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Challenging the Habeas Process Rather Than the Result

Justin F. Marceau

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Challenging the Habeas Process Rather Than the Result

Justin F. Marceau*

Abstract

Habeas scholarship has repeatedly assessed whether the Antiterrorism and Effective Death Penalty Act's (AEDPA's) limitations on federal habeas relief were as severe in practice as they appeared to be on paper. By analyzing recent doctrinal shifts—particularly focusing on two Supreme Court decisions from this Term—and substantial new empirical data, this Article acknowledges that AEDPA's bite has reached substantial proportions, in many ways exceeding the initial concerns and hype surrounding the legislation. More importantly, after acknowledging that federal habeas relief from state court convictions has become “microscopically” rare, this Article considers what the rarity of relief ought to mean as a prescriptive matter for federal oversight of state convictions.

Contrary to the dramatic proposals of scholars who have recently suggested that the general futility of habeas litigation dictates that individual, case-by-case habeas review should be abolished, this Article seeks to regain intellectual and practical traction for the longstanding view that federal courts play an important role in overseeing and enforcing the Constitution. To be sure, the path to success for state prisoners on federal habeas review has become infinitesimally narrow, but the recent scholarly interest in abandoning federal review of state convictions in nearly all circumstances other than capital cases misses the mark. This

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Article suggests that the paucity of success by habeas petitioners does not naturally or necessarily justify the abandonment of federal oversight, as the scholarly trend suggests. Instead, scholars and courts should recognize the critical role federal courts play in ensuring that the state court process is fundamentally fair. Indeed, if the primary responsibility for substantive review now rests with the state courts, the need for federal oversight of the procedures is heightened. To this end, this Article makes the case for focusing more attention on the need for challenges of process rather than result and discusses novel methods, both under § 1983 and § 2254, for bringing such litigation. By focusing federal review on the adequacy of the state process, the deterrence model of federal oversight retains a position of importance and distinction, and principles of comity, federalism, and fair process are well protected.

Table of Contents

I. Introduction	87
II. The Federal Habeas Mirage: Recognizing Federal Review as Insufficient and Unreliable	93
A. Empirical Evidence of a Narrowing Scope of Habeas Review	98
B. Recent Doctrinal Developments Substantially Undercut Federal Habeas Review	106
1. The Habeas Standard of Review in Practice: <i>Harrington v. Richter</i>	108
2. The Procedural Abyss of Federal Habeas Practice: <i>Pinholster v. Cullen</i> in Context	117
III. Considering the Consequences of a Diminished Writ: Abolish or Reorient the Writ in Criminal Cases?	125
IV. Federal Courts Have a Constitutional Duty to Remedy State Procedural Unfairness	137
V. Challenging Deficient State Procedures Through Federal Habeas Litigation	146
A. Section 2254(d)(2) as a Safety-Valve to Pinholster and Deferential Review	150

B. New Facts Creating a “New” Claim for Purposes of AEDPA Review	156
VI. Challenging Deficient State Procedures Through § 1983 Actions	166
A. Understanding <i>Skinner</i> as Permitting § 1983 Actions	168
B. The Advantages of a § 1983 Challenge to State Post-Conviction Procedures.....	171
1. Exhaustion	172
2. Section 2254(d)(1) & Factual Development.....	174
3. Class Actions and Attorney Fees.....	177
C. The Defects and Disadvantages of § 1983 Challenges to Process	181
VII. Conclusion.....	198
Appendix	200

I. Introduction

Undeterred by a robust and persistent academic commentary criticizing as constitutionally dubious the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹ the Supreme Court has consistently upheld, albeit only indirectly,² the

1. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections 18, 21, 28, and 42 U.S.C. (2006)). Scholars have leveled well-founded critiques of AEDPA’s interference with the ability of federal courts to provide a constitutional safeguard against unjust state convictions on various theories, ranging from the Suspension Clause, to the separation of powers doctrine, to the Fourteenth Amendment. *See, e.g.*, Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1239 (2008); *see also* Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 360 (2006) (arguing that the reliability of the justice system is in question until the AEDPA is repealed).

2. Although the Supreme Court has not squarely addressed the issue, the circuit courts that have considered the constitutionality of AEDPA’s central provisions, such as 28 U.S.C. § 2254(d), have upheld the enactment as constitutional. Notably, the United States Attorney General’s Office continues to intervene and vigorously defend the constitutionality of AEDPA when issues arise in the lower federal courts. *See, e.g.*, United States Response and

constitutionality of AEDPA's restrictions on federal habeas review of state criminal convictions.³ At least initially, however, AEDPA's limits on federal review seemed to result more in delay, uncertainty, and confusion than substantially diminished access to federal oversight. Leading habeas corpus scholar John Blume characterized the first decade of AEDPA litigation as substantial "hype" without any serious "bite."⁴ Both in terms of doctrinal shifts and recent empirical data, much has changed. The harshness of AEDPA's restrictions has come into focus over the past five years.

Recent decisions confirm that the tide has turned and the once academic questions of AEDPA's application are, one by one, being resolved in favor of reduced federal review. Illustrative are two of the Court's most recent federal habeas decisions, *Harrington v. Richter*⁵ and *Cullen v. Pinholster*,⁶ both of which resolve longstanding and divisive questions of habeas procedure in favor of substantially curtailing federal courts' authority to overturn a state conviction or sentence. Although it is arguable that the "hype" around AEDPA's enactment exceeded its "bite" in the years immediately following its enactment, the most recent wave of decisions as well as recent empirical data leave little doubt that AEDPA's practical bite is even more ferocious than the initial legislative bark may have suggested.⁷ Both in terms of the

Memorandum of Law in Opposition to Petitioner's Motion to Declare 28 U.S.C. § 2254(d)(1) Unconstitutional at 7 n.1, *Goforth v. Parker*, No. 5:09-cv-00352 (E.D. Ky. Apr. 29, 2011) ("While the Supreme Court has never addressed the constitutionality of Section 2254(d)(1), it has applied this provision more than thirty times (including in cases decided this Term) without questioning its constitutionality.") (on file with the Washington and Lee Law Review).

3. Although the Court has found no occasion to strike down the limitations on federal review of state convictions contained in AEDPA, in the context of executive detentions, the Court has recently reaffirmed the notion that the writ of habeas corpus is an essential bulwark against intrusions on our fundamental rights. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 742 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 588–89 (2006); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (recognizing the right of foreign nationals to challenge their detention by the U.S. government at Guantanamo Bay).

4. John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 261 (2006).

5. *Harrington v. Richter*, 131 S. Ct. 770 (2011).

6. *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

7. There has never been any debate that many of AEDPA's statutory enactments simply codified the existing habeas common law. The question,

factual development of a habeas claim and the standard of review under which the claim is considered, the Court, particularly through decisions this Term, has imposed an exceptional array of barriers to relief. In the words of Professors Nancy King and Joseph Hoffmann, federal habeas review of state convictions has become futile, illusory, and so improbable as to be “microscopic.”⁸ Indeed, these scholars regard the deterrence model of federal oversight embraced in this Article as nothing more than a misguided “fairytale.”⁹

After analyzing whether these claims about the demise of federal habeas review of state convictions have merit, this Article considers the range of responses to such a reality. As federal constitutional law becomes increasingly the exclusive domain of state courts—as state courts become the last, best hope for constitutional review of one’s conviction—certain fundamental changes in our thinking about federal review are necessary. One response—a response that has become fashionable among leading reform advocates—is to effectively abolish individualized federal habeas review.¹⁰ This Article concludes that eliminating federal oversight is not a natural or necessary consequence of diminished success on the merits but urges, instead, a re-orientation of the focus of judges and litigants.¹¹ Federal habeas review may exist

however, has been to what extent the statutory enactments present new limitations on federal review that were unknown to the common law of this area. *Cf. Duncan v. Walker*, 533 U.S. 167, 178 (2001) (explaining that Congress enacted AEDPA both to codify preexisting judge-made doctrines that restricted the habeas corpus remedy for state prisoners and to impose some new restrictions, all for the purpose of “further[ing] the principles of comity, finality, and federalism”).

8. NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* 81–84 (2011).

9. Joseph F. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 848 (2009).

10. *See* KING & HOFFMANN, *supra* note 8, at 87–108 (proposing that Congress amend § 2254 to limit the availability of case-by-case habeas review).

11. Instead of reorienting federal review toward a process-based focus, one could also bolster the effectiveness of federal review by abandoning some of the key limitations on federal habeas review. *See, e.g.*, John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 473–74 (2011) (advocating for the abandonment of limits on habeas relief such as the procedural default doctrine and § 2254(d)). This Article, by contrast, starts from the premise that a refurbished federal habeas system that is more friendly to habeas petitioners is

in a realm of diminished opportunities to overturn the merits of state court adjudications, but this dictates that federal oversight of the relevant state procedures is of increased importance. As scholars have emphasized, the nature of federal oversight must remain flexible and responsive to the current legal crises of the day,¹² and at present, challenges of process will often be at least as important as challenges to the ultimate result.

As the role of deciding the substantive law, often with binding and nearly unreviewable finality, falls to the states, it becomes increasingly important to ensure that states' post-conviction systems are procedurally fair and reliable on an individual and a systemic level. Consequently—now more than ever—it is important for prisoners to find creative ways to litigate challenges to the state process rather than litigating (or as a means of facilitating) challenges to the result. The era of exhaustive, *de novo* federal habeas review has passed, at least for the time being, and so too must the focus of federal review be redirected. Building on the conclusion from my prior work that AEDPA's deference is conditional—there is a *quid pro quo* such that states earn the newfound deference enshrined in AEDPA by developing state review systems that are sufficiently fair and reliable¹³—I now confront the question of what procedural mechanisms are available for procedural challenges to state post-conviction processes. That is to say, the scope of the writ expanded in the 1960s in response to the absence of state review, and it has recently retreated based on the assumption that federalism and comity require more deference to the now-established state post-conviction review procedures.¹⁴ But just as the *absence* of state procedures necessitated robust federal habeas review in the twentieth century, so too is federal oversight needed in the twenty-first century to ensure the *adequacy* of the

unlikely and, accordingly, urges a reform that is viable within the existing legal framework.

12. KING & HOFFMANN, *supra* note 8, at 87–108.

13. See Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254(d) Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 64–65 (2010) (contending that the AEDPA's constitutionality may be dependent upon full and fair state procedures).

14. See Blume, Johnson & Weyble, *supra* note 11, at 440–41 (describing the history of noncapital habeas corpus).

state processes in individual cases. Federal review may no longer be necessitated by the absence of state procedures, but its role in ensuring the adequacy of such procedures is no less important.

This Article, then, accepts that under the current form of post-conviction review, the state habeas systems are now the critical forum for the litigation of constitutional challenges based on facts outside the direct appeal record. More significantly, this Article posits that with this great power, state post-conviction systems have assumed a commensurate level of responsibility in terms of providing a full and fair state process.¹⁵ Consequently, if state collateral review is the last, best chance for constitutional review, then it is critical to set forth with clarity the nature and proper litigation platform for challenging procedurally unfair state processes. This Article is the first step toward envisioning a shift in focus toward challenges of process as opposed to merely the result. As set out below, there exist procedures under both the federal habeas statute, 28 U.S.C. § 2254,¹⁶ and the statute permitting civil litigation regarding constitutional violations, 42 U.S.C. § 1983,¹⁷ as interpreted this Term in *Skinner v. Switzer*,¹⁸ that provide viable methods for state prisoners to challenge the process through which their constitutional rights were adjudicated.

In Part II, I provide the critical background for understanding that state habeas procedures stand as the last, best hope, or only viable forum, for robust constitutional challenges to one's conviction. In particular, the impact of the recent decisions in *Richter* and *Pinholster* are discussed insofar as they serve to substantially alter the previous paradigm for merits review on federal habeas review. This Part also includes a modest, somewhat impressionistic original empirical study

15. Cf. Joseph L. Hoffmann & Nancy J. King, *Right Problem; Wrong Solution*, 1 CAL. L. REV. CIRCUIT 49, 52 (2010), available at <http://www.californialawreview.org/assets/pdfs/Circuit/King31.pdf> (explaining that the federal writ is a great power that requires a commensurate level of discretion on the part of federal judges, "lest the courts inadvertently drain the deep reservoir of respect that has sustained it for centuries").

16. 28 U.S.C. § 2254 (2006).

17. 42 U.S.C. § 1983 (2006).

18. *Skinner v. Switzer*, 131 S. Ct. 1289, 1298–1300 (2011) (determining that the petitioner's request for DNA testing can properly be pursued in an action under 42 U.S.C. § 1983).

analyzing AEDPA's impacts on Supreme Court decision-making. In Parts III and IV, alternative scholarly reactions to the diminished federal writ are considered. In particular, the approach suggested by Professors Nancy King and Joseph Hoffmann, which calls for the general elimination of federal habeas review, is considered and ultimately rejected. Finally, Parts V and VI introduce alternative opportunities for process-based challenges to state procedures; Part V discusses and analyzes process-based challenges through federal habeas, and Part VI presents a novel procedure for challenging state post-conviction procedures through § 1983. The advantages and disadvantages of each approach to challenging the process rather than the result are considered in light of the statutory and common-law limitations on these forms of litigation. This Article, then, recognizes that federal habeas law has reached a critical crossroads insofar as recent doctrinal shifts and empirical data suggest that challenges as to the result of state post-conviction proceedings, standing alone, will rarely succeed. By urging a model of federal review focused on challenges of process, this Article posits that the deterrence model is not dead and ought not be euthanized, as other scholars have urged; the focus of federal oversight, however, should be substantially redirected in the manner proposed by this Article.¹⁹

19. This is the first comprehensive proposal for challenging state processes since the state post-conviction systems emerged as commonplace during the period between 1950 and 1970. See *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (per curiam) (granting certiorari “to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees”). The Court, however, ultimately remanded to the state in light of the fact that while the case was pending, the state legislature enacted a statute providing for post-conviction review. *Id.* Professor Jordan Steiker has observed that although the Warren Court “consistently applied an exhaustion requirement . . . many states did not have robust post-conviction remedies for non-record claims” during this period. Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 340; see also Jordan M. Steiker, *Improving Representation in Capital Cases: Establishing the Right Baselines in Federal Habeas to Promote Structural Reform Within States*, 34 AM. J. CRIM. L. 293, 308 (2007) (“State post-conviction forums grew in response to the emergence of federal habeas corpus as an effective means for the enforcement of federal constitutional rights of state inmates. States sought to limit the fact-finding role of the federal courts by providing their own vehicles for the development of non-record evidence.”).

*II. The Federal Habeas Mirage: Recognizing Federal Review as
Insufficient and Unreliable*

After decades of failed legislative attempts to substantially limit federal habeas review, in the immediate wake of the 1995 Oklahoma City bombing, the Republican Congress passed, and President Clinton signed into law, the Antiterrorism and Effective Death Penalty Act.²⁰ Though the Act's name suggests a focus on antiterrorism and the death penalty, the functional centerpiece of the Act, 28 U.S.C. § 2254, fundamentally altered federal habeas corpus review for all state prisoners, whether or not they were charged with terrorism or a capital crime.²¹ Section 2254 applies to all prisoners challenging their state conviction²² and serves to prohibit federal habeas relief for any claim

20. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (codified in part at 28 U.S.C. §§ 2244–2267 (2006)); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 447 (2007).

21. The only death-penalty specific provisions of AEDPA were limitations on the time within which federal habeas judges had to decide a case and an accelerated statute of limitations. 28 U.S.C. §§ 2244(b), 2261(b), 2263(a)–(b), 2264(a), 2266(b)–(c). These provisions, however, were conditioned on a state “opting-in” by satisfying certain conditions, such as providing experienced counsel to defendants during state post-conviction review. *Id.* To date, no state has effectively opted in and gained the only AEDPA advantages unique to capital cases. 28 U.S.C. §§ 2244(b), 2261(b), 2263(a)–(b), 2264(a), 2266(b)–(c).

22. Habeas relief is entirely unavailable to persons who are not in custody. This means that a person convicted of an offense but not sentenced to any custodial term is not entitled to the habeas remedy. *See, e.g.,* Carafas v. LaVallee, 391 U.S. 234, 237–38 (1968) (holding that a habeas action that is filed while the prisoner is in custody does not become moot because the prisoner is released while the habeas petition is pending). To be sure, “the combined effect of the exhaustion and custody requirements” has led to a decline in the number of persons convicted in state court who are eligible to file for federal habeas relief. KING & HOFFMANN, *supra* note 8, at 73 (describing the custody requirement as having “choked off federal habeas review”). Contrary to King and Hoffmann’s assumption, however, the existence of a short sentence, or even a mere sentence of probation, does not necessarily dictate that the defendant will not be able to exhaust state remedies and file a federal habeas petition. *Compare id.* (noting that only “two of every five people convicted of felonies in state court are actually sentenced to prison” and that “most will . . . never have the chance to seek a writ of federal habeas corpus because they will be sentenced to less than five years and . . . serve less than three”), *with* BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 1:9 (2010) (“A person who is on parole or probation at the time he files his federal habeas petition satisfies the custody requirement.”).

“adjudicated on the merits” by the state court unless one of three exceptions is satisfied: (1) the state court decision was “contrary” to clearly established federal law; or (2) the state court decision involved an unreasonable application of clearly established federal law; or (3) the state court decision was based on an unreasonable determination of the facts.²³ For these purposes, a state court decision is said to be contrary to federal law only if the state court applies an interpretation of federal law that is “diametrically different” or “mutually opposed” to the binding Supreme Court interpretation of the provision, or if the state court “confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a [different] result.”²⁴ Similarly restrictive, a state court adjudication is “unreasonable” only if the state prisoner can demonstrate something “substantially” more than a constitutional error—that is, if “fairminded jurists” could so much as reasonably disagree about the decision of the state court, then federal habeas relief is not available.²⁵ To be sure, “an unreasonable application of federal law is different from an incorrect application of federal law.”²⁶

AEDPA’s reforms were, almost immediately, greeted by the legal academe with a vast expression of fear and loathing. Professor James Liebman captured the sentiment of many academics on the topic: “Dwarfed among the many unspeakable evils that [Timothy] McVeigh wrought is a speakable one . . . , namely, the so-called Antiterrorism and Effective Death Penalty Act of 1996.”²⁷ Stated more directly, there was a fear among

23. 28 U.S.C. § 2254(d)(1). As discussed in more detail later in the Article, § 2254(d)(2) is a potential exception to the deference prescribed by (d)(1). To date, however, the Court has made no effort to elaborate on the scope and function of the (d)(2) escape hatch. See Marceau, *supra* note 13, at 57–59 (noting that the Court has yet to decide the proper interpretation of § 2254(d)(2)).

24. See *Williams v. Taylor*, 529 U.S. 362, 406 (2000) (“On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner’s case would not fit comfortably within § 2254(d)(1)’s ‘contrary to’ clause.”).

25. *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011).

26. *Id.* at 785 (emphasis omitted) (internal quotation marks omitted) (quoting *Williams*, 529 U.S. at 410).

27. James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 411–12 (2001).

scholars and practitioners that AEDPA was effecting a *sub rosa*, procedural evisceration of the critical constitutional protections of the Bill of Rights incorporated against the states by the Warren Court.²⁸ As I have previously explained, “[t]he hallmark of incorporation under the Fourteenth Amendment, or more precisely, selective incorporation, is the promise that constitutional rights must apply with the same force and breadth in each of the fifty states, a promise that is impossible to realize under the strictures of [AEDPA].”²⁹ The enactment of AEDPA, then, was accompanied by predictions that federal habeas had been “dramatically altered” to the detriment of our constitutional democracy.³⁰

In the first several years after AEDPA’s enactment, however, the Supreme Court granted relief in several cases under AEDPA.³¹ Moreover, the most notable cases were grants of

28. See, e.g., *id.* at 420–21; see also Stevenson, *supra* note 1, at 360. Alan Chen similarly observed that the AEDPA would handcuff federal courts and relegate a substantial amount of constitutional litigation to the realm of shadow law. Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 539 (1999).

29. Marceau, *supra* note 1, at 1232. Of course, not all scholars agree that the denigration of the Great Writ is a negative legal development. Professors Joseph Hoffmann and Nancy King believe that federal habeas has largely outlived its utility and argue that, rather than “pouring tax dollars down the [habeas] drain[,]” we should leave post-trial review of constitutional defects “to the state courts.” Hoffmann & King, *supra* note 9, at 796; see also Hoffmann & King, *supra* note 15, at 52 (“[T]he particular crisis of federalism that gave rise to [the Writ’s] twentieth-century expansion has long since passed . . .”). Notably, King and Hoffmann’s suggestion has been adopted in function—though not in form—by the Supreme Court—that is, constitutional review is largely delegated to state courts following the Court’s recent decisions; however, the time and costs associated with federal review, which animates the Hoffmann and King proposal, have not been alleviated.

30. See, e.g., Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 702 (2002). Many other scholars and commentators joined this apparent consensus. *Contra* Hoffmann & King, *supra* note 15, at 53–54; Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 888–93 (1998).

31. For example, between 2000 and 2005, there were three Supreme Court decisions granting relief under AEDPA based on ineffective assistance of counsel. There are no prior Supreme Court decisions granting relief on this basis. See *Rompilla v. Beard*, 545 U.S. 374, 379–80 (2005); *Wiggins v. Smith*, 539 U.S. 510, 518–19 (2003); *Williams v. Taylor*, 529 U.S. 362, 367 (2000); see also Blume, *supra* note 4, at 280 (discussing this phenomena). Also noteworthy

habeas relief on the basis of ineffective assistance of counsel claims under *Strickland v. Washington*,³² a constitutional claim that the Court itself had *never* granted habeas relief on prior to the enactment of AEDPA.³³ This spat of post-AEDPA victories, among other things, led a prominent habeas scholar to conclude, perhaps aspirationally, that the impact of the AEDPA reforms was actually much less than it seemed. As Professor John Blume emphatically summarized the state of the law up through 2005, “AEDPA has been less ‘bite’ than ‘hype.’”³⁴ Simply put, AEDPA had not achieved “the far reaching effects that many predicted.”³⁵

This is no longer true. In light of recent developments in the interpretation and application of AEDPA, and in view of available empirical data, the conclusion is unmistakable that AEDPA’s bite, though perhaps slow to manifest symptoms, has gradually and systemically infected and undermined the federal habeas infrastructure. As Professor Blume did in 2005, I measure the impacts of AEDPA based on two metrics: (1) changes in substantive and procedural habeas doctrine under AEDPA as compared to the pre-AEDPA habeas common law; and (2) available empirical data—both a comprehensive 2007 study of district court habeas cases and a more modest original empirical project that mirrors the empirical work done by Blume on this question but updates and broadens the scope of data. Based on empirical data I gathered, the 2007 empirical study funded by the Department of Justice, and, most importantly, doctrinal shifts in the law, this Article conclusively demonstrates that AEDPA has now developed into a major barrier to relief for state prisoners. As

is the fact that in 2000, state prisoners prevailed in four of the six habeas cases arising under AEDPA in the Supreme Court.

32. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (determining that to grant habeas relief on an ineffective assistance of counsel claim, a plaintiff must show both that “counsel’s representation fell below an objective standard of reasonableness” and that the “deficient performance prejudiced the defense”).

33. Blume, *supra* note 4, at 279–80.

34. *Id.* at 261.

35. *Id.* at 274. Other leading scholars echoed this sentiment. Professor Larry Yackle, for example, in describing AEDPA’s effect on access to an evidentiary hearing noted that “on reflection I am not sure any really dramatic change is afoot.” Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 144 (1996).

Professors King and Hoffmann have similarly observed, “the Supreme Court and Congress clearly no longer perceive the need for more aggressive federal habeas oversight of the state courts in non-capital cases.”³⁶ Much more so than in the pre-AEDPA era, state prisoners now face unique procedural barriers and one of the most uncharitable standards of review known to law.

In sum, one might fairly describe AEDPA’s impact on Supreme Court review as having three stages. The initial stage preceded some or all of the Supreme Court’s decisions addressing AEDPA and was characterized by substantial and vocal opposition and criticism—this was the “hype.”³⁷ The next stage of AEDPA’s application was characterized by the Court’s willingness to grant relief in a handful of post-AEDPA cases in the early 2000s, creating a correspondingly lessened interest by the academic world in AEDPA. With a diminished bite, the AEDPA-based concerns seemed less immediate or crucial. And now, just as the fervent opposition to AEDPA has become less vocal, or at least less widespread among academics, the Court has entered a third phase in which the application of AEDPA has evolved so as to become increasingly harsh and the reversal of federal courts who disturb state court convictions increasingly brazen.³⁸ The remainder of this Part substantiates the claim that federal habeas review by the Supreme Court has evolved to the point where it is, both from an empirical and a doctrinal matter, substantially hostile to the efforts of state prisoners who attempt to have their conviction or sentence set aside.

36. Hoffmann & King, *supra* note 15, at 53.

37. See Blume, *supra* note 4, at 274–87 (describing the “hype” surrounding AEDPA).

38. The tone of recent Supreme Court decisions is itself worthy of attention. Repeatedly this Term, the Supreme Court has reversed grants of habeas relief by the lower courts in sternly worded decisions that accuse the lower courts of judicial dereliction and “disregard.” See, e.g., *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011); *Premo v. Moore*, 131 S. Ct. 733, 740–45 (2011); see also *Cavazos v. Smith*, No. 10-1115, 2011 WL 5118826, at *9 (U.S. 2011) (Ginsburg, J., dissenting) (*per curiam*) (stating that “the Court is bent on rebuking the Ninth Circuit for what it conceives to be defiance” as to the proper standard of review required under AEDPA).

A. Empirical Evidence of a Narrowing Scope of Habeas Review

Analyzing federal habeas corpus cases in the Supreme Court from 1990 to 2005, Professor Blume concluded that the data was emblematic of the old saying, “What if you gave a revolution and nobody came?”³⁹ Blume examined the 105 Supreme Court cases reviewing state convictions on habeas during this period—sixty-one were pre-AEDPA and forty-one were governed by AEDPA—and found that AEDPA was having no impact on the success rates of state habeas petitioners.⁴⁰ Specifically, Blume’s data from 1990 through 2005⁴¹ shows that the pre-AEDPA petitioners prevailed 33% of the time and the post-AEDPA petitioners succeeded in 34% of the cases before the Court.⁴² These numbers Blume argued, supported the conclusion that many of the hardships imposed on prisoners by AEDPA were, in reality, already imposed under pre-AEDPA, court-created doctrines.⁴³

By updating Blume’s data and expanding the range of years studied, one is left with the impression that, as an empirical matter, Blume’s conclusion no longer holds true. I have updated Professor Blume’s empirical data so that it now runs from 1985 through 2011 (as compared to 1990 through 2006).⁴⁴ Most

39. Blume, *supra* note 4, at 260.

40. *See id.* at 276 (noting no statistical difference between petitioner success pre- and post-AEDPA).

41. It may seem anomalous that even after 1996, the year of AEDPA’s enactment, there were still pre-AEDPA cases. The explanation is that Amendments made to 28 U.S.C. §§ 2244–2267 (2006) by AEDPA do not apply to cases pending in federal court on April 24, 1996—AEDPA’s effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (determining that AEDPA’s Amendments apply “only to cases filed after the Act became effective”).

42. Blume, *supra* note 4, at 277.

43. It is possible that Professor Blume’s finding that AEDPA had not had much effect fails to account for the fact that AEDPA may have discouraged many prisoners from even filing a petition. Knowing they were time barred, or aware of how onerous relief had become, it is possible that petitioners were discouraged from filing habeas petitions and, as such, the effective rate of denial may have gone up. *See KING & HOFFMANN, supra* note 8, at 70 (charting the declining rate of habeas filings by state prisoners).

44. The data was gathered by using the SCT database on Westlaw and running the following search: habeas & da(aft 1984). The search produced 2,789 results. Each of the results was screened, and the cases that were not federal habeas appeals from state prisoners were filtered out. We also filtered out certiorari denials, certiorari grants, dismissals, and any orders or summary (no

significantly, then, my data examine the Supreme Court's decisions in habeas cases brought by state prisoners from 2006 through 2011, critical years of AEDPA development that were not yet available at the time of Blume's study, and it provides a larger set of non-AEDPA cases for purposes of comparison.⁴⁵ Whereas Blume's study considered only 63 pre-AEDPA cases and 41 AEDPA decisions, my dataset includes 182 non-AEDPA cases and all 115 of the AEDPA decisions to date.⁴⁶

opinion) decisions. The result is that some decisions, though they contain significant reasoning, are not part of the dataset. *See, e.g.* *Medellin v. Dretke*, 544 U.S. 660, 666–67 (2005) (discussing the impact of AEDPA on various claims but ultimately dismissing the case as improvidently granted). In order to minimize errors in the data collection, at least three people reviewed all of the cases and the coding. I personally reviewed the coding of all of the cases included in the dataset. The citations and prevailing party for each case are reproduced in the appendix. Notably, my dataset is not identical to Blume's for the years that were also covered by that study, 1990–2005. While I have included all of the cases in his study, I have included additional habeas cases decided by the Court that were, for reasons not explained, not part of Blume's dataset. I have included twelve cases that were not part of Blume's study, each of which is denoted by an asterisk in the appendix. Although the data gathering involved the manual review of many cases, this study could be replicated. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 38–45 (2002) (“Research must be replicable.”).

45. Any empirical analysis that is limited to Supreme Court appeals is subject to a selection effect. Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 300–01 n.224 (1995) (“Under what is known as the ‘selection effect,’ the pool of cases that reaches the trial and appellate courts is not representative of the entire body of disputes in the legal system.”); *id.* (compiling sources discussing the selection effect). Assuming, however, that the selection effect is relatively constant over time, the comparative results between my study and Blume's should not be affected. The recent changes of Supreme Court personnel have tended, as a general matter, to maintain the status quo on the Court without any major ideological shifts to the left or the right, and, other than AEDPA itself, there have not been other major legislative developments that would make habeas relief more or less likely. I have not attempted to control for these changes because to do so would require modeling of variables such as judicial behavior that are difficult or impossible to quantify with precision.

46. Defining the “winner” of habeas cases is not always easy. The gradual accretion of habeas doctrine means that even a case that reflects a win for an individual may represent a loss for habeas petitioners more generally. A holding might, for example, narrow the set of claims that are eligible for relief, and yet find the petitioner before the Court within the narrowed set. It is true that, in this way, “winners can be losers’ and visa versa.” Blume, *supra* note 4, at 278 n.104. Likewise, in some cases the prisoner wins on the seminal issue, but loses on smaller issues. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 680–81 (1993) (refusing to apply *Stone* bar on habeas review to *Miranda* claims and remanding

My study of Supreme Court decisions, suggests that there may have been a lag time or period of time during which the Court proceeded with caution as it familiarized itself with AEDPA.⁴⁷ The updated dataset, including the years from 2006 to 2011, demonstrates that this unofficial grace period is over. Between 2006 and 2011, nearly every habeas case reviewing a state prisoner's conviction arose under AEDPA, and, by contrast, in the first two years of AEDPA's existence, 1996 and 1997, there was only one AEDPA case adjudicated in the Court.⁴⁸ The

on this issue, but reversing the grant on the grounds of involuntariness).

Moreover, this study counts as a "win" for both outright grants of relief by the Court as well as cases in which the Court reverses a denial of relief by the lower court and remands for further review. Obviously, this latter category of victory is contingent, and may reflect only a short, rather Pyrrhic victory under AEDPA; it is, nonetheless, a victory for that prisoner at that moment in an AEDPA case. To this extent, a reversal of a lower court denial of relief accompanied by a mere remand is fairly characterized as a victory in the Supreme Court, and likewise, a reversal of a grant of relief accompanied by a remand can reasonably be considered a loss for the prisoner. In light of these limitations, however, I readily concede that the data compiled herein, classified as it is in binary form and limited to Supreme Court cases, is probably less revealing than the discussion elsewhere in this Article examining the doctrinal developments that illuminate unequivocally the "bite" of AEDPA.

47. In studying the impact of AEDPA, I have focused only on those cases for which AEDPA's provisions have been directly applied in a reasoned opinion—that is, the cases examined are only cases of state prisoners challenging the constitutionality of their detention through federal habeas. In this way, the dataset reflects only a study of the impact of AEDPA—positive, neutral, or negative—on those cases for which AEDPA's statutory terms are relevant. One could re-orient this study to include, for example, the recent wave of cases that challenge executive detentions at Guantanamo or immigration detentions and perhaps get different results. Because my goal was to estimate the impact of AEDPA in Supreme Court decisions, I did not consider cases for which AEDPA was clearly irrelevant. The dataset also includes only reasoned opinions and not summary orders dismissing a case as improvidently granted, or granting certiorari, vacating the decision below, and remanding. *See Zant v. Moore*, 489 U.S. 836 (1989); *Webster v. Cooper*, 130 S. Ct. 456 (2009). If, however, the GVR or summary reversal took the form of a reasoned opinion, even if relatively brief, then it was included. *See Terrell v. Morris*, 493 U.S. 1 (1989); *Dye v. Hofbauer*, 546 U.S. 1 (2005); *Schriro v. Smith*, 546 U.S. 6 (2005); *Corcoran v. Levenhagen*, 130 S. Ct. 8 (2009); *see also Medellin v. Dretke*, 544 U.S. 660 (2005) (excluded from my dataset because the case was dismissed as improvidently granted despite the fact that it contains a substantial reasoned majority opinion as to the application of AEDPA to the claims in question).

