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The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)

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NOTE

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The enforcement of the U.S. Constitution within the criminal justice system is an odd subspecies of constitutional law. In areas other than criminal law, federal courts act as the ultimate guarantors of constitutional rights by providing remedies whenever violations occur.[1] Criminal law, however, is different by necessity; the bulk of criminal justice occurs in state courthouses, leaving constitutional compliance largely to state judges.[2] The U.S. Supreme Court, of course, may review these decisions if it chooses,[3] but a writ of certiorari can be elusive, especially given the Court's shrinking docket.[4]

After World War II, however, this feature of criminal constitutional law came under attack. Many critics, particularly members of the civil rights movement, saw state judiciaries as insensitive to defendants' constitutional rights and demanded more extensive federal oversight of criminal law.[5] In its 1953 decision *Brown v. Allen*,[6] the U.S. Supreme Court expanded the system of federal habeas corpus to provide such supervision.[7]

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1. *See* U.S. CONST. art. III, § 2 ("[t]he judicial Powers shall extend to all Cases, in Law and Equity, arising under this Constitution"); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.2, at 248 (2d ed. 1994).

2. *See* Michigan v. Long, 463 U.S. 1032, 1043 n.8 (1983) ("The state courts handle the vast bulk of all criminal litigation in this country."); *see also* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 3-4 (2d ed. 1992). Although 42 U.S.C. § 1983 (1994) also provides relief to victims of state actors' constitutional and statutory violations, such suits only provide monetary, declaratory, or injunctive remedies. *See* CHEMERINSKY, *supra* note 1, § 15.4.2, at 808. Habeas corpus provides a different range of remedies, including commutation of the death penalty, release conditional on a new trial, and even unconditional release. *See* 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 33.1-.4 (2d ed. 1994).

3. *See* CHEMERINSKY, *supra* note 1, § 10.2, at 574.

4. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 36 (7th ed. 1993).

5. *See* CHEMERINSKY, *supra* note 1, § 15.2, at 787-88.

6. 344 U.S. 443 (1953).

7. Habeas corpus is a broad term encompassing three separate systems of relief: state habeas, federal habeas for federal prisoners, and federal habeas for state prisoners. While the statute at issue in this Note only affects the last of these, all three provide prisoners collateral avenues of attack on their criminal conviction. *See* CHEMERINSKY, *supra* note 1, § 15.2, at 785-86 (discussing both types of federal habeas); LARRY YACKLE, POSTCONVICTION REMEDIES §§ 2-6 (1981) (discussing state habeas).

Federal habeas corpus for state convicts works in the following way: Prisoners convicted in state court can seek in federal district court a writ of habeas corpus that collaterally attacks the constitutional underpinnings of the state court's judgment.[8] If the federal court finds a constitutional violation, it issues the writ, forcing the state to release the prisoner from custody.[9] In effect, federal habeas corpus serves as a means of federal appeal for state prisoners, providing a vehicle for federal enforcement of state prisoners' constitutional rights.[10]

The strength of this system, however, fundamentally depends on the extent of review permitted federal courts. If a federal court reviews a state judgment under a de novo standard of review, it can grant a writ of habeas corpus whenever it simply disagrees with a state court's constitutional interpretation.[11] Alternatively, a deferential standard of review greatly reduces the reach of a federal court's authority, as a federal court may issue the writ only when it finds the state court's decision unreasonable — not merely when it disagrees with that decision.[12]

With the *Brown* decision, federal habeas corpus became a powerful substantive remedy.[13] Habeas corpus petitions assert that a state court has incorrectly decided one of three types of questions: legal, factual, or mixed.[14] Under *Brown,* a federal court applies de novo review to the following two categories:[15] (1) legal questions, in which the petitioner challenges the state court's determinations of what rule governed an issue,[16] and (2) mixed questions, in which the petitioner challenges the state court's application of a legal rule

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8. *See generally* 1 LIEBMAN & HERTZ, *supra* note 2, §§ 2.1-.7.

9. *See, e.g., id.* § 2.3, at 17.

10. Federal habeas corpus is a collateral remedy and not a replacement for direct appeal. Federal habeas, however, has an "undeniable appellate flavor." *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute,* 44 BUFF. L. REV. 381, 403 (1996). Indeed, many have concluded that the two are nearly identical. *See* 1 LIEBMAN & HERTZ, *supra* note 2, § 2.4(b) & n.2, at 19.

11. *See, e.g.,* Townsend v. Sain, 372 U.S. 293, 312 (1963) (describing de novo review as plenary review); BLACK'S LAW DICTIONARY 435 (6th ed. 1990) (defining de novo to mean "afresh; a second time"); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2589, at 608 (1995) (noting that conclusions of law are "freely reviewable").

12. *See* 9A WRIGHT & MILLER, *supra* note 11, § 2585, at 571-74.

13. Soon after *Brown,* the Court also eliminated many of the procedural hurdles encountered by habeas corpus petitioners, further increasing the extent of the federal courts' authority. *See generally* 1 LIEBMAN & HERTZ, *supra* note 2, § 2.4(d).

14. It has often proved difficult to distinguish between these categories. *See* Wainwright v. Witt, 469 U.S. 412, 429 (1985). The absence of clearly demarcated boundaries separating these types of questions further complicates the determination of the appropriate standard of review.

15. *See* Brown v. Allen, 344 U.S. 443, 506-07 (1953) (Frankfurter, J.).

16. *See* BLACK'S LAW DICTIONARY 591-92 (6th ed. 1990); *see also* 9A WRIGHT & MILLER, *supra* note 11, § 2588, at 604-05.

to the facts of a particular case.[17] Under *Brown*, federal courts deferentially reviewed only the remaining category:[18] factual questions, or the state court's findings of what happened in a case.[19] Because only legal and mixed questions can implicate constitutional issues,[20] the *Brown* Court's designation of a de novo standard of review for these questions, later codified by Congress at 28 U.S.C. § 2254,[21] substantially extended the ambit of the federal judiciary's authority.[22]

Yet this powerful system had costs. Victims and their families found habeas corpus a torturous process, prolonging their agony by adding another layer of "appeals" to an already overburdened criminal justice system.[23] It also led to inefficient expenditures of courts' time and attention, with federal judges facing towering stacks of barely legible handwritten petitions, very few of which were likely to raise valid constitutional claims.[24]

In this landscape of competing interests, the Supreme Court began to narrow the path to habeas corpus. A series of decisions in the 1990s resurrected many of the procedural hurdles the Court had eliminated during the 1960s.[25] Nevertheless, the Court has not al-

17. *See* Thompson v. Keohane, 116 S. Ct. 457, 465 (1995); *see also* 1 LIEBMAN & HERTZ, *supra* note 2, § 20.3(d), at 571-73 (listing a variety of issues that have been held to constitute mixed questions on federal habeas).

18. *See Brown*, 344 U.S. at 506-07 (Frankfurter, J.).

19. *See* Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

20. The federal court may question the state court's factual findings only to the extent that "there is no finding," that "the finding is inadequate," or that the court "appl[ies] an improper legal standard." 1 LIEBMAN & HERTZ, *supra* note 2, § 2.4(b), at 21-22.

21. The statute only explicitly codified the standard of review for factual questions. Nevertheless, some scholars interpret the statute as implicitly codifying a de novo standard for legal and mixed questions. *See* 1 *id.* § 2.4(d), at 65 n.270.

22. *See generally* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2011-12 (1992) ("The guts of the habeas corpus remedy [was] *de novo* review of mixed legal and factual questions. Adoption of [a deferential standard] would be a serious, perhaps mortal blow to the writ's function . . . .").

23. *See, e.g.*, Elizabeth Shogren, *Senate OKs $1 Billion Anti-Terrorism Measure*, L.A. TIMES, Apr. 18, 1996, at A1.

24. *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) ("It must prejudice the occasional meritorious [habeas] application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."); Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1019 (1993) ("Without change, we will continue to toil under a procedural system that breeds judicial inefficiency, delay, public misunderstanding, and fundamental unfairness.").

25. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) (permitting writ only if constitutional wrong has a "'substantial and injurious effect or influence in determining the jury's verdict'"), *overruling* Anderson v. Nelson, 390 U.S. 523 (1968) (per curiam); Keeney v. Tamayo-Reyes, 504 U.S. 1, 5, 11-12 (1992) (tightening standard for excusing petitioner for failure to develop a material fact during state proceedings), *overruling in part* Townsend v. Sain, 372 U.S. 293 (1963). Many commentators describe these and other recent Supreme Court decisions as having crippled federal habeas review. *See, e.g.*, Ronald J. Tabak, *Habeas*

tered the underlying de novo standard of review for legal and mixed questions. In its 1989 decision *Teague v. Lane*,[26] however, the Supreme Court did make a significant inroad into the scope — as opposed to the standard — of review. *Teague* instructed federal courts to review petitioners' convictions against federal case law as it existed at the time of conviction rather than applying subsequent developments in federal case law retroactively.[27] While affecting the scope rather than the standard of review, *Teague* represented the first retraction of the reach of the federal courts' authority to review state court convictions for constitutional infirmities.

