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AEDPA AS FORUM ALLOCATION: THE TEXTUAL AND STRUCTURAL CASE FOR OVERRULING *WILLIAMS v. TAYLOR*

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ABSTRACT

In Williams v. Taylor*, the Supreme Court read a section of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) to change the long-prevailing de novo standard of review of federal habeas petitions by state prisoners. In holding that Congress had denied the lower federal courts the power to grant habeas relief to prisoners in custody pursuant to wrong but reasonable state court decisions, the Court departed from the provision's text and relied instead on its perception of a generalized congressional purpose to cut back on habeas relief and on the non-redundancy canon of statutory construction. On both scores, the minority opinion had the better argument. Moreover, both opinions overlooked legislative history strongly supporting the conclusion that Congress did not intend to change the standard of review. The case for reading the provision as requiring a departure from the well-established standard of review was thus remarkably weak.*

Even if the support for the holding had been stronger, however, the Court should have rejected such a reading for a reason considered by neither opinion: under the majority's interpretation, the provision allocates federal jurisdiction over the relevant cases in a highly dysfunctional manner. AEDPA (as construed in Williams*) does not prohibit all federal courts from granting relief to state prisoners convicted pursuant to wrong but reasonable state court decisions. Had it done so, it would have raised serious constitutional issues. Instead, the statute leaves it to the Supreme Court to review state court criminal convictions for such errors. But allocating this role to the Supreme Court today makes little sense. Precedent and principle support judicial resistance to interpretations of jurisdictional statutes that produce such dysfunctional allocations of judicial power. The Court should reverse* Williams *at its earliest opportunity. Pending such reversal, the Court should grant review of at least some allegedly "wrong but reasonable" state court convictions in order to vindicate the liberty interests of state prisoners*

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who would not be in custody had those precedents been properly applied and to protect its precedents requiring the reversal of convictions infected with non-harmless constitutional errors.

INTRODUCTION

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) has been aptly described as "surely one of the worst statutes ever passed by Congress and signed into law by a President."[1] Perhaps the most troubling aspect of this law, however—the part that keeps state prisoners incarcerated despite prejudicial errors in their trials[2]—is attributable not to the Congress that enacted the statute or the President who signed it, but to the slim majority of the Supreme Court that misinterpreted it in *Williams v. Taylor*.[3] The statute added § 2254(d)(1) to Title 28 of the U.S. Code, which bars the federal courts from granting habeas corpus relief to state prisoners if their claims were adjudicated on the merits in state court and the state court's decision was neither "contrary to" nor "involve[d] an unreasonable application of" clearly established federal law.[4] In *Williams*, the Supreme Court interpreted this section to bar habeas relief even if the state court's decision was erroneous, as long as it was not "unreasonably" so.[5] In other words, the Court interpreted the provision to bar habeas relief to persons in state custody pursuant to wrong but reasonable state court decisions.

The standard of review introduced in *Williams* departed starkly from the long-prevailing standard, under which federal habeas courts reviewed de novo the state courts' decisions on questions of law and mixed questions of law and fact.[6] The effect of AEDPA, as construed in *Williams*, is to bar the lower federal courts on habeas from granting relief to state prisoners even if the trials were infected with the sort of constitutional error that, according to the Supreme Court's own precedents, warrants reversal of the conviction.

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1. Lincoln Caplan, *The Destruction of Defendants' Rights*, THE NEW YORKER (June 21, 2015), http://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights.

2. *See* Emily Bazelon, *The Law That Keeps People on Death Row Despite Flawed Trials*, N.Y. TIMES MAG. (July 15, 2015), http://www.nytimes.com/2015/07/17/magazine/the-law-that-keeps-people-on-death-row-despite-flawed-trials.html?_r=0); *see also* Marcia Coyle, *Sotomayor Says Congress Should Not Tell Judges How to Review Cases*, NAT'L LAW J. (Nov. 19, 2015), https://www.law.com/nationallawjournal/almID/1202742882533/sotomayor-says-congress-should-not-tell-judges-how-to-review-cases/.

3. 529 U.S. 362, 365 (2000).

4. 28 U.S.C § 2254(d)(1) (2012).

5. *Williams*, 529 U.S. at 404–13. I describe the standard in greater detail, *infra* Section II. The characterization of the standard in the text captures the gist.

6. Brown v. Allen, 344 U.S. 443, 501–08 (1953) (Frankfurter, J., dissenting); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1280–81 (7th ed. 2015) (explaining that Justice Frankfurter's opinion reflects the way that *Brown v. Allen* has been understood by subsequent cases and best reflects the majority's position in the case on federal habeas corpus review of state court decisions).

The Court's construction of § 2254(d)(1) in *Williams* is difficult to square with the provision's text, which authorizes habeas relief if the state court's decision was "contrary to" clearly established federal law. As the term is generally understood, a decision is "contrary to" law if it is erroneous. Justice Stevens and three other Justices would have held that § 2254(d)(1) did not change the standard of review.[7] Justice O'Connor's opinion for the majority adopted an unconventional reading of that term in order to give effect to Congress's purpose to cut back on the availability of habeas relief and because interpreting "contrary to" to permit de novo review would read the "unreasonable application" clause out of the statute.[8]

Judged by traditional indicia of statutory meaning, Justice Stevens' interpretation of § 2254(d)(1) was the more well-founded. The case for Justice Stevens's interpretation of the statute is even more compelling when one considers a point not raised in either opinion: The majority's interpretation of § 2254(d) transforms the statute into a highly dysfunctional forum-allocation rule. AEDPA does not limit the power of *all* federal courts to grant relief for wrong but reasonable applications of federal law resulting in custody; if it had, the majority's interpretation in *Williams* would have raised significant constitutional questions. The *Williams* construction skirts constitutional problems because it leaves intact the jurisdiction of the Supreme Court to review and reverse wrong but reasonable applications of federal law on direct appeal.

But allocating to the Supreme Court the responsibility for monitoring state court compliance with clearly established federal law is, to put it mildly, not a sensible allocation of the resources of the federal courts. Such an interpretation rolls us back to the period, stretching from the beginning of the Republic to the early-to-mid-twentieth century, when the Supreme Court, through its mandatory writ of error jurisdiction, was tasked with correcting errors in the state courts' interpretation and application of federal law. The replacement of mandatory writ of error review with discretionary writ of certiorari review made it possible for the Court to focus its limited resources on the resolution of conflicts among the lower courts and the resolution of broadly applicable interpretive questions. The growth of the nation, and the concomitant increase in state court judgments potentially reviewable by the Court, made such a shift all but unavoidable. At the same time, the availability of de novo review of state court convictions resulting in custody meant that such a shift would not be accomplished on the backs of erroneously convicted state prisoners.

After *Williams*, the Supreme Court can no longer assume that erroneous state court convictions will be corrected on habeas review. The Court must now either allow erroneously convicted state prisoners to languish in prison (or be executed) or shift some of the resources it now devotes to resolving conflicts among lower

7. *Williams*, 529 U.S. at 375–78 (opinion of Stevens, J.).
8. *Id.* at 404–13 (2000) (O'Connor, J.).

courts and deciding novel legal questions to correcting case-specific errors by the state courts.

This Article argues that the Court should either reverse *Williams* or begin granting certiorari petitions of state prisoners seeking review of state court convictions alleged to rest on wrong but reasonable applications of federal law. Reversing *Williams* would be the preferable course. As noted, Justice Stevens's interpretation of the statute was far more convincing than Justice O'Connor's. Reversal of *Williams* is also supported by evidence not presented to the Court or considered in either opinion, indicating that Congress did not intend to bar relief for wrong but reasonable state court decisions. The majority's holding in *Williams* also saddles the Supreme Court with a burden that it is ill-equipped to carry. Avoidance of this highly dysfunctional allocation of federal jurisdiction is a strong reason to reject the *Williams* interpretation. If this last consideration had been taken into account in *Williams*, it should have swayed the Justices who joined Justice O'Connor to adopt Justice Stevens's interpretation.

In the absence of five votes for overruling *Williams*, the Court should alter its certiorari policy and begin to grant some petitions for certiorari by state prisoners seeking review of wrong but reasonable applications of clearly established federal law. The Justices will have to be very selective in doing so, given the Court's limited resources and other responsibilities, but some attention to such cases is necessary to avoid the continued incarceration of the erroneously convicted and to protect the integrity of the Court's precedents in the field of constitutional criminal procedure. Such a shift would require the votes of only four Justices.

Treating AEDPA (as interpreted in *Williams*) as a forum-allocation rule would be consistent with the Court's approach to the statutes addressing the scope of federal habeas jurisdiction for state prisoners since such review was first authorized by Congress. From the beginning, the Court has contracted or expanded the scope of habeas review available to state prisoners in response to developments in the availability of direct review in the Supreme Court. I have examined this history in detail in other work.[9] To place the current thesis in context, Section I provides a brief sketch of the pre-AEDPA availability of habeas relief for state prisoners. The discussion shows that the availability of de novo review of state criminal convictions in the federal courts has been a constant throughout our history; only the federal forum affording such review has changed.

Section II examines the reasons given by the Court in *Williams* for denying the habeas courts the power to grant relief for wrong but reasonable state court convictions. The majority claimed to be acting as Congress's faithful agent, but the textualist and purposivist support it provided for its holding were remarkably weak. Moreover, legislative history not considered in either opinion provides strong support for the conclusion that Congress did not intend to bar habeas relief for wrong

9. *See* Carlos M. Vázquez, *Habeas as Forum Allocation: A New Synthesis*, 71 U. MIAMI L. REV. 645 (2017).

but reasonable applications of clearly established constitutional law. Indeed, the sponsors of the bill that became AEDPA assured their wavering colleagues that the provision that became § 2254(d)(1) would *not* change the standard of review.[10] Thus, the *Williams* majority's interpretation of AEDPA was unconvincing on its own terms.

The case for the minority's interpretation is further strengthened by a consideration addressed in neither opinion: as interpreted in *Williams*, AEDPA functions as a dysfunctional forum-allocation rule. Section III elaborates the forum-allocation interpretation of AEDPA and explains its dysfunctionality. It considers and rejects an alternative reading of AEDPA as reflecting Congress's view that persons in state custody pursuant to wrong but reasonable applications of federal law should just stay in prison. Congress did not withdraw the Supreme Court's jurisdiction to grant relief for wrong but reasonable state court applications of constitutional law. In exercising that authority, the Court will have to make its own assessment of the need for federal review in such cases. The Court has on numerous occasions expressed the view that lower federal court review of state convictions is necessary for effective enforcement of federal rights in criminal cases.[11] If the Court remains convinced that federal review is necessary to ensure that state courts "toe the constitutional mark,"[12] it should be willing to grant review in some cases alleging wrong but reasonable errors by the state courts. Section III concludes by considering how the Court might feasibly implement § 2254(d)(1), understood as a forum-allocation rule.[13]

Finally, Section IV argues that avoiding the dysfunctional allocation of judicial resources thrust upon the Court by the *Williams* majority's interpretation of AEDPA is a proper reason to reject that interpretation. In construing jurisdictional statutes, the Court has never rigidly adhered to the faithful agent model of statutory interpretation. Section IV shows that the Court has interpreted the habeas statute without adhering closely to the statutory language. Instead, it has narrowed and broadened the availability of habeas relief for state prisoners to accord with its

10. *See infra* Section II(B).

11. *See infra* text accompanying notes 247–49.

12. Teague v. Lane, 489 U.S. 288, 307 (1989) (quoting Solem v. Stumes, 465 U.S. 638, 653 (1984) (Powell, J., concurring)).

13. My argument here is distinct from the argument in Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211 (2008). Professors Shay and Lasch argue that because the federal courts may not grant habeas relief under § 2254(d)(1) if the relevant federal legal principles have not been clearly established by the Supreme Court, the Supreme Court should review more cases from the state courts in order to clearly establish the law. I focus instead on the fact that even if the relevant federal law has been clearly established by the Supreme Court, habeas relief is unavailable under § 2254(d)(1), as interpreted in *Williams*, if the state court's decision was reasonable. My argument is that if *Williams* is not overruled and the Supreme Court remains the only federal court with jurisdiction to grant relief from wrong but reasonable state court decisions resulting in custody, the Court should grant certiorari in some such cases even if the relevant constitutional law was already clearly established. Implementing the proposal by Professors Shay and Lasch would not require as significant a revision of the Court's current approach to granting certiorari as my proposal would.

own views of the need for federal habeas review in light of the efficacy of other avenues for federal review. Even when faced with enactments making highly specific amendments to jurisdictional statutes, the Court has resisted interpretations that would result in anomalous or highly problematic allocations of jurisdiction. Section IV argues that such resistance is proper, both because the complexity of the law of federal jurisdiction makes it unlikely that Congress anticipated or intended the dysfunction and because it is in any event proper for the Court to resist interpretations that would undermine the judiciary's ability to perform its proper constitutional functions.

I. THE HISTORICAL FORUM-ALLOCATION FUNCTION OF HABEAS

With respect to state prisoners, habeas jurisdiction has always functioned as a forum-allocation device—that is, the availability of habeas relief has always served to allocate among federal courts the responsibility for protecting the federal constitutional rights of state prisoners.[14] Until the enactment of AEDPA in 1996, protection of these rights had never been relegated to the state courts. De novo review of questions of federal law and of mixed questions of law and fact was always available; only the federal forum providing such review changed over time. Interpreting AEDPA as a forum allocation rule would thus accord with the Court's longstanding approach to interpreting habeas statutes. The *Williams* interpretation of AEDPA breaks new ground only insofar as it produces a highly dysfunctional allocation of federal jurisdiction.

This Section provides a brief summary of the pre-AEDPA history of federal review of state criminal convictions.[15] As relevant to this Article's thesis, this history establishes that, until the enactment of AEDPA, de novo review of issues of federal constitutional law and of application of such law to fact was always available to persons convicted of crimes in state court. At first, the Supreme Court provided review through its mandatory writ of error review of state court decisions. During this period, the Court interpreted the lower courts' habeas jurisdiction narrowly, viewing direct review as the proper mechanism for protecting the federal rights of state prisoners. As the Court's writ of error jurisdiction was replaced by discretionary review via writ of certiorari, and as the Court came to realize that it could no longer feasibly serve an error-correction function, the Court loosened the restrictions it had read into the habeas statute, thus ensuring that state prisoners had an alternative federal forum for enforcing their federal constitutional rights. The

14. All rules of federal jurisdiction are forum allocating in the sense that they distribute judicial power between federal and state courts. I use the term "forum allocation" to describe the distribution of judicial power *among federal courts*. This sense of the term can be traced to Vicki C. Jackson's contention that the Eleventh Amendment serves a forum-allocation function by allocating the power to enforce the federal obligations of the states between the Supreme Court and the lower federal courts. *See* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988). The Court subsequently rejected this understanding of the Eleventh Amendment. *See* Alden v. Maine, 527 U.S. 706, 706 (1999).

15. The arguments in this Section are defended at greater length in Vázquez, *supra* note 9.

story of federal habeas jurisdiction for state prisoners has long been one of allocating the responsibility for monitoring state court compliance with the federal constitutional rights of state prisoners as between the Supreme Court and the lower federal courts.

A. The 1789–1916 Period

From 1789 until 1916, persons convicted of crimes in state courts were guaranteed a federal forum to obtain de novo review of issues of federal law decided against them by the state courts, including issues of application of federal law to the facts of the case.[16] Such review was available in the Supreme Court via writ of error on direct review of the state's highest court decision upholding the conviction.[17] The Court had no discretion with respect to its writ of error jurisdiction; it was required to review the federal questions decided against the appellant.[18]

Congress did not grant the lower federal courts habeas corpus jurisdiction over persons in state custody until 1867.[19] In the late nineteenth and early twentieth centuries, the Court interpreted this jurisdiction narrowly.[20] Most relevantly, the Court articulated what became a strict rule that habeas should not be used as a substitute for writ of error review.[21] As the Court put it in *Ex parte Frederich*:

> [T]he general rule, and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a state court violates his rights under the constitution or laws of the United States to seek a review thereof by writ of error, instead of resorting to the writ of habeas corpus.[22]

Thus, the Court significantly curtailed the availability of habeas relief for state prisoners during this period, but the limits the Court read into the statute were justified on forum-allocation grounds: the Supreme Court was the more appropriate federal forum for the adjudication of such cases because of the sensitivity of reversing a state criminal conviction that had been upheld by the state's highest court. It would be unseemly for a single lower federal judge to set a state prisoner free. Only review in the Supreme Court was regarded as consistent with the dignity of the

16. *See* Vázquez, *supra* note 9, at 649.

17. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73 (1789).

18. *See* FALLON ET AL., *supra* note 6, at 461 (describing writ of error review as mandatory).

19. Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (1867).

20. *See* Vázquez, *supra* note 9, at 657-62.

21. *See generally* James Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2055 (1992) ("Federal habeas corpus is not a substitute for a general writ of error or other direct appeal as of right.").

22. *Ex parte* Frederich, 149 U.S. 70, 78 (1893); *see also* Baker v. Grice, 169 U.S. 284, 290–91 (1898); Whitten v. Tomlinson, 160 U.S. 231, 242 (1896); Bergemann v. Backer, 157 U.S. 655, 659 (1895); New York v. Eno, 155 U.S. 89, 96 (1894); Pepke v. Cronan, 155 U.S. 100, 101 (1894); Cook v. Hart, 146 U.S. 183, 195 (1892); Duncan v. McCall, 139 U.S. 449, 454 (1891); Wood v. Brush, 140 U.S. 278, 287 (1891); Jugiro v. Brush, 140 U. S. 291, 296 (1891); *Ex parte* Fonda, 117 U.S. 516 , 518 (1886).

state courts and respect for their constitutional obligation to enforce federal rights.[23]

B. The 1916–1953 Period

Beginning in 1916, Congress amended the statute governing the Supreme Court's jurisdiction to review state court decisions.[24] The Court's mandatory writ of error jurisdiction was gradually replaced by its discretionary writ of certiorari jurisdiction.[25] As a result of these amendments, most state prisoners no longer had a statutory right to review of their convictions by the Supreme Court.

The scope of habeas review during this period is famously contested, but the most persuasive analyses of habeas jurisdiction between 1916 and 1953 show that the Court expanded the scope of federal habeas jurisdiction during this period in direct response to the "certiorarification" of the Supreme Court's appellate jurisdiction. One side of this debate, endorsed by Justice Thomas in *Wright v. West*,[26] relies heavily on the analysis of Professor Paul Bator.[27] This side contends that before *Brown v. Allen*, habeas review was available only for claims that the state court lacked jurisdiction or had denied a full and fair hearing for the constitutional claim.[28] The other side of the debate, endorsed by Justice O'Connor in *Wright v. West*,[29] was developed by Justice Brennan in *Fay v. Noia*,[30] and later defended by Professor Gary Peller.[31] This side contends that de novo review of constitutional claims was always available on habeas and that only the substantive protections provided by the Constitution in criminal trials expanded over the years.[32]

More recently, Professor James Liebman has argued that both sides of this debate get certain aspects of the history wrong and has defended an intermediate position.[33] Liebman maintains that the availability of habeas review of constitutional questions was narrow during the period in which the Supreme Court's jurisdiction to review state criminal convictions on direct review was mandatory, but became plenary when Supreme Court review became discretionary.[34] Under Professor Liebman's version of the history, the Supreme Court treated habeas jurisdiction as a forum-allocation rule (although Liebman does not use that term). De

23. For cases so explaining the preference for review in the Supreme Court, *see* Liebman, *supra* note 21, at 2091–92.

24. FALLON ET AL., *supra* note 6, at 462–63.

25. *Id.*

26. 505 U.S. 277, 285 (1992).

