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The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences

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THE DEMISE OF HABEAS CORPUS AND THE RISE OF QUALIFIED IMMUNITY: THE COURT'S EVER INCREASING LIMITATIONS ON THE DEVELOPMENT AND ENFORCEMENT OF CONSTITUTIONAL RIGHTS AND SOME PARTICULARLY UNFORTUNATE CONSEQUENCES

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Introduction

The collapse of habeas corpus as a remedy for even the most glaring of constitutional violations ranks among the greater wrongs of our legal era. Once hailed as the Great Writ, and still feted with all the standard rhetorical flourishes, habeas corpus has been transformed over the past two decades from a vital guarantor of liberty into an instrument for ratifying the power of state courts to disregard the protections of the Constitution. Along with so many other judicial tools meant to safeguard the powerless, enforce constitutional rights, and hold the government accountable, habeas has been

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slowly eroded by a series of recent Supreme Court rulings that aim ultimately at eliminating that judicial method of protecting individual rights.[1]

In this age of calls for the near-total abolition of habeas[2] and scathing rebukes of judges who fail to toe the not-so-hidden party line, it is easy to lose sight of how we got here. It is convenient to blame it on inevitable historical or jurisprudential trends, or to insist that it followed necessarily from passage of the Antiterrorism and Effective Death Penalty Act (AEDPA).[3] One can then proclaim that there is no reasonable alternative to the Supreme Court's present construction of that statute, even though any participant in our habeas regime would have to agree that it resembles a twisted labyrinth of deliberately crafted legal obstacles that make it as difficult for habeas petitioners to succeed in pursuing the Writ as it would be for a Supreme Court Justice to strike out Babe Ruth, Joe DiMaggio, and Mickey Mantle in succession—even with the Chief Justice calling balls and strikes.[4]

Whatever the virtues of the inevitability arguments, accuracy is not one of them. As a judge on the United States Court of Appeals for the Ninth Circuit—a court conservatives love to deride for its attachment to protecting the constitutional rights of persons accused or convicted of crimes[5]—I have

1. This Essay concerns the use of federal habeas corpus to review the convictions or sentences of state prisoners. It considers only cases issued by the Supreme Court through March 31, 2015. Over ninety percent of incarcerated persons in the United States are under state, rather than federal, control. *See* Lauren E. Glaze & Danielle Kaeble, Bureau of Justice Statistics, NCJ 248479, Correctional Populations in the United States, 2013, at 11 app. tbl.1 (2014), *available at* http://www.bjs.gov/content/pub/pdf/cpus13.pdf. Moreover, it is in the context of reviewing state court adjudications of constitutional claims that the Court, purportedly following the requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA), has erroneously elevated a respect for state courts over the obligation of federal courts to independently review whether a conviction or sentence violates the Constitution.

2. *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. Rev. 791, 797 (2009).

3. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

4. These rules range from harshly construed time limits within which a prisoner must file his post-conviction petitions in both state and federal court, to exhaustion and procedural default doctrines that punish prisoners who do not succeed in timely developing all the necessary information or in following all of the complex rules, to a bar on nearly all second or successive habeas petitions, to an equitable tolling doctrine that is limited to "extraordinary circumstances" that courts too rarely are willing to find. *See, e.g.*, Ken Armstrong, *When Lawyers Stumble, Only Their Clients Fall*, Wash. Post, Nov. 17, 2014, at A1, *available at* http://www.washingtonpost.com/sf/national/2014/11/16/when-lawyers-stumble-only-their-clients-fall/. This maze of procedure would be difficult for the most competent of lawyers to navigate, let alone a prisoner who, often with little or no schooling, must research habeas law in the confines of an underfunded prison law library. From a practical standpoint, a prisoner is often remitted to whatever assistance he can obtain from other prisoners who develop a skill, though usually inadequate, in writing. The alternative is simply to forfeit his constitutional rights.

5. *See, e.g.*, John Schwartz, *'Liberal' Reputation Precedes Ninth Circuit Court*, N.Y. Times, Apr. 25, 2010, at A33A, *available at* http://www.nytimes.com/2010/04/25/us/25sfninth.html?_r=0; Editorial, *The Biggest Judicial Losers: The Liberal Ninth Circuit Keeps Racking Up Losses at the Supreme Court*, Wall St. J., June 13, 2014, at A12, *available at* http://www.wsj.com/articles/the-biggest-judicial-losers-1402615642.

been an involuntary participant in the shaping of modern habeas law, although not in the form that I believe the Constitution demands. In my experience, the true story is not the version that apologists for the drastic reduction of the powers of the Writ put forth. Rather, it is a tale defined by a series of highly questionable Supreme Court rulings that took a new statute, AEDPA—misconceived at its inception and born of misguided political ambition—and repeatedly interpreted it in the most inflexible and unyielding manner possible. Exalting notions of comity and finality above all else, and treating the constitutional rights at stake with the same lack of concern manifest elsewhere in their recent jurisprudence,[6] the conservative justices who form the majority on the current Supreme Court—joined more and more frequently, for differing reasons, by their more moderate colleagues[7]—embarked on a path designed to render constitutional rulings by state courts nearly unreviewable by the federal judiciary.

In order to fully comprehend the story of the Supreme Court's post-AEDPA habeas jurisprudence, it is necessary to understand that most of our current habeas law is the product of choices, many of them seriously ill-advised, made by a deeply conservative Court.[8] The upshot will be a more fundamental appreciation of the disagreement between the Supreme Court and the lower courts in the shaping of habeas law, as well as an understanding of the Court's role in turning AEDPA into a body of law that might well disturb even some of its strongest congressional proponents.[9] It is also helpful to that understanding to view the Court's habeas cases more broadly, in light of the Court's decisions erecting similar limitations on the enforcement of constitutional rights that have been violated by law enforcement officers or other state or local officials.

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6. *See, e.g.*, Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 11–13 (2012).

7. I deliberately do not use the term "liberals" because the moderate wing of the Court is, with possibly one exception, comprised of Justices who have rejected or would reject being so labeled. The term so often used—"four liberals"—is a creation of the media solely for purposes of making the fundamental division on the Court easier for the public to understand, regardless of its lack of accuracy. I have discussed this mislabeling of the Court minority with a number of the leading newsmen and newswomen who cover the Court and have found none who justifies the use of the term on the merits.

8. Unlike the Court's decisions in a number of controversial cases in which he is the swing vote, Justice Kennedy is a firm member, if not the leader, of the five-member conservative bloc of the Court that, in the name of comity, consistently upholds erroneous state court decisions on matters of federal constitutional rights, *see, e.g.*, Harrington v. Richter, 131 S. Ct. 770, 792 (2011) (Kennedy, J.); Premo v. Moore, 131 S. Ct. 733, 740 (2011) (Kennedy, J.), and allows an affinity for procedure and finality to outweigh the duty to do justice, *see, e.g.*, Calderon v. Thompson, 523 U.S. 538, 557 (1998) (Kennedy, J.) (authorizing the execution of a person who was likely innocent of the special circumstance that justified the death penalty, based on a newly adopted procedural rule that precluded the circuit court from reaching the merits of a decision in which it had held that the person to be executed received ineffective assistance of counsel in violation of the Sixth Amendment and that his due process rights were violated due to prosecutorial misconduct at his trial; notwithstanding these constitutional violations, Thompson was executed as a result of the procedural ruling by the Court majority).

9. *See infra* text accompanying notes 121–122.

In the latter case, it is the law of qualified immunity that by the Court's adoption of drastic new restrictions on finding civil liability, and even more so on declaring when police misconduct is unconstitutional, forecloses the development of constitutional law in areas where such development is most needed.[10] Regrettably, these growing restrictions both in the area of habeas law and of qualified immunity contribute to the growing belief by members of minority groups that our legal system does not afford fair and equal treatment to all.

Although far from the most important, but perhaps the most interesting, lesson to students of the workings of the federal courts may be the refutation of the false impression given by some, both in and out of the judicial world, that the United States Court of Appeals for the Ninth Circuit and other circuit courts refuse to follow the habeas and other decisions of the Supreme Court.[11] Just the opposite is true. We in the appellate courts dutifully follow the existing Supreme Court law. However, as demonstrated later in this Essay, the Supreme Court often reverses us not for failing to apply the law it has previously enunciated, but by creating new, previously undeclared, and extreme rules that serve to limit the ability of federal courts to enforce the rights embodied in the Constitution. An unfortunate collateral consequence is that, because of the way our justice system works, those limitations have disproportionate effects on the rights of minorities to obtain equal treatment and equal justice under the law.

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10. Ultimately, this Essay discusses two principal aspects of a broader trend in the Court's cases—the trend toward rolling back individual rights and limiting access to the courts. Examples of this trend range from the Court's civil procedure cases—through which the Court, often with the help of some of the moderate Justices, has elevated procedure over justice by sharply restricting jurisdiction over corporations, *see, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011), and imposing pleading standards that essentially require plaintiffs to prove major elements of their cases without the benefit of discovery, *see* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)—to the Court's arbitration and class action cases that promise to exclude major categories of litigants from the courts, *see, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). For some of the most compelling scholarship concerning this trend in the Court's procedural cases, see Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286 (2013). The procedural limitations on the rights of plaintiffs reflect a judicial attitude that also underlies the Court's willingness, if not eagerness, to limit the substantive rights of the average worker and the ordinary citizen. The specific subjects referred to in this footnote are, however, generally best left for discussion elsewhere.

11. *See, e.g.*, Diarmuid F. O'Scannlain, *A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Through October Term 2010*, 87 Notre Dame L. Rev. 2165, 2168 (2012) ("It seems that at least once every term, the Supreme Court has to remind us about the proper standard of review in habeas proceedings under the Antiterrorism and Effective Death Penalty Act (affectionately called 'AEDPA')."); Robert Barnes, *Supreme Court Reversals Deliver a Dressing-Down to the Liberal 9th Circuit*, Wash. Post, Jan. 31, 2011, at A13, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/30/AR2011013003951.html.

I. The Demise of Habeas Corpus

Although in most cases it serves our society honorably and admirably, the modern American criminal justice system all too often does not produce fair and just outcomes. In fact, recent studies as well as newly developed scientific techniques[12] suggest that it fails to live up to our ideals more frequently than most of us would hope. Some of the major structural problems include insensitivity to the causes and effects of racial discrimination,[13] inadequate public defender services, and a lack of adequate oversight and transparency in law enforcement. These problems manifest themselves in any number of ways, from racially disparate enforcement of the criminal law, to trials marked by fundamental constitutional errors, to the tragedy of wrongful convictions.

Federal judges encounter these issues in many ways. We see them in trials and appeals, sometimes squarely presented and other times at the edges of a more typical claim of error. We read about them in briefs and newspapers, we discuss them with each other, and on occasion we testify before Congress or the United States Sentencing Commission. For the most part, though, at least on the Ninth Circuit, we come face to face with many of the most serious problems in our criminal justice system when addressing petitions for habeas corpus. Among the most troublesome of these cases are those that concern whether a person whom a state seeks to execute has any recourse in the federal system.

It is no secret that some judges on our court take a broader view of when habeas relief is warranted under AEDPA than do a majority of the Supreme Court Justices. Although often framed as the tale of a lawless circuit, this difference in orientation is more properly understood as a division between those who would unduly limit the writ of habeas corpus, and those who think that the law, even after AEDPA, does not require (and in fact forbids) so harsh a result. The real story is one of a Supreme Court that has gone to an extreme, reading AEDPA in unwarranted and unpredictable ways in its effort to overly restrict habeas relief, and of a circuit that has largely adhered to moderate principles in tune with the statutory and constitutional law governing habeas. To be clear, we follow Supreme Court precedent faithfully when we decide habeas cases. What we do not do is attempt to anticipate the extreme rules that the Court often devises to deny habeas relief to persons who may have been convicted or sentenced unconstitutionally; nor do we adopt those rules before the Court tells us that we must do so. Thus, while it is no surprise that our reversal rate on habeas matters is high, it is important to understand that we are reversed as often as we are, not because we defy the Court, but because we do not leap to anticipate or find new ways

12. *See generally* Margaret A. Berger, *The Impact of DNA Exonerations on the Criminal Justice System*, 34 J.L. Med. & Ethics 320 (2006).

