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The Reasonableness of the “Reasonableness” Standard of Habeas Corpus Review Under the Antiterrorism and Effective Death Penalty Act of 1996

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THE REASONABLENESS OF THE
“REASONABLENESS” STANDARD OF
HABEAS CORPUS REVIEW UNDER THE
ANTITERRORISM AND EFFECTIVE
DEATH PENALTY ACT OF 1996

Paul J. Larkin[†]

ABSTRACT

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 modified the standard of review that federal courts may use when reviewing the legality of a state court’s judgment of conviction. Historically, common-law and federal courts reviewing a habeas corpus petition could inquire only into the jurisdiction of the court that entered the judgment. The Supreme Court gradually expanded that review. In 1953, the Court jettisoned that limited re-examination in favor of a standard of de novo review of all properly preserved federal claims. The result was to leave the finality of state-court judgments unsettled. What is more, the Supreme Court’s evident disquiet over the states’ implementation of the death penalty, coupled with an apparent guerilla war against capital punishment by some federal judges, left the death penalty a punishment in name only. Congress sought to rectify those problems through the AEDPA by limiting federal habeas review to the “reasonableness” of a state court’s interpretation of Supreme Court case law. Congress did not return habeas corpus review to the original, jurisdiction-only basis, but it did curtail the ability of federal courts to substitute their interpretations of federal constitutional law for those of the state-court judges. The AEDPA standard of review has been criticized for violating the Article I Suspension Clause, the Article III Judicial Power Clause, and the Fifth Amendment Due Process Clause. Yet, unless the Constitution imposes a ratchet on Congress’s ability to define collateral review of state-court judgments, the AEDPA is a lawful exercise of Congress’s Article III authority to define the jurisdiction of the lower federal courts.

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INTRODUCTION

Just over twenty years ago, Congress passed the habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA)¹ largely to address the intersection of two of the most controversial criminal-justice issues that had agitated the American legal system over the preceding sixty years: (1) federal-court habeas corpus review of state convictions, and (2) reliance on the death penalty as a punishment for certain crimes. Two motivations spurred Congress to amend the 1867 federal habeas corpus statute that had largely remained unchanged since it became law. One was the belief that, when carried out, the death penalty saves lives by deterring violent crimes that could result in death. The other was frustration with the willingness of some federal judges to prevent the death penalty from being anything more than an abstract on-the-books-only punishment by using federal habeas corpus to fault the state-court trial and appellate processes for rulings that were the subject of reasonable disagreement among fair-minded jurists.²

The AEDPA was controversial when it was enacted and remains so in some quarters today.³ The principal target of criticism has been the

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1. Pub. L. No. 104-132, 110 Stat. 1214.
 2. See Paul J. Larkin, Jr., *John Kingdon's "Three Streams" Theory and the Antiterrorism and Effective Death Penalty Act of 1996*, 28 J.L. & POL. 25, 30–46 (2012) (discussing the provenance of the AEDPA). As explained below in Part I(A), state court judges are as entitled to decide federal-law issues as federal judges are, and lower federal courts cannot ordinarily review state court judgments.
 3. Most commentators have been heavily critical of the act. See, e.g., Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full*

act's judicial-review feature. The statute changed the standard of review that federal courts had employed since 1953 when considering the legality of a state-court judgment of conviction. In that year, the Supreme Court of the United States held in *Brown v. Allen*⁴ that the federal courts should review de novo all federal constitutional claims a state prisoner raised to challenge the legality of his confinement.⁵ Concluding that the Supreme Court had overreached in *Brown*, Congress substituted a "reasonableness" standard in lieu of the de novo standard.⁶ Since then, various scholars have criticized that feature of the AEDPA, calling for Congress to repeal it and for the courts to hold it unconstitutional.⁷ I disagree. The act's revisions are far more faithful to the historic purpose of habeas corpus than the *Brown v. Allen* approach, and they are consistent with American law's historic reluctance to relitigate fully and fairly adjudicated issues in a never-ending quest for the one true, correct result.

This Article proceeds as follows: Part I will summarize the development of habeas corpus from the common law to the passage of the AEDPA. Part II discusses the new standard of review that statute

Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights, 78 TEX. L. REV. 1805, 1834–36 (2000); Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 333–37 (1998); Panel Discussion, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 560 (1996); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 4–12 (1997). A far smaller number have been supportive (or at least not openly critical). See, e.g., J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 GEO. J.L. & PUB. POL'Y 109, 119–20 (2004); William J. Meade, Recent Case, *Williams v. Taylor*, 85 MASS. L. REV. 127 (2001); Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 944 (1998); Joseph T. Thai, Recent Case, *A Case for Speedier Executions: Felker v. Turpin*, 116 S. Ct. 2333 (1996), 20 HARV. J.L. & PUB. POL'Y 605, 605–08 (1997). Numerous pre-AEDPA articles debated the permissibility and desirability of de novo review. Compare, e.g., Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982), and Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1331–32 (1961) (arguing in favor of de novo review), with Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 494 n.142, 501–02 (1963), and Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Corpus Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1154–56 (1995) (arguing to the contrary).

4. 344 U.S. 443 (1953).
5. *Id.* at 422.
6. See *infra* notes 149–218 and accompanying text.
7. See *supra* note 3.

imposed on the federal courts, especially as the Supreme Court has elaborated how that standard works in practice. Finally, Part III addresses, and finds unpersuasive, the arguments that the new standard violates the Article I Suspension Clause, the Article III Judicial Power Clause, and the Fifth Amendment Due Process Clause.

I. THE HISTORY OF FEDERAL HABEAS CORPUS REVIEW

A. *The Expansion of Federal Review of State Judgments*

The First Judiciary Act⁸ was Congress's initial exercise of its Article III power to create a federal judicial system.⁹ Section 14 of the act granted federal courts the power to issue writs of habeas corpus, but it expressly exempted cases in which a petitioner was in federal custody pursuant to a judgment of conviction.¹⁰ In so doing, Congress incorporated the common-law rules governing habeas corpus. As Chief Justice John Marshall explained in *Ex parte Watkins*,¹¹ a court entertaining a habeas corpus petition could order a jailer to justify someone's confinement, but proof that the person in custody had been convicted by a court with jurisdiction over the offense was dispositive.¹²

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8. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 ("An Act to establish the Judicial Courts of the United States").
 9. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
 10. § 14, 1 Stat. at 81–82 ("That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.").
 11. 28 U.S. (3 Pet.) 193 (1830).
 12. *Id.* at 202–03 ("This writ is, as has been said, in the nature of a writ of error which brings up the body of the prisoner with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered. A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other

The First Judiciary Act did not in terms empower a federal court to re-examine a judgment of conviction entered by a state court.¹³ In 1845, the Supreme Court expressly so held in *Ex parte Dorr*.¹⁴ Congress did not generally¹⁵ authorize federal courts to review state-court

courts. It puts an end to inquiry concerning the fact, by deciding it.”); *id.* at 207 (“The cases are numerous, which decide that the judgments of a court of record having general jurisdiction of the subject, although erroneous, are binding until reversed. It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us to settle the question now before the court. The judgment of the circuit court in a criminal-case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We cannot usurp that power by the instrumentality of the writ of habeas corpus. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied.”); *see also, e.g.*, *Brown v. Davenport*, 142 S. Ct. 1510, 1520–21 (2022); *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 39 (1822); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807).

13. *See Ex parte Cabrera*, 4 F. Cas. 964, 965–66 (C.C.D. Pa. 1805).
14. 44 U.S. (3 How.) 103, 105 (1845) (“Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual, who may be indicted in a Circuit Court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under the authority of a state.”).
15. Congress extended the writ to persons held in state custody in limited ways in 1800, 1833, and 1842. For a brief period beginning in 1800, Congress empowered federal courts when exercising bankruptcy jurisdiction to issue the writ to free debtors arrested by state officials after the debtors’ discharge in bankruptcy. Act of Apr. 3, 1800, ch. 18, § 38, 2 Stat. 19, 32. Three decades later, Congress again expanded the writ available to state petitioners in a minor way. In 1828, Congress passed a tariff to protect northern and western agricultural products from foreign competition. The tax on foreign goods, however, considerably raised the cost of living in the Southern states. In response, Vice President John Calhoun of South Carolina wrote *South Carolina Exposition and Protest*, which stated the doctrine of “nullification.” *See The Tariff of Abominations: The Effects*, U.S. HOUSE OF REPRESENTATIVES, HIST., ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1800-1850/The-Tariff-of-Abominations/> (last visited Sept. 21, 2021). In order to counter South Carolina’s resistance to the “Tariff of Abominations,” the 1833 act, known as the Force Bill of 1833, authorized federal courts to issue the writ for anyone confined for carrying out federal law or a federal court order. Ch. 57, § 7, 4 Stat. 632, 634–35. The final revision had nothing to do with the states. In 1842, in response to protests from the English government about the New York state murder trial of a Canadian soldier,

judgments of conviction until 1867.¹⁶ Even after that law took effect,¹⁷ the Supreme Court adhered to the common-law restriction on habeas review.¹⁸

Over time, the Court gradually increased the role of the federal courts in habeas corpus. Abandoning the earlier limitations on the power of a federal court to review a judgment entered in a state criminal trial, the Supreme Court broadened the type of claims that a prisoner could assert in federal habeas—from a narrow challenge to the jurisdiction of the trial court, to the fairness of the entire state trial and appellate process, and ultimately to the correctness of a state court’s

Congress empowered federal courts to issue the writ in cases involving “subjects of a foreign state, and domiciled therein,” detained in violation of a treaty. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, 539.

16. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (“[T]he several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . .”).
17. The 1867 act did not have any serious effect for nearly 20 years. In 1868, Congress deleted the Supreme Court’s appellate jurisdiction granted by the 1867 act to prevent the Court from ruling on the constitutionality of certain Reconstruction legislation. Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44. The Court upheld the validity of that law, *see Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 509–10 (1868), but relied instead on the Judiciary Act of 1789 to consider original habeas petitions, *see Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 87–89, 91–92, 94–96 (1869). Congress restored the Court appellate jurisdiction over state prisoner cases in 1885. Act of Mar. 3, 1885, ch. 353, 23 Stat. 437.
18. *See United States v. Hayman*, 342 U.S. 205, 211 (1952) (“[A] judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal . . . [and] prevented issuance of the writ without more.”); *see also, e.g., Edwards v. Vannoy*, 141 S. Ct. 1547, 1563 (2021) (Thomas, J., concurring); *id.* at 1566–68 (Gorsuch, J., concurring); *Wright v. West*, 505 U.S. 277, 285–86 (1992) (plurality opinion); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 94–98 (1868); *Ex parte Watkins*, 28 U.S. (3 Wall.) 193, 202–03 (1830) (“A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. . . . It puts an end to inquiry concerning the fact, by deciding it. . . . An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.”).

decision on every federal claim.¹⁹ The development happened slowly, but it had a definite trajectory to it.²⁰

19. See, e.g., *Brown v. Allen*, 344 U.S. 443, 460–61 (1953); Bator, *supra* note 3, at 463–519.
20. The first step came in a series of cases raising claims that, at least at an abstract level, deal with the jurisdiction of the trial court in a non-common-law system. The first decision came in a federal case, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). Convicted under a statute authorizing confinement *or* a fine, the trial court sentenced Lange to *both* penalties. After paying his fine, Lange sought habeas relief on the ground that he had satisfied the punishment authorized by statute and therefore could not be imprisoned without being punished twice for the same offense, in violation of the Double Jeopardy Clause. The Supreme Court agreed and ordered his release. *Id.* at 175–76, 178. Similar were *In re Snow*, 120 U.S. 274, 282 (1887), and *Nielsen*, 131 U.S. 176, 182 (1889), which allowed a habeas court to consider a claim that a defendant was given multiple sentences for one offense. Next in line was a federal case, *Ex parte Wilson*, 114 U.S. 417, 429 (1885), in which the Court allowed a defendant to claim that he had the right to an indictment as a prerequisite for trial. Finally, in one case, *Ex parte Siebold*, 100 U.S. 371, 374 (1889), the Court held that a habeas court may consider a defendant’s challenge to the constitutionality of the statute creating the offense for which he was tried. Why? Common-law trial courts have general jurisdiction over any matter unless the legislature has restrained it by statute, but lower federal courts have only the authority that Congress has vested in them. An unconstitutional statute cannot create jurisdiction. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807) (Marshall, C.J.). If viewed generously, the issues in *Lange*, *Snow*, *Nielsen*, and *Siebold* could be characterized as jurisdictional prerequisites to trial or punishment. The Court offered that explanation in *Siebold*, 100 U.S. at 376–77 (“Without attempting to decide how far this case may be regarded as law for the guidance of this court, we are clearly of opinion that the question raised in the cases before us is proper for consideration on *habeas corpus*. The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court’s authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws.”). So viewed, a jurisdictional limitation on habeas-corporis review remained the law. That interpretation of those decisions would render them consistent with later Supreme Court decisions involving similar issues. See, e.g., *In re Moran*, 203 U.S. 96, 103–05 (1906) (considering several jurisdictional challenges

The Supreme Court signaled a change in the law in 1915 in *Frank v. Mangum*.²¹ Tried for murder, Frank claimed that a mob atmosphere so dominated his trial that neither the jury nor judge could fairly adjudicate the charge against him.²² The Court rejected his claim, but did so in part on the ground that the state judicial system had provided him with a “corrective process” to review his claims that the trial-level verdict was the product of “mob domination.”²³ Because the state courts had reviewed the evidence in an opinion that had treated Frank’s claim seriously but ruled against him—not because a mob trial was permissible, but because the facts did not support his claim that there had been any such improper influence—the Supreme Court refused to order his release.²⁴ *Frank* enlarged the scope of review that a federal habeas court may undertake while acknowledging three new points: the then- (and now-) widespread existence of appellate courts was part of the “due process” a defendant can and must receive; those courts can ensure that a defendant’s own trial remains within the contemplation of what the Framers had in mind for a “Trial” when they drafted the

to the trial court’s authority but refusing to consider a Fifth Amendment Self-Incrimination Clause claim because it did not challenge the trial court’s jurisdiction over the case); *In re Belt*, 159 U.S. 95, 99–100 (1895) (refusing to examine the constitutionality of a federal statute permitting a defendant to waive a jury trial); *Andrews v. Swartz*, 156 U.S. 272, 275–76 (1895) (refusing to allow a defendant to challenge on federal habeas corpus a state conviction on the ground that the state had unlawfully discriminated against African Americans in the selection of grand and petit jurors); *In re Jugiro*, 140 U.S. 291, 296–97 (1891) (noting the same as in *Andrews*, in addition to a claim that the defendant’s lawyer had not been admitted to the bar); *In re Wood*, 140 U.S. 278, 290 (1891) (same as *Andrews*); *Ex parte Bigelow*, 113 U.S. 328, 328–29, 331 (1885) (refusing to address a Double Jeopardy Clause claim not involving multiple punishments).

21. 237 U.S. 309 (1915).
22. *Id.* at 309.
23. *Id.* at 335 (“We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law. But the State may supply such corrective process as to it seems proper.”).
24. *Id.* at 338 (“The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law.”).

Constitution;²⁵ and the state courts' judgment on the merits of a claim should be treated respectfully.²⁶

In 1953, the Supreme Court abandoned its historic understanding of the limits on a habeas corpus action. In *Brown v. Allen*,²⁷ the Court held that a state prisoner could raise non-jurisdictional federal claims in habeas corpus, and a federal court was obliged to review them de novo.²⁸ The majority opinion by Justice Stanley Reed did not acknowledge the drastic revision of habeas corpus that it approved. The Court reviewed and rejected the applicants' claims on the merits, but did not point to any text in the 1867 habeas act requiring de novo review.²⁹ Indeed, the Court did not even expressly disavow the jurisdictional limitation that had existed for more than a century, let alone explain why plenary review was necessary.³⁰ Nonetheless, *Brown v. Allen* was a

25. The term "Trial" appears in art. III, § 2, cl. 3. *See infra* note 258.

26. *See* Bator, *supra* note 3, at 486–87 ("The *Frank* case is often seen as restrictive with respect to the habeas jurisdiction. Yet the importance of the case derives as much from what the Court said the federal courts *could* do on habeas as what it held they could *not* do. For the first time the Court explicitly added a crucial weapon to the arsenal of the habeas corpus court: if that court finds that a state tribunal has failed to supply 'corrective process' with respect to the full and fair litigation of federal questions, *whether or not 'jurisdictional,'* in a state criminal proceeding, a court on habeas may appropriately inquire into the merits in order to determine whether the detention is lawful. From this aspect of *Frank v. Mangum*, I suggest, derive all the great and beneficent [sic] expansions of the writ we have witnessed in the past fifty years. (Of course expansion created problems of its own. As long as habeas was narrowly restricted to jurisdictional issues, the fact that it was available without limit of time did not create intolerable delays in the administration of justice by the states. But the effect of the widening of the writ in *Frank* was to import the time problem into a much larger category of cases, and this has made the problems of delay in the criminal process much more acute.) On the other hand the *Frank* opinion does, concededly, state what I conceive to be simple common sense but which others may regard as restrictive: that the fact that an unbiased court of competent jurisdiction has previously adjudicated, through a full and fair litigation, the merits of whether a defendant's federal rights were violated is crucially relevant to the question whether his detention may on habeas corpus be considered unlawful because he was denied due process of law. I regard this as common sense because it *directs* the inquiry on habeas corpus to the meaningful question whether the totality of state process assures us of a reasoned probability that justice was done, rather than whether in some ultimate sense the truth was in fact found." (footnote omitted)).

27. 344 U.S. 443 (1953).

28. *Id.* at 485–86.

29. *Id.* at 466–87.

30. In a concurring opinion, Justice Felix Frankfurter at least sought to justify the need for de novo review by writing that it was necessary to ensure that federal courts could decide the merits of a federal claim. *Id.* at 506–

clear break with prior law.³¹ The result was that, by the 1970s, federal habeas review was independent and plenary, which enabled a state prisoner to re-litigate in federal court any federal claim that he had raised in state court, and perhaps even to retry his case.³² The effect of *Brown v. Allen* was to utterly transform federal habeas corpus review from a simple, unpretentious, and widely hallowed means of preventing the Sheriff of Nottingham from throwing in jail someone he disliked³³ (or from whom he was trying to extract a backhander) or being unlawfully confined for another reason³⁴ into a complicated, controversial, and often accursed vehicle that allowed sometimes-haughty federal

08. In his words, “the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have.” *Id.* at 500. That reasoning just assumes the conclusion.

