Suspension for Beginners: *Ex Parte Bollman* and the Unconstitutionality of the 1996 Antiterrorism and Effective Death Penalty Act

by DAN POULSON*

I. Introduction

The writ of habeas corpus (Latin for "you have the body") refers to a proceeding in which a court inquires into the legal sufficiency of an individual's imprisonment by ordering the responsible official to bring the prisoner before the court and justify the confinement.[1] If the court determines that there is no legal basis for the confinement, the prisoner is set free. Since its creation in the thirteenth century, the writ has come to occupy a cherished, singular role in Anglo-American jurisprudence as a safeguard against government oppression.[2]

Today, the federal habeas forum is most often invoked as a form of post-conviction review that occurs after the inmate has been denied all other forms of relief.[3] For a state inmate, this requires exhausting state judicial remedies either on direct appeal or through state post-conviction proceedings by presenting the state's highest court with a fair opportunity to rule on the merits of every claim they seek to raise in federal court.[4] A state prisoner who satisfies this criterion may file a petition for habeas

---

* J.D. Candidate, 2008, University of California, Hastings College of the Law. B.A., Political Science, B.A., English, 2004, Brown University.

1. The proper term for this proceeding is *habeas corpus ad subjiciendum*. At the time of this country's founding, the term habeas corpus actually referred to a number of writs, each of which were issued by the courts, commanding that an official appear before the court with the named individual. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95-98 (1807).

2. Hamdi v. Rumsfeld, 542 U.S. 507, 554-58 (2004) (Scalia, J., dissenting).

3. *See* 28 U.S.C. §§ 2244, 2254(b) (2006).

4. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Rose v. Lundy, 455 U.S. 509, 515-16 (1982).

review in a federal district court, which is then required to decide whether the prisoner is being held in custody "in violation of the Constitution or laws or treaties of the United States."[5] The federal habeas forum is almost always the court of last resort and is typically the last legal proceeding guaranteed to capital inmates before they are executed. It is fitting, then, that habeas is also the only common law writ directly mentioned in the Constitution. The Suspension Clause provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[6]

Chief Justice John Marshall's 1807 opinion in *Ex parte Bollman*[7] gave the Suspension Clause an extremely narrow construction that has not been seriously challenged by the Court since. Even though the Suspension Clause seems to presume that federal courts have the inherent power to grant habeas relief, *Bollman* held that such authority had to be vested in federal courts by Congress.[8] *Bollman* narrowed the writ's scope even further by holding that the Suspension Clause's protection only extended to federal, rather than state, prisoners.[9]

Since *Bollman*, there have been substantial changes in the landscape of federal habeas law. Most importantly, Congress eventually expanded federal habeas jurisdiction to include challenges brought by state prisoners. Nonetheless, it remains accepted wisdom today—200 years after *Bollman*—that the Suspension Clause does not meaningfully constrain Congress's considerable latitude in defining the boundaries of federal habeas review. Indeed, the most recent revision to the federal habeas statute, the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA),[10] dramatically limited the availability of review for state prisoners, effectively denying relief for all but the most egregious constitutional errors committed by state courts. Today, under 28 U.S.C. § 2254(d)(1), federal courts are prohibited from granting habeas relief to state prisoners with regard to any claim that has been adjudicated on the merits by a state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

---

5. 28 U.S.C. § 2254(a).

6. U.S. CONST. art. I, § 9, cl. 2.

7. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

8. *Id.* at 99.

9. *Id.*

10. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2244-2267).

Over the past eleven years, this language has come under attack as an unconstitutional limitation on the decision-making powers of federal courts. In particular, critics contend that § 2254(d)(1) violates Separation of Powers principles articulated in *Marbury v. Madison*,[11] *United States v. Klein*,[12] and *City of Boerne v. Flores*.[13] This argument has essentially two components, the first being that § 2254(d)(1) imposes substantive restrictions on federal courts that prohibit them from exercising their Article III judicial power[14] to independently review questions of, and give effect to, matters relating to the Constitution.[15] In other words, because § 2254(d)(1) compels the judicial branch to leave intact erroneous but not "objectively unreasonable" state court constitutional decisions, the federal courts are no longer freely empowered to "say what the law is."[16] Second, because § 2254(d)(1) forces federal courts to depend solely on "clearly established Federal law, as determined by the Supreme Court of the United States," the statute unconstitutionally prescribes the sources of law that federal courts must use in exercising habeas jurisdiction.[17] According to this logic, if a federal habeas court cannot rely on its own precedent to elucidate a principle of federal law in the absence of controlling Supreme Court authority, these prior rulings are stripped of their binding precedential effect.

As credible as these arguments are, the Supreme Court has repeatedly declined to address the murky constitutional status of § 2254(d)(1), and some circuit courts have construed this silence as implicit approval of AEDPA's substantive restrictions.[18] Those circuits that have explicitly

11. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

12. United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

13. City of Boerne v. Flores, 521 U.S. 507 (1997).

14. U.S. CONST. art. III, § 1.

15. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

16. *Marbury*, 5 U.S. at 147.

17. *See, e.g.*, Brief of Amici Curiae Habeas Corpus Resource Center et al. in Support of Petitioner at 16-20; Irons v. Carey, 479 F.3d 658 (9th Cir. 2007) (No. 05-15275); Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103 (1998); Joseph M. Brummer, Comment, *Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III Hierarchy*, 75 U. CIN. L. REV. 307 (2006).

18. *See, e.g.*, Crater v. Galaza, 491 F.3d 1119, 1129 (9th Cir. 2007) ("We consider the Court's longstanding application of the rules set forth in AEDPA to be strong evidence of the Act's constitutionality."); Duhaime v. DuCharme, 200 F.3d 597, 601 (9th Cir. 2000) ("[T]he Supreme Court . . . has refused to reverse decisions from other circuits on the ground that upholding § 2254(d)(1) would unconstitutionally prohibit Article III courts from determining how they should function and from executing their responsibilities.").

confronted the constitutionality of § 2254(d)(1) have carefully distinguished its provisions from the federal laws invalidated in *Klein*, *Marbury*, and *Boerne*.[19] There are still hints of dissatisfaction among some circuit court judges (judges on the Ninth Circuit in particular) who believe Congress overstepped its boundaries by so radically altering the terms of habeas relief, but for the most part constitutional critiques of § 2254(d)(1) have been limited to a handful of concurrences and dissents.[20] Any questions about the constitutional status of this provision would seem to be long-settled.

Then again, past constitutional challenges to § 2254(d)(1) have not seriously grappled with the Suspension Clause and its implications, focusing instead on Article III and *Marbury*. Perhaps this strategy is misguided.

Bollman may have given Congress considerable discretion over the regulation of the judiciary's jurisdiction in habeas actions, but it by no means implied that Congress had unilateral power to define the circumstances in which habeas relief could be granted. On the contrary, *Bollman* noted in forceful terms that while the jurisdictional boundaries of the writ were subject to congressional approval, the actual meaning of the writ—the procedural and doctrinal scope of the rights vindicated under it—was left in the hands of the judiciary.[21] While *Bollman* did not explicitly say so, this distinction is a natural extension of the Suspension Clause, which can be read as an exhaustive, rather than illustrative, elaboration on Congress's power with regard to the writ. While Congress is free to suspend the writ in times of rebellion or national emergency, nothing in the Suspension Clause contemplates Congress's powers as encompassing the

19. *See, e.g.*, *Duhaime*, 200 F.3d at 601; Green v. French, 143 F.3d 865, 874-75 (4th Cir. 1998) ("[S]ection 2254(d) does not limit any inferior federal court's independent interpretive authority to determine the meaning of federal law in an Article III case or controversy."); Lindh v. Murphy, 96 F.3d 856, 869-72 (7th Cir. 1996) (en banc) ("Regulating relief is a far cry from limiting the interpretive power of the courts . . . and Congress has ample power to adjust the circumstances under which the remedy of the writ of habeas corpus is deployed."), *rev'd on other grounds*, 521 U.S. 320 (1997).