In 1996, Congress took the Court's restrictive approach one crucial step further by altering the core of federal habeas corpus: the de novo standard of review for legal and mixed questions. Inflamed by the terrorist assault on a federal building in Oklahoma City,[28] Congress passed the Antiterrorism and Effective Death Penalty Act.[29] Title II, section 104 of this Act amended the codified standard of review found in 28 U.S.C. § 2254(d) to provide that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .[30]

Three interpretations of the 1996 amendment to section 2254(d)(1) have emerged. A district court in the Third Circuit,[31] a federal appellate judge,[32] and an influential commentator[33] argue, each on different grounds, that the amendment does not change the preexisting de novo standard of review for legal and mixed questions. The Fifth and Seventh Circuits hold that the amendment limits de novo review for legal questions and installs a deferential

Corpus As a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy, 26 SETON HALL L. REV. 1477, 1483-89 (1996).

26. 489 U.S. 288, 209-310 (1989) (plurality opinion). The full Court adopted *Teague* in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

27. *See Teague*, 489 U.S. at 310.

28. *See* Susan Aschoff, *Critics Say Rights Lost in Terror Fight*, ST. PETERSBURG TIMES, June 29, 1997, at 1A, *available in* 1997 WL 6205792.

29. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.A. § 2254 (West Supp. 1997); *see also* Tabak, *supra* note 25, at 1477 ("A more accurate rephrasing of the title would have been the . . . Anti-Habeas Corpus Act of 1996.").

30. 28 U.S.C. § 2254(d).

31. *See* Buehl v. Vaughn, No. 95-5917, 1996 WL 752959, at *7 (E.D. Pa. Dec. 31, 1996).

32. *See* Drinkard v. Johnson, 97 F.3d 751, 778-79 (5th Cir. 1996) (Garza, J., dissenting), *cert. denied*, 117 S. Ct. 1114 (1997).

33. *See* Yackle, *supra* note 10, at 381.

standard for mixed questions.[34] Finally, two district courts in the Ninth Circuit hold that the amendment creates a deferential standard of review for both legal and mixed questions.[35]

This Note asserts that the 1996 amendment to section 2254(d)(1) remodels federal habeas corpus review of state court convictions in two ways. First, the statute as amended dictates the *scope* of review for both legal and mixed questions by limiting the precedent available in those analyses to clearly established legal principles set out by the Supreme Court. As Part I argues, this change codifies the *Teague v. Lane* retroactivity rule and adds an additional restriction that further narrows the scope of review. Second, the statute separately addresses the underlying *standards* of review for legal and mixed questions. Part II discusses the two constituent clauses of section 2254(d)(1), contending that the "contrary to" clause governs legal questions while the "unreasonable application" clause governs mixed questions. Part III asserts that the "contrary to" clause establishes a de novo standard of review for legal questions. Part IV argues that the "unreasonable application" clause creates a deferential standard of review for mixed questions.

I. THE SCOPE OF REVIEW

This Part contends that the statutory language "clearly established Federal law, as determined by the Supreme Court of the

34. *See Drinkard*, 97 F.3d at 766-69; Lindh v. Murphy, 96 F.3d 856, 868-74 (7th Cir. 1996) (en banc), *revd. on other grounds*, No. 96-6298, 1997 U.S. LEXIS 3998 (June 23, 1997). The Third Circuit has also indicated support for such a reading, although it has so far declined to resolve the issue. *See* Berryman v. Morton, 100 F.3d 1089, 1102-05 (3d Cir. 1996); Dickerson v. Vaughn, 90 F.3d 87, 90 (3d Cir. 1996).

The First Circuit and a court in the Eleventh Circuit have recently adopted an interpretation of § 2254(d)(1) that mirrors in result, if not in form, the understanding of the Fifth and Seventh Circuits. *See* Martin v. Bissonette, No. 96-1856, slip op. at 17-24 (1st Cir. May 29, 1997), *vacated on different grounds*, 118 F.3d 871 (1st Cir. July 11, 1997); Green v. Wharton, No. 4:96-CV-0142-HLM, 1997 U.S. Dist. LEXIS 10329, at *5-15 (N.D. Ga. July 15, 1997). This alternative interpretation argues that § 2254(d)(1)'s two clauses jointly govern legal and mixed questions. *See, e.g., Martin*, No. 96-1856, slip op. at 22. If the legal or mixed question contained in a habeas petition has already been decided by a Supreme Court precedent, the de novo "contrary to" clause governs the claim; if the legal or mixed claim involves an issue that has not been directly decided, the deferential "unreasonable application" clause governs. *See, e.g., Martin*, No. 96-1856, slip op. at 22-24. While the form of this interpretation is different from that of the Fifth and Seventh Circuits, according to this theory's proponents, "it is unlikely to produce results that differ very much, in practical effect, from these two cases" because "pure questions of law often will be controlled by existing Supreme Court precedent, while mixed questions of law and fact more frequently require a court to extrapolate from available caselaw." *Martin*, No. 96-1856, slip op. at 24. Thus, the de novo "contrary to" clause will often govern legal questions, while the deferential "unreasonable application" clause will typically govern mixed questions. This Note disagrees with this interpretation and contends that the Fifth and Seventh Circuits have the better argument. *See infra* note 65.

35. *See* Perez v. Marshall, 946 F. Supp. 1521, 1532-33 (S.D. Cal. 1996), *affd. without opinion*, No. 96-56705, 1997 WL 469645 (9th Cir. Aug. 18, 1997); Duncan v. Calderan, 946 F. Supp. 805, 813 (C.D. Cal. 1996).

United States"[36] amends the scope of review for both legal and mixed questions. The language restricts the precedent available for those analyses to a specific and narrow body of law: the Supreme Court's case law as it existed at the time of the petitioner's conviction. Section I.A contends that the language "clearly established Federal law" codifies the *Teague v. Lane* retroactivity rule. Section I.B argues that the text "as determined by the Supreme Court of the United States" further restricts the precedent available to habeas petitioners to include only Supreme Court decisions.

A. *"Clearly established Federal law"*

According to the statute, a court may issue a writ of habeas corpus only if the state court criminal conviction violates "clearly established Federal law."[37] This section argues that the phrase "clearly established" instructs federal courts to use the strict *Teague* retroactivity test to ascertain the boundaries of the federal case law available to conduct their analysis. This section also rebuts the argument that *Teague* changed the standard, as opposed to the scope, of review.

The *Teague* Court ruled that federal courts should grant a writ of habeas corpus only if a petitioner's conviction is inconsistent with federal case law as it existed at the time the petitioner's conviction became final.[38] It did this by holding that habeas petitioners generally could not rely on precedent handed down after their conviction became final.[39] The Court, however, allowed petitioners to base their claims on later cases if those cases simply elaborated doctrines that were explicitly or implicitly contained within federal precedent at the time of conviction.[40] The Court required federal courts to apply retroactively these postconviction cases containing what the Court called "old rules."[41]

The Supreme Court has made it very difficult, however, to hold that a case expounds an "old rule." A case applies an old rule only if the legal proposition it contains was "*dictated* by precedent ex-

36. 28 U.S.C.A. § 2254(d)(1) (West Supp. 1997).

37. *See* 28 U.S.C.A. § 2254(d)(1).

38. *See* Teague v. Lane, 489 U.S. 288, 299-310 (1988).

39. *See Teague,* 489 U.S. at 310.

40. *See Teague,* 489 U.S. at 301. Additionally, the Court recognized two exceptions to the *Teague* doctrine. First, a new rule will be retroactively applied "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)). Second, a new rule will be retroactively applied "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" 489 U.S. at 311 (quoting *Mackey,* 401 U.S. at 693 (Harlan, J., concurring) (citation omitted)). For discussion of how the 1996 amendment to § 2254(d)(1) affects these exceptions, see *infra* note 45.

41. *See Teague,* 489 U.S. at 299-302.

isting at the time the defendant's conviction became final."[42] Assessing whether precedent "dictates" a rule is a reasonableness inquiry; that is, the retroactivity principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[43] Thus, while *Teague* permits federal courts to apply retroactively some cases handed down after the petitioner's conviction, it also narrows that category to a very small set of cases.[44]

The 1996 amendment to section 2254(d)(1) should be read to adopt the *Teague* rule of retroactivity.[45] The statute addresses the propriety of the state court's determination, inquiring as to whether *that* analysis "resulted in a decision that *was*" in dereliction of

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42. *Teague,* 489 U.S. at 301; *see also* Saffle v. Parks, 494 U.S. 484, 491 (1990) ("Even were we to agree with [petitioner's] assertion that our decisions in *Lockett* and *Eddings* inform, or even control or govern, the analysis of his claim, it does not follow that they *compel* the rule [that] [petitioner] seeks." (emphasis added)); Butler v. McKellar, 494 U.S. 407, 415 (1990) (holding that a postconviction case was not applicable retroactively where the legal proposition to be applied "was susceptible to debate among reasonable minds" at the time the state court made its determination).

43. *Butler,* 494 U.S. at 414.

