LOPER BRIGHT AND THE GREAT WRIT

By Anthony G. Amsterdam* and James S. Liebman**

ABSTRACT

Chevron deference is dead. The Court's forty-year, seventy-decision experiment with Article-III-court deference to "reasonable" agency interpretations of ambiguous federal statutes failed, killed in part by concern that it unduly curbed the "judicial Power" to enforce the rule of law in the face of politics, partisanship, and mission-driven agency decision-making.

"AEDPA deference" lives. The Court's twenty-five-year, seventy-two decision experiment with Article-III-court deference to "reasonable" state-court interpretations of the Constitution under the 1996 Antiterrorism and Effective Death Penalty Act continues to relegate criminal defendants to prison or death, notwithstanding federal habeas judges' independent judgment that the state courts have misread or misapplied the federal Constitution in adjudicating these defendants' claims.

How can this be? Only if state judges have more authority to make *constitutional* law by which federal judges may be bound than federal agencies have to make *sub-constitutional* law by which federal judges may be bound.

This is obviously wrong. Federal agencies are creatures of Congress to which it may appropriately delegate some of its power to make the law that federal courts then are duty-bound to apply. Neither Congress nor any other authority save the American people by amendment may delegate the making of constitutional law.

Constitutional text and history make the wrongness even clearer. The Framers wrote the Constitution precisely to quell the "violence of faction" that the States exhibited under the Articles of Confederation. They understood faction to produce "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury." So the Framers resolved to bind "the judges in every State" to treat the

* University Professor Emeritus, New York University School of Law
** Simon H. Rifkind Professor, Columbia Law School

Constitution as the "supreme Law of the Land"; and the Framers gave federal judges—protected by life tenure and irreducible salaries—the "judicial Power" to neutralize factious state-court decisions by exercising independent judgment whenever Congress gave them jurisdiction to review those decisions. Congress, for its part, has always mandated federal-court as-of-right review of state custody on either writ of error (1789–1914) and/or habeas corpus (1867–today). And throughout more than two-and-a-third centuries, the Supreme Court has issued one federal-courts classic opinion after another, characterizing deference to Congress' or state courts' reasonable-but-wrong constitutional judgments as "treason to the Constitution."

New Constitutionalists successfully challenged *Chevron* under the banner of reasserting the rule of law to protect "small" businesses and "the citizenry" against politics and special interests. The test of their bona fides is whether they will take the same course in cases of individuals like William Packer and Joshua Frost, both convicted and sentenced to prolonged imprisonment through "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury."

TABLE OF CONTENTS

INTRODUCTION: WITH *CHEVRON*'S DEMISE, HOW CAN "AEDPA DEFERENCE" SURVIVE?

In a case arising under the Constitution over which a federal court has jurisdiction, Article III requires it to exercise "[t]he judicial Power" *independently*—to say what the Constitution means and how it bears on the facts of the case and to carry its judgment into effect subject only to appeal to a higher federal court.[1] When the case originates with state judges and reaches a federal court on review, Article VI additionally obliges the federal court to assure that "the Judges in [the] State" were "bound" in their decision by the "Constitution" as the "supreme Law of the Land," "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[2] The Framers thought these requirements necessary to contain "the spirit of power and faction" and its influence on state judging, which gravely endangered the law's sovereignty, the nation's unity, and the people's liberty.[3] In James Madison's words at the Constitutional Convention, the cardinal causes of that risk were "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury."[4]

In 1789, the first Congress gave the Supreme Court as-of-right appellate jurisdiction over state judges' decisions posing that risk.[5] Since 1867, Congress has obliged lower federal courts to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . on the ground that he is in state custody in violation of the Constitution."[6] Especially given exhaustion-of-state-remedies

---

1. U.S. CONST. art. III, §§ 1–2.

2. U.S. CONST. art. VI, cl. 2. Federal statutes and treaties also are supreme law, but the focus here is on the Constitution. Article I, section 9, clause 2 of the Constitution bars suspension of the writ of habeas corpus. That clause "refers to the writ as it exists today," not "in 1789." Felker v. Turpin, 518 U.S. 651, 664 (1996). Consequently, the protections accorded to the federal courts' exercise of habeas jurisdiction by Articles III and VI—the focus of this Article—have Suspension Clause implications that are not addressed here.

3. THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

4. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (James Madison) (Max Farrand ed., 1911) [hereinafter Farrand].

5. *See infra* notes 132–133 and accompanying text (discussing Madison's cardinal case).

6. 28 U.S.C. § 2254(a); *see* § 2241(c)(3) (establishing habeas corpus jurisdiction to determine whether a prisoner is "in custody in violation of the Constitution . . . of the United States"), recodifying without substantive change

requirements,[7] this jurisdiction has long obliged federal habeas courts to review state judges' prior decisions rejecting applicants' claims of unconstitutional custody. In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA)[8] amended the habeas statute's section 2254(d) to mandate what the Supreme Court has since interpreted as a "highly deferential standard for evaluating state court rulings."[9] Under that standard, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied [the Constitution] erroneously or incorrectly. Rather, that application must also be unreasonable."[10] Even if the federal courts' "independent review of the legal question[s]" leaves them with a "firm conviction" that state judges' application of supreme law was "erroneous" and in "clear error,"[11] the federal courts must leave the state decision and the unconstitutional custody it affirms in place unless that decision was "so obviously wrong" and "so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement."[12] If

---

Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (quoted *infra* text accompanying note 137).

7. 28 U.S.C. § 2254(b)(1).

8. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

9. Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam). As amended by AEDPA, section 2254(d) provides that the writ "shall not be granted with respect to any claim" of unconstitutional custody "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." The section regulates the standards by which federal habeas courts review state-court decisions; it does not address or affect habeas courts' jurisdiction. *See* Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013) (adopting the "bright line" rule that statutory limits do not govern jurisdiction unless Congress "clearly states" so). Congress adopted AEDPA to curb habeas corpus and federal post-conviction remedies in order to enable the prompt execution of death sentences in the wake of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995 that killed 168 people and injured an additional 680 or more. *See* James S. Liebman, *An "Effective Death Penalty?" AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 411–18 (2001) (reviewing AEDPA's history). For more on AEDPA's legislative history, see *infra* notes 20, 481.

10. Williams v. Taylor, 529 U.S. 362, 411 (2000).

11. Lockyer v. Andrade, 538 U.S. 63, 75 (2003).

12. Shinn v. Kayer, 592 U.S. 111, 123–24 (2020) (per curiam); Harrington v. Richter, 562 U.S. 86, 103 (2011); *see, e.g.*, Davis v. Jenkins, 115 F.4th 545, 554 (6th Cir. 2024) (en banc) ("'Clear error does not suffice.'") (citation omitted).

state judges in fact "applied a theory that was flat-out wrong," it "does not matter."[13]

In *Williams v. Taylor*, the Supreme Court's first application of revised section 2254(d), the Justices split 5–4 on its interpretation.[14] Justice O'Connor for the majority initiated the view described above.[15] Justice Stevens disagreed. Analogizing to different modes of review the Court has used in reviewing administrative decisions,[16] Justice Stevens read AEDPA to require what administrative lawyers call "*Skidmore* deference"[17]: "Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails."[18] "Whatever 'deference' Congress had in mind" in section 2254(d), he wrote, "it surely is not a requirement that federal courts actually defer to a state court application of the federal law that is, in the independent judgment of the federal court, in error,"[19] "as if the Constitution means one thing in Wisconsin and another in Indiana."[20]

"Nor," Justice Stevens continued, does section 2254(d) "tell us to treat state courts the way we treat federal administrative agencies":

> Deference after the fashion of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* depends on delegation. Congress did not delegate either

13. Johnson v. Williams, 568 U.S. 289, 310 (2013) (Scalia, J., concurring). For discussions of the historical and statutory-interpretation arguments in favor of AEDPA deference, see *infra* Section II.A.2 and Part IV. The constitutional validity of the policy argument in favor of deference—that state judges deserve federal courts' deference out of respect for their coordinate positions in our federal system—is the subject of the rest of this Article.

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

15. *See id*. at 409 (O'Connor, J., delivering the opinion of the Court with respect to Part II, interpreting § 2254(d) AEDPA, and concurring in the judgment).

16. *See id*. at 386 (Stevens, J., concurring).

17. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (discussed *infra* Part IV).

18. *Williams*, 529 U.S. at 386 (2000) (Stevens, J., concurring) (quoting Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996)).

19. *Id*. at 387.

20. *Id*. at 387 n.13 (citation omitted); *see* Renico v. Lett, 559 U.S. 766, 797 (2010) (Stevens, J., dissenting) ("[Section 2254(d)] never uses the term 'deference,' and the legislative history makes clear that Congress meant to preserve robust federal-court review.").

> interpretive or executive power to the state courts. They exercise powers under their domestic law, constrained by the Constitution of the United States. "Deference" to the jurisdictions bound by those constraints is not sensible.[21]

Justice Stevens' resort to administrative law analogies is no surprise. He authored the *Chevron* decision in which the Court famously replaced "*Skidmore* deference"—requiring respect for but never displacement by administrators' demonstrated experience, learning, and thoroughness of reasoning—with "*Chevron* deference," requiring federal judges' acquiescence to "reasonable" administrative decisions under certain circumstances.[22]

From *Williams* forward, the full Court has never addressed the constitutionality of "AEDPA deference."[23] It has, though, applied it in seventy-two decisions—81% of which reversed grants of habeas relief by federal appeals courts convinced that the state decision under review deviated from the supreme law of the land and did so unreasonably.[24]

In 2024, the Court did consider the constitutionality of mandated federal-court deference to non-Article-III actors' legal determinations. In *Loper Bright Enterprises v. Raimondo*,[25] it heard two challenges to the constitutionality under Article III of the "*Chevron* deference" that it had previously applied "at least 70 times" without addressing its constitutionality.[26] Owners of Atlantic

---

21. *Id.* (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984); Adams Fruit Council v. Barrett, 484 U.S. 638 (1984)) (quoting *Lindh*, 96 F.3d at 868 (majority opinion of Easterbrook, J.)).

22. "Deference" means a non-Article-III authority's "displacement of what might have been the judicial view *res nova*," i.e., "displacement of judicial judgment." Henry P. Monaghan, *Marbury and Administrative Law*, 83 COLUM. L. REV. 1, 5 (1983) [hereinafter Monaghan, *Marbury*].

23. Berghuis v. Thompkins, 560 U.S. 370, 389–90 (2010). "AEDPA deference" is lower federal courts' go-to shorthand for their "standard of review" of state-court decisions under section 2254(d)(1). Examples include Kelsey v. Garrett, 68 F.4th 1177, 1190 (9th Cir. 2023); Haight v. Jordan, 59 F.4th 817, 845 (6th Cir. 2023); Dunn v. Neal, 44 F.4th 696, 706 (7th Cir. 2022). In *Felker v. Turpin*, 518 U.S. 651 (1996), the Court addressed the constitutionality of AEDPA provisions other than section 2254(d).

24. Appendix D collects the Court's AEDPA deference decisions.

25. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

26. *Id.* at 472 (Kagan, J., dissenting); *see id.* ("*Chevron* was cited in more than 18,000 federal-court decisions[.]" (citing Kent Barnett & Christopher J. Walker, *Chevron and Stare Decisis*, 31 GEO. MASON L. REV. 475, 477 & n.11 (2024)).

fisheries challenged federal courts' invocation of *Chevron* to uphold the Commerce Department's imposition of fishery-monitoring fees covering the cost of onboard government monitors without making an independent judgment whether the fees violated the statutes under which the Department claimed to act.[27] Defending *Chevron*'s constitutionality, the Government could find in the nation's 235-year history only a single precedent to support congressionally mandated Article-III-court deference to a non-Article-III actor's interpretation of the Constitution or any other law: AEDPA deference.[28] In swatting away that precedent, the only theory that Justices Gorsuch and Thomas, former Solicitor General Paul Clement for plaintiffs, or dozens of his amici could offer was that AEDPA deference is "merely" a "limit on a remedy."[29] AEDPA deference, of course, doesn't *limit* a remedy; it absolutely denies any remedy for custody under state-court decisions that the federal court independently concludes violate supreme law but which are not "so lacking in justification" as to be "beyond any possibility for fairminded disagreement."[30]

AEDPA deference presents a particularly virulent version of the constitutional question that the Court mooted in *Loper*[31]: may a deferential standard of review force Article-III courts to deny relief to litigants harmed by a non-Article-III actor's application of federal law that the judges, upon independent analysis, would determine to be incorrect as a matter of federal law, but not "unreasonably" so?

---

27. *Id.* at 377–82.

28. Brief of Respondent at 39, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2024) (mem.) (No. 22-1219) [hereinafter Government's Brief, *Relentless*]; Transcript of Oral Argument at 126, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2024) (mem.) (No. 22-1219) [hereinafter *Relentless* OA Tr.] (Solic. Gen. Elizabeth Prelogar). The Government also cited mandamus as a precedent while acknowledging that deference in that context is different because it is accorded to an agency to which Congress has delegated law-making authority or to an agent vested with authority by Article II—authority that, when exercised in either case, establishes the supreme national law to which Article-III courts must be subservient. Brief of Respondent at 12–13, 36–37, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (No. 22-451). In the AEDPA context, it is the Constitution itself to which federal courts must be subservient. *See supra* note 21 and accompanying text; *infra* notes 45–47, 432–434, 448–449, 507–508 and accompanying text (elaborating this point).

29. *Relentless* OA Tr., *supra* note 28, at 125–26 (Gorsuch, J.).

30. Harrington v. Richter, 562 U.S. 86, 103 (2011); *see supra* text accompanying notes 9–13 (describing breadth of AEDPA deference).

31. *See infra* notes 388–402 and accompanying text (cataloguing ways AEDPA deference tolerates more serious violations of federal law than *Chevron* deference did).

During oral argument on that question, Justices Thomas, Kavanaugh, and Gorsuch, former Solicitor General Clement, and dozens of amici expressed their firm conviction that Article III allows no such thing.[32]

Not surprisingly, therefore, Chief Justice Robert's six-person majority opinion in *Loper* begins with "the responsibility and power" Article III "assigns to the Federal Judiciary" to decide cases and controversies.[33] Citing Federalist No. 37—Madison's explanation of the federal courts' role in "remedy[ing] . . . the vicissitudes and uncertainties which characterize the State administrations"[34]—*Loper* acknowledges the Framers' "appreciat[ion] that the laws judges would necessarily apply in resolving those disputes would not always be clear."[35] But, quoting No. 37 and Alexander Hamilton's paeon in No. 78 to the good "JUDGMENT" of the life-tenured "federal judicature,"[36] *Loper* joins the Framers in insisting that the "final 'interpretation'" even of "'obscure and equivocal'" laws is "'the proper and peculiar province of th[os]e courts.'"[37] Only those courts could be expected to "exercise that judgment independent of influence from the political branches"[38] and to "construe the law with '[c]lear heads . . . and honest hearts,' not with an eye to policy preferences that had not made it into the [law]."[39] Next, citing Article III decisions from *Marbury v. Madison* in 1803 to *St. Joseph Stock Yards Co. v. United States* in 1936, the Court notes that "[s]ince the start of our Republic," federal courts "have 'decide[d] questions of law' and 'interpret[ed] constitutional and statutory provisions' by applying their own legal judgment."[40]

---

32. *See infra* Section III.B.

33. *Loper*, 603 U.S. at 369.

34. THE FEDERALIST NO. 37, at 226–27 (James Madison) (Clinton Rossiter ed., 1961).

35. *Loper*, 603 U.S. at 369 (citing THE FEDERALIST NO. 37, at 236 (James Madison) (J. Cooke ed., 1961)).

36. THE FEDERALIST NO. 78, at 464, 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

37. *Loper*, 603 U.S. at 369 (quoting THE FEDERALIST NO. 37, *supra* note 35, at 236; THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961)).

38. *Id.* (quoting THE FEDERALIST NO. 78, *supra* note 37, at 522).

39. *Id.* at 403–04 (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed., 1896)).

40. *Id.* at 392 n.4, 385–88 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803) ("'[I]t is emphatically the province and duty of the judicial department to say what the law is.'"); citing St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936)).

The clarity and consistency of this "traditional conception of the judicial function" grounds *Loper*'s actual, statutory holding: when the 1946 Administrative Procedure Act (APA) directed federal courts reviewing agency action to "'decide all relevant questions of law,'" it could and did "'go without saying'" that those courts had to "exercise their *independent judgment* in deciding whether an agency has acted within its statutory authority."[41] Accordingly, "*Chevron* [deference] is overruled."[42] Concurring, Justice Thomas wrote separately "to underscore a more fundamental problem": "Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III's mandate."[43] Justice Gorsuch agreed, explaining that "*Chevron* deference" was too fundamentally flawed to deserve stare decisis protection because it unconstitutionally "precludes courts from exercising the judicial power vested in them by Article III to say what the law is."[44]

As Justice Stevens noted in his *Williams* opinion declining to treat *Chevron* deference as a precedent for AEDPA deference[45]—and as the *Loper* Justices all acknowledged—*Chevron* did not forgo federal-court adherence to the will of the lawgiver (Congress) in favor of deference to agency decisions. Instead, *Chevron* deference aimed to *implement* Congress' assumed delegation to agencies of authority to fill gaps in laws they administered, binding courts to treat agencies' reasonable judgments as Congress' own.[46] That is what Justice Stevens meant when he said "[d]eference after the fashion of *Chevron* depends" on a congressional "delegation" to the agency of a lawmaking role. But, as Justice Stevens said, Congress through section 2254(d) "'did not delegate either interpretive or executive power to the state courts'" to make federal law because Congress cannot do so consistently with the Constitution.[47]

---

41. *Id.* at 392 n.4, 392–93, 412 (emphasis added) (quoting 5 U.S.C. § 706).

42. *Id.* at 412 (overruling *Chevron* deference while preserving *Chevron*'s "Clean Air Act holding").

43. *Id.* at 413–15 (Thomas, J., concurring).

44. *Id.* at 433 (Gorsuch, J., concurring).

45. *See supra* note 21 and accompanying text.

46. *See Loper*, 603 U.S. at 372 (majority opinion) ("*Chevron* rested on 'a presumption [now rejected] that Congress . . . understood that [statutory] ambiguity would be resolved . . . by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" (citation omitted)); *id.* at 449 (Kagan, J., dissenting) (describing *Chevron* deference as "rooted in a presumption of legislative intent").

47. Williams v. Taylor, 529 U.S. 362, 387 n.13 (Stevens, J., concurring) (quoting Lindh v. Murphy, 96 F.3d 856, 868 (7th Cir. 1996)); *see* Northern Pipeline

Yet *Loper* did not hesitate to overturn a forty-year-old ruling and sideline seventy of its own precedents. It did so as part of an ongoing upheaval in U.S. constitutional law unlike any seen since the Warren Court or, perhaps, the 1930s' "switch in time."[48] Being heaved aside are scores of established—even epochal—rulings, such as *Chevron* itself. With an assist from the many *Loper* amici propelling this "New Constitutionalism,"[49] new Supreme Court majorities have toppled numerous precedents as violations of purportedly clear constitutional commands.[50] When the jurisprudential earth moves like this, questions about judges' and the law's integrity and neutrality naturally follow.[51]

With those questions in mind, this Article subjects the Court's rapidly developing legal doctrine, represented here by *Loper*, to two tests for its integrity. Looking backwards, the Article tests the new law's fit with founding constitutional principles that the new law claims to resurrect. Looking forward, it imagines the new law's neutral application in contexts beyond the one generating its resurgence—contexts in which the *legal* valences are the same but the *political* valences are different. *Loper* applied the resurrected

---

Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83–84 (1982) (plurality opinion) ("Congress . . . has the discretion . . . to create presumptions" and "prescribe remedies . . . incidental to [its] power to define the right that *it* has created," but "when the right being adjudicated is not of congressional creation" and arises under the Constitution, such rules are "unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.").

48. *See* Noah Feldman, *The Court's Conservative Constitutional Revolution*, N.Y. REV. BOOKS (Oct. 5, 2023), https://www.nybooks.com/articles/2023/10/05/the-courts-conservative-constitutional-revolution-noah-feldman (on file with the *Columbia Human Rights Law Review*) (addressing the Supreme Court's recent overruling of longstanding constitutional and allied doctrines).

49. By New Constitutionalism, we mean an activist movement aiming, *inter alia*, to reduce the power of the federal government and shift economic power and cultural controls into the private sector. *See generally id*. (discussing what we call the "New Constitutionalism").

50. *See Loper*, 603 U.S. at 473, 479 (Kagan, J., dissenting) (citing recent Court decisions using an "overruling-through-enfeeblement technique [that] 'mock[s] stare decisis'"; "just . . . my own dissents to this Court's reversals of settled law . . . by now fill a small volume").

51. *See, e.g.*, Feldman, *supra* note 48 (describing distortions in constitutional doctrine created by "know[ing] what decisions to reverse but often lack[ing] a clear sense of what legal regime should replace them"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (criticizing constitutional doctrine driven by political considerations that cannot be applied neutrally without regard to who the litigants are).

principles to the evils of a purportedly runaway administrative state that the Framers could barely have imagined;[52] this Article applies them to the selfsame divisive evils of factious state law and adjudication that the Framers directly experienced under the Articles of Confederation and deliberately designed the Constitution to preclude.

The New Constitutionalist Court interred *Chevron* on behalf of "the immigrant, the veteran" and all others lacking controlling factions' "power to influence" and "capture" agencies—"whose interests are not the sorts of things on which people vote."[53] It did so to end "deference requir[ing] courts to 'place a finger on the scales of justice in favor of the most powerful of litigants'"[54]—the "government party."[55] This Article challenges the New Constitutionalists likewise to come to the defense of the William Packers and Joshua Frosts[56] against whose liberty and lives AEDPA deference places a finger on the scales of justice. It asks how New Constitutionalism can tolerate a regimen that tips the scales, often irreversibly, in favor of the very government parties whose oppressive influence the Framers designed federal courts' judicial power and the Constitution's supremacy to restrain.

I. THE FRAMERS' GAMBLE: FIGHTING FACTION THROUGH STATE JUDGES' FEALTY TO SUPREME LAW AND FEDERAL JUDICIAL POWER TO ENFORCE IT

A. Convention and Compromise

When the Framers convened in May 1787 to make a nation out of thirteen loosely confederated states, they had one driving objective: to build—*e pluribus unum*—a "well-constructed Union" strong enough to overcome the dangerously "factious" and "oppressi[ve]" forces in the States that threatened to destroy the unity and liberty that independence from Great Britain had

52. *See Loper*, 603 U.S. at 441, 447–48 (Gorsuch, J., concurring) (describing *Chevron* as "a counter-*Marbury* revolution" "masquerading as the status quo").

53. *Relentless* OA Tr., *supra* note 28, at 133–34 (Gorsuch, J.).

54. *Loper*, 603 U.S. at 433 (Gorsuch, J., concurring).

55. Brief of New Civil Liberties Alliance as Amicus Curiae in Support of Petitioners at 12, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (No. 22-451) [hereinafter NCLA Brief, *Loper*].

56. *See infra* Part V (describing the impact on Packer and Frost of claimed state-court constitutional violations left unaddressed by AEDPA deference).

momentarily allowed.[57] "Among the numerous advantages promised by a well-constructed Union," James Madison wrote in Federalist No. 10, "none deserves to be more accurately developed than its tendency to break and control the violence of faction"—the "dangerous vice" and "mortal diseases under which popular governments have everywhere perished."[58] The confederated states had not

> effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our

57. THE FEDERALIST NO. 10, *supra* note 3, at 77–78 (James Madison); 1 Farrand, *supra* note 4, at 134 (James Madison) (identifying state "faction and oppression" and resulting "[i]nterferences" with "the security of private rights, and the steady dispensation of Justice" as "evils which more perhaps than any thing else, produced this convention"); *see id.* at 167 (James Wilson) ("To correct [Articles of Confederation's] vices is the business of this convention . . . . [including] the want of an effectual controul in the whole over its parts . . . . [L]eave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?"); *id.* (John Dickinson) (fearing that as between States' "danger of being injured by the power of the Natl. Govt. or the latter to the danger of being injured by" the States, "the danger [is] greater from the States" which generate a "spring of discord"); 2 Farrand, *supra* note 4, at 288 (John Mercer) ("What led to the appointment of this Convention? The corruption & mutability of the Legislative Councils of the States."); James Madison, *Vices of the Political System of the United States (Apr. 1787)*, *in* 9 THE PAPERS OF JAMES MADISON 9 APR. 1786–24 MAY 1787, at 348, 353–58 (Robert A. Rutland et al. eds., 1975) [hereinafter MADISON PAPERS]; *see also* Patchak v. Zinke, 583 U.S. 244, 266–67 (2018) (Roberts, C.J., dissenting) ("The Framers' decision to establish a judiciary 'truly distinct from both the legislature and the executive' was born of their experience with [state] legislatures 'extending the sphere of [their] activity and drawing all power into [their] impetuous vortex,'" including by pressuring local courts to "'grant exemptions from standing law.'") (quoting THE FEDERALIST NO. 78, *supra* note 36, at 466; THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961)); LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 76–107 (1995) (documenting Convenors' "alarm about abuses in the states"); JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 44–52 (1990) (noting Madison's "deep concern with the process by which [state] laws were enacted, enforced, and obeyed" and with the "'vicious' character of the state governments" and his "overriding conviction that factious majorities *within the states* posed the greatest danger to liberty"); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 467, 502 (1998) ("'[E]vils operating in the States' . . . led to the overhauling of the federal government in 1787" to "'secure the public good and private rights against the danger of such a faction'" and control of state government by "'an interested and overbearing majority.'").

58. THE FEDERALIST NO. 10, *supra* note 3, at 77 (James Madison).

> governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.[59]

Chiefly responsible for nurturing this "mortal disease[ ]" was *state law* and its administration[60]— "irregular and mutable legislation";[61] state officers' practice of treating their own governments "as distinct from, not parts of the[ ] General System" by "giv[ing] a preference to the State Govts";[62] "Courts of the States [that] can not be trusted with the administration of the National laws . . . [and] often place the General & local policy at variance";[63] and

---

59. *Id.*; *see* THE FEDERALIST NO. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961) ("Everyone knows that a great proportion of the errors committed by the State legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interest . . . to the particular and separate views" of local factions and from "not sufficiently enlarg[ing] their policy to embrace the collective welfare.").

60. *See* 1 Farrand, *supra* note 4, at 134 (James Madison) (decrying "abuses of [liberty] practiced in (some of) the States" and their "interferences" with "the steady dispensation of justice"); *id.* at 319 (James Madison) (listing "dreadful class of evils" precipitating the Convention: the "multiplicity," "mutability," and "injustice" of "laws passed by the several States").

61. THE FEDERALIST NO. 37, *supra* note 34, at 226–27 (James Madison) ("An irregular and mutable legislation is not more an evil in itself than it is odious to the people" who "will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State administrations."). As Madison wrote Thomas Jefferson after the Convention:

> The mutability of the laws of the States . . . . [and] injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism . . . . [T]he evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.

Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 MADISON PAPERS, *supra* note 57, at 206, 212.

62. 2 Farrand, *supra* note 4, at 88 (Elbridge Gerry, one of the Convention's fiercest states' righters).

63. 2 *id.* at 46 (Edmund Randolph); *see* 1 *id.* at 203 (Edmund Randolph) ("[U]nless [state judiciaries] be brought under some tie <to> the Natl. system, they will always lean too much to the State systems, whenever a contest arises between the two."); 2 *id.* at 27–28 (James Madison) ("Confidence can <not> be put in the State Tribunals as guardians of the National authority and interests . . . [because they] are more or less dependt. on the Legislatures."); *id.* at 28 (James Madison) ("In R. Island the Judges who refused to execute an unconstitutional

"improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury."[64] As such, the new constitution's "great pervading principle" must be "to controul the centrifugal tendency of the States" to apply their laws to "infringe the rights & interests of each other[,] oppress the weaker party within their respective jurisdictions," and "continually fly out of their proper orbits and destroy the order & harmony of the political system."[65]

The new Constitution's remedy for these dreadful maladies, Madison famously wrote in No. 10, was *national* law drafted by representatives of and encompassing a "sphere" more "extend[ed]" than any of the thirteen states through which

> you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.[66]

Only through national law would "the Union . . . consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest" and benefit from "the greater obstacles opposed to the concert and

---

law were displaced, and others substituted, by the Legislature who would be willing instruments of the wicked & arbitrary plans of their masters.").

64. 1 *id.* at 124 (James Madison); *see* 2 *id.* at 391 (James Wilson) (identifying the need for an effective way to control factious state law, because "the firmness of [state] Judges is not of itself sufficient").

