AEDPA: THE "HYPE" AND THE "BITE"

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On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[1] Thus, the AEDPA era began. While Clinton's presidential signing statement paid lip service[2] to meaningful federal court review of state court convictions, AEDPA's supporters knew better. The fix was in, and happy habeas days were here again. Gone were the years of waiting to carry out executions; AEDPA's "opt-in" provisions with the short statute of limitations,[3] expedited timetable for federal review,[4] and other

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1 Pub. L. No. 104-132, 110 Stat. 1214 (1996).

2 I use the term "lip service" deliberately. President Clinton could easily have derailed AEDPA. But he made no attempt to do so; in fact, he encouraged congressional Democrats to vote for the legislation. *See* James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 413 (2001); Marianne L. Bell, Note, *The Option Not Taken: A Progressive Report on Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act*, 9 CORNELL J.L. & PUB. POL'Y 607, 615–16 (2000). In any event, in his signing statement, President Clinton said, "I have signed this bill because 1 am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims . . . ." Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 720 (April 24, 1996).

3 *See* 28 U.S.C. § 2263 (2000).

4 *See id.* § 2266.

procedural "fixes"[5] would eliminate the interminable delays and fast-track death. Also gone were the days of a lone federal judge or panel of judges routinely finding constitutional defects in state court convictions. For all practical purposes, this overturning of the state court apple cart would be eliminated by 28 U.S.C. § 2254(d), colloquially referred to as the deference provision. With its requirement that the great writ of habeas corpus could only be issued if a federal judge determined the state court decision was "contrary to" or an "unreasonable application" of Supreme Court precedent,[6] AEDPA's supporters believed that they had firmly bound the Article III hands.[7] Although AEDPA's habeas "reform" provisions made a number of other modifications to habeas corpus practice and procedure, a few of which will be discussed later in this Article, the opt-in sections and § 2254(d) were the centerpieces of the new habeas revolution.[8]

But, as the old saying goes, "What if you gave a revolution and nobody came?" As I will argue, that is in many (but not all) respects what happened. Today, almost nine years after AEDPA came into effect, not a single state has successfully opted in to the special capital case procedures that AEDPA's drafters were so proud of. And while § 2254(d) has made the difference in a handful of cases,[9] the writ of habeas corpus lives on. In fact, the Supreme Court has been just as involved in reviewing—and overturning—state court convictions and

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5 *See, e.g., id.* § 2264 (applying more restrictive procedural default rules for qualifying opt-in jurisdictions).

6 Section 2254(d) provides that the writ of habeas corpus

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

Id. § 2254(d).

7 *See* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 945 (1998) (noting that § 2254(d) is "the key element of the 1996 reform of habeas corpus").

8 *See* Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 537 (1999) (discussing § 2254(d)(1)); Benjamin Robert Ogletree, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603, 606–07 (1998) (discussing the opt-in sections).

9 *See, e.g.*, Brown v. Payton, 544 U.S. ____, ____, 125 S. Ct. 1432, 1442 (2005) (Breyer, J., concurring) ("In my view, this is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference."); *see also* Neal v. Puckett, 286 F.3d 230, 244 (5th Cir. 2002) (en banc) (per curiam) (finding that petitioner's claim of ineffective assistance of counsel was meritorious, but that § 2254(d) precluded the court from granting the writ of habeas corpus); Sellan v. Kuhlman, 261 F.3d 303, 310 (2d Cir. 2001) (noting that "whether AEDPA deference applies . . . is all but outcome-determinative").

death sentences in the nine post-AEDPA years than it was in the same period of time prior to AEDPA. While the same claim cannot be made about the federal courts of appeals, AEDPA has still not completely gutted habeas corpus.

After discussing these developments, and making the case for the counterintuitive proposition that AEDPA has been less "bite" than "hype," i.e., that it has not had the effects its proponents[10]—or for that matter its detractors[11] (including myself)—envisioned, I will then tackle the more difficult question: Why? Why, in spite of the AEDPA hype, has there been so little bite? The answer, or I should say answers, are certainly subject to debate. Some would say, and I would agree, that a significant contributing factor is that AEDPA is so poorly drafted. Justice Souter remarked that "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."[12] That is an extremely charitable observation.[13] Even Justice Scalia recently disparaged the statutory language at oral argument in an AEDPA case involving the meaning of one of the statute of limitations provisions, asking of one of the attorneys arguing before the Court, "Who is responsible for writing this?"[14] But poor drafting would be a simple story, and, as I will discuss, I do not believe this particular story is quite so simple. Others would argue, and again I agree in part, that AEDPA's framers chose arcane statutory language, especially for § 2254(d), that had no prior habeas history or pedigree. The use of new statutory language combined with the speed with which Congress enacted AEDPA left the Supreme Court, and lower federal courts, with little guidance regarding Congress's intent.[15] That argument

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10 *See, e.g.*, William J. Meade, *The Demise of De Novo Review in Federal Habeas Corpus Practice*, 85 MASS. L. REV. 127, 132 (2001) ("[AEDPA] marks a great shift towards a system of federal review which more properly acknowledges the respect and deference state court decisions are not only owed but deserve.").

11 *See, e.g.*, Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1 (2002); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 702 (2002) ("AEDPA has dramatically altered federal habeas corpus practice in a number of respects."); Nat Hentoff, *Clinton Screws the Bill of Rights*, VILLAGE VOICE (N.Y.), Nov. 5, 1996, at 12 ("[AEDPA] contain[ed] the most draconian restrictions on habeas corpus since Lincoln suspended the Great Writ [of habeas corpus] during the Civil War." (third alteration in original)).

12 Lindh v. Murphy, 521 U.S. 320, 336 (1997).

13 Other scholars have noted AEDPA's shoddiness. *See, e.g.*, LARRY YACKLE, FEDERAL COURTS: HABEAS CORPUS 57 (2003) ("AEDPA is notorious for its poor drafting. The Act is replete with vague and ambiguous language, apparent inconsistency, and plain bad grammar."); Liebman, *supra* note 2, at 426 ("AEDPA complicates review . . . because of its poor drafting.").

14 Transcript of Oral Argument at 14, Dodd v. United States, 125 S. Ct. 2478 (2005) (No. 04-5286).

15 *See* Larry Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541 (2005).

also has some force, but again, I do not think it is the complete story. Finally, some may even argue that the Court narrowly construed AEDPA in order to avoid any Article III or Suspension Clause problems with the statute. I find this even less likely, but not wholly out of the question.

The argument I advance here is that AEDPA's lack of bite is largely due to the fact that the Supreme Court, in the absence of congressional habeas reform throughout the 1960s, 1970s, 1980s, and 1990s, had already significantly curtailed the writ of habeas corpus. Furthermore, the Supreme Court and lower federal courts—but especially the Supreme Court—believe that it is ultimately up to the courts, not Congress, to decide how much habeas is "enough." While the Court maintains that the scope of the writ is primarily for Congress to determine,[16] it does not, in my view, really believe that to be true. At the end of the day, the Court has assumed a fair share of the responsibility for determining the scope of habeas review, or how much habeas is enough. However, as I will also argue, the Court has a very narrow view of the great writ's scope.

I
A BRIEF HISTORY OF THE HABEAS DEBATE

The debate over the role of federal habeas corpus is an old one. Scholars, including several of those who participated in this Symposium, have debated the history of federal review of state court convictions, including the question of whether the framers envisioned that state prisoners would be permitted to seek a writ of habeas corpus in the federal courts.[17] Over the last one hundred years, and especially since the Supreme Court's decision in *Brown v. Allen*[18] and its three

16 *See, e.g.*, Felker v. Turpin, 518 U.S. 651, 664 (1996) ("[J]udgments about the proper scope of the writ are 'normally for Congress to make.'" (quoting Lonchar v. Thomas, 517 U.S. 314, 323 (1996))); Brown v. Allen, 344 U.S. 443, 499 (1953) (noting that Congress controls the scope of the writ).

17 *See, e.g.*, WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001); ROBERT S. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY (1960); YACKLE, *supra* note 13, at 1–58; Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605. For a detailed discussion of the history of habeas corpus and the debate over the role of habeas corpus in the United States, see 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 5–107 (4th ed. 2001).

18 344 U.S. 443 (1953). In broad strokes, *Brown* rejected the notion that the state court's decision on the merits of a federal constitutional claim was res judicata. According to the Court, the state court decision was entitled only to the "weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitu-

subsequent decisions establishing the highwater mark of habeas a decade later,[19] the debate has intensified. Proponents of broad habeas review extolled (and extol) the need for every inmate that so desires to have a federal forum to entertain the merits of her federal constitutional challenges to the underlying conviction and sentence.[20] Of course, there were variations on this theme,[21] but the essence of this approach was (and is) that federal courts should engage, for the most part, in de novo review of a state prisoner's federal constitutional claims.[22] In other words, a state court's resolution of the federal constitutional issue was not entitled to any deference; a federal court determined the issue anew.[23] From at least *Brown v. Allen* until late in the twentieth century, that view more or less prevailed.

To habeas detractors, however, federal habeas review of state convictions was anathema.[24] They felt punishing and controlling crime is a—if not *the*—quintessential state function.[25] Having federal courts effectively sit in judgment over state courts demonstrated contempt

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tional issues," *id.* at 458, and the scope of the federal court's review was de novo, *id.* at 500 (Frankfurter, J., concurring).

19 Fay v. Noia, 372 U.S. 391, 398–99 (1963) (holding that federal courts have the authority to review claims which were procedurally defaulted in state court); Townsend v. Sain, 372 U.S. 293 (1963) (holding that federal courts can hold evidentiary hearings if state court fact-finding process was defective); Sanders v. United States, 373 U.S. 1 (1963) (holding that petitioner can, under a variety of circumstances, file more than one habeas petition).

20 *See, e.g.*, William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993).

21 *Compare* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992) (arguing that federal habeas corpus serves as a surrogate for Supreme Court review), *with* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985) (arguing for a federal forum for federal rights model of habeas corpus).

22 I say "for the most part" because *Brown* and other cases recognized that state court factual findings must be treated as presumptively correct. *See, e.g., Brown*, 344 U.S. at 506 (Frankfurter, J., concurring). And these factual findings can, in many cases, circumscribe a federal court's ability to grant habeas corpus relief. *See, e.g.*, Marshall v. Lonberger, 459 U.S. 422, 433 (1983); Buckley v. Terhune, 397 F.3d 1149 (9th Cir.), *reh'g en banc granted*, 416 F.3d 1003 (9th Cir. 2005).

23 *Brown*, 344 U.S. at 508 (Frankfurter, J., concurring) ("[T]he District Judge [must] decide constitutional questions presented by a State prisoner even after his claims have been carefully considered by the State courts.").

24 *See, e.g.*, John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1948); Frank W. Wilson, *Federal Habeas Corpus and the State Court Criminal Defendant*, 19 VAND. L. REV. 741 (1966).

25 *See, e.g.*, Rose v. Mitchell, 443 U.S. 545, 585 (1979) (Powell, J., concurring in the judgment) ("Nowhere has a 'proper respect for state functions' been more essential to our federal system than in the administration of criminal justice. This Court repeatedly has recognized that criminal law is primarily the business of the States, and that absent the most extraordinary circumstances the federal courts should not interfere with the States' administration of that law.").

for the state court system, which in turn created federal-state friction, disrupted the state's legitimate interest in finality, and undermined effective law enforcement.[26] Thus, opponents of habeas advocated for a more hands-off policy.[27] Again, there were variations in the restrictions habeas opponents would place on a state prisoner's ability to obtain the great writ (e.g., Professor Bator's "process" model of habeas;[28] Judge Friendly's "innocence model"[29]), but the essence of these approaches was similar: The role of habeas was crimped and state court judgments should only be disrupted under extreme circumstances.[30]

Federal habeas in the Article III trenches, as opposed to habeas in the academy, was a more rough-and-tumble affair. The ongoing habeas debate in practice was driven in large part by the equally vigorous and ongoing debate about capital punishment.[31] Almost all state death row inmates whose convictions and sentences were affirmed by the state courts sought (and to this day seek) federal review of their convictions and death sentences. Thus, after the Supreme Court ushered in the modern era of capital punishment in 1976,[32] the habeas debate intensified not only in the academy, but also in Congress and the courts. To the anti-habeas camp, death row inmates used the writ of habeas corpus to cheat (or at least delay) the executioner;[33] to the pro-habeas contingent, however, searching federal habeas review was absolutely essential to avoid unjust executions.

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26 *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

27 *See* YACKLE, *supra* note 13, at 53.

28 *See* Bator, *supra* note 26. Professor Bator's process model argues for limiting federal habeas relief to situations in which the petitioner did not receive a full and fair hearing in state court. *See id.*

29 *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on State Court Judgments*, 38 U. CHI. L. REV. 142 (1970). Judge Friendly argued that habeas was an extraordinary remedy, and thus federal courts "act as a safety net to catch the few truly innocent people who have slipped through the cracks." Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 153 (1994).

30 Much of the debate was also driven by differing views as to whether federal courts are "systematically better thau state courts in detecting and correcting errors of federal law." YACKLE, *supra* note 13, at 6; *see, e.g.*, Bator, *supra* note 17, at 622–25; Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

31 *See, e.g.*, Larry W. Yackle, *Capital Punishment, Federal Courts, and the Writ of Habeas Corpus*, *in* BEYOND REPAIR? AMERICA'S DEATH PENALTY 58 (Stephen P. Garvey ed., 2003).

32 For a more detailed discussion of this history, see John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285 (2002). *See also* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 267–311 (2002).

33 *See, e.g.*, Yackle, *supra* note 31, at 59.

A. The Court as Habeas "Reformer"

Prior to AEDPA, there had been a number of attempts at habeas "reform." Many of these efforts were supported by members of the Supreme Court, the most vocal of which was former Chief Justice Rehnquist, who had long been an opponent of federal review of state convictions and death sentences.[34] From his days as Justice Jackson's law clerk, he continually expressed his disdain for habeas corpus and the intrusion of the writ on the state court criminal justice system.[35] Spurred on by judicial and academic criticism of the Supreme Court's perceived expansion of the writ during the highwater-mark era of *Brown v. Allen*, *Townsend v. Sain*, *Fay v. Noia*, and *Sanders v. United States*, and further fueled by condemned prisoners' pesky persistence in filing multiple habeas corpus petitions, a range of proposed legislative fixes were prepared. The efforts to curb federal habeas varied in their restrictiveness,[36] but Congress was never able to muster enough votes to pass any of these measures.[37]

Faced with congressional inaction, a majority of the Supreme Court, led by then–Chief Justice Burger, Justice Powell, and Justice Rehnquist, set out on its own to limit a federal habeas court's ability to disturb state court convictions.[38] This regime of systematic judicial limitations on federal habeas corpus continued throughout the 1970s, 1980s, and into the 1990s. The Court did not make much of an effort to hide its agenda, noting in one case that "[i]n light of 'the profound societal costs that attend the exercise of habeas jurisdiction,' we have found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief."[39] Moreover, in another decision, the Court specifically rejected an argument that Congress's failure to pass any of the various habeas reform measures amounted to disapproval of the Court's ability to restrict the circumstances under which

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34 *See* Yackle, *supra* note 20, at 2332 ("Over a career spanning forty years, Chief Justice Rehnquist has been witness to, or has participated in, numerous efforts to import preclusion into the law of habeas corpus . . . .").

