 130 S. Ct. 1855, 1875 (2010); *Wong v. Smith*, 131 S. Ct. 10, 12 (2010) (Alito, J., dissenting).

87. *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011).

88. *Id.*

89. See *id.* at 786–87 (clarifying that the only questions for the federal habeas court is “whether it is possible fair-minded jurists could disagree that those [state court’s] arguments or theories are inconsistent with the holding in a prior decision of this Court”).

90. See *In re Richter*, 2001 Cal. LEXIS 1946 (Cal. Mar. 28, 2011).

91. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1) (2012).

92. The problem ostensibly is that without any information about what precedent the state court applied or the reasoning used when applying precedent to the facts of a specific case, there is no way to decide whether the state court used the correct Supreme Court precedent and/or whether its application of precedent was unreasonable.

Despite the fact that the state did not include the “summary order” issue in its petition, in its grant of certiorari the Court directed the parties to brief and argue it.⁹³ Thus, habeas practitioners and jurists were particularly anxious to see how the Court would rule on the summary order dilemma.⁹⁴ When the Court decided *Richter*, the limelight focused on the Court’s decision that despite the issuance of a summary order by the state court, a petitioner was still required to fulfill his or her burden under § 2254(d)(1).⁹⁵ Moreover, while the parties plainly disagreed about the reasonableness of the California courts’ application of federal law, neither the petitions for and against certiorari nor the briefs on the merits devoted any attention to the standard or measure of reasonableness.⁹⁶ The parties simply noted that “incorrect” was not the same as “unreasonable” and then each made extensive arguments for and against what could be characterized as the correctness of the state court’s decision.⁹⁷ The briefs did not contain even one reference to how unreasonableness is to be determined much less argument aimed at or opposed to changing the standard to make it more difficult to establish.⁹⁸

In or out of the limelight, *Richter* represents a shift in unreasonable application analysis.⁹⁹ Unlike in *Alvarado*, where the Court found many reasons to fully agree with the state court making a finding of reasonableness obvious, the *Richter* Court performed a more extensive reasonableness analysis making that standard more pivotal.

93. See *Richter*, 130 S. Ct. at 1506–07 (2010).

94. See HERTZ & LIEBMAN, *supra* note 6, at 272 (remarking that whether AEDPA deference applied in summary denial cases “had divided the lower courts throughout the decade and a half following AEDPA’s enactment”).

95. See *Richter*, 131 S. Ct. at 784 (holding that “where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief”); see also *Johnson v. Williams*, 133 S. Ct. 1088, 1091 (2013) (holding that *Richter*’s presumption that summary state court denials were adjudications on the merits applies where state court ruled on some but not all of petitioner’s claims); Marceau, *supra* note 7, at 108–16.

96. See Petition for Writ of Certiorari, *Harrington v. Richter*, 131 S. Ct. 770 (2011) (No. 09-587), 2009 LEXIS 2970; Brief in Opposition to Petition, *Richter*, 131 S. Ct. 770 *Richter* (No. 09-587), 2009 2971 (No. 09-587); Petitioner’s Brief on the Merits, *Richter*, 131 S. Ct. 770 (No. 09-587), 2010 LEXIS 369; Respondent’s Brief on the Merits, *Richter*, 131 S. Ct. 770 (No. 09-587), 2010 LEXIS 663.

97. See sources cited *supra* note 96. Richter petitioned the federal court for the Eastern District of California for a writ of habeas corpus claiming that his attorney was ineffective within the meaning of the Sixth Amendment to the United States Constitution and the dictates of *Strickland v. Washington*, 466 U.S. 668 (1987). *Richter*, 131 S. Ct. at 783. The district court denied the petition. On appeal, a panel of the Ninth Circuit affirmed the district court. After a rehearing *en banc*, Richter won relief. *Id.* Four judges on the Ninth Circuit dissented, agreeing with the original panel that the writ should be denied. See *id.*

98. See sources cited *supra* note 96.

99. By “shift,” I mean that the Court moved away from a previously announced standard, but not necessarily that all cases afterwards reflected the shift. See *infra* Part III.D.

The *Richter* majority began its § 2254(d)(1) discussion with an observation about the provision's application to a claim of ineffective assistance of counsel.¹⁰⁰ Under *Strickland*, the Court's lead precedent for ineffective assistance claims, a reviewing court must evaluate the reasonableness of defense counsel's performance.¹⁰¹ The *Richter* majority criticized the Ninth Circuit for confusing the *Strickland* reasonableness analysis with the reasonableness analysis required by § 2254(d)(1).¹⁰² In its view, the Ninth Circuit's analysis involved merely an assessment of the reasonableness of Richter's lawyer's representation and any ensuing prejudice¹⁰³ when the true question was the reasonableness of the California Supreme Court's determination of the reasonableness of Richter's lawyer's representation.¹⁰⁴ In pronouncing its verdict that California had not unreasonably applied Supreme Court precedent, the Court said: "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."¹⁰⁵

For this principle, the Court cited *Alvarado* as if this were a longstanding interpretation of objective unreasonableness.¹⁰⁶

If the *Richter* majority believed that it was deviating from its own precedent, it did not acknowledge so in the opinion. Thus, also absent was any justification for embracing the standard specifically rejected by Justice O'Connor and the Court's majority in *Williams*, which for over ten years represented the definitive interpretation of § 2254(d). Perhaps Justice Kennedy lost patience with what he viewed as the overly generous grants of relief to state court prisoners by federal courts.¹⁰⁷ The opinion characterizes § 2254(d)'s purpose as just stopping "short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings."¹⁰⁸ To Justice Kennedy's mind, AEDPA's amendments to § 2254(d)(1) were designed to practically eliminate the oppor-

100. See *Richter*, 131 S. Ct. at 785.

101. See *Strickland*, 466 U.S. at 687–88. *Strickland* instructs reviewing courts to afford great deference to decisions and strategies of counsel. See *id.* at 689.

102. See *Richter*, 131 S.Ct. at 785. Since *Strickland* requires deference to counsel and many believe that AEDPA calls for deference to state courts, some argue that federal habeas cases involving ineffective assistance of counsel claims require "double deference." See Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)

103. Which would have been its only obligation under a de novo review.

104. See *Richter*, 131 S. Ct. at 785, 788.

105. *Id.* at 786. The Court added that a "state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Id.* at 786–87.