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

28. *Id.* at 499.

29. 505 U.S. at 299, 303–04 (O'Connor, J., concurring in the judgment).

30. 372 U.S. 391, 402–03, 409–10 (1963).

31. *See* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.C.L. L. REV. 579 (1982).

32. *Fay*, 372 U.S. at 409, 414; Peller, *supra* note 31, at 663.

33. Liebman, *supra* note 21, at 2048.

34. *Id.* at 2091–92.

novo review of state criminal convictions in the federal courts was thought to be necessary, and when a right to such review in the Supreme Court no longer existed, habeas jurisdiction was expanded to fill the gap.

In other work, I have defended a fourth version of the availability of habeas relief for state prisoners during this period, one that bridges the Liebman and Bator versions.[35] I argued that Professor Liebman is right in maintaining that habeas jurisdiction expanded during this period in response to changes in the Supreme Court's approach to direct review of state criminal convictions, but that the relevant cases do not support his claim the shift occurred concurrently with the enactment of the statutes that amended the Supreme Court's appellate jurisdiction.[36] The transition was more gradual than Liebman suggests, and, as Bator argued, it was not completed until the Supreme Court's decision in *Brown v. Allen*.[37] However, while Bator was right with respect to the timing of the change, Professor Liebman is right with respect to the reason for the change. The expansion of habeas relief for state prisoners was the direct result of the narrowing of the availability of direct review for such prisoners in the Supreme Court.[38]

In brief, my argument is that the period between 1916 and 1953 was a transitional period characterized by disagreement among the Justices about the appropriate scope of habeas review. The Justices agreed that meaningful federal review of state criminal convictions was necessary, but, even after Congress made the Court's jurisdiction over such cases discretionary, the Justices disagreed about whether such review should take place in the Supreme Court on direct review or in the lower federal courts via habeas corpus. Some Justices believed strongly that, in the absence of exceptional circumstances, only the Supreme Court should undertake the sensitive task of reviewing state court convictions and potentially setting free a person whose conviction had been upheld by the highest state court.[39] In the view of these Justices, the Court should continue to perform an error-correction function in exercising its discretionary certiorari jurisdiction over state criminal convictions. Other Justices believed that the lower federal courts were better situated to perform such review via habeas corpus.[40] The latter view gradually prevailed, as the Justices realized that they could no longer feasibly fulfill an error-correction function. The debate during this period was thus about forum allocation. The need for meaningful review in *some* federal court was recognized on all sides; the disagreement was about the appropriate tribunal.

If either the Peller/Brennan story or the Liebman story is correct, the 1916–1953 period was one in which state prisoners had broad access to the lower federal courts to obtain habeas relief for constitutional errors in state court criminal

35. *See* Vázquez, *supra* note 9, at 649–53.
36. *Id*. at 651.
37. *Id*.
38. *Id*. at 668 (citing Liebman, *supra* note 21, at 2083, 2092).
39. *See id*. at 650.
40. *See id*.

convictions. If Liebman is right, then the broad availability of habeas relief is explicable in forum-allocation terms. Even if Professor Bator is correct as to the *timing* of the expansion of the availability of habeas relief for state prisoners, my analysis shows that Professor Liebman's explanation of the *reason* for such expansion was basically correct: the expansion was the direct result of the lack of availability of meaningful direct review of such cases in the Supreme Court. Thus, regardless of when the shift occurred, the story of the expansion of habeas review is very much a forum-allocation story.

C. The 1953–1996 Period

Between its decision in *Brown v. Allen* and the enactment of AEDPA in 1996, the Supreme Court adhered to the view that de novo review was available on habeas for cognizable constitutional claims.[41] The Burger and Rehnquist Courts tightened the procedural requirements for obtaining habeas relief and placed some limits on the types of claims that could be the basis for habeas relief.[42] The new limits had a significant impact on the practical availability of habeas relief and were subjected to (mostly well deserved) criticism.[43] But these limits paled in comparison to the limits imposed by AEDPA in 1996. Unlike the limits the Court held were imposed by AEDPA, the pre-AEDPA limits articulated by the Burger and Rehnquist Courts were largely consistent with the idea that state prisoners are entitled to a federal forum for the vindication of their constitutional rights.[44]

For present purposes, the most relevant pre-AEDPA limit the Court imposed on habeas jurisdiction was the one articulated in *Teague v. Lane*.[45] The Court in *Teague* held that, subject to two narrow exceptions,[46] the lower federal courts on habeas were not to grant relief on the basis of "new" rules—that is, rules that had not yet been recognized at the time the petitioner's conviction became final.[47] *Teague* was framed as a holding regarding the retroactive applicability of Supreme Court decisions on questions of constitutional law. In reaching its decision, the Court endorsed the view that "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[48] But, the Court wrote, "[i]n order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the

41. *See id*. at 646-47.

42. *See id*. at 690.

43. *See id*. at 691-700.

44. For an explanation of how the decision in *Stone v. Powell*, 428 U.S. 465 (1976), is consistent with this statement, *see* Vázquez, *supra* note 9, at 654.

45. 489 U.S. 288, 306–07 (1989).

46. For a discussion of these exceptions, *see* Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Post-Conviction Collateral Review*, 103 VA. L. REV. 905 (2017).

47. *See Teague*, 489 U.S. at 306–07.

48. *Id*. at 306 (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)).

original proceedings took place."[49] For this reason, the Court held that "new" constitutional rules should ordinarily not be applicable on federal habeas review.[50]

At least in principle, the *Teague* doctrine is consistent with the proposition that state prisoners are entitled to de novo review of their constitutional claims. *Teague* merely tells the habeas court what law they should apply in performing this de novo review. The state court proceeding is to be tested against the law in effect at the time of the state proceeding. If the purpose of habeas review is to provide state courts with an incentive to apply federal law faithfully, this rule makes some sense. After all, state trial and appellate judges cannot reasonably be expected to comply with constitutional principles not yet articulated. The *Teague* rule also produces (again, in principle) a sensible division of authority as between the Supreme Court and the lower federal courts.[51] Unless the claim falls within one of the two narrow exceptions the Court recognized, the role of the lower federal courts on habeas is to carry out the comparatively mundane role of ensuring state-court compliance with well-established constitutional rules. The Supreme Court, in directly reviewing state court judgments of conviction, would retain the task of resolving unsettled questions of federal constitutional law arising in state criminal cases.

As applied, however, the *Teague* doctrine has been rightly criticied as giving state courts an insufficient incentive to apply federal precedents faithfully.[52] The problem has primarily been the Court's very broad interpretation of the concept of "new" law.[53] Additionally, the Court's test for distinguishing old rules from new rules blurs the line between de novo and deferential review of state decisions. The Court determines whether a claimed rule would be new and hence inapplicable on habeas by asking whether a reasonable jurist examining the extant precedents would conclude that the claimed rule was already established.[54] In *Wright v. West*, Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) argued that this test effectively requires the habeas court to defer to the state court's interpretation of the then-existing precedents.[55] Justice O'Connor (*Teague*'s author) disagreed:

> *Teague* did not establish a "deferential" standard of review of state court determinations of federal law. It did not establish a standard of review at all. Instead, *Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final. In *Teague*,

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49. *Id.* (internal citation omitted). The Court also quoted and endorsed Justice Powell's statement from *Solem v. Stumes* that habeas review is required to force the trial and appellate courts to "toe the constitutional mark." *Id.* at 307 (quoting Solem v. Stumes, 465 U.S. 638, 653 (1984)).

50. *Id.* at 306.

51. That is, compared to AEDPA as interpreted in *Williams*.

52. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1816–17 (1991) ("*Teague* reduces the incentives for state courts, and state law enforcement officials, to take account of the evolving direction of the law.").

53. *Id.* at 1817.

54. Wright v. West, 505 U.S. 277, 291 (1992).

55. *Id.*

> we refused to give state prisoners the retroactive benefit of new rules of law, but we did not create any deferential standard of review with regard to old rules.[56]

Justice Kennedy agreed that "*Teague* did not establish a deferential standard of review of state-court decisions of federal law. It established instead a principle of retroactivity."[57]

In sum, *Teague* retained de novo habeas corpus review for "old" rules.[58] As we shall see, AEDPA (as interpreted in *Williams*) not only codified *Teague*'s limitation of habeas review to "old" rules, but also required an additional layer of deference; if the petitioner's claim was adjudicated on the merits in state court, the federal court cannot grant habeas relief unless the state court's decision was unreasonable.

II. *WILLIAMS* AND THE STANDARD OF REVIEW

Justices O'Connor and Kennedy made clear in *Wright* that *Teague* had not mandated deferential review of "old" constitutional claims on habeas.[59] In *Williams*, however, Justices O'Connor and Kennedy joined Justice Thomas, as well as Chief Justice Rehnquist and Justice Scalia (both of whom had joined Thomas's opinion in *Wright v. West*) in concluding that Congress, in enacting AEDPA, had displaced de novo review of old claims that had been adjudicated on the merits in state court.[60] In other words, they concluded that Congress, in enacting AEDPA, had imposed the deferential standard of review that Justice Thomas had mistakenly believed had been adopted earlier in *Teague*.

This Section of the Article examines the plausibility of the Court's interpretation of AEDPA in *Williams*. Part A considers the reasons given by the majority for its holding and finds them wanting. Justice Stevens had much the better of the argument. Part B considers the evidence of Congress's actual intent, which had been presented to the Court in *Williams* only passingly and was not discussed by either Justice O'Connor or Justice Stevens. This evidence reveals that Congress did not intend to bar relief for wrong but reasonable state court errors.

A. The Williams Majority's Basis for Its Interpretation

In *Williams*, Justice O'Connor relied on two types of arguments to conclude that Congress had mandated an extra level of deference to state court decisions—a conclusion that a majority of the Justices (including O'Connor herself) had rejected in *Wright v. West*.[61] First, she relied on a purposive argument, reasoning that a contrary interpretation of the statute would have been inconsistent with Congress's

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56. *Id.* at 303–04 (O'Connor, J., concurring in the judgment).

57. *Id.* at 307 (Kennedy, J., concurring in the judgment).

58. *Teague v. Lane*, 489 U.S. at 306.

59. *Wright*, 505 U.S at 303–04 (O'Connor, J., concurring in the judgment); *id.* at 307 (Kennedy, J., concurring in the judgment).

60. Williams v. Taylor, 529 U.S. 362, 404 (2000).

61. *See supra* text accompanying notes 55–57.

well-known intent in enacting AEDPA to cut back on habeas review.[62] Second, she presented a textual argument largely based on the non-redundancy canon.[63] Both arguments are deeply flawed.

1. AEDPA's Text

A literal reading of § 2254(d)(1) supports the conclusion that federal habeas relief may be granted if the federal habeas court concludes, using its independent judgment, that the state court's application of law to fact was erroneous.[64] After all, the statute authorizes habeas relief if the state court's decision was "contrary to" "clearly established federal law."[65] As Justice Stevens noted, "[t]he simplest and first definition of 'contrary to' as a phrase is 'in conflict with.'"[66] A "decision" is "in conflict with" the law if it is erroneous under that law.[67] The "contrary to law" standard of review is well established in administrative law and is understood in just this way.[68]

In reaching a contrary conclusion, Justice O'Connor also made a textual argument, but one that departed from a literal reading of the text. To be sure, textualism is not literalism. Textualists countenance departures from the literal or plain meaning of a statutory text under certain circumstances.[69] One such circumstance is when a literal reading of the statutory language would contravene one of a number of established canons of statutory interpretation.[70] The majority in *Williams* relied on the frequently-invoked "non-redundancy" canon, also known as the rule against superfluities: "[A] cardinal principle of statutory construction is that courts must give effect, if possible, to every clause and word of a statute."[71] If a literal reading of a statute would render one of its clauses superfluous, that reading is disfavored.

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

63. *Id.*

64. With the caveat that the decision is now to be measured against clearly established federal law *as determined by the Supreme Court*.

65. 18 U.S.C. § 2254(d)(1) (2012).

66. *Williams*, 529 U.S. at 388 (citing *Contrary to*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 285 (1983)).

67. *See Williams*, 529 U.S. at 388-89.

68. The Administrative Procedure Act (APA) provides that a reviewing court shall "hold unlawful" or "set aside" agency action that is "contrary to constitutional right, power, privilege or immunity." 5 U.S.C. § 706(2)(B). The courts have uniformly understood this language to establish a de novo standard of review. *See* R.J. Reynolds Tobacco Co. v. Food and Drug Administration, 696 F.3d 1205, 1217–18 (D.C. Cir. 2012); Copar Pumice Co. v. Tidwell, 603 F.3d 780, 802 (10th Cir. 2010); Darden v. Peters, 488 F.3d 277, 283-284 (4th Cir. 2007); Save Our Valley v. Sound Transit, 335 F.3d 932, 955 (9th Cir. 2003); Gulf Power Co. v. FCC, 208 F.3d 1263, 1271 (11th Cir. 2000); Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 410 (5th Cir. 1999); Beauchemin v. Nat'l Transp. Safety Bd., 91 F.3d 159, 159 (10th Cir. 1996); Lead Indus. Ass'n, Inc. v. EPA, 647 F.2d 1130, 1173–74 (D.C. Cir. 1980).

69. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 40 (2012).

70. *See id.*

71. *Williams*, 529 U.S. at 404 (O'Connor, J.) (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955)) (internal quotation marks omitted).

Whether textual interpretation based on the non-redundancy canon reflects the actual intent of legislators is highly questionable. In their empirical study of Congress's awareness and use of the various canons of interpretation, Professors Bressman and Gluck conclude that legislators and their staff "do not generally draft in accordance with the rule against superfluities."[72] Thus, to the extent Justices O'Connor and Kennedy believed that adoption of the standard they had previously rejected was compelled by their role as Congress's faithful agents, their reliance on the non-redundancy canon was ill-advised. The canon may be justified as a means of disciplining Congress, but it is highly questionable as a means of ascertaining Congress's intent.

Even on its own terms, the majority's textual analysis was unpersuasive. According to the majority, a literal interpretation of the "contrary to" language would "sap[ ] the 'unreasonable application' clause of any meaning."[73] The majority understood "unreasonable application" to mean something more than just erroneous application.[74] If the "contrary to" clause authorizes relief when the state court's decision is erroneous, the Court reasoned, there would never be occasion to apply the "unreasonable application" clause:

> If a federal habeas court can, under the "contrary to" clause, issue the writ whenever it concludes that the state court's application of clearly established federal law was incorrect, the "unreasonable application" clause becomes a nullity. We must, however, if possible, give meaning to every clause of the statute.[75]

But the Court overlooked the fact that, in its attempt to give meaning to the "unreasonable application" clause, it effectively read the "contrary to" language out of the statute.[76]

The majority sought to avoid this problem by advancing an alternative definition of "contrary to." That phrase does not necessarily mean "in conflict with," according to the majority, because the dictionary also defines "contrary" as "diametrically

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72. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation and the Canons, Part I*, 65 STAN. L. REV. 1, 6 (2013)*; see also* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

73. *Williams*, 529 U.S. at 407.

74. *Id*. at 410.

75. *Id*. at 407.

76. It is revealing in this regard that, in post-*Williams* cases, the Court often describes *Williams* as permitting habeas relief only if the state court decision was unreasonable. For example, in *Dunn v. Madison*, the Court, after quoting § 2254(d), including the "contrary to" language, explained that "[a] habeas petitioner meets this demanding standard only when he shows that the state court's decision was 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Dunn v. Madison, 138 S. Ct. 9, 11 (2017) (quoting Harrington v. Richter, 562 U. S. 86, 103 (2011)).

different," "opposite in character or nature," or "mutually opposed."[77] Thus, the majority concluded, "contrary to" can be read to require a stronger degree of contradiction than contemplated by Justice Stevens's opinion. Rather than merely being in conflict with Supreme Court precedent, the state court's decision "must be *substantially* different from the relevant precedent of this Court."[78]

This attempt to avoid the superfluity problem was unpersuasive for several reasons. First, the Court cited a dictionary definition of the word "contrary,"[79] but the statute uses the word as part of a phrase—"contrary to"—that has its own, distinct meaning. The dictionary's illustrations of the Court's definition of "contrary" clarify the difference between the word "contrary" standing alone and as part of the phrase "contrary to." As an illustration of "contrary" used as an adjective to mean "opposite to," the dictionary gives the sentence: "He ignored contrary advice and agreed on the deal."[80] As an illustration of the definition of "contrary" used as a noun to mean "the opposite," the dictionary gives the sentence: "The magazine has proved that the contrary is true."[81] These uses of the term stray far from the meaning of the phrase "contrary to"; the dictionary definition of "contrary to" is exactly the one provided by Justice Stevens: "in conflict with; counter to."[82] Indeed, as used in the law, "contrary to" is understood to mean "against; opposed or in opposition to; in conflict with" and "contrary to law" is understood as "illegal; in violation of statute or legal regulations at a given time."[83]

Second, interpreting the words "contrary to" to require more than a mere error of law does not eliminate redundancy. The definition aligns the meaning of the first clause with that of the second clause and thus *produces* redundancy.

Third, even if the phrase "contrary to" might, in the alternative, mean "opposite to," that meaning is, at best, a secondary one. It is a particularly unfamiliar definition of the term as used in legal parlance. If reliance on an uncommon usage of the term "contrary to" were a permissible strategy for aligning the two clauses, then it would be equally permissible to do so by seeking an alternative definition of "unreasonable application." Although the majority is probably correct in noting that the more common understanding of "unreasonable" is as something more than "erroneous," the term, as used in § 2254(d)(1), might also be understood to mean erroneous. That section, after all, permits relief only where the law was *clearly established by the Supreme Court*.[84] One might reasonably say that an erroneous application of *clearly established* Supreme Court precedent is ipso facto

77. *Williams*, 529 U.S. at 405 (quoting *Contrary*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976)).

78. *Id*. (emphasis added).

79. *Id*. at 405 (citing *Contrary*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976)).

80. *Contrary*, The OXFORD DICTIONARY OF ENGLISH (3d ed. 2010).

81. *Contrary*, The OXFORD DICTIONARY OF CURRENT ENGLISH (4th ed. 2006).

82. *Contrary to*, THE OXFORD DICTIONARY OF ENGLISH (3d ed. 2010).

83. *Contrary to*, BLACK'S LAW DICTIONARY 296–97 (5th ed. 1979).