20. *See., e.g.*, *Irons*, 479 F.3d at 667 (Noonan, J., concurring) ("AEDPA does not address jurisdiction: it addresses the materials for judging. It deprives a whole class of cases of their normal value as governing authority for the circuit which has decided them."); Davis v. Straub, 430 F.3d 281, 291-99 (6th Cir. 2005) (Merritt, J., dissenting) (observing that the majority's interpretation of 28 U.S.C. § 2254(d)(1) "unconstitutionally obstructs Article III's mandate to exercise the judicial power in cases over which the court properly has jurisdiction"); Gibbs v. Frank, 387 F.3d 268, 278 (3d Cir. 2004) (Nygaard, J., concurring) ("[T]o the extent AEDPA was actually intended by Congress to deny access by habeas petitioners to the protections of the Bill of Rights subject to a condition precedent, in my view this preclusion should be considered a suspension of the writ.").

21. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807).

right to dictate the writ's substantive meaning. Indeed, such power, when taken to its logical endpoint, would render the writ—and the Suspension Clause—an empty, formalistic gesture.

Part I of this Note will discuss the relevance of *Bollman* and its key holdings. Part II will discuss the evolution of the modern habeas standard of review, and how it was altered under AEDPA. Part III will examine the dominant constitutional critiques of § 2254(d)(1). Finally, Part IV will explain the significance of the Suspension Clause as a constraint on the powers of Congress to redefine the terms of habeas relief.

II. Habeas and the Suspension Clause Under *Bollman*

There is a certain degree of tension between the Suspension Clause, which seems to assume the writ's existence at common law, and the notable absence of any reference to the common law in Article III's description of the federal courts' judicial power.[22] *Bollman*, the first case to expressly define the contours of federal habeas, held that the Suspension Clause does not expressly endow federal courts with the inherent power to grant the writ, and, in the absence of such power, Congress must make an affirmative grant of jurisdiction.[23] "To enable the court to decide on such question," Marshall wrote, "the power to determine it must [be] given by written law."[24] In other words, because federal courts derive their power directly from the text of Article III, or by an Act of Congress authorized under Article III,[25] the power of a federal court to grant the writ must be traced to one of those two sources.

The implications of this argument were quite radical: *Bollman* is regarded as essentially severing federal habeas corpus from the body of common law and the historical understanding that had nurtured its usage in Great Britain and the colonies. After *Bollman*, the argument goes, the writ became something strange and new: a creature of statutory law. By *Bollman*'s logic, Congress could even "suspend" the writ simply by doing nothing at all.[26]

---

22. U.S. CONST. art. III, § 2.

23. *Bollman*, 8 U.S. at 93-94. The controversy around this holding has not dimmed over time: former U.S. Attorney General Alberto Gonzales was lambasted for making similar claims during his Jan. 24, 2007 testimony before the Senate Judiciary Committee regarding the recently enacted interrogation and trial law, which denies federal habeas relief for suspected terrorists held under executive detention. Bob Egelko, *Gonzales Says the Constitution Doesn't Guarantee Habeas Corpus*, S.F. CHRON., Jan. 24, 2007, at A1.

24. *Bollman*, 8 U.S. at 94.

25. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175-76 (1803).

26. *See Bollman*, 8 U.S. at 95 ("[The first Congress] must have felt . . . the obligation of providing efficient means by which this great constitutional privilege should receive life and

But even as *Bollman* empowered Congress with the statutory authority to withdraw habeas jurisdiction, it drew a subtle distinction between that power and the power of the courts to define the scope of the writ. "[T]he *meaning* of the term *habeas corpus*," Marshall wrote, may be defined by "resort . . . to the common law; but the *power to award the writ* by any of the courts of the United States, must be given by written law."[27] This deft rhetorical maneuver affirmed the legislative branch's control over the courts' jurisdictional reach, but freed from congressional interference the courts' power to decide questions that arose under that jurisdiction. Marshall stressed that "[t]his opinion is not to be considered as abridging the power of courts . . . to protect themselves . . . from being disturbed *in the exercise of their functions.* It extends only to the *power of taking cognizance* of any question between individuals, or between the government and individuals."[28]

The holding in *Bollman* thus strongly recalls Marshall's elegant work four years prior in *Marbury.* *Marbury* conceded Congress's Article III jurisdictional powers, but it also read the Constitution as endowing the Judicial Department with the power to invalidate federal laws that, in its independent judgment, violated the Constitution (which in the context of *Marbury* conveniently allowed the Court to avoid deciding the merits of a politically toxic case).[29] Similarly, even as *Bollman* gestures to the omnipotence of Congress to confer jurisdiction in habeas corpus actions, the opinion extols the power of the courts to breathe life and force into the writ.[30] Under *Bollman,* as in *Marbury*, the jurisdictional grant to hear a habeas case may originate with Congress, but it is the domain of the judiciary to shape its meaning.

---

activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."). In *INS v. St. Cyr*, the Court distanced itself from this argument and hinted that it found Marshall's reasoning unsound, construing *Bollman* as holding that the Clause was "intended to preclude any possibility that 'the privilege itself would be lost' by either the inaction or the action of Congress." INS v. St. Cyr, 533 U.S. 289, 304 (2001) (quoting *Bollman*, 8 U.S. at 95), *superseded by statute*, REAL ID Act, Pub. L. No..109-13, 119 Stat. 231, 302 (2005). In Professor Freedman's opinion, this interpretative feat was accomplished only by "truncating the relevant passages of *Bollman.*" ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 4 (2001).

27. *Bollman*, 8 U.S. at 93-94 (emphasis added).

28. *Id.* at 94 (emphasis added).

29. *Marbury*, 5 U.S. 137.

30. The facts of *Bollman*, and its ultimate resolution illustrate this dramatically: Samuel Swartwout and Erick Bollman had been committed without trial by the D.C. Circuit Court of Appeals on charges of treason for aiding Aaron Burr's failed revolutionary campaign. After Marshall determined that the Court had the power to issue the writ, the Court examined the merits of the petition and ruled that the evidence against the petitioners was insufficient to support an indictment for treason, and the prisoners were discharged. *Bollman*, 8 U.S. at 114-37.

But while *Marbury* is arguably the most revered case in Supreme Court history, *Bollman* has suffered withering criticism. Professor Eric M. Freedman has found documentary support for the notion that the Framers, notwithstanding *Bollman*'s contention otherwise, actually did intend the Suspension Clause to confer habeas power to Article III courts, even in the absence of any congressional action.[31] Freedman argues that the Framers' unanimous agreement of the writ's importance as a safeguard against government overreaching expressly contradicts *Bollman*'s reasoning that the writ was subject to jurisdictional authorization by Congress.[32] Moreover, the Framers modeled the Suspension Clause after the texts of various state constitutions, all of which functioned to preserve habeas as a pre-existing right conferred on the courts at common law.[33] Certainly, the Suspension Clause when read most naturally suggests this interpretation: to say that something cannot *be suspended* assumes that there is already something *to suspend.* Nor was there any precedential support at the time for Marshall's assertion in *Bollman* that courts established by written law are restricted to exercising only those powers given to them by that law.[34]

However, criticisms of *Bollman*'s reasoning remain largely academic. That is because, for as long as Article III courts have been in existence, they have always been empowered with a statutory grant of habeas jurisdiction. Section 14 of the Judiciary Act of 1789 gave Article III courts the power to issue the writ for all persons seeking review of federal court judgments, "for the purpose of an inquiry into the cause of commitment."[35] *Bollman* upheld the constitutionality of section 14, but in order to do so it treated habeas as an appellate, rather than an original, proceeding.[36] The reason for this is simple: while Congress has the power to establish the original jurisdiction of the inferior federal courts, *Marbury* held that Congress was strictly circumscribed from modifying the Supreme Court's original jurisdiction.[37] In the context of *Bollman*, this was especially

31. FREEDMAN, *supra* note 26, at 26.

32. *Id.* at 12.

33. *Id.* at 26, 164 n.46 (citing Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development, in* FREEDOM AND REFORM 55, 75 (Harold M. Hyman & Leonard W. Levy eds., 1967)).