106. See *id.*

107. See *id.* (emphasizing that "if this standard is difficult to meet, that is because it was meant to be").

108. See *id.*

tunity of a defendant who was convicted in a state court to obtain federal review of constitutional claims.¹⁰⁹ The rare exception, in his view, is when not one fair-minded jurist could agree with the state court's understanding or application of federal law.¹¹⁰ The *Richter* majority opinion, however, offers no acknowledgement that the reasonable jurist test was not in line with the Court's precedent.¹¹¹

III. THE "FAIR-MINDED JURIST TEST" FALLACY

The fair-minded jurist test's potential for causing injustice is best appreciated in the context of the purpose of the AEDPA and the tradition of the Great Writ.¹¹² Before the passage of AEDPA, there was much debate about whether it was necessary or appropriate to amend the law to restrict a state court defendant's access to redress in the federal courts.¹¹³ With AEDPA's enactment, however, few would dispute that the pro-restrictions, states' rights and law enforcement movements won. With AEDPA, a state inmate trying to access a federal writ faced obstacles through a host of new, or sometimes tougher, procedural hurdles.¹¹⁴ And as indicated in Part II, the revised language of § 2254(d)(1) suggested the abandonment of de novo review.¹¹⁵ The amended version of § 2254, however, does not specifically speak of the federal courts' giving "deference" to state court decisions.¹¹⁶ Moreover, the congressional debates reveal that even AEDPA's supporters were not uniform in their under-

109. *See id.*

110. *See id.* at 786–87 (holding that habeas petitioner must prove that the error made by the state court left no possibility for fair-minded disagreement).

111. The same was true of opinions issued by the Court in the wake of *Richter*. *See, e.g.*, *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). When Justice Thomas, writing for the majority, addressed the unreasonable application question, he used the fair-minded jurist test citing to *Richter*. *Id.* at 1402. No mention was made of the fact that the fair-minded jurist test was a change in the legal landscape. *See id.* at 1402. Interestingly, in her dissenting opinion, Justice Sotomayor found that the state court *did* unreasonably apply Supreme Court precedent, and she too cited *Richter* and the fair-minded jurist test. *See id.* at 1426 (Sotomayor, J., dissenting).

112. *See* 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4261 (3d ed. 2012) (referring to habeas corpus as "the 'Great Writ,' as it has been called by the Supreme Court from John Marshall's day to this"); FREEDMAN, *supra* note 7, at 1; Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 57 (2012).

113. *See infra* notes 130–46 and accompanying text.

114. *See supra* notes 29–33 and accompanying text. Several of these statutory changes simply codified or strengthened habeas restrictions put into place by the U.S. Supreme Court while others, like the statute of limitations, were entirely new.

115. *See supra* note 42 and accompanying text; *see also* *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (O'Connor, J., concurring) (recognizing that "it cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved"). *But see Williams*, 529 U.S. at 378 (Stevens, J., concurring). It could be said that Justice Stevens's opinion in *Williams* took the position that AEDPA does not and cannot preclude de novo review in federal court.

116. *See* Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1) (2012).

standing of whether or how much deference AEDPA would require.¹¹⁷ The fair-minded jurist test for unreasonableness amounts to a relinquishment of the power to review to an extent not likely envisioned at AEDPA's enactment.

A. The Test

There are a few different ways the test has been articulated,¹¹⁸ but they all boil down to the same crucial question: When a state's highest court rules on an inmate's federal constitutional claim, the federal habeas court must ask itself whether any—even if only one—fair-minded jurist could agree with the decision.¹¹⁹ If the court answers in the affirmative, the federal habeas judge must deny the writ. Typically, the initial inquiry for the court is whether it agrees with the state court's resolution of the claim.¹²⁰ If it agrees, the denial of the writ is the required result, which was also the case even prior to AEDPA's enactment.¹²¹ However, if the federal court disagrees with the state court holding believing that the state court erroneously applied federal law, it must nevertheless deny the writ if it believes that a fair-minded jurist somewhere could debate that conclusion. Of course, when a § 2254 claim comes before a federal habeas judge, there will always have been a denial of that claim by a panel of state court appellate judges and by lower court judges in the state system as well.¹²² When a § 2254 claim arrives before a United States Cir-

117. See *infra* notes 131–46 and accompanying text.

118. Compare *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090 (1999), *overruled by Williams*, 529 U.S. 362 (2000) (unreasonable application means that state court has applied federal law “in a manner that reasonable jurists would all agree is unreasonable”), with *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (question is whether “fair-minded jurists could disagree over whether Alvarado was in custody”).

119. When the question is articulated as, “Is the state court’s conclusion ‘debatable amongst fair-minded jurists?’” its harshness is less obvious. This articulation might suggest that only state court decisions that would likely be supported by a significant number of fair-minded jurists should be allowed to stand. In other words, it conjures up an image of a close legal issue that could fairly be decided in more than one way. In truth, however, it is interpreted to mean that if *any* fair-minded jurist could agree with the state, its decision must stand. Moreover after *Richter*, § 2254 deference must be afforded to even summary denials by state courts. See *supra* notes 91–96 and accompanying text. Presumably, this means that a federal court must consider whether any possible, even though unarticulated, rationale exists for the state’s decision that one fair-minded jurist might agree was correct.

120. In *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003), the Supreme Court held that there is no required order for applying § 2254(d)(1) and that at the outset of its analysis, a federal habeas court may legitimately choose to address whether the state court unreasonably applied federal law without first considering the matter de novo. Nevertheless, it may be more logical and easier for a court to first make up its own mind on the correct conclusion. See HERTZ & LIEBMAN, *supra* note 6, at 1812–32.

121. See *Brown v. Allen*, 344 U.S. 443, 500–13. (1953).

122. Habeas corpus petitioners challenging state court convictions are required to exhaust their state court remedies before filing claims in federal court. See Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(b)–(c) (2012); *Rose v. Lundy*, 455 U.S. 509, 515 (1982). The claim may be presented to the state court on either direct or collateral review, but must be litigated through

cuit Court of Appeals or the United States Supreme Court, there may well have been one or more additional jurists¹²³ who agreed¹²⁴ with the state court's resolution of the claim.¹²⁵ Must the deciding federal court deny the writ unless it is willing to imply that these jurists were not fair-minded? Presumably the answer is yes. Justice O'Connor rejected the fair-minded jurist test when she wrote about the "unreasonable application" in *Williams v. Taylor* because this line of inquiry inevitably leads to questioning the fair-mindedness of jurists.¹²⁶

B. Legislative Intent

Statements made during the AEDPA congressional debates reveal lawmakers' expectations regarding AEDPA's practical impact. In addition to habeas reform, AEDPA contained amendments to existing law touching on a range of issues such as immigration, terrorist organizations, and governmental wiretapping.¹²⁷ Most were hotly debated. In both the Senate and the House of Representatives, the debate regarding the proposed standard for granting a writ (i.e., de novo review versus a more deferential standard), followed noticeable themes. The bills that resulted in AEDPA were introduced just after the Oklahoma City federal office building bombing and the arrest of Timothy McVeigh as the principal

the state's appellate courts including seeking discretionary appellate review. See *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Exhaustion does not include the requirement of asking the United States Supreme Court for a writ of certiorari to the state's highest court. See *Lawrence v. Florida*, 549 U.S. 327, 333 (2007).

123. Sitting on the federal bench.

124. "Agreed with" is to be contrasted with "found reasonable." A federal court is permitted to grant a writ if it finds that the state court unreasonably applied federal law. Therefore, the federal court need not decide whether or not it actually agrees with the state court or merely finds the decision reasonable. See *supra* note 121. Notwithstanding, oftentimes a federal court will agree with the state court (i.e., judge the decision to be correct) and it will say so. When this occurs, the judge or judges on that court join the state court judges in the pool of jurists who must be deemed not fair-minded if the writ is to be granted by a higher federal court.

