Vanderbilt Law Review

Volume 51
Issue 1 *Issue 1 - January 1998*

Article 2

1-1998

Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual

Evan T. Lee

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Evan T. Lee, Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual, 51 *Vanderbilt Law Review* 101 (1998)
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Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual

Evan Tsen Lee
51 Vand. L. Rev. 103 (1998)

The Anti-Terrorism and Effective Death Penalty Act of 1996 made wholesale changes to the federal habeas corpus statute. In particular, the statute contains a new section 2254(d), which controls the standards that federal habeas courts must employ when reviewing state convictions. This new provision governing the standards of review applies generally to petitions filed after April 24, 1996, the effective date of the Act. The provision's text, however, is critically ambiguous in several respects.

Because most of the federal circuit courts of appeal have not yet settled even basic interpretive questions about section 2254(d), federal district courts and circuit panels are often writing on a clean slate. In this Article, Professor Lee systematically offers interpretive suggestions to federal judges construing section 2254(d) for the first time. Specifically, Professor Lee proposes answers to the following questions: (1) Whether different standards apply to pure legal questions versus mixed questions of law and fact; (2) what test should be used to determine what state court applications of law to fact are "unreasonable;" (3) what test should be used to ascertain when federal law is "clearly established;" and (4) to what degree federal habeas courts may use decisions from the federal circuit courts when reviewing the constitutional infirmity of state court adjudications.

Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual

*Evan Tsen Lee**

I. INTRODUCTION 104
II. SECTION 2254(d) AND THE NEW HABEAS ORDER 106
III. DO DIFFERENT STANDARDS APPLY TO PURE LEGAL QUESTIONS VERSUS MIXED QUESTIONS OF LAW AND FACT? 108
A. *The Foundation* 109
B. *The New Statute* 110
1. The Variegation Interpretation 110
2. The Global Non-Deference Interpretation 111
IV. THE MEANING OF "UNREASONABLE" 115
V. THE "CLEARLY ESTABLISHED" STANDARD 117
A. Teague *and the "Clearly Established" Clause* 118
B. *The Alternative Measuring Points* 120
1. Clearly Established as of Trial 120
2. Clearly Established as of Final Conviction 121
C. *The Meaning of "Clearly Established"* 123
1. The Law of Qualified Immunity 123
a. *The Existing Case Law* 124
b. *Purpose of Immunity* 126
2. Interstitial Use of Cases after *Teague* 129
VI. THE USE OF THE DECISIONS OF THE FEDERAL CIRCUIT COURTS OF APPEALS 131
VII. CONCLUSION 136

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* Professor, University of California, Hastings College of the Law. A.B., University of California, Berkeley; J.D., Yale University. Thanks to Larry Yackle for his valuable criticisms. Conversations with Larry Alexander and Ash Bhagwat were helpful.

I. INTRODUCTION

In April 1996, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").[1] The AEDPA made sweeping revisions to the federal habeas corpus statute, including a truncated process for capital cases in certain states,[2] new exhaustion rules,[3] tougher rules on successive petitions,[4] and an all new statute of limitations.[5] Major interpretational issues have arisen and will continue to arise under these new provisions. But no aspect of the statute poses greater or deeper interpretational problems than the new section 2254(d), which governs the way in which federal habeas courts are to regard state court adjudications.[6] If federal judges pay insufficient heed to these problems, the entire institution of federal habeas corpus could be perverted in a way for which no one has bargained.

Any candid observer would have to admit that the new section 2254(d) contains more than its fair share of ambiguities. This Article focuses on the four most doctrinally and intellectually urgent issues of interpretation.[7] First, does the statute prescribe different standards for reviewing pure questions of law versus mixed questions of law and fact? Second, assuming that federal habeas courts are to review state court conclusions regarding mixed questions for reasonableness, what does "reasonableness" mean in this context? Third, when is federal

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1. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2244, 2253-55, 2261-66 (Supp. 1997)).

2. *See* 28 U.S.C. §§ 2261-66 (Supp. 1997).

3. *See id.* § 2254(b).

4. *See id.* § 2244(b). The constitutionality of section 2244(b)(3)(E) was upheld in *Felker v. Turpin*, 116 S. Ct. 2333, 2339 (1996).

5. *See* 28 U.S.C. § 2244(d) (Supp. 1997).

6. It is not, however, the only provision that controls how federal habeas courts are to deal with state factual findings. *See id.* § 2254(e)(1) (stating that a state court's factual determinations shall be presumed correct).

7. My focus on four specific textual ambiguities separates this Article from two other scholarly treatments of the new section 2254(d). Immediately following the enactment of the AEDPA, Professor Larry Yackle undertook a comprehensive analysis of the new statute, including considerable analysis of section 2254(d). *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996). The coverage of this Article overlaps with Professor Yackle's in some places, though our analytical foci and conclusions differ considerably. More recently, another commentater has compared the text of section 2254(d) with prior case law and offered some opinions about how to interpret portions of the new provision. *See* Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997). The author attempts to resolve only one of the four textual ambiguities that make up the focus of this Article. In this Article, I have specifically tried to approach the new section 2254(d) from the standpoint of lower federal court judges who must apply it without guidance from the Supreme Court. However, for a well-rounded education on section 2254(d), I urge the reader to consult these other two works.

law "clearly established?" Finally, does "determined by the Supreme Court" mean that federal habeas courts may not take lower federal court decisions into account in determining whether federal law was clearly established?

The Supreme Court's recent decision in *Lindh v. Murphy*[8] will delay the manifestation of some of these interpretive problems because after *Lindh*, the new section 2254(d) does not apply to cases that were pending as of April 24, 1996, the effective date of the statute.[9] When the problems do surface, however, the stakes will be high. There are already signs of conflict on the question of whether pure questions of law are to be reviewed on the same basis as mixed questions of law and fact.[10] Moreover, the federal circuit courts of appeals seem headed toward interpretations of "unreasonableness" so narrow that district courts could be lulled into a rubber-stamp mentality.[11] Some federal courts also seem headed toward giving state judges as much "elbow room" as state officials enjoy under the law of qualified immunity.[12] This analogy misconceives the role of judges in the criminal justice system and threatens to drain federal habeas corpus of its recognized value in prodding state judges to keep abreast of developments in federal constitutional criminal procedure.

Part II of this Article introduces the reader to the new section 2254(d) and situates it in the new statutory framework. Part III concludes that pure questions of law are to be reviewed de novo, while mixed questions of law and fact are to be reviewed for "unreasonableness." Part IV explains why the definitions of "unreasonableness" currently gaining favor among the circuits are both implausible and undesirable, and offers an alternative definition. Part V explains why the analogy to official immunity is flawed and suggests an alternative interpretation of the phrase "clearly established federal law" in section 2254(d). Part V also argues that this portion of the statute leaves the Supreme Court's decision in *Teague v. Lane*[13] undisturbed. Part VI warns of the dangers that lurk in the

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8. 117 S. Ct. 2059 (1997).

9. *See id.* at 2063.

10. *See infra* notes 21-25 and accompanying text.

11. *See infra* notes 52-53 and accompanying text.

12. *See, e.g.*, Blankenship v. Johnson, 106 F.3d 1202, 1206 (5th Cir. 1997) (drawing on the meaning of "clearly established" developed in immunity cases to help define it in the AEDPA) (citing Anderson v. Creighton, 483 U.S. 635, 639 (1987)), *reh'g granted and rev'd on other grounds*, 118 F.3d 312 (1997); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (providing qualified immunity for a White House staffer whose conduct did not violate clearly established rights).

13. 489 U.S. 288 (1989).

portion of the statute that purports to exclude circuit decisions from consideration in federal habeas review.

II. SECTION 2254(d) AND THE NEW HABEAS ORDER

The first thing to notice about the new section 2254(d) is that it does not cover the same subject matter as the old section 2254(d). The old section 2254(d) set forth the standards for the grant of an evidentiary hearing in habeas proceedings.[14] In the AEDPA, Congress redesignated the former section 2254(d) as the new section 2254(e) and enacted the following as the new section 2254(d):

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14. The former section 2254(d) stated:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed te appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) te (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (1994), *amended by* 28 U.S.C. § 2254(d) (Supp. 1997). Many of the exceptions were drawn from *Townsend v. Sain*, 372 U.S. 293, 313 (1963).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[15]

In colloquial terms, then, the new section 2254(d) prescribes "standards of review"—that is, the standards by which federal habeas courts are to review state court judgments.[16] As a formal matter, this terminology is of dubious validity; federal habeas corpus has always been classed as an original proceeding whose function was to test the legality of a prisoner's custody simpliciter.[17] Federal habeas courts never formally reviewed state court convictions in the way that appellate courts review trial court judgments. Habeas corpus proceedings were collateral to judgments of conviction. As a practical matter, however, federal habeas courts have acted as appellate courts for at least forty years.[18] The usual remedy in a habeas proceeding is an order to release the prisoner, stayed on the condition that the state courts grant a new trial. The grounds for issuance of this remedy virtually always consist of constitutional infirmity in the original judgment of conviction. Thus, there is no meaningful distinction between habeas and appellate review,[19] and the new section 2254(d) governs the standard of review to be employed in habeas proceedings in much the way that Federal Rule of Civil Procedure 52(a) governs the standard of federal appellate review of federal district court decisions.[20]

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15. 28 U.S.C. § 2254(d) (Supp. 1997).