34. *Id.* at 25, 164 n.41.

35. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

36. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) ("The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature.").

37. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall

problematic, since the habeas petition in that case had not first passed through a lower federal court. Indeed, while habeas corpus in its modern form is typically a form of collateral post-conviction relief, in the nineteenth century the writ was almost always a pre-conviction procedure, available only to individuals who were confined without trial or bail, but unavailable to those who had been convicted by a federal court of proper jurisdiction, even one whose judgment was in error.[38] Thus, Marshall's statement that habeas was "clearly appellate"[39] seems a bit disingenuous, since the writ, in contrast with appellate procedure, was usually unavailable to review convictions issued by a court of competent jurisdiction.[40] But in order for Marshall to uphold the federal courts' power to review habeas actions, the grant of jurisdiction had to be labeled appellate.

Bollman's reading of section 14 was also notable in that it interpreted the Judiciary Act as withholding federal habeas jurisdiction for state inmates.[41] In dicta, Marshall suggested that this limitation did not violate the Suspension Clause because it only protected the writ for persons under federal custody.[42] Whether or not this interpretation of the Suspension Clause was legally correct,[43] it has been mooted by three developments. First, in 1867, Congress amended the federal statute to extend habeas protection to state inmates.[44] Second, the Court has come to interpret the Suspension Clause as applying to the modern form of the writ, rather than any of its historical antecedents.[45] Third, the Court's 1960s habeas jurisprudence suggests that the Suspension Clause might be applicable against the states through the Fourteenth Amendment's Due Process Clause.[46] In other words, if Congress were to suspend habeas jurisdiction

---

be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.").

38. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202-09 (1830) (holding that the writ shall be denied where inmate is detained in prison by virtue of the judgment of a court that possesses general and final jurisdiction in criminal cases).

39. *Bollman*, 8 U.S. at 101.

40. *Watkins*, 28 U.S. at 202-09.

41. *Bollman*, 8 U.S. at 99.

42. *Id.*

43. *See* FREEDMAN, *supra* note 26, at 3.

44. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867).

45. *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'") (quoting Felker v. Turpin, 518 U.S. 651, 663-64 (1996)); *Felker*, 518 U.S. at 663-64 ("[W]e assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.").

46. *See* Fay v. Noia, 372 U.S. 391, 406 (1963) (noting "intimations of support" for the proposition that congressional refusal to accord the writ its full common-law scope might

for state prisoners in all federal courts,[47] it would undoubtedly run afoul of the Suspension Clause's edict, regardless of whether state prisoners had access to the writ in 1789.[48]

But while the jurisdictional power of federal courts to hear habeas petitions by state prisoners has remained more or less unaltered, the "qualitative" aspects of the writ—the rights that can be vindicated through the writ and the standard of review federal courts apply—have been much more volatile, having expanded and contracted dramatically over the course of the twentieth century.

III. Scope of Rights and Standard of Review Before and After the Antiterrorism and Effective Death Penalty Act of 1996

The first major developments in the rights available through habeas came after the 1867 Amendments. These amendments empowered federal courts with habeas jurisdiction over all persons—state and federal—who presented claims under federal law.[49] Even then, post-conviction relief through habeas was largely limited to challenges regarding the subject matter and territorial jurisdiction of the court that had entered the

constitute an unconstitutional suspension of the writ); Jones v. Cunningham, 371 U.S. 236, 238 (1963) (noting that federal habeas statute extending jurisdiction to state prisoners "implements the constitutional command that the writ of habeas corpus be made available"). *See generally* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862 (1994).

47. In 1868, Congress withdrew the Supreme Court's appellate jurisdiction in habeas cases filed under the 1867 Act, only to reinstate it again in 1885. Act of Mar. 27, 1868, ch. 34, 15 Stat. 44 (1868), *repealed by* Act of Mar. 3, 1885, ch. 353, 23 Stat. 437 (1885); *see Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

48. *But see* Boumediene v. Bush, 476 F.3d 981, 993 (D.C. Cir. 2007) (holding that Military Commissions Act of 2006, codified at 28 U.S.C. § 2241(e), which eliminated jurisdiction in federal courts over habeas petitions filed by alien enemy combatants held by the United States in Guantanamo Bay Naval Base, Cuba, did not violate the Suspension Clause because the Clause's protections extend only to the writ as it existed in 1789, and in 1789 habeas review was unavailable to aliens held in overseas military bases), *cert. granted*, 75 U.S.L.W. 3707 (U.S. Jun. 29, 2007) (No. 06-1196). It should be noted that the D.C. Circuit's conclusions were derived from an abbreviated passage in *St. Cyr*, 533 U.S. at 303. As the dissent pointed out, *St. Cyr* only suggested that the Suspension Clause, *at the absolute minimum*, protected the writ as it existed in 1789. *Boumediene*, 476 F.3d at 1000 n.5 (Rogers, J., dissenting). Moreover, *Felker*, 518 U.S. at 663-64, upon which *St. Cyr* relied, proceeded under the opposite assumption—that the Suspension Clause protected the modern form of the writ. Deliberate or not, by misreading *St. Cyr* and assuming that the Suspension Clause does not protect the modern form of the writ, the D.C. Circuit was able to avoid the more complicated question of whether modern habeas relief is available to enemy combatants.

49. Act of Feb. 5, 1867.

judgment.[50] But eventually the Court began to recognize circumstances where the state court had "voided" its jurisdiction through constitutional error.[51] State prisoners were disadvantaged in two respects, however. The first was that prisoners held under state custody had very few constitutional rights because the Bill of Rights was not thought to apply to the states. Second and most important, even where a constitutional error had been committed, the exhaustion of appellate remedies doctrine established under *Ex parte Royall* denied federal habeas relief for prisoners who had not first exhausted all other forms of relief.[52] For state prisoners, this meant they had to first seek state trial, appellate, and post-conviction relief for their federal claims.[53] As Justice O'Connor would later explain in her concurring opinion in *Wright v. West*, the exhaustion doctrine precluded most constitutional claims for state prisoners seeking federal habeas review, because, with very few exceptions, Due Process—essentially the only federal right available to state inmates—was considered satisfied if the state prisoner had been granted a "full and fair hearing" in the state courts.[54] While state inmates were entitled to seek writs of error in federal courts on direct appeal, they were mostly shut out from seeking relief under federal habeas.

Yet another barrier to habeas relief from state convictions was the fact that, while state court determinations of federal law were subject to review *de novo*, state court findings of fact were subject to little or no review. Crucially, the Court applied an extremely broad definition of what qualified as "factual determinations," including determinations that today would be treated as mixed questions of law and fact.[55] In time, the Court began to

50. *In re* Wood, 140 U.S. 278, 285-87 (1891); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830).

51. *See, e.g.*, *Ex parte* Wilson, 114 U.S. 417 (1885) (granting the writ where federal prosecutor charged petitioner under an information rather than a grand jury indictment, as required under the Fifth Amendment in all capital and otherwise infamous crimes); *Ex parte* Siebold, 100 U.S. 371 (1879) (holding that convictions under unconstitutional laws were jurisdictionally void and subject to habeas relief); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (granting writ to cure double jeopardy violation).

52. *Ex parte* Royall, 117 U.S. 241, 251 (1886) ("The [statute's] injunction to hear the case summarily and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it.") (quoting Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867)).

53. *Id.*

54. Wright v. West, 505 U.S. 277, 297-98 (1992) (O'Connor, J., concurring in the judgment) (citing Ponzi v. Fessenden, 258 U.S. 254, 260 (1922)); *Ponzi*, 258 U.S. at 260 ("One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that.").