31. Professor Henry Hart recognized what the Court had done shortly after it had decided the case. See Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices, in The Supreme Court 1958 Term*, 73 HARV. L. REV. 84, 106 (1959) (“[*Brown v. Allen*] seems to say that due process of law in the case of state prisoners is not primarily concerned with the adequacy of the state’s corrective process or of the prisoner’s personal opportunity to avail himself of this process—with the proper operation, in other words, of the rules distributing authority to make decisions—but relates essentially to the avoidance in the end of any underlying constitutional error—that is, to the correct application of basic federal rules governing the decision to be made. The decision manifestly broke new ground.”). It took a while, but the Court later acknowledged the dramatic change that *Brown v. Allen* had made. See, e.g., *Edwards v. Vannoy*, 141 S. Ct. 1547, 1563 (2021); *id.* at 1568–69 (Gorsuch, J. concurring); *Felker v. Turpin*, 518 U.S. 651, 663 (1996).
32. See *Brown v. Davenport*, 142 S. Ct. 1510, 1521–22 (2022); Scheidegger, *supra* note 3, at 888–89 (“Under what circumstances should the habeas court examine the prisoner’s claim and decide the issue for itself, rather than dismiss the claim on the ground it is precluded by the original court’s unreversed judgment? The Supreme Court has given a variety of answers to that question over the years. In 1830, the answer was ‘never.’ In 1963, the answer was ‘almost always.’ At other times, the high court has given a number of answers in between. Since the 1953 case of *Brown v. Allen*, the general rule had been one of de novo review, although with some substantial exceptions.” (footnotes omitted)). The two principal exceptions were for claims that a prisoner had failed to preserve in the state system and claims under the Fourth Amendment Exclusionary Rule. See *Coleman v. Thompson*, 501 U.S. 722, 755–56 (1991); *Stone v. Powell*, 428 U.S. 465, 494 (1976).
33. See *infra* notes 233–50 and accompanying text.
34. For example, in *Somerset v. Stewart* (1772) 98 Eng. Rep. 499 (KB), the Court of King’s Bench ordered the release of James Somerset, an African American brought to England against his will and about to be transferred to Jamaica to be sold into slavery.

judges to treat their state counterparts as if they were law clerks rather than equals holding office in a different but parallel judicial system.³⁵

Why did the Supreme Court so reshape federal habeas corpus? It certainly was not due to a material revision to the text of the 1867 habeas statute. Also, the Court did not justify its novel direction based on a scholarly unearthing of documents shedding a new light on the statute's meaning.³⁶ No, we must look elsewhere for the answer. In my opinion, history, not logic, tells us what we need to know.³⁷

B. The Rationale for the Expansion

Three factors played critical roles in the Court's expansion of habeas corpus. The first one was that the Fourteenth Amendment Due Process Clause imposed a new regulation of the state's authority to punish someone for crime by depriving him or her of life, liberty, or property.³⁸ In reliance on that clause, the Supreme Court over time demonstrated its willingness to review the states' trial processes to ensure that a defendant received a fundamentally fair trial, and progressively enlarged the types of federal constitutional claims that a defendant could raise challenging a state criminal prosecution.³⁹ For example,

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35. The Court's decision in *Brown v. Allen* must be read together with its rulings in *Fay v. Noia*, 372 U.S. 391, 394 (1963), which addressed the issue of when a state petitioner can be denied the right to relitigate an issue in federal habeas due to his or her failure to preserve the issue in state court, and *Townsend v. Sain*, 372 U.S. 293, 295, 297 (1963), which addressed when a district court may conduct a new evidentiary hearing on a state applicant's claim, rather than rely on the record created in state court. Together, the three rulings gave a federal district court almost complete freedom to hold an evidentiary hearing and review almost any claim that a habeas petitioner raised or could have raised in state court. *Fay* and *Townsend* added to the insult state-court judges felt by *Brown v. Allen*.
36. That has happened in other instances. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 49-51 (1923).
37. As Justice Oliver Wendell Holmes advised us it often might. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) ("Upon this point a page of history is worth a volume of logic.").
38. U.S. CONST. amend. XIV, § 1 ("No State . . . shall deprive any person of life, liberty, or property, without due process of law . . .").
39. That is not to suggest that the Equal Protection Clause did not play an important role in guaranteeing defendants, particularly African American defendants, a fair pretrial and trial process. It did. Shortly after the Fourteenth Amendment became law, the Supreme Court made it clear that no state could discriminate in the selection of grand or petit jurors by intentionally excluding African Americans from jury pools or actual venires. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 261 (1986) (collecting cases ruling that a conviction must be set aside if there was discrimination in the selection of the grand jury); *Carter v. Jury Comm'n*, 396 U.S. 320, 329-30 (1970) (ruling that a state cannot discriminate on the basis of race

as noted above in *Frank v. Mangum*,⁴⁰ the Court explained that a mob-dominated proceeding was not the type of “trial” that due process guaranteed.⁴¹ After *Frank*, the Court addressed other state trial practices that suffered from the same flaw, some of which made a mockery of the Anglo-American understanding of a “trial.” For instance, the Court made it clear that the following practices violate the Due Process Clause: a state may not knowingly use perjured testimony to prove a defendant’s guilt⁴² (or knowingly allow perjured testimony to go

in the selection of petit jurors); *Avery v. Georgia*, 345 U.S. 559, 560–62 (1953) (ruling that the defendant had established a prima facie case of discrimination in petit jury selection when the names of members of the venire were color-coded by race and no African American sat on the jury in the defendant’s case); *Cassell v. Texas*, 339 U.S. 282, 286 (1950) (ruling that a state cannot limit the participation of African Americans for grand-jury service to their proportional representation in the local community); *Smith v. Texas*, 311 U.S. 128, 132 (1940) (ruling that a conviction must be set aside if there was discrimination in the selection of the grand jury); *Hale v. Kentucky*, 303 U.S. 613, 616 (1938) (ruling that the exclusion of jurors based on race constitutes a denial of equal protection guaranteed to a petitioner by the Fourteenth Amendment); *Hollins v. Oklahoma*, 295 U.S. 394, 395 (1935) (ruling that the exclusion of jurors based on race deprived the petitioner of equal protection of the laws); *Norris v. Alabama*, 294 U.S. 587, 599 (1935) (same); *Carter v. Texas*, 177 U.S. 442, 448–49 (1900) (same); *Neal v. Delaware*, 103 U.S. 370, 397 (1881) (same); *Virginia v. Rives*, 100 U.S. 313, 322–23 (1879) (stating that the exclusion of jurors based on race deprives a petitioner of equal protection of the laws); *Strauder v. West Virginia*, 100 U.S. 303, 309–10 (1879) (same).

40. 237 U.S. 309 (1915).
41. *Id.* at 335 (“We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.”). Similar examples are those cases in which the Court prohibited the government from trying a defendant who, because of a mental disease or defect, is incapable of understanding what a trial is (or that he is on trial) or from being able to consult with defense counsel. *See, e.g.*, *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975) (ruling that a defendant has a right not to be tried if he is mentally incompetent and cannot understand the nature of the proceedings or assist in his defense); *Pate v. Robinson*, 383 U.S. 375, 385–86 (1966) (discussing procedures necessary at a hearing held to determine whether a defendant should be psychiatrically examined for his competency to stand trial); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (adopting a standard to determine whether a defendant is competent to stand trial).
42. *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (ruling that due process forbids a prosecutor from proving a defendant’s guilt entirely through perjured testimony).

uncorrected⁴³); a state cannot pay a trial judge per conviction;⁴⁴ given the overwhelmingly incriminating effect that a defendant's confession would have on a jury, the government cannot introduce at trial an admission of guilt that was coerced from the accused;⁴⁵ and, in a gradually increasing number of cases,⁴⁶ no defendant may be left to defend himself at trial without the assistance of defense counsel, provided by the state if need be.⁴⁷ Over time, the Due Process Clause came to serve as a basis for challenging a particular government action deemed fundamentally unfair but outside of one of the few specific constitutional prohibitions contained in the original Constitution.⁴⁸

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43. See, e.g., *Napue v. Illinois*, 360 U.S. 264, 265, 269–70 (1959) (ruling that due process forbids a prosecutor from knowingly allowing a witness's perjury to go uncorrected at trial); *Pyle v. Kansas*, 317 U.S. 213, 215–16 (1942) (ruling that due process forbids a prosecutor from intentionally using perjured testimony to convict a defendant); cf. *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963) (ruling that due process forbids the prosecution from not disclosing to the defense exculpatory evidence on the issues of guilt or sentence).
 44. See *Tumey v. Ohio*, 273 U.S. 510, 531 (1927) (holding unconstitutional a state law basing a judge's salary on the penalties imposed following a conviction).
 45. See *Brown v. Mississippi*, 297 U.S. 278, 286–87 (1936).
 46. See, e.g., *Carnley v. Cochran*, 369 U.S. 506, 507–12 (1962); *Gibbs v. Burke*, 337 U.S. 773, 780–82 (1949); *Foster v. Illinois*, 332 U.S. 134, 136–38 (1947); *Williams v. Kaiser*, 323 U.S. 471, 472–73 (1945); *Betts v. Brady*, 316 U.S. 455, 461 (1942).
 47. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).
 48. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . .”). That practice has continued to the present day. See, e.g., *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006) (ruling that a defendant has a right to offer proof that someone else committed the crime); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (holding a jury instruction was constitutionally deficient based on the meaning of the “reasonable doubt” standard); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (ruling that a defendant has a right to offer evidence at trial that the circumstances under which he confessed rendered his statement unworthy of belief); *Wardius v. Oregon*, 412 U.S. 470, 476 (1973) (holding unconstitutional a state law requiring the defense to provide discovery materials to the prosecution but not imposing a corresponding responsibility on the prosecution); *In re Winship*, 397 U.S. 358, 364 (1970) (requiring the government to prove a defendant's guilt beyond a reasonable doubt); *Jackson v. Virginia*, 443 U.S. 307, 315–16 (1979) (holding that the *Winship* standard requires not only that the fact-finder have a state of near certitude of the defendant's guilt but also that the government adduce sufficient proof to ensure that a reasonable fact-finder could achieve that near certainty); *Foster v. California*, 394 U.S. 440, 441–43 (1969) (ruling that it violates due process to use the results of a police-staged, unduly suggestive identification procedure, at trial); *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (holding unconstitutional a court's

The second factor was the Supreme Court's 20th-century decision to reject its 19th-century precedents applying the Bill of Rights only to the federal government. The Bill of Rights, particularly the Fifth and Sixth Amendments,⁴⁹ guaranteed defendants tried in federal court a panoply of procedures designed to distinguish the guilty from the innocent, but the Supreme Court made it clear early in the 19th century that those protections were inapplicable to the states.⁵⁰ The Supreme

"unforeseeable and retroactive judicial expansion of narrow and precise statutory language"); *Cox v. Louisiana*, 379 U.S. 559, 571 (1965) (holding unconstitutional the prosecution of a person for engaging in conduct that a police officer had expressly told the defendants was lawful); *Thompson v. City of Louisville*, 363 U.S. 199, 206 (1960) (holding that the government cannot convict someone of a crime when there is no proof that the defendant committed any illegal conduct); *Cole v. Arkansas*, 333 U.S. 196, 201–02 (1948) (ruling that a defendant's conviction concerning one crime cannot be upheld on the ground that, regardless of whether he committed that crime, he was guilty of a materially different, uncharged crime); see also Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 316–22 (2016) (discussing this line of cases).

49. See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").
50. In 1833, the Supreme Court held in *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. 243, 250–51 (1833), that the Bill of Rights applied only against the federal government, not the states. The *Barron* decision remained the law for decades. See, e.g., *Adamson v. California*, 332 U.S. 46, 67–68 (1947) (ruling that a state-law rule permitting the prosecution to comment on the defendant's refusal to take the stand at trial does not violate the Fifth Amendment Self-Incrimination Clause because the clause does not apply to the states), *abrogated by* *Malloy v. Hogan*, 378 U.S. 1, 11, 17 (1964), and *Griffin v. California*, 380 U.S. 609, 615 (1965); *Betts v. Brady*, 316 U.S. 455, 471–72 (1942) (rejecting the defendant's claim that he was entitled to a state-appointed defense counsel on the ground that the Sixth Amendment Counsel Clause does not apply to the states); *id.* at 461 nn. 9 & 10 (collecting cases so ruling), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963); *Twining v. New Jersey*, 211 U.S. 78, 114 (1908) (ruling that the Fifth Amendment Self-Incrimination Clause does not apply to the states), *abrogated by* *Malloy v. Hogan*, 378 U.S. 1, 11, 17 (1964); *Maxwell v. Dow*, 176 U.S. 581, 604–05 (1900)

Court abandoned that “hands off” approach, however, after passage of the Fourteenth Amendment. That turnabout had a particular effect on the states’ criminal-justice systems.⁵¹ Over time, the Court extended to state law enforcement and judicial officials the same federal constitutional requirements that governed federal agents, prosecutors, and judges. The Fourth Amendment Reasonableness⁵² and Warrant Clauses⁵³ (as well as its Exclusionary Rule⁵⁴); the Fifth Amendment Double Jeopardy⁵⁵ and Self-Incrimination Clauses,⁵⁶ the Sixth Amendment Speedy Trial,⁵⁷ Public Trial,⁵⁸ Jury Trial,⁵⁹ Confrontation,⁶⁰ Compulsory Process,⁶¹ and Counsel Clauses;⁶² the Eighth Amendment’s Cruel and Unusual Punishments⁶³ and Excessive Fines Clauses⁶⁴—at one time, none of them applied to the states; now they all do. Indeed, today there are few Bill of Rights provisions not applicable to the

(rejecting the defendant’s claim that he could not be tried for a noncapital offense by a jury of fewer than twelve men, on the ground that the Sixth Amendment Jury Trial Clause did not apply to the states), *abrogated in part by* *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968); *Hurtado v. California*, 110 U.S. 516, 534-36 (1884) (ruling that the Fifth Amendment Indictment Clause did not apply to the states).

51. Perhaps to avoid giving state criminal justice officials the feeling of being singled out, the Court also extended other Bill of Rights amendments to the states, such as the First Amendment. *Cf.* *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15 (1947) (Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (Free Exercise Clause); *De Jonge v. Oregon*, 299 U.S. 353, 365-66 (1937) (Free Assembly Clause); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (Free Press Clause); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (Free Speech Clause).
52. *See* *Wolf v. Colorado*, 338 U.S. 25, 28 (1949); *overruled by* *Mapp v. Ohio*, 367 U.S. 643, 670-72 (1961).
53. *See* *Aguilar v. Texas*, 378 U.S. 108, 110, 115-16 (1964).
54. *See* *Mapp v. Ohio*, 361 U.S. 643, 654-60 (1961).
55. *See* *Benton v. Maryland*, 395 U.S. 784, 787 (1969).
56. *See* *Malloy v. Hogan*, 378 U.S. 1, 5-6 (1964).
57. *See* *Klopfer v. North Carolina*, 386 U.S. 213, 222-23, 226 (1967).
58. *See* *In re Oliver*, 333 U.S. 257, 271-73 (1948).
59. *See* *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968).
60. *See* *Pointer v. Texas*, 380 U.S. 400, 403 (1965).
61. *See* *Washington v. Texas*, 388 U.S. 14, 18-19 (1967).
62. *See* *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963).
63. *See* *Robinson v. California*, 370 U.S. 660, 666-67 (1962).
64. *See* *Timbs v. Indiana*, 139 S. Ct. 682, 687-89 (2019).

states.⁶⁵ The result was to create an additional tranche of federal constitutional claims that a state defendant could raise to forestall or undo a judgment of conviction.

There is one more. The third, and likely most important, factor leading to the expansion of habeas corpus was that—to put it bluntly, but honestly—the Supreme Court justices didn't trust state and local police officers or judges on the state benches. That inference is reasonable considering how the Court came to treat convictions in state criminal cases. The Equal Protection Clause prohibited the states from discriminating on the basis of race, but race-based distinctions proved more resilient than the Reconstruction Congress had hoped. Originally, discrimination was overt and bold-faced, but states later used subtle and disguised forms of racial discrimination in their criminal-justice systems. Even in the 1960s, the Supreme Court found itself still forced to remind the states of their equal-treatment obligations.⁶⁶ Atop that was a standard oppressive police practice that became known as the

65. Principally, the Fifth Amendment Indictment Clause and, for civil cases, the Seventh Amendment right to a jury trial. *See McDonald v. Chicago*, 561 U.S. 742, 759–66, 764–66 nn.12–14 (2010).

66. *See supra* note 39 (collecting cases). Unfortunately, racial discrimination in crime still exists. *See, e.g., Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867–71 (2017) (ruling that the Equal Protection Clause entitles a defendant to prove his claim that racial bias infected jury deliberations); *Buck v. Davis*, 137 S. Ct. 759, 775–77 (2017) (finding prejudicial the introduction of testimony by a defense psychologist that African American males are prone to violence); *Miller-El v. Dretke*, 545 U.S. 231, 253–66 (2005) (ruling that the prosecution used peremptory challenges to dismiss members of the venire because of their race). Equally unfortunate, however, is the fact that, however hard we try to end their reappearance, both forms of antisocial conduct will continue to exist on this side of the River Styx until Judgment Day, given the nature of people on this side. *See Genesis* 3:1–24 (King James).

“third degree,”⁶⁷ an interrogation technique that, the Court wrote, “to some degree [was] widespread throughout our country.”⁶⁸

67. See, e.g., Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 804–09 (1970). At first, the Court’s decisions reflected police officers’ willingness to use clearly abusive practices to obtain a confession. See, e.g., *Beecher v. Alabama*, 408 U.S. 234, 234–35 (1972) (“The uncontradicted facts of record are these. Tennessee police officers saw the petitioner as he fled into an open field and fired a bullet into his right leg. He fell, and the local Chief of Police pressed a loaded gun to his face while another officer pointed a rifle against the side of his head. The Police Chief asked him whether he had raped and killed a white woman. When he said that he had not, the Chief called him a liar and said, ‘If you don’t tell the truth I am going to kill you.’ The other officer then fired his rifle next to the petitioner’s ear, and the petitioner immediately confessed.” (quoting *Beecher v. Alabama*, 389 U.S. 35, 36–37 (1967))); *Culombe v. Connecticut*, 367 U.S. 568, 623 (1961) (explaining that the circumstances in *Haley v. Ohio*, 332 U.S. 596 (1948), where relays of five or six police officers questioned (and one or more of whom likely physically beat) a fifteen-year-old suspect for five or six hours after midnight and held him incommunicado for several days afterwards lead to the Court to hold that a confession had been coerced); *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (describing that the defendant was held incommunicado for three days; often deprived of food; denied contact with a family member, advisor, or friend; and the police chief threatened the suspect with a lynching if he did not confess); *Fikes v. Alabama*, 352 U.S. 191, 193, 196–97 (1957) (showing that the police questioned a suspect—described by his mother as “thick-headed,” held incommunicado in a state prison “far from his home”—off and on for five days); *Watts v. Indiana*, 338 U.S. 49, 53 (1949) (explaining that defendant was repeatedly questioned day and night, often without respite, for almost six days; held in solitary confinement for two days; often deprived of sleep and food); *Haley v. Ohio*, 332 U.S. 596, 599–600 (1948) (At first, courts’ decisions reflected police officers’ willingness to use clearly abusive practices to obtain a confession); *Ashcraft v. Tennessee*, 322 U.S. 143, 153 (1944) (reporting that the suspect was held and questioned for 36 hours without food or sleep); *White v. Texas*, 309 U.S. 631, 631 (1940) (relying on *Chambers v. Florida*, 309 U.S. 227 (1940)), *summarily rev’g* *White v. State*, 128 S.W.2d 51, 54 (Tex. Crim. App. 1939). Though the *White* Court did not quote the Texas courts, it accepted as true the following facts accepted by Texas courts: “Bill of exceptions No. 3 complains of the introduction of an alleged confession by the defendant, because the same was claimed to have been extorted from him by means of a whipping and violence shown to him, and under duress and threats, thus rendering the same involuntary; and also that same was finally made to certain persons who were highly prejudiced towards the appellant; that same was made under promises to appellant, and was not his confession, but was dictated by one of the prosecuting officers, and many other objections were made thereto as set forth in thirteen separate and distinct paragraphs in the bill.” 128 S.W.2d at 54, *discussed with approval in* 310 U.S. at 706. Additional cases reflected police officers’ willingness to use clearly abusive practices to obtain a confession. *Chambers v. Florida*, 309 U.S. 227, 231–32 (1940) (explaining that the defendant was subjected to six days of intensive grilling before confessing); *Brown v. Mississippi*, 297 U.S. 278, 281 (1936)

Over and again, the Court saw the worst of what state criminal processes can do. As a result, the Court did not believe that state criminal-justice officials could be trusted with the responsibility of managing a system that would lead to reliable judgments that convicted only those defendants who were truly factually guilty, or that state officials would enforce the law in anything approaching a fair, even-handed, responsible, and humane manner.⁶⁹ Instead, the Court came to believe that state criminal-justice systems were not respected mechanisms for accomplishing impartial “justice” but were “pious charade[s]”⁷⁰ often-times used to clear a case⁷¹ by pinning the blame for crime on somebody,

(showing that the defendant exhibited rope burns and scars from where he had been hung and whipped until he confessed). Over time, however, the police learned how to shape their testimony to avoid mentioning such practices, and supportive state-court judges made factual findings that avoided trespassing on the Supreme Court’s caselaw. See generally *Amsterdam*, *supra*, at 806. Believing that it was being played by the police and state judges, the Court started finding non-abusive and increasingly less aggressive interrogation practices nonetheless to be coercive. See, e.g., *Haynes v. Washington*, 373 U.S. 503, 504 (1963) (explaining that police denied the suspect the ability to contact his wife and gave the suspect reason to believe that he would be held incommunicado until he confessed); *Lynum v. Illinois*, 372 U.S. 528, 531 (1963) (describing that police told the suspect that her children could be taken away from her if she were arrested and that she could receive ten years’ imprisonment for drug possession); *Blackburn v. Alabama*, 361 U.S. 199, 207–11 (1960) (reporting that three or four police officers constantly questioned a mentally ill suspect for eight or nine hours in a small room); *Spano v. New York*, 360 U.S. 315, 322–23 (1959) (describing that police interrogated the suspect for eight hours and denied his request to speak with counsel, who was present when he surrendered himself to the police).

