AEDPA REPEAL

Brandon L. Garrett† *& Kaitlin Phillips*††

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") dramatically altered the scope of federal habeas corpus. Enacted in response to a domestic terrorism attack, followed by a capital prosecution, and after decades of proposals seeking to limit post-conviction review of death sentences, and Supreme Court rulings severely limiting federal habeas remedies, AEDPA was ratified with little discussion or deliberation. The law and politics of death penalty litigation, which had been particularly active since the U.S. Supreme Court invalidated all death penalty schemes in its 1972 ruling in Furman v. Georgia, *culminated in restrictions for all federal habeas corpus cases, whether capital or non-capital. Still more perverse, the impact of AEDPA was particularly strong in non-capital cases. Since its enactment, AEDPA has been widely criticized by academics, legislators, and judges for erecting a complex, poorly drafted set of procedural barriers and for limiting federal review on the merits of most constitutional claims. This Article examines statutory approaches designed to restore federal habeas corpus. Any partial or complete repeal of AEDPA raises complex and unexplored issues. The central challenge is that AEDPA operates alongside decades of Supreme Court-created restrictions of federal habeas corpus. In this Article, we walk through proposals for how AEDPA provisions could be amended, benefits and costs of each change, and how Supreme Court doctrine affects each choice. AEDPA repeal is not as simple as eliminating the judicially-created doctrine of qualified immunity in civil rights litigation. However, real improvements to federal habeas practice are achievable, and in this Article, we provide a legislative roadmap for habeas reform through AEDPA repeal.*

† L. Neil Williams, Jr. Professor of Law, Duke University School of Law and Director, Wilson Center for Science and Justice. Many thanks to John Blume, Rebecca Brown, Lee Kovarsky, and Laura Nirider for comments on earlier drafts, as well as participants at the symposium hosted by Cornell Law Review.

†† J.D., 2021, Duke University School of Law.

INTRODUCTION

In 1997, a California jury convicted Shirley Ree Smith of shaking her infant grandson to death and the judge sentenced her to fifteen years to life in prison.[1] Smith steadfastly maintained innocence.[2] The evidence underlying Smith's conviction was, at best, conflicting. Prosecutors based their theory of the case on the findings of two forensic pathologists, one of whom told the jury that the child was killed by "invisible injuries to his brain stem."[3] Yet, they found no injuries that fit the pattern traditionally associated with a "shaken baby syndrome" diagnosis[4]—a since-partially discredited medical

---

1 Smith v. Mitchell, 437 F.3d 884, 888 (9th Cir. 2006).

2 A.C. Thompson, *California Governor Commutes Sentence in Shaken Baby Case*, PROPUBLICA (Apr. 6, 2012), https://www.propublica.org/article/california-governor-commutes-sentence-in-shaken-baby-case [https://perma.cc/93XW-R3KM].

3 *Id.*

4 *Id.* Shaken baby cases typically relied on expert medical testimony that there was some indicator of violent shaking, "such as bruises on the body,

theory.[5] After the state appeals court denied relief, Smith challenged sufficiency of the evidence to support her conviction,[6] filing a federal habeas petition that was subject to the recently enacted Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[7]

The federal magistrate judge reviewing Smith's habeas petition, though troubled by the case, concluded Smith was not entitled to relief.[8] If the case had been filed prior to AEDPA's effective date, the judge could have more directly granted relief on the merits. However, the judge was required to follow Section 2254(d), an AEDPA provision that prevents federal courts from correcting a state court's erroneous application of federal law unless the decision was "contrary to," or an "unreasonable application" of, clearly established Supreme Court precedent.[9] The Ninth Circuit reversed.[10] The court reasoned "[a] constitutionally permissible finding of guilt . . . depends on the expert evidence of the cause of death," and such evidence was lacking.[11] The Supreme Court, however, disagreed. Like the Ninth Circuit, the Supreme Court extensively discussed the contradicting expert testimony.[12] In reversing the Ninth Circuit and ultimately denying Smith relief,

---

fractured arms or ribs, or retinal bleeding." *Smith*, 437 F.3d at 890. None of those indicators were present in Smith's case. *Id.* at 889 ("This is not the typical shaken baby case . . . . [T]here is no evidence that Etzel was doing anything other than sleeping the night that he died. The medical evidence was not typical . . . .").

5 *See* Will Storr, '*We Believe You Harmed Your Child': The War Over Shaken Baby Convictions*, THE GUARDIAN (Dec. 8, 2017), https://www.theguardian.com/news/2017/dec/08/shaken-baby-syndrome-war-over-convictions [https://perma.cc/F8AK-X4S6].

6 *See* Smith v. Mitchell, No. CV 01-4484-ABC (PJW), 2004 WL 7340514, at *1 (C.D. Cal. Mar. 22, 2004).

7 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections 28 U.S.C.).

8 *See Smith*, 2004 WL 7340514, at *5, *7.

9 *Id.* at *7.

10 Smith v. Mitchell, 437 F.3d 884, 889–90 (9th Cir. 2006). The Ninth Circuit had concluded the state court's affirmance of the conviction was an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307 (1979), which established sufficiency of the evidence must be determined by examining "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis omitted).

11 *Smith*, 437 F.3d at 889. Notably, the Ninth Circuit approached its analysis "with a firm awareness of the very strict limits that [AEDPA] places on our collateral review of state criminal convictions." *Id.* at 888–89. However, where "[a]bsence of evidence cannot constitute proof beyond a reasonable doubt," the Ninth Circuit concluded the evidence was insufficient and thus, the state court's decision was unreasonable—"even with the additional layer of deference mandated by AEDPA." *Id.* at 890.

12 *See* Cavazos v. Smith, 565 U.S. 1, 2–6 (2011).

the Court repeatedly emphasized the deference required under AEDPA[13]—noting "judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold."[14]

Shirley Ree Smith's case demonstrates just some of the myriad problems underlying AEDPA and the uncertain judicial interpretation of the statute,[15] which dramatically altered the scope of federal habeas corpus.[16] Enacted in response to a domestic terrorism attack, the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, the capital prosecution of Timothy McVeigh, and the perceived need to create a more "effective" death penalty in federal courts, AEDPA was quickly ratified with little discussion or deliberation in Congress.[17] As a result, there is limited legislative history available; however, the general stated purpose of the alterations to the then-existing federal habeas corpus statutes was to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases."[18]

AEDPA represented the apotheosis of legal and political efforts to restrict federal habeas corpus that picked up speed after the Supreme Court's ruling in *Furman v. Georgia*, invalidating all death sentences schemes in the United States, engendered years of backlash.[19] Federal habeas corpus had

---

13 *Id.* at 7.

14 *Id.* at 2. Notably, as the dissent sharply pointed out, the Supreme Court's decision was a summary reversal, reached without full review, briefing, and argument. *Id.* at 16–17 (Ginsburg, J., dissenting). Although Smith never received relief from the federal courts, her sentence was later commuted by the Governor of California. Thompson, *supra* note 2.

15 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections 28 U.S.C.).

16 *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 806 (2009) (discussing AEDPA's dramatic structural changes to federal habeas proceedings reviewing state court convictions).

17 *See* Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 546 (2006) (noting that the habeas corpus provisions of AEDPA's "fast-moving vehicle" were not subjected to any "opportunit[y] for testing ideas," were unaccompanied by any explanatory reports, and that the floor debates were "scarcely rigorous").

18 H.R. REP. No. 104-518, at 111 (1996) (Conf. Rep.). *See* President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 720 (Apr. 24, 1996) [hereinafter President's Statement] ("I have long sought to streamline Federal appeals for convicted criminals sentenced to the death penalty.").

19 Furman v. Georgia, 408 U.S. 238, 239–40 (1972); *see* Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 46–55 (2007) (describing how the Supreme Court's ruling in *Furman* "stimulat[ed] political countermobilization and a resurgence of death penalty support").

long been a crucial instrument ensuring review of constitutional violations in death penalty cases. However, in the modern death penalty area, death penalty cases instead became vehicles for new judicial and statutory restrictions on habeas corpus. Thus, the Court, after finding valid certain death penalty schemes in a trio of 1976 rulings,[20] continued to limit federal habeas corpus remedies in death penalty cases in the face of efforts by counsel for death row inmates to involve the Court in substantively reviewing state death sentencing.[21]

That highly procedural and complex jurisprudence, largely focused on death penalty challenges,[22] was then incorporated, but not entirely displaced by AEDPA, which represented a high-water mark in new restrictive approaches towards review of death sentencing.[23] To be sure, when signing AEDPA into law, President Bill Clinton asserted his confidence that, while expediting death penalty cases, the bill would "preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary."[24] Perversely, AEDPA accomplished neither, as its enactment was followed by greater delays in all types of post-conviction cases, whether capital or not, and curtailment of independent federal review.[25] Further, the result was also accompanied by greatly reduced access to habeas corpus by capital petitioners.[26]

---

20 *See* Gregg v. Georgia, 428 U.S. 153, 153–56 (1976), *stay granted*, 428 U.S. 1301 (1976), *reh'g denied*, 429 U.S. 875 (1976).

21 *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 586–88 (1978) (finding that the state courts imposed undue limits on mitigation evidence, but not imposing any constitutional proportionality limits on death sentencing); McCleskey v. Kemp, 481 U.S. 279, 279 (1987) (declining to remedy statistical evidence of racial discrimination in death sentencing), *reh'g denied*, 482 U.S. 920 (1987).

22 *See* Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 315–320 (1998).

23 *See infra* Part I.

24 President's Statement, *supra* note 18, at 720.

25 *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 21–22 (2007) [hereinafter 2007 HABEAS STUDY], http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/JZH8-NZ6W] (describing increased habeas litigation delays post-AEDPA); Matthew Redle, *A View of the ABA Death Penalty Defense Representation Guidelines from the Prosecution's Table*, 47 HOFSTRA L. REV. 127, 128 (2018) (describing how time from sentence to execution had risen from six years in 1984 to about sixteen years in 2012–2013).

26 *See* David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 261, 261 (Charles S. Lanier, William J. Bowers & James R. Acker eds., 2009), https://scholarlycommons.law.hofstra.edu/faculty_scholarship/756 [https://perma.cc/6FCS-CHXN] (demonstrating in a study spanning the years 2000–2006 that capital petitioners' success rate on federal habeas fell dramatically).

Since its enactment, AEDPA has been widely criticized by academics,[27] legislators,[28] and members of the federal judiciary.[29] AEDPA erected a complex set of procedural barriers, preventing federal review on the merits of most claims brought.[30] Although one of the primary goals of AEDPA was to speed up the federal habeas process, particularly in death penalty cases, the opposite effect has been observed. A 2007 study of habeas litigation in federal district courts found that since AEDPA's passage, the average period from conviction to federal filing increased from 4.9 to 6.3 years[31] and the average petition disposition time increased from a median of 6 months to a median of 7.1 months, for an average of 11.5 months in federal court for each petition.[32] Further, while AEDPA was intended to streamline, but not preclude, federal habeas review, in practice it has dramatically limited ability of federal courts to review and correct federal constitutional violations, and chiefly in non-capital cases (despite the titular focus on death penalty cases).[33]

---

27 *E.g.*, Hoffmann & King, *supra* note 16; Yackle, *supra* note 17; Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 919–21 (2001); 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, 1–4 (1997).

28 *E.g.*, Marcia Coyle, *Congress Looks at More Limits on Habeas; Quiet Push Alarms Writ Supporters*, NAT'L L.J., July 25, 2005 (quoting Senator John Kyl as stating "[t]en years later, unfortunately, things have gotten worse, not better. The backlog of habeas claims has actually increased, and so has the workload of prosecutors.").

29 *E.g.*, Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 NOTRE DAME L. REV. 1809, 1827–28 (2020); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1220 (2015); Lynn Adelman, *Federal Habeas Review of State Court Convictions: Incoherent Law but an Essential Right*, 64 ME. L. REV. 379, 383–84 (2012).

30 *See* Brandon L. Garrett, *Aggregation in Criminal Law,* 95 CALIF. L. REV. 383, 445–46 (2007) (noting that most federal habeas claims are dismissed summarily without effectively sifting meritorious claims from baseless ones); Williams, *supra* note 27, at 923–26 (discussing AEDPA's changes to federal habeas corpus as hampering inmates' "ability to receive a meaningful substantive review of their claims"); Wood, *supra* note 29, at 1810 (stating that "many of the changes . . . have done nothing but create endless hurdles, loops, and traps for potential users").