65. 1 *id.* at 164–65, 168 (James Madison); *id.* at 315–19 (James Madison) (describing the "object of a proper plan" as "1. to preserve the Union. 2. to provide a Governmt. that will remedy the evils felt by the States[;]" "prevent those violations of the law of nations & of Treaties[,] . . . encroachments on the federal authority[, and] . . . trespasses of the States on each other[;]" and "secure a good internal legislation & administration to the particular States") (footnotes omitted); *see id.* at 207 (Edmund Randolph) (success of "supreme national government" requires constitutional "sinews" constraining state judges applying federal law); Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 MADISON PAPERS, *supra* note 57, at 317–18 (describing the Virginia Plan for a new constitution preventing state legislatures from "thwarting and molesting . . . other [states], and even from oppressing the minority within themselves by . . . unrighteous measures which favor the interest of the majority").

66. THE FEDERALIST NO. 10, *supra* note 3, at 83 (James Madison).

accomplishment of the secret wishes of an unjust and interested majority."[67]

But as comprehending and public-minded as the extended republic's law might be, it had to be enforced. "No man of sense," Alexander Hamilton wrote in Federalist No. 80, "will believe that such [national legal] prohibitions" of the evils of faction "would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them."[68] "This power," he added, "must either be a direct negative on the State laws or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union."[69]

Madison, Hamilton, and allies[70] entered the Convention believing that enforcing national legal constraints on the factious tendencies of state government required multiple new structures.[71] Among these were a national legislative veto of any state law inimical

---

67. *Id.* at 84; *see* THE FEDERALIST NO. 46, *supra* note 59, at 294–95 (James Madison) (further developing Madison's extended-republic principle).

> Quelled by the extended sphere's effectually implemented law, the influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for . . . an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.

THE FEDERALIST NO. 10, *supra* note 3, at 84 (James Madison).

68. THE FEDERALIST NO. 80, at 475–76 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

69. *Id.* at 476.

70. Madison's allies included Nathaniel Gorham, Alexander Hamilton, John Langdon, Gouverneur Morris, Charles Pinckney, Edmund Randolph, and James Wilson. *See* James S. Liebman & William F. Ryan, *Some Effectual Power: The Quantity and Quality of Decisionmaking Required of Article-III Courts*, 98 COLUM. L. REV. 696, 711 n.68, 744–45 & n.235 (1998); *infra* note 76 (quoting Nathaniel Gorham). For illustrative debates between Madison and Rutledge and their allies, see 1 Farrand, *supra* note 4, at 125, 138–40, 167–68, 203; 2 *id.* at 45–46, 390–91.

71. Madison and his Virginia allies included all these structures in their Virginia Plan. 1 Farrand, *supra* note 4, at 20–22. Discussions and amendments of that Plan dominated the Convention's first months. *See* Liebman & Ryan, *supra* note 70, at 712–33 (describing the Virginia Plan debates, May–July 1787).

to "the articles of the Union" and the national interest;[72] a council of revision to backstop that power lest Congress itself become captive of the States;[73] authorization "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof";[74] state judges' oath of allegiance to federal law;[75] and a national judiciary composed of "inferior tribunals" and "one or more supreme tribunals."[76] All members of the national judiciary would have assurances of life tenure during good behavior and an undiminishable salary.[77] Inferior tribunals would have mandatory

72. 1 Farrand, *supra* note 4, at 21; *see id.* at 47, 54 (expanding veto to include state laws inimical to U.S. treaties). Madison and others believed the veto was the Plan's most important feature. *See, e.g.,* 2 *id.* at 27 (James Madison) ("[T]he negative on the laws of the States [i]s essential to the efficacy & security of the Genl. Govt."); 1 *id.* at 164 (Charles Pinckney) (describing the veto as "indispensably necessary," "the corner stone of an efficient national Govt.").

73. 1 *id.* at 21 (proposing council of "the Executive and a convenient number of the National Judiciary" with power to veto national legislative enactments and decisions whether to negative state legislation, this veto being subject to supermajority override). The Convenors quickly removed federal judges, it being "quite foreign from the nature of [their] office to make them judges of the policy of public measures." *Id.* at 94, 97–98, 139 (Elbridge Gerry, Rufus King).

74. 1 *id.* at 21 (authorizing national legislature "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof"). Madison quickly moved to table this provision, *id.* at 54, and his allies, Hamilton and Randolph, later criticized the reappearance of "coertion of arms" in the competing New Jersey Plan, *id.* at 245, saying it invited "war between" the national government and the states and contrasting it with the "coertion of laws," which would knit the union together. *Id.* at 284–85.

75. *Id.* at 21–22.

76. *Id.* at 22 (granting inferior and supreme federal tribunals power to "*hear & determine*" all (whole) federal-question "cases") (emphasis added); *see* 2 *id.* at 46 (Nathaniel Gorham) ("Inferior tribunals are essential to render the authority of the Nat. Legislature effectual."); *id.* (George Mason, states righter) ("[M]any circumstances might arise not now to be foreseen, which might render [inferior federal courts] absolutely necessary."); *id.* (Gouverneur Morris, Edmund Randolph) (similar); 1 *id.* at 124 (James Madison) (advocating "inferior tribunals" with original jurisdiction in "*many* cases").

77. 1 *id.* at 21–22; 2 *id.* at 46; *see* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 432 (2024) (Gorsuch, J., concurring) ("[T]he framers made a considered judgment to build judicial independence [citing "life tenure" and "salary" protections] into the Constitution's design . . . to ensure . . . [that] impartial judges, not those currently wielding power in the political branches, would 'say what the law is.'"); Stern v. Marshall, 564 U.S. 462, 484 (2011) ("By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered [independently]."). Protections of federal judges' independence went "unchallenged throughout the Convention." Liebman & Ryan, *supra* note 70, at 713 & n.74.

jurisdiction "to hear & determine in the first instance," and the supreme tribunal(s) would have mandatory jurisdiction "to hear and determine in the dernier [appellate] resort, all . . . questions which may involve the national peace and harmony."[78]

In response, other Convenors, led by John Rutledge,[79] opposed each of those devices, proposing instead to rely on *state* judges—beholden only to oaths to obey *state* law—to protect national unity and individual liberty against the ravages of faction. Those judges, Rutledge and allies argued, should exercise exclusive original jurisdiction over all cases affecting the "national peace and harmony," including federal criminal cases, with review by a single supreme tribunal limited to the "construction" of federal law but without power to hear and determine other aspects of the "Cause."[80]

---

78. 1 Farrand, *supra* note 4, at 21–22.

79. Rutledge's allies included Pierce Butler, Luther Martin, Elbridge Gerry, Rufus King, George Mason, Roger Sherman, and Hugh Williamson. *See* Liebman & Ryan, *supra* note 70, at 711 & n.68, 715–20, 725, 730–33, 745 & n.237 (discussing views of Rutledge and his Constitutional Convention allies).

80. *Overall*: 1 Farrand, *supra* note 4, at 125 (Pierce Butler) (predicting popular revolt at various encroachments on States); *id.* at 228–32, 235–37, 243–44 (William Paterson) (proposing the New Jersey Plan omitting the Virginia Plan's national veto, counsel of revision, and state judges' oath; assigning all original federal-question jurisdiction, including all federal cases involving "punishments, fines, forfeitures & penalties" to "Common law Judiciarys of the State" with appeal to single "supreme Tribunal" with power to "*hear and determine*" maritime and ambassadorial cases but with power in federal-question cases limited to "*construction*" of federal law).

National veto: 1 *id.* at 165, 167–68 (Bedford Gunning, Elbridge Gerry, Rufus King, Hugh Williamson) (criticizing veto for "enslav[ing]" and "cutting off all hope of equal justice to the distant States" and destabilizing state law); 2 *id.* at 27 (Roger Sherman) (opposing veto because state courts would reliably void state laws "contravening the Authority of the Union"); *id.* at 390–91 (Roger Sherman, George Mason, Gouverneur Morris, John Rutledge, Hugh Williamson) (opposing veto).

State judges' oath: 1 *id.* at 203 (Luther Martin) (deeming it "improper" to require state judges to swear loyalty to national law in conflict with their oaths to uphold state law); *id.* at 203, 207 (Elbridge Gerry, Roger Sherman, Hugh Williamson) (opposing oath requirement for state judges, which would generate "divided loyalties and "intrud[e] into the State jurisdictions"); Luther Martin, *Reply to the Landholder*, MARYLAND J., March 19, 1788, *reprinted in* 3 Farrand, *supra* note 4, at 286–87 (arguing that state constitutions should trump contrary federal law).

Inferior federal courts: 1 Farrand, *supra* note 4, at 87, 119, 124–25 (John Rutledge) (speaking "against establishing any national tribunal except a single supreme one" because "State tribunals <are most proper> to decide all cases in the first instance"; moving to omit "inferior tribunals" from the Virginia Plan with

Through a series of carefully crafted compromises,[81] the Convenors rested the new nation's capacity to protect itself against factious state forces on *both* "the judges in every state" *and* "one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish." First, Madison and his allies relinquished their insistence on placing the full quantity of federal-question jurisdiction in "a National Judiciary" consisting of "inferior tribunals" with original jurisdiction and "one or more supreme tribunals" with appellate jurisdiction.[82] Instead, in a unanimously adopted substitute for those provisions, Madison and Edmund Randolph redefined its list of cases and controversies from a floor-*and*-ceiling designation of what the national judiciary's jurisdiction "shall be"[83] to a ceiling-only designation of what the judiciary's jurisdiction "shall extend to," letting Congress define the floor.[84]

"State Tribunals . . . left in all cases to decide in the first instance," with "right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts" and avoiding "unnecessary encroachment on the jurisdiction <of the States>"); 2 *id.* at 45–46 (Luther Martin; also Pierce Butler) (opposing inferior federal courts, which "will create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere").

Scholarly treatments often base faulty conclusions only on statements revealing how Madison and allies, *left alone*, would have designed the Constitution (for example, Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 844–55 (1984)), or on how Rutledge *left alone* would have designed it (for example, Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888 (1998)).

81. *See* Appendix A (cataloguing these compromises). The Framers were committed textualists. They carefully considered, tested, rejected, and replaced words "to develop a coherent and shared understanding of the functions of the [judiciary and Supremacy Clauses and] draft language that plainly and precisely expressed that understanding." Liebman & Ryan, *supra* note 70, at 708.

82. 1 Farrand, *supra* note 4, at 21–22.

83. *Id.*

84. *Id.* at 223–24, 232, 238; *see* 2 *id.* at 186 (later amending this provision to read: "The jurisdiction of the *Supreme Court* shall extend to") (emphasis added); *see* THE FEDERALIST NO. 81, at 490 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that the Article-III power to declare exceptions "enable[s] the government to modify [federal jurisdiction] in such a manner as will best answer the ends of public justice and security"); Martin v. Hunter's Lessee, 14 U.S. 304, 374 (1816) (Johnson, J., concurring) ("The words are, 'shall extend to;' now that which *extends to*, does not necessarily *include in*, so that the circle may enlarge, until it reaches the objects that limit it, and yet not take them in."); *see also* 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 696 (Beth Rapp Young et al. eds., 2021) (4th ed. 1773) ("[E]xtend" "derives from the Latin 'extendere,' meaning 'to stretch [tendere] out [ex].").

Next, a compromise "Committee of Detail" proposal jointly drafted by Rutledge and Madison-ally James Wilson more explicitly empowered Congress to decide how much arising-under jurisdiction to leave to state courts as an original matter and how much original or appellate jurisdiction over such cases to confer on federal courts.[85] Crucially, however, the provisions that became the compromise document's Supremacy Clause (Article VI) and Judiciary Clause (Article III) carefully prescribed the responsibilities and powers of state and federal judges in the exercise of that jurisdiction. Wilson and Rutledge's proposed supremacy clause "bound" "the judges in every state" to swear oaths of allegiance to the Constitution and to treat the nation's "Acts" and "Treaties" (but not yet its "Constitution") as the "supreme Law of the several States, and of their Citizens and Inhabitants."[86] In what became Article III, the compromise replaced the mandated *quantity* of federal-court jurisdiction with mandated *qualities* of the status and authority—what Wilson and Rutledge called "the judicial Power"—that federal judges deciding all "cases" "arising under Laws passed by the Legislature of the United States" were to have. Among other things to be clarified later, "the judicial Power" entailed that federal judges "*shall* hold their offices during good behaviour" and "at stated times, receive . . . compensation which shall not be . . . diminished."[87]

From August 23 to 29, 1787, Madison and Rutledge orchestrated another set of compromises that clarified the reach and content of the "judicial Power":

- modifying what it was that the specified heads of jurisdiction "shall extend to" from "[t]he *Jurisdiction* of the *Supreme*

85. 2 Farrand, *supra* note 4, at 172–73. For Court opinions treating Congress' power over state-court jurisdiction as either plenary or subject only to an "essential functions" requirement barring exceptions from swallowing the rule of Supreme Court appellate jurisdiction over state-court federal-question decisions, see Felker v. Turpin, 518 U.S. 651, 667 n.2 (1996) (Souter, J., concurring); Ankenbrandt v. Richards, 504 U.S. 689, 697–98 (1992); Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

86. 2 Farrand, *supra* note 4, at 169, 174; *see* U.S. CONST. art. VI, cl. 2 (Supremacy Clause as ultimately adopted, making "[t]his Constitution, and the laws of the United States . . . and all treaties . . . the supreme law of the land"); Printz v. United States, 521 U.S. 898, 907 (1997) (reading the Supremacy Clause as "obligating state *judges* to enforce federal prescriptions, insofar as those prescriptions relate[ ] to matters appropriate for the judicial power").

87. *See* 1 Farrand, *supra* note 4, at 116, 121, 243–44; 2 *id.* at 27–28, 37–38, 41–45, 172–73, 186, 575–76; 3 *id.* at 600; *see also id.* 423, 428–29 (opposing executive removal of federal judges on application by Congress).

Court" to the "*judicial Power*" of "*one Supreme Court*" and "such *inferior Courts*" as Congress may create;[88]

- expanding the definition of what "shall be supreme law of the several States" (which the Committee of Style changed to the "supreme Law of the Land"[89]) by which state judges shall be "bound" from national "Laws" and "treaties" to "[t]his Constitution, the laws of the United States and treaties made or which shall be made";[90]
- revising the arising-under jurisdiction Congress could confer on the federal judiciary— "*conformably*" to the changes made a few days earlier to the Supremacy Clause—from "Cases arising under Laws passed by the Legislature of the United States" to "cases *both in law and equity* arising under this *constitution*, the laws of the United States and treaties made or which shall be made";[91]
- clarifying that the federal judiciary's "appellate" power operates "both as to law *and fact*";[92] and
- removing language that would have given Congress the power to specify "the *manner [in] which and the limitations under which*" inferior federal courts exercised their jurisdiction[93] and later rejecting a proposed sentence that would have restored that power and extended it to the "manner" in which the Supreme Court exercised *its* jurisdiction: "In all the other cases before mentioned [i.e., all cases not involving ambassadors] the judicial power *shall* be exercised in *such manner as the Legislature shall direct*."[94]

---

88. 2 *id.* at 425, 431–32 (emphasis added).

89. *Id.* at 603 (making this change and combining the state-oath requirement and Supremacy Clause in Article VI).

90. *Id.* at 381–82, 389, 409, 417.

91. *Id.* at 422–25, 428–31 (emphasis added). Until these changes, the Convenors variously defined federal "arising under" jurisdiction and "supreme law" as only federal "Treaties," only federal "laws," or both but not as the federal Constitution. *Id.* at 21, 243–45; 2 *id.* at 39, 136, 146–47, 169, 172–73.

92. *Id.* at 424, 431.

93. *Id.* at 172–73 (emphasis added).

94. *Id.* at 425, 431–32 (emphasis added). At the time, as today, "manner" meant the substantive "method" or "way of performing or executing" the specified task, or a "[c]ertain" "[s]ort," "kind," or "degree or measure of" specified behavior. 1 JOHNSON, *supra* note 84 (under "manner"); 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (under "manner") (Johnson Reprint Corp. ed. 1970) (1828). The defeated proposal would have given "Congress plenary authority not only over jurisdiction, but over the judicial power," including "to

Confirming the last-mentioned change, the Convenors assured inferior as well as the supreme tribunals the "judicial Power" effectually and independently to decide the "case" free from outside control of the *manner* of doing so. The Convenors safeguarded independence by:

- rejecting a proposal to replace the Virginia Plan's empowerment of the national judiciary to "hear & determine" "cases" arising under federal law[95] with a power only to "construe" federal law without otherwise resolving the case;[96]
- considering but ultimately removing language empowering Congress (as it had done under the Articles of Confederation) to "appoint" state courts to serve as original tribunals in "arising under" cases, because of the Convenors' firm commitment to life tenure and undiminishable salary protections not afforded state judges,[97] thus establishing the entire federal judiciary's "structural equality"—same judicial power, tenure, and salary protections—as well as "structural

---

dictate . . . how [federal courts] should decide . . . cases." Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 733 (1997). The late August changes left intact Congress' power to make "exceptions" and "regulations" to Supreme Court appellate jurisdiction—the former confirming Congress' power over the Court's jurisdiction, the latter enabling Congress to "organize" (2 Farrand, *supra* note 4, at 146–47 (John Rutledge, Edmund Randolph)) state-court original and federal appellate jurisdiction into a "single integrated court system" through rules governing "movement of records, judgments, and orders of enforcement between sovereigns." Liebman & Ryan, *supra* note 70, at 738 & n.208, 742–43 & n.223, 756 & nn.274–77; *see* Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 326–27 (1796) (Ellsworth, C.J. for Court and Wilson, J., dissenting) (both acknowledging Congress' power to "regulate" what trial-court evidentiary records federal courts would receive).

95. 1 Farrand, *supra* note 4, at 21–22. Except in the rejected New Jersey Plan, the Virginia Plan's definition of the judiciary's power to decide whole "cases" and "controversies" persisted throughout the Convention. *See, e.g., id.* at 124, 223–24, 230–32, 237–38; 2 *id.* at 39, 146–47, 172–73, 423, 425, 427, 430, 432.

96. 1 *id.* at 243–44, 313, 322; *see supra* note 74, 80, 95 (summarizing the rejected New Jersey Plan).

97. 1 Farrand, *supra* note 4, at 118, 124–25, 230–31, 237; 2 *id.* at 45–46, 146–47, 163; *see* 1 ANNALS OF CONG. 844 (Joseph Gales ed., 1834) (James Madison) (opposing congressional proposal to "appoint" state courts as federal ones as violating Article III's tenure and salary protections); Liebman & Ryan, *supra* note 70, at 717 & nn.99–100, 735–36 & nn.198–99 (detailing Framers' objections to "appointing" state courts staffed by judges lacking tenure and salary protections in lieu of federal courts served by judges with those protections).

superiority"[98] to "dependent" state judges[99] who "hold their offices by a temporary commission . . . fatal to their necessary independence"[100] and "cannot be trusted with the administration of the National laws" when it is "at variance" with "local policy";[101]

- confirming Congress' power to make "exceptions" to the Supreme Court's presumptive responsibility for appellate federal-question jurisdiction over state courts by assigning any part of it to lower federal courts;[102]
- rejecting multiple proposals requiring or allowing federal judges to issue or offer advisory opinions, either in the process of adjudication or in other roles in which their counsel might be sought,[103] fearing that an "improper mixture" of judicial

98. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 235–39 & n.115 (1985); *see* Brian Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure,* 98 VA. L. REV. 839, 850–82 & n.98 (2012) (citing sources and demonstrating how the "gap between the independence of state and federal judges has grown since the Founding").

99. 1 Farrand, *supra* note 4, at 124 (James Madison).

100. THE FEDERALIST NO. 78, *supra* note 36, at 471.

101. 2 Farrand, *supra* note 4, at 46 (Edmund Randolph); *see* THE FEDERALIST NO. 44, at 286 (James Madison) (Clinton Rossiter ed., 1961) (lamenting state governments' lack of an independent "body between the State legislatures and the people interested in watching the conduct of the former," which allow "violations of the State constitutions . . . to remain unnoticed and unredressed"); THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961) (describing "independence of some member of the government" as the "only [available] security" against "oppressive combinations of a majority" in the "States"); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221 (1995) (recognizing federal judges' structural independence as a central attribute of the judicial power).

102. 1 Farrand, *supra* note 4, at 21–22, 238 (Madison-Randolph substitute for the Virginia Plan, removing inferior tribunals' limitation to first-instance jurisdiction); 2 *id.* at 172–73 (Wilson-Rutledge draft, confirming Congress' power to make "exceptions" to the Supreme Court's "appellate" jurisdiction and "assign any part of" it to lower federal courts); Mayor v. Cooper, 73 U.S. 247, 251–52 (1868) ("How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, . . . are remitted without check or limitation to the wisdom of [Congress] . . . . Every variety and form of appellate jurisdiction within the sphere of the power . . . is permitted.").

103. 1 Farrand, *supra* note 4, at 21, 94, 97–98, 131, 139; 2 *id.* at 335–36, 342–43, 367, 423, 430; *see, e.g.*, *id.* at 334, 341 (rejecting the proposal that "[e]ach Branch of the Legislature, as well as the supreme Executive shall have authority

> and advisory functions would bias and corrupt the judges and undermine the responsible exercise of the duties of any executive officers they advised;[104] and insisting instead that judges' "right of expounding the Constitution" be limited to deciding "Judiciary cases."[105]

B. The Framers' Gamble

The Framers' compromises bound state judges to the Constitution, laws, and treaties of the United States; enabled the establishment of federal-court jurisdiction over cases arising under that same supreme law; and mandatorily extended the judicial power to such cases. Those decisions allocated the principal burden of "effectually obviat[ing]" the "vices" of "interested and overbearing" factions in the States[106] to a single, crucial category of cases—federal-question cases originating in state courts subject to "federal judicial oversight and control."[107] As Madison wrote to George Washington before the Convention, giving exclusive jurisdiction "to expound & apply the laws" to state judges "connected by their interests . . . with the particular States" would have permitted local factionalism to pollute "the law of the Union."[108] Convenors across the spectrum acknowledged that, in such cases, full "[c]onfidence could not be put in the State Tribunals as guardians of the National authority and interests" (Madison).[109] There was, accordingly, unanimous agreement regarding a "right of appeal" of at least some federal-question cases from state courts "to [a] national tribunal . . . to secure the national rights & uniformity of Judgmts" (Rutledge).[110] On that

---

to require the opinions of the supreme Judicial Court upon important questions of law").

104. 1 *id.* at 98, 138–40 (John Dickinson, Elbridge Gerry, Rufus King, Charles Pinckney).

105. 2 *id.* at 423, 430 (James Madison; others).

106. THE FEDERALIST NO. 10, *supra* note 3, at 77.

107. James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U.L. REV. 191, 199 (2007).

108. Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 MADISON PAPERS, *supra* note 57, at 382–84.

109. 2 Farrand, *supra* note 4, at 27–28 (James Madison).

110. 1 *id.* at 124 (John Rutledge); *accord* 1 *id.* at 125 (Roger Sherman); *see* 2 *id.* at 136 (Pinckney Plan, allowing "Appeal[s]" to "federal judicial Court" from "Courts of the several States in all Causes wherein Questions shall arise on the Construction of" federal treaties and acts); 1 *id.* at 243–44 (New Jersey Plan, allowing "correction of all errors, both in law & fact" in federal criminal cases on "appeal" from the "Judiciary in [each] State" to "Judiciary of the U. States"); 2 *id.*

point there was no compromise. What Madison and allies acceded to was Rutledge's and allies' "wish and hope" that Congress could permit "all questions arising on treaties and on the laws of the general government" to be "determined in the first instance in the courts of the respective states."[111] What Rutledge and allies acceded to in return was Madison's and allies' firm belief that "*[i]nferior* tribunals are essential to render the authority of the Nat. Legislature effectual,"[112] both to keep appeals from "improper Verdicts in State tribunals" from inundating the Supreme Court "to a most oppressive degree" and to provide remedies for those "distant from the seat of the Court" and "unable to support an appeal agst. a State to the supreme Judiciary."[113]

The Framers designed their "well-constructed Union" to "break and control the violence of faction," operating through state law and its administration, by requiring Article-III courts, when reviewing state judges' federal-question decisions, "effectually" to maintain the Constitution's supremacy.[114] In doing so, Madison and allies surrendered more direct protections like the congressional veto in favor of judicial mechanisms that they left in Congress' hands from the standpoint of jurisdictional quantity but not quality or "*judicial power*." Madison and allies knew this compromise risked leaving the union and its people without a cure for the mortal disease of "interested and overbearing" state factionalism.[115] They took the risk,

---

at 46 (Nathaniel Gorham); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038–39 (1982) ("It was plainly not contemplated" by any of the Convenors "that the system could work effectively with the state courts as courts of *last* resort on issues of federal law"; Convenors agreed that federal "appellate jurisdiction" was necessary to "provide sufficient assurance of the supremacy and uniformity of federal law in cases decided by the state courts.").

111. 3 Farrand, *supra* note 4, at 286–87 (Luther Martin); *accord* 2 *id*. at 22 (Luther Martin); *id*. at 28–29 (Luther Martin).

112. 2 *id*. at 46 (Nathaniel Gorham); *accord id*. (Gouverneur Morris).

113. 1 *id*. at 124 (James Madison); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 MADISON PAPERS, *supra* note 57, at 211.

114. THE FEDERALIST NO. 10, *supra* note 3, at 77.

115. *See* THE FEDERALIST NO. 46, *supra* note 59, at 296–98 (noting "great proportion of the errors committed by the State legislatures" and States' power through Congress to defeat unwanted federal "encroachment" and doubting that States and their judges "will make the aggregate prosperity of the Union, and the dignity and respectability of its government, the objects of their affections and consultations"); THE FEDERALIST No. 78, *supra* note 36, at 470 (observing that the Constitution "operates as a check" of "vast importance" on unjust state laws *only* if oppressive state majorities "perceiv[e] that obstacles to the success of an

based on a quantitative prediction and a qualitative constitutional certainty: they predicted that Congress' ambition to hold the new nation together and protect its people's liberty would lead it to establish a sufficient number of inferior federal courts with sufficiently broad jurisdiction to hold state judges to their Article-VI oaths and supreme-law-of-the-land commitment by reviewing their decisions in cases arising under federal law.[116] The certainty was that, once Congress established those courts and gave them arising-under jurisdiction, Article III guaranteed the *power* of their decisions independently and "effectually" to enforce national law and hold state judges to it.

C. The *Federalist Papers*

The *Federalist Papers*—"usually regarded as indicative of the original understanding of the ratifiers of the Constitution"[117]—mirror the Convenors' concern with the "pestilential influence of party animosities" on state law,[118] the inability of state judges by themselves to restrain it, and the essential role of federal courts and their judicial power to remedy it by keeping the Constitution supreme and holding state judges to it. In Federalist No. 22, Hamilton linked and justified Article III and the Supremacy Clause as bulwarks against the "much" there was "to fear from the bias of local views and prejudices and from the interference of local regulations."[119] Leaving

---

iniquitous intention are to be expected" as a result of ongoing federal judicial oversight).

116. "[G]overnment cannot be run without the use of courts for the enforcement of coercive sanctions and within large areas it will be thought that federal tribunals are essential to administer federal law . . . . [W]ithdrawal of such jurisdiction would impinge adversely on so many varied interests that its durability can be assumed." Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965); *see* THE FEDERALIST NO. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting the "weighty public reasons" why Congress would establish "courts of the Union" where federal question and other nationally important cases "could receive their original or final determination").

117. Printz v. United States, 521 U.S. 898, 910 (1997); *see* Cohens v. Virginia, 19 U.S. 264, 418 (1921) (Marshall, C.J., describing the *Federalist Papers* as "a complete commentary on our constitution," "appealed to by all parties" on "questions to which that instrument has given birth" and as "entitle[d] to this high rank" by their "power to explain the views with which [the Constitution] was framed").

118. THE FEDERALIST NO. 37, *supra* note 34, at 231.

119. THE FEDERALIST NO. 22, at 150–51 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

matters to state judges alone would fail because the "inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can . . . not be expected from judges who hold their offices by a temporary commission."[120] "[P]rovisions of the particular laws" then "might be preferred to those of the general laws" and decisions might be driven by "the deference with which men in office naturally look up to that authority to which they owe their official existence."[121] These realities created "a correspondent necessity for leaving the door of [federal] appeal as wide as possible."[122]

In "controversies relating to the boundary between the two [state and federal] jurisdictions," Madison added, the Constitution assigned the obligation "ultimately to decide" to courts "established under the general government." That was where "decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality."[123] Neither Congress nor any other body lacking the "complete independence" afforded by Article-III judges' tenure and salary protections, Hamilton wrote, could interfere with federal judges' interpretive power.[124] Rejecting the idea "that the legislative body" might serve as "constitutional judges" whose "construction . . . is conclusive upon the other departments," Hamilton insisted that "interpretation of the law is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its

120. THE FEDERALIST NO. 78, *supra* note 36, at 470–71; *see* FEDERALIST No. 81, *supra* note 84, at 486 ("State Judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.").