44. The Supreme Court's record on *Teague* analysis is instructive. Of the twelve cases in which it has applied *Teague,* the Court has applied precedent retroactively only twice. *Compare* O'Dell v. Netherland, 117 S. Ct. 1969 (1997) (holding that no retroactive application should occur) *and* Lambrix v. Singletary, 117 S. Ct. 1517 (1997) (same) *and* Gray v. Netherland, 116 S. Ct. 2074 (1996) (same) *and* Caspari v. Bohlen, 510 U.S. 383 (1994) (same) *and* Gilmore v. Taylor, 508 U.S. 333 (1993) (same) *and* Graham v. Collins, 506 U.S. 461 (1993) (same) *and* Wright v. West, 505 U.S. 277 (1992) (same) *and* Sawyer v. Smith, 497 U.S. 227 (1990) (same) *and Saffle,* 494 U.S. at 484 (same) *and Butler,* 494 U.S. at 407 (same) *with* Stringer v. Black, 503 U.S. 222 (1992) (applying retroactively) *and* Penry v. Lynaugh, 492 U.S. 302 (1989) (same).

45. A question remains as to whether § 2254(d)(1) codifies the exceptions to the *Teague* doctrine. *See supra* note 40. Admittedly, neither § 2254(d)(1) nor its accompanying legislative history explicitly discuss the *Teague* exceptions. Nevertheless, this Note argues that when Congress used the phrase "clearly established," it meant to codify the entire *Teague* doctrine, including the exceptions.

First, Congress assumed that the *Teague* exceptions would continue to exist. In a separate 1996 amendment to § 2254, Congress instructed federal courts to hold an evidentiary hearing if the petitioner's claim relies on "a *new rule* of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C.A. § 2254(e)(2)(A)(i) (West Supp. 1997) (emphasis added). Yet according to *Teague,* the only "new rules" that are applicable to a habeas corpus petition are those that meet one of the two specified exceptions. *See supra* note 40. If this provision is to have any meaning, *see infra* text accompanying note 77, then the *Teague* exceptions must still exist.

Second, the statute should be interpreted to codify the *Teague* exceptions because they have "roots in due process concerns," and so eliminating them might raise constitutional objections. *See* Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254,* 110 HARV. L. REV. 1868, 1884 (1997). These constitutional objections are arguably unpersuasive given Congress's past experience in restricting habeas merely to jurisdictional issues without raising due process concerns. *See infra* text accompanying note 132. The law underlying the due process clause has dramatically changed since then, however. *See generally* Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?,* 96 COLUM. L. REV. 1973 (1996). Thus, there is at least an open question as to whether the *Teague* exceptions are constitutionally required.

In practice, though, the resolution of this issue should make little difference given the narrowness of the exceptions to the *Teague* rule. *See, e.g., O'Dell,* 117 S. Ct. at 1973.

"clearly established Federal law."[46] This focus on the adequacy of the state court's ruling, coupled with the use of the past tense, directs federal courts to evaluate that state decision using the federal case law available to the state court when it made its decision. This statutory command echoes *Teague*'s emphasis on habeas corpus's fundamental aim of deterring state court error rather than necessarily guaranteeing justice for the defendant at a later date.[47]

Section 2254(d)(1) also employs the same strict approach to retroactivity as does *Teague*.[48] To determine whether a legal proposition existed in federal case law at the time petitioner's conviction became final, *Teague* probes to see if the relevant case was "dic-

46. 28 U.S.C.A. § 2254(d)(1).

47. The Supreme Court reasoned that habeas's primary function is to deter state courts from violating defendants' constitutional rights at trial and on appeal. *See Saffle*, 494 U.S. at 488. Retroactively applying new developments in the law, the Court observed, could not further this purpose, as a state court cannot accurately predict if and when the federal judiciary will hand down a decision changing the law. *See Teague*, 489 U.S. at 306-07, 310. Post-conviction cases that include "old rules," however, do not materially change the law, nor do they "break[] new ground or impose[] a new obligation on the States or Federal Government." *Teague*, 489 U.S. at 301. Because the state courts should have been aware of these legal propositions when making their decisions regarding the petitioner's conviction, the Court required federal courts to apply these cases retroactively. *See Teague*, 489 U.S. at 306-07.

48. Furthermore, the phrase "clearly established" relates indirectly to the *Teague* doctrine, further suggesting an inherent link between the statute's use of the phrase and the *Teague* rule. "Clearly established" is the explicit standard in qualified immunity doctrine. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 & n.30 (1982) (noting that qualified immunity applies to government officials in order to protect them from suit brought directly under the Constitution or 42 U.S.C. § 1983 "insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known" (emphasis added)). In turn, the qualified immunity doctrine closely resembles *Teague* analysis. *See* Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 115 (1991). Even the Supreme Court in *Sawyer v. Smith*, 497 U.S. 227, 236 (1990) (citing Anderson v. Creighton, 483 U.S. 635, 639 (1987)) implicitly recognized these similarities by citing a qualified immunity case to help explain its *Teague* analysis. Lower courts have also suggested that the two are identical, *see, e.g.*, Aldridge v. Hill, No. 95-55841, 1996 WL 528513, at *1 (9th Cir. Sept. 13, 1996) (explaining, in the parlance of qualified immunity, how *Teague* analysis works), *cert. denied*, 117 S. Ct. 988 (1997), as have commentators, *see, e.g.*, Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423, 442 n.75 (1994) (listing commentators). The Fourth Circuit went even further when it noted that the qualified immunity doctrine, the *Teague* retroactivity principle, and the 1996 amended version of § 2254(d)(1) all embody the same core concept. *See* O'Dell v. Netherland, 95 F.3d 1214, 1223 (4th Cir. 1996), *affd.*, 117 S. Ct. 1969 (1997).

It is true that qualified immunity, the *Teague* doctrine, and § 2254(d)(1) do not have the same objective. For this reason it has been argued that the "clearly established" language does not indirectly invoke *Teague*. *See* Lindh v. Murphy, 96 F.3d 856, 870 (7th Cir. 1996) (en banc), *revd. on other grounds*, No. 96-6298, 1997 U.S. LEXIS 3998 (June 23, 1997); Yackle, *supra* note 10, at 403-07. This Note claims, however, only that the statute borrows the "clearly established" language and operating mechanism from qualified immunity doctrine — not its objective. *See* Kinports, *supra*, at 115 (noting that *Teague* and the qualified immunity doctrine operate by forgiving erroneous interpretations of the law unless unreasonable). Indeed, these differences in purpose might explain why no one in Congress analogized the statute to qualified immunity doctrine. *Cf.* Yackle, *supra* note 10, at 406 (arguing that Congressional neglect of this point undermines the qualified immunity connection).

tated" by preexisting precedent.[49] In requiring case law to be "clearly established," the statutory text invokes the core concept of the *Teague* doctrine. Certainly a federal judge who describes a legal proposition as "dictated" by precedent can also call it "clearly established." Conversely, if a judge labeled a legal proposition as clearly established in existing case law, it would be natural to assume that reasonable minds could not disagree over its existence. The statutory mandate and *Teague*'s requirement appear identical.

The legislative history never refers to *Teague*, nor does the statute track the language of *Teague* or its progeny. Some may thus decide that section 2254(d)(1) does not codify *Teague*. That conclusion, however, may be hasty. Congress may have wisely chosen to avoid mentioning *Teague* because the Court itself is split as to what its decision means.[50] Regardless, the plain language of the statute best supports the interpretation that "clearly established" instructs federal courts to apply the *Teague* rule when determining which precedent to use in their analyses of state convictions.

This retroactivity limitation changes the *scope* of review by which legal and mixed questions are analyzed but leaves the *standard* of review untouched.[51] One way to understand *Teague*'s relationship to the governing standard of review is to realize that they involve two separate stages of analysis.[52] First, the federal court uses the *Teague* retroactivity rule to determine which federal cases are available to analyze the petitioner's conviction.[53] This can be described as a choice of law rule sorting out which legal principles

49. *See Teague*, 489 U.S. at 301.

50. *See infra* note 51.

51. The Court recently considered explicitly changing the standard of review in mixed habeas questions from de novo to deferential. *See* Wright v. West, 505 U.S. 277, 294-95 (1992) (plurality opinion). The Court had requested additional briefing regarding whether, given *Teague*, a federal habeas court should afford deference to state court determinations applying law to the specific facts of a case. *See* Wright v. West, 502 U.S. 1021 (1991) (requesting briefing). Despite spending a great deal of time on the proposal, the Court eventually declined to resolve the issue. *See Wright*, 505 U.S at 294-95 (plurality opinion).

Three Justices argued that the Court should extend *Teague* to mixed questions. After presenting *Teague* as having created a deferential standard for legal questions, Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, observed that factual questions were also reviewed deferentially. Given that, they noted that "it makes no sense . . . for a habeas court generally to review factual and legal determinations deferentially, but to review applications of law to fact *de novo*." *Wright*, 505 U.S. at 294 (plurality opinion). Four Justices opposed this claim, pointing out that the assumption that legal questions were to be reviewed deferentially under *Teague* was incorrect. *See Wright*, 505 U.S. at 303 (O'Connor, J., joined by Blackmun and Stevens, JJ., concurring) ("Justice Thomas mischaracterizes *Teague v. Lane*. . . . *Teague* did not establish a 'deferential' standard of review of state court determinations of federal law." (citation omitted)); *Wright*, 505 U.S. at 307 (Kennedy, J., concurring).

