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The Wall that AEDPA Built: Revisiting the Suspension Clause Challenge to the Antiterrorism and Effective Death Penalty Act

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— Comment —

THE WALL THAT AEDPA BUILT:
REVISITING THE SUSPENSION
CLAUSE CHALLENGE TO THE
ANTITERRORISM AND EFFECTIVE
DEATH PENALTY ACT

“We are all broken by something. We have all hurt someone and have been hurt. We all share the condition of brokenness even if our brokenness is not equivalent . . . We’ve submitted to the harsh instinct to crush those among us whose brokenness is most visible. But simply punishing the broken—walking away from them or hiding them from sight—only ensures that they remain broken and we do, too. There is no wholeness outside of our reciprocal humanity.”¹

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1. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 289–90 (2014).

INTRODUCTION

For more than four centuries, the writ of habeas corpus has been the primary vehicle for “oppressed and distressed prisoners” to stake their claims to righteousness and to unmask government misconduct.² The framers recognized the importance of protecting oppressed prisoners by ensuring that “[t]he Privilege of the Writ of Habeas Corpus *shall not be suspended*.”³ But the Antiterrorism and Effective Death Penalty Act⁴ (AEDPA) has built a virtually impenetrable wall of isolation around these prisoners, silencing their grievances and leaving them powerless against state abuses. As interpreted by the Supreme Court, AEDPA’s Section 2254(d)(1) bars habeas petitioners from obtaining federal postconviction relief for any claims decided in state court, unless the petitioner can show that the state court decision is irrational—a standard that has proven almost impossible to meet.

Celebrating its twentieth anniversary this year, AEDPA might finally be ready to fall. Federal judges of varying political persuasions have begun to publicly voice their disapproval of AEDPA and question its constitutionality, some calling it one of the “greater wrongs of our legal era.”⁵ While it is unlikely that the Supreme Court would find that

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2. See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 1 (2010) (quoting JOHN LILBURNE, *THE PRISONER’S MOST MOURNFUL CRY* 3 (1648)); Noam Biale, *Beyond a Reasonable Disagreement: Judging Habeas Corpus*, 83 U. CIN. L. REV. 1337, 1344 (2015) (explaining that the writ developed under English common law “as a mechanism for ensuring compliance with the King’s laws”).
 3. U.S. CONST. art. I, § 9, cl. 2 (emphasis added).
 4. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles of U.S.C.).
 5. Hon. 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, 1219, 1224 (2015) (explaining that the Supreme Court’s interpretation of AEDPA has “troubling constitutional implications”); see also Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xlii (2015) (“AEDPA is a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice. It has resulted and continues to result in much human suffering. It should be repealed.”); Hon. Gregory M. Sleet, *The Execution of Shannon Johnson: A Subversion of Due Process and the Adversarial System?*, 30 A.B.A.J. CRIM. JUST. 9, 10 (2015) (“[W]hile it is impossible to remedy any possible constitutional infirmity in Johnson’s case, it seems to me that it is incumbent upon us as participants in the legal process at issue, especially those of us at the very heartbeat of that process, to continuously evaluate whether that process has functioned consistent with both our notions of due process and societal precepts of what is or is not fair.”); Marcia Coyle, *Sotomayor Says Congress Should Not Tell Judges How to Review Cases*, THE NAT’L L.J. (November 19, 2015), <http://www.nationallawjournal.com/id=1202742882533/Sotomayor-Says-Congress->

its own statutory interpretation violates the Constitution, a well-argued Suspension Clause challenge can expose AEDPA's friction with important legal principles and may pressure Congress to take action.⁶ This Comment provides such an argument.

Part I gives background on AEDPA, points out what Section 2254(d)(1) does, explains why AEDPA's standard of review is problematic, and introduces the Suspension Clause challenge. Part II describes the writ of habeas corpus at common law and observes that there are two versions of habeas's history, a narrow version and a functionalist version. The functionalist approach is essential to a strong attack on AEDPA. Part III introduces the age-old debate over the writ's constitutional scope. To formulate the best Suspension Clause challenge to Section 2254(d)(1), a challenger should argue that: (1) the Suspension Clause impliedly guarantees a right, or entitlement, to the writ of habeas corpus that Congress cannot take away; (2) that right includes meaningful review of a petitioner's federal claims; and (3) that right also includes some federal review.

Part IV argues that the Court's interpretation of Section 2254(d)(1) does not merely make it more difficult for petitioners to successfully obtain the writ; it builds a wall that renders petitioners voiceless, courts powerless, and justice a nullity. This Part focuses on three pieces of AEDPA's standard of review and argues that each of these pieces adds significant barriers to substantive postconviction review. Collectively, they form the suspension wall: (1) all claims "adjudicated on the merits" in state court receive deference; (2) that deference requires petitioners to show that the state court decision was "contrary to or an unreasonable application of" federal law, perhaps the most deferential standard in all of Supreme Court jurisprudence; (3) the federal law applied in the state court must be "clearly established, as determined by the Supreme Court of the United States." Part V then discusses the early Suspension Clause challenges in the circuit courts and

Should-Not-Tell-Judges-How-to-Review-Cases?slreturn=20160109093344 [https://perma.cc/SM45-WYW4] ("[J]udicial independence is compromised when Congress decides with details what the standards [of review] should be.").

6. The Court is unlikely to hold that its interpretation of AEDPA violates the Suspension Clause for three practical reasons. First, it interpreted AEDPA "in the most inflexible and unyielding manner possible" by choice, not obligation. Reinhardt, *supra* note 5, at 1221, 1225–29. Second, the Court frequently chides lower courts that grant habeas petitions as if it were "scold[ing] a naughty child." Ursula Bentele, *The Not So Great Writ: Constitution Lite for State Prisoners*, 5 U. DENV. CRIM. L. REV. 34, 36 (2015). Third, the Court avoids deciding constitutional issues, unless necessary. *See* *Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). However, the Suspension Clause challenge has persuasive value because constitutional challenges can garner attention and add much-needed political pressure.

distinguishes the reasoning in those cases from AEDPA's current suspension wall. With the recent surge in scholarship calling for radical reform to AEDPA,⁷ the time is ripe to strike with a strong challenge that can awaken the public to the need for change.

I. AEDPA BACKGROUND AND THE PROBLEMS AEDPA POSES

After the 1995 Oklahoma City bombings stunned the nation,⁸ Congress took advantage of its opportunity to reform the writ of habeas corpus by enacting the Antiterrorism and Effective Death Penalty Act.⁹ Seemingly "semi-obscure,"¹⁰ AEDPA was "the most significant habeas reform" since the Habeas Corpus Act of 1867.¹¹ Since its enactment, however, "AEDPA has proven to be as confusing as it is controversial."¹² Among its changes, AEDPA added a number of daunting procedural hurdles for habeas petitioners, including a tighter exhaustion

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7. See Samuel R. Wiseman, *What is Federal Habeas Worth?*, 67 FLA. L. REV. 1157 (2015) (proposing that resources be focused on actual innocence cases); Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. 887 (2012) (arguing that King and Hoffman should expand their concept of federal intervention in state criminal processes); Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85 (2012) (disagreeing with King and Hoffman that federal habeas review should be tossed out and, instead, proposing increased federal review over state processes and decreased federal review over state results); NANCY J. KING & JOSEPH L. HOFFMAN, *HABEAS FOR THE TWENTY-FIRST CENTURY* (2011) (criticizing the current habeas system for its costliness and ineffectiveness and proposing plans to reform state criminal justice systems).
 8. See 142 Cong. Rec. H3614 (daily ed. Apr. 18, 1996) (statement of Rep. Pelosi) (noting that the Oklahoma City bombing was the force pushing the AEDPA).
 9. After signing the bill into law, President Clinton stated, "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 and the bedrock constitutional principle of an independent judiciary." Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 720 (Apr. 24, 1996).
 10. Emily Bazelon, *The Law that Keeps People on Death Row Despite Flawed Trials*, N.Y. TIMES MAG., (July 17, 2015), http://www.nytimes.com/2015/07/17/magazine/the-law-that-keeps-people-on-death-row-despite-flawed-trials.html?_r=0 [<https://perma.cc/ZF4M-F4MW>].
 11. Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 923 (2001) (explaining that much of Congress "wanted to 'get tough on crime'" and that President Bill Clinton signed the bill into law "to avoid charges that he was 'soft' on crime").
 12. Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 959 (2012); *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("[I]n a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting.").

requirement, a one-year statute of limitations, and a ban on “successive petitions.”¹³

AEDPA’s “centerpiece,” Section 2254(d), alters the standard of review for federal courts reviewing habeas petitions.¹⁴ Before AEDPA, the Court conducted independent de novo review of a habeas petitioner’s federal claims.¹⁵ But Section 2254(d)(1) provides that federal courts shall not issue petitions for the writ of habeas corpus for state-court judgments “adjudicated on the merits” unless the state-court judgment “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.”¹⁶ This provision may not seem like much on its face, but it deals deadly blows to federal habeas petitions, even where courts know that a claim is meritorious.¹⁷ With this exacting standard, AEDPA “make[s] 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.”¹⁸

Congress created this “difficult to meet” standard to advance finality, federalism, and comity.¹⁹ Proponents of the AEDPA argue that

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13. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (1996). AEDPA also limited the circumstances under which a federal court may conduct an evidentiary hearing, *id.*, further limited appellate review, § 102, and added requirements for the adjudication of capital cases, § 107. AEDPA’s procedural limitations are beyond the scope of this Comment.
 14. Daniel J. O’Brien, *Heeding Congress’s Message: The United States Supreme Court Bars Federal Courthouse Doors to Habeas Relief Against All But Irrational State Court Decisions, and Oftentimes Doubly So*, 24 FED. SENT’G REP. 320, 322 (2012).
 15. *Brown v. Allen*, 344 U.S. 443, 465, 506 (1953).
 16. Antiterrorism and Effective Death Penalty Act of 1996 § 104 (codified as amended at 28 U.S.C. § 2254 (2012)). Section 2254(d)(2) provides that federal courts may not grant the writ of habeas corpus for any cases adjudicated on the merits in state court unless the state court decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Id.* This provision, too, is beyond the scope of this Comment.
 17. Kozinski, *supra* note 5, at xli (“[Judges] now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted.”).
 18. Reinhardt, *supra* note 5, at 1220–21 (arguing that the Court’s conservative majority has “embarked on a path designed to render constitutional rulings by state courts nearly unreviewable by the federal judiciary”).
 19. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (“If this standard is difficult to meet, that is because it was meant to be.”). Finality refers to “the principle that the criminal process must have some end.” Barry Friedman, *Failed Enterprise: The Supreme Court’s Habeas Reform*, 83 CAL. L. REV. 485, 489 (1995). “Federalism refers to the coordinate role of the states in both adjudicating

federal review of state convictions “frustrates ‘both the States sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.’”²⁰ They further emphasize that swift punishment is “essential to the educational and deterrent functions of the criminal (justice system).”²¹ The federal postconviction habeas process unnecessarily promotes the “endless reopening of convictions”²² and the “floods of stale, frivolous and repetitious petitions [that] inundate the docket of the lower courts.”²³ After a state invests time, effort, and money into a conviction, it feels disrespected when a federal court forces it to begin anew.²⁴