35 *See* EDWARD P. LAZARUS, CLOSED CHAMBERS 130–46 (1998).

36 For example, some proposals advocated the total abolition of federal review of state court convictions. *See* Yackle, *supra* note 20, at 2350 (discussing provision of crime act that would have overruled *Brown v. Allen*). Other proposals embraced Professor Bator's process model or tracked Judge Friendly's innocence model. *See id.* at 2354–57. Other proposals, e.g., the Powell Committee report, offered procedural reforms for capital cases. *Id.* at 2367–68.

37 For a detailed history of various congressional proposals, see *id.* at 2337–74.

38 *Id.* at 2356–57.

39 Calderon v. Thompson, 523 U.S. 538, 554–55 (1998) (citation omitted) (quoting Smith v. Murray, 477 U.S. 527, 539 (1986)). In *Wainwright v. Sykes*, the Court acknowledged its "willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." 433 U.S. 72, 81 (1977).

a federal court could grant the writ.[40] While any detailed discussion of the Supreme Court's habeas reform decisions is beyond the scope of this Article, the Rehnquist Court's judicial handiwork included the following cutbacks on habeas corpus:

- In *Stone v. Powell,* the Court precluded habeas petitioners from raising Fourth Amendment claims when the state courts had "provided an opportunity for full and fair litigation" of the issue.[41]
- In *Wainwright v. Sykes,*[42] the Court effectively overruled *Fay v. Noia,*[43] and restricted a federal habeas court's ability to entertain the merits of an issue that was not properly preserved in state court proceedings by requiring that the petitioner demonstrate "cause and prejudice" for the procedural default.[44]

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40 *See* Brecht v. Ahrahamson, 507 U.S. 619, 632–33 (1993) (adopting a more stringent prejudice standard for habeas cases). The *Brecht* majority stated that it was "reluctant to draw inferences from Congress' failure to act." *Id.* at 632 (quotations omitted). The Court then concluded that "[i]n the absence of any express statutory guidance from Congress, it remains for this Court to determine what harmless-error standard applies on collateral review." *Id.* at 633.

41 428 U.S. 465, 482 (1976) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."). Thus, *Stone* represents the judicial adoption of Professor Bator's process model, at least for Fourth Amendment issues. *See supra* note 28. Justice Brennan's dissent in *Stone* noted that the case was "a harbinger of future eviscerations of the habeas statutes that plainly does violence to congressional power to frame the statutory contours of habeas jurisdiction." 428 U.S. at 516 (Brennan, J., dissenting). In *Withrow v. Williams,* the Court refused to extend *Stone*'s rationale to Fifth Amendment violations, specifically claims that police obtained a confession in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966). *See* 507 U.S. 680 (1993). For a more detailed discussion of *Stone,* see 1 HERTZ & LIEBMAN, *supra* note 17, at 450–56; YACKLE, *supra* note 13, at 60–63.

42 433 U.S. 72 (1977).

43 372 U.S. 391 (1963).

44 Drawing on several decisions from the prior term, e.g., *Francis v. Henderson,* 425 U.S. 536 (1976), the Court rejected *Fay*'s deliberate bypass standard as not being sufficiently rigorous to protect the state's comity interest in its contemporaneous objection rules. *See Wainwright,* 433 U.S. at 87–91. In doing so, Justice Rehnquist referred to "this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Id.* at 81. Again, Justice Brennan's dissent argued that the Court's action was inconsistent with Congress's decision to grant "liberal post-trial federal review." *Id.* at 106 (Brennan, J., dissenting). While acknowledging that "some of [his] Brethren may feel uncomfortable with this congressional choice of policy," Justice Brennan nevertheless contended that such a decision was still Congress's alone to make. *Id.* at 105. For a more detailed discussion of the procedural default doctrine, see 1 HERTZ & LIEBMAN, *supra* note 17, at 1133–277; YACKLE, *supra* note 13, at 192–226. *See also* John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure,* 47 S.C. L. REV. 271, 286–90 (1996) (describing possible effects of state procedural default); John H. Blume & Pamela A. Wilkins, *Death by Default: State Procedural Default Doctrine in Capital Cases,* 50 S.C. L. REV. 1 (1998) (describing procedural default rules of South Carolina and their application in capital cases).

- In *Sumner v. Mata*, the Court expanded the circumstances under which the presumption of correctness afforded to state courts' factual findings is applicable.[45]
- In *Rose v. Lundy*, the Court adopted a "total exhaustion" rule precluding federal courts, in most instances, from adjudicating "mixed" habeas petitions, such as those containing both exhausted and unexhausted claims.[46]
- In *Barefoot v. Estelle*, the Court approved the use of expedited review procedures in capital habeas appeals.[47] The Court also held that a death-sentenced inmate must make "a 'substantial showing of the denial of [a] federal right'" before being granted leave to pursue such an appeal.[48]
- In *Teague v. Lane*, the Court crafted a nonretroactivity doctrine that prevents federal courts, except in the rarest of cases, from granting the writ of habeas corpus if doing so would require the creation or application of a new rule of criminal procedure.[49]

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45 449 U.S. 539 (1981). In *Mata*, the Court held that the presumption applies even to state appellate court fact-findings. *Id.* at 546–47. For a more detailed discussion of the presumption of correctness doctrine, see 1 HERTZ & LIEBMAN, *supra* note 17, at 822–33; YACKLE, *supra* note 13, at 228–33. *See also* Blume & Voisin, *supra* note 44, at 296–98 (discussing when federal courts should presume that state court findings are correct).

46 455 U.S. 509 (1982) (plurality opinion). The Court noted that "[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Id.* at 518. The Court went on to say that "[a] rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Id.* at 518–19.

47 463 U.S. 880, 894 (1983). The Court stated:

> When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

Id. at 887.

48 *Id.* at 893 (alteration in original) (quoting Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971)).

49 489 U.S. 288 (1989). As the Court explained, "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310. According to the Court, "The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Butler v. McKellar, 494 U.S. 407, 414 (1990). Justice Brennan, again in dissent, maintained that the Court was stripping prisoners of "virtually *any* meaningful federal review of the constitutionality of their incarceration." *Id.* at 417 (Brennan, J., dissenting). He also stated that "the Court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime." *Id.* at 418. For a more detailed discussion of *Teague*, see 2 HERTZ & LIEBMAN, *supra* note 17, at 1025–1132; YACKLE, *supra* note 13, at 69–94; John Blume & William Pratt, *The Changing Face of Retroactivity*, 58 UMKC L. REV. 581 (1990); John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325 (1991); Blume & Voisin, *supra* note 44, at 292–94.

- In *McCleskey v. Zant*, the Court placed significant restrictions on a federal court's ability to entertain a second or subsequent federal petition.[50]
- In *Keeney v. Tamayo-Reyes*, the Court limited the circumstances under which a federal court could conduct an evidentiary hearing.[51]
- In *Duncan v. Henry*, the Court heightened pleading requirements so that a habeas petitioner must exhaust all state remedies to preserve a claim for subsequent federal review.[52]
- In *Brecht v. Abrahamson*, the Court adopted a more stringent harmless error standard for federal courts to use in determining whether the presence of constitutional error requires that the writ of habeas corpus be granted.[53]

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50 499 U.S. 467 (1991). Normal principles of res judicata historically did not apply in habeas corpus. A judicially crafted doctrine known as "abuse of the writ" developed. *See id.* at 479–89; Sanders v. United States, 373 U.S. 1 (1963). In *McCleskey*, the Court held that a federal court should dismiss a second federal petition unless the petitioner could demonstrate cause and prejudice for failing to include the claim in the first federal petition. 499 U.S. at 493. In his dissent, Justice Marshall argued that the majority's "doctrinal innovation . . . repudiates a line of judicial decisions codified by Congress in the governing statute." *Id.* at 506 (Marshall, J., dissenting). For a more detailed discussion of the abuse of the writ doctrine, see 2 HERTZ & LIEBMAN, *supra* note 17, at 1264–75; YACKLE, *supra* note 13, at 250–54; Blume & Voisin, *supra* note 44, at 294–95.

51 504 U.S. 1 (1992). The Court, overruling in part *Townsend v. Sain*, 372 U.S. 293 (1963), adopted the "cause-and-prejudice" standard used in the procedural default context. *Id.* at 8 ("As in cases of state procedural default, application of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum."). Justice O'Connor, in her dissenting opinion, maintained that the Court's decision could not be reconciled with 28 U.S.C. § 2254(d), "a statute Congress enacted three years after *Townsend*." *Id.* at 12 (O' Connor, J., dissenting). For a more detailed discussion of *Keeney*, see 1 HERTZ & LIEBMAN, *supra* note 17, at 803–06; Blume & Voisin, *supra* note 44, at 298–301.

52 513 U.S. 364 (1995) (per curiam). In his dissent, Justice Stevens observed that the Court's opinion "creates an exacting pleading requirement that serves no legitimate purpose in our habeas corpus jurisprudence." *Id.* at 367 (Stevens, J., dissenting).

53 507 U.S. 619 (1993). The Court rejected the traditional harmless-error standard for constitutional claims established in *Chapman v. California*, 386 U.S. 18 (1967), which required the prosecution to demonstrate beyond a reasonable doubt that the error did not contribute to the verdict. Instead, it adopted a test requiring that the petitioner establish that the error had "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 623 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The majority rejected the habeas petitioner's argument that "Congress' failure to enact various proposals since *Chapman* was decided . . . amounts to legislative disapproval of application of a less stringent harmless-error standard on collateral review of constitutional error." *Id.* at 632. Rather, the majority concluded "it remains for this Court to determine what harmless-error standard applies on collateral review." *Id.* at 633. In his dissenting opinion, Justice White believed the majority's decision was "at odds with the role Congress has ascribed to habeas review, which is, at least in part, to deter both prosecutors and courts from disregarding their constitutional responsibilities." *Id.* at 648 (White, J., dissenting). For a more detailed discussion of *Brecht*, see 2 HERTZ & LIEBMAN, *supra* note 17, at 1365–78; YACKLE, *supra* note 13, at 63–66; John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After* Brecht v. Abrahamson, 35 WM. & MARY L. REV. 163 (1993).

In each of these decisions, the majority focused on the interests of comity, federalism, and finality[54]—interests it believed prior habeas jurisprudence had significantly undervalued.[55] When the Court considered those interests, the "profound social costs that attend the exercise of habeas jurisdiction"[56] were apparent. These costs, as well as the "heavy burden" that federal habeas places on "scarce judicial resources,"[57] supported the Court's systematic campaign to "impose significant limits on the discretion of federal courts to grant habeas relief."[58]

In numerous cases decided between 1976 and 1996, the Court applied and tightened the judicial habeas reform measures described above.[59] Particularly in the procedural default and *Teague* new rule context, a majority of the Court embraced draconian applications of the procedural default doctrine[60] and definitions of new and old rules,[61] which made it very difficult for habeas petitioners to prevail.

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54 *See, e.g., Brecht*, 507 U.S. at 635 ("The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that bave survived direct review within the state court system. We have also spoken of comity and federalism." (citations omitted)); *Keeney*, 504 U.S. at 7 ("The writ strikes at finality of a state criminal conviction, a matter of critical importance in a federal system."); *McCleskey*, 499 U.S. at 491 ("Finality has special importance in the context of a federal attack on a state conviction. . . . Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." (citations omitted)); *Teague*, 489 U.S. at 308 (" '[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.' Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review." (alteration in original) (citation omitted) (quoting Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (plurality opinion)).

55 *See, e.g., Keeney*, 504 U.S. at 7 ("Again addressing the issue of state procedural default in *Coleman v. Thompson*, 501 U.S. 722 (1991), we described *Fay* [*v. Noia*] as based on a conception of federal/state relations that undervalued the importance of state procedural rules . . . .").

56 Smith v. Murray, 477 U.S. 527, 539 (1986); *see McCleskey*, 499 U.S. at 490–91 ("The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review.").

57 *Keeney*, 504 U.S. at 7.

58 Calderon v. Thompson, 523 U.S. 538, 554–55 (1998).

59 *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality opinion) (establishing a rigorous factual innocence standard which a habeas petitioner must meet in order to satisfy the miscarriage of justice exception excusing state procedural defaults); Wainwright v. Witt, 469 U.S. 412 (1985) (establishing that juror impartiality is a question of fact subject to the presumption of correctness); Maggio v. Fulford, 462 U.S. 111 (1983) (per curiam) (holding that competency to stand trial is a question of fact subject to the presumption of correctness).

60 *See, e.g., Coleman*, 501 U.S. at 722 (holding that all claims raised by a death-sentenced inmate were procedurally barred, because his attorney filed a notice of appeal less than a week late).

61 *See, e.g.*, Caspari v. Boblen, 510 U.S. 383 (1994) (finding petitioner's claim to be *Teague*-barred); Gilmore v. Taylor, 508 U.S. 333 (1993) (same); Graham v. Collins, 506 U.S. 461 (1993) (same); Saffle v. Parks, 494 U.S. 484 (1990) (same); Butler v. McKellar, 494 U.S.

Thus, by the time Congress finally passed habeas "reform" legislation, something it in all likelihood could not have achieved without the help of Timothy McVeigh,[62] the Supreme Court had dramatically reshaped the writ of habeas corpus.

II
AN AEDPA OVERVIEW

AEDPA's habeas reform provisions have been discussed in detail in the legal literature and I will not replow that ground.[63] For contextual purposes, however, a quick look at several of AEDPA's provisions is necessary. In broad strokes, AEDPA did the following:

- Created a statute of limitations for habeas corpus cases.[64] Prior to AEDPA, there was no set time limit on a habeas petitioner's ability to seek federal review of his state conviction or sentence. AEDPA contains a one-year statute of limitations with various tolling provisions.[65] In most cases, the limitations period commences on the date the Supreme Court denies certiorari following direct appeal.[66]
- Placed extremely stringent restrictions on a habeas petitioner's ability to file a second (or subsequent) habeas petition. Federal courts must dismiss any claim raised in a previous petition.[67] Claims not previously raised are subject to dismissal unless the petitioner is able to demonstrate either that the claim relies on a new retroactive legal rule, or that new facts have been discovered (which could not have been discovered previously), and that these facts establish by clear and convincing evidence that no reasonable factfinder would have found the petitioner guilty.[68] It

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407 (1990) (finding petitioner's claim to be *Teague*-barred and establishing that a rule was new for *Teague* purposes if it was not dictated by precedent that existed at the time the petitioner's conviction was final).