84. 28 U.S.C. § 2254(d)(1) (2012).

unreasonable. Such an interpretation is supported by the equivalency drawn by Senator Hatch, one of the bill's sponsors, between § 2254(d)(1)'s "unreasonable application" standard and the standard adopted in *Harlow v. Fitzgerald*[85] for obtaining damages against government officials.[86] Senator Hatch stated that "the Supreme Court [in *Harlow*] has held that if the police officer's conduct was reasonable, no claim for damages under [*Bivens*] can be maintained."[87] Under *Harlow*, however, a government official's violation of clearly established federal law is *sufficient* to vitiate qualified immunity; the courts do not apply an additional level of deference.[88] Therefore, as Hatch applied the term, a decision erroneously applying clearly established federal law is unreasonable. As discussed below, legislators who addressed the issue advanced the interpretation that a violation of clearly established federal law is ipso facto unreasonable, in light of the sponsors' denial that the bill would alter the existing de novo standard.[89]

Perhaps in recognition of the tenuousness of its definition of "contrary to," the majority's opinion also sought to avoid superfluity by establishing distinct domains of application for the two clauses. The Court suggested that the "contrary to" clause does not apply to applications of law to fact:

> Reading § 2254(d)(1)'s "contrary to" clause to permit a federal court to grant relief in cases where a state court's error is limited to the manner in which it applies Supreme Court precedent is suspect given the logical and natural fit of the neighboring "unreasonable application" clause to such cases.[90]

The Court seemed to be saying that the "contrary to" clause applies to review of the state courts' decisions on purely legal questions and the "unreasonable application" clause applies to review of the state courts' applications of law to fact. This separation of the clauses' domains of application would thus mean that the habeas court may grant relief if the state courts' purely legal decisions are erroneous, but may only grant relief for erroneous state court decisions of mixed questions of law and fact if such decisions were unreasonable. Such an understanding of *Williams* is supported by the Court's indication that a state court decision is "contrary to" clearly established law if the court misidentified the applicable legal rule.[91]

But such an interpretation is difficult to square with the text of the statute, which states that habeas relief may be granted when the *decision* of the state court is contrary to clearly established federal law.[92] The state court's "decision" is its ultimate resolution of the case. If the Court is reading the statute to permit relief under the

85. 457 U.S. 800 (1982).
86. See 141 CONG. REC. 15,064 (1995) (statement of Sen. Hatch).
87. *Id.*
88. *Harlow*, 457 U. S. at 815–19 (1982).
89. *See infra* text accompanying notes 159–62.
90. Williams v.Taylor, 529 U.S. 362, 407 (2000).
91. *Id.*
92. 28 U.S.C. § 2254(d)(1) (2012).

"contrary to" clause only when the state court misidentifies the relevant legal standard, then it is reading the statute to permit relief only when the state court's *opinion* conflicts with Supreme Court precedent. This construction raises significant problems in the many cases in which the state courts have not written an opinion at all. The court in such cases has not written an opinion, and thus has not misidentified the applicable legal standard. Yet, it surely has rendered a "decision" which might be "contrary to" clearly established federal law, as those terms are generally understood.[93]

Moreover, a reading of § 2254(d)(1) that applies the "contrary to" clause only to issues of law and reserves the "unreasonable application" clause to applications of law to fact is inconsistent with other parts of the *Williams* opinion. As the Court correctly noted, it will often be difficult to draw the line between issues of law and mixed questions of law and fact.[94] Thus, the Court accepted that the "unreasonable application" clause applies to review of state courts' "exten[sion of] a legal principle . . . to a new context where it should not apply."[95] Yet an extension of a legal principle could be understood as a legal question. As the Court acknowledged, it is difficult "to distinguish a decision involving an unreasonable extension of a legal principle from a decision that arrives at a conclusion opposite to that reached by this court on a question of law."[96]

The Court also held that a state court decision is "contrary to" clearly established federal law when the court "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours."[97] The latter situation seems to be an example of a state court applying law to fact. A set of facts can be "materially indistinguishable"[98] from another set of facts only by reference to some legal principle. A court granting relief on the ground that the facts of the case are materially indistinguishable from a prior Supreme Court decision seems to be engaging in application of law to fact. Yet the Court recognized that the "contrary to" clause applies in this situation.[99]

Thus, in the end, the Court did not reserve one clause for issues of law and the other for applications of law to fact. An application of law to fact can be covered by the "contrary to" clause, but only if the facts are "materially indistinguishable" from those of a prior Supreme Court decision. The latter limitation, which might also be thought to render the decision "unreasonable," is attributable to the Court's hyper-restrictive interpretation of "contrary to." In this way, the Court effectively read "contrary to" as

93. *But cf*. Harrington v. Richter, 562 U.S. 86, 98–100 (2011) (holding that the "unreasonable application" standard applies to state court decisions rendered without opinion).

94. *Williams*, 529 U.S. at 408.

95. *Id*. at 407 (describing Fourth Circuit's holding to this effect and stating that the approach was "generally correct"); *see also id*. at 408 (stating that this holding was "perhaps . . . correct").

96. *Id*. at 408 (internal quotation marks omitted).

97. *Id*. at 405.

98. *Id*.

99. *Id*.

"unreasonable," thus creating rather than eliminating redundancy, and reading "contrary to" (as that term is usually understood in the law) out of the statute.

In sum, the Court's attempt to avoid redundancy by reading "contrary to" to mean "unreasonable" equally contravenes the non-redundancy canon by reading the "contrary to" language out of the statute. The Court's attempt to save the provision from redundancy by carving out separate domains of application for the two clauses strains the statutory language to the breaking point and is in any event not consistent with its ultimate holding regarding the types of rulings to which the two clauses apply. The Court read "contrary to" to mean "unreasonable," but it could just as plausibly have read "unreasonable" to mean "contrary to." Section II (B) shows that the legislators pivotal to the enactment of this provision understood the terms in the latter sense.

2. AEDPA's Purpose

In rejecting Justice Stevens's interpretation of § 2254(d)(1) as retaining a de novo standard of review, the *Williams* majority emphasized that Justice Stevens's interpretation would be inconsistent with the well-known fact that "Congress wished to bring change to the field."[100] In the majority's view, this purpose of Congress "is significant to this case."[101]

As Justice Stevens noted, however, "there is an obvious fallacy in the assumption that because the statute changed preexisting law in some respects, it must have rendered this specific change here."[102] Congress indisputably narrowed the availability of habeas relief in numerous *other* sections of AEDPA. For example, it imposed a statute of limitations[103] and narrowed the grounds for filing second or successive petitions.[104] Even in § 2254(d)(1), Congress limited the availability of habeas relief by narrowing the source of "clearly established" law that may ground a grant of habeas relief.[105] The section provides that habeas relief may be granted only if the state court decision was contrary to constitutional law that was clearly established "*as determined by the Supreme Court*."[106] Congress's general purpose of narrowing the availability of habeas relief can thus be given significant effect without giving the "contrary to" language other than its usual meaning.

The majority's purposive approach to interpreting § 2254(d) was all the more remarkable because Justice O'Connor's opinion was joined by Justices who have been critical of departing from text to give effect to perceived congressional

100. *Id.* at 404 (noting that "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law" and that "Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved").

101. *Id.*

102. *Id.* at 387 n.14 (opinion of Stevens, J.).

103. 28 U.S.C. § 2244(d)(1) (2012).

104. § 2244(b)(3)(B).

105. 28 U.S.C. § 2254(d)(1) (2012).

106. *Id.* (emphasis added).

purposes.[107] Justice Scalia, in particular, has criticized purpose-driven approaches to statutory interpretation on the ground that legislation rarely, if ever, reflects a unitary purpose.[108] Legislation is typically the product of compromise. Some legislators undoubtedly preferred a more restrictive statute and others a less restrictive one. The statute that emerged from the legislative process accomplished something in between. According to the critics of purposive interpretation, the best evidence of the resulting compromise is the statutory text.[109] In the case of § 2254(d)(1), the statutory text authorized habeas relief if the state court's decision was "contrary to" clearly established federal law. As discussed in Section II(B), its authorization of relief in such cases was clearly important for some of the legislators who voted for it.[110]

The textualist critique of purpose-driven interpretation has particular resonance with respect to § 2254(d)(1). This provision was part of a broader statute, the main purposes of which did not relate to habeas relief for state prisoners convicted of non-capital offenses; as the statute's name suggests, the habeas portions of the statute were mainly driven by a perceived need to cut back on delays in the imposition of the death penalty.[111] The impending death penalty trial of Timothy McVeigh for the Oklahoma City bombing provided momentum for this aspect of the statute.[112] Section 2254(d)(1) is only tenuously related to this purpose of AEDPA. First, this subsection applies to all state prisoners, not just those on death row.[113] Second, a change in the standard of review does not reduce delay; it determines whether the habeas petition will succeed. AEDPA reduces delay through other provisions, such

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107. *See, e.g.*, Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., concurring in the judgment); E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992). Justices Alito and Gorsuch appear to share these views. *See Digital Realty*, 138 S. Ct. at 783–84 (both justices joining Justice Thomas's opinion); Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1988 (2017) (Gorsuch, J., dissenting).

108. *See, e.g.*, E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring). For scholarly versions of this critique, *see* Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 16–17 (1984); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. PUB. POL'Y 59, 60 (1988); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3–4 (2001); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2005); John F. Manning, *What Divides Textualists From Purposivists*, 106 COLUM. L. REV. 70, 70 (2006).

109. *See* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 802 (1983).

110. *See infra* Section II(B).

111. *See, e.g.*, 141 CONG. REC.15,053 (1995) (statement of Sen. Snowe) ("The bill also contains habeas corpus reform to curb the abuse of habeas corpus and to address the acute problems of unnecessary delay and abuse in death penalty cases.").

112. *See, e.g.*, *id.* at 15,046 (1995) (statement of Sen. Inhofe) ("[H]ad it not been for the bombing in Oklahoma City, we would not be here today. We would not even be having a discussion. There would not be a debate on habeas reform. There would not be a counterterrorism bill.").

113. 28 U.S.C. § 2254(d) (2012) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted . . .") (emphasis added).

as those imposing a statute of limitations[114] and tightening the grounds for filing a second or successive petition.[115]

More importantly, as its name indicates, the other principal purpose of AEDPA was to fight terrorism.[116] In light of the statute's link to the Oklahoma City bombing, the habeas provisions might have been thought to have some loose connection to the fight against terrorism. But the provisions of AEDPA most directly linked to the fight against terrorism were those that denied sovereign immunity to foreign states that sponsored certain terrorist acts.[117] The momentum for including these provisions in AEDPA was provided by the bombing of a jet over Lockerbie, Scotland by persons linked to the regime of Moammar Qaddafi in Libya. As later recounted by the lawyers for the victims of the Lockerbie tragedy, AEDPA resulted from "an informal alliance among those whose lives had been touched by these two immense crimes—between [those] who wanted to see McVeigh die, and [those] who wanted to make Libya pay."[118] "An accident of politics had thrown them together. The two issues they cared about were linked only because they happened to be part of the same 'counter-terrorism' bill."[119] AEDPA thus reflects compromises not only between those who favored restricting habeas relief and those who would have preferred not to do so, but also between those who cared about habeas reform and those who wanted to provide a remedy against foreign states that sponsored terrorism. It is a classic example of legislative logrolling. It is far from clear that either part of the statute would have been enacted had the other not been included. It is thus the sort of statute that implicates most strongly the textualist critique of purposivism.

Adopting a restrictive interpretation of the "contrary to" language on the basis of an imputed general intent of Congress to "bring change to the field"[120] is a highly questionable approach to statutory interpretation. It is particularly inappropriate for a statute that reflects as many compromises in as many distinct areas as does AEDPA.

B. Congress's Actual Intent

Justice O'Connor's opinion discussed evidence of legislative intent in a footnote, which garnered a plurality.[121] As noted by Justice Stevens, the footnote does

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114. *See id.* § 2244(d)(1).

115. *See id.* § 2244(b).

116. *See, e.g.*, 141 CONG. REC.15,053 (1995) (statement of Sen. Snowe) ("[AEDPA] contains a broad range of needed changes in law to enhance our country's ability to combat terrorism, both at home and from abroad.").

117. *See, e.g.*, 28 U.S.C. § 1605A (2012); 28 U.S.C. § 2339B (2012); 8 U.S.C § 1189 (2012); 18 U.S.C. § 332 (d) (2012).

118. ALLAN GERSON & JERRY ADLER, THE PRICE OF TERROR: HOW THE FAMILIES OF THE VICTIMS OF PAN AM 103 BROUGHT LIBYA TO JUSTICE 231 (2001).

119. *Id.* at 232.

120. Williams v.Taylor, 529 U.S. 362, 404 (2000).

121. *Id.* at 408 n.* (2000). Justice Scalia concurred in Part II of Justice O'Connor's opinion "except as to the footnote." *Id.* at 399 n.*.

little more than quote the statutory language.[122] Neither opinion examined the legislative history bearing directly on whether § 2254(d)(1) was intended to bar relief for wrong but reasonable applications of clearly established constitutional law. Had the Justices examined the legislative history, they would have found strong evidence that the section was *not* intended to bar such relief.

This Part examines AEDPA's legislative history relevant to the interpretation of the standard of review under § 2254(d)(1). This examination shows (a) that the bill's sponsors did not regard the provisions relating to the standard of review as the most important of the bill's provisions relating to habeas reform, but instead emphasized the provision for a new limitations period and the limits on successive petitions as the main ways the bill would streamline the habeas process; (b) that it was mainly the opponents of the bill who feared that the bill altered the standard of review by barring relief for wrong but reasonable applications of federal constitutional law; (c) that the sponsors of the bill strenuously denied that it would require the Court to uphold wrong but reasonable applications of federal law, and, indeed, made clear that the bill would retain the de novo standard of review; and (d) that the sponsors of the bill and wavering legislators who ultimately voted in favor of it understood that a state court's erroneous application of clearly established constitutional law was ipso facto unreasonable.

Senator Specter first introduced the habeas corpus reform provisions with the "contrary to" and "unreasonable application" language as part of a comprehensive anti-terrorism bill.[123] Outlining what he perceived as the benefits of the proposed habeas reform, he mentioned the "strict time limits on appeals," which he viewed as "the best way to stop [the] mockery" of undue delays in carrying out death sentences.[124] He also mentioned that the proposed bill "severely restricts the filing of any successive petition," "requires that the appropriate Federal court of appeals approve the filing of any successive petition" and "imposes time limits on Federal judges to decide habeas corpus petitions in capital cases."[125] He made no reference to a change in the standard of review.

Senator Hatch, the other sponsor of the bill in the Senate, also rose to explain its benefits. Like Specter, he focused on the "time limits to eliminate unnecessary delay" and on the limits to "second or successive Federal petitions."[126] He did note that the bill "also ensures that proper deference is given to the judgments of State courts, who have the primary obligation of trying criminal cases,"[127] but he did not explain what he meant by "deference." His response to some critics' complaints

122. *Id.* at 383–84 (opinion of Stevens, J.).

123. 141 CONG. REC. 9,306 (1995). The text of the provision was similar to that of § 2254(d) as ultimately enacted: "An application for a writ of habeas corpus . . . shall not be granted [unless it] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . ." *Id.*

124. *Id.* at 9,304.

125. *Id.*

126. *Id.* at 9,309 (statement of Sen. Hatch).

127. *Id.*

that the reform would "destroy the Constitution's guarantees of individual liberty" suggests that he did not envision a standard that would have barred habeas courts from granting relief for wrong but reasonable state court decisions.[128] Hatch explained that the new bill "will uphold the constitutional guarantees of freedom from *illegal* punishment, while at the same time ensuring that *lawfully convicted* criminals will not be able to twist the criminal justice system to their own advantage."[129] Allowing wrong but reasonable state court decisions to stand hardly seems consistent with "uphold[ing] the constitutional guarantee of freedom from *illegal* punishment."[130] On the other hand, preventing "*lawfully* convicted criminals" from "twist[ing] the criminal justice system"[131] is perfectly consistent with allowing *unlawfully* convicted defendants to be released from their unlawful confinement.

Senator Biden introduced an amendment that would have eliminated the "rule of deference for habeas corpus."[132] Biden summarized the difference between his position and that of his "Republican friends" as follows: "I said the Federal courts should exercise independent review while the Specter-Hatch bill requires Federal courts to defer to the States."[133] Biden argued that, under the Specter-Hatch bill, "as long as the State court decision could be described by a lawyer as being reasonable, the Federal court has to defer to the State court."[134] Even though the State court decision "may not be right" and the Federal court "might not have decided it that way" it will often have to be deemed "reasonable."[135] The effect of this, Biden argued, is that "there is no habeas corpus review on matters of fact and law at a Federal level."[136] He stated that, under Specter-Hatch:

> [A] claim can be granted only if the State court's application of Federal law to the facts before it was unreasonable, not merely wrong but unreasonable. It could be wrong but viewed as reasonable. This is an extraordinary deferential standard to the State courts, and I believe it is an inappropriate one. It puts the Federal courts in the difficult position of evaluating the reasonableness of a State court judge rather than simply deciding whether or not he correctly applied the law, not whether he did it reasonably.[137]

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128. *Id.*

129. *Id.* (emphasis added).

130. *Id.* (emphasis added).

131. *Id.* (emphasis added).

132. *Id.* at 15,056–57 (statement of Sen. Biden). The amendment would have struck language indicating that state prisoners could obtain habeas relief if the state court's judgment "resulted in a decision that involved an unreasonable application of, clearly established Federal law . . ." *Id.* at 15,058.

133. *Id.* at 15,056–57.

134. *Id.* at 15,058.

135. *Id.*

136. *Id.*

137. *Id.* Other Senators expressed similar concerns about the bill. For example, Senator Feingold objected to "the requirement that [the] Federal judiciary defer to State courts," which he called "a major departure from more than 200 years of legal precedent . . . and the most egregious change proposed by habeas reform supporters," *Id.*

In response, Senator Hatch stated that Biden's claim that "Specter-Hatch requires Federal courts to defer to State courts in almost all cases, even if the State is wrong about the U.S. Constitution" is "*absolutely false*."[138] He then elaborated:

> The fact of the matter is, currently, Federal courts have virtual de novo review of a State court's legal determination. Under our change, Federal courts would be required to defer to the determination of State courts, *unless the State court's decision was "contrary to or involved in [sic] an unreasonable application of clearly established Federal laws as determined by the Supreme Court*." . . .
>
> . . .
>
> This is a wholly appropriate standard. It enables the Federal court to overturn State court positions that clearly contravene Federal law. It further allows the Federal courts to review State court decisions that *improperly apply* clearly established Federal law. The standard also ends the improper review of the State court decisions.
>
> After all, State courts are constrained to uphold the Constitution and faithfully apply Federal law as well. There is simply no reason that Federal courts should have the ability to virtually retry cases that have been *properly adjudicated* by our State courts.[139]

Hatch's recognition that habeas courts would be able to grant relief if the state court "improperly" applied federal law is consistent with a de novo standard of review. Hatch also made clear that deference applies only if the state court decision was *not* "contrary to" or an "unreasonable application of" clearly established federal law.

Senator Specter rose immediately after Hatch and noted that he was not completely satisfied with the language of the proposed provision because a change in language "breeds a lot of new litigation to have interpretations of untested language."[140] In his view, there would be "substantial latitude here for interpretation."[141] His view of the proposed standard was that, just as under existing law, under the new bill "there is still a good bit of latitude which the Federal judge will have when he makes a determination under a habeas corpus petition."[142] He then referred to the "contrary to" and "unreasonable application" language, and concluded that "there still is latitude for the Federal judge to disagree with the determination made by the State court judge."[143]

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at 15,031 (statement of Sen. Feingold). He urged "that the habeas provisions of this bill be removed." *Id*. at 15,032.

138. *Id*. at 15,062 (statement of Sen. Hatch) (emphasis added).

139. *Id*. (emphasis added).

140. *Id*.at 15,063 (statement of Sen. Specter).

141. *Id*.

142. *Id*.

143. *Id*.