But AEDPA flirts with the line between the politically foolish and the unconstitutional. While costs certainly play a role in the administration of criminal justice, AEDPA does not reduce caseloads; it does not streamline convictions; it does not trim expenses from habeas litigation.²⁵ Further, federal review of possible constitutional violations in state court proceedings is not an affront to federalism but rather an example of “the federal system . . . working as it should.”²⁶ Moreover,

guilt and innocence, and in addressing claims of constitutional violation.” *Id.* Comity, as an aspect of federalism, refers to the idea “that federal courts should respect the determinations of state courts regarding the adjudication of constitutional claims.” *Id.*

20. *Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998) (quoting *Murray v. Carrier*, 477 U.S. 478, 487 (1986)).
21. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963); see also Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1108–09 (2014) (arguing that some error is inevitable because every level of the criminal process involves “the judgment of people” and that states are confronted with the very real need to combat crime and make “tradeoffs”).
22. Bator, *supra* note 21, at 452.
23. *Brown v. Allen*, 344 U.S. 443, 536 (1953) (Jackson, J., concurring).
24. 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, 76 (2013); see Naftali Bendavid, *The Hangman Cometh*, N.J. L. J., Dec. 30, 1996 (“It [is] about time we put a stop to the endless, frivolous appeals of justly imposed sentences.”).
25. See Wiseman, *supra* note 7, at 1164–65 (estimating that the current habeas process costs \$327 million per year); Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009) (criticizing the costliness and inefficiency of federal habeas review of state criminal cases); NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 59 (2007) (analyzing the statistics of all federal habeas cases and explaining that the “[o]verall disposition time *per case* has increased on average since AEDPA”).
26. Eric M. Freedman, *State Post-Conviction Remedies in the Next Fifteen Years: How Synergy Between the State and Federal Governments Can Improve the*

AEDPA's valuation—finality over fairness—is short-sighted. These policies contribute to the cycle of mass incarceration, exacerbate the distrust of the criminal justice system in poor communities, and increase the likelihood of imprisoning innocent people for crimes they did not commit.²⁷ At its root, AEDPA willfully ignores that the criminal justice system can escape this cyclicity only when it acknowledges that its primary role is to “preserve the integrity of society itself.”²⁸

More relevant here, AEDPA's Section 2254(d)(1) creates unsettling friction with many constitutional principles.²⁹ Habeas corpus speaks to the power of federal judges to review cases, the procedural rights of detainees and defendants, and other substantive individual rights of defendants throughout the criminal process. Accordingly, scholars and litigators have challenged Section 2254(d) on separation of powers grounds because it deprives federal judges of their duty to “say what the law is.”³⁰ They have argued that Section 2254(d) violates defendants' Fifth and Fourteenth Amendments rights to Due Process because it cheapens habeas postconviction procedures.³¹ And they have challenged that it unconstitutionally suspends the writ because it prohibits

Criminal Justice System Nationally, 24 FED. SENT'G REP. 298, 299 (2012) (explaining that federal review in habeas proceedings furthers efficiency and acts as a “double security” for the rights of the people) (quoting THE FEDERALIST NO. 51, at 139 (James Madison) (Jack N. Rakove ed., 2003)).

27. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 340–45 (2006) (explaining that the AEDPA exacerbates the United States' incarceration rate, which is already the highest in the world, as well as the perception that the criminal justice system is “unfair, corrupt, biased, and error-plagued”).
28. Sleet, *supra* note 5, at 9 (quoting Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 61 (1998)).
29. Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414, 416 (1998) (arguing that the although “the AEDPA is unconstitutional,” constitutional challenges will likely fail “in light of the Supreme Court's current composition”).
30. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); 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, 696, 864–84 (1998) (arguing that the interpretation of Section 2254(d)(1) (later adopted by the Court) violates the separation of powers because it deprives “the judicial Power” of its five core qualities: (1) deciding “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”).
31. See Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 6 (2010) (arguing that the AEDPA's constraint of federal review constitutes a lack of due process).

defendants who were convicted in state courts from fully vindicating their constitutional rights.³²

Though each of these challenges failed in the lower federal courts shortly after AEDPA's enactment,³³ recent Supreme Court cases may have breathed life back into the Suspension Clause challenge, as Part IV discusses. Further, the Suspension Clause challenge is in the best position to reveal many of AEDPA's problems. As Parts II and III argue, the Suspension Clause's "very broad limits"³⁴ and historical background can provide enough flexibility to utilize due process and separation-of-powers grievances.

II. THE TWO VERSIONS OF HABEAS CORPUS "AS IT EXISTED IN 1789"

The writ of habeas corpus has long been celebrated as an indispensable piece of American democracy, and any restrictions on the writ's availability are met with the "immediate incantation of the Great Writ."³⁵ The Court reasons that the writ of habeas corpus as it existed in 1789 informs the constitutional scope of the writ as it exists now.³⁶

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32. See Dan Poulson, Note, *Suspension for Beginners: Ex Parte Bollman and the Unconstitutionality of the 1996 Antiterrorism and Effective Death Penalty Act*, 35 HASTINGS CONST. L.Q. 373, 374 (2008) (arguing that the AEDPA limits the availability of judicial review for state prisoners).
 33. See *Crater v. Galaza*, 491 F.3d 1119 (9th Cir. 2007) (holding that AEDPA's Section 2254(d) is not a violation of separation of powers and does not suspend the writ); *Irons v. Carey*, 505 F.3d 846, 855 (9th Cir. 2007) (Noonan, J., concurring) (rejecting the argument that "habeas corpus today is a requirement of due process"); *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (holding that AEDPA's Section 2254(d) is neither a suspension of the writ nor a due process violation).
 34. *Schlup v. Delo* 513 U.S. 298, 343 (1995) (Scalia, J., dissenting).
 35. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142-43 (1970) (arguing that innocence should be the primary concern in postconviction habeas cases and that such a restriction on the writ's "current excesses" does not conflict with the writ's true purpose).
 36. See *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, J., concurring) ("The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted."). *But see* *Felker v. Turpin*, 518 U.S. 651, 663-664 (1996) ("But we 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.").

But the robustness of the early writ has long been debated.³⁷ The framers' understanding of the writ was undoubtedly influenced by English Common Law, which relied a great deal on the writ.³⁸ Many scholars credit Chapter 29 of the Magna Carta with first mentioning the writ, though its true origins date back even further.³⁹ Most scholars agree that the writ occasionally expanded and contracted throughout history in England and in the United States.⁴⁰ But the unchanging, outermost boundaries of the writ are less clear, and the breadth of habeas review available today depends, in part, on the version of history offered to support that review.⁴¹

Judges, scholars, and attorneys primarily endorse two descriptions of the writ's historical background, a narrow description and a functionalist description. According to the narrow description, the common law writ was used primarily to prevent arbitrary imprisonment by the king. As Blackstone explained, it is an "absolute necessity" that the king show cause "upon every commitment" and "that the court, upon a *habeas corpus*, may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner."⁴² Thus, the framers envisioned a writ used as means for getting prisoners and defendants into court, not a writ that ensures post-conviction review.⁴³

37. See Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 375–77 (1998) (discussing the "divergent views of the history of habeas corpus").

38. *Id.* at 389–90.

39. See HALLIDAY, *supra* note 2, at 17, 40–41 (noting historians' consideration of the writs *de homine repligiando*, *de odio et atia*, and mainprise as possible antecedents to habeas corpus *ad subjiciendum*).

40. See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 584, 631–32 (2008) (discussing early habeas legislation in the United States).

41. Clarke, *supra* note 37, at 375–377.

42. 3 WILLIAM BLACKSTONE, COMMENTARIES *133–34.

43. *Hamdi v. Rumsfeld*, 542 U.S. 507, 555–56 (2004) (Scalia, J., dissenting) ("The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses."); Clarke, *supra* note 37, at 378 (explaining that habeas corpus originated to "bring people—such as jurors or witnesses—before the court so that the judiciary could conduct its business"); Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 338–45 (1952) (detailing the history of habeas corpus at common law and at America's founding and expressing doubt that the framers intended the writ to include federal review, since they decided not to put an affirmative right to the writ in the Bill of Rights).

In *Darnel's Case*,⁴⁴ this view's paradigm case, King Charles I imprisoned more than seventy knights and gentlemen who had refused to contribute to the king's "forced loan" strategy to fund war with Spain and France.⁴⁵ Some of those prisoners sought habeas corpus and argued that because the king did not lawfully charge them with any crime, the jailer must release them.⁴⁶ After the King's Bench denied the writ, *Darnel's Case* became a symbol of exactly the sort of executive oppression the framers wanted to prevent.⁴⁷ For this narrow view, the Suspension Clause does not secure any "content" or substance to the writ; it simply ensures that prisoners receive due process of law.⁴⁸

According to the functionalist description, however, the common law writ of habeas corpus included more than just an assurance of due process in the face of tyranny; it embodied three underlying principles, each of which must play a role in the writ's constitutional scope. First, the writ acted as a protector of individual liberty.⁴⁹ Blackstone described the writ as "the Bulwark of the English Constitution" and as "the Great Writ of liberty."⁵⁰ Two centuries later, Justice Brennan similarly described the writ's history as "inextricably intertwined with the growth of fundamental rights and of personal liberty." Even those advocating for the narrow view cannot not help but explain the writ's functions in these broader terms. In *Hamdi v. Rumsfeld*,⁵¹ Justice Scalia wrote that the "Great Writ" lies at "the very core of liberty."⁵²

The earliest statutes that recognized the writ, too, spoke in these terms. The Magna Carta broadly provided that "[n]o free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, *except by*

44. (1627) 3 Cobbett's St. Tr. 1 (K.B.) (Eng.).

45. Clarke, *supra* note 37, at 381.

46. *Id.* at 382 (statements made by Serj. John Bramston, a counsel for the accused) ("[I]f this return shall be good, then his imprisonment shall not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually . . .").

47. Collings, Jr., *supra* note 43, at 336–388 (explaining that the American colonists familiarized themselves with the writ by reading and circulating pamphlets from the arguments in *Darnel's Case*).