62 *See* Kennetb Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How To Fix It*, 33 CONN. L. REV. 919, 923 (2001); *see also* Liebman, *supra* note 2, at 413 ("AEDPA, thus, was the product of the bizarre alignment of three ill-starred events: Timothy McVeigh's twisted patriotism and disdain for 'collateral damage,' the Gingrich Revolution in its heyday, and the Clinton Presidency at the furthest point of its most rightward triangulation.").

63 *See, e.g.*, Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Court To Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997); Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997); Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103 (1998); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996). For a comprehensive discussion of AEDPA's provisions, see 1 HERTZ & LIEBMAN, *supra* note 17, at 109–215.

64 28 U.S.C. § 2244(d)(1) (2000).

65 *Id.*

66 *See id.* § 2244(d)(1)(A).

67 *See id.* § 2244(b)(1).

68 *Id.* § 2244(b)(2)(A), (B)(i)–(ii).

also made the court of appeals, as opposed to the district court, the gatekeeper for determining whether a second petition may be submitted.[69]

- Regulated the circumstances under which a federal district court is permitted to convene an evidentiary hearing in cases where the petitioner fails to take advantage of state court fact-development opportunities.[70]
- Altered in several respects the exhaustion of state remedies requirement.[71]
- Modified preexisting law regulating appeals in habeas matters.[72]

But, the two big ticket items were:

- A new chapter, Chapter 154, which created a new set of procedures for capital cases in opt-in jurisdictions.[73]
- A new section, § 2254(d), which limited the circumstances under which a federal court can grant the writ of habeas corpus.[74]

I will discuss these two provisions in more detail.

A. The Opt-In Provisions

Chapter 154 of AEDPA provides a number of procedural advantages to qualifying states in federal habeas proceedings.[75] Colloquially, these states are referred to as opt-in jurisdictions. Chapter 154's provisions are applicable to states that provide both a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal"[76] and "standards of competency for the appointment of such counsel."[77]

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69 *Id.* § 2244(b)(3).

70 *See id.* § 2254(e)(2). If the habeas petitioner is at fault for failing to develop the facts in state court, then a federal court can conduct an evidentiary hearing only if the claim relies on a new retroactive rule of law, or if the facts could not have been discovered earlier and those facts make a clear and convincing showing of actual innocence. *See id.*

71 *See id.* § 2254(b)(2)–(3) (permitting a federal court to deny an unexhausted claim on the merits, and requiring any waiver of the exhaustion of state remedies defense to be express).

72 *See id.* § 2253. This section primarily codified existing law. *See* Slack v. McDaniel, 529 U.S. 473, 475 (2000). The only change was that it required a court issuing a certificate of appealability to indicate the specific issue or issues regarding which the "applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000).

73 *See id.* §§ 2261–66.

74 *See id.* § 2254(d)(1)–(2).

75 *See* Calderon v. Ashmus, 523 U.S. 740, 742 (1998).

76 28 U.S.C. § 2261(b) (2000).

77 *Id.*

AEDPA provides opt-in states with a shorter statute of limitations period: 180 days as opposed to one year.[78] It treats an untimely filed petition as a second habeas petition,[79] and only permits a petitioner to amend a habeas petition after a response is filed if the prisoner can meet the rigorous standards for a second or successive petition.[80] In most circumstances, Chapter 154 prevents a federal court from reviewing a claim that the state courts found to be procedurally defaulted.[81] Finally, the opt-in provisions require the lower federal courts to decide habeas cases under relatively tight timelines: A federal district court must issue a final judgment in a habeas case within 180 days of the petition being filed,[82] and the court of appeals must decide the case on appeal within 120 days of the briefs being filed.[83]

B. Section 2254(d)

Section 2254(d), which, most agree, was the centerpiece of AEDPA,[84] provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[85]

This statutory language had no habeas pedigree; for example, it was not taken from any Supreme Court decision, like other AEDPA provisions, nor was it part of any previous habeas reform proposal offered

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78 *Id.* § 2263(a) ("Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review."). This limitations period also has different, less generous tolling provisions. *See id.* § 2263(b).

79 *Id.* § 2262(c).

80 *See id.* §§ 2244(b), 2266(b)(3)(B).

81 *See id.* § 2264(a) ("[T]he district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is . . . the result of [unconstitutional] State action[,] . . . [a new retroactive rule of law,] or based on [facts] that could not have been [previously] discovered . . . .").

82 *See id.* § 2266(b)(1)(A).

83 *Id.* § 2266(c)(1)(A). It does not shorten the Supreme Court's time to decide whether or not to grant certiorari following the court of appeals' decision in a capital habeas case.

84 *See, e.g.*, YACKLE, *supra* note 13, at 95; Scheidegger, *supra* note 7, at 945.

85 28 U.S.C. § 2254(d) (2000).

by Congress or a habeas scholar. The floor debates and the perfunctory conference report on AEDPA are also unilluminating regarding § 2254(d)'s intent.[86] Thus, for the most part, the federal courts were forced to divine its meaning from scratch.

The Supreme Court, remarkably, has said little about how § 2254(d) works beyond that it limits a federal court's power to grant relief.[87] And the Court has also said little about how § 2254(d) fits in with prior judge-made habeas doctrines, e.g., the *Teague* doctrine.[88] For the most part, the Court has gravitated towards talismanic characterizations of § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses, while remaining virtually silent about § 2254(d)(2). The following passage is indicative of the Court's current formulation:

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86 *See* Yackle, *supra* note 63, at 398–401.

87 *See* Brown v. Payton, 544 U.S. ____, ____, 125 S. Ct. 1432, 1439 (2005) (stating that § 2254(d)'s "conditions for the grant of federal habeas relief have not been established"); Bell v. Cone, 543 U.S. ____, ____, 125 S. Ct. 847, 851 (2005) (per curiam) ("A federal court may grant a writ of habeas corpus based on a claim adjudicated by a state court if the 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.'" (quoting § 2254(d)(1))); Tennard v. Dretke, 542 U.S. 274, 282 (2004) ("Relief may not be granted unless the state court adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States.'" (quoting § 2254(d)(1))); Middleton v. McNeil, 541 U.S. 433, 436 (2004) (per curiam) ("A federal court may grant habeas relief to a state prisoner if a state court's adjudication of his constitutional claim was 'contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States.'" (quoting § 2254(d)(1))); Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); Bell v. Cone, 535 U.S. 685, 694 (2002) ("Petitioner contends that the Court of Appeals exceeded its statutory authority to grant relief under § 2254(d)(1). . . ."); Felker v. Turpin, 518 U.S. 651, 662 (1996) ("Our authority to grant habeas relief to state prisoners is limited hy § 2254, which specifies the conditions under which such relief may be granted . . . ."). The Court also refers at times to § 2254(d) as a "deference" provision. *See, e.g., Middleton*, 541 U.S. at 437 ("This conclusion failed to give appropriate deference to the state court's decision."); Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997) (stating that § 2254(d) dictates a "highly deferential standard for evaluating state-court rulings"). However, the word "deference" does not appear anywhere in AEDPA. Scholars have discussed the constitutional problems with requiring federal courts to defer to state court interpretations of the Federal Constitution. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998); Scheidegger, *supra* note 7.

88 What the Court has said makes little sense. For example, in *Horn v. Banks*, the Court held that if the state raises nonretroactivity as a defense, then a federal court should consider at the outset whether the habeas petitioner is seeking the benefit of a new rule. 536 U.S. 266, 271 (2002) (per curiam). Assuming the petitioner does not need the benefit of a new rule, the Court would then determine whether relief is foreclosed by § 2254(d). However, the Court made no attempt to explain how this would work in practice. For instance, could a claim not depend on a new rule for *Teague* purposes, but nonetheless be barred because it was not based on "clearly established federal law"?

> A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner.[89]

There are a number of interpretive questions that are currently percolating in the lower federal courts. By and large, however, the Court has not yet resolved many of the thornier questions. I will return to some of these issues in Part V.

III
HAS AEDPA MADE A DIFFERENCE?

A. The "Hype"

In this section, I contend that AEDPA has not had the far reaching effects that many predicted. As will be discussed in detail below, two of AEDPA's key provisions—§ 2254(d) and Chapter 154—have not had the profound effect many initially predicted.

The Chapter 154 case is the easier one to make and I begin there. More than nine years after AEDPA's enactment, not a single jurisdiction has successfully opted in.[90] Some states do not even argue that they can satisfy Chapter 154's demands.[91] Other jurisdictions have as-

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89 *Brown*, 544 U.S. at ____, 125 S. Ct. at 1438–39 (citations omitted); *see* Rompilla v. Beard, 545 U.S. ___, ____, 125 S. Ct. 2456, 2462 (2005) ("An 'unreasonable application' occurs when a state court 'identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts' of petitioner's case." (quoting Wiggins v. Smith, 539 U.S. 510, 520 (2003))); Price v. Vincent, 538 U.S. 634, 640 (2003) ("[A] decision by a state court is 'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" (quoting Williams v. Taylor, 529 U.S. 362, 405–06 (2000))); *Bell*, 535 U.S. at 694 ("A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one." (citations omitted)).

90 *See* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 62–63.

91 *See, e.g.*, Johnson v. Nagle, 58 F. Supp. 2d 1303, 1335 n.26 (N.D. Ala. 1999) (Alabama does not assert that it meets the opt-in requirements.); Noel v. Norris, 194 F. Supp. 2d 893, 923 (E.D. Ark. 2002) (Arkansas concedes that it fails to meet the opt-in requirements.); Mincey v. Head, 206 F.3d 1106, 1131 n.58 (11th Cir. 2000) (Georgia does not

serted that they do qualify, but courts have disagreed.[92] Several states are still trying.[93] Nevertheless, it seems fair to say that the "special" procedures for capital cases have been much ado about very little, and unless something changes dramatically, these special procedures for capital cases appear to be a candidate for the habeas history books.[94]

Then, the following question naturally arises: If AEDPA gives states with the death penalty these many advantages, why have more states not opted in? To properly entertain that question, one must look at the other side of the quid pro quo equation. To qualify, the state must provide "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings."[95] In addition, the state scheme must provide competency standards for appointed counsel in state postconviction proceedings, and it must affirmatively offer counsel to all death-sentenced inmates.[96] Few states are willing to provide meaningful compensation to qualified counsel in capital cases at trial,

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assert that it meets the opt-in requirements.); Leavitt v. Arave, 927 F. Supp. 394, 396 (D. Idaho 1996) (Idaho makes no claim that it meets the opt-in requirements.); Burris v. Parke, 95 F.3d 465, 466 (7th Cir. 1996) (en banc) (Indiana concedes that it fails to meet the opt-in requirements.); Duvall v. Reynolds, 139 F.3d 768, 776 (10th Cir. 1998) (Oklahoma does not assert that it meets the opt-in requirements.).

92 *See, e.g.*, Ashmus v. Woodford, 202 F.3d 1160 (9th Cir. 2000) (California fails to meet the opt-in requirements.); Hill v. Butterworth, 170 F.R.D. 509 (N.D. Fla. 1997) (Florida fails to meet the opt-in requirements.); Williams v. Cain, 942 F. Supp. 1088, 1092 (W.D. La. 1996), *rev'd in part on other grounds*, 125 F.3d 269 (5th Cir. 1997) (Louisiana fails to meet the opt-in requirements.); Baker v. Corcoran, 220 F.3d 276, 284–87 (4th Cir. 2000) (Maryland fails to meet the opt-in requirements.); Grayson v. Epps, 338 F. Supp. 2d 699 (S.D. Miss. 2004) (Mississippi fails to meet the opt-in requirements.); Hall v. Luebbers, 341 F.3d 706, 711–12 (8th Cir. 2003) (Missouri fails to meet the opt-in requirements.); Ryan v. Hopkins, No. 4:CV95-3391, 1996 WL 539220, at *3–4 (D. Neb. July 31, 1996) (Nebraska fails to meet the opt-in requirements.); Smith v. Anderson, 104 F. Supp. 2d 773, 786 (S.D. Ohio 2000) (Ohio fails to meet the opt-in requirements.), *aff'd sub nom.* Smith v. Mitchell, 348 F.3d 177 (6th Cir. 2003); Tucker v. Moore, 56 F. Supp. 2d 611, 614 (D.S.C. 1999) (South Carolina did not meet the opt-in requirements in the particular case before the court.), *aff'd sub nom.* Tucker v. Catoe, 221 F.3d 600 (4th Cir. 2000); Austin v. Bell, 927 F. Supp. 1058, 1061–62 (M.D. Tenn. 1996) (Tennessee fails to meet the opt-in requirements.); Nobles v. Johnson, 127 F.3d 409, 413 n.3 (5th Cir. 1997) (Texas fails to meet the opt-in requirements.); Tillman v. Cook, 25 F. Supp. 2d 1245, 1253 (D. Utah 1998) (adopting report and recommendation of magistrate) (Utah fails to meet the opt-in requirements.); Kasi v. Angelone, 200 F. Supp. 2d 585, 592 n.2 (E.D. Va. 2002) (Virginia fails to meet the opt-in requirements.).

93 For example, the Ninth Circuit held in 2002 that Arizona meets the opt-in requirements, but, in the same case, the court held that Arizona was not "entitled to enforce the procedures of Chapter 154 in this case, because it did not comply with the timeliness requirements of its own system with respect to Petitioner." Spears v. Stewart, 283 F.3d 992, 1007 (9th Cir. 2002).

94 However, several bills are currently pending in Congress that would require federal courts to decide capital habeas cases under timelines similar to those found in Chapter 154 regardless of whether the state was an opt-in jurisdiction. *See, e.g.*, The Streamlined Procedures Act of 2005, H.R. 3035, S. 1088, 109th Cong. (2005).

95 28 U.S.C. § 2261(b) (2000).

96 *See id.*

much less in state postconviction proceedings.[97] The reasons for this are complex and beyond the scope of this Article,[98] but, for the most part, it is the states' refusal to pay the AEDPA freight that renders Chapter 154 powerless.[99]

As for § 2254(d), it too has had a relatively modest impact on a habeas petitioner's ability to obtain habeas corpus relief. Let me make a limited empirical argument for this assertion.[100] For the purposes of this Article, I reviewed federal habeas corpus cases decided by the Supreme Court from 1990 through the end of the Court's last Term.[101] I chose 1990 because, by then, almost all of the key components of the Court's judicial habeas reform described in Part II were

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97 There is, at present, no constitutional right to counsel in postconviction proceedings, even for death-sentenced inmates. *See* Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion). In Georgia, for example, counsel in state habeas corpus proceedings are not compensated at all; nor do counsel receive any funds for investigative and expert services. One death-sentenced inmate, Exzavious Gibson, was forced to represent himself in the state collateral review process. *See* Gibson v. Turpin, 513 S.E.2d 186 (Ga. 1998); *see* Sandy Hodson, *Appeal Hinges on Evidence: Death Row Inmate Exzavious Gibson, Who Stood Without Lawyer in Earlier Trials, Disputes Sentence*, AUGUSTA CHRONICLE (Ga.), Aug. 20, 2000, at B1. In other states, e.g., Alabama, compensation for appointed counsel in postconviction proceedings is so minimal that the representation is essentially pro bono. *See* ALA. CODE § 15-12-23(d) (placing a $1000 cap on compensation in capital postconviction proceedings). Even in states where counsel are compensated, the quality of representation in state postconviction proceedings is often abysmal. *See, e.g.*, TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS xi (2002), *available at* http://www.texasdefender.org/execsum.pdf (concluding that the attorneys appointed for condemned inmates in state postconviction proceedings are "unqualified, irresponsible, or overburdened and do little if any meaningful work for the client"); *see also* Coleman v. Thompson, 501 U.S. 722 (1991) (holding that a Virginia death-sentenced inmate forfeited all federal constitutional claims because his appointed state postconviction counsel filed a notice of appeal one day late).