52. *See* Liebman, *supra* note 22, at 2031-32.

53. *See, e.g., Teague*, 489 U.S. at 300.

are applicable to the habeas corpus petition.[54] Second, the federal court uses the precedent deemed applicable during the first stage to conduct a de novo review of the state court's legal determinations.[55] Thus, even after *Teague* the federal court independently determined the correct rule of law and issues the writ if it finds that the state court's decision deviated from that rule.[56] By only permitting precedent containing legal principles that existed at the time of conviction, *Teague* limited the scope of de novo review.

Three Justices have suggested, however, that *Teague* may not merely limit the scope of de novo review but replaces it altogether with a deferential standard.[57] This argument is based on *Teague's* analysis of how lower courts are to make the critical distinction between "old rules" and "new rules." A reasonableness test is the hallmark of a deferential standard, and *Teague* does distinguish between old and new rules with a reasonableness inquiry.[58] This claim, however, confuses the first and second stages of analysis. *Teague* imports a reasonableness inquiry into its retroactivity determinations, but this inquiry only affects the first stage of analysis. If a reasonableness inquiry functioned within the second stage as well, then the federal court would issue the writ only when the state court's legal determination was unreasonable relative to the correct rule of law and not merely when the state court's decision differed from that rule. As *Teague* does not impose such restrictions, it does not create deferential review.

Indeed, deferential review would have gone far beyond the *Teague* Court's reasoning. The chief rationale behind *Teague* is the desire not to reverse state courts when they have properly applied the law as it existed at the time of conviction.[59] A deferential standard, however, would grant state courts a license to ignore the state of the law and instead to apply their own interpretations of the Constitution, so long as those interpretations are not "unreasonable."[60]

54. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534-35 (1991) (plurality opinion) ("[R]etroactivity is properly seen in the first instance as a matter of choice of law . . . ."); *see also* Liebman, *supra* note 22, at 2031-32.

55. *See Wright,* 505 U.S. at 309 (Kennedy, J., concurring) ("With this *[Teague]* safeguard in place . . . *de novo* review can be exercised within its proper sphere.").

56. *See Wright,* 505 U.S. at 305 (O'Connor, J., concurring) ("[T]he duty of the federal court in evaluating whether a rule is 'new' is not the same as deference; federal courts must make an independent evaluation of the precedent existing at the time the state conviction became final. . . .").

57. *See Wright,* 505 U.S. at 294 (plurality opinion). The Justices ultimately declined to reach the issue, however. *See Wright,* 505 U.S. at 295.

58. *See Wright,* 505 U.S. at 307 (Kennedy, J., concurring).

59. *See* Butler v. McKellar, 494 U.S. 407, 414 (1990).

60. *See* Liebman, *supra* note 22, at 2032-33.

For these reasons, the retroactivity standard established in *Teague* and codified by section 2254(d)(1) does not change the standard of review for legal and mixed questions, but rather changes the scope of that review. This retroactivity rule strictly limits the precedent applicable to habeas corpus petitions. It ensures that the federal court reviews the state court criminal conviction against federal case law as it existed at the time of petitioner's conviction. This includes two sets of precedent: first, any pre-conviction case, and second, those few postconviction cases "dictated" by precedent in existence when petitioner's conviction became final.[61]

B. *"As Determined by the Supreme Court of the United States."*

The statutory phrase "as determined by the Supreme Court of the United States" further restricts the precedent available for the federal court's review of the state court conviction to Supreme Court decisions. Just as the phrase "clearly established" lays out the general contours of the federal case law available for legal and mixed question analyses, the phrase "as determined by the

61. Federal judges have recently disagreed as to whether the phrase "clearly established" permits a federal court to issue the writ of habeas corpus in situations in which it cannot point to a specific Supreme Court decision explicitly establishing the right the petitioner seeks but in which the federal judge believes the right is implicit in the Supreme Court's general approach to that area of law. *Compare* Blankenship v. Johnson, 106 F.3d 1202, 1211 (5th Cir. 1997) (Parker, J., dissenting) (arguing for the latter position) *and* Childress v. Johnson, 103 F.3d 1221, 1225 (5th Cir. 1997) (reviewing state court conviction against the Supreme Court's Sixth Amendment case law) *with* Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (holding that habeas corpus petitioners "must be able to point to an authoritative decision of the Supreme Court in order to secure a writ") *and Blankenship,* 106 F.3d at 1205-06 (majority opinion) (reviewing a state court conviction soley against the Supreme Court's decision in *Ross v. Moffit,* 417 U.S. 600 (1974)).

This Note argues that federal courts should look to the Supreme Court's general approach to an area of law, not only to the Court's individual decisions. The amendment instructs federal courts to review a state court conviction against "clearly established Federal *law,* as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1) (West Supp. 1997) (emphasis added). If Congress had meant to point to specific Supreme Court decisions, it easily could have replaced "law" with "decision of the Supreme Court" or something equivalent. Instead, here "law" is used broadly. Also, the phrase "clearly established" does not require federal courts to base their decision on a particular Supreme Court case. Applying the *Teague* rule in *Stringer v. Black,* 503 U.S. 222, 232 (1992), the Supreme Court issued a writ of habeas corpus based on its overall approach to the Eighth Amendment and sentencing in capital cases even though the relevant legal proposition was not found in "any single case." In doing so the Court explicitly rejected the dissent's argument that it must base a writ on a legal proposition derived from a single case. Finally, the Supreme Court takes so few cases a year that it would be very unlikely that the events underlying a habeas petition will ever "precisely track the facts of a case decided by the Supreme Court." *Blankenship,* 106 F.3d at 1211 (Parker, J., dissenting). Such an interpretation would virtually eliminate federal habeas corpus. Although the 1996 amendment does significantly curtail federal habeas corpus as a viable remedy, there is no evidence that opposing sides in Congress agreed to kill it, particularly in such a discreet fashion.

Supreme Court of the United States" refines these boundaries to include only Supreme Court decisions.[62]

Legislative history is also clear on this point. Senator Joseph R. Biden, for example, recognized this limitation when he noted that "even if there is a Federal court decision directly on point, the state court could ignore it as long as the application of law had not been directly decided by the Supreme Court."[63] Thus, the newly amended statute draws the scope of federal habeas corpus review even more narrowly than case law prior to the new amendment did, not only codifying *Teague* but attaching a restriction in addition to it.[64]

II. Separate Clauses for Legal and Mixed Questions Under Section 2254(d)(1)

This Part examines how section 2254(d)(1) affects the standard of review for both legal and mixed questions. Two views exist as to how this new amendment operates.[65] Proponents of both views agree that the phrases "contrary to" and "unreasonable application" govern the standards of review for legal and mixed questions.[66] Both agree that the provision naturally breaks down into

62. *See, e.g., Lindh,* 96 F.3d at 869 ("State courts must knuckle under to decisions of the Supreme Court, but not of this court.").

63. 141 Cong. Rec. S7842 (daily ed. June 7, 1995) (statement of Sen. Biden).

64. A circuit split has recently emerged on the issue of whether federal courts applying § 2254(d)(1) can use non-Supreme Court case law to help interpret relevant Supreme Court decisions. *Compare* Bocian v. Godinez, 101 F.3d 465, 471 (7th Cir. 1996) (holding that federal courts "must look exclusively to Supreme Court caselaw") *with* Martin v. Bissonette, No. 96-1856, slip op. at 19-20 (1st Cir. May 29, 1997) (holding that lower court opinions are available to help explain the Supreme Court's decision), *vacated on different grounds,* 118 F.3d 871 (1st Cir. 1997).

65. *Compare* Yackle, *supra* note 10, at 437 (utilizing the nonexclusive approach) *with Lindh,* 96 F.3d at 868-70 (applying the mutually exclusive approach). The First Circuit and a court in the Eleventh Circuit recently set forth a third understanding of § 2254(d)(1)'s operation. *See supra* note 34. Those courts argue that under § 2254(d)(1), both legal and mixed questions go through the same analytical framework, and that the two clauses are simply separate stages of that analysis. *See supra* note 34. Their rationale is twofold. First, they argue that Congress did not explicitly differentiate between the review of legal and mixed questions. Second, they contend that Congress actually rejected an earlier bill that would have imposed a rigid taxonomy by which legal and mixed questions were reviewed under different clauses. *See, e.g.,* Martin v. Bissonette, No. 96-1856, slip op. at 21.

As for the first criticism, although Congress did not state in the statutory text that legal and mixed question analyses were to differ, members of Congress did make explicit statements to that effect during the floor debates. *See infra* section II.B.1. The criticism that Congress "rejected" the bill is an overstatement; actually, the House approved it, but the Senate never voted on it. *See* Yackle, *supra* note 10, at 435. Indeed, it later served as the draft for S. 735, the bill that eventually became the 1996 amendment to § 2254(d)(1). *See* Yackle, *supra* note 10, at 435-36. This suggests that courts could legitimately draw on at the least the more general features of the "rejected" bill for legislative history, such as its underlying taxonomy. In any event, the bill is at best inconclusive: There exist three separate interpretations of the bill, see *infra* section II.B.2., making it a fragile foundation upon which to build an entire approach to § 2254(d)(1).