31 2007 HABEAS STUDY, *supra* note 25, at 56.

32 *Id.* at 43, 56.

33 *See* Yackle, *supra* note 17, at 554–56; Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J.L. & SOC. CHANGE 1, 10 (2016); *see also* Brown v. Payton, 544 U.S. 133, 148–49 (2005) (Breyer, J., concurring) (noting that a constitutional violation had likely occurred but that the state court decision had not failed AEDPA's "deferential test" and commenting that this, among other

In this Article, we ask what it would look like to turn the clock back on AEDPA and accompanying efforts to overly proceduralize federal habeas corpus, largely in reaction to capital post-conviction litigation. AEDPA represents the halfway mark in the fifty years that have passed since the Supreme Court's ruling in *Furham v. Georgia.* We ask what it would take to exorcise the myth that over-proceduralizing habeas corpus is a solution to the challenges of administering the writ in federal court, and ensuring the sound litigation of post-conviction constitutional claims more generally. We present a series of proposals to revise the federal habeas corpus statutes in order to restore federal habeas corpus. We note that in the past, proposals to "reform" habeas corpus have largely focused on stripping rights and remedies, and preserving just a limited subset of cases, such as those asserting new evidence of innocence.[34] The goal had been to restrict the scope of the writ and limit access to remedies, with the starting place being that habeas corpus had gone "too far" to protect constitutional rights as against error in state judgments. Judges and scholars have assumed that limitations on the scope of the writ would deliver efficiency gains and focus federal judges on the more meritorious litigants or claims.[35]

With the benefit of hindsight, following more than twenty-five years of AEDPA's application to federal habeas review of state convictions, we part ways with the empirical assumptions of those proposals, and also with their accompanying substantive recommendations. The story of AEDPA's implementation shows how poorly those limitations operate in practice, how little they incentivize state systems to correct errors, and how they undermine development of sound constitutional law. Indeed, the death penalty specific provisions of the AEDPA illustrate those problems particularly

---

cases, was one "in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference").

34 *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (arguing that federal habeas corpus should be largely limited to cases in which evidence of innocence is asserted). Others have argued that more substantive categories of claims should be excluded from federal habeas corpus. *See* Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 947–48 (2000).

35 *See supra* note 34*; see also infra* Part III (discussing the implications of replacing or repealing AEDPA).

vividly, as they have never taken effect.[36] States have been almost entirely uninterested in trading further procedural post-conviction benefits in exchange for improving substantive justice. Further, experience has shown AEDPA has taken federal habeas corpus to another extreme: it is excessively difficult to obtain any remedy for even quite serious constitutional violations.

One helpful but also potentially misleading analogy is to the qualified immunity jurisprudence in the civil rights context. Complex rules make it nearly impossible to obtain a remedy for a violation of a person's constitutional rights.[37] Thus, habeas corpus raises an access to justice issue: can constitutional violations be meaningfully addressed in our federal courts? However, qualified immunity can be far more simply repealed, through legislation restoring the text of Section 1983; legislation to that effect has been proposed at the federal level and state-level legislation has been enacted.[38] Altering AEDPA raises special complications, however, given the pre-existing body of Supreme Court-made habeas doctrine that it operates alongside.

Given how pressing the problem has become, and the real interest in reforms to promote access to justice, this Article takes a different tack than prior habeas reform work: to restore habeas corpus to its pre-AEDPA and pre-Rehnquist court state, in which a federal court can review claims and reach their merits. The approach would preserve flexibility at the district court level and remove the many layers of procedural complexity that the Supreme Court and then Congress have

---

36 AEDPA included a set of capital opt-in procedures, through which states that provide adequate and effective indigent capital defense benefit from enhanced procedural restrictions and highly expedited habeas review. See 28 U.S.C. §§ 2261–2266. No state has successfully opted in, suggesting that states were not interested in the quid pro quo approach. *See* Betsy Dee Sanders Parker, *The Antiterrorism and Effective Death Penalty Act ("AEDPA"): Understanding the Failures of State Opt-In Mechanisms*, 92 IOWA L. REV. 1969, 1981 (2007).

37 Reinhardt, *supra* note 29, at 1220 ("[A]ny participant in our habeas regime would have to agree that it resembles a twisted labyrinth of deliberately crafted legal obstacles that make it as difficult for habeas petitioners to succeed in pursuing the Writ as it would be for a Supreme Court Justice to strike out Babe Ruth, Joe DiMaggio, and Mickey Mantle in succession—even with the Chief Justice calling balls and strikes.").

38 *See* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (as passed in the House of Representatives on March 3, 2021); *see, e.g.*, Enhance Law Enforcement Integrity Act, SB 20-217, 72nd Gen. Assemb., 2nd Reg. Sess. (Colo. 2020) https://leg.colorado.gov/bills/sb20-217 [https://perma.cc/86WB-E7N3] (removing the qualified immunity defense for peace officers that violate Colorado citizens' civil rights).

erected.[39] We believe that deep changes are needed, and in that, we agree with judges and scholars that have for some time proposed such changes in the writ.[40] As we describe, AEDPA was enacted as a culmination of more than two decades of complex Supreme Court law that had already limited access to federal habeas corpus. While AEDPA incorporated some of those procedural rulings, the concern would be that should AEDPA be repealed, even in part, those court-made restrictions could be interpreted to supplant AEDPA restrictions. Clear statutory language will be needed to ensure that the Court does not frustrate Congress, as it has in the past, by supplementing statutory text in order to limit constitutional remedies. We do not mean to suggest that the various proposals set out here are exhaustive. Our goal is to promote careful considerations of alternatives to the present-day set of federal habeas corpus statutes and accompanying judicial interpretation.

In Part I, below, we summarize the background concerning the enactment of AEDPA, the preexisting and companion restrictions adopted by the U.S. Supreme Court, and we review examples of noteworthy cases in which AEDPA played a central role. In Part II, we walk through key sections of AEDPA and outline proposals for replacing or repealing key language, including by discussing implications for the relevant U.S. Supreme Court doctrine. In Part III, we situate these proposals in broader policy and scholarly efforts to rethink federal habeas corpus and federal legislative efforts to improve constitutional litigation more broadly.

I
AEDPA AND FEDERAL HABEAS CORPUS

The U.S. Constitution protects the privilege of the writ of habeas corpus in the Suspension Clause, the only rights provision contained in the original Articles.[41] Since the enactment of the Habeas Corpus Act of 1867, as part of post-Civil War Reconstruction legislation, federal habeas corpus statutes have permitted a person convicted in state court to petition a federal court for relief if the person was convicted in

---

39 Early in the Supreme Court's effort to define new procedural restrictions regarding federal habeas corpus, Gary Peller advocated relaxing such barriers. *See* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 690–91 (1982).

40 *See, e.g.*, Larry W. Yackle, *The Figure in the Carpet*, 79 TEX. L. REV. 1731, 1756 (2000) (calling federal habeas corpus an "intellectual disaster area").

41 U.S. CONST. art. I, § 9, cl. 2.

violation of the Constitution and laws of the United States.[42] Prior to the enactment of AEDPA in 1996, a federal judge conducted, if the claim was procedurally proper, a *de novo* review of the constitutional question presented.[43]

However, during the modern era of U.S. Supreme Court death penalty law, beginning with *Furman v. Georgia*, the Supreme Court not only fundamentally changed how the death penalty was administered in states, but also revamped all of federal habeas corpus, sharply limiting a range of procedural rules to restrict access to the writ. The federal courts have long viewed death as different. As Justice Brennan explained in *Furman*, "The unusual severity of death is manifested most clearly in its finality and enormity."[44] Thus, as Justice Souter wrote in *Kyles v. Whitley*, "[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."[45]

Indeed, large percentages of death penalty cases were reversed in the years after the Court revived the American death penalty in its 1976 rulings, resulting in a set of Supreme Court responses that each narrowed the writ, but did so largely through procedural means that set the stage for AEDPA. As James Liebman, Jeffrey Fagan, Valerie West, and Jonathan Lloyd, have shown, the habeas reversal rate was extremely high in the years since the Court's 1976 rulings.[46] In response to this perceived "over-reversal problem," the Court developed a series of procedural restrictions regarding federal habeas corpus review.[47] Those rules may have been animated by concern with death sentencing, but they applied across the board; as Joseph Hoffman has observed, "[T]he Court began judicially restricting access to federal habeas, even though, as a practical matter, habeas review created few problems for the states in non-capital cases."[48]

---

42 28 U.S.C. § 2241; Habeas Corpus Act of 1867, 14 Stat. 385.

43 *See, e.g.*, Brown v. Allen, 344 U.S. 443, 458 (1953) (noting that state decisions receive the same weight as the "court of last resort of another jurisdiction on federal constitutional issues").

44 Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring).

45 Kyles v. Whitley, 514 U.S. 419, 422 (1995) (citing Burger v. Kemp, 483 U.S. 776, 785 (1987)).

46 *See* James S. Liebman, Jeffrey Fagan, Valerie West, & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1856 (2000) (describing a 40% reversal rate in federal capital habeas litigation).

47 Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771, 1783 (2000).

48 *Id.* at 1784.

AEDPA represented the culmination of that perverse effort, targeting capital post-conviction litigation, which suffered a steep decline in success rates,[49] and as a result, also overly proceduralizing and restricting federal habeas review of state convictions. AEDPA resulted in more than just an extremely complex set of procedural restrictions regarding federal habeas litigation. Even if a judge does reach the merits of a constitutional claim, AEDPA also imposes a *substantive* limitation on the ability of a federal court to grant the writ on the merits.[50] The first section below presents the statutory background regarding the adoption of AEDPA.[51] The second section summarizes pre-AEDPA U.S. Supreme Court doctrine, which AEDPA supplemented but largely did not displace. The third section describes the impact of AEDPA's rules on constitutional rulings.

A. Statutory Background

AEDPA was preceded by decades of proposals and a study commission that offered recommendations concerning how to revise and reform federal habeas corpus, largely focused on the post-conviction litigation of capital cases in federal court.[52] One influential proposal, advanced by Professor Paul M. Bator, would have restricted habeas corpus review to cases in which there had already been a "full and fair" review in the state courts.[53] That federalism-oriented approach influenced much of the Supreme Court caselaw that restricted habeas remedies in the decades that followed. Proposals to legislate such a provision included a 1991 draft statute that would restrict access to relief, where a state decision was not full and fair if it

---

49 *See* DOW & FREEDMAN, *supra* note 26, at 267 (describing how pre-AEDPA federal habeas success rates resulted in reversals in over half of capital petitions, and post-AEDPA, by 2009, that rate declined to approximately twelve percent and appeared to be declining).

50 28 U.S.C. § 2254(b)(2).

51 The legislative history of AEDPA has been detailed in Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 459–68 (2007).

52 JUDICIAL CONFERENCE OF THE U.S., AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL 11 (1989), *reprinted in Habeas Corpus Legislation: Hearings on H.R. 4737, H.R. 1090, H.R. 1953, and H.R. 32584 Before the H. Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 46 (1990). For an overview of that legislative history and preceding reform proposals, see Kovarsky, *supra* note 51, at 444 ("Bearing the scars of a ferocious half-century battle over habeas reform, the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) has become less a legal text than a force of nature.").

53 *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456 (1963).