16. *See* Note, *supra* note 7, at 1871-72 (describing § 2254(d) as addressing the "standards of federal habeas review"). *Cf.* Yackle, *supra* note 7, at 408 n.96 (asserting that the review of state court judgments in § 2254(d) cannot he referring to review of state judgments in the "ordinary appellate sense").

17. *See* Fay v. Noia, 372 U.S. 391, 423-24 (1963) (noting the "traditional characterization" of the writ as an original remedy).

18. *See* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 254 (1988) (arguing that modern habeas corpus "now serves in effect as a federal appeal from every state conviction").

19. Of course, there is an important distinction between *federal* habeas review and *state* appellate review, but that is another matter entirely.

20. FED. R. CIV. P. 52(a) states in pertinent part: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

III. DO DIFFERENT STANDARDS APPLY TO PURE LEGAL QUESTIONS VERSUS MIXED QUESTIONS OF LAW AND FACT?

American law generally employs different appellate standards of review for legal conclusions versus findings of fact.[21] Trial court conclusions of law are usually reviewed less deferentially than findings of fact. Trial court findings with respect to so-called mixed questions of law and fact are sometimes reviewed under a separate standard.

Section 2254(d) appears to follow this traditional approach and to establish standards of review based on the type of question involved. Subsection (d)(1) states that no relief shall be granted unless the decision of the state court was "contrary to . . . clearly established federal law." This provision presumably prescribes a de novo standard of review for pure questions of law. Subsection (d)(1) also provides that no relief shall be granted unless the decision involved "an unreasonable application of . . . clearly established federal law." This clause seems to establish an "unreasonableness" standard of review for mixed questions of law and fact, which, after all, are nothing more than questions of how law should be applied to the facts of the case.[22] Finally, subsection (d)(2) states that no relief shall be granted unless the decision was based on an unreasonable determination of the facts in light of the evidence adduced at trial. In other words, the standard of review for findings of fact is "unreasonableness."

The Fifth and Seventh Circuits have adopted the view that section 2254(d) varies the standard of review depending on whether the question is one of law, fact, or both.[23] This approach can be characterized as the "variegation" interpretation. According to this

For my views on standards of review in federal civil appeals, see Evan T. Lee, *Principled Decisionmaking and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 284-90 (1991) [hereinafter Lee, *Mixed Questions*] (arguing that de novo review should be reserved for cases likely to have some practical precedential value).

21. *See, e.g.*, United States v. McConney, 728 F.2d 1195, 1200-01 (9th Cir. 1984) (en banc) (discussing use of de novo standard of review for lower court conclusions of law and clearly erroneous standard for conclusions of fact). *See generally* Lee, *Mixed Questions*, *supra* noto 20 (exploring the problematic distinction between the standard of review for questions of law and fact for the purposes of appellate review of mixed questions of law and fact).

22. *See* Brown v. Allen, 344 U.S. 443, 507 (1953) (opinion of Frankfurter, J.) (stating that mixed questions involve the "application of principles to the facts"); Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) (stating that mixed questions are those in which the "rule of law [is] applied to the established facts").

23. *See* Lindh v. Murphy, 96 F.3d 856, 868-70 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 117 S. Ct. 2059 (1997); Drinkard v. Johnson, 97 F.3d 751, 767-68 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997).

interpretation, state court decisions with respect to pure questions of law are reviewed de novo. The commentators disagree with each other, too. One advocates the variegation interpretation;[24] another argues that the "unreasonableness" standard does not require deference even to state court conclusions with respect to mixed questions of law and fact.[25] This position can be characterized as the "global non-deference" interpretation.

The variegation interpretation is the better of these theories because it makes more sense of the text of the new section 2254(d)(1) in light of prior case law. In order to see this, the standards of review that pre-existed the AEDPA must be examined.

A. The Foundation

The Supreme Court has consistently stated that a federal habeas court is to conduct an independent review of state court conclusions of law.[26] A federal habeas court was not to give any deference to state court conclusions on abstract legal propositions. The Court has also repeatedly stated that the same sort of independent, non-deferential review was to be exercised over state court decisions on mixed questions of law and fact.[27] Thus, federal courts were to afford petitioners de novo review of state court applications of law to fact. The only exception to this de novo standard was the review of state court findings of historical fact; under the pre-AEDPA habeas statute, the federal courts were to review state court findings of fact on a deferential basis.[28]

In sum, federal habeas courts have always exercised independent judgment with respect to abstract propositions of federal law. Although they have also exercised such independent judgment with respect to applications of law to fact, habeas courts have consistently recognized a theoretical and practical distinction between an abstract rule of law and the application of law to the facts of a particular case. They have always been aware that "mixed" questions of law and fact contain different mixtures; some are more heavily legal, some more

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24. *See* Note, *supra* note 7, at 1879-81.

25. *See* Yackle, *supra* note 7, at 384.

26. *See Brown*, 344 U.S. at 506 (opinion of Frankfurter, J.); Miller v. Fenten, 474 U.S. 104, 110-12 (1985).

27. *See* Thompson v. Keohane, 516 U.S. 99, 109-12 (1995); *Brown*, 344 U.S. at 507 (opinion of Frankfurter, J.).

28. *See supra* note 14 for the portion of the pre-AEDPA habeas statute that describes the standard for reviewing state court findings of fact.

heavily factual. The mixed questions that were more heavily factual often were classified as "pure findings of fact" and reviewed on a deferential basis.

Thus, although it is true that prior case law only established two standards of review—de novo for pure questions of law and mixed questions; presumption of correctness for pure findings of fact—it must be emphasized that courts and lawyers always *thought* in terms of three categories.[29] Pure questions of law might ultimately be reviewed on the same basis as mixed questions, but courts always paid heed to the difference between the two.

B. The New Statute

1. The Variegation Interpretation

Under the text of the new section 2254(d), federal habeas courts may not issue relief unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law"[30] or unless it "resulted in a decision that was based on an unreasonable determination of the facts."[31] Does this statute contemplate two or three categories? The statute is far from a model of clarity, but apparently it alludes to three categories of questions. A state court decision that is "contrary to . . . federal law" errs on a pure question of law. A state court decision that involves an "unreasonable application of . . . federal law" errs on a mixed question. And a state court decision that is "based on an unreasonable determination of the facts" errs on a pure finding of fact.

Assuming for a moment that the statute does allude to three categories, what standard of review does the statute prescribe for

29. *Compare* Sumner v. Mata, 455 U.S. 591, 597-98 (1982) (per curiam) (whether identification procedure was impermissibly suggestive was mixed question); *Miller*, 474 U.S. at 115 (admissibility of confession was mixed question); Brewer v. Williams, 430 U.S. 387, 403 (1977) (whether suspect waived right to counsel was mixed question) *with* Maggio v. Fulford, 462 U.S. 111, 113 (1983) (per curiam) (whether defendant was competont to stand trial was question of fact); Rushen v. Spain, 464 U.S. 114, 120 (1983) (per curiam) (whether ex parte judicial communication biased the jury is a question of fact); Wainwright v. Witt, 469 U.S. 412, 430 (1985) (whether juror could be excluded from capital jury for cause was question of fact). *See generally* JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 20.3 (2d ed. 1994) (Supreme Court has had difficulty distinguishing mixed questions from questions of fact).

30. 28 U.S.C. § 2254(d)(1) (Supp. 1997).

31. *Id.* § 2254(d)(2).

each? If a federal habeas court may grant relief whenever a state court decision is "contrary to . . . federal law," then the review is unqualified and non-deferential. It is de novo. If a federal habeas court may grant relief when the state court decision involves an "unreasonable application of . . . federal law," then the review is based on reasonableness. The question is not whether the application of federal law to the facts of the case is correct simpliciter, but whether it is reasonable. Finally, the standard of review for pure findings of fact is also reasonableness, although this is greatly complicated by the presumption of correctness contained in the new section 2254(e).[32] The text of the new section 2254(d), then, appears to address each of the three categories of questions separately.

The variegation interpretation is in strong harmony with the text of section 2254(d). It makes sense in light of the words and punctnation in the statute.

2. The Global Non-Deference Interpretation

The leading proponent of the global non-deference interpretation is Professor Larry Yackle. According to his argument, section 2254(d)(1) retains de novo review for mixed questions of law and fact.[33] Subsection (d)(1) states that relief shall not be granted unless the decision "was contrary to, or involved an unreasonable application of, clearly established federal law."[34] Professor Yackle has argued that "federal law" encompasses not only abstract legal precepts—for example, that involuntary confessions are inadmissible—but specific legal propositions as well, for example, that a confession is involuntary if the arrestee admits committing the crime only after being shown a large rubber hose in the hands of a burly detective.[35] In other words, habeas advocates claim that "law" refers to applications of law to fact as well as to pure propositions of law.