48. *I.N.S. v. St. Cyr*, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting).

49. HALLIDAY, *supra* note 2, at 2 ("[T]he writ's history has traditionally been approached as something grander, told as the tale of liberty: 'the Great Writ of Liberty,' as we have called it for three hundred years.").

50. 3 BLACKSTONE, *supra* note 42, at *129.

51. 542 U.S. 507 (2004).

52. *Id.* at 554–55 (Scalia, J., dissenting); *see also* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 23 (1998) (describing the writ as "an important safeguard for personal liberty").

*the legal judgment of his peers or by the law of the land.*⁵³ The Petition of Right later provided that “no freeman . . . [may] be imprisoned or detained . . . contrary to the laws and franchise of the land.”⁵⁴ And the Habeas Corpus Act of 1679—originally entitled “An Act for the better *Securing the Liberty of the Subject*, and for Prevention of Imprisonments beyond the Seas”—protected “any person . . . committed or detained . . . for any crime.”⁵⁵ As a close relative of due process rights, the writ served as a vehicle through which individuals may realize “great and fundamental laws”⁵⁶ and as “instrument by which due process rights could be insisted upon.”⁵⁷

Second, the writ gave judges the flexibility to correct errors because it was based on equitable principles.⁵⁸ Common law judges “took account of petitioners’ individual circumstances, ‘rather than imposing obedience to a set of rules inscribed in precedents.’”⁵⁹ In doing so, they protected individuals against “momentary diversions of law through practices that the English legal tradition and moral norms would never permit” and corrected “errors in judicial proceedings.”⁶⁰ In *James Bagg’s Case*,⁶¹ a paradigm case for the functionalist view, the mayor removed Bagg from his public office for speaking ill of his fellow officials.⁶² The mayor did not give Bagg notice of the charges against him, nor did he give Bagg an opportunity to answer the charges.⁶³ Sir Edward Coke explained that the court had jurisdiction to issue the writ to correct “any manner of misgovernment” and that “no wrong or

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53. MAGNA CARTA, ch. 39 (1215), *reprinted in* SOURCES OF OUR LIBERTIES 17 (R. Perry & J. Cooper eds., 1959) (emphasis added).
54. Halliday & White, *supra* note 40, at 620.
55. Habeas Corpus Act of 1679, 31 Car. 2 c. 2 (Eng.).
56. *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9,487); *see also* *Boumediene v. Bush*, 553 U.S. 723, 743 (2008) (“[T]he Framers considered the writ a vital instrument for the protection of individual liberty . . .”).
57. *Hamdi*, 542 U.S. at 555 (Scalia, J., dissenting).
58. Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 139 (2014) (“Equity runs through the law of habeas corpus.”); *see also* *Boumediene*, 553 U.S. at 813 (Roberts, C.J., concurring) (describing the writ as a “flexible” device).
59. Hashimoto, *supra* note 58, at 143–44 (quoting PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 102 (2010)).
60. Halliday & White, *supra* note 40, at 609, 623 (describing the prerogative writs’ equitable remedies and the writ of habeas corpus’s “hidden righteousness”).
61. (1615) 77 Eng. Rep. 1271.
62. Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 352 (2012).
63. *Id.* at 352–53.

injury . . . can be done but that it shall be (here) reformed or punished by due course of law.”⁶⁴

Third, the writ checks governmental powers⁶⁵ and provides an “essential mechanism in the separation-of-powers scheme.”⁶⁶ Because the stakes are so high in criminal cases, the writ of habeas corpus calls upon the judiciary to ensure that neither individual liberties nor the integrity of the criminal proceedings have been compromised. As Alexander Hamilton wrote in the Federalist Papers, the writ of habeas corpus protects individuals against “the favorite and most formidable instruments of tyranny” and against the “dangerous engine[s] of arbitrary government.”⁶⁷ And as James Madison wrote, the writ provides a “double security” for “the rights of the people.”⁶⁸ In *Ex parte Merryman*,⁶⁹ Justice Taney observed that the early habeas corpus acts in England were not enacted merely to “bestow an immunity from arbitrary imprisonment” but instead to “cut off the abuses by which the government’s lust of power . . . had impaired so fundamental a privilege.”⁷⁰

The functionalist approach provides a solid foundation from which a litigator can build a Suspension Clause challenge. Under this approach, the writ is not just a device to ensure that the executive comports with due process of law when making arrests and detaining prisoners. Rather, it ensures that individual rights are not violated during the criminal process. As a means of securing those rights, it provides judges with the flexibility to issue a remedy and the power to check other branches of government.⁷¹ Part III explains that the constitutional contours of the Suspension Clause remain largely unexplored. Yet, the

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64. Halliday & White, *supra* note 40, at 608–609 (quoting James Bagg’s Case (1615) 77 Eng. Rep. 1271, 1277–78). Although *James Bagg’s Case* dealt with the writ of mandamus, Halliday and White suggest that the writ of mandamus and the writ of habeas corpus, both prerogative writs, share these equitable principles. *Id.*
65. Penny J. White, *Federal Habeas Corpus, in* PRESIDING OVER A CAPITAL CASE: A BENCHMARK FOR JUDGES 297 (Daphne A. Burns, Robin E. Wosji & William J. Brunson eds., 2010).
66. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).
67. THE FEDERALIST NO. 84, at 479–80 (Alexander Hamilton) (Clinton Rossiter ed., 1999).
68. ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 6 (2001).
69. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).
70. *Id.* at 151 (quoting HENRY HALLAM, 3 CONSTITUTIONAL HISTORY OF ENGLAND 19 (1827)).
71. The Court embraced this functionalist approach in *Boumediene v. Bush*. See *infra*, Part III.C.

Court has left some room to craft a Suspension Clause challenge to AEDPA's Section 2254(d)(1); Part III explains how to best utilize that room.

III. THE WRIT'S CONSTITUTIONAL SCOPE

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.”⁷² Because habeas corpus embraced so many functions at common law, the Suspension Clause uniquely channels many interrelated legal principles in the United States: protection of individual liberty, the ability to check the branches of government that have the power to punish individuals, and the judiciary's power to review.⁷³

Beyond descriptions of the writ's history, the Supreme Court consistently avoids defining the constitutional parameters of the writ of habeas corpus. So the meaning of the Suspension Clause is “obscure,” “elusive,”⁷⁴ and “shrouded in mystery.”⁷⁵ The Court stated in *I.N.S. v. St. Cyr*⁷⁶ that “[a]t the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789,’⁷⁷ and it assumed in *Felker v. Turpin*⁷⁸ (albeit, for the sake of argument) that an inmate's constitutional privilege is more expansive today than it was at the founding.⁷⁹ This suggests that the Court is willing to look to the writ's broader principles as well as the functions it has served to determine the writ's constitutional scope.⁸⁰ Yet the Suspension Clause does not act as a “one-way ratchet” that includes all benefits that Congress chose to confer to

72. U.S. CONST., art. I, § 9, cl. 2.

73. *See Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (“[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”).

74. David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 59 (2006).

75. Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 602 (2009).

76. 533 U.S. 289 (2001).

77. *Id.* at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)) (emphasis added).

78. 518 U.S. 651 (1996).

79. *Id.* at 663–64 (“The writ of habeas corpus known to the Framers was quite different from that which exists today.”).

80. Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 52 (2012) (“[In *Boumediene*] [t]he Court put to rest the notion that the Suspension Clause is an empty vessel and regulates only the conditions for congressional suspension of the writ.”).

individuals and courts in the past.⁸¹ A Suspension Clause challenge to Section 2254(d)(1), then, must fall safely in between these two extremes. A challenger must argue (a) that the Suspension Clause preserves a right to the writ, upon which Congress may not infringe, (b) that the right to the writ includes meaningful review of federal claims, and (c) that the right to the writ includes at least some federal review.

A. The Suspension Clause Preserves a Right to the Writ

The Suspension Clause does not affirmatively state the privilege to the writ,⁸² and the writ is not expressly included in the Bill of Rights or any other constitutional amendment. Yet, the Clause's reference to the writ makes it "one of the few safeguards of liberty specified in [the] Constitution,"⁸³ the only common-law writ mentioned in the Constitution, and the Constitution's "most explicit reference to remedies."⁸⁴ Thus, the Court satisfies itself that the Framers' mention of the writ affirms its continued existence⁸⁵ and that this "great constitutional privilege" plays a critical role in United States democracy.⁸⁶

Moreover, habeas corpus is not, by itself, a "positive right."⁸⁷ It is a privilege and a writ. For some, these labels diminish the writ's status. But the Supreme Court explained in *Boumediene v. Bush*⁸⁸ that the privilege to the writ can act as both an individual right and a judicial right.⁸⁹ At common law, the word "privilege" described the relationship between law and sovereignty in early modern England.⁹⁰ Because all authority and power belonged to the king, the writ of habeas corpus, along with the other "prerogative writ[s]," did not belong to the king's

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81. *St. Cyr*, 533 U.S. at 341 n.5 (Scalia, J., dissenting).
82. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830).
83. *Id.* at 739.
84. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 n.329 (1987).
85. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1162 (6th ed. 2009) ("The constitutional text appears to presuppose the existence of habeas corpus jurisdiction, but it does not affirmatively guarantee a right to habeas corpus.").
86. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).
87. Garrett, *supra* note 80, at 58 (explaining that by attempting to understand the writ as a right, "scholars seem to be imposing a modern question . . . on a premodern text with a common law answer—habeas is not a right, but judges may entertain a prayer for the writ and require the jailer to justify the legality of the detention").
88. 553 U.S. 723 (2008).
89. *Id.* at 743; see *infra* Part III.C.
90. Halliday & White, *supra* note 40, at 595–97.

“dependent subjects” but to the king himself;⁹¹ the writ “flowed from the king’s power and his mercy.”⁹² But the Framers rejected the notion that all legal power derived from the king and embraced the idea that each person was his own subject.⁹³ Thus, they gave the power to issue the writ directly to the judiciary and gave individuals the power to seek the writ on their own behalf.⁹⁴ Moreover, the Framers likely used the word “privilege” simply “to avoid mentioning some rights to the exclusion of others.”⁹⁵

Most importantly, Article III of the Constitution gives Congress the power to create and, theoretically, destroy all inferior courts.⁹⁶ So AEDPA’s proponents argue that Congress does not have to give any federal courts jurisdiction over habeas postconviction proceedings. In *Ex parte Bollman*,⁹⁷ Chief Justice John Marshall wrote that “the power to award the writ by any of the courts of the United States, must be given by written law.”⁹⁸ Though some have argued that the Constitution contains internal limitations on Congress’s broad power to regulate federal-court jurisdiction,⁹⁹ the Court has long held that these limitations do not exist.¹⁰⁰

The Court, however, recognizes that external rights may limit Congress’s power to strip federal courts of jurisdiction. In particular, the Court treats the privilege to the writ of habeas corpus as a constitu-

91. *Id.*

92. *Id.* at 672–73. The King’s Bench implemented the privilege to the writ “to ensure that royal franchises were not abused—thereby protecting the liberties of [the king’s] subjects.” *Id.* at 630.