"was contrary to or involved an arbitrary or unreasonable interpretation or application of clearly established Federal law" or if it "involved an arbitrary or unreasonable determination of the facts in light of the evidence presented."[54]

On April 19, 1995, United States Army Veteran and white supremacist militia sympathizer Timothy McVeigh detonated a truck bomb at the Murrah Federal Building in Oklahoma City, killing 168 people in the deadliest act of domestic terrorism in U.S. history. Antiterrorist legislation quickly introduced in response, and, accounting for AEDPA's name, was then amended to include not only new capital terrorism-related offenses, but also habeas corpus restrictions, including ones that did not just apply in death penalty cases.[55]

While the House introduced a more restrictive "full and fair" proposal tracking the earlier 1991 approach, the two leading sponsors and drafters in the Senate, Orrin Hatch and Arlen Specter, introduced compromise legislation that was ultimately successful.[56] There is not a substantial record of the intent behind AEDPA's revisions, but only a joint Conference Committee report, which explains:

> This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases. It sets a one year limitation on an application for a habeas writ and revises the procedures for consideration of a writ in federal court. It provides for the exhaustion of state remedies and requires deference to the determinations of state courts that are neither "contrary to," nor an "unreasonable application of," clearly established federal law.[57]

The language reflected in the last sentence of that excerpt from the Conference Committee Report incorporates the language of the 1991 draft statute into the core provision of AEDPA, which fundamentally altered the role of federal courts by asking a judge to review a state decision for its "reasonableness," based

---

54 137 CONG. REC. H. 26757 (1991)

55 *See* John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 270, 270 n.62 (2006); *see also* 142 CONG. REC. H. 7968–69 (1996) (describing the Oklahoma City bombing as the legislative impetus for AEDPA).

56 *See* Kovarsky, *supra* note 51, at 460–65 (describing origins of "full and fair" model in the work of law professor Paul M. Bator and the 1964 Parker Committee proposal, later incorporated but not enacted as part of the 1968 Omnibus Crime Control and Safe Streets Act, and setting out text of legislative events that influenced adoption of language that appears in AEDPA). For another excellent overview, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 381 (1996).

57 H.R. REP. NO. 104–518, at 111 (1996) (Conf. Rep.).

on whether it involved a decision that was "contrary to" or an "unreasonable application of" Supreme Court law, before granting relief.[58] This standard raises a host of questions, because what it means for a state court ruling to be "unreasonable" is not at all clear.[59] As Justice Souter famously remarked, "[I]n a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting."[60]

Unfortunately, this brief extant legislative history sheds little light on what the key Section 2254(d) provision or others mean. Senator Hatch further described the key provision of AEDPA, Section 2254(d), as follows: "[T]his standard essentially gives the Federal court the authority to review, de novo, whether the State court decided the claim in contravention of Federal law."[61] In the same statement, Senator Hatch added:

> What does this mean? It means that if the State court reasonably applied Federal law, its decision must be upheld. Why is this a problematic standard? After all, Federal habeas review exists to correct fundamental defects in the law. After the State court has reasonably applied Federal law, it is hard to say that a fundamental defect exists.[62]

Senator Specter noted that "there still is latitude for the Federal judge to disagree with the determination made by the State court judge."[63] He added: "It is my sense, having litigated these cases . . . that where there is a miscarriage of justice, the Federal court can come to a different decision than was made in the State court proceedings."[64] Finally, recall that when signing the legislation, President Bill Clinton noted, "I have signed this bill because I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims . . . ."[65]

Summarizing the legislative history well, Bryan Stevenson has stated that AEDPA "[w]as drafted, enacted, and signed in an atmosphere of anger and fear. The legislation, which

---

58 28 U.S.C. § 2254(d)(1).

59 *See infra* Part II.A; *see also* Kovarsky, *supra* note 51, at 489–92 (noting that, despite Supreme Court interpretations of that key AEDPA language, "when confronted with that provision's ambiguous language, intermediate federal appellate courts will often stake out positions based on varied readings of congressional intent.").

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

61 142 CONG. REC. S. 7772 (1996).

62 *Id.*

63 141 CONG. REC. S. 15063 (1995).

64 *Id.*

65 President's Statement, *supra* note 18, at 720.

includes substantial cutbacks in the federal habeas corpus remedy, was Congress's response to the tragedy of the Oklahoma City bombing."[66]

B. Pre-AEDPA Caselaw Regulating Federal Habeas Corpus

When AEDPA was adopted in 1996, the U.S. Supreme Court had already substantially narrowed the scope of federal habeas corpus review based on a series of largely procedural doctrines, which, as noted, were animated by concerns regarding delays in death penalty cases. Justice Blackmun lodged one of the most famous judicial complaints about the then-fairly fully formed doctrine in 1991: "I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."[67]

Those doctrines are: (1) the complete exhaustion rule of *Rose v. Lundy*, which requires that federal prisoners exhaust all available state remedies for all claims contained in a petition before seeking federal habeas relief; (2) the complex doctrine of "procedural default," generally barring federal habeas review of claims that state courts rejected on adequate and independent (for example, "procedural") grounds; (3) the rule largely barring second or "successive petitions," which can include both new and previously-presented claims; (4) the doctrine of miscarriages of justice, which can permit procedural barriers to be excused; (5) non-retroactivity, under *Teague v. Lane* and its progeny, which bars reliance on new rules of constitutional law during any post-conviction proceeding, with very narrow exceptions; and (6) the harmless error doctrine, which may excuse a constitutional error as not sufficient in its contribution to the conviction.[68]

The first such procedural doctrine, the exhaustion rule, requires that a federal prisoner present a claim in state court prior to seeking federal habeas relief. Over time, the Supreme Court interpreted this rule in a manner that made it far more stringent. The exhaustion doctrine was first recognized by the U.S. Supreme Court in *Ex Parte Royall* in 1886.[69] Congress then codified the doctrine in a statute in 1948, shortly after the

---

66 Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 701 (2002).

67 Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

68 For an overview of each of these doctrines, see BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION 169–416 (2013).

69 *Ex parte* Royall, 117 U.S. 241 (1886).

Supreme Court had updated the judicially-created exhaustion rule.[70] That rule largely required that persons who had available state avenues pursue those state remedies before proceeding in federal court. In *Rose v. Lundy*, the Court added an additional requirement of "total exhaustion," requiring that every claim in a petition be exhausted (or claims that are unexhausted be dismissed, or the petition be stayed pending exhaustion).[71] AEDPA then altered that rule slightly by permitting petitions that are unexhausted to be dismissed, if lacking in merit.[72]

Second, the doctrine of procedural default was, at its high-water mark, a fairly discretionary rule that applied if a claim was not exhausted in state court and some state law rule prevents that claim from being exhausted.[73] Over time, the Supreme Court interpreted it as a fairly inflexible "adequate and independent state ground" barring review of the federal constitutional claim in federal court.[74] The procedural default doctrine is purely court-made; to this day, it has not been contained in any federal habeas statute.[75] The requirements are complex and the Supreme Court has crafted several tests designed to identify whether a state procedural rule is applicable and whether the state courts in fact relied upon it. Earlier rulings permitted a federal court to examine the merits of a procedurally defaulted claim, so long as the petitioner did not deliberately bypass the federal courts.[76] However, beginning with its 1977 ruling in *Wainwright v. Sykes*, the Court substantially altered and tightened the doctrine, creating a new "cause and prejudice" test making it very difficult to excuse a procedural default for any reason.[77] Further, the

---

70 *See* 28 U.S.C. § 2254.

71 Rose v. Lundy, 455 U.S. 509, 510 (1982) ("Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute, we hold that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.").

72 *See* 28 U.S.C. § 2254(b).

73 *See* Fay v. Noia, 372 U.S. 391, 398–99 (1963). Previously, in *Brown v. Allen*, the Court found a state procedural default to be a rigid barrier, however, to relief. 344 U.S. 443, 483–85.

74 *See* GARRETT & KOVARSKY, *supra* note 68, at 191.

75 *See id.*; *see also* Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 312 (2003) (noting that AEDPA does not focus significant attention on the doctrine of procedural default).

76 *Fay*, 372 U.S. at 439.

77 Wainwright v. Sykes, 433 U.S. 72, 84 (1977); *see also* Coleman v. Thompson, 501 U.S. 722, 744–45 (1991) (noting that *Fay v. Noia*, 372 U.S. 391,

Court created two exceptions to this demanding doctrine, including first, under *Schlup v. Delo*, that if there "more likely than not" would be a miscarriage of justice, based on newly discovered evidence of innocence, then the federal court should reach the underlying constitutional claim.[78] Second, the Court, in *Martinez v. Ryan*, also recognized an exception for claims of ineffective assistance of counsel that were waived during the first-available opportunity for review in state courts.[79] Thus, both the procedural default doctrine and its exceptions grew in stringency and complexity over time, as interpreted by the Supreme Court, and not as set out in any statute.

Third, a related doctrine of abuse of the writ, concerning second or successively filed habeas petitions, also originated from Supreme Court-made doctrines, but in contrast, AEDPA cemented new standards that imposed still more stringent standards on federal courts. That doctrine operated to similarly bar bringing a claim that was previously included in a federal habeas petition, absent a similarly demanding showing of "cause" and "prejudice."[80] The Supreme Court has indicated that a federal judge should typically address these procedural questions regarding exhaustion and procedural default before addressing the merits: "[the] procedural-bar issue should

---

438–39 (1963) created a presumption of federal habeas review for procedurally defaulted state court claims); YLST v. Nunnemaker, 501 U.S. 797, 798 (1991) (ruling that a federal court may use "the last reasoned opinion on the claim" to identify the state court's ground for denying relief). Regarding the definition of "cause," see, for example, Murray v. Carrier, 477 U.S. 478, 488 (1986) (describing cause as consisting of impediments and factors external to the defense); *see also* Edwards v. Carpenter, 529 U.S. 446, 451 (2000) ("[W]e have not identified with precision exactly what constitutes 'cause' to excuse a procedural default . . . .").

78 Schlup v. Delo, 513 U.S. 298, 321 (1995) (holding that to excuse a procedural default, that a litigant must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent") (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)); *see also* House v. Bell, 547 U.S. 518, 538 (2006) ("[T]he *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence . . . [a] reasonable juror would have reasonable doubt.").

79 Martinez v. Ryan, 566 U.S. 1, 17 (2012) ("Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.").

80 McCleskey v. Zant, 499 U.S. 467, 493 (1991); *see also* Sanders v. United States, 373 U.S. 1, 18 (1963) ("Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.").

ordinarily be considered first."[81] Those same basic rules were adopted to additionally limit the availability of evidentiary hearings in federal court.

Finally, the non-retroactivity bar on federal habeas corpus filings is more recent, dating back to the Supreme Court's decision in *Teague v. Lane*,[82] and is also Court-made, not reflected in any federal statute, and unaltered by AEDPA.[83] The Court has held that a district judge must inquire into whether the petitioner is seeking to take advantage of a "new rule" of constitutional law and whether doing so is permitted.[84] The petitioner may not, under *Teague* and its progeny, take advantage of any such "new rule" after the direct appeal is complete, unless it is a rule of substantive constitutional law made retroactive by the Court or it satisfies a narrow "watershed" exception for truly groundbreaking changes in constitutional law.[85] Notably, the Supreme Court recently found *Teague*'s watershed exception "moribund," with "no vitality," and emphasized that "[n]ew rules of criminal procedure ordinarily do not apply retroactively on federal collateral review."[86] The result has the tendences to freeze constitutional criminal procedure from the lower federal courts, which cannot apply or interpret constitutional law in a manner that would constitute a "new rule." Any such rules could only be developed by the Supreme Court on direct review or review of state post-conviction rulings by state courts.

Thus, to summarize, the Supreme Court had already developed a complex body of law regulating federal habeas corpus proceedings before AEDPA was enacted. These rules were demanding and served to prioritize, procedurally, litigation in state courts, and substantively, development of constitutional criminal procedure in state courts rather than in the lower federal courts.

---

81 Lambrix v. Singletary, 520 U.S. 518, 524 (1997).

82 Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion).

83 For an overview, see GARRETT & KOVARSKY, *supra* note 68, at 303–18; *see also* Kovarsky, *supra* note 51, at 449 n.24 ("As a technical matter, *Teague* still exists, and it applies in retroactivity contexts that the stricter language of § 2254(d) does not.").

84 *Teague*, 489 U.S. at 304–05.

85 *See* Graham v. Collins, 506 U.S. 461, 477–78 (1993) (describing exceptions).

86 *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1556, 1559–60 (2021) (stating "candid[ly]" that "no new rules of criminal procedure can satisfy the watershed exception").

C. The Impact of AEDPA

As described, federal habeas corpus rules consist of an uneven mixture, with a range of doctrines that the U.S. Supreme Court created as a supplement to pre-existing statutes, doctrines that the Court created whole-cloth, and still others that AEDPA modified (whether included in prior statutory text or Court-made). As a result, several of these pre-existing habeas corpus doctrines were subsumed by AEDPA, but some were not.