If we accept this argument, the net effect is to nullify the clause: "or involved an unreasonable application of." Any petitioner who claims that the state court incorrectly applied law to fact will assert that such an application is "contrary to law." If the federal court decides that the application was incorrect, even if not unreason-

32. Both Yackle, *supra* note 7, at 388 & n.27, and the author of Note, *supra* note 7, at 1875-76, take on the difficult problem regarding the standard of review for state court findings of fact. I do not attempt to resolve it here.

33. *See* Yackle, *supra* note 7, at 412.

34. 28 U.S.C. § 2254(d)(1).

35. *See* Yackle, *supra* note 7, at 384.

able, then it may grant relief. The result is the same even if the state can show that the application was reasonable, since its being contrary to law is by itself adequate to support issuance of the writ. The "unreasonable application" clause simply drops out of the statute. Professor Yackle puts it plainly: "The only language doing any genuine work in § 2254(d) is the language establishing the basic rule that a federal court is authorized to award habeas relief if a previous state court judgment was 'contrary to' federal law as 'clearly established' by the Supreme Court."[36]

As support for this interpretation, Professor Yackle cites legislative history. For years, Republicans had pushed for a law that would forbid federal habeas courts from disturbing reasonable state court decisions. According to Yackle, Senate Republicans in the 104th Congress simply realized that they could not secure any standard-of-review provision at all unless they capitulated on their insistence that federal courts defer to all reasonable state court decisions.[37] Not only did they have to concede that mere reasonableness would not shield incorrect conclusions of law, they had to concede that mere reasonableness would not protect incorrect applications of law to fact either.[38]

Of all the legislative history that Professor Yackle cites, however, very little supports the proposition that habeas relief could be granted on the basis of incorrect-but-reasonable applications of law to fact. The evidence Yackle cites is either inconclusive or actually points in the other direction. For example, Yackle cites the following quotation from Senator Orrin Hatch's floor defense of the language in question:

> [The standard now in § 2254(d)] is a wholly appropriate standard. It enables the Federal court to overturn State court [decisions] that clearly contravene Federal law. Indeed, this standard essentially gives the Federal court the authority to review de novo whether the State court decided the claim in contravention of Federal law.
>
> Moreover, . . . this . . . standard . . . allows the Federal court to review State court decisions that improperly apply clearly established Federal law. . . .
>
> What does this mean? *It means that if the State court reasonably applied Federal law, its decision must be upheld.* Why is that a problematic standard?

36. *Id.* at 437.

37. *Id.* at 438 & n.185 (citing 141 CONG. REC. S7846 (daily ed. June 7, 1995) (statement of Sen. Specter)).

38. *See id.* at 438 ("Hatch . . . . continued to insist that 'reasonable' state court decisions should be undisturbed. Yet now he had it that a state court judgment could not be beth 'reasonable' and 'wrong' ") (citing Letter from Orrin G. Hatch to Douglas G. Robinson (Apr. 26, 1995), *reprinted in* Yackle, *supra* note 7, at 438 n.186).

> After all, Federal habeas review exists to correct fundamental defects in the law. If the State court has reasonably applied Federal law it is hard to say that a fundamental defect exists.[39]

The last paragraph of this quotation clearly supports the notion that incorrect-but-reasonable applications of law to fact may not serve as a foundation for the grant of relief.[40]

The first two paragraphs are not inconsistent. They confirm the availability of de novo review for state court conclusions on pure questions of law. In this quotation, Senator Hatch sought to placate the concerns of some Democrats who were afraid that the bill would prohibit relief based on incorrect-but-reasonable conclusions to pure legal questions.[41]

The statements by Senator Arlen Specter are equally probative. Senator Specter had opposed the early forms of proposed habeas reform legislation because he felt they went too far.[42] Eventually, Hatch altered his proposed legislation to obtain Specter's support and cooperation.[43] Senator Specter then became a co-sponsor, and the bill was thereafter known colloquially as the "Hatch/Specter" bill.[44] When the conference report was on the floor for final passage, Specter spoke candidly about his ambivalence about the final product. He admitted he did not favor the "deference" the bill would accord to state judgments.[45] Most important for present purposes, Specter stated that the federal courts would not defer to state courts regarding "determinations of Federal law," but he understood that "deference" would be owed to a state court "decision applying the law to the facts."[46]

Professor Yackle cites only one piece of evidence supporting the notion that the term "reasonable" in section 2254(d)(1) was to have no

39. Yackle, *supra* note 7, at 440 (first alteration Professor Yackle's) (quoting 141 CONG. REC. S7848 (daily ed. June 7, 1995) (statement of Sen. Hatch)) (emphasis added).

40. Though it must be conceded that Senator Hatch never actually said "incorrect-but-reasonable applications of law to fact must stand," I infer from the quotation taken as a whole.

41. Among the concerned Democrats were Senator Edward Kennedy, *see, e.g.*, 142 CONG. REC. S3458 (daily ed. Apr. 17, 1996); Senator Daniel Patrick Moynihan, *see, e.g.*, 142 CONG. REC. S3438 (daily ed. Apr. 17, 1996); and Senator Joseph Biden, *see, e.g.*, 142 CONG. REC. S3357 (daily ed. Apr. 16, 1996).

42. *See* Yackle, *supra* note 7, at 430 & n.161 (quoting 139 CONG. REC. S15,378 (daily ed. Nov. 16, 1993) (statement of Sen. Specter)).

43. *See id.* at 436 (citing 141 CONG. REC. S4596 (daily ed. Mar. 24, 1995) (statement of Sen. Hatch)).

44. *See id.*

45. *See id.* at 441 n.191 (citing 142 CONG. REC. S3471 (daily ed. Apr. 17, 1996) (statoment of Sen. Hatch)).

46. This is Yackle's own interpretation of Senator Specter's remarks. *See id.*

effect. One of the witnesses appearing before the Senate Judiciary Committee expressed concern about federal courts being unable to grant relief when the state court decision was reasonable yet wrong. After the hearing, Senator Hatch responded to the witness by letter:

> You have testified that the provision of S.623 that would require federal courts to defer in habeas petitions to state court adjudications that are not "unreasonable" interpretations of federal law, will result in the affirmance of state court interpretations of federal law which are, in your words, " 'reasonable,' even if they are wrong." Could you expand on how an interpretation of federal constitutional law could be wrong, that is contrary to established federal law, and yet still be a *reasonable* interpretation of the Constitution?[47]

This correspondence, if taken at face value, supports Professor Yackle's argument that the courts should disregard the "unreasonable application" clause of section 2254(d)(1). It suggests that Senator Hatch, at least, believed that there was no difference between a decision being "contrary to . . . law," that is, wrong, and being "unreasonable." It suggests that Congress intended to use "contrary to" and "unreasonable" interchangeably as synonyms.

There is reason to doubt whether this letter accurately reflects Hatch's thinking. First, it flies in the face of everything the Republicans had argued during the previous decade. At least since the Warren Court, habeas practice has been for federal courts to grant relief whenever they concluded that state courts had committed constitutional error.[48] This has long rankled conservatives, who for a variety of reasons thought the state criminal courts should be given more flexibility.[49] Republicans pushed for a reasonableness standard in habeas corpus under which a petitioner could not obtain relief unless the state judgment was deemed unreasonable.[50] If Republicans

47. Letter from Orrin G. Hatch to Douglas G. Robinson (Apr. 26, 1995), *reprinted in* Yackle, *supra* note 7, at 438 n.186.

48. *See* Brown v. Allen, 344 U.S. 443, 460-65 (1953) (concluding that the normal principles of preclusion do not apply to habeas review). Relief, however, was subject to the harmless error doctrine. *See, e.g.*, Chapman v. California, 386 U.S. 18, 22 (1967). It was also subject to the restrictions of procedural default. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). Finally, the rule of criminal procedure sought to be enforced could not have been handed down by the Supreme Court after the petitioner's conviction had become final. *See* Teague v. Lane, 489 U.S. 288, 310 (1989).

49. *See, e.g.*, S.2216, 97th Cong. § 5 (1982) (precluding habeas review if state court result was "fully and fairly adjudicated"); H.R. 2709, 101st Cong. § 605(d) (1989).

50. In their dissent from a committee report, endorsing a democratic bill in 1991, House Republican leaders explained their proposal for a "full and fair" standard of review in federal habeas corpus: "The full and fair standard of review in the [Republican] proposal encompasses two essential requirements: (1) the state determination must be reasonable, including a reason-

really thought "wrong" and "unreasonable" meant the same thing, what would their proposed reasonableness standard have availed them?

Second, Hatch's remark comes in written correspondence rather than extemporaneous speech. Most correspondence coming out of congressional offices is written by staffers. Senator Hatch may or may not have read the letter before it was mailed. It is thin support for the global non-deference interpretation of section 2254(d)(1).