93. *Id.* at 671.

94. *Id.* at 681–83.

95. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).

96. See Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52–56 (1975) (“[T]he greater power of total abolition logically includes the lesser power of removing certain areas from their jurisdiction.”).

97. 8 U.S. (4 Cranch) 75 (1807).

98. *Id.* at 94.

99. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816) (“[C]ongress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance.”).

100. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (“[H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.”).

tional right that can push back against Congressional power.¹⁰¹ In *Boumediene v. Bush*,¹⁰² the Court struck down the jurisdiction-stripping portion of the Military Commissions Act as an unconstitutional suspension of the writ.¹⁰³ The MCA provided that no judge had the power to “hear or consider an application for a writ of habeas corpus” by any alien detainee who had been designated an enemy combatant.¹⁰⁴ The Court explained that the Suspension Clause “guarantees an affirmative right to judicial inquiry into the causes of detention” and “protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”¹⁰⁵ Because Congress “intended to circumscribe habeas review” and did not provide an adequate substitute for federal habeas review, Congress violated the petitioner’s entitlement to a “meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”¹⁰⁶

Therefore, the Suspension Clause impliedly guarantees a substantive constitutional right, or entitlement, that Congress cannot take away. Still, the scope of this right remains largely unexplored.

B. The Right to the Writ Includes the Right to Meaningful Review

A prisoner’s opportunity to have his claims heard through a full and fair process is an important part of habeas corpus.¹⁰⁷ At the very least, habeas corpus should serve as a “backstop” because “it is . . . the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case.”¹⁰⁸ The Court has explained that the constitutional scope of the writ “entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”¹⁰⁹

Without meaningful review, the writ’s goals of preserving individual rights and checking governmental power cannot be realized. Meaningful

101. See Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 275–76, 302 (2008) (explaining that it is unclear whether the writ is a “structural” right or an “individual” right).

102. 553 U.S. 723 (2008).

103. *Id.* at 724–30.

104. *Id.* at 736 (quoting 28 U.S.C. § 2241 (2006)).

105. *Id.* at 744–45.

106. *Id.* at 776–777, 779 (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001)).

107. Marceau, *supra* note 7, at 137–46.

108. Bator, *supra* note 21, at 456 (“[A]t the minimum, some kind of supervisory jurisdiction should exist to test the question whether the processes furnished by the previous tribunal were meaningful and rational.”).

109. *Boumediene*, 553 U.S. at 779 (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001)).

review must include “the means to correct errors,” “some authority to assess the sufficiency of the Government’s evidence,” and “the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.”¹¹⁰ An inmate’s ability to merely file a petition does not meet this standard.¹¹¹ And the federal court must be able to do more than simply “rubber stamp” the state court’s decision.¹¹²

This standard does not require federal courts to throw out traditional procedural requirements, such as exhaustion of state remedies. It does not ask federal courts to overlook *Stone v. Powell*’s¹¹³ restriction on Fourth Amendment claims. It does not require federal courts to employ something more lenient than *Brecht v. Abrahamson*’s¹¹⁴ harmless error review. And it does not demand that federal courts hear claims arising under wholly new constitutional rules, as prohibited by *Teague v. Lane*.¹¹⁵ However, the constitutional scope of the writ does entitle inmates to some “independent review” of constitutional claims.¹¹⁶ It is only through meaningful review that the writ can effectuate the principles it embodies.

*C. The Right to the Writ Includes Some Federal Review
of Federal Claims*

The most difficult part of crafting a Suspension Clause attack on the AEDPA wall is showing that the constitutional scope of the writ includes federal review for state prisoners. Many scholars agree that Congress cannot constitutionally bar federal courts from reviewing all state court convictions but have difficulty articulating why.¹¹⁷ But habeas petitioners convicted in state courts could not obtain federal review until Congress gave them that right in 1867, so it is difficult to argue that the framers envisioned federal habeas review.¹¹⁸ Though the

110. *Id.* at 786.

111. *Brown v. Allen*, 344 U.S. 443, 461 (1953).

112. Woolley, *supra* note 29, at 435.

113. 428 U.S. 465 (1976).

114. 507 U.S. 619 (1993).

115. 489 U.S. 288 (1989).

116. Woolley, *supra* note 29, at 435.

117. See 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.3, at 15–17 (2d ed. 1994) (describing the wide array of purposes that courts have attributed to habeas corpus).

118. Habeas Corpus Act, 14 Stat. 385 (1867) (expanding scope of writ to all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States).

Court held in *Boumediene v. Bush*¹¹⁹ that the Suspension Clause pushes back against Congress's power to limit federal court jurisdiction, the petitioner in that case was a Guantanamo Bay detainee who could only obtain postconviction review through the "limited procedure" of the Detainee Treatment Act; unlike the habeas petitioners under AEDPA's Section 2254(d), the *Boumediene* petitioner did not receive collateral postconviction review in state courts.¹²⁰ Nevertheless, two fairly recent cases, along with the *Boumediene* Court's functionalist approach, could help a defense attorney mount a strong Suspension Clause challenge.

The Court has twice suggested that Congress runs into Suspension Clause problems where it prohibits federal courts from reviewing habeas petitions at all. In *Stewart v. Martinez-Villareal*,¹²¹ an inmate's *Ford* claim was properly dismissed as premature by the federal district court.¹²² When the inmate refiled at the appropriate time, the AEDPA's Section 2244(b) prevented the district court from hearing the claim because it was a "second or successive" petition.¹²³ As the dissent pointed out, the inmate's claim fell within "the unmistakable language" of AEDPA's bar.¹²⁴ Yet, the Court refused to read the statute this way because it "would bar the prisoner from ever obtaining federal habeas review," which would have "far reaching and seemingly perverse" implications on the statute's constitutionality.¹²⁵

Similarly, the Court held in *Panetti v. Quarterman*¹²⁶ that inmates may raise *Ford* claims later in the habeas proceedings if their mental conditions did not arise until after they filed their first petitions.¹²⁷ Thus, the Court created the second-in-time, first-petition exception to ensure that the AEDPA's Section 2244(b) did not infringe upon the constitutional scope of the writ.

Moreover, the *Boumediene* Court's functionalist approach leaves some room to argue that the Suspension Clause entitles state prisoners to some collateral postconviction review of their federal claims in federal courts. The Court explained that the writ is "a vital instrument to secure [individual liberty]" and an "essential mechanism in the

119. 553 U.S. 723 (2008).

120. *Id.* at 773–79.

121. 523 U.S. 637 (1998).

122. *Id.* at 640.

123. *Id.* at 640–41.

124. *Id.* at 646 (Scalia, J., dissenting).

125. *Id.* at 644–45.

126. 551 U.S. 930 (2007).

127. *Id.* at 945.

separation-of-powers scheme.”¹²⁸ That is, the writ’s ultimate goal is to protect individuals against “cyclical abuses,” such as unlawfulness in criminal proceedings.¹²⁹ The writ’s means of achieving that goal are to “preserve[] limited government,” to “maintain the ‘delicate balance of governance,’” and to “make Government accountable.”¹³⁰

States can, and often do, abuse the criminal process and ignore individual rights,¹³¹ not unlike the executive at common law. State criminal justice systems often let constitutional violations such as prosecutorial misconduct—tampering with witnesses, withholding exculpatory evidence, and even destroying evidence—go unnoticed.¹³² Further, a good deal of academic evidence shows that some states even “systematically violate criminal defendants’ rights.”¹³³ For example, many states use a “bait-and-switch” technique to “prevent[] defendants from ever having their federal claims considered.”¹³⁴ The Court, too, has recognized the need to check the state criminal process through habeas corpus. In *Brown v. Allen*,¹³⁵ the Court held that federal courts have the power to review constitutional claims de novo and to relitigate those claims even if they were fully litigated in state court.¹³⁶ As Justice Frankfurter reasoned, state law-enforcement agencies sometimes abuse

128. *Boumediene v. Bush*, 553 U.S. 723, 739, 743 (2008).

129. *Id.* at 745.

130. *Id.* at 742, 744–45 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)).

131. See Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 756–59 (1987) (discussing Supreme Court habeas cases arising from state courts).

132. Biale, *supra* note 2, at 1337, 1347.

133. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1, 2, 17–22 (2010) (describing many ways in which “state courts still routinely violate defendants’ constitutional rights,” such as “routinely underfund[ing] public defender offices,” employing “procedural rules that systematically prevent defendants from asserting right-to-counsel claims,” defaulting defendants’ federal claims after misapplying “the state’s contemporaneous objection rule,” and withholding exculpatory or impeachment evidence).

134. *Id.* at 20 (“A criminal defendant attempts to raise a claim on direct appeal and is told by the appellate courts that the claim can or should be raised during state postconviction review. However, when the defendant attempts to raise the claim on state postconviction review, the postconviction court holds that the claim is procedurally defaulted for failure to comply with a state procedural rule requiring him to raise it on direct appeal.”).

135. 344 U.S. 443 (1953), *overruled on other grounds by* *Townsend v. Sain*, 372 U.S. 293 (1963).

136. *Id.* at 459–60.

their power, and “even the highest State courts have failed to recognize” these constitutional violations.¹³⁷

For the past century and a half, the writ has functioned to check such abuses in the state criminal process.¹³⁸ Congress first addressed this evil through the Habeas Corpus Act of 1867, which enabled federal post-conviction review of state prisoners.¹³⁹ Since the Reconstruction Era, habeas corpus has provided individuals convicted in state courts some form of federal collateral review to ensure that those individuals are not held in violation of federal law.¹⁴⁰ In *Fay v. Noia*,¹⁴¹ the Court acknowledged that habeas corpus must be “viewed against the backdrop of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy” and that part of habeas’ role was to prevent unconstitutional incarceration by state governments.¹⁴² Likewise, the Court in *Reed v. Ross*¹⁴³ stated that after the Civil War, “Congress sought to ‘interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action.’”¹⁴⁴

Additionally, federal courts are poised to check the state criminal process on questions of federal law. The Court recognizes that state courts have at least two motives to turn a blind eye to inmates’ constitutional claims. First, “[t]he greater the difficulties of detecting and punishing crime, the greater the temptation to place a strained construction on statutes to supply what may be thought to be more efficient means of enforcing law.”¹⁴⁵ Second, judges often lose elections

137. *Id.* at 511 (opinion of Frankfurter, J.). Despite this, Justice Frankfurter’s reasoning was also based on the authority given to federal courts by the previous habeas statute. *Id.* at 499 (“Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts.”).

138. Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 AM. J. CRIM. L. 207, 214–15 (2007).

139. Chemerinsky, *supra* note, 131 at 753.

140. Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 546 (1999).

141. 372 U.S. 391, 422–23 (1963) (holding that an inmate’s procedural default in a state-court proceeding did not bar federal jurisdiction because “the very nature of the writ” gives federal courts broad power to independently adjudicate habeas corpus cases), *overruled on other grounds by* *Wainwright v. Sykes*, 433 U.S. 72 (1977).

142. *Id.* at 415.

143. 468 U.S. 1 (1984).

144. *Id.* at 10 (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

145. *Brown v. Allen*, 344 U.S. 443, 511 (1953) (quoting Attorney General William D. Mitchell).

based on decisions to reverse death sentences or order new trials, while federal judges are independent and hold life tenure.¹⁴⁶ Though the Court has also said that state judges are no less competent than federal judges,¹⁴⁷ “the very existence of federal courts and most federal jurisdiction is based on a distrust of state courts.”¹⁴⁸

Federal habeas review of state court proceedings does not intrude upon the state’s power over its own criminal laws. Contrarily, federal habeas review is an example of “the federal system . . . working as it should.”¹⁴⁹ States have the power to administer and enforce their own criminal laws, but they do not have the power to violate federal rights in doing so.¹⁵⁰ Moreover, the federal system exists to ensure the protection of individuals, not to protect states no matter the cost.¹⁵¹

IV. AEDPA’S SUSPENSION WALL

The AEDPA’s Section 2254(d)(1) provides that federal courts shall not grant the writ of habeas corpus

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146. *Swain v. Pressley*, 430 U.S. 372, 382 (1977) (“We are fully cognizant of the critical importance of life tenure, particularly when judges are required to vindicate the constitutional rights of persons who have been found guilty of criminal offenses.”); *see also* Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CAL. L. REV. 1515, 1517 (2007) (“Only Article III judges, who unlike their state counterparts are always politically independent and experts in federal law, can be trusted ultimately to expound that law accurately and guarantee its supremacy and uniformity.”); Woolley, *supra* note 29, at 433 (“In key judicial elections, [state] judges have not been reelected because of their decisions to overturn death sentences.”)
147. *See Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (asserting that the Court is “unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States”).
148. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 283 (1988); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977) (referring to the Court’s assumption of parity between state and federal courts as “at best, a dangerous myth”); *Mitchum*, 407 at 242 (explaining that in the § 1983 context “[Congress] realized that state officers might, in fact, be antipathetic to the vindication of [constitutional] rights”).
149. Eric M. Freedman, *State Post-Conviction Remedies in the Next Fifteen Years: How Synergy Between the State and Federal Governments Can Improve the Criminal Justice System Nationally*, 24 FED. SENT’G REP. 298, 299 (2012).
150. *See* U.S. CONST. art I, § 9, cl. 2 (“The 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.”).
151. *See Marbury v. Madison*, 5 U.S. 137, 176 (1803) (“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.”).

with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.¹⁵²

Though this provision does not use the word “deference,”¹⁵³ it is “colloquially referred to as the deference provision.”¹⁵⁴ The language in this provision, as interpreted by the Supreme Court, carries three barriers to substantive review: (1) it applies to any claim that was “adjudicated on the merits” in state courts; (2) the petitioner cannot obtain relief unless the state court decision was an “unreasonable application” of federal law; (3) the violation of federal law must be “clearly established . . . as determined by the Supreme Court of the United States.”¹⁵⁵ Collectively, these three barriers, along with the Court’s interpretation of them, create AEDPA’s enigmatic wall: the AEDPA drastically expands the level of deference owed to the state criminal process while simultaneously stripping away any assurances that the state process is full, fair, or meaningful.¹⁵⁶

A. Adjudication on the Merits: Deferring to the State’s Process

When a federal court receives a habeas petition, it must first decide whether the claims in that petition were “adjudicated on the merits” in the state court proceedings.¹⁵⁷ A claim is not adjudicated on the merits

152. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219 (1996). In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court interpreted the phrases “contrary to” and “unreasonable application of” as holding two separate meanings. *Id.* at 404–05. While this interpretation poses some of its own problems, *see id.* at 384–90 (Stevens, J., concurring), the majority of the Section 2254(d)(1) cases fall under the “unreasonable application” piece. *Id.* at 406. The scope of this Comment is limited to cases challenging that state courts unreasonably applied federal law.

153. Antiterrorism and Effective Death Penalty Act of 1996 § 104.

154. John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 CORNELL L. REV. 259, 260 (2006).

155. Antiterrorism and Effective Death Penalty Act of 1996 § 104.

156. *See* Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 140 (1996) (“Bluntly stated, it appears that the federal habeas courts must accept state court findings at face value—no questions asked.”).

157. Brittany Glidden, *When the State Is Silent: An Analysis of AEDPA’s Adjudication Requirement*, 27 N.Y.U. REV. L. & SOC. CHANGE 177, 181–82 (2001); Claudia Wilner, *“We Would Not Defer to That Which Did Not Exist”: AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. REV. 1442, 1457 (2002).

where the state court disposes of the claim on procedural grounds.¹⁵⁸ If claims were not adjudicated on the merits, then federal courts “are obliged to apply de novo review.”¹⁵⁹ But if they were, federal courts must apply AEDPA deference—a near-impossible-to-meet standard of review—to the state court’s decision.¹⁶⁰ This phrase unnecessarily places two difficult hurdles in front of habeas petitioners. First, the Court in *Harrington v. Richter*¹⁶¹ held that when state courts issue summary denials, “the state court adjudicated the claim on the merits.”¹⁶² Second, the Court’s decision in *Cullen v. Pinholster*¹⁶³ means that petitioners cannot introduce new evidence of their federal claims in federal courts if those claims had already been adjudicated on the merits in state court.¹⁶⁴ Each of these barriers add their own layers of deference that federal courts must apply before asking whether the state court unreasonably applied federal law. Accordingly, each contributes to AEDPA’s enigmatic suspension wall.

1. Summary Denials and the Presumption of Adjudication on the Merits

Summary denials, also known as “postcard denials,”¹⁶⁵ are decisions that are “unaccompanied by an opinion explaining the reasons relief has been denied”¹⁶⁶ or that “dispose of whole claims in a perfunctory manner.”¹⁶⁷ These denials are fairly common in state courts, and they are not a new feature of habeas litigation.¹⁶⁸ But before AEDPA, summary denials did not affect federal review because habeas petitions were

158. 2 HERTZ & LIEBMAN, *supra* note 117, at 1421–22.

159. *Id.*

160. *See* Antiterrorism and Effective Death Penalty Act of 1996 § 104.

161. 131 S. Ct. 770 (2011).

162. *Id.* at 784.

163. 131 S. Ct. 1388 (2011).

164. *Id.* at 1400–01. The AEDPA provides a few very narrow exceptions. Antiterrorism and Effective Death Penalty Act of 1996 § 104.

165. Monique Anne Gaylor, *Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 HOFSTRA L. REV. 1263, 1264 (2003) (citing *Luna v. Cambra*, 306 F.3d 954, 960 (9th Cir. 2002)).

166. *Richter*, 131 S. Ct. at 784.

167. Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L.J. 283, 284 (2004). Frequently, state courts respond to habeas petitions simply by asserting that a “[p]etitioner’s other claims are without merit,” *id.*, or that “[r]elief is denied on the merits.” Marceau, *supra* note 7, at 114.

168. Glidden, *supra* note 157, at 179.

decided de novo.¹⁶⁹ Summary denials do not indicate what law the state court applied; they do not indicate what facts the state court considered; they do not even indicate what claims the state court considered.¹⁷⁰ Indeed, the denials themselves offer no assurances that the state court even considered the petitioner's federal question.¹⁷¹ It seems necessary to ask, then, "[s]hould federal courts be required to defer to that which may not exist?"¹⁷²

According to the *Richter* Court, the answer is "yes." There, the Court held that federal courts must "*presume*[]" that the state court adjudicated the claim on the merits," even when a state court issues an unexplained summary denial of the petitioner's claims.¹⁷³ The Court rejected the argument that giving AEDPA deference to unexplained decisions "will encourage state courts to withhold explanations for their decisions" because "state courts are influenced by considerations other than avoiding scrutiny."¹⁷⁴ The Court added that "requiring" state courts to explain their decisions "could undercut state practices designed to preserve the integrity of the case-law tradition," and it could prevent state courts from "concentrat[ing] its resources . . . where opinions are most needed."¹⁷⁵

Scholars have noted that this presumption of adjudication, by itself, has serious Suspension Clause implications.¹⁷⁶ The presumption essentially tells federal courts to defer to state courts in order to decide whether or not to defer to the actual decision. But AEDPA's current scheme offers no assurances that state courts will give a petitioner's claim any meaningful review.

169. Wilner, *supra* note 157, at 1455 ("Prior to AEDPA . . . federal habeas courts . . . did not have to review state court reasoning; federal habeas courts decided legal and mixed questions de novo.").

170. Glidden, *supra* note 157, at 182–83.

171. *Id.* at 183.

172. Wilner, *supra* note 157, at 1443; *see* Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001) ("[W]e can hardly defer to the state court on an issue that the state court did not address.").

173. *Richter*, 513 S. Ct. at 784–85 (emphasis added).

174. *Id.* at 784.

175. *Id.*

176. *See* Marceau, *supra* note 7, at 137–46 (explaining that "if the state court review is not procedurally full and fair" and there is no federal oversight of that process, a habeas petitioner likely has strong Due Process and Suspension Clause challenges); Glidden, *supra* note 157, at 200 ("[V]iewing a perfunctory decision as an adjudication raises due process concerns when there is a possibility that a properly raised constitutional claim did not receive legal review.").