55. 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4d, at 61 (2003).

subject certain "factual" findings to review *de novo* such as when a factual finding unsupported by the record led to the deprivation of a federal right, or when it was necessary to re-examine a factual finding because it was so "intermingled" with the federal right at issue.[56]

Moreover, as Due Process under the Fourteenth Amendment became more robust and the Court's incorporation doctrine made the Bill of Rights applicable against the states, the category of constitutional claims available to state inmates gradually expanded.[57] Starting in the 1940s, a federal court could grant a petition challenging a state conviction regardless whether such violations had the effect of voiding the jurisdiction of the state sentencing court.[58] In 1948, Congress codified these principles in the modern habeas statute, which affirmed that federal habeas courts had to consider all constitutional claims, and eliminated any restrictions on the standard of review applied to factual and legal claims.[59] The new habeas statute also recognized that the exhaustion of remedies doctrine for state prisoners could be waived if there had been "an absence of available State corrective process" or "circumstances rendering such process ineffective to protect the rights of the prisoner."[60]

By the time of the watershed case *Brown v. Allen*[61] in 1953, it was an established rule that federal habeas courts were no longer bound by the prior state courts' adjudications on questions of law and mixed questions of law and fact, even if the petitioner had been given a full and fair hearing on those claims.[62] *Brown* also declared with certainty that state prisoners were entitled to at least one meaningful review of their federal constitutional claims in an Article III court, either through federal habeas or through direct review on a writ of certiorari to the Supreme Court.[63] In sum, by the

---

56. N. Pac. Ry. Co. v. North Dakota, 236 U.S. 585, 593 (1915).

57. *Wright*, 505 U.S. at 300-06 (O'Connor, J., concurring in the judgment).

58. Waley v. Johnston, 316 U.S. 101, 104 (1942).

59. Act of June 25, 1948, ch. 646, §§ 2241-2255, 62 Stat. 869, 964-68 (codified as amended at 28 U.S.C. §§ 2241-2255 (2006)).

60. *Id.*

61. Brown v. Allen, 344 U.S. 443, 456-58 (1953) (Reed, J., majority opinion).

62. *Id.* at 508 (Frankfurter, J., separate opinion). With regard to mixed questions of fact and law Justice Frankfurter stated:

> Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

Id.

63. This can be inferred from the central holding of *Brown*, which is that the denial of certiorari by the Supreme Court "imports no expression of opinion upon the merits of the case."

second half of the twentieth century, both the category of rights available under federal habeas and the scope of review that federal courts applied were dramatically enlarged from where they had stood less than a hundred years earlier: a state prisoner was entitled to *de novo* review of all constitutional claims,[64] independent of how those claims were treated in the prior state proceedings. That is more or less how things stood until 1996.[65]

The Antiterrorism and Effective Death Penalty Act[66] was passed in the wake of the capture and arrest of Timothy McVeigh, the lead perpetrator in the bombing of the Murrah Federal Building in Oklahoma City.[67] The Act's habeas reforms synthesized and consolidated various proposals that had been circulating within Congress as far back as the Reagan Administration,[68] all of which were designed to streamline federal habeas review for state criminal convictions.[69] This package of reforms, now named the "Effective Death Penalty Act," was then awkwardly attached to a pending "Antiterrorism Bill" supported by President Clinton that was designed to ensure that McVeigh received the death penalty.[70] Ironically, the habeas revisions would not have had any meaningful impact on McVeigh's chances for post-conviction relief, since he was tried in federal rather than state court, and the bulk of the AEDPA's provisions concern state prisoners.[71]

Id. at 456 (majority opinion). Therefore, no res judicata or precedential effect follows when a habeas petitioner raises constitutional claims that were denied review by the Supreme Court on direct review. *Id.*

64. The Supreme Court removed from the purview of federal habeas all challenges resting on the Fourth Amendment where there was a full and fair opportunity to raise them in the state court. Stone v. Powell, 428 U.S. 465, 482 (1976).

65. A series of 1960s cases introduced a number of procedural innovations, but these cases were systematically overturned over the next thirty years. *See infra* note 77.

66. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2244-2267 (2006)).

67. James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 413 (2001).

68. *See* CHARLES DOYLE, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 10 n.37 (2006) (citing legislative bills); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute,* 44 BUFF. L. REV. 381, 426-35 (1996) (discussing the legislative history behind AEDPA).

69. *See, e.g., The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the Judiciary*, 97th Cong., 2d Sess. 98 (1982). The essential goal of this and other Reagan-era habeas reforms was to strip the federal courts of habeas jurisdiction in matters where the prisoner had received a "full and fair" hearing on the merits of their federal claims, even if the state court judgment had been in error. Under this "procedural" analysis, federal courts were still entitled to review the merits of a habeas petition filed by state prisoners, but a state adjudication would be considered "full and fair" if, among other things, the ultimate disposition was "reasonable."

70. Liebman, *supra* note 67, at 413.

71. *Id.*

For state prisoners seeking federal habeas relief, AEDPA imposes a variety of procedural obstacles. State inmates seeking habeas relief must now consolidate their claims in a single petition, rather than dispersing their claims through second or successive applications.[72] Nor are state inmates free to file their petitions at any time; AEPDA requires that state inmates file their petitions within a one-year statute of limitations, starting in most cases from the date when their conviction becomes "final."[73] AEDPA also requires circuit court judges to issue "certificate[s] of appealability" before they can consider appeals from denials of habeas relief entered by district courts.[74] With regard to factual findings, AEDPA all but eliminates the use of evidentiary hearings to develop facts that the petitioner failed to develop in the state courts—unless "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."[75]

As pernicious as these reforms were, they weren't terribly innovative, nor did they represent an ideological break from the direction the Court was headed at the time. It is true that the Court's 1960s habeas jurisprudence had substantially relaxed the prerequisites for habeas petitions—opening up the availability of relief for state inmates who would ordinarily have been denied review altogether—but over the next thirty years the Court had systematically overturned or abrogated many of those rulings, evincing a greater respect for finality in the state appellate process.[76] By the early 1990s, the Court had reinstated or strengthened the barriers for review that the Warren Court had sharply curtailed.[77] By

72. 28 U.S.C. § 2244(a)-(b) (2006).

73. *Id.* at § 2244(d).

74. *Id.* at § 2253(c).

75. *Id.* at § 2254(e)(2)(B).

76. *See* Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) (noting the potential of federal habeas review to undermine the "State's interest in the finality of convictions that have survived direct review," as well as "frustrate . . . the States' sovereign power to punish offenders and . . . honor constitutional rights," and needlessly re-litigate petitioners' claims (citing Engle v. Issac, 456 U.S. 107, 128 (1982))).

77. *See* Keeney v. Tamayo-Reyes, 504 U.S. 1, 8 (1992) (overruling Townsend v. Sain, 372 U.S. 293 (1963), and limiting the circumstances in which habeas petitioners challenging state convictions are entitled to an evidentiary hearing on a claim that material facts were not adequately developed in the prior state proceedings); McCleskey v. Zant, 499 U.S. 467, 487-97 (1991) (overruling in part Sanders v. United States, 373 U.S. 1 (1963), and requiring dismissal of successive habeas petitions which fail to raise new or different grounds for relief); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (overruling in part *Sanders*, 373 U.S. 1, and holding that successive habeas petitions may be entertained only where the prisoner supplements the constitutional claim with a colorable showing of factual innocence); Wainwright v. Sykes, 433

directly codifying or expanding on these rulings, AEPDA simply finished what the Supreme Court started.

But in § 2254(d)(1), AEDPA radically departed from some of the most well-established principles of habeas review. As previously mentioned, federal courts exercising habeas jurisdiction had long applied *de novo* review of "pure" questions of law and mixed questions of law and fact, regardless of how those questions were adjudicated by the state court.[78] In the language of § 2254(d)(1), however, federal habeas relief can only be granted if the state court judgment is "contrary to," or involves an "unreasonable application" of clearly established federal law. In 1996, the precise interpretation of these terms was unclear, but they seemed to obligate federal courts to "defer" to state court interpretations of federal law.

