A Reasoning-Process Review Model for Federal Habeas Corpus

Steven Semeraro

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation
A REASONING-PROCESS REVIEW MODEL FOR FEDERAL HABEAS CORPUS

STEVEN SEMERARO

For more than a century, judges and commentators have debated the standard of review applied in federal habeas corpus cases, i.e. collateral attacks on state criminal convictions in federal court. Prior to 1996, the federal statute creating habeas jurisdiction did not specify a degree of scrutiny, and the standard applied by the courts varied over time in vaguely articulated ways untethered to the statutory language. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, which, for the first time, explicitly included a standard of review. It permits a federal habeas court to grant the writ only if a state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

* Associate Dean for Academic Affairs and Associate Professor of Law, Thomas Jefferson School of Law. The author wishes to thank Teresa M. Gillis and Anders Kaye for their comments and encouragement, Eric Mitnick for his help in understanding the scope of judicial review of agency decisions, and the faculty at the Thomas Jefferson School of Law for permitting me to present an early version of this article at the school’s scholarly paper brown-bag lunch program. The comments made there contributed substantially to the final product. The author also thanks Elizabeth Corasiniti, Dorothy Hampton, and June MacLeod for their excellent research assistance.

1 This system of federal court collateral review of state criminal convictions is referred to in this article as federal habeas review. Habeas proceedings are nominally independent civil actions that test the lawfulness of an inmate’s confinement. 28 U.S.C. § 2254 (1994). As a practical matter, however, a federal habeas court reviews the state court’s decisions on matters of federal constitutional law in the same way that an appellate court reviews a trial court’s decisions. The concept of a standard of review in federal habeas can thus be understood as the degree of deference that a federal habeas court should afford to the decisions of the state courts.

2 See infra Part I.A.


4 Id. This article discusses the standard of review applicable on federal habeas to questions of law and mixed questions of fact and law. With respect to pure questions of fact, the 1996 Act also permitted a federal habeas court to grant the writ when the state court
The Supreme Court has interpreted that standard to require a state court to reach what it calls an "objectively reasonable" decision. Conceptually, a federal habeas court may be required to deny the writ even if, had it been reviewing the case de novo, it would have ruled for the petitioner. As long as objectively reasonable jurists could debate the issue, the Court has said, a federal habeas court must allow the state's decision to stand.\(^5\)

Many have argued that this new standard of review is too narrow.\(^6\) Others have advocated even narrower habeas review.\(^7\) Pointing to different historical periods, both sides of this debate contend that the writ must remain true to its original form. A critical examination of habeas's history, however, reveals that it has no true form. Instead, it has evolved as the role of federal constitutional law in state criminal justice systems has changed.\(^8\)

To justify a particular level of federal habeas review in the contemporary criminal justice system, one must do more than point to some period in which the preferred level of review existed. One must demonstrate instrumentally how particular levels of scrutiny of federal constitutional claims on federal habeas would serve particular goals in modern society. Neither the instrumental arguments that have been made for broad de novo review nor those for extremely narrow habeas review coherently support or explain the value of habeas in contemporary criminal justice systems. This article therefore concludes that the debate is unwinnable and should be abandoned in favor of a new model of federal habeas review.

Unfortunately, the current federal habeas standard is not an acceptable solution. The concept of objective-reasonableness, despite its name, is not objective at all. It turns on the court's subjective assessment of a concept that could not be vaguer: whether a decision reached by a state court, even if wrong to the mind of the federal judge, is nonetheless reasonable not simply in the sense that respected judges have reached it but in some

\(^5\) See infra Part I.B.


\(^7\) For the classic argument, see generally Paul Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441 (1963).

\(^8\) See generally Steven Semeraro, New Perspectives on Habeas Corpus History (forthcoming, under submission fall 2004) (copy on file with the author) (arguing that the writ has served to enable superior court systems to enforce their right to articulate the law, an instrumental function that is served by different levels of review over time).
additional *objective* sense. Such a standard provides no basis other than the
subjective assessment of the federal habeas court to gauge the
reasonableness of a state court’s decision.

This incoherence is problematic in the obvious sense that it does not
guide the lower federal courts and thus renders the law more unpredictable
than it needs to be. Rejecting all attempts to adopt objective standards\(^9\) or
familiar review formulations,\(^10\) the Court simply reiterates, as if repetition
could produce clarity, that *objectively reasonable* results must be upheld.

Even worse than this uncertainty, the objective-reasonableness
standard undermines both the principle of reasonable deference to state
decisions embodied in the 1996 Act and Article VI’s constitutional mandate
that state courts are bound by federal law.\(^11\) The 1996 Act required federal
habeas courts to defer to *reasonable applications* of federal law, which
given Article VI should be interpreted to mean well-reasoned opinions
taking full account of the applicable law.\(^12\) The Supreme Court’s objective-
reasonableness standard makes the quality of state court analysis irrelevant.
Deference thus turns not on the reasonableness of the state’s analysis, as
Congress intended, but on the federal court’s subjective assessment of the
merits of the state court’s result. By failing to demand even cursory state
court analysis of federal law, yet permitting reversal no matter how
thorough the state’s analysis, the Court’s objective-reasonableness standard
is inconsistent with the 1996 Act and permits, and may even encourage,
state courts to avoid their constitutional duty under Article VI.

\(^9\) See infra text accompanying note 34.
\(^10\) See infra text accompanying note 38.
\(^11\) U.S. CONST. art. VI, cl. 2 (asserting that federal law “shall be the supreme Law of the
Land; and Judges in every State shall be bound thereby”). The Supreme Court has long
recognized that Article VI demands that state judges fully enforce federal law even at the
expense of conflicting state law. As the first Justice Harlan described the obligation:

Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce,
and protect every right granted or secured by the Constitution of the United States and the laws
made in pursuance thereof, whenever those rights are involved in any suit or proceeding before
them, for the judges of the State courts are required to take an oath to support that Constitution,
and they are bound by it, and the laws of the United States made in pursuance thereof, and all
treaties made under their authority, as the supreme law of the land, “anything in the Constitution
or laws of any state to the contrary notwithstanding.” If they fail therein, and withhold or deny
rights, privileges, or immunities secured by the Constitution and laws of the United States, the
party aggrieved may bring the case from the highest court of the State in which the question
could be decided to this court for final and conclusive determination.

Robb v. Connolly, 111 U.S. 624, 637 (1884); see also Mooney v. Holohan, 294 U.S. 103,
113 (1935).

\(^12\) 28 U.S.C. § 2254(d)(1)-(2) (Supp. 2004).
This article proposes an alternative to the objective reasonableness standard that would look to the state court's reasoning process rather than the merits of its result. Under this standard, a federal habeas court would look first to whether the state court cited the federal law that the habeas court would have cited had it been presented with the claim. Second, the federal court would ask whether the state court weighed the factors that federal law would have required the habeas court to evaluate. If a state court considered the cases and weighed the appropriate factors, the federal court would deny the petition and allow the state decision to stand without addressing the merits of the claim. Where the state court did not fully analyze applicable federal law, however, a federal habeas court applying reasoning-process review would return the case to state court for more thorough analysis, but again without addressing the merits. If a state court repeatedly refused to apply the applicable federal law, the Supreme Court would remain free to address the merits on certiorari review.

Part I of this article briefly traces the historic standards of review applied in federal habeas cases and explains the standard now applied by the Court. Part II challenges the theologies favoring either narrow or broad collateral review of state criminal convictions in federal court, concluding that the arguments for and against are roughly equally persuasive and equally speculative. Part III critiques the objective reasonableness standard of review, concluding that its flaw is incoherence and its unjustifiable cost is the undermining of the state courts' constitutional obligation to treat federal law as supreme. Part IV describes reasoning-process review. It argues that this standard, which is analogous to forms of review used in other areas of the law, would provide appropriate deference to well-reasoned state court decisions, as the 1996 Act requires, without freeing states of their Article VI obligations, as the Supreme Court's objective-reasonableness standard effectively does.

13 This article focuses on the "unreasonable application" prong of the 1996 Act's standard of review. It does not directly address the question whether a state court decision is "contrary to" federal law. As a practical matter, however, it is unlikely that a decision contrary to federal law could meet the elements of the reasoning-process review proposed in this article. See infra Part IV. Such a decision would not likely cite the applicable federal law or address the relevant considerations that federal law requires a court to weigh in reaching a decision.

14 Returning cases to state court rather than ordering the conditional release of the prisoner should be a permissible remedy under the federal habeas statute, which permits courts to "dispose of the matter as law and justice require." 28 U.S.C. § 2243 (1994).
I. STANDARDS OF REVIEW IN FEDERAL HABEAS CORPUS CASES

Although federal habeas review has always rested on statutory law, prior to 1996 Congress never articulated a standard of review. As a result, the Supreme Court has taken it upon itself to define habeas's scope.\(^{15}\) Unfortunately, the Court's pronouncements are invariably vague and debate has raged both within and outside the Court with respect to the level of scrutiny that has actually been applied.\(^{16}\)

Congress's decision, for the first time, to squarely address the scope of federal habeas in the 1996 Act has led the Court to pay greater attention to the issue than it had before. Nevertheless, the standard that the Court applies, and whether that standard best accords with the statutory language, remains unsettled.

A. HISTORIC STANDARDS OF REVIEW

Section 14 of the Judiciary Act of 1789 created authority in the federal courts to grant the writ to prisoners held in federal custody "for the purpose of an inquiry into the cause of commitment."\(^{17}\) Two early amendments expanded the scope of the writ to cover state prisoners who were (a) confined for fulfilling their obligations to the federal government, or (b) serving a foreign government.\(^{18}\) The 1789 formulation arguably suggested


\(^{16}\) Wright v. West, 505 U.S. 277 (1992) (Justice Thomas's lead opinion and Justice O'Connor's concurrence debate the standard of review); Wainwright v. Sykes, 433 U.S. 72, 78-85 (1977) (describing the Court's changing approach to the standard of review over time); Stone v. Powell, 428 U.S. 465 (1976) (Justice Powell's opinion for the Court and Justice Brennan's dissent debate the scope of habeas review). Compare Bator, supra note 7, at 463-64 (arguing that the pre-1952 Court reviewed state decisions only for lack of jurisdiction or unconstitutional statutes or sentences), with Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 620 (1982) (concluding that 1867 Act indicated that Congress believed state courts would not "vindicate federal law" and it thus conferred full authority to federal courts to adjudicate federal claims anew).

\(^{17}\) Ch. 20, 1 Stat. 73, (1789).

\(^{18}\) In 1833, Congress extended the scope of federal habeas to cases in which a prisoner was held by a state tribunal as a result of conduct undertaken in the service of the federal government. Ch. 57, § 7, 4 Stat. 634-35 (1833) (extending power of federal courts to grant the writ in favor of a prisoner "committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof . . ."). In 1842, the power was further extended to prisoners who were "subjects or citizens of a foreign State" held under federal or state law for acts protected by the law of a foreign state and principles of international law. Ch. 257, 5 Stat. 539 (1842) (extending power of federal courts to grant the writ in favor of a prisoner held "on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exception, set up or claimed under the commission, or order, or
that the writ would be available only to those confined without cause, since
it provided for inquiry only into the "cause of commitment." The early
amendments, however, made at least some causes improper. Unfortunately,
the early Court never articulated the standard that it applied, and
commentators have reached no firm conclusions about the federal courts' 
early practice.  

In 1867, Congress adopted the habeas language that remains in force
today: "[T]he several courts of the United States . . . shall have power to
grant writs of habeas corpus in all cases where any person may be 
restrained of his or her liberty in violation of the constitution, or of any

treaty or law of the United States . . . ." Despite the apparent clarity and
broad scope of this language, debate as to Congress's intent has lingered.
Some commentators have narrowly interpreted the 1867 Act merely to 
extend the existing habeas power to freed slaves who were effectively
bound to continued servitude by state law. Others have argued that the

---

19 Although most commentators and the Court itself have interpreted the 1789 statute to 
prohibit federal habeas review of state cases, Fay v. Noia, 372 U.S. 391, 409 (1963); Bator, 
supra note 7, at 465, at least two commentators reach the opposite conclusion. Eric M. 
Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty 46 (2001); see generally 

20 An Act to amend "An Act to establish the judicial Courts of the United States," ch. 28, 

("[T]here was no hint that the measure was intended to apply to those convicted by a state 
court of competent jurisdiction . . . ."); Clarke D. Forsythe, The Historical Origins of Broad 

[T]here is a strong and consistent record that can be read to understand the 1867 Act as referring 
to the Thirteenth Amendment and the Reconstruction laws designed to enforce it. Indeed, the
purpose of protecting the freedmen seems to dominate the entire course of the bill . . . . \[A\]side
from the class of persons protected, there is nothing in the legislative history that alters the
conclusion from the text that the Act did not change the English limitations except in the mode 
of factual inquiry.

Id.; Lewis Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 
33 U. Chi. L. Rev. 31, 55-56 (1965) ("[T]here is no foundation for the Court's assertions that the 
1867 act was intended to afford a new remedy for state prisoners, that it was enacted in 
contemplation of anticipated southern resistance to Reconstruction, and that it was aimed at 
implementing the fourteenth amendment."); Neil McFeeley, Habeas Corpus and Due 
indicates that the . . . [1867 Act was] instituted to protect the newly-freed slaves against the 
vagrant and apprentice laws formulated by the southern states.").
Act created a federal forum to review all questions of federal law that arise in state criminal cases.\(^\text{22}\)

The Court itself fueled this continuing debate by repeatedly failing to squarely address the standard of review applicable to habeas cases. Prior to its 1952 decision in *Brown v. Allen*, the Court often insisted that federal habeas courts did not review constitutional questions *de novo*.\(^\text{23}\) Yet, some cases suggested otherwise.\(^\text{24}\) After *Brown*, the Court assumed for nearly forty years that *de novo* review was appropriate.\(^\text{25}\) In the early 1990s, however, the Court called that assumption into question nearly rejecting the notion that it had ever endorsed *de novo* review.\(^\text{26}\) Although failing to take that extreme step, in the late 1980s and early 1990s, the Court effectively eliminated *de novo* review by (1) entirely prohibiting federal habeas courts

\(^\text{22}\) Ex Parte McCordle, 73 U.S. 318, 325 (1868) ("This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of deprivation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."); Peller, *supra* note 16, at 620 (concluding that 1867 Act indicated that Congress believed state courts would not "vindicate federal law" and it thus conferred full authority to federal courts to adjudicate federal claims anew).