To summarize: the total exhaustion rule was codified by AEDPA, with some modifications to permit dismissal of non-exhausted claims. The procedural default doctrine was not addressed by AEDPA. AEDPA adopted a still more restrictive set of rules regarding second or successive petitions. AEDPA reconstituted the abuse-of-the-writ defense and the successive petition bar as jurisdictional preconditions to relief. Specifically, Section 2244(b)(2) states that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application *shall be dismissed* . . . ."[87] Then, Section 2244(b)(2) creates two exceptions. One exception is for new law and one is for newly-discovered facts. Regarding new facts, AEDPA adopted a more restrictive miscarriage of justice rule for such situations. Regarding new law, AEDPA adopted a more stringent rule as well. More generally, AEDPA largely incorporated the Supreme Court's prior non-retroactivity jurisprudence into Section 2254(d).[88]

AEDPA, however, also introduced entirely new restrictions on habeas corpus, three of which are particularly important. First, AEDPA introduced, for the first time, a one-year statute of limitations applicable to federal habeas claims of state prisoners.[89] Second, AEDPA introduced new restrictions in Section 2254(e) on reviewing state court fact-findings.[90] Third, AEDPA limited relitigation opportunities for cases that had been adjudicated on the merits in state court.[91]

---

87 28 U.S.C. § 2244(b)(2) (emphasis added).

88 However, in *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam), the Court held that Section 2254(d)(1) did not displace *Teague*, and, for example, if a claim was not "adjudicated on the merits" and Section 2254 does not apply, the *Teague* doctrine still does apply.

89 *See* 28 U.S.C. § 2244(d).

90 *See* 28 U.S.C. § 2254(e).

91 *See* 28 U.S.C. § 2254(d).

1. *AEDPA Statute of Limitations*

A one-year statute of limitations may sound like a simple rule to adopt and administer, but in practice, in the context of federal post-conviction review, it is an extremely complex and counter-productive rule. The intent, to speed up review in federal court, may have been quite straightforward. The Supreme Court has explained that the statute of limitations provision "quite plainly serves the well-recognized interest in the finality of state court judgments."[92] However, this provision, "Section 2244(d)[,] raised, both on its face and in combination with other procedural rules, very difficult issues that Congress almost certainly failed to anticipate."[93] Those include questions regarding when and whether the one-year statute of limitations begins to run,[94] when it is tolled during the pendency of a "properly filed" state post-conviction proceeding, and when and whether equitable tolling applies.[95] Interpreting the provision, applying it in a given case, and processing the results of its application, can all cause delays, arbitrary outcomes in cases, and poor incentives for litigation.

The strictness of AEDPA's statute of limitations provision is illustrated by the case of Kalvin Michael Smith, who, in 1995, was convicted of assaulting Jill Marker at the Silk Plant Forest store in Winston-Salem, North Carolina and was sentenced to twenty-nine years in prison.[96] No physical evidence linked Smith to the scene, and Smith has long maintained his innocence.[97] Nearly a decade later, the *Winston-Salem Journal* published the results of a six-month journalistic probe, criticizing the investigation and the prosecutors in the case. The *Journal* showed that the police failed to investigate another

---

92 Duncan v. Walker, 533 U.S. 167, 179 (2001).

93 GARRETT & KOVARSKY, *supra* note 68, at 266.

94 *See* 28 U.S.C. § 2244(d)(1) (setting out four alternative "trigger" dates for the one-year limitations period to begin).

95 *Id. See* 28 U.S.C. § 2244(d)(2) (tolling during pending and properly filed state post-conviction proceedings).

96 *Silk Plant Forest Case: Kalvin Smith Released From Prison*, WFMY NEWS 2 (Nov. 10, 2016), https://www.wfmynews2.com/article/news/local/silk-plant-forest-case-kalvin-smith-released-from-prison/83-350479327 [https://perma.cc/S3ZB-8G8N].

97 The initial police investigation focused upon Smith after two of his former girlfriends told police that Smith had admitted to assaulting Marker, statements which they have since recanted. *Id.*; FINDINGS AND RECOMMENDATIONS OF THE SILK PLANT FOREST CITIZENS REVIEW COMMITTEE 13, 40 (2009), https://www.cityofws.org/DocumentCenter/View/7649/Final-Report-of-the-Silk-Plant-Forest-Citizens-Review-Committee-redacted-including-Attachments-One-and-Two-PDF [https://perma.cc/5XTC-XGDL] [hereinafter SILK PLANT FOREST CITIZENS REVIEW COMMITTEE].

suspect, failed to corroborate significant information from witnesses implicating Smith (most of whom have since recanted), and failed to document evidence they believed favorable to Smith.[98] Following the release of the *Journal* series, the Winston-Salem city council created the Silk Plant Forest Citizens Review Committee to review the police investigation.[99] The Committee ultimately determined they "d[id] not have confidence in the investigation, the information in question, or the result of the investigation."[100]

The investigation and proceedings were plagued by numerous allegations of police and prosecutorial misconduct. For instance, in 2012, Smith's legal team became aware of an allegedly false affidavit, never introduced in court, that the prosecution purportedly used to undermine Smith's post-conviction proceedings.[101] The affidavit, completed in 2008 by Arnita Miles, one of the first cops at the scene of the crime, claimed that Marker told Miles that her assailant was a Black man. This conflicted with Miles' original report from the scene, which stated that Marker was incoherent and could not identify her attacker.[102] In addition, several pieces of evidence—including surveillance tape, photographic lineups, and the results of pretrial polygraph exams—were not disclosed to the defense team, which was unaware of the withheld evidence until 2007.[103]

Despite the evidence supporting Smith's claim of innocence, the state court rejected Smith's post-conviction claims. When Smith attempted to seek relief in federal court, AEDPA barred his petition. The federal court held that Smith's claims were untimely under AEDPA's strict statute of limitations, deferring to the state court's findings that Smith could have discovered the suppressed evidence earlier if he had

---

98 Michael Hewlett, *Kalvin Michael Smith Ordered Freed After 20 Years in Prison; Supporters Will Still Push for Exoneration*, WINSTON-SALEM J. (Nov. 10, 2016), https://journalnow.com/news/crime/kalvin-michael-smith-ordered-freed-after-years-in-prison-supporters/article_ef1a32cd-8d3a-5a76-86e4-50f2cbc75c4f.html [https://perma.cc/XDW6-9J8J].

99 SILK PLANT FOREST CITIZENS REVIEW COMMITTEE, *supra* note 97, at 1–2.

100 *Id.* at 5.

101 Michael Hewlett, *Disputed Affidavit in Silk Plant Forest Case at Center of Kalvin Michael Smith's Appeal*, WINSTON-SALEM J. (Apr. 16, 2015), https://journalnow.com/news/local/disputed-affidavit-in-silk-plant-forest-case-at-center-of-kalvin-michael-smith-s-appeal/article_2b492b16-e452-11e4-a39e-db725ffd50cd.html [https://perma.cc/RWJ2-9Z35].

102 *Id.*

103 *See* Smith v. Pinion, No. 1:10-CV-29, 2013 WL 3897766, at *2 (M.D.N.C. July 29, 2013).

exercised greater diligence.[104] Thus, the failings of counsel resulted in dismissal of the petition under the statute of limitations.

Still more complex caselaw has involved a series of other questions, including the related question whether equitable tolling is possible based on such evidence of innocence.[105] Quite complex questions have revolved around how to toll the statute of limitations, including whether a state petition was properly filed and met all relevant conditions for filing,[106] and whether different types of state procedural vehicles count for the purposes of the AEDPA one-year clock.[107] These procedural complexities have occupied an enormous amount of federal judicial energy, have encouraged litigants to file early protective filings in federal court when uncertain about the meaning of these complex rules, and have not produced a clear body of law for litigants, as the distinctions are often very case-specific or depend on quirks of state appellate and post-conviction practice.[108]

2. *AEDPA and State Court Fact Finding*

A second important restriction AEDPA introduced was Section 2254(e), as well as a related provision in Section 2254(d)(2), which limited the ability of federal courts to review state court fact findings, both creating a confusing standard of review and establishing an extremely high burden of proof for a petitioner to obtain an evidentiary hearing.[109] First, AEDPA bars relief on a factual challenge unless the state proceedings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented . . ."[110] Second, Section 2254(e)(1) instructs that a state determination of fact is presumed correct and further, that a petitioner may defeat such a presumption only by clear and convincing evidence.[111]

---

104 *Id.* at *1.

105 McQuiggin v. Perkins, 569 U.S. 383, 393 (2013) (permitting petitioners who can satisfy a "miscarriage of justice" showing to overcome AEDPA statute of limitations).

106 *See* Artuz v. Bennett, 531 U.S. 4, 8–10 (2000); Pace v. DiGuglielmo, 544 U.S. 408, 410 (2005).

107 *See* Carey v. Saffold, 536 U.S. 214, 216–17 (2002).

108 *See* GARRETT & KOVARSKY, *supra* note 68, at 296–97.

109 *See* 28 U.S.C. § 2254(e).

110 *See* 28 U.S.C. § 2254(d)(2).

111 *See* 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

Section 2254(e)(2) sets forth standards for obtaining an evidentiary hearing in order to introduce new facts.[112]

Kalvin Michael Smith's case is, again, illustrative in demonstrating the impact of this restriction. In addition to determining that Smith's claims were time barred under AEDPA's one-year statute of limitations, the district court also held that Smith was not able to overcome the statute of limitations with a claim of actual innocence, as he did not present "clear and convincing evidence" that would allow the federal court "to second-guess the state court's findings" under Section 2254(e).[113] The state court found that the victim's failure to identify Smith in a photo lineup was due to "flaws in the lineup" rather than being evidence of Smith's innocence.[114] Smith attempted to refute these findings, given the existence of reports showing the severe shortcomings of the initial investigation as well as the prosecution's use of a false affidavit.[115] The district court, however, did not allow the reports to come into evidence.[116] The district court instead found that even if it *had* allowed the additional evidence in, the evidence would at most discredit the credibility of the two witnesses who implicated Smith and did not testify as eyewitnesses.[117] Further, the court disregarded the Committee's report because it was not explicitly directed at exonerating Smith.[118] In sum, none of the new evidence Smith proffered—although it seriously discredited the entirety of the prosecution against him—was sufficient to overcome AEDPA's presumption of deference to the state court's findings of fact under Section 2254(e).

3. *AEDPA's Limitation on Merits Relief*

The third and perhaps most controversial and impactful merits-related relitigation restriction introduced by AEDPA was a limitation on relief, contained in Section 2254(d).[119] The basic rule is as follows: if a claim was adjudicated on the merits

---

112 *See* 28 U.S.C. § 2254(e)(2).

113 Smith v. Pinion, No. 1:10-CV-29, 2013 WL 3897766, at *9–10 (M.D.N.C. July 29, 2013).

114 *Id.* at *8.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at *9.

119 *See* Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 697 (2003); *see also* Lee Kovarsky, *The Habeas Optimist*, 81 U. CHI. L. REV. DIALOGUE 101, 106 (2014) (noting that "Courts, lawyers, and academics

in state court, the petitioner must show that the state merits decision was either legally "unreasonable" under Section 2254(d)(1), or factually "unreasonable" under (d)(2), based on U.S. Supreme Court law that was clearly established at the time when the state court judgment was issued.[120] Additionally, in *Cullen v. Pinholster*, the Court has interpreted these provisions to require that the analysis be confined to the state court record that was developed at the time that the state court ruling occurred.[121] As a Ninth Circuit judge commented on a case in which relief was barred under Section 2254(d), the Supreme Court's interpretation of AEDPA has essentially "immunized" state court decisions, potentially "allow[ing] state courts almost unlimited latitude to deny relief" where a general rule is clearly established, but where the "'precise contours' of the rule are not clear to all."[122]

On their own, any of these restrictions creates hurdles to accessing the writ. In combination, AEDPA's restrictions create a procedural labyrinth that blocks even potentially meritorious claims. The interplay between these provisions is well-illustrated by the tragic case of Marvin Lee Wilson.