121. THE FEDERALIST NO. 22, *supra* note 119, at 151; *see also* 1 ANNALS OF CONG. 813 (1789) (Joseph Gales ed., 1834) (James Madison) ("In some of the States[, judges] are so dependent on State Legislatures, that to make the Federal law dependent on them would throw us back into all the embarrassments which characterized the former situation.").

122. THE FEDERALIST NO. 81, *supra* note 84, at 486; *see* Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1034 (1997) ("[At] its inception . . . the American doctrine of judicial review was far more concerned with federalism than with separation of powers . . . [i.e., with] the principle of national judicial supremacy over state legislative acts and judicial decisions.").

123. THE FEDERALIST NO. 39, at 245–46 (James Madison) (Clinton Rossiter ed., 1961).

124. THE FEDERALIST NO. 78, *supra* note 36, at 465–66.

meaning," including "to keep [the legislature] within the limits assigned to their authority."[125]

Hamilton and Madison knew federal courts would face hard cases and would particularly need the fullest independence to decide them. Acknowledging ambiguity in the Constitution's meaning, both insisted on federal judicial, not congressional, supremacy in resolving it, maintaining federal courts as an "intermediate body between the people and the legislature."[126] Likewise, in deciding "between two contradictory laws" or interpretations, "it is the province of the courts to liquidate and fix their meaning and operation."[127] As Chief Justice Roberts reminds in *Loper*, Madison recognized that the "imperfection of the human faculties" and of "words [used] to express ideas" renders "all" laws "more or less obscure and equivocal,"[128] necessitating that "the meaning of constitutional provisions would be 'liquidated and ascertained by a series of particular discussions and adjudications'" and by "'[c]ontemporary and current expositions' of the Constitution [to provide] reasonable evidence of [its] meaning."[129] Necessarily, therefore, the "judicial Power" extended to resolving ambiguities in constitutional terms by instantiation of their meaning through myriad applications of the guiding principle to different facts and circumstances. Oliver Ellsworth (later, the nation's Chief Justice) assured Connecticut ratifiers that, "if the states . . . make a law which is a usurpation upon the general government," "the national judges, who, to secure their impartiality, are to be made independent," would "void" it.[130] James Wilson and John Marshall (later, respectively, Supreme Court Justice and Chief Justice) said the same at the Pennsylvania and Virginia Ratification conventions.[131]

---

125. *Id.* at 467; *see* Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 329 n.*, 337 (1788) ("[T]he legislative power is confined to *making* the law, and cannot interfere in the *interpretation*; which is the natural and exclusive province of the judicial branch of government.") (emphasis added).

126. THE FEDERALIST NO. 78, *supra* note 36, at 467.

127. *Id.* at 468.

128. THE FEDERALIST NO. 37, *supra* note 34, at 229 (quoted in part in Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400 (2024)).

129. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 938–41 (2017) (quoting THE FEDERALIST NO. 37, *supra* note 34, at 229; 2 ANNALS OF CONG. 1946 (1791)).

130. 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 196 (Jan. 7, 1788).

131. *Id.* at 489 (Dec. 7, 1787) (James Wilson); 3 *id.* at 554 (Jan. 7, 1788) (John Marshall) ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary?").

II. RISK REWARDED: TWO CENTURIES OF FEDERAL JUDICIAL POWER EFFECTUATING SUPREME CONSTITUTIONAL LAW AND HOLDING STATE JUDGES TO IT

At and after the Convention, Madison described the cardinal case of the violence of state factionalism: "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury"[132] and "decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[133]

This Part asks how well the cure for state factionalism on which the Framers gambled—Article-III courts' judicial power independently and effectually to hold state judges to Article VI's promise of constitutional supremacy—has worked in Madison's cardinal case and beyond.

The answer is that, despite the jurisdiction-stripping risk the Framers took, Congress has consistently extended federal-court jurisdiction to apply the Constitution and hold state judges to it in the cardinal case—through transposable federal-court review on writ of error to the Supreme Court and on writ of habeas corpus to all federal courts. As for the other risks involved—that Congress or the state courts would interfere with, or that the federal courts themselves would skimp on, federal judicial power to apply the Constitution *independently* and *effectually* to cure the malady of factionalism in federal-question cases—the Court proved up to the task, jealously preserving its and the lower federal courts' judicial power. Until 1996.

A. Federal Judicial Review in Madison's Cardinal Case

1. Jurisdiction on Writ of Error or Habeas Corpus, 1789–Today

In *Whitten v. Tomlinson*, Justice Gray described "three different methods . . . provided by statute for bringing before the courts of the United States proceedings begun in the courts of the states" when "necessary to secure the supremacy of the

132. 1 Farrand, *supra* note 4, at 124; *see also id.* at 164–65, 168 (noting "a constant tendency in the States to oppress the weaker party within their respective jurisdictions" and arguing for giving Congress power to negate state laws).

133. THE FEDERALIST NO. 10, *supra* note 3, at 77.

[C]onstitution,"[134] each with antecedents back to 1789 or 1815: (1) as-of-right writ-of-error review in the Supreme Court of state-court judgments affirming exercises of state "authority" alleged to be "repugnant to the constitution" under section 25 of the Judiciary Act of 1789, as broadened by section 2 of the Act of February 5, 1867;[135] (2) removal to lower federal courts of state-court actions against federal employees asserting claims "'arising under'" the Constitution pursuant to statutes adopted during times of inter-regional domestic crisis starting in 1815, as expanded by section 3 of the Act of February 5, 1867;[136] and (3) habeas corpus review by the entire federal judiciary, which section 14 of the Judiciary Act of 1789 initially reserved for federal prisoners and which chapter 28, section 1 of the February 5, 1867 Act extended to any state prisoner "restrained of his or her liberty in violation of the constitution."[137] The last-mentioned mode of review was at issue in *Whitten* on application by a Connecticut prisoner.[138] What motivated Congress' threefold expansion of federal-court review of state judges' decisions in 1867, in the immediate aftermath of the Civil War and on the eve of the Fourteenth Amendment's ratification, was the compelling need to assert the supremacy of federal law in the previously rebellious states and—presenting Madison's cardinal case—to protect emancipated Black individuals' rights to "fair and impartial justice at the hands of the local tribunals" and "extend to them, *as far as possible under the Constitution*, the protection of the Federal courts."[139] Within months

134. Whitten v. Tomlinson, 160 U.S. 231, 238–39 (1895).

135. *Id.* at 238 (citing Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386–87 (amending Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85)).

136. *Id.* at 239. Removal statutes have often been adopted during inter-regional national crises, such as the Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756–57 (adopted during the Civil War); Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633–34 (responding to southern states' claim of authority to nullify federal law); Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198–99) (responding to New England states' resistance to and consideration of secession during War of 1812). *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 853 & n.6 (7th ed. 2015) (discussing removal statutes adopted in response to these crises).

137. *Whitten*, 160 U.S. at 239 (quoting Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86 (amending Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 82)).

138. *Id.* at 242–43.

139. H.R. REP. NO. 48-730, at 3–6 (1884) (emphasis added) (rejecting proposals "to curtail" 1867 Act's conferral of habeas review of state courts, given persistence of "[t]he special causes which were deemed sufficient to make the act of 1867 necessary"); *see* William M. Wiecek, *The Reconstruction of Federal Judicial Power 1863-1875*, 13 AM. J. LEGAL HIST. 333, 342–48 (1969) (describing

of its passage, the Supreme Court interpreted the habeas provision to extend the federal courts' jurisdiction to review the constitutionality of state carceral judgments to the Article-III limit: "It is impossible to widen this jurisdiction."[140]

The 1789 Act as written and the 1867 Act as it came to be administered in habeas cases starting in 1886 included exhaustion-of-state-court-remedies requirements. Those requirements routed writ-of-error cases through a full set of available state-court proceedings before reaching the Supreme Court and routed habeas cases through those state-court proceedings *plus* as-of-right writ-of-error proceedings in the Supreme Court, when available, before the case could be adjudicated in lower federal courts.[141] Together, the habeas

---

history of 1867 Acts extending federal-court power to review decisions of and remove cases from state courts).

140. *Ex parte* McCardle, 73 U.S. 318, 325–26 (1867); *accord Ex parte* Royall, 117 U.S. 241, 247–48 (1886) ("The [1867 Act's] grant . . . of jurisdiction to issue writs of habeas corpus, is in language as broad as could well be employed," demonstrating "purpose of Congress to invest the courts of the Union . . . with power . . . to restore to liberty any person . . . held in custody, by whatever authority, in violation of the Constitution."); *see* CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866) (Rep. Lawrence) (explaining intention of 1867 Act's habeas provision to "enforce the liberty of all persons . . . . It is a bill of the largest liberty, . . . [not] restrain[ing] the writ of *habeas corpus* at all"); *id.* at 4229 (Sen. Trumbull) (describing the bill as "in aid of the rights of the people"); Seymour D. Thompson, *Abuses of the Writ of Habeas Corpus*, 6 ANN. REP. A.B.A. 243, 260–63 (1883) (noting that the 1867 Act gave federal courts "power to annul the criminal processes of the states, to reverse and set aside by *habeas corpus* the criminal judgments of the state courts, to pass finally and conclusively upon the validity of the criminal codes, the police regulations, and even the constitutions of the states").

141. *See* Act of Sept. 24, 1789, ch. 20 §§ 22, 25, 1 Stat. 73, 84–86 (limiting writ-of-error review to judgments of "highest court of law . . . of a State in which a decision in the suit could be had"); *Whitten*, 160 U.S. at 240–42 (explaining that judiciary acts give the Court "'discretion as to the time and mode in which it will exert the powers conferred upon it,'" which it has exercised by requiring prisoners seeking habeas review to raise their federal claims "in the first instance" in state courts) (citation omitted); *Royall*, 117 U.S. at 249, 253 (identifying the preferred mode of de novo review of state-court legal determinations resulting in detention as a "writ of error from the highest court of the state" to the Supreme Court after "[S]tate court[s] shall have finally acted upon the case").

The Supreme Court continued entertaining state-prisoner habeas petitions when exhaustion of state remedies or Supreme Court writ-of-error review were not meaningfully available. *See, e.g.*, Felts v. Murphy, 201 U.S. 123, 128–30 (1906) (forgoing exhaustion requirement where petitioner could not afford to pay for printing of the record necessary to permit exhaustion of state remedies); Storti v. Massachusetts, 183 U.S. 138, 142–43 (1901) (providing immediate review of impending execution); *In re* Chapman, 156 U.S. 211, 216–18 (1895) (ruling that,

statute, Article III, and the exhaustion requirement had several important effects. They extended to federal habeas courts in *state prisoner* cases the same "clearly appellate jurisdiction" that, as Chief Justice Marshall recognized in *Ex parte Bollman*, the 1789 Act's habeas provision gave federal courts in *federal prisoner* cases.[142] They extended "the judicial Power" to habeas review of state decisions, equivalent in all ways to the power the Supreme Court exercised on writ-of-error review. And they avoided duplicate federal review by requiring federal habeas courts to treat any prior *Supreme Court* ruling on the merits of the same question in the same case on as-of-right writ-of-error review (or, more recently, on discretionary certiorari review) as res judicata.[143]

Justice Gray's description in *Whitten* of the extent of federal-court review of state-court proceedings held true until Congress, in and after 1914, gradually replaced Supreme Court as-of-right writs of error with discretionary certiorari review of state-court decisions arising under federal law in criminal proceedings.[144] Starting in the 1910s, the exhaustion-of-remedies requirement has routed the vast majority of state postconviction decisions from the highest state court into federal district court habeas proceedings, with court of appeals review of "substantial" questions and discretionary Supreme Court review on certiorari in the rarest cases.[145]

---

if, after exhaustion of District of Columbia remedies, writ of error did not lie to D.C. courts, the Court would provide habeas review). For additional examples, see decisions cited *infra* note 147.

142. *Ex parte* Bollman, 8 U.S. 75, 96, 100–01 (1807) (describing habeas corpus as "clearly *appellate*," given its "revision of a decision of an inferior court, by which a citizen has been committed to jail"); *accord Ex parte* Siebold, 100 U.S. 371, 374 (1879); *Ex parte* Yerger, 75 U.S. 85, 97 (1868); *Ex parte* Watkins, 28 U.S. 193, 202 (1830) (describing habeas as "in the nature of a writ of error"). Note also section 13 of the 1789 Judiciary Act, providing that "[t]he Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for," followed immediately by section 14, authorizing habeas writs to the Supreme Court. Act of Sept. 24, 1789, §§ 13–14, 1 Stat. 73, 80–82.

143. Decisions applying res judicata bars under these circumstances include *Reid v. Jones*, 187 U.S. 153, 154 (1902), and *Tinsley v. Anderson*, 171 U.S. 101, 104–05 (1898). *See also* 28 U.S.C. § 2244(c) (codifying res judicata effect of prior Supreme Court merits rulings; adopted in 1966).

144. Statutes "certiorarifying" Supreme Court appellate review include Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726; Act of Feb. 13, 1925, ch. 229, § 237, 43 Stat. 936, 937.

145. *See* 28 U.S.C. § 2253(c)(2) (conditioning circuit-court review of adverse habeas decisions on "substantial showing" of "denial of a constitutional right"). Commentary linking the early twentieth century migration of the review of state

Thus, since 1789, Congress has continuously given federal courts jurisdiction to review the legality of custody under state-court judgments, deliberately exercising Article III's judicial power to assure that the state courts are held to their obligation to obey the federal Constitution as the supreme law of the land.[146] In 1942, quoting a brief written by the young Herbert Weschler, the Supreme Court described the overarching jurisdictional principle in place in Madison's cardinal case since 1867: state-prisoner habeas corpus review extended to "cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights" because the state courts failed to respect those rights on exhaustion of their remedies and because Supreme Court as-of-right review was unavailable either for case-specific reasons or (since 1914) more broadly.[147] As constitutional

---

carceral decisions from Supreme Court writ-of-error to lower-court federal-habeas review with Congress' certiorarifying of Supreme Court review include, e.g., *Darr v. Burford*, 339 U.S. 200, 229 (1950) (Frankfurter, J., dissenting) (pointing out that absent federal habeas review, "[t]he burden of the Court's volume of business will be greatly increased, not merely because a greater number of certiorari petitions would be filed, but by reason of the effective pressure toward granting petitions more freely"); Patrick E. Higginbotham, *Reflections on Reform of § 2254 Habeas Petitions*, 18 HOFSTRA L. REV. 1005, 1009–10 (1990); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2077–78 (1992); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158 & n.11 (1953).

146. From 1789 to 1867, that review occurred as-of-right on writ-of-error review in the Supreme Court. From 1867 until 1886, it could occur as-of-right on both Supreme Court writ-of-error review and lower federal-court habeas review. From 1886 to 1914, as-of-right review in most cases reverted to the Supreme Court pursuant to the requirement that the prisoner exhaust state remedies and Supreme Court writ-of-error review before resorting to federal habeas; but federal habeas review of state-court decisions under the 1867 Act was maintained as a backstop when writ-of-error review was unavailable (as is discussed *infra* note 147). From 1914 until today, with the withdrawal of Supreme Court as-of-right appellate jurisdiction in favor of discretionary certiorari review, as-of-right review has been assigned primarily to the federal district courts in habeas under the 1867 Act as recodified without substantive change in 1948. Act of June 25, 1948, ch. 646, pt. VI, ch. 153, §§ 2241–2255, 62 Stat. 869, 964–68 (current version at 28 U.S.C. §§ 2241–2256 (1988)); *see* H.R. REP. NO. 80-808, at A177–78 (1947) (1948 habeas codification does not substantively change prior practice).

147. Waley v. Johnston, 316 U.S. 101, 105 (1942) (discussed in Herbert Wechsler, *Habeas Corpus and the Supreme Court*, 59 U. COLO. L. REV. 167, 174–75 (1988)); *see, e.g.*, *In re* Belt, 159 U.S. 95, 100 (1895) ("Ordinarily the [habeas] writ will not lie where there is a remedy by writ of error or appeal."); *In re* Tyler, 149 U.S. 164, 180 (1893) ("The writ of habeas corpus is not to be used to perform the office of a writ of error or appeal; but [is available] when no writ of error or

rights expanded—slowly during most of the nineteenth century; more quickly starting in the 1890s—so did federal courts' habeas responsibilities.[148]

2. Judicial Power in Habeas, 1807–1995

It is worth considering now *how fully and faithfully* federal judges exercised their judicial power independently and effectually to remedy "improper Verdicts" left uncorrected by the state judiciaries.[149]

In *Ex parte Bollman* in 1807, Chief Justice Marshall described and modeled the judicial power of federal judges on habeas review of (in that case) a detaining court's application of the Fourth Amendment probable-cause requirement. His job, he said, was to "do that which the court below ought to have done," which was to "fully examine[ ] and attentively consider[ ]" whether the constitutional requirements were met and to grant the writ, if not.[150] Putting habeas in lock step with the de novo standard the Court then and since has applied in reviewing constitutional claims on writ of error and, later, certiorari,[151] the *Bollman* standard held firm until 1996.

---

appeal will lie."); Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. 505, 513 (2022) ("[H]abeas corpus . . . serves petitioners as a constrained substitute for review by the Supreme Court."). Post-1914 decisions excusing failure to exhaust state or Supreme Court writ-of-error remedies that were not practicably available include: *Walker v. Johnston*, 312 U.S. 275, 286–87 (1941); *Johnson v. Zerbst*, 304 U.S. 458, 465, 467 (1938); and *Escoe v. Zerbst*, 295 U.S. 490, 494 (1935). True, the *number* of habeas cases increased during the twentieth century, but as Wechsler himself wrote in 1948, that was due not to the broadening of the writ's availability or reach—those dated back to 1867—but to "decisions by the Supreme Court expanding the procedural requirements of due process in state criminal proceedings." Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 12 L. & CONTEMP. PROBS. 216, 230 (1948).

148. *See* Carlos M. Vázquez, *Habeas as Forum Allocation: A New Synthesis*, 71 U. MIAMI L. REV. 645 (2017) (tracing gradual early-twentieth-century transition of Supreme Court review of state-prisoner constitutional claims from writ-of-error to habeas review).

149. 1 Farrand, *supra* note 4, at 124.

150. *Ex parte* Bollman, 8 U.S. 75, 114, 125, 135–36 (1807).

151. Supreme Court habeas decisions citing direct-review precedents for the Court's de novo review include *Miller v. Fenton*, 474 U.S. 104, 113–18 (1985) (citing, *e.g.*, Haynes v. Washington, 373 U.S 503, 515–16 (1962)); *Rogers v. Richmond*, 365 U.S. 534, 546 (1961) (citing Thompson v. City of Louisville, 362 U.S. 199 (1960)); and *Brown v. Allen*, 344 U.S. 443, 458–59 & n.8 (1953) (citing Malinski v. New York, 324 U.S. 401 (1945)). Supreme Court direct-review decisions citing habeas cases as precedent for "'independent federal determination'" include *Arizona v. Fulminante*, 499 U.S. 271, 303 (1991) (quoting

Appendix B cites forty-five habeas cases decided between 1807 and 1921 in which the Court addressed habeas claims on their legal merits. In all of them, the Court applied the *Bollman* de novo review standard to questions of law without comment or contemplation of any other possibility. Starting in 1915 in *Frank v. Mangum*,[152] however, the Court became habituated to discussing differing standards of review of facts and of legal (including "mixed") questions. As the seventy Supreme Court decisions in Appendix C show, the Court between then and 1996 consistently applied de novo review to habeas consideration of any determinations by the detaining court that the Supreme Court perceived to present questions of law or mixed questions of fact and law arising under the Constitution.

Between 1915 and Congress' 1996 adoption of AEDPA, the Court several times paused to address the habeas standard-of-review question at length. The first such occasion arose at the border between pure legal questions and mixed questions of law and historical fact. Between 1789 and 1915, both on writ-of-error and habeas review, the Court always had distinguished independent review of the detaining court's legal determinations from more constrained review of that court's factual determinations.[153] Initially, Congress exercised its power to "regulate" the flow of records between the state and federal judiciary by limiting writ-of-error review to the face of the state-court record.[154] Doing so denied the Court access to the record, leaving no capacity to review the evidence and only limited capacity to review the facts underlying state courts' determinations. The Court likewise religiously declined to address pure questions of fact on habeas review of federal-prisoner cases and (after 1867) state-prisoner cases, extending that principle, for example, to claims of insufficient evidence of guilt.[155] Early in the

---

Miller, 474 U.S. at 110), and *Thomas v. Arizona*, 356 U.S. 390, 393 (1958) (citing *Brown*, 344 U.S. at 507).

152. Frank v. Mangum, 237 U.S. 309 (1915).

153. *See* Liebman, *supra* note 145, at 2008 n.48, 2056, 2094 (documenting the Supreme Court's parallel treatment of factual questions on writ-of-error and habeas review).

154. *See, e.g.*, Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796) (discussed *supra* note 94).

155. *See, e.g.*, Harlan v. McGourin, 218 U.S. 442, 448, 451–52 (1910) (holding that a challenge based on sufficiency of evidence is outside "the province of a writ of habeas corpus"); *In re* Wood, 140 U.S. 278, 285–87 (1891) (accepting state-court finding of no jury discrimination); Whitten v. Tomlinson, 160 U.S. 231, 245 (1895) (declining to review finding that petitioner was a "fugitive from

twentieth century, however, federal courts' access to the evidence and facts expanded under writ-of-error and, later, certiorari review. In 1912, in *Kansas City Southern Railway. Co. v. C.H. Albers Commission Co.*,[156] that trend gave rise to the doctrine extending de novo review to situations in which "what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."[157]

Three years later, the application of that understanding of legal questions in habeas cases arose in the Court's notorious *Frank* decision. There, the Court considered whether the jury that convicted Leo Frank, a Jewish man accused of raping a Christian woman, was sufficiently swayed by a mob to deprive him of due process. On determinative legal questions, Justice Pitney for the majority and Justice Holmes in his famous dissent agreed on the "impropriety" of a review standard "limiting in the least degree the authority of the United States [courts] in investigating an alleged violation by a state of the due process of law guaranteed by the 14th Amendment."[158] Both also agreed—consistently with longstanding Supreme Court practice in both writ-of-error and habeas cases—that deference is due to state-court "determination of the facts."[159]

For the majority, the latter proposition sufficed to resolve the case against Frank, in deference to the Georgia Supreme Court's "determination of the facts" that Frank's mob-domination allegations were "unfounded."[160] Citing *Albers*, Justice Holmes disagreed,

---

justice"); *In re* Converse, 137 U.S. 624, 631 (declining to review finding that prisoner understood he was pleading guilty to felony, not misdemeanor).

156. Kansas City Southern Railway. Co. v. C.H. Albers Commission Co., 223 U.S. 573 (1912).

157. *Id.* at 591; *see* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 261–62, 271–76 (1985) (explaining why de novo review is necessary to assure the supremacy of federal constitutional law when factual concepts—*e.g.*, a confession's voluntariness—are difficult to define for all cases and depend for their evolution on a progression of fact situations; giving state courts unreviewable authority to find facts and say whether they satisfy a legal definition would give them unchecked power to say what the Constitution means).

158. Frank v. Mangum, 237 U.S. 309, 334 (1915); *id.* at 347–48 (Holmes, J., dissenting); *see id.* at 340–43 (majority opinion) (reviewing de novo, and rejecting, Frank's alternative legal claim that right to presence at trial is not waivable); *id.* at 346 (Holmes, J., dissenting) (same); *see also id.* at 334 (majority opinion) (declining to apply "doctrine of res judicata" to state-court legal determinations); *Ex parte Spencer,* 228 U.S. 652, 658 (1913) (same).

159. *Frank*, 237 U.S. at 335; *id.* at 348 (Holmes, J., dissenting).

160. *Id.* at 335–36 (majority opinion).

arguing that "[w]hen the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. Otherwise, the right will be a barren one."[161] Deferring to the Georgia Court on facts determinative of the constitutional right, Holmes said, is "a removal of what is perhaps the *most important guarantee of the Federal Constitution*"—that it be treated as the supreme law of the land.[162] Eight years later in *Moore v. Dempsey*, with Holmes writing, the Court followed his advice in *Frank* and applied the mixed-question doctrine on habeas review of another mob-rule claim, in this case involving five Black men charged with murdering a white man during a race riot.[163] Four years after that, the Court issued the first of a long string of *direct-review* cases applying the mixed-question doctrine to overturn state-court decisions rejecting claims of jury discrimination and coerced confessions.[164]

Documenting this trend, both majority opinions in the Court's 1953 habeas decision in *Brown v. Allen* carefully catalogued the Court's preexisting standards of review on habeas of state courts' legal and "mixed" legal determinations. They observed that (1) deferential review was to be paid to state judges' determinations of fact; and (2) when state judges decide matters of federal law or when their determinations of federal law "call[ ] for interpretation of the legal significance" of the historical facts, the federal judge "must exercise his own judgment" and have the "final say," "independent" of state judges' ruling—power that "the prior State determination of a

161. *Id.* at 347–48 (Holmes, J., dissenting).

162. *Id.* (emphasis added); *see* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1813 (1991) ("[F]ederal habeas relitigation serves vital purposes in the elaboration and enforcement of constitutional norms.").

163. Moore v. Dempsey, 261 U.S. 86, 92 (1923) ("[I]t does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.").

164. Fiske v. Kansas, 274 U.S. 380, 385–86 (1927) (reviewing de novo facts establishing criminal syndicalism statute's unconstitutional application "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question"); *see, e.g.*, Brown v. Mississippi, 297 U.S. 278, 286–87 (1936) (reviewing de novo the voluntariness of confession); Norris v. Alabama, 294 U.S. 587, 589–90 (1935) (ruling that, absent de novo review of whether jury discrimination occurred, "this Court would fail of its purpose in safeguarding constitutional rights").

claim under the United State Constitution cannot foreclose."[165] Canvassing prior caselaw, the Court left no doubt about its responsibility independently to review legal questions of every type. State-court determinations of strictly legal questions "cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide."[166] Likewise, "so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge."[167]

In the Court's last pre-AEDPA exploration of habeas standards of review—in *Wright v. West* in 1992—Justice Thomas' three-justice plurality opinion questioned the propriety of any de novo review on habeas, relying on two aspects of a 1963 article by Professor Paul Bator.[168] First, ignoring the clear terms of the habeas statute from 1867 until now authorizing habeas review of custody "in violation of the constitution,"[169] Bator theorized that habeas courts' arising-under jurisdiction included only questions addressing the detaining court's subject-matter or personal jurisdiction. At times, Bator shaded this point into a standard-of-review issue by advocating res judicata effect for detaining courts' legal determinations on all but jurisdictional questions.[170] The forty-five pre-1923 decisions in Appendix B deny—and seventy more recent decisions in Appendix C

165. Brown v. Allen, 344 U.S. 443, 500–01, 506–07 (1953) (majority opinion of Frankfurter, J.); *accord id.* at 456–59 (majority opinion of Reed, J.).

166. *Id.* at 506 (majority opinion of Frankfurter, J.).

167. *Id.* at 507; *see* Thompson v. Keohane, 516 U.S. 99, 110–16 (1995) ("[M]ixed question[s] of law and fact" are "ranked as issues of law" because "case-by-case elaboration when a constitutional right is implicated may more accurately be described as law declaration than as law application."). Another standard-of-review issue that momentarily flared in the first half of the twentieth century is the one dividing Justices Frankfurter and Reed in *Brown*. Although both agreed that only prior *federal*-court decisions on the "merits" of the same claim by the same prisoner deserved any res judicata effect in habeas proceedings, Justice Reed (for a minority) thought the Supreme Court's denial of certiorari review might qualify as on-the-merits. *Brown*, 344 U.S. at 456–57 (Reed, J., dissenting). Then and since, Justice Frankfurter's majority view has prevailed that denials of certiorari have no res judicata, precedential, or gravitational force in subsequent habeas (or other) proceedings. *Id.* at 489–97 (majority opinion of Frankfurter, J.).

168. Wright v. West, 505 U.S. 277, 285–86 (1992) (plurality opinion) (citing Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963)).

169. *See supra* note 137 and accompanying text (1867 Act).