Senator Hatch took the floor again and stated that the standard in the bill "essentially gives the Federal court the authority to review *de novo* whether the State court decided the claim in contravention of Federal law."[144] He continued: "Moreover, the Federal standard, this review standard proposed in S.735, allows the Federal court to review State court decisions that *improperly* apply clearly established Federal law."[145] So, "if the State court reasonably applied Federal law, its decision must be upheld."[146] Hatch thus confirmed that the language that was eventually adopted would not alter the de novo standard of review. He used the term "unreasonably" to mean "improperly."

That this is how Senator Hatch understood the "unreasonableness" standard is confirmed by his citation of cases in the *Bivens* and Fourth Amendment contexts, which, in his view, support "the principle that no remedy is available where the Government acts reasonably."[147] The qualified immunity cases to which Hatch referred protect an officer from damage liability if she did not violate "clearly established federal law."[148] These cases do *not* impose an additional deference standard, as the Court in *Williams* read § 2254(d)(1) to do.[149] Hatch's equation of the "unreasonableness" standard with the qualified immunity standard confirms that he understood a violation of clearly established federal law to be ipso facto unreasonable.

The Senate then voted in favor of the bill.[150] Even though his amendments had been rejected, Senator Biden supported the bill and urged his colleagues to do the same.[151] He made no reference to the habeas corpus issue. After the vote, Senator Dole explained that "[t]he most critical element of this bill, and the one that bears most directly on the tragic events in Oklahoma City, is the provision reforming the so-called habeas corpus rules."[152] He then mentioned the new filing deadlines and the limitation on second and successive petitions as "landmark reforms" that "will go a long, long way to streamline the lengthy appeals process and bridge the gap between crime and punishment in America."[153] He did not mention a change in the standard of review.

The Senate later debated the conference report (containing identical language with respect to future § 2254(d) as the original Senate bill). Senator Moynihan introduced a collection of letters and newspaper articles expressing concern about the deferential standard of review.[154] In response, Senator Hatch again explained

144. *Id.* at 15,064 (statement of Sen. Hatch).
145. *Id.* (emphasis added).
146. *Id.*
147. *Id.*
148. *Id.*
149. *See* FALLON ET AL., *supra* note 6, at 1047.
150. 141 CONG. REC. 15,074 (1995).
151. *Id.* at 15,073 (statement of Sen. Biden).
152. *Id.* at 15,095 (statement of Sen. Dole).
153. *Id.*
154. *See* 142 CONG. REC. 7,764–69 (1996).

that the standard provided for in the bill "essentially gives the federal court the authority to review, *de novo*, whether the State court decided the claim in contravention of Federal law."[155] Moreover, he added, federal courts will also be able "to review State court decisions that improperly apply clearly established Federal law."[156] At the end of his statement Hatch concluded that "[t]he standard is a good one. The deference to State law is good, because it just means that we defer to them *if they have properly applied Federal law*."[157]

After Hatch's explanation that the bill would not alter the de novo standard of review, several Senators who had been critical of the provision announced that they would vote in favor of the bill. Senator Levin, for example, said that he viewed the habeas corpus provisions as "problematical,"[158] but then quoted the language of § 2254(d)(1) and explained how he interpreted it:

> I interpret the new standard to give the Federal courts the final say as to what the U.S. Constitution says. I reach this conclusion for two reasons.
>
> First, several Members have raised the concern that the reference in the bill to an unreasonable application of Federal law could create two different classes of constitutional violations – reasonable and unreasonable. I vote for the bill because I have confidence that the Federal courts will not do this. I believe the courts will conclude, as they should, that a constitutional error cannot be reasonable and that if a State court decision is wrong, it must necessarily be unreasonable.
>
> Second, I note that this provision permits a Federal court to grant a petition for habeas corpus if the State court decision was contrary to Federal law. I interpret this language to mean that a Federal court may grant habeas corpus – on a first petition – any time that a State court incorrectly interprets Federal law and that error is material to the case. In other words, if the State court's interpretation of the U.S. Constitution is wrong, this standard authorizes the Federal courts to overturn that interpretation.[159]

No one, including the sponsors of the bill, disputed Levin's interpretation after he spoke. Indeed, Senator Specter's explanation of his understanding of the standard of review was largely in accord with Senator Levin's:

> The bill continue [sic] to require deference to State courts' findings of fact. Federal courts will owe no deference to State courts' determinations of Federal law, which is appropriate in our Federal system. However, under the bill deference will be owed to State courts' decisions on the application of Federal law to the facts. Unless it is unreasonable, a State court's decision applying the law to the facts will be upheld. I am not entirely comfortable

155. *Id*. at 7,772 (statement of Sen. Hatch) (emphasis added).
156. *Id*.
157. *Id*. at 7,773 (emphasis added).
158. *Id*. at 7,792 (statement of Sen. Levin).
159. *Id*.

> with this restriction, but upon reflection I believe that the standard in the bill will allow Federal courts sufficient discretion to ensure that convictions in State court have been obtained in conformity with the Constitution.[160]

Thus, like Senator Levin, Senator Spector appears to have understood that a decision not "in conformity with the Constitution"[161] as clearly established by the Supreme Court was ipso facto unreasonable.

Senator Biden rose again to discuss the language of proposed § 2254(d)(1):

> [I]t seems to me that even under this provision of the law we are now changing, which I think is inadvisable to change, but even under this provision, if Federal courts think that State courts are right on the Constitution, they will uphold it. And if they are wrong, they will not.
>
> So, if a State court makes an unconstitutional determination, the Federal courts will, and should, continue to say so. Therefore, I think this is much less onerous – unnecessary but much less onerous – than, in fact, it may appear on its face.
>
> If a Federal court concludes the State court violated the Federal Constitution, that, to me, is by definition – by definition – an unreasonable application of the Federal law, and therefore, Federal habeas corpus would be able to be granted.[162]

Senator Hatch rose immediately after Biden to express his satisfaction with "the action that I believe the Senate is about to take."[163] He did not dispute Biden's interpretation of § 2254(d)(1). The Conference Report was agreed to shortly thereafter.[164]

The debate in the House was less illuminating but consistent with the above. A number of Members expressed their opposition to the bill because they understood it to establish a deferential standard of review. For example, in response to his colleagues' criticism of the provision that became § 2254(d)(1) as requiring deference to the state courts, Representative Hyde, the Congressman who called up the Conference Report for debate, explained that "the Federal judge always reviews the State court decision to see if it is *in conformity* with established Supreme Court precedence [sic], or if it has been misapplied. So it is not a blank total deference, but it is a recognition that you cannot relitigate these issues endlessly."[165] He also emphasized that "[t]he Federal judge still has to look at the work product of the State court *to decide if they got it right*."[166] Hyde believed that the real benefit of the reform was that it would "end the charade of endless habeas proceedings," not

160. *Id*. at 7,799 (statement of Sen. Specter).
161. *Id*.
162. *Id*. at 7,802 (statement of Sen. Biden).
163. *Id*. (statement of Sen. Hatch).
164. *Id*. at 7,804–05.
165. *Id*. at 7,956 (statement of Rep. Hyde) (emphasis added).
166. *Id*. at 7,958 (emphasis added).

that erroneous decisions would be allowed to stand.[167] When he called up the conference report, he described habeas reform as "the Holy Grail," but his explanation of the reform consisted only of a reference to the fact that "we have a 1-year statute of limitations in habeas," which would end the "endless appeals" up and down the State and Federal systems.[168] He did not mention a more lenient standard of review.[169]

The use of legislative history to interpret statutes is a much debated topic. It is no doubt true that the notion of a single "legislative intent" is a fictional one. Perhaps some legislators interpreted the language of § 2254(d)(1) as the *Williams* majority did and voted for it. Other legislators may have understood the language of the provision in the same way and voted against it for that reason.[170] Very likely there were also legislators who did not much care about and did not have a clear understanding of the habeas provisions and voted in favor of or against the bill because of its provisions relating to terrorism. As noted above, this is a reason to read the statute as its text provides, and the text of § 2254(d)(1) allows a habeas court to grant relief if the "decision" of the state court was, inter alia, erroneous.

The view that legislative history should never be consulted in interpreting a statute has not yet garnered a majority of the Supreme Court. If legislative debates about the meaning of a statutory provision can ever be thought to illuminate the "legislature's" understanding of the provision it was adopting, the debates surrounding the meaning of § 2254(d)(1) would appear to offer particularly clear evidence of the Congress's understanding of that provision.

First, the understanding of the bill's sponsors would appear to deserve special weight in interpreting a statute.[171] AEDPA's sponsors in the Senate clearly expressed their view that the statute would not alter the de novo standard of review.[172] Even if the sponsors' statements to that effect were not sincere, the statements are important in interpreting the statute, as they were made in order to convince wavering Senators to vote in favor of the bill. If the understanding of any set

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167. *Id*.

168. *Id*. at 7,961.

169. Professor Allan Ides reviewed some (but not all) of this history and reached similar conclusions. 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, 693–97 (2003). Ides additionally cites Senator Hatch's statement that "[t]he Great Writ will not be affected by this [provision] one bit." *Id*. at 696. I have not relied on this statement because Hatch appears to have been assuring his colleagues that the provision would not affect the scope of the *constitutional* guarantee of habeas corpus. Hatch explained that "[t]he Great Writ of Habeas Corpus contained in the Constitution applied to only two circumstances: No. 1, to challenge an illegal imprisonment before trial; and, No. 2, to determine whether the trial court had jurisdiction to hear the case. The habeas corpus we are reforming is the statutory form of habeas corpus." 142 CONG. REC. 7,773 (1996).

170. This may have been the reason that Senators Feingold and Moynihan voted against the bill. 142 CONG. REC. 7,805 (1996) (recording vote). Senator Kennedy also voted against the bill, *id*., even though, like Biden and Levin, he expressed the view that, properly interpreted, it did not change the standard of review. *See* 141 CONG. REC. 15,024 (1995) (statement of Sen. Kennedy).

171. *See* Victoria Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313, 316 (2014).

172. *See supra* text accompanying notes 144, 155.

of legislators can be said to reflect the meaning of a law, it is that of "those in a critical position to forge a final legislative compromise and whose assent is critical to the act's enactment."[173] The views of these pivotal legislators are important "because they are the most reliable indicators of the compromises necessary to produce a bill that can pass. Without the pivot's assent and the compromises necessary to gain it, there would be no legislation. These legislative compromises are therefore central to an act's meaning."[174] The sponsors' assurances about the meaning of the statute provide indirect evidence of the understanding of the pivotal legislator.[175] The fact that the sponsors believed it necessary to mollify their concerns, and did so by putting forward an interpretation of the statute that (by hypothesis) was contrary to their preferences, suggests that the sponsors believed the statute would not have gained the votes necessary to pass had the pivotal legislator understood the statute to mean something else. In this case, that means the statute would not have passed had the pivotal Senators not understood it as Senator Hatch insisted it should be understood – i.e., as retaining the de novo review standard. If the pivotal Senators had not so understood it, it would not have passed in the Senate; and if it had not passed in the Senate, it would not have passed at all.

The statute also would not have passed at all if it had not been signed by the President. President Clinton, upon signing the bill into law, made clear his view that § 2254(d)(1) would not change the standard for review in habeas cases beyond limiting the source of law to Supreme Court precedent. Clinton stated that he "signed this bill because I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary."[176] He went on to quote *Marbury*'s dictum that "[i]t is emphatically the province and duty of the judicial department to say what the law is," and expressed confidence that the courts would apply the canon of avoidance to construe the statute "to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws."[177] Because the President's

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173. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political History of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1450 (2003); *see also* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 L. & CONTEMP. PROBS. 3, 3 (1994); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 705 (1992); *cf.* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 479 (2007) ("It is clear both that the decisive Republican votes disfavored any substantive limit and that, to the extent they signed on to the unreasonableness standard, they did not have any restrictionist 'purposes' beyond the limit's text.").

174. Rodriguez & Weingast, *supra* note 173, at 1450.

175. Senators Biden and Levin likely fell in this category, as they voted in favor of the bill despite their previously expressed concerns about the language embodying the standard of review. 142 CONG. REC. 7,805 (1996) (recording vote).

176. Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 720 (Apr. 24, 1996).

177. *Id.* at 721.

signature was of course necessary for the statute's enactment, his interpretation of the provision is entitled to significant weight.

To be sure, reliance on signing statements in construing statutes may be problematic in certain contexts.[178] A President might, for example, use a signing statement opportunistically to influence the interpretation of a provision of a veto-proof statute.[179] These concerns are less weighty where, as here, the President's statement simply confirms the views expressed by the bill's sponsors and pivotal legislators and is otherwise in accord with its text and legislative history.

Some (though very little) of the legislative history discussed above was brought to the Court's attention at the end of an amicus brief submitted in *Williams*.[180] These sources were apparently overlooked by both opinions. The majority opinion cribbed from another amicus brief that quoted legislative history suggesting that the provision was intended to bar relief for wrong but reasonable errors.[181] But most of the statements supporting this interpretation came from opponents of such a standard and, as discussed above, were refuted by the bill's sponsors. They reflect "loser's history," which is widely recognized to be highly unreliable as evidence of statutory meaning.[182] Had the Court considered the legislative history of § 2254(d)(1)'s standard of review, it would have found substantial support for Justice Stevens's interpretation.

* * *

In sum, the *Williams* majority's interpretation of § 2254(d)(1) as barring habeas relief for wrong but reasonable state court decisions was unpersuasive. The Court relied in part on a generalized congressional purpose to "bring change to the field,"[183] overlooking the fact that other provisions of the statute sufficiently accomplished this goal. The Court's effort to avoid reading the "unreasonable application" clause out of the statute was similarly unpersuasive. The Court also overlooked strong evidence that both the Congress and the President understood § 2254(d)(1) as retaining the de novo standard of review.

At a minimum, the analysis in this Section establishes that the interpretation embraced by Justice Stevens and the other concurring Justices was at least equally plausible. If so, an additional concern that neither opinion considered should have tilted the balance in favor of Justice Stevens's interpretation; neither opinion

178. For a discussion of the "function, legality, and value" of presidential signing statements, *see* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006).

179. *See* Daniel B. Rodriguez, Edward Stiglitz & Barry R. Weingast, *Executive Opportunism, Presidential Signing Statements, and the Separation of Powers*, 8 J. LEGAL ANALYSIS 95, 96 (2016).

180. Brief for the American Civil Liberties Union as Amicus Curiae Supporting Petitioner at 28 n.50, Williams v. Taylor, 529 U.S. 362 (2000) (No. 98-8384).

181. *See* Brief for the State of California, et al. as Amici Curiae Supporting Respondents at 21, Williams v. Taylor, 529 U.S. 362 (2000) (No. 98-8384)).

182. *See* Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History By The Rules*, 122 YALE L.J. 70, 118–28 (2012).

183. Williams v. Taylor, 529 U.S. 362, 403 (2000).

adverted to the fact that, as interpreted in *Williams*, § 2254(d)(1) allocates federal jurisdiction in a highly dysfunctional manner. Section III explains the dysfunctional nature of the allocation of jurisdiction effectuated by the *Williams* interpretation of AEDPA. Section IV argues that avoidance of such dysfunction is a legitimate basis for rejecting an interpretation of a jurisdictional statute.

III. AEDPA's FORUM-ALLOCATION FUNCTION

As interpreted in *Williams*, § 2254(d)(1) is best understood as a forum-allocation rule. The *Williams* interpretation of AEDPA skirts constitutional objections because it does not purport to deny *all* federal courts the power to review and reverse erroneous state court decisions. The Supreme Court retains the power to correct such errors through its power to review cases directly from the state courts. AEDPA shifts to the Supreme Court the responsibility of reviewing reasonable, though possibly erroneous, state court decisions resulting in custody. To undertake this review, however, the Supreme Court would have to depart from its current certiorari policy, under which it would rarely if ever review state court decisions alleged to be wrong but reasonable.

This Section elaborates the forum-allocation function of AEDPA, as the Court interpreted the statute in *Williams*. Part A explains the constitutional significance of AEDPA's retention of Supreme Court jurisdiction to review and reverse wrong but reasonable state court decisions resulting in custody. Part B explains the dysfunctional nature of an interpretation of AEDPA as shifting from the lower federal courts to the Supreme Court the responsibility of reviewing reasonable but potentially erroneous state court decisions. Part C considers and rejects an alternative interpretation of AEDPA as reflecting Congress's expectation that persons in custody pursuant to wrong but reasonable state court decisions should remain in prison (or be executed). Part D considers how the Court might implement AEDPA, understood as a forum-allocation rule.

A. The Constitutionality of the Williams *Construction of § 2254(d)(1)*

In *Williams*, Justice Stevens intimated that an interpretation of § 2254(d) that bars relief when the state court decision resulting in conviction was wrong but reasonable would impinge upon Chief Justice Marshall's famous dictum that it is the province and duty of the courts to say what the law is.[184] Scholars have developed constitutional objections to such a reading of § 2254(d) in greater detail.[185] Some

184. *See* Williams v. Taylor, 529 U.S. 362, 378–79 (2000) (opinion of Stevens, J.) (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)). President Clinton also referred to Chief Justice Marshall's language in his AEDPA signing statement. *See* Presidential Statement, *supra* text accompanying note 176.

185. *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, 307–08 (2006); Mohammed Usman Faridi, Comment, *Streamlining Habeas Corpus While Undermining Judicial Review: How 28 U.S.C. § 2254(D)(1) Violates the Constitution*, 19 ST. THOMAS L. REV. 361, 364 (2006); James S. Liebman & William F. Ryan,

maintain that, if federal courts are given jurisdiction over a case, the Constitution requires that they give effect to the Constitution whenever constitutional issues arise in the case.[186] Some of the scholars who argue that § 2254(d) is unconstitutional acknowledge that Congress would have been free to dispense with habeas jurisdiction entirely for persons duly convicted in the state courts.[187] But they maintain that, as Henry Hart put it, "the Constitution always applies when a court is sitting with jurisdiction in habeas corpus."[188] Some federal judges have adopted this argument, albeit in dissent.[189]

The majority in *Williams* did not address Justice Stevens's constitutional concerns. Subsequent Supreme Court decisions unanimously apply the *Williams* standard and affirm that AEDPA bars habeas relief for wrong but reasonable applications of clearly established federal law.[190] Thus, the Court as a whole appears unconcerned about the constitutionality of the standard adopted in *Williams*.[191] Although the Court has never responded to the constitutional arguments, its placidity presumably rests on its belief that Congress's greater power to deny all habeas review in the cases to which § 2254(d)(1) applies includes the lesser power to authorize habeas relief only in the most egregious cases.

If so, the constitutionality of barring relief when the state court decision was wrong but reasonable depends on the proposition that federal habeas jurisdiction for state prisoners is constitutionally optional. The latter proposition, in turn, assumes that the constitutional guarantee of habeas relief does not apply when the detainee has received a trial in state court at which he was entitled to have his federal rights adjudicated and enforced. Under current statutes, a person convicted in the state courts is also entitled to seek direct review in the Supreme Court of any federal issues that arose in the case.[192]

Whether the opportunity for Supreme Court review is constitutionally required is a matter of some debate. Some scholars maintain that the Exceptions Clause[193] gives Congress the power to dispense with Supreme Court review of federal issues, even constitutional ones.[194] Other scholars maintain that Congress may not exclude

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"Some Effectual Power": The Quality and Quantity of Decisionmaking Required of Article III Courts, 98 COLUM. L. REV. 696, 814 (1998).