This suggestion was a controversial one. Even President Clinton, ostensibly the driving force behind the Act, expressed particular concern about § 2254(d)(1). In a statement issued when he signed the Act into law, Clinton acknowledged that AEDPA could potentially "limit the authority of the Federal courts to bring their own independent judgment to bear on questions of law and mixed questions of law and fact" when exercising habeas jurisdiction.[79] Such a reading, he said, would be subject to constitutional challenge if it prevented federal courts from making an "independent determination about 'what the law is'"[80] in accordance with *Marbury*'s vision of the judicial power. Nonetheless, he expected the courts to resolve the "ambiguity" so as to preserve their independent authority to review constitutional claims.[81]

Initially, it seemed Clinton's confidence was misplaced. Because § 2254(d)(1)'s language was both vague and unprecedented, the circuit courts adopted wildly divergent interpretations of its meaning, some of which directly contradicted *Marbury*. Of critical importance was identifying how decisions that were "contrary" to federal law differed from those that "unreasonably" applied such law. With regard to the latter question, the most extreme interpretation was expressed by the Fourth Circuit, which held that the phrase "unreasonable application" of federal

U.S. 72, 87-89 (1977) (overruling Fay v. Noia, 372 U.S. 391 (1963), and re-establishing the procedural default bar on claims not properly raised in prior state proceedings).

78. Wright v. West, 505 U.S. 277, 300-06 (1992) (O'Connor, J., concurring in the judgment).

79. Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 631 (Apr. 24, 1996).

80. *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

81. *Id.*

law obligated near-total deference to the state courts; a state court decision implicated the "unreasonable" clause only if the state court applied federal law "in a manner that reasonable jurists would all agree is unreasonable."[82] Under this logic, habeas review under § 2254(d)(1) became a rubber stamp on the state court conviction.

The Supreme Court granted certiorari on the proper interpretation of § 2254(d)(1) in *Williams v. Taylor*,[83] but expressly declined to address its constitutionality.[84] Justice O'Connor, writing for a shifting majority,[85] explained how the new standard of review would be applied.

The first point of the O'Connor opinion was that the "contrary to" and the "unreasonable application" clauses carried independent meanings.[86] According to Justice O'Connor, a state decision is deemed "contrary to" federal law in one of two circumstances: if the state court arrives at a conclusion that is opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Court already has on a set of "materially indistinguishable" facts.[87] Under Justice O'Connor's literal definition of the term, "contrary" means that a federal court can grant habeas relief with regard to questions of law or mixed questions of law and fact only if the state court decision answers those questions in a way that is "diametrically different" or "opposite in character or nature" to existing Supreme Court precedent.[88] As Justice O'Connor observed, such a scenario would be unlikely in the context of a "run-of-the-mill" case in which the state court identifies the correct legal standard.[89]

The "unreasonable application" clause is another matter. According to *Williams*, a federal habeas court may grant the writ under this clause if the state court identifies the correct governing legal principle from the

82. Green v. French, 143 F.3d 865, 870 (4th Cir. 1998).

83. Williams v. Taylor, 529 U.S. 362, 367 (2000).

84. Williams v. Taylor, 526 U.S. 1050 (1999) (mem.).

85. Justice Stevens announced the judgment of the Court, and Justices Souter, Ginsburg, and Breyer joined his full opinion. Although Justices O'Connor and Kennedy joined the portion of the Stevens opinion concluding that the habeas petitioner was entitled to relief, they disagreed with Stevens' analysis of how to properly interpret the AEDPA standard. As to that issue, Justice O'Connor wrote the majority opinion, joined by Chief Justice Rehnquist, and Justices Kennedy, Thomas and Scalia. Justice Kennedy joined the portion of Justice O'Connor's concurrence in the granting of habeas relief. Chief Justice Rehnquist wrote an opinion concurring with O'Connor's interpretation of the AEDPA standard, but dissenting in the grant of habeas, joined by Justices Kennedy and Thomas. Williams v. Taylor, 529 U.S. 362 (2000).

86. *Id.* at 405 (O'Connor, J., writing for the Court).

87. *Id.*

88. *Id.*

89. *Id.* at 406.

Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.[90] O'Connor's interpretation also contemplates a situation where a state court identifies the correct governing legal principle but unreasonably *extends* that principle from existing precedent to a new context where it should not apply or, alternatively, unreasonably refuses to extend a legal principle to a new context where it should apply.[91] O'Connor left undefined the precise contours of the phrase "unreasonable" except to say that it was something more egregious than "erroneous," and that "unreasonableness" was to be defined objectively, rather than subjectively.[92]

The approach articulated by *Williams* lies between two extremes. On the one hand, Justice O'Connor's reading of the "unreasonable application" standard was not as severe as the Fourth Circuit's "all reasonable jurists" standard, an interpretation Justice O'Connor characterized as imposing an additional gloss on the phrase "unreasonable."[93] On the other hand, the O'Connor majority rejected the extremely lenient interpretation represented by Justice Stevens in his concurrence, which argued that the entirety of § 2254(d)(1) did not establish a rigid body of rules but rather a "mood"[94] that the federal courts were obliged to respect when reviewing state court adjudications—an interpretation that Justice O'Connor said gave the amendment "no effect whatsoever."[95]

Under Justice O'Connor's middle ground approach, a federal court reviewing a habeas action by a state prisoner cannot grant the petition under the "unreasonable application" clause merely because the state court deprived the inmate of his constitutional rights. Instead, the federal court is required to leave undisturbed "reasonable" but erroneous state court decisions. In identifying the relevant legal principles, a federal court is restricted to what the statute calls "clearly established Federal law, as determined by the Supreme Court of the United States,"[96] which Justice O'Connor deemed to constitute a highly restrictive choice of law provision. In one of the most quoted passages from *Williams*, Justice O'Connor helpfully concluded that "clearly established" federal law consists of "the holdings, as opposed to the dicta, of this Court's decisions as of the time of

90. *Id.* at 413.
91. *Id.* at 408.
92. *Id.* at 409-10.
93. *Id.* at 409.
94. *Id.* at 386 (opinion of Stevens, J.).
95. *Id.* at 403 (O'Connor, J., writing for the Court).
96. 28 U.S.C. § 2244(d)(1) (2006).

the relevant state-court decision."[97] The implications of this have become clearer over time: a state court decision may not be overturned on habeas review simply because of a conflict with principles propounded by the federal circuit courts. Instead, § 2254(d)(1) expressly forecloses reliance on anything other than existing Supreme Court precedent.[98]

Subsequent cases have largely confirmed the principles articulated in *Williams*: a federal court no longer reviews the legal claims presented by the petition starting from scratch. Rather, the court applies a more limited review of how those claims were treated in the state court decision.[99] Even if the petitioner can successfully identify a constitutional error, he must also show that the state court's adjudication of the claim resulted in a decision outrageous enough under Supreme Court precedent to justify habeas relief under § 2254(d)(1).[100]

IV. The Dominant Constitutional Critiques of AEDPA

It is both surprising and slightly cruel that none of the opinions in *Williams* directly confronted the constitutionality of the AEDPA revisions, given that between 1996 and 2000 an intriguing body of scholarly opinion had emerged that § 2254(d)(1) unconstitutionally restricted the exercise of the federal courts' powers under the Supremacy Clause and Article III. Professors James S. Liebman and William F. Ryan expressed the most notable of these attacks in a 1998 law review article.[101] Surveying the history and painstaking compromises that were negotiated during the Constitutional Convention, the authors concluded that the Supremacy Clause and Article III were premised on several fundamental principles designed to ensure that federal law remained supreme over contrary

97. *Williams*, 529 U.S. at 412.

98. Carey v. Musladin, 127 S. Ct. 649, 653-55 (2006) (holding that, in the absence of decisions from the Court regarding the precise issue in question, the federal circuit court improperly relied on its own precedent to identify clearly established federal law under § 2254(d)(1)).

99. *See* Lockyer v. Andrade, 538 U.S. 63, 71 (2003) (invalidating Ninth Circuit rule requiring federal habeas courts to first review legal claims *de novo* before applying AEDPA standard of review); Bell v. Cone, 535 U.S. 685, 694 (2002) (per curiam) (holding that under the unreasonable application clause, the focus is on whether the state court's application of clearly established federal law is objectively unreasonable (citing *Williams*, 529 U.S at 409-10)).