Wilson, who had an IQ of 61, was convicted in Texas in 1998 of murdering a police informant and sentenced to death.[123] The only evidence that Wilson committed the crime was the testimony of his co-defendant's wife, who claimed that Wilson confessed to her.[124] Wilson's first federal habeas petition was denied in 2002.[125] In the same year, the Supreme Court decided *Atkins v. Virginia*,[126] which categorically exempted offenders with intellectual disability ("ID") from capital punishment. In 2003—after *Atkins* was decided—Wilson filed a second petition in state court, alleging that he had ID and thus his capital sentence was unconstitutional.[127]

---

almost always refer to § 2254(d) as a (substantive) 'standard of review,' but § 2254(d) behaves much more like a (procedural) preclusion rule").

120 *See* 28 U.S.C. § 2254(d).

121 Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011).

122 Reinhardt, *supra* note 29, at 1234–35.

123 Lee Kovarsky, *Swimming Upstream: The Execution of Marvin Wilson*, JUST. WATCH (Aug. 10, 2012), http://afjjusticewatch.blogspot.com/2012/08/swimming-upstream-execution-of-marvin.html [https://perma.cc/VXJ4-PJYE].

124 *Id.*

125 Wilson v. Thaler, 450 F. App'x 369, 372 (5th Cir. 2011).

126 Atkins v. Virginia, 536 U.S. 304, 304 (2002).

127 Wilson v. Quarterman, No. 6:06cv140, 2009 WL 900807, at *3 (E.D. Tex. Mar. 31, 2009).

In *Atkins*, the Supreme Court allowed individual states the ability to define ID as they see fit.[128] Texas, where Wilson was convicted, uses a judicially created test called the *Briseño* factors to determine if an offender has ID.[129] The *Briseño* factors—which involve questions about whether defendants can lie in their own self-interest and whether they are coherent and rational[130]—have not been scientifically endorsed.[131] These factors frequently result in only protecting the most severely-incapacitated defendants.[132]

The Texas state court adjudicating Wilson's ID claim conducted an evidentiary hearing.[133] Five I.Q. test scores were presented, ranging from ones administered when Wilson was thirteen to ones administered when he was forty-six years old.[134] The highest scores Wilson received were 75 and 79—the lowest was 61.[135] A score of 70 or below typically supports a finding of ID.[136]

Wilson presented a strong case that he had ID. Wilson's expert, who had diagnosed with him with ID after administering several tests, reviewing his prior test scores and school records, and interviewing him for several hours, testified that the test reflecting a score of 61 was "the most valid indicator of adult intelligence in current usage."[137] The expert also testified that Wilson suffered adaptive deficits in many areas and that his ID was evident before he turned 18.[138]

The state presented no clinical evidence to refute Wilson's findings.[139] Instead, the state court used the *Briseño* factors themselves to determine that Wilson did not have ID.[140] Although acknowledging that Wilson "did poorly in school, . . . seldom went to class, and . . . was considered 'slow' by most," it found that all *Briseño* factors pointed against a finding of ID.[141] In denying Wilson's petition, the court emphasized that Wilson had held several jobs, was married,

---

128 *Atkins*, 536 U.S. at 317.
129 Kovarsky, *supra* note 123.
130 *Wilson*, 450 F. App'x at 374.
131 Kovarsky, *supra* note 123.
132 *Id.*
133 *Wilson*, 450 F. App'x at 374–75.
134 *Id.* at 375.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 Wilson v. Quarterman, No. 6:06cv140, 2009 WL 900807, at *7 (E.D. Tex. Mar. 31, 2009).
140 *Id.*
141 *Wilson*, 450 F. App'x at 376–77.

was "coherent, rational, and on point," and was "able to formulate a plan and carry it out."[142]

Wilson again sought federal habeas relief, arguing that the state court's determination was based on an unreasonable determination of facts under Section 2254(d)(2).[143] Wilson argued that the state court's broad application of the *Briseño* factors alone, rather than adequately testing the clinical evidence of his ID, was unreasonable in light of *Atkins*.[144] The federal court, however, concluded the state court's "implicit finding[s]" focused on general clinical factors as the *Briseño* factors.[145] Accordingly, the federal court found that the state court's factual findings were not unreasonable under Section 2254(d).[146] The Fifth Circuit affirmed the district court's decision, emphasizing that "[t]he state court's factual findings are statutorily entitled to the presumption of correctness and deferential review" under Section 2254(e)(1).[147]

In sum, the state court's factual findings—which were implied from a review of legal factors rather than based in evidence—were twice insulated from federal judicial review: first, by the deference required under Section 2254(d) and second, by the deference required to a state court's factual findings (such as they were) under Section 2254(e). AEDPA had, in effect, immunized the state court's decision. After his final petition for certiorari was denied, Wilson was executed by the state of Texas on August 7, 2012, becoming the person with the lowest I.Q. ever executed in Texas.[148]

We conclude by emphasizing that the cases we have highlighted as examples—those of Shirley Ree Smith, Kalvin Michael Smith, and Marvin Lee Wilson—are not at all unique. The barriers to federal habeas corpus introduced by AEDPA—in combination with the ever-more restrictive ways the Supreme Court has interpreted such barriers—have left countless petitioners without an opportunity to bring a federal petition, let alone the ability to access a remedy, even for

---

142 *Id.* at 376.

143 *Wilson*, 2009 WL 900807, at *7.

144 *Id.*

145 *Id.* at *9.

146 *Id.*

147 *Wilson*, 450 F. App'x at 378.

148 *Texas Set to Execute Marvin Wilson Today Despite Ban on Executing People with Intellectual Disability*, EQUAL JUST. INITIATIVE (Aug. 7, 2012), https://eji.org/news/texas-to-execute-marvin-wilson-despite-intellectual-disability [https://perma.cc/E7N7-HF4M].

seemingly clear constitutional violations.[149] However, the preceding discussion also highlights that modifying AEDPA to acknowledge the central realities of habeas litigation—that indigent and pro-se litigants cannot easily navigate complex procedural rules, that powerful evidence supporting constitutional claims often surfaces post-conviction, that evidence of innocence may surface unpredictably, that constitutional interpretation can change over time, and that state courts have poor incentives to carefully develop a factual record or lay out a reasoned interpretation of federal constitutional rights—all create real challenges to the sound operation of any regime designed to "streamline" habeas corpus.

Post-conviction litigation is messy, due to the aftershocks of the constitutional violations in question, at trial and sometimes continuing during an appeal and post-conviction, where counsel remains ineffective and evidence remains undisclosed by the State. As Lee Kovarsky has put it, "habeas jurisprudence soft pedals some of the most obvious pathologies of state law enforcement and criminal-justice administration, favoring instead a wishful parity principle that state and federal governments tend to administer federal law with equal zeal."[150] Grave injustices can result from efforts to impose artificial, formal guardrails on such litigation. In the next section, we turn to amendment proposals, that might return federal habeas corpus to a pre-AEDPA state permitting greater flexibility to address the merits of truly meritorious constitutional claims.

II
AEDPA AMENDMENT AND REPEAL

While many have observed the deficiencies and maladies of AEDPA, as enacted and as interpreted over time by the U.S. Supreme Court, none have suggested a program for statutory revision and reconsideration. Statutory modifications and

---

149 As noted by Justice Steven Breyer in *Brown v. Payton*, 544 U.S. 133 (2005), where he concurred in the judgment but expressed his view that a constitutional violation had likely occurred, there exist cases "in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference." *Id.* at 148. Breyer further stated that were he in the state judge's position, "[he] would likely hold that [the state court] proceedings violated the Eighth Amendment." *Id.* However, given Section 2254(d)'s stringent standards, he could not say that the state court's decision failed AEDPA's "deferential test." *Id.* at 149.

150 Kovarsky, *supra* note 119, at 121.

outright AEDPA repeal, however, raise far more complex issues than might be appreciated. Any effort to address defects of AEDPA's text must account for accompanying Supreme Court doctrine, both pre-existing, and post-enactment. The project has the character of three-dimensional chess, anticipating moves and countermoves in a complex space. However, we suggest that repeal options, ranging from comparatively modest amendments, to the outright removal of much of the force of AEDPA, are feasible. We do not mean to suggest that we have provided an exhaustive menu for statutory revisions. Instead, we seek to encourage careful exploration of statutory alternatives.

In this Part, we turn to description and analysis of a series of possible changes to 28 U.S.C. Sections 2244 and 2254. The general approach taken below is to restore the 1966 pre-AEDPA text,[151] with some alterations, to reflect the manner in which the prior statutory language reflects a well-developed body of law to guide federal judges in its application. The current language of the AEDPA amendments, as well as the language from the 1948 and 1966 versions of the statutes, are also separately catalogued in Appendix A. Our proposed changes to AEDPA are separately catalogued in Appendix B.

A. Remove or Amend the 28 U.S.C. Section 2254(d) Relitigation Bar

Section 2254(d) dramatically reduced the ability of a federal judge to set aside a state court decision, functionally eliminating federal de novo review and instead erecting a precondition to obtaining relief on the merits.[152] As described, Section 2254(d) asks that a judge deny relief to a claim that had been adjudicated on the merits in the state court, even if the claim has merit, if it is not sufficiently or additionally problematic (such as if it is "unreasonable" in its use of existing Supreme Court precedent). As Section 2254(d) has no common law or statutory precedent, courts have had to interpret its meaning,[153] leading to variation and confusion.[154] Such confusion is exemplified in *Lockyer v. Andrade*, in which the

---

151 An Act Relating to Applications for Writs of Habeas Corpus by Persons in Custody Pursuant to the Judgment of A State Court, Pub. L. 89-711, 80 Stat. 1104 (1966) (amended 1996).

152 *See* Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Corpus Are Wrong*, 37 SEATTLE U. L. REV. 55, 59 (2013).

153 Blume, *supra* note 55, at 272–73.

154 Ritter, *supra* note 152, at 64–65.

Court found that the "gloss of clear error fails to give proper deference to state courts," as does only a "firm conviction" that the state court was erroneous, and pronounced instead the state court's "application must be *objectively unreasonable*," merely repeating the statutory text without any further guidance.[155] Given the extensive criticisms of Section 2254(d)[156] and its lack of habeas or other relevant legal pedigree, this proposal recommends deleting the provision in its entirety.

In the alternative, if wholesale repeal of Section 2254(d) is not feasible, various changes could be made to the statutory language to ease the burdens the provision places on federal habeas review. One such change would make clear that the definition of "unreasonable" does not permit a court to ask, following *Harrington v. Richter*, whether no "fairminded jurist[ ]" would grant relief.[157] That gloss on statutory language is potentially highly circular and subjective, asking whether state judges might have been "fairminded" when they erred in interpreting or applying the Constitution to the petitioner's claim.[158] In order to eliminate the use of that gloss, a change could include a definition of what is "unreasonable," stating that it is based on an objective standard and therefore, that objectively, the state judge erred in applying Supreme Court precedent.

Second, the statute could be amended to make clear that new facts may be considered when examining the relitigation bar question. In so doing, the statutory revision would reverse the doctrine of *Cullen v. Pinholster*, in which the Court interpreted Section 2254(d)(1) as limiting the evidence relevant to the inquiry as that previously presented to the state court.[159] Thus, the change would add to Section 2254(d)(1): "In assessing a claim under this provision, a circuit or district judge may consider all evidence presented in the State court proceeding and presented before the federal habeas court."

A series of more incremental revisions to Section 2254(d), if it is to remain, could expand the meaning of "clearly

---

155 Lockyer v. Andrade, 538 U.S. 63, 75–76 (2003) (emphasis added).

156 *E.g.*, Yackle, *supra* note 17, at 545–53.

157 Harrington v. Richter, 562 U.S. 86, 102 (2011).

158 *See* Reinhardt, *supra* note 29, at 1228–29; Ritter, *supra* note 152, at 56–57; *see also* Noam Biale, *Beyond a Reasonable Disagreement: Judging Habeas Corpus*, 83 U. CIN. L. REV. 1337, 1384–91 (2015) (offering an evidence-based standard for how to conduct a fairminded jurists inquiry).

