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## NOTES

# UNREASONABLY WRONG: THE SUPREME COURT'S SUPREMACY, THE AEDPA STANDARD, AND *CAREY V. MUSLADIN*

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*“Trial by jury is not an instrument of getting at the truth; it is a process designed to make it as sure as possible that no innocent man is convicted.”*<sup>1</sup>

### I. INTRODUCTION

Plenty of injustices go judicially unresolved. On the Supreme Court's docket, however, injustices in the criminal context have become alarmingly perfunctory, and the cause is a single procedural mechanism: a piece of legislation passed in 1996 called the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). Though in effect for more than ten years now, two representative cases serve to demonstrate the enormous power of the AEDPA. First, in 2001, a man named Leandro Andrade, a repeat nonviolent thief who stole \$150 worth of videotapes from a California big-box store, received a prison sentence of fifty years.<sup>2</sup> In 2003, the Supreme

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1. Lord Devlin, *The Criminal Trial and Appeal in England*, Address at the University of Chicago for the Third Dedicatory Conference (Jan. 1960), in HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* 190 (1966).

2. *Lockyer v. Andrade*, 538 U.S. 63, 66–68 (2003). See also Erwin Chemerinsky, *Cruel and*

Court, in a 5-4 decision, declined Andrade's petition for habeas corpus without ever reaching the merits of his claim that his sentence was excessive under the Eighth Amendment.<sup>3</sup> In the second case, a seventeen-year-old boy named Michael Alvarado, who was suspected of participating in a car hijacking that led to the murder of the car's driver, was subjected to a two-hour police station interrogation without *Miranda* warnings.<sup>4</sup> Though he steadfastly denied involvement at first, the boy eventually broke down and confessed. In 2004, the Supreme Court, in another 5-4 decision, declined his petition for habeas corpus,<sup>5</sup> likewise never reaching the merits of his claim that youth should have been a factor in evaluating whether he was in police custody and therefore deserved *Miranda* warnings. In both these representative cases the Court never reached the merits, and therefore never decided the interesting questions. The Supreme Court did not decide in *Andrade* whether fifty years for \$150 worth of videotapes was excessive under the Eighth Amendment, nor did the Supreme Court decide in *Alvarado* whether a seventeen-year-old boy, who was interrogated alone by sheriffs for two hours, was in police custody for purposes of *Miranda*. To some, such decisions may have been indefensible.<sup>6</sup> Yet because of the AEDPA, the Court never had to make such decisions. Instead, the Court ruled that the respective state court decisions—fifty years for minor theft in *Andrade* and no consideration of youth in *Alvarado*—had not violated “clearly established” Supreme Court law as required by section 2254(d)(1) of the AEDPA when granting habeas relief.<sup>7</sup> As this Note will show, this is the procedural habeas corpus mechanism whereby injustices occur: the AEDPA.

Because such habeas denials are commonplace, there was hardly a stir when in 2006 a now-unanimous Supreme Court used the same procedural device in declining to grant habeas relief to Mathew Musladin.<sup>8</sup> Musladin claimed—in *Carey v. Musladin*, the focus of this Note—that the family of his alleged victim wore photo buttons to his murder trial, and that these photo buttons cost him the impartial jury to which he was constitutionally entitled. The Supreme Court decision, which shirked Musladin's claim much as it had shirked Andrade's and Alvarado's, was perceived by most

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*Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1 (2003–04).

3. *Andrade*, 538 U.S. at 77.

4. *Yarborough v. Alvarado*, 541 U.S. 652, 655–60 (2004). *See* *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

5. *Yarborough*, 541 U.S. at 665–66.

6. *See* Chemerinsky, *supra* note 2, at 22–24.

7. *Andrade*, 538 U.S. at 77; *Yarborough*, 541 U.S. at 655.

8. *Carey v. Musladin*, 127 S. Ct. 649, 651 (2006).

as yet another blip on the Court's unwavering trajectory of diminishing habeas relief.<sup>9</sup> This Note however, will argue that such a perception is distorted, and that in some less than obvious ways, *Musladin* was a rather profound departure from established Supreme Court reasoning and from the justifications that support habeas relief in the first place. Put most simply, Andrade and Alvarado—along with other similarly situated defendants—were guilty. After admitting their guilt, they had argued collateral points: that the punishment imposed because of their guilt was too steep, or that the method of ascertaining their guilt was too crafty. Musladin argued a wholly different point. He argued that the process by which his guilt was determined, the reason for which he would be punished, was fundamentally flawed. In essence, he argued that his guilt was in doubt. Because potential innocence is (at least potentially) a much more serious problem, the judicial system should have been more responsive to his claim. This Note takes up why it was not and how it could have been.

Part II introduces *Carey v. Musladin*, describing the facts, the important prior precedent, and the decisions in the case. It also includes a short substantive response to the Supreme Court's majority opinion, therein exposing some shortcomings in the majority's legal reasoning. Part III explores the three historical justifications for the writ of habeas corpus, and asks how the Court has accepted, rejected, or otherwise responded to these justifications. This section argues that the Court rejected the first historical justification, but has on some level adopted the other two. Part IV discusses the story of the AEDPA, both the story of its inception by Congress in 1996 and its subsequent interpretation by the Court. Part V, relying on an understanding of how the AEDPA works, discusses the constitutionality of the AEDPA. The section highlights three areas of constitutional concern surrounding the statute: habeas-specific problems such as the Suspension Clause problem, broader separation of powers problems, and federalism problems. We see how the separation of powers and the federalism issues are made especially invidious in the context of *Musladin*. Part VI returns directly to *Musladin* in order to explore the concurrences by Justices Kennedy and Souter. This section argues that Justice Kennedy's concurrence is unrealistically optimistic about the AEDPA's interaction with prior precedent, and that Justice Souter's concurrence is confused about the type of deference the AEDPA affords to state court decisions.

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9. See Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (listing *Musladin* as one of many Supreme Court cases that signaled a small step to the right, and in the field of habeas corpus, a step toward restrictive collateral review).

Part VII argues that, despite appearances to the contrary, *Musladin* does not align with the trajectory of the Court. This is because *Musladin* fails to respond to doubts about the accuracy of the defendant's guilt determination. Finally, Part VII concludes that while the Supreme Court would be wise to declare the AEDPA unconstitutional for any number of reasons, it is clearly inapt to do so. Therefore, the Court ought to renounce some of the positions implicitly adopted in *Musladin*. That is, it ought to announce that lower courts may ascribe ordinary stare decisis effect to all cases; it ought to reopen the exceptions that protected against convicting the innocent; and lastly, it ought to defer to the reasoning in the state court opinion, but not to the result.

## II. CAREY V. MUSLADIN

### A. THE FACTS

On May 13, 1994, Mathew Musladin shot and killed Tom Studer, the fiance of his estranged wife, outside a house in San Jose, California.<sup>10</sup> His wife lived in the house along with her brother and Studer.<sup>11</sup> According to witnesses, Musladin fired two bullets.<sup>12</sup> The first hit Studer in the shoulder, and as Studer retreated to the garage and hid beneath a truck, the second, a ricochet shot, hit him in the head and killed him instantly.<sup>13</sup> Shortly before, Musladin had arrived in order to pick up his three-year-old son for a scheduled weekend visit.<sup>14</sup> He and his wife quarreled, he pushed her to the ground, she cried out, and her fiance and her brother emerged from the house.<sup>15</sup> At trial, Musladin claimed that the fiance and the brother emerged carrying a gun and a machete respectively, but this much is unclear.<sup>16</sup> What is clear is that Musladin reached into his car, grabbed a gun, and fired two shots in Studer's direction.

At the 1995 trial, Musladin argued both perfect and imperfect self-defense, that he had fired out of fear for his own life. But after a fourteen-day trial, the jury convicted him of first-degree murder and three related

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10. David G. Savage, *The Nation: Victim-photo Ruling Is Reversed*, L.A. TIMES, Dec. 12, 2006, at A16.

11. *Musladin v. LaMarque*, 427 F.3d 653, 654 (9th Cir. 2005), *rev'd sub nom. Carey v. Musladin*, 127 S. Ct. 649 (2006).

12. *Morning Edition: Supreme Court Hears Case on Photos of Victim* (NPR radio broadcast Oct. 11, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6246103>.

13. *Musladin v. LaMarque*, 427 F.3d at 661–62 (Thompson, J., dissenting).

14. *Id.* at 661.

15. *Id.*

16. *Id.* at 654 (majority opinion).

offenses.<sup>17</sup> By all these descriptions, this was a fairly routine, if intriguing, murder case, but what distinguishes it, and what matters for the purposes of this Note, is what occurred in the courtroom.

A contingent of Tom Studer's family attended the trial and sat in the front row of the spectators' gallery, in clear view of the jury.<sup>18</sup> On at least some of the fourteen days of trial, members of Studer's family wore buttons that featured a photograph of Studer.<sup>19</sup> Musladin's counsel objected to the content of the buttons and, before opening arguments, moved to order the family members to remove them.<sup>20</sup> The trial judge inspected the buttons and denied the motion, recognizing "no possible prejudice to the defendant."<sup>21</sup>

Considering that the Studer buttons constitute the heart of Musladin's habeas petition, and the heart of this Note, there exists remarkable ambiguity regarding the buttons—what they looked like, who wore them, and when. As Justice Thomas writes, "the record contains little concrete information about the buttons."<sup>22</sup> According to the defendant, the buttons were "several inches in diameter and 'very noticeable.'"<sup>23</sup> The Ninth Circuit dissent figured the buttons to be "three to four inches in diameter."<sup>24</sup> After oral arguments at the Supreme Court, National Public Radio reported that the buttons had been just two inches across.<sup>25</sup> In its opinion, the Supreme Court described them as two to four inches in breadth,<sup>26</sup> without pausing to acknowledge that a four-inch circular button has four times the surface area of a two-inch circular button. That increased surface area could perhaps bridge the gap between the illegible and the "very noticeable." Still, what was on the button is in no dispute. Although Tom Studer was never a uniformed officer and although he used methamphetamine until the day he died, the buttons featured a photo of Tom Studer in his Navy uniform smiling.<sup>27</sup> The buttons featured no writing

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17. Carey v. Musladin, 127 S. Ct. 649, 651 (2006).

18. Musladin v. LaMarque, 427 F.3d at 655.

19. Carey v. Musladin, 127 S. Ct. at 651.

20. *Id.* at 651–52.

21. *Id.* at 652.

22. *Id.* at 651 n.1.

23. Musladin v. LaMarque, 427 F.3d at 655.

24. *Id.* at 662 (Thompson, J., dissenting).

25. *Morning Edition*, *supra* note 12.

26. Carey v. Musladin, 127 S. Ct. at 651 n.1.

27. *All Things Considered: Court Hears Arguments on "Victims Buttons"* (NPR radio broadcast Oct. 11, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6248521> (relating defense counsel's depiction of Tom Studer).

whatsoever.<sup>28</sup>

Exactly when the buttons were worn, and by whom, is of some mild yet fairly irrelevant controversy. The Ninth Circuit asserted that on each day of trial, at least three members of Studer's family wore the buttons on their shirts.<sup>29</sup> The Supreme Court majority treaded with more trepidation, writing that "on at least some . . . days . . . some members" wore them, and adding in a footnote, "[i]t is not clear how many family members wore the buttons or how many days of the trial they wore them."<sup>30</sup> National Public Radio's version strayed even further from the Ninth Circuit's, reporting a family member's claim that, after consulting with the prosecutor mid-trial, the family decided to remove the buttons in order to avoid jeopardizing a verdict.<sup>31</sup> In any event, the Supreme Court's analysis is probably soundest. The record amply demonstrates that at least some family members wore the buttons on some days.

#### B. IMPORTANT SUBSTANTIVE PRECEDENT

After contending that the buttons deprived him of his Sixth Amendment and Fourteenth Amendment rights to a fair trial,<sup>32</sup> Mathew Musladin brought a direct appeal before the California Court of Appeal.<sup>33</sup> Relying on two Supreme Court cases, *Estelle v. Williams*<sup>34</sup> and *Holbrook v. Flynn*,<sup>35</sup> he argued that the photo buttons created an inherently prejudicial trial.

In *Estelle*, the accused was forced to wear his prison clothing at trial.<sup>36</sup> The Court asked "whether an accused who is compelled to wear identifiable prison clothing at his trial by a jury is denied due process or

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28. *Morning Edition*, *supra* note 12.

29. *Musladin v. LaMarque*, 427 F.3d at 655.

30. *Carey v. Musladin*, 127 S. Ct. at 651 n.1.

31. *Morning Edition*, *supra* note 12.

32. U.S. CONST. 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 . . ."). *See also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law."). The Due Process Clause incorporated the Sixth Amendment protection, and applied it to state as well as federal prosecutions. *See generally* *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976) ("Because 'trial by jury in criminal cases is fundamental to the American scheme of justice,' the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions." (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968))).

33. *Musladin v. LaMarque*, 427 F.3d at 655.

34. *Estelle v. Williams*, 425 U.S. 501 (1976).

35. *Holbrook v. Flynn*, 475 U.S. 560 (1986).

36. *Estelle*, 425 U.S. at 502.

equal protection of the laws,”<sup>37</sup> and answered yes. The accused was denied his Sixth and Fourteenth Amendment rights, the Court found, because “of the possible impairment of the presumption [of innocence] so basic to the adversary system.”<sup>38</sup> Also, unlike visibly tethering the defendant with shackles or other physical restraints, compelling the accused to stand trial in prison garb furthered “no essential state policy.”<sup>39</sup>

In *Flynn*, a subsequent Supreme Court case, four uniformed state troopers had been positioned in the spectators’ gallery, directly behind the accused.<sup>40</sup> There the Court held that the troopers’ unusual presence, which was supplemental to ordinary courtroom security, was not so inherently prejudicial that it begrudged the accused a fair trial.<sup>41</sup> The Court reasoned that, unlike inherently prejudicial practices, the inferences to be drawn from extra security were ambiguous. The troopers might remind a juror merely of the “impressive drama” of the courtroom, or of the juror’s profound responsibility.<sup>42</sup> Or a juror might draw no inference whatsoever, mistaking the troopers for ordinary courtroom practice. Most importantly, the Court established that “[w]henver a courtroom arrangement is challenged as inherently prejudicial . . . the question must be . . . whether ‘an unacceptable risk is presented of impermissible factors coming into play.’”<sup>43</sup>

### C. STATE APPEALS

On direct review, Musladin argued that the Studer buttons had created “an unacceptable risk of impermissible factors coming into play.” The California Court of Appeal agreed that the inherent prejudice test elaborated in *Flynn* applied to Musladin’s case.<sup>44</sup> Furthermore, the court also agreed, citing *Flynn*, that the buttons occasioned the risk of “impermissible factor[s] coming into play,” and therefore, such buttons ought to be discouraged.<sup>45</sup> The court, however, added an additional test: it ruled that the buttons “had not branded [Musladin] with an unmistakable

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37. *Carey v. Musladin*, 127 S. Ct. 649, 653 (2006) (quoting *Estelle*, 425 U.S. at 502).

38. *Estelle*, 425 U.S. at 504.

39. *Id.* at 505.

40. *Flynn*, 475 U.S. at 562.

41. *Id.* at 571–72.

42. *Id.* at 569.

43. *Id.* at 570 (quoting *Estelle*, 425 U.S. at 505).

44. *Musladin v. LaMarque*, 427 F.3d 653, 655 (9th Cir. 2005), *rev’d sub nom.* *Carey v. Musladin*, 127 S. Ct. 649 (2006).

45. *Carey v. Musladin*, 127 S. Ct. 649, 652 (2006).

mark of guilt in the eyes of the jurors.”<sup>46</sup> The California court reasoned that the buttons failed to brand because they symbolized only the ordinary grief of a family in mourning.<sup>47</sup> After tacking this branding requirement onto *Flynn*’s inherent prejudice test, the court affirmed the conviction.<sup>48</sup>

When the California Supreme Court declined to hear the case, and his state remedies were exhausted, Musladin filed a petition for a writ of habeas corpus in federal district court.<sup>49</sup> His petition fell under the purview of a particular section of the Anti-Terrorism and Effective Death Penalty Act of 1996 codified at 28 U.S.C. § 2254.<sup>50</sup> The district court denied habeas relief, but granted a certificate of appealability, and a panel of the Ninth Circuit reviewed.

#### D. THE NINTH CIRCUIT DECISION

The Ninth Circuit panel recognized the limited availability of habeas relief under § 2254.<sup>51</sup> Under the section, a federal court cannot grant habeas relief unless the state court’s last reasoned decision was “contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.”<sup>52</sup> Thus, the appeal was limited to the question of whether *Flynn* and *Estelle*, the two relevant Supreme Court cases, clearly established a standard that the California court had misconstrued or misapplied. Although authority was limited to laws “clearly established by the Supreme Court,” Judge Reinhardt, who wrote the Ninth Circuit opinion, allowed that any circuit’s decisions are persuasive in defining which laws are clearly established and whether application was unreasonable.<sup>53</sup> Under Judge Reinhardt’s rationale, the Supreme Court decisions in *Estelle* and *Flynn*, when bolstered by a past Ninth Circuit decision, clearly established that the inherent prejudice test applied to the trial spectators’ conduct, and since the California Court of Appeal had misapplied this standard, the application was both contrary to Supreme Court law and objectively unreasonable.<sup>54</sup>

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46. *Id.* (citing *Flynn*, 475 U.S. at 571) (internal quotation marks omitted).

47. *Id.*

48. *Id.*

49. *Musladin v. LaMarque*, 427 F.3d at 655.

50. 28 U.S.C. § 2254(d) (2000).

51. *Musladin v. LaMarque*, 427 F.3d at 655.

52. 28 U.S.C. § 2254(d)(1) (2000).

53. *Musladin v. LaMarque*, 427 F.3d at 655–56. In supporting this proposition, the opinion cites two Ninth Circuit cases, as well a case each from the First, Third, and Eighth Circuits.