48. During the relevant time period, from 2006 through 2011, the Court only decided a few pre-AEDPA cases, two of which were merely summary reversals of the Ninth Circuit Court of Appeals. *See generally Bobby v. Van*

commonplace nature of AEDPA cases before the Court has allowed a fuller scope of the AEDPA limitations to be revealed in recent years. The doctrinal shifts resulting from these new and more frequent cases are discussed below, but the rate of prisoner success in these cases, therefore, provides impressionistic empirical data in support of the conclusion that AEDPA's bite has become severe.⁴⁹

As indicated in Table 1, the rate of relief in all non-AEDPA cases from 1985 through 1995, the decade preceding AEDPA's enactment, was 37.5%, and the rate of success for cases not governed by AEDPA in the Court from 1985 through 2011 was nearly 35%. By contrast, the Supreme Court has issued 91 opinions in cases for which AEDPA applies since the legislation was enacted in 1996, and the rate of relief in those cases is only 27.4%.⁵⁰

Table 1. Rate of Success in Habeas Cases 1985-2011

Category of Case	Success Rate of Prisoner
1985–1995 (pre-AEDPA cases)	37.5% (36/96)
1985–2011 (non-AEDPA & pre-AEDPA cases)	34.8% (47/135)
1996–2011 (AEDPA cases)	27.4% (25/91)

Whereas Table 1 allows for a comparison of the pre-AEDPA cases and the AEDPA cases across the entire period of AEDPA's existence, Table 2 looks at the data in five-year increments.

Hook, 130 S. Ct. 13 (2009) (per curiam); *Wong v. Belmontes*, 130 S. Ct. 383 (2009) (per curiam).

49. For example, during 2010 and 2011, only three state prisoners out of eighteen, or roughly 16%, prevailed on a habeas petition before the Supreme Court, a dramatic downtick from previous years.

50. To be sure, some of the cases in which relief was denied post-AEDPA would have come out the same way under pre-AEDPA law. *See, e.g.*, *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2265 (2010) (determining that prejudice could not be shown, even under de novo review); *Whorton v. Bockting*, 549 U.S. 406, 409 (2007) (holding relief is barred by *Teague v. Lane*, 489 U.S. 288 (1989), which laid out the framework for when to retroactively apply a new rule to an old criminal case).

Specifically, from 1996 through 2011 there have been 91 total AEDPA cases, and the prisoners have prevailed in 25 of the cases. There are only 39 non-AEDA cases for this entire period.

Table 2. Rate of Success in 5 year Increments after AEDPA's Enactments

	1996–2000	2001–2005	2006–2011 ⁵¹	2010–2011
AEDPA	50% (5/10)	22.8% (8/35)	23.9% (11/46)	13.6% (3/22)
Non-AEDPA ⁵²	25% (5/20)	36.3% (4/11)	25% (2/8)	x

Table 2 provides support for the view that there was an informal grace period for AEDPA cases in the Supreme Court during which time the full force and scope of the statutory reforms had not been realized. Initially, very few AEDPA cases reached the Court, and the rate of success in these initial cases was surprisingly high. Whereas the first 19 prisoners (1996–2001) succeeded at a rate of over 45% (6/13), the last 24 prisoners (2010–2011) have succeeded at a rate of about 14%. The percentage of cases that are governed by AEDPA is approaching 100%, and the rate of success in these cases is plummeting.⁵³

To avoid the distortions of small datasets, it is most useful to compare a robust sample of cases. From 1985 through 1995, for example, 132 non-AEDPA cases were decided, and the rate of

51. The period from 2006 through 2011 is six years rather than five.

52. The non-AEDPA data is being provided in five-year increments in the interest of having a complete census of the cases in the post-AEDPA era, but the number of cases is likely too small for meaningful statistical inference.

53. It is worth briefly noting that there is one anomaly in the data that defies easy explanation. Although the rate of success for all non-AEDPA cases from 1985 through 2011 is roughly 35%, in the thirty-nine non-AEDPA cases from 1996 through 2011, relief was only obtained 28% (11/39) of the time. One might suggest that this low rate of success for non-AEDPA prisoners reflects a general mood shift away from habeas relief in the AEDPA era. Or, perhaps, it tends to confirm Blume's conclusion that AEDPA had no consequence, at least in terms of the raw rate of success for prisoners before the Court. But the dataset for post-AEDPA cases that are not governed by AEDPA is relatively small, only thirty-nine total cases spread across sixteen years. A similarly small dataset reveals rates of success under AEDPA of only 14.2% for the past two years. Both datasets are likely too small to make meaningful statistical inferences.

success for prisoners was 37.5%. That is to say, for the eleven years leading up to the enactment of AEDPA, state prisoners were victorious in the Supreme Court in one out of every 2.6 cases. By contrast, considering all 91 AEDPA cases from 1996 through 2011, the rate of prisoner success was only 27.7%, or one out of every 3.6 cases. The data demonstrate, consistent with the doctrinal narrative presented in the next section of this paper, that the rate of success for habeas prisoners has declined.

More to the point, the contrast between all AEDPA cases (1996–2011), and all non-AEDPA cases for the eleven years prior to AEDPA's enactment (1985–1995) reveals a stark drop in the rate of success, suggesting the bite of AEDPA has taken hold. To be sure, one could argue that comparing data from 1985–1995 to data from 1996–2011 is unrevealing as to AEDPA's relative impact insofar as the court's pre-AEDPA jurisprudence was more generous to state prisoners in the 1980s and early 1990s than it was later in the 1990s.⁵⁴ As a practical matter, however, all of the judicially imposed limitations on habeas relief, including the *Teague* decision,⁵⁵ had been handed down by 1995, making this a valuable, if not conclusive, range for comparison. Indeed, Professor Blume identified ten key pre-AEDPA “cutbacks” on habeas relief that occurred prior to AEDPA and made AEDPA somewhat redundant and superfluous; all ten of these major developments occurred prior to 1995.⁵⁶

54. See, e.g., Blume, *supra* note 4, at 266–70, 276, 280 (discussing the Court's creation and use of new rules and limitations on habeas, especially in the late 1980s and early 1990s, noting most of the Court's habeas modifications were in place by 1990, and stating the Court's reforms had significantly diminished the writ's potency by the time of AEDPA); see also Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 10–11 (1997) (contrasting the previous retroactivity standard with the Court's approach in *Teague v. Lane*, 489 U.S. 288 (1989), which used an “extremely expansive definition of what would count as ‘new’ for habeas purposes” and thus greatly reduced the number of claims that could survive).

55. See *Teague v. Lane*, 489 U.S. 288, 299–306, 310 (1989) (stating that retroactivity of a new rule of constitutional criminal procedure is a threshold issue, and asserting that “new constitutional rules of criminal procedure will not be applicable to those cases that have become final before the new rules are announced” unless certain limited exceptions apply).

56. See Blume, *supra* note 4, at 265–68 (noting the Court's habeas reform efforts from the 1970s to the 1990s).

A second and more salient critique of my study is that a study of relief in the Supreme Court is unreflective of the broader trends among lower courts regarding the likelihood of relief.⁵⁷ I am also willing to concede this point and note, as Professor Blume did in 2006, that this is “a limited empirical argument.”⁵⁸ However, just as Professor Blume looked exclusively at success rates from the Supreme Court in order to support his claim that the likelihood of success with or without AEDPA deference was “remarkably stable,”⁵⁹ I look at success rates in the Supreme Court in order to argue that while the AEDPA picture was initially stable, it is no longer so. My data suggest that the “arcane statutory language” used in AEDPA and the suddenness with which “Congress enacted AEDPA”⁶⁰ may have caught the Court off guard, slowed the impacts of the statutory reform, and created a sort of AEDPA grace period. But the grace period appears to be over. The data reflected in Tables 1 and 2, although not conclusive, are usefully predictive of a downward trend in the rate of success for state prisoners in the Supreme Court, and it seems likely that as the rate of success in the Supreme Court diminishes, lower courts seeking to avoid reversal will also become more parsimonious with grants of relief to habeas petitioners.

Finally, other available post-AEDPA research tends to corroborate the findings of the original empirical study I have presented here. Any empirical claim about the impacts of AEDPA would be substantially incomplete if it failed to reference the impressive empirical study completed in 2007 by Professors Nancy King, Fred Cheesman, and Brian Ostrom, with funding from the Department of Justice.⁶¹ There does not appear to be

57. See Chen, *supra* note 45, at 300 n.224 (discussing authority regarding the selection effect problem); cf. Brian Z. Tamanaha, *The Distorting Slant of Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 707 (2009) (noting that in quantitative studies of judicial politics there is a “lopsided” focus on the Supreme Court. This “disproportionate focus is not itself what misleads.” Instead the “problem arises when scholars loosely slip from making assertions about judging on the Supreme Court to assertions about judging generally”).

58. Blume, *supra* note 4, at 276.

59. *Id.* at 277.

60. *Id.* at 261.

61. See NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY

any consensus about the rate at which habeas relief was ultimately granted to state prisoners prior to AEDPA. Professors King and Hoffmann have speculated that “[e]xcluding capital cases, success rates for state prisoners in habeas probably never approached double-digit percentages.”⁶² Wright and Miller, for example, estimated, based on available studies, that no more than 4% of habeas petitioners were granted relief.⁶³ Another study found that, prior to AEDPA, relief was granted in 40% of the capital habeas cases.⁶⁴ The DOJ-funded 2007 study, by contrast, found that relief was granted in district courts in 0.35% of non-capital cases (7/1986), and in 12% of capital cases (33/267) after AEDPA.⁶⁵ By any measure, and based on any available pre-AEDPA data, the 2007 study suggests that relief is granted in substantially fewer cases under the AEDPA.⁶⁶

STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 9, 10 (2007), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> (“Each year, more than 18,000 cases, or one out of every 14 civil cases filed in federal district courts, are filed by state prisoners seeking habeas corpus relief . . .”).

62. KING & HOFFMANN, *supra* note 8, at 89.

63. Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 103 n.108 (1988) (citing WRIGHT & MILLER, PRACTICE AND PROCEDURE § 3261 (1981)).

64. See JEFFREY FAGAN, ET AL., FINAL TECHNICAL REPORT: GETTING TO DEATH: FAIRNESS AND EFFICIENCY IN THE PROCESSING AND CONCLUSION OF DEATH PENALTY CASES AFTER *FURMAN* 7, 56 (2004), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/203935.pdf> (reporting the conclusions of a study that considered more than 5,000 decisions in capital sentences and found that 40% were reversed by state courts performing federal habeas review and 40% were reversed by federal habeas courts).

65. KING ET AL., *supra* note 61, at 64. This study only takes into account rates of relief in the trial court. Commentators who have considered the rate of relief including appeals have suggested that the rate of relief might actually be substantially higher. See Blume, Johnson & Weyble, *supra* note 11, at 452 (“[A]ccording to our data, the set of successful noncapital cases grows by 22% when appellate outcomes are considered.”).

66. KING ET AL., *supra* note 61, at 59 n.109.

The study also notes another source of empirical data regarding the impacts of AEDPA: In 2003 Judge Weinstein took on 500 non-capital habeas cases that had been pending in the Eastern District of New York for up to six years. . . . The concentrated disposition of 500 cases provides a statistical snapshot of post-AEDPA habeas processing by one judge in one federal district. He granted relief in 9 of the 494 cases terminated without transfer, a grant rate of 2.0%. This is nearly

B. Recent Doctrinal Developments Substantially Undercut Federal Habeas Review

Professor Blume supported his conclusion that AEDPA was over-hyped in 2005 not just through his empirical analysis of Supreme Court cases but also by considering the scope and effect of doctrinal shifts wrought by the AEDPA regime.⁶⁷ Blume concluded that the habeas framework itself had not, contrary to the fears and predictions of commentators, substantially shifted to the detriment of the petitioners.⁶⁸ This too has changed. In the past five years, the procedures and standards governing federal habeas review have substantially evolved so as to reduce the power of federal courts to reverse unconstitutional state convictions.⁶⁹ The viability of federal habeas review has been substantially undercut, and perhaps no single Term has been more devastating for the modern habeas petitioner than the Court's 2010–2011 Term.

six times higher than the grant rate of 0.35% in our nationwide sample.

67. See Blume, *supra* note 4, at 271–74 (describing the special expedited capital case “opt-in” provision and § 2254(d) of AEDPA, highlighting that no state has successfully opted into the expedited capital provisions, and stating the Court has “said little about how § 2254(d) works beyond that it limits a federal court’s power to grant relief”).

68. See Blume, *supra* note 4, at 260–61, 297 (noting that the Supreme Court has been as active after AEDPA as it was before, and the success rate of petitioners remained essentially unchanged after AEDPA’s passage).

69. See, e.g., *Renico v. Lett*, 130 S. Ct. 1855, 1859 (2010) (“Because AEDPA authorizes a federal court to grant relief only when a state court’s application of federal law was unreasonable, it follows that [t]he more general the rule’ at issue . . . ‘the more leeway [state] courts have in reaching outcomes in case-by-case determinations.’” (first and third alterations in original) (citation omitted)); *Fry v. Pliler*, 551 U.S. 112, 119, 121–22 (2007) (stating that AEDPA limits habeas and holding that a habeas “court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the ‘substitute and injurious effect’ standard, whether or not the state appellate court recognized the error and reviewed it for harmlessness” (citation omitted)); *Shriro v. Landrigan*, 550 U.S. 465, 474 (2007) (noting AEDPA’s prohibition of relief unless the state court’s determination was unreasonable rather than incorrect is a “substantially higher threshold” and stating that, when determining whether to grant an evidentiary hearing, a federal court must take the deferential standards from § 2264 into account).

Two recent Supreme Court decisions, *Harrington v. Richter*⁷⁰ and *Cullen v. Pinholster*,⁷¹ are illustrative of the recent might of AEDPA's bite. These decisions substantially fill out the doctrinal contours of § 2254(d) by answering longstanding questions about the scope of federal habeas review post-AEDPA.⁷² Both decisions interpret § 2254(d), the modern centerpiece of federal habeas practice, so as to limit state prisoners' access to Writ.⁷³ As developed in detail below, the thrust of these two decisions is to simultaneously limit both the form and the function of federal habeas corpus practice. *Pinholster* alters the form or procedures of habeas practice by holding that new evidence, not originally part of the state court record generally, "has no bearing" on the federal court's review of the state court decision.⁷⁴ The *Richter* decision, by contrast, limits the functional work or substantive merits review of a federal habeas court⁷⁵—that is to say, *Richter* elaborates on the narrow set of circumstances in which a federal court may disturb a state conviction. Just this Term, then, the Court has considerably clarified the constricted nature of the procedures available for federal habeas review as well as the

70. *Harrington v. Richter*, 131 S. Ct. 770 (2011).

71. *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

72. The issue presented in *Richter*, for example, had remained the subject of heated debate since AEDPA's enactment. More than seven years ago, Professor Evan Lee foresaw the risk of deference to summary state dispositions and counseled against such an approach. See Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L.J. 283, 284 (2004) ("One of the most pressing issues is how federal habeas courts should review 'silent' state court decisions—that is, summary affirmances or summary denials of relief, or opinions that dispose of whole claims in a perfunctory manner.").

73. See Scheidegger, *supra* note 30, at 945 (recognizing § 2254(d) as the defining feature of the AEDPA statutory regime).

74. *Pinholster*, 131 S. Ct. at 1400.

75. See *Harrington*, 131 S. Ct. at 786–87 (stating § 2254(d) requires that "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"). I am not the first commentator to consider the standard of review language in § 2254(d)(1) to be one of AEDPA's few substantive limitations on relief. Leading scholar Larry Yackle, for example, has observed, "One provision in AEDPA, 28 U.S.C. § 2254(d)(1), is more substantive." Larry Yackle, *Federal Habeas Corpus in a Nutshell*, HUMAN RIGHTS MAGAZINE, Summer 2001, at 8.

nature of the ultimate merits adjudication. In the wake of these decisions, it is difficult to take seriously the claim that federal habeas serves as a meaningful check on state post-conviction proceedings.⁷⁶ As this subpart demonstrates, it is increasingly clear that state collateral review is the last best chance for constitutional review; the substantive deference⁷⁷ owed to state courts provides a narrow window for achieving success on the law, and the constricting procedural rules ensure that federal habeas relief based on newly developed facts will be similarly difficult.

*1. The Habeas Standard of Review in Practice:
Harrington v. Richter*

As previously mentioned, Professor Blume's view in 2005 was that the dire predictions about AEDPA's impact far outpaced its practical effect.⁷⁸ And other leading scholars shared this view. In the months just after AEDPA's enactment, for example, Professors Larry Yackle and Mark Tushnet theorized that AEDPA was largely a "symbolic" statute that made only trivial or

76. Professors King and Hoffmann have gone so far as to conclude that "federal habeas review . . . completely fails" to correct or deter state court errors. KING & HOFFMANN, *supra* note 8, at 81. The likelihood of relief, they note, is "very close to zero," and thus reliance on federal habeas for any error correction function is, in their mind, "absurd." *Id.* But see, e.g., Blume, Johnson & Weyble, *supra* note 11, at 451–52 (disputing the empirical conclusions drawn by King and Hoffmann by pointing out, among other things, that their study is limited to habeas review in district courts and that a meaningful number of habeas relief grants are awarded at the federal appellate level).

77. Some have rightly criticized the use of the term "deference" to describe the restrictions on relief contained in § 2254(d), and with good reason because the term "deference" nowhere appears in AEDPA. See, e.g., Kovarsky, *supra* note 20, at 444 (critiquing the view that "AEDPA's legislative history supports an interpretive mood disfavoring habeas relief"). Nonetheless, the Court has embraced the term's use in this context. See, e.g., *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (noting that the court of appeals decision demonstrated insufficient "deference to the state court's determination"). But the term has been adopted by the Court in this context. See, e.g., *Renico v. Lett*, 130 S. Ct. 1855, 1862 n.1 (2010) ("The dissent correctly points out that AEDPA itself 'never uses the term 'deference.'" But our cases have done so over and over again to describe the effect of the threshold restrictions in 28 U.S.C. § 2254(d)" (citations omitted)).

78. Blume, *supra* note 4, at 297.

“marginal changes” to the already existing judicially created limitations on relief.⁷⁹ Early in AEDPA’s history, it was not uncommon to conclude that the statutory reform would ultimately only serve to “tinker at the edges” of habeas law and that the Court would choose very “limited interpretations” of the Act.⁸⁰ Recent decisions interpreting one of the centerpieces of the AEDPA reforms, § 2254(d)(1),⁸¹ standing alone, demonstrate that such predictions have missed the mark.

In a nutshell, § 2254(d)(1) insulates unconstitutional state convictions from federal oversight by providing that relief is unavailable to a state prisoner unless he can demonstrate the state court conviction amounted to “an unreasonable application of, clearly established Federal law.”⁸² In 2006, Professor Blume observed that “the Court has . . . provided almost no guidance regarding the necessary increment of error warranting habeas relief” under this provision.⁸³ Presently, however, the Court’s aggressive interpretation of § 2254(d)(1) serves to ensure that most state prisoners are not eligible for relief despite the fact that their convictions rest on unconstitutional procedures—that is to say, “an *unreasonable* application of federal law is different from

79. See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 3 (1997) (contrasting the previous retroactivity standard with the Court’s approach in *Teague v. Lane*, 489 U.S. 288 (1989), which used an “extremely expansive definition of what would count as ‘new’ for habeas purposes” and thus greatly reduced the number of claims that could survive).

80. *Id.* at 4. The work of Tushnet and Yackle in unpacking the relationship between the Court and the Congress in the mid-1990s was brilliant and likely descriptively accurate. As time has passed, however, it is clear that the Court’s approach to AEDPA has far outpaced the preexisting limitations on habeas relief. Recent cases undermine the previously sound conclusion that “[c]ourts will eschew sharp breaks with judicially developed reforms and will prefer more modest adjustments in the system.” *Id.* at 26.

81. This provision is often the determinative barrier between relief and non-relief in modern habeas cases. Because of the breadth of this provision’s application, it is often the provision that the Court focuses on to the exclusion of other aspects of § 2254. See, e.g., *Premo v. Moore*, 131 S. Ct. 733, 739 (2011) (explaining that the provision “[r]elevant here” is § 2254(d)(1)); see also *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011) (noting that the lower court had “relied” exclusively on (d)(1) in denying relief in this case).

82. 28 U.S.C. § 2254(d)(1) (1996).

83. Blume, *supra* note 4, at 292.

an *incorrect* application of federal law.”⁸⁴ Unless an error is so patent and egregious as to amount to an intentional disregard for the supremacy of federal law, then the unconstitutional conviction must not be reversed by a federal court, “lest intrusive post-trial inquiry” threaten the autonomy of the states and the comity interests at issue in our criminal justice system.⁸⁵

Accordingly, whereas prior to AEDPA a federal habeas court’s review of a state court’s conclusions of law in support of a conviction were reviewed *de novo*, without any deference, cases like *Harrington v. Richter* from this Term make clear that federal habeas review now has considerably less of a role in defining and enforcing the substance of constitutional protections. In *Richter*, the Court spends more than three pages elaborating on the appropriate level of deference to be afforded to state courts, and emphasizing that the lower courts’ application of AEDPA looked too much like the pre-AEDPA standard of review and thus reflected an “improper understanding of § 2254(d)’s unreasonableness standard . . .”⁸⁶ Firmly rejecting an application of (d)(1) that is primarily semantic and largely retains the habeas status quo, the Court explained:

Here it is not apparent how the Court of Appeals’ analysis would have been any different without AEDPA. The court explicitly conducted a *de novo* review, and after finding a *Strickland* violation, it declared, without further explanation, that the “state court’s decision to the contrary constituted an unreasonable application of *Strickland*.” *AEDPA demands more*. Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that

84. *Richter*, 131 S. Ct. at 785 (internal quotation marks omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)); *see also* Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1754 (2000) (“[T]his understanding keeps faith with the Court’s insistence that federal courts must sometimes withhold habeas relief even if they think that a state court reached an erroneous determination of a mixed question. The test is not whether the state court reached the correct decision, but whether that court reached a decision that was reasonable.”).

85. *Premo*, 131 S. Ct. at 740 (internal quotation marks omitted).

86. *Richter*, 131 S. Ct. at 785.

those arguments or theories are inconsistent with the holding in a prior decision of this Court.⁸⁷

Federal relief is precluded, in other words, unless “there is no possibility fairminded jurists could disagree.”⁸⁸ Far from a slight adjustment to the pre-AEDPA *de novo* review,⁸⁹ the Court stressed that (d)(1)’s “unreasonableness question” is not merely a “test of [the federal court’s] confidence in the result it would reach under *de novo* review.”⁹⁰ Instead, not even a particularly “strong case” for constitutional relief justifies reversal under the newly

87. *Id.* at 786 (emphasis added).

88. *Id.* Notably, the notion that state court convictions should be affirmed so long as any reasonable basis for denying relief exists—even if it is not actually the basis for the state’s denial of relief—reflects the Supreme Court’s rational basis review as to other constitutional questions. Under rational basis review, a constitutional violation does not exist if there is any rational basis for the government action, and under (d)(1) a violation of a constitutional right must go without remedy if there is any rational basis for supporting the state court’s misapplication of the Constitution. *Compare* Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366–67 (2001) (“Under rational-basis review, . . . the State need not articulate its reasoning at the moment a particular decision is made; [rather] any reasonably conceivable state of facts that could provide a rational basis for the classification [will suffice].” (internal quotation marks omitted)), and Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 803 (2006) (identifying cases where the Court treats rational basis scrutiny as satisfied “if there is any rationally conceivable basis for the government’s conduct”), with Cullen v. Pinholster, 131 S. Ct. 1388, 1402 (2011) (“[A] habeas court must determine what arguments or theories . . . could have supporte[d] the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.” (quoting *Richter*, 131 S. Ct. at 786) (internal quotation marks omitted))).

89. Professors Yackle and Tushnet had previously predicted that “[j]udged by its text, and the legislative history behind that text, section 2254(d)(1) may reinforce the traditional scope of the writ . . . and confirm Brown’s principle of independent federal adjudication. Thus the federal habeas courts may grant relief whenever they conclude that a prisoner’s claim is meritorious, no matter what view the state courts previously took.” Tushnet & Yackle, *supra* note 79, at 44; see also *id.* at 47 (“Once again, another of the AEDPA’s provisions produces marginal results. This is only to be expected. Symbolic statutes must nonetheless fit into the legal landscape.”). Obviously, in the wake of decisions like *Harrington*, this is no longer a viable position. See *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (recognizing that relief under (d)(1) required showing an unreasonable decision by the state court, which is a “substantially higher threshold” than showing a merely incorrect decision).

90. *Richter*, 131 S. Ct. at 786.

explained habeas standard.⁹¹ It is no longer the case that federal habeas serves as a reliable “federal forum” for adjudicating constitutional questions regarding state convictions.⁹² Only “extreme malfunctions in the state criminal justice systems” justify federal intervention,⁹³ and the key, according to the Court, is to recognize that “state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding.”⁹⁴

91. *See id.* (stating a “strong case for relief does not mean the state court’s contrary conclusion was unreasonable”).

92. Professor Evan Lee helpfully organized the various theories in support of federal habeas review into four distinct categories. Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 Wash. U. L.Q. 151, 152–54 (1994) (discussed in Yackle, *supra* note 84, at 1756). Lee has described the “federal forum” theory as the conception of habeas that was embraced by Hart, Liebman, Yackle, and others.

93. *Richter*, 131 S. Ct. at 786. *Richter* has had an immediate impact on the Court’s habeas decisions. In a per curiam decision later in 2011, the Court’s opening sentence introduced the AEDPA standard of review not by quoting § 2254(d) but rather by quoting *Richter*. *Bobby v. Dixon*, No. 10-1540, 2011 WL 5299458, at *1 (U.S. Nov. 7, 2011) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786–87 (2011)).

Under the Antiterrorism and Effective Death Penalty Act, a state prisoner seeking a writ of habeas corpus from a federal court “must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”

AEDPA’s application during the Roberts’ Court makes it difficult to discern what, if any, distinction there is between the Court’s current application of § 2254(d)(1) and the interpretation of that clause by the Fourth Circuit that was rejected by Justice O’Connor, writing for the majority, in the first case interpreting the meaning of the unreasonableness clause. *See Williams v. Taylor*, 529 U.S. 362, 409 (2000) (rejecting as erroneous the Fourth Circuit’s conclusion that a “state-court decision involves an ‘unreasonable application of . . . clearly established Federal law’ only if the state court has applied federal law in a manner that reasonable jurists would all agree is unreasonable”).

94. *Id.* at 787. The centrality of the state proceedings does not compel the conclusion that the federal proceedings are irrelevant. I continue to regard federal habeas as a critical source of deterrence, even if relief is only occasionally granted. As one group of commentators has recently remarked, “If the prospect of subsequent federal habeas review was eliminated, there is every reason to believe that relief rates in state courts would decrease, not because of a reduction in the number of deserving cases, but because a key incentive for state courts to acknowledge and remedy constitutional error would be absent.” Blume, Johnson & Weyble, *supra* note 11, at 453.

This approach to federal habeas review is not without significant practical consequences. In *Valdovinos v. McGrath*,⁹⁵ for example, a three-judge panel from the Ninth Circuit considered an instance of prosecutorial malfeasance in the form of failing to disclose exculpatory evidence as required by *Brady v. Maryland*.⁹⁶ Professor Scott Sundby has described the *Brady* right as a sort of “constitutional superhero that not only would ensure that a criminal defendant had access to all important exculpatory evidence before facing the State at trial, but also embodied the prosecutor’s ethical duty to pursue ‘justice’ and not simply victory in the courtroom.”⁹⁷ The *Brady* right may be heroic in form, but the modern interpretations of AEDPA make *Brady* meek in function. The Ninth Circuit concluded that there was little doubt “Valdovinos’s *Brady* rights were violated” but nonetheless held that, because federal review is constrained by § 2254(d), the petitioner was not “entitled to habeas relief.”⁹⁸ The point is, even as to the most sacrosanct of the constitutional criminal procedure rights, under AEDPA, the duty of constitutional enforcement is largely delegated to the state courts.

Related to the issue of how much deference to give to a state court judgment is the question of when state court judgments are entitled to deference. In summarizing the “important issue[s]” regarding AEDPA that remained unresolved up through 2005, Professor Blume identified as critically unresolved the question of “what significance an unexplained or summary state court decision should have.”⁹⁹ Several other scholars and judges

95. *Valdovinos v. McGrath*, 42 F. App’x 720 (9th Cir. 2011).

96. *See* *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment”).

97. Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 646 (2002).

98. *Valdovinos*, 423 F. App’x at 722–23. Professor Evan Lee has eloquently argued that a standard of review that considers the degree of error, or “how far off the mark” the decision is, must be recognized as nonsense. When, for example, there is a *Brady* violation, asking “how far off the mark” the state was in concluding that there was no *Brady* violation is “like asking how far off the mark an answer of ‘on’ is when the correct answer is ‘off.’” Lee, *supra* note 72, at 289.

99. Blume, *supra* note 4, at 293.

similarly identified the impact of summary state court denials—e.g., “Relief is denied on the merits”—on AEDPA deference as a pressing issue for purposes of understanding how severe the AEDPA limitations on relief would be in practice.¹⁰⁰ Professor Evan Lee eloquently explained his view on the issue as follows:

I would not require anything of state courts that is not already required of them. They are already required to follow federal law, but they are not required to write opinions justifying their decisions. The pending question is what sort of review a federal habeas court ought to perform if the state court chooses not to write. If the state court wishes to take advantage of the “unreasonable application” clause of § 2254(d)(1), it can write; if not, then not. Some may still complain that this is tantamount to requiring state courts to write because, it might be said, of course all judges want their decisions reviewed as deferentially as possible. I am unmoved by this argument. The statute establishes a sort of *quid pro quo*: if state courts want their law application reviewed deferentially, then they owe the reviewing court an explanation of what they did.¹⁰¹

100. Compare Lee, *supra* note 72, at 315–17 (concluding that AEDPA deference ought not apply absent a reasoned state court decision), and Brittany Glidden, *When the State is Silent: An Analysis of AEDPA’s Adjudication Requirement*, 27 N.Y.U. REV. L. & SOC. CHANGE 177, 205–14 (2002) (same), and Adam Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA’s Standard of Review Operate After Williams v. Taylor?*, 2001 WIS. L. REV. 1493, 1529 (same), and Monique Anne Gaylor, Note, *Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 HOFSTRA L. REV. 1263, 1284–85 (2003) (arguing state court decisions with no articulated reasoning should not be considered “adjudications on the merits” for AEDPA purposes), with Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223, 230–31 (2002) (concluding that AEDPA “contemplates some sort of judicial reasoning process” but that the state court is not required to articulate its reasoning to get deference from the habeas court), and Claudia Wilner, Note, *We Would Not Defer to That Which Did Not Exist: AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. REV. 1442, 1461–64 (2002) (describing the “adjudicated on the merits” language of AEDPA as including all state court decisions “except denials on procedural grounds” and making an analogy to exhaustion doctrine, in which a silent state court decision is treated as a denial on the merits).

101. See Lee, *supra* note 72, at 312 (commenting that, in the context of independent and adequate bars to federal litigation, the Supreme Court has explained that a state may insulate a decision from review by stating clearly and unequivocally that the decision rests on state rather than federal law grounds) (citations omitted).

Likewise Judge Calabresi provided a similar explanation of the proper functioning of § 2254(d)(1):

[T]he AEDPA runs the risk of imposing a heavy, and sometimes unwanted and unmanageable, burden on State courts. Specifically, if AEDPA deference were deemed automatically and universally to apply, then that law would require extremely busy State court judges to figure out what can be very complicated questions of federal law at the pain of having a defendant incorrectly stay in prison should the State court decision of these complex questions turn out to be mistaken (but not unreasonably so). . . . In contrast, a reading of the AEDPA under which AEDPA deference does not apply where a State court has rejected a petitioner's claim without expressly mentioning its federal aspects allows State courts to avoid this burden. It enables State courts to *choose* whether or not they wish to take on the burden and be deferred to. . . . Under this interpretation, State courts that wish fully to evaluate federal claims need only indicate that they have done so, and their decisions will be deferred to.¹⁰²

This question of how to deal with silent or summary state court decisions is not of interest only to academics or academically oriented judges; the deference owed to silent state court judgments is of immense practical importance. The Supreme Court has highlighted that the California Supreme Court issues at least “several hundred” summary denials each year, each of which is so cursory as to make it impossible to even discern whether the denial of relief is on the merits or, for example, because of untimeliness.¹⁰³ This Term, however, also in *Harrington v. Richter*, the Supreme Court held that there is no requirement that a “state court . . . give reasons before its decision can be deemed” entitled to deference under § 2254(d).¹⁰⁴

102. *Washington v. Schriver*, 255 F.3d 45, 62–63 (2d Cir. 2001) (Calabresi, J., concurring).

103. *See Evans v. Chavis*, 546 U.S. 189, 198–99 (2006).

104. *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011). Likewise, Blume observed that the Court's retroactivity doctrine had yet to be reconciled with the strictures of AEDPA. Blume, *supra* note 4, at 294. But the Court has now granted certiorari to resolve this issue. *See* Brief of Petitioner at i, *Greene v. Fisher*, 131 S. Ct. 1813 (2011) (No. 10-637), *available at* http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/other_brief_updates/10-637_petitioner.authcheckdam.pdf (“[W]hat is the temporal cutoff for whether a decision from this Court qualifies as ‘clearly established Federal law’ under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty

Writing for a unanimous Court, Justice Kennedy explained that “[t]here is no text in [§ 2254] requiring a statement of reasons,” and the Court seemingly responded to the likes of Judge Calabresi by commenting that the “[o]pinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court.”¹⁰⁵ After *Richter*, even where the state court denial of relief does not state that the denial of relief is on the merits, federal courts are ordered to presume that the state court adjudication was on the merits and, therefore, to apply the onerous limitations on relief contained in § 2254(d).