98 For example, it may simply be that in difficult fiscal times, indigent defense is the first casualty. However, it may also be the case that some jurisdictions have done a cost-benefit analysis and determined that Chapter 154's advantages do not justify its cost. Most of AEDPA's provisions apply to all cases, and the slightly shorter statute of limitations, limits on amendments, and its timelines may not be enough of a carrot to induce states to provide qualified, adequately financed counsel.

99 For this reason, the provisions of the Streamlined Procedures Act of 2005 (SPA), *see supra* note 94, which establish timelines for the disposition of capital habeas cases regardless of whether the states provide qualified or adequately compensated counsel, or counsel at all for that matter, are misguided. Having failed to satisfy AEDPA's rather modest standards, the SPA would eliminate any incentives for states to provide competent counsel with adequate resources to adequately develop the factual and legal bases for viable postconviction claims. Hence, in many of the cases, additional investigation and evidentiary hearings will be required.

100 There has been no previous empirical analysis of AEDPA's effect on habeas corpus litigation. There have, however, been empirical studies of other legislation enacted the same year as AEDPA that was intended to limit prisoner civil rights suits. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

101 Appendix A contains a chart listing all Supreme Court habeas cases from 1990 through the end of the present Supreme Court Term.

operative. My examination of the cases revealed a remarkably stable picture.

The Court decided 63 pre-AEDPA habeas cases. The habeas petitioner—the inmate—was successful in 21 (33%) of those cases. There were 41 Supreme Court decisions that were governed by AEDPA. The habeas petitioner was successful in 14 (34%) of the post-Act decisions. Thus a habeas petitioner's overall success rate did not significantly change after AEDPA came into effect. The same composite holds true if only cases involving death-sentenced inmates are considered. During the same period, 38 (59%) of the Court's pre-AEDPA federal habeas cases involved death-sentenced inmates; in the post-AEDPA regime, 24 (58%) of the Court's habeas corpus decisions fell into this category. Thus, the relative distribution of capital to noncapital habeas cases remained essentially the same.

More importantly, a death-sentenced inmate's success rate also remained constant. In the pre-Act cases, the habeas petitioner prevailed 15 times (39%), and in cases governed by AEDPA the babeas petitioner prevailed 9 times (38%). Table 1 captures these data.

TABLE 1. PRE-ACT/POST-ACT SUPREME COURT HABEAS CASE COMPARISON 1990–2005

Case Category	Petitioner's Success Rate[a]
Pre-Act/All Habeas Cases	33%
Post-Act/All Habeas Cases	34%
Pre-Act/Capital Habeas Cases	39%
Post-Act/Capital Habeas Cases	38%

Source: Appendix

[a] The difference in the petitioner's success rate Pre-Act and Post-Act in all habeas cases (P = .932) and Pre-Act and Post-Act in capital habeas cases (P = .876) is not statistically significant.

Among the cases in which the Court actually decided the merits of the habeas petitioner's underlying claim, habeas petitioners have, if anything, been slightly *more* successful in the post-AEDPA cases. For purposes of this analysis, I divided the cases into two categories: procedural and substantive. I classified a case as procedural if the Court did not dispose of the merits of the petitioner's constitutional claims. For example, if the Court announced a rule and then remanded the case to the court of appeals for further consideration of the claim in light of that rule,[102] I deemed the case to be procedural. On the other

102 *E.g.*, Miller-El v. Cockrell, 537 U.S. 322 (2003) (holding that the court of appeals erred in refusing to grant the habeas petitioner a certificate of appealability in connection with his *Batson* claim and remanding the case to the court of appeals to consider the merits of the issue).

hand, if the Court issued a ruling that disposed of the petitioner's underlying constitutional claim,[103] I classified the case as substantive.[104]

This analysis also demonstrated a relatively stable situation. In both the pre- and post-AEDPA cases, there were slightly more substantive than procedural dispositions (54% and 58%, respectively). In the procedural cases, the habeas petitioner was successful in 15 of 28 (54%) of the pre-AEDPA cases, and 9 of 17 (53%) of the post-Act decisions. As for substantive rulings, the habeas petitioner prevailed in 6 of 35 (17%) pre-AEDPA decisions, and in 5 of 24 (21%) of the cases controlled by AEDPA. Thus, the percentage of cases in which the inmate prevailed on procedural grounds decreased a bit in the post-AEDPA cases, but his chances of winning on the merits went up slightly. Moreover, if one just looks at the capital habeas cases, the world also did not change dramatically. In the pre-AEDPA habeas cases involving death-sentenced inmates, the habeas petitioner was successful in 10 of 14 (71%) procedural decisions, and in AEDPA capital habeas cases the petitioner prevailed in 4 of 6 (67%) procedural cases. When the substantive rulings are considered, a death row petitioner's success rate was 21% (5 of 24 decisions) in the cases not controlled by the Act, and 28% (5 of 18 cases) in the cases where the Court was constrained by AEDPA. Table 2 reflects this information.

Finally, as set forth below in Table 3, in both pre- and post-Act cases, the Court generally tended to grant review in cases from the

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103 *E.g.*, Williams v. Taylor, 529 U.S. 362 (2000) (holding that the petitioner was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to discover and present mitigating evidence during the sentencing phase of the proceedings).

104 Admittedly, dividing cases into broad categories such as substantive or procedural is necessarily imprecise. For example, in some of the procedural cases, while the Court announced a rule and remanded the case for further consideration, the outcome was often a foregone conclusion given the nature of the Supreme Court's ruling. *See, e.g.*, Stringer v. Black, 503 U.S. 222, 237 (1992) (holding that the court of appeals erred in concluding that petitioner's challenge to Mississippi's "heinous, atrocious or cruel" aggravating circumstance was *Teague*-barred and remanding for further consideration). And, in a few cases, it is difficult to categorize the Court's ruling. In *Gonzalez v. Crosby*, for example, the Court was faced with the question whether Fed. R. Civ. P. 60(b), which under certain circumstances permits a federal court to reopen a judgment, was available to habeas petitioners. 545 U.S. ___, ___, 125 S. Ct. 2641, 2644 (2005). The court of appeals determined that the petitioner's 60(b) motion was, in fact, a second or successive habeas petition subject to dismissal under § 2244(b). *Id.* at 2645. The Supreme Court rejected the Eleventh Circuit's recharacterization of petitioner's motion, but nonetheless affirmed the denial of petitioner's 60(b) motion because petitioner had not presented evidence of extraordinary circumstances sufficient to justify reopening the prior judgment finding the habeas petition to be untimely. *Id.* at 2650–51. For purposes of this study, I determined that the decision was procedural. An additional caveat has to do with the big picture; the story behind any case is often more complicated since the Supreme Court's decisions, in addition to deciding the individual case, establish rules that are applicable to future cases. Thus "winners can be losers" and visa versa.

TABLE 2. SUBSTANTIVE/PROCEDURAL CASE COMPARISON

Case Category	Petitioner's Success Rate
Pre-Act/Procedural (All)	54%
Post-Act/Procedural (All)	53%[a]
Pre-Act/Substantive (All)	17%
Post-Act/Substantive (All)	21%[b]
Pre-Act/Procedural (Capital)	71%
Post-Act/Procedural (Capital)	67%[c]
Pre-Act/Substantive (Capital)	21%
Post-Act/Substantive (Capital)	28%[d]

Source: Appendix.
[a] The difference in petitioners' success rates Pre-Act and Post-Act in all procedural cases is not statistically significant (P = .967).
[b] The difference in petitioners' success rates Pre-Act and Post-Act in all substantive cases is not statistically significant (P = .721).
[c] The difference in petitioners' success rates Pre-Act and Post-Act in all capital procedural cases is not statistically significant (P = .831).
[d] The difference in petitioners' success rates Pre-Act and Post-Act in all capital substantive cases is not statistically significant (P = .601).

TABLE 3. CIRCUIT DISTRIBUTION OF CASES REVIEWED BY THE SUPREME COURT

Pre-AEDPA										
1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
0	1	1	8	10	5	6	7	16	2	7

Post-AEDPA										
1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
0	2	4	7	6	5	1	0	14	1	1

Source: Appendix.

same courts of appeals. More than half of the cases heard by the Court originated from the Fourth, Fifth, and Ninth Circuits: 59% (34 of 64 cases) of the pre-Act habeas cases involved the review of decisions from these circuits and 66% (27 of 41 cases) of the post-Act cases were from these circuits.

In examining the Supreme Court's decisions, several other points are worth making. One has to do with the Court's treatment of arguments that a death-sentenced inmate was denied the right to the effective assistance of counsel during the sentencing phase of his trial. In the pre-AEDPA regime, the Supreme Court had never held that an attorney rendered ineffective assistance of counsel under the standard

the Court established in *Strickland v. Washington.*[105] Nor had the Court found, in the habeas context, that a prosecutor exercised his peremptory challenges in a racially discriminatory manner under the Court's 1986 decision in *Batson v. Kentucky.*[106] Under AEDPA, however, the Court has determined on three separate occasions that trial counsel were ineffective in the development and presentation of mitigating evidence.[107] And, in *Miller-El v. Cockrell,* the Court reversed a decision of the Fifth Circuit that had rejected a death-sentenced inmate's *Batson* claim.[108] In each of these cases, the Court rejected the state's contention that § 2254(d) barred relief. Thus, AEDPA appears to be no serious obstacle to habeas relief if the Supreme Court determines that the state court decision under review significantly deviated from its precedents.

Why has AEDPA not had a more profound impact on the Supreme Court's habeas corpus decisions? Is it because the Supreme Court is a pro-habeas Court? No.[109] When Congress failed to act in the 1960s, 1970s, and 1980s, a majority of the Supreme Court set about to "reform" habeas corpus through the creation and refinement of various common law habeas doctrines such as procedural default, abuse of the writ, and *Teague* nonretroactivity.[110] The Court tried to outsource habeas reform to Congress, but eventually did the job in-house. Thus the "old great writ" was not so great in 1996 when the "Johnny come lately" Congress passed AEDPA. But—at least for this

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105 466 U.S. 668, 690 (1984). The Court rejected ineffective assistance of counsel claims in *Strickland, Darden v. Wainwright,* 473 U.S. 928 (1985), *Burger v. Kemp,* 483 U.S. 776 (1987), and *Lockhart v. Fretwell,* 506 U.S. 364 (1993).

106 476 U.S. 79, 95–97 (1986).

107 *See Williams,* 529 U.S. at 362 (counsel was ineffective for failing to discover and present available mitigating evidence); Wiggins v. Smith, 539 U.S. 510 (2003) (same); Rompilla v. Beard, 545 U.S. ___, 125 S. Ct. 2456 (2005) (same). On the other hand, the Court has also reversed several court of appeals decisions, finding that counsel's performance at the sentencing phase was unreasonable and prejudicial. *See, e.g.,* Woodford v. Visciotti, 537 U.S. 19 (2002) (per curiam); Yarborough v. Gentry, 540 U.S. 1 (2003) (per curiam).

108 537 U.S. 322 (2003).

109 For example, Justice O'Connor has been frequently referred to as a moderate member of the Court. While that may be true in relative terms, she was very conservative in criminal procedure cases in general and habeas corpus cases in particular. In *Coleman v. Thompson,* 501 U.S. 722 (1991), for example, she wrote the majority opinion concluding that Coleman had lost the right to any federal review of his convictions and death sentence because his state postconviction attorney filed a notice of appeal late. Her opinion for the Court began: "This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Id.* at 726. Coleman was subsequently executed despite substantial evidence indicating he may have been innocent. *See* JOHN C. TUCKER, MAY GOD HAVE MERCY 50–52, 327–30 (Dell Publishing 1998) (1997).

110 *See supra* Part I.

Court—enough appeared to be enough: The Court had done the job that needed to be done.[111]

A second, and related, piece of this same phenomenon has to do with who—institutionally—controls the scope of habeas corpus, Congress or the Court. On a number of occasions, both pre- and post-AEDPA, the Court has indicated that it is primarily the role of Congress to determine the scope of the writ.[112] I do not think that is true, or—perhaps more accurately—I do not think the Court believes that is true. The Court's pre-AEDPA curtailment of the scope of the writ, despite Congressional inaction, and the failure to further curtail the writ post-AEDPA, despite an alleged congressional directive, suggests the opposite is true. The Court, or at least a majority of the Court, believes that the role of Congress is secondary, and that it is primarily the Court's responsibility to say how much habeas is enough.[113] While

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111 Professors Tushnet and Yackle have argued that AEDPA was a "symbolic" statute. *See* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997). They argue that statutes, such as AEDPA, which are "enacted after substantial judicial reconstruction of the law are likely to be largely symbolic." *Id.* at 3. Such statutes, in their view, create a "host of interpretive issues," which courts will defuse by reading the statute "to endorse, and to some degree fortify, the reforms they have already advanced." *Id.* I agree with much that is in the piece, but I disagree that in passing AEDPA Congress intended only to make a "pungent political statement." *Id.* at 5. First, I think this gives Congress too much credit. There is no indication in the legislative history that Congress realized that the Supreme Court had been engaging in a systematic (and successful) campaign to limit federal habeas review. Second, while the Court has held that AEDPA codifies some of its pre-AEDPA jurisprudence, *see, e.g.*, Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("Our conclusion follows from AEDPA's present provisions [§ 2254(c) governing certificates of appealability], which incorporate earlier habeas corpus principles."); Felker v. Turpin, 518 U.S. 651, 664 (1996) ("The Act also codifies some of the pre-existing limits on successive petitions . . . ."), it has not done so in regard to § 2254(d). A number of scholars, including Professor Yackle, believed that the Court would attempt to reconcile § 2254(d) with its pre-AEDPA nonretroactivty jurisprudence. *See* Yackle, *supra* note 63, at 382. Given the statutory language, this would have been a logical way for the Court to reduce the number of "interpretive issues," i.e, the Court could have easily interpreted § 2254(d)'s prohibition against granting federal habeas corpus relief unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" as codifying *Teague*'s nonretroactivty principles. However, the Court did not do so. In *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam), the Court, without further explanation, held that "the AEDPA and *Teague* inquiries are distinct" and that, "in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state."

112 *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 172 (2001) ("Our task is to construe what Congress has enacted.").