54. *Id.* at 660–61.



The bolstering Ninth Circuit precedent was *Norris v. Risley*;<sup>55</sup> Judge Reinhardt wrote that *Norris* and *Musladin* “simply cannot reasonably be distinguished.”<sup>56</sup> In *Norris*, at least three women from a group called the Rape Task Force watched a rape trial from the spectators’ gallery. The women donned two-and-a-half-inch-wide buttons that read “Women Against Rape.”<sup>57</sup> Before trial, after trial, and during recesses, the women milled about outside the courtroom, rode the public elevator with jurors, and even served refreshments on behalf of the state, all while wearing the buttons.<sup>58</sup> The court found that, because of their sly invidiousness and plainly communicative purpose, the “Women Against Rape” buttons sent an even more impermissible message to the jury than did the unlawful prison garb in *Estelle*.<sup>59</sup> The buttons were not just inherently prejudicial, they were particularly so.<sup>60</sup>

Likewise, the Ninth Circuit *Musladin* panel concluded that when Tom Studer’s family wore photo buttons of the “victim” to the self defense murder trial, the message conveyed was “even stronger and more prejudicial than the one conveyed in *Norris*.”<sup>61</sup> Whereas the *Norris* spectators’ general opposition to rape specified neither the defendant nor the alleged victim,<sup>62</sup> the buttons here “argue[d]” that Musladin was the aggressor and Studer the innocent victim.<sup>63</sup> As a result, the California court’s decision that the buttons were merely the normal grief of a mourning family was incorrect as a matter of law, and thus the California decision both was contrary to, and was objectively unreasonable in its application of, clearly established Supreme Court law.

#### E. THE SUPREME COURT MAJORITY DECISION

When the U.S. Supreme Court granted certiorari in 2006, the bulk of the commentators predicted a reversal, and they were correct.<sup>64</sup> Seemingly, the most objectionable portion of the Ninth Circuit’s decision was its

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55. *Norris v. Risley*, 918 F.2d 828, 829 (9th Cir. 1990).

56. *Musladin v. LaMarque*, 427 F.3d at 660.

57. *Norris*, 918 F.2d at 829.

58. *Id.*

59. *Id.* at 831–32.

60. *Id.* at 833 (“[T]he button’s informal accusation was not susceptible to traditional methods of refutation. Instead, the accusation stood unchallenged, lending credibility and weight to the state’s case without being subject to the constitutional protections to which such evidence is ordinarily subjected.”).

61. *Musladin v. LaMarque*, 427 F.3d at 660.

62. *Id.*

63. *Id.*

64. *See, e.g.*, S. Brannon Latimer, Case Note, 59 SMU L. REV. 395, 395 (2006).

attempt to bolster Supreme Court law with the Ninth Circuit case *Norris*.<sup>65</sup> But the majority decision, written by Justice Thomas, shied away from that issue. The Thomas opinion fulfilled expectations by reversing the Ninth Circuit's decision, and presumably the Ninth Circuit's reliance on *Norris*.<sup>66</sup> Yet many had expected the Court to be more forthright in admonishing reliance on Ninth Circuit precedent. Instead, the Court simply did not extend Supreme Court precedent to the facts of *Musladin*, and declined to discuss *Norris*, or the merits of a circuit court abiding by its own precedent, altogether.

The Court reviewed the question of whether there was "clearly established law, as determined by the Supreme Court" that applied to the buttons issue, and found that there was not.<sup>67</sup> In this inquiry, the decision admitted that "certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial."<sup>68</sup> It then briefly reviewed the two principal sources of Supreme Court precedent for the so-called inherent prejudice test: *Estelle*, disallowing prison garb, and *Flynn*, allowing state troopers in the spectators' gallery.

After review, Justice Thomas's opinion offered two reasons for why no clearly established federal law pertained to the buttons in *Musladin*'s trial. First, Justice Thomas distinguished *Estelle* and *Flynn*, which both dealt with "state-sponsored courtroom practices," from *Musladin*, which dealt with private spectator conduct. Justice Thomas pointed out that *Estelle*'s and *Flynn*'s language that inherently prejudicial courtroom practices must be justified by an "essential state policy" proved that the test specifically contemplated state action and did not extend to private spectators.<sup>69</sup> Therefore, private actor behavior and its inherent prejudice was still an open Supreme Court question.<sup>70</sup> On this distinction, the opinion probably does not plumb two early twentieth-century cases as fully as it might have. These two cases, *Frank v. Mangum*<sup>71</sup> and *Moore v. Dempsey*,<sup>72</sup>

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65. See Recent Case, *Musladin v. Lamarque*, 403 F.3d 1072 (9th Cir.), *reh'g denied*, 427 F.3d 647 (9th Cir. 2005), 119 HARV. L. REV. 1931, 1931 (2006). See also *Musladin v. LaMarque*, 427 F.3d at 662 (Thompson, J., dissenting) ("I disagree with the majority's reliance upon our decision in [*Norris*]."). Thompson, however, is more concerned with factual distinctions between *Musladin* and *Norris* than he is with the principle of relying on Ninth Circuit precedent.

66. See *Carey v. Musladin*, 127 S. Ct. 649, 652 (2006).

67. 28 U.S.C. § 2254(d)(1) (2000); *Carey v. Musladin*, 127 S. Ct. at 651.

68. *Carey v. Musladin*, 127 S. Ct. at 651 (citing *Estelle v. Williams*, 425 U.S. 501, 503–605 (1976); *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986)).

69. *Id.* at 653.

70. *Id.*

71. *Frank v. Mangum*, 237 U.S. 309 (1915). In *Frank*, the petitioner contended that his Georgia trial was ruled by mob domination to which the presiding judge succumbed. *Id.* at 324–25. He claimed

also dealt with the prejudicial impact of private spectator conduct, though in admittedly different and perhaps dated contexts. The decision does not confront either *Mangum* or *Dempsey* except to posit that the spectator conduct was more severely prejudicial in those cases than in *Musladin*.<sup>73</sup>

Second, to further demonstrate that the law in this area was not clearly established, Justice Thomas cited to a series of circuit and state court opinions that split on the question of whether to extend the inherent prejudice test to private spectators' conduct.<sup>74</sup> That is, these lower court opinions split on whether the law was clearly established or not. Justice Thomas concluded that the wide divergence in the treatment of defendants' spectator conduct claims indicated a lack of guidance from the Supreme Court.<sup>75</sup> For these two reasons, the California decision was not contrary to, nor was an unreasonable application of, clearly established federal law.

#### F. RESPONSE TO THE SUPREME COURT MAJORITY OPINION

Thus, the Court held that *Estelle* and *Flynn* did not extend to *Musladin*

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the disorder in and around the courtroom was so debilitating that neither the defendant nor his lawyer were present when the verdict was read, for fear of violence. *Id.* The Court rejected these claims, mainly in deference to the Georgia appellate court's factual findings. *Id.* at 344. Justice Holmes was convincing in dissent, indicating that the spectators, who were packed into and around the courthouse, cheered when the solicitor general arrived and loudly derided defense witnesses. *Id.* at 346 (Holmes, J., dissenting). Also, the judge told the defendant's lawyer that there was a "probable danger of violence" if the jury returned an acquittal or could not agree, and therefore, the defendant was better not to be in the courtroom. *Id.* Holmes claimed that whatever else fair trial means, it surely embraces an "opportunity to be heard." *Id.* at 347. For a discussion of the especial political pressure on state judges in such passionate trial atmospheres, see this Note's discussion *infra* Part V.C.

72. *Moore v. Dempsey*, 261 U.S. 86 (1923). In *Moore*, written by Justice Holmes, a petition of habeas corpus was sufficient to overcome a demurrer where the petitioners were convicted of murder in the heat of a race riot, where they were represented by an attorney appointed at the beginning of trial, and where the trial lasted just forty-five minutes. *Id.* at 87–92.

73. *Carey v. Musladin*, 127 S. Ct. at 653 n.2. Note that this distinction is factual, not legal. The legal distinction between state-sponsored and private action is feasible, though this Note will argue that it misses the point. *But* the legal distinction between the "mob domination" and the button-wearing "mob" in *Musladin* fails at the outset. The difference is one of degree, not of type. Justice Kennedy demonstrates this by comparing the "coercion [and] intimidation" of past cases to the instant case. *Id.* at 657 (Kennedy, J., concurring). While the difference would suffice to reject *Musladin*'s appeal on direct review or approve the state court's substantive application of the law on a habeas petition, it has little bearing on whether subject is an open question in Supreme Court jurisprudence.

74. *Id.* at 654 (majority opinion). For the extension of *Estelle* and *Flynn* to spectator conduct, Justice Thomas cited *Norris v. Ritsley*, 918 F.2d 828, 830–31 (9th Cir. 1990) and *In re Woods*, 114 P.3d 607, 616–17 (Wash. 2005) (en banc). For the refusal to so extend, Justice Thomas cited *Billings v. Polk*, 441 F.3d 238, 246–47 (4th Cir. 2006) and *Davis v. State*, 223 S.W.3d 466, 474–76 (Tex. App. 2006). Justice Thomas also cited six other state cases where those courts ruled on spectator conduct claims without mentioning *Estelle* or *Flynn*.

75. *Carey v. Musladin*, 127 S. Ct. at 654.

for two reasons; this Note will ponder the wisdom of both. The Court's first reason is its distinction between state-sponsored courtroom practices and private action courtroom practices. This distinction is misplaced, because the source of disturbing courtroom behavior is meaningless both to the holder of the right—the accused—and to the body charged with enforcing that right—the trial court.

The distinction is meaningless to the accused because the Constitution guarantees a fair trial;<sup>76</sup> the source of the violation hardly matters.<sup>77</sup> This is not to insist that in practical terms the difference between state and private action inside a courtroom is insignificant. Government abuses will tend to prejudice the jury more effectively than private abuses, if only because government abuses are likely to be more systemic, more overwhelming, and less transparent. Jurors are likely well equipped cognitively to discount private trial spectator bias, and may even do so conscientiously. They are, of course, trusted to identify similar partisan bias in witnesses and counsel. State bias, meanwhile, may be more difficult to perceive. But habeas courts ought to account for this difference when applying the inherent prejudice standard, not when choosing whether to apply it all. That is, the courts ought to account for the potential invidiousness of state driven prejudice when weighing the unacceptability of risk or the impermissibility of factors. For example, we might expect that a partisan button pinned to the chest of a trial bailiff is more likely to involve impermissible factors—whatever those may be—than is the same button pinned to the chest of an alleged victim's family member. Of course, we can only speculate about the effectiveness of either measure. A weeping widow draped in black is perhaps effective, or perhaps if she is shrill or disagreeable she is counterproductive. But the ultimate issue—inherent prejudice—remains identical. Since the inquiry is interested not with effectiveness, but with “unacceptable risk[s] of impermissible factors,” the inherent prejudice test should not devolve into an evaluation of effectiveness. A fair trial deserves to be free of bias, whatever the source.

Next, the difference between private and state conduct is meaningless to the body charged with enforcing the right—the trial court—because the judge controls the courtroom. A judge's action or inaction could effectively amount to state action.<sup>78</sup> A trial court is capable of stemming all

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76. U.S. CONST. amend. VI; U.S. CONST. amend. XIV.

77. See *Carey v. Musladin*, 127 S. Ct. at 657 (Souter, J., concurring).

78. Otherwise, fair trial rights might end up assuming bizarre legal fictions that parse the analytical difference between action and inaction. An excellent example in another field of law is the Fourteenth Amendment problems surrounding racially restrictive covenants on real property. Courts

undesirable behavior, state inflicted or otherwise. The Supreme Court has previously announced that “the courtroom and courthouse premises are subject to the control of the court.”<sup>79</sup> As Justice Souter stated in his concurrence in *Musladin*, “the trial judge has an affirmative obligation to control the courtroom and keep it free of improper influence.”<sup>80</sup> This obligation is well established. For instance, in the famous case of *Sheppard v. Maxwell*, the Court reversed a doctor’s conviction for murdering his wife where the trial had assumed a “carnival atmosphere,” full of hoopla and damaging publicity.<sup>81</sup> The Court emphasized that “the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity . . . and to control disruptive influences in the courtroom.”<sup>82</sup> Many private spectator prejudice cases similarly concern the press.<sup>83</sup> Specifically, they concern the judge’s power to control private behavior *outside* the courtroom. Therefore such cases square up directly against First Amendment rights and strain the judge’s authority to govern speech and behavior outside the physical courtroom.<sup>84</sup> In that way alone, private behavior is markedly different from state-sponsored practice during trial.

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refused to enforce these covenants on the ground that enforcing the covenant amounted to state action. *See Shelley v. Kraemer*, 334 U.S. 1, 19 (1948). Some courts, however, found that the form of title determined whether or not state action was required. If held in fee simple determinable, the property would have reverted automatically, without any court intervention. Therefore, there was no state action. *See Charlotte Park & Recreation Comm’n v. Barringer*, 88 S.E.2d 114, 123 (N.C. 1955). *But see generally* Capitol Fed. Sav. & Loan Ass’n v. Smith, 316 P.2d 252 (Colo. 1957) (en banc). Meanwhile the same property, if held in fee simple subject to a condition subsequent, would not have reverted automatically. To enforce the covenant would therefore amount to state action and so would violate the Fourteenth Amendment. It is no stretch to imagine that similarly absurd differences could apply to fair trial rights. *See also* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 627–28 (3d ed. 2002).

A related point can also be found in another Sixth Amendment right, the right to effective assistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335 (1980), held that the performance of a privately retained lawyer is subject to the same scrutiny as the performance of a court appointed lawyer. *Id.* at 344–45. The Court reasoned that “[s]ince the State’s conduct of a criminal trial itself implicates the State in the defendant’s conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.” *Id.* If anything, the rejected distinction in *Cuyler* between state action and private action was even more compelling than the distinction in *Musladin*. At least those who hire private attorneys would have chosen to waive their Sixth Amendment right, whereas those defendants who suffer outrageous private conduct in the courtroom never enjoyed such a choice.

79. *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

80. *Carey v. Musladin*, 127 S. Ct. at 657 (Souter, J., concurring).

81. *Sheppard*, 384 U.S. at 358.

82. *Id.* at 362.

83. *See generally* Terri A. Belanger, Note, *Symbolic Expression in the Courtroom: The Right to a Fair Trial Versus the Freedom of Speech*, 62 GEO. WASH. L. REV. 318 (1994).

84. *See* Sheldon Portman, *The Defense of Fair Trial from Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393, 403–05 (1977).

Yet *Musladin* faces none of those complexities; all of the offensive behavior arose inside the courtroom, within the control of the court. The distinction between private and state action, which was immaterial to the trial judge's authority, should not serve now to resist application of the law.<sup>85</sup>

The Supreme Court's second reason for refusing to extend *Estelle* and *Flynn* is more troubling. While the distinction between state and private behavior is problematic, but plausible, the Court's second basis for declaring the law not clearly established is much less comprehensible. Justice Thomas reviewed the lower court decisions, and decided that since those lower courts were in disarray, the law was not clearly established. Consider Justice Thomas's implicit syllogism: when laws are clearly established, lower courts do not disagree about them; the lower courts disagree here; therefore, the law is not clearly established. Now consider the fallacy of that logic as applied to *Musladin*: anytime lower courts disagree as to whether law is clearly established, the law is not clearly established. But the courts to which Justice Thomas cites have disagreed on a slightly different point. They have not disagreed as to whether the law is established at all, but as to whether it was "*clearly* established," as the AEDPA requires.<sup>86</sup> Therefore, Justice Thomas has demonstrated that the law is not clearly "clearly established." That question is related, but irrelevant.

Also, under the AEDPA, the power to establish federal law vests solely in the Supreme Court, yet the Court ironically relies on circuit and even state decisions. The cumulative message appears to be this: circuit courts *cannot* rely upon their own precedent to formulate what *is* clearly established federal law under the AEDPA; however, the Supreme Court *can* rely on dissent among lower courts' precedent to demonstrate what is

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85. Justice Souter does suggest that the button wearers might enjoy First Amendment protection, though he fails to develop the idea any further. *Carey v. Musladin*, 127 S. Ct. at 658 (Souter, J., concurring). It is hard to imagine Justice Souter is serious, since the Court's prior restraint of the buttons could endure even the strictest scrutiny. Indeed, Justice Stevens, in his concurrence, dismisses Justice Souter's suggestion, saying it has "no merit whatsoever . . ." *Id.* at 656 (Stevens, J., concurring). *But see* Belanger, *supra* note 83.

86. *See, e.g., Billings v. Polk*, 441 F.3d 238, 247 (4th Cir. 2006) (cited by Justice Thomas as a case declining to extend *Estelle* and *Flynn* to private spectator conduct) ("These precedents do not *clearly* establish that a defendant's right to a fair jury trial is violated whenever an article of clothing worn at trial arguably conveys a message about the matter before the jury.") (emphasis added). It is worth noting that this quotation is slightly misaligned with the instant case anyway. Notice how the *Billings* decision hedged its description of the precedent with the intensifiers "whenever" and "arguably." *Musladin* never claimed the clear establishment of an inherent prejudice test so needlessly broad, nor did he need to.

not clearly established federal law. This structure is not internally inconsistent if we believe either A) *the infallibility theory*: that as the ultimate arbiter of the law the Supreme Court can look anywhere it wants in order to decide anything it wants, or B) *the consensus theory*: that the Supreme Court is wise to heed the voices of lower courts in reading its own precedent, and that many judges' understanding of what has been clearly established is superior to the judgment of nine justices. The infallibility theory may state a truism, but that does not make it persuasive. And as good as the consensus theory may sound, Justice Thomas's survey hardly revealed a consensus. Besides, one has to wonder about the integrity of the consensus approach. If all lower courts that addressed the issue had extended the inherent prejudice test to spectators, would that enshrine the Supreme Court law as clearly established? One doubts it. The Court simply would not have referred to those cases. And if a consensus would not have established the law, then the majority's analytical structure is patently unfair to the habeas petitioner. Indeed, this Note will make this same point again: that *Musladin* is patently—probably to the brink of unconstitutionally—unfair to habeas petitioners. But to explore the case's implications about procedural fairness, this Note must first contemplate habeas corpus and the AEDPA more generally.