In short, AEDPA’s maturation process has not been good for state prisoners. Decisions like *Richter* leave no doubt that AEDPA has wrought significant changes to the role that federal courts play in substantively reviewing state convictions.¹⁰⁶ Federal constitutional errors by state courts present an ever-shrinking target for federal habeas courts. Only the clearest state court errors—indeed, only those errors that border on outright defiance or rejection of federal supremacy—will warrant federal intervention to cure an unjust conviction or sentence. And even state court judgments that do not contain any reasoning are entitled to the full scope of AEDPA shielding deference.

Act of 1996”); see also Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User’s Manual*, 51 VAND. L. REV. 103, 119 (1998) (“If ‘clearly established’ is measured as of the time of the trial, then the *Teague* doctrine has been expanded. If ‘clearly established’ is measured as of the time direct appeals are concluded, then *Teague* has been codified, at least in that respect.”).

105. *Richter*, 131 S. Ct. at 784. Justice Ginsburg concurred only in the judgment of the case, but she did not dissent as to any of the Court’s analysis. *Id.* at 793 (Ginsburg, J., concurring); see also *id.* at 784 (majority opinion) (explaining that the “issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed”).

106. A media article cited a prominent capital lawyer, reporting that “‘We all understood AEDPA seriously cut back federal habeas review,’ said Tarik S. Adlai, a Pasadena-based appellate attorney who represents defendants. ‘But the Supreme Court has said, ‘No, the pond is much more shallow than you thought.’” Robert Iafolla, *High Court and 9th Circuit Battle Over Federal Habeas Claims*, LOS ANGELES DAILY J., May 16, 2011, at 1 (on file with the Washington and Lee Law Review).

2. *The Procedural Abyss of Federal Habeas Practice:
Pinholster v. Cullen in Context*

AEDPA's demanding substantive standard of review is not the only feature of the 1996 Act that has recently come into focus so as to substantially disadvantage state prisoners. Recent procedural developments further portend the conclusion that AEDPA's bite has caught up to its initial hype.

Professor Yackle has aptly observed that “[c]onstitutional claims invariably turn on the underlying historical facts.”¹⁰⁷ Facts are the critical foundation upon which a claim of constitutional defect can rise to the level of “unreasonableness” as required for federal intervention under § 2254(d). This conclusion has been confirmed by the King Report from 2007.¹⁰⁸ The study found that one of the most reliable predictors of ultimate success for a habeas petitioner was whether the federal court ordered an evidentiary hearing in the case.¹⁰⁹ Specifically, “a case in which an evidentiary hearing was held was 32 percentage points more likely to result in a grant than a case in which an evidentiary hearing was not held, controlling for other factors.”¹¹⁰ Similarly, the study found that grants of discovery in federal habeas cases are also significantly correlated with ultimate success rates.¹¹¹

The study concedes that “[i]t is unclear whether evidentiary hearings and discovery are granted because the judge first determines that a claim is potentially meritorious, or whether the causal relationship operates in the other direction, with discovery and hearings revealing proof of merit that would otherwise be unavailable.”¹¹² What is clear, however, is that AEDPA now substantially curtails the availability of hearings and discovery and diminishes the importance of any evidence garnered through these mechanisms. One study conducted prior to the enactment of

107. Yackle, *supra* note 35, at 135.

108. See KING ET AL., *supra* note 61, at 89 (“An evidentiary hearing has a more powerful relationship with the probability of relief than any variable other than location.”).

109. *Id.*

110. *Id.* at 87 n.159.

111. See *id.* at 89 (“Also increasing the likelihood of relief (by nine to 12 percentage points) was an order of discovery.”).

112. *Id.*

AEDPA found that capital habeas petitioners received hearings at a rate of about 19%, but the King study found that capital habeas petitioners received hearings in only 9.5% of cases.¹¹³ The King study also shows that during the relevant post-AEDPA years, non-capital habeas petitioners received a federal evidentiary hearing at the almost non-existent rate of 0.4%, or “one of every 243 cases.”¹¹⁴

The absence of access to discovery or an evidentiary hearing in the period of the study, between 2000 and 2005, is not directly attributable to AEDPA. AEDPA contains a provision, § 2254(e)(2), which specifically limits access to evidentiary hearings, but the limit is merely a codification of the pre-AEDPA rule. By its plain text, § 2254(e)(2) limits access only to those prisoners who are “at fault and bear[] responsibility for the failure” to develop the facts in state court.¹¹⁵ Notably, an unwillingness to permit factual development in federal court, when the prisoner could have presented such facts through reasonable diligence in state court, is entirely consistent with the pre-AEDPA barriers announced in *Keeney v. Tamayo-Reyes*.¹¹⁶ That is to say, even prior to AEDPA, prisoners’ efforts to develop new facts in federal court after being dilatory in state court were

113. *Id.* The study also confirms that significantly fewer capital habeas petitioners are receiving relief post-AEDPA. *See id.* at 61 (finding that approximately 13% of capital habeas petitioners receive federal relief, as compared to roughly 40% of petitioners at a point in time considerably before the enactment of the AEDPA). The study also found that petitioners only received discovery in post-AEDPA cases about 12.5% of the time. *Id.* at 64.

114. *Id.* at 36. Interestingly, the rate of relief under AEDPA is, according to the King study, also less than one-half percent. *See id.* at 52 (finding 0.35% relief rate in non-capital cases). Apparently, there is not a reliable source of data regarding the rate at which pre-AEDPA evidentiary hearings were granted in non-capital cases, but the authors of the AEDPA study speculate that at least 1.1% of all habeas cases received an evidentiary hearing prior to AEDPA. *Id.* at 60. The study also found that only 0.3% of non-capital defendants received discovery. *Id.* at 36.

115. *Williams v. Taylor*, 529 U.S. 420, 432 (2000).

116. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 6 (1992). There is, however, one critical difference between the pre- and post-AEDPA limits on evidentiary hearing access. Prior to AEDPA, if a prisoner “failed” to develop the facts in state court through non-diligence, he was merely required to demonstrate cause and prejudice for the failure. *Id.* By contrast, under § 2254(e)(2), a prisoner who fails is barred from a hearing absent a showing of a set of conditions that, to the best of the author’s knowledge, no prisoner has satisfied.

substantially curtailed. Perhaps, then, the decline in evidentiary hearings found in the King study can best be understood as a product of the general anti-habeas petitioner interpretive mood that scholars like Lee Kovarsky identified in the wake of AEDPA and less as a result of any direct textual or judicial limitation.¹¹⁷

Notably, starting in 2007, after the King study's data collection was complete, the Supreme Court began to take a more active approach to limiting state prisoner access to federal habeas hearings.¹¹⁸ Whereas previous AEDPA decisions had focused primarily on the merits of the state court decision and the proper application of § 2254(d)(1)'s deference, in *Schriro v. Landrigan*,¹¹⁹ the Court granted certiorari and reversed a lower court's mere grant of an evidentiary hearing.¹²⁰ That is to say, the court of appeals had not granted habeas relief but had merely remanded for an evidentiary hearing in order to develop more facts in support of the alleged constitutional violation, and the Court reversed.¹²¹ Given the Supreme Court's stingy standards for reviewing cases,¹²² it is noteworthy that the Court deemed the mere provision of factual discovery an issue of sufficient national importance to warrant briefing, argument, and ultimately, reversal. On a micro level, the Court's decision resulted in Jeffrey Landrigan's being executed without the benefit of factual development in support of a claim of ineffective assistance of sentencing counsel.¹²³ On the macro level, *Landrigan* left lower

117. See Kovarsky, *supra* note 20, at 444.

118. In truth, some such efforts to formally limit access to new facts had occurred prior to 2007, but they were relatively limited. See, e.g., *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (holding that the AEDPA limits on evidentiary hearings, § 2254(e)(2), applied as well to efforts to expand the record to include new facts even in the absence of a hearing).

119. *Schriro v. Landrigan*, 550 U.S. 465 (2007).

120. *Id.* at 473.

121. *Id.*

122. See SUP. CT. R. 10 ("A petition for writ of certiorari will be granted only for compelling reasons."); see also *Cavazos v. Smith*, No. 10-1115, 2011 WL 5118826, at *5 (U.S. Oct. 31, 2011) (Ginsburg, J., dissenting) (per curiam) (criticizing the majority for taking a law correcting approach, rather than looking for broad issues in need of sweeping clarification, in the realm of AEDPA interpretation).

123. The Court refused to permit discovery or a hearing as ordered by the court of appeals, despite the fact that the trial court judge who had sentenced Landrigan to death signed an affidavit stating that she would not have

courts considerably less certain about their post-AEDPA authority to order evidentiary hearings in cases in which the prisoner was not at fault for failing to develop the facts in support of his claim in the state courts. Prior to *Landrigan*, it was *de rigueur* for a lower court, barring a failure by the prisoner that would trigger the onerous requirements of § 2254(e)(2), to order an evidentiary hearing under the generous pre-AEDPA standard for granting hearings. Indeed, outside of § 2254(e)(2), AEDPA did not explicitly mention, let alone limit, evidentiary hearing access.¹²⁴

Consequently, although there is not yet any empirical data on this point, it is very likely that lower federal courts became even more reluctant to grant evidentiary hearings in the post-*Landrigan* world because, much more so than the text of AEDPA itself, the *Landrigan* decision called into question the preexisting framework for obtaining an evidentiary hearing.¹²⁵ But if AEDPA generally, and the *Landrigan* decision more specifically, made access to evidentiary hearings more difficult, the Court's recent decision in *Cullen v. Pinholster*¹²⁶ threatens to fundamentally alter the way federal habeas courts consider factual development. Under *Pinholster*, new facts developed during federal habeas proceedings have “no bearing” on federal habeas review such that the “federal habeas petitioner must overcome the limitation of

sentenced him to death had she known about some of the mitigating evidence that his lawyer had failed to uncover. See Editorial, *No Justification for the Death Penalty*, N.Y. TIMES, Oct. 29, 2010, at A30.

124. See, e.g., *Insyxiengmay v. Morgan*, 403 F.3d 657, 669–70 (9th Cir. 2005) (recognizing the pre-AEDPA rule of a mandatory hearing applies barring a failure for purposes of (e)(2) by the petitioner); *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 234 (7th Cir. 2003) (“Having thus determined that the AEDPA posed no bar to taking additional evidence on Hampton’s claim, the court turned to pre-AEDPA standards.”).

125. The pre-AEDPA law governing evidentiary hearings was generous to state prisoners who were not at fault for the non-development of facts in state court. See ANDREA LYON ET AL., *FEDERAL HABEAS CORPUS: CASES AND MATERIALS* (2d ed. 2011) (referring to these standards as the “high-water mark” for access to federal courts). Under *Townsend v. Sain*, 372 U.S. 293 (1963), for example, a federal court was *required* to hold an evidentiary hearing when the habeas petitioner stated a colorable claim of constitutional deprivation and had not had a full and fair opportunity to develop the facts in state court. *Id.* at 322.

126. *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

§ 2254(d)(1) on the record that was before the state court” without the benefit of any facts developed through a federal hearing.¹²⁷

In *Pinholster*, the defendant was convicted of murder by a California jury and sentenced to death.¹²⁸ A federal district court judge granted Pinholster an evidentiary hearing in order to develop facts in support of his claim that trial counsel was constitutionally ineffective during the sentencing proceedings of his trial and ultimately granted Pinholster relief based on the facts adduced during the evidentiary hearing.¹²⁹ In reversing the grant of relief, the Supreme Court held that the lower court erred when it considered the newly adduced evidence in determining the prisoner’s eligibility for relief.¹³⁰ The majority opinion cited two reasons in support of the holding.

First, the five-Justice majority explained:

Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that “resulted in” a decision that was contrary to, or “involved” an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.¹³¹

In addition, the Court invoked a general view of congressional purpose to support the result:

This understanding of the text is compelled by “the broader context of the statute as a whole,” which demonstrates Congress’ intent to channel prisoners’ claims first to the state courts. “The federal habeas scheme leaves primary responsibility with the state courts . . .” Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo.¹³²

127. *Id.* at 1400.

128. *Id.* at 1396.

129. *Id.* at 1397.

130. *Id.* at 1398.

131. *Id.*

132. *Id.* at 1398–99 (citations omitted).

It is important not to understate the potential significance of the *Pinholster* holding on future federal habeas litigation. In the short term, *Pinholster* has resulted in a rush of GVRs from the Supreme Court,¹³³ and orders from lower courts requesting briefing as to whether previously granted evidentiary hearings are no longer justified under *Pinholster*.¹³⁴ Over the longer term, however, *Pinholster* threatens to substantially reduce the viability of federal habeas relief in cases where court assistance—e.g., subpoenas or discovery orders—is needed in order to substantiate a claim of constitutional injury.¹³⁵ Writing shortly after AEDPA's enactment, Professors Tushnet and Yackle were confident that “[i]n the end, courts are likely to read [AEDPA] to authorize federal evidentiary hearings in most of the same circumstances in which hearings were conducted in the past.”¹³⁶

133. See, e.g., *Ryan v. Detrich*, 131 S. Ct. 2449 (2011) (vacating and remanding lower court decision in light of *Pinholster*). For a thorough discussion of the Supreme Court's GVR procedure, see generally Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711 (2009). GVR stands for “grant, vacate, remand” and refers to the Court's procedure for granting certiorari, vacating the lower court decision without a finding of error, and remanding the case back to the lower courts for additional review. *Id.* at 712. The GVR device allows “the lower court the initial opportunity to consider the possible impact of intervening developments and, if necessary, to revise its decision accordingly.” *Id.*

134. See Bruhl, *supra* note 133, at 712 (“[T]he purpose of the GVR device is to give the lower court the initial opportunity to consider the possible impact of intervening developments and, if necessary, to revise its decision accordingly.”). For an example of GVRs in this context, see *Atkins v. Clarke*, 642 F.3d 47, 48 (1st Cir. 2011) (applying *Pinholster* to deny a hearing and relief). Illustrative is a recent federal district court decision in which a grant of discovery and a federal hearing was revoked by the court after *Pinholster* was decided. See *Carter v. Bigelow*, No. 2:02-cv-326, 2011 WL 2551325, at *2 (D. Utah 2011) (“[F]urther factual development in this case would be futile since the results of such factual development could not be considered by this Court in resolving Petitioner's claims.”).

135. Factual development through discovery and evidentiary hearings has long been considered a hallmark of good federal habeas practice. Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 TUL. L. REV. 385 (2007); see also Yackle, *supra* note 35, at 135 (noting that “[c]onstitutional claims invariably turn on the underlying historical facts”). And, for the most part, discovery orders and hearings in a § 2254 case do not occur until after the federal habeas petition has been filed. If district courts are amenable to granting hearings and discovery prior to the filing of the petition, then the impact of *Pinholster* might be mitigated for reasons discussed in the next Part of the Article. *Infra* Part V.

136. Tushnet & Yackle, *supra* note 79, at 40. Professors Tushnet and Yackle

The limitation on access to a federal hearing under *Pinholster*, however, substantially curtails the availability of hearings by limiting hearings to circumstances where the defendant can satisfy § 2254(d)(1) without the benefits of any newly adduced evidence. In other words, the excruciating standard of review commanded by cases like *Richter* apparently must be satisfied completely on the basis of the state court record and without the benefit of federal court fact-finding or discovery.

The data has shown that federal hearings are one of the best indicators of success on the merits, but after *Pinholster*, the circumstances in which habeas discovery or an evidentiary hearing is available seem perilously narrow. When § 2254(d) applies, a strong argument can be made that any evidence extrinsic to the state court record that a petitioner seeks to rely on is precluded for one of two reasons—either the evidence is merely cumulative of what was produced below and thus a hearing is unnecessary and unavailable, or the evidence is conclusively non-cumulative or novel, and thus barred under *Pinholster*.¹³⁷ Stated another way, *Pinholster* creates a stifling catch-22 for many federal habeas petitioners. On the one hand, *Pinholster* holds that “if the factual allegations a petitioner seeks to prove at an evidentiary hearing” would not satisfy the requirements for relief under (d)(1), then “there is no reason for a hearing.”¹³⁸ In other words, a hearing is generally not permitted unless the facts sought to be developed at the hearing would satisfy the strictures of (d)(1). But on the other hand, under the *Pinholster* rule, if the new evidence that would be adduced at a hearing would demonstrate that (d)(1) is satisfied, then the use of

observed that it would be quite “extraordinary” if § 2254 were read to limit evidentiary hearings to circumstances in which the prisoner could establish a strong claim of innocence and either the existence of “new” law or “new” facts that were previously undiscoverable. *Id.* at 38. The limitation on access to a federal hearing in *Pinholster*, however, may actually be even more extraordinary.

137. Habeas Rule 6, governing discovery, permits discovery only where “good cause” is shown. R. GOVERNING SEC. 2254 CASES IN U.S. DIST. CTS. 6, printed in 28 U.S.C. § 2254 (2006). Surely mere cumulative factual support will rarely, if ever, amount to good cause. The Rule also requires that the party specify exactly what information will be sought. *Teti v. Bender*, 507 F.3d 50, 60 (1st Cir. 2007).

138. *Pinholster*, 131 S. Ct. at 1414 (citing *Shriro v. Londrigan*, 550 U.S. 465, 481 (2007)).

the evidence is conclusively barred because the review for relief eligibility under § 2254(d)(1) “is limited to the record that was before the state court that adjudicated the claim on the merits.”¹³⁹ A hearing is barred if it would not generate the sort of evidence that would justify relief, and yet evidence that is sufficiently new so as to justify relief is outside of the federal court’s scope of review.

Procedural labyrinths are nothing new for those versed in AEDPA practice, but the *Pinholster* decision creates a system of federal review that is particularly inhospitable to efforts to establish an entitlement to constitutional relief. The impact of this limitation, particularly in view of the increased deference prescribed by (d)(1) in cases like *Richter*, will be to profoundly limit the availability of federal habeas relief.¹⁴⁰ When a state court summarily and without explanation denies relief, the limitations enshrined in (d)(1) apply. Moreover, when a prisoner is at fault for failing to develop facts in the state court, those facts ordinarily cannot be raised in federal court under § 2254(e)(2). And even if a petitioner is diligent so as to avoid (e)(2)’s bar on hearings, now, under *Pinholster*, a hearing is permitted only when the prisoner can satisfy (d)(1) on the basis of the state court record alone. This trifecta of procedural barriers ensures that the safekeeping of substantive federal constitutional rights in the realm of criminal law is increasingly outside the purview of federal courts, and instead reserved for state post-conviction review.¹⁴¹

139. *Id.* at 1398.

140. The most robust limitation on *Pinholster* that could reasonably be imagined would be that a federal hearing is permitted whenever the petitioner attempts and fails, through no fault of his own, to develop facts in state court. The expectation that a hearing is available under such circumstances would require the Court to read very narrowly its own recent and nearly unanimous decision in *Pinholster*, a seemingly unlikely result. It is far from clear that the sort of diligence—i.e., non-fault—required to satisfy the strictures of § 2254(e)(2) will also suffice to satisfy *Pinholster*.

141. There will still be rare instances in which new evidence will be admitted in federal habeas proceedings in support of a prisoner’s claim of constitutional injury. *Ervin v. Cullen*, No. C 00-01228, 2011 WL 4005389, at *3 (N.D. Cal. Sept. 8, 2011) (applying the “new claim” exception and permitting discovery in service of a *Brady* claim); *Bemore v. Martel*, No. 08cv0311, 2011 WL 2650337, at *1 (S.D. Cal. July 6, 2011) (permitting an expansion of the record to include an affidavit that confirms the factual allegations that were assumed to

III. Considering the Consequences of a Diminished Writ: Abolish or Reorient the Writ in Criminal Cases?

There is a distinguished line of scholars and judges who have argued federal habeas must function so as to “guarantee[] a federal forum for every claim of non-harmless constitutional error by a state convict.”¹⁴² As illustrated by the discussion above, this theory of federal habeas review—the “federal forum” theory—is almost entirely rejected by the AEDPA-centered decisions of the Roberts Court in this past Term.¹⁴³ Under AEDPA, the primary, and often final, arbiters of federal constitutional law are state post-conviction courts,¹⁴⁴ and federal habeas review of state convictions is substantively *de minimis* for the first time since 1867, when federal habeas review of state convictions became statutorily recognized and roundly accepted.¹⁴⁵ Accepting that

be true by the state court adjudicating the claim).

142. See Lee, *supra* note 92, at 153 (compiling authorities).

143. As Professor Lee has explained, it is possible to understand the conceptual underpinnings for a broad approach to federal habeas review as being rooted either in a belief in the “federal forum” imperative, or in a belief (which I share) that regards federal review as playing a necessary role in deterring state court errors as to constitutional law. *Id.* at 153–54. Despite commentary to the contrary, there is still room to argue that the existence of federal habeas review deters state courts from defying federal constitutional mandates. The relief may be rare, but this could be explained, in part, by the existence of federal review itself, which serves as a deterrent to state courts reviewing constitutional challenges. *But see* Hoffmann & King, *supra* note 9, at 811 (“[B]ecause grants of habeas relief are so infrequent, and often occur long after the trial is over, they cannot possibly pose a meaningful deterrent for state actors in noncapital cases.”).

144. See *supra* Part I.

145. Commentators and courts frequently invoke the Habeas Corpus Act of 1867 as the point at which habeas corpus was first made generally available to state prisoners. See, e.g., DONALD E. WILKES, JR., FEDERAL POSTCONVICTION REMEDIES & RELIEF HANDBOOK § 5:8 (2010) (compiling Supreme Court cases and academic commentary making this point). But one leading commentator has compellingly explained that the modern view that the writ was unavailable to state prisoners prior to the Act of 1867 is entirely ahistorical. Eric Freedman has explained:

In approaching Suspension Clause issues, the Court, like scholars, proceeds on the assumption that the [Suspension] Clause originally protected only federal, not state, prisoners. This assumption is a mistake. It should be corrected, lest it undermine the Court’s willingness to recognize the applicability of the Clause to state prisoners and encourage Congress to disregard the constitutional

AEDPA has stripped substantive federal habeas review to the bone, it is necessary to consider what, if any, doctrinal or policy changes ought to result.¹⁴⁶ Stated another way, in light of the general futility of the federal habeas remedy, the necessary question is what statutory- or case-law-based changes should be pursued. Presently, scholars have charted two related but divergent paths for federal review based on the empirical and doctrinal reality of the writ's diminished power.¹⁴⁷

First, Professors Nancy King and Joseph Hoffmann have urged courts and commentators to regard the infinitesimally small rate of relief in non-capital habeas cases post-AEDPA as justifying a nearly complete abandonment of the writ in this context.¹⁴⁸ King and Hoffmann conclude that “the federal courts

limits on its ability to deny those prisoners federal vindication of their rights.

Eric M. Freedman, *Milestones in Habeas Corpus: Part I: Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 535–37 (2000); see also *id.* at 537 (“To the extent that legal arguments regarding the meaning of the Suspension Clause proceed from history, they should recognize that, since the Constitution came into force, the federal courts have had the authority—both by statute and independently of it—to free state prisoners on habeas corpus.”). Moreover, a strong argument has been advanced that, even if the writ did not originally apply to state prisoners, the ratification of the Fourteenth Amendment had the effect of extending federal habeas review to state prisoners. Jordan Streiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 868 (1994).

146. Alternatively, there is certainly room for robust scholarly criticism of the cramped federal review permitted under AEDPA. See, e.g., Blume, Johnson & Weyble, *supra* note 11, at 452–53 (calling for the limitations on habeas relief to be revisited). I have previously joined a chorus of scholars in making novel constitutional challenges to AEDPA. See, e.g., Marceau, *supra* note 1. The present Article, however, takes the AEDPA framework for granted and considers what, if any, logical conclusions one can draw about the future of federal habeas review.

147. Presently, only one academic article provides a detailed critique of the conclusions reached by King and Hoffmann. See Blume, Johnson & Weyble, *supra* note 11, at 452–53 (urging, as an alternative to the general elimination of non-capital habeas, the elimination of certain restrictions on federal review—e.g., the statute of limitations and the procedural default rules—so as to enhance the deterrent effect of federal habeas).

148. KING & HOFFMANN, *supra* note 8, at 87–107; see also Hoffmann & King, *supra* note 9, at 819–23. King and Hoffmann have also made their case to the general public in op-eds. See, e.g., Joseph L. Hoffmann & Nancy J. King, Op-Ed., *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 17, 2011, at WK8

remain in a 1960s-style habeas rut [and] continue to receive tens of thousands of habeas petitions from convicted state prisoners,”¹⁴⁹ and argue the statistics indicating the improbability of federal relief “speak for themselves: habeas review of routine state criminal cases is no longer needed to enforce federal constitutional rights.”¹⁵⁰ According to this view, federal habeas ought to be relied on only for certain fundamental structural corrections to our democratic system. In other words, the use of habeas corpus to safeguard against novel uses of executive power to detain, for example, alleged enemy combatants at Guantanamo is a necessary and appropriate use of habeas corpus jurisdiction.¹⁵¹ Likewise, King and Hoffmann acknowledge that the expansion of federal habeas review of state convictions during the Warren Court era played a similarly important role in preserving the structure of our democracy by insisting on federal supremacy at a time when “defiant state judges . . . [might] thumb their noses at, or deliberately ignore, federal law.”¹⁵² Maintaining a flexible and prudently applied habeas remedy, however, requires, according to King and Hoffmann, that when the conditions giving rise to the need for the writ recede, so too must the writ’s use in that arena cease.¹⁵³ Consequently, they summarize their conclusions by explaining that: “Retaining that system might make sense today if the problems that gave rise to it persisted, but they do not. Retaining the current system might also make sense today if it represented

(“Congress should limit habeas review of state criminal cases to two categories in which it actually can do some serious good: capital cases and cases in which the prisoner can produce persuasive new evidence of his innocence.”).

149. Hoffmann & King, *supra* note 148, at WK8 (“Still, the habeas machinery runs on, wasting resources and dissipating respect for the Great Writ, while benefiting almost nobody.”); Hoffmann & King, *supra* note 9, at 793 (“In 99.99% of all state felony cases—excluding those cases in which the defendant is sentenced to death—the time, money, and energy spent on federal habeas litigation is wasted, generating virtually no benefit for anyone.” (citation omitted)).

150. Hoffmann & King, *supra* note 148, at WK8.

151. See KING & HOFFMANN, *supra* note 8, at 42–47 (describing the writ’s “starring role” as preserving democracy by serving to balance or offset executive detentions).

152. Hoffmann & King, *supra* note 9, at 805.

153. *Id.*

an effective and efficient way of enforcing the Constitution's commands in individual cases, but it does not."¹⁵⁴

In a nutshell, King and Hoffmann conclude that, because there is no longer a crisis of federalism like that of the 1960s and because the rate of habeas relief is extremely small,¹⁵⁵ federal habeas review of state convictions should be largely abandoned.¹⁵⁶ For King and Hoffmann, "[t]he resources now wasted on reviewing and rejecting claims of constitutional error in habeas litigation should be redeployed" such that the money currently spent on federal habeas would be diverted to funding programs in support of trial-level indigent defense.¹⁵⁷ Federal habeas review for non-capital prisoners would be permitted in only two circumstances:

The first category would include those petitioners incarcerated in violation of federal law who can offer 'clear and convincing' proof of factual innocence The second category would allow for the postconviction enforcement of new constitutional

154. *Id.* King and Hoffmann defend maintaining federal habeas review of all capital sentences, in part, based on the relatively higher rates of federal relief in capital cases. That is to say, they regard the fact that "habeas courts continue to grant relief regularly" in capital cases as an indication that "there is a special need for habeas review in capital cases that is not present in noncapital cases." KING & HOFFMANN, *supra* note 8, at 147, 149. It is worth noting, however, that only capital petitioners have a statutory right to counsel for federal habeas review, and thus the disparity in relief rates, for those who practice in the field, is not terribly surprising in view of the disparate provision of rights facilitating meaningful access to the courts. *See, e.g.*, 18 U.S.C. § 3599 (2011); *McFarland v. Scott*, 512 U.S. 849, 855, 858 (1994) (discussing the statutory right to habeas counsel in capital cases, holding that the right to counsel applies, and holding that a motion for appointment of counsel provides a federal court with the authority to stay a state execution); *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 813 (9th Cir. 2003) (holding that a capital habeas petitioner's statutory right to counsel encompasses the right to competence in habeas proceedings).

155. *See* KING ET AL., *supra* note 61, at 52 (noting non-capital prisoners obtain habeas relief post-AEDPA in just 0.35% of all cases).

156. *See* Hoffmann & King, *supra* note 9, at 818; *see also* KING & HOFFMANN, *supra* note 8, at 100–01. These sentiments, though more empirically supported, are not new. *See* Schwartz, *supra* note 63, at 104 (referring to Judge Friendly's path-marking 1970 article and explaining that "Friendly referred to federal habeas corpus as 'a gigantic waste of effort' because the remedy produces no result in the overwhelming majority of cases and a good result only rarely").

157. Hoffmann & King, *supra* note 9, at 818; *see also* KING & HOFFMANN, *supra* note 8, at 100–01.

rules that have been held to apply retroactively to cases already final on direct appeal [under *Teague v. Lane*].¹⁵⁸

So for non-capital habeas petitioners, only those who can demonstrate their innocence or the retroactivity of a new rule of law would be entitled to federal habeas review.

To be sure, increased funding for trial-level indigent defense would improve the criminal justice system in many jurisdictions.¹⁵⁹ But conditioning such funding on the elimination of non-capital habeas review in nearly all cases is a conclusion that, with due respect for King and Hoffmann's empirical work, does not naturally or necessarily flow from the observation that the Constitution is already severely under-enforced through post-AEDPA habeas corpus litigation. Neither of the two explanations proffered for the elimination of non-capital habeas review stands up to scrutiny. First, by their own admission, the question of whether there remains a crisis of federalism justifying such review is, at the very least, an open question. To their substantial credit, King and Hoffmann concede that reasonable persons could disagree about the conclusion that the federalism concerns that justified the expansion of habeas corpus litigation in the 1960s have passed,¹⁶⁰ but they do not acknowledge that such a concession substantially undermines their conclusion that the federal review of state convictions is futile and "utterly

158. Hoffmann & King, *supra* note 9, at 820–21.

159. It must be noted that the sort of political trade that is envisioned by King and Hoffmann seems improbable. If federal habeas review is regarded as disposable at the whim of Congress, then initially some of the funding may be diverted to a federal resource center for trial level representation. However, in tight budgetary times, surely this office would see cuts to its budget just as similar systems at the state level have. *See, e.g.*, Blume, Johnson & Weyble, *supra* note 11, at 468 ("To [succeed], the new federal initiative that Hoffmann and King advocate would require . . . a massive amount of federal money, a commitment by Congress and the President to spend that money on indigent defense, and a willingness on the part of the states to commit their own resources to improving defense representation. None of these ingredients are in good supply . . .").

160. King and Hoffmann note that "[r]easonable people . . . may resist our claim that the serious federalism conflict that originally provoked the Warren Court into action has passed. But whatever one might think about that claim, the stark statistical picture . . . is impossible to ignore." KING & HOFFMANN, *supra* note 8, at 169.

worthless.”¹⁶¹ In reality the empirical data raises more questions than it answers.

As an initial matter, if federal habeas is rarely a source of relief under AEDPA, does the conclusion that the system should be scrapped “speak for itself” as they have concluded? Certainly not. Data suggesting that federal oversight has become increasingly futile might be used just as compellingly to support the conclusion that some of the modern limitations on federal habeas review should be revisited and abandoned. Indeed, one group of commentators has explained:

If . . . the chief problems with the existing noncapital habeas review scheme are too much volume (and corresponding cost) and too little success, then we would offer a different recipe for fixing them. The most obvious solution to the problem of too many habeas filings is to stop imprisoning so many people for such long periods of time. . . . [Moreover,] Congress could effectively address the problem of too little success in noncapital habeas by modifying, rather than abandoning, the current scheme.¹⁶²

Interestingly, King and Hoffmann flippantly reject a loosening of the AEDPA noose with little discussion, noting only that peeling back the limitations on federal habeas review reflects a “possible way to respond,” but “not a sensible” one.¹⁶³

While reasonable people could differ as to whether curtailing limits on federal review is the best approach, King and Hoffmann’s abrupt rejection of such reforms as not only

161. *Id.* King and Hoffmann’s approach also appears to be unabashedly utilitarian. They ultimately argue that retaining habeas corpus review would only make sense if “habeas actually corrected or deterred enough error to be worth its cost.” *Id.* at 81. It is not obvious that habeas corpus, the most cherished writ, ought to be subject to a raw cost-benefit metric like that applied to the exclusionary rule—perhaps there is some intrinsic value in having a safety net, even if the safety net is often more theoretical than practical or actual.