13. *See, e.g.*, Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 350 (2007); Eva Paterson, Op-Ed., *Implicit Bias and the 14th Amendment*, L.A. Daily J., Sept. 8, 2014, at 6.

not demanded by AEDPA itself or by the Court's already established precedent, to render habeas of as little value as it is currently being rendered. In short, we apply what we believe to be fair and just constitutional principles until the Supreme Court forbids us to do so. That is what is too often missing from the critics' assessment of the Ninth Circuit and its relationship to the Supreme Court in habeas cases.

A. *The Evolution from Independent Review to Near-Total Deference to State Courts*

A system in which federal habeas courts do not provide independent review of constitutional claims previously litigated in state court was by no means inevitable. Indeed, prior to AEDPA, if a prisoner had a claim that was cognizable on habeas, and he was able to navigate the procedural obstacles imposed by the Burger and Rehnquist Courts, that prisoner generally had the right to have a federal court independently review his constitutional claim. In other words, irrespective of the state court's view of the merits of the prisoner's constitutional claim, a federal court had the authority, yes even the duty, to grant a writ of habeas corpus to a prisoner who was imprisoned or sentenced in violation of the Constitution.[14] In 1996, inspired by the bombing of the federal building in Oklahoma City and the desire of President William Clinton, then seeking re-election, to be seen as a law-and-order candidate, an eager Congress passed AEDPA.[15] Personally, I saw this statute as misguided from its inception because it elevated the desire for finality and comity over the constitutional rights of criminal defendants. However, despite my disagreement with AEDPA, I, like many other circuit judges who disagreed with the statute, have sought to interpret it as it was written rather than to expand on its provisions to a point that threatens the very existence of the Writ.

Through a series of decisions that are highly questionable as a matter of statutory interpretation and have troubling constitutional implications,[16] the

14. *See* John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 Cornell L. Rev. 435, 440–43 (2011). Although the difficulties for habeas petitioners imposed by the Burger and Rehnquist Courts pale in comparison to AEDPA and its subsequent interpretation by the Court, the Burger and Rehnquist Courts' pre-AEDPA rulings excessively limited petitioners' opportunities to vindicate their rights as well. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 310 (1989) (barring the application of new constitutional rules of criminal procedure that were announced after the petitioner's conviction became final); Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (barring federal habeas review of claims that were procedurally defaulted in state court absent a showing of cause and prejudice).

15. The story of the enactment of AEDPA and the history behind that crass political action is a fascinating tale to be told another day. This Essay deals only with the implementation of the statute following its enactment. Still, it is worth noting that § 2254(d), which limits the ability of federal courts to grant habeas relief, was inserted without much advance discussion into a bill dealing primarily with combating terrorism, although it had previously been rejected by Congress on a fair number of other occasions.

16. *See* Irons v. Carey, 505 F.3d 846, 859 (9th Cir. 2007) (Reinhardt, J., concurring specially) ("Having granted the courts the authority to review state convictions under our habeas powers, it seems to me inconsistent with our fundamental obligations as judges to require us,

Court has deliberately exacerbated the worst aspects of AEDPA. Specifically, the Court has in many instances forbidden federal courts to exercise meaningful review over legitimate constitutional claims, and has instead allowed erroneous constitutional decisions by state courts to stand in the name of comity. As is demonstrated below, a fundamental and far-reaching shift in the Supreme Court's AEDPA jurisprudence came in its needless and highly restrictive view of when a state court adjudication of an individual's federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"[17]—a precondition established by AEDPA for a federal court to grant the writ in a case in which a claim has been adjudicated on the merits by a state court. The Court's construction of this language is far beyond what the text of AEDPA required and has left state prisoners unlawfully detained or facing execution without any legal recourse in the federal courts.[18]

Before the Supreme Court overruled us, our court read AEDPA as the ordinary meaning of its text would appear to demand. We explained that the terms "contrary to" and "unreasonable application of" "reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court."[19] Rather than try to impose a "rigid distinction" or "fixed division" between the terms, we said that the "terms overlap, and cases may fall into one or both classifications."[20] The result was that we reviewed state court judgments on questions of federal law simply to determine whether the state court had erred on a matter clearly governed by Supreme Court precedent. We respected the reasoned judgments of state courts, but we also respected the right of every individual to be free from unlawful imprisonment.

In *Williams v. Taylor* (*Terry Williams*),[21] the Supreme Court began to seriously restrict the ability of federal courts to offer state prisoners a meaningful recourse for violations of their federal constitutional rights. Contrary to the opinions of our court and to the well-reasoned concurrence of Justice Stevens, Justice O'Connor, writing for a majority of the Justices, claimed

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except in unusual or exceptional circumstances, to rule for the state regardless of whether it violated the Constitution."), *overruled by* Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc).

17. 28 U.S.C. § 2254(d)(1) (2012).

18. Although this provision—§ 2254(d)(1)—is a primary focus of this Essay, it is certainly not the only provision of AEDPA that the Court has given an unnecessarily restrictive interpretation. *See, e.g.*, Tyler v. Cain, 533 U.S. 656, 663 (2001) (holding that a new rule has not been "made retroactive to cases on collateral review by the Supreme Court" within the meaning of 28 U.S.C. § 2244(b)(2)(A) unless the Court has held that the new rule is retroactively applicable to cases on collateral review, even if the reasoning in the Court's cases would compel precisely that conclusion).

19. Davis v. Kramer, 167 F.3d 494, 500 (9th Cir. 1999), *vacated*, 528 U.S. 1133 (2000).

20. *Id.*

21. 529 U.S. 362 (2000).

that, as a matter of statutory interpretation, "contrary to" and "unreasonable application of" must hold independent, mutually exclusive meanings.[22] Ostensibly for the sake of abiding by this unnecessary and unsupported construction of the statute, the majority forced the "contrary to" language to hold a meaning completely at odds with the ordinary meaning of the term. Selectively citing *Webster's Dictionary*, the majority decided that for a state court decision to be "contrary to" clearly established Supreme Court precedent, it not only had to be wrong, but the state court had to have "applie[d] a rule that contradicts the governing law set forth in [Supreme Court] cases" or "confront[ed] a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrive[d] at a [different] result."[23] Thus, if a state court interpreted Supreme Court precedent erroneously, and arrived at an incorrect legal conclusion, that error alone would not be enough for a federal habeas court to grant relief to the aggrieved petitioner. Remarkably, in the view of the supposed textualists on the Supreme Court, an erroneous holding on the meaning of Supreme Court precedent leading to an incorrect conclusion does not in itself result in a decision "contrary to" clearly established federal law.

Although the *Terry Williams* majority went to great lengths to define "contrary to" in such a way that it nearly guaranteed that many state prisoners who suffered constitutional violations would not receive relief, it did not define the meaning of "unreasonable application," the other basis for obtaining relief under AEDPA.[24] The Court made only two things clear: First, an "unreasonable application" is different than an erroneous or incorrect application.[25] Second, a state court's application of clearly established law is not reasonable simply because one "reasonable jurist" believes that it is correct.[26] Thus, after *Terry Williams* our court was left with an interpretive gap to fill when considering AEDPA cases. We filled that gap in *Van Tran v. Lindsey*.[27] There, we noted that the Court in *Terry Williams* adopted an "objectively unreasonable" standard—the same standard previously used by the Third and Eighth Circuits, which had rejected "other circuits' tests [that] were too deferential [to state courts]. The Supreme Court," we hoped, "chose to adopt the interpretation of AEDPA that espoused the more robust habeas review."[28] In order to strike the proper balance between an overly deferential test and a test that would reverse any incorrect application of federal law, we decided to use the "clear error" standard to guide our review of what constitutes an "unreasonable application" of federal law.[29] We explained that "[t]he 'mutual respect' that informs the use of the clear error

22. *Terry Williams*, 529 U.S. at 404.

23. *Id.* at 405–06.

24. *See* Van Tran v. Lindsey, 212 F.3d 1143, 1150, 1152 (9th Cir. 2000).

25. *Terry Williams*, 529 U.S. at 410–11.

26. *Id.* at 409–10.

27. 212 F.3d 1143.

28. *Van Tran*, 212 F.3d at 1151.

29. *Id.* at 1152–53.

standard is highly analogous to the comity concerns at issue in habeas cases."[30]

We quickly learned that we were wrong about what the Court had in mind. *Lockyer v. Andrade*[31] disabused us of our optimistic view that the Court had chosen to provide habeas petitioners with a fair opportunity to seek relief from unconstitutional deprivation of rights by state courts. Despite the fact that *Terry Williams* had not provided a method for determining reasonableness under AEDPA, the *Andrade* Court treated *Van Tran* as though it had ignored *Terry Williams* rather than attempted faithfully to implement it. In a patent misreading of *Van Tran* and the "clear error" doctrine generally, the Supreme Court claimed that "clear error" review would allow federal habeas courts to reverse state court decisions simply because the state court applied clearly established federal law incorrectly.[32] In fact, *Van Tran* held the opposite. We explained that "clear error" review "generally allows for reversal only where the court of appeals is left with a 'definite and firm conviction' that an error has been committed,"[33] and we specifically noted that *Terry Williams* "made clear that some erroneous applications [of federal law] may nonetheless be reasonable."[34] Not to be deterred, the Supreme Court asserted that there was some, unspecified difference between "clear error" and "objectively unreasonable" review, and in the process managed to restrict even further the ability of federal courts to grant relief to individuals who have been convicted or sentenced unconstitutionally in state court—this time by declaring that even clear error on a matter governed by Supreme Court precedent is not, in itself, cause for habeas relief. (Although bound by the Court's rulings interpreting AEDPA, I personally believe, like Justice Stevens, that "clear error" provides too high (not too low) a test for review of claims regarding the deprivation of important constitutional rights. What can possibly be wrong with the elementary concept that if a defendant has been convicted or sentenced by a state court in violation of the United States Constitution, that person should not be executed or imprisoned for a term of the rest of his natural life, or indeed for any term at all?)[35]

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30. *Id.* at 1153.

31. 538 U.S. 63 (2003).

32. *Andrade*, 538 U.S. at 75–76.

33. *Van Tran*, 212 F.3d at 1153 (quoting Wash. Pub. Utils. Grp. v. U.S. Dist. Court, 843 F.2d 319, 325 (9th Cir. 1988)).

34. *Id.* at 1150.