### III. PURPOSE OF HABEAS CORPUS

#### A. IDEOLOGICAL BASES FOR THE WRIT

Historically, there have been at least three bases for habeas corpus.<sup>87</sup> The first is the federal right/federal forum argument for the writ.<sup>88</sup> The second is the “innocence matters” conception of the writ.<sup>89</sup> And the third and most important for our purposes is the fair process vision of the writ, elaborated in Paul Bator's famous article.<sup>90</sup> Bator argued that, since the correctness of a legal resolution can never be known, we should not attempt

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87. Richard H. Fallon Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1813–15 (1991).

88. Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 997 (1985). Yackle describes “the often-denied but deeply held idea that state criminal defendants are entitled to litigate their federal claims in a federal forum other than the Supreme Court,” and calls it “essential that postconviction habeas be available to ensure the choice of a federal forum.” *Id.*

89. See, e.g., Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 69.

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

to validate prior proceedings only to the extent that they are “correct.”<sup>91</sup> Instead, their validity should depend on fair deployment of the procedural mechanisms that we have agreed reach the correct result. Only when these mechanisms are absent or defective should habeas relief issue.<sup>92</sup> Since an appellate or federal court is unlikely to be more “correct” in the esoteric and ultimate sense than was the state court, only apparent procedural reasons should support the reversal of a state court proceeding.<sup>93</sup>

Thus, the fair process habeas conception is the one that matters the most for this Note, because this Note offers no opinion—nor could it—on the guilt of Mathew Musladin. Rather, it proceeds from the perspective that his ultimate guilt or innocence is unknowable and scarcely matters anyway.<sup>94</sup> It is the process of his guilt determination, and the concepts of reliability that we ascribe to it, that matter most.

The levels of scrutiny for habeas claims, and therefore success rates of petitioners, vary according to the ideological moorings of the habeas system. For instance, a system founded on the federal right/federal forum conception of the writ yields the most habeas relief, since in most of this ideology’s incarnations the federal court must review the federally claimed right *de novo*.<sup>95</sup> Since the claimant enjoys an inherent right to a federal forum, that right disintegrates if the federal court merely defers to a prior state court decision. The claimant has effectively been denied the federal forum. On the other side, a system founded on Bator’s fair process model would traditionally yield the fewest grants of the writ, though under the rubric of substantive fair process that this Note explores, the fairness of process test may well issue more relief than would a true “innocence matters” model.<sup>96</sup> In any event, the ideology underlying habeas will substantially predict the outcome of many petitions.<sup>97</sup>

#### B. PROCEDURAL PRECEDENT: THE SUPREME COURT’S RESPONSE

In several decisions, the Supreme Court has demonstrated that it is not

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91. *Id.* at 447.

92. *Id.* at 448.

93. *Id.*

94. This Note declines to comment on whether the elusiveness of Musladin’s “true” guilt is a function of the conflicting factual record, or rather a function of what Bator describes as the unknowability of the Universe.

95. Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA’s Standard of Review Operate after Williams v. Taylor?*, 2001 WIS. L. REV. 1493, 1511 (2001).

96. *Id.*

97. *Id.*



agnostic regarding the underlying justifications for habeas corpus. Specifically, the Court seems to have rejected the federal right/federal forum justification while preserving, at least in part, the other two justifications. The best example of this preference is *Teague v. Lane*.<sup>98</sup> Under *Teague*, a habeas petitioner cannot usually benefit from a “new rule” of criminal procedure if the rule was announced after his conviction was finalized on direct appeal.<sup>99</sup> A new rule was one “not *dictated* by precedent existing at the time the defendant’s conviction became final.”<sup>100</sup> A later decision defined “new rule” broadly, casting into its net any rule “susceptible to debate among reasonable minds.”<sup>101</sup> Old rules would apparently have to be unquestionably imbedded in case law. This broad definition of a new rule thereby meant that habeas relief would significantly decline. Inherent in that decline was a firm rejection of the federal right/federal forum objective of habeas corpus. Some state prisoners would never receive a federal forum to argue their federal right, and indeed, this was the avowed purpose.

Meanwhile, the Court did attempt to protect fundamental fairness to the defendant, and thereby preserved the writ’s other two ideological bases. The Court protected fundamental fairness by creating two exceptions to the antiretroactivity rule. The first excluded “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.”<sup>102</sup> The second and more important exception allowed retroactivity for “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.”<sup>103</sup> This protection for the accused apparently voiced a Supreme Court preference for either the “innocence matters” model or Bator’s fair process model. On its face, the exception clause protects the actually innocent. But in concerning itself with the accuracy of the result, the clause also necessarily protects fair process. As we shall see, the gulf between these two concepts is not so broad.

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98. *Teague v. Lane*, 489 U.S. 288 (1989).

99. *See id.* at 305–10.

100. *Id.* at 301.

101. *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

102. *Teague*, 489 U.S. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

103. *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994) (quoting *Saffle v. Parks*, 494 U.S. 485, 495 (1990)).

## IV. PURPOSE AND INTERPRETATION OF THE AEDPA

## A. CONGRESSIONAL PURPOSE: THE THREE NARRATIVES OF THE AEDPA

Congress enacted the AEDPA in 1996. It was intended to limit the number of habeas petitions filed in federal court by state prisoners, and to reduce the number of such petitions that were actually granted.<sup>104</sup> To achieve these goals, the AEDPA delimited the authority of federal courts to grant habeas petitions. Section 2254(d)(1) of the AEDPA created a new set of limits to apply whenever a federal court reviewed a habeas corpus petition. The section reads, in pertinent part: “[a]n application for a writ of habeas corpus . . . shall not be granted . . . unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.”<sup>105</sup> While this Note explores the interpretations and implications of this (fairly unclear) language in depth in Parts III.B and III.C, it first discusses its origins.

Scholars have offered myriad theories regarding the genesis of the AEDPA. Vicki Jackson has consolidated these explanations, which have been trotted out individually by various scholars, into three narratives each purporting to explain the origins of, *inter alia*, the AEDPA.<sup>106</sup> The first narrative is one of opposition called “Congress Against the Courts,” in which the passage of the AEDPA was retaliation against judicial activism.<sup>107</sup> By judicial activism, Jackson means merely cases in which a judge’s decision is politically troubling;<sup>108</sup> in the case of habeas petitions,

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104. Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO L.J. 2445, 2446 (1998). As to the first goal of reducing the volume of petitions, the statute has, quite bizarrely, not worked. See Elizabeth J. Barnett, *A Great Writ Reduced: Why the Tenth Circuit’s Interpretation of Congressional Intent and Supreme Court Precedent Portends Defeat for State Prisoners Seeking Federal Habeas Corpus Relief*, 58 OKLA. L. REV. 469, 520–22 (2005). After the enactment of § 2254(d)(1), a “sudden and unanticipated surge occurred in both the rate and quantity of federal habeas petitions filed by state inmates.” *Id.* at 521. The surge did not go away either: state prisoners filed fifty percent more petitions in 2000 than in 1995. *Id.* at 522. These statistics are hard to square with the obvious added difficulty of receiving relief under the statute.

105. 28 U.S.C. § 2254(d) (2000).

106. Jackson, *supra* note 104, at 2445–46. Jackson’s article proposes the narratives to explain the genesis of the AEDPA along with two other statutes passed the same year that similarly restricted access to federal judicial review. The two other statutes are the Prison Litigation Reform Act and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

107. *Id.* at 2448–49.

108. *Id.* at 2449.

this means any time the judge grants a habeas petition.<sup>109</sup> Under this conception, the AEDPA is simply one more manifestation of the everlasting tension between the courts and the legislature. Once again, the conflict pits the power of the courts to reach substantive decisions against the power of the legislature to use jurisdiction in order to curb or nullify those decisions whenever they are politically unsavory.<sup>110</sup>

The second narrative entails cooperation and is called “Congress with the Courts.”<sup>111</sup> Under this framework, the AEDPA may be viewed as a “symbolic” move to codify then (and still) existing Supreme Court law.<sup>112</sup> The corollary of this narrative is that the statute becomes mostly meaningless. If Congress achieved any change at all with the AEDPA, it only gently nudged the judicial branch further along in the direction it was already headed in order to reap the political fruits of that trend.<sup>113</sup> As some scholars have noted, this cooperation theory spurs its own difficulties, because when the legislature acts “symbolically,” courts are faced with the difficult decision of whether the new laws actually do change anything, whether those changes are intentional or not, and whether it matters.<sup>114</sup> Nevertheless, powerful support for the cooperation narrative of the AEDPA can be found in the form of the Supreme Court’s two to three decade long contraction of the writ of habeas corpus.<sup>115</sup> Indeed, perhaps the contraction was accelerating; during the time preceding the AEDPA, that contraction was especially acute. For instance, three cases in the years immediately

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109. *See id.* at 2449–50. Jackson writes that “[a]ccording to Chief Judge Robert C. Broomfield of the United States District Court for the District of Arizona, Congress wanted to set aside judgments made by ‘liberal federal judges’ based on the populist sentiment that courts are molycoddling prisoners.” *Id.* at 2449–50. Jackson apparently concurs with this view.

110. *Id.* at 2450.

111. *Id.* at 2451.

112. *Id.*

113. *Id.* *See also* 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, 2–3 (1997).

114. Tushnet & Yackle, *supra* note 113, at 2–3.

115. The Burger and Rehnquist Courts first halted the expanding availability of habeas corpus and then shrank it. *See* RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.4d, at 72–78 (4th ed. 2001) (describing an expansion of federal habeas review during the Warren era followed immediately by contraction under Chief Justice Burger and Chief Justice Rehnquist); Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 548–52 (1999) (similarly outlining the Burger Court’s limits on habeas review); R. Stephen Painter, Jr., Note, *O’Sullivan v. Boerckel and the Default of State Prisoners’ Federal Claims: Comity or Tragedy?*, 78 N.C. L. REV. 1604, 1604 (2000). Furthermore, the public was aware of this contraction during the 1990’s. *See, e.g.*, Linda Greenhouse, *Justices Limit Path to U.S. Courts for State Prisoners on Death Row*, N.Y. TIMES, Mar. 6, 1990, at A1 (explaining that “[a]s the Supreme Court itself has grown more conservative over recent years, it has issued a number of decisions limiting habeas corpus jurisdiction”).

leading up to 1996 all shrank the availability of habeas relief: *Teague v. Lane*,<sup>116</sup> *McCleskey v. Zant*,<sup>117</sup> and *Schlup v. Delo*.<sup>118</sup> *Teague* held that courts cannot grant habeas relief where the legal rule undergirding such relief was developed after the prisoner exhausted his direct review.<sup>119</sup> *McCleskey* withheld relief where a failure to raise the claim in an earlier filing could not be shown to meet “cause and prejudice.”<sup>120</sup> Most shockingly, *Schlup* implied that actual innocence was insufficient for habeas relief if not associated with another constitutional violation.<sup>121</sup>

The third and final narrative explaining the passage of the AEDPA combines elements of both of the first two, in that Congress simultaneously cooperates with the Supreme Court and conflicts with the lower courts. Under this narrative, the AEDPA served primarily to reinforce the hierarchy of Article III courts, and therein to reemphasize the Supreme Court’s supremacy.<sup>122</sup> Congress was reacting to a narrower concept of judicial activism: the image of a rogue district, or even circuit, court judge busy overturning the convictions of hardened criminals.<sup>123</sup> To avoid that problem, Congress declared only the Supreme Court competent to form law in the area of criminal procedure and habeas corpus. In many ways, this narrative is the most compelling. It is a tantalizing way to explain, for instance, the perceived tension between the Ninth Circuit and the Supreme Court on issues of criminal procedure. Resolution of such tension would be politically welcomed by Congress, especially since much of the media has portrayed the Ninth Circuit as procriminal and particularly at odds with the Supreme Court on that front.<sup>124</sup> Indeed, Judge Reinhardt, the author of the

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116. *Teague v. Lane*, 489 U.S. 288, 288 (1989). See *infra* Part V.A (discussing *Teague* in the aftermath of the AEDPA and *Musladin*).

117. *McCleskey v. Zant*, 499 U.S. 467 (1991).

118. *Schlup v. Delo*, 513 U.S. 298 (1995).

119. *Teague*, 489 U.S. at 308–09.

120. *McCleskey*, 499 U.S. at 493.

121. *Schlup*, 513 U.S. at 314–15.

122. Jackson, *supra* note 104, at 2453.

123. *Id.*

124. See Tony Mauro, *Mavericks of the Federal Judiciary*, USA TODAY, Aug. 8, 1997, at A3; Howard Mintz, *Breaking Up the “Nutty 9th” Close Up*, SEATTLE TIMES, Nov. 8, 2005, at A3. There are, of course, questions about how correct this perception is. See Martin Kasindorf, *The Court Conservatives Hate*, USA TODAY, Feb. 7, 2003, at A3 (arguing that the Ninth Circuit is more libertarian than liberal, and that there are only four or five liberal and eleven or twelve judicial conservatives in the Circuit). See also Bob Egelko, *Reversals of Fortune—Ninth Circuit’s [sic] Gets a Bad Rap As Wacky, Rogue Court*, S.F. CHRON., July 28, 2002, at D3. With regard to *Musladin*, see Editorial, *Not so Fast, 9th Circuit: A U.S. Supreme Court Rebuff in a Death Penalty Case Points to a Problem with the Appeals Panel*, L.A. TIMES, Dec. 12, 2006, at A28 (remarking that the “liberal-leaning court’s latest rebuff by the Supreme Court . . . points to something more pervasive and troubling: that the 9th Circuit seems predisposed to second-guess state courts, especially in death penalty cases—even to the point of

Ninth Circuit *Musladin* opinion, is a frequent target of these assaults.<sup>125</sup> It is true that Ninth Circuit opinions are reviewed disproportionately by the Supreme Court.<sup>126</sup> They are also overruled slightly more than is typical.<sup>127</sup> Yet, if true, this narrative also means that Congress and the AEDPA greatly misunderstand the nature of the Article III hierarchy and in so misunderstanding, create a host of constitutional problems taken up in Part V.

Whichever of these narratives best describes the AEDPA, we can see that the Congress clearly did mean to annihilate the federal right/federal forum basis. Meanwhile, Congress did not mean to annihilate the fair process basis for the writ. In order to understand why, we need to understand what exactly the language of 28 U.S.C. § 2254(d)(1) means. The AEDPA came into being in 1996 and, considering what a paradigmatic shift it represented in habeas law, received surprisingly scant attention from the high court—just seven cases mentioned § 2254(d)(1) before the 2002 term.<sup>128</sup> As a result, there was some confusion as to how to apply the law. Some noted sarcastically that § 2254(d)(1) was “hardly a model of clarity”<sup>129</sup> and scholars speculated about its precise precedential meaning

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usurping the high court’s role. The 9th Circuit’s image problem is easy grist for conservatives, but it should be troubling to liberals and moderates as well”).

125. See Robert Marquand, *Reinhardt Versus Rehnquist: A War Between Two Courts*, CHRISTIAN SCIENCE MONITOR, Mar. 6, 1997, at 1 (calling Reinhardt’s liberal agenda “as big as Los Angeles”). See also Editorial, *A Court Divided or Expanded?*, CHATTANOOGA TIMES FREE PRESS, Nov. 9, 2005, at B7 (calling Reinhardt a “judicial leftist,” adding that he considers the Supreme Court’s “legal spankings a badge of honor”).

126. See Cullen Seltzer, *In Defense of the 9th Circuit: Why the Federal Appeals Court from the Left Coast Doesn’t Deserve Its Bad Rap*, SLATE.COM, July 16, 2007, <http://slate.com/id/2170477/> (“Last term [2006], according to SCOTUSBlog, 32.8 percent of the on-the-merits cases that the Supreme Court reviewed from the federal courts of appeals came from the 9th Circuit. The numbers from the two previous years are similar, if slightly lower: for the 2004 October Term, 26.8 percent; for the 2005 October Term, 28.1 percent. So, yes, 9th Circuit cases were disproportionately represented in the Supreme Court [in 2006]. Since caseload and population would predict a review rate of 18 percent to 20 percent [and the actual figure was 32.8 percent], the justices heard between one and a half times and twice as many cases from the 9th as would have been expected.”).

127. *Id.* The reversal rate for the Ninth Circuit is higher than average: 90.5 percent in 2006, 88.9 percent in 2005, and 84 percent in 2004. Meanwhile, the average reversal rates were 75.3 percent, 75.6 percent, and 76.8 percent respectively. *Id.* Seltzer argues that given the relatively low number of cases, this difference amounts to only one or two extra cases per year. Pundits have been touting similar statistics for years, and the numbers have been fairly constant. See Kasindorf, *supra* note 124, at A3 (“From 1994 through the 2001–02 term, the Supreme Court looked at 183 cases from the 9th Circuit and reversed 77% of them. The average reversal rate for all circuits was 63%. . .”).

128. Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 679 (2003).