On some occasions, it is fairly clear that a state court issued a summary denial without reviewing a claim at all. In *McClellan v. Rapelje*,¹⁷⁷ a Sixth Circuit case, the Michigan Court of Appeals summarily denied the petitioner's ineffective assistance of counsel claim, incorrectly stating that the petitioner procedurally defaulted.¹⁷⁸ Michigan argued that it had, in fact, reached the merits of the case, but later conceded that it "did not have the lower court record when it rendered its decision."¹⁷⁹ Similarly in *Bell v. Jarvis*,¹⁸⁰ the petitioner argued that he had been denied a fair trial because the trial judge closed the doors to the public. Despite the fact that the Supreme Court holds that "structural errors" like the "denial of a public trial" require reversal,¹⁸¹ the state trial court summarily denied the petitioner's claim by saying only that he "failed to state a claim."¹⁸² The state appellate court then summarily affirmed by saying only "Petition for Writ of Certiorari is denied."¹⁸³ Though the trial court did not make any factual findings or give any reasons for its decision, the Fourth Circuit deferred to the state court and denied the petitioner's claim.¹⁸⁴ In these types of cases, AEDPA's failure to oversee the state court process denied petitioners their rights to meaningful review of their federal claims.

In addition, the presumption impacts the level of AEDPA deference owed to state court decisions. Judge Friendly once explained that "[a] written statement of reasons, almost essential if there is to be judicial review, is desirable" on several grounds: the need for "justification is a powerful preventative of wrong decisions"; it "tends to effectuate intra-agency uniformity"; and it allows for judicial review.¹⁸⁵ Because federal courts reviewing summary denials do not have any legal reasoning to review, they are forced to imagine all possible reasons why the state court denied relief and, in some cases, simply "craft a story that makes

177. 703 F.3d 344 (6th Cir. 2013).

178. *Id.* at 348.

179. *Id.* at 349. Luckily, the Sixth Circuit reasoned that because the trial court had also denied the petitioner's claim on basis of a procedural default, "there [was] reason to think that the Michigan Court of Appeals did not reach the merits of Petitioner's claim." *Id.* at 348–49.

180. 236 F.3d 149, 155 (4th Cir. 2000). Note that this case was decided prior to *Richter*.

181. *Neder v. United States*, 527 U.S. 1, 7–8 (1999) (citing *Waller v. Georgia*, 467 U.S. 39 (1984)).

182. *Bell*, 703 F.3d at 176 (dissenting opinion).

183. *Id.*

184. *Id.* at 168.

185. Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1292 (1975).

the state result justifiable.”¹⁸⁶ Moreover, federal courts “must review the state court’s application of law to the facts.”¹⁸⁷ But state courts often do not make factual findings when they issue summary denials, so federal courts must “recreat[e]” possible scenarios and consider any “plausible factual findings.”¹⁸⁸ In other words, *Richter* tells courts created under the power of Article III that they must guess.

The *Richter* Court’s federalism concerns seem ill founded. The Court framed the question as whether AEDPA “requir[es]” state courts to give a statement of reasons.¹⁸⁹ But the real question was whether AEDPA deference applies when a state does not give a statement of reasons. The latter formulation makes clear that state courts may “choose whether or not they wish to take on the burden and be deferred to.”¹⁹⁰ “If the state court wishes to take advantage of the ‘unreasonable application’ clause of § 2254(d)(1), it can write; if not, then not.”¹⁹¹ While some may argue that “this is tantamount to requiring state courts to write” because all judges want deference and no judge wants to be overturned, a state judge’s interest in keeping his reputation intact surely does not trump the petitioner’s interest in meaningful review of his federal claim.¹⁹²

2. Pinholster: Deferring to the Evidence in Front of State Courts

Before *Cullen v. Pinholster*,¹⁹³ federal courts could consider “evidence developed at the federal level—through exhibits attached to the petition, evidentiary hearings, discovery, or record supplementation—to determine whether § 2254(d)(1) had been satisfied.”¹⁹⁴ Under Section 2254(e)(2), federal courts cannot hold evidentiary hearings if a petitioner “failed to develop a factual basis of a claim in [s]tate court,”¹⁹⁵ though there are some exceptions. And for a petitioner challenging the state court’s findings of fact, Section 2254(d)(2) explicitly limits a federal court’s review to “the evidence presented in the [s]tate court proceed-

186. Glidden, *supra* note 157, at 190.

187. *Id.* at 191.

188. *Id.* at 191–192.

189. *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011).

190. *Washington v. Schriver*, 255 F.3d 45, 62–63 (2d Cir. 2001) (Calabresi, J., concurring).

191. Lee, *supra* note 167, at 312.

192. *Id.* (“I am unmoved by this argument.”).

193. 131 S. Ct. 1388 (2011).

194. Wiseman, *supra* note 12, at 962.

195. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (1996).

ing.”¹⁹⁶ However, if a petitioner did develop a factual basis for his claim in state court and if a petitioner is not making a Section 2254(d)(2) challenge, then the federal court can allow for an evidentiary hearing within its “sound discretion.”¹⁹⁷

But *Pinholster* “changed the rules.”¹⁹⁸ There, the petitioner alleged ineffective assistance of counsel for failing to investigate or present several important pieces of mitigating evidence.¹⁹⁹ After the state supreme court summarily denied the petition, the federal district court granted the petitioner’s request for an evidentiary hearing and, after hearing the evidence, granted habeas relief.²⁰⁰ But the Supreme Court reversed, holding that “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”²⁰¹ Thus, if a petitioner obtains new evidence on a claim that was adjudicated on the merits in state court, federal courts can no longer hear that evidence, no matter how grave the injustice.

Under many circumstances, *Pinholster* prevents petitioners from obtaining any review, let alone meaningful review, of their federal claims. The Fourteenth Amendment does not “require the [s]tate to appoint counsel for indigent prisoners seeking state postconviction relief.”²⁰² So “the great majority” of state prisoners do not have the aid of counsel to “discover and document relevant facts” in state post-conviction proceedings.²⁰³ Additionally, “virtually every State provides for the summary disposition of post-conviction claims without a hearing,” and even where petitioners can get a hearing, they must first “cross[] high procedural hurdle[s].”²⁰⁴

B. Unreasonable Application of: Deferring to the State’s Application of Federal Law

The AEDPA’s Section 2254(d) requires habeas petitioners to show that the state court’s decision was “an unreasonable application of” clearly established federal law.²⁰⁵ A state court unreasonably applies federal law if it identifies the correct legal rule “but unreasonably

196. *Id.*

197. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

198. *Wiseman*, *supra* note 12, at 963.

199. *Pinholster v. Ayers*, 590 F.3d 651, 660–61 (9th Cir. 2009) (en banc).

200. *Id.* at 661.

201. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1391 (2011).

202. *Murray v. Giarratano*, 492 U.S. 1, 7 (1989).

203. *Wiseman*, *supra* note 12, at 973.

204. *Id.* at 974–75.

205. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (1996).

applies it to the facts of the particular state prisoner's case."²⁰⁶ This is an "extremely deferential standard of review"²⁰⁷ that makes up the biggest portion of the AEDPA suspension wall and barricades petitioners off from receiving any substantive review of their claims.²⁰⁸

The Court consistently states that a state court decision is not unreasonable just because it is incorrect.²⁰⁹ Further, "even a strong case for relief"²¹⁰ and even "clear error" in the state court's judgment fall short of the unreasonableness standard.²¹¹ In *Williams v. Taylor*,²¹² the Court added one limit to its seemingly unbounded reasonableness spectrum. It rejected the argument that the unreasonableness standard requires the petitioner to show that all "reasonable jurists" would find the state court's decision unreasonable and, instead, held that federal courts must ask whether the state court decision was "objectively unreasonable."²¹³

But the Court has since, somewhat quietly, pushed passed this upper boundary of the reasonableness "spectrum" to include a more subjective inquiry.²¹⁴ In *Harrington v. Richter*,²¹⁵ the Court explained that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."²¹⁶ There, the petitioner argued that his trial counsel provided ineffective assistance by failing to consult blood experts to help absolve him of a murder he claimed he did not

206. *Williams v. Taylor*, 529 U.S. 362, 407 (2000).

207. *John-Charles v. California*, 646 F.3d 1243, 1247 (9th Cir. 2011).

208. Ritter, *supra* note 24, at 57 ("[T]he 'unreasonable application' clause has proven to be most critical to the availability of habeas corpus relief.").

209. *See Greene v. Fisher*, 132 S. Ct. 38, 43 (2011) (explaining that the AEDPA's purpose is "to guard against only extreme malfunctions in the state criminal justice system").

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

211. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) ("The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness. It is not enough that a federal habeas court, in its 'independent review of the legal question' is left with a 'firm conviction' that the state court was 'erroneous.'" (citation omitted).

212. 529 U.S. 362 (2000).

213. *Id.* at 365.

214. *See Biale, supra* note 2, at 1359–60 (explaining that the Court acknowledged that it was not overruling *Williams*); Ritter, *supra* note 24, at 65–70 (noting the Court's shifting emphasis towards a "reasonable jurist standard").

215. 131 S. Ct. 770 (2011).

216. *Id.* at 786 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

commit.²¹⁷ After the California Supreme Court issued a summary denial, the Ninth Circuit granted the writ and held that the court unreasonably denied the petitioner's *Strickland* claim.²¹⁸ The Supreme Court reversed the Ninth Circuit and elaborated on its "fairminded jurists" standard by explaining that federal courts must look to the arguments or theories that "could have supported" the state's decision then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."²¹⁹ It later emphasized that the writ may issue only where the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."²²⁰ The Court admonished the Ninth Circuit for relying solely on its certainty that a *Strickland* violation occurred and "overlook[ing] arguments that would otherwise justify the state court's result."²²¹

Scholars quickly pointed out that *Richter's* "fairminded jurists" test is even more onerous than *Williams's* "objectively unreasonable" test. They have dubbed the test "near-total deference,"²²² "super-deferential,"²²³ "one of the most uncharitable standards of review known to law,"²²⁴ "an unworkable . . . standard that fundamentally contradicts American common law decision-making,"²²⁵ and "dangerous and improper."²²⁶ Much like the subjective test rejected in *Williams*, the "fairminded jurists" test requires federal courts to look at "the reasonableness of the decision *makers*, as opposed to the decision, as grounds to

217. *Id.* at 783. In his petition to the California Supreme Court, the petitioner offered affidavits from three types of forensic experts that substantiated his defense. *Id.*

218. *Id.* at 785–86.

219. *Id.* at 786.

220. *Id.* at 786–87.

221. *Id.* at 786.

222. Reinhardt, *supra* note 5, at 1224; *see id.* at 1229 ("[I]f the 'fairminded jurist' rule were taken literally, it would mean that a federal court could never grant habeas relief. That is because, in order to grant habeas relief, we would need to find that each of the state court judges who denied the petitioner's claim was not fairminded . . .").

223. Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G REP. 110, 115 (2012).

224. Marceau, *supra* note 7, at 97.

225. Ruth A. Moyer, *Disagreement About Disagreement: The Effect of a Circuit Split or "Other Circuit" Authority on the Availability of Federal Habeas Relief for State Convicts*, 82 U. CIN. L. REV. 831, 857 (2014).