35. *See* Renico v. Lett, 130 S. Ct. 1855, 1876 (2010) (Stevens, J., dissenting) ("If a federal judge were firmly convinced that [a state court] decision were wrong, then in my view not only would he have no statutory duty to uphold it, but he might also have a constitutional obligation to reverse it."); Williams v. Taylor (*Terry Williams*), 529 U.S. 362, 378–79 (2000) (Stevens, J., concurring) ("When federal judges exercise their federal-question jurisdiction under the 'judicial Power' of Article III of the Constitution, it is 'emphatically the province and duty' of those judges to 'say what the law is.' At the core of this power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to

Since *Andrade*, matters have only become worse. Recent language from the Supreme Court has made Justice O'Connor seem like some sort of judicial radical and has stretched the meaning of "unreasonable application" beyond all recognition. Remarkably, in 2011 the Supreme Court said in *Harrington v. Richter*[36] that AEDPA

> preserves authority [of federal courts] to issue the writ in cases where there is *no possibility fairminded jurists* could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a "guard against *extreme malfunctions* in the state criminal justice systems," not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond *any possibility* for *fairminded disagreement*.[37]

As an initial matter, this description of AEDPA is completely untethered from Supreme Court precedent. The Court had never before used the "fairminded jurist" standard to describe the "unreasonable application" test in AEDPA,[38] likely because that standard is flatly at odds with the admonition in *Terry Williams* that a federal habeas court should not "rest[ ] its determination . . . on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case."[39] That did not seem to bother the Court, as it acknowledged no shift in its approach to AEDPA review despite the fact that it adopted nearly the same test that it had previously rejected.[40]

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the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

36. 131 S. Ct. 770 (2011).

37. *Richter*, 131 S. Ct. at 786–87 (emphases added) (citation omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)), *rev'g* Richter v. Hickman, 578 F.3d 994 (9th Cir. 2009) (en banc).

38. Although the Court cited *Yarborough v. Alvarado*, 541 U.S. 652 (2004), that case certainly did not establish a "fairminded jurist" rule. First, the Court in *Alvarado* clearly favored the state court's decision, so it was "unnecessary for the Court to struggle with the test for objective unreasonableness." Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Corpus Are Wrong*, 37 Seattle U. L. Rev. 55, 66 (2013). Second, the sentence from which *Richter* cited the "fairminded jurists" language from *Alvarado* clearly "disassociated its reference to fair-minded jurists from the unreasonable application clause of § 2254." *Id.* at 66–67; *see Alvarado*, 541 U.S. at 664 ("*Ignoring the deferential standard of § 2254(d)(1) for the moment*, it can be said that fairminded jurists could disagree over whether Alvarado was in custody." (emphasis added)).

39. *See* 529 U.S. at 410; *see also* Ritter, *supra* note 38, at 69 ("[A]lso absent was any justification for embracing the standard specifically rejected by Justice O'Connor and the Court's majority in *Williams*, which for over ten years represented the definitive interpretation of § 2254(d).").

40. Of course, by the time the Court expressed its "fairminded jurist" standard, Justice Alito had replaced Justice O'Connor on the Court, and when the Ninth Circuit attempted to

Even putting the lack of precedent aside, it is apparent that if the "fairminded jurist" rule were taken literally, it would mean that a federal court could *never* grant habeas relief. That is because, in order to grant habeas relief, we would need to find that each of the state court judges who denied the petitioner's claim was not fairminded; after all, all of them, ordinarily including at least a majority of the state supreme court, would have already disagreed with the conclusion that the petitioner was entitled to relief. In fact, under the Court's rationale, if only a single Supreme Court justice agreed with the state court, the rest of the Court would have to adopt the view that the dissenting Justice was not "fairminded" in order to grant habeas relief. The impracticality of this rule, if not its patent irrationality, necessarily leads to the only conclusion possible: the Supreme Court cannot have meant literally that the only unreasonable applications of federal law are those by state court judges who are not "fairminded." The Court's cases following its initial expression of the "fairminded jurist" standard confirm this conclusion, as they repeatedly invoke this language, yet never apply it literally. In any event, the fact that the Supreme Court was even willing to announce the "fairminded jurist" test, and that it purports to view federal habeas relief as appropriate only when there is an "extreme malfunction[ ]" in the state court and no "possibility for fairminded disagreement,"[41] shows that the Court's wildly expansive characterization of AEDPA goes far beyond the ordinary meaning of "unreasonable application of[ ] clearly established Federal law."[42] More important, it reveals that the Court, as currently composed, has little desire to enforce the constitutional rights of individuals who have been subjected to unconstitutional convictions or sentences in state courts, and even less to preserve the Writ itself.[43]

B. *Respect for State Courts at the Expense of Constitutional Rights*

Unfortunately, the Court's extreme construction of "unreasonable application" and "contrary to" is only one example of a larger trend in the Supreme Court's habeas cases, in which the Court's unsurpassed veneration of state courts comes at the expense of individual constitutional rights. Perhaps most prominent among the cases of this ilk is, again, *Harrington v. Richter*. In *Richter*, the Court justified its extremely restrictive view of AEDPA by asserting that "[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-

follow *Terry Williams*, the new majority reversed us by applying a new and transparently incorrect standard.

41. *Richter*, 131 S. Ct. at 786–87 (internal quotation marks omitted).

42. 28 U.S.C. § 2254(d)(1) (2012).

43. I refer of course to the Writ as applied to the over ninety percent of prisoners held in custody pursuant to state court proceedings. *See supra* note 1. Other limitations on the Writ are beyond the scope of this Essay.

faith attempts to honor constitutional rights,"[44] and "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."[45] In fact, the Court in *Richter* was so concerned about state sovereignty that it constructed a completely indefensible rule designed to immunize state court decisions that are accompanied by no explanation at all.

AEDPA, on its face, applies only when a federal habeas court reviews a claim that was "adjudicated on the merits in State court."[46] In *Richter*, the state court denied the petitioner's *Strickland* claim, as well as seven other claims, in an eight-word ruling: "Petition for Writ of Habeas Corpus is DENIED."[47] Although on federal habeas review we typically "'look through' to the last state-court decision that provides a reasoned explanation capable of review,"[48] this eight-word ruling was the only state court decision on the petitioner's *Strickland* claim—a claim the Ninth Circuit later found to be meritorious.[49] It seems reasonable to assume that when a state court, as in *Richter*, issues a decision with no explanation at all, it may not have actually adjudicated the claim at issue on the merits. Certainly, if the state court gives no reasons for its decision, it is difficult for us to know whether the merits of the petitioner's claim were ever given serious consideration.

The Supreme Court in *Richter* was unmoved by this basic logic. Rather than giving the text of AEDPA a reasonable construction, the Court invented a "presum[ption] that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."[50] In *Johnson v. Williams*,[51] the Court went even further. It extended this presumption to a petitioner's federal claim even when the state court "provided a lengthy, reasoned explanation for its denial of [the petitioner's] appeal, but none of those reasons addressed her [federal] claim in any fashion, even indirectly."[52] To add insult to injury, the Court has also adopted

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44. 131 S. Ct. at 787 (quoting Calderon v. Thompson, 523 U.S. 538, 555–56 (1998)) (internal quotation marks omitted). As for *Calderon*, see generally Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process"*, 74 N.Y.U. L. Rev. 313 (1999), and *supra* note 8.

45. *Richter*, 131 S. Ct. at 787 (quoting Harris v. Reed, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)) (internal quotation marks omitted).

46. 28 U.S.C. § 2254(d).

47. Respondent's Brief on the Merits at 11–12, *Harrington v. Richter*, 131 S. Ct. 770 (2011) (No. 09-587).

48. Murray v. Schriro, 745 F.3d 984, 996 (9th Cir. 2014) (quoting Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000)).

49. Richter v. Hickman, 578 F.3d 944, 968–69 (9th Cir. 2009) (en banc), *rev'd sub nom. Harrington v. Richter*, 131 S. Ct. 770 (2011); *see also* Respondent's Brief on the Merits, *supra* note 47, at 10–11.

50. *Richter*, 131 S. Ct. at 784–85.

51. 133 S. Ct. 1088 (2013).

52. Williams v. Cavazos, 646 F.3d 626, 639 (9th Cir. 2011), *rev'd sub nom.* Johnson v. Williams, 133 S. Ct. 1088 (2013). In that case, the petitioner raised both a state-law claim and a Sixth Amendment claim challenging the legality of the trial judge's decision to dismiss a juror during deliberations. The state court expressly decided only the petitioner's state-law claim and failed even to mention the federal claim. *Id.* at 634–35.

the rule that "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was *no reasonable basis* for the state court to deny relief."[53] In other words, if the state court did not consider a particular basis for its decision, or even silently rejected that basis as inapplicable to the facts before it, that basis may still be a sufficient cause for upholding an unlawful conviction. The result is that state courts can ignore or summarily deny meritorious claims as long as a federal judge can conjure up any possible way that existing Supreme Court precedent would not compel a contrary conclusion. This rule is particularly difficult to square with AEDPA's requirement that the state court must have adjudicated the claim on the merits before its decision is entitled to deference.

What is clear from *Richter* and *Williams* is that the Supreme Court's comfort with dramatically limiting the right to federal habeas review rests in large part on its confidence in the ability of state courts to assess federal constitutional claims. To many, it would seem far more consistent with the principles underlying AEDPA, let alone our federal judicial system generally, were the Court to have limited its confidence to the reasoned judgments of state courts rather than granting them total deference with respect to matters of federal, constitutional rights that they failed to discuss. A basic problem with such total deference is that state courts are simply not as willing or able to recognize infringements of federal constitutional rights in criminal proceedings as are federal courts.

Although there are many reasons why state courts are unable or unwilling to afford the same dedication to federal constitutional rights as are federal courts, the most obvious is that federal judges have life tenure and salary protection, while many state judges do their job under the threat of an election challenge if they issue or join in unpopular decisions, especially in death penalty cases.[54] While state judges who decide criminal appeals face the possibility that they will be labeled "soft on crime," federal judges are free to decide such issues secure in the knowledge that the unpopularity of

53. *Richter*, 131 S. Ct. at 784 (emphasis added).

54. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127–28 (1977). For example, in California, the voters removed three state supreme court Justices, including the Chief Justice, purportedly because of their views on the death penalty, *see* Robert Lindsey, *Defeated Justice Fearful of Attacks on Judiciary*, N.Y. TIMES, Nov. 8, 1986, at 7, *available at* http://www.nytimes.com/1986/11/08/us/defeated-justice-fearful-of-attacks-on-judiciary.html ("One issue dominated the campaign that led to [Chief Justice Rose Bird's] removal from the court and that of Justices Grodin and Reynoso: the death penalty."), although in actuality the removal campaign was financed and promoted by business interests seeking their defeat for wholly different reasons, *see* Henry Weinstein, *Rose Bird Eulogized for Compassion, Strength*, L.A. TIMES, Jan. 10, 2000, at A3, *available at* http://articles.latimes.com/2000/jan/10/news/mn-52560 ("The recall focused on the death sentence issue but was financed in large part by major corporate interests angry at Bird for her decisions on behalf of workers and consumers."). More recently, voters in Iowa removed three state supreme court Justices, including that state's Chief Justice, due to their votes to legalize same-sex marriage. *See* A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1, *available at* http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0.

their decisions can pose no threat to their job security. Federal judges also have the advantage of more experience enforcing individual constitutional rights, as well as a special obligation to the Constitution.[55] Indeed, the protection of the federal Constitution is the fundamental reason we have federal courts: that is simply the most important function federal judges perform.

Oddly, both *Richter* and *Williams* justified the presumption that a state court adjudicated a claim on the merits by referring to the heavy caseload of state appellate courts.[56] The Court reported, for example, that the "California Supreme Court disposes of close to 10,000 cases a year, including more than 3,400 original habeas corpus petitions."[57] The workload of state judges is, admittedly, a fair reason why state courts frequently do not address (or, more likely, even consider) prisoners' claims of federal constitutional violations. However, the fact that resource-constrained state courts have a backlog of cases is not a reason *in favor* of deference; it clearly cuts in the opposite direction, as truly meritorious claims are far more likely to be missed under a system in which state court judges simply are not able to exercise the same degree of care as federal appellate judges. That the Supreme Court draws the opposite conclusion, reasoning that because state courts do not have time to prepare opinions in each of their cases, federal courts must assume that they considered each constitutional claim and defer to their often unexplained denials of relief, is both difficult to comprehend and fundamentally unfair to individuals who may have been convicted or sentenced to life in prison, or even death, in violation of the dictates of the Constitution.