186. *See* Liebman & Ryan, *supra* note 185, at 814.

187. *See id*. at 775.

188. *Id*. at 849 (quoting Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1393 (1953)).

189. *See, e.g*., Evans v. Thompson, 524 F.3d 1, 4 (1st Cir. 2008) (Lipez, J., dissenting); Crater v. Galaza, 508 F.3d 1261, 1270 (9th Cir. 2007) (Reinhardt, J., dissenting); Davis v. Straub, 445 F.3d 908, 908–11 (6th Cir. 2006) (Martin, Jr., J., dissenting).

190. *See, e.g*., Nevada v. Jackson, 569 U.S. 505, 512 (2013); Marshall v. Rodgers, 569 U.S. 58, 61 (2013); Howes v. Fields, 565 U.S. 499, 505 (2012); Harrington v. Richter, 562 U.S. 86, 100–01 (2011).

191. *But see* Coyle, *supra* note 2 (noting Justice Sotomayor's concern).

192. 28 U.S.C. § 1257 (2012).

193. U.S. CONST. art. III, § 2.

194. *See* Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038–41 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An*

Supreme Court review of at least constitutional questions, at least if it has excluded jurisdiction of the lower federal courts over such questions.[195] The Court itself has spoken broadly of Congress's power under the Exceptions Clause,[196] but it has never upheld a statute that has excluded all Supreme Court jurisdiction over constitutional questions in particular categories of cases.[197] Some Justices have expressed strong doubts about the permissibility of curtailing Supreme Court jurisdiction over such questions.[198] The Court is sufficiently uncertain about the constitutionality of statutes stripping it of jurisdiction over constitutional questions that it has stretched statutory language to obviate that substantial constitutional question.[199]

If the Exceptions Clause does not authorize Congress to deny the Supreme Court jurisdiction over constitutional questions, then it follows that a federal statute restricting the Supreme Court from reversing state court convictions based on wrong but reasonable applications of federal constitutional law would run afoul of Article III. Restricting the scope of the Supreme Court's direct review in such cases could not be justified on the theory that Congress has the greater power to deny such review altogether. Thus, had AEDPA attempted to curtail the Supreme Court's direct review of state court judgments resulting in criminal convictions in the manner that § 2254(d)(1) (as construed in *Williams*) restricts the federal courts' habeas jurisdiction, the statute would have raised substantial constitutional questions. If § 2254(d) had also purported to limit the Supreme Court's power to grant relief on direct review, therefore, the Court would presumably have relied on the canon of avoidance and adopted the interpretation of that provision favored by Justice Stevens.

The constitutionality of § 2254(d)(1) (or at least the absence of substantial questions regarding its constitutionality) thus depends crucially on the fact that it does *not* apply to the jurisdiction of all federal courts. Its constitutionality, in other words, depends on § 2254(d)(1) functioning as a forum-allocation rule: it allocates

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Opinionated Guide to the Ongoing Debate, 36 STAN. L. REV. 895, 908 (1984); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004–06 (1965).

195. This is the position of Lawrence Sager. *See* Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 63–65 (1981). Akhil Amar would require jurisdiction in either the Supreme Court or the lower federal courts of all cases arising under federal law, as well as admiralty and public ambassador cases. *See* Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442, 445 (1991); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206 (1985).

196. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512-14 (1868).

197. *See* Felker v. Turpin, 518 U.S. 651, 654, 660–62 (1996); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 106 (1868).

198. *See Felker*, 518 U.S. at 666–67 (Souter, J., concurring, joined by Stevens and Breyer, JJ.).

199. *See*, *e.g.*, *Felker*, 518 U.S. at 660–62 (majority opinion); Webster v. Doe, 486 U.S. 592, 603–04 (1988). *But see Webster*, 486 U.S. at 611–15 (Scalia, J., dissenting).

the jurisdiction to correct wrong but reasonable state court applications of federal law resulting in custody to the Supreme Court on direct review.[200]

B. The Dysfunctional Nature of AEDPA's Allocation of Jurisdiction

Understood as a forum-allocation rule, AEDPA would cast the Supreme Court in a role unfamiliar to it since the early twentieth century, a role that it is ill-suited to carry out. Fulfilling an error-correction role with respect to claimed wrong but reasonable decisions of the state courts resulting in custody would require that the Court alter its approach to exercising its discretionary certiorari jurisdiction.

As discussed in Section I, between 1789 and 1916, the Supreme Court's jurisdiction over federal questions arising in the state courts was mandatory. Under § 25 of the First Judiciary Act, a party who raised a federal question in the state courts and lost had a right to obtain Supreme Court review of that question.[201] Thus, a person convicted of a crime in state court had a right to obtain Supreme Court review of any federal defenses raised and decided against her, even if the only question was whether the state court had correctly applied clearly established federal law to the facts of the case. This mandatory regime began to change in 1916, when Congress, for the first time, gave the Supreme Court discretionary jurisdiction over some state court decisions denying federal rights.[202] After 1925, the Court's mandatory jurisdiction extended only to "state judgments invalidating a treaty or Act of Congress or upholding a state statute attacked on federal grounds."[203] Since 1988, the Supreme Court's jurisdiction over state court decisions has been entirely discretionary.[204]

Today, the Supreme Court regards its primary role as ensuring uniformity in the application of federal law by resolving conflicts in the interpretation of such law among the lower federal courts, among state courts, or between state and federal courts. Thus, in selecting cases to review from the state courts, the Court places primary emphasis on whether ''a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.''[205] In the absence of such a conflict, the Court might grant certiorari if a state court "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant

200. Just because the Supreme Court is the only federal court with jurisdiction to review certain federal claims does not mean that it is constitutionally required to grant review of such claims. How the Supreme Court should exercise its discretion to review wrong but reasonable errors resulting in state custody is discussed *infra*, Part D.

201. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85–86 (1789).

202. *See* Act of Sept. 6, 1916, ch. 448, § 2, 39, Stat. 726–27 (1916).

203. FALLON ET AL., *supra* note 6, at 433; *see also* Judiciary Act of 1925, ch. 229, § 237, 43 Stat. 937 (1925).

204. *See* 28 U.S.C § 1257 (2012).

205. *See* SUP. CT. R. 10(b); *see also* EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE & PROCEDURE.: JURISDICTION AND RELATED MATTERS § 4017 (2d ed. 2013).

decisions of this Court."[206] These last two considerations both focus on the existence of a question of legal interpretation and its importance. Under its current rules, therefore, the Court is highly unlikely to grant certiorari where the petitioner is arguing that the state court simply misapplied federal law to the particular facts of his case.

The Court is not precluded from granting certiorari in such a case, and from time to time it does summarily reverse a state court decision misapplying a well-settled legal rule to particular facts.[207] But the Court does so only in the rare cases in which the state court's misapplication of the law has been egregious. This is precisely the sort of case that is likely to qualify as an "unreasonable application" of clearly established law under the *Williams* Court's construction of § 2254(d). A grant of certiorari with respect to a decision that is alleged to have rested on a wrong *but reasonable* application of clearly established federal law would today be virtually unheard of. As interpreted in *Williams*, therefore, AEDPA denies the lower courts the authority to grant habeas relief in precisely the category of cases that the Supreme Court today would almost never review. [208]

As the Court's rules for granting certiorari show, the Supreme Court today does not regard its role to be the vindication of federal rights in individual cases. A petitioner's argument that the state courts have misapplied federal law to the particular facts of the case will not persuade the Court to take the case. The Court's focus on conflicts among the lower courts means that the Court will ordinarily allow potentially erroneous decisions to stand while awaiting conflicting decisions from other lower courts. And once such conflicts arise, the Court's choice of a case in which to address the conflict will turn on factors that make a particular case a good vehicle for addressing the issue—factors that often have little or nothing to do with the strength of a given petitioner's case on the facts.[209] Thus, although the vindication

206. SUP. CT. R. 10(c).

207. *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 277–78 (9th ed. 2007).

208. In the death penalty context, the Court has granted certiorari and reversed lower federal court decisions denying habeas relief on what the dissenting opinion regarded as case-specific grounds. *See* Kyles v. Whitley, 514 U.S. 419, 456–57 (Scalia, J., dissenting). Although the majority noted that "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case," *id*. at 422 (quoting Burger v. Kemp, 483 U.S. 776, 785 (1987)), the majority also insisted that "this is not a case of simple error correction." *Id*. at 422 n.1; *cf. id*. at 455 (Stevens, J., concurring) ("Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity of capital punishment makes this 'generalizable principle,' . . . especially important."). Justice Scalia, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas, objected to the Court's consideration of a "fact-bound claim of error," noting that, "when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (*i.e*., except in cases of the plainest error) be denied." *Id*. at 456 (Scalia, J., dissenting) (citing United States v. Johnston, 268 U. S. 220, 227 (1925)). More recently, however, Justice Scalia, joined by Justice Alito, urged that certiorari be granted in some "utterly fact-bound decisions that present no disputed issues of law," namely in cases in which habeas relief was *granted* by the lower federal courts in defiance of the *Williams* standard. Cash v. Maxwell, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari). Justice Scalia's opinion is discussed *infra* note 234.

209. *See* GRESSMAN ET AL., *supra* note 207, at 248–49, 294–95.

of federal rights was the principal reason for the Founders' decision to create federal courts, and although such vindication was evidently what the First Congress viewed as the principal purpose of the Supreme Court's appellate jurisdiction,[210] the Supreme Court today clearly does not regard the vindication of federal rights in particular cases as its principal role. It regards such vindication as primarily the role of the lower federal courts.

Before the *Williams* decision, the Court could focus on the resolution of conflicts among the lower courts or the resolution of novel questions of federal law of broad import without condemning wrongly convicted state prisoners to continued deprivation of liberty (or life). As discussed in Section I, federal relief was available in either the Supreme Court or the lower federal courts to state prisoners who could show that the state court had erroneously applied clearly established federal law. Indeed, before *Teague v. Lane*, such relief was available even if the federal law that was misapplied by the state courts was not clearly established at the time the conviction became final.[211] During the post-*Brown*/pre-*Teague* era, the lower federal courts effectively functioned in habeas cases as "surrogate Supreme Courts."[212] During that period, the lower federal courts entertaining habeas petitions performed the role that the Supreme Court had played when its jurisdiction over federal questions was mandatory.

In *Teague*, the Court held that habeas relief was ordinarily not available if the state courts misapplied constitutional principles that were not clearly established at the time the conviction became final.[213] Post-*Teague*, the lower federal courts exercising habeas review of state court convictions lost the authority to recognize new rules of constitutional law. That authority remained with the Supreme Court on direct review (and with the lower federal courts exercising original and appellate jurisdiction over federal crimes). But the lower federal courts on habeas remained responsible for monitoring state court compliance with well-established rules. The division of authority as between the Supreme Court and the federal courts during this period remained consistent with the Supreme Court's understanding of its role as the resolver of conflicts among the lower courts and of novel questions of law. The Supreme Court could focus on these latter tasks, knowing that the lower federal courts exercising habeas review would monitor state court compliance with the principles it articulated.

Although, after *Teague*, the lower federal courts exercising habeas review no longer functioned as complete surrogates for the Supreme Court, the lower courts continued to perform the pre-1916 Supreme Court's function of correcting

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210. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85–86 (1789) (making Supreme Court review of state court decisions mandatory but authorizing such review only if the party relying on federal law lost in the state courts).

211. *See* Teague v. Lane, 489 U.S. 288, 299–305 (1989) (plurality opinion).

212. *See* Stone v. Powell, 428 U.S. 465, 511–12 (Brennan, J., dissenting).

213. *See Teague*, 489 U.S. at 305–10; *see also* FALLON ET AL., *supra* note 6, at 1242 ("[I]n numerous subsequent decisions, the Court has endorsed and followed Justice O'Connor's approach.").

erroneous applications of federal law, if the relevant federal law was clearly established at the time of the state court's decision.[214] As the Court itself continued to articulate new rules of constitutional law when necessary, the Court apparently perceived little need for the lower federal courts to act as a "surrogate" in that regard. The need for a surrogate to perform the Court's error-correction function remained, however, as the Court had abdicated that role. With AEDPA (as interpreted in *Williams*), however, the lower federal courts lost the authority to correct wrong but reasonable applications of established federal rules, leaving the Supreme Court as the only court with such authority. AEDPA (as interpreted in *Williams*) thus challenges the Supreme Court's conception of its role as excluding mere error-correction in a way that the *Teague* decision did not.

From the perspective of judicial policy, shifting the error-correction function from the lower federal courts to the Supreme Court is obviously problematic. The sort of error correction that the Supreme Court is now solely empowered to perform (correcting "wrong but reasonable" decisions) is a labor-intensive job, the benefits of which accrue to a single litigant. To perform this role, the Court would have to divert scarce resources from what it has rightly considered its principal function of resolving conflicts and answering novel questions of law. The lower federal courts under AEDPA will continue to examine such cases, but they are now barred from providing relief if the state court's error was not unreasonable.[215]

It would of course be far more sensible to have the lower courts, rather than the Supreme Court, correct the reasonable errors that they will confront in any event as they review such cases for reasonableness. In performing the error-correction function post-AEDPA, the Supreme Court cannot even rely on the lower federal courts to play a filtering role, as the Supreme Court's authority to correct such errors will generally have to be performed on direct review, *before* any collateral review by the lower federal courts takes place.[216] The correction of wrong but reasonable state court decisions will thus have to be performed, if at all, solely by the Supreme Court.

In sum, if interpreted as a forum-allocation rule, AEDPA establishes a highly counter-intuitive regime—so counter-intuitive that perhaps the statute (as interpreted in *Williams*) should be understood differently. The next section considers other possible interpretations.

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214. *See* Vázquez, *supra* note 9, at 697.

215. *See supra* Section III(A).

216. If collateral review is available in the state courts, the Supreme Court has the power to review federal claims arising in such proceedings. But the Supreme Court would be able to grant relief in such cases only if the state court denied relief on the merits or if it denied review in circumstances in which the Constitution requires such review. For discussion of one such circumstance, *see* Vázquez & Vladeck, *supra* note 46, at 957.

C. Alternative Interpretations?

The alternative to viewing AEDPA (as interpreted in *Williams*) as a forum-allocation rule, and thus as a reason for the Court to alter its certiorari policy, would be to treat AEDPA as a basis for leaving such errors uncorrected. Proponents of this alternative understanding of AEDPA might note that, since the replacement of mandatory review with discretionary review in the Supreme Court, the federal courts have never purported to correct *all* errors of federal law committed in the state courts. The lower federal courts have always lacked the power to review state court decisions in civil cases.[217] The same is true for decisions in criminal cases resulting in fines or in short sentences of incarceration.[218] Unreviewed state court decisions in such cases are entitled to preclusive effect in subsequent litigation in the federal courts.[219] The Supreme Court has long been the sole federal court with the power to correct errors of federal law committed in the state courts in such cases, yet the Court has long exercised its power in the highly selective manner described above, ordinarily granting review only to resolve conflicts among the lower courts or to resolve important questions of broad applicability.[220] Thus, in civil cases and criminal cases resulting in penalties other than incarceration, or resulting in incarceration for a short term, errors of federal law committed by the state courts routinely remain unreviewed by the federal courts.

AEDPA, it might be argued, merely establishes the same regime for wrong but reasonable state court convictions that has long prevailed for state court decisions in civil cases and criminal cases not resulting in lengthy confinement. Indeed, under the *Williams* interpretation of AEDPA, state prisoners have *greater* access to federal courts for error correction than do others who have lost their cases in the state courts as a result of errors of federal law. State prisoners, after all, can still obtain habeas relief if the state courts erred unreasonably. Civil defendants and criminal defendants required to pay a fine or receiving a short sentence lack access to federal courts (other than the Supreme Court on certiorari review) even to correct an unreasonable error.

In assessing this alternative understanding of AEDPA, it is useful to distinguish two versions of the argument. The first is that the Court should continue to deny direct review to state prisoners alleging wrong but reasonable violations of federal constitutional law because Congress so intended. The second is that the Court itself should conclude that adhering to its usual certiorari standards with respect to

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217. *See, e.g.*, District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415–16 (1923).

218. Habeas relief is available only if the petitioner is "restrained of his liberty." *See* Habeas Corpus Act, ch. 28, § 1 (1867) (current version at 28 U.S.C. § 2241 (2012)). Criminal defendants subjected only to a fine are not "restrained of [their] liberty." Criminal defendants subjected to short sentences will be released before their habeas petition makes its way through the courts.

219. *See* U.S. CONST. art. VI, § 1 (as implemented by Full Faith and Credit Statute, 28 U.S.C. § 1738 (2012)); Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 (1982); Allen v. McCurry, 449 U.S. 90, 96 (1980).

220. *See supra* text accompanying notes 205–10.

petitions by state prisoners alleging wrong but reasonable applications of constitutional law is the most sensible way to balance the relevant considerations given the many competing demands on its limited resources. I discuss the first version of the argument in the remainder of Part C. I discuss the second version in Part D.

The first version of the argument holds that the Court should maintain its current policy of routinely denying certiorari petitions alleging wrong but reasonable state court applications of federal law because Congress did not contemplate that the narrowing of habeas jurisdiction be accompanied by a broadening of direct review. Rather, Congress intended that persons in custody pursuant to reasonable if possibly erroneous state court decisions simply remain in prison (or be executed). To attribute this intent to Congress is not necessarily to say that Congress intended that persons remain in prison even if the state courts *in fact* committed reversible error. Instead, Congress may have believed that the de novo standard of review would result in grants of habeas relief to state prisoners whose convictions were not in fact erroneous, only some of which would be reversed by the federal courts of appeals. Congress, in other words, may have believed that the state courts are more likely to decide the federal issues correctly than the lower federal courts on habeas. If so, Congress may have intended the Supreme Court to apply the same standard in determining whether to grant the certiorari petitions filed by persons convicted of crimes in state courts that it applied, pre-AEDPA, to certiorari petitions seeking review of federal court of appeals decisions affirming or reversing grants of habeas relief to state prisoners. Under that standard, petitions would rarely if ever be granted for error-correction purposes.

Reliance on congressional intent in maintaining the current approach to certiorari petitions filed by state prisoners is problematic for multiple reasons. First, if Congress had had such an intent with respect to the Supreme Court's exercise of its appellate jurisdiction and had enacted it into law, the resulting statute would have raised substantial constitutional questions. Avoidance of such questions would have led the Court to reject such an interpretation of the statute if at all possible.

The constitutional problems with the proffered interpretation of AEDPA have already been discussed.[221] The denial of power to the lower federal courts to grant habeas relief for wrong but reasonable state court decisions skirts constitutional difficulties because the Supreme Court retains the power to grant relief in such cases.[222] If Congress had also mandated denial of direct review for that same category of cases, the statute would effectively deny access to *any* federal court to correct constitutional errors in such cases. Denial of access to all federal courts for a given category of constitutional claim would, in the view of many scholars, exceed

221. *See supra* Section III(A).
222. *See id.*

Congress's power under the Exceptions Clause.[223] The Court itself has held that such denial would raise significant constitutional questions.[224]

As discussed above, the Court has in past cases stretched statutory language almost to the breaking point to avoid similar constitutional questions.[225] In this case, avoiding the constitutional question does not require any stretching of statutory language, as AEDPA does not purport to limit the Court's power to grant direct review to state prisoners alleging wrong but reasonable errors. To the contrary, AEDPA's proponents stated that Congress did not and, in their view, *could not* limit the Supreme Court's jurisdiction over direct appeals by persons convicted in the state courts alleging constitutional errors.[226]

Indeed, the available evidence suggests that Congress understood that a limitation on the lower federal courts' habeas jurisdiction would shift responsibility for protecting federal rights to the Supreme Court on direct appeal. The Senate debate over a rejected amendment that would have denied the lower federal courts the power to grant habeas relief in another category of cases shows that Congress understood that such a denial would shift the responsibility for safeguarding the relevant constitutional rights to the Supreme Court.