66. *See, e.g., Lindh,* 96 F.3d at 868-70; Yackle, *supra* note 10, at 384.

two clauses:[67] the writ will not issue unless the conviction "was *contrary to* . . . clearly established Federal law"[68] or "involved an *unreasonable application* of[ ] clearly established Federal law."[69]

The dispute lies in determining how these two clauses apply to legal and mixed questions. One approach, described here as the *mutually exclusive approach,* argues that the two clauses are mutually exclusive and that the "contrary to" clause governs legal questions, while the "unreasonable application" clause reviews mixed questions.[70] The second approach, described here as the *nonexclusive approach,* contends that either clause can govern both legal and mixed questions, and that habeas corpus petitioners choose the clause under which to bring their claim.[71] This approach predicts that because the "contrary to" clause gives the federal court greater license to vacate the state court conviction, the habeas corpus petitioner will always seek review under the "contrary to" clause, rendering the "unreasonable application" clause "superfluous."[72]

Resolving this question is of enormous importance. The two clauses dictate two different standards of review.[73] As such, the federal judiciary's power to enforce its interpretation of the Constitution turns on which clause, and hence which standard of review, governs a particular claim. This Part asserts that the two clauses are mutually exclusive. Section II.A argues that the statute's plain language naturally organizes legal and mixed questions into two separate clauses, whereas section II.B contends that the legislative history reflects a similar congressional understanding.

A. *The Text of Section 2254(d)(1)*

A careful analysis of section 2254(d)(1) reveals that questions of law should fall exclusively under the "contrary to" clause, while the "unreasonable application" clause should encompass mixed questions. The "contrary to" clause instructs the federal court to review the state court conviction to determine whether it is "contrary to . . . clearly established Federal law."[74] On its face, this clause refers to "law," indicating that it addresses only the purely legal findings of the state court. On the other hand, the "unreasonable application" clause modifies the word "law" to emphasize a review of an "appli-

67. *See, e.g., Lindh,* 96 F.3d at 870; Yackle, *supra* note 10, at 384.

68. 28 U.S.C.A. § 2254(d)(1) (West Supp. 1997) (emphasis added).

69. 28 U.S.C.A. § 2254(d)(1) (emphasis added).

70. *See Lindh,* 96 F.3d at 868-70.

71. *See* Yackle, *supra* note 10, at 437.

72. *See id.*

73. *See Lindh,* 96 F.3d at 868-70; *see also infra* Parts III, IV.

74. 28 U.S.C.A. § 2254(d)(1).

cation of . . . law."[75] Applications of law are traditionally synonymous with mixed questions of law and fact,[76] suggesting that this clause deals with mixed questions. Thus, the use of the unqualified term "law" in the "contrary to" clause indicates that it refers to legal questions, while the change to "application of . . . law" in the "unreasonable application" clause targets mixed questions.

By contrast, the alternative, nonexclusive approach is not firmly grounded in the statutory text. According to this interpretation, petitioners have a choice as to which clause governs their claim. Because petitioners would naturally choose the standard that reviews their convictions more extensively, the de novo "contrary to" clause would render the deferential "unreasonable application" clause superfluous.[77] Yet this interpretation violates elementary "rules of statutory construction [that] declare that a legislature is presumed to have used no superfluous words."[78] A more reasonable reading gives effect to both clauses of the provision.

Moreover, this nonexclusive interpretation erroneously emphasizes the word "decision." According to the language of the "contrary to" clause, the federal judge tests the state court "decision" to determine if it is "contrary to . . . law."[79] Proponents of the nonexclusive approach argue that the first clause must encompass both legal and mixed questions because a state court's decision includes both the legal and mixed determinations in a case.[80]

This view, if it proves anything, proves too much. In addition to legal and mixed determinations, a state court's decision includes factual findings as well. Therefore, an inevitable consequence of this argument is that section 2254(d)(1)'s first clause must also treat questions of fact. Yet that would render the next statutory provision, section 2254(d)(2), superfluous as well. Section 2254(d)(2) instructs federal courts to grant the writ if the State court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[81] This provision's exclusive mention of "facts" indicates that section

75. 28 U.S.C.A. § 2254(d)(1).

76. *See, e.g.*, Thompson v. Keohane, 116 S. Ct. 457, 459 (1995) (observing that a mixed question "calls for application of the controlling standard to the historical facts"); Wainwright v. Witt, 469 U.S. 412, 429 (1985) (noting that a mixed question requires an application of law to fact).

77. *See supra* text accompanying note 72.

78. Platt v. Union Pac. R.R., 99 U.S. 45, 58 (1878); *see also, e.g.*, United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992).

79. *See* 28 U.S.C.A. § 2254(d)(1).

80. *See* Yackle, *supra* note 10, at 384; *see also* Drinkard v. Johnson, 97 F.3d 751, 778 (5th Cir. 1996) (Garza, J., dissenting), *cert. denied*, 117 S. Ct. 1114 (1997).

81. 28 U.S.C.A. § 2254(d)(2).

2254(d)(2) concerns itself solely with questions of fact.[82] Including review of factual findings under section 2254(d)(1) thus would require a court to render meaningless an entire subsection of the statute — straining the rules of statutory construction even further.

A simpler reading of the "contrary to" clause is that although the word "decision" might refer to any of the legal, mixed, and factual determinations in a case, the language of each clause identifies the aspect of the state court's decision to which it applies. Thus the phrase "contrary to law" in the first clause isolates the legal questions addressed by the state court's decision, while the wording "application of law" in the second clause isolates the mixed questions decided by the state court.

B. *The Legislative History*

The legislative history underlying section 2254(d)(1) further indicates that Congress understood the "contrary to" and "unreasonable application" clauses to be mutually exclusive. Section II.B.1 asserts that this congressional intent existed throughout the Senate floor debates about S. 735, the bill that became the 1996 amendment to section 2254(d). Section II.B.2 then counters objections raised by proponents of the nonexclusive approach, concluding that the legislative history of S. 735's predecessor bill does not reveal any contrary congressional intent.

1. *The Floor Debates Over S. 735*

The Senate understood section 2254(d)(1) to treat legal questions and mixed questions under separate clauses. This is evidenced by explicit statements made by both the bill's supporters and opponents in Congress.

Senator Arlen Specter, who co-sponsored S. 735, explained that the bill distinguishes between treatment of legal, mixed, and factual questions. He explained that it would

> continue to require deference to State court's findings of fact. Federal courts will owe no deference to State courts' determinations of federal law, which is appropriate in our Federal system. However, under [S. 735] deference will be owed to State court's decisions on the application of Federal law to the facts.[83]

Senator Specter, himself a lawyer, consciously separated state court findings into three categories: findings of fact, determinations of law, and applications of law to facts. Such a classification scheme exactly mirrors the three categories of factual, legal, and mixed

82. *But see* Note, *supra* note 45, at 1874-76 (commenting on an emerging judicial split over whether § 2254(d)(2) or § 2254(e)(1) governs factual questions).

83. 142 CONG. REC. S3472 (daily ed. Apr. 17, 1996) (statement of Sen. Specter).

questions.[84] Furthermore, Senator Specter explicitly segregated the standards of review for legal and mixed questions, suggesting that different statutory language governs legal and mixed questions. Finally, Senator Specter's statement also clarifies that federal law is being *applied* to the facts underlying the habeas corpus claim. This supports the claim that the "unreasonable application" clause must exclude legal questions because facts are a major, if not the chief, component in any analysis under this clause.[85] Together, these references indicate that Congress intended for the clauses in section 2254(d)(1) to treat legal and mixed questions separately.

S. 735's opponents also shared this understanding. For example, during debate on a proposal to eliminate the drafted amendment to section 2254(d)(1) altogether, Senator William Cohen announced, "I believe the writ's core function of affording independent Federal review to mixed questions of law and fact should be retained and that the deference provision in S. 735 should be withdrawn."[86] Senator Cohen targeted for criticism the proposed amendment's effect on mixed questions, suggesting that S. 735 treated mixed questions differently from other habeas corpus claims. Moreover, that Senator Cohen directed his criticism exclusively toward the standard for mixed questions indicates that the statute does not similarly burden legal questions. This implies that the standard of review, and hence the governing statutory clause, is different for each.

The nonexclusive interpretation of section 2254(d)(1) is not as well-grounded in legislative history. That approach emphasizes the "contrary to" clause's importance to the exclusion of the "unreasonable application" clause, rendering the latter "superfluous."[87] Yet had Congress held that view, one would expect the legislators to have paid scant attention to the "unreasonable application" clause. Examining the legislative history, however, leads to the opposite conclusion. Senators Joseph Biden and Edward Kennedy aimed their criticism of the bill at the "unreasonable application" clause of the provision and almost entirely ignored the "contrary

84. *See supra* text accompanying notes 14-19.

85. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) (describing mixed questions as "questions in which the historical facts are admitted or established, *the rule of law is undisputed*, and the issue is whether the facts satisfy the [legal] standard" (emphasis added)).

86. 141 CONG. REC. S7839 (daily ed. June 7, 1995) (statement of Sen. Cohen). Senator Cohen was quoting a letter written by Columbia University Law Professor Henry Monaghan. Senator Cohen's statement additionally supports the argument, advanced by Part IV of this Note, that federal courts are to review deferentially a state court's resolution of mixed questions. Senator Cohen explicitly observed that mixed questions will no longer be reviewed de novo.