170. Bator, *supra* note 168, at 462, 485.

disprove—that theory in historical practice.[171] Second, Bator questioned the appropriateness of the Court's treatment of mixed questions as legal questions on habeas review, claiming it dated only from *Brown v. Allen* in 1953[172]—a theory disproved by Chief Justice Marshall's independent legal review on habeas in *Bollman* in 1807 and by the Court's consistently independent review of unconstitutional state custody as it gravitated from writ-of-error review (1789–1867), to habeas (1867–1886), back to writ of error (1886–1914, presumptively with many exceptions), then to habeas (1914–present).[173] Concurring in *Wright*'s judgment after *independently reviewing and rejecting* petitioner's mixed-legal-and-factual claim, Justice O'Connor carefully analyzed the Court's caselaw, concluding that "[w]e have always held that federal courts, even on habeas, have an independent obligation to say what the law is" and that "a move away from *de novo* review of mixed questions of law and fact would be a substantial change in our construction of the authority conferred by the habeas corpus statute."[174]

---

171. Micah Quigley attempts to rehabilitate Bator's habeas "common law" conclusions by resting them instead on the words of the 1867 Habeas Act, which extended habeas to all state prisoners "'restrained of [their] liberty in violation of the constitution.'" Micah Quigley, *What Is Habeas?*, 173 U. PA. L. REV. 453, 458 (2025) (quoting Act of Feb. 5, 1867, ch. 28, 14 Stat. 385). Quigley mangles those straightforward words, however, with a caveat that contradicts them—that unlawful restraint *excludes* custody under unconstitutional criminal *convictions*, which (Quigley claims) are ipso facto lawful. *Id.* at 458. Quigley bases that claim on his own faulty "common law" reading of the Court's habeas cases to apply only to jurisdictional defects. *Id.* at 464–66. *But see* decisions cited in Appendix B. In any event, Quigley acknowledges that "Congress may have ratified then-current judicial practice when it reenacted the operative text in 1948," *id.* at 518, which clearly extended habeas to custody under unconstitutional convictions, as the decisions collected in Appendix C illustrate. This concession undoes his entire argument. *See, e.g.*, Lorillard v. Pons, 434 U.S. 575, 580–81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); Lindahl v. Off. of Pers. Mgmt., 470 U.S. 768, 782 & n.15 (1985) (similar); Ankenbrandt v. Richards, 504 U.S. 689, 700–01 (1992) (similar); Forest Grove Sch. Dist. v. T.A., 577 U.S. 230, 239–40 (2009) (similar).

172. Bator, *supra* note 168, at 500–07.

173. *See supra* notes 150–167 and accompanying text; decisions collected in Appendix C.

174. Wright v. West, 505 U.S. 277, 305–06 (1992) (O'Connor, J., concurring in the judgment); *See id.* at 297–305 (stating that the plurality opinion "errs in describing the pre-1953 law of habeas corpus," which was available for any "claim under the Due Process Clause" and "other federal claims"; "understates" how clearly "*Brown v. Allen* rejected a deferential standard of review"; and "incorrectly states that we have never considered the standard of review to apply to mixed

From the Founding until 1996, therefore, federal habeas courts persistently exercised the power independently to obviate the influence of local faction and effectuate supreme law in the cardinal case of state custody imposed and upheld in violation of the Constitution.[175] The question is whether Articles III and VI as elucidated since the ratification can tolerate AEDPA's departure from that tradition.

B. Judicial Power Beyond the Cardinal Case, 1787–2024

In their late-August-1787 flurry of actions conforming the Article-III judicial power to Article VI's Supremacy Clause, the Framers twice rejected proposals for Congress to regulate the "manner" in which federal courts reached and effectuated constitutional judgments.[176] Ever since—with the exception of its embrace of AEDPA deference—the Supreme Court has insisted that Article-III judges with jurisdiction exercise "the whole judicial power,"[177] applying the *whole constitutional law* across the *whole constitutional case* to *effectuate* supreme law.[178] With that same, sole exception, as this Section documents, the Court has held firm, notwithstanding contrary requests and directives from Congress and other non-Article-III authorities, no matter how reasonable or respectable the authority or how urgent the national crisis. In cases originating with state judges, the Supreme Court has been particularly protective of federal courts' judicial power to effectuate

---

questions of law and fact raised on federal habeas" (citing twenty-eight habeas decisions applying mixed-question independent review)). Justices White, Kennedy, and Souter concurred in the judgment following de novo review of the constitutional claim. *Id.* at 297–310.

175. *See* Carlos M. Vázquez, *AEDPA as Forum Allocation: The Textual and Structural Case for Overruling* Williams v. Taylor, 56 AM. CRIM. L. REV. 1, 6 (2019) ("[U]ntil the enactment of AEDPA, de novo review of issues of federal constitutional law and of application of such law to fact was always available to persons convicted of crimes in state court.").

176. *See supra* notes 93–94 and accompanying text.

177. Marbury v. Madison, 5 U.S. 137, 173 (1803).

178. The *whole constitutional case* encompasses Article-III courts' power of independent decision from filing to a judgment with res judicata effect unless it is overturned by a higher Article-III court. The *whole constitutional law* entails Article-III courts' independent interpretation and application of all the Constitution's provisions, including "construction" of its words and "liquidation" of the words' meaning through serial application to the facts of cases before the courts.

constitutional supremacy, citing state judges' susceptibility to factional prejudices and dependencies.[179]

The Section foregrounds the requirement of *independent determination* of the law (subsection 1). It then addresses the principles that the judicial power reaches the *whole constitutional law* including law-determination and application (subsection 2) and the *whole constitutional case* including decision and effectuation (subsections 3 and 4). Each subsection demonstrates inconsistencies between AEDPA deference and these basic constitutional commands.

1. *Independent* determination

At the least, federal judges' power to effectuate constitutional supremacy in cases before them entails the power to say what the Constitution means.[180] As Chief Justice Roberts affirmed in *Loper*, those "[j]udges have always been expected to apply their 'judgment' *independent* of the political branches when interpreting the laws those branches enact."[181] "Since the start of our Republic, courts have 'decide[d] . . . questions of law' and 'interpret[ed] constitutional and statutory provisions' by applying their own legal judgment."[182]

In 1792, three years after the Constitution's ratification, Congress passed a statute requiring federal judges to advise it on the handling of pension requests from Revolutionary War orphans and veterans.[183] In opinions on circuit and a letter to President Washington—collected in *Hayburn's Case*[184]—six Supreme Court Justices and three inferior federal judges explained why they would not comply. Notwithstanding their "duty, to receive with all possible respect every act of the Legislature," and Congress' reasonable

179. *See, e.g.*, *supra* notes 160–175; *infra* notes 200–211, 221–231, 285–301, 409–422 and accompanying text (providing examples).

180. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 385 (2024) ("This Court embraced the Framers' understanding of the judicial function early on [in] *Marbury v. Madison*, [5. U.S. at 177, when] Chief Justice Marshall famously declared that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'").

181. *Id.* at 412.

182. *Id.* at 392 n.4.

183. Act of Mar. 23, 1792, ch. 11, § 2, 1 Stat. 244 (1792) ("The circuit court . . . shall forthwith proceed to examine into the nature of the wound . . . and having ascertained the degree thereof, shall certify the same, and transmit the result of their inquiry . . . to the Secretary at War, together with their opinion in writing [based on which the Secretary would] make a final discretionary decision on whether to award a pension] . . . .").

184. Hayburn's Case, 2 U.S. (2 Dall.) 408, 410–11 n.† (1792).

"difference in opinion" with their own as to the Constitution's application, *and* their having "formed an opinion" only "with . . . difficulty," they had "the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration."[185] The statute, they concluded, required advisory opinions, which Article III barred.[186] Thus began a succession of decisions refusing, on Article III and Supremacy Clause grounds, to defer to Congress' determination of constitutional questions, however reasonable, and insisting instead on Article-III judges' duty independently to define and apply the whole constitutional law.

Consider Chief Justice Marshall's explication in *Marbury v. Madison* of "the *whole* judicial power of the United States."[187] As Marshall described the task the case presented, "[i]f two laws conflict with each other, the courts must decide on the operation of each."[188] One such conflict was between the *Court*'s reading of Article III's delineation of its original jurisdiction as exclusive and *Congress*' reading of Article III's "such exceptions" language as allowing Congress to transpose the Court's acknowledged "appellate" jurisdiction into original jurisdiction to issue writs of mandamus. As Marshall famously wrote, explaining the Court's choice of its own over Congress' reading, "[i]t is emphatically the province and duty of the *judicial* department to say what the law is."[189] In resolving the question without deferring to Congress' plausible—but, the Court believed, incorrect—reading,[190] the Court modeled the principle for which *Marbury* is best known: that "the judicial power" mandates "independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text."[191]

---

185. *Id.* at 412 n.† (reprinting letter of C.C.D. N.C. to President Washington).

186. *Id.*

187. Marbury v. Madison, 5 U.S. 137, 173 (1803) (emphasis added).

188. *Id.* at 177.

189. *Id.* (emphasis added).

190. *See* William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 319–20 (1996) (noting that Congress' reading of exceptions clause was not "in any obvious way, 'unreasonable'").

191. Monaghan, *Marbury*, *supra* note 22, at 6–7, 9; *see* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 429–30 (2024) (Gorsuch, J., concurring) ("From the Nation's founding, [the Court] considered '[t]he interpretation of the laws' . . . 'the proper and peculiar province of the courts.' [*Marbury*] reflected exactly that view . . . declar[ing] it 'emphatically the province and duty of the judicial department to say what the law is.'" (quoting THE FEDERALIST NO. 78, *supra* note 36, at 467; Marbury v. Madison, 5 U.S. 137, 177 (1803)).

Marshall spent much more time on the conflict between Article III's implied directive not to exercise original mandamus jurisdiction and the Judiciary Act's directive to do so. Although the point would be beyond dispute today—lest the Constitution be "reduce[d] to nothing"—Marshall saw the need to refute "[t]hose . . . who controvert the principle that the constitution is to be considered, in court, as a paramount law" and who argue "that courts must close their eyes on the constitution, and see only the law."[192] Marshall settled the matter with three Article-III propositions and one Article-VI proposition that together establish the "whole law" principle: (1) "the judicial power of the United States is extended to all cases arising under the constitution"; (2) the idea that "the constitution should not be looked into" in exercising the judicial power in cases arising under it "is too extravagant to be maintained"; (3) if "the constitution must be looked into by the judges," there can't be any "part of it [that they are] forbidden to read, or *to obey*"; and (4) "in declaring what shall be the *Supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United State generally, but those only which shall be made in pursuance of the constitution, have that rank."[193] As Professor Henry Monaghan distilled *Marbury's whole-law* meaning in an article cited in both *Loper* opinions, "[t]here is no half-way position in constitutional cases; so long as it is directed to decide the case, an article III court cannot be 'jurisdictionally' shut off from full consideration of the substantive constitutional issues."[194]

---

192. *Marbury*, 5 U.S. at 178.

193. *Id.* at 178–80.

194. Monaghan, *Marbury*, *supra* note 22, at 11 (cited in *Loper*, 603 U.S. at 395; *id.* at 467 n.5, 469 (Kagan, J., dissenting)).

Before addressing these momentous questions, Chief Justice Marshall had to decide whether the case presented them by asking (1) whether Marbury had a right to a "commission as a justice of the peace" that outgoing President Adams had signed but incoming Secretary of State James Madison had declined to deliver, and if so, (2) whether mandamus would lie to restore it—questions Marshall answered in the affirmative (while still denying relief because the Court lacked original jurisdiction to issue the writ). *Marbury*, 5 U.S. at 155–62. Longstanding English legal limits on the scope of mandamus might well have required "deference" to the Secretary of State's decision. *See* Bamzai, *supra* note 129, at 947–50 (describing English practice). But Marshall's "opinion tended to disregard the [English] standard in order to elevate the right-remedy" principle. *Id.*; *compare* United States v. Dickson, 40 U.S. 141, 161–63 (1841) (Story, J.) (declining on mandamus to defer to agency's "uniform construction of [an] act ever since its passage" because it was "not in conformity to the [act's] true intendment" as the Court independently interpreted it); Bamzai, *supra* note 129, at 950 &

AEDPA deference instructs federal courts with jurisdiction over the constitutionality of a prisoner's custody and of state judges' decisions approving it to *forbear* doing what *Marbury* says they must do: "say what the law is"; "declar[e] what shall be the *Supreme* law of the land"; "obey" all "parts of" the Constitution; and apply their independent judgment of it *without* bowing to a non-Article-III authority's reasonable approximation. The rare habeas court that does say what the law is must then forbear doing anything about it, thereby violating *Hayburn's Case* by advising on legal meanings it can't "obey," much less enforce.

2. Independent Determination of the *Whole Law*

Thirteen years after *Marbury*, in *Martin v. Hunter's Lessee*,[195] when confronted with the prospect of factional influence on state judges, the Court resolutely extended the judicial power to say what the Constitution means *all* the way (from interpretation to application and decision), reaching *all* sources of that meaning (the words and their elucidation by the facts at issue). In its prior decision in *Fairfax's Devisee v. Hunter's Lessee*,[196] the Court had interpreted and applied a federal treaty in favor of a Revolutionary War "alien enemy," overturning a Virginia court's award of property in question to Hunter's Lessee, a Virginia citizen.[197] On remand, the Virginia Court of Appeals refused to recognize the English heir's rights, claiming that Article III limited the question properly before the Supreme Court to "the mere abstract construction of the treaty itself," rendering *ultra vires* its "decision [applying that interpretation] against the title set up by reference to the treaty."[198] Here, then, was a decision by state "judges who hold their offices by a temporary

---

n.174 (documenting the Marshall Court's "robust[ly]" nondeferential examination of legal issues on mandamus). The *Marbury* Court thus answered the first question de novo, not deferentially: it determined for itself the meaning that "seems to have prevailed with the Legislature" in adopting the governing acts. It rejected the Secretary of State's interpretation of the acts (that the commission vested only upon delivery), declaring that the Court was "decidedly [of] the opinion . . . that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state." *Marbury*, 5 U.S. at 155–62.

195. Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

196. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813).

197. *Id.* at 606–08, 619, 626–28.

198. *Martin*, 14 U.S. at 323–24, 358–59 (reviewing Hunter v. Martin, 18 Va. (4 Munf.) 1, 49–50, 59 (1815)).

commission" possibly swayed by "the bias of local views and prejudices."[199]

Justice Story first addressed Virginia's reading of Article III as "limit[ing] the appellate power of the United States to cases in their *own* courts," given that "state judges are bound by an oath to support the constitution" and "must be presumed to be men of learning and integrity."[200] Story "cheerfully admit[ted]" the premise that state judges are "of as much learning, integrity, and wisdom, as" federal judges while rejecting Virginia's conclusion.[201] The Constitution "has proceeded upon a theory of its own . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."[202] In "cases arising under the constitution, laws, and treaties of the United States, . . . reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation" warrant Article III's authorization and Congress' grant of jurisdiction.[203] Then, by Article-III edict, Congress' extension of jurisdiction brought with it the federal courts' judicial power "to expound *and enforce*" federal law, and "to *carry into effect* . . . the express provisions of the constitution."[204]

Story then explained why Article III required the Court, in exercising its appellate jurisdiction over the case, to review the Virginia court's "decision against the title" under the treaty and not merely the treaty's "abstract construction."[205] Insisting—as Hamilton and Madison had—on federal courts' power to "liquidate[ ]" the Constitution's whole meaning by its application to "a series of particular . . . adjudications,"[206] Story asked rhetorically, "[h]ow, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what the title is, and whether it have a legal validity?"[207] The Court's prior decision had

199. THE FEDERALIST NO. 22, *supra* note 119, at 151 (Alexander Hamilton); THE FEDERALIST NO. 78, *supra* note 36, at 471.

200. *Martin*, 14 U.S. at 346.

201. *Id.* at 346, 351.

202. *Id.* at 347.

203. *Id.*; *see* Mayor v. Cooper, 73 U.S. (247, 253 (1867) (providing the same justification for federal-question removal jurisdiction).

204. *Martin*, 14 U.S. at 329 (emphasis added).

205. *Id.* at 358–59.

206. THE FEDERALIST NO. 37, *supra* note 34, at 229 (discussed *supra* text accompanying notes 127–129).

207. *Martin*, 14 U.S. at 358–59.

ascertained those crucial predicates by applying the law to "[t]he real fact . . . that the legislature supposed that the commonwealth were in actual seizin and possession of the vacant lands of lord Fairfax"—a factual "mistake which surely ought not to be pressed to the injury of third persons."[208] In order to effectuate supreme law, "every error that immediately respects that question [of the treaty's application] must, of course, be within the cognizance[] of the court."[209] Otherwise, Story wrote (anticipating the mixed-question doctrine), the Court's appellate jurisdiction "will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure."[210]

Concurring, Justice Johnson saw the Article-III problem in advisory-opinion terms: if Virginia's "doctrine be assumed"—that the Court could construe but not apply the treaty—the Court would "then be called upon to decide on a mere hypothetical case—to give a construction to a treaty without first deciding whether there was any interest on which the treaty, whatever be its proper construction, would operate." And he too identified the doctrine's intolerable effect: leaving in force a "decision to [the petitioner's] prejudice [which] may have been the result of those very errors, partialities, or defects, in state jurisprudence against which the constitution intended to protect the individual."[211]

Through Chief Justice Marshall, *Osborn v. Bank of the United States*[212] reinforced *Martin*: "If . . . [the] right set up by the party, may be defeated by one construction of the constitution" but "sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as *incidental* to this, which gives that jurisdiction."[213] Otherwise, "the judicial power never can be extended to a *whole case*, as expressed by [Article III], but to those parts of cases only which present the particular question involving the construction of the constitution."[214] Article III's words, "obviously intended to secure to those who claim rights under the constitution," would then "be restricted to the *insecure remedy* of an appeal upon an insulated point, *after it has*

208. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603, 626 (1812).
209. *Martin*, 14 U.S. at 358–59.
210. *Id.* at 357.
211. *Id.* at 369–70.
212. Osborn v. Bank of the United States, 22 U.S. 738 (1824).
213. *Id.* at 822 (emphasis added).
214. *Id.* (emphasis added).

received that shape which may be given to it by another tribunal, into which [the claimant] is forced against his will."[215]

In 1932, the Court applied the whole-constitutional-law principle in the administrative-review context in *Crowell v. Benson*,[216] connecting *Martin*'s and *Osborn*'s "whole law" principle to *Albers*' mixed-question doctrine.[217] Congress, it held, could not confer jurisdiction to review an agency decision in admiralty while "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or admiralty."[218] Instead, Article-III courts must have "complete authority to insure the proper application of law."[219] "In cases brought to enforce constitutional rights," Chief Justice Hughes wrote, law application includes law-instantiating determinations of fact: "the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."[220]

Three years later in *Norris v. Alabama*,[221] Chief Justice Hughes applied the same rule to Madison's cardinal case. Overturning the Alabama Supreme Court's determination of "fact" that no discrimination had occurred in selecting the all-white grand jurors who indicted seven young Black men for rape of a white woman, Hughes wrote: "That the question [of discrimination] is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied."[222] "[W]henever a conclusion of law of a state court as to a federal right and findings of fact are so

215. *Id.* at 822–23 (emphasis added).

216. Crowell v. Benson, 285 U.S. 22 (1932).

217. *See supra* notes 156–157 and accompanying text (describing *Albers*' mixed-question doctrine).

218. *Crowell*, 285 U.S. at 45–46, 49 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1816)).

219. *Id.* at 54.

220. *Id.* at 60; *see id.* at 56–57 (requiring de novo federal-court review of legal and mixed questions so "the federal judicial power [assures] the observance of constitutional restrictions"); *accord* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51–52, 56 (1936) (Hughes, C.J.) (requiring de novo review of mixed questions so "the *Constitution* as the supreme law of the land may be maintained"); *id.* at 74, 84 (Brandeis, J., concurring) ("The supremacy of law demands . . . [an] opportunity to have some [Article III] court decide whether an erroneous rule of law was applied" and resolve "what purports to be a finding upon a question of fact [but] is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter.").

221. Norris v. Alabama, 294 U.S. 587 (1935).

222. *Id.* at 589–90.

intermingled that the latter control the former," it is the Court's "province to inquire not merely whether [the right] was denied in express terms but also whether it was *denied in substance and effect*." Otherwise, "review by this Court would fail of its purpose in safeguarding constitutional rights."[223]

In drafting Article III, the Framers rejected the New Jersey Plan's limit on federal-court review of state judges' rulings to *construing* the Constitution but not applying it to "*determine*" the whole constitutional "case."[224] *Martin* and *Osborn* in turn refused Virginia judges' and Ohio officials' demand that the Court limit judgment to "the mere abstract construction"[225] of federal law: those decisions insisted on the power to "expound *and enforce*" and "*carry into effect* . . . express provisions of the constitution"[226] and to reach and correct "every error that immediately respects that question"[227] or is necessarily "incidental"[228] to its answer. Nor would the Court even let state judges' determinations "shape" or steer their consideration of constitutional error.[229] *Crowell* and *Norris* extended the principle to agency and state-court determinations of *fact* that (in Madison's and Hamilton's locution[230]) "liquidate" the normative constitutional meaning at issue. *Norris*, on writ of error—like Justice Holmes' preceding *Moore* decision on habeas—applied the whole-law principle to mixed questions determinative of a cardinal example of "improper Verdicts in State tribunals obtained under the biassed directions of a" racially charged mob (*Moore*) and of "local prejudices" in selecting an all-white grand "jury" (*Norris*).[231]

AEDPA deference, limiting independent federal habeas review to whether state judges articulated a legal standard that is "contrary to" law,[232] demands exactly the kind of ineffectual review that the Framers, *Martin*, *Osborn*, *Crowell*, and *Norris* rejected as incompatible with the federal judicial power in Madison's cardinal faction-imperiled cases. Worse, because AEDPA demands "deference . . . near its apex" whenever constitutional meaning "turns on general,

223. *Id.* at 590 (emphasis added).
224. *See supra* notes 95–96 and accompanying text (discussing the Framers' rejection of the New Jersey Plan).
225. Martin v. Hunter's Lessee, 14 U.S. 305, 358 (1816).
226. *Id.* at 329.
227. *Id.* at 358–59.
228. Osborn v. Bank of the United States, 22 U.S. 738, 822 (1824).
229. *Id.* at 822–23.
230. *See supra* notes 126–129 and accompanying text.
231. 1 Farrand, *supra* note 4, at 124 (James Madison).
232. 28 U.S.C. § 2254(d)(1).

fact-driven standards"—on facts documenting mob influence, jury discrimination, coerced confessions, ineffective representation, materiality of evidence withheld or falsified by the state[233]—it gives state courts the broadest license to evade the Constitution in cases where the most fundamental human rights are at stake.

3. Independent Resolution of the *Whole Case*

United States v. Klein[234] stands as Congress' sentinel attack on the whole judicial power.[235] There, Congress did everything it could—belts, suspenders, and garter—to restrain the Court from applying the whole constitutional law to decide the whole constitutional case. That statute alone matches AEDPA deference in its brazen affront to Article III and the Supremacy Clause.

After the Civil War, facing a recalcitrant Court thwarting Reconstruction at every step, the Radical-Republican Congress was in a bind. Deluged by a flood of private bills it could not handle, it needed the Court of Claims to process the trials of tens of thousands of compensation claims from Southerners whose property federal troops seized during the War—and to have the Supreme Court process appeals from those trials.[236] Each claim required a fact-intensive analysis of the claimant's ownership rights and past loyalty to the Union.[237] The Radical Republicans wanted "affirmative" evidence of loyalty and were enraged by the Court's recent decision in *United States v. Padelford* suggesting that under Article II, inclusion

---

233. Sexton v. Beaudreaux, 585 U.S. 961, 968 (2018) (per curiam); *see* Yarborough v. Alvarado, 541 U.S. 652, 664 (2004) ("The more general the [constitutional] rule, the more leeway [AEDPA deference requires federal courts to give to state-court] outcomes in case-by-case determinations.").

234. United States v. Klein, 80 U.S. 128 (1871).

235. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372–73 (1953) (quoted *infra* text accompanying note 305); Lawrence Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 87–88 (1981) (quoted *infra* note 260); *infra* notes 237, 256, 258 (citing authority recognizing *Klein*'s central role in explicating the Article-III judicial power).

236. *See* Liebman & Ryan, *supra* note 70, at 815–16 (explaining Congress' bind).

237. *See* Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1192–99 (summarizing *Klein's* factual background); *see also Southern Claims Commission Files*, NAT'L ARCHIVES (June 4, 2020), https://www.archives.gov/research/military/civil-war/southern-claims-commission [https://perma.cc/G5FE-J8ZU] (documenting 22,298 compensation claims).

in one of President Lincoln's blanket pardons (to anyone swearing a prospective loyalty oath) was conclusive proof of loyalty even for admitted Confederates.[238] Pending in the Court was Klein's appeal from the claims court, relying on *Padelford*'s dictum to require compensation despite admitted disloyalty.

Rejecting as too crassly unconstitutional a proposal to direct the Supreme Court to "reverse" Court of Claims judgments favoring claimants, Congress settled on five redundant fail-safes. The first three made evidence of a presidential pardon and accompanying loyalty oath (1) inadmissible; (2) preclusive of sovereign immunity waivers; and (3) preclusive of Supreme Court appellate jurisdiction if (as in *Klein*) a pardon was the basis for a prior claims-court ruling favoring compensation. Additionally, if such evidence was offered and showed the claimant "was guilty of" and pardoned for "disloyalty," that (4) provided "conclusive evidence" of disloyalty and (5) required any court with jurisdiction to "cease" and 'forthwith dismiss" the suit.[239] Although Chief Justice Chase's turgid opinion is not easy reading, it unanimously rejected all five fail-safes as unconstitutional withdrawals of the judicial power to apply the whole constitutional law independently and decide the whole constitutional case.[240]

---

238. United States v. Padelford, 76 U.S. 531, 538, 542 (1869) (applying Act of June 25, 1868, ch. 71, § 3, 15 Stat. 75, 75).

239. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235. On the Act's legislative history, see H.R. 974, 41st Cong. (1870), *reprinted in* CONG. GLOBE, 41st Cong., 2d Sess. 3809 (1870); CONG. GLOBE, 41st Cong., 2d Sess. 3816, 3824 (1870) (statements of Sens. Trumbull, Edmonds, Morton); Young, *supra* note 237, at 1206–08.

240. United States v. Klein, 80 U.S. 128, 144–47 (1871); *id.* at 148 (Miller, J., dissenting). Agreeing on the most recent act's unconstitutionality and on previously disloyal but pardoned applicants' eligibility for compensation, the Justices split on whether earlier compensation statutes or Article II dictated the latter result. *Id.* at 142 (majority opinion); *id.* at 148–50 (Miller, J., dissenting).

The "whole case" principle is manifest as early as *Marbury*. In addition to declaring that the Court's determination of the law brooked no dictation by Congress, Chief Justice Marshall firmly asserted the judicial power to implement its legal ruling. "The government of the United States has been emphatically termed a government of laws, and not of men," and "[i]t will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right," and nothing in the "the nature of the [mandamus] writ applied for" required a different conclusion. Marbury v. Madison, 5 U.S. 137, 163, 168 (1803). Having already ruled that mandamus did not require deference to the Secretary of State's interpretation of the law, *see supra* note 194, the Court denied that mandamus limited it to ordering performance of an act expressly mandated by law. *Id.* at 172. Though the relevant "acts of Congress [we]re *silent*" on any such duty, that "difference [was] not considered as affecting the case" because the

In short, the Court read Congress as having given it jurisdiction and then a series of unconstitutional instructions governing the manner in which it should exercise that jurisdiction, each instruction abrogating the Court's Article-III judicial power:

Act's directive to the Court	Statutory terms[241]	Court's Article-III response
Determine compensation rights, including loyalty.	Court has jurisdiction to decide loyalty.[242]	Congress gave federal courts jurisdiction.[243]
If you consider or already considered the Constitution, do not consider how the facts elucidate its meaning.	If evidence of a pardon has been admitted, it shall not be "considered."[244]	Congress unconstitutionally removed federal courts' power to rule based on the Constitution's full meaning.[245]
If you look or already looked at the Constitution, resolve the constitutional issue as we direct.	A pardon is "conclusive evidence" of "giving aid and comfort to the late rebellion." [246]	Congress unconstitutionally removed federal courts' power *independently* to say what the constitutional law is, including the power to instantiate the law through its application to the "evidence."[247]

Court's independent reading of the statutes convinced it that they created "a vested legal right [to the commission] of which the Executive cannot deprive him." *Id.* (emphasis added).

241. *Klein*, 80 U.S. at 145 (reading act to give instructions noted in this column).

242. Act of June 25, 1868, ch. 71, § 3, 15 Stat. 75, 75.

243. *Klein*, 80 U.S. at 145 (Congress could have but did not "withhold the right of appeal from its decisions"; if it "did nothing more [than that], it would be our duty to give it effect").

244. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

245. *Klein*, 80 U.S. at 146–47 (ruling that the act unconstitutionally "prescribe[s] the rule for decision of a cause in a particular way").

246. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

247. *Klein*, 80 U.S. at 145–47 (ruling that the act unconstitutionally "forbid[s the Court] to give the effect to evidence which, in its own judgment, such

If you do or already did independently resolve the issue, identifying the pardon's constitutionally mandated effect, do not decide the case.	At that point, Court has "no further jurisdiction"; its jurisdiction "shall cease"; it "shall forthwith dismiss the suit."[248]	Congress unconstitutionally gave federal courts jurisdiction only "to a given point" but removed the power to *decide the case* consistently with Constitution.[249]
If you do or already did decide the case, do not award relief or bind the parties to your legal judgment		Congress unconstitutionally removed federal courts' power to *carry their constitutional judgment into effect*.[250]

AEDPA deference traverses the same crooked path as the *Klein* act.

AEDPA's directive to federal courts[251]	Article III response
Determine if state prisoner is in custody in violation of the Constitution,	Congress gives federal courts jurisdiction to determine the constitutionality of

evidence should have, and is directed [by conclusive presumption] to give it an effect precisely contrary").

248. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

249. *Klein*, 80 U.S. at 146–47; *see* Patchak v. Zinke, 583 U.S. 244, 257 (2018) (plurality opinion) ("Congress [in *Klein*] had no authority to declare that pardons are not evidence of loyalty [or] . . . achieve the same result by stripping jurisdiction whenever claimants cited pardons . . . [or whenever a court] concluded that a pardoned claimant should prevail." (citing *Klein*, 80 U.S. at 146–48)); Bank Markazi v. Petterson, 578 U.S. 212, 228 (2016) (explaining that the *Klein* statute had "infringed the judicial power" by "attempt[ing] to direct the result without altering the legal standards governing the effect of a pardon [which] Congress was powerless to prescribe").

250. *Klein*, 80 U.S. at 145 ("[The Act's] great and controlling purpose is to deny pardons granted by the President the [Article II] effect which this court ha[s] adjudged them to have."); *see id*. at 146–47 (ruling that Congress had unconstitutionally "prescribe[d] a rule in conformity with which the court must deny to itself the jurisdiction [to decide and award relief], because and only because its decision, in accordance with settled law, [is] adverse to the government and favorable to the suitor").

251. *See supra* notes 9–13 and accompanying text (describing the Court's application of AEDPA deference); Appendix D (listing Supreme Court decisions applying AEDPA deference).

reviewing the state decision approving custody.[252]	custody and review the state-court decision approving it.
In lieu of interpreting and applying the Constitution, you may decide the case based only on what the state decision says if there is any possibility that what it said is reasonable.[253]	Congress unconstitutionally directs federal courts to stop before determining the Constitution's full bearing on the case.[254]
If you apply a constitutional rule, you must decide whether the state decision can, within the realm of reasonable possibility, be reconciled with that rule in the abstract, ignoring the facts of both the precedential Supreme Court cases and the case at bar.[255]	Congress unconstitutionally directs federal courts to stop before considering the full meaning of the Constitution as elucidated by its application to the facts.[256]
If you apply the Constitution and consider how the facts elucidate its meaning, you may not decide the case on that basis; instead, you must decide it	Congress unconstitutionally directs federal courts to *decide the case* based on something other than its independent judgment of what the Constitution

252. 28 U.S.C. § 2241(c)(3).

253. *Id.* § 2254(d)(1), as interpreted in Williams v. Taylor, 529 U.S. 362, 409 (2000).

254. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 392 (1980) ("Congress overstepped its bounds by granting . . . jurisdiction to decide the merits . . . while prescribing a rule for decision that left the court no adjudicatory function to perform."); Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("[W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it."); Hart, *supra* note 235, at 1401–02 (in reviewing state-court decisions, "Congress can't shut the Supreme Court off from the [constitutional] merits and give it jurisdiction simply to reverse" (or, presumedly, affirm)); Monaghan, *Marbury*, *supra* note 22, at 11 (quoted *supra* text accompanying note 194); Wechsler, *supra* note 116, at 1006, 1011 ("Congress [may] not employ federal courts as organs of enforcement and preclude them from attending to the Constitution in arriving at decision of the cause"; nor do federal "courts have a discretion to abstain . . . when constitutional infringement are established in cases properly before them.").

255. 28 U.S.C. § 2254(d)(1), as interpreted in *Williams*, 529 U.S. at 409.

256. *See* Gordon G. Young, *United States v. Klein, Then and Now*, 44 LOYOLA U. CHI. L.J. 265, 271, 299 (2012) ("*Klein* also restricts tampering with federal courts' methods of statutory and Constitutional interpretation [and] interference with federal courts' decision processes" with "implications for [AEDPA deference], which hamstring[s] the decision processes of federal courts when exercising habeas corpus jurisdiction"); *supra* notes 205–223 and accompanying text.

according to Congress' preferred rule of decision: accept whatever the state decision does or says that could possibly be reasonable.[257]	says.[258]
If you do decide the case based on your independent judgment that the custody and state-court decision violate the Constitution, you "shall not" grant relief if there is a fair-minded possibility that the state decision is reasonable.[259]	Congress unconstitutionally denies federal courts power to carry their independent judgment into effect.[260]

257. 28 U.S.C. § 2254(d)(1), as interpreted in *Williams*, 529 U.S. at 409.

258. *See* Patchak v. Zinke, 583 U.S. 244, 268 (2018) (Roberts, C.J., dissenting) (reading *Klein* to bar Congress from "'prescrib[ing] rules of decision to the Judicial Department . . . in cases pending before it'" (quoting United States v. Klein, 80 U.S. 128, 146–47 (1871))); Bank Markazi v. Petterson, 578 U.S. 212, 228 n.19 (2016) ("Congress 'may not exercise [authority] in a way that requires a federal court to act unconstitutionally.'" (quoting Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549 (1998)); *Yakus*, 321 U.S. at 468 (Rutledge, J., dissenting) (Congress may not "confer [jurisdiction] and direct that it be exercised in a manner inconsistent with constitutional requirements"); Christopher Eisgruber & Lawrence Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 471 (1994) ("*Klein* prohibits . . . the conscription of the Court by Congress to play a role in a charade . . . in which the Court is obliged to act as though its own judgment about a matter of consequence is different than it actually is."); Amanda Tyler, *The Story of Klein: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, *in* FEDERAL COURTS STORIES 87, 112 (V. Jackson & J. Resnik eds., 2010) ("Congress may not employ the courts in a way that forces them to become active participants in violating the Constitution"); William W. Van Alstyne, *A Critical Guide to Ex Parte* McCardle*,* 15 ARIZ. L. REV. 229, 268 (1973) ("[T]he power to decide at all must include the power to decide according to the Constitution, consistent with the judicial duty and oath of office to support that Constitution.").

259. 28 U.S.C. § 2254(d)(1), as interpreted in *Williams*, 529 U.S. at 409; *see supra* notes 9–13 and accompanying text (documenting the Supreme Court's definition of AEDPA deference).

260. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (concluding that Article III forbids Congress to require federal courts to extend relief beyond what Court "precedent" says the Constitution allows and, conversely, forbids Congress to grant federal courts jurisdiction to resolve a constitutional case while withholding their power to give their ruling the effect on the parties that the Constitution demands); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 429–30 & n.6 (1995) (concluding that Congress may not constitutionally "instruct[ ] [an Article-III] court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate"); Amar, *supra* note 98, at 233 (interpreting the judicial power to "encompass[ ] the power . . . to speak definitively and finally"); Sager, *supra* note 235, at 87–88 (locating the "objection to legislation that . . .

AEDPA deference brazenly withdraws federal courts' obligation independently to say what the Constitution means and to assay its *whole* meaning as elaborated by its application to the facts; to decide the *whole* case before them based on their best constitutional judgment; and to oppose that judgment to decisions by even the most "biassed," "partial," and "interested" state judges if those judges' rulings are "possibly" reasonable. "This Congress cannot do."[261]

4. *Effectuating* the Whole Law as the Essential Endpoint of the Whole Case

The decisions discussed thus far shield the judicial power from attempts to keep Article-III courts from *independently saying* and effectually *applying* what the Constitution means. The decisions discussed in this section focus on state-court and congressional efforts to keep federal judges in the later, decisional and remedial stages of cases from exercising what Hamilton called an "*effectual power* . . . in the federal courts to *overrule* such [state actions] as might be in manifest contravention of the articles of the Union."[262]

Two guiding principles recur in these decisions. We already encountered the first principle in *Martin* and *Klein*: the judicial power is not only independently "to expound and enforce" but also "to carry into effect . . . the express provisions of the constitution."[263] Second, "'the judicial Power'" to effectuate the federal court's independent judgment "can no more be shared" with any non-Article III authority than "'Congress [can] share with the Judiciary the power to override a Presidential veto.'"[264] "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of

---

deprives [Article-III courts] of jurisdiction to provide effective relief at the very heart of . . . *Klein*").

261. *Yakus*, 321 U.S. at 468 (Rutledge, J., dissenting) ("Once it is held that Congress can require the courts . . . to enforce unconstitutional laws . . . or [enforce laws] without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so.").

262. THE FEDERALIST No. 80, *supra* note 68, at 476 (Alexander Hamilton) (emphasis added).

263. Martin v. Hunter's Lessee, 14 U.S. 304, 329 (1816); *see Klein*, 80 U.S. at 145–47 (making the same point).

264. Stern v. Marshall, 546 U.S. 462, 483 (2011) (quoting United States v. Nixon, 418 U.S. 683, 704 (1974)).

judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III."[265]

Plaut v. Spendthrift Farm, Inc.[266] reviewed a statute "retroactively commanding the federal courts to reopen final judgments."[267] Writing for the Court, Justice Scalia held that the statute violated the Framers' "fundamental principle" giving "the Federal Judiciary the power, not merely to *rule* on cases, but to *decide* them, subject to review *only* by *superior courts in the Article III hierarchy*—with an understanding, in short, that 'a judgment *conclusively resolves* the case' because 'a judicial Power' is one to render *dispositive* judgments."[268] *Plaut*'s holding clearly encompasses a federal court's power to enter a judgment arranging the parties' rights in accordance with its interpretation of supreme law, with res judicata effect on the parties.[269]

Plaut recalls and cites *Hayburn's Case*, where the collective federal judiciary rejected Congress' mandate to rule on orphans' and veterans' pensions because the War Department's and Congress' ability to "revise[ ]" and thus "control[ ]" the effect of the judges' decisions made those decisions mere advisory opinions.[270] In ruling the arrangement "radically inconsistent with the independence of the judicial power," *Hayburn's Case*, like *Plaut* centuries later, sounded in *power*, in *effectualness*. "[U]nder any circumstances . . . agreeable to the constitution," a "decision of any court of the United States" cannot "be liable to a revision, or even suspension," by "the

265. *Id.* at 484.

266. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

267. *Id.* at 219.

268. *Id.* at 218–19 (emphasis added) (citation omitted).

269. *Id.*; *see also* Michaelson v. United States, 266 U.S. 42, 65–66 (1924) ("The Courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the [judicial] power," and "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative . . . ."); Glidden Co. v. Zdanok, 370 U.S. 530, 568–71 (1962) (plurality opinion) (identifying res judicata effect as an essential feature of judgments by courts exercising the judicial power); Gordon v. United States, 117 U.S. 697, 704–05 (1864) (same).

270. *Plaut*, 514 U.S. at 218 (citing Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792)); *see Hayburn's Case*, 2 U.S. at 411–12 n.† (reprinting letter of C.C.D. Pa. to President Washington).

legislature,"[271] by "the executive department"[272]—and surely, we can add, by "the Judges in every State."[273]

Plaut also cites *Gordon v. United States*,[274] where the Court refused to hear an appeal from Court of Claims' awards that did not bind the Government until the Treasury Secretary "include[d them] in his estimate of private claims" to Congress, and Congress "determine[d] whether they will or will not make an appropriation for [their] payment."[275] Chief Justice Taney's decision in *Gordon* emphatically defined an *effectual* "award of execution" as "an essential part of every judgment passed by a court exercising judicial power," else "the judgment would be inoperative and nugatory"—"an opinion, which would remain a dead letter, and without any operation upon the rights of the parties."[276] By its nature, "a judicial tribunal [is] authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the appropriate process of execution may be issued by the court to *carry it into effect*."[277] If the court's "judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to *carry it into effect*," then Congress may not "authorize or require this Court to express an opinion on [the] case" because "its judicial power could not be exercised."[278] This power is all-or-nothing: either the court must "execute[ ] firmly *all* the judicial powers entrusted to it" or it must "abstain from exercising *any* power that is not strictly judicial in its character."[279]

Illustrating Article-III courts' enforcement capacity, Chief Justice Taney cited their "unusual power" under the Supremacy Clause to "null[ify]" state action in conflict with the Constitution and the Court's power under the 1789 Judiciary Act to order its own judgment into execution rather than rely on recalcitrant state courts

271. *Hayburn's Case*, 2 U.S. at 412–13 n.† (reprinting letter of C.C.D. N.C. to President Washington).

272. *Id.* at 411–12 n.† (reprinting letter of C.C.D. Pa. to President Washington).

273. U.S. CONST. art. VI ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

274. Gordon v. United States, 117 U.S. 697 (1864).

275. *Id.* at 698–99 (cited in *Plaut*, 514 U.S. at 226).

276. *Id.* at 702.

277. *Id.* (emphasis added).

278. *Id.* (emphasis added).

279. *Id.* at 706 (emphasis added).

to do so.[280] The Supreme Court did just that years before in *Martin v. Hunter's Lessee*. In voiding the Virginia Court's ruling, Justice Story wrote: "A final judgment of this Court is supposed to be conclusive upon the rights which it decides . . . ."[281] Justice Johnson concurred: "We pretend not to more infallibility than other courts composed of the same frail materials," but "we are constituted by the voice of the union, and when decisions take place . . . ours is the superior claim upon the comity of the state tribunals."[282] Taking no chances, the Court issued its own judgment directly against the parties—lest Virginia try to nullify the Court's judicial power to make its judgment stick by disobeying its mandate.[283]

In *Hayburn's Case*, *Martin*, *Gordon*, and *Plaut*, the offending interference with federal courts' power to effectuate their independent judgment of supreme law was conditional and ex post: the executive, Congress, or a state court *might thereafter* reject the court's judgment. AEDPA's interference with federal habeas courts' power to effectuate their constitutional judgments is certain and ex ante: the federal court *always* must defer to the prior state-court decision. The manifest unconstitutionality of the categorical and ex ante disabling of a federal court's power to enforce its judgments is established by Chief Justice Marshall's authoritative opinion in *Cohens v. Virginia.*[284]

In *Cohens*, Virginia argued that the Supreme Court lacked "power to compel State tribunals to obey your decisions" and so could not take jurisdiction over the case for lack of a fundamental component of the judicial power—the ability to effectuate its ruling.[285] Under review for error was a Virginia criminal conviction growing out of the State's dispute with the District of Columbia over the legality of selling D.C. lottery tickets in Virginia. Chief Justice Marshall responded that Virginia's argument was backwards. The Framers, he

280. *Id.* at 700–01, 705 (citing Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 86).

281. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 355 (1816).

282. *Id.* at 364–65 (Johnson, J., concurring).

283. *Id.* at 340–42, 344, 354 (majority opinion). In order to maintain federal law's "supremacy," state courts may not overrule federal-court judgments of law with which they disagree and must treat such judgments as "finally and conclusively decided," and federal district courts must have "appellate power effectual, and altogether independent of the action of State tribunals" to "carry [their judgments] into execution." Ableman v. Booth, 62 U.S. 506, 515, 517–18, 521–22, 525–26 (1858).

284. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

285. *Id.* at 317.

said, had designed the judicial power precisely to resist powerful factions in the states that had "questioned partially" and "habitually disregarded" the "requisitions of Congress[ ] under the confederation," even when the requisitions were "as constitutionally obligatory as the laws enacted by the present Congress" and were "supported by the great majority of the American people."[286] Because States are prone to "legislate in conformity to their opinions" and to "enforce those opinions by penalties," the Framers could not rely entirely on "judicatures of the States," which are not "exempt from the prejudices by which the legislatures and people are influenced."[287] Against these vices, the Framers insisted on a "power of the government to apply a corrective" and "restrain[ ] peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole."[288] That power was the Article-III court's *judicial* power to make the Constitution "supreme in all cases where it is empowered to act."[289]

Accepting Virginia's argument—that the "Courts of the Union cannot correct the judgments by which [state] penalties may be enforced"—would "prostrate . . . the government and its laws at the feet of every State in the Union," flouting "the necessity of uniformity, as well as correctness in expounding the constitution."[290] To expose the "magnitude" of the effect on "the Union" of the claim that federal courts may not "inquir[e] whether the constitution and laws of the United States have been violated by the [criminal] judgment which the plaintiffs in error seek to review," the Chief Justice opened his opinion by imagining, as if they were actually in place, the "baneful" constitutional conditions facing the government and nation if Virginia's claim were true:

---

286. *Id.* at 386, 388.

287. *Id.* at 386; *see id.* at 386–87 ("When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist . . . .").

288. *Id.* at 377.

289. *Id.* at 381.

290. *Id.* at 385, 415–16 (discussing ill effects of national legal disuniformity); *accord* Mayor v. Cooper, 73 U.S. 247, 253 (1867) (basing constitutionality of post-judgment removal of cases from state to federal courts on need for "uniformity" and "correct decision[s]" of federal law); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (identifying federal "appellate jurisdiction" in federal-question cases as "the only adequate remedy" for the "truly deplorable" "public mischiefs" that occur when judges "in different states . . . differently interpret" national law).

- "[A]dmitting [a constitutional] violation, it is not in the power of the government to apply a corrective . . .";
- "[T]he nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and the government is reduced to the alternative of submitting to such attempts, or of resisting them by force . . .";
- "[T]he constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the Courts of every State in the Union . . .";
  and
- "[T]he constitution, laws, and treaties[ ] may receive as many constructions as there are States; and . . . [this] mischief[ ] is irremediable."[291]

"If such be the constitution," Marshall said, "it is the duty of the Court to bow with respectful submission to its provisions."[292] But "[i]f such be not the constitution, it is equally the duty of this Court to say so; and to perform that task which the American people have assigned to the judicial department."[293] And so the Court did. "[T]aught by experience, that this Union cannot exist without a government for the whole," Marshall said, the nation's people "believed a close and firm Union to be essential to their liberty" and "adopted the present constitution."[294] "If it could be doubted, whether from its nature, [the Constitution] were not supreme in all cases where it is empowered to act, that doubt would be removed by the [Supremacy Clause]."[295] "To this supreme government ample powers are confided" to enforce the law's supremacy, including those of a "judicial department . . . authorized to decide all cases of every description, arising under the constitution" with "no exception [being] made of those [criminal] cases in which a State may be a party."[296] Since 1789, Congress had chosen to "submit the judgment of [state tribunals] to re-examination" by federal courts with "power to revise the judgment rendered . . . by the State tribunals" conformably to

291. *Cohens*, 19 U.S. at 377, 386.
292. *Id.*
293. *Id.*
294. *Id.* at 380–81.
295. *Id.* at 381 (going on to quote the Supremacy Clause in full).
296. *Id.* at 381–82.

supreme law.[297] Even in the face of a constitutional crisis posed by the threat that the Virginia court might disobey its mandate, the Court would not cede its judicial power. Any such resistance would be at the state courts' and the nation's peril. This principle of supreme law, enforced by federal courts with appellate jurisdiction over state court cases arising under the Constitution, Marshall concluded, "is a part of the constitution; and if there be any who deny its necessity, *none can deny its authority*."[298]

Still, Virginia had a fallback. The Court had discretion to give some ground—to extend to Virginia and its courts some degree of "respectful submission," some deference—in recognition of the difficulty of the Court's constitutional judgments in the case (about which the most Marshall often could say was that those judgments were "reasonable," or at least not "unreasonable," to "suppose").[299] Given the uncertainties, given the risk of state resistance to the judicial power, given the impracticality of "extend[ing] the judicial power to every violation of the constitution which may possibly take place," should not the Court limit review of state decisions to only the "extreme and improbable" situation in which a state court blatantly disregarded federal law, while leaving state decisions intact when they presented "gradations of opposition to [federal] laws far short" of the "extreme?"[300] Chief Justice Marshall answered, "no":

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true that it must take jurisdiction if it should. The judiciary *cannot*, as the legislature may, *avoid a measure because it approaches the confines of the constitution*. We *cannot pass it by because it is doubtful*. With *whatever doubts,* with *whatever difficulties*, a case may be attended, *we must decide it*, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be *treason to the constitution*. Questions may occur which *we would gladly avoid*; but we *cannot avoid them*. All

297. *Id.* at 410, 415.

298. *Id.* at 381 (emphasis added).

299. *Id.* at 377, 414, 441, 446; *see id.* at 387, 394, 442 (premising conclusions on what it is "reasonable to expect" and on a "reasonable construction" of the Constitution).

300. *Id.* at 386–87, 404–05; *see id.* at 304–07 (reprising argument of counsel).

> we can do is, to exercise our *best judgment, and conscientiously to perform our duty*.[301]

AEDPA deference recapitulates each of the "baneful" implications of Virginia's argument that Marshall firmly rejected as contrary to Article III and the Supremacy Clause. It likewise recapitulates all of the obstructions to the effectuation of federal judges' best constitutional judgments that the Court rejected in *Hayburn's Case*, *Gordon*, and *Plaut*. In particular, Chief Justice Marshall's conclusion anticipates and rejects—its negative answer applies directly and without emendation to—AEDPA deference. By requiring federal courts to "pass" on state-court constitutional violations that are "doubtful," "difficult," not "extreme," or that "approach the confines" of the rights the Constitution assures, AEDPA deference commands "treason to the Constitution."

C. A History Lesson Read Right and Wrong

Professor Henry Hart's Dialogue—a staple of all seven editions of his and Herbert Wechsler's canonical textbook *The Federal Courts and the Federal System* and a rite of passage for generations of lawyers as they first encounter Article III[302]—famously encapsulated the problem the Framers faced and their risky solution: "In the

---

301. *Id.* at 404 (emphasis added); *see* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 430 (2024) (Gorsuch, J., concurring) ("This duty of independent judgment is perhaps 'the defining characteristi[c] of Article III judges.'" (quoting Stern v. Marshall, 564 U.S. 462, 483 (2011))); *id.* ("No matter how 'disagreeable that duty may be' . . . a judge 'is not at liberty to surrender, or to waive it.'" (quoting United States v. Dickson, 40 U.S. 141, 162 (1841))).

James Madison stood by his Constitution when his home state challenged it in *Martin* and *Cohens*. Writing to Thomas Jefferson, Madison deemed "essential to an adequate System of Govt." the "provision within the Constitution for deciding in a peaceable & regular mode all cases arising in the Course of its operation." The Convenors "intended the Authority vested in the Judicial Department as a final resort in relation to the States, for cases resulting to [the federal judiciary] in the exercise of its functions" with its judges' "oaths & official tenures . . . guaranteeing their impartiality." Proof of "this intention is expressed by the articles declaring that the federal Constitution & laws shall be the supreme law of the land, and that the Judicial power of the U.S. shall extend to all cases arising under them." Letter from James Madison to Thomas Jefferson (June 27, 1823), *in* 3 THE PAPERS OF JAMES MADISON, RETIREMENT SERIES 82 (David B. Mattern et al. eds., 2009).

302. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 690 (1989) (reviewing PAUL BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d. ed. 1988) ("By the sheer breadth and depth of their presentation, Professors Hart and Wechsler succeeded in defining the pedagogic canon of what has come to be one of the most important fields of public law . . . .").

scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights . . . . If they were to fail, and if Congress had taken away the [federal judiciary's] appellate jurisdiction . . . then we really would be sunk."[303] Luckily, though, Congress always has provided federal appeals. But what "if Congress gives jurisdiction but puts strings on it" placing "the *way* of exercising jurisdiction . . . in question, rather than its denial . . . "?[304] In that situation, Hart said, "the constitutional tests are different . . . . [I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court how to decide it" as the Supreme Court made "clear long ago in *United States v. Klein*."[305] "In reviewing state court decisions," Hart concluded, "Congress can't shut the Supreme Court off from the merits and give it jurisdiction simply to reverse [or, presumedly, to affirm]. Not, anyway, if I'm right . . . that jurisdiction always is jurisdiction only to decide constitutionally."[306]

Hart wrote his celebrated dialogue in 1953, the same year the Court addressed the Constitution's bearing on local factionalism tainting state defendants' right to trial by racially integrated juries in *Brown v. Allen*.[307] *Brown*'s holding bore out Hart's confidence that the gamble the Framers took paid off. Review by independent federal judges exercising the "whole judicial power"[308] would "restrain or correct"[309] the "very errors, partialities, or defects, in state jurisprudence" and state practice "against which the constitution intended to protect the individual."[310]

A decade later, Professor Bator assailed as ahistorical and wrong the *Brown* Court's (1) exercise of habeas jurisdiction to reach *all* state "custody in violation the Constitution" and (2) extension to federal habeas judges of the judicial power independently to apply "all" constitutional law—including that elucidated through non-deferential application of the Constitution to the facts of jury-discrimination and involuntary-confession claims—and to carry that law into effect by issuing the writ and overturning the offending

303. Hart, *supra* note 235, at 1401.
304. *Id.* at 1372 (emphasis in original).
305. *Id.* at 1372–73 (emphasis omitted) (citing United States v. Klein, 80 U.S. 128 (1872)).
306. *Id.* at 1401–02.
307. Brown v. Allen, 344 U.S. 443 (1953) (discussed *supra* notes 165–167).
308. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173 (1803).
309. THE FEDERALIST NO. 80, *supra* note 68, at 476 (Alexander Hamilton).
310. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 369–70 (1816).

state-court decision whenever custody violates the Constitution.[311] The analysis above demonstrates, however, that, across several score habeas cases and the pantheon of the Court's judicial-power and Supremacy-Clause decisions, it is Bator's analysis that is ahistorical and wrong—especially its fundamental premise that habeas cases deserve *less* than the judicial power because they involve people finally adjudged criminal by state judges. Bator turns on its head Madison's cardinal case for the Constitution's solution to local factionalism: Article-III court review of "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury," so as to assure the Constitution's supremacy.[312] Bator's proposal and the Court's interpretation of AEDPA to make the reasonable but constitutionally wrong decisions of the judges of every State supreme in the cardinal cases—anything in the Constitution of the United States notwithstanding—are utterly untenable.[313]

---

311. Bator, *supra* note 168 (cited in Brown v. Davenport, 596 U.S. 118, 129 (2022); Wright v. West, 505 U.S. 277, 285–86 (1992) (plurality opinion); Edwards v. Vannoy, 593 U.S. 255, 277–78 (2021) (Thomas, J., concurring); *id.* at 290–91 (Gorsuch, J., concurring)). For opinions dismantling Bator's argument, see *Brown v. Davenport*, 596 U.S. at 154–58 (Kagan, J., dissenting), and *Wright*, 505 U.S. at 298–306 (1992) (O'Connor, J., concurring in the judgment).

312. 1 Farrand, *supra* note 4, at 124.