\(^\text{24}\) Compare *In re Wood*, 140 U.S. 278, 285-87 (1891) (refusing to review as applied equal protection claim in federal habeas proceeding), with *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (granting as applied equal protection claim on habeas review); see also Moore v. Dempsey, 261 U.S. 86 (1923) (reversing on ground that mob influence over the jury constituted a violation of the Due Process Clause).

\(^\text{25}\) During the period, the Court either cited *Brown v. Allen* for its authority to review federal constitutional claims on habeas review, see, e.g., *Fay v. Noia*, 372 U.S. 391, 414 (1963), or simply reviewed the claim *de novo* without citing any authority at all. See, e.g., *Whiteley v. Warden*, Wyo. State Penitentiary, 401 U.S. 560 (1971). In 1966, Congress next significantly amended the habeas statute. Without changing the basic definition of the writ's scope, Congress limited the federal habeas courts' discretion to hold evidentiary hearings where state fact findings were made. 28 U.S.C. § 2244(a)-(c) (1966); see S. Rep. No. 89-1797, at 2 (1966); see also H.R. Rep. No. 89-1892, at 5-6 (1966), reprinted in 1966 U.S.C.C.A.N. 3663-64. Like the amendments before it, this one did little to clarify the level of scrutiny that federal courts should apply to state court interpretations of the Federal Constitution.

\(^\text{26}\) In *Wright v. West*, 505 U.S. 277 (1992), the lead opinion by Justice Thomas argued that the Court had never actually held that *de novo* review of federal habeas claims was appropriate. *Id.* at 287 (per Thomas, J., announcing the judgment of the Court) ("We had no occasion [in *Brown*] to explore in detail the question whether a 'satisfactory' conclusion was one that the habeas court considered *correct*, as opposed to merely *reasonable*."). A majority of the Court, however, held that *de novo* review was required. *Id.* at 300-03 (O'Connor, J., concurring) (stating holding of Court that the federal habeas statute required federal habeas courts to review state court decisions on legal issues and most mixed questions of fact and law *de novo*).
from reviewing claims that raised constitutional questions that were not clearly established, and (2) adopting an actual prejudice harmless error standard in place of the harmless-beyond-a-reasonable-doubt standard applied generally to constitutional questions in criminal cases.

B. THE CURRENT HABEAS STANDARD OF REVIEW

In 1996, Congress for the first time explicitly imposed a standard of review on federal habeas courts, requiring that they uphold a state court decision so long as it was not "contrary to, or [did not] involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Even under this relatively clear language the justices disagreed on the appropriate standard, and the writ continues to be applied, to say the least, flexibly.

27 In Teague v. Lane, 489 U.S. 288 (1989), the Court established the principle that new rules of constitutional criminal procedure may not be established on habeas corpus. Like the Court's standard of review for habeas cases, the Teague retroactivity doctrine was never applied consistently. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 315 (1989) (holding claim that jury's inability to give effect to mitigating evidence did not impose a new obligation even though Court had never addressed the issue before, because petitioner "simply asks the State to fulfill the assurance upon which Jurek was based; namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence that a defendant might present in imposing a sentence").

28 In 1971, the Court applied the harmless-beyond-a-reasonable-doubt standard, see Chapman v. California, 386 U.S. 18, 21-24 (1967), in a habeas case. Whiteley, 401 U.S. at 569-70, 570 n.13. Twenty-two years later, however, the Court treated the question as open and decided that federal habeas relief could not be awarded unless the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The Court explained that "[u]nder this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless . . . it resulted in 'actual prejudice.'" Id.; see also O'Neal v. McAninch, 513 U.S. 432, 438-40 (1995) (re-affirming Brecht harmless-error standard but clarifying that [w]ould should be resolved in favor of the habeas petitioner).


30 In Williams v. Taylor, 529 U.S. 362 (2000), the Court split 5-4 on what this language meant. The majority held the new amendment limited the federal courts' authority to grant the writ to cases in which state courts "unreasonabl[y] appl[y]" federal law in an objective sense to be determined by the federal courts. Id. at 412. The four justices in the minority concluded that the 1996 Amendment required federal courts to "give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails." Id. at 387 (Stevens, J., concurring in judgment) (citing Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996)).

The Court has interpreted the statutory language to require a federal habeas court to ask whether the state court has reached a decision that either (1) "applies a legal rule that contradicts . . . [the Supreme Court's] prior holdings or . . . reaches a different result from one of [the Court's] cases despite confronting indistinguishable facts"32 or (2) "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case."33 Under this approach, a habeas court must look directly to the merits of the decision rather than the state court's reasoning.34 That the state court may have failed to cite applicable precedent or even knew of its existence is not critical.35 So long as the result reached does not contradict federal law and is objectively reasonable in light of that law,36 the petition must be denied.37


32 Ramdass, 530 U.S. at 165-66.
33 Penry, 532 U.S. at 792 (quoting Williams, 529 U.S. at 407-08 (internal quotations omitted)).
34 See, e.g., Weeks, 528 U.S. at 236-37 (reviewing merits of claim, concluding state court analysis was correct, and concluding "[f]or the reasons stated above, it follows a fortiori that the adjudication of the Supreme Court of Virginia affirming petitioner's conviction and sentence neither was 'contrary to,' nor involved an 'unreasonable application of,' any of our decisions").
35 See Early, 537 U.S. at 8 (holding that state court not required to cite applicable U.S. Supreme Court cases or even be aware of them); Mitchell, 124 S. Ct. at 8 ("We have held that a state court need not even be aware of our precedents . . .").
36 Although the Court maintains that it engages in two inquiries—(1) whether the state decision is contrary to federal law in that it contradicts a Supreme Court case or (2) whether it purports to apply the correct law but does so unreasonably—both inquiries ultimately ask the same question: has the state court reached a decision that is reasonable given existing precedent.
37 Mitchell, 124 S. Ct. at 12 ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent for this Court is, at best, ambiguous."); Price v. Vincent, 538 U.S. 634, 641 (2003); Williams, 529 U.S. at 410; Woodford v. Visciotti, 537 U.S. 19, 25 (2003); Bell v. Cone, 535 U.S. 685, 694 (2002).
Defining what contradicts federal law, or what is objectively reasonable, has proven to be a challenging and uncertain task. On the one hand, the Court has held that a federal court should not substitute its own judgment for that of the state court. A federal court is similarly prohibited from asking whether the state court has made a clear error in the sense that the habeas court is left with "a firm conviction that the state court was erroneous." On the other hand, a habeas court should not defer to the state court whenever the state has provided a fair process for adjudication of federal rights or reached a rational decision in the sense that reasonable jurists could agree with it. Where between these extremes the precise standard of review falls remains uncertain.

II. THE DEBATE OVER THE APPROPRIATE BREADTH OF FEDERAL HABEAS CORPUS REVIEW

Virtually no commentator has supported the Court's current standard of federal habeas review. Much of the existing commentary stresses the need for a searching, de novo federal review of state criminal convictions. The justifications range from our constitutional structure to institutional limitations on the state courts to firmly held subjective beliefs by experienced litigators that federal courts reach more accurate decisions on federal constitutional questions.

Conversely, impassioned arguments by respected legal intellects make the opposite claim that federal habeas should be limited to ensuring that states provide adequate procedures to address federal constitutional claims. Justice Jackson articulated the view succinctly in an internal Court memorandum during the Brown v. Allen deliberations: "Moderate penalties promptly and effectively applied after fair and calm trial reviewable once to make sure that no prejudicial error has occurred is all that a defendant... is entitled to. When he has had that society is entitled to have the decrees of its courts enforced with finality."

38 Price, 538 U.S. at 641; Woodford, 537 U.S. at 24-25; Bell, 535 U.S. at 698-99.
40 Williams, 529 U.S. at 409-10. The opinions of other courts are not, however, entirely irrelevant to whether a decision is objectively unreasonable. Price, 538 U.S. at 641 (pointing out that "numerous other courts have refused to find double jeopardy violations under similar circumstances").
41 But see FREEDMAN, supra note 19, at 153 (reading the 1996 Act and the objective-reasonableness standard as "making no fundamental alteration in the existing role of the federal courts in inquiring into state capital convictions").
42 See infra Part II.B.
43 FREEDMAN, supra note 19, at 128.
This Part explores the arguments on each side of this debate, asking whether a broader or narrower standard of review on federal habeas is most desirable. It concludes that firm answers cannot be reached, and the wiser course would be to change the terms of the debate. Adherents to the arguments for either broad or narrow habeas review will likely feel that this article short-changes the arguments on their side. The goal, however, is not to disprove definitively these arguments, but to show that the undeniable merits of both are tempered by uncertainty that precludes the unqualified adoption of either.

A. THE COSTS OF BROAD FEDERAL HABEAS REVIEW

A half century ago, Professor Paul Bator and Judge Henry Friendly advanced the classic arguments for narrow habeas review. One can rightly criticize Bator and Friendly, and many have, for the historical flaws in their interpretations of federal habeas and for wrongly suggesting that their own proposals for narrow habeas review had greater claim to historical integrity than the doctrine they were criticizing. One cannot deny, however, that Bator and Friendly make a strong instrumental case that "collateral attack of criminal convictions carries a serious burden of justification."1

1. Friendly's Cost/Benefit Analysis

Judge Friendly emphasized the cost of habeas review in terms of state prosecutorial, defense bar, and judicial resources. Even more important for him, however, were the uncertain rewards. The problem is not just that the overwhelming majority of prisoner petitions lack merit. Even among those that are meritorious, he argues, many would simply vacate convictions of obviously guilty defendants who would either (a) be convicted in a new trial, or (b) receive an unjust windfall because the passage of time had weakened the state's ability to convict. The subset of cases in which granting the writ would serve a beneficial purpose, Friendly

\[\text{References:}\]

44 See supra notes 6, 15, 18. At this point, there can be little doubt that habeas corpus has always served a broader function in the United States than it did in the common law English courts, and indeed was used throughout the 1800s in ways that many would now consider outrageous usurpations of executive and legislative authority. Seymour D. Thompson, Abuses of the Writ of Habeas Corpus, 18 AM. U. L. REV. 1, 4-5 (1884) (describing aggressive use of habeas by federal courts from the ratification of the Constitution through the 1880s, the period when others have claimed that it was at its narrowest).


46 Id. at 147-48.

47 Id.
concluded, would be quite small. And the existence of an expansive writ that encourages the filing of frivolous petitions might lead judges—who are human enough to get lazy when reviewing "so much dross"—to miss the rare, truly meritorious petition.48

2. Bator's Psychological Concerns

Bator's concerns about federal habeas were more nuanced. First, he argued that an unlimited right to attack a criminal conviction undermines the educative and deterrent functions of criminal punishment by encouraging the prisoner to continually search for ways to test the lawfulness of confinement rather than to accept punishment as a justified response to antisocial behavior.49 Second, he contended that the existence of de novo federal habeas review may undermine the quality of state judicial decision-making because he saw habeas review as "subversive... of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well."50 Third, he stressed "a psychological necessity in a secure and active society" of permitting a sense of repose to form, i.e., reaching a point in which the society accepts that it has "tried hard enough and thus may take it that justice has been done."51 If "our limited resources" are to be channeled toward the most "productive ends," Bator argued, "[s]omehow, somewhere we must accept the fact that human institutions are short of infallible..."52

3. Evaluating the Criticisms of Broad Habeas Review

At the level of generality that these arguments are made, they seem quite persuasive. And they have stood essentially unrebutted despite the many attacks on Friendly's and Bator's histories and proposals. The further

---

48 Id. at 148-49 (quoting Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones.").
50 Bator, supra note 7, at 451; id. at 506 ("The crucial issue is the possible damage done to the inner sense of responsibility, to the pride and conscientiousness, of a state judge in doing what is, after all, under the constitutional scheme a part of his business: the decision of federal questions properly raised in state litigation."). Although Bator is often cited as the original skeptic with respect to broad habeas, Seymour Thompson made many similar points nearly eighty years earlier. Thompson, supra note 44, at 3 ("The police regulations of the States, their criminal codes, the decisions of their highest judicatories, and even their constitutions lie at the feet of the inferior Federal judges.").
51 Bator, supra note 7, at 452.
52 Id. at 453.
one moves from the general to the particular, however, the more questions these arguments raise.

With respect to the costs of habeas litigation, Friendly carefully avoids degrading the value of enforcing constitutional rights. Instead, he constructs a trade-off between broad habeas and effective initial criminal prosecutions. Without denying that we must vigorously protect constitutional rights, he suggests that the broader our habeas review, the weaker our primary criminal processes will be.\(^53\) But he offers no proof that such a tradeoff needs to be made. It seems unlikely that states fail to prosecute, or even prosecute less effectively, because district attorneys, courts, and defense attorneys are too busy with habeas proceedings. On the contrary, broad habeas may save resources by helping ensure that (a) initial prosecutions accord with the rule of law and thus (b) the resulting convictions are less likely to be overturned on appeal.

Bator’s concern with the educative and deterrent functions of criminal law may artificially assume a unity of psychological outlook. Is it really impossible for a convicted felon to recognize the error of his ways while continuing to explore options to reduce the length of his sentence? And even if the answer is yes, there are surely worse activities for those held in state penitentiary systems than hitting the law books.

With respect to the negative impacts of broad habeas on the quality of state court judging and the proper allocation of social resources, Bator readily admits that there are no bright-line answers.\(^54\) But there may be no answer at all. For example, Bator posits a distinction between “smug acceptance of injustice merely because it is disturbing to worry whether injustice has been done” and “unreasoned anxiety that there is a possibility that error has been made in every criminal case in the legal system.”\(^55\) Perhaps in Bator’s era of raising expectations about the accuracy of criminal convictions and the realistic hope that capital sentences would soon be a relic of the past, one could see a real distinction between the psychological states that Bator posits.\(^56\) Given the contemporary evidence

\(^53\) Friendly, supra note 45, at 148-49.
\(^54\) Bator, supra note 7, at 451 (“Of course this does not mean that we should not have appeals. . . . [I]mportant functional and ethical purposes are served” by appropriate review.).
\(^55\) Id. at 452.
\(^56\) Samuel R. Gross, The Risks of Death: Why Erroneous Convictions are Common in Capital Cases, 44 BUFF. L. REV. 469, 470 (1996) (“Until recently, most judges, lawyers and scholars were willing to believe that the system worked as intended: that wrongful capital convictions were rare, and wrongful executions virtually non-existent.”) (citing FRANK CARRINGTON, NEITHER CRUEL NOR UNUSUAL 123 (1978)); Alex Kozinski & Sean Gallagher, Death: The Ultimate Run-On Sentence, 46 CASE W. RES. L. REV. 1, 21 & n.99 (1995) (“[E]rrors that go to guilt or innocence are exceedingly rare in criminal cases, and even more
of wrongful convictions even in capital cases, the picture today is considerably murkier.\textsuperscript{57}

Friendly's and Bator's raising of these considerations is surely valuable. As general principles unconnected to particular practices at particular places and times, they are provocative. In themselves, however, these instrumental arguments cannot justify any particular level of habeas review.