Senator Kyl, one of the principal proponents of AEDPA, offered an amendment that would have provided as follows:

> [A]n application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment or order of a State court shall not be entertained by a court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention.[227]

This proposed amendment generated substantial opposition from legislators who regarded it as an evisceration of federal habeas jurisdiction. As Senator Biden put the criticism, the amendment "takes away one last shot, as a practical matter, that [the state prisoner] has to get before a Federal court."[228] Senator Kyl responded to this criticism as follows:

> [W]e do have one shot in the federal system under my amendment. It is directly to the U.S. Supreme Court. That right exists today, *and it could not be taken away in our amendment and we do not do that, of course*. So if a state court prisoner believes that, despite all of the hearings he has gotten in the State court system, he still has not gotten a fair shake, . . . he has really two things that he can claim — first, the State court system is not fair, and secondly, he can go to the U.S. Supreme Court and make his final point there.[229]

223. *See supra* text accompanying notes 193–94.
224. *See supra* note 198 and accompanying text.
225. *See supra* note 199 and accompanying text.
226. *See infra* text accompanying note 229.
227. 41 Cong. Rec, 15,044 (1995) (text of Sen. Kyl's proposed amendment).
228. *Id*. at 15,048 (statement of Sen. Biden).
229. *Id*. at 15,049 (statement of Sen. Kyl) (emphasis added).

Senator Kyl thus recognized the potential constitutional problem with limiting Supreme Court review and denied that his amendment would do so. Because Supreme Court review remained available, Senator Kyl argued, "there is adequate ability to protect the constitutional rights of both State and Federal prisoners."[230]

Senator Biden responded that error correction is properly the role of the lower federal courts, not the Supreme Court:

> It is not the Supreme Court's job to take a detailed look at every State court conviction. It is for the Supreme Court to decide weighty issues of Federal constitutional law. That is why we have Federal courts and that is why my committee spends so much time . . . considering the nomination of Federal judges. Our system depends on Federal courts, all the Federal courts, being the safeguarders of Federal law.[231]

Senator Specter, also in opposition to the amendment, added that, in his view, "it is very important to have the kind of detached, objective review that the Federal courts give," noting that "[i]n many of our States we have elected judges."[232] The Kyl amendment was ultimately rejected.[233]

The debate surrounding the Kyl amendment shows that at least some of AEDPA's sponsors understood that withdrawing jurisdiction over certain claims from the habeas courts would shift to the Supreme Court the responsibility to protect the rights involved. It is true that the Kyl amendment would have gone further than the version of § 2254(d)(1) that was eventually adopted. It would have denied habeas relief even for unreasonable errors, as long as the state made adequate and effective remedies available. In theory, it is possible that Senator Kyl or other Senators would not have expected the Supreme Court to review potentially wrong *but reasonable* state court decisions. But there is no direct evidence that any legislator adhered to such a view, most likely because (as discussed in Section II) the statute was not understood to remove the power to grant relief for wrong but reasonable errors from the habeas courts. Still, the debate surrounding the rejected Kyl amendment indicates that the statute's supporters understood the forum-allocation consequences of a narrowing of the habeas courts' jurisdiction.

In the end, AEDPA left the Supreme Court's power to review reasonable state court decisions intact. Even if some legislators understood the statute to take away the lower federal courts' power to grant relief for wrong but reasonable decisions and also expected the Supreme Court to continue to deny review in such cases, Congress did not enact the latter expectation into law. At most, then, the statute (as interpreted in *Williams*) punts to the Supreme Court itself the question of the state courts' ability and willingness to enforce federal law faithfully. AEDPA thus leaves it to the Court itself to determine whether it should respond to the denial to

230. *Id*. at 15,052.
231. *Id*. at 15,051 (statement of Sen. Biden).
232. *Id*. at 15,050 (statement of Sen. Specter).
233. *Id*. at 15,066.

habeas courts of the power to grant relief for wrong but reasonable errors by state courts by altering its approach to certiorari petitions alleging such errors or instead by allowing persons in custody pursuant to what the habeas courts would regard as wrong but reasonable violations of constitutional law to languish in prison (or allow such persons to be executed). The next Part considers how the Court might respond to a statute denying the habeas courts power to grant relief in such cases.

D. Implementing the Forum-Allocation Interpretation

As discussed in Section I, until the enactment of AEDPA, persons convicted of crimes in state courts were entitled to federal court review of questions of constitutional law or application of such law to fact decided against them in the state court. When the Court concluded that it could no longer feasibly perform an error-correction role, it recognized the power and duty of the lower federal courts to afford such review via habeas.

If Congress has now denied the federal habeas courts jurisdiction to grant relief for state court constitutional errors deemed "reasonable," while leaving intact the Supreme Court's jurisdiction to review and grant relief in such cases, it seems to follow that the Supreme Court should rethink its certiorari policy and at least consider employing its appellate jurisdiction for error-correction purposes, as it did earlier in our history. If federal review was necessary to provide an incentive to the state courts before AEDPA, and if AEDPA now prevents the habeas courts from providing such an incentive, then direct review of such cases in Supreme Court would now appear to be necessary for this purpose because the Court is now the only federal court that can provide the incentive.

On the other hand, the reasons that led the Supreme Court to abdicate that role in the mid-twentieth Century apply fully today. Indeed, it is even less feasible today than in 1953 for the Supreme Court to ensure that state court convictions are free of constitutional errors that would warrant reversal on direct appeal.[234] At best, the Court can hope to employ its appellate jurisdiction to serve an error-correction function in a highly selective manner. If the Court cannot hope to fulfill

234. It is worth noting, however, that Justices Scalia and Alito recently voted to grant certiorari "to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law." Cash v. Maxwell, 126 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari). Ironically, they advocated granting certiorari in such cases to ensure that the Court's holding in *Williams* is strictly followed by the federal courts of appeals and thus to ensure that the federal courts on habeas do not "deprive [State] courts of that control over the State's administration of criminal justice which federal law assures." *Id.* As discussed above, AEDPA does not "assure" state courts control over their administration of criminal justice—as interpreted in *Williams*, AEDPA merely disempowers the lower federal courts from monitoring the state courts' compliance with their constitutional obligations. The state courts remain obligated to apply federal law faithfully; state appellate courts remain obligated to reverse convictions that rest on a non-harmless error of federal law; and the Supreme Court retains jurisdiction to reverse such convictions if the state courts do not. In any event, Justices Scalia and Alito appear to believe that performing this "unaccustomed task" is not beyond the Supreme Court's abilities. *Id.* There is even greater reason for the Justices who dissented from the majority's construction of § 2254(d)(1) in *Williams*, and those current Justices who would have done so, to vote to grant review in some cases alleging wrong but reasonable applications of federal law by state courts.

such a role in a comprehensive manner, should it feel any compulsion to adjust its certiorari policy in response to *Williams*? More fundamentally, if the Court has come to accept that state court errors of federal law committed in civil cases and in criminal cases resulting in fines or short sentences will remain mostly unreviewed by federal courts, why should it adjust its certiorari policy to correct such errors in criminal cases resulting in lengthy custody?

To address the last question first, there is an important difference between cases for which habeas review is not generally available and those for which it has been available until now: the severity of the consequences of error. An erroneous state court decision in a civil case, or in a criminal case resulting in a fine, produces an erroneous loss of property, usually money. Such losses can be devastating to the people involved, but they are different in kind from the consequence of an error in a criminal case resulting in incarceration: the convicted defendant's loss of his liberty (or life). Criminal cases resulting in short sentences result in a loss of liberty, but if such cases are not eligible for habeas review, it is because the loss of liberty has come to an end.

On the other hand, the cases for which AEDPA changed the standard of review are cases in which a defendant who was, by hypothesis, convicted as a result of a non-harmless error of federal law *is currently suffering a loss of liberty*. The main point of habeas review is to end that erroneous deprivation of liberty (or life). Denying relief to someone who is currently suffering a loss of liberty as a result of an erroneous conviction is properly regarded as far less tolerable than denying relief to someone who has erroneously suffered a loss of property. Though the denial of relief is regrettable in both sorts of cases, the denial of a federal forum for persons currently suffering a loss of liberty (or threatened with the loss of life) as a result of an error of federal law is far more difficult to justify on grounds of judicial economy.

It might nevertheless be argued that the plight of the erroneously convicted prisoner should not weigh heavily in the Court's certiorari calculus. First, judicially-imposed limits on habeas long predating AEDPA show that the Court has long since abandoned any attempt to provide a federal forum for the purpose of ensuring that state prisoners' incarceration is legally correct in some ultimate sense. For example, the Court in *Teague* denied prisoners a federal habeas forum in which to argue that their convictions were based on erroneous interpretations of the Constitution that had not yet been clearly established at the time of the state court proceeding.[235] If the Court has been willing to deny a federal forum to state prisoners who may well be in custody under an erroneous state court decision just because the decision did not contravene constitutional law that was clearly established at the time the conviction became final, then why should the Court alter its approach to certiorari out of a concern for the prisoner's plight when she is in

235. *See* Teague v. Lane, 489 U.S. 288, 310 (1989).

custody pursuant to a reasonable if possibly erroneous state court application of clearly established law?

If one adheres to the notion that courts apply the law but do not make it, then *Teague* does seem to consign some persons erroneously convicted in state court to continued incarceration without a realistic prospect of federal court review of the constitutional error. But the premise that courts do not make law is contestable, to say the least. The *Teague* decision itself appears to acknowledge that the Court makes new law.[236] The Court's holding that most new rules of constitutional criminal procedure do not apply retroactively can be understood to mean that a state court decision that does not comport with a subsequently recognized constitutional rule is not for that reason erroneous.[237] On this view, the role of the Court is to articulate constitutional decision rules that adapt the broad principles in the Constitution to current circumstances.[238] On this understanding of what it means for the Court to articulate a non-retroactively applicable new rule of constitutional law, a state court decision applying the decision rules in force at the time of its decision is not necessarily erroneous even if the Court later articulates a decision rule that would require a different result. So understood, *Teague* does not consign erroneously convicted state prisoners to continued incarceration.

A second argument for not giving weight to the plight of someone incarcerated pursuant to an erroneous state court decision would question whether the constitutional error bears upon the basic justice of the incarceration. According to this argument, many constitutional errors do not call into question the prisoner's guilt of the underlying crime. If the basic justice of the incarceration is our concern, it might be argued, we should provide additional layers of review of the factual questions decided by the state courts rather than focusing on errors of law or mixed questions. Yet a free-standing claim of factual innocence is not even regarded as a basis for granting habeas relief.[239] If the prisoner is guilty and in this sense "deserves" his incarceration, the Court need not alter its current policy out of a concern for the prisoner.

It may be true that some constitutional errors do not call into question the prisoner's guilt of the underlying offense. But many constitutional rules applicable in the criminal context are designed to protect the innocent, and with respect to such rules it is difficult to know if a constitutional error in a particular case resulted in the conviction of an innocent person. The possible

236. *Id.* (noting that "new constitutional rules" of criminal procedure will not apply to cases that become final before "the new rules are announced").

237. For discussion of what it means for a new rule to be retroactively applicable, *see* Vázquez & Vladeck, *supra* note 46.

238. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term – Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997).

239. *See* Herrera v. Collins, 506 U.S. 390, 401 (1993). *But cf. id.* at 417 (reserving question whether "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim . . . ."). *See also* House v. Bell, 547 U.S. 518, 555 (2006).

innocence of the prisoner might be a relevant consideration for the Court in determining on a case-by-case basis whether to grant a certiorari petition of a state prisoner alleging a wrong but reasonable state court error,[240] but the possibility that the petitioner may in fact be guilty does not warrant an across-the-board policy of denying review to persons convicted pursuant to wrong but reasonable state court decisions. That factual innocence may not be a free-standing basis for seeking relief from the federal courts either on direct review or on habeas does not mean that the plight of the erroneously convicted is not a concern of the federal system. It may merely reflect the belief that federal courts do not have a comparative advantage in addressing such issues.

This leads to the third possible reason why the Court might not want to respond to *Williams* by altering its certiorari policy: the Court may believe that when a state court's decision is reasonable, the state court is as likely to have reached the correct result as the federal habeas courts would be. Thus, if the Court, pre-*Williams*, was content to let the habeas courts decide those issues, with only a slim possibility of certiorari review, then (on this view) it should be content apply the same standard to determine whether to grant certiorari to review state court decisions alleged to be erroneous. If we assume that the state courts are as reliable in deciding questions of federal law as are the lower federal courts, the chances that the court got the federal question wrong is the same in the two situations.

This third argument implicates the long running and probably unresolvable debate about the parity of federal and state courts as effective enforcers of federal law.[241] No doubt the willingness and ability of state courts to enforce federal law effectively varies over time, and undoubtedly the state courts as a whole are less hostile to federal rights than they once were. Undoubtedly, some state courts are as willing and able to enforce federal law faithfully as many federal courts are. But it is also likely that other state courts are less reliable protectors of the constitutional rights of criminal defendants. The Court's pre-*Williams* statements that habeas provided a "necessary incentive" for state courts to enforce such rights indicates that the Court had doubts about the parity of state and federal courts in this regard. Again, the Court may need to take this factor into account on a case-by-case basis in determining whether to grant petitions by persons convicted of crimes in state court alleging wrong but reasonable errors of constitutional law. But, if it continues to believe that federal monitoring provides a necessary incentive, it should not continue to adhere to an approach to certiorari that consigns all such persons to continued imprisonment without the realistic prospect of any federal review.

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240. *But cf. infra* text accompanying note 242.

241. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); *see also* Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Federal Court Interpretations of* Nollan v. California Coastal Comm'n, 23 HARV. J.L. & PUB. POL'Y 233, 245–52 (1999) (summarizing the conflicting parity literature). For the conclusion that the debate concerns an empirical question for which there cannot be a reliable empirical answer, *see* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236 (1988).

Moreover, the plight of erroneously convicted state prisoners is not the only reason for the Court to alter its certiorari policy in the wake of *Williams*. The Court has reason to be concerned that, in the absence of monitoring by the federal courts, state courts might come to regard themselves as free to commit "reasonable" errors in applying the Court's constitutional doctrine. If AEDPA were treated by state courts as a green light to commit wrong but reasonable errors, then the Court's precedents relating to constitutional criminal procedure will have ceased to be the prevailing law in the states, having been effectively replaced by a watered-down version of the same, which might vary from state to state. Concern for the integrity of its criminal procedure precedents would thus also support a reconsideration of its certiorari policy for direct appeals by state prisoners.

It is true that the Court does not review state court decisions interpreting federal law in the civil cases for error correction purposes. Under its certiorari policy, it will ordinarily review such decisions only where there has been a conflict among the lower courts or if it deems the issue otherwise to be important. Nevertheless, there is some basis for fearing that unmonitored state judges would be more likely to disregard federal defenses in criminal cases than in civil cases. Many state judges are elected, and such judges might be more reluctant to give effect to federal defenses when it favors a criminal defendant than when it would favor a civil defendant. Indeed, this concern would appear to be stronger when giving effect to constitutional law would result in a guilty defendant escaping punishment.[242] The Court's pre-AEDPA statements that habeas serves as a "necessary incentive" to ensure that state courts "toe the constitutional mark"[243] indicate that the Court has greater doubts about the parity of state courts in giving effect to constitutional precedents in the criminal context than in the civil context.

In sum, AEDPA (as construed in *Williams*) denies the lower federal courts the power to grant relief for wrong but reasonable applications of clearly established constitutional law but neither prohibits nor requires the Supreme Court to afford such relief on direct review. The combination of the more severe consequence of a state court's error in the criminal context (deprivation of liberty versus deprivation of property) and a concern for the integrity of its constitutional civil procedure precedents should lead the Court to respond to *Williams* by taking a fresh look at its approach to certiorari petitions filed by state prisoners. Specifically, it is now for the Court to consider whether its pre-AEDPA approach to certiorari petitions by state prisoners should be modified in light of the fact that it is now the only federal court with the power to correct wrong but reasonable applications of federal law by the state courts in criminal cases.

In addressing this question, the Justices will be influenced by their own assessments of the state courts' ability and willingness to apply federal constitutional law correctly in criminal cases without federal court monitoring. Some Justices may be

242. *Cf. supra* text accompanying note 240.

243. *See* Solem v. Stumes, 465 U.S. 638, 653 (1984) (Powell, J., concurring)).

confident that federal monitoring is unnecessary. They may agree with Justice Jackson, who famously stated in his dissent in *Brown v. Allen* that "we are not final because we are infallible, but we are infallible only because we are final."[244] More recently, the Court in *Stone v. Powell* noted its "unwillingness to assume that state courts now lack appropriate sensitivity to constitutional rights."[245]

But the Court's refusal to expand the *Stone* exclusion to other constitutional claims suggests that the real reason for excluding exclusionary rule claims is the prophylactic and non-constitutional nature of the exclusionary rule.[246] In a subsequent opinion, Justice Powell (the author of *Stone*) noted the important role of habeas jurisdiction in ensuring that state courts "toe the constitutional mark."[247] The plurality in *Teague* endorsed Justice Powell's point, and stated, to the same effect, that "the threat of habeas serves as *a necessary additional incentive* for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[248] Subsequent opinions likewise state that habeas jurisdiction is needed to ensure that "state courts conduct criminal proceedings in accordance with the Constitution."[249]

Indeed, as discussed in greater detail in Section I, the Court's adoption of the de novo standard of review in *Brown v. Allen* (possibly earlier) appears to have been a direct response to Congress's replacement of the Court's mandatory writ of error review with discretionary certiorari review, combined with the Court's realization that it could no longer feasibly fulfill an error-correction role. If this realization did indeed lead the Court to interpret the habeas statute in a manner that allowed the lower federal courts to fulfill the error-correction function in the Court's stead, and if the Court continues to believe that habeas is a "necessary additional incentive" for states courts to adhere to federal constitutional law, then Congress's amendment of the habeas statute to preclude the lower courts from serving that function with respect to potentially wrong but reasonable state court decisions should lead the Court to reassess its standards for exercising its certiorari jurisdiction.

Congress would have thrust these questions on the Court had it clearly denied the federal courts the jurisdiction to grant habeas relief to state prisoners on the basis of wrong but reasonable applications of federal law. However, as discussed in Section II, it is far from clear that Congress intended to adopt the *Williams* interpretation of § 2254(d)(1). The discussion in this section adds an important

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244. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). Notably, however, only the Chief Justice and Justice Thomas signed on to a recent dissenting opinion by Justice Scalia relying on Justice Jackson's opinion in Brown v. Allen. *See* McQuiggin v. Perkins, 133 S. Ct. 1924, 1942–43 (2013). *See also* Kyles v. Whitley, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting) (quoting and endorsing Justice Jackson's view in *Brown v. Allen*).

245. Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

246. *See* Vázquez, *supra* note 9, at 137.

247. *See* Solem v. Stumes, 465 U.S. 638, 653 (1984) (Powell, J., concurring).

248. Teague v. Lane, 489 U.S. 288, 306 (1989) (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)).

249. Saffle v. Parks, 494 U.S. 484, 488 (1990).

additional consideration supporting Justice Stevens's interpretation of the statute and reject the majority's: the interpretation adopted by the majority entails a highly problematic adjustment of the Court's approach to exercising its discretionary review, requiring the Court (or at least placing substantial pressure on it) to expend scarce resources to review (or at least to consider reviewing) types of cases it is not well-situated to review, diverting scarce resources from the sorts of cases to which the Court has been, and should be, devoting its attention. Section IV argues that avoiding such a dysfunctional allocation of federal jurisdiction is a proper basis for resisting an otherwise plausible interpretation of a jurisdictional statute, and should lead the Court to reconsider its interpretation of § 2254(d) in *Williams*.

IV. RECONSIDERING *WILLIAMS*

The majority in *Williams* read AEDPA to effectuate what Justice O'Connor had previously described as a "far-reaching" change in habeas jurisprudence[250]—a change that she and Justice Kennedy were previously unwilling to effectuate without congressional intervention.[251] In other words, Justices O'Connor and Kennedy in *Williams* subordinated their own views about the proper scope of habeas review to those of the legislature. We have already seen that they probably misunderstood what Congress sought to accomplish in § 2254(d)(1).[252]

Here, I argue that, even if the evidence that Congress intended to deny habeas courts the power to grant relief for wrong but reasonable state court decisions had been stronger, the Court would have been well justified in resisting that intent in the absence of clearer support for it. The Court has never rigidly adhered to a "faithful agent" model in construing jurisdictional statutes. In interpreting such statutes, the Court has long placed far greater weight on its own views about sound policy and considered itself freer to reject the interpretation that would have emerged from application of conventional approaches to statutory interpretation. More specifically, the Court has strenuously resisted interpretations of jurisdictional statutes that would produce significant misallocations of judicial power.

Part A shows that the Court has frequently rejected interpretations of jurisdictional statutes that seemed strongly supported by the statute's text, adopting instead the interpretation that cohered best with its own views about the proper allocation of judicial resources. In what can best be described as a common-law method of construing jurisdictional statutes, it has departed from the statutes' plain meaning and instead erected complex doctrinal edifices bearing little relation to the statutory language. In the absence of any change in the statutory language, the Court has altered its interpretation of jurisdictional statutes to advance its own views of the proper allocation of judicial power in the light of evolving needs. Even when confronted with specific congressional alterations of federal jurisdiction, the Court has

250. Wright v. West, 505 U.S. 277, 297–306 (1992) (O'Connor, J., concurring).
251. *Id.* at 306–10 (Kennedy, J., concurring).
252. *See supra* Section II.

rejected the interpretation most strongly indicated by the statute's text when that interpretation would produce a severely dysfunctional allocation of jurisdiction. Part B explains why the Court is justified in resisting interpretations of jurisdictional statutes that would produce severe misallocations of jurisdiction and thus undermine the federal judiciary's ability to fulfill its constitutional functions.

A. The Court's Freer Hand in Interpreting Jurisdictional Statutes

In interpreting jurisdictional statutes, the Supreme Court does not adhere rigidly to conventional norms of statutory interpretation. It is not unusual for the Court to take substantial liberties with the statutory text or to overlook generally-applicably canons of construction to avoid an interpretation that would produce a severe misallocation of jurisdiction as between state and federal courts or among federal courts. Sometimes this involves engrafting limitations to broadly-worded jurisdictional grants. Sometimes it involves the adoption of narrow interpretations of jurisdictional limits that the statutory language appears to impose. Sometimes it involves adjusting the interpretation of a jurisdictional statute in the absence of any change in the statute's language to account for changes in other jurisdictional statutes or in the broader legal or societal landscape.

Subpart (1) offers examples of the Court's "common law" approach to the interpretation of broadly worded jurisdictional statutes. The Court's approach to interpreting the statutes authorizing federal habeas review of state criminal convictions is a good example of the common law approach. I therefore draw liberally in this section from the evolution of habeas doctrine, as discussed in Section I and in other work. Subpart (2) shows that even with respect to very specific congressional regulation of its jurisdiction, the Court has eschewed the interpretation plainly supported by statutory text read in light of established canons of interpretation when that interpretation would produce a dysfunctional allocation of jurisdiction. Indeed, the Court has rejected interpretations even more clearly supported by the non-redundancy canon than was its interpretation in *Williams*. Rather than viewing itself as Congress's faithful agent, the Court often resists congressional interventions in the name of protecting what it regards as its proper constitutional role.

1. The Court's Common Law Approach to the Interpretation of Jurisdictional Statutes

One well-known example of the liberties the Court frequently takes in interpreting jurisdictional statutes is its interpretation of the general federal question statute. The Constitution extends the jurisdiction of the federal courts to "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[253] The Court interpreted

253. U.S. CONST. art. III, § 2.

this clause very broadly in *Osborn v. Bank of the United States*.[254] There is some debate about the precise scope of *Osborn*'s reading of the constitutional "arising under" clause, but no one doubts that it was quite broad.[255] According to a widely cited formulation, the Court in *Osborn* read the constitutional clause potentially to extend federal jurisdiction to any case in which there is even the "remote possibility" that an issue of federal law will arise in the case.[256]

In 1875, when Congress for the first time conferred a general "arising under" jurisdiction on the federal courts, it employed language that closely tracked the parallel clause of the Constitution. The statute gives the federal courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[257] The use of the same language as in Article III suggests that Congress intended to confer the entire judicial power over federal questions, an intention confirmed by the legislative history, which includes the statement that "[t]his bill gives precisely the power which the Constitution confers — nothing more, nothing less."[258] Yet, virtually from the start, the Court interpreted the statute to confer substantially less "arising under" jurisdiction than the constitutional maximum.[259]

The Court's reasons for declining to read the statute to extend the jurisdiction of the lower federal scope to the full extent of the Constitution as interpreted in *Osborn* are not difficult to fathom. Had it adopted the *Osborn* test, the lower federal courts would have had jurisdiction over any imaginable case that would otherwise have been adjudicated in the state courts.[260] The federalism problems that such a reading would have produced are obvious. Perhaps as importantly, adopting such a broad interpretation of the statute would have overwhelmed the federal courts. It is therefore not surprising that the Court engrafted extra-textual limitations to the statute. It articulated the "well-pleaded complaint" rule, limiting federal jurisdiction to suits in which an issue of federal law appears on the face of the well-pleaded complaint.[261] The rule has been defended on grounds of judicial administrability: jurisdiction must be determined at the start of a case, and at that

254. 22 U.S. (9 Wheat.) 738, 818–23 (1824).

255. *See generally* Carlos M. Vázquez, *The Federal "Claim" in the District Courts:* Osborn, Verlinden *and Protective Jurisdiction*, 95 CAL. L. REV. 1731, 1735 (2007) ("Marshall's opinion in *Osborn* has been read as maintaining that a suit arises under federal law for purposes of Article III as long as there is a possibility that a disputed question of federal law will arise in the case.").

256. *See* Textile Union Workers v. Lincoln Mills of Ala., 353 U.S. 448, 482 (1957) (Frankfurter, J., dissenting); *see also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 492 (1983) (reading *Osborn* to hold that "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law").

257. 28 U.S.C. § 1331 (2012).

258. 2 CONG. REC. 4,987 (1874).

259. *See, e.g., Verlinden*, 461 U.S. at 492–93.

260. It is difficult to imagine a case that would fail the *Osborn* test, if the latter encompasses "any case or controversy that might call for the application of federal law." *Verlinden*, 461 U.S. at 492.

261. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 153 (1908); *see* RICHARD D. FREER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS § 3566 (2d ed. 2013).

point one cannot be certain of the grounds of the defenses that may be raised or of any replications.[262]

The well-pleaded complaint rule has proved difficult to apply in certain contexts. For example, the Court has shifted course a number of times in applying the well-pleaded complaint rule to cases in which the plaintiff's claim is based on a state law claim with an "embedded" federal issue.[263] In fashioning doctrine for that question, the Court has sought to achieve a "common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside."[264] The Court has also fashioned exceptions to the well-pleaded complaint rule, unsupported by statutory text but warranted, in the Court's view, to accommodate exceptional situations requiring access to the federal courts.[265]

Perhaps the best illustration of the Supreme Court's common-law approach to interpreting jurisdictional statutes is also the most directly relevant to the subject of this article: the Court's shifting interpretation of the Habeas Corpus Act of 1867. As summarized in Section I,[266] this Act conferred on the federal courts the power to grant habeas relief "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . ."[267] The statutory language has not changed, yet the Court has revised the scope of available habeas review numerous times based on its own views about the proper allocation of jurisdiction as between the lower federal courts and the Supreme Court, sometimes in the light of changes in other jurisdictional statutes.

At the time of the statute's enactment, persons convicted of crimes in state court had a right to review in the Supreme Court of the federal issues decided against them. As already discussed, the Court held that, in the absence of peculiar urgency warranting an exception from the exhaustion requirement, direct review in the Supreme Court was the exclusive remedy for a state prisoner convicted in state court claiming constitutional error.[268] This limitation was understood to be consistent with the statutory language on the theory that someone convicted by a court with jurisdiction is not "in custody in violation of the Constitution or laws or treaties of the United States" as long as the rendering court had jurisdiction over the

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262. *See* FALLON ET AL., *supra* note 6, at 784.

263. *Compare* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 813–14 (1986), *with* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313–14 (2005).

264. Gully v. First Nat'l Bank, 299 U.S. 109, 117–18 (1936), *quoted in Merrell Dow*, 478 U.S. at 813–14 and *Grable & Sons*, 545 U.S. at 313.

265. *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) (reaffirming and broadening the "complete preemption" exception to the well-pleaded complaint rule).

266. And explained in greater detail in Vázquez, *supra* note 9.

267. Habeas Corpus Act, ch. 28, § 1 (1867) (current version at 28 U.S.C. § 2241 (2012)).

268. *See supra* Section I(B).

person and subject matter.[269] That the court may have committed an error in the interpretation or application of the Constitution did not render the custody itself unconstitutional.[270] The writ of error exclusivity doctrine strained even this "jurisdictional" reading of the 1867 statute, however, as the Court applied the doctrine to preclude habeas relief in the lower federal courts even when the prisoner alleged that the state court lacked jurisdiction.[271] As discussed in Section I, it did so in order to advance its own view that direct review in the Supreme Court review was the more appropriate mechanism for protecting the federal constitutional rights of persons convicted of crimes in state court.

As discussed above, Professor Liebman has argued that the writ of error exclusivity doctrine evaporated when the statutes governing direct review in the Supreme Court were amended to eliminate mandatory review of claims from the state courts in most cases.[272] I have alternatively argued that, with respect to claims by state prisoners, the Court gradually expanded the scope of habeas review as it came to recognize that it could no longer fulfill an error-correction role.[273] Either way, the Court expanded the availability of habeas jurisdiction in the lower federal courts without a corresponding change in the language of the habeas statute, based on its perception of a need for a right of review in the lower federal courts to compensate for the absence of direct review in the Supreme Court.

The Court in *Brown v. Allen* definitively rejected the idea that it is ordinarily only for the Supreme Court to review state criminal convictions. In explaining the Court's holding, Justice Frankfurter claimed that the Court was merely giving effect to the habeas statute as Congress had written it in 1867:

> It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted.[274]

In light of the long period in which the statute had been read more narrowly, it is difficult to take seriously Justice Frankfurter's disavowal of the Court's own

269. 28 U.S.C. § 2254(a) (2012).

270. For the view that this interpretation of the statutory language is the only plausible one, *see* Bator, *supra* note 26, at 474–78; Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 103–07 (1959).

271. *See, e.g.*, Baker v. Grice, 169 U.S. 284, 292-93 (1898).

272. *See supra* Section I(B).

273. *See id.*

274. Brown v. Allen, 344 U.S. 443, 510. (1953); *see also id.* at 499–500 ("It is not for us to determine whether this power should have been vested in the federal courts. As Mr. Justice Bradley, with his usual acuteness, commented not long after the passage of that Act, 'although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on habeas corpus, there seems to be no escape from the law.'").

agency in the matter. If Congress in 1867 did designate the district courts as the "organ of higher law," then the Court's articulation of an all-but categorical bar on the lower courts' power to grant habeas relief—a bar that prevailed for much of the nineteenth century and at least through the early part of the twentieth century—would be hard to defend. It seems likely that Justice Frankfurter was projecting to Congress his own views about the need for federal review of these cases, a view reflected in his observation in *Brown* that:

> Unfortunately, instances are not wanting in which even the highest State courts have failed to recognize violations of these precepts that offend the limitations which the Constitution of the United States places upon enforcement by the States of their criminal law.[275]

The Burger and Rehnquist Courts later narrowed the availability of habeas relief in some respects. Again, the Court adjusted its interpretation of the statute without any relevant intervening change in the statutory language. It relied instead on its views regarding the proper allocation of power as between the lower federal courts and the Supreme Court.[276] As already explained, by the time of AEDPA's enactment, the Court had concluded that habeas review in the lower federal courts provided a necessary incentive for state courts to "toe the constitutional mark."[277] Without such an incentive, the Court appears to have concluded, state courts could not be counted on to apply the Court's criminal procedure precedents faithfully.

In sum, the whole history of the Supreme Court's interpretation of the habeas statute reflects the Court's adjustment of its interpretation of the statute's unchanged text to give effect to its own views of the proper allocation of jurisdiction as between itself and the lower federal courts in the light of its own conviction of the need for federal review of state court decisions resulting in custody. In view of this history, the subordination by Justices O'Connor and Kennedy of their own convictions regarding the need for habeas review of state criminal convictions in favor of what they took, from ambiguous evidence, to be Congress's preferences stands out as aberrational.

2. Supreme Court Resistance of Severe Misallocations of Jurisdiction

Nor was the approach taken by Justices O'Connor and Kennedy any less aberrational because the statute they were construing purported to impose a very specific limitation on federal court jurisdiction. The freer hand the Supreme Court takes in interpreting jurisdictional statutes is evident not just in its interpretation of broadly worded statutes such as those discussed in the previous Section.[278] The Court has also departed from its usual approach to statutory interpretation when confronted

275. *Id*. at 511 (citing De Meerleer v. Michigan, 329 U.S. 663 (1947); Marino v. Ragen, 332 U.S. 561(1947)).
276. For a detailed discussion, *see* Vázquez, *supra* note 9.
277. *See supra* text accompanying notes 247–49.
278. *See supra* Section IV(A)(1).

with statutes making quite specific changes in the jurisdiction of the federal courts. Here, too, the Court has resisted interpretations apparently required by the text, adopting instead an interpretation that produced an allocation of jurisdiction more in line with its assessment of the need for federal review or that avoided severe problems of judicial administration.

As examples of the Court's resistance to problematic interpretations of specific jurisdictional provisions, this section discusses a decision interpreting the "proviso" of the statute addressing its writ of error review and a decision construing the effect of the proviso's repeal. These decisions properly insist that Congress speak clearly if it wishes to foist on the federal courts a jurisdictional regime that compromises their ability to fulfill their proper functions.

Although the Court has not articulated this resistance as an interpretive canon in its own right, I posit such a canon as the best explanation of the Court's interpretations of these (and other) jurisdictional statutes. The canon might be considered a specific application of the canon of avoidance of constitutional questions, based on the assumption that a statute that significantly impairs the federal courts' ability to perform its proper functions raises substantial constitutional questions. I argue here, however, that the canon is best understood as a distinct quasi-constitutional clear-statement rule.[279]

a. Martin v. Hunter's Lessee

Section 25 of the Judiciary Act of 1789 addressed the jurisdiction of the Supreme Court to review decisions of the state courts.[280] It authorized review by writ of error where the state court decided an issue of federal law against the party claiming a right under such law.[281] The final sentence of § 25 [hereinafter "the proviso"] provided that "no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the [federal law] in dispute."[282] Despite the statutory text purporting to limit the Supreme Court's review to the issues of federal law in dispute, the Supreme Court in *Martin v. Hunter's Lessee* construed the proviso to permit review of certain questions of state law.[283]

The plaintiff in error in *Martin* claimed title to some land in Northern Virginia, tracing his title to that of a British subject who had previously owned the land.[284] He relied in part on the 1783 Treaty of Peace with Great Britain, which provided in

279. *See* William N. Eskridge, Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 595, 595 & n.4 (1993).

280. *See* Judiciary Act of 1789 § 25, 1 Stat. 85–87 (1789).

281. *See id.*

282. *See id.* at 86–87.

283. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 357–59 (1816).

284. *Id.* at 311; Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch.) 603, 607 (1812).

part that there should be "no future confiscations" of the property of British subjects.[285] The plaintiff in error did not dispute the state court's construction of the treaty.[286] The state court did not deny that the treaty prohibited confiscations of the property of British subjects after the treaty's entry into force.[287] It held, instead, that the Commonwealth of Virginia had confiscated the land before the treaty had entered into force.[288] Thus, on appeal to the Supreme Court, the only disputed question concerned interpretation of Virginia law: Did Virginia statutes effect a completed confiscation of the land prior to the treaty's entry into force in 1783? The Virginia Court of Appeals held that the land had been confiscated under Virginia law prior to that date.[289] The Supreme Court held that it had jurisdiction to review that question of Virginia law, notwithstanding the proviso in § 25, and it reversed the Virginia Court of Appeals on that question of Virginia law.[290]

In construing the proviso, the Court departed from the plain text of the statute on the basis of its understanding of the purposes of its appellate jurisdiction. The Court, speaking through Justice Story, held that, where a party relies for his title on the treaty, and the state court's decision is against that title, the Court has the jurisdiction to review the state court's decision against the title, even if the state court decided against the title on grounds of state law.[291] If otherwise construed, the Court wrote, § 25 "will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure."[292] According to the Court, the proviso applied only to issues of state law that are completely independent of the claimed title protected by federal law.[293]

Justice Johnson, who disagreed with the majority's construction of Virginia law, agreed that the Court had jurisdiction to review that question.[294] He too relied on the need to advance the broader purposes of § 25.[295] Inquiry into the plaintiff in error's title under Virginia law ''must, in the nature of things, precede the consideration how far the law, treaty and so forth, is applicable to it; otherwise an appeal to this court would be worse than nugatory.''[296]

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285. *See Fairfax's Devisee*, 11 U.S. (7 Cranch.) at 608–09, 614.
286. *Id*. at 608.
287. *See id*. at 612, 616.
288. *Id*. at 614–15.
289. *Martin*, 14 U.S. (1 Wheat.) at 306–07.
290. *Id*. at 357–59, 362.
291. *Id*. at 357–59.
292. *Id*. at 357.
293. *Id*. at 359.
294. *Id*. at 368–69 (Johnson, J., dissenting).
295. *Id*. at 369 (Johnson, J., dissenting).
296. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch.) 603, 632 (1812) (Johnson, J., dissenting); *see also Martin*, 14 U.S. (1 Wheat.) at 370 (Johnson, J., dissenting) ("And if the contrary doctrine be assumed, what is the consequence? This court may then be called upon to decide on a mere hypothetical case—to give construction to a treaty without first deciding whether there was any interest on which that treaty, whatever be its proper construction, would operate.").