313. A number of judges and scholars have questioned AEDPA's constitutionality. *See, e.g.*, Evans v. Thompson, 524 F.3d 1, 1–4 (1st Cir. 2008) (Lipez, J., dissenting from denial of rehearing en banc); Crater v. Galaza, 508 F.3d 1261, 1261–62 (9th Cir. 2007) (Reinhardt, J., dissenting from denial of rehearing *en banc*); Irons v. Carey, 505 F.3d 846, 856–57 (9th Cir. 2007) (Noonan & Reinhardt, JJ., concurring); Davis v. Straub, 445 F.3d 908, 908–11 (6th Cir. 2006) (Martin, J., dissenting from denial of rehearing *en banc*); O'Brien v. DuBois, 145 F.3d 16, 21 (1st Cir. 1998); Lindh v. Murphy, 96 F.3d 856, 885–90 (7th Cir. 1996) (en banc) (Wood, J., dissenting, joined by Ripple & Rovner, JJ.), *rev'd on other grounds*, 521 U.S. 320 (1997); Drinkard v. Johnson, 97 F.3d 751, 767–69 (5th Cir. 1996) (Garza, J., dissenting), *cert. denied*, 520 U.S. 1107 (1997), *overruled*, United States v. Carter, 117 F.3d 262 (5th Cir. 1997); Figueroa v. Walsh, 2008 U.S. Dist. LEXIS 35845, at *23, *25 (E.D.N.Y. May 1, 2008); Evan H. Caminker, *Allocating the Judicial Power in a "Unified Judiciary" (Restructuring Federal Courts)*, 78 TEX. L. REV. 1513, 1540–41 & n.98 (2000); Marcia Coyle, *Sotomayor Says Congress Should Not Tell Judges How to Review Cases*, NAT'L L.J. (Nov. 19, 2015) (quoting Justice Sotomayor questioning AEDPA deference); Muhammad U. Faridi, *Streamlining Habeas Corpus While Undermining Judicial Review: How 28 U.S.C. Sec. 2254(d)(1) Violates the Constitution*, 19 ST. THOMAS L. REV. 361, 364 (2006); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2467, 2470, 2474 (1998); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty*

Back in 1953, Hart distilled the same truth from a simple reading of the habeas statute in light of Articles III and the Supremacy Clause, identifying the full judiciary's spot-checking review of state-court decisions on habeas as the Madisonian compromises' central triumph over local factionalism and as proof that, in that perpetual struggle, we are not sunk. He wrote:

> The great and generating principle of this whole body of law [is] that *the Constitution always applies when a court is sitting with jurisdiction in habeas corpus*. For then the court has always to inquire, not only whether the statutes have been observed, but whether the petitioner before it has been "deprived of life, liberty, or property, without due process of law," or injured in any other way in violation of the fundamental law.
>
> . . . .
>
> That principle forbids a constitutional court . . . from *ever accepting* as an adequate return to the writ the *mere statement that what has been done is authorized by act of Congress*. The inquiry remains, if *Marbury v. Madison* still stands, whether the act of Congress is consistent with the fundamental law. Only upon such a principle could the Court reject, as it surely would, a return to the writ which informed it that the applicant . . . lay stretched upon a rack with pins driven in behind his finger nails pursuant to authority duly conferred by statute . . . .[314]

Written when (as is true today) incursions on the judicial power often arose in separation-of-powers, not federalism, contexts,[315] Hart's Dialogue also shows that the judicial power is the same in both contexts. As Professor Monaghan (citing Hart) wrote in his article cited in *Loper*,[316] the "deference" forbidden by Article III occurs whenever a federal court's legal "judgment" is "displace[d]" by *any*

Act and the Prison Litigation Reform Act, 47 DUKE L.J. 1, 33 (1997); Vázquez, *supra* note 175, at 32–36; Young, *supra* note 256, at 319–21. *See also Lindh*, 96 F.3d at 871 (majority opinion of Easterbrook, J.) (rejecting argument that AEDPA deference offends "the 'judicial Power of the United States' . . . to interpret the law independently" because that "would mean that deference in administrative law under *Chevron* is [also] unconstitutional").

314. Hart, *supra* note 235, at 1393–94 (emphasis added).

315. *See supra* notes 216, 220, 234, 249, 254, 258, 260, 266 (citing Article-III decisions since the 1870s arising in separation-of-powers contexts); *infra* note 434 (same).

316. *See* Monaghan, *Marbury*, *supra* note 22 (discussed *supra* note 194 and accompanying text).

non-Article III authority—whenever any authority "not the [federal] court, supplies at least part of the meaning of the law."[317] Displacement vel non also explains why constitutional rules based on an action's "reasonableness" do not raise Article-III problems[318]—unless they require a federal court to cede part of the Constitution's meaning to a non-Article-III actor.[319] For example, a federal-court determination that a criminal defense lawyer's representation was "reasonable" in keeping with the Sixth Amendment[320] turns on a variety of factors, but the reasonableness judgment is the federal court's alone.

III. *LOPER BRIGHT*: THE NEW CONSTITUTIONALIST'S NEW LIGHT ON AEDPA DEFERENCE

A. The New Constitutionalism and the Emperor's New Clothes

In *Williams v. Taylor*, Justice Stevens read section 2254(d)(1) to require the same "*Skidmore* respect" for state court decisions that *Loper* now requires federal courts, in lieu of *Chevron* deference, to pay to agency interpretations of law.[321] Federal courts, Stevens wrote, must "attend to every state-court judgment with utmost care, but . . . not . . . defer to the opinion of every reasonable state-court judge on the content of federal law."[322] After "carefully weighing all the reasons for accepting a state court's judgment," if "a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution, that independent judgment

317. *Id.* at 5; *see id.* at 3 (premising the article on the "'no-deference' thesis" in Hart's "widely and rightly praised" Dialogue); *id.* at 31 n.186, 32 (applying the same Article-III principles in "separation of powers" and "federalism context[s]").

318. *See id.* at 28–29 (making a similar point in the separation-of-powers context).

319. *See infra* notes 436–440 and accompanying text (extending this point to other cause-of-action elements).

320. Strickland v. Washington, 466 U.S. 668, 681 (1984) (defining Sixth-Amendment effective assistance of counsel).

321. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 386–88 (2024) (directing federal courts to give "'respectful consideration'" to "'body of experience and informed judgment'" federal agency exhibited in interpreting federal law (quoting United States v. Moore, 95 U.S. 760, 763 (1878); Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944))).

322. Williams v. Taylor, 529 U.S. 362, 389 (2000) (Stevens, J., concurring).

should prevail." Otherwise, the Constitution "might be applied by the federal courts one way in Virginia and another way in California."[323]

Skidmore respect is not, however, what the Court now requires Article-III judges to apply in habeas cases.[324] Instead, when applying AEDPA deference, federal judges (in Justice Gorsuch's phrase in *Loper*) must "almost reflexively defer."[325] A federal habeas court "may grant relief only if *every 'fairminded juris[t]*' would agree"[326] with the Article-III judge's best judgment that a prisoner is in custody in violation of the Constitution and that the state judges who upheld the custody did so in "clear [constitutional] error."[327] Although "federal judges . . . might have reached a different conclusion had they been presiding," "simple disagreement does not overcome the . . . deference owed by a federal habeas court."[328] To justify this review standard, which is "intentionally 'difficult to meet'"[329]—a standard that requires federal courts to correct only "'error well understood and comprehended in existing law beyond any possibility of fairminded disagreement'"—the Court cites "respect" for "the authority and ability of state courts and their dedication to the protection of constitutional rights."[330] "Under AEDPA, state courts play the leading role."[331]

As laid out above, elevating state courts over federal courts in the constitutional hierarchy is an arrangement the Convenors deliberately rejected.[332] Holding that the Constitution "has provided no tribunal for the final construction of itself" and "that this power may be exercised in the last resort by the Courts of every State in the Union" is precisely the state of affairs Chief Justice Marshall in

323. *Id.* at 389–90; *see supra* notes 17–18 and accompanying text (describing *Skidmore* respect).

324. *Loper*, 603 U.S. at 386, 399 ("'Respect' [under *Skidmore*] was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it"; "a judge 'certainly would not be bound to adopt' [an agency's interpretation]" or give it "*binding* deference . . . ." (quoting Decatur v. Paulding, 39 U.S. 497, 515 (1840)).

325. *Id.* at 2287 (Gorsuch, J., concurring).

326. Dunn v. Reeves, 594 U.S. 731, 740 (2021) (emphasis added) (quoting Harrington v. Richter, 562 U.S. 86, 101 (2011)).

327. Woods v. Donald, 575 U.S. 312, 316 (2015).

328. White v. Wheeler, 577 U.S. 73, 80 (2015) (per curiam).

329. *Woods*, 575 U.S. at 316.

330. Shoop v. Hill, 586 U.S. 45, 48 (2019).

331. Shinn v. Kayer, 592 U.S. 111, 124 (2020).

332. *See supra* notes 81–113 and accompanying text; *infra* Appendix A (discussing the Convenors' compromise in placing federal courts above state courts).

Cohens (on review of criminal convictions) and Justice Story in *Martin* rejected on Article-III and Supremacy-Clause grounds[333]—not least because it leaves the Constitution with "as many constructions as there are States."[334] Mandating deference that keeps federal judges on appeal from carrying into effect their best interpretation of the Constitution "had they been presiding" at trial is the opposite of Chief Justice Marshall's insistence in *Bollman* that habeas judges "do that which the court below *ought* to have done."[335] "[R]equiring the unanimous consent"[336] of all reasonable state and federal judges before any one federal judge or panel may independently decide the case and carry its decision into effect violates the noninterference and full-constitutional-case-consideration requirements of *Hayburn's Case*, *Marbury*, *Gordon*, *Klein*, and *Plaut*.[337] Freeing federal judges from responsibility to inquire into the Constitution at all in cases arising under it and forbidding them to exercise their best judgment in deriving the Constitution's full normative content from its "application" to the facts to "liquidate" its meaning violates the full-constitutional-law-consideration requirements of *Marbury*, *Martin*, *Osborn*, *Klein*, *Crowell*, and *Norris*.[338] Worst of all, requiring federal judges faced with "difficulties" posed by a constitutional question "approach[ing] the confines of the constitution" to "pass it by because it is doubtful" is what Chief Justice Marshall called treason to the Constitution.[339]

Is it not obvious, then, as in Hans Christian Andersen's tale, that the emperor has no constitutional clothes?[340]

The run-up to the Court's *Loper* decision overturning "*Chevron* deference" was cut from New Constitutionalist cloth. Under the *Chevron* "two-step," a federal court reviewing agency action would "first assess 'whether Congress has directly spoken to the precise

333. *See supra* Sections II.B.2, II.B.4 (discussing *Martin v. Hunter's Lessee* and *Cohens v. Virginia*).

334. Cohens v. Virginia, 19 U.S. 264, 377 (1821).

335. *Ex parte* Bollman, 8 U.S. 75, 114, 125 (1807) (emphasis added).

336. Drinkard v. Johnson, 97 F.3d 751, 779 (5th Cir. 1996) (Garza, J., dissenting) (criticizing AEDPA deference), *cert. denied*, 520 U.S. 1107 (1997), *overruled* on other grounds *by* United States v. Carter, 117 F.3d 262 (5th Cir. 1997).

337. *See supra* Section II.B (discussing noninterference and full-constitutional-case-consideration requirements).

338. *See id.* (discussing full-constitutional-law-consideration requirements).

339. *Cohens*, 19 U.S. at 404.

340. HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (Naomi Lewis trans., 1st ed. 1997).

question at issue,'" and, if so, would enforce Congress' "'clear'" intent. If, though, "'the statute is silent or ambiguous with respect to the specific issue,' the court [would], at *Chevron*'s second step, defer to the agency's interpretation" if it was reasonable—even if it was not the Article-III court's best independent interpretation of the statue.[341] In the two consolidated cases on appeal in *Loper*, federal circuit courts had denied ocean fishermen de novo review of Commerce Department regulations requiring the fishermen to pay heavy fees covering the cost of government monitors—fees the fishermen petitioners alleged were outside the authority of the Commerce Department to require.[342] Both circuit courts found the statutory questions close and difficult and—following the forty-year-old *Chevron* decision with its seventy-odd Supreme Court and 18,000 lower-court precedents[343]—deferred to the Department's "reasonable" reading of the statute.[344] Through former Solicitor General Paul Clement and an array of New Constitutionalist legal defense funds and scholars (among others),[345]

341. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 379, 384, 414 (2024) (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984)).

342. Relentless, Inc. v. Dep't of Com., 62 F.4th 621, 626–28, 634 (1st Cir. 2023); Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 364–66, 370 (D.C. Cir. 2022); *see* Brief for Petitioners at 47–48, Loper Bright Enters. v. Raimondo, 114 S. Ct. 2244 (2024) (No. 22-451) [hereinafter Petitioners' Brief, *Loper*] (discussing the decision below). Highlighting the factionalism risk posed by non-Article-III decisionmakers that explains the constitutional requirement of independent federal-court review, the petitioners—small-scale East Coast fisheries—claimed that the hefty fees left them at a competitive disadvantage to the larger, wealthier Alaskan fisheries to which, in their view, the statute intended to limit those fees. Brief for Petitioners at 8, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2024) (mem.) (No. 22-1219) [hereinafter Petitioners' Brief, *Relentless*].

343. *Loper*, 603 U.S. at 472 (Kagan, J., dissenting).

344. *Relentless*, 62 F.4th at 634; *Loper*, 45 F.4th at 370.

345. Amici for the fishermen included the America First, Atlantic, New England, Landmark, Mountain States, National Right to Work, Pacific, Southeastern, and Washington Legal Foundations; the America First Policy, American Cornerstone, Buckeye, Cato, Competitive Enterprise, Goldwater, and Manhattan Institutes; American Center for Law and Justice and Center for Constitutional Jurisprudence; the New Civil Liberties Alliance; and U.S. Senator Ted Cruz, Congressman Mike Johnson, and thirty-four other Members of Congress. *See Loper Bright Enterprises v. Raimondo*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/loper-bright-enterprises-v-raimondo [https://perma.cc/M6U9-3W93] (listing briefs amici curiae in *Loper*); *Relentless, Inc. v. Department of Commerce*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/relentless-inc-v-department-of-commerce [https://perma.cc/4776-6QYP] (same).

petitioners argued that *Chevron* had been constitutionally unclothed from the start and that federal courts' agency review should return to the prior, non-acquiescent rule of *Skidmore*.[346]

Representing the New Civil Liberties Alliance (NCLA), Columbia Law Professor Philip Hamburger—a *Chevron* critic[347] and credentialed New Constitutionalist—was counsel on petitioner's brief in one of two consolidated cases and on an *amicus* brief in the other. "No clothes!" cries abound in both briefs: "[*C*]*hevron* is egregiously wrong several times over";[348] "Courts would not tolerate *Chevron*'s abandonment of independent judgment in any other context—even if it were commanded by statute and even if Congress commanded deference to a truly expert body."[349] The Court, NCLA argued, should declare the reigning doctrine jurisprudentially naked and dead: "Rather than just discard *Chevron*, this Court should candidly confess its *Chevron* error. The Court has for so long refused to repudiate *Chevron* that its glaring injustices have come to seem an almost ineradicable stain on the reputation and legitimacy of the judiciary."[350] "Only such candor can show that this Court is committed to restoring the judges' duty of independent judgment under Article III."[351] The Court obliged, "plac[ing] a tombstone on

346. *See, e.g.*, Petitioners' Brief, *Loper*, *supra* note 342, at 23 ("*Chevron* is egregiously wrong."); Petitioners' Brief, *Relentless*, *supra* note 342, at 39–40 (advocating for a return to *Skidmore* deference).

347. *See* Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1197 (2016) (criticizing *Chevron* for violating federal courts' duty of independent judgement and for systematically biasing their judgment in the government's favor).

348. Petitioners' Brief, *Loper*, *supra* note 342, at 15.

349. NCLA Brief, *Loper*, *supra* note 55, at 8. Raising the "spirit of party and faction" (THE FEDERALIST NO. 10, *supra* note 3, at 79 (James Madison)) twenty-first-century style, NCLA challenged the *Loper* Court to

> [i]magine that a statute established a committee of expert law professors and instructed the federal judiciary to "defer" to that committee's announced interpretations of a category of federal statutes so long as they were "reasonable." Or imagine the statute directed the courts to interpret legislation by bowing to the legal interpretations of *The New York Times*'s editorial board. Such statutes would be laughed out of court, summarily declared as gross violations of Article III and a perversion of the independent judgment the Constitution requires of the judiciary.
>
> Yet *Chevron* operates precisely the same way.

NCLA Brief, *Loper*, *supra* note 55, at 8–9 (footnotes omitted).

350. *Id.* at 5.

351. *Id.*

Chevron no one can miss" and—with "'humility'"—"admitting . . . our own mistakes."[352]

B. AEDPA Unclothed

Section 2254(d) is likewise constitutionally unclothed—far more so than *Chevron*, even as *Chevron* is portrayed in its harshest denunciations by the *Loper* litigators. (1) The first table below lays out a compendium of core constitutional principles to whose violation, the New Constitutionalists argued in *Loper*, *Chevron* deference had blinded the Court and the public. The table substitutes "AEDPA" for "*Chevron,*" "state judges" for federal "agencies," "Constitution" for "statute," and "Supremacy Clause" for "Article II," to show that the unconstitutionality of AEDPA deference under Article III and the Supremacy Clause is exposed at least as powerfully—in many respects more powerfully—than the unconstitutionality of *Chevron* deference argued in *Loper*. In the second and third tables, which make the same substitutions, the *Loper* arguments likewise illustrate (2) how AEDPA deference distorts state- and federal-court decision-making analogously to how *Chevron* was said to have distorted agency and federal-court decision-making and (3) how the constitutional shortcomings of *Chevron* deference pale to relative insignificance compared to those of AEDPA deference.

Essential features of the judicial power that AEDPA denies	Constitutional critiques of *Chevron* deference that as, or more, powerfully condemn AEDPA deference
Saying what the *law is*	"[AEDPA] has thus become an impediment . . . to accomplishing the basic judicial task of 'say[ing] what the law is.'"[353] (*Loper*)
Exercising independent judgment	"[AEDPA violates] the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that [federal] courts decide legal questions by applying their own judgment."[354] (*Loper*)
	"[W]hat most clearly necessitates overturning [AEDPA] is that it requires the judges themselves to violate the Constitution." It "compels the Court to

352. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 417 (2024) (Gorsuch, J., concurring); *id*. at 411 (majority opinion).

353. *Id*. at 410 (majority opinion) (citation omitted).

354. *Id*. at 391–92.

	persistently violate its own constitutional obligations under Article III and [the Supremacy Clause]." It "directs Article III judges to abandon even the pretense of independent judgment by giving automatic and often dispositive weight to [state judges'] interpretation of [the Constitution]. It forces federal judges to acquiesce in [state judges'] view of the law—even when the courts themselves disagree with [that] view." It "imposes deference on lower court judges [who] are thus invidiously compelled to depart from their independent judgment. And when judges acquiesce in [AEDPA] deference, they unconstitutionally abandon their very office as judges." "This is a gross dereliction of duty and a violation of Article III."[355]
	"[AEDPA] says that even if all nine of you agree with us that [a state judge's] construction is worse than ours, you should nonetheless defer to the construction and uphold their [decision]."[356]
Independently *interpreting* the *whole* law (including "liquidating" its normative content by applying it to the facts)	"[AEDPA] defies these [Article-III] principles by telling judges to defer to inferior-but-tenable [state-court] interpretations of ambiguous federal [constitutional provisions]. Acquiescence is mandatory so long as the [state court's] interpretation falls within an ill-defined zone of reasonableness—even if the judge believes the [state court's] interpretation is wrong. [AEDPA] thereby forces judges to abdicate their most important duty: to faithfully apply the law."[357]
	"When applying [AEDPA] deference, reviewing [federal] courts do not interpret all relevant [constitutional] provisions and decide all relevant questions of law. Instead, [federal] judges abdicate a large measure of that responsibility in favor of [state judges, whose] interpretations of 'ambiguous' laws

355. NCLA Brief, Loper, *supra* note 55, at 5–6, 7–8, 22.

356. *Relentless* OA Tr., *supra* note 28, at 5.

357. Petitioners' Brief, *Relentless*, *supra* note 342, at 12–13; *see also id*. at 17–19 (citing cases in which the Court acknowledges Article-III judges' responsibility to exercise independent judgment, including *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Stern v. Marshall*, 564 U.S. 462, 483 (2011); *Crowell v. Benson*, 285 U.S. 22, 60 (1932); and *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936)).

	control even when those interpretations are at odds with the fairest reading of the law an independent 'reviewing court' can muster."[358] (*Loper*, Gorsuch, J., concurring)
	"[AEDPA] directly interferes with judges' Article III duty to apply their own independent judgment when saying what the law [decreed by the Constitution] is . . . . Applying independent judgment requires judges to consider the text, history, purpose, and precedent of the federal law at hand, and to faithfully give effect to what they determine is the *best* interpretation of that law."[359]
	In "application of law to fact," AEDPA withdraws from Article-III judges the "legal component of that question"; "there's an important legal component to that question, that in any other context, like, for example, if you were interpreting the Constitution, I think the court would quite reasonably think it's its own job to interpret the constitutional requirement of interstate commerce and give its best meaning."[360]

358. *Loper*, 603 U.S. at 427 (Gorsuch, J., concurring).

359. Petitioners' Brief, *Relentless*, *supra* note 342, at 2–3; *see* Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to 'say what the law is.'" (citations omitted)).

360. *Relentless* OA Tr., *supra* note 28, at 30–32, 10. During oral argument, Chief Justice Roberts (*id.* at 9–10) and Justices Kavanaugh (*id.* at 58–59) and Barrett (*id.* at 31–33) and former Solicitor General Clement distinguished terms through which Congress makes "express delegations" to agencies (e.g., authority to set "reasonable" utility rates or "appropriate limits" on length of trucks) from terms with both factual and normative content posing legal questions (e.g., is a communications medium an "information service" or "telecommunication service"; is an ingestible a "dietary supplement" or "drug"?). Transcript of Oral Argument at 8–9, 85–87 (Clement), Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (No. 22-451) [hereinafter *Loper* OA Tr.]. Under law predating *Chevron* and accepted by all parties in *Loper*, Congress uses the former terms to delegate its law-making function to an expert agency. *See Loper*, 603 U.S. at 395, 404 (approving prior caselaw requiring federal judges "to independently identify and respect such delegations" while "polic[ing] the[ir] outer statutory boundaries"). In the latter, mixed-question situation, the *Loper* Court and petitioners noted, federal courts' "good old-fashioned [de novo] construction" is required. *Loper* OA Tr., *supra*, at 8–9, 86–87 (Paul Clement); *see Loper*, 603 U.S. at 431 (Gorsuch, J.,

Independently deciding the *whole case*	"[AEDPA deference is] the only [standard of review] I know that says that at a certain point you just stop the de novo stuff and you sort of surrender, even under circumstances where, if the [state] weren't a litigant, you would keep going. Only [AEDPA deference] does that"; "the problem [is] with deferring at a certain point to the [state decision]"; "essentially telling the courts in [28 U.S.C. § 2241] specifically you have interpretive authority over . . . constitutional issues but then . . . at a certain point, you stop doing [constitutional] interpretation, even though you think there's a better answer, and you defer to a different branch of government."[361]
	"[I]f you use all the traditional tools of [constitutional] interpretation, you'll get an answer, and we know that because, in cases where we don't have [AEDPA deference] involved and we use those same traditional tools, we get an answer. So how do we deal with" a doctrine requiring less than that?[362] (Kavanaugh, J.)
	AEDPA "eviscerate[s] independent judicial review, as it did here, by causing a court to throw in the interpretive towel as soon as it sees a purported 'silence' on the face of [the Constitution]."[363]

concurring) ("[A]s the Court details," "so-called mixed questions of law and fact" are subject to the "normal and usual" rule of independent judicial review. (citing *id*. at 420–21 (majority opinion)). Of course, the Constitution's content is nondelegable except via the amendment process, ruling out the former situation (explicit delegation of discretion to agencies through terms such as "reasonable" or "appropriate") when a mixed question of fact and constitutional law arises. Elucidating the Constitution's meaning through its application to norm-exposing facts is a core component of the judicial power to exercise "independent judgment in interpreting and expounding upon the laws." Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 119 (2015) (Thomas, J., concurring); *see supra* notes 156–157, 161–164, 205–223 and accompanying text (describing the norm-elucidation function of independent judicial review of mixed legal and factual questions).

361. *Loper* OA Tr., *supra* note 360, at 6–7, 28, 44–45 (Paul Clement).

362. *Relentless* OA Tr., *supra* note 28, at 83–84.

363. Brief for the New England Legal Found. as Amicus Curiae Supporting Petitioners, at 17, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (No. 22-451).

Independently deciding *who wins* based on supreme law	"Nonetheless, seizing on the [Constitution's] 'silence' and purported 'ambiguity,'" and "[a]though the D.C. Circuit unanimously agreed that [the Constitution] never explicitly authorized this crushing regulation . . ., a panel majority upheld it under [AEDPA] anyway. That *result* is intolerable, and the Court should jettison [AEDPA deference]." "The right result here is clear: [AEDPA deference] should be overruled, and the decision should be reversed so that the liberty of the small [litigants] that pursued the matter all the way to this Court is secured."[364]
Carrying supreme law into *effect* by making it binding on the parties through an *adequate judicial remedy*	"Any decision that avoids frankly acknowledging [AEDPA's] patent constitutional defects would leave Americans without an adequate judicial remedy."[365]
	"[T]he [state] unilaterally imposed massive costs on . . . petitioners . . . without [constitutional] authority . . . . Nonetheless, the [federal] courts below applied [AEDPA deference] to uphold [an] implausible and self-serving interpretation"; "a court cannot perform [a] checking function unless it *enforces* its own best understanding of what the law requires"; "Citizens should be able to rely on the *best* interpretation of [the] federal [Constitution]—and on the judiciary's willingness to enforce that interpretation."[366]
Deciding the case *neutrally* based on supreme law, undiminished by *partisanship, party, or faction*	"[AEDPA] systematically requires judges in their cases to favor the legal position of one of the parties—always the government party." "Judicial precommitment to accept one party's interpretation of a statute so long as it is reasonable and an express unwillingness to impartially consider the opposing party's position—even where its proposed [constitutional] interpretation is *more* reasonable—would be utterly disqualifying in any other circumstance." "The judiciary, however, routinely flouts these basic principles of justice and constitutional law by 'deferring' to [state judges'] interpretations of [the Constitution] under [AEDPA].

364. Petitioners' Brief, *Loper*, *supra* note 342, at 2, 52 (emphasis added).
365. NCLA Brief, *Loper*, *supra* note 55, at 29.
366. Petitioners' Brief, *Relentless*, *supra* note 342, at 4, 25, 43 (emphasis added).

	The judges defer under [AEDPA] even in cases where the court concludes another interpretation is more reasonable."[367]
	Article III "[j]udges are supposed to be impartial arbiters of law—not home-team umpires for the [state courts]." But AEDPA petitioners "face [federal] appellate courts primed and inclined to affirm any [state] action imposed on them."[368]
	"[AEDPA] deference requires courts to 'place a finger on the scales of justice in favor of the most powerful of litigants, the . . . government.'"[369] (*Loper*, Gorsuch, J., concurring) "[W]hat niggles at so many of the lower court judges—are the immigrant, the veteran seeking his [relief], who have no power to influence [state courts], who will never capture them, and whose interests are not the sorts of things on which people vote. And . . . I didn't see a case . . . where [AEDPA deference] wound up benefitting those kinds of people."[370] (*Loper*, Gorsuch, J., concurring)
	"In a liberty-loving Republic, one would expect that, whenever there is doubt about whether the [state] has authority over the governed, the tie would go to the citizenry—as is true in other contexts. *Cf. United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (rule of lenity [in criminal cases]). But [AEDPA] quite literally erects the opposite rule for breaking not only ties, but anything deemed 'ambiguous.'"[371]

367. NCLA Brief, *Loper*, *supra* note 55, at 3–4, 12–13 (citation omitted).

368. Petition for Writ of Certiorari at 25, 30, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2024) (mem.) [hereinafter *Relentless* Cert. Petition].

369. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 433 (2024) (Gorsuch, J., concurring) (citation omitted).

370. *Relentless* OA Tr., *supra* note 28, at 132–33.

371. Petitioners' Brief, *Loper*, *supra* note 342, at 38; *see id.* at 16 ("*Chevron*'s primary victim is the citizenry, as *Chevron* literally gives the tie to regulators in every close case.").

Binding non-Article-III actors to *supreme law*	"Until [AEDPA], this Court had recognized no major carveout to Article III's investment of judicial power in the Judiciary when it came to reviewing [non-Article-III actors'] interpretations of law. In the wake of [AEDPA], however, this Court's . . . jurisprudence has lost its way, outsourcing the judiciary's core responsibility to a [non-Article-III] branch of government."[372]
	"A court may, of course, adopt [a non-Article-III authority's decision], but only by exercising the judicial power which requires independently judging that the interpretation is correct." "[AEDPA's] abdication of power is clearly at odds with the Constitution."[373]

How AEDPA distorts the legal process	How *Chevron* deference is said to distort the legal process
Inviting state courts to limit constitutional rights aggressively[374]	"Because [AEDPA deference] remains on the books, [state judges] continue to churn out [decisions] premised on aggressive, newfound readings of [the Constitution], and lower [federal] courts continue to feel obligated to afford '[AEDPA] deference' unless and until this Court explicitly says otherwise."[375]

372. Brief for Former Supreme Court Justices Andrew W. Gould et al. as Amici Curiae Supporting Petitioners at 16, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2024) (mem.) (No. 22-1219).

373. Brief for the Found. for Gov't Accountability as Amicus Curiae Supporting Petitioners at 5–6, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (No. 22-451).

374. *See* Fallon & Meltzer, *supra* note 162, at 1816–17 ("[D]isabling federal habeas courts from granting relief whenever reasonable disagreement is possible . . . reduces the incentives for state courts, and state law enforcement officials, to take account of the . . . law"). For examples of state courts "embolden[ed]" by Supreme Court AEDPA-deference decisions upholding questionable state-court interpretations, see Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 228 & nn.93–95 (2008).