B. THE BENEFITS OF BROAD FEDERAL HABEAS REVIEW

The case in favor of broad habeas is by and large more particularized than the case against it. Ultimately, however, the arguments though persuasive, remain inconclusive.

1. \textit{ Constitutional Structure

A number of commentators have argued that the nature of the Constitution itself compels broad federal court review of federal law issues in state criminal proceedings. These arguments range from the original conception of the federal courts as a place to resolve issues on which state prejudices might influence decisions to the need for uniform law in a multi-jurisdictional system to the value of inter-jurisdictional judicial dialogue. Although each of these claims has merit, none logically compels broad federal habeas review in modern American society.

a. Traditional Notions of Federal/State Relations

Our constitutional structure could be read to compel us to accept broad federal habeas. For example, Eric Freedman and James Liebman argue that the framers presumed that states would seek to advance parochial interests
necessitating federal oversight. As Justice Storey wrote in Martin v. Hunter's Lessee, the framers "presume[d that] . . . State prejudices, State jealousies, and State interests, might sometimes obstruct, or control, or be supposed to obstruct or control the regular administration of justice." Even if the original Constitution did not mandate federal habeas, the Fourteenth Amendment may have done so, in a manner similar to the incorporation of much of the Bill of Rights, through the due process clause.

These arguments surely support federal review of some sort, but not necessarily perpetual de novo review. Periods of open hostility between the federal and state systems have provoked periods of de novo habeas review, but the Court has invariably pulled back. The initial broad application of federal habeas to the states after the Civil War and the systematic expansion in the 1950s and 1960s were both coincident with widespread breakdowns in the Southern judiciary's application of federal law. When the crises subsided, the scope of habeas retracted. In the late 1970s, a different, but somewhat analogous, hostility to federal death penalty law among state court judges may have again led to an era of broad habeas review that was again followed by a pullback.

Some cite these periods of transition as justification for perpetual de novo habeas review. Given that the Constitution did not require a system of lower federal courts, and state courts have long played a substantial role in deciding federal questions (including some federal criminal law matters in the early days), one could argue just as persuasively that our constitutional structure permits de novo federal habeas when necessary to halt widespread state court hostility to federal law, but does not necessarily

---

58 Freedman, supra note 19, at 12-19; Liebman, supra note 6, at 2007.
59 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349 (1816) (holding that Supreme Court must have appellate jurisdiction over state court decisions on matters of federal law to guard against state prejudice and ensure uniformity in federal law); see Liebman, supra note 6, at 2007.
62 See Semeraro, supra note 8 (discussing history of expanding and contracting habeas review).
64 Thompson, supra note 44, at 3.
mandate it as standard practice during periods when state courts are generally upholding their constitutional oaths.\(^6\)

Today, isolated examples of state defiance of federal law remain, but systematic breakdowns have not occurred for some time.\(^6\) At least one study suggests that continued state hostility to federal constitutional rights can no longer be presumed.\(^6\) And particularly with respect to criminal procedure, the state courts have overwhelmingly come to adopt federal law as their own.\(^6\) A decade ago, Joseph Hoffman and William Stuntz concluded that "[t]he historical tension between state and federal law . . . has been almost completely eliminated in the criminal procedure context."\(^6\) "[T]In an important sense," they found, "the law of the Fourth, Fifth, and Sixth Amendments—our detailed, national Code of Criminal Procedure—today 'belongs' to state courts as much as it does to their federal counterparts. . . . [S]tate courts deal with federal criminal procedure law the same way federal courts do—as the sole source of detailed rules that govern their criminal dockets."\(^7\)

Larry Yackle contends that even absent a current crisis or compulsory constitutional text, federal habeas is justified by a "deeply held idea that state criminal defendants are entitled to litigate their federal claims in a federal forum other than the Supreme Court."\(^7\) Certainly, American society's strong affinity for liberty pushes toward that view. But our conflicting desire for crime control commits many just as deeply to Judge Friendly's contention that once one has an "opportunity to litigate . . . [a federal constitutional claim in a state forum], release of a guilty man is not ..... 

---

\(^6\) But see Steiker, supra note 60, at 899 (arguing that adoption of the fourteenth amendment imposed a requirement of "a meaningful, nondiscretionary opportunity for federal review of federal claims").


\(^6\) Joseph L. Hoffman & William J. Stuntz, Habeas After the Revolution, 1993 SUP. CT. REV. 65, 111 (1994) ("The notion that state courts as a whole are strongly pro-government in criminal procedure disputes seemed plausible thirty years ago, but it is a hard sell [in 1994] . . . . There is no good evidence (and it is hard to see how one would go about really testing the point), but it seems more plausible to believe that state court criminal procedure errors are distributed about equally on both sides of the constitutional line."); Paul Bator, The State Courts and Federal Constitutional Litigation, 22 WM. & MARY L. REV. 605 (1981).

\(^6\) Hoffman & Stuntz, supra note 68, at 67-68.

\(^7\) Id. at 79-81.

\(^7\) Yackle, supra note 6, at 997; id. at 1031 ("To be sure, this tradition of distrust is traceable to historical (and modern) suspicions regarding the commitment of the state courts to the federal procedural standards applicable to criminal cases.").
required in the interest of justice even though he might have escaped
deserved punishment in the first instance with a brighter lawyer or a
different judge."72

b. Uniformity in Federal Law

Even if our constitutional structure does not directly compel broad
federal habeas, it might do so indirectly. Given the multiple legal
jurisdictions in our federal system, habeas review could be a means to
maintain uniformity in federal law. Unfortunately, habeas review would
not likely yield very uniform law. After all, there are more federal district
courts than state supreme courts. Moreover, if discretionary review in the
Supreme Court is sufficient to ensure uniformity in all non-criminal,
constitutional cases, the need for uniformity can hardly justify a guaranteed
federal forum in every criminal case.73

c. Fostering a Dialogue Among Federal and State Courts

Our federal structure also might support broad federal habeas as a way
to foster beneficial inter-jurisdictional dialogue among courts. At first
blush, federal habeas would seem unnecessary to achieve this goal. There
are already fifty state jurisdictions, the District of Columbia, and various
territorial courts, all handling vast criminal law dockets. Surely, they can
look to each other for inter-jurisdictional dialogue.

In 1977, however, Robert Cover observed that state criminal courts
tended to look to federal habeas courts, but not other state courts, in
developing constitutional criminal procedure doctrine.74 Without broad
federal habeas, he feared, state courts would become more isolated and the
benefits of inter-jurisdictional dialogue lost.75

In the quarter century since Cover made that argument, however, there
has been a dramatic expansion in federal criminal law. Federal courts now
receive ample opportunity to decide fourth, fifth and sixth amendment
questions in their own criminal cases. State courts can now look to these

72 Friendly, supra note 45, at 157.
73 Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990
74 Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus
and the Court, 86 YALE L.J. 1035, 1046-67 (1977) (describing benefits of lower federal
court/state supreme court dialogue in developing constitutional standards such as the right to
counsel for probation and parole revocation hearings, and the appropriate measure of
counsel's effectiveness).
75 Id. at 1065.
cases as the source of inter-jurisdictional dialogue, lessening the need for federal habeas to ensure a sufficient criminal case load in the federal courts.

2. Institutional Factors

A second set of arguments used to justify broad federal habeas looks to institutional limitations on the state courts that render them less likely than federal courts to properly enforce the Bill of Rights. These arguments either prove too little, or too much, to justify the de novo habeas regime that they advocate.

a. Money, Time & Election

Federal judges are typically better paid, have more talented law clerks, and have smaller dockets than their state counterparts. These factors suggest that federal judges have advantages over state judges at the same level of the judicial system. In considering habeas corpus, however, the appropriate comparison is between state supreme courts and federal district and appellate courts. The money and time differences between those courts are certainly less pronounced. Still, federal courts no doubt have certain advantages.

Many state judges are also elected. Unpopular decisions with respect to criminal procedure rights place their status in jeopardy in a way that their life-tenured federal counterparts need not consider. Of course anyone is subject to the influence of popular sentiment, life tenure or not. The law, however, both demands and presumes that public servants act in the public interest in part by upholding their constitutional duties, again life tenure or

---

76 Neuborne, supra note 66, at 1115-28.
77 Id. at 1121-23.
78 Id. at 1116 n.45 ("When comparing federal district and state appellate courts . . . if a competence gap exists at all, it is very slight and may, indeed, favor state appellate judges. Moreover, the sense of elan and mission characterizing federal judges is also present among many state appellate courts.").
79 Peller, supra note 16, at 666; Neuborne, supra note 66, at 1127-28; Donald H. Ziegler, Federal Court Reform of State Criminal Justice Systems: A Reassessment of the Younger Doctrine from a Modern Perspective, 19 U.C. DAVIS L. REV. 31, 46-48 (1985); K. Lee, COURTS AND JUDGES 109-79 (1987). The Court has recognized "the critical importance of life tenure, particularly when judges are required to vindicate the constitutional rights of persons who have been found guilty of criminal offenses." Swain v. Pressley, 430 U.S. 372, 382 (1977). Yet, the Constitution does not require persons charged with federal crimes to be tried in Article III courts, nor has it been interpreted to require habeas review by Article III judges. Id. On the contrary, even judges without life tenure "must be presumed competent to decide all issues, including constitutional issues that routinely arise in the trial of criminal cases." Id. at 382-83 (comparing District of Columbia superior court judges to elected state court judges and holding both capable of resolving matters of constitutional magnitude).
not. Nevertheless, one cannot deny that the prospect of re-election likely makes a difference in at least some cases.

The problem with each of these arguments is that they effectively condemn the state judiciary to a level of under-performance that seems intolerable in a society governed by the rule of law. In that sense, they prove too much. If state judges are so resource poor and so improperly impacted by popular sentiment, more would be required to ensure justice than broad collateral review of federal constitutional issues in criminal cases. Conversely, if state judges meet the baseline requirements of fair, impartial, and intelligent judging generally, a reason beyond these institutional factors would be needed to justify broader collateral review of federal questions in criminal cases than is provided for other types of cases.

b. Experience and Jadedness

A court with more experience deciding a particular type of case might be expected, all other things being equal, to do a better job of deciding that type of case both because it would become technically more adept and because it could become more sensitive to the need to enforce a particular type of claim. Commentators have thus argued in favor of federal jurisdiction with respect to the types of constitutional cases, such as civil rights cases, in which the federal courts' experience is superior to the states.

With respect to criminal procedure issues, however, the federal courts are not more experienced. Despite the expanding scope of federal

80 The Supreme Court has long held that state courts must be presumed to know and follow federal law. See, e.g., Parker v. Dugger, 498 U.S. 308, 314-16 (1991); LaVallee v. Delle Rose, 410 U.S. 690, 694-95 (1973) (per curiam).

81 In a memorandum to Justice Jackson during the consideration of Brown v. Allen, then law clerk William Rehnquist wrote, “[t]o think that state cts [sic] would deliberately or in ignorance refuse to follow Supreme Court precedents is to suggest a malady in the body politic which no additional hearing before a federal judge would cure.” Freedman, supra note 19, at 121.

82 For example, Neuborne argues that “if significant constitutional cases were forced into state courts more frequently, state judges would acquire greater expertise and sensitivity in the area and would probably develop an enhanced sense of institutional responsibility for the enforcement of constitutional rights.” Neuborne, supra note 66, at 1129.


84 Cf. Stone v. Powell, 428 U.S. 465, 493-94 n.35 (“[T]he argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems.”).
criminal liability, state criminal courts continue to have vastly more experience applying federal constitutional safeguards.

That very experience, however, might create a jadedness that undermines the accuracy of state court decisions on federal constitutional questions. Because state courts have as their primary responsibility the administration of the criminal law, their concern with accurately interpreting the guilt or innocence of the defendants may limit their ability to dispassionately enforce federal constitutional rights.85 As Bert Neubome described the phenomenon: "[s]tate trial judges... are steadily confronted by distasteful and troubling fact patterns which can sorely test abstract constitutional doctrine and foster a jaded attitude toward constitutional rights."86 Rules requiring the suppression of relevant evidence of guilt, he believes "will command greater allegiance from a judge who has not been repeatedly exposed to the reality of the social harms inflicted by some felons whom the rule requires to be freed."87

The anti-social consequences of criminal behavior are likely to affect any judge, state or federal, who faces a difficult procedural question, and in some sense we probably would not want entirely dispassionate judges who could somehow remain entirely unaffected. A valid point nonetheless remains: a judge who is not charged with presiding over the guilt or innocence decision may find it easier to apply difficult, but important, procedural law.

An advocate of broad habeas review, however, would need to take the argument a step further and explain why the universal availability of state

---

85 Larry Yackle has explained the argument as follows:

The primary focus in state court is upon the implementation of state substantive criminal law policies—upon the determination of guilt in the individual case. Although all participants, and certainly state judges, also have the duty to respect defendants' federal constitutional rights, their chief duty is to enforce the law with respect to individuals the police and prosecutors honestly believe to have violated that law. The overriding responsibility of the state courts to carry out state law thus deprives them of the neutrality and dispassion demanded for contemporaneous enforcement of the fourteenth amendment. It is because they are charged with other, potentially conflicting duties that state courts' determinations of federal claims raised in defense cannot be accepted as final.


86 Neuborne, supra note 66, at 1125.

87 Id. Others have gone further concluding that state courts lack "neutrality," Yackle, supra note 6, at 1031, and "face[] an inherent conflict of interest," Freedman, supra note 19, at 333.
appellate review does not adequately fulfill the need for distanced re-examination of procedural questions. The remoteness of at least federal appellate courts likely makes them even more dispassionate than their state appellate counterparts. But local courts better understand local processes and the people that make them work.88 The scholarship to date does not explain why one system of distanced review is superior to the other.