IV. THE MEANING OF "UNREASONABLE"

Under the variegation interpretation, the standard for reviewing state court conclusions of mixed questions of law and fact is reasonableness—that is, the court may not grant relief unless the decision involved an unreasonable application of law to fact. The term "unreasonable," however, has many different meanings.[51] What does it mean in the context of section 2254(d)?

In *Drinkard v. Johnson*, a Fifth Circuit panel held that an application of law to facts is unreasonable "only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect."[52] In other words, a federal court can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.[53]

There are grave problems with this test. First, it is circular. It defines "unreasonable application" solely by reference to what "reasonable jurists" would think. As a logical matter, then, the *Drinkard* opinion is of no help in ascertaining the meaning of reasonable. Assuming for the sake of discussion that one knows what a

able determination of the facts in light of the evidence presented to the state court. . . ." H.R. REP. NO. 102-242, at 394 (1991).

51. One law dictionary defines "reasonable man" as "a phrase used to denote a hypothetical person who exercises 'those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interest[s] and the interests of others.'" STEVEN H. GIFIS, LAW DICTIONARY 170-71 (1975) (quoting RESTATEMENT (FIRST) OF TORTS § 283(a) cmt. a (1934)). In contrast, consider a lay dictionary's definitions of "reasonable" in the following ways: "1. Capable of reasoning; rational. 2. Governed by or in accordance with reason or sound thinking. 3. Within the bounds of common sense. . . . 4. Not excessive or extreme; fair; moderate. . . ." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1086 (1969 William Morris, ed.).

52. 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997).

53. For cases applying this standard, see Brown v. Cain, 104 F.3d 744, 749 (5th Cir. 1997), *cert. denied*, 117 S. Ct. 1489 (1997); Moore v. Johnson, 101 F.3d 1069, 1076 (5th Cir. 1996), *vacated on other grounds*, 117 S. Ct. 2504 (1997); Mata v. Johnson, 99 F.3d 1261, 1267 (5th Cir. 1996), *reh'g granted and vacated in part on other grounds*, 105 F.3d 209 (1997).

reasonable jurist is, the *Drinkard* formulation takes a crabbed view of what constitutes an unreasonable application. If even a single judge who could generally be characterized as "reasonable" might think the state court's decision is correct, then the decision is not "unreasonable." If this test seems undemanding, there is a good reason: It confuses the reasonableness of judges with the reasonableness of their individual decisions. This formulation overlooks the fact that reasonable judges sometimes make unreasonable decisions. Every honest judge of any seniority will admit to at least one impetuous or careless decision that was not only "incorrect," but indefensible in the sober light of the following day. Yet under the *Drinkard* test, such an indefensible decision is "not unreasonable" so long as one can imagine a normally reasonable judge making it on a bad day. *Drinkard* sets the bar so low that even patently incorrect state court decisions can stumble over it.

The *Drinkard* "reasonable jurist" test is fundamentally inconsistent with the statute. Section 2254(d) does not refer to unreasonable *judges*; it refers to unreasonable *applications* of law to fact. Whether the state court judge might normally be a reasonable jurist is beside the point. The question ought to be whether this particular *decision* is reasonable—whether it appears to be the product of the exercise of ordinary care by a state court judge under the circumstances. If it appears that the state court judge was even modestly negligent in the decisional process, relief may issue.

The proper interpretation of section 2254(d), then, focuses on the reasonableness *vel non* of the decision, not the judge making it. The real danger of close adherence to *Drinkard* is that the federal judge will ask whether this decision in itself constitutes sufficient evidence to conclude that the state judge is generally unreasonable. This hazard would be at its greatest when one or more of the reviewing federal judges is personally acquainted with the state judge in question.

Yet, why should mere negligence by state judges be penalized? The answer is simple—to encourage them to take care in similar criminal cases in the future. One of the principal justifications for the very existence of a federal writ of habeas corpus for prisoners in stato custody is to keep state courts in line with federal constitutional law.[54] Of course, this includes the rare outrageous instance in which a state

54. *See* Withrow v. Williams, 507 U.S. 680, 695 (1993); Teague v. Lane, 489 U.S. 288, 306 (1989) (plurality opinion) (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)); Evan T. Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 154 (1994).

judge all but declares war on the United States Supreme Court. But it also includes the much more common situation in which the state judge simply fails to think about the logical reach of a Supreme Court decision. The easiest thing for judges to do is limit new Supreme Court decisions to their facts. In this way, new Supreme Court edicts are marginalized and the status quo is preserved to the greatest degree. When the new Supreme Court edict favors prosecutors, the marginalization of new precedent benefits defendants. For better or worse, habeas corpus can have no role in correcting such errors. But when the Supreme Court hands down a new rule that benefits defendants, marginalization obviously defeats the benefit. Habeas corpus does and should deter such marginalization.

State trial judges must exercise due diligence in giving new Supreme Court edicts their proper scope, which means applying the new rule to all appropriate fact situations. Usually the state appellate courts will reverse such mistakes on direct appeal, but on occasion such an error will be lost in the sheer density of the trial record and briefs. Federal habeas relief must be available in such an instance to remind state judges, both trial and appellate, that they must exercise due diligence in apprising themselves of Supreme Court decisions and in policing the implementation of those edicts. If they fail, the prisoner will get a new trial, at considerable state expense and perhaps after significant deterioration of evidence. This is the deterrence aspect of federal habeas jurisprudence. Harsh as it may seem, it is established in precedent and is amply justified by careful analysis.[55]

The proper test, then, is not whether any reasonable jurist could have agreed with the state court decision, or whether reasonable judges would debate the point. The proper test is whether the decision is the product of due diligence in the decisional process. If the mistake is one that would not ordinarily be made by a judge exercising due diligence, then it is unreasonable.

V. THE "CLEARLY ESTABLISHED" STANDARD

The new section 2254(d)(1) states that relief is not to be granted unless the state court decision violated or involved an unreasonable determination of "clearly established" federal law. It does not take much prescience to know that many federal habeas courts will

55. *See supra* note 54.

struggle with the question of whether particular rules of federal law were clearly established at the time the prisoner's state conviction became final. To some extent, these questions are inevitable: They involve the application of a general standard, "clearly established," to particular fact patterns. But some general standards have less descriptive power than others, and "clearly established" invites more than its fair share of puzzlement.

A. Teague *and the "Clearly Established" Clause*

A complex preliminary matter requires discussion. What is the relationship between the "clearly established" clause and the *Teague* doctrine? In the "clearly established" clause, Congress has plainly expressed a policy against using habeas corpus proceedings as a vehicle for the development of new criminal procedure doctrine. New doctrine must be developed by way of the Supreme Court's certiorari jurisdiction or by other courts during direct appeals. *Teague v. Lane* obviously reflects the same policy. Thus the relationship between the two rules requires elaboration.[56] Does the "clearly established" clause effectively codify *Teague*?[57] Does it supersede *Teague*? Does it operate in tandem with it?

In *Teague*, the Court prohibited federal habeas courts from innovating or applying new rules of criminal procedure.[58] A rule of criminal procedure was to be considered new if it was created after the prisoner's direct appeals were exhausted.[59] Because both rules and Supreme Court opinions can be viewed at varying levels of generality, it was not always clear when the Court had created a new rule. For example, in *Edwards v. Arizona*, the Court held that a suspect who had expressed his desire to deal with the police only through counsel may not be interrogated further until counsel had been made available, unless the accused himself initiates further communication with the police.[60] Then, in *Arizona v. Roberson*, the

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56. 489 U.S. 288 (1989).

57. The *Drinkard* Court expressly rejected the theory that the new section 2254(d)(1) does *nothing more* than codify *Teague v. Lane* and its progeny. "We see more than a little irony in the suggestion that, after all the years of failed attempts by Congress to adopt a deferential standard of review in this area, the passage of subsection (d)(1) represents no more than the codification of existing Supreme Court precedent," the court stated. *Drinkard*, 97 F.3d at 767 n.21 (citation omitted). A panel of the 7th Circuit has also explicitly rejected the "mere codification" theory. *See* Gomez v. Acevedo, 106 F.3d 192, 198 (7th Cir. 1997), *vacated on other grounds sub nom.* Gomez v. Detella, 118 S. Ct. 37 (1997).

58. *See Teague*, 489 U.S. at 306 (plurality opinion).

59. *See id.* at 311 (plurality opinion).

60. 451 U.S. 477, 484-85 (1981).

Court held that a suspect in this situation may not be interrogated further even as to an offense unrelated to the subject of the original interrogation.[61] Did *Roberson* create a new rule or did it simply flesh out a more general rule established in *Edwards*? In *Butler v. McKellar*, the Court held that *Roberson* did establish a new rule, despite language in the *Roberson* opinion that the result therein was logically compelled by *Edwards*.[62] Because *Roberson* was handed down after the petitioner's conviction became final, it could not form the basis for habeas relief.