162. Blume, Johnson & Weyble, *supra* note 11, at 471–72.

163. KING & HOFFMANN, *supra* note 8, at 85; *see also* Hoffmann & King, *supra* note 9, at 813 (explaining that “[r]emoving the AEDPA- and Court-imposed restrictions on habeas” would not be effective at curbing unconstitutional state practices because, among other reasons, many state prisoners are not in custody long enough to file federal habeas petitions, plea bargains limit the range of viable claims, and the deterrent effect of such reversals is suspect).

impractical but nonsensical is surprising. Habeas relief for state prisoners has not been a common phenomenon over the last several decades,¹⁶⁴ but relief was not so entirely implausible as to justify the “futile,” “worthless,” and “illusory” labels that King and Hoffman use to describe the modern habeas review and justify its elimination. Specifically, King and Hoffmann defend the retention of federal habeas review in capital cases, in part, by concluding that the courts “continue to grant relief regularly” and by describing the post-AEDPA rate of relief as non-futile and “broad.”¹⁶⁵ Notably, the rate of relief in capital cases post-AEDPA according to their data is only about 12%.¹⁶⁶ Certainly, if rates of relief around 10% are considered to be substantial and “regular” so as to justify retaining habeas review, then rates of relief that are only 5–9% lower should not be dismissed out of hand as useless and futile.¹⁶⁷ More to the point, it is, contrary to the conclusions of King and Hoffmann, entirely “sensible” to consider whether relaxing some of the restrictions on federal habeas might serve a role no less important than the funding of indigent defense proposed by King and Hoffmann.¹⁶⁸ The rates of relief in

164. See KING ET AL., *supra* note 61, at 89 (stating that success rates for non-capital state prisoners in “habeas probably never approached the double digit percentages”). Just prior to AEDPA’s enactment, it is likely that the rate of relief was already substantially diminished based on court-created limitations. *Id.* at 58; see also Hoffmann & King, *supra* note 9, at 809 (“The grant rate for noncapital cases has dropped from 1% in the early 1990s to only 0.34% today.”). The study also reports that the rate of relief in capital cases has dropped from 40% pre-AEDPA to about 12% post-AEDPA. KING ET AL., *supra* note 61, at 61.

165. See KING & HOFFMANN, *supra* note 8, at 146–48 (explaining one key difference between sentences of death and life in prison is the more generous stance taken by courts toward granting relief to those sentenced to death and identifying specific categories of cases associated with a higher likelihood of habeas relief).

166. See *id.* at 46.

167. See *id.* at 149 (describing the 12% rate of relief as illustrating a perception of a “continuing need for broad habeas jurisdiction in capital cases” by the federal courts).

168. To be sure, it is unlikely that King and Hoffmann would agree with this view, but I merely point out that the data does not, as they suggest, speak for itself. See Hoffmann & King, *supra* note 15, at 52 (“The problem with habeas review of state criminal cases is that, even though the particular crisis of federalism that gave rise to its twentieth-century expansion has long since passed, the federal courts continue to entertain, on a routine basis, vast numbers of habeas petitions . . .”). That is to say, their conclusion—that federal habeas ought to be largely abandoned—does not necessarily follow from the low grant

non-capital cases might not ever reach the level of relief seen in capital cases; the higher rates of relief in capital cases, however, do not necessarily suggest some innate connection between reversible errors and capital convictions. Rather, a variety of factors, including a statutory right to counsel in capital cases, substantially explain the lower rates of relief for capital and non-capital prisoners. As one group of commentators observed:

Hoffmann and King fail to acknowledge a key distinction between capital and noncapital habeas petitioners: the former enjoy a statutory right to the assistance of appointed counsel while the latter do not. If noncapital habeas petitioners had access to counsel like their death-sentenced counterparts already do, their success rates would undoubtedly be higher¹⁶⁹

In short, the rate of relief in non-capital cases is likely to be much higher if these prisoners are also afforded a right to counsel. And even without counsel, in the years preceding AEDPA, non-capital prisoners obtained relief at a rate that King and Hoffmann have themselves regarded as non-trivial and as justification for retaining federal review. Nonetheless, the reform proposed by King and Hoffmann would, with only the narrowest of exceptions, abolish non-capital habeas review.

Professor Eve Brensike Primus proposed a second and slightly more measured reform based on the empirical data regarding the low rate of habeas grants post-AEDPA. The empirical data convinced Professor Primus, like King and Hoffmann, that habeas review as currently structured is not working and that the “the federal habeas system is broken largely *because* of its resolute focus on individual petitioners.”¹⁷⁰

rate in habeas cases, but rather reflects their policy view, consistent with Bator’s institutional competence model of habeas review, that because state courts are less “defiant” as to federal law and because all states have “appellate and collateral review procedures,” habeas is simply not the “best place to invest federal resources.” Hoffmann & King, *supra* note 9, at 795–96; *see also* Andrea Lyon, *Liberty Requires More Habeas in This Corpus*, HUFFINGTON POST (Apr. 24, 2011, 12:56 PM) http://www.huffingtonpost.com/andrea-lyon/liberty-requires-more-hab_b_853020.html (last visited Jan. 27, 2012) (on file with the Washington and Lee Law Review).

169. Blume, Johnson & Weyble, *supra* note 11, at 461.

170. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1, 3 (2010) (emphasis added). King and Hoffmann, in reviewing Primus’s work, actually congratulate her for accepting their premise that habeas

Rather than suggesting an outright abandonment of federal criminal habeas review, however, Primus suggests that the system be reconfigured so as to focus its resources and attention on “systemic state violations” of the Federal Constitution.¹⁷¹ Under this systemic model of habeas review, “a petitioner would have to show that his individual rights were prejudicially violated and would *also* have to produce some evidence that the violation was systemic rather than an idiosyncratic error in his case.”¹⁷² Stated another way, Primus would limit relief in much the same way that *Monell v. Department of Social Services* curtails municipal liability under § 1983.¹⁷³ Just as *Monell* conditions relief on a showing by the plaintiff of a pattern or custom of violations by the municipality,¹⁷⁴ Primus would condition habeas

litigation should no longer be permitted as a means of vindicating individual violations of the Constitution on a case-by-case basis: “This is the crucial lesson of the recent empirical findings, and it is a lesson that Professor Primus takes to heart.” Hoffmann & King, *supra* note 15, at 50.

171. Primus rejects the notion that individual litigation regarding constitutional violations is appropriate in federal habeas: “On all sides, the literature is large. But from each perspective, these scholars share the assumption that the point of federal review of state convictions should be to correct errors in individual cases. They only differ as to which errors they think are worth correcting—process errors, guilt-innocence errors, or errors affecting certain favored federal rights.” Primus, *supra* note 170, at 4.

172. *Id.* at 7. Although Primus would condition habeas relief on a two-part showing: (1) denial of the individual’s constitutional rights; and (2) a systemic constitutional problem in the state, she does not address the order of decision-making problem that is common to this sort of two-part constitutional decision-making. *Cf.* John C. Jeffries Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 137 (advancing the idea that the *Saucier v. Katz* order of decision-making for constitutional tort claims should still be used when money damages are the best remedy for violation of the right in question); Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 667–71 (2009) (providing an empirical analysis of sequencing issues arising from a two-part test for qualified immunity under § 1983); Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, 16 GEO. MASON L. REV. 53, 57 (2008) (urging continued use of the order of the two-part qualified immunity test announced in *Saucier*).

173. *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 663, 690 (1978) (removing municipal immunity from § 1983 suits and limiting that liability to deprivations of constitutional rights stemming from any formally adopted policy or custom not formally adopted).

174. *See id.* at 690.

relief on a showing that the state's post-conviction process had engaged in a pattern of unfairness or systemic failures.¹⁷⁵

Interestingly, there is notable overlap between Primus's proposal for reform, which apparently would permit only facial challenges to a state's post-conviction system, and the constraints on King and Hoffmann's proposal that they regard as constitutionally required. For King and Hoffmann, the Suspension Clause necessitates federal substantive review when the state fails to provide a "reasonable level" of constitutional oversight,¹⁷⁶ and for Primus, when there are systemic state failures, federal oversight is available. The common denominator, then, is that individual constitutional violations, even if prejudicial to the prisoner, do not warrant relief under either proposal—"If the federal court found no systemic problem, it would dismiss the petition."¹⁷⁷

The two approaches are not, however, identical. Despite the similarities in approach and ultimate conclusion, there is a feature of Primus's reform that is fundamentally at odds with King and Hoffmann's proposal. Primus still believes that federal habeas can and should correct extreme errors of state court process in individual cases, although she requires a showing of systemic harm in the individual case.¹⁷⁸ King and Hoffmann, by contrast, reject federal oversight on a case-by-case review basis even when the individual litigant can demonstrate a systemic defect.¹⁷⁹ Whereas King and Hoffmann urge a near complete abandonment of the habeas remedy when the state has a facially due-process-compliant post-conviction system,¹⁸⁰ Primus seeks to

175. See Primus, *supra* note 170, at 7.

176. Hoffmann & King, *supra* note 9, at 836–37.

177. Primus, *supra* note 170, at 7.

178. *Id.*

179. Hoffmann & King, *supra* note 9, at 836–37.

180. King and Hoffmann acknowledge "[p]roblems in state criminal justice" but argue that such problems "are not the kinds of problems that habeas is designed to, or can, solve." Hoffmann & King, *supra* note 15, at 54. King and Hoffmann's proposal, apparently, would only permit relief when the state's system, as intended to function, was, in effect, an inadequate substitute for federal review; it is almost as though the state system must be facially invalid—i.e., non-existent—in order for suspension problems to arise under this model. Primus would allow challenges to the state process, as applied, but only when the defect in the prisoner's case was representative of a systemic failure—in

retain federal habeas for individual litigants in the limited class of cases in which a systemic injury can be demonstrated by an individual litigant.¹⁸¹ For my purposes, however, the similarity between the proposals is more striking than the difference. Both reforms advocate for reimagining habeas in a way that refuses relief to individual petitioners whose constitutional rights have been demonstrably, even patently, violated.¹⁸² Under either

other words, the first several constitutional errors of the same type and form would be without remedy and would serve, instead, only as a necessary element of a later prisoner's entitlement to relief. *Id.*

[W]e think Professor Primus does not go far enough with her structural analysis. When Professor Primus refers to the 'structural vision' of habeas, she is talking about using habeas to try to force a change in the structure of *state criminal justice*. When we talk about a 'structural approach' to habeas, by contrast, we are talking about using habeas to force a change in the *relationship between institutions of government*—either a change in the federal balance of powers, or a change in the balance of federalism.

Id.

181. See Primus, *supra* note 170, at 7.

182. Primus stated: "I do not object in principle to federal courts' reviewing state criminal convictions to correct individual errors. . . . Given a world of limited resources, however, we must slice the habeas pie somehow," and for Primus this means limiting federal review to systemic violations of the Federal Constitution. *Id.* at 26–27. One wonders, however, whether the systemic approach proffered by Primus saves as many resources as she suggests, or protects as many state prisoners as she hopes. In each case in which relief is available under her proposal, the prisoner would have to prove not just a violation of his rights, but a systemic pattern of such violations in the state system. *Id.* at 7. Presumably the judicial labor, the amount of proof, and the cost of establishing a violation in a series of past cases will not be significantly less than the burden of proving that same violation in each case. Indeed, it is generally less resource intensive, not more, to prove an error of constitutional magnitude occurred in one's own case. I also suspect that litigation attempting to establish a pattern and practice of constitutional deprivation will, in many instances, be subject to the same sort of litigation gamesmanship that she finds too resource intensive.

Moreover, in those cases in which Primus says "demonstrating a systemic problem will be easy" because, for example, the constitutional error is "clear on the face of trial and appellate records," *id.* at 30, should it not be equally clear that there was an individual violation worthy of relief under AEDPA in each of these cases? In other words, if there is truly a body of cases, as Primus predicts, in which the entitlement to relief is so clear-cut, then one would expect that these cases would result in reversal even under AEDPA's deferential standard of review. In short, I am skeptical that proving systemic harms will be so easy. And if demonstrating the harm really is clear-cut or obvious, then I suspect that relief should generally be available for these claims under AEDPA.

reform, an individual instance of constitutional deprivation, no matter how grave and no matter how many rights were violated, does not justify federal habeas review.

Leading commentators like Primus, King, and Hoffmann have responded to the empirical data that indicates the general impotence of federal habeas review of state convictions with groundbreaking calls for reform. I agree that the data suggests a need for change, but I part ways with these scholars as to the appropriate course change. Rather than abandoning federal habeas or permitting federal habeas relief only upon a showing of a systemic failure, federal review should continue on a case-by-case basis, but more of the resources should be focused on the state process. Although it is true that AEDPA and other limits on federal habeas review have cast a long shadow over federal habeas proceedings, the absence of substantive relief ought to inspire increased attention to challenges of process and not the elimination of all federal review. As substantive challenges become increasingly impotent, it is the duty of the federal courts, all the more, to ensure that the state court process served as a minimally adequate substitute for federal habeas review.¹⁸³ As I have previously explained, due process forbids a federal court from turning a blind eye to federal challenges to the validity of one's sentence or conviction when the state post-conviction system fails "to provide a procedurally fair and full review of one's federal constitutional claims."¹⁸⁴ Accordingly, there is a need for federal challenges to the process rather than the result of state post-conviction proceedings.¹⁸⁵

Consequently I regard as dubious the claim that this systemic model would save resources and as doubly dubious the claim that this systemic model of habeas will actually increase opportunities for relief in many instances.

183. See *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (holding that the Suspension Clause requires either full federal habeas review or an adequate substitute).

184. Marceau, *supra* note 13, at 7.

185. Professor Ann Woolhandler, among others, has described the limited theory of habeas review associated with procedural fairness as the "institutional competence" model of habeas review. See Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 577 (1993) ("Under this model, federal courts considering habeas applications from state prisoners would be precluded from

In Part IV, the need for a basic check on the fairness of the state procedures as a constitutional matter is briefly developed. Part V then considers methods of challenging inadequate state procedures on federal habeas review. And finally, in Part VI, the viability and potential advantages of a novel non-habeas challenge, such as a § 1983 action, to the fairness of state procedures is considered.

IV. Federal Courts Have a Constitutional Duty to Remedy State Procedural Unfairness

For the last fifty years the federal habeas debate has centered on the appropriateness of substantive federal review of state court convictions. On one side of the debate, many scholars have argued that the integrity of the Constitution requires a merits-based review of every conviction's constitutionality, even at the great cost of occasionally disturbing the final convictions of state courts.¹⁸⁶ At the other extreme, some have called for a more parsimonious, purely proceduralist model of federal oversight such that a state court conviction could not be overturned unless the state process for ensuring federal constitutional compliance was less than full and fair.¹⁸⁷ Presently, however, federal habeas

reconsidering most issues of federal constitutional law provided there had been a 'full and fair' opportunity to address those issues in the state court."). "Institutional competence" is a term of art employed by legal process theorists to describe those features of an institution that make a certain system the best suited to solve a particular problem.

186. See *id.* (summarizing the "full-review" model as requiring federal courts to provide de novo review of all federal constitutional issues properly raised in state court).

187. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 455–56 (1963) (explaining that if the procedure was not full or fair there is no need to immunize the state court's result, and if the process employed for fact determination was fit for the task, there had already been an opportunity to litigate the issue and it should not be re-litigated); see also Woolhandler, *supra* note 185, at 579 (describing Bator). For decades legal scholars have identified Paul Bator as having voiced the most "extreme" set of limitations on federal habeas review. Woolhandler, *supra* note 185, at 577; see also Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 277 (1988) (describing Bator's theory); Lee, *supra* note 92, at 152 (describing Bator's approach as the stingiest). Under this approach, the range of "[q]uestions appropriate for habeas would include allegations that the state accorded no meaningful opportunity to litigate the federal question"

petitioners are at risk of having the worst of both worlds—all of the disadvantages of both approaches without the respective advantages. On the one hand, petitioners today are theoretically entitled to a merits-based, non-procedural review of the state court adjudication¹⁸⁸; the AEDPA regime, however, has wrought a world in which less than 1% of non-capital habeas petitions obtain relief, and over 40% of the petitions are dismissed by the district court on the basis of one of AEDPA's procedural provisions, without any consideration of the actual merits of the claim.¹⁸⁹ So merits review exists as a theoretical mirage but not as a practical reality. But on the other hand, the low rate of substantive-based relief has generated a vocal group of scholars calling for the substantial elimination of case-by-case habeas litigation, to include, apparently, the rejection of case-by-case procedural oversight of state post-conviction procedures.¹⁹⁰

Stated more directly, the writ of habeas in 2012 presents a lose-lose situation for state prisoners. There is very little substantive review of the merits of constitutional claims, and the review of state processes, which was previously the backbone of the stingiest form of relief, has been substantially called into

insofar as the state process was not fundamentally fair and adequate. Woolhandler, *supra* note 185, at 585 n.55; *see also id.* at 584–85 (“[T]he Court undertook what Bator saw as a salutary expansion of the concept of institutional competence by allowing federal courts to consider whether the state court system had provided a full and fair opportunity to litigate the federal constitutional issue.”).

188. 28 U.S.C. § 2254(a) (2011).

189. KING ET AL., *supra* note 61, at 56, 61.

190. Conceptual support for a robust federal habeas review, according to Professor Evan Lee, can generally be linked to theories recognizing either the need for a federal forum for constitutional adjudication or the need for a federal deterrent against non-compliant or disinterested state court judges. Lee, *supra* note 92, at 153–54. But Lee also points out that the deterrent theory does not require one to assume bad faith on the part of state court judges:

A much larger number of state court judges accepts and respects the Supreme Court's criminal procedure edicts, but from time to time considerations of economy and convenience tempt such judges to cut corners on enforcement. Even more commonly, these judges do not always do their best to keep track of where the Court's criminal procedure decisions are headed. According to the deterrence theory, the ready availability of federal habeas review encourages greater effort by state judges to toe the constitutional line.

Id. at 154.

question. In a paradox of habeas history, then, the proceduralist reforms of legal process theorists like Paul Bator, once deemed draconian and overly dismissive of the writ, now seem generous when juxtaposed with modern practice and proposed reforms of commentators like King and Hoffmann.¹⁹¹ Such a narrow view of federal habeas is problematic from a constitutional standpoint.¹⁹² As Bator elaborated:

Let me now put the point specifically in terms of due process and the federal habeas corpus jurisdiction When should state determinations, subject to direct Supreme Court review, not be final? I suggest that one answer, at least, fits into the very category we have been discussing: cases where the state has, in effect, failed itself to provide process. It is, after all, the essence of the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case: the state must provide a reasoned method of inquiry into relevant questions of fact and law (including, of course, all federal issues applicable to the case). If a state, then, fails in fact to do so, the due process clause itself demands that its conclusions of fact or law should not be respected: the prisoner's detention

191. See Primus, *supra* note 170, at 24–26 (describing the situations in which federal courts could consider state criminal cases under Bator's process model and King and Hoffmann's more recent proposal to eliminate federal habeas review entirely for most state prisoners). Bator subscribed to the views of the legal process theorists who reasoned that so long as the state courts had personal and subject matter jurisdiction, then they had the institutional competence required to make final and binding determinations as to one's detention. Woolhandler, *supra* note 185, at 584. But Bator regarded "allowing federal courts to consider whether the state court system had provided a full and fair opportunity to litigate the federal constitutional issue" as a "salutary expansion of the concept of institutional competence" such that "questions of jurisdiction, together with the question of full and fair opportunity to litigate, exhausted the appropriate scope of collateral review of criminal convictions." *Id.* at 584–85; see also Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 103–04 (1959) (describing a more limited process of habeas review such that the habeas court is limited to inquiring "into the competence of the tribunal—that is, its jurisdiction—to enter the judgment of conviction as well as into the question whether the judgment which it had entered authorized the detention").

192. Cf. Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1365–67 (2010) (arguing that the Due Process Clause supersedes and invalidates portions of the Suspension Clause that are inconsistent with due process—e.g., the authority to suspend the writ in times of rebellion or invasion).

can be seen as unlawful, not because error was made as to a substantive federal question fairly litigated by the state tribunals, but because the totality of state procedures did not furnish the prisoner with a fair chance to litigate his case. Thus if a state fails to give the defendant any opportunity at all to test federal defenses relevant to his case, the need for a collateral jurisdiction to afford this opportunity would seem to be plain, and federal habeas is clearly an appropriate remedy: the state has furnished no process, much less “due” process, for the vindication of an alleged federal right. Similarly, if the state furnishes process, but it is claimed to be meaningless process—if the totality of state procedures allegedly did not provide rational conditions for inquiry into federal-law (or, indeed, state-law) questions, it seems to me clear that the federal habeas jurisdiction may appropriately examine the allegation.¹⁹³

Stated more concisely, when the state fails “to provide adequate process to correct the constitutional violation,” due process requires a federal “backstop.”¹⁹⁴ It is far from clear that the proposals for reform discussed above sufficiently account for this due process requirement, and as such they raise substantial constitutional questions. To be sure, King and Hoffmann are correct in concluding that, at least in some important ways, the crisis of federalism that motivated more expansive habeas review in the past has substantially receded. All fifty states now have post-conviction review, thus making federal habeas review a truly duplicative layer of constitutional litigation. It is, however, a serious misstep to conclude that the mere existence of a state post-conviction system is, without more, a full and constitutionally adequate substitute for federal review. In support of her conclusion that proposes limiting habeas relief to

193. Bator, *supra* note 187, at 456–57.

194. Bator asked, “Is there not political wisdom in using a federal collateral jurisdiction as a ‘backstop’ for inadequacies of state process . . . ?” *Id.* at 492. In the context of challenging a denial of parole, the Supreme Court has recently recognized that due process regulates the state parole system in an extremely limited fashion. *Swarthout v. Cooke*, 13 S. Ct. 859, 862–63 (2011). But as I have explained previously, there is a strong pedigree for recognizing a right to a fundamentally fair post-conviction review process. Marceau, *supra* note 13, at 24–34. To the extent that the Suspension Clause might provide more extensive protections than due process in ensuring fundamental fairness, *id.* at 20 n.7, it is beyond the scope of this Article to address whether the Suspension Clause might give rise to a cause of action in a § 1983 action.

cases demonstrating a pattern of violations, Professor Primus notes that due process and the Suspension Clause clearly permit “some restrictions on the scope of federal review of state court convictions, as demonstrated by the Supreme Court’s removal of most Fourth Amendment claims from federal habeas review in *Stone v. Powell*.”¹⁹⁵ Critically, however, *Stone v. Powell*¹⁹⁶ is constitutional precisely because of what it does not do; it does not remove federal oversight from unfair state proceedings. Under *Stone*, any state court review that is not “full and fair” is entitled to a complete round of federal habeas proceedings. Even one of the most far-reaching examples of limitations on federal review, *Stone v. Powell*, is tempered by a requirement of federal oversight of the state procedures on a case-by-case basis.

Notably, neither Primus nor King and Hoffmann explicitly provide for federal oversight on a case-by-case basis of the procedural adequacy of the state process. These scholars recognize the need to temper reform proposals to federal habeas with an “escape valve” like the one carved out in *Stone*.¹⁹⁷ However, the proposed reforms seem to take for granted that failures of substance or process by a state will not, *in any single case*, give rise to a right to federal review—that is to say, they would permit only facial or systemic challenges to the state’s procedures rather than challenges based on the circumstances of a particular case.¹⁹⁸ Professors King and Hoffmann identify as a virtue of their proposal the fact that the litigation of challenges to a state’s procedures under the Suspension Clause will “be a

195. Primus, *supra* note 170, at 40.

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

197. Hoffmann & King, *supra* note 9, at 823. “Escape valve” in this context may be considered synonymous with “adequate substitute” for federal review, both of which serve as core constitutional protections based on due process and the Suspension Clause. Notably, I have discussed at length in a previous article the link between due process and the full-and-fair requirement of *Stone*. See Marceau, *supra* note 13, at 24–34. *Contra* Philip Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 COLUM. L. REV. 1, 17 n.115 (1982) (suggesting that due process does not mandate *Stone*’s limitation).

198. By contrast, Richard Fallon has observed that the “normal if not exclusive mode of constitutional adjudication involves . . . as-applied challenge[s].” Richard H. Fallon Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000).

temporary rather than a long-term problem.”¹⁹⁹ They specifically emphasize that:

Any Suspension Clause litigation generated by our proposal thus would initially impose a new and additional burden on the federal courts,—which might appear to undermine our goal of conserving resources[;] however, [it] should diminish quickly as the Supreme Court decides whether the review processes in various states are such that the proposed new habeas restrictions comply with the Suspension Clause.²⁰⁰

In other words, they anticipate one-time general challenges, perhaps even consolidated cases, challenging the state’s procedures, and not repeated, case-specific challenges to the procedures applied in any particular case. Professor Primus seems to agree with this sentiment, explaining that as a general matter, “[i]f the systemic challenge were rejected or if the state remedied the systemic problem, the ban on successive petitions would prohibit other petitioners from raising the same challenge.”²⁰¹

This once-and-for-all approach to procedural challenges is incompatible with a vision of due process as a backstop for fair state processes. Permitting only facial or one-time challenges to the robustness of the state’s post-conviction review system is irreconcilable with due process and the Suspension Clause.²⁰² For

199. Hoffmann & King, *supra* note 9, at 846.

200. *See id.* (“While the Court may have to evaluate the constitutionality of the proposed statute as applied in several different states with varying appellate and postconviction review, it could do so in one or two consolidated cases.”).

201. *See* Primus, *supra* note 170, at 42–43 (“Once that initial determination is made, federal review would be streamlined.”). Nowhere does Professor Primus suggest that procedural failings on the part of the state review would, as under the institutional-competence model of review, justify federal intervention. Indeed, in her only direct reference to the constitutional frailty of her argument, she concludes that the availability of original writs and certiorari review would indicate that her proposed “systemic habeas review system would not entail an unconstitutional suspension.” *Id.* at 40.

202. *See* Hoffmann & King, *supra* note 9, at 837 (“Should the states fail to maintain robust postconviction review . . . the Suspension Clause would prohibit our proposed cutback of federal habeas.”). The idea of one-time litigation regarding procedural adequacy was rejected in the context of another AEDPA challenge. *See* Spears v. Stewart, 283 F.3d 992, 1016–18 (9th Cir. 2002) (reviewing Arizona’s compliance with AEDPA after the Supreme Court denied certiorari because petitioner was not appointed counsel in a timely manner).

example, in the context of describing the *Stone v. Powell* escape valve, Professor Wayne LaFave has explained that the “opportunity for full and fair litigation of a Fourth Amendment claim . . . appears to require assessment of what was done in the *particular case* rather than what is customarily done.”²⁰³ Consistent with this view, nearly all courts and scholars have rejected and criticized a narrow reading of the *Stone* bar as adopted by the Fifth Circuit, which holds that in the absence of proof that the state’s processes are “routinely or systematically applied” in an unfair manner, *Stone* precludes federal habeas review.²⁰⁴ Just as the constitutional limitation on eliminating review under *Stone* is not appropriately understood as requiring a showing of systemic or facial defects with the state process, reforms to federal habeas must, more generally, retain a process for overseeing the fairness of the state process in individual cases. In other words, the *Stone* bar is limited such that state courts in *each individual* case must provide an adequate substitute for federal habeas review. Each prisoner is entitled to challenge the fairness of the state system as applied to his particular case.²⁰⁵ Contrary to the proposals of Hoffmann and

203. WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7(g) (2010) (quoting *Stone v. Powell*, 428 U.S. 465, 481–82 (1976)). *But see* *Frank v. Magnum*, 237 U.S. 309, 335 (1915) (considering customary practice and finding no due process violation in a particular case based, in part, on the fact that “[r]epeated instances are reported of verdicts and judgments set aside and new trials granted for [constitutional defects within the trial]”). There is some language to the contrary in *Frank*. *See id.* at 335 (concluding that due process was not violated in a particular case based, in part, on the fact that “[r]epeated instances are reported of verdicts and judgments set aside and new trials granted for” constitutional defects with the trial).

204. *See, e.g., Mitchell v. Epps*, No. 1:04CV865(LG), 2010 WL 1141126, at *16 (S.D. Miss. Mar. 19, 2010) (quoting *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1979)).

205. In this way, federal oversight of state convictions can be placed on a simple continuum—the more process the state provides, the less need there is for federal oversight. A doctrinal analogue exists in the realm of the adequate-and-independent-state-grounds doctrine, which essentially allows a state to apply its procedural rule so as to bar federal oversight so long as the state’s rule is rational, reasonable, and fairly applied. *See* Catherine T. Struve, *Direct and Collateral Federal Court Review of The Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 277, 315 (2003) (recognizing the need for the lower federal courts to conduct an “as-applied analysis of state procedures” on habeas review). Professor Struve supports the claim that the denial of post-conviction relief based “merely on a hypertechnical application of a procedural rule” must be

King and Primus, to date, the Court has not permitted the modern writ to be interpreted so as to foreclose relief in an individual case when the state process in that particular case was not full and fair.²⁰⁶

In short, there is room for debate as to whether state court review ought to be considered a substantially adequate substitute for federal review in any circumstances, but if the state court review is not procedurally full and fair, then such processes ought to be easily recognized as an insufficient substitute for federal habeas review.²⁰⁷ “[D]ue process mandates that every prisoner

avoided through case-by-case review. *Id.* at 315. Given that procedural defaults in the context of federal habeas review arise in the same federalism-fraught setting, it is useful, if not dispositive, to realize that such challenges are available on a case-by-case basis and that a “state procedural rule that violates due process will be inadequate.” *Id.* at 252.

206. Individual challenges are, after all, the bread and butter of constitutional criminal procedure. Just as challenges to a death sentence could be brought as facial challenges to the state’s capital sentencing system or as challenges to the state system as it applies to the individual case, it is only logical that a state prisoner ought to be able to challenge the state system as it applied in his particular case and not just the state system in a more general sense as the reform proposals seem to anticipate. *See Struve, supra* note 205, at 177–86 (compiling cases where federal habeas review is not precluded when the state process as applied to a particular prisoner was an inadequate procedural bar).

207. I have previously advanced this argument with considerably more detail and care. *See Marceau, supra* note 13, at 8–9 (“[T]he constitutional pedigree of a right to full and fair review, so as to ensure fundamental fairness in the justice system, is beyond question.”). It is true that the Supreme Court held that the Suspension Clause was not violated by AEDPA’s limits on successive habeas petitions. *See Felker v. Turpin*, 518 U.S. 651, 654 (1996) (“Conclud[ing] . . . that the operative provisions of the [Antiterrorism and Effective Death Penalty] Act do not violate the Suspension Clause of the Constitution, Art. I, § 9.”). However, the Suspension Clause is much less directly implicated by efforts to file multiple habeas petitions, as opposed to efforts to obtain a single, meaningful opportunity to litigate the constitutionality of one’s conviction. Accordingly, I reject the conclusion that Supreme Court review is an adequate safeguard for purposes of due process and the Suspension Clause. *Contra Primus, supra* note 170, at 40 (“Given the Supreme Court’s small docket and the rarity with which original writs have been issued, [the alternatives for Supreme Court habeas review may not be adequate], but the Supreme Court may well consider them to be enough.”). Certiorari review is not available on direct review for many post-conviction claims, and the Supreme Court has specifically and repeatedly expressed its unwillingness to grant review of state post-conviction proceedings. *See Lawrence v. Florida*, 549 U.S. 327, 335 (2007) (Stevens, J., concurring) (noting that the Supreme Court traditionally waits for “federal habeas proceedings” to consider federal constitutional claims rather

receive at least one full and fair review of his constitutional claims, either through direct or collateral proceedings, and either in state or federal court.”²⁰⁸ And, any reform in the scope of federal oversight must be mindful of this limitation. Defects in state process will not magically or spontaneously manifest themselves.²⁰⁹ Accordingly, determining whether a state court’s review of a constitutional claim relating to one’s detention was procedurally adequate is of the utmost importance. If substantive review is to be rare and limited, as it is under AEDPA, then process-based review must be all the more frequent and capacious.²¹⁰ Consequently, understanding the proper procedural mechanisms for litigating challenges of process is critically important. The remainder of this Article proposes and considers the available federal procedures for developing and litigating

than use its certiorari review power (quoting *Kyles v. Whitley*, 498 U.S. 931, 932 (1990)).

208. Marceau, *supra* note 13, at 18 (quoting *Wright v. West*, 505 U.S. 277, 298–99 (1992) (White, J., concurring)); *see also id.* (compiling authorities regarding the scope of a due process right to one full and fair review of one’s conviction).

209. Moreover, when a core unfairness or absence of state process is detected, contrary to the conclusions of King and Hoffmann’s reform, it is insufficient to simply revert to the current model of deferential AEDPA review permitted under cases like *Harrington v. Richter*. Under King and Hoffmann’s approach, an unfair state process would simply “reinstate the existing, post-AEDPA version of habeas for state prisoners.” Hoffmann & King, *supra* note 9, at 843. As I have explained in detail, deference under § 2254(d)(1) to a procedurally unfair state process is not constitutionally compliant. *See* Marceau, *supra* note 13, at 7 (“Due process forbids the substantive deference announced in § 2254 where a prisoner has not received a full and fair review of his constitutional claims, either in state or federal court.”).

210. Contrary to the conclusions of scholars like King and Hoffmann that state post-conviction systems have developed in a manner that is sufficiently fair and adequate so as to reduce the need for federal oversight, there is good reason to believe that states remain resistant to providing robust state post-conviction review that would approximate the protections provided through federal review. By way of example, AEDPA provides substantial procedural benefits, such as a shortened statute of limitations, to any state that satisfies certain minimal procedural requirements in state capital post-conviction procedures. *See* 28 U.S.C. §§ 2261–66 (providing that “[a]ny application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence”). To date, however, no state has created a mechanism for the timely appointment of qualified counsel that would satisfy the attorney general, as the certifying authority under § 2265, that the state is entitled to opt-in to the procedural benefits. *See id.* § 2265.

challenges to failures of process in the state post-conviction system on a case-by-case basis.