125. This will not always be the case. A possible scenario is that a federal district court will grant a writ and the court of appeals will unanimously affirm resulting in the case reaching the U.S. Supreme Court with no lower federal judge having agreed with the state's ruling or having found it reasonable.

126. See *Williams v. Taylor*, 529 U.S. 362, 409–10 (2000) (O'Connor, J., concurring). In a different context in her previous opinion in *Wright v. West*, 505 U.S. 277, 304 (1992), Justice O'Connor had taken a similar position. Thus, in *Williams* she maintained:

[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. The "all reasonable jurists" standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than an objective one.

Williams, 529 U.S. at 409–10.

127. See 28 U.S.C. § 2254.

perpetrator.¹²⁸ Legislators predicted that McVeigh would be sentenced to death and the proposed legislation (as is reflected in its title, “Effective Death Penalty Act”) addressed perceived delays and obstructions to the implementation of the death penalty.¹²⁹ Thus, during the floor debates, AEDPA’s proponents spoke of speeding things along and achieving finality of criminal convictions through amendments such as adding a statute of limitations and imposing strict limits on filing more than one habeas petition or on a federal court’s conducting an evidentiary hearing.¹³⁰ Many legislators opposing AEDPA did not oppose these kinds of reforms, emphasizing that they took no issue with the goal of preventing delay.¹³¹ However those legislators, along with other opponents, were unhappy with the proposed change in the substantive legal standard.¹³² These objections set the stage for a dialogue in which opponents lamented a deferential standard that they viewed as “the effective repeal” of federal habeas. And proponents responded by trying to reassure opponents that even with the passage of AEDPA, federal habeas review

128. *See supra* notes 27–28 and accompanying text.

129. *See* 141 CONG. REC. S7821 (daily ed. June 7, 1996) (statement of Sen. Nickles) (mentioning that one of his constituents whose husband was killed in the Oklahoma City bombing told him that her pain would “be much greater if the perpetrators were allowed to sit on death row for many years”); 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Gekas) (stressing that the bill is necessary to ensure that death sentences handed down by juries in cases like the Oklahoma City bombing case will not be set aside or delayed by frivolous appeals); 141 CONG. REC. S7804 (daily ed. June 7, 1995) (statement of Sen. Specter) (stating that “Congress . . . ought to act to make the death penalty an effective deterrent. This legislation will move precisely in that direction.”).

130. *See, e.g.*, 141 CONG. REC. S7822-23 (daily ed. June 7, 1995) (statement of Sen. Abraham); *Id.* at S7829 (statement of Sen. Kyl). These AEDPA proponents pointed to delayed executions of inmates convicted in both federal and state courts. However, federal habeas review of state court convictions provoked additional concerns. Lawmakers supporting AEDPA complained that federal habeas corpus “demeaned federalism.” 141 CONG. REC. S7821 (daily ed. June 7, 1996) (statement of Sen. Nickles). Several expressed frustration with the notion that state judges were less knowledgeable in constitutional law than federal judges or inclined to be less fair. *See, e.g.*, 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde) (arguing that, “the State judge went to the same law school, studied the same law[,] and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge . . . it is unfair to assume ipso facto, that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.”). In fact, Senator Kyl of Arizona introduced an amendment to the bill that would limit federal habeas corpus review to federal convictions only. *See* 141 CONG. REC. S7829 (daily ed. June 7, 1995) (statement of Sen. Kyl). Pursuant to this amendment, which was not adopted, if a prisoner is convicted in a state court, his or her only access to a federal court would be his or her petition for certiorari in the U.S. Supreme Court as part of the direct appeals process. There would be no possibility for federal post-conviction review absent inadequate state court remedies. *See id.*; *Cf.* 141 CONG. REC. S7806 (daily ed. June 7, 1995) (statement of Sen. Biden) (introducing his amendment that would limit all habeas reform to federal convictions because terrorism cases are more likely to be prosecuted in federal court and because the interests of justice require that state court prisoners have meaningful access to federal review).

131. *See, e.g.*, 141 CONG. REC. at S7841.

132. *See, e.g., id.*; 142 CONG. REC. H3612-13 (daily ed. Apr. 18, 1996) (statement of Rep. Walters); 142 CONG. REC. H3610 (daily ed. Apr. 18, 1996) (statement of Rep. Berman).

would remain alive and meaningful.¹³³ Within these dialogues lies a window into the type of review envisioned by the authors of AEDPA.¹³⁴

The AEDPA sponsors drafted amendments to § 2254(d)(1) to require a measure of deference to state court rulings on constitutional claims.¹³⁵ Consequently, the amended statute requires denial of a writ unless “the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.”¹³⁶ Nevertheless, the statute does not use the word deference and contains no specific standard for measuring unreasonableness much less an intention that the fair-minded jurist test be utilized. The concerns expressed by AEDPA’s opponents during the debates suggest that they feared the use of a fair-minded jurist type standard¹³⁷ and equated its use with the virtual elimination of habeas corpus relief.¹³⁸ Proponents answered these concerns by claiming that the new language continued to guarantee a meaningful review.

For example, Senator Orrin Hatch stressed that the new amendments continued to permit federal courts to set aside state court decisions that “*improperly apply* clearly established federal law.”¹³⁹ Senator Arlen Specter promised that he wished to preserve the “detached, *objective review* that federal courts give.”¹⁴⁰ In his view, the new standard would “allow federal courts sufficient discretion to ensure that convictions in the state court are in conformity with the Constitution.”¹⁴¹ Similarly, Representative Henry Hyde tried to reassure opponents that a federal judge “always reviews the [s]tate court decision to see if it is in confor-

133. See 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde) (claiming the new standard is “not a blank, total deference”); 141 CONG. REC. S7846 (daily ed. June 7, 1995) (statements of Sen. Hatch) (arguing that under amendments federal courts may still review “[s]tate court decisions that improperly apply clearly established Federal law”); 142 CONG. REC. S3472 (daily ed. Apr. 17, 1996) (statements of Sen. Specter) (responding to opponents’ concerns by saying “I believe that the standard in the bill will allow Federal courts sufficient discretion to ensure that convictions in State court have been obtained in conformity with the Constitution”); see *infra* notes 140–143 and accompanying text.

134. For additional discussion of the legislative history as it relates to the “unreasonable application” clause, see generally *Ides*, *supra* note 38, at 693–97.

135. See 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde).

136. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1) (2012).

137. See 141 CONG. REC. S7842 (daily ed. June 7, 1995) (statement of Sen. Biden) (claiming that amendments “put[] the Federal courts in the difficult position of evaluating the reasonableness of a State court judge . . .”).