The similarity between the "clearly established" requirement of section 2254(d)(1) and the *Teague* doctrine is striking. Both rules are aimed at preventing federal habeas courts from participating in the creation and explication of criminal procedure precedents. But one cannot determine the precise relationship between the two until one ascertains the temporal framework of the "clearly established" clause.

The real question is, "clearly established" as of when? In order for the rule to serve as the basis for a grant of relief, must it have become clearly established by the time the state trial court made its decision? Or, must it merely have become clearly established by the time the petitioner's direct appeals were concluded? The text of section 2254(d)(1) does not specify which of these measuring points to use, yet the choice of a measuring point has immense implications. 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.

It is worth illustrating why so much turns on the measuring point. Assume for the moment that "clearly established" means the same thing as "not a new rule" for *Teague* purposes. Further suppose that, during federal habeas proceedings, Petitioner Jones asserts a claim that draws support from two Supreme Court decisions. One of the decisions is fairly general in its scope and was handed down before Jones's arrest. The second decision is much more specific and was handed down between the time that the trial court rejected Jones's objection and the state supreme court affirmed Jones's conviction. Even assuming that the second decision constitutes a new rule within the meaning of *Teague*, Jones's claim is not *Teague*-barred. It

61. 486 U.S. 675, 682 (1988).
62. 494 U.S. 407, 414-15 (1990).

was handed down before Jones's conviction became final. If "clearly established" within the meaning of section 2254(d)(1) is also measured as of the time Jones's conviction became final, then Jones's claim is not barred by section 2254(d)(1). In this case, as with the vast majority of cases, *Teague* and section 2254(d)(1) would have the same effect.

If one changes the measuring point for the "clearly established" requirement, however, the relationship between section 2254(d)(1) and *Teague* changes accordingly. Assume now that the measuring point for "clearly established" is the moment the trial court makes its decision. Though Jones's claim is not *Teague*-barred, his claim is now barred by section 2254(d)(1) because the rule upon which he relies was not clearly established as of the moment his trial objection was overruled. Under this interpretation of section 2254(d)(1), the *Teague* doctrine has effectively been expanded to include claims that rely on Supreme Court decisions made between the time of the constitutional violation and the moment when the conviction becomes final.

The importance of the measuring point, then, is clear. There is, however, no guidance as to which alternative the statute contemplates. The evidence suggests that no one in Congress considered the relationship of the "clearly established" clause to the *Teague* doctrine. No provision in the statute would be rendered nonsensical or surplusage by either of the alternative interpretations concerning a measuring point.[63]

B. *The Alternative Measuring Points*

1. Clearly Established as of Trial

The principal argument in favor of measuring "clearly established" as of trial[64] is fairness to state trial judges. How can a trial judge be expected to apply a rule of criminal procedure that has not yet been handed down? This provision could be viewed as creating a buffer zone in which state judges can operate without undue fear that their work will be undone. They are responsible for knowing each

63. There are several portions of the statute that conditionally permit petitioners to rely on new rules of criminal procedure, thus assuming the existence of exceptions to *Teague*. *See* 28 U.S.C. § 2244(b)(2)(A) (Supp. 1997) (successive petitions); *id.* § 2244(d)(1)(C) (statute of limitations); *id.* § 2254(e)(2)(A)(i) (evidentiary hearing).

64. I use the term "trial" loosely. To be precise, this option is to measure "clearly established" as of the time that the state court makes the decision at issue.

decision the Supreme Court hands down, but they are not expected to "read the tea leaves" and predict the group of cases to which the Court will next extend the rule.

This interpretation's greatest strength, however, also turns out te be its greatest weakness. If measuring "clearly established" as of trial maximizes fairness to judges, it minimizes fairness to defendants. State trial judges may feel squeezed when habeas relief is granted on the basis of a Supreme Court decision handed down after trial, but the judges personally suffer no punishment. It must be extremely difficult to explain to a habeas petitioner why he may not invoke a United States Supreme Court decision handed down while he was unsuccessfully seeking review in the state supreme court. He, after all, will actually have te serve the time.

This interpretation also suffers from an absence of demonstrated congressional intent. Perhaps a poll of Republicans in Congress would have revealed a substantial majority in favor of measuring "clearly established" as of the trial date, perhaps not. The undisclosed intentions of lawmakers count for nothing in the interpretive process,[65] however, and nothing in the text of the statute even suggests such intentions. Expanding the scope of the *Teague* doctrine would constitute a significant change in habeas corpus law. One would expect explicit mention in the statute.

2. Clearly Established as of Final Conviction

There is no affirmative evidence of congressional intent to support this interpretation either. However, the absence of such evidence does not damage this interpretation as much as it damages its opposition. Measuring "clearly established" at the moment that the prisoner's direct appeals conclude would leave the present state of the law undisturbed. If common law applies interstitially to fill silent terms in statutes, then this interpretation has a leg up on its rivals.

Measuring "clearly established" as of the time when a conviction becomes final also fits the deterrence rationale of federal habeas corpus better than the alternative interpretation. In *Teague*, the plurality opinion explained that one of the principal purposes of federal habeas jurisdiction is to deter state judges from committing constitutional violations or from giving effect to those of state law en-

65. *Cf.* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) ("Law is a public act. Secret reservations or instructions count for nothing.")

forcement.[66] The prospect of federal habeas relief encourages state judges to "toe the constitutional line." Measuring "clearly established" as of trial underdeters constitutional violations because it ignores state appellate judges. If the United States Supreme Court hands down a new rule of criminal procedure between the time of trial and the conclusion of the prisoner's direct appeals, it is true that the trial judge may not have had any chance to abide by the new rule.[67] But the state appellate courts will have had ample opportunity to enforce the new rule. If the federal habeas courts conclude that relief is unavailable in such cases because the rule was not clearly established as of trial, state appellate courts are taken off the hook.

If the Supreme Court interprets "clearly established" to apply at the conclusion of direct appeals, it sets up a fascinating and important potential problem down the line. Stated in formal terms, has Congress "codified" the measuring point of *Teague* through the "clearly established" clause of section 2254(d)(1)? Or has it merely left that aspect of *Teague* undisturbed? This question would only ever become important if the Court someday contemplates overruling *Teague*. If the statute has codified it, then the Court cannot change the measuring point of "clearly established." Congress wonld have made the measuring point of *Teague* immune to judicial attack. On the other hand, if the statute simply leaves the measuring point of *Teague* undisturbed, then the Court has authority to change it.[68]

If *Teague* is to be overruled, it would be preferable for the impetus to come from Congress rather than from the Court. In any event, the Court retains the authority to do it on its own. The statute is silent on what measuring point to use for the term "clearly established." The Court should borrow from the common law to fill the statutory gap. This is a default mechanism. There is no particular reason to think that Congress affirmatively intended to use *Teague*'s measuring point. Thus, the *Teague* measuring point is not "in" the statute; the Court should simply use that measuring point on a provisional basis until either the Court or Congress specifies a different measuring point.

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66. *See* Teague v. Lane, 489 U.S. 288, 306 (plurality opinion) (1989) (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969)). *See also* RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1410 (4th ed. 1996) ("*Teague* appears to be based on the premise . . . that the major if not the sole purpose of federal habeas is to provide an incentive for state judges to adhere to constitutional norms.").

67. This assumes that the prisoner's motions for new trial and/or reconsideration have already been denied.

68. This assumes that *Teague* constitutes interstitial common law.

C. *The Meaning of "Clearly Established"*

The best interpretation of "clearly established" is that the rule must be clearly anchored in existing case law—that is, the rule must blend effortlessly inte the mosaic of existing decisions. This conclusion rejects two other possibilities: (1) that "clearly established" for purposes of section 2254(d)(1) means the same thing as "clearly established" for purposes of qualified immunity; and (2) that "clearly established" for purposes of section 2254(d)(1) means the same thing as "new rule" in the cases following *Teague*.

1. The Law of Qualified Immunity

One interpretive possibility is to borrow the interpretation of "clearly established" from the case law that recognizes the doctrine of qualified immunity in section 1983 and *Bivens* litigation.[69] Section 1983 and *Bivens* expose state and federal officers, respectively, to actions for money damages based on the officer's violation of the plaintiff's federal constitutional rights.[70] In the 1970s, the Supreme Court created an important defense to such liability. It held that an officer performing a discretionary governmental function was not liable under section 1983 or *Bivens* as long as the officer honestly and reasonably believed that what he did was legal.[71] In the early 1980s, the Court deleted the subjective component from the test for qualified immunity. In *Harlow v. Fitzgerald*, the Court articulated the test as follows: "[G]overnment 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."[72] This formulation continues to control.[73]

The temptation is to assimilate the meaning of "clearly established" as used in *Harlow* to the meaning of "clearly established" as used in section 2254(d)(1). This would be a mistake. Qualified im-

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69. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); Davis v. Scherer, 468 U.S. 183, 191 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Procunier v. Navarette, 434 U.S. 555, 562 (1978). The case law regarding qualified immunity applies equally to section 1983 litigation and *Bivens* cases. *See* Butz v. Economou, 438 U.S. 478, 500 (1978).

70. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971); Monroe v. Pape, 365 U.S. 167, 187 (1961).

71. *See* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

72. 457 U.S. 800, 818 (1982).

73. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6, at 476 (2d ed. 1994).

munity protects officers from personal liability for damages awards; the habeas jurisdiction does not impose personal liability on state judges. More importantly, it makes sense te insist upon greater knowledge of and facility with the law from judges than from executive branch officials.

a. The Existing Case Law

The Court's opinion in *Harlow* did not elaborate on the meaning of "clearly established." The only subsequent Supreme Court opinion that gives any real content to the phrase is *Anderson v. Creighton*.[74] In that decision, the Court held that an officer had qualified immunity against a Fourth Amendment claim unless a reasonable officer under the circumstances would have known that the *specific* conduct at issue was illegal.[75] In *Anderson*, the officer conducted a warrantless search under what he thought were exigent circumstances.[76] Justice Scalia's opinion for the Court rejected the argument that the relevant question was whether a reasonable officer would have known that a warrantless search in the absence of exigent circumstances violates the Fourth Amendment.[77] Instead, the majority opinion suggested that the officer could not be found liable unless a reasonable officer would have known that exigent circumstances were not present, given that unique set of facts.[78] The effect of *Anderson* has been to require a relatively fact-specific precedent on the books before a court will find that a constitutional right was "clearly established."[79]

As is perhaps inevitable, the circuits have expressed the standard in widely varying verbal formulations. The Second Circuit has stated that the right in question must be defined in case law with "reasonable specificity."[80] The Fourth Circuit has put it this way: "[I]f there is a 'legitimate question' as to whether an official's conduct constitutes a constitutional violation, the official is entitled to qualified immunity."[81] The Fifth Circuit upheld qualified immunity in a

74. 483 U.S. 635 (1987).
75. *See id.* at 641.
76. *See id.* at 637.
77. *See id.* at 638-40.
78. *See id.*
79. *See* 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.07, at 129 (3d ed. 1991).
80. Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991).
81. Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994).

case where there was no fact-specific precedent on the books.[82] The panel denied that it was requiring a case on all fours; it was merely requiring the existence of well-developed legal principles of which the defendants should have known.[83] The Seventh Circuit has also denied that a case directly on point is required to show that a right was clearly established: "It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books."[84] Likewise, in a case in which the plaintiff prisoner sued under the Eighth Amendment because a prison official refused to permit him to use the recreation area off hours on days when the law library's hours overlapped, the Ninth Circuit stated: "[Defendant] is not entitled to qualified immunity simply because [plaintiff] cannot produce a case stating that an inmate is entitled to both his constitutional right to use the law library and his right to have outdoor exercise."[85] The Eleventh Circuit en banc has held that qualified immunity is defeated only when an extremely fact-specific precedent exists:

> For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law.
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> ....
>
> *[P]ublic officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.* For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situatod, reasonable government agent that what defendant is doing violatos federal law *in the circumstances*.[86]

There is some tension among these formulations. Take the Ninth Circuit case where the prison official refused to let the prisoner use the recreation area off hours. This was not a black-and-white case in which every time the prisoner nsed the law library he was refused recreation. According to the court's statement of the facts:

82. *See* Doe v. Louisiana, 2 F.3d 1412, 1418 (5th Cir. 1993).

83. *See id.* at 1418 n.11 (quoting Jefferson v. Ysleta Indep. School Dist., 817 F.2d 303, 305 (5th Cir. 1987)).

84. McDonald v. Haskins, 966 F.2d 292, 295 (7th Cir. 1992).

85. Allen v. City & County of Honolulu, 39 F.3d 936, 939 (9th Cir. 1994).

86. Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1149-50 (11th Cir. 1994) (en banc) (citations omitted) (quoting Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting)) (emphasis added by *Lassiter* court).

> Prison officials *sometimes* scheduled an inmate's opportunity for outdoor recreation at a time that overlapped or coincided with his opportunity to use the law library. Although guards would sometimes escort an inmate to the recreation area after he used the library, [plaintiff] claims that he frequently was forced to forego outdoor recreation on days when he used the prison's law library.[87]

The Ninth Circuit panel noted federal appellate decisions separately guaranteeing prisoners access to law libraries and some form of outdoor recreation.[88] No decision had linked the two. Based on these facts and appellato decisions, the Ninth Circuit upheld the district court's denial of qualified immunity.

Is it not a "legitimate question," in the words of the Fourth Circuit, whether it is unconstitutional for law library hours and recreation hours substantially to overlap? Can it really be said, as the Eleventh Circuit put it, that "every like-situated, reasonable" prison official knows that overlapping the two is unconstitutional? This is highly doubtful. Although it would exceed the bounds of this Article to explore all of them, one can detect subtleties in the above-enumerated verbal formulations that might lead to significantly varying results from circuit to circuit.

It might be asked why Congress would want to incorporate this body of law into section 2254(d)(1). It is far from a model of clarity. A more convincing case can be made that Congress simply desired for state judges to be given a fair amount of operating room. But this general policy objective can be achieved through means other than by adopting the law of official immunity.

b. Purpose of Immunity

Qualified immunity is for the most part available only against claims for money damages.[89] It is not generally available against claims for prospective injunctive relief.[90] The reason for this divergence is simple: Money damages will come from the official's pocket, while injunctive relief effectively runs against the governmental entity. Claims for damages threaten the official in a tangible way; claims for prospective relief do not.

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87. *Allen*, 39 F.3d at 937 (emphasis added).

88. *See id.* at 938-39 (citing Bounds v. Smith, 430 U.S. 817 (1977) (access to a law library); Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979) (outdoor exercise).

89. *See* FALLON, *supra* note 66, at 1164-65 ("Questions of official immunity ordinarily arise in suits . . . seeking damages to be paid by individual officers personally . . . .").

90. For an enumeration of the exceptions, *see id.* at 1177-84.

Transplanting the law of qualified immunity to habeas corpus would be analogous to permitting the defense against claims for prospective injunctive relief in civil cases.[91] When a federal court grants a writ of habeas corpus, it does not expose the involved state judges to any kind of personal liability or judicial discipline. They will react to the granting of relief with anything ranging from mild annoyance to tremendous outrage and affront. They will not, however, be dragged into someone else's court, be subjected to discovery, have to retain counsel, suffer a personal judgment against them, or have their salaries garnished. They will suffer the insult of professional rebuke and perhaps be forced te retry the case.

Too much should not be made of the distinction between personal liability and professional rebuke. After all, if professional rebuke had no psychological effect on judges, then the deterrence theory of federal habeas corpus would be bankrupt. The detorrence theory assumes that stato judges are concerned about the granting of federal habeas relief. It assumes that they will be more diligent in the future, either out of concern for the proper administration of criminal justice, for their judicial reputations, for the inefficiency of retrials, or for the danger of having guilty defendants ultimately walk free. But the intensity and tenor of the concern is different from that attending personal liability. A normal reaction to the prospect of personal liability would be anything from a defiant refusal to change anything to an autematic upholding of any reasonable constitutional clain. Some judges, figuring that only their personal fortunes and convenience are at stake, may martyr themselves for "law and order," or at least for the sovereignty of the stato courts. Others, fearing a flood of spurious lawsuits by prisoners who have nothing better to do, may essentially capitulate. On the other hand, a normal reaction to the prospect of federal habeas relief would be to analyze constitutional claims more searchingly, if not enthusiastically. The judge cannot rationalize defiance by saying that it is only his wallet or reputation on the line. The efficiency of the system and, in some cases, the safety of the community, are at stake.

There is an even more compelling reason to reject the qualified immunity argument: It is perfectly reasonable to expect state judges to have a greater facility for legal analysis than stato officers. Judges are lawyers. They are specially trained in the craft of applying general propositions to specific fact situations. They are steeped in a

91. Professor Yackle first made this point. *See* Yackle, *supra* note 7, at 406 n.86.

distinctive legal culture that recognizes the validity of certain types of analogies and refuses to recognize the validity of others. Although the law is not an autonomous discipline which can only be properly understood or applied by lawyers,[92] judges are more likely to foresee the future course of the law, and be able to understand the force of extant precedent, than laypersons.

But, it will be asked, why should state judges have to predict future developments in the law? According to the Eleventh Circuit, *"Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases."*[93] Are judges obligated to be these things? The present Republican majority in Congress might well answer this question with a resounding no. Federal habeas courts must think carefully, however, and not just reflexively, about what "creative" and "imaginative" mean in this context. It does not mean that judges have a duty to dream up new concepts in criminal procedure law. No state judge could or should have been expected to foresee decisions like *Gideon v. Wainwright*[94] or *Miranda v. Arizona*,[95] both of which were watershed cases. But once those cases were decided, it was fair to expect state judges to comprehend the implications of the precedents.