129. *O’Brien v. Dubois*, 145 F.3d 16, 20 (1st Cir. 1998), *overruled by* *McCambridge v. Hall*, 303 F.3d 24 (1st Cir. 2002).

and its constitutionality.<sup>130</sup> Then in 2002, a series of Supreme Court cases undertook to demystify the meaning and application of the statute, and to some extent succeeded, although § 2254(d)(1) has still been called an “intellectual disaster area”<sup>131</sup> and lower courts have hardly been demure in voicing their consternation and confusion with the law.<sup>132</sup>

#### B. INTERPRETING THE AEDPA: *TERRY WILLIAMS V. TAYLOR*

The principal case to define the scope and meaning of § 2254(d)(1) is *Terry Williams v. Taylor*.<sup>133</sup> Terry Williams was convicted of robbery and murder by a Virginia jury, and was subsequently sentenced to death. Because his lawyers had failed to present mitigating evidence at his capital sentencing proceedings,<sup>134</sup> Williams brought a habeas petition to federal court in which he claimed ineffective assistance of counsel under the *Strickland* standard.<sup>135</sup> Thus, the case implicated the AEDPA, and when it came up to the Supreme Court on certiorari, it provided an opportunity to clarify § 2254(d)(1). Instead, the Supreme Court opinion made a mess of an already messy analytical landscape, in part because the opinion was weirdly fractured. Five justices rejected the idea that the AEDPA merely codified *Teague*, yet six justices decided that whatever the standard, Williams had met it and therefore deserved relief.<sup>136</sup> Partitioned into two sections, one portion of the majority’s opinion interpreted the AEDPA and announced the review standard. The second portion announced the application of that standard to the facts of the case. Justice O’Connor wrote the former (what the applicable law was), and Justice Stevens wrote the latter (how the law applied to the facts), since his proffered reading of § 2254(d)(1) did not earn a majority. As one scholar puts it, this resolution was “enigmatic” because a rule and the rule’s application are necessarily

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130. See Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for “Reasonably Erroneous” Applications of Federal Law*, 63 OHIO ST. L.J. 731, 746–47 (2002).

131. Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1756 (2000).

132. Perhaps this friction between the lower courts and the Supreme Court serves to fuel Vicki Jackson’s third narrative outlined at *supra* note 122 and accompanying text.

133. *Williams v. Taylor*, 529 U.S. 362 (2000). By happenstance, the Court decided another case named *Williams v. Taylor* (Michael Williams v. Taylor, 529 U.S. 420 (2000)) during the 2000–01 term. The cases are unrelated. Though for brevity, when this Note refers to “*Williams v. Taylor*” and “*Williams*,” these are references only to Terry Williams v. Taylor, 529 U.S. 362 (2000). A reference to Michael Williams v. Taylor is so specified.

134. *Williams*, 529 U.S. at 370–71.

135. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Under *Strickland*, to succeed on his ineffective assistance of counsel claim, a petitioner has to show, first, deficient performance by the attorney, and second, prejudice as a result. *Id.* at 689–92. Prejudice means a reasonable possibility of a different outcome. *Id.* at 687, 694.

136. Pettys, *supra* note 130, at 748–49.

interdependent, and therefore, the actual state of the law probably “lurks somewhere between these two interlocking” opinions.<sup>137</sup> We should therefore consider the opinions in turn.

Justice O’Connor’s reading of § 2254(d)(1) invokes the notion that, if possible, all parts of a statute should be given meaning and no language should be made superfluous.<sup>138</sup> To achieve this goal, her opinion breathes individual life into two clauses of the statute: (1) “contrary to . . . clearly established Federal law, as determined by the Supreme Court . . .” and (2) “unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court . . .”<sup>139</sup> A state habeas petitioner might receive relief if the state decision violated either of the two prongs. As she explains, the state court decision may violate the “contrary to” prong in one of two ways: first, “if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases,” or second, “if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.”<sup>140</sup> The former applies when the state court is plainly wrong on a pure question of law, and the latter only in the situation where the facts are identical and the result is diametrically opposite to the Supreme Court’s. Her definition means that the “contrary to” prong will not accommodate relief for the more typical habeas petition. Typically, the state court will have applied a correct (or at least not plainly *incorrect*) legal rule and the petitioner will argue merely that the court reached the wrong result. Justice O’Connor’s definition means these cases will never implicate the “contrary to” prong unless there exists a diametrically opposed Supreme Court decision whose facts are on all fours, an extreme rarity indeed.

Therefore, in those more typical cases, the petitioner will have to summon the second prong, the “unreasonable application of . . .” language. Justice O’Connor identified two ways in which the state court can unreasonably apply clearly established federal Supreme Court law: first, the state court correctly identifies the rule of law, but then unreasonably applies that law to the facts; or second, “the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new

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137. *Ides*, *supra* note 128, at 699.

138. *Williams*, 529 U.S. at 404.

139. *Id.* at 404–05 (quoting 28 U.S.C. § 2254(d)(1) (2000)).

140. *Id.* at 405–06.

context where it should apply.”<sup>141</sup> Thus, although her opinion differentiates types of unreasonableness, it invites and fails to resolve a more central question: when is a decision “unreasonable” and how is that different from being plain wrong? Justice O’Connor did not address this question, except to insist that “unreasonable” is not synonymous with “incorrect.”<sup>142</sup> Therefore, the standard that Justice O’Connor describes apparently withholds relief where the state court’s ruling was incorrect, but not unreasonable. It thus earned Justice Stevens’s pejorative label, the “wrong but nevertheless not ‘unreasonable’” standard.<sup>143</sup>

Next, Justice O’Connor attempted to settle the question of what is “clearly established federal law.” In an odd paradox—which Justice Stevens has called, sardonically again, “ironic dictum”<sup>144</sup>—Justice O’Connor decreed that the statute grants precedential authority to only the “holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-court decision.”<sup>145</sup> The paradox lies in the fact that this decree is itself probably dicta. Nevertheless, Justice O’Connor continued that the *Teague* jurisprudence of “old rule” versus “new rule” has only tangential relevance in the AEDPA inquiry, except that whatever was an old rule under *Teague* is now clearly established federal law for purposes of the AEDPA.<sup>146</sup> She thus peculiarly downplayed *Teague*, only to turn around and rely on *Teague*’s structure in a supremely meaningful way. One scholar interprets her language to mean that the set of clearly established federal law might be larger than *Teague*’s set of “old rule[s].”<sup>147</sup> Yet, others point out that the Supreme Court does not seem to have adopted such a broad set of clearly established law.<sup>148</sup> In any event, Justice O’Connor’s opinion is unequivocal about one thing: that lower court precedent cannot clearly establish federal law for purposes of a § 2254(d)(1) inquiry.<sup>149</sup>

Despite disagreeing on the appropriate standard, Justices Stevens and O’Connor agreed on its application: that habeas relief should issue on Williams’s ineffective assistance of counsel claim. Justice Stevens’s majority opinion found the Virginia Supreme Court’s ruling to be both

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141. *Id.* at 407.

142. *Id.* at 410.

143. *Id.* at 387 n.14.

144. *Carey v. Musladin*, 127 S. Ct. 649, 655 (2006) (Stevens, J., concurring).

145. *Williams*, 529 U.S. at 365.

146. *Id.*

147. Yackle, *supra* note 131, at 1752–53.

148. *Ides*, *supra* note 128, at 702.

149. *Williams*, 529 U.S. at 412 (“[Section] 2254(d)(1) restricts the source of clearly established law to this Court’s jurisprudence.”).



contrary to, and an unreasonable application of, clearly established federal law.<sup>150</sup> As a result, the Court lost an opportunity to delineate differences between the concepts. The Virginia decision was contrary to federal law because it added a “fundamental fairness” test to the *Strickland* standard, though the Supreme Court’s *Strickland* standard was well established and included no such test.<sup>151</sup> And the Virginia decision was an unreasonable application merely because of the facts of the case. Instead of refining unreasonableness or what made the decision fundamentally unreasonable, Justice Stevens simply pointed to the fact that the lawyers had botched some of their more quotidian professional responsibilities: they failed to review records of Williams’s abysmal childhood, failed to present evidence of Williams’s “borderline mental[] retard[ation],” and failed to present evidence about Williams’s good prison behavior.<sup>152</sup>

Justice Stevens’s failure to poke around the contours of § 2254(d)(1)’s unreasonableness prong probably resulted from the fact that, unlike the majority, he did not perceive that the prong possessed independent meaning.<sup>153</sup> Writing for himself and not the majority, he fretted that granting independent meaning to the unreasonable clause would develop a wrong-but-reasonable escape hatch for state courts.<sup>154</sup> Therefore, Justice Stevens concentrated on the “contrary to” language and interpreted the unreasonableness clause as an indicator that calls for a “mood” of respectfulness toward the decisions of state courts.<sup>155</sup> Justice Stevens argued that the AEDPA, in pertinent part, codified *Teague*. Furthermore, he contended that *Teague* and the AEDPA stand for essentially “congruent concepts,” so that it is fair to equate *Teague*’s “old rule” with the AEDPA’s “clearly established [rule].”<sup>156</sup> His position on this point, however, was not confined to his minority opinion; instead it permeated his portion of the majority opinion. For instance, Justice Stevens decided that the Virginia decision was objectively unreasonable because “it failed to evaluate the totality of the available mitigation evidence.”<sup>157</sup> How this failure rose from ordinary incorrectness to unreasonableness is unclear. Did Justice Stevens not “mere[ly] disagree[]” with the state court decision, as the O’Connor

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150. *Id.* at 390–91.

151. *Ides, supra* note 128, at 751–52.

152. *Williams*, 529 U.S. at 395–96.

153. *Id.* at 384 (Stevens, J., concurring) (“We are not persuaded that the phrases define two mutually exclusive categories of questions.”).

154. *Id.* at 385. Justice Stevens was right. *See supra* Part IV.B.

155. *Id.* at 386.

156. *Id.* at 379–80.

157. *Id.* at 397–98.

opinion forbade? Under Justice Stevens's application, a federal court could surely, anytime it was in "mere disagreement" with a state court, couch the terms of that disagreement artfully enough to deem the state decision unreasonable. Moreover, when we recall Justice Stevens's apprehension about the wrong-but-reasonable standard, one suspects that such judicial flexibility was no accident.

C. APPLYING THE AEDPA: OPINION-DEFERENCE OR RESULT-DEFERENCE?

One pressing AEDPA issue that *Williams* did not directly address was whether, in conducting § 2254(d)(1) analysis, the federal court should evaluate the state court's *opinion* or the state court's ultimate *result*.<sup>158</sup> That is, if the federal courts are to defer to the state courts, how should they defer?<sup>159</sup> We can see that the plain language meaning of the statute is ambiguous. Section 2254(d)(1) permits habeas relief only where the "adjudication of the claim . . . (1) *resulted in a decision*" that was contrary or unreasonable.<sup>160</sup> Both results and decisions receive attention in the text, and no preference for either is apparent, thus allowing two plausible interpretations. The two alternative readings are cogently presented in an article by Adam Steinman. The first reading, called the result-deference model, would compel deference to the state court whether or not the state decision's reasoning was tenable, so long as the federal court could reach the same *result* without violating § 2254(d)(1) boundaries.<sup>161</sup> Steinman demonstrates that this model closely mimics Justice Thomas's plurality opinion in *Wright v. West*<sup>162</sup> because relief is forthcoming only when a reasonable jurist would have been compelled to rule in favor of the petitioner at the time his or her conviction was finalized. Therefore, the state court's "actual reasoning . . . is irrelevant."<sup>163</sup> Conversely, the second reading, called the opinion-deference model, sanctifies the importance of the state court's reasoning. This model allows relief whenever the

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158. Steinman, *supra* note 95, at 1495. This question also carries significant constitutional baggage, depending on one's reading of Article III. This Note explores that baggage *infra* Part V.C.

159. *Id.*

160. 28 U.S.C. § 2254(d)(1) (2000) (emphasis added).

161. Steinman, *supra* note 95, at 1510.

162. *Wright v. West*, 505 U.S. 277, 291 (1992) (plurality opinion). *Wright* upheld a larceny conviction, and, though failing to reach a consensus as to the appropriate standard of review, decided that there was sufficient evidence to support the conviction. *Id.* at 295. Justice Thomas's position, shared by Justice Scalia and Chief Justice Rehnquist, was that *Teague* barred relief anytime the state decision had interpreted old precedent reasonably, whether or not such interpretation was proper. *Id.* at 291 & n.8.

163. Steinman, *supra* note 95, at 1510.

*reasoning* in the state's opinion is contrary to or an unreasonable application of federal law. The second model thus represents a sort of middle ground between Justice Thomas's *Wright* opinion and de novo review.<sup>164</sup>

Steinman argues compellingly that an opinion-deference model is preferable because of policy imperatives, the text of the AEDPA, and the *Williams* decision.<sup>165</sup> Opinion-deference guarantees a form of substantive due process reminiscent of Paul Bator's fair process model of habeas corpus. The opinion-deference model is more protective than Bator's because it extends relief to substantive mistakes in addition to egregious procedural errors. Still, the opinion-deference model would similarly guarantee the defendant access to at least one court that competently considers his claim, a seemingly bare minimum constitutional requirement.<sup>166</sup> But note how this fundamentally invokes a procedural, not substantive, constitutional guarantee. Next, opinion-deference encourages state courts to render analytically sound judgments because only sound analysis will survive federal review. Notice how both de novo federal review and tight result-deference review dissolve this benefit, since both would convince state courts that their decisions were meaningless. When state opinions are instead meaningful, there arises a dialogue between the state and federal courts, thought by some to be an excellent feature of habeas protection.<sup>167</sup> Lastly, Steinman posits that, because of its bifurcated reading of § 2254(d)(1), *Williams* is consistent only with opinion-deference.<sup>168</sup> When asking whether the state court applied the incorrect rule (the "contrary to" prong) or whether the state court unreasonably applied the law (the "unreasonable" prong), the court must necessarily look to the reasoning of the state court.<sup>169</sup> Thus, *Williams* implicitly advocates the opinion-deference model.<sup>170</sup>

Steinman's preference for opinion-deference is sensible and correct, but this Note will demonstrate that *Musladin*, and Justice Souter's concurrence in particular, implicitly rejects the opinion-deference model.

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164. *Id.* at 1522.

165. *Id.* at 1495.

166. *Id.* at 1515. *Cf.* Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 416 (1998) (stating that this would seem to be the minimum if "the writ must be treated as of constitutional origin").

167. Steinman, *supra* note 95, at 1523 n.124 (responding to Alan Chen's worry that the AEDPA will impair that court dialogue). *See also* Chen, *supra* note 115, at 546 n.22.

168. Steinman, *supra* note 95, at 1525.

169. *Id.* at 1526.

170. *Id.* at 1525–26.

Thus, *Musladin* may help to inaugurate a more plainly result-deferential AEDPA jurisprudence. This is perhaps only a small surprise, since Justice Thomas, who wrote for the *Musladin* majority, had already expressed such a preference in *Wright*. But before exploring the thorny implications of this development, we should turn to the constitutionality of the statute itself.

## V. CONSTITUTIONALITY OF THE AEDPA

The AEDPA is constitutionally disquieting on three different axes. On the first axis is the federalism concern inherent whenever federal courts review state court decisions. On the second axis is the separation of powers problem present whenever Congress directs the courts. And on the third axis is the constitutional treatment of habeas corpus both as an enumerated and unenumerated substantive right. This Note will examine these concerns in reverse order and address *Musladin*'s interaction with each constitutional complication. This examination will reveal that *Musladin* underscored § 2254(d)(1)'s unconstitutionality. And if *Musladin* fails to demonstrate that the AEDPA is plainly unconstitutional, then *Musladin*'s interaction with the statute at least serves to demonstrate the fragility of the AEDPA's constitutional basis and the imprudence of continuing to rely upon it.

### A. HABEAS-SPECIFIC CONSTITUTIONAL PROBLEMS

One of the constitutional issues first litigated with regard to section 2254 of the AEDPA was the statute's interaction with the Suspension Clause.<sup>171</sup> In *Lindh v. Murphy*, the petitioner contended, before an en banc panel of the Seventh Circuit, that § 2254 was an impermissible restriction of habeas corpus under the Suspension Clause of the Constitution.<sup>172</sup> But, as the courts have always been reticent to identify an affirmative right to habeas corpus, the constitutional challenge was thwarted.<sup>173</sup> One scholar, Amanda Tyler, has indicated that "[w]hat precisely the Clause protects from suspension has invited to date scarce judicial discussion and authoritative guidance. Instead, this issue has for the most part been debated among legal scholars."<sup>174</sup> The conventional view holds that Congress's decision to suspend the writ is a nonjusticiable political

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171. The so-called Suspension Clause reads: "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." U.S. CONST. art. I, § 9, cl. 2.

172. *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320, 334 (1997).

173. *Id.*

174. Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006).

question.<sup>175</sup> Tyler argues persuasively that this view is misguided because, inter alia, the bright-line requirement of rebellion or invasion places an external limit on Congress that the courts could adjudicate.<sup>176</sup> Indeed by a plain reading of the clause, the overtly political question of whether “the public Safety may require it” is not contemplated without being triggered by rebellion or invasion. In any event, Tyler argues more interestingly that habeas corpus rights are coextensive with due process rights, because to imprison without affording the right to challenge the validity of that imprisonment amounts to the paradigmatic taking of liberty without due process.<sup>177</sup> Therefore, habeas rights can be evaluated within a due process framework.<sup>178</sup>

The power of this latter argument depends on deeply held beliefs about the performance and bias of state courts and about the proper role of federal courts. Many argue that any due process owed to the criminal defendant was amply granted during state court proceedings, especially given the fact that all fifty states provide convicts appellate measures of one form or another.<sup>179</sup> For that reason, the most engrossing debates surrounding the Suspension Clause tend to relate to the Guantanamo prisoners and their ilk, where a total lack of formal judicial proceedings presents a more egregious affront to due process.<sup>180</sup>

Still, we can see how this Suspension Clause line of argument accommodates Musladin too, who claims not that his case was wrongly decided, but that the procedure was inherently unfair: a quintessential due process claim. Still, the fact that he was tried in circumstances that were, even at their very worst, only questionable means that the Suspension Clause argument is especially weak. Additionally, debating this argument bleeds into the comity and federalism debate taken up in Part VI.C.

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175. *Id.* at 335.

176. *Id.* at 381. Admittedly the judicial task of defining “rebellion” and “invasion” would not be easy, especially in the hazy twilight of the “war on terror.”

177. *Id.* at 383–84 (quoting David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2494 (1998)).

178. One additional constitutional dimension of the AEDPA’s viability under the Due Process Clauses is discussed briefly *infra* Part VI.A.1.