138. See *supra* note 133.

139. See *supra* note 134 (emphasis added).

140. 142 CONG. REC. S3472 (daily ed. Apr. 17, 1996) (statement of Sen. Specter) (emphasis added). Senator Specter went on to mention that many state court judges are elected and subject to political pressures to which federal judges, appointed for life, are not. See *id.*; see also Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1055 (2006) (re-marking that “elected judges exhibit less political independence than non-elected ones”).

141. 142 CONG. REC. S3472 (daily ed. Apr. 17, 1996) (statements of Sen. Specter).

mity with established Supreme Court precedence, or if it has been *misapplied*.¹⁴² These encapsulations of the level of review under the AEDPA amendments belie the notion that Congress endorsed the idea that a federal judge should leave alone an erroneous state court ruling that a single reasonable jurist might agree with. To the contrary, to say that federal courts should act when state courts improperly apply federal law suggests less deference than that afforded by the fair-minded jurist test.¹⁴³ The advocates of AEDPA were of the mind that a misapplication of federal law was akin to an unreasonable application. Granted, this may suggest that disagreement with the state court would be an insufficient reason for a federal judge to grant a writ.¹⁴⁴ However, it also suggests that what they had in mind was that some measure beyond erroneous would qualify as an unreasonable application. It does not suggest that an erroneous state court decision should be left intact as long as a jurist somewhere, albeit a fair-minded one, would have ruled as the state did. Moreover, Senator Specter's endorsement of the federal courts' exercise of an "objective" review comports with Justice O'Connor's reason for rejecting the fair-minded jurist test.¹⁴⁵

C. Does Showing Deference for State Court Judgments Require the Use of the Fair-Minded Jurist Test?

First, it is worth asking whether AEDPA actually requires deference. As noted earlier, the statute makes no mention of deference. The notion that deference to state court decisions is what Congress had in mind stems, at least partly, from the public agenda of AEDPA's proponents.¹⁴⁶ Congress passed AEDPA in response to years of complaints by a number of state prosecutors that the federal bench in habeas corpus proceedings too often undid hard-won convictions or death sentences, sometimes both.¹⁴⁷ The state prosecutors' lament sounded something like this: a horrible crime is committed against a citizen,¹⁴⁸ the state invests

142. See 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statements of Rep. Hyde) (emphasis added).

143. The dictionary defines "misapply" as "badly or wrongly apply." MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/misapply> (last visited Aug. 25, 2013). It defines "improper" as "not in accord with fact, truth or right procedure." *Id.*

144. It just may be that the comments of Senators Hatch and Specter and Representative Hyde imply a federal scrutiny that defers to state court decisions by paying them all due respect, but correcting them when they are wrong.

145. See *supra* notes 53–57 and accompanying text.

146. See *supra* notes 23–28 and accompanying text.

147. See *id.*

148. It is logical that most habeas cases involve capital murder, other murders, or crimes almost as serious. Aside from the obvious reason that death row inmates have the strongest incentives to file habeas cases, these inmates have a statutory right to the appointment of counsel for this purpose. See 18 U.S.C. § 3599(a)(2) (2012). Non-capital inmates serving the longest prison sentences have strong, if somewhat less, motivation to challenge their convictions in multiple forums as well.

time, money, and energy into bringing the perpetrator to justice; over a period of years, the perpetrator litigates both state and federal constitutional claims as part of direct review¹⁴⁹ and state collateral review;¹⁵⁰ claims that a defendant's constitutional rights were violated are presented to and denied (maybe more than once) by the highest court of the state; after as much as ten or more years,¹⁵¹ the same constitutional claims are heard by a federal court; the federal court makes its own call on the validity of the claim(s); despite previous holdings by state court judges, a federal court requires that the whole process begin anew or worse, orders the defendant's release; states are frustrated by what appears to be a lack of respect, even blatant disregard, for its considered rulings. It is of little wonder that despite AEDPA's language, judges interpreting AEDPA's meaning would see it as Congress's effort to require some measure of deference to state court decisions. Thus, if the spirit of the amended § 2254(d)(1) is deference, how is this to be fairly accomplished?

A good place to start to answer this question is with the meaning of "deference." Dictionaries define it as "humble submission or respect" or "courteous respect or regard."¹⁵² These definitions capture what state courts saw as lacking in the pre-AEDPA era. States do not want a federal court to decide a defendant's claim as if the state court had never ruled in the first place.¹⁵³ Courteous respect or regard (or deference) requires that the state court's decision be recognized and evaluated, not ignored by the federal habeas court.¹⁵⁴ However, it is hard to imagine states taking the

149. Direct review of a criminal conviction refers to appeals of right and discretionary appeals to the state appellate courts and also includes a request for a writ of certiorari from the U.S. Supreme Court. For a useful chart of the phases of review, see ANDREA D. LYON ET AL., *FEDERAL HABEAS CORPUS CASES AND MATERIALS* 7 (2d ed. 2011).

150. State collateral review or state habeas corpus refers to a post-conviction challenge, usually initiated in the trial court, ordinarily raising issues not developed in the trial record. See HERTZ & LIEBMAN, *supra* note 6, at 215–17.

151. The delay is aggravating to the prosecution for several reasons. For example, resources must be invested in the particular case long after the jury verdict. The victim or victim's family cannot obtain a sense of closure. Should a new trial be required all these years later, crucial witnesses may no longer be available. See *Wetzel v. Lambert*, 132 S. Ct. 1195, 1199 (2012) (commenting that "any retrial here would take place *three decades* after the crime, posing the most daunting difficulties for the prosecution" (emphasis in original)). While those sentenced to prison terms are usually incarcerated during the appellate and post-conviction litigation, death sentences are frequently stayed.

152. See MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/deference>; <http://www.thefreedictionary.com/deference> (last visited Aug. 25, 2013).

153. This would be the essence of de novo review of mixed questions of law and fact. A de novo review entails the federal court applying federal law to facts found by the state courts (or in limited circumstances to additional facts proven in the federal court proceedings) without regard to the state courts' legal rulings.

154. Should federal courts first decide cases as it would in de novo review and then consider § 2254(d) as a defense that bars relief? See *supra* note 121. This is an important question as some have taken the position that AEDPA does not violate Article III's grant of power to the federal judiciary only if understood not as a restriction on the federal court's ability to review constitutional

position, at least not publicly, that its courts' judgments, in capital or similarly serious cases, should be left undisturbed even if they are quite clearly wrong on the application of constitutional law.

While perhaps subtle, there is a difference between a court resolving a legal claim on a blank slate on the one hand, and incorporating in its review a close examination of the state court's judgment on the other.¹⁵⁵ Section 2254(d)(1) as amended by AEDPA requires regard for the state court decision by prohibiting the issuing of a writ unless the state has unreasonably applied federal law.¹⁵⁶ The problem is that the language fails to prescribe a method for determining whether an application of law is unreasonable.¹⁵⁷ But surely the spirit of the concept of deference does not require a federal court to back away in all cases save for ones in which the state's decision was "off the charts" in its incorrectness.¹⁵⁸ Yet, the fair-minded jurist test requires just this. By its terms, the fair-minded jurist test means that a state court decision must be left uncorrected by a federal court unless it is so wrong that not a single fair-minded jurist could agree with it. Far more than deference, this test requires acquiescence.¹⁵⁹

D. Post-Richter "Unreasonable Application" Analyses

It is difficult and perhaps too soon to gauge the impact of the Court's embrace of the fair-minded jurist test. Since the Court decided *Richter*, it has routinely ruled against habeas corpus petitioners in cases involving the "unreasonable application" clause.¹⁶⁰ There have been a significant number of Supreme Court opinions that convey impatience on

questions and make rulings, but after review, as a bar to a habeas petitioner's ability to obtain relief under certain circumstances.