68. *Chambers*, 309 U.S. at 240 n.15; see also, e.g., *Culombe*, 367 U.S. at 572–73 (1961) (“In the United States, ‘interrogation’ has become a police technique, and detention for purposes of interrogation a common, although generally unlawful, practice.” (footnote omitted)).
69. See *Amsterdam*, *supra* note 67, at 809 (“If my analysis of this thirty-five year process is correct, what the Supreme Court has done is to recognize, after long and exasperating experience, that the right vouchsafed to suspects by *Brown v. Mississippi* is essentially worthless if it is left to vindication by state trial judges upon the testimony of policemen. No experienced criminal lawyer could doubt that judgment. *Miranda*’s insistence that the suspect have a lawyer in the station house is plainly necessary, as the Court says, ‘unless other fully effective means are devised to . . . [protect his] right of silence.’ And the only fully effective means that comes to mind is a shakeup of the police forces and the trial benches of the fifty states.” (alteration in original) (footnotes omitted) (citing *Brown v. Mississippi*, 297 U.S. 278, 285–87 (1936)) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966))).
70. *Id.* at 806.
71. *Id.* at 793 (“[P]olice departments almost invariably measure their own efficiency in terms of ‘clearances by arrest,’ not by conviction . . .”).

who generally was someone less fortunate than criminal-justice officials or the classic “upstanding citizens.”⁷²

To be sure, the Court never quite came out and said as much.⁷³ But that is not surprising given the Court’s reluctance, from the beginning of the 20th century until several years into the Burger Court Era, to avoid expressly labeling as “racist” state or local police officers, judges, and other officials.⁷⁴ Nonetheless, there seems to be little doubt that the

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72. What seemed to have troubled the Court, perhaps especially Justice Hugo Black, was evidence that the police would never have used such practices against (as the phrase goes) “upstanding members of the community.” See, e.g., *Chambers*, 309 U.S. at 237–38 (Black, J.) (“The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman’s noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.”); *id.* at 238 n.11 (“In all third degree cases, it is remarkable to note that the confessions were taken from ‘men of humble station in life and of a comparatively low degree of intelligence, and most of them apparently too poor to employ counsel and too friendless to have any one advise them of their rights.’ ‘That the third degree is especially used against the poor and uninfluential is asserted by several writers, and confirmed by official informants and judicial decisions.’” (citation omitted) (first quoting Alberto E. Filamor, *Third Degree Confession*, 13 BOMBAY L. J. 339, 346; and then quoting IV NAT’L COMM’N ON L. OBSERVANCE & ENF’T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 159 (1931))).
73. Members of the Warren Court came to the edge a few times, see *supra* notes 67, 69, & 72, but retreated before formally saying “*J’accuse!*”
74. Want proof? Consider the Court’s 1971 decision in *Palmer v. Thompson*, 403 U.S. 217 (1971). Ordered to desegregate its public parks, golf links, auditoriums, city zoo, and pools, the city of Jackson, Mississippi, desegregated all but its public pools, which it closed. *Id.* at 218–19. African American residents sued, claiming that the pool closure was racially discriminatory, in violation of the Equal Protection Clause, and urged the federal courts to order the pools reopened for everyone. *Id.* at 219. In an opinion by Justice Black, the Supreme Court rejected their claim. *Id.* at 219. The Court distinguished on its facts one precedent that, it said, barred the state from engaging in a subterfuge by allowing private parties to nominally operate public facilities while government officials actually did so. *Id.* at 221–23 (distinguishing from *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218 (1964)). The Court also interpreted a second decision as going no further than limiting government efforts to encourage private discrimination. *Id.* at 223–24 (distinguishing *Reitman v. Mulkey*, 387 U.S. 369 (1967)). That ruling was also inapplicable, the Court said, because there was no finding in the *Palmer* case that the government had any such intent. See *id.* *Palmer* is proof that the Court did not want to expressly accuse state actors of racial prejudice. A Court that proved itself time and again willing to pursue with vigor the incorporation against the states of Bill of Rights guarantees, done in the teeth

Court just didn't trust state officials involved in, as Justice Robert Jackson once colorfully put it, "the often competitive enterprise of ferreting out crime."⁷⁵ To make matters worse, the Court also feared that what it saw was only the visible portion of a very large iceberg.⁷⁶

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of its own contrary precedents, suddenly decided that two decisions must be read like boundaries on a local property map and confined to their plot lines, fixed and immovable for even a millimeter. Following a change in its personnel, the Court finally recognized in *Washington v. Davis*, 426 U.S. 229, 238–48 (1976), that discriminatory intent was the keystone to equal-protection analysis, requiring the Court to find racial discrimination when the facts so demand. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 225 (1985).

75. *Johnson v. United States*, 333 U.S. 10, 11, 14 (1948) (Jackson, J.) (footnote omitted).

76. *See Culombe v. Connecticut*:

"This practice has its manifest evils and dangers. Persons subjected to it are torn from the reliances of their daily existence and held at the mercy of those whose job it is—if such persons have committed crimes, as it is supposed they have—to prosecute them. They are deprived of freedom without a proper judicial tribunal having found them guilty, without a proper judicial tribunal having found even that there is probable cause to believe that they may be guilty. What actually happens to them behind the closed door of the interrogation room is difficult if not impossible to ascertain. Certainly, if through excess of zeal or aggressive impatience or flaring up of temper in the face of obstinate silence a prisoner is abused, he is faced with the task of overcoming, by his lone testimony, solemn official denials. The prisoner knows this—knows that no friendly or disinterested witness is present—and the knowledge may itself induce fear. But, in any case, the risk is great that the police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only with ropes and a rubber hose, not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices.

In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingements, undermining even if not obvious pressures of every variety. In such an atmosphere, questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks."

367 U.S. 568, 573–76 (footnotes omitted).

The bottom line was this: The Supreme Court saw far too many cases on its docket with legitimate claims of physically abusive police practices and racial discrimination in the selection of grand and petit jurors (and who knows where else) that state-court judges knowingly let slide, presumably for the otherwise necessary and honorable purpose of fighting crime. Needing help in its effort to guarantee justice to the accuser *and* accused, the Court expanded the reach of federal habeas review to conscript help from the lower federal courts in reviewing state-court judgments in criminal cases.

Think of what the Court did as a form of triage. The Court likely envisioned that its own plenary federal review on direct appeal from a judgment of conviction would identify and cure the worst state practices, while leaving minor ones for the lower federal courts to remedy going forward on a case-by-case basis. Over time, the state courts would get in line or see their judgments regularly set aside.

The problem with that strategy, however, was twofold. First, by not being honest about why it expanded federal habeas corpus review, the Court didn't ensure that the lower federal courts would focus on what it saw as the two greatest problems in the operation of state criminal-justice systems (the ones discussed above), rather than matters of lesser importance. Second, the Court also didn't anticipate that lower federal courts would come to use habeas corpus as a means of frustrating the use of the death penalty as a punishment for crime—a punishment whose constitutionality was certain from 1787 throughout the 1950s.⁷⁷ Yet that rock-like certainty started to disintegrate in the 1960s, 1970s, 1980s, and halfway through the 1990s.

II. THE AEDPA STANDARD OF REVIEW

Societies have used the death penalty for millennia.⁷⁸ At common law, capital punishment was the authorized—indeed, mandatory—

77. *See Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion) (“[L]et us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.”); *infra* notes 86–87.

78. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 333 (1972) (Marshall, J., concurring) (“Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization. Its precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members. Thus, infliction of death as a penalty for objectionable conduct appears to have its beginnings in private vengeance.” (footnote omitted)).

sanction for all felonies,⁷⁹ and executions were regularly carried out.⁸⁰ In America, capital punishment was “the standard penalty for all serious crimes” at the time of this nation’s founding.⁸¹ The Fifth Amendment refers to capital punishment in three places as a legitimate penalty,⁸² and the First Congress authorized it in the Crimes Act of 1790.⁸³ The passionate debate over the morality and utility of capital punishment is an old one;⁸⁴ it has continued to this date;⁸⁵ and it shows

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79. *McGautha v. California*, 402 U.S. 183, 197–98 (1971); Ben Darlow, *History of Capital Punishment*, THE NEW JURIST (May 18, 2014), <https://newjurist.com/history-of-capital-punishment.html> [<https://perma.cc/T5H4-7WMA>].
80. Henry VIII alone is reported to have executed 72,000 people. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749 (1935).
81. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019) (quoting STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 23 (2002)); *see also*, *Glossip v. Gross*, 576 U.S. 863, 867 (2015) (“The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights.”); *Baze v. Rees*, 553 U.S. 35, 41–42, 47 (2008) (plurality opinion) (describing the procession of methods utilized for capital punishment throughout U.S. history); *id.* at 87–88 (Scalia, J., concurring) (noting permissive references to capital punishment within the Constitution, and that “[t]he same Congress that proposed the Eighth Amendment also enacted the Act of April 30, 1790, which made several offenses punishable by death”).
82. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of *life* or limb; . . . nor be deprived of *life*, liberty, or property, without due process of law” (emphasis added)). The Fourteenth Amendment adds an additional, and of course later-in-time, reference. U.S. CONST. amend. XIV, § 1.
83. *Bucklew*, 139 S. Ct. at 1122 (discussing the Crimes Act of 1790, ch. 9, 1 Stat. 112).
84. *See, e.g.*, CHARLES L. BLACK JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 31–32 (W.W. Norton & Co. 2d ed. augmented 1981) (“One must now ask oneself whether the moral value of sheer retribution is sufficient to justify not only the infliction of death in accordance with clear standards and without error, but also the infliction of death without clear standards and by mistake.”); ALBERT CAMUS, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* 188 (Justin O’Brien trans., 1961) (arguing that the practical justifications for capital punishment are frequently contradicted by the reality of its application); ARTHUR KOESTLER, *REFLECTIONS ON HANGING*, at xxi (1957) (“[C]apital punishment is not merely a problem of statistics and expediency, but also of morality and feeling. Fair pleading . . . does not exclude having one’s heart and spleen in it.”).
85. *See, e.g.*, BANNER, *supra* note 81, at 3 (“From Stephen Clark to Gary Gilmore, from Bruno Hauptmann to Timothy McVeigh, Americans have

no sign of letting up. But that debate traditionally occurred in the legislatures, the academy, or the public, not the courts. By 1971, the Supreme Court had expressly or implicitly, but repeatedly, upheld its

argued passionately about the purposes, methods, and effects of capital punishment.”); DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE, at vii (Hugo Adam Bedau & Paul G. Cassell eds., 2004) (“Today, opponents of execution point to recent cases in which innocent prisoners—like Roland Cruz in Illinois in 1995—narrowly escaped being unjustly executed.”); DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION 286 (2010) (“In late-modern America, the death penalty has ceased to be governmentally or penologically necessary”); MATTHEW H. KRAMER, THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES 4 (2011) (advancing a morality-based rationale in support of the death penalty); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 2 (2016) (discussing the historical and ongoing development of constitutional regulation of the death penalty in the United States); FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT, at ix (2003) (endeavoring “to explain the contradictions in American culture that generate conflict over the death penalty and the changes that will be necessary to bring it to a peaceful end”); Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625, 626–27 (2005) (examining the limitations of modern academic arguments for abolition of the death penalty); Jonathan F. Mitchell, *Capital Punishment and the Courts*, 130 HARV. L. REV. F. 269, 269 (2017) (“Whether and to what extent governments should use capital punishment turn on hotly contested empirical and philosophical questions, and tradeoffs between competing and sometimes incommensurable policy objectives.”); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 357–58 (1995) (“[S]ome critics claim that the Court’s work has burdened the administration of capital punishment with an overly complex, absurdly arcane, and minutely detailed body of constitutional law”); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 704 (2005) (arguing that certain empirical findings would morally obligate—not merely permit—the government to carry out capital punishment).

constitutionality.⁸⁶ No one could have reasonably thought that it was unconstitutional across the board.⁸⁷

Nonetheless, that debate eventually spread from the policy arena into the federal courts.⁸⁸ That shift was principally due to the efforts of a small but talented and dedicated group of lawyers⁸⁹ who sought to

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86. *See, e.g.*, *McGautha v. California*, 402 U.S. 183, 207 (1971) (“[W]e find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.”); *id.* at 226 (Black, J., concurring) (“The Eighth Amendment forbids ‘cruel and unusual punishments.’ In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment.”); *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion) (quoted *supra* note 77); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 465–466 (1947) (holding that carrying out a second attempt at execution after first attempt was unsuccessful was not unconstitutional); *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.”); *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878) (“Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the [E]ighth [A]mendment.”).
87. As even some of capital punishment’s opponents acknowledged. *See, e.g.*, HUGO ADAM BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 118 (1977) (“Until fifteen years ago [(viz., 1962)], save for a few mavericks, no one gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law.”).
88. Opponents of capital punishment argued that it was an immoral penalty, for several reasons. *See, e.g.*, Larkin, *supra* note 2, at 33 n.46 (“The argument was that society deemed brutal and uncivilized the government’s willful taking of human life; that execution of a helpless inmate dehumanizes everyone involved in that process; that the death penalty would be imposed in an arbitrary manner or for illegitimate reasons; and that there was no proof that capital punishment served any legitimate penal interest more effectively than imprisonment.”).
89. That story is well told in MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).

persuade the Supreme Court to outlaw its use on one or more constitutional grounds.⁹⁰ They almost succeeded. In *Furman v. Georgia*,⁹¹ decided in 1972, the Supreme Court held that applying the death penalty in the three capital cases before the Court violated the Eighth Amendment's Cruel and Unusual Punishments Clause.⁹² Although the per curiam opinion did not explain the Court's reasoning, the concurring Justices pointed, in part, to the "untrammelled discretion" judges and juries wielded in determining whether a convicted defendant should be executed or imprisoned.⁹³ That ruling had the effect of erasing the procedures used nationwide at the sentencing stage of a capital case.⁹⁴ Over the next four years, thirty-five states adopted new capital sentencing schemes, and in 1976 the Court in *Gregg v. Georgia*⁹⁵ upheld the constitutionality of capital punishment over an Eighth Amendment

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90. See, e.g., Larkin, *supra* note 2, at 32–33 (“Advocates for abolition of capital punishment and counsel for individual condemned prisoners not only sought to overturn the conviction or sentence for particular death row inmates, but they also challenged the constitutionality of the institution of capital punishment on several broad grounds. Among those arguments were the following: the death penalty is invariably a ‘cruel and unusual punishment’ forbidden by the Eighth Amendment; capital punishment lacks a legitimate penological justification; no manner of carrying out an execution can lead to an immediate and painless death; and the death penalty has always been and continues to be imposed and carried out in a manner that discriminates on the basis of race, social class, and wealth.” (footnotes omitted)).
91. 408 U.S. 238 (1972).
92. *Id.* at 239–40.
93. *Id.* at 248, 253, 255–57 (Douglas, J., concurring); see also *id.* at 298 (Brennan, J., concurring) (noting that legislatures granted juries discretion to impose the death penalty in response to jury nullification); *id.* at 309–10 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”); *id.* at 314 (White, J., concurring) (“[L]egislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion . . . , may refuse to impose the death penalty”); *id.* at 365 (Marshall, J., concurring) (stating that giving juries such discretion “was an open invitation to discrimination”).
94. For an excellent discussion of the meaning and implications of the nine separate opinions in *Furman*, see generally Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1 (1972).
95. 428 U.S. 153, 178–80 (1976).

challenge.⁹⁶ Since then, the Court has elaborated on—some said needlessly tinkered with⁹⁷—the appropriate capital sentencing procedures. But the Court has made it clear that it finds entirely unpersuasive the claim that the death penalty can never be used as a punishment.⁹⁸

In the meantime, however, abolitionists had been successful in halting any actual use of the death penalty. Executions were rare in the 1960s.⁹⁹ After *Furman*, governors or courts set aside all death sentences that had been imposed up to 1972,¹⁰⁰ and no new capital sentences were carried out for the next four years. Then, the Supreme Court backed away from holding that the death penalty is invariably unconstitutional.¹⁰¹ Even after 1976, however, there was no flood of executions. In part, that was due to repetitive, and often last-minute, use of federal habeas corpus challenges to stave off execution.¹⁰² Abolitionists had effectively created a “stalemate” in the imposition of the death penalty

96. *Id.* at 168–69.

97. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (“I am therefore reluctant to magnify the burdens that our *Furman* jurisprudence imposes on the States.”); *Walton v. Arizona*, 497 U.S. 639, 657, 661 (1990) (Scalia, J., concurring in part) (“Shortly after introducing our doctrine *requiring* constraints on the sentencer’s discretion to ‘impose’ the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer’s discretion to ‘decline to impose’ it.”), *abrogated on other grounds by Ring*, 536 U.S. at 609; *Lockett v. Ohio*, 438 U.S. 586, 629 (1978) (Rehnquist, J., concurring in part and dissenting in part) (noting that, in the six years from *Furman* to *Lockett*, “the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed.”).

98. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1122–23 (2019) (“The Constitution allows capital punishment. . . . [T]he judiciary bears no license to end a debate reserved for the people and their representatives.”).

99. In the 1960s, fewer than 200 executions took place in the United States, and only three of those occurred between 1965 and 1970. The 1930s, 1940s, and 1950s, by contrast, had seen about 1,700, 1,300, and 700 executions, respectively. *See* M. WATT ESPY & JOHN ORTIZ SMYKLA, EXECUTIONS IN THE U.S. 1608–2002: THE ESPY FILE, <https://files.deathpenaltyinfo.org/legacy/documents/ESPYyear.pdf>.

100. *See, e.g.*, *Rose v. Hodges*, 423 U.S. 19, 20 (1975) (per curiam) (Tennessee); *Mears v. Nevada*, 367 F. Supp. 84, 85, 86 & n.1 (D. Nev. 1973); *State v. Gibson*, 192 S.E.2d 720, 720–21 (S.C. 1972); *Huggins v. Commonwealth*, 191 S.E.2d 734, 735 (Va. 1972).

101. *See Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (rejecting the argument that the death penalty was a “cruel and unusual punishment” forbidden by the Eighth Amendment).

102. *See, e.g.*, *Larkin*, *supra* note 2, at 37–38.

as a punishment for murder¹⁰³ and, according to then-Justice William Rehnquist, had made a “mockery of our criminal justice system.”¹⁰⁴

103. *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651, 655–56 (1996) (noting that the prisoner had been on death row for 13 years).

104. *Coleman v. Balkcom*, 451 U.S. 949, 957, 958 (1981) (Rehnquist, J., dissenting); *see, e.g.*, Mark Tushnet, “*The King of France with Forty Thousand Men*”: *Felker v. Turpin and the Supreme Court’s Deliberative Processes*, 1996 SUP. CT. REV. 163, 166 (1996) (“When the Supreme Court upheld the constitutionality of modern death penalty statutes in 1976, capital punishment’s supporters might have believed that executions would resume after a relatively brief shakedown period. They were wrong. To adopt a military analogy, death penalty abolitionists continued to fight even as they were forced to retreat. They fought in two ways: relatively large-scale fixed battles over whether the death penalty was administered in a racially discriminatory manner, whether those who were mentally retarded or juveniles at the time they murdered others could be executed, and the like; and guerilla campaigns against the execution of almost anyone sentenced to death, on the ground that particular problems in the defendant’s trial invalidated either the conviction or the death sentence.” (footnote omitted)). *See also* Larry W. Yackle, *The Habeas Hagioscope*:

As the debate over habeas has unfolded, the press has been filled with lurid accounts of instances in which notorious murderers have filed numerous applications for relief in the state courts, followed by multiple federal habeas petitions and, in the process, managed to keep themselves alive for years *pendente lite*. Equally significant, the press has reported the current Supreme Court’s impatience with such cases and the disturbing, sometimes unseemly, way the Court has treated lower court judges struggling to meet their responsibilities.

The pattern is now familiar. A prisoner is convicted of a heinous crime and sentenced to death. Direct review in the state appellate courts requires substantial time and effort—often because trial counsel failed to raise and pursue all the federal claims open to the accused and new counsel must attempt to compensate on appeal. Next come state post-conviction proceedings, in which many states provide no counsel to indigents—thus leaving undereducated death row inmates to generate even more confusion and complexity as they stagger through alien territory *pro se*. At some point several years after sentencing, state remedies are exhausted and the appropriate state officer fixes an execution date. At that point, one of the country’s thinly spread volunteer-counsel programs (for example, the ABA Postconviction Project or LDF) manages to find the prisoner an attorney by triage: the next prisoner scheduled to die gets the next available volunteer lawyer. New counsel promptly seeks a stay of execution from the appropriate federal district court, pending the court’s consideration of a petition for habeas corpus relief. State’s attorneys oppose the stay request, and everyone is then put through stressful emergency proceedings up and down the federal judicial hierarchy—proceedings that typically require hastily called evening sessions or deliberations by telephone. If a stay finally issues and is sustained, substantially more time is required to consider the issues revealed in the petition

Of course, it is not surprising that counsel for a condemned prisoner would use every tactic at his or her disposal to keep his client alive; that had happened before.¹⁰⁵ To make matters worse, “[r]epetitive challenges to a prisoner’s conviction or sentence had become the norm in capital cases, even in convictions involving heinous crimes with no

on the merits. In some instances, moreover, there may be successive applications on behalf of the same prisoner. This “hurry up and wait” process has no champions, only critics.