V. Challenging Deficient State Procedures Through Federal Habeas Litigation

One forum that affords an opportunity for a federal challenge based on the inadequacy of state proceedings is federal habeas review. To be sure, federal habeas review is presently centered on challenges to the state court's result, but federal review, even constrained by AEDPA, can function as a meaningful review mechanism for state procedures.²¹¹ In a process-based habeas challenge, clearly demonstrating that the state process for litigating a constitutional challenge was unfair is, in a very literal sense, collateral to resolving the issue of whether the prisoner is in fact in "custody in violation of the Constitution or laws or treaties of the United States."²¹² Insofar as that is the case, a habeas-based challenge will surely not result in reversal of conviction. Nonetheless, on habeas review, challenges to process rather than to pure result will play a critical role in the next wave of habeas litigation as courts attempt to understand the scope of the limitations on federal habeas imposed by recent decisions like *Pinholster v. Cullen*.

In habeas cases, as in other forms of constitutional litigation, one's success in developing facts correlates strongly with his

211. I have previously discussed the reasons that process-based habeas litigation has faded into the background:

In view of the Court's willingness [for decades] to revisit the merits of federal constitutional litigation impacting a state conviction, regardless of the adequacy of the state process, the diminished role of federal courts in reviewing the [due process] question—whether the state court's process was full and fair—was inevitable.

Marceau, *supra* note 13, at 15–16 (explaining that the emergence of "selective incorporation cases, and the Warren Court's habeas jurisprudence" overshadowed the process-based rights and made them less important and, therefore, less litigated).

212. See 28 U.S.C. § 2254(a) (2006) (providing for federal review of habeas corpus on behalf of a state court defendant "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"); see also *id.* § 2241(d) (providing federal habeas review for "a person in custody under the judgment and sentence of a State court").

ultimate success on the merits.²¹³ Accordingly, an important feature of pre-*Pinholster* habeas law was the recognition by federal courts of appeal that, even after AEDPA, evidentiary hearings were mandatory so long as the prisoner was relatively diligent, he made a colorable claim of constitutional violation, and there were material issues of fact.²¹⁴ As the Tenth Circuit summarized the state of the law after AEDPA:

We now join every other circuit that has confronted this question and hold that where, as here, a habeas petitioner has diligently sought to develop the factual basis underlying his habeas petition, but a state court has prevented him from doing so [T]he AEDPA does not preclude [him] from receiving an evidentiary hearing.²¹⁵

The focus of litigation efforts aimed at obtaining a hearing or factual development was oriented toward demonstrating some defect in the state process, whether the problem was a one-time procedural lapse or a longstanding systemic gap. More precisely, the issue of whether the prisoner was entitled to federal factual development turned on whether he was diligent in his efforts in state court or, in the language of § 2254(e)(2), whether he had “failed” to develop the facts in support of his claim.²¹⁶ If the defendant was to blame—non-diligent—for the lack of factual development, then federal hearings and discovery were generally not permitted.²¹⁷ Alternatively, where a defect in the state

213. Cf. Yackle, *supra* note 35, at 142 (“[I]f a prisoner failed to develop the facts in state court in circumstances constituting ‘a deliberate bypass’ of state procedures, a federal court could decline to hold a federal evidentiary hearing.” (quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963))).

214. See, e.g., *Insyxiengmay v. Morgan*, 403 F.3d 657, 670–71 (9th Cir. 2004) (recognizing a hearing as mandatory when the petitioner states a colorable claim (citing *Townsend*, 372 U.S. at 313)); *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 233–34 (7th Cir. 2003) (determining “AEDPA posed no bar to taking additional evidence” after finding “no evidence that prisoner had been anything but diligent in pursuing his ineffectiveness claim in state court”); *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998) (“Mr. Miller is entitled to receive an evidentiary hearing so long as his allegations, if true and if not contravened by the existing factual record, would entitle him to habeas relief.” (citing *Medina v. Barnes*, 71 F.3d 363, 368–69 (10th Cir. 1995))).

215. *Miller*, 161 F.3d at 1253 (citing *Medina*, 71 F.3d at 368–69).

216. 28 U.S.C. § 2254 (1996).

217. See *Hampton*, 347 F.3d at 233 (“Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), forbids a district court from holding an

process was to be blamed for the failure to develop the factual record in state court, a federal hearing was not barred by § 2254(e)(2).²¹⁸ Satisfying (e)(2), in other words, was generally regarded as synonymous with establishing an entitlement to federal factual development through a hearing, discovery, or an expansion of the record.

Pinholster imposes novel limitations on a prisoner's access to a federal hearing and other less formal discovery devices.²¹⁹ The pre-*Pinholster* question that seemed to be dispositive as to whether a hearing was permitted—whether the petitioner satisfied (e)(2) through diligent pursuits of the relative evidence—is now substantially displaced by the question of whether § 2254(d)(1) can be satisfied without the benefit of new facts developed during federal habeas proceedings.²²⁰ As the seven-justice majority explained, “[i]t would be strange to ask federal courts to analyze whether a state court’s adjudication resulted in a decision that unreasonably applied federal law [for purposes of (d)(1)] to facts not before the state court.”²²¹ And because the majority expressly addressed the interaction of (d)(1) and (e)(2) regarding evidentiary hearing access—“section

evidentiary hearing on a habeas claim if the petitioner failed to develop the factual basis of that claim in state court.”).

218. See (Michael) *Williams v. Taylor*, 529 U.S. 420, 437 (2000) (noting an evidentiary hearing is not barred “where [appellant] was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2)”).

219. See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (“We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”). I equate less formal factual development mechanisms with evidentiary hearings because the Supreme Court has explained that, for purposes of federal habeas, unless one has satisfied the requirements for obtaining a hearing, then he is generally ineligible for other factual development as well. See *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (“Those same restrictions [respondent was diligent in state court, or the conditions required by § 2254(e)(2) were met] apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing.” (citing *Cargle v. Mullin*, 317 F.3d 1196, 1209 (10th Cir. 2009))).

220. See *Pinholster*, 131 S. Ct. at 1400 (rejecting the contention of the petitioner and the dissent that the Court’s holding renders § 2254(e)(2) substantially superfluous).

221. *Id.* at 1399. *But see id.* at 1419–20 (Sotomayor, J., dissenting) (arguing that there is nothing strange about allowing consideration in federal court of new evidence under § 2254(d)(1)).

2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief²²²—it seems that the threshold question in determining access to an evidentiary hearing is now a question of § 2254(d), and the questions of diligence and non-fault that dominate the (e)(2) analysis may be only secondarily important.

Nonetheless, the best reading of *Pinholster* is that its limitations on federal factual development are, like the deference in (d)(1) more generally, conditioned on a full and fair state process. When either section of 2254(d) is satisfied—either (d)(1) or (d)(2)—then the *Pinholster* bar on evidentiary hearings does not apply.²²³ Likewise, when the claim presented in federal court was not “adjudicated on the merits” in state court, the limitations contained in (d)(1) and in *Pinholster* do not apply.²²⁴ Accordingly, understanding the limitations on (d)(1)’s reach is of the utmost importance in understanding not just whether the federal review is de novo but also whether new facts may be adduced during the federal proceedings. Although it is too early to predict with confidence the ultimate application of *Pinholster*, my careful study of the decision has led me to conclude that the bar on factual development is still implicitly conditioned on the existence of a full and fair underlying state process; as Justice Sotomayor’s dissenting opinion explains: “I assume that the majority does not intend to suggest that review is limited to the state-court record when a petitioner’s inability to develop the facts supporting his claim was the fault of the state court itself.”²²⁵

The remainder of this Part sets out to demonstrate that the due process command of procedural fairness will operate so as to condition *Pinholster*’s application to circumstances in which the state process for developing and litigating factual disputes was full and fair. Specifically, I contend that unfairness in the state factual development procedures will render (d)(1) and *Pinholster* inapplicable because of two separate but related safeguards within the text of § 2254. When factual development opportunities are robust and adequate in state court, *Pinholster*

222. *Id.* at 1402.

223. *See* Pape v. Thaler, 645 F.3d 281, 288 (5th Cir. 2011) (summarizing *Pinholster* and applying the (d)(1) and (d)(2) tests).

224. 28 U.S.C. § 2254(d) (1996).

225. *Pinholster*, 131 S. Ct. at 1417 n.5 (Sotomayor, J., dissenting) (citing Transcript of Oral Argument, *Bell v. Kelly*, 555 U.S. 55 (2008) (No. 07-1223)).

serves as a more definitive barrier to federal hearings and fact development, but when the state process is inadequate, *Pinholster* does not impose any new barriers to relief.

A. *Section 2254(d)(2) as a Safety-Valve to Pinholster and Deferential Review*

When a state court process is patently unfair and this unfairness taints the factual conclusions, then the state court adjudication rests on an “unreasonable determination of the facts” such that § 2254(d)(2)’s limitation on relief is satisfied.²²⁶ Because § 2254(d)(1) and (d)(2) serve as alternative limitations on relief,²²⁷ a petitioner who is able to satisfy (d)(2) in this manner is no longer constrained by (d)(1). Stated more directly, a prisoner who, in the language of § 2254(d)(2), demonstrates that the state court decision was “based on an unreasonable determination of the facts in light of the evidence presented in the state court,” is entitled to a de novo review of his legal claims and is not barred from adducing new facts conclusive of the constitutional injury in federal court.²²⁸ A showing under (d)(2) is AEDPA’s silver bullet insofar as the legal deference of (d)(1) and the cramped factual procedures of *Pinholster* are both rendered inapplicable.

Lest one think that (d)(2) represents a rare mark of congressional generosity to state prisoners under AEDPA, it is important to note that the advantages of satisfying (d)(2), although substantial, are not disproportionate. Far from a windfall for the prisoner, it is reasonable that one who is able to demonstrate that the state court’s management of the factual record was unfair or unreliable would be entitled to develop a more complete and reliable factual record and obtain legal review unencumbered by the unfair proceedings. But the advantages of establishing a (d)(2) claim should not be understated. Because § 2254(d) is phrased in the disjunctive so as to impose two alternative limitations on relief, either (d)(1) or

226. 28 U.S.C. § 2254(d)(2) (1996).

227. Section 2254(d) limits federal habeas relief for a state conviction unless *either* (d)(1) or (d)(2) is satisfied.

228. 28 U.S.C. § 2254(d)(2) (1996).

(d)(2), a state prisoner can obtain federal habeas relief where (d)(2) is satisfied without also satisfying the onerous limits set out in (d)(1) and defined in cases like *Pinholster* and *Richter*.²²⁹ For example, a prisoner who satisfies (d)(2) may be entitled to relief, even without demonstrating a violation of his “clearly established” federal rights, insofar as the clearly-established-law requirement exists only in § 2254(d)(1). In this way, relief under (d)(2) is actually more expansive than relief in many types of § 1983 actions; whereas a petitioner satisfying § 2254(d)(2) need not demonstrate the existence of clearly established law, a plaintiff under § 1983 generally must overcome the qualified immunity standard announced in cases like *Harlow v. Fitzgerald*,²³⁰ which explicitly requires a deviation from clearly established law.²³¹ Similarly, *Pinholster* imposes its limitations on factual development only in those cases where § 2254(d)(2) does not apply.²³² Specifically, the majority in *Pinholster* holds that “evidence introduced in federal court has no bearing on § 2254(d)(1) review,”²³³ but where the

229. Professor Evan Lee’s analysis of the statute supports this conclusion. See Lee, *supra* note 72, at 292 (“The statute should be construed in a way that makes sense of the separation between (d)(1) and (d)(2).”); see also Cullen v. Pinholster, 131 S. Ct. 1388, 1415 (2011) (Sotomayor, J., dissenting) (concluding that the text of the § 2254 compels the conclusion that (d)(1) analysis is not confined to the record before the state court).

230. See *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982) (“Reliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit resolution of many insubstantial claims on summary judgment.”).

231. See *id.* (“We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” (citations omitted)). This is a remarkable fact in view of the Supreme Court’s aggressive interpretation of (d)(1) and the Court’s extension of a habeas-like standard of review into the exclusionary rule realm. Cf. *Herring v. United States*, 555 U.S. 135, 144–46 (2009) (construing the good-faith exception to the exclusionary rule broadly so as to bar relief when the police errors were merely the product of negligence).

232. See *Pinholster*, 131 S. Ct. at 1400 (“If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.”).

233. See *id.* (majority opinion) (rejecting the previous assumption “that § 2254(d)(1), despite its mandatory language, simply does not apply when a federal habeas court has admitted new evidence that supports a claim

petitioner satisfies (d)(2), this limit on factual development has no application.²³⁴

In short, by challenging a state process as inadequate and therefore inconsistent with § 2254(d)(2), a petitioner can avoid the strictures of (d)(1), and thus likewise avoid the harshness of AEDPA's deference as well as the stingy factual development rules announced in *Pinholster*.²³⁵ But there are limitations to this method of litigating challenges to the fairness of the state process, and the scope of such limitations remains to be developed through litigation.²³⁶

previously adjudicated in state court" (citing *Holland v. Jackson*, 542 U.S. 649, 653 (2004)).

234. See *id.* at 1412–13 (Breyer, J., concurring). Justice Breyer wrote a separate concurrence in *Pinholster*, which ostensibly serves but one purpose: to alert habeas petitioners that the sky is not falling and that the decision will not have terribly broad applications. Justice Breyer notes, for example, “[i]f the federal habeas court finds that the state-court decision fails (d)’s test (or if (d) does not apply), then an (e) hearing may be needed.” *Id.* at 1412 (Breyer, J., concurring). Most likely Justice Breyer is envisioning a scenario in which the state court *assumes all facts in the light most favorable to the prisoner*, or where the state court summarily denies relief, and thus implicitly assumes the truth of the prisoner’s allegations. But Justice Breyer’s opinion also leaves open the possibility that, at least in some circumstances, gross procedural violations might, in his words, “fail (d)’s test” by violating § 2254(d)(2) and thus factual development would be appropriate and necessary. *Id.* Several lower courts have attempted to apply Justice Breyer’s reasoning to avoid the *Pinholster* bar on hearings. See *Skipwith v. McNeil*, No. 09-60361-CIV, 2011 WL 1598829, at *2–3 (S.D. Fla. Apr. 28, 2011); *Hale v. Howes*, No. 07-cv-12397, 2008 WL 2858458, at *1 (E.D. Mich. July 23, 2008).

235. It is unfortunate that even Justice Sotomayor, who provided a reasoned and impassioned dissent to the procedural narrowing of factual development in *Pinholster*, has not acknowledged the full scope of the safety valve built into (d)(2). See *Pinholster*, 131 S. Ct. at 1413–36 (Sotomayor, J., dissenting). Although Justice Sotomayor rejects the majority’s willingness to punish diligent prisoners when unfairness in the state system prevents them from developing critical factual evidence, she is equally firm in her conviction that the evidence that is newly admitted through a federal evidentiary hearing should be considered in light of (d)(1). See *id.* at 1413 (“I also disagree with the Court that . . . § 2254(d)(1) analysis is limited to the state-court record.”). New evidence is not barred from consideration when the state process is unfair, but the unfairness of the state process, under this view, would not impede the application of (d)(1).

236. Scholars and judges that favor extreme deference to the states will no doubt respond to this reading of (d)(2) by asserting that such a reading is inappropriate insofar as it substantially undercuts the force of § 2254(d)(1), which is often regarded as the centerpiece of AEDPA. But just as the Court was content to conclude in *Pinholster* that “Section 2254(e)(2) continues to have force

Although it seems eminently reasonable to conclude that (d)(2) will apply where, for example, the evidence before a state court on a material issue is in conflict or unclear and the state court resolves the issue against the prisoner without a fair hearing or other procedural steps to fairly determine the strength of the relative evidence,²³⁷ there is a wide range of rather less compelling factual scenarios that will arise after *Pinholster*. For example, many federal habeas petitioners will likely argue that *Pinholster* does not apply so as to bar federal fact development whenever the state court record is factually undeveloped through no fault of the petitioner. That is to say, so long as the petitioner was diligent—not at fault for purposes of § 2254(e)(2)—then gaps in the state court record may be filled through factual development. This form of procedural challenge is likely to be very common, particularly in non-capital cases, where the prisoner’s post-conviction pleadings were filed pro se, or otherwise without considerable factual specificity so as to create material issues of fact. This narrow reading of *Pinholster* seems doomed to fail. Such a reading of AEDPA prioritizes the pre-*Pinholster* (e)(2) inquiry into diligence to the substantial exclusion of the analysis offered in *Pinholster*. Given the tenor of the *Pinholster* majority opinion and its focus on the need to generally limit federal review to the “record in existence” at the time of the state court adjudication, such a narrow reading of *Pinholster*, while not entirely implausible, seems unlikely.²³⁸

where § 2254(d)(1) does not bar federal habeas relief,” it is appropriate to note that Section 2254(d)(1) continues to have force where § 2254(d)(2) does not require relief. *Id.* at 1401 (majority opinion).

237. I have previously discussed a more detailed scenario that presents a similarly straightforward application of (d)(2). See Marceau, *supra* note 135, at 390–93 (discussing a hypothetical in which a state prisoner did not receive fair process in state court).

238. *Pinholster*, 131 S. Ct. at 1398. This is not to suggest that a state process that is truly unfair will be deferred to under *Pinholster*. The point I am making here is simply that the pre-*Pinholster* analysis as to whether a hearing was required focused on § 2254(e)(2). See (Michael) Williams v. Taylor, 529 U.S. 420, 424 (2000) (limiting the § 2254 issue to whether § 2254(e)(2) as amended by AEDPA “bars the evidentiary hearing petitioner seeks”). And after *Pinholster* it seems unlikely that a showing of diligence on the part of the petitioner, without more, will lead the Court to hold that federal factual development is permitted. The line between petitioner diligence for purposes of (e)(2) and state court unfairness for purposes of (d)(2) is surely undefined, subject to change, and hard to identify, but there is space between these two concepts. Whereas the diligence

Another potential limitation on the use of § 2254(d)(2) as a mechanism for litigating procedural unfairness in state post-conviction procedures derives from the plain text of the statute, which provides that the prisoner must demonstrate that the state court decision “was based on an unreasonable determination of the facts.”²³⁹ Arguably, a state court decision is never based on an unreasonable determination of the facts when a state court concludes that the petitioner’s factual allegations fail to state even a prima facie case for relief. That is to say, when a state court concludes that the prisoner’s allegations, if regarded as true, do not entitle him to relief, it is difficult for the petitioner to colorably argue on federal habeas review that the state court’s factual findings were unreasonable; after all, the findings purportedly were all made in favor of the defendant. And this is not an altogether unlikely or uncommon occurrence. Many states, such as California, deny thousands of habeas petitions per year through summary dispositions, and many of these states have laws that prohibit summary dispositions unless the state court finds “that the claims made in the petition do not state a prima facie case entitling the petitioner to relief.”²⁴⁰ To be sure, a state court that purports to construe all factual conflicts in the defendant’s favor and nonetheless denies relief might be incorrect or even procedurally unfair; it is, however, difficult to characterize the defects in the state process

required under (e)(2) might best be understood as subjectively focused on the reasonable efforts by the petitioner in light of available information known at the time, the unfairness required under (d)(2) might focus on some objective characteristic of the state process that was affirmatively unfair or obstructive of efforts to develop a claim. Notably, Justice Sotomayor seems to share the view that a distinction exists between factual development failures based on an unfair state process and factual development failures despite relative diligence by the petitioner. Compare *Pinholster*, 131 S. Ct. at 1436 (Sotomayor, J., dissenting) (“I fear the consequences of the Court’s novel interpretation of § 225(d)(1) for diligent state habeas petitioners with compelling evidence supporting their claims who were unable through no fault of their own, to present that evidence to the state court.”), with *id.* at 1417 n.5 (“I assume that the majority does not intend to suggest that review is limited to the state court record when the inability to develop the facts . . . was the fault of the state court itself.”).

239. 28 U.S.C. § 2254(d)(2) (1996).

240. *Pinholster*, 131 S. Ct. at 1402 n.12 (majority opinion) (quoting *In re Clark*, 855 P.2d 729, 741–42 (Cal. 1993)).

as, strictly speaking, defects in the state court's "determination of the facts" or fact-finding procedures as required in order to satisfy § 2254(d)(2).²⁴¹

Confronted with such a case, a savvy habeas defense lawyer might argue that a federal court considering a claim for which the state court assumed all facts in favor of the defendant, though perhaps unable to permit relief under (d)(2), would be required to review the claim for relief under (d)(1) based on the assumed facts from the state court record. The § 2254(d)(1) inquiry in cases where the state court purported to take as true the petitioner's factual allegations should ask whether the state court's application of federal law to the facts, as asserted (not proved) by the prisoner in state court, would amount to an unreasonable application of federal law. In other words, the question is whether clearly established law was applied in an unreasonable manner to the facts as alleged by the prisoner in his state pleadings. Thus, in most cases of summary disposition or where the state court explicitly states it is assuming the petitioner's factual allegations are true, the analysis is purely one of law and not of process.²⁴² In this way, an otherwise unfair state process may be insulated from expansive federal review, rendering § 2254(d)(2) an inconsistent and sometimes inadequate means of challenging state post-conviction processes. In order to obtain de novo review or a federal hearing in circumstances where the state court

241. 28 U.S.C. § 2254(d)(2) (1996).

242. As favorable as this formulation initially appears, a prisoner's success under (d)(1) will hinge substantially on the quality and clarity of his state court pleadings. If the factual allegations that preceded a summary disposition were generic or overly conclusive, then there is no concrete set of facts upon which the (d)(1) inquiry can be conducted. Indeed, the Supreme Court acknowledged that state courts will not accept as true "wholly conclusory allegations." *Pinholster*, 131 S. Ct. at 1402 n.12. The quality and specificity of the briefing in the state court is, therefore, of the utmost importance. Unfortunately, this sort of speculative briefing is likely to be difficult in many cases and impossible in others, particularly where counsel is not appointed to the prisoner for state proceedings. Expecting a pro se prisoner to determine which constitutional provisions apply, much less which facts must be alleged in a state pleading or potentially waived forever, is expecting too much. Cf. Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677, 689-90 (2000) (explaining that with the assistance of counsel, capital habeas petitioners "frequently include factually disputable claims in their habeas petitions" and noting that the petitioner does not even know the accuracy of some of these allegations until the facts are developed through a hearing).

assumed the facts as alleged by the prisoner, a federal court will have to be persuaded that § 2254(d)(1) is satisfied.²⁴³ To be sure, this presents a considerable burden to prisoners, particularly pro se prisoners, who, in presenting their claims to the state court, are expected, even without discovery, to colorably assert facts not yet known to them in order to meaningfully preserve the claims for federal habeas review. Viewed in this light, (d)(2) provides a meaningful but insufficient check on the fairness of the state procedures.²⁴⁴

*B. New Facts Creating a “New” Claim for Purposes of
AEDPA Review*

An alternative framework for limiting the scope of *Pinholster* and indirectly providing a mechanism for challenging unfair state procedures relies on a prisoner arguing that the claim he is presenting to the federal habeas court is new or materially different from the claim he presented to the state court.²⁴⁵ The

243. It seems likely that federal hearings in this context will be limited to circumstances in which the federal court concludes that, based on the prisoner’s allegations, (d)(1) is satisfied but the court needs a hearing to confirm the validity of the allegations and conclusively establish the constitutional violation. This scenario could arise if the state court “assumed the habeas petitioner’s facts” and then a federal court concluded that the state court’s denial of relief, based on the petitioner’s version of the facts, was contrary to or an unreasonable application of clearly established federal law. *Pinholster*, 131 S. Ct. at 1412 (Breyer, J., concurring). In these circumstances, a “hearing might be needed in order to determine whether the facts alleged [in state court] were indeed true” so as to justify relief. *Id.*

244. I reiterate, however, that (d)(2) is not an insignificant mechanism for reviewing state procedures in many cases. For example, when the state post-conviction court refuses to fund a single defense expert despite the presentation of expert testimony by the State as to a material issue, a finding of fact in favor of the State as to the material issue should be regarded as satisfying the unreasonableness requirement of (d)(2) such that federal review is unconstrained by the *Pinholster* limitation on factual development and unconstrained by the deferential review of (d)(1).

245. In a habeas case, *Bell v. Kelly*, which the Court ultimately dismissed as improvidently granted, there was a significant amount of valuable briefing by the parties and amici for both parties. See *Bell v. Kelly*, 555 U.S. 55, 55 (2008). Members of the Court continue to cite the briefs and arguments in this case. See, e.g., *Pinholster*, 131 S. Ct. at 1417 n.5 (Sotomayor, J., dissenting) (citing Transcript of Oral Argument, *Bell v. Kelly*, 555 U.S. 55 (2008) (No. 07-1223)). In Petitioner Bell’s opening brief, counsel explained with considerable care the

limitations on relief contained in § 2254(d) only apply to claims “adjudicated on the merits by a state court.”²⁴⁶ Consequently, if the claim presented to the federal habeas court is materially different than the claim presented to the state court, then § 2254(d) would not apply. As a general rule, arguing that a claim or issue of law is new is not a desirable approach for a federal habeas petitioner. New rules of law are barred by the *Teague* rule governing retroactive application of new laws and by § 2254(d)(1)’s requirement that federal habeas petitioners state a claim under “clearly established federal law as determined by the Supreme Court.”²⁴⁷ Likewise, if a claim is brought for the first time on federal habeas review, then the claim is typically said to be unexhausted and therefore defaulted.²⁴⁸ Thus, even though the odds of winning on habeas review are always immensely small, a denial of relief is typically certain if the prisoner alleges that something new, never before presented, justifies federal relief. Such a petitioner does not lose because of § 2254(d)(1); he loses because his claim is said to be procedurally defaulted.²⁴⁹

notion that new evidence can render a claim new, and therefore unadjudicated for purposes of AEDPA. See Brief for Petitioner at 19, *Bell v. Kelly*, 555 U.S. 55 (2008) No. 07-1223, 2008 WL 2958115, at *23–39. Petitioner’s counsel specifically stated:

[W]here, as here, a petitioner establishes his entitlement to fact development and proves facts not before the state court that significantly affect the court’s application of the relevant constitutional rule (or one of its components) or its impression of the relevant facts, then the claim adjudicated by the state court ceases to be susceptible to meaningful review under § 2254(d).

Id. at *20.

246. 28 U.S.C. § 2254(d) (1996).

247. *Id.*

248. See *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (“[W]hen a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.” (citing *Rose v. Lundy*, 455 U.S. 509, 515–16 (1982); *Darr v. Burford*, 339 U.S. 200, 204 (1950))).

249. Practically speaking, the new claim is simply unexhausted and thus non-cognizable. However, courts tend to recognize that when a claim is not presented to a state court and no state court remedy remains available, then the claim is “technically exhausted but procedurally defaulted.” See, e.g., *Lopez v. Ryan*, 630 F.3d 1198, 1210 (9th Cir. 2011). Some states completely bar all successive habeas applications, and thus a claim not presented in one’s first state petition is technically exhausted because there is no state court remedy, and the only question is whether the procedural default can be overcome. See

Significantly, however, there is an important exception to the rule that bringing a new claim on federal habeas review will result in an automatic denial of relief, and the exception may have relevance in the context of challenging state procedures. A prisoner's procedural default for failing to raise a claim in the state courts is forgiven and federal habeas review is available if the defendant can demonstrate cause and prejudice from the failing to previously raise the claim.²⁵⁰ The sort of "cause" necessary to overcome a default is understood to require a showing "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."²⁵¹ Accordingly, where state court procedures are so inadequate or unfair as to prevent the full development of a claim by the prisoner, cause exists to excuse the procedural default.

Ordinarily, when a prisoner seeks to demonstrate cause and prejudice, he is pursuing an *entirely new* claim that came to light after the state post-conviction proceedings had already concluded. A paradigmatic example would be a due process *Brady* claim based on the prosecution's failure to disclose certain exculpatory evidence.²⁵² Equally strong would be a claim that the state court

Pinholster, 131 S. Ct. at 1418 n.6 (Sotomayor, J., dissenting) (noting "that Virginia law bars all successive habeas applications, even in cases where the petitioner has new evidence").

250. In addition to the cause and prejudice limitations, a claim can only be defaulted if the state procedural bar is independent and adequate. If the state's procedures in defaulting a claim are patently unfair, one might also argue that the default is not predicated on an adequate state law. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 366 (2002) (holding "that the Missouri Rules, as injected into this case by the state appellate court, did not constitute a state ground adequate to bar federal habeas review"); *Henry v. Mississippi*, 379 U.S. 443, 448 (1965) (holding that "[t]he Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence" would not bar federal review). In other words, a state procedure that is, as-applied, unfair or inadequate cannot serve as a basis for barring federal review.

251. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also* MEANS, *supra* note 22, at § 9B:51 (interpreting *Murray*). Means specifically states:

Without attempting an exhaustive catalog of objective impediments to compliance with a procedural rule, the Court in *Murray* identified the following: (1) interference by officials that makes compliance with the state's procedural rule impractical; (2) a showing that the factual or legal basis for the claim was not reasonably available; and (3) the procedural default was the result of ineffective assistance of counsel.

Id.

252. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding "that the

procedures or mechanisms for litigation directly impede the development of a claim. For example, the Supreme Court has permitted relief on a new claim when the facts of a juror misconduct claim could not have reasonably come to light through the state process.²⁵³ So long as the best efforts of the defense are insufficient to discover and present a claim to the state court, there is said to be cause to excuse the failure to exhaust the claim. Moreover, when litigating a claim in state court was impractical because of procedural or prosecutorial unfairness, the federal review of the claim is *de novo*.²⁵⁴ That is to say, an unfair state procedure that prevents an *entirely new* claim from being presented to the state court will provide the prisoner an opportunity to develop and litigate the claim for the first time on federal review, unencumbered by AEDPA.²⁵⁵

In an effort to benefit from the absence of AEDPA deference, state prisoners who are seeking a forum to challenge a state process as unfair ought to urge the Court to adopt a capacious view regarding what constitutes a new claim. As discussed immediately above, if a claim is truly new, then the restrictions on relief contained in § 2254 and *Pinholster* do not apply. Thus,

suppression by the prosecution of evidence favorable to an accused upon request violates due process” and will not procedurally bar petitioner from raising the claim in federal court).

253. See (Michael) Williams v. Taylor, 529 U.S. 420, 442 (2000) (explaining that the state record lacked evidence suggesting material misrepresentations by a juror during voir dire). The Court noted that “[s]tate habeas counsel did attempt to investigate petitioner’s jury” by filing “a motion for expert services with the Virginia Supreme Court, alleging “irregularities, improprieties and omissions” in the empanelling of the jury. *Id.* at 442 (quoting Williams v. Taylor, 189 F.3d 421, 426 (4th Cir. 1999)). The Court further noted that “the Virginia Supreme Court denied [the motion] and dismissed the habeas petition, depriving petitioner of a further opportunity to investigate,” and despite the fact that petitioner’s allegations of juror misconduct in the state court were “vague,” the Court concluded that such “vagueness was not the fault of petitioner” insofar as he had no knowledge that one of the jurors had concealed personal and professional relationships with the prosecutor. *Id.*; see also *id.* at 444 (holding that the petitioner’s failure to present the claim to the state court was excused insofar as the unavailability of the evidence constituted “cause” and on remand the prejudice issue could be determined).

254. See *id.* at 444.

255. See *id.* (finding that the failure to exhaust is excused because there is cause and prejudice). AEDPA does not apply because the same claim at issue was not “adjudicated” on the merits as required by § 2254(d). *Id.*

the more robust the understanding of what constitutes a new, unadjudicated claim, the more opportunity there is for prisoners who are able to demonstrate an unfair state process, and thus cause for the non-exhaustion, to avoid AEDPA.²⁵⁶ Specifically, a state prisoner might plausibly argue that a claim was not adjudicated for purposes of § 2254(d) when new evidence discovered after the completion of the state proceedings substantially bolsters a legal claim raised in state proceedings. The broadest articulation of this principle—substantial new facts developed in federal habeas render (d)(1) inapplicable—was presented to the Court in a prior case, *Bell v. Kelly*.²⁵⁷ Although the *Bell* case was ultimately dismissed as improvidently granted, the briefing and oral argument from the case continues to be cited by the Justices and considered by lower courts.²⁵⁸ The petitioner's brief in *Bell* was the apotheosis of the argument that new facts will suffice to render a claim new:

By its plain language, [§ 2254(d)] applies only to “claims” that were “adjudicated on the merits” in state court. A “claim” is the application of governing law to a particular set of facts. The admission of significant new evidence on federal habeas, therefore, may give rise to a new “claim” that no state court has previously “adjudicated on the merits.”²⁵⁹

In *Pinholster*, the Court expressly rejected the broad notion of new claim that regarded the admission of any substantial new evidence during federal habeas review as precluding the application of § 2254(d).²⁶⁰ Nonetheless, the Court left open the

256. The scenario presented in (*Michael*) *Williams*, while an important limit on AEDPA, is likely to be less common because it requires habeas counsel to uncover an entirely new legal theory justifying relief, as opposed to merely substantial new facts in support of a claim raised in state court. In (*Michael*) *Williams*, the petitioner raised for the first time in his federal habeas petition an entirely new claim of juror bias. *Id.* at 427.

257. *Bell v. Kelly*, 555 U.S. 55 (2008) (denying cert. in part).