179. Betsy Dee Sanders Parker, Note, *The Antiterrorism and Effective Death Penalty Act (“AEDPA”): Understanding the Failures of State Opt-In Mechanisms*, 92 IOWA L. REV. 1969, 1975–76 (2007) (“While no constitutional provision explicitly requires that states grant convicted criminals a right to appeal their convictions, every state has chosen to grant this right.”).

180. *See, e.g.*, David G. Savage, *Court Denies Guantanamo Legal Rights*, L.A. TIMES, Feb. 21, 2007, at A1 (discussing how the D.C. Circuit’s denial to hear the habeas petitions of hundreds of Guantanamo Bay detainees sets up a Supreme Court “showdown” about whether Congress can so suspend their habeas rights).

Next, some scholars have suggested that the Constitution guarantees a right to habeas corpus based on federal common law. These scholars consider the writ to be “inexplicably intertwined with the growth of fundamental rights of personal liberty.”<sup>181</sup> In this vein, perhaps the AEDPA impermissibly interferes with *Marbury*’s promise of a federal forum for a substantive federal constitutional right. The statute does effectively deprive a defendant of a federal forum for all Sixth Amendment and other rights that, at the time the statute took effect in 1996, had not yet been litigated in the Supreme Court. This argument is specious, however, because it is well established that there need not be a federal forum for every federal constitutional claim.<sup>182</sup> The modern Court has never pretended otherwise. The most strident example is *Stone v. Powell*, in which the Supreme Court eliminated the federal relitigation of all Fourth Amendment claims, thus entrusting the resolution of these cases entirely to the state courts.<sup>183</sup> Similarly, the Court’s steadfast refusal to hear subsequent habeas petitions or new claims—unless the petitioner can show both cause and prejudice<sup>184</sup>—suggests that not all rights deserve a federal forum, or at least that the Constitution does not demand it. It has been supposed, however, that, since the history of the writ is “inexplicably intertwined with the growth of rights of personal liberty,” and since the underlying rights that the writ implicates are constitutionally born, there is something like a substantive right to the writ, at least in some instances.<sup>185</sup> Consequentially, although Congress bestows the writ, the Court must determine its application. Thus *Stone*’s delimitation is constitutional, but the AEDPA’s is not. Limits prescribed by the Court itself are merely a function of judicial authority, while such limits, when congressionally introduced, are illegitimate. Supporters of this position maintain that although authority to grant the writ at all “must be bestowed by Congress, the standards for determining whether the writ should issue [in particular cases] are of constitutional origin and should therefore be defined by the judicial branch.”<sup>186</sup> A brief examination shows that this is not an argument for a substantive right to federal habeas review; it is an argument about constitutional separation of powers.

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181. See, e.g., Bloom, *supra* note 166, at 416 (quoting *Fay v. Noia*, 372 U.S. 391, 401 (1963)).

182. See *Stone v. Powell*, 428 U.S. 465, 492–94 (1976).

183. *Id.* at 489–94.

184. See *Wainwright v. Sykes*, 433 U.S. 72, 90–91 (1977).

185. Bloom, *supra* note 166, at 416.

186. *Id.*

## B. SEPARATION OF POWERS PROBLEMS

Much scholarly work suggests that § 2254 creates a separation of powers problem. In a long, thorough, and influential historical review of Article III, scholars Liebman and Ryan concluded that “Congress was meant to ‘[r]egulate’ the Court’s ‘jurisdiction’ but not to control the ‘manner’ in which jurisdiction would be exercised.”<sup>187</sup> Informed by a rich history of proposed, but rejected alternatives, Liebman and Ryan concluded that the text of Article III is a particularly precise and reliable means of deducing the intention of its drafters.<sup>188</sup> Thus, for instance, the text’s unequivocal assertion that judicial power “shall be vested in one Supreme Court *and* in such inferior courts”<sup>189</sup> ought to mean just that, and not “in one Supreme Court *or* in such inferior courts.”<sup>190</sup> Within this vision of judicial power, Congress maintains the authority to delegate or not delegate judicial power to the judiciary, but once delegated, does not maintain the authority to prescribe or proscribe the methods by which the judiciary exercises that power.<sup>191</sup> Under this system, the idea of judicial power is distinct from the idea of jurisdiction.

What emerges from this research is something like the essential function theory: that the manner of exercising the courts’ essential judicial power is constitutionally protected. Therefore, the principal problem with § 2254(d)(1) (and other sections of the AEDPA) would be that Congress has interfered with an essential function of the Article III courts. That is, Congress may not impair the courts’ exercise of their already granted jurisdictional powers. While Congress is free to regulate the scope of federal jurisdiction,<sup>192</sup> and is also free to change the prospective substantive law,<sup>193</sup> Congress is not free to regulate the methods or manner in which judicial power is exercised, because this manner is one of the courts’ essential functions.<sup>194</sup> Two cases suggest the existence of this essential

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187. 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, 708 (1998).

188. *Id.* at 707–09.

189. U.S. CONST. art. III, § 1 (emphasis added).

190. Liebman & Ryan, *supra* note 187, at 708.

191. See Joseph M. Brunner, Comment, *Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III Hierarchy*, 75 U. CIN. L. REV. 307, 317 (2006).

192. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1868). See U.S. CONST. art. III, § 2 (“[T]he Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”).

193. See *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 437–39 (1992).

194. See *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

function. The first is *Plaut v. Spendthrift Farm, Inc.*, where the Supreme Court invalidated a law requiring the reopening of final judgments.<sup>195</sup> The second is *City of Boerne v. Flores*, where the Court implied that Congress had violated separation of powers principles by failing to heed the Court's previous rejection of a religious liberty theory.<sup>196</sup> Congress could not statutorily reinstate a constitutional standard of review that the Court had already rejected. Vicki Jackson says that, taken together, "*Plaut* and *Boerne* suggest a vision of Article III courts that requires Congress . . . to treat (and allow other courts to treat) their decisions as having ordinary *stare decisis* effect."<sup>197</sup> In the case of the AEDPA, Congress certainly did thwart the ordinary *stare decisis* effect of many decisions when it eliminated from the federal courts' purview all valid case law that did not come from the Supreme Court. Therefore, the anti-AEDPA argument using separation of powers is this: Congress cannot selectively negate federal precedent, no matter its source. If Congress limits precedent to Supreme Court law, it has impermissibly interfered with the courts' use of their constitutional powers.

Several judicial opinions have expressed reservations that reflect the argument above while applying the AEDPA standard. Judge Ripple, dissenting from the Seventh Circuit's en banc decision in *Lindh v. Murphy*, asked whether, via § 2254(d)(1), Congress had "intruded impermissibly into the federal judicial function."<sup>198</sup> He concluded that it had.<sup>199</sup> Ripple objected to Congress's command to "disregard the work product of one of [the judiciary's] components, a source of law upon which the courts otherwise would rely in the adjudication of the case."<sup>200</sup> Ripple noted that Congress "has no power to dictate how the content of the governing law will be determined within the judicial department."<sup>201</sup> This is consistent with the positions espoused in the paragraph above. More recently, a Ninth Circuit panel, including Judges Reinhardt and Noonan, requested the parties file briefs arguing whether the "ADEPA unconstitutionally prescribes the sources of law" that courts can use, "or unconstitutionally

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195. *Plaut*, 514 U.S. at 240.

196. *Boerne*, 521 U.S. at 512–13, 536. ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.")

197. Jackson, *supra* note 104, at 2469–70.

198. *Lindh v. Murphy*, 96 F.3d 856, 886 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).

199. *Id.* at 887.

200. *Id.* at 886.

201. *Id.* at 887.



prescribes the substantive rules” that federal courts can apply in state prisoners’ habeas petitions.<sup>202</sup>

Other commentators have also acknowledged the AEDPA’s constitutional separation of powers problem, but some have argued for a limited reading of the statute in order to evade unconstitutionality.<sup>203</sup> At first, the Court itself seemed amenable to such an approach. For instance, in *Felker v. Turpin*, the Court construed a different portion of the AEDPA, 28 U.S.C. § 2244(b)(E), narrowly in order to preserve original jurisdiction.<sup>204</sup> The statute purported to divest the Supreme Court of some jurisdiction over state convicts, but the Court essentially rejected the maneuver by deciding that the legislation was not repugnant to the Court’s original habeas jurisdiction.<sup>205</sup> Some have argued that *Felker* again signaled the Court’s preservation of its “essential role.”<sup>206</sup> But *Musladin* may demonstrate the endpoint of such evasive rejection because other justifications for the statute—including Liebman and Ryan’s—do not withstand the decision. This is mainly because *Norris v. Riskey*,<sup>207</sup> the Ninth Circuit rape button decision, receives no attention whatsoever from the *Musladin* majority despite being virtually indistinguishable on the facts. The Court thus implicitly accepted the statute’s meaning at face value: only Supreme Court decisions count. There is no analytical squirming to accommodate a reading that preserves an essential function.

Finally, other commentators have defended the constitutionality of § 2254(d)(1) from the ground up, arguing either that the plain language does not impinge on essential functions of the court or that no such provision for the essential function exists. One scholar, in a response to Liebman and Ryan, argues that Congress has plenary power over remedies of its own making, and in any case is free to limit the jurisdiction of the lower courts.<sup>208</sup> This seems to confuse the point of the foregoing analysis altogether (and of Article III, Section 1), which specifically distinguishes Congress’s granting of remedies and jurisdiction from Congress’s meddling with the Court’s functional exercise of those remedies and that

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202. See Order in *Irons v. Carey*, 408 F.3d 1165, 1165 (9th Cir. 2005).

203. See, e.g., Liebman & Ryan, *supra* note 187, at 868.

204. *Felker v. Turpin*, 518 U.S. 651, 658–62 (1996).

205. *Id.* at 660.

206. See Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 HARV. L. REV. 1551, 1569 (2001) (observing that “the *Felker* decision suggests an irreducible role for the Court”).

207. *Norris v. Riskey*, 918 F.2d 828 (9th Cir. 1990).

208. See generally Kent S. Scheidegger, Response, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888 (1998).

jurisdiction.

In any case, this entire debate leaves the slightly narrower, but more pragmatic stare decisis question unresolved: what authority controls in determining whether federal law is clearly established? We have already seen how *Musladin* wants it both ways, with the Court rejecting the Ninth Circuit reliance on *Norris*, but bolstering its own decision with lower court decisions. But there is no inherent dilemma for the Supreme Court; the real dilemma arises in the lower federal courts.

The problematic hypothetical scenario is simple. Imagine the Supreme Court never reviewed, and therefore never reversed, the Ninth Circuit's *Musladin* decision. The Ninth Circuit decision is still good law. Then imagine that one year later, a Ninth Circuit district court receives a habeas petition with an identical factual scenario. That district court would face a dilemma. Could it look to this Ninth Circuit precedent, not for the establishment of the law in the first place—as the actual *Musladin* wrongfully looked to *Norris*—but instead for a settled legal question in its jurisdiction? That is, could the district court look to the Ninth Circuit *Musladin* opinion for the (ordinarily) controlling authority which states that the inherent prejudice test *is* clearly established? For clarity's sake, the Ninth Circuit in our hypothetical scenario did not establish or invent the inherent prejudice test. The Ninth Circuit stated simply that the Supreme Court had clearly established it. Should not that statement be sufficient to bind the district court to the position that, yes, the test is clearly established? Either answer, yes or no, is problematic because it respectively violates either the language of the statute or the axiomatic principles of stare decisis implied by Article III. Even an inbetween answer stating that the authority is only persuasive still violates the Article III principle which holds that a Ninth Circuit decision is controlling for its district courts. This is a deeply problematic, pressing, and unresolved procedural question under the AEDPA in both theoretical and practical terms.<sup>209</sup>

### C. FEDERALISM CONCERNS

As the Supreme Court has said, habeas review power requires a “delicate balance” between the state and federal courts.<sup>210</sup> The same could likely be said about all federal court power. Thus, the AEDPA and its

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209. See Brunner, *supra* note 191, at 326 (outlining an interesting and elaborate hypothetical based on *The Godfather* that explores this point within the realm of an ineffective assistance of counsel claim).

210. Michael Williams v. Taylor, 529 U.S. 420, 436 (2000).

progeny bring to the surface a recurring U.S. ideological motif: the struggle for state power in a federal system.<sup>211</sup> Of course, they also implicate a host of corollary efficiency considerations: the wisdom of redundant procedures, finality of state decisions, stability of the system, and so forth.<sup>212</sup> Under any of Vicki Jackson's narratives, Congress evinced a strong preference for the finality of state court criminal proceedings when it passed the AEDPA.

In regarding the comity values implicated by the AEDPA and *Musladin*, we should analyze the political vulnerability of state judges. State legislatures and media frequently criticize judicial decisions in criminal cases.<sup>213</sup> Common experience tells us that, for the most part, such criticism is the voter's only information about elected state judges. Therefore, the *Musladin* buttons, with their powerfully sympathetic and quasi political message, might have been intimidating for a state judge who, above all else, would like to avoid the political fray. Such a judge might reasonably calculate that forbidding the Studer family from wearing the buttons, or later granting a habeas petition because the family wore them, is a political risk. And this perception would not be unwarranted: it could cost him his office. For that reason, one scholar has argued that "[t]o insulate habeas corpus proceedings from political machinations . . . substantive standards for granting the writ must be considered a form of federal constitutional common law."<sup>214</sup> Of course, this is a general argument for broad federal habeas access. While one might well subscribe to such a view, the point this Note makes is narrower: inherently prejudicial behavior by trial spectators will tend to occur especially in trials that expose state judges to their own most self-serving

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211. The Court has asserted that the "AEDPA's purpose [is] to further the principles of comity, finality, and federalism." *Id.* Indeed, this language is frequently invoked. One scholar has written that these catchwords "hum[] like a sacred mantra throughout Supreme Court habeas opinions, often reaching shrill tonalities when decrying the reckless award of habeas relief." Christopher Q. Cutler, *Friendly Habeas Reform: Reconsidering a District Court's Threshold Role in the Appellate Habeas Process*, 43 WILLAMETTE L. REV. 281, 282 n.3 (2007) (citing specifically *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Duncan v. Walker*, 533 U.S. 167, 178 (2001)).

212. See Michelle Hertz, *Another Hurdle to Habeas: The Streamlined Procedures Act*, 56 DUKE L.J. 1319, 1327–28 (2007); Doyle Horn, *Lockyer v. Andrade: California Three Strikes Law Survives Challenge Based on Federal Law That is Anything But "Clearly Established"*, 94 J. CRIM. L. & CRIMINOLOGY 687, 721–22 (2004). See also Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 547–48 (2006). Yackle interestingly argues that, on these points, the AEDPA is confused and operates at cross purposes. This is so because Congress aimed to discipline the system into efficiency while it also aimed to curtail the substance of federal judicial authority. Yackle concludes that "[t]he manner in which AEDPA was cobbled together suggests that no one thought any of this through at a conceptual level." *Id.* at 548.

213. Bloom, *supra* note 166, at 419 n.195.

214. *Id.* at 420.

political instincts.

*Musladin* is again the paradigmatic case. The organized button-wearing in *Musladin* communicated a distinctly political message and, just as importantly, the buttons communicated a willingness to transport that political message into, and presumably out of, the courtroom. The Tom Studer buttons in *Musladin* and the “Women Against Rape” buttons in *Norris* were plainly designed to exert political leverage on the juries, but they were also designed to exert that leverage on the judges. The most even-handed of judges would strain not to envision the powerful political vengeance that an organized, bloodthirsty victim’s family (or interest group or media outlet) could exact. The point is that political-based comity concerns about state judges do not resound as strongly in other constitutional areas of claims—such as Fourth or Eighth Amendment rights claims—as they do in situations where political messages potentially disrupt the accuracy of trial. Therefore, in *Musladin* and like cases, the argument for respecting the fairness and finality of state court judgments appears especially weak and the argument for doubting the state court’s capacity for impartiality especially strong. These are precisely the cases that demand the apolitical life tenure of federal judges.

Then there is the more profound fear associated with the federal courts’ relative powerlessness under the AEDPA. If the grounds for habeas relief are especially narrow, many injustices will never find remedies in the federal courts.<sup>215</sup> While that prospect may delight some who support finality of state court judgments, all three of the ideological foundations for federal habeas corpus outlined in Part III demand at least some federal habeas review for the most egregious state cases. An advocate of small federal powers probably still agrees that federal courts must maintain some minimum oversight in order to ensure harmony with the Federal Constitution. *Musladin* serves to underline the AEDPA’s gnawing premise that in novel fact patterns even the most shocking injustice will never be federally resolved. With this fear fresh in mind, we can return to *Musladin*

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215. Consider this exchange at oral arguments:

JUSTICE STEVENS: May I ask this question? Supposing we all thought that this practice in this particular case deprived the defendant of a fair trial, but we also agreed with you that AEDPA prevents us from announcing such a judgment. What if we wrote an opinion saying it is perfectly clear there was a constitutional violation here, but Congress has taken away our power to reverse it.

Then a year from now, the same case arises. Could we follow—could the district court follow our dicta or could it—would it be constrained to say we don’t know what the Supreme Court might do?

MR. OTT [counsel for the petitioner, Carey]: It could not follow this Court’s dicta under this Court’s statement in *Williams v. Taylor*.

Transcript of Oral Argument at 17–18, *Carey v. Musladin*, 127 S. Ct. 649 (2006) (No. 05-785).

and its two most prominent concurrences, where we see the AEDPA's procedural problems come to light.