100. *See Andrade*, 538 U.S. at 75 (holding that a federal habeas court must be left with more than just a firm conviction that the state court is erroneous in its application of federal law to justify granting relief); Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam) (holding that relief not warranted where a federal habeas court independently concludes that the state-court decision applied federal law incorrectly, because the decision must also be objectively unreasonable).

101. *See* Liebman & Ryan, *supra* note 15.

legislative and decisional law—a goal seemingly at odds with the language contained in § 2254(d)(1).[102] First, Article III confers upon Congress the power to regulate the federal judiciary's jurisdiction over federal questions.[103] However, once that jurisdiction is granted, the Supremacy Clause compels the federal courts to exercise what Liebman and Ryan identify as the five crucial qualities of the judicial power: "[To] decide (1) the whole federal question (2) independently and (3) finally, based on (4) the whole supreme law, and (5) impose a remedy that, in the process of binding the parties to the court's judgment, effectuates supreme law and neutralizes contrary law."[104]

As Chief Justice Marshall eloquently illustrated in *Marbury,* the judicial power in Article III requires that the judicial branch not just exercise its independent judgment in deciding cases, but to invalidate and nullify those laws and decisions which are repugnant to the "supreme law of the land."[105] This means that once the federal courts have been granted jurisdiction to decide a case, Congress may not forbid them from exercising the power to effectuate their independent judgments and make them binding on the parties. While Congress has control over the quantitative boundaries of jurisdiction, the judicial power of federal courts inheres in their qualitative exercise of that power.[106] Crucially, that qualitative power is beyond the reach of congressional interference.[107]

Beyond *Marbury*, the qualitative/quantitative distinction is bolstered by other Supreme Court cases in which the Court similarly invalidated acts of Congress that seemed to infringe on the Court's qualitative power to independently decide, and give effect to, questions of federal law. For purposes of this discussion, two cases stand out. In *United States v. Klein*,[108] the Court struck down a Reconstruction-era law[109] designed to

102. In particular, Liebman and Ryan identify constitutional weaknesses with the interpretations of § 2254(d)(1) that were then being applied by the Fifth, Seventh, and Eleventh Circuits. The common feature of these standards was that they called for heightened deference to state court findings regarding mixed questions of law and fact, which were presumed to fall under the "unreasonable application" clause. *See id.* at 864-87.

103. *Id.* at 884.

104. *Id.* at 696.

105. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

106. Liebman & Ryan, *supra* note 15, at 772.

107. *See* Michaelson v. United States, 266 U.S. 42, 65-66 (1924) ("[T]he attributes which inhere in [the judicial] power and are inseparable from it can neither be abrogated nor rendered practically inoperative.").

108. United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

109. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 (1870), *invalidated by Klein*, 80 U.S. 128, 148.

nullify a prior Supreme Court ruling[110] that had entitled former Confederate sympathizers who had obtained presidential pardons the right to sue for compensation for property seized by the Union Army during the Civil War.[111] The law directed federal courts to treat such pardons as conclusive proof that the plaintiff had aided the rebellion, and thereupon dismiss the claim.[112] Furthermore, if the plaintiff had already received a favorable ruling in the Court of Claims (as Klein did), the law deprived the Supreme Court of appellate jurisdiction and required that it dismiss the suit in its entirety.[113] The Court found that the law's "rules of decision" violated the Constitution in two ways, by dictating how the court should decide an issue of fact and by denying effect to a presidential pardon.[114] With respect to the former, the Court observed that:

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Congress has inadvertently passed the limit which separates the legislative from the judicial power.[115]

The law at issue in *Klein* not only robbed federal courts of the power to hear a category of cases, but it required that they assign a meaning to a factual question that was the *exact opposite* of what the Court would have ruled under its independent authority. While Congress can and has imposed rules of decision on federal courts in other contexts, the principal offense Congress committed was imposing rules of decision on the federal courts as a means to a particular end.[116]

In the 1997 decision *City of Boerne v. Flores*,[117] the Court likewise invalidated an Act of Congress that had attempted to engineer a particular judicial outcome—in that case, by dictating the standards by which federal courts should evaluate challenges brought against state and local governments[118] under the First Amendment's Free Exercise Clause.[119] The

110. United States v. Padelford, 76 U.S. (9 Wall.) 531 (1869).

111. *Klein*, 80 U.S. at 143-44.

112. *Id.*

113. *Id.*

114. *Id.* at 146.

115. *Id.* at 146-47.

116. *Id.* at 145.

117. City of Boerne v. Flores, 521 U.S. 507 (1997).

118. *Id.* at 512-14.

119. U.S. CONST. amend. I.

Court had previously held in *Employment Division v. Smith*[120] that neutral, generally applicable governmental regulations that "substantially burdened" a religious practice did not need to be supported by a "compelling" governmental interest to survive scrutiny under the Free Exercise clause.[121] *Smith* overturned several decades of precedent[122] that had held otherwise, and Congress responded by passing the Religious Freedom Restoration Act (RFRA),[123] which, among other things, attempted to "restore" the compelling-interest test for religious-practice claims brought under the Free Exercise clause.

But *Boerne* held that the RFRA infringed on Separation of Powers principles because it attempted to re-write the Constitution by forbidding the courts from giving effect to Supreme Court precedent.[124] The Court reiterated the maxim derived from *Marbury* that the "power to interpret the Constitution in a case or controversy remains in the Judiciary."[125] The Court also found that the RFRA as it applied to state and local governments exceeded Congress's powers under Section 5 of the Fourteenth Amendment to "enforce, by appropriate legislation," the Amendment's provisions.[126] *Boerne* held that while Congress had the power to remedy past discrimination and prevent future discrimination, such remedial legislation had to bear "congruence and proportionality" between "the injury to be prevented or remedied and the means adopted to that end."[127] Allowing the legislature to dictate the substance of a constitutional freedom was more than remedial—it endowed Congress with the virtually limitless power to "amend" the Constitution as it saw fit.[128]

It is worth noting that AEDPA is not nearly as aggressive as either of these laws. Unlike the law at issue in *Klein*, it does not impinge on executive powers, nor does it explicitly instruct Courts how to dispose of a case. Additionally, AEDPA applies generally across all constitutional questions, rather than a particular species of constitutional questions as the

120. Employment Division v. Smith, 494 U.S. 872 (1990).

121. *Id.* at 883-87.

122. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner 374 U.S. 398 (1963).

123. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488 (codified at 42 U.S.C. § 2000bb to 2000bb-4 (2006)), *invalidated by Boerne*, 521 U.S. 507.

124. *Boerne*, 521 U.S. at 519.

125. *Id.* at 524.

126. U.S. CONST. amend. XIV, § 5.

127. *Boerne*, 521 U.S. at 520.

128. *Id.* at 529 ("Under this approach, it is difficult to conceive of a principle that would limit congressional power.").

RFRA did. Furthermore, because AEDPA was enacted pursuant to Congress's Article I powers, it does not need to be congruent and proportional to any perceived injury.[129] But perhaps the most obvious distinction between these laws and § 2254(d)(1) (and perhaps the reason why the *Williams* court demurred on its constitutional status) is that § 2254(d)(1) is not styled as a qualitative restriction on the powers of judicial review, but rather on the judicial *remedy*.[130]

The distinction may seem trivial, but in practice it means that § 2254(d)(1) preserves the right of federal courts to apply their own independent judgment to questions of federal law.[131] Instead, the statute "merely" redefines the circumstances in which the federal courts can grant a remedy to those constitutional errors that they independently identify. Accepting for a moment this formalistic interpretation of AEDPA as a remedial limitation, and comparing it with the five attributes of the judicial power identified by Liebman and Ryan, it seems that only one such quality—the power to effectuate federal court judgments by issuing binding judgments—is really threatened.[132]

That is not to imply that a remedial limitation is less constitutionally problematic than the kinds of qualitative restrictions on the judicial power invalidated in *Boerne* and *Klein*. Rights without remedies cannot fairly be called rights at all, and the power of federal courts is "not merely to rule on cases, but to *decide* them."[133] Moreover, if federal courts lack the power to issue an appropriate remedy, then erroneous state decisional law is allowed to stand—a deeply troubling prospect that has the potential to "corrupt and trivialize"[134] the judicial power.