258. See, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388, 1417 n.5 (2011) (Sotomayor, J., dissenting).

259. Brief for Petitioner at 19–20, *Bell v. Kelly*, 555 U.S. 55 (2008) No. 07-1223, 2008 WL 2958115, at *19–20.

260. See *Pinholster*, 131 S. Ct. at 1400 (noting that in a prior decision the Court had assumed, without deciding, that (d)(1) did not apply when significant new evidence had been admitted, and holding that “[t]oday, we reject that assumption and hold that evidence introduced in federal court has no bearing on § 2254(d)(1) review”).

possibility that, in certain circumstances, significant new evidence will justify regarding a federal claim as sufficiently new so as to be unadjudicated for purposes of § 2254(d) and therefore unaffected by *Pinholster*.²⁶¹ Specifically, there is a footnote in *Pinholster* that is destined to be revered by habeas defense lawyers as the only redeeming feature of the decision and bound to be reviled by proponents of less federal habeas oversight as an unnecessary point of confusion. In footnote 10, the Court left a crack in the door leading to the habeas looking glass: “Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, Justice Sotomayor’s hypothetical involving *new evidence* of withheld exculpatory witness statements may well present a *new claim*.”²⁶² It may ultimately prove unwise to place too much weight on the Court’s failure to directly foreclose such an argument,²⁶³ but this single footnote will, for many habeas petitioners, be the strongest argument against the application of (d)(1) and the *Pinholster* prohibition on a court’s ability to consider new evidence on habeas review. Accordingly, it is necessary to consider with due care the hypothetical in Justice Sotomayor’s dissent that spurred this soon to be infamous footnote:

Consider, for example, a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady v. Maryland*. The state court denied relief on the ground that the withheld evidence then known did not rise to the level of materiality required under *Brady*. Before the time for filing a federal habeas petition has expired, however, a state court orders the State to disclose additional documents the petitioner had timely requested under the State’s public records Act. The disclosed documents reveal that the State withheld other exculpatory witness statements, but state law would not permit the petitioner to present the new evidence in a successive petition.²⁶⁴

261. *Id.* at 1401.

262. *Id.* at 1401 n.10.

263. Similar reliance was placed on *Holland v. Jackson*, 542 U.S. 649 (2004), which had assumed without deciding that the introduction of new evidence in federal court rendered (d)(1) inapplicable. *Holland*, 542 U.S. at 653.

264. *Pinholster*, 131 S. Ct. at 1417–18 (Sotomayor, J., dissenting).

Responding to her own hypothetical,²⁶⁵ Justice Sotomayor makes a series of observations that all but forces the majority to concede that, at least in some circumstances, new evidence justifies regarding a legal theory or claim that was exhausted in state court as a new claim:

Under our precedent, if the petitioner had not presented his *Brady* claim to the state court at all, his claim would be deemed defaulted and the petitioner could attempt to show cause and prejudice to overcome the default. If, however, the new evidence merely bolsters a *Brady* claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain federal habeas relief after today's holding Because the state court adjudicated the petitioner's *Brady* claim on the merits, § 2254(d)(1) would still apply. Yet, under the majority's interpretation of § 2254(d)(1), a federal court is now prohibited from considering the new evidence in determining the reasonableness of the state-court decision.

The majority's interpretation of § 2254(d)(1) thus suggests the anomalous result that petitioners with new claims based on newly obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits in state court cannot obtain federal habeas relief if they cannot first satisfy § 2254(d)(1) without the new evidence.²⁶⁶

265. It is interesting to note that the Justice's hypothetical refers to a state court's discovery order as providing the relevant new evidence. *Id.* If no such state procedures are available, then many state prisoners will never develop such evidence without the aid of a federal court's discovery order. My research has not revealed any statistics regarding the frequency with which federal courts grant discovery prior to the filing of a federal petition, but my experience suggests that this is not the norm in most jurisdictions.

266. *Id.* at 1419 (citations omitted). Although Justice Sotomayor's hypothetical does seem to uncover an anomaly insofar as prisoners who raise a claim are at a greater disadvantage than prisoners who do not raise the claim, this is not the only instance of such an anomaly under AEDPA. For example, a prisoner who raises a claim in his first federal habeas petition is absolutely, categorically barred from raising the same claim in a second or successive petition. 28 U.S.C. § 2241(b)(1). By contrast, a prisoner who has never before raised the claim may do so in a successive petition if, for example, the claim is subsequently announced as a new rule of law made retroactive by the Supreme Court. 28 U.S.C. § 2244 (b)(2)(A).

In response to this discussion in the dissent, the *Pinholster* majority responds in footnote 10 by noting that this hypothetical petitioner who obtains new *Brady* evidence “may well [have] a new claim” such that § 2254(d) would not apply.²⁶⁷ In short, if government misconduct, or state procedural unfairness, or even simply circumstances beyond the defendant’s control prevented the discovery of substantial new facts, then an “old” claim reviewed in federal court in light of the “new” facts *might* be deemed a new claim and thus free of the restrictions in § 2254.²⁶⁸ The dissent seems to have prompted the majority to concede that the presentation of substantial new facts in support of a claim may be sufficient to render a preexisting claim “new” and therefore unadjudicated for purposes of § 2254(d),²⁶⁹ and, to be sure, this is one of the few chinks in the AEDPA armor. Notably, however, there remain some substantial deficiencies with this approach as a model for ensuring full and fair state court proceedings.

Most importantly, it seems unlikely that any new facts can be considered after the filing of the federal habeas petition. That is to say, if there is an exception to *Pinholster*’s limitation when substantial new evidence is discovered to support the claim, the exception may extend only to evidence presented prior to the filing of the federal habeas petition. This rule necessarily follows from *Pinholster* because *Pinholster* bars the consideration of evidence outside of the state court record unless § 2254(d)(1) is satisfied.²⁷⁰ If the claim presented in the federal petition is not “new” based on the substantial additional facts, then it is the

267. *Id.* at 1401 n.10 (majority opinion). Of course, if the new evidence renders a claim new, then the claim is also unexhausted. If the state law bars the filing of a successive petition, *see, e.g., id.* at 1400 n.6, then the petitioner must overcome the default by demonstrating cause and prejudice. *Cf.* (Michael) Williams v. Taylor, 529 U.S. 420, 432–33 (2000) (recognizing that the diligence required for § 2254(e)(2) will typically also constitute the cause needed to overcome a default). By contrast, if the state procedures would allow a new claim to be presented, then the claim would have to be exhausted. Notably, if the claim (or substantial new facts) were not discovered until after the habeas petition was filed in district court, then it is unlikely that the new claim can be added by amendment to the pending habeas petition. *See* Mayle v. Felix, 545 U.S. 644, 657 (2005).

268. *Pinholster*, 131 S. Ct. at 1400 (majority opinion).

269. *Id.* at 1418 (Sotomayor, J., dissenting).

270. *Id.* at 1398 (majority opinion).

same claim that was adjudicated by the state court. And “if a claim has been adjudicated on the merits by a state court,” federal review is constrained by (d)(1) and limited to the state court record.²⁷¹ In essence, this means that a petitioner relying on this “new” claim approach must establish the facts in support of his claim prior to the filing of his federal habeas petition and without the assistance of the court in the form of subpoenas and discovery orders. This presents a number of barriers to relief that will often prove insurmountable unless federal judges, alerted to this conundrum, more regularly permit pre-petition discovery or hearings.²⁷²

For example, in the vast majority of non-capital habeas cases, the prisoner will be unrepresented.²⁷³ The prisoner will finish his state post-conviction proceedings and, still without counsel, be expected to generate substantial new facts in support of his claims within the one-year statute of limitations for filing a federal petition as prescribed by AEDPA.²⁷⁴ In the absence of federal procedures, such as a court ordered evidentiary hearing to develop facts in support of the claims, it is all but impossible for the vast majority of prisoners to uncover relevant, substantial

271. Sotomayor’s dissent highlights this confusion when she notes: “Even if it can fairly be argued that my hypothetical petitioner has a new claim, the majority fails to explain how a diligent petitioner with new evidence supporting an existing claim can present his new evidence to a federal court.” *Id.* at 1418 n.8 (Sotomayor, J., dissenting).

272. It should be noted that recent limitations on certain types of civil actions under § 1983, particularly in the context of supervisory liability, impose similar burdens on prisoners. *See, e.g.,* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (finding that in § 1983 suits, a government official is only responsible for his or her own actions and mere knowledge is not sufficient to hold an official liable for his or her subordinate’s discriminatory behavior). Certainly a prisoner seeking to construct a well-pleaded complaint so as to state a claim under the heightened standards of *Iqbal* would benefit from pre-filing discovery as well. *Cf.* Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1336–39 (2010) (positing that, in reality, the *Iqbal* standard does not impose a materially higher pleading burden on plaintiffs).

273. *See* Louis Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 479 (2002) (noting that a significant increase in habeas filings involve pro se litigants).

274. *See id.* at 483 (addressing the fact that pro se claims present complex issues because these applicants lack resources to interpret the law or to obtain evidentiary support for claims).

evidence in support of their claims.²⁷⁵ Presently, however, there is no federal procedure for obtaining an evidentiary hearing prior to the filing of a federal habeas petition.²⁷⁶ Moreover, in the unlikely event that a state prisoner who filed a federal petition convinced a federal judge to grant an evidentiary hearing in order to develop new facts, it is unlikely that the petitioner would ultimately be permitted to benefit from these new facts. On the one hand, if the new facts merely supported existing, exhausted claims, then *Pinholster* expressly holds that such facts are not relevant to the determination of whether habeas relief may be granted.²⁷⁷ On the other hand, if the petitioner claimed that the newly developed facts that resulted from the hearing were sufficiently substantial so as to render his claim “new” under the terms of footnote 10 from *Pinholster*, the new claim would likely not be cognizable because habeas petitions can be amended so as to add new claims only when the new claims relate back to the claims in the original petition.²⁷⁸ In *Mayle v. Felix*,²⁷⁹ the Court limited amendments to habeas petitions²⁸⁰ such that amendments are permitted only insofar as they arise out of “the same core facts as the timely filed claim.”²⁸¹ It would obviously be difficult for a petitioner to argue that he is permitted to amend his petition because the newly developed facts arise out of the same “core of facts” while simultaneously arguing that the new facts that are the source of the amendment are sufficiently

275. *See id.*

276. The text of Habeas Rule 8 seems to explicitly foreclose the possibility of a pre-filing evidentiary hearing: “If the petition is not dismissed, the judge shall . . . determine whether an evidentiary hearing is warranted.” Rules Governing § 2254 Cases in the United States District Courts, Rule 8, 28 U.S.C. § 2254 (2010). Likewise, in *McFarland v. Scott*, 512 U.S. 849, 857–58 (1994), a closely divided Court concluded that the statutory right to counsel is triggered prior to the filing of a habeas petition. *Id.*

277. *See Pinholster*, 131 S. Ct. at 1398 (majority opinion).

278. *Id.* at 1419 n.10 (Sotomayor, J., dissenting).

279. *Mayle v. Felix*, 545 U.S. 644 (2005).

280. The *Mayle v. Felix* issue applies only to efforts to amend that occur after AEDPA’s one-year statute of limitations has expired. *Id.* at 656. An amendment as of right that occurs before the one year deadline should be immune from this difficulty. *Id.*

281. *Id.* at 657.

material and different so as to render the previously presented claim unadjudicated by the state court.²⁸²

I do not purport to have all of the answers about this rapidly developing and unsettled area of law, but as this brief discussion illustrates, the “new” claim approach suffers from substantial shortcomings. Even where a state process is patently unfair—the state actively obstructs the development of relevant facts in support of a colorable claim by denying funding, or experts, or hearing—the federal court probably can only consider new facts when those facts are discovered prior to the filing of the habeas petition and included in the federal petition. Perhaps the Court will simply read a procedural fairness requirement into the *Pinholster* rule, but if not, the new-claim approach, like the efforts to litigate procedural unfairness under § 2254(d)(2), are likely to prove an insufficient check on unfair state procedures.

VI. Challenging Deficient State Procedures Through § 1983 Actions

In view of the fact that AEDPA poses procedural and substantive barriers that are often insurmountable, it is time for courts to consider seriously the viability of a non-habeas challenge to state procedures, i.e., a challenge under § 1983 seeking declaratory or injunctive relief because of an unfair state practice. Ideally, a § 1983 action could serve as a collateral forum for litigating procedural fairness issues—it is collateral review of the collateral review.

Until very recently, such challenges seemed unnecessary in view of the accepted wisdom that AEDPA was more legislative hyperbole (or hype) than bite. Moreover, lawyers have likely been deterred from bringing such actions, which thematically resemble a post-conviction or collateral challenge, by the Court’s repeated admonition that habeas proceedings are the exclusive vehicle for

282. Potentially the prisoner could file the “new” claim as a successive habeas petition. 28 U.S.C. § 2244(b). However, in order to satisfy the limitation on successive petitions the new facts must not have been discoverable through “due diligence” and “the facts underlying the claim” would have to demonstrate the petitioner’s innocence. *Id.*

challenging the legality of one's conviction.²⁸³ Presently, however, there is both a need for procedural challenges unconstrained by AEDPA and a viable option for such challenges based on the Court's recent decision in *Skinner v. Switzer*.²⁸⁴ Whereas the Court's recent decisions in *Pinholster* and *Richter* signal that AEDPA's restrictions on federal review are maturing in their severity, within weeks of these two habeas decisions the Court also decided *Skinner*, which opens the door to procedural²⁸⁵ challenges to state post-conviction²⁸⁶ proceedings under § 1983. As the remainder of this Article explains, a § 1983 challenge to state post-conviction proceedings seems to provide a plausible alternative (or supplement) to challenging unfair state processes through federal habeas proceedings. Assuming a mechanism for staying petitions during the pendency of non-habeas challenges so as to avoid the prohibitions on successive habeas petitions and amendments, civil litigation under § 1983 promises a unique opportunity to prompt systemic reform of state processes, like that urged by Professor Primus, without eliminating individualized habeas corpus review. As with procedural challenges brought within the habeas framework, it is an imperfect solution to a complicated problem, but § 1983 litigation provides advantages to prisoners seeking to challenge the procedural adequacy of their state court proceedings.

283. See *Heck v. Humphrey*, 512 U.S. 477, 478 (1994) (finding that certain claims, such as challenging the fact or duration of confinement, “must be brought in as habeas corpus proceedings, which do contain an exhaustion requirement”).

284. *Skinner v. Switzer*, 131 S. Ct. 1289, 1298–1320 (2011) (allowing a claim under § 1983 to proceed so long as it does not demonstrate invalidity of conviction).

285. The *Skinner* majority is clear that challenges to a state's procedures (or lack thereof) as a matter of substantive due process are not generally viable. See *id.* at 1293 (“*Osborne* rejected the extension of substantive due process to this area” (citing *Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2321 (2009))); *id.* (holding that a viable claim is one that alleges that the available state procedures denied “him procedural due process”).

286. See *id.* at 1301 (Thomas, J., dissenting) (“Like *Osborne*, *Skinner* seeks to challenge state collateral review procedures.”); *id.* at 1301 n.2 (explaining that the procedure in question is a collateral, post-conviction procedure even though the challenged DNA procedure “does not itself provide a vehicle for obtaining relief” (quoting *Ex Parte Tuley*, 109 S.W.3d 388, 391 (Tex. Crim. App. 2002))).

A. *Understanding Skinner as Permitting § 1983 Actions*

In *Skinner*, the Court considered whether a state prisoner could assert a claim under § 1983 challenging a state's DNA testing procedures or whether such a claim must be brought in a habeas petition under § 2254. *Skinner* brought a § 1983 action seeking an injunction forcing the state of Texas to allow him to test DNA evidence from the crime scene. More precisely, *Skinner* brought an action against the district attorney whose office had control of the evidence that *Skinner* sought to test, claiming that the failure to permit testing in his case was procedurally improper.²⁸⁷ In a 6–3 decision, the Court held that a challenge to the procedural fairness of a “postconviction claim . . . is properly pursued in a § 1983 action.”²⁸⁸ This holding could prove to be pathmarking in the field of post-conviction review.²⁸⁹

At the outset, however, it is critical to point out that *Skinner*'s allowance of non-habeas challenges to state post-conviction proceedings is limited to challenges of process rather than challenges of substance.²⁹⁰ The first sentence of *Skinner* emphasizes the limits of the holding by explaining that the decision is limited to the narrow question “left unresolved in *District Attorney's Office for Third Judicial District v. Osborne*.”²⁹¹ In *Osborne*, the Court unequivocally held that there is no substantive right to access DNA evidence, and such a conclusion is consistent with the prior decisions concluding that there is no due process right to post-conviction proceedings more generally.²⁹² As the Court has explained, “*Osborne* rejected the

287. See *id.* at 1294–95 (majority opinion).

288. See *id.*

289. Prior to *Skinner*, it was far from obvious that § 1983 authorized such challenges. See, e.g., *Dickerson v. Walsh*, 750 F.2d 150, 152–54 (1st Cir. 1984) (holding that such claims could only be raised through habeas corpus because the ultimate relief sought was release); Schwartz, *supra* note 63, at 160 (“A forceful argument can be made that *Younger* abstention normally should preclude federal court relief that interferes with state post-conviction proceedings.”).

290. See *Skinner*, 131 S. Ct. at 1293.

291. *Id.*

292. See *Osborne*, 129 S. Ct. at 2322 (“*Osborne* seeks to defend the judgment on the basis of substantive due process as well We reject the invitation and conclude, in the circumstances of this case, that there is no such substantive due process right.”). As a general matter, courts operate on the assumption that

extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process.”²⁹³ There is, in short, no right to certain state post-conviction procedures, but when a state provides post-conviction review, and therefore earns federal deference to its review, the process must be fundamentally fair.²⁹⁴ *Skinner*-type challenges, then, will be limited to claims that the state has deprived the prisoner of a liberty interest in a full and fair state post-conviction process in contravention of procedural due process.²⁹⁵

there is no due process (or other constitutional) right to state post-conviction procedures of any particular form, or even at all. *See, e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (explaining that “[s]tates have no obligation to provide” opportunities for collateral challenges). However, when such procedures exist, they must be fundamentally fair as required by procedural due process. *Cf. Osborne*, 129 S. Ct. at 2320 (asking whether “the State’s procedures for postconviction relief ‘offends some principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ or ‘transgresses any recognized principle of fundamental fairness in operation’” (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992))). The requirement of procedural fairness operates as a sort of quid pro quo—the state’s review is insulated with deference under the habeas common law and AEDPA, but the state’s review must earn such deference by honoring basic precepts of fairness. *Cf. id.* at 2332 (Stevens, J., dissenting) (“Although States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause” (citing *Evitts v. Lucey*, 469 U.S. 387, 393 (1985))).

293. *Skinner*, 131 S. Ct. at 1293 (citations omitted).

294. The conclusion that there is no right to state post-conviction review is often explained by reference to the even more surprising conclusion that there is no constitutional right to a direct appeal. *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 503–04 (1992) (noting that the Court has bolstered its conclusion that state habeas is not required by relying on the conclusion that state appeals are not even required). As one commentator has explained,

Criminal appeals did not exist at the time of the Founding; Congress did not provide for federal criminal appeals until the late nineteenth century; accordingly, the criminal appeal cannot form part of the historic tradition of due process. As recently as 1987, the Supreme Court reaffirmed its allegiance to this conventional view, stating that there is no constitutional right to appellate review of criminal convictions, a proposition that the Court has repeated with remarkable regularity since first enunciating it in 1894.

Id.

295. As expressed in *Osborne*, “Federal courts may upset a State’s postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.” *Osborne*, 129 S. Ct. at 2320.

In short, *Skinner* opens the door to § 1983 challenges to the procedural adequacy of state collateral proceedings. In *Skinner*, the challenge was to the state's construction and application of a DNA access statute; however, subsequent challenges could be brought on procedural due process grounds against any state collateral proceeding implicating constitutional rights so long as a favorable outcome for the prisoner in the proceeding would not necessarily imply the invalidity of his conviction.²⁹⁶ It is true that the "ultimate aim" of these procedural challenges by a prisoner is to undermine the validity of a conviction.²⁹⁷ And in this regard, Justice Thomas is surely correct that such a claim "sounds in habeas" and provides a "roadmap" for prisoners seeking to avoid the constraints of AEDPA.²⁹⁸ Nonetheless, *Skinner* leaves no doubt that, as a procedural matter, such challenges can be brought in a § 1983 action, and, as such, § 1983 may serve to impose an important additional deterrent on state courts such that they will be more careful about the procedures employed to review claims of unconstitutional incarcerations.²⁹⁹

296. See *Skinner*, 131 S. Ct. at 1298.

297. See *id.* at 1299.

298. *Id.* at 1302. The Court has repeatedly held that "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." See *Hill v. McDonough*, 547 U.S. 573, 579 (2006) (holding that a challenge to the State's proposed method of execution may be brought under § 1983) (quoting *Muhammad v. Close*, 540 U.S. 749, 750 (2004)). The Court reasoned that such claims must be more akin to a challenge to the conditions or circumstances of confinement than an outright challenge to the legality of one's sentence or conviction, and thus, the habeas bar on successive petitions did not apply to such actions. *Id.*

299. See *Skinner*, 131 S. Ct. at 1298–99. The range of challenges to process available to petitioners is legion and far from hypothetical. For example, the Tenth Circuit observed a recurring procedural trap in Oklahoma: the state courts would treat a claim as defaulted if it was not raised on direct appeal, even if the claim in question could not be raised on direct appeal. See *Miller v. Champion*, 161 F.3d 1249, 1252 (10th Cir. 1998) ("In this case, the record contains no evidence that Mr. Miller had the opportunity to consult with separate appellate counsel in order to evaluate his attorney's performance or that Oklahoma provided him with any procedural mechanism to develop the factual basis of his ineffective assistance claim on direct appeal."). Professor Primus has gathered several other useful examples. See Primus, *supra* note 170, at 2 (noting, for example, that "[c]apital defendants in Idaho who discover six weeks after sentencing that the state withheld impeachment evidence about prosecution witnesses are statutorily barred from challenging the state's misconduct in state court").

B. The Advantages of a § 1983 Challenge to State Post-Conviction Procedures

Summarizing his objections to *Skinner*'s approval of § 1983 challenges to state collateral proceedings, Justice Alito explained: "In truth, the majority provides a roadmap for any unsuccessful state habeas petitioner to relitigate his claim under § 1983: After state habeas is denied, file a § 1983 suit challenging the state habeas process rather than the result. What prisoner would not avail himself of this additional bite at the apple?"³⁰⁰

The prospect that *Skinner* provides a procedural bypass around AEDPA is significant, and this section catalogues the various advantages that such litigation would provide to prisoners. Given that Congress has shown no signs of imminently overhauling AEDPA, a "roadmap" around the limitations would be a welcome development for those interested in restoring a system of more substantial oversight of state convictions. A well-timed § 1983 challenge to state procedures would enable the prisoner to avoid, to varying degrees, the onerous exhaustion, discovery, and deference provisions of AEDPA and would likely even facilitate class actions that would conserve judicial resources, attorney time, and promote efficiency.³⁰¹ Equally important, such litigation would carry with it the promise of attorney fees in successful cases and thus spur the representation of non-capital prisoners who, with few exceptions, are forced to litigate pro se in federal habeas review. All the while, because such litigation is done outside the realm of habeas corpus, one avoids the concerns raised by King and Hoffmann that the overuse of habeas corpus has the effect of diminishing the writ insofar as the judge who has to sort through the habeas haystack ends up resenting the needle.³⁰²

Nonetheless, there is also reason to believe that the concerns raised by Justices Alito, Thomas, and Kennedy—that *Skinner* "undermines the [AEDPA] restrictions"—are substantially overblown. In view of the fact that federal habeas actions remain the *only* litigation vehicle through which a conviction can actually

300. *Skinner*, 131 S. Ct. at 1303 (Alito, J., dissenting).

301. KING & HOFFMANN, *supra* note 8, at 73.

302. *See id.*

be set aside, the siren song of AEDPA's fundamental demise is overstated.³⁰³ After briefly surveying some of the positive attributes of litigation under § 1983 as opposed to § 2554, I will consider the shortcomings of this § 1983 approach.

1. Exhaustion

The first significant advantage of § 1983 litigation is that, as a general rule, actions litigated under § 1983 do not require exhaustion.³⁰⁴ The Prison Litigation Reform Act of 1995 requires that prisoners bring grievances through the prison's administrative processes before filing a § 1983 action,³⁰⁵ and the Court has interpreted this requirement as imposing a duty to timely and properly exhaust the available procedures for redressing prisoner grievances.³⁰⁶ The exhaustion of administrative remedies required of prisoners is, however, less onerous and less time consuming than AEDPA-based exhaustion, and, most importantly, it is limited to circumstances where the prisoner brings an action "with respect to prison conditions."³⁰⁷ In other words, the limited form of exhaustion that applies to

303. For example, rigid limitations on filing successive habeas petitions, without more, substantially ameliorate Justice Thomas's concerns. 28 U.S.C. § 2244(b).

304. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 500–01 (1982); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). There is good reason not to require exhaustion in the context of such litigation. As Professor Martin A. Schwartz has observed, the "1983 remedy exists, in part, because of congressional mistrust for the 'factfinding processes of state institutions,'" and thus § 1983 is designed to provide persons with "immediate access to the federal judicial system despite state laws to the contrary." Schwartz, *supra* note 63, at 98. It should be noted that insofar as exhaustion does not apply to § 1983 actions, the procedural default barriers applicable to habeas actions are also inapplicable. 28 U.S.C. § 2254(b)(1)(A).

305. 42 U.S.C. § 1997e(a). Prisoners had no exhaustion requirement prior to a 1979 enactment that provided a milder exhaustion requirement. See *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) ("Before 1980, prisoners asserting constitutional claims had no obligation to exhaust administrative remedies." (citing *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971))).

306. See *Ngo*, 548 U.S. at 93 ("[E]xhaustion requirement requires proper exhaustion."); *Booth v. Churner*, 532 U.S. 731, 740–41 (2001) (finding that Congress amended § 1997e(a) to demand exhaustion of administrative remedies regardless of relief offered).

307. 42 U.S.C. § 1997e(a) (2006).

prisoners bringing § 1983 actions is inapplicable to prisoners challenging state post-conviction review procedures.³⁰⁸ Indeed, in *Osborne*, the Court expressly stated that nothing in the opinion should be construed as requiring a petitioner to “exhaust state-law remedies,”³⁰⁹ and Skinner himself did not exhaust his “challenge to Texas[s] procedures for postconviction relief to the Texas courts.”³¹⁰

The avoidance of an exhaustion requirement is a significant advantage for prisoners seeking to challenge state procedures.³¹¹ Under § 2254(b)–(c), a prisoner is explicitly required to exhaust all federal claims in state court, and a prisoner “shall not be deemed to have exhausted . . . if he has the right under the law of

308. Indeed, if a petitioner were to raise a federal claim in state court and, after losing, proceed with the identical claim in a § 1983 action, the so-called *Rooker-Feldman* doctrine or the preclusion doctrines would likely deprive a federal court of jurisdiction. See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983) (holding that federal courts other than the Supreme Court do not have jurisdiction over challenges to state court decisions arising out of judicial proceedings); see also *Rooker v. Fidelity Trust*, 263 U.S. 413, 416 (1923) (stating that appellate jurisdiction over final state court decisions rests solely with the Supreme Court of the United States). In *Skinner*, rather than bringing a federal challenge to a state court’s adjudication of his challenge to state procedures, Skinner “target[ed] as unconstitutional” the specific procedures applied in his case. See *Skinner v. Switzer*, 131 S. Ct. 1289, 1298 (2011) (recognizing that while a state court decision is not reviewable by a federal court under § 1983, the statute or rule governing the decision may provide a basis for a federal action).

309. *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2321 (2009) (citing *Patsy v. Bd. of Regents*, 457 U.S. 496, 500–01 (1982)). While rejecting the exhaustion requirement, the majority commented, “[i]t is difficult to criticize the State’s procedures when Osborne has not invoked them. . . . These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice.” *Id.*

310. *Skinner*, 131 S. Ct. at 1303 (Thomas, J., dissenting).

311. The significance of the fact that exhaustion does not apply to § 1983 actions, particularly as they relate to challenges predicated on state post-conviction review, has not escaped the attention of several of the Justices. In a concurring opinion in the *Osborne* judgment, Justice Alito, writing also for Kennedy and Thomas, observed that exhaustion is not required when the challenges to post-conviction procedures are pursued under § 1983. *Osborne*, 129 S. Ct. at 2324 (Alito, J., concurring) (explaining that such challenges ought to be forced into the habeas jurisdiction because exhaustion is not required for § 1983 actions); see also *Skinner*, 131 S. Ct. at 1304 (Thomas, J., dissenting) (describing the majority opinion as facilitating an intrusion by § 1983 “into the boundaries of habeas corpus” and lamenting the absence of an exhaustion requirement in cases like *Skinner*).

the State to raise, *by any available procedure*, the question presented.”³¹² Exhaustion, in other words, requires complete exhaustion in the sense that the prisoner must invoke “one complete round” under all of the established state review procedures.³¹³ Complete exhaustion is time consuming and filled with procedural pitfalls, and, for these reasons, Professor Martin Schwartz has identified the exhaustion requirement as being “at the heart” of the reasons why individuals prefer § 1983 over habeas litigation.³¹⁴

2. Section 2254(d)(1) & Factual Development

Prisoners seeking to challenge the fairness of state procedures under § 1983 will also enjoy the opportunity to avoid the centerpiece of AEDPA, § 2254(d)(1), and one of the more onerous pre-AEDPA limits on habeas relief: the rule of non-retroactivity.³¹⁵ As Justice Thomas explained in his dissent, the

312. 28 U.S.C. § 2254(b)–(c) (2006) (emphasis added).

313. *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

314. See Schwartz, *supra* note 63, at 98 (“The exhaustion requirement under the federal habeas corpus doctrine lies at the heart of the section 1983—habeas corpus conflict.”). It is also worth noting that § 1983 does not contain a statute of limitations; instead, the federal courts apply the forum state’s personal injury statute of limitations. See *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (agreeing to adopt, for a § 1983 action, the statute of limitations for recovery of damages in personal injury cases). In many actions under § 1983 the statute of limitations would be more generous than AEDPA’s one-year filing deadline. See *id.* at 280 (applying New Mexico’s three-year statute of limitations governing actions “for an injury to the person or reputation of any person”); see also *Owens v. Okure*, 488 U.S. 235, 238–39 (1989) (applying “New York’s 3-year residual statute of limitations for claims of personal injury” rather than the one-year statute of limitations urged by the State).

315. As a general rule, new constitutional rules announced by the Supreme Court that do not “place certain kinds of primary individual conduct beyond power of States to proscribe” and that are not “‘watershed’ rules of criminal procedure,” do not apply retroactively to cases that are already final. *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (citing *Teague v. Lane*, 489 U.S. 288 (1989)). If, however, the challenge is brought as an injunctive action under § 1983, the limitations imposed by *Teague* ought not apply. See *Teague*, 489 U.S. at 308–10 (describing exceptions where a decision will apply retroactively, including when the decision requires adherence to procedures that are “implicit in the concept or ordered” (internal quotation marks omitted) (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937))). Accordingly, a prisoner could theoretically challenge a state procedure as insufficiently full and fair and obtain an

Skinner rule allows prisoners to “undercut[] the restrictions Congress and this Court have placed on federal review of state convictions,” including the “significant deference” afforded to state courts under (d)(1).³¹⁶ This means that the severe limitations on relief dictated by decisions like *Richter* do not apply to prisoners challenging the adequacy of the state process under § 1983. To the extent that the challenges to state procedures prove ineffectual under § 2254(d)(2) or the new claim approach, discussed above, a § 1983 challenge to the process provides a viable alternative that is unencumbered by the exhaustion and deference provisions of AEDPA.³¹⁷

injunction ordering the state court to comply with the new procedural rule. Of course, the § 1983 challenge’s ultimate goal must be the undermining of the state review procedures and not the overturning of the prisoner’s conviction. See *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (stating that if a § 1983 judgment in favor of a plaintiff necessarily implies the invalidity of his conviction, the complaint must be dismissed absent proof of the conviction’s prior invalidation). On the other hand, one could reasonably argue that many new rules of state post-conviction procedure could be announced on federal habeas review—that is to say, the Court has never addressed whether *Teague*’s retroactivity rule applies to *new* rules of post-conviction procedure, and there is good reason to believe that *Teague* does not bar the announcement of new rules of procedure on habeas review when the new rule implicates the state post-conviction procedures rather than the trial procedures. Cf. *Martinez v. Schriro*, 623 F.3d 731 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 2960 (U.S. June 6, 2011) (No. 10-1001).

316. *Skinner*, 131 S. Ct. at 1303 (Thomas, J., dissenting).

317. Although the fact that § 1983 litigation is not subject to the limitations contained in § 2254 is obvious, I do not mean to overstate the advantages of litigating under § 1983 in this regard. It must be acknowledged, for example, that I do not think that a claim of procedural unfairness in the state process raised under § 2254(d)(2) would be constrained by the limits in (d)(1) either. In other words, to the extent that a petitioner is able to challenge the unfairness of a state proceeding through federal habeas proceedings, it seems unlikely that (d)(1) would apply to this determination. Moreover, it must be acknowledged that a prisoner challenging a state’s procedures under § 1983 would, at the very least, be required to state a claim under Rule 8 of the Federal Rules of Civil Procedure, a task that is increasingly difficult in the wake of cases like *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009), which held that Iqbal failed to state a claim because he did not allege sufficient facts “to plausibly suggest petitioners’ discriminatory state of mind.” Cf. Steinman, *supra* note 272, at 1294 (“If a plaintiff seeking judicial redress is unable to provide an adequate ‘statement of the claim’ at the pleadings phase, then that claim is effectively stillborn.”). Nonetheless, it still appears safe to assume that developing a well-pleaded civil complaint is easier than satisfying the strictures of § 2254(d)(1).