155. When a state court has issued a summary denial and therefore not giving a reviewing federal court the benefit of its reasoning, this would entail the federal court performing a close examination of the result and possible rationales for it. *See Harrington v. Richter*, 131 S. Ct. 770, 784 (2011).

156. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1) (2012).

157. *Id.*

158. It cannot be denied that the majority's language in *Richter* conveyed a "we are getting tougher on habeas cases" message. *See Richter*, 131 S. Ct. at 787 (proclaiming "[i]f this standard is difficult to meet, that is because it was meant to be"); *see also Parker v. Matthews*, 132 S. Ct. 2148 (2012); *Ryan v. Gonzalez*, 133 S. Ct. 696, 708 (2013). Nevertheless, habeas corpus relief could still be rare under a deferential standard not as rigid and virtually impossible to achieve as under the fair-minded jurist test.

159. Even before *Williams*, the Third Circuit was highly critical of the reasonable jurist test adopted by other circuits. *See Matteo v. Superintendent*, 171 F.3d 877, 889 (3d Cir. 1999) (commenting that "[w]e do not believe AEDPA requires such unanimity of opinion. Nor do we think it entails an examination of whether the jurists responsible for the state court decision are reasonable: such an approach . . . would doubtless lead to the denial of virtually all petitions").

160. *See, e.g., Metrish v. Lancaster*, 133 S. Ct. 1781, 1792 (2013); *Nevada v. Jackson*, 133 S. Ct. 1990, 1992–93 (2013) (citing *Richter*, 131 S. Ct. 770).

the part of some of the justices.¹⁶¹ Some of the justices perceived that the lower courts too often failed to give state courts the deference required by AEDPA.¹⁶² In a series of these post-*Richter* cases, the Court has issued per curiam summary reversals.¹⁶³ Whether these or other denials of relief are attributable to the harshness of the fair-minded jurist test is not clear. Nevertheless, there is little doubt that a strict application of the test would make it extraordinarily difficult for a habeas petitioner to prevail.

Both before and after *Richter*, federal court § 2254 decisions fail to make clear, beyond a recitation of the standard, how unreasonableness has in fact been measured. In some cases a recitation of the § 2254(d)(1) standard is simply followed by the conclusion that, even if incorrect, the state court decision was not unreasonable.¹⁶⁴ Others contain lengthy discussions of why the record might support the state court's perspective.¹⁶⁵ The authors of these opinions may be of the mind that if the state court's perspective can be rationally explained, it is per se reasonable.¹⁶⁶ However, the opinions do not include any objective measures of the reasonableness of the state's legal conclusions.

In the lower federal courts, the scale of outcomes has been more balanced. In some of these cases, judges or panels mention that the fair-minded jurist test is the required standard.¹⁶⁷ Yet in other cases, the stan-

161. See, e.g., *Cash v. Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting) (complaining that “[i]t is a regrettable reality that some federal judges *like* to second-guess state courts” (emphasis in original)); *Parker*, 132 S. Ct. at 2149 (stating that the Sixth Circuit's decision is “a textbook example of what the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) proscribes”).

162. See, e.g., *Nevada*, 133 S. Ct. 1990; *Parker*, 132 S. Ct. 2148. In *Richter*, the majority criticized the court of appeals for giving “§ 2254(d) no operation or function in its reasoning.” *Richter*, 131 S. Ct. at 786.

163. See, e.g., *Parker*, 132 S. Ct. 2148; *Coleman v. Johnson*, 132 S. Ct. 2060 (2012). When the Supreme Court issues a summary opinion, it grants the certiorari petition and, in the same ruling, adjudicates the merits of the question(s) presented without allowing briefs on the merits or oral argument. See 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, 323 (2012) (noting the Court's recent increased use of summary reversals).

164. See, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388, 1404 (2011). The same can be said about cases in which the courts find that the state court was unreasonable in applying federal law. See, e.g., *Burr v. Branker*, No. 1:01CV393, 2012 WL 1950444, at *8 (M.D. N.C. May 30, 2012), *rev'd sub nom.* *Burr v. Lassiter*, F. App'x 327 (4th Cir. 2013).

165. See, e.g., *DeCastro v. Branker*, 642 F.3d 442, 451–56 (4th Cir. 2011); *West v. Symdon*, 689 F.3d 749, 752 (7th Cir. 2012).

166. Cf. *Ides*, *supra* note 38, at 689–90.

167. See, e.g., *Simpson v. Warren*, 475 F. App'x 51, 56 (6th Cir. 2012); *Simon v. Epps*, 463 F. App'x 339, 345–46 (5th Cir. 2012); *Johnson v. Secretary*, 643 F.3d 907, 932 (11th Cir. 2011); *Jones v. Basinger*, 635 F.3d 1030, 1044, 1052 (7th Cir. 2011); *Ayala v. Wong*, 693 F.3d 945, 961 (9th Cir. 2012); *Schneider v. McDaniel*, 674 F.3d 1144, 1149–50 (9th Cir. 2012); *Burr*, 2012 WL 1950444, at *2–3.

dard is an objectively unreasonable test.¹⁶⁸ However, the analyses that follow the recitation of the standard are often quite similar to pre-*Richter* analyses.¹⁶⁹ This is understandable given that both the “objective unreasonableness” and the “fair-minded jurist” tests lack concreteness. The harm inherent in the newly embraced fair-minded jurist test, however, emerges where relief is denied with accompanying language that conveys the court’s belief that the current standard is meant to make a win for the petitioner—a rarity.¹⁷⁰

In *Williams*, Justice O’Connor rejected the fair-minded jurist test because she believed it was too subjective.¹⁷¹ In the post-*Richter* period, an interesting illustration of what she may have had in mind can be found in *Elmore v. Ozmint*.¹⁷² A South Carolina state court convicted Elmore of murder and sentenced him to death.¹⁷³ After litigating numerous claims in state court on direct appeal and in post-conviction proceedings, he filed a habeas corpus petition in the United States District Court for the District of South Carolina. The district court denied the claims of ineffective assistance of counsel and denial of due process.¹⁷⁴ The district court judge agreed with the state court’s resolution of these legal claims, as opposed to merely finding them to be reasonable.¹⁷⁵ Thus, when Elmore appealed to the United States Court of Appeals for the Fourth Circuit, a ruling in his favor would imply that both the state court judges and the federal district court judge were not fair-minded jurists. Elmore nevertheless prevailed in the Fourth Circuit.¹⁷⁶ Language in the Fourth Circuit’s majority and dissenting opinions demonstrates the subjective and even personal nature of the test. For example, the dissenting judge seems outraged by the realization that the majority’s “remarkable” decision reveals its belief that “every single judge to have previously considered this issue

168. See, e.g., *Detrich v. Ryan*, 677 F.3d 958, 973, 978 (9th Cir. 2012); *Blystone v. Horn*, 664 F.3d 397, 417–18 (3d Cir. 2011); *Guzman v. Secretary*, 663 F.3d 1336, 1355 (11th Cir. 2011).