## VI. THE *MUSLADIN* CONCURRENCES

### A. JUSTICE KENNEDY'S *MUSLADIN* CONCURRENCE AND THE *TEAGUE* ANALYSIS

Justice Kennedy responds most directly to this Note's fears that the AEDPA precludes relief for petitioners in certain unfair yet novel circumstances; he claims such fears are baseless. Justice Kennedy says in his *Musladin* concurrence: "[i]f, in a given case, intimidation of this nature was brought about by the wearing of buttons, relief under the [AEDPA] would likely be available even in the absence of a Supreme Court case addressing the wearing of buttons."<sup>216</sup> This claim is worth exploring in depth. How, given the majority opinion, could relief be available? This Note contends, in contradiction to Justice Kennedy, that it could not. *Musladin* stands for the proposition that, because of § 2254(d)(1), a private spectator's courtroom behavior, no matter how egregiously prejudicial, can never allow federal habeas relief for a state prisoner. Justice Kennedy's claim that the AEDPA will accommodate relief in such a setting is wrong, especially considering the current state of both the law and the Court. Indeed, the implications of *Musladin* are even greater than those relevant to private spectator behavior since § 2254(d)(1) will similarly withhold relief in any other unique, yet egregiously unfair, factual setting. What is most unfortunate about the Kennedy concurrence then, and the Supreme Court decision altogether, is that they speak of resisting such an odious jurisprudence, but do nothing to avoid it. Moreover, the Court does not admit the pervasiveness of its result.

In order to better explain the shortcomings in Justice Kennedy's understanding of *Musladin*'s consequences, we should consider how—by what procedural processes—he believes that the Court could offer such a petitioner relief. Justice Kennedy's concurrence explicitly suggests two methods, and also implies a third. We will take them in order.

#### 1. The Broader Reading of Precedent Approach

First, Justice Kennedy explains that if the prejudicial behavior of private spectators was profoundly disruptive, coercive, or intimidating—

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216. *Carey v. Musladin*, 127 S. Ct. 649, 656 (2006) (Kennedy, J., concurring).

which the buttons in *Musladin* were not—then it would fall under the purview of the Court’s general jurisprudence securing the petitioner a fair trial free from coercion and intimidation. The presence of such intimidation would make relief available even without any specific Supreme Court caselaw.<sup>217</sup> Although Justice Kennedy sketches this method out in only its broadest terms, this Note makes a very similar argument in response to the majority opinion in Part II.F. Therefore, this Note cannot quarrel with the sound legal intuition that Supreme Court case law secures an accused the right to a fair trial atmosphere.

Unfortunately, the majority of the Court *does* quarrel with this intuition. In fact, it rejects this notion outright. Justice Kennedy might argue that both he and the majority simply did not find the buttons in *Musladin* sufficiently damaging to warrant the application of an overarching fairness rationale. In other words, *Musladin*’s petition failed the test. This could be true in theory, but it is inconsistent with the majority opinion. If the majority had taken this tack, it would have applied a “trial free from coercion” test—whatever that is—and rejected *Musladin*’s petition on this basis. If Justice Kennedy truly believed it, he too would have applied a “trial free from coercion” test and rejected *Musladin*’s petition on this basis. In Part II.F, this Note argues that the appropriate fair trial test is the inherent prejudice test.<sup>218</sup> But whatever the appropriate test is, the Court and Justice Kennedy certainly did not apply it, since they did not apply any substantive test at all to the facts of *Musladin*.

Therefore, Justice Kennedy says in essence that because private spectator problems could theoretically be resolved by a line of reasoning that the Court today rejects, relief is still somehow available for the petitioner. A neater way to put this might be that relief is still available to the petitioner, so long as the Court overrules *Musladin* and uses an entirely different theoretical framework for the next petitioner. This is too optimistic.

Justice Kennedy states that the “AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.”<sup>219</sup> Again, according to the *Musladin* majority, this seems to be precisely what the AEDPA requires. Justice Kennedy’s notion of what *Musladin* means is hard to square with *Musladin* itself,

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217. *Id.*

218. Justice Souter and Justice Stevens also believe the inherent prejudice test is appropriate. *See id.* at 657 (Souter, J., concurring). *See also infra* Part VI.B.

219. *Carey v. Musladin*, 127 S. Ct. at 656 (Kennedy, J., concurring).

where the Court overturns the Ninth Circuit's attempt to grant relief, and in so doing, implies that the factual patterns of past cases are not the least bit elastic. Perhaps what Justice Kennedy actually means is that if a case like *Musladin*'s were to involve palpable injustice, we would see the Supreme Court invoke much broader readings of the precedent. Again, this rationale seems intuitively fair, but inconsistent with the Supreme Court data. We have seen—in *Andrade*, for instance—the Court's failure to reach the merits of a case largely because § 2254(d)(1) permitted only a narrow reading of narrow precedent, even in the face of palpable unfairness.

To support his proposition that the Court need not wait for identical factual patterns, Justice Kennedy cites to *Wright v. West*.<sup>220</sup> There are two problems with this citation. First, Justice Kennedy cites not to the majority opinion, but to his own concurrence. No one joined that *Wright* concurrence, just as no one joined his concurrence in *Musladin*. This suggests that Justice Kennedy's optimism is too idealistic, or at least that no other member of the Court shares it. It is striking that Justice Kennedy remains so confident the Court will adopt a broader reading of precedent in cases of unfairness. Second, and more importantly, *Wright*, decided in 1992, predates the AEDPA by four years, and therefore, if relevant at all, disserves Justice Kennedy's purpose. His concurrence in *Wright* emphasized that *Teague v. Lane*—which § 2254(d)(1) “seems to subsume and supplant,”<sup>221</sup>—did not strip the federal courts of their power to review *de novo* mixed questions of law and fact. In *Wright*, Justice Kennedy generally expounded upon the virtues of *Teague*'s mushiness, which is due to the malleability of the term “new rule.” That is, old rules that necessitated case by case evaluation could be applied to novel or unique facts without requiring the formation of a new rule.<sup>222</sup> This was a boon to the habeas petitioner. Yet we can see how self-serving the standard would become under this vision of *Teague*: any judge can manipulate such a malleable rule. Perhaps this concern explains why no other Justices joined Justice Kennedy's opinion.

Moreover, the mushiness of the old rule/new rule distinction in *Teague* is precisely what the tightly wound language of § 2254(d)(1) purports to stiffen. Indeed, authors Liebman and Ryan astutely identify four ways in which § 2254(d)(1) is more deferential to state court decisions than

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220. *Id.* (quoting *Wright v. West*, 505 U.S. 277, 306 (1992)).

221. Liebman & Ryan, *supra* note 187, at 866 & n.811 (“This new standard [§ 2254(d)(1)] is a codification and . . . modification of the . . . doctrine in *Teague v. Lane* . . .” (quoting *Zuern v. Tate*, 938 F. Supp. 468, 475–76 (S.D. Ohio 1996)).

222. *Wright v. West*, 505 U.S. 277, 307–08 (1992) (Kennedy, J., concurring).

the *Teague* analysis.<sup>223</sup> First, as we have seen, and as *Musladin* clarified, only Supreme Court case law may clearly establish federal law under the AEDPA, whereas circuit law sufficed under *Teague*.<sup>224</sup> Second, under the AEDPA the law must be clearly established by the time of the state decision, whereas under *Teague* the law could be established while federal certiorari was pending.<sup>225</sup> Third, the AEDPA recognizes no exceptions for granting relief via a new rule, whereas the *Teague* analysis recognized two exceptions.<sup>226</sup> The doctrine provides for an exception for new rules where the rule will “(1) immunize behavior from criminal sanction or (2) create ‘watershed’ criminal procedure protections against convicting the innocent.”<sup>227</sup> The second exception, the more important one for our purposes, applies only where the procedure at issue is essential to an accurate determination of guilt.<sup>228</sup> The exception is therefore extremely unlikely since by now there are few watershed issues in criminal procedure without Supreme Court treatment.<sup>229</sup> In any event, and however unusual such exceptions were under *Teague*, the AEDPA provides no such exceptions.<sup>230</sup> The lack of an exception protecting against conviction of the innocent is perhaps the fundamental deficiency of the AEDPA. Such resolute finality in the face of demonstrative unfairness compromises a petitioner’s Sixth Amendment and Fourteenth Amendment right to a fair trial. Fourth and finally, the AEDPA focuses on the state’s decision rather than the merits of the petitioner’s underlying constitutional claim. This amounts to a restoration of the writ’s nineteenth century appellate status, where the writ served to correct and review lower proceedings.<sup>231</sup> Such appellate treatment erodes the conception of the writ as an independent civil suit, in which a federal court was required to consider each constitutional claim anew, and where the original state decision served merely as “relevant authority from another jurisdiction.”<sup>232</sup>

Though some scholars, such as Liebman and Ryan, speculated that the

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223. Liebman & Ryan, *supra* note 187, at 867.

224. *Id.*

225. *Id.*

226. *Id.* at 867–68.

227. *Id.* at 852.

228. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 981 (4th ed. 2000).

229. *Id.* The facts of *Musladin* suggest, however, that the Supreme Court’s criminal procedure jurisprudence is not as comprehensive as one might have assumed.

230. Liebman & Ryan, *supra* note 187, at 867–68.

231. *Id.* at 852.

232. *Id.* (quoting *Brown v. Allen*, 344 U.S. 443, 458 (1953)).



AEDPA “subsume[d] and supplant[ed]” *Teague*,<sup>233</sup> *Horn v. Banks* announced that the two analyses are distinct, and that the *Teague* analysis becomes a threshold question.<sup>234</sup> For the most part, the distinction is superfluous because *Teague* will not usually bar petitions on which AEDPA analysis might otherwise have permitted relief. Since § 2254(d)(1) requires that the result “was contrary to” or “was an unreasonable application” of federal law, the statute apparently requires contrariness or unreasonableness when the state case was decided, not in light of later precedent. As one scholar explains, the “precedent must predate the judgment of conviction of the person seeking habeas.”<sup>235</sup> Yet under the AEDPA, the court evaluates the last reasoned state court opinion,<sup>236</sup> so that the state appellate court’s affirming opinion is what matters, and that appellate decision would have to have been unreasonable at that time. Meanwhile, *Teague* also forbids retroactivity from the time the rule is announced, but allows for retroactivity under the two exceptions. Thus, the facts in *Horn v. Banks*, where the Supreme Court established the pertinent federal law *after* the petitioner’s jury trial, but *before* his state appeals, exemplify the rather unusual circumstances in which a *Teague* analysis might proscribe a claim otherwise viable under the AEDPA. The point is that the distinction does no good for a habeas petitioner, but it does occasionally spare the state from enduring review on the merits, and thus nudges relief just slightly further out of a habeas petitioner’s reach.<sup>237</sup>

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233. *Id.*

234. *Horn v. Banks*, 536 U.S. 266, 272 (2002) (“While it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review set forth in 28 U.S.C. § 2254(d) . . . none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard, or that AEDPA relieves courts from the responsibility of addressing properly raised *Teague* arguments. To the contrary, if our post-AEDPA cases suggest anything about AEDPA’s relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct.”).

235. *Ides*, *supra* note 128, at 704–05.

236. *Franklin v. Johnson*, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002) (citing *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000)). *See also* *Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991).

237. Similarly, does the *Teague* threshold process discourage generous state postconviction procedures? If a state wishes for crisper finality of its convicts’ sentences, the state will attempt to decline to hear habeas petitions based on federal law or constitutional requirements, by adopting strict waiver rules and the like. That way, by not producing a reasoned decision after a new clearly established federal rule from the Supreme Court, the most recent state decision will remain invulnerable under the AEDPA. Some might appreciate a reduction in what are perceived as duplicative and gratuitous postconviction remedies. Yet, even the soul most stridently opposed to invasive federal habeas procedures might agree that the incentive structure here is unfortunate, because the federalism implications are severe. The state has a disincentive to resolve its own criminal proceedings, lest the state courts face more invasive federal review. That state has no incentive to review more closely, but instead has incentive to shun review altogether, since shutting the courthouse doors renders previous decisions airtight. This argument cuts against *Teague*’s structure more than it cuts against

In any event, and more importantly, the retroactivity exceptions under *Teague* will not cure the AEDPA's retroactivity deficiency. Even if a petition passes the *Teague* threshold, it will not pass the § 2254(d)(1) threshold, since the decision will not have been contrary to or an unreasonable application of federal law at the time of the decision. This is a serious problem, and one with which the *Musladin* Court does not sufficiently grapple. To make this concept more concrete, consider the most offensive hypothetical scenario for a habeas petitioner under the *Teague*/AEDPA rubric. Imagine that this petitioner has been convicted unfairly, but unfairly in such a unique way that the Supreme Court has never encountered it before. Imagine this unique way is so unfair that the Supreme Court decides to establish a new rule to abolish it and, because this new rule creates "'watershed' criminal procedure protections against convicting the innocent," the Court decides to apply the rule retroactively under *Teague*'s second exception.<sup>238</sup> Therefore, the petitioner passes the initial *Teague* threshold. At this point, it would seem that the Court must grant the petition. The Court has decided that the offense is so bad it requires a new rule to handle it. And it has decided that this new rule is so fundamental to the accuracy of a conviction that it should apply to all cases, past or future. In other words, the Court can establish this new rule and apply it retroactively because for past convictions the temporal and logistical difficulties of applying the rule are so overwhelmed by the apparent injustice of *not* applying it. But after all this, § 2254(d)(1) still denies relief. This is because, no matter how unfair the conviction, the original state decision was not contrary to federal law at the time; it only became contrary to federal law when the Court announced the new rule. Thus, the cause for concern is powerful. Does this AEDPA rejection not usurp the final protective measures that *Teague* preserved? Does this interaction not make the *Teague* and AEDPA systems incompatible, at least in terms of fairness to the petitioner?

This interaction is not hypothetical. The nightmarish *Teague*/AEDPA interaction is evident in *Musladin* itself. Imagine that a majority of the Court believed that there was no clearly established Supreme Court precedent on private spectator conduct in the courtroom. Yet this same majority also honestly believed that the Studer buttons, worn by trial spectators and intended to communicate a message to the jury, were so inherently prejudicial that they implicated procedures fundamental to an

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§ 2254(d)(1)'s. Still, the AEDPA seals any final leaks.

238. Liebman & Ryan, *supra* note 187, at 852 n.745 (citing *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994)).

accurate guilt determination.<sup>239</sup> To make this example easier and more powerful we can embellish *Musladin*'s facts, which under the Court's technical approach, have no bearing on the decision. Therefore, imagine the buttons were as big as dinner plates and read "Hang Musladin."<sup>240</sup> Now the Court decides—sensibly probably, under the facts of this hypothetical—that the buttons compromised Musladin's right to a fair trial. For this reason, the buttons also induce skepticism about the validity of the guilt determination process. The Court should therefore create a "watershed" rule to protect against convicting the innocent, and apply the necessary retroactivity under the second *Teague* exception. Such a scenario is precisely the eventuality the *Teague* Court anticipated. Yet under the AEDPA, the reasoning and result of *Carey v. Musladin* would remain identical, even if all members of the Court think that the dinner plate buttons were grossly unfair, and even if all members of the Court think that the dinner plate buttons compromised the accuracy of the verdict. Justice Kennedy is wrong that the AEDPA would allow relief; it would prevent it.

Yet even worse than the fact that the individual petitioner receives no relief is the fact that the Supreme Court remains unable to construct a watershed rule to prevent similar injustices in the future.<sup>241</sup> If the Court

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239. As an aside, it is plausible that some Supreme Court Justices did actually think this, at least if we extrapolate from certain comments at oral argument. Justice Breyer noted that for the most part, other judges that have reviewed this case "say wearing buttons is a bad idea. For obvious reasons." Transcript of Oral Argument, *supra* note 215, at 14. Justice Kennedy compared the buttons to banners and then said, "I think I know why [there are no cases involving banners]. Because it affects the atmospherics of the trial." *Id.* at 15.

240. At oral argument, Justice Stevens suggested a similar hypothetical: "What if three buttons had said 'Hang Musladin'?" Souter asked. 'Wouldn't that call for overturning the conviction?' Maybe so, [state counsel] Ott replied, because that would send an explicit message to the jury." David G. Savage, *Justices Debate Photo Buttons Worn by Trial Spectators*, L.A. TIMES, Oct. 12, 2006, at A14. In this exchange, counsel for Carey was arguing for a distinction between implicit and explicit messages that the Court did not adopt.

241. Justice Stevens's sensible but rejected position in *Teague v. Lane* was that the court ought first to resolve the case on its merits, and then to decide whether the remedy should to be withheld on the basis of novelty. *Teague v. Lane*, 489 U.S. 288, 318–19 (1989) (Stevens, J., concurring). Justice Stevens's system had the virtue of creating notice for lower courts, by placing new law on the books to stem continued violation of a constitutional requirement. Unfortunately, the system would be toothless in the post AEDPA era, since such notice would not "clearly establish[]" any federal law; however, the Supreme Court's pronouncement of a constitutional preference may still bear on the behavior of state court judges, and in that sense serve a valuable purpose. Furthermore, this type of "unnecessary" litigation is not unprecedented. The most notable instance of such "unnecessary" litigation in order to establish useful case law exists in the area of civil rights suits brought under 42 U.S.C. § 1983, usually against police officers, where the police officer claims qualified immunity. Before reaching the immunity question, which can dispose of the case immediately, the court first determines whether there was a constitutional violation. PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 1102 (5th ed. 2004). Though sometimes creating needless work, the approach has been defended on the ground that it is a time and money saving mechanism for police

attempted to create that rule, the rule would be reduced to dictum. Since the AEDPA prevents relief, the Court's holding would have to be that the state court's decision was not contrary to or an unreasonable application of clearly established federal law. Therefore, any language regarding the wrongfulness of the buttons—or the wrongfulness of any other unique unfairness—would reduce to inessential dicta. And as *Williams v. Taylor* emphasized, dicta cannot “clearly establish[]” federal law.<sup>242</sup> If the Supreme Court received the same case one year later, it would be forced to hand down—albeit begrudgingly—the same result. The Court would have to do this again and again. Thus, a harsh reality plainly emerges. A petitioner who was convicted in a proceeding that was inherently prejudiced by nonstate actors, no matter how flagrantly, will never receive federal habeas relief nor will any petitioner who suffers a uniquely unfair conviction.