If one could establish that inter-jurisdictional review of constitutional questions in criminal cases was justified, the appropriate response would likely be an alternative system to review all criminal cases—state and federal—rather than broad federal habeas review of state cases. That would be true because, if state appellate review is an inadequate check on jaded state trial courts, then federal appellate review would likely be an inadequate check on federal district court judges when they preside over the guilt determination. Like the more concrete institutional factors, the jadedness argument, if one accepts it, appears to justify a remedy much more thorough than broad federal habeas.

3. Subjective Assessment

One who reads the extensive commentary urging an expansive system of federal habeas cannot help but conclude that the writers are relatively unconcerned with the relative strength of the structural and institutional arguments supporting broad review because in their hearts they know that federal courts more effectively uphold federal criminal procedure rights than state courts.89 Like all matters of the heart, this one has proven to be extremely difficult to measure.

88 Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 7 (1956). There are types of cases in which collateral review enables a court to scrutinize certain claims that are not efficiently reviewable on direct appeal. For example, an ineffective assistance of counsel claim may be difficult to litigate on direct appeal because of the trial counsel's potential continued involvement and because of the practical difficulty of presenting evidence outside the record that may bear on the claim. The need for collateral review, however, does not compel a need for federal habeas review. Collateral review of claims best reviewed after direct appeal is generally available within the state system and could be constitutionally mandated.

89 Of course, there is no universal agreement on the matter. Commentators have long debated whether state courts, however well intended, uphold federal rights as effectively as the federal courts. State v. Phillips, 540 P.2d 936, 938-39 (Utah 1975); Chemerinsky & Kramer, supra note 73, at 78 ("There is a vigorous scholarly debate over whether state courts equal federal courts in their ability and willingness fairly to adjudicate federal constitutional claims."); Bator, supra note 68, at 631; Jerry K. Beatty, State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court, 6 Val. U. L. Rev. 260 (1972); R. Bruce Carruthers, Note, Gideon, Escobedo, Miranda: Begrudging Acceptance of the United States Supreme Court's Mandates in Florida, 21 U. Fla. L. Rev. 346 (1969); Bert Neuborne, Toward Procedural Parity in Constitutional Litigation, 22 Wm.
a. The Futility of Objective Measures of Relative Court Quality

In response to Bator's and Friendly's call to limit federal habeas principally to cases in which defendants are denied a fair process in state court, commentators have insisted that the Constitution requires more than a hearing; it also conveys a "right to have constitutional claims correctly decided." But that truism just begs the question, what qualities does one attribute to a correct constitutional decision. For example, suppose a state supreme court's divided decision is overturned by a federal habeas court's granting the writ; a federal appellate panel reverses that decision two to one; and that result is reversed by the Supreme Court five to four. The final outcome is the correct one only in the political sense that American society has adopted the convention of accepting constitutional decisions by the Supreme Court unless overturned by constitutional amendment or the Court itself. That is, we have accepted the Court's pronouncement as "a sufficient moral predicate in the sense that society will accept it as sufficient for the exercise of the power in question."

A more objective measure of the relative accuracy of state and federal courts with respect to constitutional criminal law questions is likely beyond the realm of existing tools of measurement. Justice Jackson perpetually


90 Peller, supra note 16, at 593.

91 This is the main point of Professor Bator's analysis. He writes, "the concept of 'freedom from error' must eventually include a notion that some complex of institutional processes is empowered definitively to establish whether or not there was error, even though in the very nature of things no such processes can give us ultimate assurances." Bator, supra note 7, at 447; see 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, 711 (2003) ("Within the context of underdeterminate laws, there is, in essence, no superior authority when the law does not mandate a particular result.").


93 Chemerinsky & Kramer, supra note 73, at 79-80; Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. REV. 233, 261-73 (1988); Redish, supra note 83, at 3 (explaining that "it would be difficult to devise a system of measurement which could be used to answer [the question whether federal courts are better equipped to protect constitutional rights] empirically").
REASONING-PROCESS REVIEW MODEL

919

reminds us that no court, not even the Supreme Court, is infallible. Some court must have the final say, and that court will inevitably reverse some of the judgments that come to it. But there is no measuring tool to compare the quality of the decisions reached. Erwin Chemerinsky and Larry Kramer make the point well: "[t]hat state and federal courts reach different results says nothing about which system is better—perhaps the results reached by state courts are correct and federal courts are prejudiced against state officials and biased in favor of individual claimants." To recognize, as this analysis does, that constitutional rights in criminal cases are formally indeterminate within a closed system of legal analysis is not to deny that "rights exist independently of the institutional processes designed to vindicate them." Nor does it suggest that the content of rights changes based upon the circumstances in which the right is asserted. Rights can have substantive content even if the precise articulation of that content is a political rather than a legal exercise. Rights, and their remedies, may not be deducible from some set of preestablished principles to which a formal process of technical legal reasoning may be applied. Although jarring at some level, that realization need not be tragic. To see that there is more to defining and enforcing fundamental rights than simply perfecting the legal technique for identifying their content should be a refreshing revelation, not an alarming one.

b. Directional Preferences

Although objective assessments of the relative accuracy of two court systems may be impossible, we might still reach firm conclusions about the directional shift in accuracy of the ultimate outcome of the whole decision-making process. Hoffman and Stuntz, for example, contend that because only the defendant can seek habeas review of an adverse decision "the threat of habeas relief must, at the margin, tend to push state courts toward greater protection of federal rights." This conclusion is a function not

95 Chemerinsky & Kramer, supra note 73, at 79.
96 Peller, supra note 16, at 592; Yackle, supra note 6, at 1016-17; cf. Freedman, supra note 19, at 122 (quoting a memorandum from then law clerk William Rehnquist to Justice Jackson: "This is not to say that there should be no federal standards of due process, but only that we should trust the state cts [sic] to enforce them, as we do other federal standards.").
97 Yackle, supra note 6, 1015 (accusing Bator of "insist[ing] that the meaning of 'due process' changes" in calling for a lower standard of review on federal habeas).
98 Hoffman & Stuntz, supra note 68, at 90-91; id. at 100 ("[T]he grant of habeas relief resembles a reversal on appeal. . . . To whatever extent appellate review in general deters lower court judges from misapplying law, habeas review should exert a similar deterrent effect on state judges."). Robert Cover too concluded that habeas review improves the
only of additional layers of federal review, but also of the anticipated affect
of that review on state courts. As Robert Cover argued, "[i]f state courts
knew that errors would be corrected by a federal court requiring a retrial,
they might be more solicitous toward claims brought before them."99

These directional arguments suffer from two flaws. First, they
resonate only if one has predetermined that decisions in favor of expansive
interpretations of federal constitutional rights are always better or more
accurate decisions. If enforcing individual federal rights has a cost, erring
on the side of greater enforcement is not inevitably better.100 And if
incarcerating those guilty of committing crimes as a form of social
punishment has value, then there is a cost to over-enforcing criminal rights.

Some commentators argue that the pressure toward greater protection
is justified because state courts tend to be stingy with federal rights. Bert
Neuborne, for example, has argued that although state courts are usually
subjectively faithful to their oath to follow the federal constitution when the
law is clear, they "are less likely to resolve arguable issues in favor of
protecting federal constitutional rights than are their federal brethren."101
Similarly, Erwin Chemerinsky stresses that federal courts, although not
necessarily "better" than state courts, may "in some places, on some issues
. . . be more likely to vindicate constitutional claims."102 He therefore
concludes that "litigants raising constitutional claims should be able to
select the forum they prefer."103

Even if tilting in favor of greater protection were an incontrovertibly
justifiable goal, however, broad federal habeas could still be problematic.
These arguments rest on the assumption that habeas review will have only
one effect on state court processes, i.e., it will lead them to find more
constitutional violations in order to avoid reversal by federal habeas courts.
The actual effects of changing the level of federal habeas review, however,
may be more complicated.

99 Id. at 1046.
100 See, e.g., Woolhandler, supra note 6, at 635 ("The argument for diminishing the role
of federal courts in individual rights enforcement . . . turns less on a claim of strict parity
than it does on a claim that federalism is a constitutional value appropriately enhanced at the
expense of the competing constitutional value of individual rights enforcement.").
101 Neuborne, supra note 66, at 1120.
102 Chemerinsky & Kramer, supra note 73, at 91.
103 Id.; Chemerinsky, supra note 93, at 300-26.
First, it may be inaccurate to assume that a state court that is worried about reversal would protect federal rights significantly more vigorously in response to more expansive habeas review. Although the state may not collaterally attack an acquittal, it can and often does seek direct review of adverse appellate decisions in the Supreme Court. In recent decades, that Court has often granted *certiorari* to overturn state decisions that favor defendants on federal constitutional issues.\(^{104}\) The extent to which broader habeas review would lead a state court concerned about federal reversal to favor federal claims is thus tempered to at least some degree by the Court’s existing willingness to reverse cases finding federal constitutional violations. Theoretically, broader habeas review would add to the deterrent effect on state courts, but the magnitude of that effect given direct review by the Supreme Court may not be large.

Second, broader habeas review may actually create incentives for state judges to be less sensitive to federal constitutional claims. Unpopular claims can be politically difficult to grant, particularly for elected state judges. If such a state judge knows that a life-tenured federal judge is equally obligated to bear the political burden of a publicly unpopular decision, broad federal habeas may cause the state court to rule against defendants more often than it would were the state court the last line of defense. Legislators are known to tailor their votes to let another do the dirty work as long as the right result is reached in the end. Elected judges might well respond the same way.\(^{105}\)

There should be at least some question, however, as to whether federal judges really will do the constitutional dirty work particularly well even under the broadest habeas regime. Many highly respected scholars, who are also experienced litigators, perceive federal courts to be a more sympathetic forum than state courts with respect to federal rights.\(^{106}\) One cannot help

---

\(^{104}\) See Appendix I (listing seventy-three cases since 1970 in which the Court has granted *certiorari* to vacate or reverse state court decisions even though the state court had ruled in favor of the defendant on a federal constitutional issue).

\(^{105}\) See Steven Semeraro, *Responsibility in Capital Sentencing*, 39 San Diego L. Rev. 79, 97-98, nn.50-56 (2002) (citing psychological evidence tending to show that those who know someone else has ultimate responsibility for a decision will minimize negative outcomes and take the decision less seriously).

\(^{106}\) Bert Neuborne claims that these subjective beliefs “frequently shape the forum selection strategy in constitutional cases today as they have in the past.” Neuborne, *supra* note 66, at 1116:

As a civil liberties lawyer for the past ten years, I have pursued a litigation strategy premised on two assumptions. First, persons advancing federal constitutional claims against local officials will fare better, as a rule, in a federal, rather than a state, trial court. Second, to a somewhat lesser degree, federal district courts are institutionally preferable to state appellate courts as forums in which to raise federal constitutional claims.
but wonder, however, whether they are remembering a different era. The judges on the federal bench in the early years of constitutional death penalty review were often disciples of the Warren Court and the early Burger Court, whose justices aggressively advanced federal rights in areas ranging from school desegregation remedies to capital punishment to abortion. In the shadow of those Courts, the lower federal court judges probably were more attentive to federal claims than their state counterparts, many of whom came of age before the criminal procedure revolution or during the period that it remained controversial.

By the late 1990s, however, the federal bench had become overwhelmingly populated with judges who, whether appointed by a Democrat or a Republican, had little connection to the heyday of habeas review in the 1960s or even early death penalty review in the 1970s. They were instead products of an era of federal court restraint in habeas cases. By contrast, today's state judiciary has overwhelmingly known nothing but federally-regulated criminal procedure, and many state courts have gone beyond federal standards to offer greater protection to criminal defendants under their own state constitutions. The dogma of federal superiority may thus be a relic that has outlived its vitality.

---

Id.; see id. at 1120 ("Stated bluntly, in my experience, federal trial courts tend to be better equipped to analyze complex, often conflicting lines of authority and more likely to produce competently written, persuasive opinions than are state trial courts."); id. at 1127 n.79 ("I concede the inherent difficulty of proving the validity of these psychological factors. . . . Many of us who routinely practice constitutional law . . . think that we perceive them at work in a sufficiently large proportion of our cases to require their consideration in our forum selection strategy."); FREEDMAN, supra note 19, at 152:

Practically, the problem is that an unrealistic reliance on the quality of justice in state judicial systems will inevitably (as in Frank) lead to unacceptable outcomes. These in turn will invariably produce a backlash whose certain result will be legislative or judicial action to insure more extensive habeas corpus review (as in Moore), and whose likely result will be to undermine public support for the criminal justice system as a whole.

Id. My personal, albeit limited, death penalty litigation experience differs. In a Mississippi death case from the 1980s and 1990s, the state supreme court gave thorough and careful consideration to the defendant's claims, reversing his first death sentence. Wiley v. State, 449 So. 2d 756 (Miss. 1984). By contrast, the federal district court seemed hostile to the entire proceeding, and the Fifth Circuit panel made clear that it had no intention to rule for the defendant unless Supreme Court precedent directly compelled that result. Wiley v. Puckett, 969 F.2d 86 (5th Cir. 1992). This is precisely the attitude that commentators often attribute to state courts. Neuborne, supra note 66, at 1124-25 ("[I]n my experience federal judges appear to recognize an affirmative obligation to carry out and even anticipate the direction of the Supreme Court. Many state judges, on the other hand, appear to acknowledge only an obligation not to disobey clearly established law.").

107 See Appendix II (showing that since 1970 at least 32 states in over 100 cases have interpreted their own state constitutions more broadly than the federal constitution).
C. WEIGHING THE COSTS AND BENEFITS OF BROAD HABEAS REVIEW

The arguments on each side of the breadth-of-review debate are significant but ultimately not decisive or compelling. The costs of broad federal habeas are potentially profound, but too general to yield firm conclusions. The benefit of a searching federal review turns on the quality of state constitutional decision-making and the effect that habeas review has on that decision-making process. Based on the available evidence, the risk that strict federal review would retard state processes seems potentially as great as the risk that narrower review would weaken state processes. Absent empirical evidence that is unlikely to materialize, the wiser course may be to abandon the quest for habeas’s true form and start asking a different question.

III. A DIFFERENT CRITIQUE OF THE OBJECTIVE-REASONABLENESS STANDARD

The Supreme Court’s objective-reasonableness standard does not enable a federal habeas court to evaluate coherently a state court ruling on a federal constitutional question. This approach gives the Court itself the flexibility to grant the writ when a majority believe that justice so requires. But it leaves the lower federal courts at sea without a compass to guide their course. Even worse, the objective-reasonableness standard effectively discourages state courts from engaging in the careful analysis of federal law that Article VI demands and on which the 1996 Act is premised.