169. But see *Simpson*, 475 F. App’x at 56, 65 (granting the writ and despite the fact that the Michigan Supreme Court ruled against petitioner, expressing the opinion that no reasonable jurist could conclude that petitioner’s rights had not been violated).

170. See, e.g., *Splawn v. Thaler*, 494 F. App’x 448, 452 (5th Cir. 2012); *Conley v. Warden*, 505 F. App’x 501, 506–07 (6th Cir. 2012).

171. See *supra* notes 54–57 and accompanying text.

172. *Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011).

173. A South Carolina post-conviction court subsequently set the death sentence aside after it found that Elmore was mentally retarded and thus categorically excluded from the death penalty pursuant to *Atkins v. Virginia*. See *id.* at 848 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002)).

174. See *id.* at 847.

175. See *id.*

176. See *id.* at 851; see also *Grant v. Lockett*, 709 F.3d 224 (3d Cir. 2013); *Cornell v. Kirkpatrick*, 665 F.3d 369 (2d Cir. 2011). The court of appeals panel in *Cornell* found that the state court decision was an unreasonable application of federal law despite the fact that the federal district court found that the state court decision was a “proper application of clearly established federal law.” See *Cornell*, 665 F.3d at 371 (quoting *New York v. Kirkpatrick*, No. 06-CV-0734 (MAT), 2010 WL 161429, at *5 (W.D. N.Y. Jan. 13, 2010), *rev’d sub nob. Cornell*, 665 F.3d 369).

has been unreasonable.”¹⁷⁷ To this the majority responds that the mere fact that previous judicial rulings all went against Elmore cannot be the “yardstick” it uses in making its determination.¹⁷⁸ The majority forthrightly states, “If our opinion embarrasses anyone, so be it.”¹⁷⁹

IV. HOW FAR FROM CORRECT IS UNREASONABLE? BY WHAT MEASURE?

Acknowledging that “unreasonable” is “no doubt difficult to define” in 2000, Justice O’Connor nevertheless expressed confidence in the ability of the federal courts to apply the new § 2254 because, as she suggested, “it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning.”¹⁸⁰ While this is true, the analysis of or test for reasonableness often varies with the context. For example, courts determine whether a search and seizure is unreasonable and therefore violates the Fourth Amendment¹⁸¹ by balancing an individual’s right to privacy and to be free from governmental intrusions against the state’s interest in uncovering needed evidence of a crime.¹⁸² Another legal context in which reasonableness must be evaluated is in the many examples of when a person’s conduct or belief must be compared with that of the reasonable person.¹⁸³ Both tort and criminal law frequently require this measure. Negligence or unreasonable conduct is a long-standing basis for tort liability.¹⁸⁴ Simple negligence is less frequently the basis for criminal liability, however, many criminal cases turn on the reasonableness of a defendant’s perceptions and/or conduct as they relate to an element of a crime or defense.¹⁸⁵ The reasonable person test common to torts and

177. *Elmore*, 661 F.3d at 877.

178. *See id.* at 877 n.52. The majority granted the writ while unambiguously stating that it was observing the dictates of *Richter*. *See id.* at 856 (citing *Harrington v. Richter*, 131 S. Ct. 770 (2011) (calling the state court’s adjudication “error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement” (citation omitted))). After acknowledging the “constraints” AEDPA places on their scope of review and promising that it “faithfully” adhered to its “deferential standard,” the majority maintained that it is not its job to “rubberstamp the state PCR court” and that it “see[s] a meaningful role for the federal courts in safeguarding the constitutional rights of state prisoners” *See id.* at 872.

179. *See id.* at 873.

180. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000).

181. “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated.” U.S. CONST. amend. IV.

182. *See Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Reasonableness determinations require a balancing of interests in other contexts as well. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 850A (1977) (regarding water usage).

183. *See Ides, supra* note 38, at 688 (comparing tort law reasonableness analysis to that provided for in § 2254).

184. *See Fleming James, Jr., The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 1 (1951).

185. *See* MODEL PENAL CODE § 2.02(2) (containing General Requirements of Culpability), § 3.09 (regarding use of force) (1962). Even the concept of recklessness in criminal law relies upon a reasonable person comparison. *See id.* at § 2.02(2)(c).

criminal law has balancing at its root as well. While we understand that the hypothetical reasonable person is an abstract concept that may not even exist, on balance, we believe that holding citizens to this standard is in the interests of protecting society as a whole. In other words, holding everyone to this normative standard offers greater protection to us all.¹⁸⁶

Since context is an important consideration for choosing a reasonableness standard, it is fair to ask why—in the context of federal habeas corpus—state court prisoners face what Professor Justin Marceau calls in his recent article, “one of the most uncharitable standards of review known to law.”¹⁸⁷ A comprehensive discussion of the history of the Great Writ and its importance¹⁸⁸ is beyond the scope and breadth of this article. Nevertheless, if context has relevance for defining unreasonableness, it seems useful to point to a few basic principles in order to create a vivid backdrop for discussion. While Congress passed legislation authorizing federal courts to issue writs of habeas corpus to federal prisoners in 1789,¹⁸⁹ the Judiciary Act of 1867¹⁹⁰ established that prisoners incarcerated pursuant to state court convictions were also entitled to federal habeas corpus review.¹⁹¹ While many believe that the purpose of the 1867 Act was to protect newly freed slaves from unjust and retaliatory incarceration,¹⁹² it has functioned to redress injustices on a much broader basis for well over a century.¹⁹³ The writ’s function is to be “the best and only

186. See James, *supra* note 184, at 2 (explaining the need for an objective test of reasonableness and stating that “if the standard of conduct is relaxed for *defendants* who cannot meet a normal standard, then the burden of accident loss resulting from the extra hazards created by society’s most dangerous groups . . . will be thrown on the innocent victims of substandard behavior”). Cf. *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (finding that the appropriate reasonableness test is to compare the accused “from the standpoint of a person whose mental and physical characteristics are like [hers] . . .”); MODEL PENAL CODE § 210.3 cmt (1962).

187. See Marceau, *supra* note 7, at 97. Professor Marceau documents that habeas corpus relief under AEDPA has greatly diminished after an early period in which it appeared that AEDPA did not have the impact that was predicted. He argues that state court prisoners may stand a better chance of getting relief in federal court if they challenge the process or lack thereof in state court as opposed to the result of state court litigation. See *id.* at 137–97.