66 S. CAL. L. REV. 2331, 2365–67 (1993) (footnotes omitted).

105. See *Lambert v. Barrett*, 159 U.S. 660, 662 (1895) (“It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts.”). Late in the 19th century, condemned state prisoners abused a provision in the Habeas Corpus Act of 1867 providing for an automatic stay of execution until his habeas petition had been resolved and a right to appeal to the Supreme Court of the denial of a petition. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 385–86. Prisoners repeatedly filed last minute petitions to fend off their execution. See, e.g., *Rogers v. Peck*, 199 U.S. 425, 426–27 (1905); *Lambert v. Barrett*, 159 U.S. 660, 662 (1895); *In re Shibuya Jugiro*, 140 U.S. 291, 291–92 (1891). Believing that the prisoners were toying with the habeas system, Congress revised the 1867 act. It removed the automatic right to appeal the denial of a habeas petition to the Supreme Court, and it required that a prisoner obtain a certificate of probable cause to appeal. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40, 40; see H.R. REP. NO. 60-23, at 1–2 (1908); 42 CONG. REC. 608–09 (1908). That certificate became a jurisdictional prerequisite to appeal to the Supreme Court. *House v. Mayo*, 324 U.S. 42, 44 (1945); *Ex parte Patrick*, 212 U.S. 555 (1908); *Bilk v. Strassheim*, 212 U.S. 551 (1908). In 1925, Congress extended the probable-cause requirement to the courts of appeals as part of an overall revision of federal appellate jurisdiction. Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 936, 940; *Davis v. Jacobs*, 454 U.S. 911, 916–17 (1981) (Rehnquist, J., dissenting); *Jeffries v. Barksdale*, 453 U.S. 914, 914 (1981) (Rehnquist, J., dissenting). Congress modified the entire judicial code in 1948 and retained the probable-cause certificate requirement, then codified at 28 U.S.C. § 2253. See H.R. REP. NO. 80-308, at A179–80 (1947); 28 U.S.C. § 2253 legis. history; *Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 (1983); see also, e.g., *Garrison v. Patterson*, 391 U.S. 464, 465 (1968); *Carafas v. LaVallee*, 391 U.S. 234, (1968); *Nowakowski v. Maroney*, 386 U.S. 542, 542–43 (1967). To obtain a certificate, a prisoner had to make a “substantial showing of the denial of [a] federal right.” *Barefoot*, 463 U.S. at 893 (alteration in original) (quoting *Stewart v. Beto*, 406 U.S. 925, 270 n.2 (5th Cir. 1971)).

doubt about the prisoner's guilt or the appropriateness of a capital sentence.¹⁰⁶ What was scandalous, however, was that there was reason to believe that some federal judges had enlisted in the cause.¹⁰⁷ The upshot

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106. Larkin, *supra* note 2, at 37 (footnotes omitted); *e.g.*, Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal., 503 U.S. 653 (1992) (fifth action for relief by condemned prisoner); Delo v. Stokes, 495 U.S. 320 (1990) (fourth habeas petition by condemned prisoner); *see also* Woodard v. Hutchins, 464 U.S. 377, 380 (1984) (separate opinion of Powell, J., for a majority of the Court) ("A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus."); Yackle, *supra* note 104, at 2346 (noting the litigation in "the 'redlight bandit' episode in the 1950s, which saw Caryl Chessman take nine trips to the Supreme Court in an attempt to overturn his death sentence" (footnote omitted)).
107. Consider the case of Robert Harris, which wended its way through the state and federal courts for 13 years. The case involved much litigation that took place between the time that he committed his crimes (kidnapping, robbery, and two cold-blooded murders) in 1978 and was executed 14 years later. *See* People v. Harris, 623 P.2d 240, 243, 256 (Cal. 1981) (affirming Harris' conviction and sentence on direct appeal), *cert. denied*, 454 U.S. 882 (1981) (signaling the end of the direct-review process); Harris v. California, 457 U.S. 1111 (1982) (denying certiorari seeking review of Harris' second state habeas petition); Harris v. Pulley, 692 F.2d 1189, 1204 (9th Cir. 1982) (rejecting most of Harris' claims in his first federal habeas petition, but remanding to the district court for it to analyze the California comparative proportionality review process); Pulley v. Harris, 465 U.S. 37, 43–44 (1984) (ruling that no "comparative proportionality review" of state death penalty cases is required by federal law); Harris v. Pulley, 885 F.2d 1354, (9th Cir. 1988) (upholding district court's denial of Harris' second federal habeas petition); Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990), *remanded for a limited evidentiary hearing*, 928 F.2d 891, 893 (9th Cir. 1991), *superseded by* 943 F.2d 930, 955 (9th Cir. 1991) (affirming the district court's denial of Harris' third federal habeas petition); Harris v. Vasquez, 949 F.2d 1497, 1501 (9th Cir. 1990) (affirming the district court's denial of Harris' third federal habeas petition), *denying motion to recall the mandate, petition for rehearing, and suggestion for rehearing en banc*, 961 F.2d 1449, 1450 (9th Cir. 1992), *cert denied*, 503 U.S. 910 (1992). During the last thirty-six hours before his sentence was carried out, the U.S. Court of Appeals for the Ninth Circuit seemed so dead set on preventing Harris's execution that the Supreme Court ultimately had to issue an order stating that "[n]o further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court." Vasquez v. Harris, 503 U.S. 1000, 1000 (1992). In effect, the Supreme Court was forced to enjoin the Ninth Circuit against disrupting the imposition of a sentence for murders that Harris never denied having committed throughout his thirteen-year progress through the federal courts. For opposing views of whether certain Ninth Circuit judges acted like fifth columnists in the Harris case, *compare, e.g.*, John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011, 1017 (1993), and Stephen Reinhardt,

was that the Supreme Court had gone from distrusting state courts to treating some lower federal courts with the same suspicion.¹⁰⁸

The Supreme Court, the Death Penalty, and the Harris Case, 102 YALE L.J. 205, 206–07 (1992) (offering a favorable description of what the Ninth Circuit’s judges did), and Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225, 225–26 (1992) (offering an unfavorable description of what the Supreme Court did), with, e.g., Daniel E. Lungren & Mark L. Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, 40 UCLA L. REV. 295, 302–04 (1992) (stating that the existing system ill-served anyone, and proposing reforms to prevent similar cases in the future).

108. Such as the Ninth Circuit. If you’re wondering whether the Harris case was a one-off, you should consider that the Supreme Court has continued to reverse the Ninth Circuit in habeas cases on a somewhat regular basis since the AEDPA became law. See, e.g., *Shinn v. Kayer*, 141 S. Ct. 517, 522 (2020); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2557 (2018); *Nevada v. Jackson*, 569 U.S. 505, 512 (2013); *Harrington v. Richter*, 562 U.S. 86, 113 (2011); *Yarborough v. Alvarado*, 541 U.S. 652, 655 (2004). See generally *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (“We have before cautioned the lower courts—and the Ninth Circuit in particular—against ‘framing our precedents at such a high level of generality.’ (quoting *Jackson*, 569 U.S. at 512)); *Jackson*, 569 U.S. at 512 (“By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into ‘clearly established Federal law, as determined by the Supreme Court.’” (quoting 28 U.S.C. § 2254(d)(1))); *Cavazos v. Smith*, 565 U.S. 1, 9 (2011) (“The [Ninth Circuit’s] decision below cannot be allowed to stand. This Court vacated and remanded this judgment twice before, calling the panel’s attention to this Court’s opinions highlighting the necessity of deference to state courts in § 2254(d) habeas cases. Each time the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention. Its refusal to do so necessitates this Court’s action today.” (citations omitted)). Some reversals were quite pointed. See *Swarthout v. Cooke*, 562 U.S. 216, 222 (2011) (“The short of the matter is that the responsibility for ensuring that the constitutionally adequate procedures governing California’s parole system are properly applied rests with California courts, and is no part of the Ninth Circuit’s business.”). “The problem is particularly acute in capital cases.” Scheidegger, *supra* note 3, at 942 (“In 1995, I examined the capital punishment issues on which the Ninth Circuit had disagreed with the supreme courts of the states that comprise it in the period since the restoration of capital punishment. There were thirteen such issues subsequently resolved by the Supreme Court. The Ninth Circuit was wrong and the state courts were right on twelve of the thirteen.” (citing KENT S. SCHEIDEGGER, CRIM. JUST. LEGAL FOUND., OVERDUE PROCESS: A STUDY OF FEDERAL HABEAS CORPUS IN CAPITAL CASES AND A PROPOSAL FOR REFORM, at A-11 (1995))). Even (at least) one judge on that court recognized what was happening. See Diarmuid F. O’Scannlain, *A Decade of Reversal: The Ninth Circuit’s Record in the Supreme Court Through October Term 2010*, 87 NOTRE DAME L. REV. 2165, 2174 (2012) (“I think there are three points worth stressing about [*Harrington v. Richter*, 562 U.S. 86 (2011)]. The first, and most obvious, is the harsh tone of the opinion. The tone could simply reflect the Court’s frustration with having to reiterate

Many parties criticized the Supreme Court's habeas decisions for decades.¹⁰⁹ After hearing the debate, Congress finally listened and passed the AEDPA in 1996.¹¹⁰ The act was the first major habeas

the same AEDPA principles year after year only to have them ignored by the same court of appeals, or perhaps, something more deliberate is going on. It could be that, recognizing that it cannot correct every misuse of the writ, the Supreme Court has chosen to use a shaming mechanism by which it picks the worst judicial offenders each year and loudly points out their errors for the public to see. Modern political science research supports this general proposition: the Supreme Court will frequently utilize its discretionary docket to strategically audit cases from ideologically distant lower courts.”).

109. *See generally* AD HOC COMM. ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT AND PROPOSAL (1989) (known as the POWELL COMMITTEE REPORT). *See, e.g.*, Report of the Committee on Habeas Corpus, in *Applications for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts*, 33 F.R.D. 363, 367–68 (1964); *Report of the Attorney General's Task Force on Violent Crime: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 97th Cong. 321 (1981). For discussions of the criticisms and defenses, see generally Bator, *supra* note 3; Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 54–55 (1956); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 422–426 (1996); Yackle, *supra* note 104, at 2344–416.
110. *See generally* *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the S. Comm. on the Judiciary*, 104th Cong. (1995); *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. (1993 & 1994); *Innocence and the Death Penalty: Hearing on S. 221 Before the S. Comm. on the Judiciary*, 103d Cong. (1993); *Violent Crime Control Act of 1991: Hearings on S. 618 and S. 635 Before the S. Comm. on the Judiciary*, 102d Cong. (1991); *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. (1991); *Race Claims and Federal Habeas Corpus: Hearings before the Subcomm. on Civ. and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. (1991); *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 Before the Subcomm. on Courts, Intell. Prop., and the Admin. of Just. of the S. Comm. on the Judiciary*, 101st Cong. (1990); *Habeas Corpus Legislation: Hearings on H.R. 4737, H.R. 1090, H.R. 1953, and H.R. 3584 Before the Subcomm. on Courts, Intell. Prop., and the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong. (1990); *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the S. Comm. on the Judiciary*, 101st Cong. (1989–90); *Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 98th Cong. (1983); *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 98th Cong. (1983); *Federal Criminal Law Revision, Parts 2 & 3: Hearings on H.R. 1647, H.R. 4492, H.R. 4711, H.R. 5679, H.R. 5703, Before the Subcomm. on Criminal Justice of the H. Comm. on the*

reform since the 1867 act. The AEDPA revised virtually every aspect of the habeas process, such as the circumstances when a district court could reconsider the factual basis underlying an applicant's claim, the treatment to be afforded claims that were not properly preserved in the state-court system, and the treatment of successive petitions. Most important for present purposes was a limitation on a federal court's authority to review the merits of a petitioner's federal claims.¹¹¹ The AEDPA bars relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" either

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.¹¹²

In essence, "to further the principles of comity, finality, and federalism," the AEDPA establishes a "reasonableness" standard of review—in other words, a federal court cannot set aside a reasonable state court ruling.¹¹³

The Supreme Court has interpreted the AEDPA with that principle in mind. The Court has explained that, under the revised § 2254, a federal court cannot award relief simply because it disagrees with a state court's rulings. Rather than presume defiance or evasion by state courts, a federal court must start "with the presumption that state

Judiciary, 97th Cong. (1981–82); *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the S. Comm. on the Judiciary*, 97th Cong. (1982); *Habeas Corpus Procedures Amendment Act of 1981: Hearing on S. 653 Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 97th Cong. (1981); *Federal Habeas Corpus: Hearing on S. 1314 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. (1978); *Habeas Corpus: Hearings on H.R. 15319 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 94th Cong (1976).

111. 28 U.S.C. § 2254(d) (1996). Congress also revised the standard for deciding whether a prisoner's failure to preserve a claim in compliance with state procedural rules barred him or her from a raising a claim in habeas corpus and whether a district court can grant a habeas petitioner an evidentiary hearing in federal court. *See, e.g.*, Schiro v. Landrigan, 550 U.S. 465, 479 (2007).

112. 28 U.S.C. § 2254(d).

113. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (quoting *Duncan v. Walker*, 533 U.S. 167, 178 (2001)); *see also, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) (per curiam).

courts know and follow the law.”¹¹⁴ A federal court can award relief only if the state court ruling is (1) “contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) it involved an “unreasonable” application of that law.¹¹⁵ A “reasonableness” limitation applies to each prong of that inquiry.¹¹⁶ In each, what is “reasonable” turns on the specificity of that legal rule. That is, broadly phrased legal standards define a wider range of possible legal judgments than very specific ones.¹¹⁷

As to the first scenario: The issue is whether the state court’s ruling is reasonable, and a state court’s ruling is not unreasonable “merely because the federal habeas court would have reached a different conclusion in the first instance.”¹¹⁸ Plus, only Supreme Court decisions can supply the relevant “law”; rulings by the lower federal or state courts are insufficient.¹¹⁹ If “none” of the Court’s decisions “confront[ed] ‘the

114. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam); *see also, e.g.*, *Dunn v. Reeves*, 141 S. Ct. 2405, 2411 (2021) (per curiam).

115. 28 U.S.C. § 2254(d).

116. *See Bell v. Cone*, 535 U.S. 685, 694 (2002) (“As we stated in *Williams v. Taylor*, § 2254(d)(1)’s ‘contrary to’ and ‘unreasonable application’ clauses have independent meaning. A federal habeas court may issue the writ under the ‘contrary to’ clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the ‘unreasonable application’ clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court’s application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one.” (citations omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 404–05, 407–08 (2000))); *see also, e.g.*, *Thaler v. Haynes*, 559 U.S. 43, 47 (2010) (per curiam).

117. *Yarborough v. Alvarado*, 541 U.S. 652, 663–64 (2004) (“The term ‘‘unreasonable’’ is a ‘common term in the legal world and, accordingly, federal judges are familiar with its meaning.’ At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” (citations omitted) (quoting *Williams*, 529 U.S. at 410)); *see also, e.g.*, *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Alvarado*, 541 U.S. at 664).

118. *Wood v. Allen*, 558 U.S. 290, 301 (2010).

119. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *Renico v. Lett*, 559 U.S. 766, 778–79 (2010); *Smith v. Spisak*, 558 U.S. 139, 149 (2010);

specific question presented” by a prisoner’s case, “the state court’s decision could not be ‘contrary to’ any holding from [the Supreme] Court.”¹²⁰ The Supreme Court decision also must predate the state court ruling; later-decided cases are not “clearly established” law.¹²¹ Moreover, the term “clearly established Federal law” means “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions.”¹²² Only a Supreme Court decision that “squarely addresses” and “clearly hold[s]” “in [the applicant’s] favor” counts.¹²³ In deciding whether the state courts reasonably interpreted those rulings, the prisoner must establish that the state court applied a rule that “contradicts,” is “diametrically different” from, “opposite in character or nature” to, or “mutually opposed” to the precedent.¹²⁴ If a state court correctly identified the governing legal principle, the first habeas inquiry is done.¹²⁵

Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam); *Williams*, 529 U.S. at 404–406.

120. *Woods v. Donald*, 575 U.S. 312, 317 (2015) (per curiam) (quoting *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam)); *see also, e.g., Lopez*, 574 U.S. 1, 5–7.

121. *See, e.g., Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam); *White v. Woodall*, 572 U.S. 415, 419–20, 426 (2014).

122. *Williams*, 529 U.S. at 412; *see also, e.g., Alvarado*, 541 U.S. at 660–61.

123. *Wright v. Van Patten*, 552 U.S. 120, 122, 125–26 (2008) (per curiam); *see also, e.g., Knowles v. Mirzayance*, 556 U.S. 111, 122–23 (2009).

124. *Williams*, 529 U.S. at 405–06; *see also, e.g., Bell v. Cone*, 535 U.S. 685, 698 (2002).

125. *See, e.g., Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam); *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Woodford v. Visciotti*, 537 U.S. 19, 23–24 (2002) (per curiam). The Supreme Court vigorously applies that analysis. For example, in *Bell v. Cone* the prisoner argued that he was entitled to a presumption that his counsel’s constitutionally deficient performance prejudiced him because his case fit into a category identified in *Strickland v. Washington* and *United States v. Cronin* for cases where “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Cone*, 535 U.S. at 696–97 (quoting *United States v. Cronin*, 466 U.S. 648, 659 (1984)). The Supreme Court disagreed, concluding that the prisoner had unreasonably reified the ruling in *Cronin*. *See Cone*, 535 U.S. at 696–97 (“Respondent argues that his claim fits within the second exception identified in *Cronin* because his counsel failed to ‘mount some case for life’ after the prosecution introduced evidence in the sentencing hearing and gave a closing statement. We disagree. When we spoke in *Cronin* of the possibility of presuming prejudice based on an attorney’s failure to test the prosecutor’s case, we indicated that the attorney’s failure must be complete. We said ‘if counsel *entirely* fails to subject the prosecution’s case to meaningful adversarial testing.’ Here, respondent’s argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronin*, this difference is not of degree

As to the second scenario: It, too, establishes a difficult hurdle. A federal court may not award relief merely because it would have decided the issue differently had it originally applied the law to the facts.¹²⁶ In that regard, there is a clear difference between “an *incorrect* application” of Supreme Court precedent and “an *unreasonable* application” of those decisions, and only the latter affords a basis for relief.¹²⁷ That “highly deferential” standard is “substantially higher” than the de novo review standard that federal courts used prior to the AEDPA.¹²⁸ To show that a state court decision involved an “unreasonable application” of Supreme Court precedent, “a prisoner must show far more than that the state court’s decision was ‘merely wrong’ or ‘even clear error.’”¹²⁹ A state prisoner need not prove that the facts of his claim are identical to those of a relevant Supreme Court decision,¹³⁰ but a state court cannot be faulted for being “unreasonable in refusing to extend the governing legal principal” to a materially different context.¹³¹ Moreover, “it is not ‘an unreasonable application of’ ‘clearly established Federal law’ for a

but of kind.” (citations omitted)); *see also, e.g.*, *Howes v. Fields*, 565 U.S. 499, 505, 508 (2012) (concluding that prior Supreme Court case law did not establish that imprisonment always renders a questioned inmate “in custody” for *Miranda* purposes). Moreover, the Court has been quite unwilling to allow prisoners to use an ineffective-assistance-of-counsel claim to relitigate trial strategy judgments. *See, e.g.*, *Dunn v. Reeves*, 141 S. Ct. 2405, 2411 (2021) (per curiam) (“[A] federal court may grant relief only if *every* “fairminded juris[t]” would agree that *every* reasonable lawyer would have made a different decision.” (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011))); *Mays v. Hines*, 141 S. Ct. 1145, 1146 (2021) (per curiam); *Kayer*, 141 S. Ct. at 520; *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (per curiam); *Premo v. Moore*, 562 U.S. 115, 121–22 (2011); *Richter*, 562 U.S. at 101, 104–05; *Mirzayance*, 556 U.S. at 121–23 (referring to “the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard”); *Cone*, 535 U.S. at 694–99; *cf. Van Patten*, 552 U.S. at 124–26 (ruling that the Court had never prohibited defense counsel from participating by speakerphone in a plea hearing).

126. *See, e.g., Visciotti*, 537 U.S. at 24–25; *Cone*, 535 U.S. at 694; *Williams*, 529 U.S. at 411.

127. *Williams*, 529 U.S. at 410–11; *see also, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 202–03 (2011); *Alvarado*, 541 U.S. at 665.

128. *Renico v. Lett*, 559 U.S. 766, 773 (2010) (first quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); and then quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

129. *Kayer*, 141 S. Ct. at 523 (quoting *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (per curiam)).

130. *See, e.g., White v. Woodall*, 572 U.S. 415, 427 (2014); *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

131. *Woodall*, 572 U.S. at 424–26; *see also, e.g., Metrish v. Lancaster*, 569 U.S. 351, 365–66 (2013); *Lett*, 559 U.S. at 777–78; *Carey v. Musladin*, 549 U.S. 70, 75–77 (2006).

state court to decline to apply a specific legal rule that has not been squarely established by th[e] Court.”¹³² The habeas applicant must demonstrate that “there was no reasonable basis” for the state court’s decision.¹³³ The state court’s decision must be obviously wrong, “beyond any possibility for fairminded disagreement.”¹³⁴ If “other reasonable interpretations” of the facts and law are possible¹³⁵—that is, if “fair-minded jurists could disagree” on the correctness of a state court’s application of Supreme Court case law to the facts—a federal court cannot set that decision aside.¹³⁶ Put another way, if the Supreme Court “has never found” a constitutional violation “in circumstances remotely resembling” the petitioner’s case, a federal court must deny relief.¹³⁷

That “demanding standard” imposes an onerous burden on a state prisoner.¹³⁸ “If this standard is difficult to meet,” as Justice Anthony Kennedy explained, “that is because it was meant to be.”¹³⁹ The role of federal habeas corpus under the AEDPA is not to afford an offender a second look at his or her trial, but “to ensure that federal habeas relief functions as a ‘guard against extreme malfunctions in the state criminal

132. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (quoting *Wright v. Van Patten*, 552 U.S. 120, 125–26 (2008) (per curiam)).

133. *Harrington v. Richter*, 562 U.S. 86, 98 (2011); *see also, e.g., Woodall*, 572 U.S. at 423; *Lancaster*, 569 U.S. at 357–58; *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011).

134. *Richter*, 562 U.S. at 103; *see also, e.g., Mays v. Hines*, 141 S. Ct. 1145, 1146 (2021) (per curiam); *Woodall*, 572 U.S. at 419–20; *Lancaster*, 569 U.S. at 357–58.

135. *Lett*, 559 U.S. at 777.

136. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004); *see also, e.g., Parker v. Matthews*, 567 U.S. 37, 47 (2012) (per curiam); *Richter*, 562 U.S. at 101.

137. *Lancaster*, 569 U.S. at 367–68.

138. *Lancaster*, 569 U.S. at 367; *see also, e.g., Woodall*, 572 U.S. at 419.