159 Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011); Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. REV. 953, 953 (2012).

established law" to permit relief based on a broader range of constitutional errors. Thus, the revision could delete: "as determined by the Supreme Court of the United States" from Section 2254(d)(1). Alternatively, the revision could substitute "as determined by the Supreme Court *or circuit courts* of the United States." Further, a revision could clarify that Section 2254(d) requires an examination of the actual reasons of the state court, rather than the hypothetical reasons. Possible language could state:

> In assessing a State court judgment on the merits under Section 2254(d), the federal court shall examine the actual reasons articulated by the State court. If the actual reasons of the State court judgment are not clearly apparent, the federal court shall review the claim on the merits de novo.
>
> In so doing, the text would end the practice of deferring to summary state court orders that do not explain the reasoning behind the ruling denying relief for federal constitutional claims.

B. Codify Teague to Preserve Mixed Question Review

If Section 2254(d) is eliminated either in whole or in part, it may be advisable to codify the Supreme Court's non-retroactivity doctrine originating in its ruling in *Teague v. Lane*[160] to prevent the Court from supplying additional, more stringent, restrictions that would, in effect, recreate AEDPA's relitigation bar as a substantive barrier to relief by deeming any mixed application of law to a particular case's facts as "new." Any codification of *Teague* should attempt to revise the current form of that doctrine as well as ward off any unwarranted expansion of it.

Teague established that "new" constitutional rules of criminal procedure do not apply retroactively on federal collateral review.[161] The doctrine considers a rule to be new "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[162] *Teague* provided two narrow exceptions, allowing new rules to become retroactive if: (1) the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or if (2) the new rule constitutes a "watershed" rule of criminal procedure.[163]

---

160 Teague v. Lane, 489 U.S. 288 (1989).
161 *Id.* at 310.
162 *Id.* at 301.
163 *Id.* at 311 (internal quotations omitted).

Notably, the Supreme Court recently overturned *Teague*'s watershed exception and emphasized that "[n]ew rules of criminal procedure ordinarily do not apply retroactively on federal collateral review."[164] While this partial abrogation of *Teague* may have no real practical effect, given the Court's historical unwillingness to ever declare a "new" rule of constitutional law (indeed one Justice recently expressed a view that no watershed rules of constitutional procedure will ever again be recognized),[165] this decision is indicative of the modern Court's trend toward restricting the scope of habeas corpus and limiting the potential relief available on collateral review.

As *Teague*'s current form is frequently criticized for its expansive definition of what constitutes a "new rule," the proposed revision intends to restrict the category of "new rules" to only pure questions of law or those that propose a watershed rule of criminal procedure. We propose:

> 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 relies upon:
>
> (1) a new rule of constitutional law, announced after the State court's decision on collateral review, unless that new rule has been made retroactive by the Supreme Court of the United States.
>
> (2) For purposes of the above, a "new rule" refers only to a pure question of law. A rule shall be considered "new" if it is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

C. Revise AEDPA's Procedural Restrictions

As noted, AEDPA introduced a range of procedural restrictions which then interacted with pre-existing U.S. Supreme Court doctrine in unanticipated ways. Revisiting the unnecessary complexity of those statutory procedures also requires, to some extent, revisiting companion decisional law. We discuss below each of those procedural restrictions, in the context of accompanying decisional law.

---

164 *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1556, 1559–60 (2021) (stating "candid[ly]" that "no new rules of criminal procedure can satisfy the watershed exception").

165 *See id.* at 1557 ("Consistent with those many emphatic pronouncements, the Court since *Teague* has rejected *every* claim that a new procedural rule qualifies as a watershed rule.").

1. *28 U.S.C. Section 2244(b): Second or Successive Petitions*

AEDPA substantively altered the ability of federal courts to address second and successive habeas petitions. It completely foreclosed all claims raised in previous petitions and created substantial barriers for new claims, including an onerous procedure requiring appellate court review prior to filing, and substantially raising the burden of proof for petitioners seeking relief based on actual innocence.[166]

Our proposal recommends modifying Section 2244(b)(1) to grant more discretion to the federal judge in deciding whether or not to allow a successive petition. The goal is not to state any preference for or against such litigation, but rather to restore the pre-AEDPA discretion that federal judges retained. Three possible amended versions of Section 2244(b)(1) are proposed below.

The first version pulls primarily from the 1966 version of the statute, which strikes a balance between preventing abuse of the writ and allowing petitions when an applicant's circumstances have genuinely changed. "Application" in the 1966 version has been changed to "claim" in the proposed version below.

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on a claim for a writ of habeas corpus, a subsequent claim for a writ of habeas corpus on behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the claim alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier claim for the writ, and unless the court, justice, or judge is satisfied that the claimant has not on the earlier claim deliberately withheld the newly asserted ground or otherwise abused the writ.

The second proposed version mirrors the language of the 1948 version of the provision, which grants federal judges discretion to dismiss a successive claim if they determine that it is an abuse of the writ. This would read:

---

166 Hartung, *supra* note 33, at 11–12.

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

The third proposed version of Section 2244(b)(1) inverts the language of the 1948 version, granting the judge more discretionary authority to hear a successive claim rather than mandating dismissal:

> A circuit or district judge may entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, regardless if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, if the petition presents a new ground not theretofore presented and determined, and if the judge or court is satisfied that the ends of justice will be served by such inquiry.

Each of those proposals covers both new and repeated claims and could therefore replace the Section 2244(b)(2) language, which creates convoluted and very difficult-to-meet standards for permitting presentation of a new claim in a second or successive application. If it is retained, we would then propose modifying Section 2244(b)(2) to grant federal judges the discretion to handle successive petitions as they deem appropriate. Additionally, we recommend modifying the provision to lower the screening standard necessary to bring such a claim.[167]

---

167 A more incremental modification to Section 2244(b)(2) is reflected in the bolded language below:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application may be dismissed unless—
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> **(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be more likely than not that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.**

Finally, we also recommend modifying Section 2244(b)(3)—the court of appeals authorization procedure—as in our view, the process consumes, rather than preserves, resources and forces claimants to argue the merits of claims before they can adequately develop law or facts. To that end, we propose either deleting Section 2244(b)(3) in its entirety or replacing Section 2244(b)(3)(C) with:

> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application satisfies the requirements of this subsection. In making its determination, the court of appeals shall make no findings of facts, but shall only assess if the application makes a prima facie showing that it satisfies the requirements of § 2254(b).

Each of these proposals, as described, seeks to simplify procedure and instead focus federal judges on the merits of constitutional claims.

2. *28 U.S.C. Section 2244(d): Statute of Limitations*

AEDPA's strict one-year limitations period has been heavily criticized as a stark departure from well-established common law practice that lacks any clear policy justification.[168] Further, it is a common and confusing procedural barrier for courts and for litigants, particularly indigent defendants and those proceeding pro se, given how challenging it is to calculate what time periods apply or should be tolled.[169] As the time required for state court review far exceeds AEDPA's one-year limitation, the limitation is the most common reason why habeas claims are dismissed[170] and it effectively precludes federal habeas review for most state defendants.[171] This proposal offers several methods to amend AEDPA's statute of limitations.

The most direct method for amendment would be to delete the current language of Section 2244(d)(1)–(2) entirely and replace it with discretionary language. Four suggested alternatives are detailed below.

The first approach allows a petition to be heard at any time post-final judgment unless the applicant's delay appears

---

168 Hartung, *supra* note 33, at 7–8.
169 Hartung, *supra* note 33, at 8.
170 2007 HABEAS STUDY, *supra* note 25, at 46.
171 *E.g.*, Hoffmann & King, *supra* note 16, at 807 ("Given the time required for state court review, most state defendants convicted of felony offenses have no practical access to federal habeas review.").

inexcusably neglectful or abusive. Under this approach, Section 2244(d) would be replaced with:

> A circuit or district judge shall entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, notwithstanding an applicant's failure to timely file such petition following the date on which the judgment became final, unless it appears that applicant's failure to timely file was a result of inexcusable delay or neglect.

A second option would return to the "deliberate by-pass[ ]" standard set out in *Fay v. Noia*,[172] in which the bar would be high to show that there was some improper delay or litigation by the petitioner, and not simply attributable to counsel, justifying a judge's refusal to hear the petition. As there is little evidence to support the "sandbagging" concerns that the Supreme Court articulated in *Wainwright v. Sykes*,[173] this standard, evoking a broader test while still allowing a judge discretion to deny a petition when an applicant has deliberately slept on their rights, strikes an appropriate balance:

> A circuit or district judge shall entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, notwithstanding an applicant's failure to timely file such petition following the date on which the judgment became final, unless it appears that applicant's failure to timely file was a result of inexcusable delay or an attempt to *deliberately bypass State procedural requirements*.

Ideally, the text or legislative materials would make clear that errors or tactics of counsel should not prejudice the petitioner.

The third approach would reflect discretion and a deliberate bypass standard, combined, rather than mandating that they must hear a claim:

> A circuit or district judge *may* entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, notwithstanding an applicant's failure to timely file such petition following the date on which the judgment became final, unless it appears that applicant's failure to timely file was a result of inexcusable delay or an

---

172 *See* Fay v. Noia, 372 U.S. 391, 439 (1963).

173 *See* Wainwright v. Sykes, 433 U.S. 72, 89 (1977); Hartung, *supra* note 33, at 8.

> attempt to deliberately bypass State procedural requirements.

Finally, the fourth proposed approach regarding the statute of limitations provision would be to lengthen the time period rather than eliminating it entirely. Along with lengthening the time period, this proposal recommends broadening tolling under AEDPA and differentiating between capital and non-capital cases. Under this approach, Section 2244(d) would be modified to reflect a five-year time period.[174]

3. *28 U.S.C. Sections 2254(b)–(c): Exhaustion*

AEDPA moderately changed the previous statutory exhaustion rules. However, AEDPA's one-year statute of limitations, in combination with the total exhaustion requirement set out in *Rose v. Lundy*, means that litigants bringing petitions with both exhausted and unexhausted claims face having their entire petition dismissed, as well as perverse incentives to file premature protective filings, in order to preserve claims.[175] Revisions should seek to grant the judiciary more discretion and consider the practical concerns of avoiding needless parallel litigation, protective filings, and instead, offering discretion to review mixed applications with exhausted and non-exhausted claims.

---

[174] The five-year period is a placeholder, as more research should be conducted to establish a preferred time range. The revision would read:

> A **5-year period of limitation** shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
> **(E) For indigent capital defendants, the limitation period shall run from the latest of § 2244(d)(1)(A)-(D) or of the appointment of post-conviction counsel.**
> (2) The time during which a properly filed application for State **or federal** post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

[175] *See* Rose v. Lundy, 455 U.S. 509, 518–19 (1982).

First, and simplest, we suggest a revision that would alter Section 2254(b)(1) to state: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *may* not be granted unless it appears that . . . ." That revision would grant wholesale discretion to federal judges to grant relief for unexhausted claims, just as judges may currently deny relief for unexhausted claims. It would be important, however, for lawmakers to make clear that "may" grants unrestricted discretion that should not be limited by further judge-made gloss.

A second option would delete Section 2254(b)(1)–(3) entirely. That approach would simply eliminate any exhaustion requirement and make clear to subsequent courts that non-exhaustion is not a defense. Perhaps granting tolling to permit exhaustion could instead by set out as an option, since exhaustion is generally in the interests of litigants unless doing so is futile due to a procedural bar.

The third option sets up an inverse to the current Section 2254(b)(2), allowing judges to hear exhausted claims in mixed petitions. The suggested language echoes Justice Byron White's concurrence in *Lundy*.[176] The suggested language would add:

> Notwithstanding the failure of the applicant to exhaust each claim presented in an application, an exhausted claim presented in a writ of habeas corpus may be entertained on the merits unless the exhausted claim is inextricably intertwined with any unexhausted claims, or unless applicant elects to have the entire petition dismissed.

However, if the statute of limitations and second petition standards are relaxed as outlined in the proposals above, changes to the exhaustion provisions may be less necessary for applicants to successfully bring petitions. Accordingly, retaining the current version of Sections 2254(b)–(c) may be a worthwhile compromise for those concerns regarding comity and preventing abuse of the writ, particularly if there is continued emphasis in statutory text or accompanying doctrine that stays to permit exhaustion are warranted when feasible.