Equally important, where a prisoner litigates an issue outside of the shadow of § 2254(d)(1), *Pinholster*'s newly announced limitations on factual development would not apply. *Pinholster* holds that new evidence presented for the first time in federal court may not be considered and that instead, review “under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”³¹⁸ An action under § 1983 is, of course, unconstrained by § 2254(d)(1), and consequently, federal review of the state procedures is not limited to facts raised in the state court. In fact, the general federal discovery rules have been applied to civil rights actions, as opposed to habeas cases, so as to facilitate “broad discovery.”³¹⁹

Despite the fact that the Court has “long recognized the need to impose sharp limits on state prisoners’ efforts to bypass state courts with their discovery requests,” and although litigation under § 1983 challenging state procedures “implicate[s] precisely the same federalism and comity concerns,” a challenge to the state collateral proceedings litigated under § 1983 is permitted to proceed unencumbered by the discovery and deference provisions applicable to federal habeas review.³²⁰

318. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

319. *See, e.g., Inmates of Unit 14 v. Rebideau*, 102 F.R.D. 122, 128 (N.D.N.Y. 1984) (“Federal policy favors broad discovery in civil rights actions.”). For a useful example of the sort of evidence that might be available through federal discovery in order to demonstrate the unfairness of a judicial process, see *Amadeo v. Zant*, 486 U.S. 214, 217 (1988) (“[W]hile petitioner was pursuing his direct appeal to the Georgia Supreme Court, an independent civil action in federal court brought to light a scheme by the District Attorney and the Jury Commissioners of Putnam County to underrepresent black people and women on the master jury lists. . . .”). While evidence relating to the exclusion of jurors on the basis of race or gender might undermine the verdict and prove impermissible as a basis for a collateral civil rights proceeding, similar evidence regarding the unfairness of the state post-conviction process—racial discrimination, funding shortages, judicial bias, etc.—might be discoverable through a civil rights action and ultimately serve as evidence of an unfair state process.

320. *See Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2325 (2009) (Alito, J., concurring) (“It is no answer to say, as respondent does, that he simply wants to use § 1983 as a discovery tool to lay the foundation for a future state postconviction application . . .”).

3. Class Actions and Attorney Fees

In the past, habeas corpus was associated with correcting systemic failures as well as protecting individual rights. Recalcitrant states that were either unable or unwilling to enforce federal rights were forced into compliance through habeas corpus actions.³²¹ And the inability of the AEDPA model of habeas review to efficiently redress systemic failures of the justice system is one of the major motivations for recent reformers to suggest that federal habeas review, as we currently know it, should be abandoned.³²² To be sure, class action litigation is a powerful method of spurring reform,³²³ and review under § 2254 is currently not amenable to such litigation. However, rather than scrapping § 2254 litigation, in the wake of *Skinner*, in some cases it may make sense to supplement it with § 1983 litigation, which does permit class actions.

At least from the 1960s through the early 1990s, a wide range of systemic failures in state justice systems could be efficiently consolidated for litigation in federal habeas class actions.³²⁴ The efficiency and structural benefits of aggregated litigation in this context are easily appreciated when one considers that this form of litigation allowed prisoners to collectively challenge, for example, the validity of a jurisdiction's death penalty,³²⁵ or limited access to counsel or legal materials,

321. See Primus, *supra* note 170, at 14 (“[F]ederal habeas review of state court criminal convictions was not only about emancipating wrongly convicted individuals; it was also about coercing reluctant states to enforce federal rights.”).

322. King and Hoffmann regard habeas as a protection against systemic failures and note that the modern writ, as applied in review of criminal convictions, is substantially incapable of curing these defects. KING & HOFFMANN, *supra* note 8, at 87–108.

323. There is a robust literature documenting the important role that class actions, generally speaking, have in prompting social reform. See, e.g., Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 645 (providing examples of class actions brought in hopes of spurring social change).

324. See Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 404 (2007) (“[T]o remedy systemic criminal procedure violations, courts did for a time certify class actions in federal habeas corpus . . .”).

325. See Knapp v. Cardwell, 513 F. Supp. 4, 8 (D. Ariz. 1980) (describing a challenge to Arizona's death penalty procedures as proceeding as a class action pursuant to Rules 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure).

or the question of whether a jurisdiction had complied with federal procedures so as to “opt-in” under a special provision of AEDPA that provides for, among other things, an accelerated statute of limitations for capital prisoners.³²⁶ Collective challenges or habeas class actions reduced the strain on the courts of litigating the claims individually and allowed prisoners, who lack a right to counsel in post-conviction, to prioritize their shared or aggregate interests such that a single lawyer could represent many prisoners in a single case.³²⁷ Class actions in this context promote the efficient use of scarce resources, draw judicial attention to common systemic problems, and even protect the innocent by facilitating aggregate claims brought by persons who were unable to afford counsel or competently prepare a pro se pleading.³²⁸

In 1998, the Supreme Court effectively rendered the practice of litigating a habeas class action impossible by holding that the systemic challenges raised by prisoners could not be addressed until each petitioner has properly and completely exhausted the claim, on his own, through state court proceedings.³²⁹ As has happened repeatedly in the realm of modern habeas review, questions of constitutional substance were delayed, side-stepped, or permanently evaded by shifting attention to a procedural rule. In this instance, the efficiencies and advantages of collective litigation were bypassed in favor of a requirement that trial courts ensure that each prisoner had fully exhausted the claims

326. See, e.g., Garrett, *supra* note 324, at 405 (compiling cases).

327. Professor Primus has recognized that class actions “would preserve judicial time, energy, and resources and would ensure that habeas petitioners had counsel to raise their common claims.” Primus, *supra* note 170, at 52.

328. As Professor Garrett points out, the story of Earl Washington, Jr. illustrates that, at least in one circumstance, the use of class-action habeas litigation saved an innocent man from execution. Garrett, *supra* note 324, at 407. Garrett discusses a lawsuit in which a “jailhouse lawyer” brought a pro se class action arguing for a right to counsel in post-conviction “largely because of his concern for a fellow inmate, Earl Washington Jr., who could not bring a case himself because he had ‘an IQ of 69, an execution date three weeks away, and no lawyer.’” *Id.* The case eventually resulted in a stay, and “we now know, Earl Washington was actually innocent.” *Id.*

329. See *Calderon v. Ashmus*, 523 U.S. 740, 748 (1998) (“[I]f respondent . . . is allowed to maintain the present action, he would obtain a declaration as to the applicable statute of limitations in a federal habeas action without ever having shown that he has exhausted state remedies.”).

at issue before any of the claims could be joined together. Given the one-year statute of limitations for habeas cases and the fact that it is very rare for two prisoners to be at the same stage of exhaustion so as to be able to collectively bring such a challenge, for all practical purposes, the Court's decision in this regard "meant the end of the habeas corpus class action."³³⁰ Moreover, if any vestiges of the class-action model of habeas review survived this exhaustion rule, they have certainly been eviscerated by AEDPA's strict limits on second or successive habeas petitions.³³¹

Notably, however, collective challenges to systemic or common procedural failings through class action litigation is permitted in litigation under § 1983.³³² Professor Primus has recognized the advantages of cumulative or collective litigation in spurring systemic reforms of procedure; however, she ultimately concludes that the "procedural obstacle course and the deferential merits review . . . prevent habeas [class actions] from deterring systemic state violations."³³³ Even accepting the questionable assumption that challenges to state processes would be governed by AEDPA deference in a habeas action, as discussed above, the exhaustion and deference provisions of § 2254 do not apply to litigation under § 1983. Accordingly, § 1983 class actions provide a viable vehicle for systemic challenges to state processes insofar as neither AEDPA deference nor the Court's exhaustion rules apply to such actions.³³⁴

330. Garrett, *supra* note 324, at 406.

331. *Id.* As Garrett points out, the bar on successive habeas petitions codified in AEDPA, 28 U.S.C. § 2244, provide an even "harsher procedural barrier to habeas corpus class actions." *Id.* at 409. No prisoner can afford to participate in a class action as to some shared systemic issue if the filing of that petition will bar him from litigating his own individual claims in a separate and subsequent petition.

332. FED. R. CIV. P. 23(a); *see also* Angelo N. Ancheta, Comment, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. REV. 283, 284 (1985) ("[T]he defendant class action is a powerful, albeit uncommon, procedure for vindicating constitutional and statutory civil rights.").

333. Primus, *supra* note 170, at 53.

334. The recent challenges to lethal injection procedures and methods serve as a useful analogue. In Pennsylvania, for example, death-row inmates brought a class action under § 1983 challenging the state's lethal injection procedures. *See* Chester v. Beard, 657 F. Supp. 2d 534, 536 (M.D. Pa. 2009) (describing the class action claim that lethal injection subjects prisoners to the risk of "excruciating pain and suffering" in violation of the Eighth and Fourteenth Amendments); Jackson v. Danberg, 601 F. Supp. 2d 589, 591 (D. Del. 2009)

Whereas the availability of class action litigation considerably assists the plight of indigent prisoners who have no right to habeas counsel by allowing the work of a single pro bono attorney to directly benefit an entire class of prisoners, another feature of § 1983 litigation makes access to counsel for procedural challenges even more likely. Section 1983 litigation improves the chances that indigent defendants seeking to challenge a state post-conviction system will be able to obtain the assistance of counsel for either an individual or systemic challenge insofar as there is statutory authority for attorneys' fees for prevailing parties.³³⁵ Whereas habeas petitioners in non-capital cases will frequently be appearing pro se or relying on overworked pro bono counsel, under 42 U.S.C. § 1988 a prevailing party may be entitled to reasonable attorneys' fees.³³⁶ Moreover, although awards for attorneys' fees and costs to a prevailing party are a matter of trial court discretion, the Supreme Court has implied that § 1988(b) awards should not be parsimoniously granted. In rejecting an individual's argument that it would be too difficult to find an attorney to bring § 1983 actions for technical Fourth Amendment violations, Justice Scalia, writing for the Court, explained that "42 U.S.C. § 1988(b) answers this objection."³³⁷ In other words, the Court assumes that fee awards will be generously awarded to deserving prevailing parties, even where, as may be the case with a procedural challenge to the state post-conviction process, damages might be nominal unless or until the prisoner's conviction is ultimately reversed.

(same). Even where these challenges have failed on the merits, they provided prisoners a forum to litigate these challenges as a consolidated unit, independent of the normal procedural abyss that accompanies habeas litigation.

335. The Civil Rights Attorneys' Fees Awards Act of 1976 allows attorneys' fees for prevailing plaintiffs in § 1983 actions, a benefit that is not available to prisoners seeking to challenge the fairness of the state process through habeas corpus actions. See 42 U.S.C. § 1988(b) (2006) (permitting a court to award, in its discretion, reasonable attorneys' fees to a prevailing party in a § 1983 action). Significantly, under § 1988, fees may also be awarded for experts retained by the prevailing party. 42 U.S.C. § 1988(c).

336. "Section 1983's no-exhaustion rule and statutory fee authority are the two major distinctions between the two remedies and generally render section 1983 more desirable than federal habeas corpus to state prisoners." Schwartz, *supra* note 63, at 106.

337. Hudson v. Michigan, 547 U.S. 586, 597 (2006).

In short, litigation challenging state collateral proceedings is permitted under § 1983, and challenges in this posture avoid many of the most cumbersome procedural hurdles presented by AEDPA. The opportunity to engage in collective litigation of systemic problems, the possibility of attorneys' fees awards, the absence of exhaustion requirements, and the inapplicability of § 2254(d)(1)'s discovery and substantive limitations create substantial incentives to challenge state processes through non-habeas litigation.

C. The Defects and Disadvantages of § 1983 Challenges to Process

The notion that a litigant might prefer § 1983 challenges over AEDPA-based review has not been overlooked by Justices Thomas, Alito, and Kennedy, who have voiced concern that allowing § 1983 challenges to state collateral proceedings threatens to undermine the restrictions imposed by AEDPA.³³⁸ In separate opinions in both *Osborne* and *Skinner*, this trio has lamented what they regard as a readymade path or “roadmap” around AEDPA for those wise enough to “artful[ly] plead” their claims under § 1983 rather than § 2254.³³⁹ Observing that the federalism and comity issues are no less forceful in challenges to process,³⁴⁰ these Justices have complained that the *Skinner* rule allows a prisoner to challenge state “collateral review procedures under § 1983 [and thereby] impeach the result of collateral review without complying with any of the restrictions for relief in federal habeas.”³⁴¹

To be sure, *Skinner*-based challenges to procedure provide a novel vehicle for prisoners to “impeach” the state post-conviction

338. *Osborne*, 129 S. Ct. at 2324 (Alito, J., concurring); *Skinner*, 131 S. Ct. at 1303 (Thomas, J., dissenting).

339. “The rules set forth in our cases and codified in AEDPA would mean very little if state prisoners could simply evade them through artful pleading.” *Osborne*, 129 S. Ct. at 2325.

340. Some have suggested that “injunctive relief associated with section 1983” might create greater “federalism concerns” than the sort of outright release relief available on habeas. Primus, *supra* note 170, at 49.

341. *Skinner*, 131 S. Ct. at 1303.

processes that is, at least initially, unencumbered by AEDPA. However, while it is premature to attempt to catalogue all of the difficulties or shortcomings of *Skinner*-based challenges to process, it is clear that the predictions of AEDPA's untimely death are, at least for now, substantially overstated and misdirected. This section identifies a few of the key limitations on relief under the *Skinner* approach to litigation, paying particular attention to difficulties that may arise as to the proper remedy and the timing for filing such actions.

First, given that *Skinner* arose on a motion to dismiss, it remains to be seen what sort of circumstances will warrant a merits-based determination that due process has been violated. *Skinner* holds that a state's collateral proceedings are subject to federal review under § 1983,³⁴² but the Court did not decide whether *Skinner* will "ultimately prevail on his procedural due process claim."³⁴³ Thus, the question of what exactly constitutes a sufficient transgression of fundamental fairness so as to violate due process remains to be developed in specific cases. It is clear that due process does not require state proceedings to take a particular form or to provide the most comprehensive set of protections imaginable, but it seems equally clear that a state post-conviction process that is largely a sham or entirely ineffectual for purposes of developing and litigating fact-intensive claims will run afoul of due process.³⁴⁴ Until additional cases are decided on this issue, it is impossible to predict just how broad or narrow the due process right is in the context of challenges to state collateral review, but there is no reason to believe that such

342. *Id.* at 1298 (majority opinion).

343. *Id.* at 1296 (internal quotation marks omitted).

344. The Court did address a process-based challenge to the Alaska law governing procedures for DNA testing and concluded that the procedures did not violate due process. *See Osborne*, 129 S. Ct. at 2319 (acknowledging that a state-created post-conviction system, while not constitutionally required, can "beget yet other rights to procedures essential to the realization of the parent right" (internal quotation marks omitted) (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981))). And while it denied *Osborne* relief, the Court recognized that federal intervention is necessary if the state post-conviction process is "fundamentally inadequate to vindicate the substantive rights provided." *See id.* at 2320 (recognizing that the state has some "flexibility in deciding what procedures are needed in the context of postconviction relief" and that "due process does not 'dictat[e] the exact form such assistance must assume'" (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987))).

review will be less hospitable to prisoners than AEDPA-based review; indeed, the very novelty of such a claim is likely to produce some favorable judicial outcomes that might not have been achieved through pure habeas litigation alone.

A second limitation on the viability of *Skinner*-based challenges to state processes concerns the relationship between § 1983 and habeas actions. More precisely, a second limitation on the scope of challenges to state post-conviction proceedings under *Skinner* relates to the appropriate remedy resulting from such litigation. It is well settled that § 1983 challenges, even if successful, must not “necessarily imply’ the invalidity of [the] conviction”³⁴⁵ because only habeas corpus actions are permitted as a basis for challenging the validity of one’s conviction or sentence. Consequently, damage or injunctive actions premised on the invalidity of one’s conviction generally are not permitted under § 1983.³⁴⁶ Indeed, any action that will “necessarily spell speedier release” must be brought under § 2254.³⁴⁷ This recognition that claims relating directly or necessarily to the

345. *Skinner*, 131 S. Ct. at 1298 (citing *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)).

346. Similarly, challenges to a search or seizure that, if successful, would necessarily imply the invalidity of the conviction are also not permitted under § 1983 unless the conviction has already been set aside on appeal or through habeas proceedings. *See, e.g.*, *Wiley v. City of Chicago*, 361 F.3d 994, 997 (7th Cir. 2004) (“If, as alleged, Wiley was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of a prosecution premised on the planted drugs.”). By contrast, when evidence is not suppressed because of an exception to the exclusionary rule, a § 1983 challenge based on the illegality of the officer conduct is generally permitted. *Cf. Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (rationalizing a refusal to exclude evidence obtained in violation of the Fourth Amendment by virtue of the prisoner’s ability to bring a civil action under § 1983). There is thus a distinction between civil actions that undermine the validity of one’s conviction, which are not cognizable until the conviction has been overturned, and challenges that do not necessarily undermine the validity of the conviction. But in many instances, even where the illegal government conduct could theoretically be challenged through a § 1983 action insofar as it does not undermine the conviction, a plaintiff is not entitled to any compensatory damages if his conviction has not been reversed.

347. *Skinner*, 131 S. Ct. at 1299 n.13 (internal quotation marks omitted) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005)). A claim under *Brady v. Maryland*, for example, cannot be brought under § 1983 because a *Brady* claim, if successful, necessarily undermines one’s conviction and thus lies at the “core of habeas corpus.” *Id.*

validity of one's conviction lie at the "core of habeas corpus" and outside of the reach of § 1983 actions, though a significant limitation on the form of remedy available from such actions, does not undermine the purpose of a *Skinner* challenge to one's post-conviction proceedings. In fact, the analysis regarding Skinner's challenge to the post-conviction procedures for DNA access in Texas demonstrates the viability of such challenges against a state's post-conviction system more generally:

Skinner has properly invoked § 1983. Success in his suit for DNA testing would not "necessarily imply" the invalidity of his conviction. While test results might prove exculpatory, that outcome is hardly inevitable; [the] results might prove inconclusive or they might further incriminate Skinner.³⁴⁸

The same can be said for a state prisoner's challenge to the procedural unfairness of a state post-conviction proceeding. A federal court's holding that the process was flawed would not necessarily imply the invalidity of one's conviction. In order to overturn a conviction, one must demonstrate, per § 2254(a), that his conviction was unconstitutional. Standing alone, a finding of unfairness as to the state post-conviction process will require corrective procedural actions by either the state or federal system, but it does not imply the invalidity of the underlying conviction.³⁴⁹ At most, such a finding would result in an injunction ordering a new state process or a federal habeas proceeding unencumbered by the state review, either of which might result in a definitive determination that the conviction does *not* rest on a constitutional violation.³⁵⁰ Simply stated, a

348. *Id.* at 1298.

349. *Skinner* reverses the Fifth Circuit's holding that such challenges are not cognizable under § 1983, but it does not prescribe a remedy should such an action ultimately succeed. *Id.* at 1293. One option would be to simply allow the prisoner to proceed to federal habeas for a review of his constitutional claims unencumbered by AEDPA. A remedy that is more consistent with the federalism concerns that arise in this area of the law would be to remand the case to the state for a post-conviction review process that comports with due process. Assuming that the tolling of AEDPA's one-year statute of limitations would be available for the remand proceedings, this latter remedy seems to better fulfill the deterrence role I envision federal oversight playing in this arena.

350. To be sure, a challenge to state post-conviction procedures does, as Justice Thomas observed, "concern the validity of the conviction." *Id.* at 1302–03 (Thomas, J., dissenting). But it only does so indirectly. A victory by the plaintiff does not "necessarily imply" that his conviction is invalid any more than the

prisoner who is ultimately successful in challenging a state's procedures as fundamentally unfair is not entitled to release. The prisoner who obtains a judgment of procedural inadequacy would certainly prefer a grant of conditional release rather than damages or a procedural "redo" in the state court. The paradox of *Skinner*, however, is that the more robust the remedy provided by federal courts for procedural violations, the less viable the *Skinner* procedure remains as a metric for testing the fairness of state procedures.

A state prisoner is permitted to proceed under § 1983 precisely because such a victory would not, without more, undermine his conviction or entitle him to relief.³⁵¹ In practical terms, this means that a state prisoner wishing to take advantage of *Skinner* must proceed through two tiers of federal litigation—§ 1983 and habeas review—and it means that at least some of AEDPA's restrictions on relief likely continue to govern the habeas portion of the litigation through which the prisoner seeks to directly challenge the validity of the conviction or sentence. Stated another way, the injunctive relief, or perhaps declaratory relief,³⁵² available through § 1983 challenges to the state collateral processes does not directly lead to a prisoner's conviction being set aside. But it certainly has promise as a means of augmenting challenges to state processes in the federal courts.

The caveats about the nature of the § 1983 remedy do not displace the previously discussed advantages to litigating

right to test DNA evidence does; instead, the prevailing party simply wins the right to a process through which he might eventually test the ultimate validity of his conviction.

351. For this reason alone, the concerns expressed by the dissenters in *Skinner*, that AEDPA's restrictions are effectively bypassed through "artful pleading," is considerably overstated. *See id.* at 1303 (Thomas, J., dissenting) ("Allowing *Skinner* to artfully plead an attack on state habeas *procedures* instead of an attack on state habeas *results* undercuts [AEDPA].").

352. Declaratory judgments are likely not available as to matters collateral to the ultimate dispute: the constitutionality of the conviction. *See Calderon v. Ashmus*, 523 U.S. 740, 745 (1998) (noting that federal courts may issue declaratory judgments only in limited situations). Although the language in *Calderon* suggesting that any bypass of the exhaustion rule applicable to habeas proceedings is impermissible, *id.* at 748, is overruled in light of *Skinner*, the Court's limitations on declaratory judgments likely remains applicable in this context.

procedural unfairness through § 1983 actions. To be sure, a two-tier litigation track is cumbersome, but for many prisoners, particularly non-capital prisoners who lack counsel for federal habeas review, the benefits will sometimes outweigh the costs. As previously noted, the independent value of § 1983 challenges includes the ability of the proceedings to facilitate the discovery of the facts necessary for a habeas claim without the entanglements of AEDPA. I concede that, as to specific procedural challenges, a prisoner will only be able to get discovery if he states a claim in the manner required by the Rules of Civil Procedure—that is, § 1983 litigation does not promise unhinged and limitless discovery opportunities. However, it seems reasonable to conclude that many prisoners will be able to provide “a short and plain statement”³⁵³ describing the procedural unfairness of the state post-conviction system in their particular cases, and the resulting access to discovery, among other procedures, will likely be more favorable for a § 1983 plaintiff than it would be for a habeas petitioner. For one thing, a federal court ordering discovery and ultimately relief on a § 1983 action is at liberty to merely remand the case for additional state proceedings, a remedial step that avoids some of the stickiest federalism concerns that plague decisions to grant relief in the habeas context. Scholars have observed that, when it comes to constitutional adjudication, context matters,³⁵⁴ and when the context involves setting aside a final state conviction, the resulting judicial decisions may tend to be less favorable to the prisoner than an action under § 1983.³⁵⁵ Moreover, although the concurrence in *Osborne* concluded that “[i]t is no answer to say, as respondent does, that he simply wants to use § 1983 as a discovery tool to lay the foundation for a future,”³⁵⁶ in *Skinner* the Court implicitly approved the notion that a § 1983 claim is an entirely permissible vehicle for facilitating discovery that might

353. FED. R. CIV. P. 8(a)(2).

354. For an insightful account of how context matters for the constitutional adjudication of the Fourth Amendment, see Nancy Leong, *Making Rights*, 91 B.U. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719774.

355. See, e.g., Schwartz, *supra* note 63, at 179 (suggesting that courts might be less disposed to grant relief in the habeas context).

356. *Osborne*, 129 S. Ct. at 2325 (Alito, J., concurring).

ultimately be useful during habeas litigation.³⁵⁷ Consequently, litigation under § 1983 designed to compel discovery in aid of a federal habeas petition may become critical after cases like *Pinholster*—if “new” evidence cannot be considered after a federal habeas petition has been filed,³⁵⁸ then discovery through an independent § 1983 action so as to obtain critical new details prior to the filing of the federal habeas petition may justify the cumbersome nature of this two-track litigation.

To reiterate this important point, *Skinner*-type actions present a unique remedial problem insofar as they do not promise relief from the underlying conviction or sentence. However, the availability of an injunctive form of relief through which state courts would conduct a post-conviction redo ultimately reflects a proper remedy.³⁵⁹ Indeed, if, as many commentators assert, collateral review in several states is disastrously unfair and incomplete, then a federal court decision ordering the state to redo a particular prisoner’s review, perhaps after providing discovery on the issue, has the triple benefit of leaving the first

357. A pre-AEDPA circuit court case is generally illustrative on this point regarding how § 1983 actions might facilitate discovery for federal habeas review. In *Qualls v. Shaw*, 535 F.2d 318 (5th Cir. 1976), a Texas prisoner whose requests for information from the state had been repeatedly ignored obtained a discovery order based on a § 1983 challenge. *Id.* at 319. The federal court deemed the information necessary to the prisoner’s ability to fully plead his federal habeas case, and because the state would not willingly provide the information, § 1983 provided a useful workaround. *Id.*

358. Recall the majority’s concession in *Pinholster* that “new evidence [in support of a claim] . . . may well present a new claim.” *Pinholster*, 131 S. Ct. at 1401 n.10. If new evidence can convert an old claim (bound by (d)(1)) into a new claim (unencumbered by (d)(1)), then § 1983 discovery practices may prove valuable in litigation prior to the filing of a federal habeas petition.

359. The Anti-Injunction Act, 28 U.S.C. § 2283, should not bar such action by a federal court. The text of the Act reads: “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” 28 U.S.C. § 2283. By its plain text, the Act only applies to stays and not to injunctions forcing proceedings to occur. Moreover, it is accepted wisdom that “§ 1983 is an exception to the anti-injunction statute.” 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 2.15(f)(iv) (4th ed.) (compiling citations including HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1249 (2d ed. 1973)); see also *Mitchum v. Foster*, 407 U.S. 225, 243 (1972) (concluding that actions under § 1983 are exempt from the limitations contained in the anti-injunction statute).

and primary review in the control of the state,³⁶⁰ while facilitating both structural reforms and case-specific relief. As Justice Scalia has recognized in a related context, the “precepts of fundamental fairness inherent in ‘due process’ suggest that a forum to litigate [constitutional] challenges like petitioner’s must be made available somewhere,” and principles of comity and federalism would suggest that the state, as the “rendering jurisdiction,” should be given an opportunity to correct the error.³⁶¹ In short, § 1983 offers a viable litigation forum for spurring systemic reform in state systems, and it could do so while leaving substantial discretion and responsibility for federal constitutional adjudication in the hands of the states—it is a federalism-respecting form of federal intervention.

The final and perhaps most pressing potential problem with § 1983 challenges to state post-conviction procedures is the issue of the proper timing for filing such challenges—that is, when should a *Skinner* challenge be filed? Both § 1983 and § 2254 impose limitations on when an action may be filed—in certain circumstances, both prohibit filings that are too late as well as filings that are too early. Although § 1983 actions must be filed within the time allotted by the applicable state statute of limitations for personal injury actions, the ultimate application of a prudential abstention doctrine may be determinative as to when *Skinner*-type challenges should be litigated. Specifically, the appropriate time for filing may require considering the interaction between the *Younger* abstention limits on § 1983 actions,³⁶² AEDPA’s statute of limitations, and the complementary limits on subsequent or successive federal habeas petitions. Based on these considerations, if *Younger* abstention applies to these challenges, then, as discussed below, the *Skinner* challenge cannot be made until after the state post-conviction

360. See, e.g., *Daniels v. United States*, 532 U.S. 374, 386 (2001) (Scalia, J., concurring in part) (“Fundamental fairness could be achieved . . . by holding that the rendering jurisdiction must provide a means for challenge . . .”); Transcript of Oral Argument at 6, *Bell v. Kelly*, 555 U.S. 55 (2008) (No. 07-1223) (providing Justice Scalia’s suggestion that the appropriate course in cases of state unfairness might be to return the matter to the state for additional proceedings).

361. *Daniels*, 532 U.S. at 386.

362. See *Younger v. Harris*, 401 U.S. 37, 46 (1971) (citing a “fundamental policy” of abstention by federal courts from interfering with state prosecutions).

proceedings are complete, thus presenting challenging issues regarding the AEDPA statute of limitations. By contrast, if *Younger* does not apply, then perhaps such a challenge can be made simultaneously with the completion of state post-conviction litigation. The details of this doctrinal interaction are set forth below.

Under *Younger v. Harris*,³⁶³ “absent exceptional circumstances creating a threat of irreparable injury both great and immediate, a federal court must not intervene by way of either injunctive or declaratory relief in a pending state law-enforcement proceeding.”³⁶⁴ Moreover, an action is deemed pending for purposes of *Younger* until all state appellate remedies have been exhausted.³⁶⁵ In a typical case of *Younger* abstention, this means that a defendant wishing to enjoin his prosecution under a criminal statute may not have his claim heard in federal court until all of his state appeals are complete. Although post-conviction proceedings are nominally civil rather than criminal proceedings, and although I could not locate any cases applying *Younger* to bar a challenge to state post-conviction proceedings, I predict that it is nonetheless very unlikely that a federal court would, barring extraordinary circumstances, intervene and hear a challenge to a state process that is not yet complete.³⁶⁶ In this way, it is arguable that *Younger* would impose a quasi-exhaustion procedure on prisoners such that it is unlikely that a federal court would intervene and declare a state system fundamentally unfair if the prisoner has not attempted to secure relief through that system in his own case.³⁶⁷ In this way, even a § 1983 action

363. *Id.* at 37.

364. See FEDERAL PROCEDURE, LAWYERS EDITION § 1:617 (2011) (explaining the rule from *Younger*).

365. See, e.g., *Brown v. Day*, 477 F. Supp. 2d 1110, 1113 (2007) (“For purposes of the first *Younger* element, a proceeding is ‘pending’ if—as of the filing of the federal complaint—not all state appellate remedies have been exhausted.”).

366. It is likely that *Younger* would apply such that a prisoner seeking to make an individualized or as-applied challenge to the state procedures must have attempted to use the state procedures himself. The abstention principle, to the extent it has any application in this context, may have less force when the prisoner is bringing a more generalized, systemic challenge to the state system—that is, perhaps a facial challenge could be made to state procedures even where the prisoner has not utilized the flawed state process.

367. Cf. *Osborne*, 129 S. Ct. at 2321 (“His attempt to sidestep state process

challenging state procedures faces something akin to an exhaustion requirement, but unlike a habeas petitioner who must exhaust each claim in question, a potential § 1983 plaintiff would simply need to let the state process he seeks to challenge run its course.

Even assuming that such a quasi-exhaustion requirement exists because of abstention principles, standing alone, the requirement that a prisoner utilize the state review process before challenging the process as fundamentally unfair does not present a material barrier to litigation for most prisoners serving substantial sentences. However, considered in conjunction with AEDPA's one-year statute of limitations and the limitations on second or successive habeas petitions, this limitation on *Skinner* could prove substantial. It is unlikely that a federal challenge to a state's post-conviction proceedings under § 1983 could be researched, filed, litigated, and any appeals conclusively resolved all before the one-year limitation for filing a federal habeas petition expires. This means that if *Younger* requires the prisoner to use the available state procedures before challenging them as unfair, in many cases a prisoner will have to file a federal petition, which is due within one year of the completion of state proceedings, without the benefit of being able to complete litigation of his § 1983 challenge and without any discovery, injunctions, or other benefits that such *Skinner* litigation might yield. The three-way interaction of *Younger's* limits on § 1983 actions, AEDPA's one-year statute of limitations on filing federal habeas actions, and the AEDPA bar on second or successive habeas petitions, then, presents a bit of a conundrum for *Skinner* litigation.

The limits on filing a successive habeas petition are set out in 28 U.S.C. § 2244. Under this provision, raising the same claim in

through a new federal lawsuit puts Osborne in a very awkward position It is difficult to criticize the State's procedures when Osborne has not invoked them."); Schwartz, *supra* note 63, at 161 ("[T]hese claims will normally be denied under *Younger* abstention principles."). Alternatively, a § 1983 action might be a viable platform for challenging an unreasonable delay by the state court in adjudicating an appeal. *Cf. Vasquez v. Parrott*, 318 F.3d 387, 389 (2d Cir. 2003) (considering whether a claim challenging unreasonable delay in adjudicating an appeal is properly considered on § 2254 review and thus whether a subsequent filing is a successive petition).

a new habeas petition is categorically prohibited.³⁶⁸ Accordingly, if § 1983 litigation (either directly or through a state court remand) yields additional useful, factual evidence relevant to a federal habeas claim that was already exhausted, then filing a new petition with the same claim bolstered by the new evidence is absolutely prohibited.³⁶⁹ Moreover, even if the § 1983 action (or related state remand procedures) yields evidence sufficient to give rise to a new claim, the presentation of a new claim in a second or subsequent habeas petition is barred unless the claim relies on a new rule of law made retroactive by the Supreme Court, or the claim rests on a newly discovered factual predicate that substantially demonstrates the petitioner's innocence.³⁷⁰ In short, the circumstances in which a new petition may contain a claim discovered or developed for the first time after the filing of a habeas petition are extremely limited.³⁷¹ Likewise, the circumstances in which a petitioner can amend a pending federal petition to add a new claim, or perhaps even substantially better develop the claim, are similarly limited.³⁷²

Stated more directly, although Justices Thomas, Alito, and Kennedy have lamented the impact that *Skinner* will have on federal habeas actions, it is important to realize that the avoidance of the classic AEDPA burdens—deference, discovery, and exhaustion—are of truly limited and indeed symbolic value if

368. See 28 U.S.C. § 2244(b)(1) (2006) (stating that such claims shall be dismissed).

369. Likewise, under *Pinholster*, using the new evidence developed through § 1983 litigation to support the same claim that was adjudicated in state court is prohibited. See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (discussing the restrictions on new evidence).