## 2. The Lower Courts Approach

The second method that Justice Kennedy offers to resolve the dilemma of the petitioner convicted in the uniquely unfair way is more disquieting than the first. Justice Kennedy suggests that communicative buttons inside a courtroom have the potential to cause trouble, even if they did not in *Musladin's* case.<sup>243</sup> A preventative rule is therefore necessary, he says, but the rule should be explored in the lower courts for a number of years and then eventually brought before the Supreme Court.<sup>244</sup> This alleged alternative of a rule developed in the lower courts is especially troubling. This alternative also highlights the fundamental shortcoming of the *Musladin* opinion: it fails to contemplate fully its own procedural implications and consequences. Justice Kennedy's suggestion is problematic not so much because it is equivocal—though it is that—but because it is procedurally impossible. As we have seen, a major trouble with the AEDPA standard is that the Supreme Court (and other federal

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forces. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 93, 113 (1999). Generating such common law serves the state institution even if the law is ultimately superfluous and “unnecessary” to the immediate case, because the institution can modify unconstitutional behavior without ever paying for its previous violations. Similarly generated case law in § 2254 habeas petitions would be beneficial too. It would notify trial courts of constitutional boundaries without forcing them to pay the steep price of releasing a convict. It would also ensure that the development of new law in this area does not atrophy.

242. See *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., concurring).

243. *Carey v. Musladin*, 127 S. Ct. 649, 657 (Kennedy, J., concurring) (“In all events, it seems to me the case as presented to us here does call for a new rule, perhaps justified as much as a preventative measure as by the urgent needs of the situation.”).

244. *Id.*

courts) will virtually always fail to reach the merits of a given case on collateral review. Furthermore, a primary fault of post-*Musladin* AEDPA jurisprudence is the way it stymies further development of criminal procedure law.<sup>245</sup> This stymied development occurs even at the Supreme Court level. As for development of new criminal law at the district and circuit levels, the AEDPA absolutely forbids it.<sup>246</sup> The notion then that lower courts could develop law on habeas review within this framework is unrealistic, and the possibility that this newly developed law could then eventually surface at the Supreme Court level is simply nonexistent.

### 3. The (False) Promise of a Direct Review Alternative

Though Justice Kennedy does not state so explicitly, there is one final way the Supreme Court could avoid spiraling into such criminal procedure atrophy. That is, there is one final way that Justice Kennedy might have in mind when he says that the person convicted in a uniquely unfair way could still receive relief from the Supreme Court under *Musladin*. It is simple: the Supreme Court could take this convict's case on direct review. The Court has the power to take cases directly from the states on a petition for original habeas corpus.<sup>247</sup> We will call this the direct review alternative. The direct review alternative position is literally correct. The Supreme Court could consider a case such as *Musladin*'s on direct review, and thus circumvent § 2254(d)(1). Since the AEDPA applies only to habeas petitions on collateral review, it would be irrelevant to the Court's authority on direct review.<sup>248</sup> The Court could reverse or remand however it saw fit.

Despite all this promise, there is almost no value in the direct review alternative. The promise of direct review as an alternative to collateral review is unrealistic, untenable, and even disingenuous, for at least four reasons. The first three reasons demonstrate that Supreme Court direct review of criminal cases is theoretical only, as it is politically unrealistic and logistically troublesome. These reasons are sufficient to put to bed the

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245. See *supra* Part VI.A.1.

246. See *supra* Part IV.A (discussing of the three narratives of the AEDPA). At the very least, Congress intended to forbid criminal law development at these levels. *Id.*

247. See *In re Medina*, 109 F.3d 1556, 1564 (11th Cir. 1997) (responding to a petitioner's claim that the AEDPA stripped him of his right to federal review and pointing out that the convict could have petitioned the Supreme Court for direct review under its original habeas corpus powers). See also *In re Davis*, 121 F.3d 952, 956 (5th Cir. 1997) (indicating the same). One hint that Justice Kennedy at least contemplates the direct review alternative is evident in a question he asked at oral argument: "[L]et's assume for a minute that this case were on direct review, that we don't have AEDPA. What is the standard that should control?" Transcript of Oral Argument, *supra* note 215, at 12–13.

248. See *In re Medina*, 109 F.3d at 1564; *In re Davis*, 121 F.3d at 956.

direct review alternative. If they do not suffice, however, there is also a final reason to believe that even if the direct review option were possible, it would hardly justify eliminating the development of case law on collateral review because there is inherent value in collateral review.

First and most importantly, the direct review alternative ignores federal court realities. The Supreme Court virtually never takes criminal cases on direct review. The Court has not reversed a conviction on direct review in more than eighty years.<sup>249</sup> The Court has rarely even exercised its power to accept such a case during that time.<sup>250</sup> Indeed, the last direct review of a criminal conviction was so deep in the past, with such a different Court, with such dissimilar views on criminal justice, and in such a distant political climate, that it is difficult even to imagine the scenario that would compel today's Court to accept a case on direct review. Perhaps there is no such scenario. Moreover, given the Court's current path toward leaner federal review of state convictions, it is extremely unlikely that the Court as it is now constituted will ever change this.<sup>251</sup>

The second reason that the direct review alternative is unhelpful is that the logistics demand that the Court should not change.<sup>252</sup> Indeed, the alternative of robust direct review by the Supreme Court conflicts with what most contemporary commentators view as the ideal federal court system. While it avoids the unfortunate comity problem inherent whenever a district court reviews a state high court's decision, such Supreme Court direct review is logistically impossible. Though many years ago the Court exercised its original habeas power with a sense of duty,<sup>253</sup> such a view has faded entirely. There has been consensus for a long time that the Supreme Court cannot keep pace with the national volume of criminal cases, nor could it effectively enforce the constitutional guarantees to every criminal

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249. Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 782 (2002) (citing *Ex parte Grossman*, 267 U.S. 87, 122 (1925) as the most recent case in which the Court exercised original habeas corpus by taking direct review of a state case and reversing the conviction).

250. *Id.* at 757 n.270, 782.

251. *But see id.* at 782–84 (arguing that the AEDPA should force the Court to rediscover its power of direct review in death penalty cases). Admittedly, restricting the universe of potential direct review cases to those involving the death penalty would help resolve some of the volume problem discussed *infra* note 254 and accompanying text.

252. *But see id.*

253. *See id.* at 782 (“It was once recognized that original habeas corpus review is ‘not only within the authority of the Supreme Court, but it is its duty’ when jurisdiction to adjudicate an imprisoned person’s constitutional claim is otherwise unavailable.”) (citing *Ex parte Yarbrough*, 110 U.S. 651, 653 (1884)).

defendant.<sup>254</sup> To expect the Supreme Court, which already receives around seven thousand petitions for certiorari every term, to handle additional direct review cases, however many, is probably futile. Worse still, flooding the Supreme Court with many direct review cases could possibly incapacitate it as effectively as would denying it jurisdiction altogether. Accordingly, some have suggested a more moderate perspective since accepting the occasional direct review case would likely not have such a drastic impact. Of the many commentators who have argued for alterations to the current system of review, these suggestions have tended to be only modest retoolings of the current system.<sup>255</sup> The main point is that such suggestions do not portend a massive influx of direct Supreme Court review, and under any of these conceptions, Musladin and those like him would still never receive direct review. Direct review would not become a robust source of new criminal procedure law, though it might unfortunately become the only source.

The third reason direct review is a hollow promise is that the direct review route still does not resolve the *Teague*/AEDPA retroactivity problem for anyone other than the convict fortunate enough to reach the Supreme Court on direct review.<sup>256</sup> Although in the test case the convict receives relief, other convicts who suffered the same or similar fates would in all likelihood never receive direct review, either because direct review is no longer timely or because the Supreme Court could not handle the additional case volume necessary to reach their cases. Thus, these convicts' habeas petitions would be barred by the contemporaneously "contrary to . . . or unreasonable" requirement of § 2254(d)(1).

Fourth and finally, the fact that a case could theoretically be decided on direct review is hardly compelling justification for failing to address an

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254. See Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 253–54, 331 (1988). The article argues that *Brown v. Allen*, 344 U.S. 443 (1953), expanded the writ in order to alleviate strain on the Supreme Court and allow lower federal courts to behave like surrogate appellate judges. Friedman writes, "[t]he new model recognizes this review for what it is: a surrogate for the direct review that the Supreme Court could no longer meaningfully provide for every criminal case. The question remains whether such review should exist." *Id.* at 331. With respect to the volume of writs for certiorari that the Court must wade through each term, see Richard A. Posner, *The Courthouse Mice*, THE NEW REPUBLIC, June 5, 2006, at 32, 33 ("[T]he number of petitions for certiorari (and other applications for review) has grown substantially since the 1930s (from about 900 a year to about 7,500), and each one has to be decided. But most of the growth has been in petitions filed by indigents, mainly prisoners, who do not have lawyers, and most of these petitions are frivolous.").

255. See Friedman, *supra* note 254, at 335 (calling for a conception of the lower courts as "surrogates" of the Supreme Court, thus allowing the Court to exercise "direct review" via the district courts; this amounts to a structure not altogether different from the current one). See also Stevenson, *supra* note 249, at 782–83 (calling for direct Supreme Court review in death penalty cases).

256. See *supra* Part VI.A.1.

issue when it is currently raised on collateral review. Consider Justice Brennan's compelling *Teague* dissent:

Sometimes a claim which, if successful, would create a new rule not appropriate for retroactive application on collateral review is better presented by a habeas case than by one on direct review. In fact, sometimes the claim is *only* presented on collateral review. In that case, while we could forgo deciding the issue in the hope that it would eventually be presented squarely on direct review, that hope might be misplaced, and even if it were in time fulfilled, the opportunity to check constitutional violations and to further the evolution of our thinking in some area of the law would in the meanwhile have been lost.<sup>257</sup>

The evolution of Supreme Court thinking might be lost forever in cases with unique circumstances such as *Musladin*. Indeed, this threat is especially salient with fair trial claims, because the possible circumstances—the order, procedure, atmosphere—of a fair trial are fairly narrow, but the circumstances of an unfair trial are virtually unlimited. Presumably, the Supreme Court has not faced all those imaginary, and yet in some ways inevitable, unfair circumstances.

#### 4. The Constitutional Implications of Justice Kennedy's Concurrence

Altogether, we can see how this deficiency in the *Musladin* result exposes a nasty side effect of the AEDPA, and perhaps this effect is unconstitutional. In short, § 2254(d)(1) eviscerates the fairness safeguards that kept the *Teague* analysis constitutionally viable in the first place. In their pre-AEDPA article which argues, inter alia, that *Teague*'s encroachment on habeas relief is “troubling,”<sup>258</sup> but constitutionally viable, Richard Fallon and Daniel Meltzer contend that two principles guide the determination of whether particular remedies must follow constitutional violations.<sup>259</sup> The first is *Marbury v. Madison*'s promise of redress for every violation of a constitutional right, a promise that is admirable, but never uniformly attainable.<sup>260</sup> The second is a more pragmatic promise of “a system of constitutional remedies adequate to keep government generally within the bounds of law.”<sup>261</sup> The first promise is relatively malleable to the logistical and sensible limits of judicial efficiency.<sup>262</sup> The

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257. *Teague v. Lane*, 489 U.S. 288, 338 (1989) (Brennan, J., dissenting).

258. Fallon & Meltzer, *supra* note 87, at 1816.

259. *Id.* at 1778–79.

260. *Id.* at 1778. *See also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *supra* Part III.B (discussing the Court's rejection of the federal right/federal forum conception of habeas corpus).

261. Fallon & Meltzer, *supra* note 87, at 1778–79.

262. *Id.* at 1779.



second is less forgiving, for though it can tolerate failures to provide redress in particular instances, it cannot tolerate systemic failures to provide such redress.<sup>263</sup>

Some argue therefore that evaluating and applying the second principle of Fallon and Meltzer's system depends on shifting empirical evidence about the constitutional errors in state court.<sup>264</sup> That is, the empirical question of whether state courts actually do stay within the bounds of the law may reveal the adequacy of the governing habeas system.<sup>265</sup> This point is powerful where parsing the adequacy of the procedural structure is delicate and the arguments on either side are sensible; empirical data may indeed swing favor one way or the other. In our situation, however, § 2254(d)(1) colludes with *Teague* to strip federal review down to a skeletal outline that is nowhere close to adequate. Even without empirical data, we can see that when the AEDPA thwarts *Teague*'s exceptions, the system is woefully inadequate for keeping government generally within the bounds of the law. Fallon and Meltzer's position, though deferential to pre-AEDPA *Teague*, is likely to agree. For instance, Fallon and Meltzer considered the *Teague* framework attractive because it "places heavy emphasis on the systemic capacity of the habeas remedy to vindicate the rule of law. And it recognizes a role for protection of individual defendants where that role is most critical—where there is a question about the defendant's guilt."<sup>266</sup> Thus, if Congress—or the Court—totally eviscerates *Teague*'s protection of individual defendants whose guilt is in doubt, Congress or the Court greatly undermines Fallon and Meltzer's reasoning and, along with it, *Teague*'s constitutional footing. Effectively, Congress or the Court has also eviscerated, in Fallon and Meltzer's terms, the constitutional remedies that can reasonably be expected to keep government within the bounds of the law. The reason is straightforward: failing to protect convicted defendants whose guilt remains ambiguous is the epitome of an inadequate criminal procedure system.<sup>267</sup>

Under *Musladin*, as informed by the Kennedy concurrence, the resulting procedural structure may be rightly criticized as a form of

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263. *Id.*

264. Jackson, *supra* note 104, at 2468 & n.114.

265. *Id.*

266. Fallon & Meltzer, *supra* note 87, at 1816.

267. See *Estes v. Texas*, 381 U.S. 532, 564 (1965) (Warren, C.J., concurring) ("[T]he criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated.").

deceptive legislative puppetry.<sup>268</sup> The structure ensures that, for the habeas petitioner, relief is phantasmal because although Congress has maintained a façade of federal adjudication, it has rigged the system behind that façade to rule overwhelmingly in the government's favor. This notion of deception is admittedly a broad expansion of a notion belonging to Gordon Young, expressed in an article in which he applied the idea to jurisdictional issues and not to substantive law.<sup>269</sup> Nevertheless, it is reasonable to view the AEDPA as a narrow brand of jurisdictional stripping. Without a doubt, pre-AEDPA federal judges enjoyed wider jurisdiction before the statute hemmed their habeas power by, for instance, limiting acceptable precedent to volumes of United States Reports. Young might rightly criticize this structure as duplicitous, since the AEDPA snares petitions that the *Teague* Court specifically foretold as valid. It would almost be beneficial to the petitioner if the AEDPA did "subsume and supplant" *Teague*, and in any event it would be much more analytically honest. One scholar very aptly calls this form of legislative and judicial chicanery "shadow law."<sup>270</sup> Shadow law is a particularly fitting term when we recall the ruse that the *Musladin* majority opinion employs, in which it relies on circuit law for the proposition that a strand of federal law is *not* clearly established, but at the same time seemingly banishes the use of circuit court precedent to show that a strand of federal law *is* clearly established.

#### B. JUSTICE SOUTER'S *MUSLADIN* CONCURRENCE AND RESULT-DEFERENCE

In Part IV.C, we worried that a result-deference system would enshrine the Thomas position in *Wright v. West*. This Note posits that Justice Souter's *Musladin* concurrence, along with the Thomas majority in *Musladin*, *does* enshrine that Thomas view and in so doing ushers in an undesirable form of result-deference. Under the result-based system, habeas is not available unless "reasonable jurists hearing petitioner's claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor."<sup>271</sup> This structure avoids answering, for instance, whether the *Musladin* state decision was itself unsound under federal law. This Note has argued that it was not, because the state opinion attached a superfluous "branding" requirement to the established inherent prejudice test.

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268. See Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 157 (1995).

269. *Id.* at 132–33, 139.

270. Chen, *supra* note 167, at 536.

271. Steinman, *supra* note 95, at 1510.

Justice Souter argues in his concurrence, as does this Note in Part II.F, that the majority's distinction between state courtroom action and private courtroom action is weak and meaningless. As to the inherent prejudice standard, Justice Souter writes, "there is no serious question that it reaches the behavior of the spectators," and there is no reason to believe "that it should matter whether the state or an individual may be to blame for some objectionable sight."<sup>272</sup> Justice Souter further asserts that the standard is simple: the trial court's affirmative responsibility is to sweep the court clear of improper influences. The appropriate language, culled from *Flynn*, is whether, in the totality of the circumstances, the trial irregularity created an unacceptable risk of impermissible factors coming into play.<sup>273</sup> Most crucially, he also believes that the photo buttons risked inducement of such improper considerations. Note that Justice Souter mentions nothing about branding with "unmistakable mark[s] of guilt," the additional standard by which the California Court of Appeal affirmed Musladin's conviction.<sup>274</sup>

We should pause here for a moment to ask whatever happened to the unmistakable branding requirement. Perhaps the risk of impermissible factors coming into play reaches a level of unacceptability at the point that the irregularity brands the defendant with an unmistakable mark of guilt. That is, the California court's branding requirement could be synonymous and coextensive with the Supreme Court's inherent prejudice test. This is coherent, but consider how absurd a standard that stringent would be. The *Estelle* and *Flynn* Courts addressed the *risk* of impermissible factors.<sup>275</sup> This makes sense when we conceive of the Sixth Amendment right as a right to a fair process under Bator's model or a right to opinion-deference under Steinman's. If the risk becomes unacceptable only once the defendant has been branded, then the term risk is inapposite. Branding connotes, almost by definition, certainty. And if the branding must be an "unmistakable" indicator of guilt, then the term risk is swallowed up completely.<sup>276</sup> Perhaps for this reason, branding has been considered as an alternative, but distinct standard to the inherent prejudice test, and one with which the Ninth Circuit has flirted, but the Supreme Court never

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272. *Carey v. Musladin*, 127 S. Ct. 649, 657 (2006) (Souter, J., concurring).