4. *228 U.S.C. Section 2254(e): Evidentiary Hearings*

AEDPA limited the ability of federal courts to review state court fact findings, both creating a stringent standard of review

---

176 *See id.* at 538.

and establishing an extremely high burden of proof for a petitioner to obtain an evidentiary hearing in order to further develop facts. The recent Supreme Court ruling in *Shinn v. Ramirez* strictly interpreted that burden, even in cases in which the evidence was not developed due to ineffective assistance of post-conviction counsel.[177]

This proposal suggests restoring the language in Section 2254(e)(1) to either the 1966 version, which enumerates specific situations where a federal judge may reexamine the state fact finding, or drafting a streamlined version which allows the federal judge broader discretion.[178] Alternatively, we suggest either: deleting Section 2254(e)(2)(A)–(B) and making no explicit mention of a judge's ability to hold an evidentiary hearing; replacing that same provision with a relaxed standard but retaining the "failed to develop" language that has been vigorously interpreted in the recent case law; or replacing that provision with a much broader standard, making clear that the judge can hold an evidentiary hearing whenever it is deemed useful and necessary.[179] Developing facts potentially relevant to a federal constitutional violation should be a central function for federal habeas corpus, particularly given the limited discovery typically available in state post-conviction processes. A federal judge should have the power to develop the facts necessary to evaluate a constitutional claim when doing so would be valuable; there is no evidence that this role would be overused, except to the extent that there are many constitutional claims that remain factually underdeveloped.

---

177 Shinn v. Ramirez, 142 S. Ct. 1718, 1728 (2022).

178 *See* Appendix A. Alternatively, we propose for a revised Section 2254(e)(1):

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct, unless the applicant shall establish by convincing evidence that the factual determination by the State court was erroneous, or if the court concludes that the record in the State proceeding, considered as a whole, does not fairly support such factual determination.

179 One option would be to replace Section 2254(e)(2)(A)–(B) with:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court may hold an evidentiary hearing on the claim.

Second, one could replace Section 2254(e)(2)(A)–(B) with:

> A circuit or district judge may hold an evidentiary hearing if useful to develop the factual basis for any relevant factual or legal issue.

5. *Include Adequate Funding for Federal Representation*

Additional reforms could extend outside AEDPA itself, to improve the fairness and quality of federal habeas litigation. One challenge, which can lead to delays, inefficiencies, and injustices, is that most federal habeas petitioners in non-capital cases are not represented by counsel, and further, even in capital cases, are denied adequate resources. In connection with any changes to AEDPA, it is advisable to amend certain provisions of the Criminal Justice Act ("CJA") to provide a clearer standard for indigent defendants to obtain funding for counsel, investigative services, and expert services.

The current standard for a petitioner to obtain any funding under the CJA is extremely broad. In 18 U.S.C. Section 3599(f), Congress established that federal courts in post-conviction capital cases could provide indigent defendants with funding for "investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence . . ."[180] A similar standard is applied for noncapital post-conviction cases, where indigent defendants may receive funding for such services when "necessary for adequate representation."[181]

After the CJA's enactment, circuits interpreted "reasonably necessary" in a variety of ways.[182] Many followed an approach interpreting the CJA as requiring funding "when the attorney makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses."[183] The Fifth Circuit,

---

180 18 U.S.C. § 3599(f).

181 18 U.S.C. § 3006A(e).

182 *Compare* United States v. Durant, 545 F.2d 823, 827–28 (2d Cir. 1976) ("[T]he purpose of the Act, confirmed by its legislative history, is clearly to redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent defendant. Therefore, the phrase 'necessary to an adequate defense' must be construed with this commendable purpose in mind. 'Necessary' should at least mean 'reasonably necessary,' and 'an adequate defense' must include preparation for cross-examination of a government expert as well as presentation of an expert defense witness. This does not mean that applications for expert assistance should be granted automatically, or that frivolous applications should be granted at all."), *with* United States v. Rinchack, 820 F.2d 1557, 1564 (11th Cir. 1987) ("A court may refuse to authorize Section 3006A(e) expert services on grounds that they are not 'necessary' when it concludes that the defendant does not have a plausible claim or defense.").

183 United States v. Theriault, 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring); *see also* United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973) (endorsing the Fifth Circuit's approach in *Theriault*); United States v. Alden, 767 F.2d 314, 318 (7th Cir. 1984) (endorsing the Ninth Circuit's approach in *Bass*);

however, recently deviated from this approach to create a stricter standard, requiring a defendant prove a "substantial need" for such services.[184] This interpretation, which required a defendant demonstrate "a viable constitutional claim, not a meritless one," functionally required a defendant prove success on the merits in order to obtain funding for investigative and other expert services.[185] The Supreme Court later rejected the Fifth Circuit's interpretation as "too restrictive," stating that "reasonably necessary" requires "a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important . . ."[186]

Although the Supreme Court clarified that this standard does not require a defendant to prove the services would result in a victory or relief, it also noted that the standard *does* require the district court to consider both "the potential merit of the claims" and the "likely utility of the services."[187] The Court emphasized that this standard grants "broad discretion" to the district court.[188]

However, despite the Supreme Court's recent intervention, the standard itself still provides little guidance on what level of merit a defendant must show to obtain funding. Further, the broad judicial discretion accorded under the CJA may allow judges to undercut a federal defender's own determination of their cases' needs, making it difficult for defendants to obtain funding critical for their defense.[189] Additionally, even if funding is obtained, the amount granted is extremely low and the statute requires several layers of judicial approval for any requests for increased funding.[190]

Brinkley v. United States, 498 F.2d 505, 510 (8th Cir. 1974) (endorsing Judge Wisdom of the Fifth Circuit's approach in *Theriault* as adopted by the Ninth Circuit in *Bass*).

184 Ayestas v. Stephens, 817 F.3d 888, 896 (5th Cir. 2016) (internal citations omitted), *overruled by* Ayestas v. Davis, 138 S. Ct. 1080, 1093–95 (2018).

185 *Id.* In addition, the Fifth Circuit also held that funding applications would be denied if a defendant did not "supplement his funding request with a viable constitutional claim that [wa]s not procedurally barred." *Id.* at 895 (internal quotations and citations omitted).

186 *Davis*, 138 S. Ct. at 1093.

187 *Id.* at 1094.

188 *Id.*

189 It is difficult to determine the rate at which such funding requests are granted or denied as many of these requests are filed ex parte and kept under seal.

190 A noncapital defendant may obtain $800 maximum for such services without prior approval from the court; total compensation cannot exceed $2,400 without approval from the circuit's chief judge. 18 U.S.C. §§ 3006A(e)(2)(A), (e)(3).

III
IMPLICATIONS OF AEDPA REPEAL

Much of the habeas reform conversation since the 1960s has been directed towards how to limit access to the Great Writ and not how to make habeas corpus more robust. To restore the writ based on varying notions of its central purposes, judges and scholars, and then Congress, sought to restrict access to constitutional rights and remedies in ever more complex ways. Since the early work of Paul M. Bator set lawmakers on a "full and fair" path, his intellectual descendants have tended to respond to the inefficiencies and unfairness generated by federal habeas doctrine with proposals to further restrict rights and remedies and to focus federal review on some concept of what consists in "core" meritorious litigation.

A. Prior Habeas Reform Models

Thus, Joseph Hoffman and Nancy King have argued that federal habeas provides "little meaningful relief to prisoners and little deterrence of constitutional violations by state courts," calling the process a "costly charade" and noting that "[m]ost of these cases are not summarily dismissed."[191] They proposed to eliminate post-conviction habeas review for all noncapital prisoners, provided the federal government increased funding for indigent defense and preserved review for claims of actual innocence.[192] In this trade, more resources would be focused in capital cases (the opposite of AEDPA's focus), and in cases raising innocence claims (not an AEDPA focus either, except in gateways to excuse procedural barriers).

A capital defendant may not receive compensation for such services in excess of $7,500. 18 U.S.C. § 3599(g)(2).

191 Hoffman & King, *supra* note 16, at 815; *see also* NANCY J. KING AND & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 67–68 (2011) (arguing that "[h]abeas simply does not matter enough to have any meaningful impact on the police, lawyers, and state judges who determine the course of state noncapital cases today—and *it never will*").

192 Hoffman & King, *supra* note 16, at 818–21, 823–25; *see also* Friendly, *supra* note 34, at 142 (as a Second Circuit judge, arguing that "convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence"); *see also, e.g.*, John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 680, 691–92 (1990) (arguing that the question when reviewing otherwise defaulted ineffective assistance of counsel claims should be "whether consideration of a defaulted claim would present a realistic possibility of correcting an unjust conviction or sentence of death").

In response, John H. Blume, Sheri Lynn Johnson and Keir M. Weyble have argued that while the "[e]xisting system of habeas review . . . is not without problems" and can be improved, it services crucial goals which should be enhanced, including "a new review of the issues by a life-tenured, Article III judge."[193]

Others have proposed different structural solutions, including novel proposals for federal courts to conduct appellate and not post-conviction review. Thus, Larry Yackle suggests that federal district courts conduct direct review of state convictions, as have James Liebman and Jordan Steiker, for capital cases.[194] Eve Brensike Primus has proposed that habeas corpus review be reconfigured to facilitate structural reform in states with systematic errors and deficiencies in criminal adjudication.[195]

B. Civil Rights Models

Both the federal civil rights and the federal habeas corpus statutes share common origins post-Civil War, in the desire to ensure that the federal courts and Article III judges provided robust remedies for violations of constitutional rights in state courts. It was not lost on the Reconstruction Congress that criminal convictions might prove to be constitutionally flawed. Section 1983 and the federal habeas statutes share similar structure and simple text, providing vehicles for litigation of constitutional rights in federal court. A range of scholars have noted that the resulting U.S. Supreme Court doctrine, including qualified immunity limitations on Section 1983 remedies, and AEDPA combined with Supreme Court doctrine

---

193 John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 439, 448 (2011). *See also* Lee Kovarsky, *Habeas Verité*, 47 TULSA L. REV. 13, 18 (2011) (defending habeas as a means for reviewing whether imprisonment is unlawful).

194 *See* Yackle, *supra* note 17, at 561–62; *see also* Steiker, *supra* note 22, at 320–21 (proposing reconstructing the multi-tiered system "disentangl[ing[federal habeas appellate review from federal habeas post-conviction review"); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2156 (2000) ("[P]lan for (1) narrowing the range of cases that are charged capitally, (2) carefully testing capital charges at trial, and (3) narrowing post-trial review of the fewer and more reliable capital sentences that result.").

195 Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 44 (2010). The habeas class actions that had been brought in prior decades became impossible once procedural bars such as exhaustion and abuse of the writ started to corrode the common interests of potential classes. *See* Garrett, *supra* note 30, at 400. The proposed reforms would make it more feasible to assert such claims.

regarding federal habeas corpus, have a range of similarities. The reasonableness doctrines incorporated into AEDPA, as well as Supreme Court gloss on those doctrines, draw on qualified immunity as well.[196] Indeed, the Court has in recent years, as noted, interpreted AEDPA's relitigation bar in still more restrictive ways, based on qualified immunity-like reasoning counseling greater (but poorly defined) deference to state judges that denied relief for meritorious constitutional claims.[197]

However, as noted, legislative repeal of the Court-made doctrine of qualified immunity is far more straightforward (and several states have already eliminated the doctrine).[198] AEDPA is so complex, and its operation on Court-made procedural limitations similarly convoluted, that great care must be taken in addressing its provisions. The chief fear is that repeal of central provisions, such as the Section 2254(d) relitigation bar, would be supplanted by aggressive new interpretation of cases like *Teague v. Lane,* in order to impose new substantive limits on access to relief for constitutional rights violations in state court. We have, however, proposed repeal options that can help to avert judicial undermining of the proposed statutory text.

C. A Consequentialist Case for Federal Habeas Reform

The AEDPA amendment and repeal options reflect a vision of federal habeas corpus that is consonant with the proposal to return Section 1983 to its original text: the goal of providing an Article III forum for litigation of constitutional rights. This is not the view of many commentators, and current U.S. Supreme Court Justices, who view the "historic" offices of the "Great Writ" as largely confined to reviewing executive detention by federal authorities, and not the review of state court

---

196 Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 81 (2017); *see also* Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 590 (2014) (discussing the concept of fault as a proxy for concerns about institutional burden in narrowing habeas relief); Stephen I. Vladeck, *AEDPA,* Saucier*, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 608 (2009) (noting similarities between AEDPA relief and resolving qualified immunity cases).