Taking into consideration the inherent limitations of state court review, it is even clearer that Justice Stevens was correct when he proclaimed the "independent responsibility" of federal courts to interpret federal law and warned against an interpretation of AEDPA "that would require the federal courts to cede this authority to the courts of the States"—an interpretation that "would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution."[58] Unfortunately, the interpretation against which Justice Stevens warned is precisely that which governs the writ of habeas corpus today.

C. *The Lack of "Clearly Established Federal Law"*

If the Supreme Court's "unreasonable application" and "contrary to" jurisprudence were not bad enough, and if its construction of "adjudicated on the merits" were somehow defensible, we would still be compelled to

55. *See, e.g.*, Neuborne, *supra* note 54, at 1129.

56. *See* Johnson, 133 S. Ct. at 1095–96 ("The caseloads shouldered by many state appellate courts are very heavy, and the opinions issued by these courts must be read with that factor in mind." (footnote omitted)); *Richter*, 131 S. Ct. at 784.

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

58. Williams v. Taylor (*Terry Williams*), 529 U.S. 362, 379 (2000) (Stevens, J., concurring).

confront the Court's treatment of "clearly established Federal law, as determined by the Supreme Court." That treatment has, for all practical purposes, ended any semblance of the possibility of habeas relief for most state prisoners. Before the Supreme Court began interpreting AEDPA as dramatically restricting habeas review in a manner far beyond the language of the statute, the Ninth Circuit looked to other areas of case law for guidance as to what Congress meant by "clearly established Federal law."[59] We agreed with several of the other circuits that had looked to the definition of "clearly established" used in the *Teague* context;[60] we stated that "a petitioner need not point a habeas court to a factually identical precedent, but rather . . . 'clearly established' Supreme Court law often erects a framework intended for application to variant factual situations."[61]

In *Terry Williams*, the "clearly established Federal law" portion of AEDPA was not (yet) a tool the Court wielded to stunt federal habeas review. Justice O'Connor wrote that this phrase "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision."[62] Although she explained that, "[i]n this respect, the . . . phrase bears only a slight connection to our *Teague* jurisprudence," she also conceded that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court'" as long as the source of the rule is the Supreme Court's jurisprudence.[63] Thus, it seemed that *Terry Williams* did not conflict with our prior cases. Indeed, we explained that both Justice Stevens and Justice O'Connor noted the conceptual equivalence between an old rule under *Teague* and "clearly established Federal law" under AEDPA.[64] With the Supreme Court's view of "clearly established Federal law" not yet fully developed, we explained in the wake of *Terry Williams* that when the Supreme Court creates a "multi-factor test . . . the clearly established federal law consists of the multi-factor test itself, not of any particular applications of the test."[65] We warned—quite presciently—that "[t]he adoption of too limited a scope for the definition of 'clearly established law' would collapse the various parts of the analysis we must perform [under AEDPA] and prevent a proper application of the [*Terry*] *Williams* mandate."[66]

Unfortunately, the Supreme Court in *Lockyer v. Andrade* not only reversed our decision to use "clear error" review to determine whether a state court decision was unreasonable, but it also began to restrict what federal

59. *See* MacFarlane v. Walter, 179 F.3d 1131, 1139–40 (9th Cir. 1999), *vacated sub nom.* Lehman v. MacFarlane, 529 U.S. 1106 (2000).

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

61. *MacFarlane*, 179 F.3d at 1139–40.

62. *Terry Williams*, 529 U.S. at 412 (opinion of O'Connor, J.).

63. *Id.*

64. Van Tran v. Lindsey, 212 F.3d 1143, 1157 n.19 (9th Cir. 2000).

65. *Id.* at 1157.

66. *Id.* at 1158.

courts could regard as "clearly established Federal law." In *Andrade*, the defendant was convicted of two counts of petty theft for stealing approximately $150 in videotapes from two Kmarts.[67] Under California's Three Strikes law, a state court sentenced the defendant to two consecutive terms of 25 years to life, and a state appellate court (in an unpublished opinion) rejected his argument that his sentence violated the Eighth Amendment.[68] In its assessment of the Supreme Court's relevant Eighth Amendment cases—*Rummel v. Estelle*,[69] *Solem v. Helm*,[70] and *Harmelin v. Michigan*[71]—the state court wrote that "the current validity of the *Solem* proportionality analysis is questionable in light of *Harmelin*."[72] As a result of this conclusion, the state court believed it was sufficient to merely compare Andrade's case to Rummel's.[73] On federal habeas review, our court reviewed these Supreme Court cases, and we corrected an important error made by the state court—its assumption that *Harmelin* in some way undermined *Solem*. Indeed, based on our review of all three cases and the close relationship of Andrade's case to the facts of *Solem*, we came to what appeared to us to be the only reasonable conclusion: that "Andrade's sentence of life in prison with no possibility of parole for 50 years is grossly disproportionate to his two misdemeanor thefts of nine videotapes, even when we consider his history of non-violent offenses."[74]

Although the four moderate members of the Court reached the same result we did,[75] the five conservative Justices in the majority continued on the path of abandoning independent federal review of state court constitutional errors by relying on a novel construction of "clearly established Federal law" and on that basis denied Andrade any relief from his excessive sentence. The majority contended that because the Supreme Court's relevant Eighth Amendment cases "exhibit a lack of clarity regarding what factors may indicate gross disproportionality," "the only relevant clearly established law . . . is the gross disproportionality principle, the precise contours of which are unclear."[76] Rather than allow a federal court to determine what the relevant Supreme Court precedent says about how to *apply* the gross disproportionality principle (as our court carefully did), the Supreme Court held that there was no clearly established federal law controlling the outcome and on that basis concluded that its own lack of clarity immunized the

67. Andrade v. Attorney Gen. of Cal., 270 F.3d 743, 749 (9th Cir. 2001), *rev'd sub nom.* Lockyer v. Andrade, 538 U.S. 63 (2003).

68. *Id.* at 749–50.

69. 445 U.S. 263 (1980).

70. 463 U.S. 277 (1983).

71. 501 U.S. 957 (1991).

72. *Andrade*, 270 F.3d at 766 (quoting People v. Andrade, No. E018257 (Cal. Ct. App. May 13, 1997)) (internal quotation marks omitted).

73. *Id.*

74. *Id.* at 767.

75. Lockyer v. Andrade, 538 U.S. 63, 78–79 (2003) (Souter, J., dissenting).

76. *Id.* at 72–73 (majority opinion).

state's imposition of a life sentence without the possibility of parole for 50 years for stealing approximately $150 in videotapes. The precedent established by *Andrade* may well allow state courts almost unlimited latitude to deny relief in cases in which the Court has clearly established a general rule that should, under all ordinary legal principles, entitle the petitioner to relief for the constitutional violation, but which can now be denied because the "precise contours" of the rule are not clear to all.

In *Carey v. Musladin*,[77] the Court employed a different means of limiting what federal courts may credit as "clearly established Federal law," with the similar result, however, of further restricting the ability of federal courts to grant habeas relief to persons who were convicted or sentenced in violation of the Constitution.[78] During the trial of Matthew Musladin, the family of Tom Struder, the deceased, sat in the front row behind the prosecution, in view of the jury, and wore buttons, "several inches in diameter and 'very noticeable,'" with Struder's photograph on them.[79] In a trial that concerned whether the killing was an act of murder or self-defense, and thus whether Struder was the instigator or the victim, it was obviously prejudicial to allow the family members of the deceased to "speak" to the jury by portraying their kin as the victim whose murder must be avenged, and thus constantly reminding the jury that *he* was "the good guy." However, the trial court saw no issue, and with the extra-judicial testimony from Struder's family, the jury found that Musladin's self-defense argument failed; he was convicted of, *inter alia*, first-degree murder.[80]

The question we considered on habeas review was whether permitting the family members to wear the expressive buttons before the jury daily interfered with Musladin's right to receive a fair trial, as guaranteed by the Due Process Clause of the Fourteenth Amendment. This question was governed by a clear principle contained in two Supreme Court cases—*Estelle v. Williams*[81] and *Holbrook v. Flynn*[82]—both of which hold that a defendant's right to a fair trial is infringed when "an unacceptable risk is presented of impermissible factors coming into play."[83] In *Williams*, such an unacceptable risk was presented by a rule compelling the defendant to appear at his trial dressed in prison clothing. The Court explained that "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may

77. 549 U.S. 70 (2006).

78. *See* Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 Lewis & Clark L. Rev. 741, 750 (2010) ("The Court's reliance on the absence of clearly established law, as reflected in the holdings of Supreme Court cases, moved decisively from the sidelines to center stage in *Carey v. Musladin*.").

79. Musladin v. Lamarque, 427 F.3d 653, 655 (9th Cir. 2005), *vacated sub nom.* Carey v. Musladin, 549 U.S. 70 (2006).

80. *Id.*

81. 425 U.S. 501 (1976).

82. 475 U.S. 560 (1986).

83. *Flynn*, 475 U.S. at 570 (quoting *Williams*, 425 U.S. at 505) (internal quotation marks omitted).

affect a juror's judgment."[84] In *Flynn*, the Court reaffirmed this standard, although it held that the mere presence of security personnel in the courtroom did not necessarily convey an inference of dangerousness to the jury.[85] Certainly, neither case limited the Court's core holding that a defendant has a right to a trial free from impermissible influences on the jury.

Based on these cases, we thought that it was obvious that permitting courtroom audience members to "argue" to the jury inferentially that the deceased was the victim in a case in which the issue was who was the aggressor introduces such a risk, just as would allowing a large portion of the audience to carry signs into the courtroom saying "Musladin is guilty." However, even if there were room for debate over whether there was any reasonable application of *Williams* and *Flynn* that would not demand reversing Musladin's conviction, there could certainly be no doubt that these cases represented clearly established law in the Court's Due Process jurisprudence. Simply put, the Court's cases clearly established that if an extra-judicial factor were likely to come into play, it had to be excluded from the trial.

Or so we thought. The Supreme Court decided that Musladin's case did not merit habeas relief not because the state court had reasonably applied *Williams* and *Flynn*, but rather because *Williams* and *Flynn* did not create clearly established federal law applicable to Musladin's case, and the state court's interpretation of the Constitution, right or wrong, must therefore prevail.[86] This conclusion was flatly wrong. Indeed, as Justice Souter wrote, "[t]he Court's intent [in these cases] to adopt a standard at [a] general and comprehensive level could not be much clearer."[87] The Court ignored this lesson from its cases, reasoning instead that "*Williams* and *Flynn* dealt with government-sponsored practices," while Musladin's case concerned private actors, and thus "the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in [Supreme Court] jurisprudence."[88] The Court could find little support for its assertion that *Williams* and *Flynn* were limited to government-sponsored practices in the cases themselves. However, by inventing the new rule that *Williams* and *Flynn* were limited to government-sponsored practices, the Court was able to deny Musladin the new trial that the Constitution guaranteed him.

Although the Court claims not to require an "identical factual pattern" in its prior cases before it will grant relief to a habeas petitioner,[89] it has recently permitted nearly any factual distinction between its prior cases and the habeas petitioner's case to justify the conclusion that the state court did

84. *Williams*, 425 U.S. at 504–05.

85. *Flynn*, 475 U.S. at 569.

86. Carey v. Musladin, 549 U.S. 70, 75–77 (2006).

87. *Id.* at 82 (Souter, J., concurring in judgment).

88. *Id.* at 75–76 (majority opinion).

89. Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (quoting *Carey*, 549 U.S. at 81 (Kennedy, J., concurring in judgment)) (internal quotation marks omitted).

not act unreasonably in denying relief.[90] This trend is most disturbing. It simply cannot matter whether a prior Supreme Court case squarely addressed the issue at hand; after all, if that is what the Supreme Court actually required for the law to be clearly established, then nearly all prior grants of habeas relief, including those by the Supreme Court itself, would have come out the opposite way. Alternatively, all grants of habeas relief would have to involve a state court decision "contrary to" a prior Supreme Court decision, and no room would exist for cases that constitute an "unreasonable application" of the Court's precedent.[91] The Court's approach in *Musladin* and similar recent cases is in conflict with the historic role of the judiciary. That role is nearly always to apply existing law to factual circumstances that have not yet come before the court in the precise setting of the pending case. By attempting to prohibit us from performing this role in the habeas context, the Supreme Court has demonstrated the extent of its determination to preclude federal courts from granting any relief to persons convicted or sentenced in state courts.

D. Pinholster *and the Court's Barriers to Establishing Factual Cause for Relief*

The Supreme Court's decision in *Cullen v. Pinholster*[92] provides perhaps the clearest example of the Supreme Court creating an unnecessary, unprecedented, and exceedingly harmful rule in the habeas context. Scott Lynn Pinholster was sentenced to death in state court. Following a rather complicated procedural history, he petitioned for a writ of habeas corpus in federal court, alleging, *inter alia*, ineffective assistance of counsel at the penalty phase of his trial. The federal district court allowed Pinholster to develop this claim at an evidentiary hearing. In that hearing, Pinholster offered powerful mitigating evidence that his counsel had entirely failed to present, including evidence that his grandmother " 'beat the hell out of' him," that his step-father beat him with "his fists, a belt, and—on at least one occasion—a two-by-four board," that he became addicted to heroin while in the eighth

90. *See, e.g.*, White v. Woodall, 134 S. Ct. 1697, 1706–07 (2014); Knowles v. Mirzayance, 129 S. Ct. 1411, 1419 (2009) (holding that a state court decision regarding a *Strickland* claim did not violate clearly established law because "it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been *squarely established* by this Court" (emphasis added)).

91. Indeed, as a result of the Court's narrow construction of "clearly established Federal law," it has come close to eliminating the difference between the "contrary to" and "unreasonable application" prongs of AEDPA that *Terry Williams* explicitly stated was essential. *See* Williams v. Taylor (*Terry Williams*), 529 U.S. 362, 404 (2000) (opinion of O'Connor, J.) ("Justice Stevens arrives at his erroneous interpretation [of AEDPA] by means of one critical misstep. He fails to give independent meaning to both the 'contrary to' and 'unreasonable application' clauses of the statute.").

92. 131 S. Ct. 1388 (2011).

grade, and that he suffered brain damage during two childhood car accidents—evidence that tended to explain his aggressive behavior and his organic personality disorder.[93] In light of this evidence, the district court granted Pinholster's habeas petition, and the Ninth Circuit en banc court affirmed because the California Supreme Court's "'postcard' denial of Pinholster's penalty phase ineffective assistance claim constituted an objectively unreasonable application of the clearly established federal law in *Strickland*."[94] We held that if the jurors had heard the available evidence concerning Pinholster's childhood, there was a reasonable probability that at least one member of the jury would have concluded that the aggravating evidence, when balanced against the mitigating evidence, did not warrant death in his case.[95]

The Supreme Court reversed, not *despite* the fact that the state court failed to consider any of the powerful mitigating evidence presented in the federal district court's evidentiary hearing, but rather *because* of it. A splintered majority held that under § 2254(d)(1), a federal court's review of a state court decision is limited to the record before the state court when it adjudicated the claim at issue, and therefore a federal evidentiary hearing can reveal *nothing* about whether a state court decision on that issue was, in fact, unreasonable.[96] In other words, in the view of the majority, federal habeas review is about determining solely whether the state court's legal conclusion was unreasonable based on the record before it, and therefore the only relevant facts in making that determination are those facts that the state court had actually heard.

This decision appears to be flatly wrong.[97] Although § 2254(d)(2) states that a federal court shall not grant a writ of habeas corpus unless a state court decision was based on an unreasonable determination of the facts "in light of the evidence presented in the State court proceeding," § 2254(d)(1) is *not* so limited.[98] In the Court's usual practice of statutory interpretation, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

93. Pinholster v. Ayers, 590 F.3d 651, 660–61 (9th Cir. 2009) (en banc), *rev'd sub nom.* Cullen v. Pinholster, 131 S. Ct. 1388 (2011). I strongly recommend reading the Ninth Circuit en banc opinion to get a fuller sense of the facts. In the space allotted, I cannot possibly recount all of the circumstances of Pinholster's childhood that might have affected his adult conduct or humanized him to the jury. *Cf.* Porter v. McCollum, 558 U.S. 30, 41 (2009) (per curiam).

94. *Pinholster*, 590 F.3d at 684.

95. *Id.* at 674–75, 684.

96. *Pinholster*, 131 S. Ct. at 1398–99.

97. Even Justice Alito was puzzled by the Court's interpretation of AEDPA in *Pinholster*. *See id.* at 1411 (Alito, J., concurring in part and concurring in the judgment) ("[R]efusing to consider the evidence received in the hearing in federal court gives § 2254(e)(2) an implausibly narrow scope and will lead either to results that Congress surely did not intend or to the distortion of other provisions of [AEDPA] and the law on 'cause and prejudice.' " (citation omitted)).

98. 28 U.S.C. § 2254(d) (2012).

Congress acts intentionally and purposely in the disparate inclusion or exclusion."[99] For some reason, the Court abandoned this rule when it interpreted AEDPA. Moreover, the Court ignored § 2254(e)(2), the provision that limits the instances in which a federal court may hold an evidentiary hearing on a petitioner's claim. This provision would be unnecessary if Congress did not believe that federal habeas petitioners might rely on evidence not presented in state court, including in cases governed by AEDPA.[100]

More important, *Pinholster* makes sense only if one accepts the Court's view that habeas corpus is primarily concerned with ensuring that state courts did not completely botch a criminal case. Of course, this is not entirely a new view on the Court. Back in 1991, Justice O'Connor began an opinion concerning whether a man *on death row* could present certain constitutional claims to a federal habeas court with the astounding statement, "This is a case about federalism."[101] This view—that habeas corpus is about the federal court interfering with the state system, and not about the federal court adjudicating the constitutional rights of the petitioner—reflects a profound misunderstanding of the proper function of the Great Writ. To explain why, I cannot improve on the words of Justice Brennan:

> Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.[102]

Understood in this light, it is difficult to comprehend why the Court has become so preoccupied with asking whether there was an "extreme malfunction[ ]" in state court.[103] The proper question is, and always should have been, whether the detainee has a constitutional right to be free. The Court's movement away from this fundamental question—indeed, the very question at the heart of the Great Writ—is perhaps the best explanation for the Court's extreme and hostile construction of AEDPA.

Although the impact of the Court's construction of AEDPA in *Pinholster* is not yet clear, adopting a doctrine that so significantly limits the ability of petitioners to develop the factual bases for their claims in federal court may have far-reaching effects. It is a basic reality of the criminal justice system that the facts required to support some constitutional claims may require a long period of time, or skilled representation, to uncover. For example, a defendant who diligently pursues a *Brady*[104] claim in state court may, after the state court denies his claim, discover new exculpatory evidence that the

99. Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)) (internal quotation marks omitted); *see also Pinholster*, 131 S. Ct. at 1415–16 (Sotomayor, J., dissenting).

100. *Pinholster*, 590 F.3d at 666–67.

101. Coleman v. Thompson, 501 U.S. 722, 726 (1991).

102. Fay v. Noia, 372 U.S. 391, 430–31 (1963).

103. *See* Harrington v. Richter, 131 S. Ct. 770, 786–87 (2011) (internal quotation marks omitted).

104. Brady v. Maryland, 373 U.S. 83 (1963).

prosecutors improperly withheld.[105] Or a prisoner with a new attorney on federal habeas review may discover a wide range of mistakes made by his trial lawyer in state court. While these facts may reveal little about whether a state court's legal conclusion on these issues, based on the evidence before it, was justifiable, it reveals a great deal about whether these prisoners are constitutionally entitled to habeas relief. After *Pinholster*, however, there is a serious risk that a federal habeas court could not even consider such new evidence. To make matters worse, if the petitioner never brought these claims in state court, the Court's complex procedural rules[106] are likely to bar him from bringing them for the first time in a federal habeas petition.[107] A just system would not tolerate these results.

Unless the Court can be persuaded to modify its approach, it may well become the rare case in which a state prisoner will have met the complex array of prerequisites that will allow a federal court to even consider holding an evidentiary hearing—and that is aside from the actual requirements for justifying such a hearing set forth in AEDPA.[108] As of now, we cannot say with certainty what role, if any, the Court will ultimately establish for federal evidentiary hearings. Although Congress explicitly chose not to bar such hearings when it passed AEDPA, the Court may be on the verge of doing so, with the result that numerous individuals who have been deprived of their constitutional rights will have no means or opportunity to establish their right to relief.

E. *The Court's Exceptional Treatment of Habeas Law*

The effort by the conservatives on the Supreme Court to render federal habeas review toothless has had far-reaching effects in the law and on the lives of persons who may have been convicted or sentenced to lengthy terms of imprisonment in violation of the Constitution.[109] Unfortunately, the conservatives have successfully expanded the restrictions in AEDPA to such an effect and so repeatedly that the moderates on the Supreme Court have simply surrendered and decided to accept the now-controlling AEDPA law as

105. Cullen v. Pinholster, 131 S. Ct. 1388, 1417–18 (2011) (Sotomayor, J., dissenting).

106. With only the rarest of exceptions, the Court gives these rules—which are often nearly impossible to navigate—their strictest possible meaning. *See, e.g.*, Bowles v. Russell, 551 U.S. 205 (2007) (holding that despite the fact that a district judge expressly instructed the habeas petitioner that he had 17 days to file his notice of appeal, the petitioner's filing after 16 days was untimely because it exceeded the days allowed under the applicable federal rule).

107. There are some exceptions to this rule, such as when a petitioner brings a claim that his state post-conviction attorney was ineffective under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Other exceptions would appear to be inherent in the very concept of the Writ, and it is possible that over time the Court may recognize them, notwithstanding its failure to do so thus far.

108. 28 U.S.C. § 2254(e)(2) (2012).

109. *See, e.g.*, Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 Drake L. Rev. 1, 1–3 (2003) (recounting the story of Leandro Andrade, a man who was convicted at the age of thirty-seven of petty theft and will not be eligible for parole until he is eighty-seven).

settled and all-encompassing. They appear to regard habeas as a battle that has been lost; after all, there are only so many battles one can fight when one is part of a minority on the Court and is struggling in large measure to protect the fundamental rights of ordinary citizens, including law-abiding females, racial minorities, working people, individuals hoping to exercise their right to vote, and others. In this light, the rights of individuals who may have committed crimes appear to be of lesser importance to the Court's minority.[110]

The statistics support this point. In October Term 2006, the Supreme Court issued five 5–4 decisions regarding whether a state court adjudication on the merits was contrary to or an unreasonable application of clearly established federal law,[111] and in three of those cases the Court found that AEDPA did not bar relief.[112] However, from October Term 2007 to October Term 2013, the Court decided (on my count, at least) twenty-eight such cases; it denied relief in all but two of them,[113] and only six of those denials of habeas relief engendered a dissent[114] (with only one of those dissents receiving four votes[115]).[116]

With the conservatives' view of federal habeas law virtually unchallenged, the Court has increasingly granted review in habeas cases for the sole purpose of reversing decisions that the Court perceived as paying too little deference to state court judgments, whether those judgments were right or wrong. From October Term 2007 through March 2015, I count *fifteen* instances in which the Court has written a per curiam reversal of a federal

110. This is not to say that all of the moderates are deeply committed to preserving the rights of criminal defendants in the first place. The contrast between the contemporary moderate Justices and the Warren Court majority is striking. *See, e.g.*, Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 Geo. L.J. 1385, 1413 tbl.2 (2006) (demonstrating that, in the Court's criminal justice cases, Justice Ginsburg and Justice Breyer voted in favor of the defendant far less frequently than did Chief Justice Warren, Justice Douglas, Justice Brennan, Justice Marshall, and other Warren Court Justices).