273. *Id.* (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)).

274. *See id.* at 657–58.

275. *E.g.*, *Estelle v. Williams*, 425 U.S. 501, 504 (1976) ("[T]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.").

276. *See Musladin v. LaMarque*, 427 F.3d 653, 659, 660 & n.3 (9th Cir. 2005) (noting that branding may serve as an alternative to the ordinary test), *rev'd sub nom.* *Carey v. Musladin*, 127 S. Ct. 649 (2006).

adopted.<sup>277</sup>

Therefore, the state tacked an additional and unnecessary branding requirement onto the inherent prejudice test. There can be little doubt this requirement was contrary to Supreme Court law. The California court applied the wrong standard. Alternatively, and at the very least, the adding of the additional requirement amounted to an unreasonable application of Supreme Court law, as no Supreme Court law suggested the branding standard.

Now to return to Justice Souter, it appears that his concurrence is, like Justice Kennedy's, a little puzzling. If Justice Souter believes that the distinction between state and individual courtroom behavior is meaningless—which he does—then there is “clearly established” Supreme Court law on this issue: the inherent prejudice standard applies. And if Justice Souter believes that the inherent prejudice standard inquires whether the trial irregularity created an unacceptable risk of impermissible factors coming into play and does not ask about branding—which Justice Souter does—then Justice Souter probably thinks that the California court applied the inherent prejudice test incorrectly. Therefore, it seems that he thinks the requirements of § 2254(d)(1) are met. Justice Souter ought to reach the substance of Musladin's claim yet he does not.

Though at first puzzling, this dissonance makes sense when we recall the distinction between deference to opinions and deference to results. Justice Souter has implicitly adopted the latter option. Consider that if opinion-deference controlled, then under Justice Souter's analysis, Musladin's writ ought to issue. After all, the state's reasoning was unsound. Naturally it would be counterproductive to grant habeas relief if for example the state court incorrectly or unreasonably applied a standard that was too solicitous to the prisoner. The petitioner was in that case advantaged by the error. But this Note's reading of opinion-deference does not require such a perverse result because § 2254(d)(1)'s language prescribes the negative: habeas relief “shall not be granted . . . unless . . . .”<sup>278</sup> Thus, the federal court may still withhold relief, even if the petitioner passes the threshold AEDPA standard. The important concept here, under a fair process oriented and opinion-deference model, is that the petitioner is entitled to at least one analytically sound review of his federal claim. Since if he passes the stiff threshold requirements of § 2254(d)(1) then the state failed to provide him one, the federal court

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277. *Id.* at 660 n.3 (citing *Williams v. Woodford*, 384 F.3d 567, 588 (9th Cir. 2004)).

278. 28 U.S.C. § 2254(d)(1) (2000).

should have to review the mishandled claim de novo. Thus, once the AEDPA threshold was passed, either because the state court applied the wrong law or because it applied the right law wrongly, the federal court decides the federal claim de novo. That way, the prisoner is entitled to a full and analytically sound review of his claim by at least one court.

In *Musladin*, the AEDPA threshold question would seem to be satisfied. This Note has argued that the California Court of Appeal improperly conducted a “branding” inquiry, and the decision was thus either contrary to federal law or was an unreasonable application of it. By adopting a *Williams/Flynn* test absent any such branding inquiry, Justice Souter’s concurrence agrees that the California court’s decision was improper.<sup>279</sup> The Ninth Circuit had adopted the same test.<sup>280</sup> The Thomas majority, though refusing to adopt any test, seems to assume that it would be the one Justice Souter articulates, since the opinion does not mention branding at all. So Justice Souter need not have dissented, but he did need to review *Musladin*’s claim de novo or at least order another court to do so using the correct standard.

Yet even after meeting this threshold, Justice Souter did not purport to decide *Musladin* de novo. Since Justice Souter thought it obvious that the buttons created some risk of impermissible factors coming into play, the only “debatable question” was whether the buttons created a risk rising to the “unacceptable” level.<sup>281</sup> Justice Souter is agnostic on this question, because he defers to the state court. He says “two considerations keep me from concluding that the state court acted unreasonably in failing” to decide that the buttons rose to the level of unacceptability.<sup>282</sup> Justice Souter’s deference is deeply problematic because the state court never decided the question at all; the state court decided a distinct (and wrong) inquiry—whether the buttons branded *Musladin*. The state never concluded

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279. *Carey v. Musladin*, 127 S. Ct. at 657–58 (Souter, J., concurring).

280. *Musladin v. LaMarque*, 427 F.3d at 659.

281. *Carey v. Musladin*, 127 S. Ct. at 658 (Souter, J., concurring).

282. *Id.* The two considerations upon which Justice Souter relies are interesting. The first repeats a tactic of Justice Thomas’s majority opinion: it relies on lower court opinion. Justice Souter finds that most lower courts that have addressed buttons have not vacated convictions, and he would therefore be uneasy assuming all those decisions were unreasonable or mistaken. *Id.* at 658. Note that this use of lower court precedent is fairer than Justice Thomas’s because it involves no logical misstep. Still, perhaps Justice Souter overstates the broader implication of his dissenting. The second consideration affecting Justice Souter is his suggestion that the button wearers might have a First Amendment interest in wearing them. *Id.* He fails to pursue this line of reasoning, and even admits that the case for a First Amendment right is not “intuitively strong.” *Id.* Perhaps that is why this position is either rejected out of hand (by Justice Stevens) or completely ignored (by everyone else). First Amendment protection of the buttons seems implausible. *See supra* note 85.

anything about whether the buttons created an “unacceptable” risk, and we can only speculate about what the state would have concluded. Justice Souter thus decides—and this is of monumental importance—that it would have been unreasonable to decide something the state court never decided. This is result-deference.

Justice Souter’s concurrence, along with the majority opinion, means that no court will ever properly analyze *Musladin*’s case using the inherent prejudice test. The reviewing federal court looks only to the result of the state court—which affirmed the conviction—and asks whether there is any reasonable way to reach that same result. But the court does not ask whether the state court did reach that result reasonably. This is an enshrinement of the result-deference framework that *Williams* had purportedly rejected for all the right reasons. As Steinman foresaw, the result-deference model eliminates the stick that motivates state courts to hand down well-conceived and well-analyzed decisions. More importantly, the model is extremely prejudicial toward the criminal defendant. It is difficult to imagine how denying an accused access to even one analytically sound review of his claim does not amount to an unconstitutional abrogation of due process.

#### VII. DIRECTION OF THE COURT’S TREATMENT OF THE AEDPA HABEAS LIMITATION

*Musladin* is hardly the first, nor will it be the last, case in which otherwise potentially meritorious claims never reach substantive review in the federal courts because of § 2254(d)(1). *Lockyer v. Andrade*, for instance, also underscored the AEDPA’s grossly unjust results.<sup>283</sup> In that case, Leandro Andrade, a lifelong heroin addict with a checkered, but nonviolent criminal past, stole just over \$150 worth of videotapes from two California K-Mart stores.<sup>284</sup> The tapes, which included *Snow White* and *Cinderella*, were probably bound to be sold in order to feed his drug habit.<sup>285</sup> Because Andrade had two previous felonies for petty theft, the jury found that he had three prior convictions for serious or violent felonies and thus fell under the auspices of California’s “three strikes” law. Under this law, any felony whatsoever could subject a three-time felon to a sentence of twenty-five years to life. Accordingly, Andrade was convicted

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283. *Lockyer v. Andrade*, 538 U.S. 63, 63 (2003). For a scathing legal review of the *Andrade* majority opinion, see Ides, *supra* note 128, at 727–48.

284. *Andrade*, 538 U.S. at 66.

285. *Three Strikes: Penal Overkill in California*, CBSNEWS.COM, July 9, 2003, <http://www.cbsnews.com/stories/2002/10/28/60II/main527248.shtml>.

and the trial court sentenced him to two consecutive twenty-five year prison terms.<sup>286</sup> Andrade argued that the punishment was so excessive as to be cruel under the Eighth Amendment.<sup>287</sup> Indeed, Justice Souter noted in dissent that since Andrade was thirty-seven at the time of the sentence, and would not become eligible for parole until age eighty-seven, the term was virtually equivalent to life in prison for fairly minor crimes.<sup>288</sup> Nevertheless, Justice O'Connor's majority opinion emphasized that Andrade would become eligible for parole, albeit late in life, and thereby distinguished his case from *Solem v. Helm*,<sup>289</sup> where a sentence had specified life in prison.<sup>290</sup> Therefore, the majority held, there was no clearly established federal law announced by the Supreme Court, and anyway, the state decision was not contrary to nor was an unreasonable application of any federal law.<sup>291</sup> Thus, the Supreme Court dodged resolving the substantive Eighth Amendment question.

*Yarborough v. Alvarado*<sup>292</sup> demonstrated the same phenomenon within the same § 2254(d)(1) framework. In that case, seventeen-year-old Michael Alvarado helped another man steal a truck, which led to the vicious murder of the truck's owner.<sup>293</sup> Police interviewed Alvarado, whose parents had taken him to the police station, inside a small room for two hours, during which time Alvarado's denial of the crime slowly deteriorated. The interview culminated in Alvarado's confession that he helped steal the truck and later hid the murder weapon.<sup>294</sup> At trial and on state appeal, he moved to suppress the confession arguing it was constitutionally infirm under *Miranda*. But he was convicted on the strength of the confession. The Supreme Court ruled that the state court of appeals had not been unreasonable in refusing to include the defendant's youth and lack of life experience as factors determining whether he was in police custody for *Miranda* purposes.<sup>295</sup> Again, the Court deftly skirted the substantive issue, here a Fifth Amendment *Miranda* one.

The primary difference between *Andrade* and *Alvarado* on the one

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286. *Andrade*, 538 U.S. at 66.

287. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

288. *Andrade*, 538 U.S. at 79 (Souter, J., dissenting).

289. *Solem v. Helm*, 463 U.S. 277 (1983).

290. *Andrade*, 538 U.S. at 74. For a powerful argument that this distinction is indefensible, see Chemerinsky, *supra* note 2, at 23–24.

291. Chemerinsky, *supra* note 2, at 22.

292. *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

293. *Id.* at 655–56.

294. *Id.* at 656–58.

295. *Id.* at 668–69.

hand and *Musladin* on the other hand is the issue of guilt. The Supreme Court has since the Warren era evinced a propensity to rank defendants' constitutional rights.<sup>296</sup> During the same period, the Court openly voiced its hierarchical preference for rights whose abrogation has a direct bearing on the accuracy of guilt determination, and the Court's decisions have sought to sanctify the "ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."<sup>297</sup> Illegally seized evidence, for instance, implicates perhaps an improper or fundamentally unfair process by the police force, but does not undercut the Court's faith in the guilt of the defendant. Thus, it is consistent with the Court's hierarchy that Fourth Amendment rights received short shrift from federal courts on habeas petitions; in fact, Fourth Amendment-based petitions were barred altogether.<sup>298</sup> Therefore, that Eighth Amendment rights, as incorporated and applied to the states by the Fourteenth Amendment Due Process Clause, receive similar short federal court shrift under the AEDPA in *Andrade* should come as no surprise either. While this direction may be offputting to some, the *Andrade* decision seems ultimately consistent with the trend of the Court, because the punishment *Andrade* receives for his theft has no bearing whatsoever on his guilt, which is clear and uncontroverted.<sup>299</sup> Depending on the narrative of the AEDPA that we adopt,<sup>300</sup> the decision may also align with the direction of the legislature. Adopting either the "Congress with the Courts" narrative or the "Congress and the Supreme Court against the Lower Courts" narrative, the abrogation of habeas relief for Eighth Amendment violations reflects the waning scope of habeas relief. For the most part, the same can be said for the improper interrogation and Fifth Amendment rights at issue in *Alvarado*. Confessions are probably good indicators of guilt, and so the Court has grown shy in withholding them. In the transition from cruel punishment to forced confessions, however, the Court ought to notice the boundaries

296. WHITEBREAD & SLOBOGIN, *supra* note 228.

297. *Stone v. Powell*, 428 U.S. 465, 490 (1976).

298. *See id.* (deciding that Fourth Amendment claims distract from the "ultimate question of guilt or innocence that should be the central concern in a criminal proceeding").

299. This Note does not intend to discount the possibility that sentencing may affect the accuracy of a guilt determination in the first instance. Harsh sentencing likely favors the state, particularly before trial, where the defendant must choose whether to accept a plea bargain. *See* Chantale LaCasse & A. Abigail Payne, *Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow Of The Judge?*, 42 J.L. & ECON. 245, 248, 267 (1999) (discussing the impact of the minimum sentencing guidelines on plea bargaining and finding that defendants "bargain in the shadow of the judge"; sentence length after trial is directly proportional to sentence length via plea). Then again, sentencing so harsh that it becomes Draconian could lead to more frequent jury nullification.

300. *See supra* Part IV.A (discussing Vicki Jackson's three narratives of the AEDPA).



separating guilt from procedural fairness growing fuzzy. Confessions are false surprisingly often.<sup>301</sup> And one is apt to presume that, when pressed, juveniles are even more likely to confess falsely.<sup>302</sup> Therefore, relying on (potentially involuntary) confessions from youths when rendering guilt determinations, as in *Alvarado*, is a recipe for unreliable guilt determinations. It appears safe to say that *Alvarado* was peculiar in that no one seriously doubted the defendant's guilt nor the heinousness of his crime. Still, the once clear-cut divide separating factual concerns about substantive guilt from technocratic concerns about police behavior begins to deteriorate.

The point is that by the time we reach *Musladin*, the boundaries between accuracy of guilt and procedural fairness have vanished entirely: they are one and the same. The subject of *Musladin*'s complaint, inherent prejudice, is immediately and irrevocably tied to the accuracy of his guilt determination. Guilt cannot be presumed when it was arrived at by a partial jury. Thus, although it would be easy to dismiss *Musladin* as yet another point along the Court's decades long curtailment of habeas relief, the case is markedly different. *Musladin* stepped into the space that previous § 2254(d)(1) cases had sidestepped, the space that the Court most revered, the space where the defendant's procedural objection implicated his substantive guilt. As Justice Powell wrote when the Court commenced its decades-long curtailment of habeas corpus, it is this "ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."<sup>303</sup> *Musladin* should have been treated accordingly.

### VIII. CONCLUSION

If we return finally to the three ideological foundations for federal habeas relief, we can see that 28 U.S.C. § 2254(d)(1), as applied by *Musladin*, preserves none of them. First, the statute is on its face antithetical to the federal forum for a federal right ideology, because it strips federal courts of the ability to hear certain federal rights. But this much is not controversial, and besides, the ideology that demanded a federal forum for every federal right seems to have died long ago under the Court's supervision, not under the legislature's. Therefore, it is

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301. See generally Miriam S. Gohara, *A Lie For A Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791 (2006).

302. See *Haley v. Ohio*, 332 U.S. 596, 599–600 (1948) ("Mature men possibly might stand the [interrogation] from midnight to 5 a.m. But we cannot believe that a lad of tender years [a fifteen-year-old] is a match for the police in such a contest.").

303. *Stone v. Powell*, 428 U.S. 465, 490 (1976).

§ 2254(d)(1)'s eradication of the tenets of the next two ideologies that is more important and more disconcerting. "Innocence matters," the second basis for the writ, no longer survives, at least not meaningfully. As we have seen, plugging the *Teague* exceptions plugged the safety valves that protected against the convictions of innocent defendants, however infrequently those exceptions were exercised in practice. Perhaps just as bad, the plugging also discourages states from pursuing their own postconviction proceedings, thus further entrenching improper state methods. Finally, the Court has forsaken the fair process ideology by implicitly adopting result-deference, instead of opinion-deference, on habeas review. *Musladin* demonstrates how under § 2254(d)(1), defendants will not be guaranteed that at least one court competently analyze their federal claims. Indeed *Musladin* himself was denied that right. Justice Souter's concurrence proves the same when he showed how the California court misapplied the law, but then decided, without engaging the merits of the case, that a reasonable court could have reached the same result. Justice Thomas's majority opinion is even more ominous about the prospect of fair process because the state decision was not reviewed at all.

Next, if we return to the three narratives for the enactment of the AEDPA, we can see that only the most confrontational, Congress against the Courts, endures. It is rather ironic that the AEDPA consecrates Supreme Court holdings, but in so doing, freezes out the current Supreme Court. In many ways it prevents them from announcing new decisions, at least without rather specific or fortuitous factual circumstances. Of course, the havoc it wreaks on lower courts is far worse. The Supreme Court should therefore have declined to apply § 2254(d)(1) on one of the constitutional grounds outlined above in the first instance. The Court, however, has made apparent its blithe acceptance of the statute, and nothing suggests the Court is anywhere near reconsidering that perspective. Therefore, the outlook is gloomy.

Nevertheless, this Note offers several suggestions that could improve the current state of § 2254(d)(1) affairs. To start, the Court should adopt a constitutional due process jurisprudence which, first, allows lower district courts to ascribe ordinary *stare decisis* power to all ordinary controlling precedent with regard to the question of what is clearly established law, language of the AEDPA notwithstanding. This approach will have the virtues of preserving Article III powers to some extent and of providing uniformity within each circuit, thereby sending plain signals to the state courts therein. Second, the jurisprudence should reopen the *Teague* valves that the AEDPA plugged and which Justice Kennedy mistakenly believes

are still open. They must be unplugged. This would preserve the worst-case scenario foresight that kept *Teague* constitutionally viable in the first place. It would also ensure that the Court not circumscribe entirely the fair trial rights of everyone whose trial circumstances are novel. Third, this jurisprudence should plainly disavow the result-deference structure suggested in Justice Souter's *Musladin* concurrence—and perhaps adopted implicitly by the majority opinion—by guaranteeing the defendant at least one analytically sound judgment on the merits. Lastly, if the Court means to make the defendant's guilt determination sacrosanct then it ought to live by that promise. Otherwise, we may witness the worst failure that can occur in criminal courts: the conviction of innocent people.