188. See generally *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970); Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952); NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 4–11 (2011). While primarily designed as a practitioners’ reference, Hertz and Liebman’s treatise, *Federal Habeas Corpus Practice and Procedure*, contains an excellent and extraordinarily well-documented recitation of the Writ’s history and significance. See HERTZ & LIEBMAN, *supra* note 6, at 5–116.

189. Act of Sept. 24, 1789, Stat. 73.

190. Act of Feb. 5, 1867, Stat. 385.

191. See *id.*; see also HERTZ & LIEBMAN, *supra* note 6, at 54–55.

192. See *Ex Parte McCordle*, 73 U.S. 318, 322 (1867) (stating “[w]hat was the purpose of [the Judiciary Act of 1867]? We all know . . . [i]t was to relieve persons from a deprivation of their liberty under State laws; . . . to protect especially those who had formerly been slaves, and who, under color of vagrant and apprentice laws in some of the States, were being reduced to a bondage more intolerable than that from which they had been recently delivered”).

193. See generally HERTZ & LIEBMAN *supra* note 6, at 55–91.

sufficient defense of personal freedom”¹⁹⁴ regardless of the motivation or cause of an unjust imprisonment. Historically speaking, the writ, as inherited from England, was intended to shield individuals from illegal detentions ordered by the crown and later in this country, from illegal detentions ordered by the executive branch of government.¹⁹⁵ Nevertheless, when Congress extended the writ to cover illegal detentions ordered by states, it was the same writ of habeas corpus with no indication that its function was to be viewed any differently.¹⁹⁶ Thus, we must be careful not to mistakenly assume that Congress intended any watering down of this crucial protection when it amended the statute with AEDPA. While the amendments to § 2254 were devised to require that state court decisions be given considerable (and increased) respect by the federal courts, nothing in AEDPA or its legislative history suggests intent to diminish the protective promise of the Great Writ.¹⁹⁷ President Clinton’s signing statement revealed his expectation that courts would uphold the ideals of justice that underlie federal habeas corpus review despite AEDPA’s statutory revisions.¹⁹⁸ To be sure, had AEDPA been intended as a diminishment of any individual’s right against unjust imprisonment, it would more than likely be unconstitutional.¹⁹⁹ In the end, even under AEDPA,

194. See *Brown v. Allen*, 344 U.S. 443, 512 (1953) (citing *Ex Parte Yerger*, 75 U.S. 85, 95 (1868)).

195. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 129–37 (6th ed. 1775); *Frank v. Mangum*, 237 U.S. 309, 325–31 (1915); Adelman, *supra* note 7, at 3–4.

196. See *Brown*, 344 U.S. at 500 (remarking that when Congress passed the Judiciary Act of 1867, which extended the availability of the federal writ to state court prisoners, it “embedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims”); see also *Reed v. Ross*, 468 U.S. 1, 10 (1984) (describing the 1867 Act as “Congress’ expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners. There can be no doubt that in enacting § 2254, Congress sought to ‘interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action’” (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972))). Perhaps, habeas corpus as a remedy for wrongful convictions by states is strongly analogous to the protection of citizens from politically motivated detentions ordered by the crown. As commentators on habeas corpus have noted, state court judges who are often elected to office may be motivated by politics in their decision-making. See *supra* note 141.

197. See *supra* notes 138–143 and accompanying text. Even AEDPA’s proponents paid homage to the historical importance of the writ and tried to persuade its opponents that these principles would remain intact.

198. See *Statement on Signing the Antiterrorism and Effective Death Penalty Act 1996*, *supra* note 25 (emphasizing that “[o]ur constitutional ideal of a limited government that must respect individual freedom has been a practical reality because independent Federal courts have the power ‘to say what the law is’ and to apply the law to the cases before them. I have signed this bill on the understanding that the courts can and will interpret these provisions of section 104 in accordance with this ideal”).

199. The concept of habeas corpus appears in the Constitution in what has been called, the Suspension Clause. See U.S. CONST. art. I, § 9, cl. 2. (providing “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it”). Therefore, significant restrictions on or interferences with access to federal courts to challenge illegal detentions raise constitutional concerns. See *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 301 (2001); *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996). See generally

the concept of habeas corpus as “the basic safeguard of freedom in the Anglo-American world”²⁰⁰ remains—at least in theory.²⁰¹ It is therefore fair to juxtapose a consideration of unreasonableness against that historical backdrop.

An inquiry about whether a state court decision that incorrectly applied federal law did so unreasonably should be performed with the ideals of the Great Writ in mind.²⁰² As previously explained,²⁰³ the fair-minded jurist test has the potential to affirm all but the most extremely incompetent decisions. Can it possibly be argued that the continued imprisonment or execution of a petitioner whose case was incorrectly decided by a state court is justified as long as that decision may be supported by just one fair-minded jurist?²⁰⁴ Historically speaking, would it have been acceptable to detain or execute a petitioner unlawfully convicted because one additional jurist could be found who agrees with the State? Such a standard is almost impossible to imagine.

The move to the fair-minded jurist test could very possibly be explained by the desire of many federal judges to curtail the granting of habeas corpus relief.²⁰⁵ Another plausible, if less political, explanation is that “objectively unreasonable”—an insufficiently defined concept—

Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1367–75 (2010).

200. See *Brown v. Allen*, 344 U.S. 443, 512 (1953).

201. Cf. Adelman, *supra* note 7, at 6 (citing a survey that documents the low grant rate under AEDPA). Judge Adelman, who sits on the federal bench and hears habeas cases, optimistically adds that “judges must understand that habeas corpus, notwithstanding the AEDPA, remains an important and workable remedy for a violation of a constitutional right and that they should not let it fall into disuse.” *Id.* at 34.

202. During the Senate debates on the AEDPA, then-Senator Biden made this point when he argued against an unreasonableness standard. He stated:

It is the lowest standard. It is one thing to apply that when we are protecting the public against environmental pollution. It is another thing when we are applying that standard to the application of constitutional rights to individuals. There we have always applied the highest standard. The Government has been required to meet the highest standard before they can put someone in jail or put them to death.

141 CONG. REC. S7842 (daily ed. June 7, 1995) (statement of Sen. Biden).

203. See *supra* notes 119–127 and accompanying text.

204. In a separate opinion in *Williams v. Taylor*, Justice Stevens articulated the fallacy of the fair-minded jurist test quite well when he said:

[T]he statute says nothing about ‘reasonable judges,’ presumably because all, or virtually all, such judges occasionally commit error; they make decisions that in retrospect may be characterized as ‘unreasonable.’ Indeed, it is most unlikely that Congress would deliberately impose such a requirement of unanimity on federal judges Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other reasonable judges.