226. Ritter, *supra* note 24, at 86.

deny habeas relief.²²⁷ This test leaves little room, if any, for judges to assess the merits to a petitioner's claim.²²⁸ Instead, federal courts ask whether any judges did, in fact, disagree and whether any fairminded judges—"even if only one"—could have possibly disagreed.²²⁹ To answer this, federal courts often count noses or imagine whether any legal theory could have reasonably supported the state court's result.²³⁰ The answer to this question must be "yes" in almost all cases because habeas cases do not reach federal court unless state court judges have already denied relief.²³¹

Richter interprets AEDPA as forcing federal courts to give more deference to state courts in habeas proceedings than to any other

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227. Biale, *supra* note 2, at 1363. Some federal courts insist that the unreasonableness standard is objective. *See, e.g., Dow v. Virga*, 729 F.3d 1041, 1051 n.8 (9th Cir. 2013) ("The 'fairminded jurist' standard is an objective standard of law . . . Fairminded jurists can make mistakes in legal reasoning or judgment, and if such a mistake is beyond reasonable legal disagreement, the 'fairminded jurist' standard is satisfied. Were we to apply a fairminded jurist standard literally, a federal court could never reverse a state court's habeas decision.").
228. In *Williams v. Taylor*, Justice Stevens argued that Section 2254(d) allows federal judges to exercise some independent review, but the majority rejected that argument. 529 U.S. 362, 403–04 (2000).
229. *See Ritter, supra* note 24, at 71 ("[The federal court] must nevertheless deny the writ if it believes that a fair-minded jurist somewhere could debate that conclusion."); *see also Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014) ("If, however, some fairminded jurists could possibly agree with the state court decision, then it was not unreasonable and the writ should be denied."); *Loggins v. Thomas*, 654 F.3d 1204, 1220 (11th Cir. 2011) ("[I]f some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief must be denied.").
230. *See Biale, supra* note 2, at 1362–65 (explaining different courts' subjective views). For cases in which federal judges count noses to see whether any other judges disagreed, *see Peak v. Webb*, 673 F.3d 465, 473–74 (6th Cir. 2012) (denying petitioner's Confrontation Clause claim because "[i]t is not unreasonable to believe, as did at least three justices on the Kentucky Supreme Court, as well as the trial-court judge, that confrontation only requires that a declarant be made available in the courtroom for a criminal defendant to call during his own case"); *Garrus v. Sec'y of Pa. Dep't of Corr.*, 694 F.3d 394, 416 (3d Cir. 2012) (en banc) (Hardiman, J., dissenting) ("The existence of a circuit split demonstrates that it is wrong to conclude that "'fairminded jurists could [not] disagree' on the correctness of the state court's decision" in this case.") (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)).
231. Biale, *supra* note 2, at 1364 (explaining that "[n]o one wants to accuse a fellow jurist of lacking a personal characteristic necessary for judging," i.e., being fairminded.); Nathaniel Koslof, Comment, *Insurmountable Hill: How Undue AEDPA Deference Has Undermined The Atkins Ban on Executing The Intellectually Disabled*, 54 B.C. L. REV. E. SUPP. 189, 195–96 (2013) ("[I]t will almost invariably be the case that at least *some* fair-minded jurists will agree . . .").

governmental body in any other context. The “concept of deference,” even in areas of law where federal courts punt the most, “does not require a federal court to back away in all cases save for ones in which the state’s decision was ‘off the charts’ in its incorrectness.”²³² For example, when courts apply *Chevron* deference and rationality review, they do not look primarily to the decisions of other governmental bodies without conducting their own independent assessments.²³³ Further, there is a “*quid pro quo*” between courts and the governmental body receiving.²³⁴ Agencies must earn *Chevron* deference by first providing a full and reasoned explanation for their decisions in accordance with the APA.²³⁵ Similarly, courts do not apply rational basis review where they know that the government has hampered an individual’s constitutional rights.²³⁶ Contrarily, AEDPA deference is completely unearned; state courts can and often do issue summary denials of habeas without any reasoned explanation.²³⁷ And AEDPA deference applies even where federal courts know that a state infringed upon a petitioner’s constitutional

232. Ritter, *supra* note 24, at 77.

233. Under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, if Congress has not “spoken to the precise question at issue,” courts examine the statute’s history and purpose to determine “whether the agency’s answer is based on a permissible construction of the statute.” 467 U.S. 837, 842–43 (1984). While a court cannot simply “impose its own construction on the statute,” it is at least able to conduct some independent assessment of whether the agency’s construction is consistent with the statute. *Id.* at 843. *But see* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 (1938) (explaining that “the existence of facts supporting the legislative judgment is to be presumed” but that courts can look at whether those presumption “have ceased to exist” in an as applied challenge).

234. *See* Marceau, *supra* note 31, at 33 (“[T]he notion that unfair state procedures obviate the need for federal deference—this notion that deference and procedural adequacy have a *quid pro quo* relationship—has an established history in the context of procedural default litigation.”).

235. *See* *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 30 (1983) (holding that parts of the National Highway Traffic Safety Administration’s regulations were arbitrary and capricious because the agency did not adequately explain its decisions).

236. Rationality review might be more analogous to AEDPA deference. *See* *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993) (explaining that rationality review begins with a “strong presumption of validity,” and “never require[s] a legislature to articulate its reasons for enacting a statute,” and places the burden of proof on the challenger). But courts apply heightened scrutiny, not rational basis review, where fundamental rights are threatened. *See* *Speiser v. Randell*, 357 U.S. 513, 528–29 (1958) (applying heightened scrutiny to statutes restraining free speech).

237. *See* Wilner, *supra* note 157, at 1442 (noting that this deferential schema is problematic and arguing that “a federal court should not defer to a state court decision unless it is unaccompanied by an opinion that actually discusses the federal claim.”).

rights. Though the Court has shifted away from applying *Chevron* deference and rationality review,²³⁸ it has increased the level of AEDPA deference owed to state courts.²³⁹ This is not just deference; it is “acquiescence.”²⁴⁰

This tremendous burden could contribute significantly to a Suspension Clause challenge for several reasons. First, it prevents individuals from vindicating their federal rights, even where a violation clearly occurred. Because AEDPA forces federal courts to defer to decisions that may not exist,²⁴¹ that do not consider new evidence that validates a claim,²⁴² or that was just plain wrong;²⁴³ many petitioner’s voices will never be heard.²⁴⁴ As one federal judge pointed out, denying a petitioner “the opportunity to present all [his] federal claims in federal court” amounts to an “unambiguous” suspension of the writ.²⁴⁵ Moreover, if a petitioner is held in prison in violation of his constitutional or federal rights or if he is held for a crime he did not commit, “[w]hether it was reasonable for a state court to misapprehend the dictates of the Constitution in a particular case hardly seems relevant”²⁴⁶

Second, habeas corpus no longer acts as a check on the state criminal justice system. Instead, federal judges must “stand by in impotent silence,” even if it is apparent that the state criminal process contained

238. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2584 (2015) (applying heightened standard of review for statutes that infringe on fundamental rights); *United States v. Mead Corp.*, 533 U.S. 218, 218 (2001) (explaining that agency letters do not get deference because they do not go through notice and comment).

239. Biale, *supra* note 2, at 1361–73.

240. Ritter, *supra* note 24, at 76–77 (explaining that “[c]ourteous respect or regard (or deference) requires that the state court’s decision be recognized and evaluated,” not “left uncorrected by a federal court unless it is so wrong that not a single fair-minded jurist could agree with it”).

241. *See supra* Part IV.A.1.

242. *See supra* Part IV.A.2.

243. Coyle, *supra* note 5. Justice Sotomayor explains that AEDPA puts federal judges in a place where they see an injustice at the state level but are powerless to correct it. *Id.*

244. Judith L. Ritter, *After the Hurricane: The Legacy of the Rubin Carter Case*, 12 HASTINGS RACE & POVERTY L.J. 1, 10–19 (2015) (explaining that former middleweight boxing contender, Rubin Carter, spent forty-eight years in prison for a crime he did not commit and was released on pre-AEDPA federal habeas review; if his claim was reviewed under AEDPA deference, he would have died in prison).

245. *Martinez-Villareal v. Stewart*, 118 F.3d 628, 635 (9th Cir. 1997) (Nelson, J., specially concurring), *aff’d*, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

246. *Irons v. Carey*, 505 F.3d 846, 859 (9th Cir. 2007) (Reinhardt, J., concurring specially).

“an egregious miscarriage of justice.”²⁴⁷ The fairminded-jurist test prevents federal judges from conducting their own independent assessments and, in doing so, stands in sharp contrast to the flexible habeas remedy used at common law. Justice Stevens warned that, without independent federal review of habeas claims, AEDPA would rob federal courts of their Article III duties.²⁴⁸

C. Clearly Established Law: Deferring to the State’s Interpretation of Federal Law

To overcome AEDPA deference, a petitioner must show that the state court unreasonably applied “clearly established Federal law, as determined by the Supreme Court of the United States.”²⁴⁹ This aspect of AEDPA deference works closely with the fairminded-jurist test and the reasonableness inquiry; the clearer a given rule of law is, the more likely it is that a federal court will conclude that the state court unreasonably misapplied it.²⁵⁰ The Court interprets this amorphous standard to mean that “only when a case arises from the same factual scenario has the law been clearly established.”²⁵¹

In *Williams v. Taylor*,²⁵² the Court stated that the phrase “clearly established” refers only to “the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-court decision.”²⁵³ The Court further elaborated on this in several cases.²⁵⁴ In *Carey v.*

247. Kozinski, *supra* note 5, at xli.

248. *Williams v. Taylor*, 529 U.S. 362, 378–90 (2000). Justice Stevens articulated an alternative theory on a way to apply AEDPA deference to preserve some independent review for federal judges, yet raise the bar from *de novo* review. *Id.* (arguing that AEDPA’s unclear language did not “establish ‘a body of rigid rules’” by which federal courts are unable to review the content of a habeas petition, but rather it “express[ed] a ‘mood’ that the Federal Judiciary must respect”).

249. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (1996).

250. Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 747–54 (2010).

251. *Id.* at 742 (quotation marks omitted); *see also* Bentele, *supra* note 6, at 37 (arguing that one harmful consequence of this is that “interpretation of the provisions of the Constitution designed to ensure the fairness of criminal convictions and sentences is placed entirely in the hands of the Supreme Court, with the lower federal courts playing virtually no role”).

252. 529 U.S. 362 (2000).