87. *See supra* text accompanying note 72.

to" clause.[88] Moreover, members of Congress repeatedly described S. 735 as creating deference to state courts' determinations of mixed questions[89] — an effect possible only if the second clause played a significant role. The extent of congressional attention paid to the second clause amplifies the argument that the two clauses are mutually exclusive.

2. *S. 735's Predecessor*

Proponents of the nonexclusive approach contend that the habeas corpus reform bill proposed immediately prior to S. 735, and the language of which became the rough draft for S. 735, signals Congress's intent to have legal and mixed questions reviewed under the "contrary to" clause.[90] In 1995, Representative Christopher Cox proposed amending section 2254(d) to instruct federal courts not to issue the writ unless the state court's decision was based on either an "arbitrary or unreasonable interpretation of clearly established Federal law," an "arbitrary or unreasonable application to the facts of clearly established Federal law," or an "arbitrary or unreasonable determination of the facts."[91] Although Representative Cox's bill failed to become law,[92] adherents of the nonexclusive view argue that the debates on Representative Cox's proposal led to a vital legislative compromise that fundamentally affects the meaning of section 2254(d)(1). Representative Cox's proposal directed federal courts not to grant a writ of habeas corpus unless the state court decision involved an "arbitrary or unreasonable" application of law to facts.[93] House opponents, however, criticized the phrase "arbitrary or unreasonable," arguing that the "arbitrary" standard was too harsh.[94] Representative Cox responded by conceding that the "or" between arbitrary and unreasonable allowed petitioners to choose whether they wished to bring suit under the "arbitrary" or "unreasonable" standard.[95] Because federal courts

88. *See* 141 CONG. REC. S7841 (daily ed. June 7, 1995) (statement of Sen. Biden); 141 CONG. REC. S7809 (daily ed. June 7, 1995) (statement of Sen. Kennedy).

89. *See, e.g.*, 141 CONG. REC. S7878 (daily ed. June 7, 1995) (statement of Sen. Moynihan) ("The legislation before us will require our Federal courts to defer to State court judgments unless a State court's application of Federal law is unreasonable."); 141 CONG. REC. S4596 (daily ed. Mar. 24, 1995) (statement of Sen. Hatch).

90. *See* Yackle, *supra* note 10, at 433-38. For a third interpretation of this bill, see *supra* note 65.

91. 141 CONG. REC. H1424 (daily ed. Feb. 8, 1995) (statement of Rep. Cox).

92. *See* Yackle, *supra* note 10, at 435.

93. *See* 141 CONG. REC. H1424 (daily ed. Feb. 8, 1995) (statement of Rep. Cox).

94. *See, e.g.*, 141 CONG. REC. H1426 (daily ed. Feb. 8, 1995) (statement of Rep. Watt).

95. *See* 141 CONG. REC. H1426 (daily ed. Feb. 8, 1995) (statement of Rep. Cox) ("I just point out that the language of the amendments says reasonable. It also says arbitrary. But a separate standard is reasonable. It is arbitrary or unreasonable. Obviously, the reasonableness test is the more difficult to meet.").

have more power to vacate the state court conviction under an "unreasonable" standard, petitioners would naturally choose to bring suit under that standard. In this way, Representative Cox consciously disowned the "arbitrary" standard altogether.

Although this compromise failed to rescue the House bill from defeat, adherents of the nonexclusive approach contend that S. 735 incorporates this concession. They argue that the disjunctive "or" between the "contrary to" and "unreasonable application" clauses in section 2254(d)(1) replicates the "or" between "arbitrary" and "unreasonable" in Representative Cox's bill, thereby providing habeas corpus petitioners with a choice between the "contrary to" and "unreasonable application" clauses.[96]

This claim, however, raises three problems. First, it confuses one "or" with another. The "or" of which Representative Cox spoke existed *within* each clause — one within the clause regarding legal questions, and the other within the clause regarding mixed questions.[97] The "or" on which nonexclusive proponents focus lies *between* these numbered clauses.[98] Thus, under Representative Cox's bill, petitioners had a choice as to which of the multiple *standards* provided for each type of question governed their claim.[99] Despite that concession, however, there remained only one *clause* for each type of question.

Second, Representative Cox's bill provides evidence that its successor, the 1996 amendment to section 2254(d), reviews legal and mixed questions separately. Representative Cox explicitly stated that his bill addressed questions of law, questions of fact, and mixed questions of law and fact.[100] Considering that his bill contains three

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96. *See* Yackle, *supra* note 10, at 437 (indicating that one phrase contained a more demanding standard than the other, rendering the latter phrase superfluous).

97. *See* 141 CONG. REC. H1426 (daily ed. Feb. 8, 1995) (statement of Rep. Cox) (focusing on the "or" between "arbitrary" and "unreasonable"); *see also* 141 CONG. REC. H1424 (daily ed. Feb. 8, 1995) (statement of Rep. Cox) (proposing that habeas petitions should not be granted unless the state adjudication "(1) resulted in a decision that was based on an arbitrary *or* unreasonable interpretation [of precedent]; (2) resulted in a decision that was based on an arbitrary *or* unreasonable application [to the facts of precedent]; or (3) resulted in a decision that was based on an arbitrary *or* unreasonable determination [of facts]" (emphasis added)).

98. The meaning ascribed to a word in one context cannot be transferred automatically to another merely because it is the same word. *See* Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). This is especially true for disjunctives like the word "or" that have the purpose of creating a choice. *See* BOUVIER'S LAW DICTIONARY 2422 (8th ed. 1914). *See generally* BOB DOROUGH, *Conjunction Junction, on* SCHOOLHOUSE ROCK: GRAMMAR ROCK (ABC, Inc. 1997) ("Conjunction Junction, what's your function? Hookin' up cars and makin' 'em function.").

99. *See supra* note 95.

100. *See* 141 CONG. REC. H1426 (daily ed. Feb. 8, 1995) (statement of Rep. Cox) ("Simply stated, the Federal courts will defer to reasonable decisions on the facts, reasonable deci-

subsections, it makes sense that each governs one of the three types of claims. Given that the newly amended section 2254(d) similarly has three operative parts,[101] it is reasonable to assume that this intent lay underneath section 2254(d)(1) as well.

Finally, the floor debates for S. 735 are devoid of any evidence that Representative Cox's concession influenced the understanding of the eventual 1996 amendment to section 2254(d)(1).[102] For these reasons, the nonexclusive interpretation of the statutory history is flawed. The more reasonable interpretation of section 2254(d)(1) is that it separates questions of law from mixed questions of fact and law.

III. The Standard for Legal Questions

This Part addresses the standard of review contained in the "contrary to" clause. That clause instructs federal courts not to grant the writ unless the state court's decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."[103] Section III.A argues that the "contrary to" language establishes a de novo standard of review. Section III.B rejects a competing interpretation of the clause known as "procedural deference."

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sions on the law, and reasonable decisions on mixed questions of law and fact made at the State courts.").

101. The three operative parts are the "contrary to" and "unreasonable application" clauses from § 2254(d)(1) and § 2254(d)(2). Between the drafting of Representative Cox's bill and S. 735, the two subsections for legal and mixed questions were merged into one. Arguably this was intended to be a substantive change. If so, that change would mean that the two bills are not analogous and that courts could not draw conclusions based on comparing the two. No explanation for this change is found, however, in the legislative history. It seems unlikely that a substantive change would be made without being noted somewhere, especially given the bill's prominence. *See, e.g.*, Edwin Yoder, *Delays May Make Capital Punishment Cruel, Unusual*, Salt Lake Trib., Apr. 5, 1995, at A9. In any event, a more likely explanation is that the separate standards for legal and mixed questions were placed into one subsection because the language relating to the retroactivity rule overlapped. *See supra* Part I.

102. Proponents of the nonexclusive approach cite only to a letter sent by Senator Orrin Hatch to a witness before the Senate Judiciary Committee. *See* Yackle, *supra* note 10, at 438 n.186. Senator Hatch wrote in response to the witness's testimony: "Could you expand on how an interpretation of federal constitutional law could be wrong, that is contrary to established federal law, and yet still be a reasonable interpretation of the Constitution?" Yackle, *supra* note 10, at 438 n.186. Because he pairs the two phrases together, Senator Hatch's question suggests he viewed the statute as collapsing the "contrary to" and "unreasonable application" clauses into one another. Arguably, this could mean that Senator Hatch thought that any legal error by the state court was unreasonable if it did not conform to the federal judiciary's constitutional interpretation. This view does not conflict with this Note's argument. Senator Hatch was speaking of legal questions, not mixed questions. The statute does not impose a reasonableness inquiry on questions of law. If the state court's legal determinations do not conform to the federal judiciary's interpretation of the Constitution, the federal court may grant habeas. *See infra* Part III.

103. 28 U.S.C.A. § 2254(d)(1) (West Supp. 1997).