139. *Richter*, 562 U.S. at 102. Indeed, that standard applies even if a state court does not issue a written opinion or discuss why it rejected a particular claim. *See Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018); *Richter*, 562 U.S. at 98 (“By its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (2). There is no text in the statute requiring a statement of reasons. The statute refers only to a ‘decision,’ which resulted from an ‘adjudication.’ . . . And as this Court has observed, a state court need not cite or even be aware of our cases under § 2254(d). Where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a ‘claim,’ not a component of one, has been adjudicated.” (citation omitted)).

justice systems,” rather than “as a means of error correction.”¹⁴⁰ A federal court may intrude on a “State[’s] sovereign power to punish offenders” only when a decision “was so lacking in justification” that it is “beyond any possibility for fairminded disagreement.”¹⁴¹ The act goes no further.

* * * * *

In sum, Congress designed the AEDPA to leave standing reasonable state-court rulings on questions of law, fact, or law and fact. Put another way, federal courts may only rein in state courts that defy Supreme Court case law.¹⁴² In the words of Chief Justice John Roberts, “AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.”¹⁴³ In sum, the statute erases the *Brown v. Allen* decision and turns the trajectory of habeas corpus law 180 degrees.

Is that shift constitutional? The next part will discuss that issue.

III. THE CONSTITUTIONALITY OF THE AEDPA’S STANDARD OF REVIEW

American law has grown accustomed to using a “reasonableness” standard in a host of different areas. In fact, it could be said that all of the law can be reduced to that standard, with the elaborate reticulations that we see in every area as being necessary only to provide some certainty as to what is “reasonable.”

The best-known example is tort law. Negligence is the classic standard of liability for the failure to exercise due care that results in a

140. *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Richter*, 562 U.S. at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment))); *see also, e.g., Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021).

141. *Richter*, 562 U.S. at 103; *see also, e.g., Hines*, 141 S. Ct. at 1149.

142. Plus, if a state court has rejected a prisoner’s claim on the merits for several reasons, “each ground supporting the state court decision” must be flawed. *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012); *Shinn v. Kayer*, 141 S. Ct. 517, 524 (2020). For example, if a state court rejected a prisoner’s claim that he received the ineffective assistance of counsel at trial, that court’s ruling cannot be set aside if either of the following is true: the state court reasonably concluded that counsel’s performance was not constitutionally deficient or that, even if it was, the defendant was not prejudiced by it. *Shinn*, 141 S. Ct. at 524; *see also Yarborough v. Alvarado*, 541 U.S. 652, 663–64 (2004); *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011); *Richter*, 562 U.S. at 102.

143. *Renico v. Lett*, 559 U.S. 766, 779 (2010).

foreseeable harm to another.¹⁴⁴ Reasonableness is also the test used to determine whether a government official should be held liable in damages for conduct that violated the Constitution,¹⁴⁵ as well as whether evidence unlawfully obtained by a law enforcement officer should nonetheless be admitted at trial.¹⁴⁶ In the criminal law, reasonableness also can enter into the determination whether someone has committed a crime. Someone charged with “willfully” breaking the law is entitled to be exonerated if he or she acted in reliance on a reasonable interpretation of what the law demands.¹⁴⁷ Finally, federal courts must defer to an agency’s reasonable interpretation of a statute and agency rule if they are ambiguous.¹⁴⁸

A. The Reasonableness of the AEDPA’s Reasonableness Standard

Challenges to the constitutionality of the AEDPA’s reasonableness standard run head long into three propositions; they are set forth below. The first two are well rehearsed in the literature, while the third one is novel. Few would seriously take issue with the first one, some might argue that the second proposition is misfocused, and an overwhelming majority of the academy would take issue with the third one. But there is a consensus in the profession about the bottom line supported by all

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144. *See, e.g.*, *Indian Towing Co. v. United States*, 350 U.S. 61, 64–65 (1955) (describing a duty of acting “in a careful manner” as “hornbook tort law”); *RESTATEMENT (SECOND) OF TORTS* § 282 (AM. L. INST. 1965) (defining “negligence” as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”); *id.* at cmt. c (“The concept of unreasonable risk includes the existence of a risk and also its unreasonable character.”); *id.* at *special note* (“The word ‘negligent’ is often used to include all conduct which, although not intended to invade any legally protected interest, has the element of social fault.”); *PROSSER AND KEETON ON THE LAW OF TORTS* § 31 (W. Page Keeton et al. eds., 5th ed. 1984).
145. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (adopting a qualified immunity standard in which government officials should not be held liable for damages if their conduct was reasonable).
146. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 922–24 (1984) (adopting the good-faith exception to the Fourth Amendment exclusionary rule if the officer acted in reasonable reliance).
147. The Supreme Court has consistently interpreted the term “willful” in a criminal statute to require the prosecution to prove that the defendant intentionally violated a known legal duty. *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 191–92 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *Cheek v. United States*, 498 U.S. 192, 200 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973). A person who reasonably and honestly believes that his conduct complies with the law is not guilty of acting “willfully.” *See* Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 *LIBERTY U.L. REV.* 335, 349 (2018).
148. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865–66 (1984) (statutes); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411–18 (2019) (rules).

three points, and the Supreme Court has repeatedly embraced that bottom line.

The first proposition is that relitigation of an issue guarantees only a *second* decision about its outcome, not necessarily a *different* one, and certainly not necessarily a *better* or the *correct* outcome considered in some epistemological sense.¹⁴⁹ That should surprise no one. Economists can disagree about the effect of a particular macroeconomic policy. Financial analysts can have different opinions on the health or direction of a particular market. Football coaches can have different takes about the best game plan. Even physicians can reach different diagnoses after reviewing the same set of signs, symptoms, and lab test results. Why should the law be different? Reasonable people can, and sometimes do, disagree over the meaning of particular facts or the best application of a settled legal rule to them. Disagreements over what is the best rule of law have generated debate since judges began publishing their decisions. That is particularly true when judges construe some of the Delphic provisions of the Constitution. To increase the chance of ensuring that only the guilty are convicted and the law is clear, we have state supreme courts and federal appellate courts to review the decisions of trial judges, with the U.S. Supreme Court sitting atop the two systems to resolve disagreements over federal-law issues. Yet as Justice Robert Jackson once noted, “[t]here is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed,” and Supreme Court justices “are not final because [they] are infallible, but [they] are infallible only because [they] are final.”¹⁵⁰ There is no certainty that any court, including the

149. The late Professor Paul Bator makes this argument in full. See Bator, *supra* note 3, at 445–48.

150. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). He was right. See, e.g., *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991) (“We acknowledge that language in the later cases of *Cage v. Louisiana*, 498 U.S. 39 (1990), and *Yates v. Evatt*, 500 U.S. 391 (1991), might be read as endorsing a different standard of review for jury instructions. . . . So that we may once again speak with one voice on this issue, we now disapprove the standard of review language in *Cage* and *Yates*, and reaffirm the standard set out in *Boyde [v. California]*, 494 U.S. 370, 380 (1990).”); *Califano v. Boses*, 443 U.S. 282, 294 n.12 (1979) (Rehnquist, J.) (“There is obviously a significant difference between this interpretation of the statutory purpose and that subscribed to by the author of this opinion in his separate concurrence in *Weinberger v. Wiesenfeld*, 420 U.S. [636, 655 (1975)]. To the extent that these interpretations conflict, the author feels he can do no better than quote Mr. Justice Jackson, concurring in *McGrath v. Kristensen*, 340 U.S. 162, 177–178, 173 (1950): ‘Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Taney, *License Cases*, 5 How. 504, recanting views he had pressed upon the Court as Attorney General of Maryland in *Brown v. Maryland*, 12 Wheat. 419. Baron Bramwell extricated himself from a somewhat similar

U.S. Supreme Court, will reach the “right” decision in a case, and it is a fool’s errand to pursue relitigation in search of an unattainable goal.

To some parties, it seems both obvious and unarguable that empowering federal courts independently to review the rulings of state courts would improve the likelihood of winding up with the “correct” result in a particular case.¹⁵¹ After all, federal judges, protected by the tenure and salary safeguards of Article III,¹⁵² are better positioned to treat the constitutional protections of the guilty and innocent as important safeguards, not useless obstacles. The reason is that federal judges need not worry that freeing an “obviously guilty” defendant because of a “legal technicality” might leave them needing to find work elsewhere.¹⁵³ Yet, as Justice Joseph Story concluded, “the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals.”¹⁵⁴ In that regard, the Framers knew that “in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States.”¹⁵⁵ Moreover, as Justice Robert Jackson noted, given the “cryptic and vagrant” provisions of the Fourteenth Amendment, “what seems established by one decision is apt to be unsettled by another, and . . . its interpretation will be more or less swayed by contemporary intellectual fashions and political currents.”¹⁵⁶

The second proposition is two-fold: state-court judges can be trusted to know and follow federal law, including the federal constitu-

embarrassment by saying, “The matter does not appear to me now as it appears to have appeared to me then.” *Andrews v. Styrup*, 26 L.T.R. (N.S.) 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: “My own error, however, can furnish no ground for its being adopted by this Court” *United States v. Gooding*, 12 Wheat. 460, 478. . . . If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.”).

151. See *supra* note 3 (describing the contention that federal judges will reach the “correct” result as a central criticism of the AEDPA).
152. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).
153. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120–21, 1127–28 (1977); J. Skelly Wright & Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 898 (1966).
154. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816).
155. *Id.*
156. *Brown v. Allen*, 344 U.S. 443, 534 (1953) (Jackson, J., concurring).

tional provisions forbidding discrimination on the basis of race. Accordingly, there should be a strong presumption to that effect. The Supreme Court certainly has endorsed each half of that proposition.¹⁵⁷ It is right to do so.

There was a striking contrast between the makeup of the federal, state, and local governing bodies when Congress passed the AEDPA and the ones that existed fifty years prior.¹⁵⁸ Consider the analysis by the late Professor Bill Stuntz: On the one hand, “[o]ur generation has seen massive gains in black political power over big-city governments, and (not coincidentally) in black representation on urban police forces.”¹⁵⁹ On the other hand, “white police officers (and white legislators, prosecutors, and judges) are surely less racist as a class than they were twenty or thirty years ago.”¹⁶⁰ Taken together, “[a] rise in systemic racism coincident with a decline in the level of racism of those who populate the system seems strange, even preposterous.”¹⁶¹

The decline that Stuntz identified predated the AEDPA and has continued since its passage. The Voting Rights Act of 1965¹⁶² enhanced the voting protection afforded African Americans by the Fifteenth Amendment.¹⁶³ African Americans now hold positions of authority

157. *See, e.g.*, *Dunn v. Reeves*, 141 S. Ct. 2405, 2411 (2021); *Woods v. Donald*, 575 U.S. 312, 316 (2015); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002); *Harris v. Reed*, 489 U.S. 255, 268–69 (1989) (O’Conner, J., concurring); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Jackson v. Virginia*, 443 U.S. 307, 323 (1979); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976); *Ex parte Royall*, 117 U.S. 241, 251–52 (1886); *Martin*, 14 U.S. at 342.

158. *See* TRACEY L. MEARES & DAN M. KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 11–12 (1999); Tracey L. Meares, Terry *and the Relevance of Politics*, 72 ST. JOHN’S L. REV. 1343, 1346–47 (1998).

159. William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1798 (1998).

160. *Id.* (emphasis omitted).

161. *Id.*

162. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1).

163. As the Supreme Court noted in *Shelby County v. Holder*:

Nearly 50 years later [than *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966), which upheld the constitutionality of the Voting Rights Act of 1965], things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, “[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” The tests

throughout the federal, state, and local governments.¹⁶⁴ Today, sixty-one members of Congress are African American (three senators and fifty-eight representatives, including two nonvoting delegates).¹⁶⁵ Roughly 9% of the state and District of Columbia legislators—approximately 740—are African American.¹⁶⁶ Thirty years ago, there were more than 300 African American mayors, including Atlanta, Baltimore, Detroit, Los Angeles, Oakland, New York City, Philadelphia, and Washington, D.C.¹⁶⁷ Today, 39 of the nation's 100 largest cities have

and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.

. . . The House Report elaborated that “the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982,” and noted that “[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.” . . . [T]here has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act.

570 U.S. 529, 547 (2013) (citations omitted) (first quoting *Nw. Austin Mun. Util. Dist. No. One v Holder*, 557 U.S. 193, 202 (2009); and then quoting H.R. REP. NO. 109-478, at 12 (2006)).

164. “The election of black mayors across the country demonstrated how the nation was changing. In 1967, there was Carl Stokes in Cleveland, followed by Kenneth Gibson in Newark in 1970; then, three years later, Tom Bradley in Los Angeles, Maynard Jackson in Atlanta, and Coleman Young in Detroit. And then D.C. got its turn. In 1973, Congress passed the Home Rule Act, set to take effect in January 1975. Although it stopped well short of making D.C. fully autonomous, the Home Rule Act provided for an elected mayor with substantial executive authority—including control of the police department—and for a city council with significant legislative power.” JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 19 (2017) (footnotes omitted).
165. *Black Americans 117th Congress*, U.S. HOUSE OF REPRESENTATIVES PRESS GALLERY (Nov. 4, 2021), <https://pressgallery.house.gov/black-americans-117th-congress> [<https://perma.cc/U3F6-6RNS>] (noting that there are 58 Black members, including two nonvoting members); *African American Senators*, U.S. SENATE, <https://www.senate.gov/senators/african-american-senators.htm> [<https://perma.cc/5EX4-4YMP>] (last visited Feb. 22, 2022).
166. Carl Smith, *Blacks in State Legislatures: A State-by-State Map*, GOVERNING (Jan. 13, 2021), <https://www.governing.com/nw/blacks-in-state-legislatures-a-state-by-state-map.html> [<https://perma.cc/Y2VU-QPYZ>]. That result is not a novelty. See, e.g., *Legislators' Race and Ethnicity 2015*, NAT'L CONF. OF STATE LEGISLATORS, https://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Raceethnicity_Rev2.pdf [<https://perma.cc/TTC4-SBDF>] (last visited Feb. 17, 2022).
167. FORMAN, *supra* note 164, at 165.

elected African American mayors.¹⁶⁸ In 2018, 57% of African American mayors served in cities with populations above 40,000 that did not have a African American-majority population.¹⁶⁹ The percentage of African Americans serving in local police departments is comparable to their percentage of the national population, and numerous police chiefs are African American.¹⁷⁰ “By 1990, for example, there were 130 African American police chiefs nationwide, including the top cops in D.C., New York, Philadelphia, Baltimore, Detroit, Chicago, and Houston.”¹⁷¹ Today, twenty-one of the police chiefs in America’s largest fifty cities are African American.¹⁷² Numerous African Americans sit on the bench in the nation’s courts and occupy other important positions in the criminal-justice system.¹⁷³ The current Vice President, Kamala Harris,

168. *Black Mayors*, BLACK DEMOGRAPHICS, <https://blackdemographics.com/culture/black-politics/black-mayors/> [<https://perma.cc/4U6U-LXUF>] (last visited June 28, 2021).

169. *Id.*

170. *See* MEARES & KAHAN, *supra* note 158, at 12 (“Growth in African-American political strength has also changed the face of urban police forces nationwide. In Chicago, 25 percent of police officers are African-American; in Washington, D.C., a majority are. New York City, Washington, D.C., and Los Angeles have all employed African-American police chiefs. It’s no longer plausible to courts simply to assume a deeply antagonistic relationship between the police and minorities, or that the democratic process is still so dominated by racial exclusion that the court must substitute for it as monitors of police practice.”); *Police Officers, Race and Ethnicity*, DATAUSA, <https://datausa.io/profile/soc/police-officers> [<https://perma.cc/49GD-2F59>] (last visited Feb. 17, 2021) (noting that, nationwide, approximately 67% of police officers are white and 12.4% are African American, while whites comprise 61.3% of the U.S. population and African Americans comprise 11.9%); Rich Morin, Kim Parker, Renee Stepler, & Andrew Mercer, *Behind the Badge: Inside America’s Police Departments*, PEW RSCH. CTR. (Jan. 11, 2017), <https://www.pewresearch.org/social-trends/2017/01/11/inside-americas-police-departments/> [<https://perma.cc/M8R8-KD45>] (noting, based on 2013 data, that the national percentage of African American police officers was the same as the percentage of African Americans nationwide); Ashley Collman, *Sellouts to the Black Community. Traitors to Fellow Officers. Black Police Chiefs Are Caught Between 2 Worlds After George Floyd’s Killing.*, INSIDER (Oct. 4, 2020, 5:58 AM), <https://www.insider.com/black-police-chiefs-challenges-after-george-floyd-killing-2020-9> [<https://perma.cc/FKA4-UW23>].

171. FORMAN, *supra* note 164, at 165 (footnote omitted); *id.* at 204 (“black police chiefs . . . were running departments in several major cities by the late 1990s.”).

172. *See* sources cited *supra* note 170.

173. *See* this anecdote from James Forman Jr. for examples:

As I passed them, I noticed another racial reality. It wasn’t only Brandon and the other young men in the cellblock who were black. So was everybody in the courtroom—not just the judge,

is of African American and Indian descent. And atop all that is this: in 2008, America elected a president of African American and white descent—Barack Obama—and re-elected him in 2012, even though each time only a minority of the population was African American.¹⁷⁴

Accordingly, African Americans hardly occupy the same position they did in the 1950s, when they were the victims of racial discrimination and had no political power to protect themselves against overt or subtle forms of racism in the criminal-justice system (or elsewhere). Since then, however, the American public has rejected racism as a legitimate rationale for decision-making both within and without the

but the court reporter, the bailiff, and the juvenile prosecutor. So was the police officer who had arrested Brandon, not to mention the police chief and the mayor. Even the building we were in—the H. Carl Moultrie I Courthouse, named after the city’s first black chief judge—was a reminder of the African American influence on D.C.’s legal system.

. . . I had been to the detention facility that would be Brandon’s new home more times than I wanted to count, and I knew that all the guards there were black, too. The city council that wrote the gun and drug laws Brandon had been convicted of violating was majority African American and had been so for more than twenty-five years. In cases that went to trial, the juries were often majority black. Even some of the federal officials involved in D.C.’s criminal justice system were African American, including Eric Holder, then the city’s chief prosecutor [and later the U.S. Attorney General].

FORMAN, *supra* note 164, at 8–9 (footnote omitted).

174. According to the Census Bureau, in 2008 there were 100,042,000 non-Hispanic white voters. Exit polls estimate Obama received 43% of the white vote, which corresponds to a rough estimate that Obama received some 43 million votes from whites in 2008. Obama received 66,862,039 total votes in 2008. Whites comprised about 69% of Obama’s voters in 2008. Based again on Census Bureau data, in 2012, 98,041,000 non-Hispanic whites cast ballots. Exit polls estimate Obama received 39% of the white vote in 2012, which allows for the estimate that Obama received about 38.2 million votes from whites in the 2012 election. Obama received 62,611,250 total votes in 2012. Whites comprised about 61% of Obama’s voters in 2012. See Thom File, *The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections)*, U.S. CENSUS BUREAU 2 tbl.2 (May 2013), <https://www.census.gov/prod/2013pubs/p20-568.pdf> [<https://perma.cc/3JNA-VZQU>]; *Election Results 2008, National Exit Polls Table*, N.Y. TIMES (Nov. 5, 2008), <https://www.nytimes.com/elections/2008/results/president/national-exit-polls.html> [<https://perma.cc/NM5W-78EE>]; *Election 2012, President Exit Polls*, N.Y. TIMES, <https://www.nytimes.com/elections/2012/results/president/exit-polls.html> [<https://perma.cc/9489-9ZFJ>] (last visited Feb. 9, 2022); *Election 2012, President Map*, N.Y. TIMES, <https://www.nytimes.com/elections/2012/results/president.html> [<https://perma.cc/PV84-L38J>] (last visited Feb. 18, 2022); *Election Results 2008, President Map*, N.Y. TIMES, <https://www.nytimes.com/elections/2008/results/president/map.html> [<https://perma.cc/M4NF-ZT9T>] (last visited Feb. 22, 2022).

criminal-justice system—and properly so.¹⁷⁵ Unfortunately, just as we will always have crime until we reach the Promised Land, so too there will always be instances in which racism is the motivation behind someone's action. Each form of conduct is socially and legally prohibited because of the harm that it causes both the particular individuals who bear its brunt and the broader society to which all of us belong. But there is a broad and deep consensus in this nation that racism should be extirpated from the criminal-justice system (and elsewhere), and there are both white and non-white people who hold positions of authority in that system who are committed to that goal. As a result, there should be no presumption that the criminal-justice system is animated by a wicked intent to harm African Americans.

The third proposition is that the AEDPA's reasonableness standard is consistent with the review afforded by the federal habeas courts to a state prisoner's claim that the evidence of his or her guilt was insufficient to support his conviction. In *Jackson v. Virginia*,¹⁷⁶ the Supreme Court noted that the reasonable-doubt standard applicable at trial demands not only that the trier of fact "reach a subjective state of near certitude" of the defendant's guilt,¹⁷⁷ but also that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."¹⁷⁸ Accordingly, the Court held that an "applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial [that] no rational trier of fact could have found proof of guilt beyond a reasonable doubt."¹⁷⁹

But the Court did not stop there. The Court then went on to explain how a federal habeas court should apply that rule when reviewing the record of the state proceedings. *Jackson* made it plain that the standard is a rigorous one. To start with, a federal habeas court cannot independently review the record evidence and substitute its judgment for that of the trier of fact regarding a prisoner's guilt. As Justice Potter Stewart explained, "the standard announced today does not permit a court to make its own subjective determination of guilt or

175. See JOHN MCWHORTER, *WOKE RACISM: HOW A NEW RELIGION HAS BETRAYED BLACK AMERICA* 13–15 (2021) (arguing that a fear of being labelled "racist" has triggered social change rather than a consensus built on social science and reasoning).