375. Petitioners' Brief, *Loper*, *supra* note 342, at 1–2. In applying AEDPA, the Court rarely "says otherwise." As Appendix D documents, the Court reversed lower-court exercises of deference favoring the state in only two (9%) of its twenty-three AEDPA-deference decisions over the decade preceding the drafting of this Article.

	AEDPA deference "has taken this Court to the precipice of [state-judge] absolutism. Under its rule of deference, [state judges] are free to invent new (purported) interpretations of [the Constitution] and then require [Article III] courts to reject their own prior interpretations."[376]
"Distort[ing] the judicial process,"[377] impeding the development and uniformity of supreme law by (1) inviting federal judges to forgo saying what the Constitution means,[378] even when (2) state judges (a) forgo "citation" or lack "even . . . *awareness* of [controlling Supreme Court] cases";[379] (b) "appl[y]	"[AEDPA] deference undermines the 'evenhanded, predictable, and consistent development of legal principle' . . . by directing courts, upon a finding of ambiguity, to avoid definitively declaring what a law means," which "ensures the law remains ill-defined and subject to politically expedient [state-court] reversals and reinterpretations"; "renders the law unpredictable by requiring courts 'to overrule their own declarations about the meaning of existing law in favor of interpretations dictated by [state judges]'"; and "encourages lower-court judges to invent new theories of deference[ ] to avoid deciding questions of law."[382]

376. Brief for the Competitive Enter. Inst. as Amicus Curiae Supporting Petitioners at 8, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (No. 22-451) (quoting Baldwin v. United States, 140 S. Ct. 690, 695 (2020) (mem.) (Thomas, J., dissenting)).

377. *Relentless* OA Tr., *supra* note 28, at 3 (Martinez for Relentless).

378. As Appendix D shows, the Supreme Court failed to resolve the constitutional merits in half of its AEDPA-deference decisions between 2000 and the end of 2024, a figure rising to 83% in the last ten years. Federal Circuits, except for the Second, follow the same practice. *Cf.* Kruelski v. Connecticut Super. Ct., 316 F.3d 103, 106 (2d Cir. 2003) ("[I]t is often appropriate in considering a habeas petition under the AEDPA for the federal court to . . . first . . . determine[ ] the correct interpretation of Supreme Court precedent" and only then decide whether the state court's understanding or application of that precedent was reasonable.). *See* Irons v. Carey, 505 F.3d 846, 856 (9th Cir. 2007) (Noonan, J., concurring) (arguing that AEDPA deference discourages federal-court development of constitutional precedent, constituting "direct legislative interference in the independence of the [federal] judiciary"); Lynn Adelman & Jon Deitrich, *Saying What the Law Is: How Certain Legal Doctrines Impede the Development of Constitutional Law and What Courts Can Do About It*, 2 FED. CTS. L. REV. 87, 90–93 (2007) (documenting ways AEDPA deference "thwarts the development of constitutional law"); Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 537, 627–32 (1999) (providing examples of AEDPA deference "diminish[ing] the law-pronouncing function of the federal courts"); Shay & Lasch, *supra* note 374, at 228–36 (documenting examples of "AEDPA's freezing effect" on constitutional law's development).

379. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam).

a [legal] theory that was flat-out wrong";[380] and (c) decline to explain their decisions at all—given that federal courts must "'defer'" even "to a state-court determination that was in fact *never made*"[381]	AEDPA deference "openly subverts the 'evenhanded, predictable, and consistent development of legal principles.' It tells judges to resolve the closest and most difficult questions of [constitutional] interpretation not through careful attention to legal precedent or through the judges' finely honed legal judgment, but through obeisance to [local-interest-]driven judgments of [decisionmakers lacking Article-III courts' tenure and salary protection]." It "tell[s Article-III courts] to avoid definitively declaring what an ambiguous law means."[383]
Hydraulically driving ever-broader deference	"[State judges] are all reasonable. I mean, my goodness, the American people elect them. Of course, they're reasonable people. (Laughter)."[384] (Gorsuch, J.)
	Some federal circuit courts apply "[AEDPA deference] to allow [state judges] to do almost anything, unchecked by searching judicial review."[385]
	"The whole business of [constitutional] construction concerns[ ] text that at least one of the litigants perceives to be ambiguous. Thus, a doctrine that defers to [state judges] at the first sign of ambiguity is nothing short of an 'abdication of the judicial duty.'"[386]

382. NCLA Brief, *Loper*, *supra* note 55, at 22–23, 27–28 (citations omitted).

380. Johnson v. Williams, 568 U.S. 289, 310 (2013) (Scalia, J., concurring)

381. *Id*. (emphasis added); *see* Harrington v. Richter, 562 U.S. 86, 101 (2011) (ruling that AEDPA deference applies to unexplained state-court decisions, so that federal judge must imagine, then defer to, any *possible* explanation for the silent decision that a "fairminded" judge might have had for that outcome); *cf*. Frye v. Broomfield, 115 F.4th 1155, 1167 (9th Cir. 2024) (Mendoza, J., dissenting) ("[I]t boggles my mind . . . that Frye will remain on death row because a hypothetical fair-minded jurist could think that an imaginary harmlessness analysis is reasonable."); Chen, *supra* note 378, at 625 (describing how AEDPA incentivizes state judges to "cloud" and not "fully articulate their reasoning" because doing so "insulate[s] their decisions from [federal] review").

383. Petitioners' Brief, *Relentless*, *supra* note 342, at 42 (citations omitted).

384. *Relentless* OA Tr., *supra* note 28, at 94. On the frequency with which state judges with jurisdiction over criminal cases are elected, not appointed, see James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2069 & n.1115, 2080–81 & 139 (2000).

385. *Relentless* Cert. Petition, *supra* note 368, at 28.

386. Petition for Writ of Certiorari at 30, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (quoting Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2015) (Gorsuch, J., concurring)).

Ways that the constitutional harms posed by *Chevron* deference pale to relative insignificance compared to the harms licensed by AEDPA deference	
AEDPA deference	*Chevron* deference
Grants nearly plenary power to decisionmakers (state judges) whom the lawgiver (the Framers) distrusted due to their political and temporary commissions and susceptibility to faction and local bias[387] and designed the Supremacy Clause and Article III to restrain through appellate review by impartial and life-tenured federal judges[388]	Partially empowered decisionmakers (federal agencies with subject-matter expertise) whom the lawgiver (Congress) presumptively had determined were better situated to effectuate its directives in the relevant domain than were federal judges[389]
Always withdraws Article-III courts' independent interpretation, application, and effectuation of the Constitution's bearing upon the legality of the applicant's custody and the state-court decision upholding it[390]	Never limited Article-III courts' independent interpretation, application, or effectuation of the Constitution[391]

387. THE FEDERALIST NO. 22, *supra* note 119, at 151 (distrusting state judges because of their motivation to privilege "the particular laws" over "the general laws"); THE FEDERALIST NO. 78, *supra* note 36, at 471 (distrusting state judges because they "hold their offices by a temporary commission . . . fatal to their necessary independence" and are susceptible to suasion by faction and to "the bias of local views and prejudices").

388. THE FEDERALIST NO. 39, *supra* note 123, at 245–46 (preferencing Article-III judges vested with "the judicial power" of decision "impartially made, according to the rules of the Constitution" after taking "all the usual and most effectual precautions" (i.e., tenure and salary protections) "to secure this impartiality"); *see supra* notes 9–13, 325–331 and accompanying text (explaining how AEDPA deference affords state judges nearly plenary control over the Constitution's meaning in habeas cases).

389. *Compare* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 455–56 (2024) (Kagan, J., dissenting) (describing *Chevron* as having assumed that "Congress would choose an agency [to resolve statutory ambiguities], with courts serving only as a backstop . . . because agencies often know things about a statute's subject matter that courts could not hope to"); *with* Williams v. Taylor, 529 U.S. 362, 386–87 (2000) (Stevens, J., concurring) (distinguishing *Chevron* and AEDPA deference because agencies have expertise on statutory regulatory law that federal courts lack, but state courts have no advantage over federal courts in construing federal constitutional law).

390. 28 U.S.C. §§ 2241(c)(1), 2254(a).

Applies to *all* state-court determinations on the constitutional "merits"[392]	Applied only to agencies' interpretations of their own enabling statute *if* Congress had given the agency authority to make rules with the force of law, *if* the agency acted through the delegated mechanisms,[393] and except for "extraordinary cases" of "economic and political significance"[394]—and, even then, applied only at *Chevron* Step 2 if federal judges concluded at Step 1 that Congress left a "gap" for the agency to fill[395]
Is by far the preponderant basis on which affected cases are decided: AEDPA deference dictated the result in 85% of the seventy-two Supreme Court habeas decisions involving a state-court decision on the merits reviewed by the Court between 2000 and the end of 2024—a figure rising to 91% of those cases over the last ten years—with the Court at times indicating that the outcome might or would have been different had the Court reached its own independent constitutional judgment[396]	"This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016."[397]

391. *See Loper* OA Tr., *supra* note 360, at 64–65 (acknowledging that *Chevron* deference never applied to interpretation of the Constitution).

392. 28 U.S.C. § 2254(d).

393. United States v. Mead Corp., 533 U.S. 218, 231–34 (2001).

394. West Virginia v. EPA, 597 U.S. 697, 721–722 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–160 (2000)).

395. *Relentless* OA Tr., *supra* note 28, at 12–13, 18–20 (Kagan, J.) ("[A]t step 1," before getting to Step 2 deference, "you work hard to figure out a statutory problem. You don't say, oh, it's difficult [and defer; instead] you look at the text, look at legislative history [and] context, look at every tool you can.").

396. *See* Appendix D (collecting and analyzing Supreme Court's AEDPA-deference decisions). Decisions and opinions indicating that, absent deference, a constitutional violation might or would have been found and remedied include *Brown v. Davenport*, 596 U.S. 118, 145 (2022); *Dunn v. Madison*, 583 U.S. 10, 12 (2017) (per curiam); *Woods v. Donald*, 575 U.S. 312, 319 (2015); *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013); *Renico v. Lett*, 559 U.S. 766, 778 (2010); *Brown v. Payton*, 544 U.S. 133, 148–49 (2009) (Breyer, J., concurring); and *Woodford v. Visciotti*, 537 U.S. 19, 24–25 (2002) (per curiam).

397. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 406 (2024).

Leaves the Constitution's meaning in the hands of 30,000 state judges—perhaps the greatest betrayal of the Framers' unanimous support for a "right of appeal" of federal-question cases from state courts "to [a] national tribunal" in order "to secure the national rights & uniformity of Judgmts"[398] and (in Chief Justice Marshall's words) to achieve "uniformity, as well as correctness in expounding the Constitution"[399] and (in Justice Story's words) to avoid "truly deplorable" "public mischiefs" when judges "in different states . . . differently interpret" the Constitution[400]	Fostered national legal uniformity through one agency interpretation, rather than leaving lawmaking in the hands of twelve circuit courts and "800 district court judges"[401] (albeit with some "flip-flopping" "shocks . . . every four or eight years when a new administration comes in"[402])

C. Fig Leaves

So much for the child's "no clothes!" statement of the obvious. What of those cheering on the monarch and his unreal attire? What is their explanation? As detailed in the following Sections, two came up in the *Loper* argument and a few scholars have offered a third. None provides even a fig leaf of constitutional cover.

1. Merely Remedial

In the *Loper* companion-case oral argument, Solicitor General Elizabeth Prelogar sought to use AEDPA deference to bolster *Chevron* deference, calling both "deferential standards of review."[403] In response, Justice Gorsuch "wonder[ed] whether," in contrast to *Chevron*, AEDPA has "more to do with remedies[, i.e.,] that we

398. 1 Farrand, *supra* note 4, at 124 (John Rutledge); *see supra* notes 81–87, 106–113 and accompanying text (documenting Convenors' unanimous support for federal-court review of state-court decisions of federal law).

399. Cohens v. Virginia, 19 U.S. 264, 386, 388 (1821).

400. Martin v. Hunter's Lessee, 14 U.S. 304, 347–48 (1816).

401. *Relentless* OA Tr., *supra* note 28, at 124; *Loper* OA Tr. 60, *supra* note 360, at 63 (Solic. Gen. Elizabeth Prelogar) (arguing *Chevron* deference "ensur[es] that there are uniform rules throughout the country").

402. *Loper* OA Tr., *supra* note 360, at 5, 22, 24 (Paul Clement); *Relentless* OA Tr., *supra* note 28, at 97 (Kavanaugh, J.).

403. *Relentless* OA Tr., *supra* note 28, at 114; *accord* Government's Brief, *Relentless*, *supra* note 28, at 39.

require a heightened standard before relief is granted."[404] Others have wondered the same,[405] principally relying on a theory of constitutional remedial discretion that Professors Richard Fallon and Daniel Meltzer articulated some years before AEDPA was adopted.[406] This defense is a mirage.

For starters, it is not what Fallon and Meltzer advocate. Their "remedial discretion" analysis addresses only cases involving the failure of non-Article-III actors to anticipate later "novel" and "surprising" Article-III-court interpretations of federal law.[407] As is elucidated further below, AEDPA deference presents a different issue: whether Congress can require federal court's subservience to "reasonable" but incorrect state court applications of constitutional law that was "*clearly established*" when they ruled.[408]

But even in the nonretroactivity situations that Fallon and Meltzer do address, the Supreme Court has interposed Article-III and Supremacy-Clause barriers to invoking remedial discretion as a basis for permitting state courts and itself to forgo awarding relief that the Constitution otherwise requires. *Reynoldsville Casket Co. v. Hyde* illustrates the point.[409] There, Ohio resident Hyde filed a civil suit against a Pennsylvania company, relying on an Ohio statute that tolled the State's two-year statute-of-limitation period (which governed residents' suits against residents) when a resident sued a nonresident.[410] Hyde's suit was timely only if the tolling provision applied to it.[411] And while Hyde's suit was pending, the United States Supreme Court invalidated the tolling provision as an unconstitutional burden on interstate commerce.[412] The Ohio Supreme Court cited state nonretroactivity principles in giving Hyde

404. *Relentless* OA Tr., *supra* note 28, at 127.

405. *See, e.g.*, Cobb v. Thaler, 682 F.3d 364, 373–77 (5th Cir. 2012), *cert. denied*, 568 U.S. 1126 (2013) ("[Section 2254(d)] limit[s] the availability of a remedy even for aggrieved individuals who may have legitimate federal constitutional claims" (citing other circuits' precedent)); Scheidegger, *supra* note 80, at 917 ("[T]he new habeas reform could be considered as a limitation on the habeas remedy.").

406. Fallon & Meltzer, *supra* note 162.

407. *Id.* at 1746–58, 1764, 1779 (limiting analysis to "*retroactivity* questions"— "cases involving new law").

408. 28 U.S.C. § 2254(d)(1).

409. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995).

410. *Id.* at 750–51.

411. *Id.*

412. *Id.* (discussing the intervening decision, Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 894 (1988)).

the benefit of the longer limitation period and denying Hyde's out-of-state defendant the benefit of the Supreme Court's ruling.[413] But this nonretroactivity analysis was squarely at odds with the federal retroactivity doctrine established by *Harper v. Virginia Department of Taxation*.[414] So, in *Reynoldsville Casket*, Hyde's lawyer asked the Court to view "what the Ohio Supreme Court has done, not through the lens of 'retroactivity,' but through that of 'remedy.'"[415] State courts, the lawyer argued, "have a degree of legal leeway in fashioning remedies for constitutional ills"; and the Ohio high court had responsibly exercised that discretion as an "'equitable' device" in favor of maintaining the lawsuit based on considerations of "fairness" and Hyde's reasonable "reliance" on the law in effect when she filed her suit.[416] The U.S. Supreme Court, he contended, could and should exercise that same remedial discretion to arrive at the same result.[417] Speaking for the majority, Justice Breyer declined this gambit, saying that the Ohio court's purported choice of remedy "would actually consist of providing *no* remedy for the constitutional violation"; instead, it would uphold and enforce unconstitutional discrimination of in-staters against out-of-staters.[418] Additionally, he wrote, "[w]e do not see how" the Court or the Ohio courts "could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create"—or, presumedly, deny—"a remedy."[419]

In *Montgomery v. Louisiana*,[420] the Court reviewed a Louisiana state post-conviction decision refusing to apply *Miller v. Alabama*—a then-recent Supreme Court case ruling that mandatory life-without-parole (LWOP) sentences for juvenile homicide offenders violate the Eighth Amendment[421]—to Montgomery's LWOP sentence.[422] Over Justice Thomas' dissent characterizing the Louisiana court's decision as an appropriate exercise of remedial

413. *Id.* at 751–52.

414. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 100 (1993).

415. *Reynoldsville*, 514 U.S. at 752 (discussing Brief for Respondent, *Reynoldsville*, 514 U.S. 749 (No. 94-3), 1994 WL 699710, at *8). The Brief for Respondent cites Fallon & Meltzer, *supra* note 162, at 1765, 1789, 1798.

416. *Id.* at 752–53.

417. *Reynoldsville*, 514 U.S. at 753.

418. *Id.*

419. *Id.*

420. Montgomery v. Louisiana, 577 U.S. 190 (2016).

421. Miller v. Alabama, 567 U. S. 460, 465 (2012).

422. *Montgomery*, 577 U.S. at 203–04. Montgomery's LWOP sentence was imposed forty-nine years earlier, when he was seventeen. *Id.*

discretion under Louisiana nonretroactivity principles,[423] the Court reversed, relying on an 1880 habeas case, *Ex parte Siebold*:[424] "Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution."[425] *Siebold* had affirmed that the Constitution renders all sentences imposed under an unconstitutional statute invalid ab initio, requiring the federal habeas court to hold the sentence unconstitutional and to carry its determination into effect by freeing Siebold from his unconstitutional conviction.[426] The Supremacy Clause, the *Montgomery* Court ruled, binds state courts to that same application of supreme law and requires the Supreme Court on appellate review to exercise its own judicial power and fulfill its duty to secure the Constitution's supremacy by reversing state-court decisions declining to obey the Constitution.[427]

The absence of remedial discretion to forgo remedies for violations of rights clearly established by prior Supreme Court precedent stretches back to *Martin v. Hunter's Lessee* in 1816. The *ultimate* Article III and Supremacy Clause problem there was not that the Court could not declare what the determinative federal law is. It already had done that in *Fairfax's Devisee v. Hunter's Lessee*.[428] The problem was the Virginia Court of Appeals' argument that the Supreme Court lacked the power to *enforce* its declaration of law against a coordinate court of a sovereign state and the Virginia Court's consequent threat to ignore the Supreme Court's remedial mandate.[429] If ever there was a time for the Court to defer in the face of a state court's assertion of dignity, sovereignty, and coequal capacity to interpret and enforce federal law, this was it. But Justice Story's answer in effect was the same one Chief Justice Marshall

423. *Id.* at 228 (Thomas, J., dissenting). Justices Scalia and Alito also dissented. *Id.* at 213 (Scalia, J., dissenting).

424. *Ex parte* Siebold, 100 U.S. 371 (1880).

425. *Montgomery*, 577 U.S. at 204 (citing *Siebold*, 100 U.S. 371).

426. *Siebold*, 100 U.S. at 376. The Court's reliance on *Siebold*—a habeas case—shows that the Supremacy Clause has equal force in habeas and direct-review cases.

427. *Montgomery*, 577 U.S. at 204–05.

428. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603, 626–28 (1813).

429. *See supra* notes 195–204, 281–283 and accompanying text (discussing this aspect of *Martin*).

gave in *Cohens v. Virginia*: the Court could not withhold a remedy binding on the parties without treachery to the Constitution.[430]

2. Cause-of-Action Limitations

In its *Loper* briefs, the Government cited AEDPA deference for another proposition: that "[a]n Article III court does not surrender its authority to say what the law is when it answers legal questions that are themselves framed in terms of reasonableness."[431] The rest of the Government's argument, however, corrodes that asserted connection between *Chevron* and AEDPA deference. The Government's dominant defense of *Chevron* was that *Chevron* deference was accorded to an agency "directly empowered by Congress to speak with the force of law and then exercising appropriately a formal level of authority in implementing the statute."[432] AEDPA deference has no similar defense because the Constitution is its own whole law; it delegates its content to no other actors except through the laborious amendment process.[433] And it treats its independent and full *interpretation* and *effectuation* as core components of the judicial power, which neither Congress nor federal judges themselves nor anyone else can delegate to another authority. "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if [Congress] could confer the Government's 'judicial Power' on entities

---

430. *See supra* notes 281–283 and accompanying text (describing *Martin*'s holding); *supra* note 301 and accompanying text (quoting Justice Marshall's *Cohens* opinion). In *Klein*, the Court rejected a similar effort by Congress to curb the Court's "merely remedial" powers by denying any remedy at all. Pursuant to the statute the Court ruled unconstitutional, if the Court had before it evidence of a presidential pardon, and if it understood the pardon to provide constitutionally conclusive proof of loyalty, then at that point it had to decline to render a compensation judgment binding on the parties and, instead, "forthwith [had to] dismiss the suit." Act of July 12, 1870, ch. 251, 16 Stat. 230, 235; *see supra* notes 248–250 and accompanying text (further documenting this point). Similarly, in *Plaut*, *Hayburn's Case*, and *Gordon*, the constitutional infirmity was the Court's inability to "carry" its independent judgment and resolution of the case "into effect"—in *Plaut* because Congress passed a law aiming retroactively to deactivate the Court's mandate, and in the other two cases because Congress or a federal agency might *possibly* revise the Court's judgment. *See supra* Section II.B.4.

431. Government's Brief, *Relentless*, *supra* note 28, at 39.

432. *Loper* OA Tr., *supra* note 360, at 76–77, 82 (Solic. Gen. Elizabeth Prelogar).

433. Williams v. Taylor, 529 U.S. 362, 387 n.13 (Stevens, J., concurring) (quoted *supra* text accompanying note 21).

outside Article III."[434] *Hayburn's Case*, *Marbury*, *Gordon*, *Klein*, and *Plaut* reach the same conclusion, as did the Justices in the *Loper* argument. They repeatedly asked the Government to assure them, as it did, that *Chevron* deference could never apply to an agency determination addressing the Constitution's meaning given "a unique Article III interest at stake there."[435]

A more subtle—but still flawed—version of the Government's argument is that "reasonableness" is an elemental feature of the habeas cause of action which courts must accept in the same way they accept any other statutorily defined element of a cause of action. According to this logic, reasonableness operates in the same way as the habeas statute's jurisdictional requirements that habeas claimants be "in custody" and that their custody be "in violation" of federal law, which bar habeas challenges by applicants who, for example, are sentenced only to pay a fine or allege only a violation of state law.[436] But, as *Marbury*, *Martin*, *Osborn*, *Klein*, *Crowell*, *Norris*, and *Reynoldsville* hold, once Congress directs an Article-III court—as the habeas statute's jurisdictional section 2241(c)(3) does—to "train its attention" on custody in violation of the Constitution and "on the particular reasons . . . why state courts rejected a state prisoner's federal claims,"[437] that court may not constitutionally avert its eyes from how the whole constitutional law bears on the whole constitutional case. That is precisely why the Court unanimously rejected Congress' efforts through the *Klein* statute to use congressional control over the cause of action to define loyalty to the Union according to criteria that blinded the Court to the constitutional effect of Presidential pardons.[438] Nor would Article III have allowed Congress to define statutory causes of action so as to direct:

- the *Marbury* Court to exercise original mandamus jurisdiction that the Constitution withholds as long as the claimant offers a "reasonable justification" for the Court's use of mandamus to keep the Secretary of State within the bounds of law;

---

434. Stern v. Marshall, 564 U.S. 462, 484 (2011) (Roberts, C.J.).

435. *Loper* OA Tr., *supra* note 360, at 65; *Relentless* OA Tr., *supra* note 28, at 111, 124.

436. 28 U.S.C. § 2241(c)(3); *see id.* § 2254(a) (specifying the federal judges and courts with this jurisdiction); Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86 (initially defining this jurisdiction).

437. Wilson v. Sellers, 584 U.S. 122, 125 (2018).

438. *See supra* Section II.B.3 (discussing *Klein*).

- the *Crowell* and *Norris* Courts, presented with claims of constitutional rights on review of agency and state-court decisions, to forgo de novo review and provide only deferential "reasonableness" consideration of agency or state-court fact findings, where "a conclusion of law of [the agency or the] state court as to a federal right [and its] findings of fact are so intermingled that the latter control the former";[439] or
- the *Reynoldsville* and *Montgomery* Courts to limit their determination of the effect of their prior constitutional rulings to reasonableness review of state nonretroactivity rules, or to qualify federal retroactivity rules through the exercise (or toleration) of equitable remedial discretion that "actually" provides "no remedy for the constitutional violation."[440]

The same analysis applies to the Court's nineteenth-century deferential exercise of its (appellate) mandamus jurisdiction to review executive action, another precedent that the Government offered when defending *Chevron* in *Loper*.[441] One form of mandamus deference—federal courts' refusal to interfere in the discretionary exercise of those "executive duties" that Article II confers on executive officers[442]—is immediately distinguishable. Although the Constitution gives States similarly broad discretion over many fields of endeavor, the Supremacy Clause withholds any such discretion from state *judges* as to federal *law*. Instead, it binds them by federal law and commands them to apply it.[443] And "the Supremacy Clause" uniquely empowers "federal *courts* to order state officials"—state judges included—"to comply with federal law."[444]

As is noted above, *Marbury* refused to defer to executive officials' interpretation of federal law in the process of adjudicating

439. Norris v. Alabama, 294 U.S. 587, 590 (1935).

440. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 753 (1995).

441. *See* Government's Brief, *Relentless*, *supra* note 28, at 24 (discussing mandamus).

442. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803) (noting "discretionary duty" limit on mandamus).

443. *See* New York v. United States, 505 U.S. 144, 179 (1992) ("[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply.").

444. *Id.* at 178–79 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate.").

and remedying violations of vested rights.[445] Contrastingly, between 1840 in *Decatur v. Paulding*[446] and Congress' 1875 grant of general arising-under jurisdiction to lower federal courts (which "ultimately put an end to the necessity of relying on mandamus jurisdiction"[447]), the Court on mandamus deferred to executive officials' interpretation of "the laws and resolutions of Congress" while noting that, on writ-of-error review, the Court "would not be bound to adopt the construction given by the head of a department."[448] Whether Marshall's non-deferential view of mandamus or the Taney Court's deferential view of mandamus is preferred, the main point is the one just made: if Congress wants, it can share some of its law-making function with administrative agencies. And, if it does, it can oblige federal courts—on mandamus or otherwise—to follow the law thus made within the broad zone of reasonableness that substantive due process requires. But neither Marshall's Court nor Taney's understood the *Constitution's* content to be delegable. Neither Court imagined Article-III judges' deferring to Congress or any other non-Article-III authority in expounding the Constitution's meaning.

"It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule."[449] There is no way to understand AEDPA deference other than as a withdrawal of that duty from the federal judiciary on the theory that it has been delegated to the judges of every State and has been appropriately exercised by them whenever it is dressed in the wispy gauze of a possibility of reasonableness. That is precisely the opposite of what Article III and the Supremacy Clause command.

3. Greater/Lesser

Some observers offer another justification for AEDPA deference: that Congress' "greater" power to withhold jurisdiction entails the "lesser" power to confer jurisdiction but to tell the courts how to exercise it.[450] This suggestion reverses constitutional history.

---

445. *See supra* note 194 (summarizing *Marbury* in this respect).
446. Decatur v. Paulding, 39 U.S. 497 (1840).
447. Bamzai, *supra* note 129, at 956.
448. *Decatur*, 39 U.S. at 515.
449. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
450. In Kent Scheidegger's view, once Congress authorizes a non-Article-III body to make a first-instance determination whether to afford a constitutional remedy, Congress thereafter can "limit the *additional remedy* of its own creation"—by which he means Congress' grant of jurisdiction to review that

In their central compromise, the Conveners ceded Congress power over jurisdiction *in return for* Article III's vesting all federal judges with "the judicial power."[451] The Framers deliberately rejected proposals to extend Congress' jurisdiction-defining power so as to include the power to specify the "manner" in which federal courts exercise the jurisdiction that Congress grants.[452] Instead, the Framers deliberately conditioned the former power on the *absence* of the latter.[453]

---

original determination—"to the circumstances in which it believes the benefit to be worth the cost." Scheidegger, *supra* note 80, at 892, 917 (emphasis added). This all over again is Virginia's argument in *Cohens*—that once its courts decided a federal claim, the Supreme Court could and should defer to its determination. Chief Justice Marshall called this "treason" *not* to the statute affording writ-of-error review but to the *Constitution*. Once the Court had jurisdiction, the Constitution required it to say what its law is, apply it, and carry it into effect. Scheidegger's argument also flouts constitutional history. *All* of the Framers agreed that some kind of federal-court "appellate" review of state-court decisions on matters of supreme law was essential. *See supra* notes 81–87, 106–113 and accompanying text (documenting Convenors' unanimity on this point). Federal habeas provides precisely that sort of review (or did until 1996). Chopping that arrangement up analytically into separate "remedies" makes a hash of the Framers' compromise on having neither exclusive state-court nor exclusive federal-court control of arising-under cases and instead having the latter be *the* appellate remedy for the factional foibles of the former. See THE FEDERALIST NO. 82, *supra* note 116, at 494:

> [T]he national and State [judicial] systems are to be regarded as ONE WHOLE. The courts of the latter [are] natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to [a federal] tribunal [that] unite[s] and assimilate[s] the principles of national justice and the rules of national decisions.