---

129. *See* Eldred v. Ashcroft, 537 U.S. 186, 218 (2003) (holding that the *Boerne* standard "does not hold sway for judicial review of legislation enacted . . .pursuant to Article I authorization").

130. *See* Lindh v. Murphy, 96 F.3d 856, 872 (7th Cir. 1996) (en banc) ("Congress has ample power to adjust the circumstances under which the remedy of the writ of habeas corpus is deployed."), *rev'd on other grounds,* 521 U.S. 320 (1997).

131. In recent years, the U.S. Department of Justice has adopted this reasoning to defend AEDPA from constitutional attack. *See* Brief for United States as Intervenor at 4, Irons v. Carey, 479 F.3d 658 (9th Cir. 2007) (No. 05-15275) ("Section 2254(d)(1) does not constitute an impermissible intrusion on federal courts' authority to interpret the governing law and to decide cases; rather, the statute represents a proper exercise of Congress's authority to define the scope of the federal habeas remedy for state prisoners.").

132. *See* 2 LIEBMAN & HERTZ, *supra* note 55, § 32.5, at 1656-76 (discussing the "effectualness ingredient" commensurate with the judicial power and how it is limited under AEDPA).

133. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995).

134. Motion of Marvin E. Frankel et. al for Leave to Appear as Amici Curiae and Brief In Support of Petitioner at 16, Williams v. Taylor, 529 U.S. 362 (2000) (No. 98-8384).

The problem is that these are abstract arguments, and while § 2254(d)(1)'s remedial restriction is theoretically just as repugnant and offensive to the judicial power as a restriction that works by limiting the interpretative abilities of Article III Courts, the actual harm inflicted is harder to gauge. That is because § 2254(d)(1) will decide the outcome in only a slim number of cases, where the state court ruling incorrectly applied "clearly established" federal law but did so in a way that was not objectively unreasonable or contrary to that law. In those instances where the Court has reversed grants of habeas relief on the grounds that the state court's misapplication of clearly established precedent failed to rise to the level of being "unreasonable,"[135] it has been almost impossible to determine whether the petitioner would have been granted relief even under the pre-AEDPA standards of review.[136] Time will only tell whether the Court will ever be presented with a wrenching close-call scenario that casts the rigidity and fundamental unfairness of the § 2254(d)(1) standard into sharp relief.

Similar practical concerns attend to the argument that § 2254(d)(1) unconstitutionally inhibits the judicial power by prescribing the sources of law federal courts must use in evaluating habeas petitions. This argument rests on the premise that, by requiring federal courts to rely on "clearly established Federal law, as determined by the Supreme Court of the United States," the entire body of circuit court rulings that would otherwise be brought to bear on a given federal question is robbed of its binding precedential effect.[137] And yet, the § 2254(d)(1) choice of law provision is supported by more than a kernel of common sense, since circuit court rulings are generally considered not to be binding on state courts.[138]

---

135. *See* Uttecht v. Brown, 127 S. Ct. 2218 (2007); Bell v. Cone, 543 U.S. 447 (2005); Brown v. Payton, 544 U.S. 133 (2005); Holland v. Jackson, 542 U.S. 649 (2004) (per curiam); Yarborough v. Alvarado, 541 U.S. 652 (2004); Yarborough v. Gentry, 540 U.S. 1 (2003); Middleton v. McNeil, 541 U.S. 433 (2004) (per curiam); Bell v. Cone, 535 U.S. 685 (2002).

136. Where the Court has found relief under § 2254(d)(1) to have been improvidently granted, the Court has not indicated whether, but for the statute, relief would have been granted under pre-AEDPA governing standards. The task is identifying a state court decision that (1) decided a question of law or a mixed question of law and fact which was (2) erroneous under Supreme Court and/or circuit-based precedent but (3) fails to rise to the level of being "unreasonable" or "contrary to" existing Supreme Court precedent. *See* 2 LIEBMAN & HERTZ, *supra* note 55, § 32.5, at 1676.

137. *See* Brief of Amici Curiae Habeas Corpus Resource Center et al. in Support of Petitioner, *supra* note 17, at 16-20.

138. *See* Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to . . . [an inferior] federal court's interpretation."); Steffel v. Thompson, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring) (noting that a lower federal court decision is not accorded

Therefore, the requirement that federal courts apply only Supreme Court precedent when exercising habeas jurisdiction seems to conform to a national judicial structure in which state courts are presumed to be coordinate and coequal with the lower federal courts on matters of federal law. For that reason, circuit court precedent should arguably never be the sole basis for disrupting the state appellate process or overturning a state conviction.

In summary, the conventional constitutional critiques of AEDPA have focused largely on readings of the Supremacy Clause and Article III. So far, however, factually distinguishable precedent and a nebulous yet persistent harm that evades easy detection have stymied these assaults. Moreover, if there is a single defining weakness to § 2254(d)(1), it is its casual disregard of the constraints placed on Congress's powers with regard to the writ that are clearly expressed in the Suspension Clause.

V. Why the Suspension Clause Matters

Section 2254(d)(1) has rendered the "very broad limits"[139] established by the Suspension Clause rather quaint: rather than strip jurisdiction entirely, Congress has simply limited the class of cases in which the federal courts can grant the habeas remedy. Superficially at least, this would seem to conform to Marshall's analysis in *Bollman*, which expressly gave Congress the power to confer habeas jurisdiction to Article III Courts. But *Bollman* is just as important for what it does not say as for what it does. Marshall's opinion in *Bollman* does *not* stand for the proposition that Congress is entitled to define the meaning of the habeas remedy, or the manner in which habeas jurisdiction is exercised. On the contrary, *Bollman* stands only for the narrow rule that the authorization of jurisdiction—and authorization alone—lies within the sphere of Congress's powers. Section 2254(d)(1) transgresses that boundary because it instructs federal courts to give force and effect to constitutional errors that they would otherwise invalidate—indeed, it "strike[s] at the center of the judge's process of reasoning"[140]—and unnaturally disturbs the federal courts "in the "exercise of their functions."[141]

---

the stare decisis effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction); Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003) ("[O]nly the Supreme Court's holdings are binding on the state courts . . . ."); Lindh v. Murphy, 96 F.3d 856, 869-72 (7th Cir. 1996) (en banc) ("State courts must knuckle under to decisions of the Supreme Court, but not of this court."), *rev'd on other grounds*, 521 U.S. 320 (1997).

139. Schlup v. Delo 513 U.S. 298, 343 (1995) (Scalia, J., dissenting).

140. Irons v. Carey, 479 F.3d 658, 667 (9th Cir. 2007) (Noonan, J., concurring).

141. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807).

The rigidity of the distinction that *Bollman* draws between what Congress can or can't do may be subject to dispute, but *Bollman* might also be read as pointing to the Suspension Clause as an additional, specific prohibition on Congress's power to interfere with the federal courts' independent adjudication of habeas petitions. In other words, the Suspension Clause does not just state that Congress can restrict the writ in times of invasion or rebellion: it presumes that Congress can *only* suspend the writ, nothing more.