113 The Court acted in much the same way prior to AEDPA. It did not act doctrinally but rather responsively in the context of particular cases that often raise narrow issues. The Court's decisions were based on a complicated and constantly shifting balancing act regarding the role of federal habeas corpus. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 489 (1991) ("[T]he doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.").

the Court's view of habeas is undoubtedly quite narrow, it nonetheless believes that habeas corpus "plays a vital role in protecting constitutional rights,"[114] and that this is a historic role[115] that Congress can modify to some extent, but not, for all practical purposes, eviscerate. Both pre- and post-AEDPA, the conservative majority of the Court believed that state court decisions generally should receive the benefit of the doubt. But the same conservative majority also appears to realize, quite correctly, that state courts cannot be completely trusted to vindicate constitutional rights, and thus there must, in some cases, be meaningful federal review of state court decisions.[116]

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114 *Slack*, 529 U.S. at 483; *see also* Teague v. Lane, 489 U.S. 288, 312 (1989) (noting that one purpose of habeas corpus is "'to assure that no man has been incarcerated under a procedure wbich creates an impermissibly large risk that the innocent will be convicted'" (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting))).

115 *See, e.g.*, Brown v. Allen, 344 U.S. 443, 512 (1953) (Frankfurter, J., concurring) ("It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world."); *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 326 (1867) (noting that habeas corpus is a remedy for "every possible case of privation of liberty contrary to the National Constitution").

116 I also think the argument can be made that in a number of decisions the Court has been attempting to "reel in" outliers and establish a more uniform application of its decisions in the federal courts of appeals. For example, two of the three successful ineffective assistance of counsel cases originated in the Fourth Circuit. *See* Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 420 (2000). The Fourth Circuit is notoriously hostile to claims that capital trial counsel provided ineffective assistance of counsel. *See* John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right To Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480 (1999). In the "modern era" of capital punishment, only one death-sentenced inmate has prevailed on sucb a claim in that court of appeals. *See* Thomas-Bey v. Nuth, 67 F.3d 296 (4th Cir. 1995) (unpublished table decision). And, in the same period, death-sentenced inmates' overall success rate in the Fourth Circuit is less than 4%, a fraction of the national average. Blume, *supra* note 32, at 303. The Fifth Circuit has also been very reluctant to grant habeas relief to state prisoners. *See, e.g.*, Harvey Rice, *5th Circuit Court Rules in Its Own Way*, HOUS. CHRON., July 6, 2005, at B1. The *Miller-El* case provides substantial evidence of that. The Supreme Court first reversed the court of appeals decision refusing to even permit the habeas petitioner to raise his *Batson* claim on appeal. Miller-El v. Cockrell, 537 U.S. 322, 344 (2003) ("We question the Court of Appeals' . . . dismissive and strained interpretation of petitioner's evidence of disparate questioning."). On remand, the Fifth Circuit panel rejected the petitioner's claim. *See* Miller-El v. Dretke, 361 F.3d 849 (5th Cir. 2004), *rev'd*, 125 S. Ct. 2317 (2005). Its opinion had long verbatim passages (without attribution) from the Supreme Court dissent. *See id.* Thereafter, the Supreme Court again granted certiorari, reversed the judgment of the Fifth Circuit, and granted the writ of habeas corpus. *See Miller-El*, 545 U.S. ____, 125 S. Ct. 2317. In *Tennard v. Dretke*, the Supreme Court also reversed a Fifth Circuit decision denying a habeas petitioner a certificate of appealability. 542 U.S. 274 (2004). In doing so, the Court demonstrated its impatience with the court of appeals. *See id.* at 283 ("Despite paying lipservice to the principles guiding issuance of a COA, the Fifth Circuit's analysis proceeded along a distinctly different track." (citation omitted)). And in *Penry v. Johnson*, the Court also reversed a Fifth Circuit decision denying a death-sentenced inmate's petition for writ of habeas corpus. 532 U.S. 782 (2001). On the other hand, the Court has also reversed a number of Ninth Circuit decisions granting the writ of habeas corpus. *See, e.g.*, Brown v. Payton, 544 U.S. ____, 125 S. Ct. 1432 (2005); Yarborough v. Alvarado, 541 U.S. 652 (2004); Middleton v. McNeil, 541 U.S. 433 (2004) (per curiam); Yarborough v. Gentry, 540

Admittedly, for a variety of reasons, the U.S. Supreme Court's habeas decisions are not the only—and perhaps not the best—barometer of AEDPA's effects. A skeptical reader could plausibly maintain that the lower federal courts are where the habeas action truly resides, and any inquiry into AEDPA's effects that does not scrutinize developments in the federal courts of appeals is misguided. As Table 4 reflects, the available data from the federal courts of appeals do not reveal that AEDPA has had a tremendous impact on the ability of a habeas petitioner to ultimately secure a writ of habeas corpus.[117]

U.S. 1 (2003) (per curiam); Lockyer v. Andrade, 538 U.S. 63 (2003); Woodford v. Visciotti, 537 U.S. 19 (2002) (per curiam); Early v. Packer, 537 U.S. 3 (2002) (per curiam). Thus, one could look at the cases as a whole as the Court's attempt to establish a more consistent—and moderate—use of the writ of habeas corpus.

In most cases, the Supreme Court reverses the judgment of the lower court. This is referred to as the "selection" effect. As one recent article states, "Reversals are a defining feature of the Supreme Court: over the last decade, the Supreme Court reversed 64% of the cases it heard." Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 358 (2005). The authors posit that the "Court is more likely to grant certiorari to review lower court decisions that are ideologically inconsistent with the Court's current majority . . . and thus it is more likely to grant certiorari to reverse than to affirm the lower court." *Id.* at 366.

117 Based on data maintained by the Administrative Office of the United States Courts, the number of habeas petitions filed by state prisoners has remained relatively constant over the last decade. In Fiscal Year (FY) 2004, there were 18,645 petitions filed, 214 of which involved death-sentenced inmates. ADMIN. OFFICE OF THE U.S. COURTS, 2004 JUDICIAL BUSINESS 133 tbl.C-2 (2004) [hereinafter 2004 JUDICIAL BUSINESS], *available at* http://www.uscourts.gov/judbus2004/appendices/c2.pdf. In FY 2003, there were 18,972 petitions filed, 228 of which involved death-sentenced inmates. ADMIN. OFFICE OF THE U.S. COURTS, 2003 JUDICIAL BUSINESS 127 tbl.C-2 (2003) [hereinafter 2003 JUDICIAL BUSINESS], *available at* http://www.uscourts.gov/judbus2003/appendices/c2.pdf. In FY 2002, there were 19,615 petitions filed, 225 of which involved death-sentenced inmates. ADMIN. OFFICE OF THE U.S. COURTS, 2002 JUDICIAL BUSINESS 130 tbl.C-2 (2002) [hereinafter 2002 JUDICIAL BUSINESS], *available at* http://www.uscourts.gov/judbus2002/appendices/c02sep02.pdf. In FY 2001, there were 20,436 petitions filed, 192 of which involved death-sentenced inmates. ADMIN. OFFICE OF THE U.S. COURTS, 2001 JUDICIAL BUSINESS 131 tbl.C-2 (2001) [hereinafter 2001 JUDICIAL BUSINESS], *available at* http://www.uscourts.gov/judbus2001/appendices/c02sep01.pdf. In FY 2000, there were 21,355 petitions filed, 259 of which involved death-sentenced inmates. ADMIN. OFFICE OF THE U.S. COURTS, 2000 JUDICIAL BUSINESS 136 tbl.C-2 (2000) [hereinafter 2000 JUDICIAL BUSINESS], *available at* http://www.uscourts.gov/judbus2000/appendices/c02sep00.pdf. In FY 1999, there were 20,493 petitions filed, 248 of which involved death-sentenced inmates. ADMIN. OFFICE OF THE U.S. COURTS, 1999 JUDICIAL BUSINESS 137 tbl.C-2 (1999) [hereinafter 1999 JUDICIAL BUSINESS], *available at* http://www.uscourts.gov/judbus1999/c02sep99.pdf. In FY 1998, there were 18,838 petitions filed, 250 of which involved death-sentenced inmates. ADMIN. OFFICE OF THE U.S. COURTS, 1998 JUDICIAL BUSINESS 143 tbl.C-2 (1998) [hereinafter 1998 JUDICIAL BUSINESS], *available at* http://www.uscourts.gov/dirrpt98/c02sep98.pdf. In FY 1997, there were 19,956 petitions filed. ADMIN. OFFICE OF THE U.S. COURTS, 1997 JUDICIAL BUSINESS 129 tbl.C-2 (1997) [hereinafter 1997 JUDICIAL BUSINESS], *available at* http://www.uscourts.gov/judicial_business/c02sep97.pdf. However, given the increase in the number of incarcerated persons, the actual number of petitions filed per 1,000 inmates has decreased.

TABLE 4. § 2254 CASES IN THE COURTS OF APPEALS

YEAR	Successful § 2254 cases in federal courts of appeal	Total § 2254 cases decided by the federal courts of appeal	Successful § 2254 case percentage in federal courts of appeal
1997	28	4109	0.68%
1998	28	5303	0.53%
1999	35	5980	0.59%
2000	39	7366	0.53%
2001	59	7250	0.81%
2002	50	6957	0.72%
2003	51	7717	0.66%
2004	31	6826	0.45%
TOTAL	321	51508	0.62%

Source: Table B-1A, "U.S. Courts of Appeals — Appeals Commenced, Terminated and Pending by Nature of Suit or Offense," in the Administrative Office of the U.S. Courts, Judicial Business reports from 1997 through 2004, cited in text note 117.

Several observations are worth making. First, the overall success rate is very low. Less than 1% of state prisoners who file federal habeas petitions ultimately prevail. Thus, any contention that the lower federal courts are freely granting habeas corpus relief on legal technicalities is not supported by the available data. Both before and after AEDPA, it is the rare state prisoner who obtains the great writ. Second, one could argue that since 2001 the success rate has steadily declined. From this, one could posit that AEDPA is limiting the availability of habeas relief. Given that the Supreme Court held that AEDPA did not apply to habeas cases that were pending when AEDPA went into effect in 1996,[118] it took several years for the majority of the pre-Act cases to be disposed of. For this reason, most of the cases decided by the courts of appeals from 1996 to 2000 were not controlled by AEDPA.[119] However, by 2001, the majority of habeas corpus cases were governed by AEDPA and § 2254(d)'s limitation on relief provision.[120] This fact, combined with several Supreme Court decisions interpreting § 2254(d)[121] and other key AEDPA provisions,[122] suggests that AEDPA has made habeas relief even more difficult for state prisoners to obtain in the lower federal courts.

If capital cases are examined, a similar pattern emerges, as shown by Table 5 below.

118 *See* Lindh v. Murphy, 521 U.S. 320, 326–27 (1997).

119 *See, e.g.*, High v. Head, 209 F.3d 1257, 1262 n.4 (4th Cir. 2000) (case governed by pre-AEDPA standards); Yeatts v. Angelone, 166 F.3d 255, 258 (4th Cir. 1999) (same).

120 Collier v. Cockrell, 300 F.3d 577, 581 (5th Cir. 2002) (case governed by AEDPA); Dressler v. McCaughtry, 238 F.3d 908, 911 (7th Cir. 2001) (same).

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

122 *See, e.g.*, Williams v. Taylor, 529 U.S. 420 (2000) (interpreting § 2254(e)(2)).

TABLE 5. CAPITAL § 2254 PETITIONS

Year	Number of Capital § 2254 petitions decided by the federal courts of appeal	Number of successful capital § 2254 cases decided by the federal courts of appeal	Successful capital § 2254 case percentage
1997	118	12	10%
1998	160	11	7%
1999	198	7	4%
2000	178	12	7%
2001	144	21	15%
2002	226	18	8%
2003	196	16	8%
2004	149	6	4%
TOTAL	1369	103	8%

Source: Table B-1A, "U.S. Courts of Appeals — Appeals Commenced, Terminated and Pending by Nature of Suit or Offense," in the Administrative Office of the U.S. Courts, Judicial Business reports from 1997 through 2004, cited in text note 117.

Again, several observations are important. First, while habeas petitioners are more successful in capital cases than in noncapital ones, the overall success rate is still low. From 1997 to 2004, only 8% of death-sentenced inmates were successful. Thus, the data would appear to refute the contention made by habeas critics that federal courts are thwarting state efforts to establish an effective death penalty. Second, the capital case data also reflect a similar decline in success rates from 2001 to 2004. The number of capital cases is much smaller than noncapital; thus, trends are more difficult to ascertain. For the reasons discussed above, a plausible argument can be made that AEDPA has also made it more difficult for death-sentenced inmates to obtain a new trial or sentencing hearing once the case enters federal court.[123]

[123] One could also argue that examining only courts of appeals cases ignores trends in the district courts where all habeas corpus cases are initially handled. However, I did not have reliable data for petitioner success rates in the district courts. The data that are available suggest that the number of cases in which the petitioner prevails at the district court level has also not changed dramatically. In 1990, according to the Administrative Office of the Courts, the petitioner prevailed in 2.9% of the cases. In 1996, the petitioner prevailed in 3.01% of the cases. By 2003, the number of cases in which the petitioner prevailed had fallen somewhat to 2.75%. Administrative Office data cited above were compiled by the author from Federal Judicial Center, *Federal Court Cases: Integrated Database, 2003* (ICPSR Study No. 4026, last updated Apr. 22, 2005), http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/04216.xml; Federal Judicial Center, *Federal Court Cases: Integrated Database, 2002* (ICPSR Study No. 4059, last updated Apr. 29, 2005), http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/04059.xml; Federal Judicial Center, *Federal Court Cases: Integrated Database, 2001* (ICPSR Study No. 3415, last updated Jan. 27, 2005), http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/03415.xml; Federal Judicial Center, *Federal Court Cases: Integrated Database, 1970–2000* (ICPSR Study No. 8429, last updated Apr. 29, 2005), http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/08429.xml. For a discussion of the reliability of this database, see Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003). However, given the number of cases, this variation is not statistically significant. One caveat should be noted. The

There are several other indicators suggesting, however, that AEDPA is affecting the disposition of cases in the lower federal courts. First, the total percentage of habeas corpus cases in the federal courts of appeals that are disposed of on procedural grounds, as opposed to on the merits, has risen since 1997. In 1997, 2,976 cases were terminated on procedural grounds, and 1,094 cases were terminated on the merits.[124] Thus, 73% of all habeas cases in 1997 were decided on procedural grounds. By 2004, 82% of all § 2254(d) cases were terminated on procedural grounds.[125] Second, the number of state prisoners who were denied permission to appeal the denial of habeas relief has also risen.[126] In 1997, 52% of all habeas petitioners were denied permission to appeal by the federal courts of appeals.[127] By 2004, 61% of habeas petitioners were denied a certificate of appealability.[128] Finally, at least since 2001, the number of habeas petitions filed in the district courts,[129] pending in

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Administrative Office does not differentiate procedural wins from substantive ones. Thus, a district court decision granting an evidentiary hearing is classified as a case in which the petitioner prevailed. However, that same petitioner may, in a subsequent year, ultimately lose on the merits. Given the limitations of Administrative Office data, it cannot be determined whether the petitioner prevailed on a procedural or substantive issue. Thus, these percentages overstate success rates as I have defined success in this Article, i.e., whether the petitioner obtained habeas corpus relief. Furthermore, the data also reveal that even considering procedural and substantive dispositions, the rates at which petitioners prevail is very low. One highly relevant subgroup of cases thus missing from this analysis are cases in which the petitioner prevails in the district court and, due to the strength of the underlying claim, the state declines to perfect an appeal.