197 *See* Huq, *supra* note 196, at 587.

198 *See Policing Legislation Registry*, WILSON CTR. FOR SCI. & JUST., https://datalab.law.duke.edu/shiny/policing-legislation/ [https://perma.cc/EFU2-4ZQ6] (last visited July 18, 2022) (listing state legislation introduced and enacted regarding qualified immunity).

convictions.[199] The current Court, following *Teague v. Lane* and pre-AEDPA cases of that era, continues to emphasize federalism and finality: that "the principle of finality . . . is essential to the operation of our criminal justice system."[200]

That insistence on rules of finality, ever more complex in procedural form, informed AEDPA as well as accompanying Supreme Court jurisprudence, and we believe that the entire project is flawed. It fails to select claims that have merit and provide meaningful constitutional review and relief. It fails to prioritize serious cases and weed out unmeritorious cases. It has increased delays and backlogs in the federal review system. It degrades the Article III role of federal judges to assure compliance with the federal Constitution, which post-Reconstruction Amendments and incorporation under the Fourteenth Amendment Due Process Clause, applies to ensure that state courts follow the U.S. Constitution and Bill of Rights.[201]

The vision set out here is primarily a practical one. It does not depend on any historical or essentialist view of the Article III role. What it rejects is an excessively proceduralized task for federal judges. Lower court judges should be able to conduct a meaningful review of federal constitutional claims, without having to first obsess over perhaps one of the most procedurally complex set of marching orders that exist in all of federal law. As Jordan Steiker has put it well, "congressionally mandated reasonableness review is an inefficient and unattractive means of accommodating states' finality concerns."[202] The current system does not vindicate constitutional rights or reflect a sound Article III role, either. Thus, Steiker adds:

> If federal enforcement of federal law is desirable, it should be available in an efficient manner; if such enforcement is excessively costly in terms of finality and comity, it should be withdrawn. But the current approach of preserving federal review in theory while imposing enormous—and enormously

---

199 *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring) (describing how "the Court began to develop doctrines aimed at returning the Great Writ closer to its historic office").

200 *See id.* at 1554 (majority opinion).

201 This is a more general claim regarding the remedial purposes of Article III courts than a specific claim, much debated elsewhere whether the specific limitations in AEDPA implicate Article III constitutional concerns. *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, 774 (1998).

202 Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1728 (2000).

> expensive—obstacles to the vindication of federal rights cannot be defended.[203]

Our position here, therefore, is largely consequentialist, and as a result, it is directed at lawmakers. Further, there a variety of ways that these goals could be accomplished. We have set out a range of alternative proposals to revise the relevant statutes, and we hope that these proposals will suggest still additional possible approaches. The simplest proposals, however, return to the federal habeas statutes that were in place pre-AEDPA, and before the U.S. Supreme Court overrode statutory text with Court-made procedure.

CONCLUSION

After twenty-five years, the time for reconsideration of AEDPA is long overdue. During a time in which the legacy of racialized mass incarceration is being reconsidered, it is all the more important that federal courts have adequate tools to grant relief from convictions that violated constitutional rights. As it stands, federal judges must often stand by, despite their Article III role, when such constitutional abuses come before them. They cannot readily develop the facts, interpret the law, or grant relief for patently violative state court convictions. This impact has been particularly felt in capital habeas cases, where constitutional violations may be particularly numerous and the declining in access to relief has been particularly pronounced. As described in this Article, the Supreme Court's evolving caselaw has, rather than blunted the constitutionally problematic and highly inefficient operation of the statute, magnified the rights-based and practical harms that unsound legislative drafting has caused.

In this Article, we have walked readers through how AEDPA provisions could be amended or outright repealed, the applicable benefits and costs of each change, and how the Supreme Court might react to each. We acknowledge that these changes reflect a particular view that federal habeas remedies should be flexible, accessible, and responsive to constitutional violations. These changes do not reflect a view that federal review should chiefly espouse concepts of comity, finality, and deference in the face of constitutional error. These proposed changes primarily reflect a return to the text of the federal statutes that had been in place for decades, prior to the Supreme Court caselaw that increasingly regulated federal

---

203 *Id.*

habeas, beginning in the late 1970s, largely in reaction to capital post-conviction litigation engendered by the Court's own conflicted interventions.

We also readily acknowledge the complexity of the task. We sought to set out this analysis in detail precisely because AEDPA repeal is not as simple as, for example, eliminating the doctrine of qualified immunity in civil rights litigation. For that reason, we have presented a series of options regarding each of the key provisions in need of reconsideration. We hope that others will develop additional proposals. Our goal is to provide a starting place for such work. We view returning to much of the pre-AEDPA practice of federal habeas corpus as desirable, and view real improvements to federal habeas practice as achievable. In this Article, we provide one roadmap. The time has come for careful consideration of at least partial AEDPA repeal.

APPENDIX A: RELEVANT PROVISIONS OF AEDPA AND THE CJA

I.
1948 VERSION OF 28 U.S.C. §§ 2244 & 2254[204]

A. Section 2244 – Second or Successive Petitions

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

B. Section 2246 – Evidence

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

C. Section 2254 – Federal Review of State Convictions

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedied available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

---

204 June 25, 1948, ch. 646, 62 Stat. 967 (1948) (amended 1966).

II.
1966 AMENDMENT TO 28 U.S.C. §§ 2244 & 2254[205]

A. Section 2244 – Second and Successive Petitions

(b) When after an evidentiary hearing on the merits of a material factual issue, or after hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

B. Section 2254 – Federal Review of State Convictions

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —

(1) that the merits of the factual dispute were not resolved in the State court hearing;

---

205 Pub.L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105 (1966) (amended 1996).

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or]
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the application to establish by convincing evidence that the factual determination by the State court was erroneous.

III.
AEDPA: CURRENT LANGUAGE ENACTED 1996

A. 28 U.S.C. § 2244(b) – Second or Successive Petitions

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless —

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

B. 28 U.S.C. § 2224(d) – Statute of Limitations

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

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

C. 28 U.S.C. § 2254 – Federal Review of State Convictions

1. Sections 2254(b)–(c): Exhaustion

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
  (A) the applicant has exhausted the remedies available in the courts of the State; or
  (B) (i) there is an absence of available State corrective process; or
    (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

2. Section 2254(d): Relitigation Bar

(d) 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.

3. Section 2254(e): Evidentiary Hearing

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no

reasonable factfinder would have found the applicant guilty of the underlying offense.

IV.
CJA PROVISIONS: § 3006A(E) AND § 3599

A. 18 U.S.C. § 3006A(e) – Services other than Counsel

(1) Upon request. – Counsel for a person who is financially unable to obtain investigative, expert, or other **services necessary for adequate representation** may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request. –

(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if **necessary for adequate representation**. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $800 and expenses reasonably incurred.

(3) Maximum amounts. – Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed **$2,400**, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

B. 18 U.S.C. § 3599 – Counsel for financially unable defendants

(a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain

adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(f) Upon a finding that investigative, expert, or other services are **reasonably necessary** for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not **exceed $7,500** in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

APPENDIX B: PROPOSED CHANGES TO AEDPA

A. Section 2254(d) Options – Relitigation Bar

1. Delete Section 2254(d) in its entirety.

2. Include language defining "unreasonable."

"Unreasonable" in this provision is defined as an objective standard. In making this objective determination, a court may not ask whether "no fairminded jurist" would grant relief.

3. To allow the examination of new facts, add the below language to Section 2254(d)(1):

In assessing a claim under this provision, a circuit or district judge may consider all evidence presented in the State court proceeding and presented before the federal habeas court.

4. To expand the meaning of "clearly established law" in Section 2254(d)(1), either:

a. Delete "as determined by the Supreme Court;" or

b. Add the bolded text: "as determined by the Supreme Court **or circuit courts** of the United States."

5. To clarify that Section 2254(d) requires an examination of the actual, not hypothetical reasons of the state court, add the following language:

In assessing a State court judgment on the merits under Section 2254(d), the federal court shall examine the actual reasons articulated by the State court. If the actual reasons of the State court judgment are not clearly apparent, the federal court shall review the claim on the merits de novo.

B. Codify *Teague*

1. Add the following provision:

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 relies upon: (1) a new rule of constitutional law, announced after the State court's decision on collateral review, unless that new rule has been made retroactive by the Supreme Court of the United States.

(2) For purposes of the above, a "new rule" refers only to a pure question of law. A rule shall be considered "new" if it is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

C. Section 2244(b) Options—Second and Successive Petitions

1. Replace Section 2244(b)(1) with either:

1. When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on a claim for a writ of habeas corpus, a subsequent claim for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the claim alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier claim for the writ, and unless the court, justice, or judge is satisfied that the claimant has not on the earlier claim deliberately withheld the newly asserted ground or otherwise abused the writ.

2. No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

3. A circuit or district judge may entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, regardless if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, if the petition presents a new ground not theretofore presented and determined, and if the judge or court is satisfied that the ends of justice will be served by such inquiry.

2. Modify Section 2244(b)(2) to reflect the bolded language:

(2) A claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application **may** be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be **more likely than not** that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

3. To modify Section 2244(b)(3), either:

1. Delete Section 2244(b)(3) in its entirety; or

2. Replace Section 2254(b)(3)(c) with:

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application satisfies the requirements of this subsection. In making its determination, the court of appeals shall make no findings of facts, but shall only assess if the application makes a prima facie showing that it satisfies the requirements of Section 2254(b).

D. Section 2244(d) Options—Statute of Limitations

1. Delete Section 2244(d)(1)–(2) and replace with one of:

i. A circuit or district judge shall entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, notwithstanding an applicant's failure to timely file such petition following the date on which the judgment became final, unless it appears that applicant's failure to timely file was a result of inexcusable delay or neglect.

ii. A circuit or district judge shall entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, notwithstanding an applicant's failure to timely file such petition following the date on which the judgment became final, unless it appears that applicant's failure to timely file was a result of inexcusable delay or an attempt to ***deliberately bypass State procedural requirements***

iii. A circuit or district judge ***may*** entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, notwithstanding an applicant's failure to timely file such petition following the date on which the judgment became final, unless it appears that applicant's failure to timely file was a result of inexcusable delay or an attempt to deliberately bypass State procedural requirements.

2. Modify Section 2244(d) to the below to reflect the bolded language:

A **5-year period of limitation** shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(E) For indigent capital defendants, the limitation period shall run from the latest of § 2244(d)(1)(A)-(D) or of the appointment of post-conviction counsel.

(2) The time during which a properly filed application for State **or federal** post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

E. Section 2254(b)–(c) Options: Exhaustion

1. Alter Section 2254(b)(1) to reflect the bolded language:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court **may** not be granted unless it appears that . . .

2. Section 2254(b)(2):G

i. Either delete Section 2254(b)(2) in its entirety; or

ii. Add the below to Section 2254(b)(2):

Notwithstanding the failure of the applicant to exhaust each claim presented in an application, an exhausted claim presented in a writ of habeas corpus may be entertained on the merits unless the exhausted claim is inextricably intertwined with any unexhausted claims, or unless applicant elects to have the entire petition dismissed.

F. Section 2254(e) Options: Evidentiary Hearings

1. Section 2254(e)(1):

i. Return to the language in the 1966 version of Section 2254(e)(1)

(*see* Appendix A); or

ii. Modify Section 2254(e)(1) to reflect the below:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct, unless the applicant shall establish by convincing evidence that the factual determination by the State court was erroneous, or if the court concludes that the record in the State proceeding, considered as a whole, does not fairly support such factual determination.

2. Section 2254(e)(2):

i. Delete Section 2254(e)(2)(A)–(B); or

ii. Replace Section 2254(e)(2)(A)–(B) with:
If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court may hold an evidentiary hearing on the claim.

iii. Replace Section 2254(e)(2)(A)-(B) with:
A circuit or district judge may hold an evidentiary hearing if useful to develop the factual basis for any relevant factual or legal issue.