176. 443 U.S. 307 (1979).

177. *Id.* at 315.

178. *Id.* at 316.

179. *Id.* at 324.

innocence.”¹⁸⁰ That is, *Jackson* “does not require a court to ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’”¹⁸¹ Rather, it is for the trier of fact “to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.”¹⁸² “[A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.”¹⁸³ For that reason, a habeas court cannot place on the prosecution “an affirmative duty to rule out every hypothesis except that of guilt.”¹⁸⁴ Nor may a federal court inquire “how rationally the verdict was actually reached” or permit “scrutiny of the reasoning process actually used by the factfinder—if known,” as long as the evidence was sufficient to convict.¹⁸⁵ “Once a defendant has been found guilty of the crime charged,” *Jackson* ruled, “the factfinder’s role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution,”¹⁸⁶ not merely the evidence offered during the prosecution’s case in chief. Since 1979, the Court has reaffirmed the “high bar”¹⁸⁷ imposed by *Jackson* on several occasions.¹⁸⁸

180. *Id.* at 319 n.13; *id.* at 334 (Stevens, J., concurring in the judgment) (noting that the Court “rejects” a standard that would “require [the reviewing] court to ‘ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt’” (emphasis omitted) (quoting *Woodby v. Immigr. & Naturalization Serv.*, 385 U.S. 276, 282 (1966))).

181. *Id.* at 318–19 (majority opinion) (quoting *Woodby*, 385 U.S. at 282).

182. *Id.* at 319.

183. *Id.* at 326; *id.* at 334 (Stevens, J., concurring in the judgment) (noting that the Court “does not require the reviewing court to view just the evidence most favorable to the prosecution and then to decide whether that evidence convinced it beyond a reasonable doubt, nor whether, based on the entire record, rational triers of fact could be convinced of guilt beyond a reasonable doubt. Instead, and without explanation, it chooses a still narrower standard that merely asks whether, ‘after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (quoting *id.* at 319 (majority opinion))).

184. *Id.* at 326.

185. *Id.* at 319 n.13.

186. *Id.* at 319 (emphasis in original).

187. *Coleman v. Johnson*, 566 U.S. 650, 651 (2012).

188. *See, e.g., Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam) (“The opinion of the Court in *Jackson v. Virginia*, makes clear that it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may

Jackson is quite instructive regarding the constitutionality of AEDPA review. The most basic (and best-known) rule of criminal law is that the state must prove a defendant's guilt beyond a reasonable doubt. Since (at least) 1850, state and federal courts, including the Supreme Court, have assumed that it is an indispensable common-law safeguard,¹⁸⁹ and in 1970 the Supreme Court elevated that rule to a constitutional requirement in *In re Winship*.¹⁹⁰ That rule is no less important to a defendant than any of the rights that are expressly guaranteed to him by the Bill of Rights. In fact, the reasonable-doubt standard is likely the most important right a defendant who chooses to go to trial rather than plead guilty has.¹⁹¹ It therefore makes sense to

set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." (citation omitted); *id.* at 7 ("Jackson says that evidence is sufficient to support a conviction so long as 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' It also unambiguously instructs that a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" (citation omitted) (quoting *Jackson*, 443 U.S. at 319, 326)); *McDaniel v. Brown*, 558 U.S. 120, 121, 132–34 (2010); *Lewis v. Jeffers*, 497 U.S. 764, 781–84 (1990); *Pilon v. Bordenkircher*, 444 U.S. 1, 2–3 (1979).

189. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958); *Holland v. United States*, 348 U.S. 121, 138 (1954); *Leland v. Oregon*, 343 U.S. 790, 795 (1952); *Brinegar v. United States*, 338 U.S. 160, 174 (1949); *Wilson v. United States*, 232 U.S. 563, 569–70 (1914); *Holt v. United States*, 218 U.S. 245, 253 (1910); *Davis v. United States*, 160 U.S. 469, 488 (1895); *Dunbar v. United States*, 156 U.S. 185, 199 (1895); *Hopt v. Utah*, 120 U.S. 430, 439 (1887); *Miles v. United States*, 103 U.S. 304, 312 (1880); *Carr v. State*, 37 N.W. 630, 631–32 (Neb. 1888); *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 309 (1850) (Shaw, C.J.); *see also* 9 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2495, at 306–07 (3d ed. 1940) (quoting *Jerke v. Delmont State Bank*, 223 N.W. 585, 586 (S.D. 1929)); *cf.* *Coffin v. United States*, 156 U.S. 432, 460–61 (1895) (describing the long history of the presumption of innocence). *See generally* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL (2008).
190. 397 U.S. 358, 364 (1970); *see also* *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (reaffirming *Winship*); *Cage v. Louisiana*, 498 U.S. 39, 39–41 (1990) (same).
191. *See Winship*, 397 U.S. at 363 ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. . . . The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" (quoting *Coffin*, 156 U.S. at 453)).

read the *Jackson* opinion carefully to discern not only what the Court held but the basis on which the Court rested that holding.

Jackson directs the federal courts, as a matter of due process, to uphold a verdict if *any* reasonable trier of fact could have found the defendant guilty. That holding was based not on the Court's interpretation of the pre-AEDPA version of the federal habeas statute, but on what the Due Process Clause requires. The Court framed the issue in Part II of its decision, describing "[t]he question thus raised" as "go[ing] to the basic nature of the constitutional right recognized in the *Winship* opinion."¹⁹² Part III then explained why the Due Process Clause requires more than a state of near certitude by the trier of fact and also demands that the government's *proof* of guilt satisfy that standard.¹⁹³ Only after concluding that the Constitution required a state to meet both aspects of the *Winship* reasonable-doubt standard did the Court turn to the state's argument that the rule of *Stone v. Powell*¹⁹⁴—exempting Fourth Amendment claims from federal habeas review—should also apply to claims like Jackson's.¹⁹⁵ The Court rejected the state's argument on the ground that "[t]he constitutional issue" in *Jackson* was "far different from" the one in *Stone*.¹⁹⁶ "The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence," and "[t]he constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless."¹⁹⁷ In Part IV of its opinion, the Court turned to the application of the "reasonable doubt" standard to the facts of Jackson's own case. The Court found that the evidence was sufficient to meet the *Winship* standard and did not refer to the habeas statute in the process of doing so. "Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could [Jackson's] challenge

192. *Jackson*, 443 U.S. at 313–14 ("This is the first of our cases to expressly consider the question whether the due process standard recognized in *Winship* constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt. Upon examination of the fundamental differences between the constitutional underpinnings of *Thompson v. Louisville*, [362 U.S. 199 (1960)], and of *In re Winship*, [397 U.S. 358 (1970)], the answer to that question, we think, is clear.").

193. *Id.* at 313–20.

194. 428 U.S. 465, 481–82, 489–91, 494–95 (1976) (ruling that federal courts cannot consider Fourth Amendment claims on federal habeas review if a prisoner had a "full and fair" opportunity to litigate them in state court).

195. *Jackson*, 443 U.S. at 320–24.

196. *Id.* at 323.

197. *Id.*

be sustained,¹⁹⁸ a standard that the Court had previously rejected¹⁹⁹ and rejected again in *Jackson*.²⁰⁰ “Under the standard established in this opinion as necessary to preserve the due process protection recognized in *Winship*,” the Court explained, the federal courts “must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts” in the record evidence “in favor of the prosecution, and must defer to that resolution.”²⁰¹ Because “a rational trier of fact could reasonably have found” that the prosecution had proved every element of the charged offense against Jackson, the Court upheld his conviction.²⁰² Accordingly, the *Jackson* habeas review standard is an interpretation of what the Due Process Clause requires, not the pre-AEDPA habeas act.

That aspect of the *Jackson* decision is critically important. The jury’s finding of guilt is simply the application of the state-law definition of a crime, as set forth in the trial court’s jury instructions, to the often-conflicting evidence in the record. Put differently, the jury is responsible for deciding a mixed question of law and fact in accordance with the law. That is not materially different from what state judges do when ruling on such issues. If a reasonableness standard is adequate to review the jury’s *factual* finding that the defendant is guilty, as *Jackson* held, then it is difficult to fault Congress for directing federal courts to use the same standard when reviewing state trial judges’ *legal* rulings. After all, the Supreme Court did precisely that when adjudicating Jackson’s own claim. Accordingly, *Jackson* directly supports the constitutionality of the AEDPA’s reasonableness standard of review.

Indeed, in his separate opinion in *Jackson*, Justice John Paul Stevens came close to justifying under the Due Process Clause the as-yet unenacted AEDPA’s use of a reasonableness standard. He wrote that there is no justification for generally distrusting state court rulings that the evidence was sufficient to convict.²⁰³ The reason is that “habeas

198. *Id.* at 326.

199. *See* *Holland v. United States*, 348 U.S. 121, 138–40 (1954).

200. *Jackson*, 443 U.S. at 326.

201. *Id.*

202. *Id.*

203. *Id.* at 328 (Stevens, J., concurring in judgment) (“Although the Judiciary has received its share of criticism—principally because of the delays and costs associated with litigation—I am aware of no general dissatisfaction with the accuracy of the factfinding process or the adequacy of the rules applied by state appellate courts when reviewing claims of insufficiency. . . . [T]he very premise of *Winship* is that properly selected judges and properly instructed juries act rationally, that the former will tell the truth when they declare that they are convinced beyond a reasonable doubt and the latter will conscientiously obey and understand the reasonable-doubt instructions they receive before retiring to reach a verdict, and

corpus is not intended as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials,” but is only a vehicle “to guard against extreme malfunctions in the state criminal justice systems.”²⁰⁴ That is precisely the office of the AEDPA, as the Court later made clear in *Davis v. Ayala*.²⁰⁵ Accordingly, the *Jackson* decision supports the constitutionality of the AEDPA.

But there is more.

Today, states offer convicted defendants the opportunity to obtain appellate review by one or more state courts, and state-court collateral challenges to a final judgment of conviction are widely available.²⁰⁶ That is significant in light of the Supreme Court’s decisions in *Frank v. Mangum*²⁰⁷ and *Moore v. Dempsey*.²⁰⁸ Frank claimed that his trial was a sham because a “mob” had coerced the jury into finding him guilty.²⁰⁹ The Court ruled against him because the state had available the “corrective process” of an appeal to the state’s highest court, which heard and rejected Frank’s claim.²¹⁰ *Moore* involved a challenge to a state

therefore that either factfinder will itself provide the necessary bulwark against erroneous factual determinations. To presume otherwise is to make light of *Winship*.”).

204. *Id.* at 332 n.5.

205. 576 U.S. 257, 276 (2015) (“The role of a federal habeas court is to “guard against extreme malfunctions in the state criminal justice systems,” not to apply *de novo* review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judge.” (citations omitted) (quoting *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson*, 443 U.S. at 332 n.5 (Stevens, J., concurring in judgment)))).

206. *See, e.g.*, CAL. PENAL CODE §§ 1235-1247e (West 2020) (appeals from a judgment of conviction); S.C. CODE ANN. 1976 § 17-17-140 (2014) (appeal from the denial of habeas corpus petition); *id.* § 18-1-10 (appeals in criminal cases); TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 2015) (post-conviction habeas review in noncapital cases); TEX. CODE CRIM. PROC. ANN. art. 11.071 (West Supp. 2021) (same, for capital cases).

207. 237 U.S. 309 (1915).

208. 261 U.S. 86 (1923).

209. *Frank*, 237 U.S. at 324–25, 332.

210. The Court elaborated:

[T]he State may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prisoner’s right to a fair trial.

conviction based on the following undisputed, and particularly egregious, facts: the state officials staved off a pretrial lynching only by promising to execute the defendants after trial.²¹¹ An all-white, biased grand jury, from which all African Americans had been intentionally

Such an appeal was accorded to the prisoner in the present case in a manner and under circumstances already stated, and the Supreme Court, upon a full review, decided appellant's allegations of fact, so far as matters now material are concerned, to be unfounded. Owing to considerations already adverted to (arising not out of comity merely, but out of the very right of the matter to be decided, in view of the relations existing between the States and the Federal Government), we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial through disorder and manifestations of hostile sentiment cannot in this collateral inquiry be treated as a nullity, but must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be deemed sufficient to raise an issue respecting the correctness of that determination; especially not, where the very evidence upon which the determination was rested is withheld by him who attacks the finding.

Id. at 335–36 (citations omitted).

211. *Moore*, 261 U.S. at 87–89 (“The case stated by the petition is as follows, and it will be understood that while we put it in narrative form, we are not affirming the facts to be as stated but only what we must take them to be, as they are admitted by the demurrer. . . . Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain, as the petition puts it, they would execute those found guilty in the form of law.”). One potential counsel for the defendants seems to have been driven off by a local mob. *Id.* at 88 (“[Petitioners] say that their meeting was to employ counsel for protection against extortions practiced upon them by the landowners and that the landowners tried to prevent their effort, but that again we pass by as not directly bearing upon the trial. It should be mentioned however that O. S. Bratton, a son of the counsel who is said to have been contemplated and who took part in the argument here, arriving for consultation on October 1, is said to have barely escaped being mobbed; that he was arrested and confined during the month on a charge of murder and on October 31 was indicted for barratry, but later in the day was told that he would be discharged but that he must leave secretly by a closed automobile to take the train at West Helena, four miles away, to avoid being mobbed. It is alleged that the judge of the Court in which the petitioners were tried facilitated the departure and went with Bratton to see him safely off.”). The prosecution’s witnesses were “whipped and tortured” until they agreed to say whatever the prosecution asked. *Id.* at 89.

excluded, charged the prisoners with murder.²¹² The state brought them to trial quickly, where they were represented by appointed counsel who did nothing in their defense.²¹³ An all-white petit jury, from which all African Americans again had been intentionally excluded, convicted the prisoners after a local mob had threatened the jurors with violence should there be any verdict but guilty.²¹⁴ The state supreme court summarily rejected the prisoner's claims.²¹⁵ Given the undenied facts, the Supreme Court, in a terse opinion by Justice Oliver Wendell Holmes, held that the prisoners were entitled to a hearing on the merits of their claims.²¹⁶ Implicit in that conclusion was the belief that, if the facts the prisoners alleged were true, the trial errors should have been obvious to all.

Like *Jackson*, *Frank* and *Moore* support the reasonableness of the AEDPA standard of review. Both decisions recognize that state appellate courts can provide the "corrective process" necessary to ensure that trial proceedings are fundamentally fair. To be entitled to respect, however, appellate courts must reach a conclusion that is reasonable on the law and the facts. The Supreme Court found that the Georgia Supreme Court had successfully done so in *Frank*. By contrast, the Court concluded that the Arkansas Supreme Court had utterly failed in *Moore*, and the Court was right to do so. The Court had previously made clear that a state cannot intentionally exclude African Americans from the

212. *Id.* ("[A] grand jury of white men was organized on October 27 with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks, upon it, and on the morning of the 29th the indictment was returned.").

213. *Id.* ("The counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand.").

214. *Id.* ("On November 3 the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result.").

215. *Id.* at 91–92. *See also* *Hicks v. State*, 220 S.W. 308, 309–10 (Ark. 1920) (affirming the convictions of Moore and several co-defendants).

216. *Moore*, 261 U.S. at 92 ("We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.").

grand and petit juries and that a mob-dominated trial is little more than a slow-motion lynching. If the facts alleged by the prisoners were true, they certainly were entitled to relief; no reasonable jurist could hold a contrary view. That is precisely the inquiry the AEDPA demands. To use the AEDPA's terms, the conclusion that the prisoners in *Moore* were denied a fair trial was "beyond any possibility for fair-minded disagreement,"²¹⁷ and the Arkansas Supreme Court's contrary decision was an "extreme malfunction[]" in a state's criminal-justice system.²¹⁸ *Frank* and *Moore*, like *Jackson*, recognize that state courts are entitled to respect when their judgments are reasonable, but not, if not. Those cases support the constitutionality of the AEDPA's reasonableness standard of review.

B. The Challenges to the AEDPA's Reasonableness Standard

Challenges to the constitutionality of the AEDPA's limited habeas review would likely rest on one or more of three bases: the Article I Suspension Clause, the Article III Judicial Power Clause, and the Fifth Amendment Due Process Clause. Each one assails the AEDPA's standard of review, arguing that Congress has impermissibly restrained the federal courts' ability to resolve federal constitutional claims. The subparts below discuss why none of those challenges is persuasive.²¹⁹

1. The Suspension Clause

The Suspension Clause denies Congress the power to suspend habeas corpus unless Congress finds that the nation is at peril of collapse due to domestic insurrection or foreign occupation.²²⁰ Some

217. *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

218. *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

219. It is worth noting that the Supreme Court itself had restricted the review that federal courts could undertake on habeas even before the AEDPA became law. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993) (ruling that the *Chapman v. California*, 386 U.S. 18 (1967), harmless-error standard applied on direct review does not apply on habeas review); *McCleskey v. Zant*, 499 U.S. 467, 494–95 (1991) (limiting the ability of prisoners to bring successive habeas petitions); *Teague v. Lane*, 489 U.S. 288, 297–99 (1989) (ruling that a prisoner cannot raise a new law claim on habeas corpus); *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983) (approving the use of expedited review procedures in capital cases); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (ruling that a state prisoner cannot bring a federal claim that he had not properly preserved in the state courts unless he can show "cause" for his failure and "prejudice" from it); *Stone v. Powell*, 428 U.S. 465, 481–82 (1976) (ruling that a prisoner cannot bring a Fourth Amendment claim in federal court if the state courts fully and fairly adjudicated the claim). Accordingly, the landscape against which Congress painted in the AEDPA was not the same one that existed after the Supreme Court's habeas decisions in the 1950s and 1960s.

220. *See* U.S. CONST. art. I, § 9, cl. 2.

have argued that the limited habeas review permitted by the AEDPA amounts to a “suspension” of the writ.²²¹ That argument goes as follows:

Habeas corpus is the traditional common-law remedy for executive detention prohibited by Magna Carta²²² and the Due Process Clauses.²²³ The inclusion of the Suspension Clause in Article I shows that the Framers intended to preserve its historic role in preventing unlawful confinement. Critics of the Warren Court’s expansion of habeas corpus review are shooting at the wrong target. What is ultimately troubling them is the Supreme Court’s expansion of the constitutional prerequisites for a fair trial, rather than the Court’s interpretation of the writ. What principally evolved up to 1996 was the Court’s understanding of what the Due Process Clause required in order for a trial to serve as a legitimate justification for punishment. The real gripe for the Warren Court’s critics is the development of federal constitutional law, not the expansion of the role of habeas corpus.

That argument is unpersuasive. It is true that the Suspension Clause generally forbids Congress from empowering the President to hold people in custody indefinitely without trial. It is also true that the clause therefore treats habeas corpus as a remedy for violations of the principle underlying the Magna Carta and the Due Process Clauses that the government may not physically confine parties outside the limits of the law.²²⁴ It is again true that the Supreme Court has expanded the list of constitutional rights a defendant must receive for a trial to be fair. But it is *not* true that federal habeas corpus must be the available remedy for a state prisoner challenging a state judgment of conviction or that, if habeas review is available, it must be plenary.

221. See, e.g., Nathan Nasrallah, Comment, *The Wall that AEDPA Built: Revisiting the Suspension Clause Challenge to the Antiterrorism and Effective Death Penalty Act*, 66 CASE W. RES. L. REV. 1147, 1148–49 (2016).

222. *Coke’s Memorandum on Chapter 29 (1604)*, in JOHN BAKER, *THE REINVENTION OF MAGNA CARTA* 1216–1616, at 502–03 (2017).

223. See *Hamdi v. Rumsfeld*, 524 U.S. 507, 533, 538 (2004); see also *id.* at 556–58 (Scalia, J., dissenting).

224. That “law” is principally the criminal law, but there are other instances in which someone can be confined without being charged with a crime, such as imprisonment for debt. See generally Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24 (1926). Another ancient and contemporary example is the quarantining of parties suffering from a contagious and dangerous disease. See, e.g., *Oregon-Washington R.R. & Navigation Co. v. Washington*, 270 U.S. 87, 93 (1926) (Taft, C.J.) (noting that “it is well settled that a State in the exercise of its police power may establish quarantines against human beings or animals or plants, the coming in of which may expose the inhabitants or the stock or the trees, plants or growing crops to disease, injury or destruction”).

There is little Supreme Court case law discussing the Suspension Clause.²²⁵ In most cases, the Court upheld a challenged federal law on the ground that it did not foreclose all habeas review or that it substituted an adequate alternative remedy.²²⁶

Only once has the Court held an act of Congress unconstitutional under the Suspension Clause, and that case did not involve a criminal prosecution.