124 1997 JUDICIAL BUSINESS, *supra* note 117, at 81 tbl.B-1A, *available at* http://www.uscourts.gov/judicial_business/b1asep97.pdf.

125 In 2004, 5,575 cases were terminated on procedural grounds and 1,215 cases were decided on the merits. *See* 2004 JUDICIAL BUSINESS, *supra* note 117, at 81 tbl.B-1A, *available at* http://www.uscourts.gov/judbus2004/appendices/b1a.pdf.

126 In habeas proceedings, a petitioner does not have a right to appeal a district court decision dismissing or denying a habeas action. Under pre-AEDPA law, a petitioner had to obtain a certificate of probable cause to appeal, which required a "'substantial showing of the denial of [a] federal right.'" Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (alteration in original) (quoting Stewart v. Beto, 454 F.2d 268, 270 n.2 (2d Cir. 1971)). AEDPA only slightly modified preexisting law regarding appeals, although it used slightly different language; a habeas petitioner must now obtain a "certificate of appealability." 28 U.S.C. § 2253(c)(1) (2000).

127 1997 JUDICIAL BUSINESS, *supra* note 117, at 104 tbl.B-5A, *available at* http://www.uscourts.gov/judicial_business/b5asep97.pdf. In 1997, 1,018 inmates were denied a certificate of probable cause to appeal, and 1,113 inmates were denied a certificate of appealability. *Id.*

128 2004 JUDICIAL BUSINESS, *supra* note 117, at 104 tbl.B-5A, *available at* http://www.uscourts.gov/judbus2004/appendices/b5a.pdf. In 2004, 4,173 inmates were denied a certificate of appealability and 2 were denied a certificate of probable cause to appeal. *Id.*

129 In 2001, 20,446 petitions were filed, which represents 17 petitions per 1,000 state court inmates. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.2.9 (2005), *available at* http://www.uscourts.gov/judicialfactsfigures/table2.09.pdf. In 2002, 19,615 petitions were filed (16 per 1000). *Id.* In 2003, 18,792 petitions were filed (15 per 1,000). *Id.* In 2004, 18,646 petitions were filed (14 per 1,000). *Id.* Given the steady rise in the number of incarcerated persons, it is important to examine not the total number of

the district courts,[130] and pending in the federal courts of appeals[131] have all declined. Thus, as Table 6 reflects, if one looks at success rates (in capital and noncapital cases), petitions filed, and petitions pending from 2001 to the present, AEDPA appears to be circumscribing federal review of state court convictions.

TABLE 6. HABEAS CORPUS PETITIONS FILED, PENDING, AND SUCCESS RATES 2001–2004

YEAR	§ 2254 Petitions Filed in U.S. District Court	§ 2254 Petitions Pending in U.S. District Court	§ 2254 Appeals Pending in U.S. Courts of Appeal	Petitioner Success Rate (all cases)	Petitioner Success Rate (capital cases)
2001	20,436 (17 per 1000 inmates)	17,374	4,204	.81%	15%
2002	19,615 (16 per 1000 inmates)	17,280	4,335	.72%	8%
2003	18,972 (15 per 1000 inmates)	17,058	3,851	.66%	8%
2004	18,646 (14 per 1000 inmates)	16,952	3,980	.45%	4%

Source: Table B-1A, "U.S. Courts of Appeals—Appeals Commenced, Terminated and Pending by Nature of Suit or Offense"; Table C-2, "U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit"; Table C-3A, "U.S. District Courts—Civil Cases Pending by Nature of Suit and District" in the Administrative Office of the U.S. Courts Judicial Business reports 2001 through 2004, cited in text note 123. Per capita rates derived from data sets discussed in text note 123.

petitions filed, but the number of petitions in relation to the number of incarcerated individuals. Furthermore, studies have demonstrated that prisoners sentenced to long periods of incarceration are more likely to file a federal habeas petition than other prisoners. Fred L. Cheesman II & Roger A. Hanson, *A Tale of Two Laws Revisited: Investigating the Impact of the Prisoner Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act* 56 (2004), *available at* http://www.ncsconline.org/WC/Publications/Res_PreCiv_TwoLawsRevPub.pdf. Given the increase in both the number of incarcerated persons and the length of sentences (attributable to mandatory minimum sentencing, tbree strikes rules, etc.), it is not surprising that the number of petitions filed, while dropping somewhat, has not fallen more. Furthermore, it is not clear that AEDPA was intended to prevent inmates from filing habeas petitions. Rather, its provisions are more logically read to encourage more prompt filing, to expedite consideration of cases that are filed, and to limit the number of cases in which relief is granted. In fact, AEDPA's statute of limitations may well encourage state prisoners to file a federal petition. Under pre-AEDPA law, when there was no statute of limitations, an incarcerated person who believed (correctly or incorrectly) that she had only a slight chance of obtaining relief may well have postponed challenging her conviction or sentence and ultimately decided not to do so. However, an incarcerated person in the post-AEDPA regime may well decide to file a federal petition because, if she fails to do so within the limitations period, the opportunity for federal review is lost.

130 In 2001, 17,374 § 2254 petitions were pending in the district courts. *See* 2001 JUDICIAL BUSINESS, *supra* note 117, at 143 tbl.C-3A, *available at* http://www.uscourts.gov/judbus2001/appendices/c3asep01.pdf. By 2004, the number of pending petitions had fallen to 16,954. *See* 2004 JUDICIAL BUSINESS, *supra* note 117, at 145 tbl.C-3A, *available at* http://www.uscourts.gov/judbus2004/appendices/c3a.pdf.

131 In 2001, there were 4,204 § 2254 appeals pending in the federal courts of appeals. *See* 2001 JUDICIAL BUSINESS, *supra* note 117, at 80 tbl.B-1A, *available at* http://www.uscourts.gov/judbus2001/appendices/b01asep01.pdf. In 2004, there were 3,980 pending appeals. *See* 2004 JUDICIAL BUSINESS, *supra* note 117, at 82 tbl.B-1A, *available at* http://www.uscourts.gov/judbus2004/appendices/b1a.pdf.

Assuming AEDPA has curtailed to some extent federal "prodigality with the Great Writ"[132] in the lower federal courts, a reader might ask why it has not had the same effect in the Supreme Court. The answer most likely lies in the cases that the Court accepts for review. The Court grants certiorari in only a fraction of the habeas cases entertained by the lower federal courts.[133] These cases generally present procedural or substantive questions that have divided the federal courts of appeals,[134] situations where the Court believes the court of appeals misconstrued the meaning of one of AEDPA's provisions,[135] or instances where the Court simply believes the court of appeals made a serious error.[136] In other words, certiorari is granted to hard cases and cases of clear error. Given the Court's discretionary review, it is not surprising—in fact it is to be expected—that habeas petitioners would prevail more often in the Supreme Court than in the lower federal courts.

B. The "Bite"

1. *Unexpected Bite*

Now, I will turn to AEDPA's bite. Prior to AEDPA there was no statute of limitations in habeas matters,[137] and the timeliness of federal habeas petitions was determined by Habeas Rule 9(a), which was, in effect, a form of laches.[138] However, AEDPA's drafters included a

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132 Stewart v. Martinez-Villareal, 523 U.S. 637, 648 (1998) (Scalia, J., dissenting).

133 In 2003, for example, the Court granted certiorari in fewer than 80 of the thousands of petitions filed. *See* Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 2003*, 73 U.S.L.W. 3045, 3046 (July 31, 2004).

134 *See, e.g.*, Mayle v. Felix, 545 U.S. ____, ____ 125 S. Ct. 2562, 2566 (2005) ("The issue before us is one on which federal appellate courts have divided: Whether, under Federal Rule of Civil Procedure 15(c)(2), Felix's amended [habeas] petition . . . relates back to the date of his original timely filed petition. . . .").

135 For example, in *Williams v. Taylor*, the Court granted certiorari to review the Fourth Circuit's decision holding that AEDPA's evidentiary hearing provision, § 2254(e)(2), precluded an evidentiary hearing even under circumstances where the habeas petitioner was completely without blame for the lack of fact development in state court. 529 U.S. 420, 429 (2000). A unanimous Court concluded that "comity is not served by saying a prisoner 'has failed to develop the factual hasis of a claim' where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2)." *Id.* at 437.

136 *See, e.g.*, Miller-El v. Dretke, 545 U.S. ___, ___, 125 S. Ct. 2317, 2325 (2005) (reiterating that AEDPA's standards are "demanding but not insatiable"). Quoting its prior decision in the same case, the Court reminded the court of appeals that "'[d]eference does not by definition preclude relief.'" *Id.* (alteration in original) (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)). The Court ultimately concluded that the state court's determination that the prosecutor did not exercise his peremptory challenges in a racially discriminatory manner was "unreasonable as well as erroneous." *Id.* at 2340.

137 *See Mayle*, 545 U.S. at ____, 125 S. Ct. at 2569 ("In enacting AEDPA in 1996, Congress imposed for the first time a fixed time limit for collateral attacks in federal court on a judgment of conviction.").

138 Former Rule 9(a) provided:

statute of limitations, which, in most circumstances, requires inmates pursuing federal habeas review to file a petition within one year of the conviction becoming final on direct review.[139] The limitations period is tolled during the time that "a properly filed application for State post-conviction or other collateral review . . . is pending [in state court]."[140] According to the Supreme Court, the limitations period reflected "'Congress' decision to expedite collateral attacks by placing stringent time restrictions on [them].'"[141] Expedient filing, in turn, promotes finality.[142]

The pursuit of finality, however, has come at a significant cost. The new statute of limitations has deprived thousands of potential habeas petitioners of any federal review of their convictions, and in some cases, their death sentences.[143] In a significant number of the cases, the failure to file in a timely manner was not necessarily the habeas petitioner's fault. Like other AEDPA provisions, the statute of limitations is very poorly drafted. This shoddy work product has led to

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> [A] petition may be dismissed if it appears that the state of which respondent is an officer has been prejudiced in its ability to respond to the petition by delay in filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

This part of Rule 9 has since been rendered moot, in most cases.

139 *See* Pace v. DiGuglielmo, 544 U.S. ___, ___, 125 S. Ct. 1807, 1810 (2005) ("(AEDPA) establishes a 1-year statute of limitations for filing a federal habeas corpus petition."); Carey v. Saffold, 536 U.S. 214, 216 (2002) ("(AEDPA) requires a state prisoner seeking a federal habeas corpus remedy to file his federal petition within one year after his state conviction has become final." (quotations omitted)). A conviction is final eitber when the Supreme Court denies certiorari review or the time to file a petition for writ of certiorari expires. *See* Clay v. United States, 537 U.S. 522, 527–28 (2003). There are several other triggering events for finality, but they rarely come into play. The other circumstances that can commence the one-year limitations period include: "impediment to filing an application created by State action in violation of the Constitution," 28 U.S.C. § 2244(d)(1)(B) (2000), a "constitutional right . . . newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," *id.* § 2244(d)(1)(C), and newly discovered facts that "could [not] have been discovered [previously] through the exercise of due diligence," *id.* § 2244(d)(1)(D).

140 28 U.S.C. § 2244(d)(2).

141 *Mayle*, 545 U.S. at ____, 125 S. Ct. at 2570 (alteration in original) (quoting United States v. Hicks, 283 F.3d 380, 388 (D.C. Cir. 2002)).

142 *See* Johnson v. United States, 544 U.S. ___, ___, 125 S. Ct. 1571, 1580 (2005) (interpreting the statute of limitations to not permit "delay [that] would thwart one of AEDPA's principal purposes"); Woodford v. Garceau, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."); Duncan v. Walker, 533 U.S. 167, 179 (2001) ("The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments . . . [and] reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.").

143 Due to the large number of unpublished district court orders dismissing habeas petitions as untimely, many of which are not appealed, it is impossible to say with precision how many petitions have been deemed untimely. However, the number is definitely in the thousands.

numerous splits in the federal courts of appeals as to the meaning of the statutory language. In turn, the Supreme Court has been forced to resolve these circuit splits, and it has granted review in nine cases involving AEDPA's statute of limitations.[144] Four statute of limitations cases were decided in the most recent Supreme Court Term; one case is already pending on the Court's docket for next Term.[145]

Ambiguity in drafting is especially problematic in the limitations period context. A statute of limitations should clearly inform a party who believes his legal rights have been violated as to when he must commence an appropriate action.[146] In the habeas corpus context, even more clarity is required given the complexity of the tolling provisions, the fact that most prisoners do not have counsel to assist in the preparation of a habeas petition, the inadequacy of many prison law libraries, and the potential unjust loss of liberty—and in some cases, life.

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144 *See Mayle*, 545 U.S. at ____, 125 S. Ct. at 2570–71 (holding that an amended claim in a federal petition does not "relate back" under Fed. R. Civ. P. 15(c)(2), and thereby avoids AEDPA's one-year statute of limitations when it asserts a new ground for relief supported by facts that differ in time and type from those set forth in the original pleading); Dodd v. United States, 545 U.S. ___, ____, 125 S. Ct. 2478, 2481–82 (2005) (holding that the one-year limitations period in 28 U.S.C. § 2255 begins to run on the date on which the Supreme Court initially recognized the right, not the date on which that right was made retroactive); *Johnson*, 544 U.S. at ____, 125 S. Ct. at 1580 (holding that the vacatur of a prior state conviction used to enhance a sentence is a "fact" that could start the one-year limitations period); Pliler v. Ford, 542 U.S. 225 (2004) (holding that a federal court does not have to warn a pro se petitioner that one of the consequences of dismissing a federal petition containing both exhausted and unexhausted claims "without prejudice" may be that his petition will be untimely when he returns to federal court); Carey v. Saffold, 536 U.S. 214 (2002) (holding that a case is "pending" for § 2244(d)(2) purposes during the time between a lower state court's decision and the filing of a notice of appeal, and a case is also "pending" in an original writ system during the period when a petitioner is preparing an original writ to a higher state court); *Duncan*, 533 U.S. at 180 (holding that a federal habeas petition is not within the ambit of § 2244(d)(2) and thus does not toll the statutory limitations period); Artuz v. Bennett, 531 U.S. 4, 8 (2000) ("An application is 'filed' . . . when it is delivered to, and accepted by, the appropriate court officer for placement into the official record."); Chavis v. Lamarque, 382 F.3d 921 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 1969 (2005) (to be argued fall Term 2006).