111. Panetti v. Quarterman, 551 U.S. 930 (2007); Uttecht v. Brown, 551 U.S. 1 (2007); Schriro v. Landrigan, 550 U.S. 465 (2007); Brewer v. Quarterman, 550 U.S. 286 (2007); Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007).

112. *Panetti*, 551 U.S. 930; *Brewer*, 550 U.S. 286; *Abdul-Kabir*, 550 U.S. 233.

113. Lafler v. Cooper, 132 S. Ct. 1376 (2012); Porter v. McCollum, 130 S. Ct. 447 (2009) (per curiam).

114. White v. Woodall, 134 S. Ct. 1697, 1707 (2014) (Breyer, J., dissenting); Cavazos v. Smith, 132 S. Ct. 2, 8 (2011) (Ginsburg, J., dissenting); Cullen v. Pinholster, 131 S. Ct. 1388, 1413 (2011) (Sotomayor, J., dissenting); Berghuis v. Thompkins, 130 S. Ct. 2250, 2266 (2010) (Sotomayor, J., dissenting); Renico v. Lett, 130 S. Ct. 1855, 1866 (2010) (Stevens, J., dissenting); Waddington v. Sarausad, 555 U.S. 179, 197 (2009) (Souter, J., dissenting).

115. *Berghuis*, 130 S. Ct. at 2266 (Sotomayor, J., dissenting).

116. As noted earlier, by October Term 2007, Justice Alito had replaced Justice O'Connor on the Court and had shown himself to be a reliable vote for the conservatives on habeas matters. *See supra* note 40. Of course, Justice O'Connor was hardly a strong protector of habeas rights and, as the only former state court judge on the Supreme Court, tended to favor excessive deference to state courts. Nevertheless, compared to Justice Alito, she was almost a moderate.

appellate court's grant of habeas relief on the ground that a state court adjudication, whether correct or not, was not unreasonable under AEDPA.[117] This practice is completely at odds with the Court's usual method of functioning, and with the concern voiced by Justice Alito (and joined by Justice Scalia) in *Tolan v. Cotton*[118] (a non-habeas case) that error correction is not a proper reason for the Court to grant a writ of certiorari.[119] In the Court's habeas cases, the Court is typically not resolving circuit splits regarding AEDPA review or ruling on issues of great importance to the functioning of the federal government. However, the Court has not seemed to hesitate before granting certiorari for the sole purpose of reversing a circuit court's grant of relief to an individual convicted in state court whether or not he suffered a violation of his constitutional rights.

The only plausible explanation for this practice is that the Court is now willing to engage in habeas exceptionalism—a suspension of its usual principles in order to ensure that the Writ is not granted contrary to how it would have decided the case under its extraordinarily severe, and in my view highly erroneous, construction of the statutory language in AEDPA.[120] In short, procedurally as well as substantively, the Court now takes every available avenue to ensure that AEDPA is implemented in a manner that serves to eliminate meaningful federal review.

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117. Woods v. Donald, No. 14-618, 2015 WL 1400852 (U.S. Mar. 30, 2015) (per curiam); Glebe v. Frost, 135 S. Ct. 429 (2014) (per curiam); Lopez v. Smith, 135 S. Ct. 1 (2014) (per curiam); Nevada v. Jackson, 133 S. Ct. 1990 (2013) (per curiam); Marshall v. Rodgers, 133 S. Ct. 1446 (2013) (per curiam); Parker v. Matthews, 132 S. Ct. 2148 (2012) (per curiam); Coleman v. Johnson, 132 S. Ct. 2060 (2012) (per curiam); Hardy v. Cross, 132 S. Ct. 490 (2011) (per curiam); Bobby v. Dixon, 132 S. Ct. 26 (2011) (per curiam); *Cavazos*, 132 S. Ct. 2; Bobby v. Mitts, 131 S. Ct. 1762 (2011) (per curiam); Felkner v. Jackson, 131 S. Ct. 1305 (2011) (per curiam); Thaler v. Haynes, 130 S. Ct. 1171 (2010) (per curiam); McDaniel v. Brown, 130 S. Ct. 665 (2010) (per curiam); Wright v. Van Patten, 552 U.S. 120 (2008) (per curiam).

118. 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring).

119. *See Tolan*, 134 S. Ct. at 1868. Indeed, the same complaints Justice Alito lodged concerning the grant of review in *Tolan* can be lodged against each of the *fifteen* grants of review in cases in which the Court has per curiam reversed habeas relief since Justice Alito joined the Court: "[A] substantial percentage of the . . . appeals heard each year by the courts of appeals present the question whether [a state court adjudication on the merits of a federal claim was reasonable]," "[t]here is no confusion in the courts of appeals about the standard to be applied in ruling on [AEDPA cases]," and "[t]here is no question that [these] case[s] [are] important for the parties, but the same is true for a great many other cases that fall into the same category." *Id.* at 1868–69.

120. In fact, Justice Scalia has made this point clear. *See* Cash v. Maxwell, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari) ("It is a regrettable reality that some federal judges *like* to second-guess state courts. The only way this Court can ensure observance of Congress's abridgement of their habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law.").

F. *How Far We Have Strayed*

Many of the cases discussed above—*Richter*, *Andrade*, *Musladin*, *Pinholster*—originated in the Ninth Circuit. Whether one agrees with these decisions or not, it is at least clear that the Court's reversals were not dictated by existing Supreme Court precedent. Instead, those cases exemplify the fact that courts that dutifully follow the existing law can and will be reversed when the Supreme Court decides, as it does so frequently in AEDPA cases, to move the goalposts so as to limit the rights of habeas petitioners even further. At this point, it appears that nearly every time a circuit court grants a petition for habeas corpus, the Court not only reverses, but in the process moves further and further toward barring relief for persons unconstitutionally convicted or sentenced in state court.

Most important, the Court's continuing diminution of federal habeas review is not an inevitable consequence of AEDPA. In fact, the Court's construction of AEDPA is directly contrary to its intended purpose. Upon signing AEDPA into law, President Clinton stated:

> I have signed this bill because I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary. . . . [AEDPA] would be subject to serious constitutional challenge if it were read to preclude the Federal courts from making an independent determination about 'what the law is' in cases within their jurisdiction. I expect that the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read [AEDPA] to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws.[121]

President Clinton's view of how AEDPA was to be interpreted was shared by leading members of the Congress that passed the bill. Indeed, the Supreme Court's interpretation of § 2254(d) as requiring excessive deference to the state courts rather than robust federal habeas review was rejected by several of the major congressional proponents of AEDPA:

> Senator Orrin Hatch stressed that the new amendments continued to permit federal courts to set aside state court decisions that "*improperly apply* clearly established federal law." Senator Arlen Spector [sic] promised that he wished to preserve the "detached, *objective review* that federal courts give." In his view, the new standard would "allow federal courts sufficient discretion to ensure that convictions in the state court are in conformity

121. President William J. Clinton, *Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996* (Apr. 24, 1996), *available at* http://www.presidency.ucsb.edu/ws/?pid=52713.

> with the Constitution." Similarly, Representative Henry Hyde tried to reassure opponents that a federal judge "always reviews the [s]tate court decision to see if it is in conformity with established Supreme Court precedence, or if it has been *misapplied*."[122]

If AEDPA was not intended to reject independent federal review of constitutional claims, the Supreme Court surely did not get the message. Notwithstanding President Clinton's admonition that AEDPA would be unconstitutional if it precluded independent federal review of constitutional claims and the assurances to the same effect of the bill's most ardent Republican proponents, the Court has used AEDPA as a justification to displace such review with almost unyielding deference to state courts. Given the Court's continuing lack of concern for the intent and purpose of the statute, it is worth asking why the circuit courts that carefully review constitutional claims are branded as lawless, rather than the Supreme Court itself.

II. The Rise of Qualified Immunity

The Court's efforts to restrict habeas corpus, though singular in its intensity, are fully consistent with the Justices' broad restrictions on the further development of constitutional law. Perhaps the most striking example of this trend outside of the habeas context is the Court's fundamental reshaping of the qualified immunity doctrine—a deliberate course of action that has unfortunate parallels to the Court's habeas jurisprudence. Indeed, in both contexts the Court has made a series of decisions not compelled by statute or precedent that has had the harmful, practical effect of limiting the ability of all persons to receive the protections of the Constitution.

From the Court's historic rhetoric, one would think that 42 U.S.C. § 1983—the law that imposes civil liability against state and local actors who violate the constitutional rights of individuals—and *Bivens*[123]—its doctrinal analogue for protection against federal actors—stand as bulwarks against constitutional abuse. Indeed, the Court once proclaimed without qualification that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[124] In *Bivens*, the Court justified its creation of a remedy for unconstitutional actions by federal actors by declaring that "where federally protected rights

122. Ritter, *supra* note 38, at 74–75 (alteration in original) (quoting 142 Cong. Rec. S3472 (daily ed. Apr. 17, 1996) (statements of Sen. Specter); 142 Cong. Rec. H3602 (daily ed. Apr. 18, 1996) (statements of Rep. Hyde)).

123. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

124. Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).

have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[125]

In light of these grand purposes, the Court invoked the availability of monetary damages as a justification for cutting back on other remedies for constitutional violations, including most prominently the exclusionary rule. It reasoned that the presence of § 1983 and *Bivens* were sufficient deterrents to constitutional abuse.[126] Why exclude illegally obtained evidence, some argued, when we can punish the wrongdoers civilly. Never mind the fact that "[p]olice officers are virtually always indemnified"[127]—a fact of which jurors are rarely aware. At the least, we were assured, municipalities and police departments will certainly avoid constitutional violations if they have cause to fear liability when law enforcement violates the constitutional rights of those they serve. In short, the Court has historically purported to rely on civil liability to play a vital role in the protection of constitutional rights—a role so vital that it justified curtailing other constitutional protections because they would be superfluous in the presence of such robust alternative remedies.

Unfortunately, the Court's actions no longer match its rhetoric. In fact, they now directly contradict it. Once again, the Court's concern for protecting government officials in general and state and local law enforcement officers in particular has prevailed over the constitutional rights of individuals. In recent years, the Court has used the qualified immunity doctrine, which shields officials from civil liability as long as their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known,"[128] to severely restrict the ability of individuals to recover for constitutional violations that they suffer at the hands of law enforcement. The problem is that, due to sovereign immunity protections for the federal government and state governments, and the need to prove an unlawful policy or custom to hold a municipality liable under § 1983,[129] claims against law enforcement officers are often the only remedy for individuals who suffer violations of their constitutional rights. However, in the name of protecting these officers from being held formally accountable for "minor" errors made in the line of duty, the Court has through qualified immunity created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights. As law enforcement officers benefit from qualified

125. *Bivens*, 403 U.S. at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)) (internal quotation marks omitted).

126. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 596–98 (2006); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 368–69 (1998) ("Although this relationship does not prevent parole officers from *ever* violating the Fourth Amendment rights of their parolees, it does mean that the harsh deterrent of exclusion is unwarranted, given such other deterrents as departmental training and discipline and the threat of damages actions."); Nix v. Williams, 467 U.S. 431, 446 (1984).

127. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014).

128. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

129. *See* Monell v. Dep't of Social Servs. of New York, 436 U.S. 658, 690-91 (1978).

immunity, so do municipalities, indirectly, because indemnification agreements would otherwise force them to pay the damages for which the officers have been held responsible; in fact, when officers receive the benefit of qualified immunity, it is in reality the municipality that is relieved of its duty to compensate the victim of a constitutional violation.[130]

As in the habeas context, the doctrinal evolution of qualified immunity was not inevitable; it was the product of a conscious choice to exempt constitutional violations from civil liability because of a concern over other lesser values. Here, the Court was purportedly concerned that officers not face litigation and, ultimately, harsh financial consequences for mistakes made in the line of duty. As a practical matter, this justification is based on a false premise—that officers would pay for the liability they incur in civil rights suits. As explained above, indemnification agreements generally shield officers from any monetary harm. To the extent, however, that qualified immunity serves a justifiable purpose of protecting officers from undergoing litigation for innocent, reasonable mistakes, even in the absence of any risk of financial liability, that purpose does not justify the Court's extreme construction of the qualified immunity doctrine—a construction that has once again exalted a lesser concern over the protection of constitutional rights.

As recently as 2002, the Court's approach to qualified immunity was actually quite measured. Indeed, the Court in *Hope v. Pelzer*,[131] per Justice Stevens, flatly rejected the Eleventh Circuit's rule that to impose liability on an official actor for violating an individual's constitutional rights, the facts of previous cases finding such a right must be "materially similar" to the facts of the case at issue.[132] To the *Hope* Court, qualified immunity was about fair notice; the doctrine "'ensure[d] that before [officials] are subjected to suit, [they] are on notice their conduct is unlawful.'"[133] To avoid any misconception, the Court reaffirmed that an official actor is not protected by qualified immunity simply because "the very action in question has [not] previously been held unlawful,"[134] and that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[135] In fact, our court relied on *Hope*'s articulation of the standard in distinguishing cases involving reasonable mistakes or borderline cases from cases in which the "contours of the right have been defined with sufficient specificity that a state official had fair warning that her conduct

130. *See* Schwartz, *supra* note 127, at 945–46.

131. 536 U.S. 730 (2002).

132. *Hope*, 536 U.S. at 739 (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001)) (internal quotation marks omitted).

133. *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).

134. *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)) (internal quotation marks omitted).

135. *Id.* at 741, 745–46.

deprived a victim of his rights."[136] This doctrinal understanding clearly provided adequate support for the Court's conclusion in *Hope* that a prison guard who "twice handcuffed [the plaintiff] to a hitching post to sanction him for disruptive conduct" could be held liable for violating the Eighth Amendment rights of the plaintiff,[137] as well as our conclusion in *Haugen v. Brosseau*[138] that an officer who shot a man accused of nonviolent crimes in the back as he tried to flee from the police, despite the fact that the officer had no objectively reasonable evidence that the man was a danger to the community, could be held liable for using excessive force in violation of the Fourth Amendment.[139]

Hope was short-lived.[140] For one thing, the Court began to backtrack on its fair-notice rationale when it reversed our decision in *Haugen* on the startling basis that it was not clearly established that an officer who shoots a fleeing man accused of nonviolent crimes has used excessive force,[141] despite the fact that the Court had earlier declared that "it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead.' "[142] The most drastic change, however, in the Court's articulation of the qualified immunity standard came in *Ashcroft v. al-Kidd*.[143] As Dean Erwin Chemerinsky has noted, prior to *al-Kidd* the standard had always "focused on whether it was clearly established law that 'a' reasonable officer should know" that the action at issue violated federal law.[144] Indeed, that was the law as stated in *Anderson v. Creighton*.[145] In *al-Kidd*, Justice Scalia writing for the Court quoted from this statement in *Anderson*, but inserted the word "every" in place of the word "a," so that the new rule of law became that a right is clearly established when " '[t]he contours of [a] right [are] sufficiently clear' that *every* 'reasonable official would have understood that what he is doing violates that right.' "[146] The Court also added in that case that for law to be clearly established, "existing precedent must have placed the statutory or constitutional question *beyond debate*."[147] In sum, the Court explained that when its new qualified immunity standard is "properly

136. Haugen v. Brosseau, 351 F.3d 372, 391–92 (9th Cir. 2003), *rev'd*, 543 U.S. 194 (2004) (per curiam).

137. *Hope*, 536 U.S. at 733.

138. 351 F.3d 372.

139. *Haugen*, 351 F.3d at 378, 392.

140. *See* Karen Blum et al., *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 Touro L. Rev. 633, 657 (2013).

141. Brosseau v. Haugen, 543 U.S. 194, 199–201 (2004) (per curiam).

142. *Id.* at 197 (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)).

143. 131 S. Ct. 2074 (2011).

144. Blum et al., *supra* note 140, at 656.

145. 483 U.S. 635, 640 (1987) (explaining that a right is clearly established if "[t]he contours of the right [are] sufficiently clear that *a* reasonable official would understand that what he is doing violates that right" (emphasis added)).

146. *Al-Kidd*, 131 S. Ct. at 2083 (alterations in original) (emphasis added) (quoting *Anderson*, 483 U.S. at 640).

147. *Id.* (emphasis added).

applied, it protects 'all but the *plainly incompetent* or those who knowingly violate the law.' "[148] The Court also admonished the Ninth Circuit for defining clearly established law at a "high level of generality,"[149] despite the fact that the Court had previously stated that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.' "[150] The sweeping results of the doctrinal shifts in *al-Kidd* have been predictable: in October Term 2013 alone, the Court found that actions by state agents were protected by qualified immunity in four cases based on its assertion that the constitutional violation alleged was not beyond debate in the existing case law at the time of the actions.[151] In none of those cases did the Court so much as mention *Hope v. Pelzer*.

The movement from *Hope* to *al-Kidd* threatens to have a far-reaching effect similar to the movement in the Court's recent habeas cases. The parallels are remarkable. Just as the Court, at least with its rhetoric, now seeks to protect state courts from reversal by a federal habeas court as long as there is some possibility that any "fairminded jurist" might agree with the state court decision, it has erected a shield for law enforcement, ensuring that individuals deprived of their constitutional rights will have no civil remedy unless *every* reasonable official would have understood the illegality of the action at issue. Moreover, in a manner similar to that in which the Court in the habeas context has reduced the body of "clearly established Federal law" by reading its cases at very low levels of generality, the Court's refusal to articulate the law in qualified immunity cases at a reasonable level of generality has been a key mechanism in its efforts to limit the reach of constitutional protections. In both contexts, the victim of the Court's handiwork is the individual who has suffered an injury of constitutional magnitude—from the man on death row who never received competent counsel to the severely wounded or deceased victim of excessive force at the hands of law enforcement.

Although there is a great deal that is troubling about the qualified immunity doctrine as it has developed, one particularly alarming consequence of the Court's recent decisions is that they rely on qualified immunity as a mechanism to stunt the development of constitutional rights. In this respect

148. *Id.* at 2085 (emphasis added) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

149. *Id.* at 2084.

150. United States v. Lanier, 520 U.S. 259, 271 (1997) (alteration in original) (quoting *Anderson*, 483 U.S. at 640). *Al-Kidd* is, therefore, like many of the habeas cases discussed in Part I, *supra*, yet another example of a case in which the Ninth Circuit followed the law, only to be reversed when the Supreme Court decided to change it in order to make it more difficult for individuals to vindicate their constitutional rights.

151. *See* Lane v. Franks, 134 S. Ct. 2369 (2014); Wood v. Moss, 134 S. Ct. 2056 (2014); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014); Stanton v. Sims, 134 S. Ct. 3 (2013) (per curiam).

as well, it was not always thus. In 2001, the Court in *Saucier v. Katz*[152] required courts ruling on qualified immunity issues to address a "threshold question"—whether the facts alleged in the case at issue "show the officer's conduct violated a constitutional right."[153] In other words, courts addressing claims for civil damages against officials could not simply state that the law to be applied was not clearly established, and therefore fail to address whether the official did, in fact, violate a constitutional right of the plaintiff. Instead, courts were required to address whether a constitutional violation had occurred for the purpose of "elaborat[ing] the constitutional right with greater degrees of specificity."[154] This rule made complete sense; after all, if a court reviewing a constitutional claim to which qualified immunity applies need not address the merits of the claim, the same right may be violated time and again, with courts declining each time to provide a remedy or state the law for future cases.[155] Requiring courts to declare that a constitutional violation occurred ensured that future victims of the same unconstitutional conduct would receive the benefits of § 1983.

As should be clear by now, however, sensible rules favoring individuals whose constitutional rights have been violated typically do not last long on today's Court. The rule of *Saucier* was no different. By 2004, several members of the Court were explicitly questioning its wisdom.[156] By 2009, the Court completely abolished the rule. In *Pearson v. Callahan*,[157] the Court held that courts are free to address only whether an official receives qualified immunity, without ever considering whether that official did, in fact, violate the constitutional rights of the plaintiff.[158] Unfortunately, *Pearson* already is having the predictable results, with many federal courts at all levels abandoning their essential function of explaining and securing the protections of the Constitution by failing to inform law enforcement officers, among others, which practices are constitutional and which are not.[159] This problem is likely only to worsen, as the Court's shift in *al-Kidd* toward immunizing

152. 533 U.S. 194 (2001).

153. *Saucier*, 533 U.S. at 201.

154. *Id.* at 207.

155. *See* John M.M. Greabe, Mirabile Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403, 405 (1999); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 Fordham L. Rev. 1913, 1924 (2007).

156. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 201–02 (2004) (Breyer, J., joined by Scalia & Ginsburg, JJ., concurring) ("I am concerned that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court.").

157. 555 U.S. 223 (2009).

158. *See Pearson*, 555 U.S. at 236.

159. Blum et al., *supra* note 140, at 647 ("The extent of *Pearson*'s negative effect on the development and clarification of constitutional rights is . . . apparent in lower court decisions, which demonstrate the courts' willingness to ignore the merits question, leaving the constitutional issue for another day.").

even the most egregious official actions will further tempt courts to ignore important constitutional questions and, instead, to assume that the current Court will rarely, if ever, reverse a grant of qualified immunity. The failure to identify constitutional violations allows government officials and law enforcement officers to continue their unconstitutional practices secure in the knowledge that they cannot be called to account for their actions. While *Saucier* ensured that even when qualified immunity applied in a particular case, federal courts would provide remedies for victims of unconstitutional law enforcement practices in future cases, *Pearson* secures precisely the opposite end. At a time in which it is vital for constitutional law to keep pace with changes in technology, social norms, and political practices, this trend toward granting immunity while failing to articulate constitutional rights will surely have far-reaching, negative repercussions.

The similarities between the growth of qualified immunity and the Court's development of federal habeas law are striking. In both contexts, the Court will grant relief only when the relevant body of existing law has already applied the Constitution to virtually the same circumstances as are present in the aggrieved individual's case. In both contexts, the Court has stunted the ability of federal courts to recognize constitutional rights, or even the application of established constitutional rights to fact patterns to which they have not been previously applied.[160] These similarities might be explained by the Court's fidelity to congressional intent if AEDPA and § 1983 were aimed at a similar purpose, and the Court simply aligned its approach to these statutes in order to comport with Congress's wishes. In fact, however, the statutes were enacted for wholly dissimilar reasons: whereas § 1983 was aimed at furthering the constitutional rights of individuals, AEDPA was aimed at limiting them. The fact that these statutes have been interpreted along such similar lines, therefore, reveals not a consistency in the Court's approach to a particular problem or statutory scheme, but rather a strictly conservative and often extreme ideology that elevates the interests of state courts and local officials above those of the individual and dictates the Court's decisions whenever it considers the cases of persons who seek the enforcement of their constitutional rights through habeas corpus or § 1983.