The case was *Boumediene v. Bush*.²²⁷ It involved a challenge to one of the post-9/11 statutes that Congress enacted to prevent a repetition of that day's events. The Military Commissions Act of 2006 provided that "[n]o court, justice, or judge shall have jurisdiction" to entertain a habeas petition seeking the release of "an alien" whom the federal

225. The lower federal courts have rejected the argument that the AEDPA violates the Suspension Clause. *See, e.g.,* *Evans v. Thompson*, 518 F.3d 1, 4–13 (1st Cir. 2008); *Crater v. Galaza*, 491 F.3d 1119, 1121–30 (9th Cir. 2007); *Green v. French*, 143 F.3d 865, 875 (4th Cir. 1998), *abrogated in part on other grounds*, *Williams v. Taylor*, 529 U.S. 362, 375–79 (2000); *Lindh v. Murphy*, 96 F.3d 856, 867–68 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997). The academic literature discusses that issue as well as ones such as whether Congress alone has the authority to suspend habeas corpus and what the effect of a lawful suspension is—viz., does it merely eliminate the remedy or also render lawful the underlying conduct? *See generally* David Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 62–64 (2006) (listing the issues). Those are important and interesting questions but are beyond the scope of this Article.

226. *See* *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 304–05 (2001) (construing federal immigration laws as not foreclosing all review of a person's lawful status); *Felker v. Turpin*, 518 U.S. 651, 664–65 (1996) (upholding other AEDPA provisions limiting a prisoner's ability to file successive habeas petitions); *Swain v. Pressley*, 430 U.S. 372, 381–84 (1977) (rejecting a Suspension Clause challenge to the District of Columbia Court Reform and Criminal Procedure Act of 1970, which created a collateral review process for prisoners convicted in the District of Columbia Superior Courts that was patterned after the provisions applicable to federal prisoners); *United States v. Hayman*, 342 U.S. 205, 222–23 (1952) (rejecting a Suspension Clause challenge to the collateral review process for federal prisoners convicted in Article III courts). Those decisions have allowed the Court to avoid answering the question whether the clause protects only the "Privilege of the Writ of Habeas Corpus" as it was known at common law, or whether the clause also reaches the more expansive version of the writ as it came to be known in the 1960s. Former Chief Justice Warren Burger, joined by Justices Blackmun and Rehnquist, concluded that "[t]he 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." *See Pressley*, 430 U.S. at 384 (Burger, C.J., concurring in part). The full Court has not resolved the issue.

227. 553 U.S. 723, 732–33 (2008).

government has found to be “an enemy combatant.”²²⁸ Construing the act to bar any federal court from releasing an enemy combatant from custody, the Court held that the Suspension Clause bars Congress from authorizing such unlimited, unending executive detention, whether in this country or elsewhere.²²⁹ The *Boumediene* decision is only obliquely relevant here, however, because it involved a classic case of pretrial executive detention without any judicial authorization. In other cases, the Court has upheld restrictions on habeas corpus because it concluded that Congress had provided an adequate substitute remedy.²³⁰ Those cases do bear on the issue here because, as explained below, state prisoners have adequate substitutes available for federal habeas corpus, even as the Supreme Court construed the Suspension Clause before Congress passed the AEDPA in 1996.

The Text of the Suspension Clause.—The text of the Suspension Clause is simple and straightforward: “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.”²³¹ The sentence is clear that Congress may not suspend the writ, but it does not define the meaning of the critical terms “Privilege of the Writ of Habeas Corpus,” or “suspen[sion].” History does,²³² so it makes sense to start there to learn what the clause means.

The English Background to the Suspension Clause.—Habeas corpus had a humble origin at common law.²³³ It did not empower one category

228. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (codified at 28 U.S.C. § 2241(3)).

229. *Boumediene*, 553 U.S. at 771.

230. *See supra* note 226.

231. *See* U.S. CONST. art. I, § 9, cl. 2.

232. The late Professor David Shapiro once noted that habeas corpus denotes “a term familiar to all lawyers schooled on a heavy diet of Blackstone.” Shapiro, *supra* note 225, at 62–63. The Framers certainly were. *See infra* note 251.

233. Valuable discussions of the history of habeas corpus include *Edwards v. Vannoy*, 141 S. Ct. 1547, 1563 (2021) (Thomas, J., concurring); *id.* at 1566–68 (Gorsuch, J. concurring); *Wright v. West*, 505 U.S. 277, 285–86 (1992) (plurality opinion); 3 WILLIAM BLACKSTONE, COMMENTARIES *129–31 (1886); WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS (The Lawbook Exchange, Ltd. 2002) (1886); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010); 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 104–25 (1926); ROBERT SEARLES WALKER, HABEAS CORPUS WRIT OF LIBERTY: ENGLISH AND AMERICAN ORIGINS AND DEVELOPMENT (2006); A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18 (1902); Maxwell Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 CANADIAN BAR. REV. 92 (1938); Forsythe, *supra* note 3; Edward Jenks, *The Story of Habeas Corpus*, 18 L.Q. REV. 64 (1902); Lewis

of judges to review judgments entered by another. Rather, it existed as a handful of different *mesne* or intermediate writs that a court could issue for various uses in the administration of justice.²³⁴ For our purposes, the most relevant process was *habeas corpus ad subjiciendum*. That form directed the recipient to produce the body of someone in custody so that the court could examine the cause and legality of the detention and, if he or she was being confined pending trial, to set a trial date and decide whether to release him or her on bail.²³⁵ The writ thereby enforced Chapter 39 of Magna Carta, which prohibited the Crown from detaining or punishing subjects except pursuant to the “law of the land”²³⁶—“the Common Law, Statute Law, or Custome of

Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966) [hereinafter Oaks, *High Court Legal History*]; Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243 (1965) [hereinafter Oaks, *Early State Habeas Corpus*]. Historically, Suspension Clause issues did not often arise in litigation and were infrequently discussed in legal journals. The federal government’s post 9/11 detention of suspected terrorists, however, has generated both case law and a sizeable literature focusing on the Suspension Clause. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 732–33 (2008); *see also generally* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, (2007); Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1; Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012). Insofar as those decisions and articles focus on executive detention, they do not directly bear on the issue of federal collateral review of state-court judgments.

234. *See, e.g.*, *Vannoy*, 141 S. Ct. at 1566–68 (Gorsuch, J. concurring); 3 BLACKSTONE, *supra* note 233, at *129–31; Oaks, *Early State Habeas Corpus*, *supra* note 233, at 243–44 & n.4. Other forms included *habeas corpus ad respondendum*, which enabled a judge to transfer a prisoner from one court to another; *habeas corpus ad satisfaciendum*, which removed from a lower to higher court a prisoner confined by order of the former; *habeas corpus ad recipiendum* (also known as *habeas corpus cum causa*), which transferred a matter and prisoner from an inferior court to a court at Westminster; and *habeas corpus ad prosequendum, testificandum, and deliberandum*, which removed a prisoner from one court to another for the purpose of trial or testimony. *See, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97–99 (1807); 3 BLACKSTONE, *supra* note 233, at *129–31.
235. *See, e.g.*, DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 28–29 (1966).
236. Chapter 39 provided that “[n]o free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.” MAGNA CARTA, ch. 39, *translated in* J.C. HOLT, *MAGNA CARTA* 389 (3d ed. 2015) (providing Latin original and English translation). It forbade unjustified executive detention. *Id.*

England.”²³⁷ Chapter 39 formally endorsed in England’s fundamental legal document what we would today call “the rule of law”²³⁸—viz., the principle that, because we are “a government of laws, and not of men,”²³⁹ every government official, both low and high, is subject to the law.²⁴⁰

Nonetheless, the issue before a court on a petition for habeas corpus was quite narrow. If an applicant made a prima facie case of wrongful detention (by affidavit, for example), a court would issue the writ against the Crown and its officers, ordering them to justify the prisoner’s restraint.²⁴¹ In response, the jailer would submit a “return”—a written justification for the prisoner’s confinement²⁴²—and the court would determine whether detention was justified. If the prisoner was lawfully being held pending trial, the court would decide whether he or she should be released on bail and promptly tried. If there was no good cause to restrain the prisoner, however, the court would order his or her immediate release.²⁴³ Unlike what happens today, a common law court would not review the legality of a detention if the prisoner was confined under the judgment of a court with jurisdiction over the offense.²⁴⁴ Neither the common-law writ of habeas corpus nor the

237. Ellis Sandoz, *Editor’s Introduction: Fortescue, Coke, and Anglo-American Constitutionalism*, in *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW* 16–17 (Ellis Sandoz ed., 1993) (quoting EDUARDO COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 45 (London, E. & R. Brooke 1797) (1681)). Coke thought that the terms “due process of law” and “the law of the land” were interchangeable. See COKE, *supra*, at 50. For discussions of the Magna Carta, see, for example, DAVID CARPENTER, *MAGNA CARTA* (2015); A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968); C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27 (1914).

238. See, e.g., A.J. CARLYLE, *POLITICAL LIBERTY* 53 (1941); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 152 (2d ed. 1898); JOHN PHILLIP REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 3 (2004).

239. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

240. A principle that the Supreme Court of the United States has reiterated often and recently. See, e.g., *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021); *United States v. Nixon*, 418 U.S. 683, 703–09 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–86 (1952).

241. Oaks, *Early State Habeas Corpus*, *supra* note 233, at 244.

242. *Id.* at 244 & n.5.

243. *Id.* at 243–44.

244. *Id.* at 244–45.

version authorized by the English Habeas Corpus Act of 1679²⁴⁵ empowered any court to review de novo the correctness of a judgment entered by a court with jurisdiction.²⁴⁶ Common-law courts did not engage in plenary collateral review of a judgment of conviction.²⁴⁷ The only postconviction remedy was an appeal for clemency.²⁴⁸

In sum, at common law, habeas corpus was a remedy to prevent the Crown or one of its ministers from confining someone outside the law—viz., from engaging in what we would today call “executive detention.”²⁴⁹ The historic office of the writ of habeas corpus was to prevent executive detention based on mere suspicion of wrongdoing, some personal insult suffered by an official with the power to throw someone in jail, or a desire to extort funds from someone as the price of freedom.²⁵⁰ The writ had nothing to do with collateral attack on a judgment of conviction entered by a coordinate judicial system—in part because there was no federal system in England like the one this nation later adopted.

The American History of the Suspension Clause.—The Framers were well acquainted with the teachings of Edward Coke and William

245. 31 Car. 2, cl. 2.

246. See Oaks, *Early State Habeas Corpus*, *supra* note 233, at 245. The 1679 act had an exception for “persons convict or in Execution by legal process.” Bator, *supra* note 3, at 466 n.51 (quoting 31 Car. 2, cl. 2.); *cf. Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99 (1807) (interpreting Section 14 of the Judiciary Act of 1789).

247. See, e.g., *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830); *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38 (1822).

248. See, e.g., DANIEL DEFOE, A HISTORY OF THE CLEMENCY OF OUR ENGLISH MONARCHS, FROM THE REFORMATION, DOWN TO THE PRESENT TIME (London, N. Mist 1717); C. H. ROLPH, THE QUEEN’S PARDON (1978); NAOMI D. HURNARD, THE KING’S PARDON FOR HOMICIDE BEFORE A.D. 1307 (1969); K.J. KESSELRING, MERCY AND AUTHORITY IN THE TUDOR STATE (2003); HELEN LACEY, THE ROYAL PARDON: ACCESS TO MERCY IN FOURTEENTH-CENTURY ENGLAND (2009); Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51 (1963).

249. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 771, 780, 783 (2008) (declaring that the Suspension Clause secures the judicial remedy of habeas corpus); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 580–81, 586–887 (2008); John Harrison, *The Original Meaning of the Habeas Corpus Suspension Clause, the Right of Natural Liberty, and Executive Discretion*, 29 WM. & MARY BILL RTS. J. 649, 650 (2021); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 903–04 (2012).

250. See, e.g., Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 613–64 (2009).

Blackstone,²⁵¹ both of whom discussed the common law of crimes and criminal procedure.²⁵² A defendant had a right to a trial with certain necessary features.²⁵³ But a “trial” was all that an offender had any right to receive;²⁵⁴ he or she had no right to appeal to a higher court.²⁵⁵

The Constitution did not change that feature of English criminal procedure. The Framers knew a criminal-justice system was necessary for civil society to exist²⁵⁶ and that each colony and state had its own system.²⁵⁷ They also anticipated that the new Congress would enact substantive criminal laws, as well as a federal judicial system to enforce them. How do we know that? The text of the Constitution, particularly Article I, expressly contemplates that Congress would enact federal

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251. See, e.g., *Klopper v. North Carolina*, 386 U.S. 213, 225 (1967) (“[Edward] Coke’s Institutes were read in the American Colonies by virtually every student of the law.”); *Alden v. Maine*, 527 U.S. 706, 715 (1999) (noting that “[Blackstone’s] works constituted the preeminent authority on English law for the founding generation”).
252. See, e.g., 3 BLACKSTONE, *supra* note 233; 1 EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (London, E. & R. Brooke 1797) (1644).
253. See, e.g., 4 BLACKSTONE, *supra* note 233, at ch. 27.
254. Whose contours evolved over time. See, e.g., JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME (2006); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2005); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 424–41 (5th ed. 1956); WHITMAN, *supra* note 189.
255. *McKane v. Durston*, 153 U.S. 684, 687 (1894) (“An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.”).
256. See THOMAS HOBBS, LEVIATHAN: OR THE MATTER, FORME & POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL 78 n.9 (Edwin Curley ed., Hackett Publ’g Co. 1994) (1651) (characterizing the state of nature as *bellum omnium contra omnes*—“a war of all against all”).
257. See generally, e.g., DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776 (1976); RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA (2000); HUGH F. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA (1965). For a concise discussion of American criminal procedure from the colonial period through the 19th century, see LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 20–27 (1993).

offenses,²⁵⁸ while Article III and the Bill of Rights also assume that there will be pretrial and trial processes to adjudicate whatever charges are brought.²⁵⁹ The specific provisions found in those documents go a long way toward ensuring that no innocent person will be convicted, that even the guilty will receive a fair trial, and that no barbaric sentence can be imposed.²⁶⁰

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258. See, e.g., U.S. CONST. art. I, § 8, cl. 6 (“[The Congress shall have Power] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States”); *id.* art. I, § 8, cl. 10 (“[The Congress shall have Power] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); *id.* art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”). Other provisions implicitly recognize that likelihood. See, e.g., *id.* art. I, § 8, cl. 17 (“[The Congress shall have Power] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings”); *id.* art. I, § 8, cl. 18 (“[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).
259. See, e.g., *id.* art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”); *id.* amend. V (requiring a grand jury indictment for some crimes, and preventing the government from forcing a defendant to testify against himself); *id.* amend. VI (granting a right to a jury trial in criminal cases).
260. All told, those two documents guarantee a person twenty specific pretrial and trial-related rights in the criminal process. Article I forbids Congress (1) from retroactively punishing someone for conduct that was legal at the time it occurred by prohibiting an *ex post facto* law—viz., a new offense applicable retroactively—and (2) from skipping the trial process altogether by passing a bill of attainder—viz., a legislative declaration that a particular individual is guilty of a crime. *Id.* art. I, § 9, cl. 3. Article III guarantees a defendant prosecuted in federal court (3) the right to a jury trial in the state where the offense was committed. *Id.* art. III, § 2, cl. 3. The Bill of Rights goes considerably further, offering a host of pretrial and trial-level protections to a defendant. (4) A person cannot be arrested for a crime unless there is probable cause to believe that he committed it. *Id.* amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

By contrast, the Constitution and Bill of Rights do *not* guarantee anyone a right to obtain a *second opinion* from a different judge about the legality of a judgment or conviction. Or, to use contemporary terminology, the Constitution does not guarantee a convicted offender a right to *appeal* his or her conviction or sentence to an appellate court, including the Supreme Court, or to seek *postconviction review* of a final judgment. Article III created a Supreme Court of the United States²⁶¹ and specifies its original jurisdiction.²⁶² Yet that authority does not include the “Trial of . . . Crimes,”²⁶³ and Congress cannot enlarge the Supreme Court’s limited original jurisdiction.²⁶⁴ Federal criminal trials therefore must occur elsewhere. The Framers left it to Congress to

the place to be searched, and the persons or things to be seized.”). (5) If he is detained in custody pending trial, excessive bail cannot be imposed to prevent his release. *Id.* amend. VIII (“Excessive bail shall not be required . . .”). (6) Whether or not released on bail, he cannot be brought to trial for a felony or other serious charge until a grand jury has indicted him. *Id.* amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .”). The government cannot criminally punish him unless and until (7) he has been convicted of breaking the law (8) on a charge made known to him before he is brought to a (9) speedy and (10) public (11) trial (12) by an impartial (13) jury (14) based on testimony by witnesses he may confront (15) and which he may rebut by offering his own witnesses, a trial (16) at which he cannot be compelled to testify against himself and (17) where he can be represented and assisted by a lawyer. *Id.* amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”); *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”). If he is convicted (18) no sentence can be “cruel and unusual” and (19) he cannot be re-prosecuted for the same offense, (20) which also applies if he is acquitted. *Id.* amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”); *id.* amend. VIII (“N[or] [shall] cruel and unusual punishments [be] inflicted.”).

261. *Id.* art. III, § 1 (“The Judicial Power of the United States shall be vested in one supreme Court . . .”).

262. *Id.* art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

263. *Id.* art. III, § 2, cl. 3 (quoted *supra* note 260).

264. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

decide where that would be because they granted Congress the authority to decide what lower federal courts to establish and what jurisdiction to vest in them.²⁶⁵ Article III contemplates that Congress might create lower federal courts, some of which might have appellate jurisdiction similar to what Congress could grant the Supreme Court,²⁶⁶ and perhaps even the post-conviction review that the AEDPA's critics desire. But there is no guarantee of that outcome. Most important for present purposes, the Constitution and Bill of Rights are utterly silent on the issue whether a state must have an appellate or collateral review system of any type.

The Actions of the First and Later Congresses.—The Framers had a very different review mechanism in mind. They would have been quite aware of the possibility of erroneous convictions or unjust sentences because the English Crown often used its clemency power to correct such mistakes.²⁶⁷ The Framers followed the English approach. Rather than create an appellate process in Article III, they vested the President with the power to grant pardons or reprieves in Article II.²⁶⁸ That was the longstanding tradition in Anglo-American common law: executive clemency was the criminal-justice system “fail safe,” not post-conviction judicial review.²⁶⁹ The Framers carried that tradition forward, while

265. See U.S. CONST. art. III, § 1 (“The Judicial Power of the United States shall be vested in . . . such inferior Courts as the Congress may from time to time ordain and establish.”).

266. *Id.*

267. See, e.g., Paul J. Larkin, Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL’Y 451, 476–77 (2021) (“[K]ings often granted clemency because of the primitive state of the substantive criminal law. Through the 15th century, the common law deemed all homicides capital crimes, regardless of their circumstances. The common law drew no distinction between murder and excusable or justifiable homicide, nor did it exempt killings attributable to actions by children or the insane. Because all felonies were capital crimes, the royal prerogative of mercy served as the only means of ‘flexibility.’ Murderers who acted in cold blood ordinarily went to the gallows, but not everyone responsible for a homicide faced the hangman; the king pardoned morally blameless parties, oftentimes on the recommendation of the trial judge, to spare them from the gallows, as well as defendants whom a trial judge thought might have been mistakenly convicted. Kings were merciful to small-scale thieves and pickpockets.” (footnotes omitted)).

268. U.S. CONST. art. II, § 2, cl. 1 (“The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”). The Framers would have known that the English Crown was under no obligation to grant clemency, and their succinct and bland phrasing of the Pardon Clause suggests that they intended to carry forward the English tradition. See, e.g., Larkin, *supra* note 267, at 475–78.

269. *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (quoting KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989)).

also leaving to Congress the decision whether to have appellate review in federal criminal cases.

The First Congress took some initial steps to establish a federal criminal-justice system. It passed a law creating the original federal court system—the Judiciary Act of 1789²⁷⁰—and adopted the initial federal criminal statute—the Crimes Act of 1790.²⁷¹ Neither act, however, created a right to appeal a judgment of conviction.²⁷² In fact, Congress did not establish a general right to appeal a federal conviction even in capital cases until 1889,²⁷³ and it was another two years before Congress extended that right to noncapital cases.²⁷⁴ To be sure, § 14 of the First Judiciary Act did grant federal courts the power to issue writs of habeas corpus. But it exempted cases in which a petitioner was in custody pursuant to a judgment of conviction.²⁷⁵ In so doing, Congress incorporated the common law governing habeas corpus, as Chief Justice John Marshall later explained in *Ex parte Watkins*.²⁷⁶ And, once again,

270. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (“An Act to establish the Judicial Courts of the United States.”).

271. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (“An Act for the Punishment of certain Crimes against the United States.”).

272. See, e.g., *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830); *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 42 (1822); *United States v. More*, 7 U.S. (3 Cranch) 159, 172–74 (1805); *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 299 (1796) (“[I]n all criminal causes, whether the trial is by a jury, or otherwise, the judgment of the District Court is final.”).

273. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656 (“An act to abolish circuit court powers of certain district courts of the United State, and to provide for writs of error in capital cases, and for other purposes.”). Previously, the Supreme Court could review a federal criminal case only if there was a split opinion on a question of law in the circuit court. Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159 (“An Act to amend the Judicial System of the United States.”); Act of June 1, 1872, ch. 255, § 1, 17 Stat. 196, 196 (“An Act to further the Administration of Justice.”).

274. Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891).

275. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (“That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, (e) and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same; or are necessary to be brought into court to testify.”).