The Court first developed the concept of a “reasonable state court decision” in the context of its retroactivity doctrine.\(^{108}\) If an issue were

---

\(^{108}\) Contemporaneously with the expansion of federal constitutional rights to the states in the early 1960s, the Court developed the retroactivity doctrine limiting the ability of inmates convicted before a decision came down to exploit the new right. For two decades, the Court handled retroactivity matters on an ad hoc basis considering the purposes of the exclusionary rule, the state’s reliance on an old rule, and the effect of applying the new rule on the administration of the criminal justice system. See, e.g., Stovall v. Denno, 388 U.S. 293, 297 (1967) (addressing retroactivity of constitutional rules respecting lineups); Linkletter v. Walker, 381 U.S. 618, 636-40 (1965) (same for rule requiring states to apply exclusionary rule to evidence seized in violation of the Fourth Amendment). These decisions limited the applicability of new rules in a variety of ways. Teague v. Lane, 489 U.S. 288, 302 (1989) (explaining that retroactivity doctrine had been used “to limit application of certain new rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced”). In the late 1980s, the Court adopted a bright line approach to retroactivity. It held that newly announced rules would apply to all cases on direct review at the time the rule was announced, Griffith v. Kentucky, 479 U.S. 314, 322 (1987), but that new rules generally would not apply on habeas review, i.e. to a case in which the direct review process was completed before the rule was announced. Teague, 489 U.S. at 310.
debatable among reasonable jurists, the Court held, overturning a state court
decision would require a new rule that could not be applied retroactively on
habeas. To determine whether an issue is reasonably debatable, then there are
effectively no objective criteria to guide a federal habeas judge in
evaluating a state court decision. “Objective,” in this context, means the
federal judge's subjective assessment of the merits of the state court’s
decision. For example, in one recent case, a five-member majority
asserted that “[t]he Court of Appeals was nowhere close to the mark” in
rejecting the state court’s decision as objectively unreasonable. Yet
Justice Breyer, writing in dissent on behalf of four members of the Court,
flatly disagreed, declaring that the defendant’s rights were “obvious[ly]”
violated and thus the state court’s decision was unreasonable. As one
commentator described the state of the law: “One thing is certain. The
objective unreasonableness standard needs further and substantial
elaboration.”

To determine whether granting the writ would require a new rule, the Court
developed the debatable-among-reasonable-jurists concept. If an issue was debatable, a state
court decision either way would be reasonable, and overturning it would require a new rule
that could not be announced on habeas review. See Sawyer v. Smith, 497 U.S. 227, 258

For example, in one case, the Mississippi Supreme Court, a panel of the Fifth Circuit,
and three members of the Court all concluded that a particular issue of Eighth Amendment
law was at least debatable. Nonetheless, the majority of the Court granted the writ. See
Stringer v. Black, 503 U.S. 222, 230 (1992) (holding that rule requiring re-sentencing when
a jury weighed a vague aggravating circumstance was an established rule even though Court
had never addressed the issue).

Professor Ides thorough analysis of each of the Court’s opinions addressing the
objective unreasonable issue shows that the Court has failed to give objective content to the
standard. Ides, supra note 91, at 698-759 (explaining that the Court “provides almost no
sensible guidance to lower federal courts . . . “).


Id. at 2152 (Breyer, J., dissenting).

Ides, supra note 91, at 718.
Like any incoherent standard, a problem with objective reasonableness is that it produces unpredictable results. Lower federal courts have received no meaningful guidance, and their attempts to articulate logical approaches have been rejected out of hand. Whenever the Court denies the writ, its tone suggests that the lower federal courts should reject a petition whenever there is some plausible justification for the state decision. The many divided decisions in recent habeas cases, however, confirm that whenever an issue is truly debatable, one cannot predict how the Court will decide.

Unpredictability is not inevitably undesirable. In some cases, an uncertain standard may have the desirable effect of forcing decision-makers to stay well away from the line between legitimacy and illegitimacy. Perhaps the Court believes that its incoherent standard will force the lower federal courts to err well on the side of denying the writ, while leaving the Court itself the freedom to grant or deny based on its own subjective assessment of the state court decision.

Even if that were a legitimate interpretation of the 1996 Act, it would improperly ignore the likelihood that the objective-reasonableness standard will discourage state courts from carefully analyzing federal law. No matter how thorough a state judge's opinion may be, a federal habeas court will re-examine the merits and pronounce it reasonable or not, based on an incoherent standard. Given that, a rational state judge may put little effort

---

116 Mitchell v. Esparza, 124 S. Ct. 7, 10 (2003) (per curiam) (holding that "a state court need not even be aware of our precedents . . ."); Early v. Packer, 537 U.S. 3, 8 (2003) (holding that state court is not required to cite or even be aware of applicable U.S. Supreme Court cases); Lockyer v. Andrade, 538 U.S. 63, 75-76 (2002) (rejecting Ninth Circuit holding that writ should be granted when federal habeas court has a definite and firm conviction that a mistake had been made).

117 The Court's recent habeas cases are split between those that are unanimous, or nearly so, in which the state court's decision on the merits was almost certainly correct, see, e.g., Middleton v. McNeil, 124 S. Ct. 1830 (2004) (per curiam); Mitchell, 124 S. Ct. at 7 (per curiam); Yarborough v. Gentry, 540 U.S. 1 (2003) (per curiam); Price v. Vincent, 538 U.S. 634 (2003) (per curiam); Woodford v. Visciotti, 537 U.S. 19 (2002) (per curiam); Early, 537 U.S. 3; Bell v. Cone, 535 U.S. 685 (2002), and fractured decisions where the state was possibly wrong, but the issue was surely debatable. Alvarado, 124 S. Ct. 2140 (5-4 decision); Wiggins v. Smith, 540 U.S. 510 (2003) (7-2 decision); Andrade, 538 U.S. 63 (5-4 decision); Penry v. Johnson, 532 U.S. 782, 791 (2000) (6-3 decision); Ramdass v. Angelone, 530 U.S. 156 (2000) (4-1-4 decision); Williams v. Taylor, 529 U.S. 420, 424 (2000) (6-3 decision); Weeks v. Angelone, 528 U.S. 225 (1999) (5-4 decision). Reviewing the Court's decision to grant the writ in Penry, one of the obviously debatable cases in which the Court nonetheless found the state decision objectively unreasonable, Professor Ides concludes that the "[C]ourt's perception of objective unreasonableness is premised largely, if not completely, on the perceived error committed by the state court." Ides, supra note 91, at 715-16.

118 Cf. LON L. FULLER, THE MORALITY OF LAW 64 (rev. ed. 1969) ("[S]pecious clarity can be more damaging than an honest open-ended vagueness.").
into analyzing the federal issue. If the result is correct, the federal court will supply the analysis necessary to affirm. As the Court has held, "a state court need not even be aware of our precedents." If, by contrast, the state court's result is wrong, the federal court can take the political heat for reversing the conviction. By effectively encouraging state court inattention to federal issues, the Court's objective-reasonableness standard is at odds with Article VI, which mandates that "states shall be bound" by federal law and must treat it as the "supreme Law of the Land." That clause should prohibit a state court from trivializing federal law, and thus compel the federal courts to reject any standard of review that countenances lax state court decision-making.

The Court's current approach is also inconsistent with the 1996 Act. The Act's language grants state courts the same freedom to interpret federal law that the federal courts have. Notably, however, Congress directs the writ to a state court's "unreasonable application" of federal law. The legislative history also indicates that Congress sought to heighten the degree of deference when state courts properly apply federal law. The choice of the term "application," rather than "result," is telling. Nothing in the text or legislative history countenances a standard of review that permits state courts to give the shortest possible shrift to federal law, so long as the result is arguably reasonable.

The objective-reasonableness test should thus be replaced with a test that both (a) satisfies the 1996 Act's call for deference to reasonable state

---

119 For example, in Andrade, 538 U.S. at 63, the state court compared the facts before it to those in a Supreme Court case that had denied relief, but effectively ignored an arguably similar case in which relief had been granted. The Court accepted that approach as reasonable, even though the Court itself provided much more thorough analysis to a similar claim raised on direct review in a case that it decided on the same day as Andrade. Compare id. at 75-77, with Ewing v. California, 538 U.S. 11, 28-31 (2003).

120 Mitchell, 124 S. Ct. at 10.

121 U.S. CONST. art. VI, cl. 2.

122 28 U.S.C. § 2254(d)(1) (2000) (equating federal law to decisions of the Supreme Court, which both the state courts and the lower federal courts must follow).

123 Id.

124 142 CONG. REC. S3446-02, S3447 (daily ed. Apr. 17, 1996) (statement of Sen. Orrin Hatch) ("The deference to state law is good, because it just means that we defer to them if they have properly applied federal law."); 141 CONG. REC. S7803-01, S7846 (daily ed. June 7, 1995) (statement of Sen. Orrin Hatch) (explaining that "currently, Federal courts have virtual de novo review of a State court's legal determination. Under our change, Federal courts would be required to defer to the determination of state courts, unless the State court's decision was 'contrary to or involved in an unreasonable application of clearly established Federal laws.'"); see Ides, supra note 91, at 693-97 (reviewing legislative history).
court applications of federal law and (b) fulfills Article VI's mandate that state courts thoroughly, and therefore reasonably, apply federal law.

IV. AN ALTERNATIVE STANDARD OF STATE REASONING-PROCESS REVIEW

Greater scrutiny of the process of state decision-making, rather than merits review under an incoherent standard, would better accord with both Article VI and the 1996 Act. The process at issue would not be the process review proposed by Professor Bator and adopted by the Court, at least for Fourth Amendment claims, in Stone v. Powell. Under that approach, the federal habeas court would ask only whether the defendant had a fair opportunity to raise and argue federal issues in state court. As many have stressed before, process review in that sense does no good if the state decision-maker ignores federal law. If the point of habeas is to root out just such unreasonable decisions, process review of that type makes no sense at all.

The reasoning-process review proposed here would require federal courts to defer to a state court's decision on the merits of a federal constitutional question so long as the state court demonstrated through its written opinion that it fully understood that it was bound by federal law. If the state court did not live up to its constitutional obligations, however, a federal court applying reasoning-process review would return the case to state court instructing it to apply the applicable federal law with due care. By ensuring that state courts approached federal issues with seriousness and reasonable logic, but otherwise deferring to their decisions, this form of review would both (a) effectively root out the cases in which a state court fails to uphold its constitutional oath, and (b) provide the deference that the 1996 Act requires.

A. THE MECHANICS OF REASONING-PROCESS REVIEW

Programmatically, a federal court applying reasoning-process review would engage in a two-step analysis. First, the habeas court would ask

---

125 Stone v. Powell, 428 U.S. 465 (1975) (recognizing federal jurisdiction but refusing to hear Fourth Amendment claim on habeas unless petitioner was not granted a full and fair opportunity to litigate the claim in state court); Bator, supra note 7, at 455.

126 See, e.g., Peller, supra note 16, at 678 ("The failure to recognize possible state court resistance to federal law is the fundamental flaw of [Bator's] process jurisprudence."); Yackle, supra note 6, at 1014-19.


128 U.S. CONST. art. VI, cl. 2.
whether the state court cited all applicable federal law—including statutes, Supreme Court cases, and federal appellate court cases from the circuit in which the state is located—that the federal habeas court would have cited had it been charged with the responsibility to decide the claim on the merits. Under the 1996 Act, state court decisions may be overturned on habeas review only if they contravene clearly established federal law as decided by the Supreme Court. Nevertheless, the state courts’ constitutional obligation to treat federal law as supreme should require them to consider applicable lower federal court cases even if a state judge may ultimately reject those cases as unpersuasive. In some instances, a federal habeas court may be uncertain as to whether it would have cited to particular cases. Reasoning-process review would not require a checklist; doubtful situations should be decided in favor of upholding the state court’s decision. But opinions wholly failing to cite significant federal authority would be returned to state court for consideration of that law.

Second, a federal habeas court should examine whether the state court has demonstrated a thorough understanding of federal law. The merits of the decision would be off limits to the lower federal courts. Their sole function would be to ensure that the state court explained logically how federal law supports the result it reached. This step would involve more judgment than the relatively objective citation-of-applicable-precedent first step. But some clear lines can be drawn. Rote citation of federal precedents would not be sufficient. Conversely, a thorough analysis of applicable federal law that the federal habeas court would have addressed if it had been presented with the question *de novo* could not be reconsidered. Even if a federal court disagreed with the weight to be assigned to varying factors or the balances drawn among them, its role would be limited to ensuring that the state court seriously considered applicable federal law. As with any decision, close cases will arise. But the federal courts have extensive experience distinguishing between *de novo* review and more limited scrutiny of a reasoning process,129 and in all events, it is hard to imagine that habeas cases could be any more controversial than they have been.130

---

129 Most prominently, federal courts have long distinguished between *de novo* review and reasoning-process review when scrutinizing administrative agency decisions. See Jacob A. Stein, et al. *Administrative Law* § 51.01[2] (2004).

130 See supra text accompanying note 117. To be sure, a determined state court could *play* the reasoning-process review system by citing the right cases and considering the appropriate factors, while still reaching a result that short-changes the defendant. By requiring state courts to take full account of federal law, and deferring to their decisions when they do, reasoning-process review requires the state court to be both properly educated
B. REMEDYING A FAILURE TO ENGAGE IN AN ADEQUATE REASONING PROCESS

When a state court fails to meet the reasoning-process review standard, the federal habeas court should not decide the merits of the issue itself. That approach would improperly let the state court off the constitutional hook that should require it to treat federal law as the supreme law. As discussed above, de novo habeas review might even provide an inappropriate incentive for state courts to engage in sloppy reasoning on politically charged constitutional issues, leaving the federal court the tough job of overturning a popular conviction.

When a state court does not engage in sufficiently thorough reasoning, the federal habeas court should identify the weakness—i.e., the cases not cited or the factors left unaddressed—and return the case to the state system for appropriate analysis. If a federal district court ordered a case returned, the state should have the right to appeal to the appropriate federal circuit and to seek certiorari in the U.S. Supreme Court. The same reasoning-process review standards would apply in those courts.