Neither Justices Story nor Johnson elaborated on why the purposes of the statute called for review of the question of state law in the case, but they appear to have feared that a state court hostile to the federal right could easily defeat the right through a tendentious resolution of the antecedent state-law question. The Court's holding was certainly a defensible one, but it is difficult to square with the language of the proviso. The Court's construction of the proviso is thus an early example of the Court's resistance to a textual reading of a jurisdictional statute that would undermine the Court's ability to serve its intended role.[297]

b. Murdock v. City of Memphis

In 1867, Congress reenacted § 25 with some changes.[298] Among the changes was the omission of the proviso just discussed. The question before the Court in *Murdock v. City of Memphis* was whether Congress's repeal of this proviso had the effect of authorizing the Supreme Court to review nonfederal questions arising in cases falling within the scope of § 25.[299] The Court in *Martin* had stated that, in the absence of the proviso, jurisdiction to review even wholly independent questions of state law "would . . . have unquestionably attached to the court."[300] It would seem to follow that the repeal of the proviso would "unquestionably" have extended the Supreme Court's jurisdiction to such independent questions of state law. Nevertheless, the Court in *Murdock* held that the repeal did not have that effect, and that the Court's jurisdiction continued to extend only to the federal questions (and, presumably, although the Court did not say so, to issues of state law antecedent to the federal right).[301] The Court based this holding on its own assessment of the needs of judicial administration.[302]

The plaintiffs in error in *Murdock* claimed some land that had been conveyed by their ancestors to the City of Memphis for the construction of a naval yard.[303] The City of Memphis conveyed the land to the federal government, which used the land as a naval yard for a time.[304] The federal government later determined that it no longer required the land for that purpose, and it conveyed the land back to the city by an act of Congress "for the use and benefit of said city."[305] The plaintiff in error claimed that the use of the land as a naval yard was a condition of the initial

297. Justice Story's majority opinion did rely on the text of § 25, specifically its conferral of jurisdiction "where is drawn in question the construction of a treaty, and the decision is against the title set up by the party." *Martin*, 14 U.S. (1 Wheat.) at 358. But the proviso purports to limit review in such cases to the construction of the federal law in dispute. Neither Story nor Johnson made a serious attempt to square the Court's holding with that language.

298. *See* Judiciary Act of 1867, ch. 28, § 2, 14 Stat. 386–87 (1867).

299. Murdock v. City of Memphis, 87 U.S. 590, 616 (1874).

300. *Martin*, 14 U.S. (1 Wheat.) at 359.

301. *Murdock*, 87 U.S. at 619, 626–28.

302. *See infra* text accompanying notes 317–18.

303. *Murdock*, 87 U.S. at 637.

304. *Id.*

305. *Id.*

conveyance and that, now that the land was not being used for that purpose, the city was obligated to reconvey it to them.[306]

Under § 25, the Supreme Court had jurisdiction to review Murdock's federal claim, viz., whether the federal statute reconveying the land to the city gave Murdock a right to the land. Murdock's federal claim was exceedingly weak, as the statute provided that the land was being conveyed to the city "for the use and benefit of said city," but it was a federal claim that Murdock had raised and that the state courts had decided against him. Under § 25 as originally enacted, the Supreme Court's role would have been limited to reviewing the state court's decision of that (easy) federal question. But Murdock argued that the repeal of § 25's proviso had the effect of authorizing Supreme Court review of all other issues in the case, including the much more substantial nonfederal issues implicating the law of contracts and trusts.[307]

Had the Court applied conventional approaches to statutory interpretation in deciding the jurisdictional question, it would have endorsed the plaintiff in error's interpretation of the statute. First, as noted, the Court had already concluded that, without the proviso, the Court's jurisdiction under § 25 would "unquestionably" have extended to state law questions.[308] Stare decisis thus strongly supported Murdock's argument. Moreover, a well-accepted principle of statutory interpretation teaches that "[s]tatutory amendments are meant to have real a substantial effect."[309] The Court's failure to apply that canon of construction offers an important contrast to the *Williams* decision, as the canon about the effect of amendments is a close cousin of the non-redundancy canon applied by the Court in *Williams*. (The latter canon counsels courts to avoid interpretations that would render a portion of the language of a statute superfluous; the former canon counsels the avoidance of an interpretation that would render the repeal of language superfluous.)

In a nod to the "faithful agent" conception of the judicial role in interpreting statutes, the Court considered whether Congress had actually intended to broaden the Supreme Court's appellate jurisdiction to state law issues decided by the state courts. It concluded that, while some members of Congress may well have intended to do so, others may have voted to repeal the proviso because they believed that the Court's jurisdiction would be limited to the federal question even without the proviso.[310] That may well be true, but the point of the non-redundancy canon (and its close cousin regarding the effect of repeal of statutory language) is to obviate that question in the absence of affirmative evidence that legislators believed the repeal of the language would have no effect. In *Murdock*, the Court's speculation about the probable intent of legislators trumped the canon. Moreover,

306. *Id.*

307. *Id.* at 618.

308. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 359 (1816).

309. WILLIAM N. ESKRIDGE, INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 414 & n.55 (citing cases).

310. *Murdock*, 87 U.S. at 618–19.

scholars who have looked at the question have concluded that the Reconstruction Congress of 1867 likely did intend to extend the Supreme Court's jurisdiction, as Murdock argued.[311]

Far from giving effect to the statutory language, the Court proceeded to "criticize[]" it.[312] The Court rejected the interpretation supported by the text and by likely congressional intent, adopting instead an interpretation that accorded with its own view of the (lack of) need for Supreme Court review of state-law questions[313] and, importantly for present purposes, its concerns about the disastrous effect that a literal interpretation would have had on judicial administration. The significant problems that would have been posed for the Court's ability to do its work had the Court adopted a literal interpretation of the statute were, in the words of counsel for Memphis, "too obvious to require to be presented."[314] Recall that writ of error review was mandatory, not discretionary. If the presence of a federal issue in the case, even one as frivolous as the one raised by Murdock, were to have the effect of triggering the Supreme Court's jurisdiction to review *every issue in the case*, then the Supreme Court's caseload would have been multiplied several-fold. The Court in *Murdock* wrote at length about this problem:

> [I]f when we once get jurisdiction, everything in the case is open to re-examination, it follows that every case tried in any State court, from that of a justice of the peace to the highest court of the State, may be brought to this court for final decision on all the points involved in it. That this is no exaggeration let us look a moment.[315]

The Court proceeded to describe at length the "burden" imposed on the Court by the "abuse" of litigants manufacturing frivolous federal questions just to get into federal court.[316] It then noted:

> If the temptation to do this is so strong under the rule of this court for over eighty years to hear only the Federal question, what are we to expect when, by merely *raising* one of those questions in any case, the party who does it can bring it here for decision on all the matters of law and fact involved in it. It is to be remembered that there is not even a limitation as to the value in controversy in writs to the State courts as there is to the Circuit Courts; and it follows that there is no conceivable case so insignificant in amount or unimportant in principle that a perverse and obstinate man may not bring it to this court by the aid of a sagacious lawyer raising a Federal question in the record—a point

311. *See* William M. Wiecek, Murdock v. Memphis*: Section 25 of the Judiciary Act of 1789 and Judicial Federalism*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 223, 232–33 (Maeva Marcus, ed., 1992) (citing work by Charles Warren, Felix Frankfurter, James Landis, and Martha Field).

312. *Murdock*, 87 U.S. at 625.

313. *Id.* at 626 ("No . . . reason nor any necessity exists for the decision by this court of [nonfederal] questions . . . .").

314. *Id.* at 613.

315. *Id.* at 628.

316. *Id.* at 629.

> which he may be wholly unable to support by the facts, or which he may well know will be decided against him the moment it is stated. But he obtains his object, if this court, when the case is once open to re-examination on account of that question, must decide all the others that are to be found in the record.[317]

The Court's rejection of a literal interpretation of the statute was also based on its concern about the radical alteration it would have caused to the state courts' control over state law:

> The State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly.[318]

But the Court was evidently more concerned with the effect the literal interpretation would have had on its own work. As legal historian William Wiecek has written:

> If the Court had accepted the jurisdiction potentially proffered by Section 2, it would have been deluged by an appalling increase in cases coming up to it from the state courts. [Justice] Miller's warning about manufactured federal questions was not hyperbole, but sober truth. The Court was already feeling itself overworked, and the justices were leery of taking on new responsibilities, to say nothing of the freshet of appeals that would have descended on it had *Murdock* been decided the other way.[319]

Murdock thus provides a clear precedent for the Court's resistance of an interpretation of a statute strongly supported by the canon against superfluities on the ground that the interpretation would produce a highly dysfunctional allocation of federal jurisdiction.

B. In Defense of Resistance of Jurisdictional Misallocations

The foregoing cases show that the Court departs from the faithful agent model of statutory interpretation in interpreting jurisdictional statutes by resisting interpretations that would produce a dysfunctional allocation of judicial power even when such an interpretation is supported by text, read in the light of traditional canons of construction. I am hardly alone in noting that the Court frequently departs from the faithful agent model of statutory interpretation in construing jurisdictional statutes. Some scholars regard such departures as defensible and in any event unavoidable.[320] Other scholars condemn such departures.[321]

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317. *Id.*
318. *Id.* at 626.
319. Wiecek, *supra* note 311, at 242–43.
320. *See, e.g.*, David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985).
321. *See, e.g.*, Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1890–91 (2008).

This Part argues that such resistance is proper for two reasons. First, the law of federal jurisdiction is notoriously complex and, as a result, it will frequently be the case that Congress did not anticipate, much less intend, the problems that the Court is resisting. Second, in enacting a jurisdictional statute, Congress is regulating the powers of a coordinate branch of government, a branch that is in some respects a check on it. Much has been written about the constitutional limits on Congress's power to regulate the jurisdiction of the federal courts. Whatever those limits may be, the Court is on firm ground in at least insisting on clear evidence of congressional intent before interpreting a statute in a way that undermines its ability to perform its proper constitutional functions. A clear statement rule that accomplishes that goal can therefore be said to have constitutional underpinnings.

1. The Complexity of the Law of Federal Jurisdiction

As is well known, the issues arising in the area of federal jurisdiction can be tremendously complex. Congress lacks the expertise to anticipate and adequately address the complexities that its occasional interventions into this field can produce. Indeed, Congress rarely attempts such interventions. Its legislation in the area is often broadly worded, leaving much to be inferred. As shown by the examples discussed above, such statutes can potentially cause enormous problems if read literally.[322]

When Congress does attempt to micromanage an aspect of federal jurisdiction, its interventions will often raise many difficult issues, again potentially causing substantial problems for judicial administration if interpreted pursuant to conventional methods of statutory interpretation. It is safe to assume that, in most cases, Congress does not anticipate, let alone intend, the problems its statutes produce for the judiciary. For this reason, the Court is justified in insisting on clearer evidence than usual that Congress intended to produce such problematic results.

AEDPA is one of Congress's rare forays into the minutiae of federal jurisdiction and it provides us with numerous examples, quite apart from the issue of deference under § 2254(d)(1), of likely unanticipated problems produced by a literal interpretation.[323] The enormously complex problems with AEDPA sometimes result from the plain text of the statute, yet it is unlikely that Congress anticipated the problems, much less that it intended to produce them. By contrast, with respect to the question that is the subject of this article, the problem does not result from a literal interpretation of the words Congress enacted. They result instead from a *failure* to apply the statute as written. The Court's departure from the statute's plain meaning was grounded in a canon of construction that the legislators are very unlikely to have had in mind when they chose the language.[324] Indeed, as discussed in Part II, the pivotal legislators appear to have recognized that the "contrary to" and

322. *See supra* Section IV(A)(2).

323. For a discussion on just one example, *see* Vázquez & Vladeck, *supra* note 46, at 954–57.

324. *See* Gluck & Bressman, *supra* note 72, at 907.

"unreasonable application" standards both permit relief for erroneous state court decisions. Resisting the dysfunctional allocation of federal jurisdiction produced by the *Williams* interpretation of § 2254(d)(1) would thus not even have required a departure from the faithful agent model of statutory interpretation. It would at most have required a departure from a canon of construction designed more to guide congressional drafting than to reflect congressional intent.

2. The Propriety of Resistance

Even when an interpretation of a jurisdictional statute finds stronger support in the text of the statute, the courts are well justified in resisting the interpretation if it would produce a dysfunctional allocation of judicial power. When Congress enacts a jurisdictional statute, it addresses the powers and duties of a coordinate branch of government. Because the judiciary serves in some respects as a check on the legislative branch, the courts act appropriately when they resist interpretations of statutes that would undermine their ability to carry out their proper functions.

The scholarship on the scope of Congress's power to regulate the federal courts is legion. Most of this scholarship has focused on the constitutionality of stripping the federal courts of jurisdiction over certain classes of cases.[325] Far less attention has been paid to the problems that would be created for the federal courts if Congress were to give those courts *too much* jurisdiction of the wrong kind. Overburdening the federal courts with the wrong kinds of cases reduces the amount of time and attention such courts can devote to the right kind of cases, even if the types of cases over which the courts are given jurisdiction fall within the federal judiciary's Article III powers. The examples discussed above of judicial resistance to problematic interpretations of jurisdictional statutes raised problems of this sort.[326] A literal interpretation of the general federal question statute would have overwhelmed the federal courts with cases not raising federal claims or requiring the application or interpretation of federal law. Interpreting the repeal of § 25's proviso to extend the Supreme Court's writ of error jurisdiction to every nonfederal question in the case would have overburdened the court with the decision of questions not implicating any discernable federal interest.[327]

Indeed, at the very beginning of the Court's history, Chief Justice Jay understood that accepting the President's invitation to take on questions of the wrong sort would interfere with the Court's effectiveness in functioning as a check on the other branches.[328] The President had sought the Court's assistance to resolve questions regarding the law of neutrality. Jay politely declined, noting that "the three branches of government" were "in certain respects checks upon each other."[329]

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325. *See* FALLON ET AL., *supra* note 6, Chapter IV.
326. *See supra* Section IV(A)(2).
327. *See supra* Section IV(A)(2)(b).
328. *See* FALLON ET AL, *supra* note 6, at 52.
329. *Id*.

Jay's concern was not only, or even primarily, that accepting the President's invitation would distract the Justices from their proper functions. Rather, the episode is an early recognition that the Court's ability to serve as a check on the other branches might be undermined by demanding too much of the courts as well as by giving them too little power.

The rule against advisory opinions is now understood to reflect constitutional limitations. If Congress gives the Court jurisdiction over cases falling outside the judicial power as defined by Article III, the Court can and should resist by finding the statute unconstitutional. If a jurisdictional statute raises potential constitutional difficulties of this sort, the Court can resist by applying the canon of avoidance.[330] If a statute unambiguously gives the federal courts jurisdiction over cases undoubtedly within the federal judicial power under Article III, the Court may have no option but to accept the jurisdiction even if, in the Court's view, doing so would undermine its ability to focus effectively on cases that are more important from the perspective of serving as a check on the other branches. As discussed in Section II, § 2254(d)(1) is not unambiguous.

If a statute clearly conferring jurisdiction over a class of cases within the federal judicial power imposes a severe burden from this perspective, the Court may well be justified in declining the jurisdiction on constitutional grounds. But declining jurisdiction on such grounds would be unprecedented and controversial. Insisting on a clear statement before adopting an interpretation that would produce such problems, on the other hand, would not be unprecedented. Both *Mottley* and *Murdock*, I have argued, are examples of such resistance.[331] Indeed, such resistance reflects the Court's assumption that Congress does not mean to interfere inappropriately with the courts' proper role. The Court is accordingly on solid ground when it rejects an interpretation of a jurisdictional statute that would produce a dysfunctional allocation of jurisdiction in the absence of a clear statement from Congress that that was its intent. A clear statement rule of this sort is properly grounded in the constitutional separation of powers.

As detailed in Section III, the *Williams* interpretation of § 2254(d)(1) produces a dysfunctional allocation of judicial power. It shifts from the lower federal courts to the Supreme Court the responsibility of granting relief from wrong but reasonable state court decisions resulting in custody. The alternative of continuing to deny review of such cases would properly be regarded by the Court as unacceptable, both because it results in the continued deprivation of liberty for prisoners whose convictions were erroneous under the Court's own precedents and because it threatens the effectiveness of those precedents. But reviewing such cases burdens the Court with an error-correction function that it is ill-suited to carrying out and

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330. *See, e.g.*, Mesa v. California, 489 U.S. 121, 137 (1989) ("If a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided, a court should adopt that construction.") (internal citations omitted).

331. *See supra* text accompanying note 261 and Section IV(A)(2)(b).

would distract it from deciding the questions of broad significance that the Court rightly regards as its far more important function. The Court would accordingly have been on firm ground in resisting such an interpretation even if it had been more strongly supported by the statute's text. A fortiori, the Court should resist such an interpretation when the statute's text provided such weak support for it.

It is not too late to shift course. Although the Court ordinarily adheres to its precedents most rigidly when it has interpreted statutes,[332] the concerns discussed in this section are of a quasi-constitutional nature. With respect to the *Williams* precedent, moreover, reliance interests do not weigh strongly in favor of retaining the majority's problematic interpretation of § 2254(d). Indeed, the possibility that state courts may come to rely on the *Williams* holding by treating it as a green light to commit reasonable errors of federal law is one of the dangers to be avoided by overruling *Williams*. The Court should revisit its interpretation of 2254(d) and adopt the minority's reading of that statute at its earliest opportunity.

CONCLUSION

In *Williams v. Taylor*, the Supreme Court departed from the text of § 2254(d)(1) in holding that the provision denies the lower federal courts the power to grant habeas relief to prisoners in custody pursuant to wrong but reasonable state court decisions. The majority relied instead on its perception of a generalized congressional purpose to cut back on habeas relief and on the non-redundancy canon of statutory construction. On both scores, the minority opinion had the better argument. Additionally, both opinions overlooked legislative history strongly supporting the conclusion that the legislature did not intend to change the standard of review that had existed since at least 1953, probably earlier. The case for reading the provision as requiring a departure from the well-established standard of review was thus remarkably weak.

Even if the case had been stronger, however, the Court should have rejected such a reading for an additional reason: under the majority's interpretation, the provision functions as a highly dysfunctional forum-allocation rule. AEDPA (as construed in *Williams*) does not prohibit all federal courts from granting relief to state prisoners convicted pursuant to wrong but reasonable state court decisions. Had it done so, it would have raised serious constitutional issues. Instead, the provision leaves it to the Supreme Court to review state court criminal convictions for wrong but reasonable errors.

This allocation of jurisdiction between the Supreme Court and the lower federal courts is highly dysfunctional. Although the Court performed an error-correction role with respect to state-court decisions during much of our history, today it lacks the resources to fulfill such a role. Precedent and principle support judicial resistance to interpretations of jurisdictional statutes that produce such dysfunctional

332. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991).

allocations of judicial power. The need to resist such dysfunction should have swayed the Justices to adopt the interpretation favored by the minority in that case. The Court should reverse *Williams* at its earliest opportunity. Pending such reversal, the Court should grant review of at least some wrong but reasonable state court convictions in order to protect its precedents requiring the reversal of convictions infected with non-harmless constitutional errors and to vindicate the liberty interests of state prisoners who would not be in custody had those precedents been properly applied.