III. Particularly Unfortunate Consequences

This is an especially unfortunate time to be limiting the opportunities of those who have been unconstitutionally convicted or sentenced by the courts to gain their freedom. It is an equally unfortunate time to be preventing those who have been unlawfully treated by law enforcement from seeking the remedies provided under one of our first civil rights acts.[161] Both movements are taking our law in the wrong direction. Confidence in our

160. *See generally* Stephen I. Vladeck, *AEDPA,* Saucier*, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 Seattle U. L. Rev. 595 (2009).

161. 42 U.S.C. § 1983 (2012) (enacted in 1871).

legal system is probably at an all-time low among minorities, while their belief that they receive unfair and unequal treatment at the hands of law enforcement may well be at an all-time high. This is a particularly sensitive matter, as so disproportionate a number of those incarcerated in our penal institutions[162] and so disproportionate a number of those subjected to excessive force by law enforcement are members of minority groups.[163] The clear perception of the minority community, right or wrong, is that justice in this nation is stacked against them.[164]

The Court has often remarked that "to perform its high function in the best way[,] 'justice must satisfy the appearance of justice.' "[165] In a country in which a disproportionate number of individuals who are behind bars or have been treated unlawfully by law enforcement are minorities—indeed, a country in which black juveniles are more than four times as likely as white juveniles to be incarcerated, even though evidence shows that they commit many offenses at similar rates[166]—satisfying the appearance of justice means ensuring that individuals do not remain in prison in violation of the Constitution or face excessive force at the hands of law enforcement without a proper remedy. On this score, the Court has simply failed in its mission.

Unfortunately, the Court's recent treatment of federal habeas law and qualified immunity evinces a lack of sensitivity to the unequal treatment of minorities in our criminal justice system similar to that which has pervaded many of the Court's decisions following the end of the Warren Court. The

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162. African-Americans and Hispanics constitute over half of our prisoners. *See* E. Ann Carson, Bureau of Justice Statistics, NCJ 247282, Prisoners in 2013, at 8 (rev. Sept. 30, 2014), *available at* http://www.bjs.gov/content/pub/pdf/p13.pdf.

163. *See, e.g.*, Andrew J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DePaul J. Soc. Just. 175 (2008).

164. Recent events in Ferguson, Missouri, Staten Island, New York, Cleveland, Ohio, and other communities, along with the reaction to them, have underscored the widespread perception among minorities that our justice system is fundamentally unfair. Following these events, "[o]nly 1 in 10 African Americans say[ ] blacks and other minorities receive equal treatment with whites in the criminal justice system," while "[o]nly about 2 in 10 say they are confident that the police treat whites and blacks equally, whether or not they have committed a crime." Dan Balz & Scott Clement, *Divide over Police Is Also Partisan*, Wash. Post, Dec. 27, 2014, at A3 (citing a Washington Post-ABC News poll), *available at* http://www.washingtonpost.com/politics/on-racial-issues-america-is-divided-both-black-and-white-and-red-and-blue/2014/12/26/3d2964c8-8d12-11e4-a085-34e9b9f09a58_story.html.

165. *In re* Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)); *see also, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting) ("Wise observers have long understood that the appearance of justice is as important as its reality."); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864 (1988); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986).

166. *Senators Grassley and Whitehouse Introduce Juvenile Justice Bill*, The Sentencing Project (Dec. 11, 2014), http://www.sentencingproject.org/detail/news.cfm?news_id=1896; The Editorial Board, Editorial, *Kids and Jails, a Bad Combination*, N.Y. Times, Dec. 29, 2014, at A18, *available at* http://www.nytimes.com/2014/12/29/opinion/kids-and-jails-a-bad-combination.html?_r=0.

Burger Court, for example, effectively prevented federal courts from enjoining police forces from using dangerous chokeholds[167]—the very practice that led to the death of Eric Garner[168]—while showing no regard for the fact that black men made up 9% of Los Angeles's population at the time, but "accounted for 75% of the deaths resulting from the use of chokeholds."[169] The Rehnquist Court saw no Equal Protection Clause issue with the death penalty despite being presented with evidence that "defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks."[170] Nor was the Rehnquist Court willing to allow black defendants to proceed on a claim of race-based, selective prosecution, despite the fact that prosecutions for distributing cocaine base under the harsher federal statute, rather than the more lenient state statute, were seemingly reserved for black defendants alone.[171]

On today's Court, the unbroken march toward limiting constitutional rights and remedies for criminal defendants and the victims of police abuse reflects a continuing lack of understanding of the lives that so many minority group members experience in our country. After all, a Court that was attentive to the unequal treatment of minorities would fulfill its obligation to enforce the law regarding discrimination, rather than facilely asserting that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[172] Surely, the Court would not abdicate its role with respect to the criminal law on the ground that "the way to stop murder is to stop murdering," or that "the way to stop crime is to stop committing it." More basically, a Court that understood the injustices faced by minorities every day in this country would not assume that the time of the post-racial society has arrived and that the effects of our deeply rooted history of

167. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 97–98 (1983).

168. In July 2014, Eric Garner, an African-American who was selling untaxed cigarettes, died as a result of a chokehold used by a New York City police officer. His death led to substantial controversy and nationwide demonstrations.

169. *Lyons*, 461 U.S. at 116 n.3 (Marshall, J., dissenting); *see also* Shakeer Rahman & Sam Barr, Op-Ed, *Legal Rules Enable Police Violence*, N.Y. Times, Dec. 6, 2014, at A23, *available at* http://www.nytimes.com/2014/12/06/opinion/eric-garner-and-the-legal-rules-that-enable-police-violence.html?_r=0.

170. McCleskey v. Kemp, 481 U.S. 279, 287 (1987).

171. *See* United States v. Armstrong, 517 U.S. 456 (1996). In that case, several defendants alleging selective prosecution produced evidence that in all twenty-four cases involving a charge for distributing cocaine base that the Federal Public Defender's Office for the Central District of California had closed in 1991, the defendant was black. United States v. Armstrong, 48 F.3d 1508, 1511 (9th Cir. 1995) (en banc), *rev'd*, 517 U.S. 456. "The decision to charge the defendants with federal rather than California state offenses was significant. Federal law impose[d] a minimum sentence of 10 years and a maximum of life for those convicted of selling more than 50 grams of cocaine base. By contrast, under California law, the minimum sentence for that offense [was] three years and the maximum [was] five." *Id.* (citation omitted).

172. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion).

racial discrimination have been eradicated.[173] Indeed, an enlightened Court would recognize that, particularly in light of the growing distrust of police and the criminal justice system in minority communities, federal courts must be allowed to play their historic role as the guardians of constitutional rights, not prohibited from doing so by a judiciary that elevates its concern for comity above the constitutional rights to which all persons are entitled.

Justice O'Connor remarked that when Thurgood Marshall was on the Court, he "imparted not only his legal acumen but also his life experiences, constantly pushing and prodding [his fellow Justices] to respond not only to the persuasiveness of legal argument but also to the power of moral truth."[174] At conference, Justice Marshall was able to remind his colleagues "that the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality."[175] This lesson has apparently been lost on the present Court. The same institution that declared racial segregation to be offensive to the Constitution's guarantee of equality now consistently evinces a basic lack of understanding of, and concern for, the racial issues that continue to plague our country and that infect many of the cases it hears. Rather than playing a positive role in counteracting racial discrimination, the Court has, by restricting the constitutional rights of persons convicted of crimes and persons treated unlawfully by law enforcement, as well as by reaching a number of racially insensitive decisions in other areas of the law,[176] only exacerbated the problem.

Conclusion

In a recent reversal of a grant of habeas relief to a state prisoner, Justice Scalia, speaking for the Court, asserted that the Sixth Circuit "disregarded the limitations of 28 U.S.C. § 2254(d)—a provision of law that some federal

173. Recent statistics reveal that while 27.4% of blacks and 26.6% of Hispanics live in poverty, only 9.9% of non-Hispanic whites do so. *Poverty in the United States: Frequently Asked Questions*, Nat'l Poverty Center, http://www.npc.umich.edu/poverty/ (last visited Dec. 23, 2014). A fundamentally unfair educational system that graduates from high school far fewer black and Hispanic than white students, along with discrimination against minority job applicants, including those who graduate from college, creates an economy that is hostile to minority advancement. *See, e.g.*, Patricia Cohen, *Arduous Job Path for Black Grads*, N.Y. Times, Dec. 25, 2014, at B1, *available at* http://www.nytimes.com/2014/12/25/business/for-recent-black-college-graduates-a-tougher-road-to-employment.html; Kelsey Sheehy, *Gaps Persist Despite Rising High School Graduation Rates*, U.S. News & World Report (Jan. 23, 2013, 8:00 AM), http://www.usnews.com/education/blogs/high-school-notes/2013/01/23/gaps-persist-despite-rising-high-school-graduation-rates.

174. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992).

175. *Id.* at 1218.

176. *See, e.g.*, Shelby County v. Holder, 133 S. Ct. 2612 (2013); Ricci v. DeStefano, 557 U.S. 557 (2009); *Parents Involved*, 551 U.S. at 748.

judges find too confining, but that all federal judges must obey."[177] I would put it differently. The problem is not that the federal judges of whom he speaks find § 2254(d) too confining. The problem is that, whenever a federal court gives a reasonable interpretation of AEDPA, the Supreme Court reverses it with a new, extreme construction that is not justified by the text of the statute or the Court's precedent, and that further limits the constitutional rights of those who come before our courts.

To be clear, while I disagree with what the Supreme Court has done to federal habeas review and to the doctrine of qualified immunity, the problem is that my colleagues and I are, in fact, bound to follow its rulings—not because these rulings are consistent with the text or purpose of AEDPA, and not because the Court's approach to qualified immunity is necessary to the welfare of law enforcement officers; rather, we follow the Court's rulings because the system of law that we so admire and respect contains a hierarchy in which the Supreme Court rests at the top. Nevertheless, I must express my regret that the Court's jurisprudence in the two areas discussed in this Essay risks turning federal judges from protectors of the Constitution into unreasoning deniers of worthy claims of constitutional rights. It is unfortunate that even reasonable, moderate rulings of federal courts meant to preserve fundamental values against state abuses are now denounced as extreme. The result is an unnecessary and unjust process that values other concerns of far less importance over the constitutional rights of individuals—rights that lie at the heart of our judicial system.

Coda

I am an optimist. I still believe that "the arc of the moral universe is long, but it bends toward justice."[178] As we look back on our constitutional history, I see a trend toward progress and social justice, sometimes after painful battles and sometimes after painful lapses or even painful defeats. Yet this is a nation that in most respects continues to improve its democracy, sometimes dragging the Supreme Court with it and sometimes being dragged in that direction by its judiciary. I would hope that some of the recent errors the Court has made will be corrected as the arc of history unfolds and that the Court will in the long run recognize that we are a single nation, with a Constitution dedicated to promoting the general welfare, ensuring the equality of all individuals, and guaranteeing liberty and justice to all—a Constitution that lives and breathes as our great nation evolves in light of the moral, economic, and scientific forces that shape our destiny.

177. White v. Woodall, 134 S. Ct. 1697, 1701 (2014) *rev'g* Woodall v. Simpson, 685 F.3d 574 (6th Cir. 2012).

178. Martin Luther King, Jr., Where Do We Go from Here, Speech to Southern Christian Leadership Conference (Aug. 16, 1967), *available at* http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/where_do_we_go_from_here/.