253. *Id.* at 412. Justice Stevens pointed out that the majority’s statement here was itself “a somewhat ironic dictum.” *Carey v. Musladin*, 549 U.S. 70, 78 (2006) (Stevens, J., concurring).

254. *See, e.g., Knowles v. Mirzayance* 556 U.S. 111, 120–22 (2009) (holding the Court had not clearly established that trial counsel’s abandonment of the defendant’s “only defense” was ineffective assistance of counsel because “[t]his

Musladin,²⁵⁵ the petitioner argued that the state court violated his right to due process and a fair trial because the victim's family and friends wore buttons with photographs of the victim's face during the trial.²⁵⁶ He relied mostly on *Estelle v. Williams*,²⁵⁷ where the Court held that a state cannot "compel an accused to stand trial before a jury while dressed in identifiable prison clothes,"²⁵⁸ to assert the principle that trial courts may not allow "impermissible factors" to affect the fairness of a defendant's trial.²⁵⁹ The Court denied the writ and explained that its previous cases dealt only with "state-sponsored courtroom practices" and that whether "private-actor courtroom conduct" can deprive a defendant of a fair trial is "an open question in our jurisprudence."²⁶⁰ But none of the Court's previous cases suggested "that it should matter whether the State or an individual may be to blame for some objectionable sight."²⁶¹ And the Court has long stood by the principle that "[t]rials must be free from a coercive or intimidating atmosphere."²⁶²

Keeping with the trend, the Court interprets this piece of Section 2254(d) in a way that precludes federal courts from applying federal law. The concept of law includes more than just narrow, fact-specific holdings; it includes principles that must "provide guidance for lawyers and judges in future cases."²⁶³ Because of the "rarity and idiosyncrasy of direct review of criminal cases by the Supreme Court," federal courts are forced to resist their obligation to apply federal law.²⁶⁴ Moreover,

Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard"); *Wright v. Van Patten*, 552 U.S. 120, 12426 (2008) ("Our precedents do not clearly hold that counsel's participation by speakerphone should be treated as a 'complete denial of counsel,' on par with total absence."); *Schriro v. Landrigan*, 550 U.S. 465, 478 (2007) (holding that the state court did not unreasonably apply federal law and explaining that, despite the long-standing Strickland standard, "we have never addressed" any situations "in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court").

255. 549 U.S. 70 (2006).

256. *Id.* at 72–73.

257. 425 U.S. 501 (1976).

258. *Id.* at 512.

259. *Musladin*, 549 U.S. at 75.

260. *Id.* at 76.

261. *Id.* at 82 (Souter, J., concurring).

262. *Id.* at 80 (Kennedy, J., concurring).

263. *Id.* at 79 (Stevens, J., concurring); *see also* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–39 (1978) (arguing that legal rights and obligations include "principles," which are "requirement[s] of justice or fairness or some other dimension of morality").

264. *Bentele*, *supra* note 250, at 743, 762–63.

federal courts cannot prevent state courts from subjecting criminal defendants to an unlawful criminal process—the function given to the federal government by the Suspension Clause—so long as any state misconduct does not fall squarely within the facts of a previous Supreme Court case. Additionally, it seems both odd and fundamentally unfair to apply a “clearly established law” standard, used only to protect public officials in civil lawsuits, to a criminal proceeding. Using this standard to protect the state, which is not on trial, prevents petitioners from fully realizing their constitutional rights in the criminal process—again, the precise evil that the writ of habeas corpus is designed to prevent.

V. DISTINGUISHING AEDPA’S SUSPENSION WALL FROM PAST CASES

Not long after Congress enacted AEDPA, litigators and scholars began arguing that Section 2254(d)(1) unconstitutionally suspended the writ of habeas corpus.²⁶⁵ Not surprisingly, people were taken aback by the drastic changes, so criminal defense attorneys and professors threw as many arguments into the mix as possible.²⁶⁶ Those claims failed for three practical reasons. First, the Supreme Court had not yet constructed the statute into a “twisted labyrinth of deliberately crafted legal obstacles.”²⁶⁷ Second, the Court had not yet embraced the more flexible, functional approach to the Suspension Clause.²⁶⁸ Third, litigators did not give the Suspension Clause challenge the attention it deserves, partially because they did not yet have the tools they needed.²⁶⁹

265. See Poulson, *supra* note 32, at 395–399 (discussing how the AEDPA weakens the writ of habeas corpus); Woolley, *supra* note 29, at 432–40 (analyzing the policy objections to broad deference under AEDPA and considering possible alternatives).

266. Interview with Michael Benza, Senior Instructor in Law, Case Western Reserve Univ. Sch. of Law, Death Penalty Defense Attorney, in Cleveland, Ohio (Oct. 12, 2015) (“When AEDPA was first enacted, everyone thought, ‘Oh no, the world is coming to an end!’ Then, everyone calmed down for a while after *Williams*. We thought, ‘Okay, this isn’t so bad after all.’ Now, after *Harrington* and *Pinholster*, we are all back to thinking that the world is coming to an end.”).

267. Reinhardt, *supra* note 5, at 1220. *Harrington v. Richter* and *Cullen v. Pinholster* were each decided in 2011. 131 S. Ct. 770 (2011); 131 S. Ct. 1388 (2011).

268. See, e.g., *Crater v. Galaza*, 491 F.3d 1119, 1122 n.1 (9th Cir. 2007) (declining to answer the question of “whether the Suspension Clause creates an individual right or sets a congressional limit, a point of recent disagreement in the D.C. Circuit”) (citing *Boumediene v. Bush*, 476 F.3d 981, 993 (D.C. Cir. 2007)). As Parts III.A and III.C explain, the Court in *Boumediene* took a functional approach to determine the writ’s constitutional scope and decided that the Suspension Clause does guarantee an individual right.

269. See, e.g., *Green v. French*, 143 F.3d 865, 874 (4th Cir. 1998) (“Almost as an afterthought, and apparently for the first time on appeal, Green argues that this limitation unconstitutionally constricts the habeas jurisdiction of the

The Fourth Circuit, Seventh Circuit, and Ninth Circuit each rejected the suspension argument for the same reasons: Congress has the power to alter federal court jurisdiction over habeas corpus. In *Lindh v. Murphy*,²⁷⁰ the Seventh Circuit reasoned, firstly, that “to alter the standards on which writs issue is not to ‘suspend’ the privilege.”²⁷¹ Secondly, collateral review of habeas petitions is subject to Congressional control; it is not within the constitutional scope of the writ.²⁷² Judge Easterbrook asserted that “[t]he Suspension Clause is not a ratchet”; it does not “forbid[] every contraction of the powers bestowed by Congress in 1885.”²⁷³

Similarly, the Fourth Circuit reasoned in *Green v. French*²⁷⁴ that the AEDPA’s requirements are “entirely ordinary and unexceptionable” and that it “represents a modest congressional alteration” of the writ.²⁷⁵ And in *Crater v. Galaza*,²⁷⁶ the Ninth Circuit explained that although the AEDPA “markedly reduces” the availability of habeas corpus, it merely amounts to a “constraint on granting relief,” not a suspension of that relief.²⁷⁷ Numerous district courts have followed this reasoning.²⁷⁸

Petitioners can successfully distinguish their claims from these previous cases by arguing, firstly, that Congress does not have unlimited power to define federal court jurisdiction over habeas, as *Lyndh* suggested. *Boumediene* established that the Suspension Clause provides something resembling an individual right that acts as an external limitation on Congress’s power.²⁷⁹ Congress does not have the power to infringe upon the constitutional scope of the writ.²⁸⁰ So if petitioners can show that the right to the writ includes either meaningful review

federal courts”); *Lindh v. Murphy*, 96 F.3d 856, 867 (7th Cir. 1996) (“Almost as an afterthought”).

270. 96 F.3d 856 (7th Cir. 1996).

271. *Id.* at 867.

272. *Id.* at 867–68.

273. *Id.* at 868.

274. 143 F.3d 865 (4th Cir. 1998).

275. *Id.* at 875.

276. 491 F.3d 1119 (9th Cir. 2007).

277. *Id.* at 1122, 1125.

278. *See, e.g.*, *Wright v. Martin*, No. 14–CV–211–JHP–FHM, 2014 WL 5431199, (N.D. Okla. Oct. 24, 2014); *Alvarez-Guerrero v. Ryan*, No. CV–10–750–TUC–JGZ (JR), 2013 WL 5498247 (D. Ariz. Oct. 1, 2013); *Bowling v. Parker*, 882 F.Supp. 2d 891 (E.D. Ky. 2012); *Norris v. Warden, NCI*, No. 2:08–cv–732, 2010 WL 883847 (S.D. Ohio Mar. 9, 2010) (all upholding AEDPA’s constitutionality).

279. *See supra* Part III.A.

280. *See supra* Part III.A.

or federal review, then they can likely demonstrate that Section 2254(d)(1) infringes upon that right.

Secondly, Section 2254(d)(1) can no longer plausibly be described as a “modest congressional alteration” of the writ or a mere “modification.” Rather, it is a drastic shift in habeas review that is “impossible to meet.”²⁸¹ The standard contains three layers of deference, each one of which substantially increases the likelihood that a petitioner will never obtain full and fair review of his federal claims and that his voice will never be heard by any court.²⁸² Further, *Boumediene* recognized that the writ’s constitutional scope is informed by the judiciary’s function to check government abuses.²⁸³ But AEDPA deference renders federal courts powerless to correct injustice and obliges them to let state abuses go unnoticed.²⁸⁴ The Suspension Clause is not a “ratchet,” but nor is it barren of the life the framers breathed into it.

CONCLUSION

For twenty years, AEDPA has buried habeas petitioners behind its walls, frustrated judges, and exacerbated society’s brokenness. Challengers can now forcefully argue that the Suspension Clause guarantees habeas petitioners a right to meaningful federal review of their federal claims. They can argue that Section 2254(d)(1)’s three layers of deference set a near impossible standard that substantially reduces a petitioner’s chances of receiving meaningful review in either state court or federal court. Further, AEDPA deference deprives judges of their duty to check state courts and to apply federal law in its entirety. The Suspension Clause challenge no longer needs to be an “afterthought.” Instead, challengers can use the Court’s seemingly contentious precedents to force political action and to publicly expose AEDPA for what it is—“a cruel, unjust, and unnecessary law”²⁸⁵ that ignorantly bites into this country’s most cherished principles. It is time to bring down the wall.

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281. *Peak v. Webb*, 673 F.3d 465, 487 (6th Cir. 2012) (Clay, J., dissenting).

282. *See supra* Part IV.

283. *See supra* Part III.C.

284. *See supra* Part IV.B.

285. Kozinski, *supra* note 5, at xlii.

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