Consider *Miranda*, which held that a prosecutor may not use any statement stemming from custodial interrogation of the defendant unless the defendant was informed of his rights.[96] The Court had cleared the way for its decision in *Miranda* by handing down *Malloy v. Hogan*[97] two years earlier. In *Malloy*, the Court held that the Fifth Amendment privilege against self-incrimination applies against the states through the Due Process Clause of the Fourteenth Amendment.[98] Only the most prescient of judges could have foreseen *Miranda* coming out of *Malloy*. Surely the rule of *Miranda* was not "clearly established" until *Miranda* itself was handed down. On the other hand, it is entirely reasonable to think that alert judges would have seen *Edwards v. Arizona*[99] following *Miranda*. In *Edwarde*, the

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92. *See generally* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987) (recounting the move away from belief in law as an independent field).

93. Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc) (quoting Adams v. St. Lucie County Sheriff's Dept., 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting)) (emphasis added by *Lassiter* court).

94. 372 U.S. 335 (1963).

95. 384 U.S. 436 (1966).

96. *See id.* at 476.

97. 378 U.S. 1 (1964).

98 *See id.* at 6.

99. 451 U.S. 477 (1981).

police ceased questioning after the defendant refused to talk without an attorney present.[100] The next day, however, the defendant was forced to return to the place of interrogation.[101] The detectives told him they wanted to talk to him and again informed him of his *Miranda* rights.[102] In response to this renewed questioning, the defendant eventually implicated himself.[103] It does not take a legal genius or a crystal ball[104] to see that the police may not repeatedly test a suspect's resolve not to speak without an attorney present. The right to refuse questioning without representation means nothing if the police are under no obligation either to obtain a lawyer or to cease the interrogation.

The law ought to expect more in the way of analogical reasoning from judges than from government officers. The law of qualified immunity reflects lower expectations. It has no place in federal habeas jurisprudence.

2. Interstitial Use of Cases after *Teague*

The measuring point of *Teague* should be used to fill the gap in section 2254(d)(1) left by Congress's failure to specify a measuring point for "clearly established." By the same token, it might be argued that the courts should use the Supreme Court decisions defining "new rule" for *Teague* purposes to fill the gap in section 2254(d)(1) left by Congress's silence on the meaning of "clearly established." Although this argument is surely defensible, on balance, it is not the bettor course.

First, some scholars have voiced separation of powers concerns about the use of federal common law.[105] Such concerns are greatest when Congress has simply nsed vague terms as opposed to situations in which Congress has actually said nothing at all about a key issue. It is questionable whether section 2254(d)(1) is truly silent on the meaning of "clearly established" in the same way that it is silent on the measuring point to be used for determining what rules are clearly

100. *See id.* at 479.
101. *See id.*
102. *See id.*
103. *See id.*
104. The metaphor is borrowed from Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115 (1991).
105. *See, e.g.*, MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 29-46 (1991). *Cf.* Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 356-57 (1992) (accepting "a fair amount" of federal common law, but generally rejecting federal common lawmaking).

established. There is a difference between a statute whose key terms are open-textured and a statute that simply fails to provide certain operational details. The "clearly established" clause of section 2254(d)(1) is the latter. At what point courts measure whether rules have become clearly established is an operational detail; the statute is silent on this. But falling back on common law because the phrase "clearly established" is ambiguous is tantamount to ignoring the words of the statute. Congress decided that rules should be clearly established before they may form the basis of habeas relief, and now it is up to the courts to determine what "clearly established" means.

None of this is te suggest that courts may not use common law as an interpretive aid. It simply serves no good purpose in this particular situation. Federal habeas courts presently follow cases like *Sawyer v. Smith*[106] and *Butler v. McKellar*[107] to determine whether a rule may form the basis of relief. Section 2254(d)(1) neither condones nor condemns these cases. There is nothing in the statute that will necessarily be contradicted or rendered nonsensical if the courts do not continue to follow these cases. The courts are back where they started: They must, all things considered, develop the best possible interpretation of "clearly established."

The best possible interpretation is one that reconciles the manifest desire of Congress to allow state judges more flexibility with the accepted notion that the prospect of federal habeas relief should nudge state judges toward the constitutional line. Some mistakes are inevitable. State trial judges typically have extremely crowded dockets. They do not commonly have the luxury of sending an Ivy League law clerk to study a constitutional question for several hours or days. At the same time, the deterrence function of habeas corpus is not served by "dumbing down" the standard of review. To say that a rule is clearly established only when no reasonable jurist could debate the question is to subject state judges to an idiot test. Imagine how it would be perceived in the rare case where the state judge flunks.

The best interpretation of "clearly established" is that the rule must be firmly anchored in existing case law. It is not enough to say that the rule is not inconsistent with existing case law. Nor is it enough to splice together isolated words and phrases from existing case law in a manner that appears to mandate the rule at issue. The root of the rule must be fixed solidly in existing opinions. Or, to use a different metaphor, the rule must blend effortlessly into the landscape

106. 497 U.S. 227 (1990).
107. 494 U.S. 407 (1990).

of existing decisions. This does not mean that every judge must be able to say that he or she could toll from existing cases that the rule was inevitable. But surely a rule is not clearly established if the rule calls attention to itself as what is wrong with the picture.

This interpretation is fair to state judges, yet retains enough substance to perform the historic deterrence function of federal habeas corpus. If the rule blends effortlessly into the landscape of existing cases, protests of unfairness will ring hollow. But state judges will be expected to do more than simply check for cases with identical facts. They will be expected to look for any relevant principle or rationale embedded in the case law.

VI. THE USE OF THE DECISIONS OF THE FEDERAL CIRCUIT COURTS OF APPEALS

Section 2254(d)(1) states that relief may be granted only if the decision violated clearly established federal law, "as determined by the Supreme Court of the United States."[108] The purpose of this clause is undeniable—to stop federal habeas courts from granting relief based on rules created solely by the Courts of Appeals. The realpolitik assumption is that some circuits are significantly more sympathetic to criminal defendants than the Supreme Court.

It is never a good idea to base enduring jurisdictional rules on reactions to the political leanings of present-day judges.[109] Wisdom aside, this "Supreme Court only" clause potentially presents a serious constitutional question. If it requires district courts to decide for themselves whether federal circuit opinions are based on "clearly established federal law, as determined by the Supreme Court," then it may be unconstitutional. Normally, of course, the doctrine of stare decisis requires district judges to assume that courts of appeals have properly interpreted Supreme Court edicts. Once the court of appeals has correctly or incorrectly announced that a Supreme Court decision means this or that, the district courts in that circuit must follow blindly. If the "Supreme Court only" clause of section 2254(d) requires district courts to make an independent determination about whether the circuit has fairly interpreted Supreme Court case law,

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108. 28 U.S.C. § 2254(d)(1) (Supp. 1997).

109. I will not dwell on the point except to say that I have separately documented my views on appropriate long-term rulemaking in the federal courts context. *See* Evan T. Lee, *The Power of a Federal Forum Norm* 49-92 (1997) (unpublished manuscript, on file with author).

then it selectively suspends the doctrine of stare decisis. This is a potential violation of Article III and the Supreme Court's inherent authority to pronounce the ways in which the lower federal courts are to operate and the ways in which judgments are to be reached.[110]

It is helpful to review the interpretive possibilities with regard to the "Supreme Court only" clause. Without a doubt, federal circuits are now forbidden from granting relief on the basis of anything other than clearly established federal law, as determined by the Supreme Court. Thus, when a petitioner asks a circuit panel to apply a rule to his case, and when the panel can see that the rule was not clearly established by Supreme Court decisious as of the time the judgment became final, the panel is obligated to refuse the request. The panel may not innovate a right to support the grant of relief. If this is the only change wrought by the "Supreme Court only" clause, then there is probably no constitutional difficulty with it.

However, the clause is susceptible to another interpretation. Suppose the circuit panel decides the proffered rule was clearly established by Supreme Court opinions as of the time judgment became final. Shortly thereafter, a district judge within that circuit is confronted by petitioner's request for relief based on the same rule. Further suppose that the district judge does not believe the rule was or is clearly established by Supreme Court case law. Does the district judge grant the relief on the basis of stare decisis, which generally forbids her to question the circuit's pronouncements? Or does she deny the relief on the ground that she lacks jurisdiction—that section 2254(d)(1) has relieved her of the power to grant relief in any case where the asserted rule is not clearly established by Supreme Court decision, and that this is such a case?

The better interpretation of the statute is that the district judge retains jurisdiction to grant relief in that situation. If the circuit has gone astray, the proper response is for the Supreme Court to reverse, not for the district courts to mutiny. Congress should have to speak clearly indeed before such long-standing practice is cast aside. After all, lower courts constantly face analogous problems both within and without the habeas context. Trial judges have undoubtedly thought many times that their intermediate appellate colleagues had misinterpreted Supreme Court case law or the Constitution itself. The universal understanding, whether or not universally observed, is that trial judges must refrain from exercising independent judgment

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110. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871) (concluding that Congress may not command the federal courts to decide cases unconstitutionally).

on the interpretive question. It is hard to believe that Congress contemplated anything different with respect to section 2254(d).