529 U.S. 362, 377–78 (2000).

205. See *supra* notes 162–163 and accompanying text.

proved to be too difficult to apply.²⁰⁶ Here is a useful way to consider the challenge: Imagine a Venn Diagram²⁰⁷ with three concentric circles. The innermost circle represents what the federal habeas court considers the correct application of federal law to the facts of a given claim. The space between this inner circle and the next (or middle) circle represents possible rulings on the same claim that are incorrect, yet reasonable.²⁰⁸ Finally, the space between the middle and outermost circle represents possible applications of federal law that are both incorrect and unreasonable.

Under AEDPA, if the habeas court agrees with the state court decision, that decision would belong in the innermost circle and the writ must be denied, as it would have been pre-AEDPA. However, when a habeas court disagrees with the state's ruling, it must decide whether the state court's incorrect ruling belongs in the middle or in the outermost circle. The only guidance the federal court has received is that decisions that are objectively unreasonable belong in the outermost circle. But how far away from that inner circle must the decision be to require that it be placed in the outer circle instead of the middle circle? It seems impossible to quantify. On more than one occasion, the Second Circuit has characterized the measure as follows: "[T]he increment of incorrectness beyond error need not be great; otherwise habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence."²⁰⁹ Pursuant to this view, the middle circle would be quite narrow and contain only decisions that were just a bit wrong. Any additional increment of wrongness would push the decision into the outer circle and trigger the label "unreasonable application." Admittedly, some of its recent opinions reveal that a majority of the Supreme Court believes that a writ should be denied unless the state court's ruling was quite far off the mark.²¹⁰ However, this is inconsistent with AEDPA's legislative history²¹¹ and, more importantly, with the age-old function of the writ.²¹² A standard that labels a decision unreasonable if it is more than incorrect but not necessarily incompetent would be far more consistent with both. The rub, so to speak, is to identify how much of an increment beyond incorrect suffices and how to measure the distance.

206. See generally *Brown v. Allen*, 344 U.S. 443, 501 (1953) (Frankfurter, J., concurring) (stressing the importance of providing adequate guidance to the district courts regarding the adjudication of habeas petitions).

207. See *Venn Diagram*, WOLFRAM MATHWORLD, <http://mathworld.wolfram.com/VennDiagram.html> (last visited Aug. 25, 2013).

208. See generally Posner, *supra* note 140, at 1053 (describing a "zone of reasonableness within which a decision either way can be defended").

209. See, e.g., *Cornell v. Kirkpatrick*, 665 F.3d 369, 375 (2d Cir. 2011) (decided post-*Richter*); *Francis v. Stone*, 221 F.3d 100, 109 (2d Cir. 2000).

210. See, e.g., *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011).

211. See *supra* notes 138–146 and accompanying text.

212. See *supra* notes 191–198 and accompanying text.

A balancing test comparable to that used for unreasonable search and seizure claims may work in the habeas or § 2254(d)(1) context. Once a federal court determines that a state court ruling is incorrect, keeping in mind the purpose of a writ of habeas corpus, it should balance a petitioner's interest not to have his or her liberty deprived by an incorrect application of federal law against the state's interest in finality. The more wrong the state court decision, the more the scale should tip toward the petitioner. In other words, the federal court would undertake the following analysis:

(1) Did the state court's decision involve an erroneous application of federal law? If not, the writ must be denied.

(2) If it did involve an erroneous application of federal law, was the state court decision so wrong that continued deprivation of the petitioner's liberty pursuant to such a decision outweighs the State's interest in finality? If not, the writ must be denied. This step should be undertaken with reference to the historical function of the Great Writ.

If the balancing in step (2) tips toward Petitioner, the state court decision involved an unreasonable application of federal law and a writ may be granted.

Another, perhaps less methodical, way of describing the analysis above is to say that the habeas court, after deciding that the state court's conclusion was wrong, must ask itself, "Is [the state court's] decision so far from correct that it seems unreasonable to continue to deny the Petitioner his or her liberty without correction?" This assessment should be performed objectively but necessarily entails the likelihood that each federal jurist will have his or her subjective view of in whose favor the scales tip. The same is no doubt also true when a court balances the interests of the parties in any context. However, at least the federal court's analysis need not involve any assessment of the fair-mindedness or reasonableness of other judges. It is the latter form of subjectivity that Justice O'Connor rightly warned against when she rejected the fair-minded jurist approach.

A balancing approach of this sort also makes sense given that after *Richter*, habeas courts are to give § 2254 deference even to state court summary decisions.²¹³ In those cases, a federal court will be unable to receive the benefit of knowing, much less evaluating, the reasoning of the state court.²¹⁴ Pursuant to the balancing approach, the federal court

213. See *Richter*, 131 S. Ct. at 784.

214. Almost a decade before *Richter* was decided, Professor Steven Semeraro wrote an article in which he recommended that under AEDPA, habeas courts should examine the state court's reasoning process as opposed to the result it reached. See Semeraro, *supra* note 57, at 929–33. The decision in *Richter* leaves no room for such a process in summary opinion cases.

need only look at the result reached by the state court, decide whether it was correct and if not, consider whether it was erroneous enough to make it unreasonable to deny relief. Presently, under *Richter*, federal courts must construct all possible rationales for the state's decision and then decide whether it is possible that a fair-minded jurist could agree with any of them.²¹⁵

V. CONCLUSION

It is important not to lose sight of the forest for the trees. The trees represent the language of AEDPA and the judicial and scholarly interpretations of its provisions. Also amongst the trees lie arguments in favor of interpreting AEDPA in a manner consistent with the interests of justice and the tradition of the Great Writ. In this analogy, the standard for determining whether a state court has unreasonably applied clearly established Supreme Court precedent could undoubtedly be considered a crucial but single limb on a single tree.²¹⁶ The forest, however, represents troubling questions about the overall fairness and desirability of the changes to habeas corpus brought by AEDPA as a whole. While beyond the more narrow scope of this article, this author sees AEDPA as an unnecessary change, which sadly has stood in the way of just remedies for constitutional violations in the course of criminal prosecutions that provide a forum for provable claims of innocence.²¹⁷

If repealing AEDPA is not currently in the cards, its harshness can nevertheless be reasonably moderated through proper judicial interpretations of its provisions. The fair-minded jurist test, however, is an example of a dangerous and improper judicial interpretation. The balancing analysis previously advocated²¹⁸ is this author's prescription for a more just standard consistent with the interests behind AEDPA and the Great Writ. Finding workable standards of this kind presents a very real challenge.²¹⁹ Legal standards are mere words, and applying them is never a simple matter. Nonetheless, that is no excuse for choosing a standard like the fair-minded jurist test that virtually guarantees the denial of even the most legitimate claims.

215. See *Richter*, 131 S. Ct. at 784.

216. As explained *supra* Part III, the issue represents a key component that can affect access to justice.

217. For examples of literature speaking to the problems with AEDPA that contain proposed solutions, see NANCY J. KING & JOSEPH L. HOFFMANN, *supra* note 188; Adelman, *supra* note 7; John H. Blume & Sheri Lynn Johnson, *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 471–78 (2011); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339 (2006).

218. See *supra* notes 214–216 and accompanying text.

219. See *supra* notes 66, 208–209 and accompanying text.