145 The question presented in *Lamarque v. Chavis* is as follows:

> Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not 'unreasonably' delay in filing the petitioner—and therefore was entitled to tolling during that entire period—because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial 'on the merits'?

Petition for Writ of Certiorari at i, *Lamarque*, 125 S. Ct. 1969 (No. 04-721), 2004 WL 2758232.

146 *See* Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 150 (1987) (stating that uniform statutes of limitations help prevent intolerable clarity); Wilson v. Garcia, 471 U.S. 261, 272 (1985) (underscoring the importance of clarity in statutes of limitations).

At the time the statute was enacted, few scholars (or habeas practitioners) fully understood or appreciated the effect that the various limitations provisions would have. Despite the fact that all habeas petitioners were given a one-year grace period in which to file their habeas petitions,[147] the overwhelming majority of the post-AEDPA cases, even to this day, involve the interpretation or application of the various statute of limitations provisions.[148] In a number of the cases, dismissal seems particularly harsh given all the circumstances.[149] In most of these cases, the petitioner would certainly have ultimately lost on the merits had he filed in a timely manner. However, the slight possibility of success on the merits is not a justification for depriving these individuals of any habeas review whatsoever, and certainly some of the dismissed cases had meritorious claims.[150] In *Rouse v. Lee*, for example, the petitioner, a death-sentenced inmate, presented powerful evidence that one of the jurors who participated in his capital trial was biased.[151] Rouse, an African American, was convicted and sentenced to death by an all-white jury for the murder of an elderly white female. The evidence Rouse presented in support of his federal peti-

147 *See, e.g.*, Rogers v. United States, 180 F.3d 349, 355 (1st Cir. 1999); Bennett v. Artuz, 199 F.3d 116, 119 (2d Cir. 1999), *aff'd*, 531 U.S. 4 (2000); Brown v. O'Dea, 187 F.3d 572, 577 (6th Cir. 1999), *vacated on other grounds*, 530 U.S. 1257 (2000); Nichols v. Bowersox, 172 F.3d 1068, 1073 (8th Cir. 1999) (en banc); Brown v. Angelone, 150 F.3d 370, 374–75 (4th Cir. 1998); Gendron v. United States, 154 F.3d 672 (7th Cir. 1998) (per curiam); Lovasz v. Vaughn, 134 F.3d 146, 148–49 (3d Cir. 1998); United States v. Flores, 135 F.3d 1000, 1006 (5th Cir. 1998); Wilcox v. Fla. Dep't of Corr., 158 F.3d 1209, 1210 (11th Cir. 1998) (per curiam); Calderon v. U.S. Dist. Court, 128 F.3d 1283, 1289 (9th Cir. 1997); United States v. Simmonds, 111 F.3d 737, 745–46 (10th Cir. 1997).

148 *See* JOHN H. BLUME ET AL., 17 FED. HABEAS CORPUS UPDATE § III-A, at 304–459 (2004).

149 In one case, the district court granted the petitioner a fourteen-day extension beyond the limitations period. The court of appeals, however, held that the district court erred in equitably extending the limitations period. *See* Spencer v. Sutton, 239 F.3d 626, 630 (4th Cir. 2001). In another, a petitioner sought a voluntary dismissal to return to state court to pursue an unexhausted claim. After exhausting his state court remedies, he returned to the district court, which concluded that his counsel provided ineffective assistance of counsel. The court of appeals concluded, based on the intervening decision of the Supreme Court in *Duncan v. Walker*, 533 U.S. 167 (2001), that the petition was untimely, explaining that "Cross-Bey's lack of understanding of the law and the effect of his voluntary dismissal, while regrettable, does not amount to an extraordinary circumstance beyond his control." Cross-Bey v. Gammon, 322 F.3d 1012, 1016 (8th Cir. 2003). In *Helton v. Secretary for the Dep't of Corrections*, the petitioner's failure to file in a timely manner was based on a letter he received from his state collateral counsel erroneously calculating the limitations period. 259 F.3d 1310 (11th Cir. 2001) (per curiam). In *Garza v. Dretke*, the case was dismissed even though petitioner's counsel told him they would file the federal petition in a timely manner. No. SA-04-CA-645-XR, 2004 WL 2385002 (W.D. Tex. Oct. 25, 2004). In *Marengo v. Conway*, the state appellate court failed to provide petitioner with notice that his appeal was denied, thus leading to the untimely filing of the federal petition. 342 F. Supp. 2d 222 (S.D.N.Y. 2004).

150 Most inmates who file federal habeas petitions do not have attorneys. Duncan v. Walker, 533 U.S. 167 (2001) (Breyer, J., dissenting).

151 339 F.3d 238 (4th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 905 (2004).

tion revealed that the juror in question intentionally failed to disclose that his mother had been murdered by an African-American male (who was executed for the offense); the juror had contempt for all African Americans and frequently used racial slurs; the juror believed African Americans valued life less than white persons; and the juror believed African-American males raped white females in order to "brag to their friends."[152] Despite the strength of Rouse's substantive claim, the court of appeals dismissed the petition as time barred because his attorneys filed the habeas petition one day late. In refusing to grant equitable tolling, the court concluded that neither the severity of his death sentence nor the strength of the claim presented was relevant to the equitable tolling analysis.[153] In sum, AEDPA's statute of limitations has had a significant impact on habeas corpus litigation.

2. *Future Bite*

As noted previously, the Supreme Court in many respects has said very little about § 2254(d). Since *Williams v. Taylor*, the Court has—for the most part—gravitated toward a talismanic formulation of § 2254(d), which it incants before moving on to the merits of the petitioner's claims.[154] But a number of significant issues remain unresolved. For example, the Court has said that "objectively unreasonable" means more than simply incorrect.[155] However, it has provided almost no guidance regarding the necessary increment of error warranting habeas relief.[156] This has left the lower federal courts somewhat at sea. Some courts have opined that "[e]ven clear error, standing alone, is not a ground for awarding habeas relief."[157] Other courts have taken a more moderate approach, stating that "'[s]ome increment of incorrectness beyond error is required,' but that 'increment need not be great.'"[158] Still, others have taken a more fluid approach, stating that "[i]t is enough if the Supreme Court's general principles can be discerned and if, respectfully but

152 *Id.* at 257 (Motz, J., dissenting).

153 *Id.* at 251.

154 *See supra* note 89 and accompanying text.

155 *See* Lockyer v. Andrade, 538 U.S. 63, 75 (2003) ("The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous." (quoting § 2254(d))).

156 In *Andrade*, the Court did say that it was more than "clear error," but provided no additional guidance. *Id.*

157 Stephens v. Hall, 407 F.3d 1195, 1202 (11th Cir. 2005).

158 Henry v. Poole, 409 F.3d 48, 68 (2d Cir. 2005) (quoting Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000)). In *Poole*, the court stated that the increment of error "falls somewhere between" merely erroneous and erroneous to all reasonable jurists. *Id.*

with confidence, we think that failure to [grant habeas relief] would be an unreasonable application of those principles."[159]

Another important issue that has frequently divided the lower federal courts is what significance an unexplained or summary state court decision should have. When a state court fails to explain why it rejected an inmate's constitutional claims, a federal habeas court cannot meaningfully determine whether that decision was "contrary to" or involved "an unreasonable application of" Supreme Court precedent. For all the federal court knows, the state court did not identify or consider the relevant Supreme Court decisions. If AEDPA's purpose was to give the state courts the benefit of the doubt if and when they make a good faith effort to identify and apply the correct constitutional doctrine articulated by the Supreme Court, then it does not seem unreasonable to require that the state court articulate why it rejected a particular claim. If it fails to explain such, then the federal court should not be constrained by § 2254(d)'s limitation on federal relief, and the issue should be reviewed de novo.

Nevertheless, the Court appeared to reject this reasoning in *Early v. Packer*.[160] A Ninth Circuit panel granted the writ of habeas corpus. In doing so, it concluded that § 2254(d) did not preclude relief because the state court decision at issue did not cite any federal law, "much less the controlling Supreme Court precedents."[161] The Supreme Court concluded that "[a]voiding [§ 2254(d)'s] pitfalls does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."[162] This makes little practical sense. In *Williams v. Taylor*, for example, the Court con-

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159 White v. Coplan, 399 F.3d 18, 25 (1st Cir. 2005). The court also rejected the state's argument that relief must be denied because there was no Supreme Court case "directly on all fours" with the present case. *Id.* In the court's view, "AEDPA requires no such thing." *Id.*

160 537 U.S. 3 (2002) (per curiam).

161 Packer v. Hill, 291 F.3d 569, 578 (9th Cir. 2002), *rev'd sub nom. Early*, 537 U.S. 3.

162 *Early*, 537 U.S. at 8. However, the standard that the state court applied in *Early v. Packer* was more forgiving to the defendant than the relevant federal constitutional standard. On that basis, some lower federal courts have concluded that § 2254(d) applies when the state court makes no reference to federal law as "long as the standard it applied was as demanding as the federal standard." Oswald v. Bertrand, 374 F.3d 475, 477 (7th Cir. 2004). The Supreme Court's reasoning, to the extent it was reasoning, in *Packer* is even more puzzling given that it does not apply § 2254(d) when the state court, in the course of issuing its decision, fails to address an issue. In *Wiggins v. Smith*, for example, the state court rejected Wiggins's ineffective assistance of counsel claim on the performance prong, and thus failed to discuss the prejudice prong. *See* 539 U.S. 510 (2003). After concluding that the state court's resolution of the performance prong constituted an unreasonable application of clearly established federal law, the Court turned to the prejudice issue. In doing so, the Court eschewed § 2254(d): "[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis." *Id.* at 534.

cluded that the Virginia Supreme Court decision rejecting petitioner's ineffective assistance of counsel claim was both "contrary to" and an "unreasonable application of" Supreme Court precedent because it "mischaracterized at best the appropriate rule"[163] and because the state court "failed to evaluate the totality of the available mitigating evidence" in assessing prejudice.[164] The Court knew the state court erred, however, only because the state court issued an opinion explaining why it rejected petitioner's claim. Thus, state courts that offer little or no explanation for their decisions obtain a windfall; relying on *Early v. Packer*, a number of federal courts of appeals presume the state court identified and applied the correct federal law.[165] It is unclear why a federal habeas court would so assume. Other courts, faced with unexplained state court decisions, have adopted what they refer to as an "intermediate approach" involving an "independent review of the record and applicable law to determine whether, under the AEDPA standard, the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented."[166] Even these courts, however, have not articulated precisely how such an "independent review" would work.

Furthermore, the Court has made very little effort to reconcile several pre-AEDPA doctrines, e.g., the *Teague* nonretroactivity doctrine, with the dictates of § 2254(d). Both doctrines currently coexist in a jurisprudential crazy quilt. Under *Teague* a court asks whether the

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163 529 U.S. 362, 397 (2000).

164 *Id.*

165 *See, e.g.*, Schaetzle v. Cockrell, 343 F.3d 440, 443 (5th Cir. 2003), *cert. denied sub nom.* Schaetzle v. Dretke, 540 U.S. 1154 (2004) ("Because a federal habeas court only reviews the reasonableness of the state court's ultimate decision, the AEDPA inquiry is not altered when, as in this case, state habeas relief is denied without an opinion. For such a situation, our court: (1) assumes that the state court applied the proper 'clearly established Federal law'; and (2) then determines whether its decision was 'contrary to' or 'an objectively unreasonable application of' that law." (citations omitted)); Reid v. True, 349 F.3d 788, 799 (4th Cir.), *cert. denied*, 540 U.S. 1097 (2003) ("[W]hen the state court does not articulate a rationale for its decision, our analysis focuses solely on the result reached, and application of the 'contrary to' prong is necessarily limited to determining whether the state court decision is contrary to a decision reached by the Supreme Court on indistinguishable facts."). The *Reid* court rejected petitioner's argument that although the state court decision contained no explanation, it should be presumed that the state court applied a rule "contrary to" *Strickland v. Washington*, 466 U.S. 668 (1984), when rejecting his ineffective assistance of counsel claim, since the Virginia Supreme Court's decision in *Williams v. Warden of the Mecklenburg Correctional Center*, 487 S.E.2d 194 (1997), *rev'd sub nom.* Williams v. Taylor, 529 U.S. 362 (2000), was the governing state court precedent at the time petitioner's case was decided. *See Reid*, 349 F.3d at 799–800.

166 Howard v. Bouchard, 405 F.3d 459, 467 (6th Cir. 2005); *see also* Cobbs v. McGraff, 123 F. App'x 794, 795 (9th Cir. 2005). Some courts apply § 2254(d) to summary decisions, even those "without even 'cursory reasoning,'" but fail to explain precisely how they conduct the AEDPA analysis. Turner v. Tafoya, 123 F. App'x 889, 892 (10th Cir.), *cert. denied sub nom.* Turner v. Ulibarri, 126 S. Ct. 86 (2005).

petitioner seeks the benefit of a new rule. If he does, then the petitioner may not obtain the benefit of the rule unless he satisfies one of *Teague*'s two very narrow exceptions. Suppose that the petitioner is relying on a new rule that is retroactive because it satisfies one of the exceptions. For example, the Supreme Court held last Term that persons under the age of eighteen at the time of their offense could not be sentenced to death.[167] This rule, while clearly new, would satisfy the first *Teague* exception.[168] Thus the nonretroactivty bar would not preclude a federal court from granting the writ of habeas corpus. But does the claim satisfy § 2254(d)? Assuming the state court rejected the inmate's claim prior to the Supreme Court's decision, the state court decision would be neither contrary to, nor an unreasonable application of, the clearly established law at the time of the state court decision. Until the Court decides whether and how *Teague* and § 2254(d) operate, and whether, and to what extent, the *Teague* exceptions are incorporated into § 2254(d), such anomalous results are possible.[169]

Two other related issues that the Court has not resolved could significantly affect § 2254(d)'s bite. The first relates to whether the lack of full and fair process in state postconviction proceedings renders § 2254(d) inapplicable. In *Valdez v. Cockrell*,[170] the Fifth Circuit said no, despite the fact that the state habeas judge in Valdez's case admittedly did not read the trial record—he maintained that he did not have time to do so—and he lost many of the exhibits offered by Valdez's counsel, thus refusing to consider the information in the exhibits.[171] Faced with this record, the federal district court convened

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167 *See* Roper v. Simmons, 543 U.S. _____, 125 S. Ct. 1183 (2005).