276. 28 U.S. (3 Pet.) 193, 202–03 (1830) (“This writ is, as has been said, in the nature of a writ of error which brings up the body of the prisoner with the cause of commitment. The court can undoubtedly inquire into the

neither the Judiciary Act of 1789²⁷⁷ nor the Crimes Act of 1790²⁷⁸ told the states how to define their penal codes or structure their judicial systems.

Given that history, it should come as no surprise that the Supreme Court has never required the federal government, let alone the states, to guarantee a convicted offender a right to challenge a trial court's judgment by appeal or a postconviction process. There also is more than the Court's silence to buttress that point. In 1894, the Court held in *McKane v. Durston*²⁷⁹ that a defendant has no right to state appellate review of his conviction in a criminal case, explaining that appellate review, regardless of the gravity of the offense or severity of the penalty, was not required at common law and is not a prerequisite of due process.²⁸⁰ The Court applied that ruling to a capital case in *Andrews v.*

sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered. A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it."); *id.* at 207 ("The cases are numerous, which decide that the judgments of a court of record having general jurisdiction of the subject, although erroneous, are binding until reversed. It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us to settle the question now before the court. The judgment of the circuit court in a criminal-case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We cannot usurp that power by the instrumentality of the writ of habeas corpus. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied."); *see also* *Kearney*, 20 U.S. (7 Wheat.) at 41-42; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807).

277. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (1789) ("An Act to establish the Judicial Courts of the United States.").

278. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (1790) ("An Act for the Punishment of certain Crimes Against the United States.").

279. 153 U.S. 684 (1894).

280. *Id.* at 687 (quoted *supra* note 255).

Swartz the following year,²⁸¹ and the Court reaffirmed it, in both criminal and civil cases, on numerous occasions over the ensuing century.²⁸² In its most recent affirmation, the Court wrote in *Goeke v. Branch*²⁸³ in 1995 that “due process does not require a State to provide appellate process at all.”²⁸⁴ To be sure, neither the federal government nor a state may arbitrarily deny a convicted offender, because of indigency, the ability to take advantage of whatever appellate rights the government has created.²⁸⁵ Yet there is no obligation for either government to create a postconviction process in the first place. It thus makes no sense to construe the bare terms of the Suspension Clause to impose such an obligation on Congress.

* * * * *

Where does that leave the Suspension Clause argument? It ultimately requires the 1867 federal habeas statute, as construed in *Brown v. Allen*, to be treated as a ratchet that Congress can only expand. The AEDPA certainly limits the scope of review adopted in *Brown v. Allen*, so, the argument goes, that act is unconstitutional. That argument, however, conflates the 1867 act of Congress with the Due Process Clause. Yes, Congress cannot amend the Constitution by statute or overturn the Supreme Court’s constitutional interpretations

281. 156 U.S. 272 (1895).

282. *See, e.g.*, *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Abney v. United States*, 431 U.S. 651, 656 (1977); *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion); *Estelle v. Dorough*, 420 U.S. 534, 536 (1975) (per curiam); *Ross v. Moffitt*, 417 U.S. 600, 611 (1974); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (per curiam); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion); *id.* at 21 (Frankfurter, J., concurring); *Nat’l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 42 n.6 (1954); *Brown v. Allen*, 344 U.S. 443, 486 n.36 (1953); *Carter v. Illinois*, 329 U.S. 173, 175 (1946); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *Willis v. Tennessee*, 296 U.S. 533, 533 (1935) (per curiam); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930); *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 536 (1926); *Frank v. Mangum*, 237 U.S. 309, 327 (1915); *Reetz v. Michigan*, 188 U.S. 505, 508 (1903); *Murphy v. Massachusetts*, 177 U.S. 155, 158 (1900); *Kohl v. Lehlback*, 160 U.S. 293, 297 (1895).

283. 514 U.S. 115 (1995) (per curiam).

284. *Id.* at 120 (citing *McKane*, 153 U.S. at 687).

285. *See, e.g.*, *Douglas v. California*, 372 U.S. 353, 356–57 (1963) (ruling that the state must provide an indigent defendant with appointed counsel for his first appeal as of right); *Griffin*, 351 U.S. at 17–19 (1956) (ruling that the state must provide an indigent offender a free trial transcript if it conditions the filing of an appeal on the filing of the trial transcript).

by law.²⁸⁶ But the Supreme Court's decision in *Brown v. Allen* held only that the 1867 act permitted a plenary second review in habeas corpus, not that the Due Process Clause required it. The Court had rejected that proposition in 1894 in *McKane v. Durston* and reaffirmed *McKane* in *Goeke v. Branch* the year before Congress adopted the AEDPA. Accordingly, Congress was free to reject the Supreme Court's interpretation of an act of Congress by adopting a new statute reflecting its view as to what the law should be.²⁸⁷

As a result, the Suspension Clause would not forbid Congress from limiting federal habeas review to its common-law roots: an inquiry into the jurisdiction of the court that entered a custodial order to prevent federal or state executive detention. The history of habeas corpus showed that the writ was so limited at common law. The structure established by the Constitution and the First Congress carried forward the principle that the chief executive, not uncreated and unidentified appellate courts, had the responsibility for any review of the legality of a judgment of conviction. The AEDPA does not go so far as to return habeas review to its state in 1789; it permits the federal courts to review the reasonableness of a state court's rulings, and that is significant. Prisoners have obtained relief under the AEDPA,²⁸⁸ and they will continue to do so if there are "extreme malfunctions" in the state criminal-justice systems.²⁸⁹ That is more than the Suspension Clause requires.

2. The Article III Judicial Power Clause

A more interesting issue is whether the AEDPA violates the Article III Judicial Power Clause. The clause provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and

286. *See, e.g.,* *City of Boerne v. Flores*, 521 U.S. 507, 512–19 (1997) (explaining that Congress could not overturn the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), via the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb–4)).

287. *See, e.g.,* Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. Law. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc to 2000cc-5); *Holt v. Hobbs*, 574 U.S. 352, 356–58 (2015) (explaining the provenance of RLUIPA in response to the Supreme Court's decision in *Flores*).

288. *See, e.g.,* *Sears v. Upton*, 561 U.S. 945, 946 (2010); *Porter v. McCollum*, 558 U.S. 30, 44 (2009); *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Wiggins v. Smith*, 539 U.S. 510, 537–38 (2003); John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 276–79 (2006) (examining pre- and post-AEDPA habeas cases and finding that "a habeas petitioner's overall success rate did not significantly change after AEDPA came into effect").

289. *Davis v. Ayala*, 576 U.S. 257, 276 (2015) (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring))).

in such inferior Courts as the Congress may from time to time ordain and establish.”²⁹⁰ By barring the federal courts in most cases from performing an independent review of a state prisoner’s constitutional claim, the argument goes, the AEDPA imposes an anomalous standard of review on the federal courts’ analysis of a habeas petitioner’s constitutional claims. Plenary review is the norm. A state trial court would independently examine the merits of a defendant’s challenge to the legality of his arrest and charges against him, as well as to the jury’s guilty verdict; a state appellate court would undertake the same review on a convicted offender’s direct appeal; and U.S. district and circuit courts would do likewise in a criminal case brought in federal court. In each instance, the court would review *de novo* an offender’s claim without deferring to the judgment of antecedent decisionmakers, such as the arresting officer, prosecutor, or trier of fact.²⁹¹ By contrast, the AEDPA forecloses that re-examination when a federal court evaluates a state-court judgment of conviction. All that a federal court may do is decide whether the state court’s ruling is “reasonable.”²⁹² If the court so finds, the AEDPA directs it to accept the state bench’s ruling even if the federal court would have decided the matter differently as an initial matter. Accordingly, the argument goes, the question is whether, by so limiting a federal court’s scope of review, the AEDPA violates the Article III “judicial Power” Clause. Critics answer that question in the affirmative on the ground that Congress cannot direct a federal court to enter a judgment that the court believes is wrong.²⁹³

That argument is clever, but unpersuasive.

The text and history of Article III establish two premises for that argument. First, it has been settled law since *Marbury v. Madison*²⁹⁴ that, as part of the judicial power, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”²⁹⁵ Second, “the Framers crafted this charter of the judicial department with an

290. U.S. CONST. art. III, § 1.

291. *See supra* notes 28–37 and accompanying text.

292. *See supra* notes 114–43 and accompanying text.

293. *See, e.g.*, *Cobb v. Thaler*, 682 F.3d 364, 373–75 (5th Cir. 2012) (noting but rejecting that argument); James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 418 (2001) (“Sometimes . . . a federal court will have jurisdiction to review a state court decision of law, will conclude that the decision violated supreme federal law, and yet will be required to give legal effect to that illegal decision, including where the effect is a human being’s execution.”). For a summary of the argument, see generally James S. Liebman & William F. Ryan, *“Some Effectual Power”: The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

294. 5 U.S. (1 Cranch) 137 (1803).

295. *Id.* at 177.

expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them,” as the Court held in *Plaut v. Spendthrift Farm, Inc.*,²⁹⁶ “subject to review only by superior courts in the Article III hierarchy”²⁹⁷ To that extent, the critics are correct. Where they go wrong, however, is in not giving effect to several closely related provisions: the Exceptions Clause of Article III,²⁹⁸ the Full Faith and Credit Clause of Article IV,²⁹⁹ the Supremacy Clause of Article VI,³⁰⁰ and the Ratification Article (Article VII).³⁰¹

The Ratification Article recognizes the antecedent lawful existence of the states, because the assent of nine states was necessary for the Constitution to take effect (and only as to the states ratifying it), while the Full Faith and Credit Clause, along with the Supremacy Clause, explicitly recognizes that there will be state judiciaries parallel to the federal bench, because those clauses refer to “Judges in every State” and “judicial Proceedings of every other State.”³⁰² The Exceptions Clause grants Congress the greater power to decide whether or not to create lower federal courts and what jurisdiction those courts should possess.³⁰³ Together, those clauses permit Congress to allocate to the state courts the authority to review federal claims except insofar as Article III might require the Supreme Court to hear a case within its original jurisdiction. That greater power logically includes the lesser power to decide what jurisdiction those inferior federal courts may

296. 514 U.S. 211 (1995).

297. *Id.* at 218–19.

298. U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

299. *Id.* art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

300. *Id.* art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

301. *Id.* art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

302. *See id.* art. VII; *id.* art. IV, § 1; *id.* art. VI.

303. *Id.* art. III, § 2, cl. 2.

exercise.³⁰⁴ In particular, denying the federal courts any authority to second-guess a state court's ruling on an issue of federal law—or, what is the same thing, not vesting federal habeas corpus authority in the lower federal courts to review state-court judgment in criminal cases—does not offend the values underlying the Judicial Vesting Clause. The reason is that the cognate Full Faith and Credit Clause contemplates that one full and fair opportunity to litigate a claim, whether based on federal or state law, is all that the Constitution demands.³⁰⁵

It is of no moment that a state court might have decided the federal question erroneously. Otherwise, the clause would hardly protect the certainty and stability of each state's judgments because a party could always challenge them as mistaken in a new lawsuit.³⁰⁶ Allowing only "correctly" decided judgments to have binding effect simply invites the very type of relitigation that the Full Faith and Credit Clause sought to stave off.

304. Generally, any "greater includes the lesser" argument contains an implicit exception for distinctions or discriminations that violate an independent clause of the Constitution, such as discrimination under the First Amendment. *See* Scheidegger, *supra* note 3, at 953–56. That implicit exception is inapplicable here, given that Congress did not grant the federal courts *any* authority to review state court criminal judgments until 1867. *See* Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

305. *See* Scheidegger, *supra* note 3, at 916–17.

306. *See* *Angel v. Bullington*, 330 U.S. 183, 187 (1947) ("That the adjudication of federal questions by the North Carolina Supreme Court may have been erroneous is immaterial for purposes of *res judicata*."); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927) ("[T]he cause of action was one and indivisible, and the erroneous conclusion to the contrary cannot have the effect of depriving the defendants in the second action of their right to rely upon the plea of *res judicata*. Plaintiff's claim for damages having been submitted and passed upon, the effect of the judgment in the admiralty case as a bar is the same whether resting upon an erroneous view of the law or not. A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause."); *cf.* *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398–99 (1981) (holding that, under federal law, *res judicata* applies even if the judgment is later shown to be erroneous).

3. The Fifth Amendment Due Process Clause

The last challenge is that the AEDPA violates the Fifth Amendment Due Process Clause.³⁰⁷ The argument, again, is that the act directs federal courts to enforce a judgment those courts might firmly believe rests on an erroneous interpretation of federal law or on a mistaken application of the law to the facts in the habeas petitioner's case. At bottom, however, that claim is just an effort to recast a Suspension or Judicial Vesting Clause contention as a due-process concern. Regardless, the Due Process Clause also does not guarantee de novo federal habeas corpus review.

The short answer to that claim is that, as explained above, the Fourteenth Amendment Due Process Clause does not require that a state have an appellate or collateral review process of its own.³⁰⁸ That makes it implausible to believe that the identically worded Fifth Amendment Due Process Clause would demand that the *federal sovereign* establish such a review process for the judgments of a *different state sovereign* as a prerequisite for the latter's judgments to be valid.³⁰⁹ That is particularly true given that, according to the Ratification Article, the states possess their own independent sovereignty separate from and anterior to that of the federal government. Besides, a state offender already has the opportunity for review by an Article III court of his or her federal claims: a state offender can petition the Supreme Court to review them.³¹⁰ Yes, the Supreme Court has discretion, not a duty, to decide whether to grant certiorari to review a state defendant's claims. But Article III expressly left to Congress the authority to decide

307. See *infra* notes 308–14 and accompanying text. See also Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 900–06 (1994) (a pre-AEDPA article arguing that the Fourteenth Amendment Due Process Clause incorporated the Article I Suspension Clause). Professor Steiker also argues that habeas corpus could be guaranteed as a privilege or immunity of national citizenship protected by the Privileges or Immunities Clause of § 1 of the Fourteenth Amendment. *Id.* at 888–89. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–79 (1873), forecloses reliance on that provision.

308. See *supra* notes 273–85 and accompanying text.

309. See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1515–16 (2020) (“[F]rom the beginning of the Constitution, it has been accepted that not every case that *can* be decided by the federal courts must be decided *only* by the federal courts. Most obviously, Article III leaves in place the systems of state courts, which are constituted independently of the federal judiciary, and whose judges are appointed, tenured, and compensated outside of Article III’s rules. These courts generally have concurrent authority to hear cases arising under federal law, to hear cases between citizens of different states, and so on — even though state court judges are nowhere to be found in Article III.”).

310. See 28 U.S.C. § 1257.

what, if any, appellate jurisdiction the Court should have in criminal cases.³¹¹ It would be nonsensical to construe one constitutional provision implicitly to deny Congress the authority that a different provision expressly grants it.

Any due-process claim ultimately rests in part on the belief that leaving the adjudication of federal claims to non-federal judges—viz., judges without the tenure and salary protections Article III affords—poses a risk and an oddity. The risk is that state judges are far less likely than federal judges to respect constitutional guarantees that could result in the freeing of an obviously guilty defendant, one that is also a “bad guy” to boot. The oddity is that, outside of court-martial for servicemembers (a historical exception),³¹² Congress cannot assign criminal cases to a non-Article III decisionmaker,³¹³ so it follows that the Constitution must guarantee some form of federal-court review. Supreme Court review by certiorari is discretionary, so there must be some other guaranteed mechanism, with review by an Article III Court filling that role.

To understand why this challenge fails, start with the text of the Fourteenth Amendment’s Due Process Clause.³¹⁴ Its simple but Delphic text hardly affords a habeas petitioner a right to relitigate on collateral attack the issues underlying a state-court judgment. The text of the clause says nothing remotely about appellate or collateral review. Besides, as a matter of cross- or intra-textual interpretation,³¹⁵ the Due Process Clause must be read consistently with the Full Faith and Credit Clause, which contemplates that the state interest in the finality of the judgments entered by its courts also merits express and equal constitutional protection.³¹⁶

311. See U.S. CONST. art. III, § 2, cl. 3 (quoted *supra* note 258).

312. See Baude, *supra* note 309, at 1516.

313. See *McElroy v. Guagliardo*, 361 U.S. 281, 286–87 (1960) (ruling that civilian employees of the armed forces stationed overseas cannot be tried by court-martial); *Kinsella v. Singleton*, 361 U.S. 234, 248 (1960) (ruling that a civilian dependent of a servicemember stationed overseas cannot be tried before a military court-martial); *Toth v. Quarles*, 350 U.S. 11, 22–23 (1955) (ruling that discharged servicemembers cannot be tried before a military court-martial for alleged in-service offenses); *cf. Gomez v. United States*, 490 U.S. 858, 859–60, 876 (1989) (narrowly construing the Federal Magistrate’s Act to bar a magistrate from conducting voir dire over a defendant’s objection).

314. U.S. CONST. amend. XIV, § 1.

315. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

316. If priority in time matters in constitutional interpretation, the Full Faith and Credit Clause predates the Due Process Clause, signifying that the Framers saw no problem with leaving to the Supreme Court the responsibility to police the state court’s interpretation and application of federal law as Congress would decide.

History also does not assist critics. The Due Process Clause traces its lineage to a 14th-century act of Parliament, stating that “[n]o Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.”³¹⁷ That provision, in turn, is the lineal offspring of Chapter 39 of Magna Carta of 1215, which provided that “[n]o free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.”³¹⁸ Chapter 39 prohibited King John from arbitrarily depriving someone of life, liberty, or property by requiring that any such action be done in accordance with, as Coke put it, “the Common Law, Statute Law, or Custome of England.”³¹⁹ In short, the modern-day Due Process Clause was designed, in the Supreme Court’s words, simply “to secure the individual from the arbitrary exercise of the powers of government.”³²⁰ To achieve that result, the Court has created an elaborate series of procedural rules governing the pretrial and trial processes,³²¹ to say nothing of “the vast, complex, and ‘annually improvised’ web of procedural rules for capital sentencing recently discovered in the Eighth Amendment, which was a purely substantive rule for the first 180 years after its enactment.”³²²

Finally, in *Allen v. McCurry*³²³ the Supreme Court squarely rejected the argument that a party has a constitutional right to have a federal court consider a federal constitutional claim.³²⁴ *Allen* was a damages action brought in federal court under 42 U.S.C. § 1983 against the arresting officers. Barred from raising a Fourth Amendment claim in federal court by virtue of the Supreme Court’s decision in *Stone v.*

317. Liberty of Subject Act 1354, 28 Edw. 3 ch. 3.

318. HOLT, *supra* note 236, at 33–34; *see also* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 15 (rev. ed. 1998) (“[A]s early as 1354 the words ‘due process’ were used in an English statute interpreting Magna Carta, and by the end of the 14th century ‘due process of law’ and ‘law of the land’ were interchangeable.”); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911). The English Petition of Right of 1628 reaffirmed the 1354 act and again used the term “due process of law,” instead of “the law of the land.” LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 4 (1999).

319. COKE, *supra* note 237, at 45.

320. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)).

321. *See supra* notes 52–62 and accompanying text.

322. Scheidegger, *supra* note 3, at 941 (footnote omitted) (quoting *Morgan v. Illinois*, 504 U.S. 719, 751 (1992) (Scalia, J., dissenting)).

323. 449 U.S. 90 (1980).

324. *Id.* at 105.

Powell,³²⁵ McCurry sought to relitigate in a tort action the merits of a search-and-seizure claim that the state courts had rejected in his criminal prosecution.³²⁶ The court of appeals had ruled in McCurry's favor, on the ground that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises."³²⁷ The Supreme Court disagreed with his premise, finding that "the authority for this principle is difficult to discern," since neither the Constitution nor § 1983 guaranteed it.³²⁸ On the contrary, Article III "leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress,"³²⁹ and nothing in the text or legislative history of § 1983 gave the Court "reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all."³³⁰ Accordingly, *Allen* disposes of any remaining claim that the Due Process Clause guarantees federal habeas corpus review.³³¹

CONCLUSION

There is no doubt that habeas corpus has long been a valuable remedy to prevent unjustified executive detention. That was true even when the only issue that could be considered was whether someone was unjustly confined before trial or after being convicted of an offense at a proceeding that was not the trial American law has come to expect. The problem is that, just as too much of any medication can injure a patient, too much relitigation can impair the state criminal-justice system. The Supreme Court expanded the scope of habeas corpus from late in the 19th century through the 1960s in response to its belief that the state criminal-justice systems were a dystopia, principally due to racial discrimination. Circumstances, however, have changed. There is no longer a persuasive reason to believe that state judges cannot be trusted to know and fairly apply federal law because they are

325. 428 U.S. 465, 494 (1976) (ruling that a state prisoner cannot raise a Fourth Amendment claim to get federal habeas corpus relief when the defendant had an opportunity to fully litigate the Fourth Amendment claim in state court).

326. *McCurry*, 449 U.S. at 91.

327. *Id.* at 103.

328. *Id.*

329. *Id.*

330. *Id.* at 104.

331. Scheidegger, *supra* note 3, at 913–14.

irredeemably, or even presumptively, racist, or that state law enforcement officers will regularly engage in practices that would make a KGB officer blanch. Reasonable people can disagree over what should be the correct rule of law or how it should apply to the facts in a particular case; the AEDPA simply enacted that principle into law. Its reasonableness standard is both reasonable and constitutional.