A. *"Contrary to . . . law"*

This clause creates a de novo standard of review by directing federal courts to deny the writ of habeas corpus unless the state court's decision was "contrary to . . . law."[104] This statement contains none of the usual language, such as "reasonable," typically associated with deferential review.[105] Moreover, while a deferential standard would preserve some incorrect state court decisions,[106] the statutory language on its face permits issuance of the writ whenever the federal court believes the state court decision is incorrect. Senator Hatch explained the "contrary to" language as follows: "Indeed, this standard gives the Federal court the authority to review *de novo* whether the State court decided the claim in contravention of Federal law."[107]

The 1996 amendment to section 2254(d)(1) did not alter the underlying de novo standard of review for legal questions. However, the newly revised statute does curtail the de novo analysis by significantly restricting the scope of that review by limiting the precedent usable in that analysis to clearly established Supreme Court decisions.[108] With these changes, a state court conviction will now be vacated by a federal writ of habeas corpus only if that conviction is inconsistent with the Supreme Court's case law as it existed at the time of the petitioner's conviction.

B. *Section 2254(d)(1) Does Not Create Procedural Deference*

One commentator suggests that section 2254(d)(1) creates a procedurally deferential standard of review.[109] He contends that prior to the passage of the 1996 amendment to section 2254(d)(1), federal courts reviewed legal questions under a "peculiar" version of de novo review by which the federal court ignored entirely the state court judgment and effectively redecided the case.[110] This differs from the "classical" understanding of de novo review, in which

104. *See* 28 U.S.C.A. § 2254(d)(1).

105. *See, e.g.*, NLRB v. International Bhd. of Elec. Workers, 481 U.S. 573, 596 (1987) (Scalia, J., concurring).

106. *See supra* text accompanying note 12.

107. 141 Cong. Rec. S7848 (daily ed. June 7, 1995) (statement of Sen. Hatch) (emphasis added).

108. *See supra* Part I.

109. *See* Yackle, *supra* note 10, at 412. One federal district court has gone further and held that the provision enacts a deferential standard for legal questions. That court reasoned that the statute's language was so similar to *Teague* that Congress must have meant to codify *Teague*. *See* Duncan v. Calderon, 946 F. Supp. 805, 812 (C.D. Cal. 1996). The *Duncan* court, however, mistakenly assumed that *Teague* creates a deferential standard of review. While § 2254(d)(1) does codify *Teague*, that case affects the scope, not the standard, of review. *See supra* section I.A.

110. *See* Yackle, *supra* note 10, at 412.

appellate courts start with, rather than ignore, the legal determinations of the state court and then independently decide whether the state court's judgment comports with federal law.[111] According to the procedural deference approach, the "contrary to" clause shifts decisionmaking from the "peculiar" habeas corpus de novo standard back to the "classical" version. This return to the classical version of habeas corpus review is called "procedural deference" because it inserts the procedural step of beginning with the state court's determination.[112]

The "procedural deference" interpretation of the "contrary to" clause is incorrect. There is no proof that federal courts ever applied a "peculiar" version of de novo review; the architect of the procedural deference understanding does not cite to any evidence substantiating such a version of habeas corpus history. In fact, Senator Edward M. Kennedy observed exactly the opposite during the debates over the 1996 amendment to section 2254(d)(1): "No one thinks that under current law the Federal courts just ignore State court decisions, even on questions of Federal constitutional law. The federal courts respect the State courts and give their decisions a great deal of attention."[113] That this observation echoes the repeated instructions of the Supreme Court[114] further suggests that the procedural deference argument rests on its own "peculiar" version of history.

Even if a peculiar standard of de novo review did exist, the controversy surrounding section 2254(d)(1) indicates that much larger problems preoccupied the statute's drafters. If the "contrary to" clause enacts procedural deference, the only concrete change in habeas corpus would be a different "focus" by federal courts.[115] While a "psychological effect" may be enough for the proponents of this interpretation,[116] it seems too small a change given the amount of attention paid by the public and Congress to section 2254(d)(1).[117]

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111. *See* Brown v. Allen, 344 U.S. 443, 458 (1953).

112. *See* Yackle, *supra* note 10, at 383.

113. 141 CONG. REC. S7809 (daily ed. June 7, 1995) (statement of Sen. Kennedy).

114. During de novo review of habeas petitions, "there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues." *Brown,* 344 U.S. at 508 (Frankfurter, J.); *see also* Wright v. West, 505 U.S. 277, 288 (1992) (plurality opinion of Thomas, J.) (citing *Brown,* 344 U.S. 443).

115. *See* Yackle, *supra* note 10, at 413 ("This difference *is* one of focus, to be sure, but it is an important difference of focus that delineates the federal court's function. In constitutional adjudication . . . it makes a good deal of practical difference whether a decision-maker shoulders initial responsibility for addressing and resolving a question or, instead, limits his judgment to whether a previous decision-maker reached the correct result. It is that *psychological effect* that § 2254(d) attempts to achieve." (second emphasis added)).

116. *See id.*

117. *See, e.g.,* William Neikirk, *Controversial Bill on Anti-Terrorism Signed,* CHI. TRIB., Apr. 25, 1996, at § 1 at 7.

Finally, and perhaps most important, the procedural deference argument is not tied to any of the statute's actual language. It never explains what effect the crucial phrase "clearly established" has on that analysis or on the language "as determined by the Supreme Court of the United States." Thus, the procedural deference standard appears to misunderstand section 2254(d)(1).

IV. The Standard For Mixed Questions

This Part addresses the "unreasonable application" clause in section 2254(d)(1) that directs federal courts to deny the writ of habeas corpus unless the state court's decision involved an "unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court of the United States."[118] When compared to its counterpart phrase "contrary to," which creates a de novo standard for legal questions, it becomes apparent that the "unreasonable application" clause creates a different standard for mixed questions. Section IV.A asserts that the "unreasonable application" clause enacts a deferential standard of review. Section IV.B defends this assertion against objections attacking its constitutionality.

A. *The Meaning of the "Unreasonable Application" Clause*

This section contends that the "unreasonable application" clause instructs federal courts to grant habeas corpus relief only if the state court's application of the law to the facts was unreasonable rather than merely incorrect. In other words, this language creates a deferential standard of review for mixed questions of fact and law.[119]

"Unreasonable" is a word commonly associated with a deferential standard of review.[120] If Congress had wanted to create a de novo standard, it could easily have used a word synonymous with "incorrect." Additionally, the legislative history makes repeated references to a deferential standard for mixed questions. For example, Senator Joseph R. Biden's criticism of the phrase "unreasonable application" demonstrates this: "[A] claim can be granted only if the State court's application of Federal law to the facts[ ] before it was unreasonable . . . . This is an extraordinarily *deferential* standard to the State courts . . . ."[121]

118. 28 U.S.C.A. § 2254(d)(1) (West Supp. 1997).

119. *See* Lindh v. Murphy, 96 F.3d 856, 870 (7th Cir. 1996) (en banc), *revd. on other grounds,* No. 96-6298, 1997 U.S. LEXIS 3998 (June 23, 1997).

120. *See* NLRB v. International Bhd. of Elec. Workers, 481 U.S. 573, 597 (1987) (Scalia, J., concurring).

121. 141 Cong. Rec. S7842 (daily ed. June 7, 1995) (statement of Sen. Biden). *See also, e.g.,* H.R. Conf. Rep. No. 104-518, at 944 (1996).

Some may argue that the "unreasonable application" language actually invokes a de novo standard of review.[122] One possible explanation for this claim can be found in Justice O'Connor's statement, albeit in a different context, that "any deviation from precedent is not reasonable."[123] Her comment suggests an alternative understanding of the word "unreasonable" that would require federal courts to issue the writ whenever they disagreed with the state court's decision — in essence invoking a de novo standard of review. Justice O'Connor's definition, however, is inapplicable to mixed question review under section 2254(d)(1). The interpretation of precedent, of which Justice O'Connor was speaking when she defined "unreasonable," is a process significantly more associated with legal question review rather than mixed question review.[124] Furthermore, there is no evidence that Congress considered such a definition when adopting section 2254(d)(1). Thus, the proper interpretation of the "unreasonable application" clause is that it creates a deferential standard of review for mixed questions.[125]

B. *A Constitutional Defense*

Some have argued that the "unreasonable application" clause cannot enact a deferential standard of review for mixed questions because such a result would offend Article III's requirement of an

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122. At least one judge has already argued for such a holding but has not explained why. *See* Drinkard v. Johnson, 97 F.3d 751, 779 (5th Cir. 1996) (Garza, J., dissenting) (claiming that this reasonableness inquiry can consider whether the federal court's analysis simply disagrees with the state court's application of law to fact and that if it finds disagreement it must grant habeas), *cert. denied,* 117 S. Ct. 1114 (1997).

123. Wright v. West, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring).

124. *See, e.g.,* Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) (describing mixed questions as ones in which "the rule of law is undisputed"); 9A WRIGHT & MILLER, *supra* note 11, § 2588, at 604-05 (describing legal question analysis).