168 The first exception makes retroactive rules that place "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" Teague v. Lane, 489 U.S. 288, 307 (1989) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)). This exception also applies to rules prohibiting a "certain category of punishment for a class of defendants because of their status or offense." Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

169 Another area where the Court has failed to resolve tensions between pre-AEDPA jurisprudence and AEDPA involves situations in which the state court determines that there was constitutional error, but the error was harmless based on the Supreme Court's decision in *Chapman v. California*, 386 U.S. 18 (1967). Some courts have examined the state court decisions to determine if the state court's harmless error analysis was an unreasonable application of *Chapman*. *See, e.g.*, Zappulla v. New York, 391 F.3d 462, 467 (2d Cir. 2004). This would appear to be the approach embraced by the Supreme Court. *See* Mitchell v. Esparza, 540 U.S. 12 (2003) (per curiam). Other courts, however, bave looked to the prejudice standard for habeas corpus cases established pre-AEDPA in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See, e.g.*, Nevers v. Killinger, 169 F.3d 352 (6th Cir. 1999). Some courts, inexplicably, do both. *See, e.g.*, Jones v. Polk, 401 F.3d 257, 264–66 (4th Cir. 2005) (holding that the state court unreasonably applied *Chapman*, but that the error was not prejudicial under *Brecht*).

170 274 F.3d 941 (5th Cir. 2001).

171 Valdez v. Johnson, 93 F. Supp. 2d 769, 776 (S.D. Tex. 1999), *aff'd in part, vacated in part sub nom. Valdez*, 274 F.3d 941.

an evidentiary hearing and ultimately granted habeas relief, finding that Valdez's trial counsel were ineffective in failing to develop and present mitigating evidence. In doing so, the district court determined that § 2254(d) and (e) were for the most part inapplicable due to the lack of full and fair process provided by the state court.[172] The court of appeals reversed, holding that "a full and fair hearing is not a prerequisite to the application of . . . § 2254's deferential scheme."[173] The dissenting judge noted that it makes

> little sense to require a federal district court to conduct its own evidentiary hearing because of material deficiencies in the state court proceeding, yet at the same time require the district court to disregard the fully developed evidence presented in its own court and instead defer to the decision of the state court made on an incomplete record.[174]

The district court and the dissent have the more defensible argument. Even under the most restrictive conceptions of habeas corpus, i.e., the Bator process model,[175] robust habeas review is warranted when the habeas petitioner does not receive adequate process in the state courts. Furthermore, to the extent AEDPA provides incentives via the applicability of § 2254(d) and (e) to the state court's resolution of factual and legal claims presented by inmates challenging their convictions and death sentences, it is counterintuitive and counterproductive to apply these provisions when the state court fails to fulfill its end of the bargain by engaging in meaningful review of the inmate's federal constitutional claims.

The final issue worth mentioning is whether § 2254(d) applies in cases where the state district attorney or the state attorney general drafts the order denying collateral relief. Some readers may be surprised to learn that in a number of states this is the prevailing practice. The attorney for the prosecuting agency submits a proposed order that the court frequently signs without making a single change. Many of these orders contain unsupported factual findings, nonexistent procedural defaults, and tenuous legal conclusions. This practice, while generally frowned upon, is also generally tolerated.[176] It should not be.

Eventually these and other AEDPA issues currently percolating in the lower federal courts will find their way to the Supreme Court. How the Court resolves these issues will, in turn, have a significant impact on AEDPA's future bite.

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172 *Id.* at 777–78.

173 *Valdez*, 274 F.3d at 959.

174 *Id.* (Dennis, J., dissenting) (quoting petitioner's brief).

175 *See* Bator, *supra* note 26.

176 *See, e.g.*, Trevino v. Johnson, 168 F.3d 173, 180–81 (5th Cir.).

CONCLUSION

In this Article, I have argued that AEDPA was, in many respects, more "hype" than "bite." For the most part this is true because by the time AEDPA's habeas "reform" measures were enacted, there was very little habeas left. Beginning in the 1970s, a conservative Supreme Court systematically limited the scope of the writ by erecting procedural barriers that made it difficult for state court inmates to thread the habeas needle. Thus, AEDPA may not have been too little, but it was too late. Because the Court had substantially completed the task of curtailing access to the writ, AEDPA has had a limited effect. This is especially true at the Supreme Court, where habeas petitioners have been successful at approximately the same rate as they were in the years immediately preceding AEDPA, a period in which the Supreme Court's judicially imposed habeas limitations were in effect. However, AEDPA does seem to have made it more difficult, especially in recent years, for petitioners to succeed in the federal courts of appeals. Given the number of exonerations in recent years, the scope of the writ—if it is to retain its historical function as a safeguard of freedom in our criminal justice system—should be expanded, not contracted, before the "bite" of judicial and congressional habeas reform exceeds the "hype" and effectively insulates even the most egregious state court decisions from federal collateral attack.

APPENDIX

Case Name	Circuit of Origin	AEDPA	Capital	Substantive or Procedural	Prevailing Party
Selvage v. Collins, 494 U.S. 108 (1990) (per curiam)	5th	No	Yes	P	P
Butler v. McKellar, 494 U.S. 407 (1990)	4th	No	Yes	S	G
Saffle v. Parks, 494 U.S. 484 (1990)	10th	No	Yes	S	G
Sawyer v. Smith, 497 U.S. 227 (1990)	5th	No	Yes	S	G
Lewis v. Jeffers, 497 U.S. 764 (1990)	9th	No	Yes	S	G
Parker v. Dugger, 498 U.S. 308 (1991)	11th	No	Yes	S	P
Lozada v. Deeds, 498 U.S. 430 (1991) (per curiam)	9th	No	No	P	P
Burden v. Zant, 498 U.S. 433 (1991) (per curiam)	11th	No	Yes	P	P
McCleskey v. Zant, 499 U.S. 467 (1991)	11th	No	Yes	S	G
Coleman v. Thompson, 501 U.S. 722 (1991)	4th	No	Yes	S	G
Ylst v. Nunnemaker, 501 U.S. 797 (1991)	9th	No	No	P	G
Estelle v. McGuire, 502 U.S. 62 (1991)	9th	No	No	S	G
Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)	9th	No	No	P	G
Wright v. West, 505 U.S. 277 (1992)	4th	No	No	S	G
Parke v. Raley, 506 U.S. 20 (1992)	6th	No	No	S	G
Richmond v. Lewis, 506 U.S. 40 (1992)	9th	No	Yes	S	P
Stringer v. Black, 503 U.S. 222 (1992)	5th	No	Yes	P	P
Gilmore v. Taylor, 508 U.S. 333 (1993)	7th	No	No	S	G
Dobbs v. Zant, 506 U.S. 357 (1993) (per curiam)	11th	No	Yes	P	P
Lockhart v. Fretwell, 506 U.S. 364 (1993)	8th	No	Yes	S	G
Herrera v. Collins, 506 U.S. 390 (1993)	5th	No	Yes	S	G
Graham v. Collins, 506 U.S. 461 (1993)	5th	No	Yes	S	G
Delo v. Lashley, 507 U.S. 272 (1993) (per curiam)	8th	No	Yes	S	G
Arave v. Creech, 507 U.S. 463 (1993)	9th	No	Yes	P	G
Brecht v. Abrahamson, 507 U.S. 619 (1993)	7th	No	No	S	G

APPENDIX (CONTINUED)

Case Name	Circuit of Origin	AEDPA	Capital	Substantive or Procedural	Prevailing Party
Withrow v. Williams, 507 U.S. 680 (1993)	6th	No	No	S	P
Godinez v. Moran, 509 U.S. 389 (1993)	9th	No	Yes	P	G
Burden v. Zant, 510 U.S. 132 (1994) (per curiam)	11th	No	Yes	P	P
Schiro v. Farley, 510 U.S. 222 (1994)	7th	No	Yes	S	G
Caspari v. Bohlen, 510 U.S. 383 (1994)	8th	No	No	S	G
Reed v. Farley, 512 U.S. 339 (1994)	7th	No	No	S	G
McFarland v. Scott, 512 U.S. 849 (1994)	5th	No	Yes	P	P
Schlup v. Delo, 513 U.S. 298 (1995)	8th	No	Yes	P	P
Duncan v. Henry, 513 U.S. 364 (1995) (per curiam)	9th	No	No	S	G
O'Neal v. McAninch, 513 U.S. 432 (1995)	6th	No	No	P	P
Goeke v. Branch, 514 U.S. 115 (1995) (per curiam)	8th	No	No	S	G
Kyles v. Whitley, 514 U.S. 419 (1995)	5th	No	Yes	S	P
Garlotte v. Fordice, 515 U.S. 39 (1995)	5th	No	No	P	P
Tuggle v. Netherland, 516 U.S. 10 (1995) (per curiam)	4th	No	Yes	P	P
Wood v. Bartholomew, 516 U.S. 1 (1995) (per curiam)	9th	No	No	S	G
Lonchar v. Thomas, 517 U.S. 314 (1996)	11th	No	Yes	P	P
Gray v. Netherland, 518 U.S. 152 (1996)	4th	No	Yes	S	G
California v. Roy, 519 U.S. 2 (1996) (per curiam)	9th	No	No	P	G
Lambrix v. Singletary, 520 U.S. 518 (1997)	11th	No	Yes	S	G
Bracy v. Gramley, 520 U.S. 899 (1997)	7th	No	Yes	P	P
O'Dell v. Netherland, 521 U.S. 151 (1997)	4th	No	Yes	S	G
Lindh v. Murphy, 521 U.S. 320 (1997)	7th	Yes	No	P	P
Trest v. Cain, 522 U.S. 87 (1997)	5th	No	No	P	P
Buchanan v. Angelone, 522 U.S. 269 (1998)	4th	No	Yes	S	G
Spencer v. Kemna, 523 U.S. 1 (1998)	8th	No	No	P	G

APPENDIX (CONTINUED)

Case Name	Circuit of Origin	AEDPA	Capital	Substantive or Procedural	Prevailing Party
Breard v. Greene, 523 U.S. 371 (1998) (per curiam)	4th	Yes	Yes	S	G
Calderon v. Thompson, 523 U.S. 538 (1998)	9th	No	Yes	P	G
Hopkins v. Reeves, 524 U.S. 88 (1998)	8th	No	Yes	S	G
Calderon v. Coleman, 525 U.S. 141 (1998) (per curiam)	9th	No	Yes	P	G
Stewart v. Martinez-Villareal, 523 U.S. 637 (1998)	9th	Yes	Yes	P	P
O'Sullivan v. Boerckel, 526 U.S. 838 (1999)	7th	No	No	P	G
Strickler v. Greene, 527 U.S. 263 (1999)	4th	No	Yes	S	G
Weeks v. Angelone, 528 U.S. 225 (2000)	4th	Yes	Yes	S	G
Smith v. Robbins, 528 U.S. 259 (2000)	9th	No	No	P	G
Portuondo v. Agard, 529 U.S. 61 (2000)	2nd	No	No	S	G
Williams v. Taylor, 529 U.S. 362 (2000)	4th	Yes	Yes	S	P
Williams v. Taylor, 529 U.S. 420 (2000)	4th	Yes	Yes	S	P
Edwards v. Carpenter, 529 U.S. 446 (2000)	6th	No	No	P	G
Slack v. McDaniel, 529 U.S. 473 (2000)	9th	Yes	No	P	P
Ramdass v. Angelone, 530 U.S. 156 (2000)	4th	Yes	Yes	S	G
Artuz v. Bennett, 531 U.S. 4 (2000)	2nd	Yes	No	P	P
Lackawanna County District Attorney v. Coss, 532 U.S. 394 (2001)	3rd	No	No	P	G
Penry v. Johnson, 532 U.S. 782 (2001)	5th	Yes	Yes	S	P
Duncan v. Walker, 533 U.S. 167 (2001)	2nd	Yes	No	P	G
Tyler v. Cain, 533 U.S. 656 (2001)	5th	Yes	No	S	G
Lee v. Kemna, 534 U.S. 362 (2002)	8th	No	No	P	P
Mickens v. Taylor, 535 U.S. 162 (2002)	4th	Yes	Yes	S	G
Bell v. Cone, 535 U.S. 685 (2002)	6th	Yes	Yes	S	G
Carey v. Saffold, 536 U.S. 214 (2002)	9th	Yes	No	P	P
Horn v. Banks, 536 U.S. 266 (2002) (per curiam)	3rd	Yes	Yes	P	G

APPENDIX (CONTINUED)

Case Name	Circuit of Origin	AEDPA	Capital	Substantive or Procedural	Prevailing Party
Stewart v. Smith, 536 U.S. 856 (2002) (per curiam)	9th	No	Yes	S	G
Early v. Packer, 537 U.S. 3 (2002) (per curiam)	9th	Yes	No	S	G
Woodford v. Visciotti, 537 U.S. 19 (2002) (per curiam)	9th	Yes	Yes	S	G
Miller-El v. Cockrell, 537 U.S. 322 (2003)	5th	Yes	Yes	P	P
Lockyer v. Andrade, 538 U.S. 63 (2003)	9th	Yes	No	S	G
Woodford v. Garceau, 538 U.S. 202 (2003)	9th	Yes	Yes	P	G
Price v. Vincent, 538 U.S. 634 (2003)	6th	Yes	No	S	G
Wiggins v. Smith, 539 U.S. 510 (2003)	4th	Yes	Yes	S	P
Mitchell v. Esparza, 540 U.S. 12 (2003) (per curiam)	6th	Yes	Yes	S	G
Yarborough v. Gentry, 540 U.S. 1 (2003) (per curiam)	9th	Yes	No	S	G
Pliler v. Ford, 542 U.S. 225 (2004)	9th	Yes	No	P	G
Banks v. Dretke, 540 U.S. 668 (2004)	5th	No	Yes	S	P
Baldwin v. Reese, 541 U.S. 27 (2004)	9th	Yes	No	P	G
Middleton v. McNeil, 541 U.S. 433 (2004) (per curiam)	9th	Yes	No	S	G
Dretke v. Haley, 541 U.S. 386 (2004)	5th	Yes	No	P	P
Yarborough v. Alvarado, 541 U.S. 652 (2004)	9th	Yes	No	S	G
Beard v. Banks, 542 U.S. 406 (2004)	3rd	Yes	Yes	S	G
Schriro v. Summerlin, 542 U.S. 348 (2004)	9th	No	Yes	S	G
Tennard v. Dretke, 542 U.S. 274 (2004)	5th	Yes	Yes	P	P
Holland v. Jackson, 542 U.S. 649 (2004) (per curiam)	6th	Yes	No	S	G
Bell v. Cone, 125 S. Ct. 847 (2005) (per curiam)	6th	Yes	Yes	S	G
Brown v. Payton, 125 S. Ct. 1432 (2005)	9th	Yes	Yes	S	G
Rhines v. Weber, 125 S. Ct. 1528 (2005)	8th	Yes	Yes	P	P
Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005)	3rd	Yes	No	P	G
Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005)	6th	No	Yes	P	G
Miller-El v. Dretke, 125 S. Ct. 2317 (2005)	5th	Yes	Yes	S	P

APPENDIX (CONTINUED)

Case Name	Circuit of Origin	AEDPA	Capital	Substantive or Procedural	Prevailing Party
Rompilla v. Beard, 125 S. Ct. 2456 (2005)	3rd	Yes	Yes	S	P
Gonzalez v. Crosby, 125 S. Ct. 2641 (2005)	11th	Yes	No	P	G
Mayle v. Felix, 125 S. Ct. 2562 (2005)	9th	Yes	No	P	G