Some will argue that this approach would be too demeaning to the state courts. But state judges, who are obligated to follow federal law, can fairly be required to understand and apply that law in a sophisticated way. Requiring a state court to reconsider a federal issue when it engages in less than the constitutionally mandated thorough analysis (and effectively passes the buck to a federal habeas court) is not inappropriately demeaning. Indeed, a federal court arguably acts in a more demeaning fashion when it overturns a reasoned state court decision simply because it disagrees with the merits. Reasoning-process review provides great deference to the state court when deference is appropriate, i.e., when the state thoroughly analyzes all of the applicable federal law.

Under reasoning-process review, a good number of cases might at first be returned to the state courts. Since 1996, some have surely become accustomed to the sloppy treatment of federal law countenanced by the Supreme Court. Before long, however, state courts would understand the careful analysis required to avoid time-consuming remands and, assuming state courts are capable of applying federal law, few cases would be returned.

and appropriately responsible. While not perfect, reasoning-process review may be superior to alternative federal habeas review standards that ignore one or the other.

131 U.S. CONST. art. VI, cl. 2.

132 Compare Peller, supra note 16, at 686 (arguing that it is less intrusive to reverse convictions than to require states to provide life tenure to judges).
Occasionally, a state court might defiantly and repeatedly fail to apply federal law. For such rare cases, there would need to be a safeguard permitting some federal court to review the merits of the decision. This concern could be addressed by retaining the petitioner's statutory right to seek a writ of *certiorari* in the Supreme Court after each final state court decision. This approach would create a clear line of demarcation between the role of (1) the lower federal courts (to review the state court's reasoning process); and (2) the United States Supreme Court, which could also review federal issues *de novo* when it chose to grant *certiorari* directly to review a state court decision.

C. APPLYING REASONING-PROCESS REVIEW

This sub-section uses the proceedings in *Ramdass v. Angelone*, a Virginia death penalty case, and *Yarborough v. Alvarado*, a California non-death penalty murder case, to illustrate how the reasoning-process review test would differ from existing habeas practice.

1. Ramdass v. Angelone

Ramdass's case was pending on *certiorari* before the United States Supreme Court when that Court decided *Simmons v. South Carolina*. In *Simmons*, the Court held that a state presenting aggravating evidence of a capital defendant's likely future dangerousness may not, as a matter of due process, deny the defendant the opportunity to inform the jury that the alternative to a death sentence is life in prison without possibility of parole. Because Ramdass had raised that issue in his petition for

---

133 28 U.S.C. § 1257(a) (2004). This approach to habeas remedies is also consistent with the 1996 Act's preference for U.S. Supreme Court control of the developments of federal criminal procedural law.

134 The 1996 Act should not be interpreted to prohibit *de novo* Supreme Court review in egregious cases. The Court has recognized that the 1996 Act does not abrogate the Court's constitutionally mandated appellate jurisdiction over federal issues and has left open the possibility that the Act's specific limitations on habeas jurisdiction do not necessarily curb the Court's own jurisdiction to grant the writ. Felker v. Turpin, 518 U.S. 651, 660-63 (1996). Further, four members of the Court concluded that the 1996 Act, though mandating careful consideration of state court conclusions, should actually be interpreted to require *de novo* review at least by the Supreme Court. Williams v. Taylor, 529 U.S. 362, 387 (1999).


138 Id. at 169; id. at 177 (O'Connor, J., concurring).
certiorari, the Court reversed and remanded Ramdass's case to the Virginia Supreme Court for reconsideration in light of Simmons.139

On remand, the state court denied Ramdass's Simmons claim. The subsequent habeas review was long, tortured, and merits-focused. In the end, seven federal judges would have denied the writ, while six would have granted it.140 Although ultimately upholding the state court's decision, the federal courts' thorough analysis showed little deference to, or respect for, that court. And by supplying the analysis that the state court neglected, the federal courts effectively encouraged future state courts to abdicate their constitutional responsibility.

The federal proceedings would have looked much different under the proposed reasoning-process review. At the first step, the federal district court could easily have determined that the state court's decision was inadequate. The unanimous Virginia Supreme Court opinion cited only one federal case, Simmons. To be sure, there are federal issues that implicate only one case. But the issue in Ramdass was not one of them. On the contrary, the Simmons Court cited several earlier cases dealing with the due process principles that come into play when a defendant seeks to rebut a prosecution argument.141 A court that seriously intends to apply federal law to a case that bears similarities to Simmons, but may differ in some way, would need to at least recognize the constitutional foundation on which Simmons was built. One could quibble about whether the Virginia court should have cited every case that the Supreme Court had cited in Simmons, and quibbles should be resolved in favor of the state. In Ramdass's case, however, more attention to federal law was obviously required as evinced by each of the federal habeas courts citing at least a half dozen relevant federal cases.142 The plurality opinion in the Supreme Court cited at least

140 Five members of the Supreme Court and two from the Fourth Circuit believed the writ should be denied while four members of the Supreme Court, the dissenting judge from the court of appeals, and the federal district court judge would have granted the writ. See infra note 149.
141 Simmons, 512 U.S. at 161-71. One of the concurring opinions argued that the Eighth Amendment should compel the state to permit a defendant to inform the jury of parole ineligibility in every capital case. Id. at 172-74 (Stevens, J., concurring) (citing additional Eighth Amendment cases). Because the plurality opinion left this issue open, id. at 162 n.4, a state court denying relief on due process grounds should—given its article VI obligations—have considered the Eighth Amendment issue as well.
142 Angelone v. Ramdass, 187 F.3d 396, 403-08 (4th Cir. 1999) (citing seven federal cases); id. at 412-15 (Mumaghan, J., concurring in part and dissenting in part) (citing seven federal cases); Ramdass v. Angelone, 28 F. Supp. 2d 343, 363-68 (E.D. Va. 1998) (citing ten federal cases).
twelve.\textsuperscript{143} Under the reasoning-process test, the case would thus have been returned to the state court for fuller consideration of the applicable federal case law.

The second step in the reasoning-process test would look beyond the citation to authority to the quality of the state court’s reasoning.\textsuperscript{144} On this count, the Virginia Supreme Court would fare no better. Its opinion was a mere two pages, and its entire analysis of federal law was contained in a single two-sentence paragraph.\textsuperscript{145} The state court reasoned that \textit{Simmons} required the state to allow the defendant to inform the jury about parole status only if the defendant was ineligible for parole.\textsuperscript{146} Although (1) Virginia had a “three-strikes” law rendering defendants with three convictions ineligible for parole, and (2) Ramdass had been convicted three times, the Virginia court nevertheless concluded that Ramdass was still technically eligible for parole because the judgment had yet to be entered on the guilty jury verdict establishing his third strike.\textsuperscript{147} The state court based this decision on a single state law opinion holding that a “jury’s verdict of conviction upon which no judgment had been entered [was] not a conviction within [the] meaning of [the state] statute disqualifying [a] person from holding public office.”\textsuperscript{148}

That formalistic reasoning wholly ignored that Ramdass—if spared death—was overwhelmingly likely to spend the rest of his life in prison. The state court never explained why federal due process principles should permit the state to deny Ramdass’s capital sentencing jury that obviously relevant information. To be sure, a reasonable court could plausibly conclude that federal due process standards were not violated by Ramdass’s death sentence. Indeed, a slim majority of the U.S. Supreme Court

\begin{flushleft}
\textsuperscript{143} Ramdass v. Angelone, 530 U.S. 156, 159-210 (2000).
\textsuperscript{144} A federal court applying reasoning-process review in \textit{Ramdass} could have stopped after step one. The second step is nonetheless addressed in the text to illustrate how it could be applied.
\textsuperscript{145} The relevant portion of the court’s opinion read:

\begin{quote}
In \textit{Simmons}, the Supreme Court held that when ‘future dangerousness’ is an issue in the sentencing phase of a capital murder case, the jury is entitled to information concerning the defendant’s parole ineligibility. Hence, \textit{Simmons} applies only if Ramdass was ineligible for parole when the jury was considering his sentence.
\end{quote}

\textsuperscript{146} \textit{Ramdass, 450 S.E.2d at 361.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\end{flushleft}
ultimately held as much. To be a reasonable application of federal law, however, that conclusion must rest on careful analysis explaining why virtually identical cases should not be treated the same. All of the federal habeas court decisions, including the Supreme Court's, did rest on many pages of rigorous analysis. Given that, one cannot coherently explain why the cryptic Virginia decision—despite its utter lack of any similarly rigorous examination of federal law—was held objectively reasonable.

A federal habeas court applying reasoning-process review could have easily determined that the state court did not consider the factors that the federal court would have identified as being relevant to the decision, namely the due process principles underlying Simmons. The state court's citation to a case about eligibility to hold elective office is obviously no substitute for thorough analysis of federal law. Rather than deem objectively reasonable an inadequate state opinion that effectively mocked Article VI, and was undeserving of the deference to reasonable applications of federal law mandated by the 1996 Act, a federal habeas court applying reasoning-process review would have returned the case to the Virginia Supreme Court so that it could apply the due process law underlying Simmons to the facts of Ramdass's case.

2. Yarborough v. Alvarado

Alvarado was convicted of murder based in part on un-counseled, un-Mirandized statements made to the police at the station house. On appeal, he argued that his confession should have been suppressed because

---

149 The plurality may have ruled in Virginia's favor on this point because it concluded that the state was not seeking to defy or trivialize federal law. Despite the result in Ramdass, Virginia had applied Simmons expansively in more recent cases. Ramdass v. Angelone, 530 U.S. 156, 177-78 (2000).

150 The federal district court discussed the Simmons issue—not including facts or procedural history—for four pages, rejecting the state court's conclusion that Simmons did not compel reversal. Ramdass v. Angelone, 28 F. Supp. 2d 343, 363-68 (E.D. Va. 1998). A divided Fourth Circuit panel reversed, but not without thorough analysis. The majority dedicated five pages to analyzing the Simmons claim, Ramdass v. Angelone, 187 F.3d 396, 403-08 (4th Cir. 1999), and the dissenting judge took three more. Id. at 412-15 (Murnaghan, J., concurring in part and dissenting in part). The Supreme Court's fractured, fifty-four-page decision had no majority opinion. Ramdass, 530 U.S. at 159-210. Of course, the number of pages that a court discusses an issue is not a perfect proxy for the quality of its reasoning. See infra Part IV.C.2. Nevertheless, the Court itself has cited to the length of opinions in its own analysis of reasoning quality. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999) (distinguishing quality of the analysis in the dissenting and lower court opinions with reference to the number of pages—eight versus fourteen); Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 98, 98 n.11 (1983) (stating that "[t]he sheer volume of proceedings before the Commission is impressive").

it was the product of un-Mirandized custodial interrogation. A California appellate court rejected the Miranda claim, and the state supreme court denied discretionary review.

As in Ramdass, the federal bench was divided. The district court denied the writ, but the Ninth Circuit reversed on the ground that the state court erred in not considering the relevance of Alvarado's youth to the question of custody. In a 5-4 decision, the Supreme Court reversed. Alvarado's conviction was thus upheld even though seven of the thirteen federal judges hearing the case would have granted the writ.

Also like Ramdass, the substance of the federal court opinions reveal the state court's failing. In addressing the first prong of the reasoning-process test, a federal habeas court would have observed that the California court in an unpublished opinion cited but one federal case, Miranda. Any federal court would surely have considered more. In deciding the merits of Alvarado's claim, the Supreme Court cited seven federal cases, and Justice Breyer's dissenting opinion cited a couple more. The Ninth Circuit cited at least a dozen as well as several state court cases that had considered the federal issue in factual contexts similar to that in Alvarado. As in Ramdass, a federal court applying reasoning-process review would have readily concluded that the state court did not cite the federal cases that it would have considered had it been responsible for resolving the federal claim.

152 The state published only certain portions of its opinion. In the published version, the state's only comment on Alvarado's Miranda claim was the statement "that the interrogation was not custodial, and hence that the officers were not obligated to admonish Alvarado of his rights." People v. Soto, 74 Cal. App. 4th 1099, 1101 (1999). It discussed the issue more extensively in an unpublished opinion. See text accompanying notes 151-67.

153 Alvarado, 124 S. Ct. at 2146.
154 Alvarado v. Hickman, 316 F.3d 841, 850 (9th Cir. 2002).
155 Although not directly relevant to the reasoning-process test proposed here, it is telling that the state appellate court refused to publish the portion of its opinion dealing with Alvarado's Miranda claim, even though other portions were published. People v. Soto, 74 Cal. App. 4th 1099, 1101 (1999) ("In the unpublished portion of this opinion, we address ... [Alvarado's contention] that he was subjected to custodial interrogation, but was not given the requisite admonitions of his rights."). When an issue of federal law is capable of dividing the federal bench as this one did, one would expect that a state court seeking in good faith to fulfill its Article VI obligation to treat federal law as supreme would publish its opinion.

157 Alvarado, 124 S. Ct. at 2147-52.
158 Id. at 2153-56 (Breyer, J., dissenting).
159 Alvarado, 316 F.3d at 845-57.
The California state court's analysis fairs no better. In upholding the state decision, the Supreme Court said that the California court applied the reasonable-person-under-the-circumstances test articulated in Thompson v. Keohane. But that is far from clear. The state court never cited or discussed the facts in Thompson or the purpose behind Miranda's custody requirement. It did include a three-quarter page block quote from People v. Ochoa, a state case that had quoted Thompson's reasonable-person-in-the-circumstances test. But the opinion on Alvarado's claim focused on facts that were largely irrelevant to the Thompson test. Although the court dedicated a substantial number of pages to the federal issue, and ultimately purported to answer the correct question, "[w]e are satisfied that a reasonable person under the circumstances in which Alvarado was questioned would have felt free to leave," it never considered the factors that any federal court would have found relevant to that issue. Instead, the state court focused almost exclusively on the non-threatening nature of the officer's interrogation techniques, an issue bearing little relevance to whether Alvarado would have felt free to leave. As Justice Breyer explained in his dissenting opinion, the unthreatening nature of the interrogation "might be highly significant were the question one of coercion. But it is not. The question is whether Alvarado would have felt free to terminate the interrogation and leave. In respect to that question, police politeness, while commendable, does not significantly help the analysis."