125. President Clinton asserted that de novo review for mixed questions should be retained. *See* Statement by President William J. Clinton Upon Signing S. 735, 4 U.S.C.C.A.N. 961-1, 961-3 ("Some have suggested that [§ 2254(d)(1)] will limit the authority of the Federal courts to bring their own independent judgment to bear on questions of law and mixed questions of law and fact.... I expect that the courts, *following their usual practice of construing ambiguous statutes to avoid constitutional problems,* will read [§ 2254(d)(1)] to permit independent Federal court review of constitutional claims ...." (emphasis added)). Because President Clinton's comments demonstrate that he believed the statute's standard for mixed questions was constitutionally questionable, this arguably indicates that the proper interpretation of § 2254(d)(1) is to retain de novo review for mixed questions. *See* Yackle, *supra* note 10, at 442-43.

Presidential remarks, of course, are neither binding nor representative of legislative intent, but they may have probative value to the extent that they reflect a common understanding of the statute. In any event, President Clinton's statement is best read as a secondary interpretation. If the constitutional problems discussed *infra* section IV.B required courts to abandon the deferential reading of the statute, an alternative reading would exist. Thus any such reading of the statute is irrelevant unless and until the statute is struck down as unconstitutional.

independent federal judiciary.[126] Proponents of this view contend that Congress invades the federal judiciary's Article III sphere of power when it instructs those courts to give substantive deference to state courts' mixed question determinations. In *Marbury v. Madison*[127] the Supreme Court interpreted Article III to empower federal courts "to say what the law is." As the Court recently stated in *Plaut v. Spendthrift Farms,* Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them."[128] Requiring substantive deference to state court decisions, critics of section 2254(d)(1)'s constitutionality say, strips the federal courts of their ability to say what the law is.[129] Under the "unreasonable application" clause, federal courts would usually merely be *ruling* on cases, rubber stamping the mixed question decisions of state courts except in the rare cases when those decisions are "unreasonable." Truly *deciding* them, this argument continues, would require the federal courts to have the power to grant the writ whenever they disagreed with the state court's mixed question decision. If this constitutional attack is valid, then federal courts should follow the canon of construction that statutes are interpreted in a manner that renders them constitutional,[130] and thus must read the "unreasonable application" clause to adopt a de novo standard of review for mixed questions.

Federal courts should not accept this Article III claim for three reasons. First, Congress is constitutionally entitled to make the decisions regarding the proper scope of habeas corpus.[131] The Constitution does not require federal habeas corpus review for state prisoners; rather, Congress created it by statute.[132] Indeed, at one time Congress allowed only those habeas corpus petitions challenging the jurisdiction of the state court.[133] The restrictions imposed by the 1996 amendment to section 2254(d)(1) pale by comparison, suggesting that Congress acted on firm ground in amending the statute.

Second, section 2254(d)(1) does nothing more than create a distinction between rights and remedies, a distinction Congress routinely and constitutionally makes. The "unreasonable application"

126. *See, e.g.,* Lindh v. Murphy, 96 F.3d 856, 885-90 (7th Cir. 1996) (Ripple & Rovner, JJ., dissenting); Satch v. Netherland, 944 F. Supp. 1222, 1249 n.17 (E.D. Va. 1996); Brief for the American Bar Association as Amicus Curiae at 3, *Lindh,* 96 F.3d 856 (No. 92-CV-690).

127. 5 U.S. (1 Cranch) 137, 177-78 (1803).

128. Plaut v. Spendthrift Farms, 514 U.S. 211, 218-19 (1995).

129. *See, e.g.,* Yackle, *supra* note 10, at 407-10.

130. *See, e.g.,* Johnson v. Robinson, 415 U.S., 361, 366-67 (1974).

131. *See* Martin v. Bissonette, No. 96-1856, slip op. at 25 (1st Cir. May 29, 1997), *vacated on different grounds,* 118 F.3d 871 (1st Cir. 1997).

132. *See* Felker v. Turpin, 116 S. Ct. 2333, 2340 (1996).

133. *See* CHEMERINSKY, *supra* note 1, § 15.2, at 786.

clause similarly separates a petitioner's right and remedy; under this clause, a petitioner may have a right, because if the federal court had complete discretion it would grant the writ, but no remedy, because the State court's resolution is not "unreasonable." Such distinctions are far from uncommon.[134] For example, qualified immunity bars a remedy to plaintiffs suing executive officials under 42 U.S.C. § 1983, even when on the merits the plaintiff's rights have been violated.[135] Even within the realm of habeas corpus, the Supreme Court requires federal courts to enforce decisions they would not have made themselves.[136]

Finally, section 2254(d)(1) does not interfere with the sphere of judicial independence that Article III protects. Article III creates a federal judiciary that "'say[s] what the law is' in *particular* cases and controversies."[137] The Framers wrote Article III in response to a system in which the legislature often set aside specific judgments and ordered new trials or appeals.[138] Section 2254(d)(1), however, does not attempt to interfere with the federal judiciary's power to resolve conclusively a particular case, but instead is a valid congressional attempt to write the law for future cases.[139] Section 2254(d)(1) is simply a change in the underlying law.[140] It is one of Congress's chief functions to "make rules that affect classes of cases."[141] Congress did nothing more in section 2254(d)(1) than it did when it imposed a cap on maximum damages, or allowed for punitive damages.[142] Thus, a deferential reading of the mixed question clause should not raise a serious Article III dilemma for federal courts interpreting the 1996 amendment to section 2254(d)(1).[143]

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134. *See* Lindh v. Murphy, 96 F.3d 856, 872 (7th Cir. 1996) (en banc) (asserting that "[t]his distinction between rights and remedies is fundamental" and listing examples).

135. *See Lindh,* 96 F.3d at 873 (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

136. To illustrate, *Stone v. Powell* instructs federal courts not to grant habeas even when they find the state court to have erred on a legal question when deciding a Fourth Amendment claim. *See* Martin v. Bissonette, No. 96-1856, slip op. at 17-24 (1st Cir. May 29, 1997), *vacated on different grounds,* 118 F.3d 871 (1st Cir. 1997) (citing Stone v. Powell, 428 U.S. 465, 482 (1976)); *Lindh,* 96 F.3d at 873 (listing other restrictions on habeas courts).

137. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) (emphasis added) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

138. *See Plaut,* 514 U.S. at 219.

139. *See Lindh,* 96 F.3d at 872; THE FEDERALIST No. 81 (Alexander Hamilton) ("A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.").

140. *See, e.g.,* Duncan v. Calderon, 946 F. Supp. 805, 813 (C.D. Cal. 1996).

141. *Lindh,* 96 F.3d at 872.

142. *See Lindh,* 96 F.3d at 872.

143. *But see* Wright v. West, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring) ("We have always held that the federal courts, even on habeas, have an independent obligation to say what the law is."). Justice O'Connor's statement must be understood in context. It was made specifically in response to Justice Thomas's assertion that the Court had never explicitly recognized a de novo standard of review for legal questions in habeas. *See Wright,* 505 U.S. at 305. Article III considerations were never hinted at during that debate. It is there-

Conclusion

Responding to many constituents who view habeas corpus as exemplifying how our criminal justice system puts technicalities ahead of justice,[144] Congress fundamentally altered the core of federal habeas corpus by amending section 2254(d)(1). Federal courts must now embark on the following statutorily driven analysis. The federal court must first identify and separate the questions of law from the mixed questions of law and fact.[145] Then, when analyzing the petitioner's claims, the federal court must apply the appropriate *standard* of review: de novo review for legal questions, as specified by section 2254(d)(1)'s "contrary to" clause; and deferential review for mixed questions, as delineated in the "unreasonable application" clause. Section 2254(d)(1), however, restricts the *scope* of both types of review by allowing federal courts to use only preconviction Supreme Court precedent and those postconviction Supreme Court decisions that constitute "old rules" under *Teague v. Lane.*

There can be little doubt that Congress's action in 1996 seriously curtails federal habeas corpus review. Yet supporters of federal habeas corpus should not view seeking the writ as wasted effort. Federal habeas corpus will still serve as an avenue of relief for some prisoners unjustly convicted or sentenced by state courts. More important, perhaps, is that the politics of federal habeas corpus is a continually shifting landscape. Shaped by the competing perspectives of criminal defendants and their attorneys, civil rights advocates, victims and their families, state governments, and even by federal judges, these politics inevitably will continue to change as people struggle with the emotional subtexts of the differing approaches. The composition of Congress has already changed since the passage of section 2254(d)(1),[146] and there are even signs that the Court has begun turning away from a restrictive approach to habeas corpus.[147] While there is no doubt that section 2254(d)(1) narrowly limits relief today, there is also reason to suspect that the politics inherent in the criminal justice system will eventually reopen the path to habeas corpus.

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fore unlikely Justice O'Connor was making any broad statement regarding the interaction between Article III and federal habeas.

144. *See, e.g.*, Edwin Yoder, *Delays May Make Capital Punishment Cruel, Unusual,* Salt Lake Trib., Apr. 5, 1995, at A9, *available in* 1995 WL 3130000.

145. For a discussion of how factual questions are to be handled after the 1996 amendment, see *supra* note 82 and accompanying text.

146. *See* Eric Pianin & Clay Chandler, *Conferees to Begin Improvising on Budget Theme,* Wash. Post, July 10, 1997, at A17 (discussing Republican Party's loss of power in Congress).

147. *See* Melissa L. Koehn, *A Line in the Sand: The Supreme Court and the Writ of Habeas Corpus,* 32 Tulsa L.J. 389, 390 (1997).