Still, a sliver of doubt remains. Circuits can only sit en banc so many times. The Supreme Court can only grant certiorari in so many cases. Might Congress have sought to associate district judges as an additional line of defense against renegade circuit panels? Although district judges can do nothing about the particular case in which a panel innovates a rule, district courts could, if so authorized, refuse to accord the new rule precedential treatment in subsequent cases.

An interpretation of section 2254(d)(1) that requires district judges to exercise independent judgment in this situation would put the "Supreme Court only" clause in a constitutional gray area. Congress has never before attempted to suspend the doctrine of stare decisis, so there is no case directly on point.[111] The Reconstruction-era case of *United States v. Klein*,[112] however, might provide the agenda for analyzing the constitutionality of the "independent judgment" interpretation of the "Supreme Court only" clause. According to one student of the case, "most commentators see *Klein* as the Court's attempt to define the exercise of judicial power and when Congress has impermissibly encroached on the exercise of such power."[113]

In *Klein*, the plaintiff was the administrator of an estato.[114] The decedent had owned property confiscatod during the Civil War.[115] The administrater sued for the proceeds of the sale pursuant to a congressional statute that permitted recovery of such confiscated property upon proof of loyalty to the Union.[116] The proof in this case was a presidential pardon; the Supreme Court had already held that

111. A recent separation of powers decision, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), is valuahle only for its general approach. Congress attemptod to resurrect previously dismissed cases under section 10(b) of the Securities Exchange Act of 1934. *See id.* at 214-15 (quoting 15 U.S.C. § 78aa-1 (1997)). The Supreme Court held the law unconstitutional on the ground that separation of powers principles generally prohibit the legislative reopening of final judgments. *See id.* at 219. Section 2254(d)(1), of course, does not call for the reopening of any judgment. The relevance of *Plaut* lies in its underscoring of the strict nature of limits on congressional ability to interfere with core judicial functions. The *Plaut* opinion notod that separation of powers is a "structural safeguard" which establishes "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Id.* at 239 (emphasis omitted).

112. 80 U.S. (13 Wall.) 128 (1871).

113. Amy D. Ronner, *Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power After* Robertson v. Seattle Audubon Soc'y *and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934*, 35 ARIZ. L. REV. 1037, 1046 (1993).

114. *See Klein*, 80 U.S. (13 Wall.) at 136.

115. *See id.*

116. *See id.* at 139.

anyone bearing a presidential pardon had to be considered loyal.[117] The Court of Claims held for the plaintiff in *Klein*.[118] Pending appeal, Congress passed a statute making presidential pardons inadmissible as proof of loyalty.[119] The statute directed the Court of Claims and the Supreme Court to dismiss for want of jurisdiction any pending claims based on a pardon.[120] Such a dismissal would not leave the lower court judgment intact. It would require dismissal of the case entirely.[121]

The opinion in *Klein* "is hardly a model of clarity."[122] Federal courts scholars have offered several plausible interpretations.[123] But at least one interpretation attributes to *Klein* some limit on Congress's authority to influence the substantive results of litigation by tinkering with subject matter jurisdiction over the federal courts. The *Klein* opinion stated:

> The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.
>
> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power [of the Supreme Court].[124]

It is not necessarily sufficient, then, for Congress to defend an attempt to influence substantive results on the ground that it is merely exercising its constitutionally mandated power over federal

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117. *See id.* at 142.

118. *See id.* at 143.

119. *See id.*

120. *See id.*

121. *See id.* at 144.

122. FALLON, *supra* note 66, at 368. When the Supreme Court granted certiorari in *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), *cert. granted*, 501 U.S. 1249, observers expected further explication of *Klein*. They were disappointed. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992) (reversing on other grounds).

123. Articles each containing several plausible interpretations of *Klein* include Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction aud Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, and Ronner, *supra* note 113.

124. 80 U.S. (13 Wall.) at 146. A caveat should be noted, however. *Klein* involved the question of Congress's control over the appellate jurisdiction of the Supreme Court, not congressional control over the jurisdiction of the lower federal courts. The former question has a textual peg in Article III: "[T]he supreme Court shall have appellate Jurisdiction, beth as to Law and Fact, with such Exceptions, and under such Rogulations as the Congress shall make." U.S. CONST., art. III, § 2, cl. 2. *See generally Ex Parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) (holding that Congress has broad power to remove cases from Supreme Court's appellate jurisdiction). The latter question, which is implicated by section 2254(d)(1), concerns an inference from the structure of Article III. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850) (concluding that because Congress had no obligation to create lower federal courts in the first place, it has broad power to remove cases from their jurisdiction).

court jurisdiction. As one leading authority puts it, "[I]nvocation of the language of 'jurisdiction' is not a talisman, and . . . not every congressional attempt to influence the outcome of cases can be justified as the exercise of a power over jurisdiction."[125]

It may be assumed for the sake of argument that Congress has the power to revoke the subject matter jurisdiction of the lower federal courts over federal habeas corpus. It may even be assumed that Congress has the power to suspend the doctrine of stare decisis in federal habeas corpus cases by revoking jurisdiction to award relief based on anything but an exercise of independent judgment on legal questions. But Congress has not done that in section 2254(d)(1). It has not simply suspended the doctrine of stare decisis in habeas corpus cases. It has given the district court full jurisdiction to decide the case as law requires, until the court reaches the detormination it must grant relief based on a court of appeals decision that, in the view of the district judge, does not rest on clearly established federal law as reflectod in Supreme Court opinions. Then, and only then, is stare decisis suspended. This sort of excision somewhat resembles a gerrymandered voting district. It also resembles the jurisdictional scheme in *Klein*, which gave the court jurisdiction "to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease."[126]

Congress could eliminate the court of appeals' jurisdiction over section 2254 cases.[127] It could prohibit the stare decisis effect of circuit decisions, eliminating the law declaration function of the courts of appeals and leaving them only in the business of error correction. But it is not at all clear that Congress may prohibit the stare decisis effect of only those courts of appeals decisions that district judges, in the exercise of their jurisdiction, determine to fall outside the logical compass of Supreme Court opinions. Such a statutory scheme reaches deep into the core adjudicatory functions of the federal courts.

The "Supreme Court only" clause certainly disables courts of appeals from granting relief based on rules that are not clearly established by Supreme Court opinions. The most plausible interpretation of the clause is that district courts must still grant relief based on

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125. FALLON, *supra* note 66, at 368.

126. 80 U.S. (13 Wall.) at 146.

127. *Cf.* Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("There is nothing in the Constitution which requires Congress te confer equity jurisdiction on any particular inferior federal court."); Cary v. Curtis, 3 U.S. (How.) 236, 245 (1845) (stating that Congress possesses "the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of withholding jurisdiction from them" to the degree which may seem proper to Congress).

rules recognized by courts of appeals, even if, in the judgment of the district courts, those rules are not clearly established by Supreme Court opinions. A contrary interpretation would be surprising and constitutionally troublesome.

VII. CONCLUSION

Of course, the AEDPA largely owes its existence to long-standing Republican dissatisfaction with lower federal courts' general treatment of habeas petitions from state prisoners. There is no denying that Congress has purposefully made the process more difficult for petitioners, from the new statute of limitations to the narrowed circumstances under which successive petitions may be heard. By the same token, it should not be denied that the new section 2254(d) introduces new restrictions on federal habeas courts' review of state criminal judgments.

It would be a grave mistake, however, to assume that every question of interpretation concerning the AEDPA must automatically be resolved in favor of the construction that treats petitioners most harshly. Whether or not the present congressional leadership would be pleased with such a rule of construction, the courts must not abdicate their interpretive responsibility. The best interpretation of a statute involves much more than a simple determination of which direction the political winds were blowing at the time of enactment. It demands careful attention to all that has gone on before. The courts must place the new enactment within the overall purposes of the statutory scheme. They must make sense of the enactment in light of judge-made law left undisturbed. They must, if possible, fit together old and new in a way that honors both and does violence to neither.

In that spirit, this Article offers the following conclusions. First, section 2254(d) prescribes different standards for reviewing pure questions of law versus mixed questions of law and fact. The standard for pure questions of law is de novo. The standard for mixed questions is unreasonableness. Second, the proper test for determining whether a state court application of law to fact is "unreasonable" is whether the decision reflects the exercise of due diligence by the state courts. If a mistake in application is not one that would ordinarily be made by judges exercising due diligence, then it is unreasonable. Third, the proper tost for whether federal law is "clearly established" is whether the rule in question is clearly

anchored in existing case law. That is, the rule must blend effortlessly into the landscape of existing opinions. The relevant time for determining whether a rule is "clearly established" is the moment that the petitioner's state conviction becomes final, which is when direct appeals have been exhausted. Finally, the federal courts of appeals may no longer grant relief on the basis of rules that are not clearly established under existing Supreme Court case law. However, federal district courts must continue to follow circuit precedent. A district court is required to grant relief when circuit precedent mandates, even if the district judge thinks it is unwarranted by Supreme Court case law. The proper remedy for a renegade panel decision is en banc or Supreme Court review.