The historical evidence supports this reading. It is important to understand that, before the establishment of the Bill of Rights, habeas corpus was considered by the Framers to be the primary vehicle for the vindication of personal liberty. The Framers were keenly aware of Blackstone's characterization of the Great Writ earlier in the eighteenth century as the "Bulwark of the British Constitution," "efficacious . . . in all manner of illegal confinement."[142] In the Federalist No. 84, Alexander Hamilton invoked the Suspension Clause, and Blackstone's description of the writ, to justify *omitting* a Bill of Rights: "Arbitrary imprisonments," Hamilton wrote, "have been, in all ages, the favorite and most formidable instrument of tyranny."[143]

There were other reasons to believe that the Constitution simply didn't need a Bill of Rights. After all, those powers not explicitly granted to the federal government were withheld from it; as James Madison put it in a letter to Thomas Jefferson, "the rights in question are reserved by the manner in which the federal powers are granted."[144] The sentiment Hamilton expressed in the Federalist 84 is typical: "Why declare," Hamilton asked, "that things shall not be done which there is no power to do?"[145] Why, for instance, should liberty of the press be expressly safeguarded from government infringement, when no power was given to the government by which such restrictions could be imposed?[146] By contrast, there was the risk that "a positive declaration of some of the most essential rights could not be obtained in the requisite latitude."[147] The doctrine of delegated powers was conceived as a safeguard to prevent the risk of such overreaching by the federal government, to ensure that the

142. WILLIAM BLACKSTONE, 3 COMMENTARIES 129 (6th ed. 1775).

143. THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

144. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* WRITINGS OF JAMES MADISON 269, 271-74 (Gaillard Hunt ed., 1904), *in* WILLIAM COHEN, JONATHAN D. VARAT & VIKRAM AMAR, CONSTITUTIONAL LAW CASES AND MATERIALS 20 (12th ed. 2005).

145. THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 143, at 513.

146. *Id.*

147. Letter from James Madison to Thomas Jefferson, *supra* note 144, at 271.

restraints on government power did not create the incentive to interpret its powers more broadly. Still, James Madison wrote, "[m]y own opinion has always been in favor of a bill of rights; *providing it be so framed as not to imply powers not meant to be included in the enumeration . . . .*"[148]

Because it was phrased as a restraint on government power, many of the same structural arguments made against the Bill of Rights were levied against the Suspension Clause. Moreover, because the writ of habeas corpus was conceived as encapsulating the individual liberties that were eventually encoded in the Bill of Rights, any provision that expressly allowed for its suspension was greeted with skepticism and concern. Why should Congress be expressly prohibited from suspending the writ when that power was not otherwise granted in the remaining body of the text? During the Constitutional Convention, John Smilie raised this very point with regard to the Suspension Clause and the Sixth Amendment's preservation of the right to a jury trial: "How indeed does this agree with the maxim that whatever is not given is reserved? Does it not rather appear from the reservation of these two articles that everything else, which is not specified, is included in the powers delegated to the government?"[149]

Professor Freedman points out that the Federalists won this debate by claiming that the Suspension Clause, despite its negative phrasing, was actually a grant of government power, and thus did not violate the principle that those powers not granted to the federal government were withheld from it.[150] The Suspension Clause allowed Congress the power to cease the execution of the writ—but that power was reserved only for those periods in which the public safety required it. Even this limited provision provoked fear and anxiety among members of the Constitutional Convention, on the grounds that any such exception would be abused by a tyrannical legislature.[151] The dispute was resolved by the parties' universal agreement that the conditions on the writ's suspension were exhaustive, not illustrative.

Bearing the preceding analysis in mind, we are left with one question: How could the Suspension Clause, which contemplates that habeas corpus can only be suspended in times of emergency, leave the Great Writ glaringly vulnerable to substantive curtailment at the hands of the legislature of the sort embodied in § 2254(d)(1)? Also, if the Constitution

148. *Id.* (emphasis added).

149. John Smilie, Speech to the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 392 (John P. Kaminski & Gaspare J. Saldino eds., 1984), *cited in* FREEDMAN, *supra* note 26, at 15.

150. FREEDMAN, *supra* note 26, at 16.

151. *See id.* at 17 (citing various discussions at the Constitutional Convention).

is read as conferring such power on Congress, the Suspension Clause becomes redundant. To paraphrase the immortal words of *Marbury*, if Congress has the power to exceed the confines of that power conferred on it in the Constitution, then the careful distribution of this power as articulated in the Suspension Clause is "form without substance."[152] Indeed, while AEDPA only slightly elevated the gravity of the constitutional violation required to trigger habeas relief, it has nonetheless had the effect of suspending the writ for those cases in which the state court applied federal law in a manner that was incorrect but not unreasonable.[153] As discussed in Section III, these kinds of cases are both rare and hard to pinpoint. But if Congress is free to substantively define the nature of the habeas remedy, and to do so in a way that suspends the writ for even a narrow category of cases, there is no logical stopping point that prevents Congress from employing these means to suspend the writ entirely.

In *Williams v. Taylor*, Justice O'Connor invalidated the draconian Fourth Circuit rule that obligated state inmates to establish that their convictions were premised on an error of federal law that all reasonable jurists would conclude was unreasonable.[154] Phrased differently, it required that the federal court deny the writ unless it could conclude that no reasonable jurist would find that the constitutional error was unreasonable. O'Connor sensibly determined that the Fourth Circuit's gloss on the term "unreasonable" was itself unreasonable under the rules of statutory construction, but she did not expressly rule out the possibility that Congress had the power to redefine the parameters of habeas relief in the kinds of extreme language embraced by the Fourth Circuit.[155]

But if the Great Writ is to have any meaning as a formidable restraint on tyranny and arbitrary confinement, it must be free from substantive limitation by the body that most fears it. In *Boerne*, Justice Kennedy, speaking for the Court, observed that if Congress had the power to dictate the substance of a constitutional right through legislation, "no longer would the Constitution be 'superior paramount law, unchangeable by ordinary

152. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

153. *See* Davis v. Straub, 430 F.3d 281, 291 (6th Cir. 2005) (Merritt, J., dissenting) ("The majority's decision achieves the unfortunate trifecta of misapplying the Supreme Court's jurisprudence under 28 U.S.C. § 2254(d)(1), gutting the Article III judicial power while 'suspending' the writ of habeas corpus, and stranding a probably innocent inmate in prison for life.").

154. Williams v. Taylor, 529 U.S. 362, 409-10 (2000).

155. *Id.*

means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.'"[156]

Habeas corpus is the quintessential constitutional inquiry, and has been at least as far back as 1867, when the Court began to recognize that constitutional error had the potential to void otherwise valid court judgments. Even after the AEDPA amendments, the federal statute makes this concept explicit: the ultimate inquiry is whether the prisoner is being held in custody in violation of "the Constitution or law or treaties of the United States."[157] Section 2254(d)(1) is hardly constitutional (or even internally consistent) if it allows prisoners who are in custody in violation of the Constitution to rot behind bars, simply because Congress has decided that the Constitution does not speak to them.[158]

VI. Conclusion

While the Suspension Clause has been interpreted as merely illustrative of Congress's powers, the *Bollman* case, the discussions at the Constitutional Convention, and the Court's vigorous history in interpreting the writ strongly suggests that the Suspension Clause should be read as an exhaustive articulation of Congress's power to manipulate the scope of the habeas remedy. Under that analysis, AEDPA's qualitative restrictions on federal habeas review for state prisoners are plainly unconstitutional.

As Professor Zechariah Chafee explained over a century ago, habeas is "the "most important human right"[159] in the Constitution because it functions as a mechanism for the enforcement of the Bill of Rights against the federal government: "Censorship can be evaded; prosecutions against ideas may break down; a prison wall is *there*. Only habeas corpus can penetrate it. When imprisonment is possible without explanation or redress, every form of liberty is impaired."[160]

And yet very little of that analysis emerged during the debates at the Constitutional Convention. As Chafee notes, "practically all contemporaneous discussion was directed at the necessity or the danger of

156. City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (quoting *Marbury*, 5 U.S. at 177).

157. 28 U.S.C. § 2254(a) (2006).

158. *See, e.g.*, Irons v. Carey, 479 F.3d 658, 670 (9th Cir. 2007) (Reinhardt, J., concurring specially) ("Whether it was reasonable for a state court to misapprehend the dictates of the Constitution in a particular case hardly seems relevant to a citizen's right not to be imprisoned in violation of the fundamental liberties he is granted by the document that governs our societal structure.").

159. ZECHARIAH CHAFEE, JR., HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION 53 (1952).

160. *Id.*

the permission to suspend the writ in emergencies. The *importance* of the writ itself is virtually taken for granted."[161] The irony is that virtually nothing about the writ has been taken for granted since.

161. *Id.* (emphasis added).