In contrast to the California court's inaccurate focus on interrogation techniques, the Supreme Court majority drew directly from its own precedent to identify a series of facts that weighed against a finding that Alvarado was in custody. The state court paid little attention to most of these. Second, the Court listed facts suggesting that Alvarado was in custody. The state court paid virtually no attention to these. Finally, the Court facilely considered whether Alvarado's juvenile status necessarily

162 Soto, No. VA035109, slip op. at 12-13.
163 Id. at 13-19.
164 Id. at 12-19.
165 Id. at 19.
166 Id. (emphasizing that Alvarado "was not subjected to the intense and aggressive tactics employed" and the officers "did not fabricate evidence or subject him to the intense pressure used").
168 Id. at 2149-50.
169 Id. at 2150.
should have played a role in the custody inquiry. The state court paid no attention whatsoever to that issue.

The Alvarado opinions, like those in Ramdass, demonstrate that the federal courts continue to carry the laboring ore in analyzing challenging federal constitutional issues in at least some state criminal cases. To justify the deference that the 1996 Act requires, and to fulfill Article VI's mandate, the California state courts should have been required to analyze carefully all of the applicable federal law, including the definition of custody and the impact of the suspect's youth.

Under reasoning-process review, the federal habeas courts in both Ramdass and Alvarado would have returned the cases to the state courts with instructions to (1) consider all of the applicable federal law and (2) thoroughly analyze the federal issues in light of that law. If the state courts complied, their decisions would be summarily affirmed. If, however, the state courts again failed to accord federal law proper respect, a federal habeas court would again return the case to state court, or the U.S. Supreme Court could grant certiorari to resolve the question de novo.

D. PRECEDENT FOR REASONING-PROCESS REVIEW

Federal habeas review has long been merits oriented. But the practice of deferring to well-reasoned opinions by inferior decision-making bodies, while remanding those that offer less than thorough analysis, is well established in other areas of the law. The reasons for these practices are seldom discussed explicitly, but likely stem from the notion that an inferior decision-maker is entitled to deference when making decisions within its area of primary expertise so long as it demonstrates that it treats the decision with an appropriate level of care. That rationale applies with full force to state courts making decisions on criminal cases of significant local import.

\[\text{footnote}{170} \text{Id. at 2150-51.} \]

\[\text{footnote}{171} \text{The Ninth Circuit did adopt a more logical two-step inquiry asking first whether the state court had erred, and then if so, whether the result was objectively unreasonable. Alvarado v. Hickman, 316 F.3d 841, 845 (9th Cir. 2002). Although logical, the concept of a wrong, but reasonable, decision may nonetheless be incoherent. In any event, the Supreme Court has shown no inclination to adopt that approach.} \]

\[\text{footnote}{172} \text{See supra Part I.} \]

\[\text{footnote}{173} \text{Professor Woolhandler has analogized current federal habeas review to the delegation of authority to expert agencies. Unlike the agency cases, she argues, deferential reasonableness review in habeas cases rests final authority with the state court without any theory of delegation to justify that deference. Woolhandler, supra note 6, at 639-40. The theory of deference in the habeas regime proposed in this article responds to her concern by separating the review functions of the lower federal courts and the Supreme Court. With} \]

As long ago as 1953, the Court stressed the importance of a state court “opinion specifically setting forth its reasons that there has been no denial of due process of law.”[^174] And the Court’s post-1996 cases, though not requiring a state court to cite federal precedent,[^175] have praised those state courts that have thoroughly analyzed federal law.[^176] Although the approach proposed here would impose a new formal requirement to cite and thoroughly analyze federal authority, it does not impose an obligation the value of which should come as a surprise to state courts.

With respect to requiring state courts to do the analysis themselves, an analogy can be drawn to the Court’s common practice of remanding to state courts for reconsideration in light of newly decided Supreme Court cases.[^177] Only when the state court defies the mandate to apply federal law does the Court decide the merits of the case itself.[^178]

Another analogy can be found in the review—direct or habeas—provided in certain capital cases. The initial decisions forming federal death penalty doctrine stressed that states needed to apply meaningful appellate review.[^179] Later cases established that in the context of errors respect to the former, state courts have the same constitutional duty and obligation to decide constitutional issues as the lower federal courts. The proper justificatory question is thus not one of deference, but of authority to overturn a thoroughly reasoned state court decision that first decided the merits. With respect to the Supreme Court, this article proposes a standard that would require de novo review, responding to Woolhandler’s concern about unjustified delegation of all federal authority to state courts.

[^175]: Mitchell v. Esparza, 124 S. Ct. 7, 10 (2003) (per curiam) (“We have held that a state court need not even be aware of our precedents . . .”); Early v. Packer, 537 U.S. 3, 8 (2003) (holding that state courts are not required to cite applicable U.S. Supreme Court cases or even be aware of them).
[^176]: Price v. Vincent, 538 U.S. 634, 640 (2003) (per curiam) (explaining that state supreme court “identified the applicable Supreme Court precedents . . . and ‘reaffirmed the principles articulated’ in those decisions”) (quoting People v. Vincent, 565 N.W.2d 629, 633 (Mich. 1997)) (internal quotations omitted); Woodford v. Visciotti, 537 U.S. 19, 23-24 (2002) (holding California Supreme Court’s multiple citation to proper federal authority supports the view that the state court’s decision was not contrary to federal law); id. at 25 (praising state court’s “lengthy and careful opinion”).
[^178]: Yates v. Aiken, 484 U.S. 211, 215 (1988) (“Since the state court did not decide that question, we shall do so.”); id. at 218 (“Since [the South Carolina Supreme Court] has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires.”).
[^179]: Jurek v. Texas, 428 U.S. 262, 276 (1976) (“By providing prompt judicial review of the jury’s decision in a court with statewide jurisdiction, Texas has provided a means to
regarding the vagueness of the criteria that rendered a defendant eligible for the death penalty, meaningful review meant a particular type and quality of scrutiny. The Court has, itself, demonstrated great reluctance, however, to address the merits of these issues, preferring to remand to the state courts to apply the required analysis.

The Court recently adopted a similar approach in the very different context of complex antitrust cases. In overturning a Ninth Circuit decision finding antitrust liability, the majority stressed that the lower court's judgment had to be overturned because that court had paid too little attention to the subtle factors that federal antitrust law requires courts to take into account. The majority all but conceded that, had the Ninth Circuit produced the thorough analysis that Justice Breyer put forth in dissent, the Court would have had no reason to reverse the case. Because the Ninth
Circuit had not fulfilled its obligation to analyze the issue thoroughly, however, the majority required the lower court to try again. As Justice Souter explained, "[t]he obligation to give a more deliberate look than a quick one does not arise at the door of this Court and should not be satisfied here in the first instance."  

In each of these analogies, the Court has expressed a clear preference to avoid merits review while retaining ultimate authority to decide the issue itself. With respect to agency rule-making decisions, however, the Court reviews decision-making processes without retaining ultimate authority to reach the merits. A court reviewing an agency rule-making does "not . . . substitute its judgment for that of the agency." Rather, the court's function "is to insure a fully informed and well-considered decision." It fulfills that function by scrutinizing the decision to ensure that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and

In light of our focus on the adequacy of the Court of Appeals's analysis, Justice Breyer's thorough-going, de novo antitrust analysis contains much to impress on its own merits but little to demonstrate the sufficiency of the Court of Appeals's review. The obligation to give a more deliberate look than a quick one does not arise at the door of this Court and should not be satisfied here in the first instance. Had the Court of Appeals engaged in a painstaking discussion in a league with Justice Breyer's (compare his 14 pages with the Ninth Circuit's 8), and had it confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion. Certainly Justice Breyer's treatment of the antitrust issues here is no "quick look." Lingering is more like it, and indeed Justice Breyer, not surprisingly, stops short of endorsing the Court of Appeals's discussion as adequate to the task at hand. . . . Professor Areeda also emphasized the necessity, particularly great in the quasi-common-law realm of antitrust, that courts explain the logic of their conclusions. "By exposing their reasoning, judges . . . are subjected to others' critical analyses, which in turn can lead to better understanding for the future." P. AREEDA, ANTITRUST LAW, ¶ 1507, 402 (1986). As the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions. For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions. Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue.


Id. at 779-80.


the choice made."\textsuperscript{186} Although the standard of review is narrow, the court's inquiry is "searching and careful."\textsuperscript{187} When an agency decision is not supported by appropriate reasoning, the courts do not hesitate to act.\textsuperscript{188} But "[t]he reviewing court should not attempt itself . . . to supply a reasoned basis for the agency's action that the agency itself has not given."\textsuperscript{189} Instead, the court must return the matter to the agency for a decision applying the appropriate standards.

The reasoning-process review proposed here would require lower federal courts on habeas review to scrutinize state court decisions on federal constitutional issues as federal circuit courts now scrutinize many agency decisions. The Supreme Court, however, would retain the authority to review the state decision \textit{de novo} when an inmate seeks \textit{certiorari} directly from a state court's decision.

\section*{Conclusion}

The standard of review in federal habeas cases has long been a matter of considerable debate. Historically, most commentators and the Court itself have structured the controversy in terms of the breadth of federal review. The arguments pro and con for broad federal habeas, however, are on the whole unconvincing. Ultimately, whether one favors broad or narrow review seems to turn on who bears the burden of demonstrating the societal effects of varying the level of scrutiny.

This article concludes that neither side can win this debate. Instead, we should move beyond it by recognizing that state courts are constitutionally obligated to apply federal law as vigorously as the federal courts. Their oath to uphold that constitutional command both entitles them to deference and charges them with the duty to elevate federal law to its required status as the supreme law of the land.

In an era of relatively stable federal constitutional criminal procedure doctrine, societal interests would be better served by abandoning more or less vigorous lower federal court review of the merits of state court decisions, and replacing it with careful review of the state courts' reasoning process. This approach would, first, eliminate the need for the incoherent objective-reasonableness standard. Second, reasoning-process review

\textsuperscript{186} \textit{Motor Vehicle Mfrs.}, 463 U.S. at 43.


\textsuperscript{188} See, e.g., United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (returning significant portions of the FCC's rule making decisions under the 1996 Telecommunications Act to the FCC); United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (same).

\textsuperscript{189} \textit{Motor Vehicle Mfrs.}, 463 U.S. at 43.
would impose a standard that is more deferential to thoroughly reasoned state court opinions than the current approach, because federal habeas courts would be prevented from second guessing the merits of a well-reasoned state court opinion. Third, it would provide appropriate incentives for a state court to take federal law seriously by requiring it to re-analyze a federal issue if it gives the issue short shift the first time around. Fourth, it would create a safety valve for stubbornly defiant state courts by permitting the Supreme Court to grant certiorari and address the merits of the federal issue de novo. By compelling state courts to cite and thoroughly analyze all applicable federal law, but deferring to their reasoned decisions on the merits, this approach would provide both the proper incentives for state courts to live up to their constitutional oath and the proper deference when they do.

190 This approach would respond to those who argue that anything less than de novo federal review transforms "the rule of law . . . [into] the rule of almost-law." Woolhandler, supra note 6, at 644. Reasoning-process review would give state courts every chance to live up to their constitutional obligation without any federal merits review. But if state courts repeatedly refuse to properly engage federal law, the potential for de novo review limited to the U.S. Supreme Court would be preserved.
# APPENDIX I

## UNITED STATES SUPREME COURT DECISIONS

*Reversing or Vacating State Court Decisions Ruling In Favor of a Criminal Defendant on Issues of Federal Constitutional Law*

<table>
<thead>
<tr>
<th>No</th>
<th>Issue On Which Court Reversed or Vacated</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Confrontation Clause</td>
<td>California v. Green, 399 U.S. 149 (1970)</td>
</tr>
<tr>
<td>3</td>
<td>Use of Statement in Violation of Miranda in Rebuttal</td>
<td>Oregon v. Hass, 420 U.S. 714 (1975)</td>
</tr>
<tr>
<td></td>
<td>Case Description</td>
<td>Case Name</td>
</tr>
<tr>
<td>---</td>
<td>----------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td>23</td>
<td>Admission of Evidence of Refusal to Submit to Blood Test</td>
<td>South Dakota v. Neville, 459 U.S. 553 (1983)</td>
</tr>
<tr>
<td>---</td>
<td>----------------------</td>
<td>-----------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>34</td>
<td>No Double Jeopardy Violation When Tried on Suspended Counts After Appeal and Reversal on Other Counts</td>
<td>Pennsylvania v. Goldhammer, 474 U.S. 28 (1985)</td>
</tr>
<tr>
<td>36</td>
<td>Whether Confrontation Clause Error was Harmless</td>
<td>Delaware v. Van Arsdall, 475 U.S. 673 (1986)</td>
</tr>
<tr>
<td>43</td>
<td>Interpretation of Search Warrant</td>
<td>Maryland v. Garrison, 480 U.S. 79 (1987)</td>
</tr>
<tr>
<td>44</td>
<td>Trial on Related Charge After Reversal Not Based on Guilt or Innocence Not Barred by Double Jeopardy</td>
<td>Montana v. Hall, 481 U.S. 400 (1987)</td>
</tr>
<tr>
<td>----</td>
<td>----------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Reasoning Process Review Model</td>
<td>Reference</td>
</tr>
<tr>
<td>---</td>
<td>--------------------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>64</td>
<td>Extradition Clause</td>
<td>New Mexico v. Reed, 524 U.S. 151 (1998)</td>
</tr>
<tr>
<td>65</td>
<td>Search Warrant Not Needed to Seize Car from Public Place When Probable Cause Exists to Believe That It Was Forfeitable Contraband</td>
<td>Florida v. White, 526 U.S. 559 (1999)</td>
</tr>
<tr>
<td>68</td>
<td>Arresting Officer's Subject Motivation</td>
<td>Arkansas v. Sullivan, 532 U.S. 769 (2001)</td>
</tr>
<tr>
<td>69</td>
<td>Reasonable Seizure Includes Not Allowing Defendant to Enter Residence Without a Police Officer Until a Search Warrant Was Obtained</td>
<td>Illinois v. McArthur, 531 U.S. 326 (2001)</td>
</tr>
<tr>
<td>70</td>
<td>Sixth Amendment Right to Counsel Attaches Only to Charged Offenses</td>
<td>Texas v. Cobb, 532 U.S. 162 (2001)</td>
</tr>
<tr>
<td>71</td>
<td>Probable Cause to Arrest Occupant of Car in Which Drugs were Found</td>
<td>Maryland v. Pringle, 540 U.S. __ (2003)</td>
</tr>
</tbody>
</table>
**APPENDIX II**

**STATE SUPREME COURT DECISIONS**

*Providing Greater Protection to the Rights of Suspects and the Accused Under Their Own State Constitutions Than is Provided by the Federal Constitution*