370. See 28 U.S.C. § 2244(b)(2) (2006) (clarifying under what circumstances such a claim shall not be dismissed).

371. Notably, there are no circumstances in which a successive petition can be filed to present for a second time the “same” claim that was previously presented, perhaps with new support or stronger legal arguments. 28 U.S.C. § 2244(b)(1) (2006).

372. See *Mayle v. Felix*, 545 U.S. 644, 650 (2005) (“An amended habeas petition, we hold, does not relate back (and thereby escape AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.”); see also *MEANS*, *supra* note 22, § 9A:149 (“If the claims in the original petition are conclusory, however, they will not provide the requisite notice for relation back purposes.”). On the other hand, “relation-back is permitted if the amended claim only serves to add facts and specificity to the original claim.” *Id.* § 9A:150.

the court rules or practices do not permit, at the very least, some form of equitable staying of the habeas petition so as to avoid the limitations on second or successive petitions. Fortunately for prisoners, however, some of the stepping stones necessary to facilitate the use of the fruits of successful *Skinner* challenges in federal habeas litigation already exist, and it is reasonable to conclude that a common-law principle of equity will emerge in these circumstances such that prisoners will be permitted to file federal habeas petitions within the statute of limitations and have them stayed pending completion of the § 1983 litigation in appropriate circumstances.

In *Rhines v. Weber*,³⁷³ the Court confronted a similar trap-of-timing by sanctioning the use of a stay and abeyance procedure.³⁷⁴ Specifically, in a pre-AEDPA case, *Rose v. Lundy*,³⁷⁵ the Court held that exhaustion by a state prisoner requires total exhaustion—that is, a district court must dismiss entirely any habeas petitions that are a mix of claims that were exhausted and unexhausted in state court.³⁷⁶ Initially, *Rose* presented relatively few problems for state prisoners because the dismissal was without prejudice and would simply permit them an opportunity to complete the exhaustion process and return to federal court.³⁷⁷ However, in *Rhines*, the Court recognized that AEDPA's one-year statute of limitations “dramatically altered the landscape.”³⁷⁸ The combination of a rule requiring dismissal of habeas petitions containing any unexhausted claims and a one-year statute of limitations meant that the many petitioners who file a petition for federal habeas relief close to the one-year filing deadline will be completely deprived of federal habeas review. For example, “[i]f a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under

373. *Rhines v. Weber*, 544 U.S. 269 (2005).

374. *See id.* at 278 (discussing the appropriate use of stay and abeyance procedure).

375. *Rose v. Lundy*, 455 U.S. 509 (1982).

376. *See id.* at 520 (mandating that “before you bring any claims to federal court, be sure that you first have taken each one to state court”).

377. A procedural dismissal of a habeas petition does not trigger the second or successive filing limitations in 28 U.S.C. § 2244.

378. *Rhines*, 544 U.S. at 274.

Lundy after the limitations period has expired, this will likely mean the termination of any federal review.”³⁷⁹

Recognizing the “gravity of this problem” of timing born out of the interaction of *Rose*’s complete exhaustion requirement and the AEDPA statute of limitations, in *Rhines*, the Court approved a stay and abeyance procedure under which a federal district court will, for good cause, stay a mixed petition and hold it in abeyance so as to provide the petitioner an opportunity to return to state court and exhaust the unexhausted claims without forfeiting his federal habeas petition.³⁸⁰ In essence, the harshness of the interplay between the statute of limitations and the exhaustion requirement prompted the Court to recognize that federal courts must occasionally stay a federal proceeding to permit full state court exhaustion.³⁸¹ The rigid application of habeas rules was softened to comport with basic principles of equity.

Notably, a similarly harsh result arises when a petitioner attempts to fully utilize a state procedure so as to avoid potential

379. *Id.* at 275. Moreover, the Court recognized that this problem is not limited to persons who file close to the AEDPA deadline because even “a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion.” *Id.* Cf. *McFarland v. Scott*, 512 U.S. 849, 857–58 (1994) (holding that a mere request for counsel initiates a habeas corpus proceeding, thereby conveying power to a federal judge to stay a state execution); *O’Neill v. United States*, 50 F.3d 677, 687 (9th Cir. 1995) (“[T]he district courts are entitled to discretion in managing cases within the federal system . . .”).

380. As one Circuit has summarized the law, “*Rhines* declared that ‘in limited circumstances,’ federal district courts have the authority to stay a mixed habeas petition and hold the entire petition—exhausted and unexhausted claims alike—in abeyance while the petitioner returns to state court to exhaust his remedies there.” *King v. Ryan*, 564 F.3d 1133, 1135–36 (9th Cir. 2009). It must, therefore, be conceded that even under a stay and abeyance procedure, the ultimate claims litigated typically must relate back to the claims raised in the first federal habeas petition prior to the stay. *See, e.g., id.* at 1142 (holding that amendments to a claim following a stay and abeyance must relate back to the claims pending during the stay).

381. In *Rhines*, the Court recognizes that “[d]istrict courts do ordinarily have authority to issue stays . . . where such a stay would be a proper exercise of discretion, [and] AEDPA does not deprive district courts of that authority.” *Rhines*, 544 U.S. at 276 (citations omitted); *see also* CYCLOPEDIA OF FEDERAL PROCEDURE § 86:140 (2011) (“[A] stay and abeyance of a federal habeas proceeding is appropriate only when the district court determines there was good cause . . .”).

abstention problems only to have insufficient time to complete a § 1983 challenge to the state court process before his federal habeas petition becomes untimely. Just as the *Rose* complete exhaustion rule might leave state prisoners without a federal habeas remedy, an attempt to obtain full and fair review through an unsound state process may deprive a prisoner of adequate time to challenge the state procedures and benefit from the discovery or the injunctive relief that flows from such a § 1983 action. To this end, federal habeas courts should exercise their discretion and grant a stay and abeyance to prisoners who have a pending § 1983 action challenging state procedures *and* a likely chance of obtaining injunctive relief or discovery through the federal civil rights action. When good cause exists for a stay, federal habeas courts are authorized, indeed required, to grant the stay.

Where, for example, a § 1983 challenge has yielded an order enjoining a state court to conduct additional post-conviction proceedings, it would seemingly amount to an abuse of discretion under *Rhines* for a federal court to refuse to stay the federal habeas petition. Likewise, where a colorable procedural challenge has been advanced under § 1983 and diligently pursued by the prisoner, a practice in favor of staying the habeas proceedings pending the resolution of the § 1983 challenge is appropriate.³⁸² In short, district courts retain considerable discretion to grant a stay and abeyance even under AEDPA, and a pending challenge to state processes under *Skinner*, like mixed habeas petitions, will occasionally provide good cause for such stays. Given the due process concerns underlying the need for a fair state collateral review process, a pending, colorable § 1983 challenge to the state post-conviction process should be understood to be among the “limited circumstances” in which a stay and abeyance of a habeas petition is justified.³⁸³ If courts take seriously the authority under

382. As with a mixed petition, a stay ought to be available only if the petitioner’s pending § 1983 action is not obviously without merit. CYCLOPEDIA OF FEDERAL PROCEDURE § 86:140 (2011) (“[A] court should not grant a habeas petitioner a stay and abeyance in a proceeding involving a mixed petition of exhausted and unexhausted claims when the petitioner’s unexhausted claims are plainly meritless.”). Likewise, if the § 1983 claim is filed for purposes of delay or as abusive litigation tactic, a stay would not be available.

383. See *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (noting the reasons limiting action by the district courts).

Rhines to stay habeas proceedings, and if petitioners construe their claims broadly such that facts newly discovered through the § 1983 action are merely supporting the pre-existing claims,³⁸⁴ then *Skinner* promises to be a valuable way of augmenting habeas litigation without the burdens of AEDPA. By gathering new facts in support of claims, either through federal discovery or new state procedures (rather than arguing that the new facts give rise to new claims), *Skinner* may yet prove substantially useful to state prisoners.

However, § 1983 challenges, supplemented with reasonable stay and abeyance procedures, will not solve every problem induced by unfair state procedures. To be sure, merely staying the proceedings does not solve the problems that will arise if a § 1983 action or a related remand procedure in state court ultimately result in the discovery of an entirely new claim. Current habeas procedures only permit amendments to the federal petition if the amendments relate back to the claims contained in the original petition.³⁸⁵ A claim is said to relate back only insofar as it derives from the same “common ‘core of operative facts’ uniting the original and newly asserted claims.”³⁸⁶ Perhaps courts faced with instances of unfair state procedures will simply exercise their equitable authority over habeas cases so as to permit amendments even when truly new claims are developed.³⁸⁷ Or more likely, on the rare occasion when a § 1983 action (or resulting state remand) produces evidence of a truly new claim that was not contained in the

384. Amendments to habeas petitions are permitted where the amendment is not “factually and legally unrelated to the claims in the original petition.” See *United States v. Henry*, 37 F. App’x 343, 345 (10th Cir. 2002); see also LARRY W. YACKLE, *POSTCONVICTION REMEDIES* § 8:2 (2010) (discussing the standard for permitting amendment).

385. See *Mayle v. Felix*, 545 U.S. 644, 656 (2005) (discussing the rationale for the rule).

386. *Id.* at 659.

387. The Court has recognized that the statutorily enacted one-year deadline for filing federal habeas petitions may be excused based on equitable considerations. See *Holland v. Florida*, 130 S. Ct. 2549, 2564 (2010) (acknowledging that equitable tolling may be applied in extraordinary situations). If the statute of limitations, which is expressly codified in AEDPA, can be excused for equitable considerations, the right circumstances ought to justify an equitable exception to the rigid, court-created rules regarding amendments to federal habeas petitions.

initially filed federal habeas petition, perhaps the petitioner will have to raise the issue in an original habeas petition to the Supreme Court.³⁸⁸ While a full recounting of the original writ's function is beyond the scope of this Article, the critical point is that scholars have recognized that successive habeas petition restrictions do not "apply in original habeas proceedings."³⁸⁹ It is an imperfect solution insofar as original habeas actions are filed directly in the Supreme Court,³⁹⁰ granting review in such cases requires five votes rather than four,³⁹¹ and the Court's rules specify that review is limited to truly "exceptional circumstances."³⁹² However, the combination of bars on successive habeas petitions and a showing that state procedural unfairness caused a claim to go undiscovered could well satisfy the criteria. When no viable alternatives exist for federal review of a claim of unconstitutional detention, circumstances are said to be sufficiently exceptional so as to warrant the Court's original habeas review.³⁹³ Original habeas review may prove an important, if infrequently necessary, corollary to the sort of § 1983 challenges authorized in *Skinner*.³⁹⁴

388. For a thorough and impressive history and explanation of the original writ, see generally Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61 (2011).

389. See *id.* at 115 (noting that this conclusion is supported by the Troy Davis case).

390. *Id.* at 62–63.

391. See *id.* at 77 (noting that a 4–4 vote effectively denies relief).

392. See 28 U.S.C. § 1367(c)(4) (noting district courts might decline jurisdiction when compelling reasons arise).

393. See Kovarsky, *supra* note 388, at 112 (“[T]here is a strong case that the exceptional circumstances requirement does not obstruct review in the same way it would if the Court could grant certiorari.”).

394. Consider the following illustrative hypothetical: Prisoner (*P*) is convicted of murder and sentenced to death. *P* attempts to litigate a *Brady* claim during state post-conviction procedures, but the prosecution refuses to cooperate with discovery, and the state courts, despite a colorable argument, refuse an evidentiary hearing and discovery. When *P* files his federal habeas petition, he has two options, but neither are favorable: (1) he could just omit the *Brady* claim, recognizing that he lacks the facts to substantiate it; or (2) he could raise the claim but realize that, under *Pinholster*, the federal review is limited to the record before the state and that he will not be able to garner factual support for his claim through a federal hearing. By contrast, if *P* files a § 1983 action, he has two potentially favorable alternatives: (1) he could include the bare-bones *Brady* claim in his federal petition, seek a stay and abeyance to complete § 1983 litigation relief in the form of a remand for additional discovery

In sum, a § 1983 challenge to state procedures bypasses the pitfalls of AEDPA litigation and may serve as a meaningful check on state collateral processes, but in many instances, this will require federal courts to exercise their authority and duty to stay pending habeas petitions pending the resolution of colorable civil rights challenges. At first blush, the utility of bifurcating the federal proceedings into civil rights challenges and habeas petitions may seem cumbersome and unnecessary. But the advantages ultimately outweigh the costs. *Skinner* litigation allows federal courts, by issuing stays in the habeas proceedings, to further principles of comity and federalism by respecting the autonomy of the states to address the challenges of prisoners in any manner they choose, so long as it comports with due process. That is to say, the federal oversight is aimed only at ensuring a minimum floor of fair process, but much more discretion and responsibility—fact-finding and conclusions of law—will rest with the state courts than would be the case when a federal court simply grants a hearing, makes findings, and issues a conditional release for a state prisoner. In this way, § 1983 provides a vehicle for systemic reform of state processes, where necessary to comport with due process, in a way that is more deferential to state sovereignty than traditional models of habeas relief. In addition, § 1983 litigation in this arena may ultimately prove more efficient. As habeas lawyers and federal judges know, a substantial portion of federal habeas litigation relates to the deference owed to state findings and the fairness of the state process. If the fairness of the state process is litigated under § 1983 in advance of a federal habeas decision and afforded res

and litigation in the state court, and ultimately attempt to amend his petition; or (2) if the facts uncovered through the § 1983 litigation rendered the claim too novel such that amending the petition was not permitted, then in order to overcome the bar on successive petitions, he could file an original habeas action in the Supreme Court based on the unfairness of the state procedures and the strength of the newly discovered constitutional claim. *Cf. Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 n.10 (2011) (recognizing that new evidence may, if it is particularly powerful, render a claim “new,” but apparently assuming that the new evidence would be discovered prior to filing the federal petition and included in the petition); *id.* at 1398 (holding that “review under § 2254(d)(1) is limited to the record that was before the state court”). There will be instances where, absent a change in the current practices of federal habeas courts in reviewing procedural challenges, *Skinner*-type litigation will offer decided, if limited, benefits to the state prisoner.

judicata effect, then far fewer issues of procedure will remain unresolved at the time of the habeas action.³⁹⁵ Obviously, there remain considerable questions about the proper workings of *Skinner* litigation, and the ultimate desirability of this form of litigation will depend on how the questions raised in this Article and others that will arise are resolved, but the potential import of § 1983 challenges in this field is presently untested, and in view of the diminished force of § 2254 review, deserving of judicial attention and resources.

VII. Conclusion

In 2005, one of the leading habeas scholars, John Blume, concluded that AEDPA had turned out to be “more hype than bite”—that is, the access to federal habeas relief had not been substantially diminished under AEDPA.³⁹⁶ As demonstrated in this Article, both as a doctrinal and an empirical matter, over the last six years AEDPA’s bite has matured and taken hold. AEDPA deference has emerged as a suffocating force in most cases, and, as a result, state post-conviction review will typically represent the only viable forum for the constitutional review of issues regarding the legality of one’s sentence or conviction. Acknowledging the diminution of the federal courts’ power to review the merits of state decisions and accepting the profoundly important role that state courts now play in adjudicating constitutional criminal procedure rights, some scholars have suggested substantially abandoning federal oversight of state convictions. This Article rejects this conclusion and seeks instead to reorient federal oversight so that it serves, at the very least,

395. There remains, of course, the question of whether an unfair state process can be afforded AEDPA deference, 28 U.S.C. § 2254(d)(1), without offending due process. I have detailed my research on this question in a previous article. See Marceau, *supra* note 13, at 45–49 (exploring the tension between AEDPA deference and due process). If federal courts defer to the sovereignty of state courts by providing the remand remedy advocated in this Article, then this issue is avoided. That is to say, if litigants pursue the *Skinner*-based challenges to the state system, then federal courts, upon finding an unfair state process, ought to simply enjoin the state to provide a more adequate state post-conviction process, and thus the (d)(1) deference applies only to proceedings that are full and fair.

396. Blume, *supra* note 4, at 297 (internal quotation marks omitted).

the critical function of ensuring the fairness of the state process. Because federal oversight of the merits of state review is substantially diminished, it is increasingly important that there be some minimal federal review of state procedures. It is time to take seriously the need for challenges of process rather than only challenges of result, and this Article takes the first steps toward identifying frameworks for such challenges.

Appendix

NAME	AEDPA	WINNER
Evitts v. Lucey, 469 U.S. 387 (1985)	NO	P
Wainwright v. Witt, 469 U.S. 412 (1985)	NO	G
Winston v. Lee, 470 U.S. 753 (1985)	NO	P
Francis v. Franklin, 471 U.S. 307 (1985)	NO	P
Black v. Romano, 471 U.S. 606 (1985)	NO	G
Carchman v. Nash, 473 U.S. 716 (1985)	NO	G
Hill v. Lockhart, 474 U.S. 52 (1985)	NO	G
Miller v. Fenton, 474 U.S. 104 (1985)	NO	P
Thomas v. Arn, 474 U.S. 140 (1985)	NO	G
Vasquez v. Hillery, 474 U.S. 254 (1986)	NO	P
Wainwright v. Greenfield, 474 U.S. 284 (1986)	NO	P
Cabana v. Bullock, 474 U.S. 376 (1986)	NO	P
Nix v. Whiteside, 475 U.S. 157 (1986)	NO	G
Morris v. Mathews, 475 U.S. 237 (1986)	NO	G
Moran v. Burbine, 475 U.S. 412 (1986)	NO	G
Holbrook v. Flynn, 475 U.S. 560 (1986)	NO	G
Turner v. Murray, 476 U.S. 28 (1986)	NO	P
Lockhart v. McCree, 476 U.S. 162 (1986)	NO	G
Darden v. Wainwright, 477 U.S. 168 (1986)	NO	G
Kimmelman v. Morrison, 477 U.S. 365 (1986)	NO	P
Ford v. Wainwright, 477 U.S. 399 (1986)	NO	P
Kuhlmann v. Wilson, 477 U.S. 436 (1986)	NO	G
Murray v. Carrier, 477 U.S. 478 (1986)	NO	G
Smith v. Murray, 477 U.S. 527 (1986)	NO	G
Allen v. Hardy, 478 U.S. 255 (1986)	NO	G
Rose v. Clark, 478 U.S. 570 (1986)	NO	G
Granberry v. Greer, 481 U.S. 129 (1987)	NO	P
Richardson v. Marsh, 481 U.S. 200 (1987)	NO	G
Hithcock v. Dugger, 481 U.S. 393 (1987)	NO	P
McCleskey v. Kemp, 481 U.S. 279 (1987)	NO	G
Hilton v. Braunskill, 481 U.S. 770 (1987)	NO	G
Sumner v. Shuman, 483 U.S. 66 (1987)	NO	P
Ricketts v. Adamson, 483 U.S. 1 (1987)	NO	G
Greer v. Miller, 483 U.S. 756 (1987)	NO	G
Burger v. Kemp, 483 U.S. 776 (1987)	NO	G

NAME	AEDPA	WINNER
Lowenfield v. Phelps, 484 U.S. 231 (1988)	NO	G
Amadeo v. Zant, 486 U.S. 214 (1988)	NO	P
Maynard v. Cartwright, 486 U.S. 356 (1988)	NO	P
Franklin v. Lynaugh, 487 U.S. 164 (1988)	NO	G
Houston v. Lack, 487 U.S. 266 (1988)	NO	P
Lockhart v. Nelson, 488 U.S. 33 (1988)	NO	G
Perry v. Leeke, 488 U.S. 272 (1989)	NO	G
Harris v. Reed, 489 U.S. 255 (1989)	NO	P
Dugger v. Adams, 489 U.S. 401 (1989)	NO	G
Teague v. Lane, 489 U.S. 288 (1989)	NO	G
Castille v. Peoples, 489 U.S. 346 (1989)	NO	G
Maleng v. Cook, 490 U.S. 488 (1989)	NO	P
Jones v. Thomas, 491 U.S. 376 (1989)	NO	G
Penry v. Lynaugh, 492 U.S. 302 (1989)	NO	P
Duckworth v. Eagen, 492 U.S. 195 (1989)	NO	G
Terrell v. Morris, 493 U.S. 1 (1989)	NO	P
Selvage v. Collins, 494 U.S. 108 (1990)	NO	P
Butler v. McKellar, 494 U.S. 407 (1990)	NO	G
Saffle v. Parks, 494 U.S. 484 (1990)	NO	G
Delo v. Stokes, 495 U.S. 320 (1990)*	NO	G
Sawyer v. Smith, 497 U.S. 227 (1990)	NO	G
Lewis v. Jeffers, 497 U.S. 764 (1990)	NO	G
Parker v. Dugger, 498 U.S. 308 (1991)	NO	P
Lozada v. Deeds, 498 U.S. 430 (1991)	NO	P
Burden v. Zant, 498 U.S. 433 (1991)	NO	P
McCleskey v. Zant, 499 U.S. 467 (1991)	NO	G
Coleman v. Thompson, 501 U.S. 722 (1991)	NO	G
Ylst v. Nunnemaker, 501 U.S. 797 (1991)	NO	G
Estelle v. McGuire, 502 U.S. 62 (1991)	NO	G
Stringer v. Black, 503 U.S. 222 (1992)	NO	P
Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)	NO	G
Wright v. West, 505 U.S. 227 (1992)	NO	G
Sawyer v. Whitley, 505 U.S. 333 (1992)*	NO	G
Richmond v. Lewis, 506 U.S. 40 (1992)	NO	P
Parke v. Raley, 506 U.S. 20 (1992)	NO	G
Lockhart v. Fretwell, 506 U.S. 364 (1993)	NO	G
Herrera v. Collins, 506 U.S. 390 (1993)	NO	G
Graham v. Collins, 506 U.S. 461 (1993)	NO	G

NAME	AEDPA	WINNER
Negonscott v. Samuels, 507 U.S. 99 (1993)*	NO	G
Delo v. Lashley, 507 U.S. 272 (1993)	NO	G
Arave v. Creech, 507 U.S. 463 (1993)	NO	G
Withrow v. Williams, 507 U.S. 680 (1993)	NO	P
Brecht v. Abrahamson, 507 U.S. 619 (1993)	NO	G
Gilmore v. Taylor, 508 U.S. 333 (1993)	NO	G
Dobbs v. Zant, 506 U.S. 357 (1993)	NO	P
Godinez v. Moran, 509 U.S. 389 (1993)	NO	G
Burden v. Zant, 510 U.S. 132 (1994)	NO	P
Schiro v. Farley, 510 U.S. 222 (1994)	NO	G
Caspari v. Bohlen, 510 U.S. 383 (1994)	NO	G
Reed v. Farley, 512 U.S. 339 (1994)	NO	G
McFarland v. Scott, 512 U.S. 849 (1994)	NO	P
Schlup v. Delo, 513 U.S. 298 (1995)	NO	P
Duncan v. Henry, 513 U.S. 364 (1995)	NO	G
O'Neal v. McAninch, 513 U.S. 432 (1995)	NO	P
Goeke v. Branch, 514 U.S. 115 (1995)	NO	G
Kyles v. Whitley, 514 U.S. 419 (1995)	NO	P
California Department of Corrections v. Morales, 514 U.S. 499 (1995)*	NO	G
Garlotte v. Fordice, 515 U.S. 39 (1995)	NO	P
Wood v. Bartholomew, 516 U.S. 1 (1995)	NO	G
Thompson v. Keohane, 516 U.S. 99 (1995)*	NO	P
Tuggle v. Netherland, 516 U.S. 10 (1995)	NO	P
Lonchar v. Thomas, 517 U.S. 314 (1996)	NO	P
Gray v. Netherland, 518 U.S. 152 (1996)	NO	G
California v. Roy, 519 U.S. 2 (1996)	NO	G
Lynce v. Mathis, 519 U.S. 433 (1997)*	NO	P
Young v. Harper, 117 S. Ct. 1148 (1997)	NO	P
Lambrix v. Singletary, 520 U.S. 518 (1997)	NO	G
Bracy v. Gramley, 520 U.S. 899 (1997)	NO	P
O'Dell v. Netherland, 521 U.S. 151 (1997)	NO	G
Lindh v. Murphy, 521 U.S. 320 (1997)	YES	P
Trest v. Cain, 522 U.S. 87 (1997)	NO	P
Buchanan v. Angelone, 522 U.S. 269 (1998)	NO	G
Spencer v. Kemna, 523 U.S. 1 (1998)	NO	G
Breard v. Greene, 523 U.S. 371 (1998)	YES	G
Calderon v. Thompson, 523 U.S. 538 (1998)	YES (2244)	G

NAME	AEDPA	WINNER
Stewart v. Martinez-Villareal, 523 U.S. 637 (1998)	YES (2244)	P
Hopkins v. Reeves, 524 U.S. 88 (1998)	NO	G
Calderon v. Coleman, 525 U.S. 141 (1998)	NO	G
Stewart v. LaGrand, 526 U.S. 115 (1999)*	NO	G
O'Sullivan v. Boerckel, 526 U.S. 838 (1999)	NO	G
Strickler v. Greene, 527 U.S. 263 (1999)	NO	G
Smith v. Robbins, 528 U.S. 259 (2000)	NO	G
Weeks v. Angelone, 528 U.S. 225 (2000)	YES	G
Roe v. Flores-Ortega, 528 U.S. 470 (2000)*	NO	G
Portuondo v. Agard, 529 U.S. 61 (2000)	NO	G
Williams v. Taylor, 529 U.S. 362 (2000)	YES	P
Williams v. Taylor, 529 U.S. 420 (2000)	YES	P
Edwards v. Carpenter, 529 U.S. 446 (2000)	NO	G
Slack v. McDaniel, 529 U.S. 473 (2000)	YES	P
Ramdass v. Angelone, 530 U.S. 156 (2000)	YES	G
Artuz v. Bennett, 531 U.S. 4 (2000)	YES	P
Fiore v. White, 531 U.S. 225 (2001)*	NO	P
Lopez v. Davis, 531 U.S. 230 (2001)*	NO	G
Seling v. Young, 531 U.S. 250 (2001)*	NO	G
Lackawanna County District Attorney v. Coss, 532 U.S. 394 (2001)	NO	G
Penry v. Johnson, 532 U.S. 782 (2001)	YES	P
Duncan v. Walker, 533 U.S. 167 (2001)	YES (2244)	G
Tyler v. Cain, 533 U.S. 656 (2001)	YES	G
Lee v. Kemna, 534 U.S. 362 (2002)	NO	P
Mickens v. Taylor, 535 U.S. 162 (2002)	YES	G
Bell v. Cone, 535 U.S. 685 (2002)	YES	G
Carey v. Saffold, 536 U.S. 214 (2002)	YES	G
Horn v. Banks, 536 U.S. 266 (2002)	YES	G
Stewart v. Smith, 536 U.S. 856 (2002)	NO	G
Early v. Packer, 537 U.S. 3 (2002)	YES	G
Woodford v. Visciotti, 537 U.S. 19 (2003)	YES	G
Miller-El v. Cockrell, 537 U.S. 322 (2003)	YES	P
Lockyer v. Andrade, 538 U.S. 63 (2003)	YES	G
Wiggins v. Smith, 539 U.S. 510 (2003)	YES	P
Woodford v. Garceau, 538 U.S. 202 (2003)	YES	G
Price v. Vincent, 538 U.S. 634 (2003)	YES	G

NAME	AEDPA	WINNER
Yarborough v. Gentry, 540 U.S. 1 (2003)	YES	G
Mitchell v. Esparza, 540 U.S. 12 (2003)	YES	G
Banks v. Dretke, 540 U.S. 668 (2004)	NO	P
Baldwin v. Reese, 541 U.S. 27 (2004)	YES	G
Dretke v. Haley, 541 U.S. 386 (2004)	YES	P
Middleton v. McNeil, 541 U.S. 433 (2004)	YES	G
Yarborough v. Alvarado, 541 U.S. 652 (2004)	YES	G
Pliler v. Ford, 542 U.S. 225 (2004)	YES	G
Schriro v. Summerlin, 542 U.S. 348 (2004)	NO	G
Tennard v. Dretke, 542 U.S. 274 (2004)	YES	P
Beard v. Banks, 542 U.S. 406 (2004)	YES	G
Holland v. Jackson, 542 U.S. 649 (2004)	YES	G
Bell v. Cone, 543 U.S. 447 (2005)	YES	G
Brown v. Payton, 544 U.S. 133 (2005)	YES	G
Rhines v. Weber, 544 U.S. 269 (2005)	YES (2244)	P
Pace v. DiGuglielmo, 544 U.S. 408 (2005)	YES (2244)	G
Bradshaw v. Stumpf, 545 U.S. 175 (2005)	NO	G
Miller-El v. Dretke, 545 U.S. 231 (2005)	YES	P
Rompilla v. Beard, 545 U.S. 374 (2005)	YES	P
Gonzalez v. Crosby, 545 U.S. 524 (2005)	YES (2244)	G
Mayle v. Felix, 545 U.S. 644 (2005)	YES (2244)	G
Bell v. Thompson, 545 U.S. 794 (2005)*	YES	G
Dye v. Hofbauer, 546 U.S. 1 (2005)*	NO	P
Schriro v. Smith, 546 U.S. 6 (2005)	NO	G
Kane v. Espitia, 546 U.S. 9 (2005)	YES	G
Bradshaw v. Richey, 546 U.S. 74 (2005)	YES	G
Evans v. Chavis, 546 U.S. 189 (2006)	YES (2244)	G
Brown v. Sanders, 546 U.S. 212 (2006)	YES	G
Rice v. Collins, 546 U.S. 333 (2006)	YES	G
Day v. McDonough, 547 U.S. 198 (2006)	YES (2244)	G
House v. Bell, 547 U.S. 518 (2006)	NO	P
Ayers v. Belmontes, 549 U.S. 7 (2006)	YES	G
Carey v. Musladin, 549 U.S. 70 (2006)	YES	G
Burton v. Stewart, 549 U.S. 147 (2007)	YES (2244)	G
Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007)	YES	P
Lawrence v. Florida, 549 U.S. 327 (2007)	YES (2244)	G
Whorton v. Bockting, 549 U.S. 406 (2007)	YES	G

NAME	AEDPA	WINNER
Brewer v. Quarterman, 550 U.S. 286 (2007)	YES	P
Schriro v. Landrigan, 550 U.S. 465 (2007)	YES	G
Uttecht v. Brown, 551 U.S. 1 (2007)	YES	G
Fry v. Pliler, 551 U.S. 112 (2007)	YES	G
Bowles v. Russell, 551 U.S. 205 (2007)	NO	G
Panetti v. Quarterman, 551 U.S. 930 (2007)	YES	P
Allen v. Siebert, 552 U.S. 3 (2007)	YES	G
Wright v. Van Patten, 552 U.S. 120 (2008)	YES	G
Hedgpeth v. Pulido, 555 U.S. 57 (2008)	NO	G
Jimenez v. Quarterman, 555 U.S. 113 (2009)	YES	P
Waddington v. Sarausad, 555 U.S. 179 (2009)	YES	G
Knowles v. Mirzayance, 556 U.S. 111 (2009)	YES	G
Cone v. Bell, 556 U.S. 449 (2009)	YES	P
Bobby v. Bies, 556 U.S. 825 (2009)	NO	G
Corcoran v. Levenhagen, 130 S. Ct. 8 (2009)	YES	P
Bobby v. Van Hook, 130 S. Ct. 13 (2009)	NO	G
Wong v. Belmontes, 130 S. Ct. 383 (2009)	NO	G
Porter v. McCollum, 130 S. Ct. 447 (2009)	YES	P
Webster v. Cooper, 130 S. Ct. 456 (2009)	YES	P
Beard v. Kindler, 130 S. Ct. 612 (2009)	NO	G
McDaniel v. Brown, 130 S. Ct. 665 (2010)	YES	G
Smith v. Spisak, 130 S. Ct. 676 (2010)	YES	G
Wood v. Allen, 130 S. Ct. 841 (2010)	YES	G
Thaler v. Haynes, 130 S. Ct. 1171 (2010)	YES	G
Berghuis v. Smith, 130 S. Ct. 1382 (2010)	YES	G
Renico v. Lett, 130 S. Ct. 1855 (2010)	YES	G
Jefferson v. Upton, 130 S. Ct. 2217 (2010)	NO	P
Berghuis v. Thompkins, 130 S. Ct. 2250 (2010)	YES	G
Holland v. Florida, 130 S. Ct. 2549 (2010)	YES	P
Magwood v. Patterson, 130 S. Ct. 2788 (2010)	YES	P
Wilson v. Corcoran, 131 S. Ct. 13 (2010)	YES	G
Harrington v. Richter, 131 S. Ct. 770 (2010)	YES	G
Premo v. Moore, 131 S. Ct. 733 (2011)	YES	G
Swarthout v. Cooke, 131 S. Ct. 859 (2011)	YES	G
Walker v. Martin, 131 S. Ct. 1120 (2011)	YES	G
Wall v. Kholi, 131 S. Ct. 1278 (2011)	YES	P
Felkner v. Jackson, 131 S. Ct. 1305 (2011)	YES	G

NAME	AEDPA	WINNER
Cullen v. Pinholster, 131 S. Ct. 1388 (2011)	YES	G
Bobby v. Mitts, 131 S. Ct. 1762 (2011)	YES	G
Cavazos v. Smith, 132 S. Ct. 2 (2011)	YES	G
Greene v. Fisher, 132 S. Ct. 38 (2011)	YES	G
Bobby v. Dixon, 132 S. Ct. 26 (2011)	YES	G
Hardy v. Cross, 132 S. Ct. 490 (2011)	YES	G