<table>
<thead>
<tr>
<th>No.</th>
<th>Right Interpreted More Expansively Under State Constitution Than Under Federal Constitution</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Double Jeopardy Attaches When Motion for Mistrial Granted to the Prosecution</td>
<td>Cardenas v. Superior Court of Los Angeles County, 56 Cal.2d 273, 277 (1961)</td>
</tr>
<tr>
<td>2</td>
<td>Double Jeopardy Clause</td>
<td>Curry v. Superior Court of San Francisco, 2 Cal.3d 707, 716 (1970)</td>
</tr>
<tr>
<td>3</td>
<td>Limiting Inter-Jurisdictional Exception to Double Jeopardy</td>
<td>Com. v. Mills, 286 A.2d 638, 642 (Penn. 1971)</td>
</tr>
<tr>
<td>4</td>
<td>Applying Miranda to Impeachment Evidence</td>
<td>State v. Santiago, 492 P.2d 657, 664 (Haw. 1971)</td>
</tr>
<tr>
<td>5</td>
<td>Oral Confessions Solicited from a Suspect While in Custody</td>
<td>Butler v. State, 493 S.W.2d 190, 198 (Tex. 1973)</td>
</tr>
<tr>
<td>7</td>
<td>Sixth Amendment Right to Counsel Applies at Moment of Arrest Rather than Indictment</td>
<td>Com. v. Richman, 320 A.2d 351 (Penn. 1974)</td>
</tr>
<tr>
<td>8</td>
<td>Fruits of Search Incident to Arrest Must Be Limited to Evidence in Connection with the Purpose of the Arrest</td>
<td>People v. Kelly, 77 Misc.2d 264, 268-69 (N.Y. 1974)</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>9</td>
<td>Search Incident to Arrest</td>
<td>State v. Kaluna, 520 P.2d 51, 60 (Haw. 1974)</td>
</tr>
<tr>
<td>10</td>
<td>Right to Trial by Jury for All Crimes, Whether Serious or Petty</td>
<td>State v. Sklar, 317 A.2d 160, 169 (Me. 1974)</td>
</tr>
<tr>
<td>11</td>
<td>Higher Standard of Reasonableness During a Search and Seizure</td>
<td>People v. Brisendine, 13 Cal. 3d 528, 552 (1975)</td>
</tr>
<tr>
<td>12</td>
<td>Consent to Search Requires Knowing Waiver</td>
<td>State v. Johnson, 346 A.2d 66 (N.J. 1975)</td>
</tr>
<tr>
<td>13</td>
<td>Illegally Obtained Inculpatory Statements</td>
<td>People v. Disbrow, 16 Cal. 3d 101, 115 (1976)</td>
</tr>
<tr>
<td>14</td>
<td>Arrest Warrant</td>
<td>People v. Hoinville, 553 P.2d 777, 781 (Colo. 1976)</td>
</tr>
<tr>
<td>15</td>
<td>Inventory Search of Seized Automobile</td>
<td>State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976)</td>
</tr>
<tr>
<td>17</td>
<td>Right to Privacy Includes Fornication</td>
<td>State v. Saunders, 381 A.2d 333, 339 (N.J. 1977)</td>
</tr>
<tr>
<td>18</td>
<td>Due Process Mandates Dismissal in an Entrapment Situation Even Though the Defendant Is Predisposed to Commit the Crime for Which He Stands Accused</td>
<td>People v. Isaacson, 406 N.Y.S.2d 714, 718, 721 (1978)</td>
</tr>
<tr>
<td></td>
<td>REASONING-PROCESS REVIEW MODEL</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>--------------------------------</td>
<td>---</td>
</tr>
<tr>
<td></td>
<td>REASONING-PROCESS REVIEW MODEL</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>Proof of Entrapment</td>
<td>People v. Spahr, 371 N.E.2d 1261, 1265 (Ill. 1978)</td>
</tr>
<tr>
<td>22</td>
<td>Requiring Explicit Waiver of <em>Miranda</em> Rights</td>
<td>Com. v. Bussey, 404 A.2d 1309, 1314 (Penn. 1979)</td>
</tr>
<tr>
<td>23</td>
<td>Legitimate Expectation of Privacy in Bank Records</td>
<td>Com. v. DeJohn, 403 A.2d 1283, 1291 (Penn. 1979)</td>
</tr>
<tr>
<td>24</td>
<td>Warrantless Inventory Search of Closed Container Within a Vehicle</td>
<td>State v. Daniel, 589 P.2d 408, 417-18 (Alaska 1979)</td>
</tr>
<tr>
<td>27</td>
<td>Inventory Search May Not Be Conducted as Pretext for Search for Evidence</td>
<td>State v. Simpson, 622 P.2d 1199 (Wash. 1980)</td>
</tr>
<tr>
<td>28</td>
<td>State Cannot Impose a Standardless Permit</td>
<td>Com. v. Tate, 432 A.2d 1382, 1391 (Penn. 1981)</td>
</tr>
<tr>
<td>29</td>
<td>Subsequent Search Unreasonable Absent Probable Cause</td>
<td>Florida v. Casal, 410 So.2d 152, 156 (Fla. 1982)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>31</td>
<td>Automatic Standing to Challenge Fourth Amendment Violation When Charged with Possession Offense</td>
<td>Com v. Sell, 470 A.2d 457, 496 (Penn. 1983)</td>
</tr>
<tr>
<td>32</td>
<td>Telephone Subscriber Has a Legitimate Expectation of Privacy in the Records of Telephone Numbers Dialed</td>
<td>People v. Sparleder, 666 P.2d 135, 144 (Colo. 1983)</td>
</tr>
<tr>
<td>34</td>
<td>Search Warrant Lacked Probable Cause</td>
<td>People v. Campa, 686 P.2d 634, 642 (Cal. 1984)</td>
</tr>
<tr>
<td></td>
<td>REASONING-PROCESS REVIEW MODEL</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>--------------------------------</td>
<td></td>
</tr>
<tr>
<td>40</td>
<td>Double Jeopardy Clause</td>
<td>People v. Marks, 486 N.Y.S.2d 971, 979 (1985)</td>
</tr>
<tr>
<td>41</td>
<td>No Good Faith Exception to the Exclusionary Rule</td>
<td>State v. Grawien, 367 N.W.2d 816, 817 (Wis. 1985)</td>
</tr>
<tr>
<td>43</td>
<td>Road Block Seizures</td>
<td>State v. Kirk, 493 A.2d 1271, 1275, 1288 (N.J. 1985)</td>
</tr>
<tr>
<td>44</td>
<td>Reasonable Expectation of Privacy in Trash</td>
<td>State v. Tanaka, 701 P.2d 1274, 1277 (Haw. 1985)</td>
</tr>
<tr>
<td>46</td>
<td>No Good Faith Exception to the Exclusionary Rule</td>
<td>People v. Sundling, 395 N.W.2d 308, 313 (Mich. 1986)</td>
</tr>
<tr>
<td>50</td>
<td>Confrontation Clause</td>
<td>Van Arsdall v. State, 524 A.2d 3, 34 (Del. 1987)</td>
</tr>
<tr>
<td>51</td>
<td>Road Block Seizures</td>
<td>City of Seattle v. Mesiani, 755 P.2d 775 (Wash. 1988)</td>
</tr>
<tr>
<td>No.</td>
<td>Description</td>
<td>Case</td>
</tr>
<tr>
<td>-----</td>
<td>-----------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>53</td>
<td>No Good Faith Exception to the Exclusionary Rule</td>
<td>State v. Carter, 370 S.E.2d 553, 562 (N.C. 1988)</td>
</tr>
<tr>
<td>54</td>
<td>Road Block Seizures</td>
<td>State v. Henderson, 756 P.2d 1057, 1063 (Idaho 1988)</td>
</tr>
<tr>
<td>55</td>
<td>Requiring Notification of Attempt By Counsel to Contact Suspect Subject to Custodial Interrogation</td>
<td>State v. Stoddard, 537 A.2d 446, 457 (Conn. 1988)</td>
</tr>
<tr>
<td>59</td>
<td>Reasonable Expectation of Privacy in Trash</td>
<td>State v. Boland, 800 P.2d 1112, 1116 (Wash. 1990)</td>
</tr>
<tr>
<td>60</td>
<td>Good Faith Exception to the Exclusionary Rule</td>
<td>State v. Marsala, 579 A.2d 58, 68 (Conn. 1990)</td>
</tr>
<tr>
<td>61</td>
<td>Good Faith Exception to the Exclusionary Rule</td>
<td>Com. v. Edmunds, 586 A.2d 887, 905-06 (Penn. 1991)</td>
</tr>
<tr>
<td>63</td>
<td>Police Must Use Least Intrusive Means to Safeguard an Arrestee’s Property</td>
<td>State v. Perham, 814 P.2d 914, 916 (Haw. 1991)</td>
</tr>
<tr>
<td>64</td>
<td>No Good Faith Exception to the Exclusionary Rule</td>
<td>Gary v. State, 422 S.E.2d 426, 430 (Ga. 1992)</td>
</tr>
<tr>
<td></td>
<td>Reasoning Process</td>
<td>Case Name and Citation</td>
</tr>
<tr>
<td>---</td>
<td>-------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>65</td>
<td>Warrant Requirement</td>
<td>People v. Scott, 583 NYS 2d 920, 937 (1992)</td>
</tr>
<tr>
<td>66</td>
<td>Warrantless Entry Absent Exigent Circumstances, Exclusionary Rule</td>
<td>State v. Geisler, 610 A.2d 1225, 1237 (Conn. 1992)</td>
</tr>
<tr>
<td>67</td>
<td>Good Faith Exception to the Exclusionary Rule</td>
<td>State v. Guzman, 842 P.2d 660, 677 (Idaho 1992)</td>
</tr>
<tr>
<td>68</td>
<td>Warrantless Car Search</td>
<td>State v. Miller, 614 A.2d 1229, 1242 (Conn. 1992)</td>
</tr>
<tr>
<td>69</td>
<td>Reasonable Expectation of Privacy During Illegal Seizure</td>
<td>State v. Oquendo, 613 A.2d 1300, 1314 (Conn. 1992)</td>
</tr>
<tr>
<td>70</td>
<td>Canine Sniff is a Search, Need Probable Cause</td>
<td>Commonwealth v. Martin, 626 A.2d 556, 559-60 (Pa. 1993)</td>
</tr>
<tr>
<td>72</td>
<td>No Good Faith Exception to the Exclusionary Rule</td>
<td>State v. Gutierrez, 863 P.2d 1052, 1068 (N.M. 1993)</td>
</tr>
<tr>
<td>73</td>
<td>Entry to Private Property</td>
<td>State v. Johnson, 879 P.2d 984, 993 (Wash. 1994)</td>
</tr>
<tr>
<td>74</td>
<td>Warrant Requirement</td>
<td>State v. Joyce, 639 A.2d 1007, 1016-17 (Conn. 1994)</td>
</tr>
<tr>
<td>75</td>
<td>Open Fields Doctrine</td>
<td>State v. Bullock, 901 P.2d 61, 75-76 (Mont. 1995)</td>
</tr>
<tr>
<td>77</td>
<td>Police Must Notify Home Dweller of Right to Refuse Consent to Search</td>
<td>State v. Ferrier, 960 P.2d 927 (Wash. 1998)</td>
</tr>
<tr>
<td>78</td>
<td>Proof Required for Seizure</td>
<td>Jones v. State, 745 A.2d 856, 874 (Del. 1999)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>----</td>
<td>-------------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>79</td>
<td>Proof Required for Seizure</td>
<td>State v. Donahue, 742 A.2d 775, 780-81 (Conn. 1999)</td>
</tr>
<tr>
<td>80</td>
<td>Warrantless Search of Car Must Be Justified By Exigent Circumstances</td>
<td>State v. Elison, 14 P.3d 456, 468 (Mont. 2000)</td>
</tr>
<tr>
<td>81</td>
<td>Road Block Seizure</td>
<td>State v. Gerschoffer, 738 N.E.2d 713, 726 (Ind. 2000)</td>
</tr>
<tr>
<td>82</td>
<td>Proof Required for Seizure</td>
<td>Flannory v. State, 805 A.2d 854, 860 (Del. 2001)</td>
</tr>
<tr>
<td>86</td>
<td>Confront Witnesses</td>
<td>State v. Moore, 49 P.3d 785, 791-92 (Or. 2002)</td>
</tr>
<tr>
<td>87</td>
<td>Reject Rule Suspect Is Not Seized Until He Submits To A Show of Authority</td>
<td>State v. Randolph, 74 S.W.3d 330, 334-36 (Tenn. 2002)</td>
</tr>
<tr>
<td>88</td>
<td>Stop Questioning Defendant and Inform Defendant Attorney Is Attempting To Contact Him</td>
<td>State v. Roache, 803 A.2d 572, 576-78 (N.H. 2002)</td>
</tr>
<tr>
<td>90</td>
<td>Drug Sniffing Dog Requires Reasonable Suspicion</td>
<td>People v. Caballes, 802 N.E. 2d 202 (Ill. 2003)</td>
</tr>
<tr>
<td>---</td>
<td>------------------------------------------------------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>93</td>
<td>Right to Consult With Lawyer Before Deciding to Take a Breath Test</td>
<td>State v. Durbin, 63 P.3d 576, 578-80 (Or. 2003)</td>
</tr>
<tr>
<td>95</td>
<td>Corroboration of Predictive Details in Tip From Known Informant Not Enough for Stop</td>
<td>State v. Martinez, 67 P.3d 207, 220-21 (Mont. 2003)</td>
</tr>
<tr>
<td>96</td>
<td>Search Cannot Be Justified As Incident to an Arrest Unless a Valid Custodial Arrest Precedes It</td>
<td>State v. O’Neill, 62 P.3d 489, 500-01 (Wash. 2003)</td>
</tr>
<tr>
<td>97</td>
<td>If Seizure Is Illegal, Subsequent Searches Are Tainted</td>
<td>State v. Sprague, 824 A.2d 539, 544-46 (Vt. 2003)</td>
</tr>
<tr>
<td>-----</td>
<td>-------------------------------------------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>104</td>
<td>Police Required to Justify With Probable Cause Decision to Place Motorist Stopped for Traffic Offense In Patrol Car</td>
<td>State v. Askerooth, Minn. No. C6-02-318 (June 17, 2004)</td>
</tr>
</tbody>
</table>