451. *See supra* Part I (tracing Convenors' compromise on this point).

452. 1 Farrand, *supra* note 4, at 425, 431–32 (rejecting language that would have given Congress power over the "manner" of federal courts' exercise of the jurisdiction Congress conferred) (discussed *supra* notes 93–94).

453. Recently, the Court invoked Congress' power to create lower federal courts as the basis for inferring Congress' power over those courts' jurisdiction. But the Court refused to infer from Congress' authority over jurisdiction any power of "'legislative interference with courts in the exercising of continuing jurisdiction'" or any other limit on "'the exercise of judicial power.'" Patchak v. Zinke, 583 U.S. 244, 251–53 & n.4 (2018) (plurality opinion) (quoting and following *Ex parte* McCardle, 74 U.S. 506, 514–15 (1868)). The former inference *enforces* the Madisonian Compromise, which resolved the Framers' disagreement about creating lower federal courts by leaving that decision to Congress; the latter inference would wreck the Compromise. Notably, the Court's main reliance in *Patchak* in assessing the breadth of the judicial power—*Ex parte McCardle*—is a habeas case, showing again that Article III applies with equal force in habeas and in direct-review cases.

In *Klein*, Congress tried to have it both ways—granting federal-court jurisdiction over compensation claims it desperately needed some other authority to resolve, while directing federal judges to exert less than "the whole judicial power" by applying only part of the law (minus the *Constitution*) or deciding only part of the case (not carrying the *Constitution* into effect).[454] The Court rejected the idea out of hand. So did *Hayburn's Case*, *Marbury*, *Martin*, *Cohens*, *Osborn*, *Gordon*, *Crowell*, *Norris*, *St. Joseph*, and *Plaut*. And so did *Bollman*, *Moore v. Dempsey*, *Brown* and the 116 other habeas decisions collected in Appendices B and C. Given the impracticality of withholding arising-under jurisdiction, it is Congress' power to do so that has turned out to be the lesser of the powers over which the Framers compromised. The constitutionally mandated qualities of federal judging have overmatched congressionally managed control of its quantity.

D. False Analogies

Fallon and Meltzer's article might be thought to provide another basis for asserting the constitutionality of AEDPA deference: analogy to the doctrines limiting habeas review based on the timing of Supreme Court decisions explicating the Constitution's meaning. The analogies are false, however.

Fallon and Meltzer did not distill their remedial-discretion doctrine from AEDPA deference (which did not yet exist) but from legal contexts involving "extreme unpredictability"—contexts in which state action is challenged as violating Supreme Court interpretations of law adopted *after* the state action occurred.[455] For that reason, neither of their key examples—*Teague v. Lane*[456] and qualified immunity in constitutional tort actions—is a convincing analogy to AEDPA deference, which applies to possibly reasonable state-court applications of "clearly established" Supreme Court interpretations.[457]

---

454. *See supra* Section II.B.3 (discussing *Klein*).

455. Fallon & Meltzer, *supra* note 162, at 1794, 1807–08, 1816 ("[A] rather extreme standard of unpredictability . . . should be required to justify denial of full, retroactive remediation"; "*Teague's* definition of the claims that will be deemed to rest on new law . . . is far too expansive.").

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

457. 28 U.S.C. § 2254(d)(1). AEDPA deference also violates both conditions Fallon and Meltzer place on their remedial-discretion proposal—that it leave in place an "overall structure of remedies adequate to preserve . . . a regime of government under law" and not keep "constitutional adjudication [from]

As described by its author, *Teague*'s judge-made rule "did not establish a 'deferential' standard of review" at all.[458] "Instead, *Teague* simply requires that a state conviction [challenged] on federal habeas be judged according to the law in existence when the conviction became final."[459] "New" law—which *Teague* forbids a federal habeas court to apply—is any law not "dictated by precedent existing at the time the petitioner's conviction became final" upon the completion of direct review.[460] Section 2254(d)(1) itself incorporates a version of the *Teague* rule by requiring that state decisions be judged against "clearly established Federal law, as determined by the Supreme Court of the United States," referring in this case to the law in effect when the highest state court ruled.[461] *Teague* and section 2254(d)(1) both impose a choice of law defined by *timing*—law in effect when the case was decided or became final. Similarly, public officers receive "qualified immunity" in section 1983 suits "where clearly established law" in effect "'*at the time*'" the challenged action occurred "does not show that [it] violated the [Constitution]."[462] These rules comport with the Supremacy Clause, even if they are not the only possible ways to conform to it. That clause binds state judges to the "supreme law of the land," which quite sensibly can be understood to mean the supreme law in place or clearly established by the authoritative source at the time when the state judges had charge of the case.

Section 2254(d)(1) additionally ties the choice of law to its *source*—"as determined by the Supreme Court."[463] This provision comports with (even if it is not mandated by) Article III. Article III vests "the judicial Power" in "one *supreme* Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish."[464] The lower "Federal Judiciary['s] . . . power" both to "rule on cases" and to "decide them," is "subject to review *only* by *superior*

---

function[ing] as a vehicle for the pronouncement of norms." Fallon & Meltzer, *supra* note 162, at 1790, 1800.

458. Wright v. West, 505 U.S. 277, 303–04 (1992) (O'Connor, J., concurring in the result) (clarifying the intent of Justice O'Connor's *Teague* decision).

459. *Id.* at 304 (citing *Teague*, 489 U.S. at 301).

460. Butler v. McKellar, 494 U.S. 407, 409 (1990); *Teague*, 489 U.S. at 301.

461. 28 U.S.C. § 2254(d)(1); *see* Yarborough v. Alvarado, 541 U.S. 652, 660–61 (2004) (discussing section 2254(d)(1)'s limitation of review to federal constitutional interpretations in effect when the last state court ruled).

462. Pearson v. Callahan, 555 U.S. 223, 243–44 (2009) (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)) (emphasis added).

463. 28 U.S.C. § 2254(d)(1).

464. U.S. CONST. art. III, § 1.

courts in the Article III hierarchy."[465] When given jurisdiction, the Supreme Court also has the final say as to the meaning and application of supreme law vis-à-vis "the Judges in every State" to whom the Supremacy Clause refers.[466] Congress thus commits no constitutional sin by holding state judges to supreme law as established by the Supreme Court. Although the Framers clearly contemplated lower-federal-court "appellate" jurisdiction over state courts—and the Supreme Court so designated habeas review by lower federal courts—there is a clear constitutional justification for subjecting that review to law "determined" by the court the Constitution makes supreme.[467]

Since 1886, habeas has been subject to an exhaustion-of-remedies rule steering constitutional claims to Article-III courts in which alternative forms of as-of-right review are available and giving their judgments res judicata effect should they file a successive action in an Article-III court.[468] As Professor Hart noted, these rules create no Article III problem: "The denial of *any* remedy is one thing . . . . But the denial of one remedy while another is left open . . . can rarely be of constitutional dimension."[469] To similar effect are sovereign and

---

465. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) (some emphasis removed and added).

466. U.S. CONST. art. III, §§ 1, 2.

467. *See* Jackson, *supra* note 313, at 2452–54 (1998) (arguing that *Teague's* and section 2254(d)'s choice-of-law rules "assert[ ] the unique competence and supreme hierarchical position of the Supreme Court"); *cf*. William M. M. Kamin, *The Great Writ of Popular Sovereignty*, 77 STAN. L. REV. (forthcoming 2025) (manuscript at 17, 19) (on file with the *Columbia Human Rights Law Review*) (arguing that section 2254(d)(1)'s choice of law preserves eighteenth-century English understandings of the writ of habeas corpus, which protected national "sovereignty" as "expressed through the laws of the land").

468. *See supra* notes 141–142, 145 and accompanying text (describing the exhaustion-of-remedies requirement).

469. Hart, *supra* note 235, at 1366; *accord* Yakus v. United States, 321 U.S. 414, 444 (1944). The congressional "limits" on habeas that *Felker v. Turpin*, 518 U.S. 651, 665 (1996), and *Lonchar v. Thomas*, 517 U.S. 324, 322–23 (1996), reference mainly apply to these successive-petition contexts. *Lonchar* also mentions judicially crafted harmless-error and adequate-and-independent-state-ground rules. The former rules apply to violations of law with no effect on the case's outcome; the latter rules preserve the judicial power by averting advisory opinions (*see* Herb v. Pitcairn, 324 U.S. 117, 126 (1945) (distinguishing federal appellate court decisions effectually correcting erroneous judgments from opinions merely advising lower courts of the appellate court's opinion as to matters its judgment cannot legitimately affect))—neither of which justifies requiring federal courts to ignore state judges' preserved constitutional error. Nor is *Stone v. Powell,* 428 U.S. 465 (1976), a precedent for AEDPA deference, given its basis in

qualified immunity rules that sometimes limit available remedies for constitutional violations to prospective relief that still "permit[s] the federal courts to . . . hold state officials responsible to 'the supreme authority of the United States.'"[470] This comports with the aim of the Supremacy Clause to maintain federal law's dominance notwithstanding anything to the contrary in the "*laws* of any State" or in those laws' application by "the Judges in every State" and other officials acting under color of law.[471] It certainly provides no precedent for withholding *any* remedy from prisoners unconstitutionally incarcerated by force of state law in violation of clearly established Supreme Court law.

* * * * *

There are, then, limits on the judicial power but none that allow AEDPA deference. As Professor Wechsler defined the Article-III judge's duty, it is "not that of policing . . . legislatures or executives" nor "of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution"; instead, it is "the duty to decide the litigated case and to decide it in accordance with the law."[472] Once Congress gives a federal court jurisdiction to decide a case arising under the Constitution on review of a state decision, the Supremacy Clause dictates the essential, fundamental objects of the judicial power—(1) to maintain the Constitution's supremacy, while

limits on the underlying constitutional right. *See* Withrow v. Williams, 507 U.S. 680, 690–92 (1993) (limiting *Stone*'s application to habeas review of violations of the non-constitutional, merely "prophylactic," exclusionary rule applicable in Fourth Amendment cases and declining to apply it to bar or limit constitutional challenges based on Fifth and Sixth Amendment rights).

470. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1985) (quoting *Ex parte* Young, 208 U.S. 123, 160 (1908)); *see* Los Angeles Cnty. v. Humphries, 562 U.S. 29, 32–33 (2010) (pointing out that at least prospective relief is available in section 1983 suits if state or local "policy or custom' caused a plaintiff to be deprived of a federal right"); Lindh v. Murphy, 96 F.3d 856, 870 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997) (qualified and sovereign immunity "draw the line between prospective relief and damages from a government body" or out of "the pocket of a public employee," neither being the "right analogy" to AEDPA deference).

471. U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, . . . Laws of any State to the Contrary notwithstanding.").

472. Wechsler, *supra* note 51, at 6; *see* Patchak v. Zinke, 583 U.S. 244, 266 (2018) (Roberts, C.J., dissenting) ("[T]he 'judicial Power of the United States' . . . sets aside for the Judiciary the authority to decide cases and controversies according to law.").

ensuring that the state judges "toe the constitutional mark";[473] (2) to serve "as a necessary additional incentive for [state] trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards";[474] and (3) to engage in "independent judicial review . . . to the end that the Constitution as the supreme law of the land may be maintained."[475] AEDPA deference frustrates the accomplishment of each of these goals. It adulterates the judicial power and by doing so, undermines constitutional supremacy.

IV. THE WAY FORWARD: RESPECT WITHOUT CAPITULATION

Even the Supreme Court, constrained by the courtesy that has always characterized its relations with Congress, has charitably said of AEDPA that "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."[476] Section 2254(d) as amended by AEDPA ranks among the statute's worst pigs' ears. As relevant here, it provides:

> 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.

In *Williams v. Taylor*,[477] the Justices all recognized that in order to give effect to one of the italicized phrases, they had to render the other a "nullity."[478] They split 5-4 on which nullity to avoid. Justice Stevens for four Justices read the de-novo-review principle conveyed by the words *contrary to law* as controlling the *unreasonable*

473. Solem v. Stumes, 465 U.S. 638, 653 (1984).

474. Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting).

475. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51–52 (1936).

476. Lindh v. Murphy, 521 U.S. 320, 336 (1997).

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

478. Vázquez, *supra* note 175, at 13–15 (reprising the *Williams* majority and concurring opinions' different ways of attempting to avoid turning phrases in § 2254(d) into a "'nullity'" (quoting *Williams*, 529 U.S. 362, 407 (2000))).

application phrase, lest the latter render the former a nullity.[479] In contrast, Justice O'Connor read *unreasonable application* to require deference, to keep *it* from being a nullity. Thus, "contrary to" was effectively stricken from the statutory text.[480]

Justice Stevens' choice between the pig's two ears has overwhelming advantages. For starters, it is more consistent with the provision's legislative history,[481] and it avoids the constitutional infirmities and national dis-uniformity of supreme law that AEDPA deference nakedly invites. It also has *textual* advantages because it provides an important role for both "unreasonable" and "application." Justice Stevens read section 2254(d) to direct federal courts "to attend to every state-court judgment with utmost care," using the "state courts' determinations" as "the starting point" for analysis. [482] "If, after carefully weighing all the *reasons* for accepting a state court's judgment, a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution [if "thorough analysis by a federal court produces a firm conviction that that judgment is infected by constitutional error,"[483] the federal

479. *Williams*, 529 U.S. at 385–86, 388 (2000) (Stevens, J., concurring) ("[AEDPA] is clear that habeas may issue under section 2254(d)(1) if a state-court 'decision' is 'contrary to . . . clearly established Federal law.'"; "[t]he simplest and first definition of 'contrary to' as a phrase is 'in conflict with'"; "the word 'deference' does not appear in [AEPDA].").

480. *Id.* at 407 (majority opinion of O'Connor, J.) (reasoning that giving the "contrary to" clause what Justice Stevens called its "simplest" definition "saps the 'unreasonable application' clause of any meaning"); Vázquez, *supra* note 175, at 14 ("[I]n its attempt to give meaning to the 'unreasonable application' clause, [the majority] effectively read[s] the 'contrary to' language out of the statute.").

481. *See* Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 24, 1996) (rejecting the view that AEDPA would keep federal judges from "bring[ing] their own independent judgment to bear on questions of law and mixed questions of law and fact that come before them on habeas corpus" and expressing President Clinton's "confiden[ce] that the Federal courts will interpret [AEDPA] to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary"); 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.3, at 1890–91 n.8, 1897–99 n.19 (7th ed. 2023) (collecting section 2254(d)'s legislative history, which confirms the drafters' understanding that section 2254(d) did not require federal-court deference); Vásquez, *supra* note 175, at 20–29 ("[AEDPA's sponsors] strenuously denied that it would require the Court to uphold wrong but reasonable applications of federal law, and, indeed, made clear that the bill would retain the de novo standard of review").

482. *Williams*, 529 U.S 362, 386, 389 (Stevens, J., concurring).

483. *Id.* at 389.

court's] independent judgment should prevail."[484] Importantly, the statute ties the word "unreasonable" not to the state court's judgment or even its "decision," but instead to its "*application*," its "act of putting something to use."[485] Under Stevens' reading, if the reasoning through which the state judges put the law and the facts to use in reaching a decision is convincing, it controls. Unlike the "highly deferential" definition of "reasonableness," which incentivizes both state judges and federal courts to say as little as possible about the constitutional merits,[486] Stevens' reading incentivizes the powerful mobilization of reasons both by state judges (to command the federal district court's respect and influence its reasoning) and by the federal district court itself (knowing that a circuit court—and potentially the Supreme Court—will compare its reasons to the state judges' reasons and decide which are more compelling).

Bolstered by the word "firm," Justice Stevens' standard is a strong version of the *Skidmore*[487] mode of review that *Loper* now applies to federal-court consideration of agency interpretations of statutory law. In *Loper*'s framing—quoting Justice Jackson in *Skidmore* and "[e]choing themes" in the Court's caselaw "from the start"—the judge's review grants "respectful consideration to another branch's interpretation of the law, but the weight due those interpretation must always 'depend upon the[ir] thoroughness . . . , the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade.'"[488] In the Framers' and the Constitution's words, in order to dispel "much to fear" from "local prejudices," "bias," "dependence," and "undirected" adjudication,[489] it seeks reasons. In place of "the centrifugal tendency of the States" to apply their laws to "infringe the rights & interests of each other[,] oppress the weaker party within their respective jurisdictions," and "continually fly out of

484. *Id.* (emphasis added); *see* Miller v. Fenton, 474 U.S. 104, 112 (1985) (describing de novo review on habeas as requiring federal courts to "give great weight to the considered conclusions of a coequal state judiciary").

485. *Application*, MERRIAM-WEBSTER DICTIONARY (Dec. 20, 2024), https://www.merriam-webster.com/dictionary/application [https://perma.cc/3M7R-5PAY].

486. *See supra* notes 378–379 and accompanying text (describing how AEDPA deference incentivizes state judges to forbear explaining their decisions).

487. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

488. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 388 (2024) (quoting *Skidmore*, 323 U.S. at 140).

489. 1 Farrand, *supra* note 4, at 124 (James Madison); THE FEDERALIST NO. 22, *supra* note 119, at 151 (Alexander Hamilton).

their proper orbits and destroy the order & harmony of the political system,"[490] it looks for evidence of a centripetal commitment to "[t]his Constitution" and a willingness to "be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[491] In place of faction, it looks for law—the "supreme Law of the Land."[492]

This interpretation is itself reasoned and moderate. It preserves several substantial ways in which section 2254(d)(1) cabins federal-court discretion compared to pre-1996 habeas practice. Before granting the writ, the federal court may not (as it could before[493]) strike out on its own in assessing the constitutionality of custody but must (1) ask whether the claim at hand was adjudicated on the merits in "[s]tate court proceedings" (and, when in doubt, assume that it was);[494] (2) if so, focus on the state-court "decision," "'train[ing] its attention on the particular reasons—both legal and factual—why [the] state courts rejected a state prisoner's federal claims'";[495] and it must limit its review to assuring the consistency of the state courts' decision with law that was both (3) "clearly established" by the Supreme Court (no matter what the circuit law may have been)[496] and (4) in effect at the time when the state court ruled.[497]

The modification proposed is small in the scheme of the statute as a whole: reinterpreting a single word, "reasonableness," as an incentive for the state courts to articulate actual *reasons* and as a directive to federal habeas courts to give a state court's reasons respectful consideration. But in constitutional effect, the change is enormous. AEDPA deference nullifies constitutional supremacy and uniformity and (in Justice Kavanaugh's words in the *Loper* argument) "abdicat[es]" to factious influences, letting them "run[ ]

490. 1 Farrand, *supra* note 4, at 164–65 (James Madison).

491. U.S. CONST. art. VI, cl. 2.

492. *Id.*

493. *See* 2 HERTZ & LIEBMAN, *supra* note 481, at 1881 (describing impact of this change).

494. 28 U.S.C. § 2254(d).

495. *Id.* § 2254(d)(1); Wilson v. Sellers, 584 U.S. 122, 125 (2018) (citation omitted).

496. 28 US.C. § 2254(d)(1); *see* Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam) (reversing habeas relief granted based partly on clearly established circuit precedent).

497. *See* Cullen v. Pinholster, 563 U.S. 170, 180–82 (2011) ("Section 2254(d)(1) . . . requires an examination of the state-court decision at the time it was made.").

roughshod over limits established in the Constitution."[498] AEDPA respect for reasons preserves the judicial power, constitutional supremacy, and the historic role of both in resisting "the violence of faction."[499] Where AEDPA deference invites silence, dissembling, distortion, and disunity, AEDPA respect for *reasons* promotes judicial deliberation and restores the writ's function as a fundamental exercise in state-federal dialogue and law elaboration.[500]

V. CONCLUSION: IS LAW DEAD AND FACTION TRIUMPHANT?

As they declared throughout the *Loper* arguments, the New Constitutionalists want the Constitution back.[501] As this article shows, the Constitution that the Framers built was designed to be a bulwark against faction, special interests, bias, and disunity. That is the Constitution Chief Justice Marshall and Justice Story staunchly defended against the Virginia courts' resistance to the federal judiciary's independence and to federal law's supremacy in *Cohens v. Virginia* and *Martin v. Hunter's Lessee*.[502] It is the Constitution Justice Holmes, on habeas, invoked in vain to save Leo Frank from an antisemitic mob but which he resuscitated in time to save the five *Moore v. Dempsey* defendants from "improper Verdicts in State tribunals" swayed by racist mobs.[503] It is the Constitution Chief Justices Marshall in *Marbury*, Taney in *Gordon*, Chase in *Klein*, Hughes in *Crowell* and *Norris*, and Roberts in *Stern* mustered against Congresses' efforts to cripple the capacity of Article-III courts *independently* to decide the *whole constitutional case* and to *carry into effect* the *whole constitutional law*.[504] It is the Constitution that calls the tie for the individual, not the state: the Constitution ever at risk from "politically expedient reversals and reinterpretations" and "aggressive, newfound readings,"[505] from the same evils, in short, that stirred the *Loper* litigators and Court to wipe *Chevron* and its seventy

498. *Loper* OA Tr., *supra* note 360, at 40–41 (Kavanaugh, J.) (describing *Chevron* deference).

499. THE FEDERALIST NO. 10, *supra* note 3, at 77 (James Madison).

500. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048–67 (1977) (describing writ's role in "dialectical federalism").

501. *See supra* Section III.A.

502. *See supra* Sections II.B.2, II.B.4.

503. *See supra* notes 158–164 and accompanying text.

504. *See supra* Section II.B.

505. NCLA Brief, *Loper*, *supra* note 55, at 23; Petitioners' Brief, *Loper*, *supra* note 342, at 1–2.

Supreme Court precedents and 18,000 lower court precedents off the books.[506]

From that Constitution's perspective, AEDPA deference is far worse than *Chevron* deference was.[507] Unlike AEDPA deference, *Chevron* never delegated the content, interpretation, and enforcement of the *Constitution* to non-Article-III actors. It never let those actors defend doubtful decisions by saying nothing or as little as possible about how those decisions accorded with the law. It never forced federal courts to invent reasons that non-Article-III actors did not offer or to defer without first going through a process where you "don't [just] say, 'oh, it's difficult'" and give up, but instead you "work hard to figure out" the law's meaning using "every tool you can."[508] *Chevron* deference unified federal law around a single agency's interpretation—with some disruptions every four or eight years, perhaps—but never fragmented federal law into 30,000 pieces in the inconstant hands of the judges in every State. Yes, it put property and livelihood at risk, but never the most basic liberties of movement and daily self-rule. And life.

There is another difference between AEDPA deference and *Chevron* deference. Backing the *Loper* fishermen and fisherwomen were powerful factions and friends—local and national Chambers of Commerce, the Christian Employers Alliance, the Competitive Enterprise Institute, Eight National Business Organizations, U.S. Senator Ted Cruz, and West Virginia and twenty-six other states, to name a few.[509]

But what factions rallied to William Packer's defense?[510] After twenty-eight hours of deliberations at Packer's second-degree murder trial, the jury was at an impasse; a juror was not convinced beyond a reasonable doubt.[511] Over the next seven days (four in court), the juror stood by her belief under fire from the others. Three times, the jurors told the judge they could not continue because they were

506. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 472 (2024) (Kagan, J., dissenting) (quantifying the federal-court decisions applying *Chevron* deference that *Loper Bright* disapproves).

507. *See supra* Section III.B (illustrating ways that AEDPA deference interferes more severely with fundamental constitutional policies than did *Chevron* deference).

508. *Relentless* OA Tr., *supra* note 28, at 12–13, 18–20 (Kagan, J.).

509. *See* sources cited *supra* note 345 (listing briefs amici curiae in *Loper* and its companion case).

510. Early v. Packer, 537 U.S. 3 (2002) (per curiam) (addressing William Packer's habeas petition).

511. *Id.* at 4–6.

"hung."[512] Twice the holdout juror asked to be removed because her deliberations were "not to the satisfaction of the others."[513] But still the judge declined to declare a mistrial, telling the juror she was forcing everyone to "start deliberations all over again."[514] Though the foreman assured the judge throughout that the juror "was continuing to deliberate," the judge twice admonished that they "do not have a right to not deliberate"—that "[t]he law is right there . . . . If [the defendant] did [that] and you find unanimously [that he] did that, you must follow the law and find [him] either guilty or not guilty."[515]

Over the Ninth Circuit's conclusion that jury coercion "manifestly" occurred,[516] and despite a state-court decision so devoid of reasons that the Supreme Court could only defend it with a reminder that AEDPA deference "does not require citation of our cases—indeed, it does not even require awareness of our cases," the Court did not independently interpret, apply, and effectuate the Constitution.[517] It did not even insist on having some indication in the record that the state court had conducted a reasoned evaluation of William Packer's federal constitutional claim. [518] AEDPA's "highly deferential standard for evaluating state-court rulings . . . demands that state-court decisions be given the benefit of the doubt."[519] So, Mr. Packer: "Even if we agreed . . . that there was jury coercion here, it is at least reasonable to conclude that there was not, which means that the state court's determination to that effect must stand."[520]

Who will rally for Joshua Frost? Frost was charged with aiding two associates to commit a series of robberies by driving them to and from the scenes of the crimes.[521] His lawyer sought to argue to the jury both (1) that the prosecution had failed to satisfy its burden of proof on the issue of Frost's guilty participation in the robberies and (2) that whatever Frost did do in connection with the robberies was done under duress.[522] The trial court required Frost in closing argument to choose between those defenses, saying that they were

512. *Id.* at 4–5.
513. *Id.* at 6.
514. *Id.* at 4.
515. *Id.* at 5–6.
516. Packer v. Hill, 291 F.3d 569, 582–83 (9th Cir. 2002), *rev'd sub nom.* Early v. Packer, 537 U.S. 3 (2002).
517. *Early*, 537 U.S. at 8 (emphasis omitted).
518. *Id.*
519. Renico v. Lett, 599 U.S. 766, 773 (2010) (citations omitted).
520. *Early*, 537 U.S. at 11.
521. Glebe v. Frost, 574 U.S. 21, 21–22 (2014) (per curiam).
522. *Id.* at 22.

incompatible as a matter of state law.[523] The Supreme Court's 1975 decision in *Herring* v. *New York*[524] *had clearly established* that "closing argument for the defense is a basic element of the adversary factfinding process" and that its complete denial violates the Sixth Amendment right to counsel and is a "structural defect" automatically requiring a new trial—even when the trial judge finds the evidence "open and shut."[525] As the Washington Supreme Court in Frost's case acknowledged, a defendant having two defenses, each supported by some evidence, is entitled to argue both: Frost's trial judge indisputably violated the federal Constitution's due-process and right-to-the-assistance-of-counsel clauses.[526] But a closely divided Washington Supreme Court ruled that denial of counsel on only one—not both—of an accused's defenses is *not* structural error; that it is susceptible to harmless-error analysis; and that, on the record of Frost's trial, the error was harmless.[527]

In federal habeas, once again a careful analysis of the facts in the light of clearly established federal constitutional law convinced the Ninth Circuit that the state court had erred and that Frost's custody violated the Constitution.[528] The United States Supreme Court reversed in a testy *per curiam* order. "Assuming for argument's sake that the trial court violated the Constitution," the Supreme Court wrote, "[a] court could reasonably conclude" that Mr. Herring's case presented a more basic denial of due process and of the right to counsel than Mr. Frost's. Mr. Herring was forbidden to argue in closing that he was not guilty because a prosecution witness was lying; Mr. Frost was *only* forbidden to argue that the facts the prosecution proved did not amount to a crime; and he *was* permitted to take on the burden of proving duress—if he conceded that the prosecutor's facts made his conduct prima facie criminal.[529]

For all the Court said and did, Mr. Packer and Mr. Frost are, as likely as not, "in custody pursuant to the judgment of a State court

---

523. *Id.*

524. Herring v. New York, 422 U.S. 853 (1975).

525. *Id.* at 858, 863; *see, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991) (describing impact of structural error).

526. *See Glebe,* 574 U.S. at 22 (discussing State v. Frost, 161 P.3d 361, 366–69 (Wash. 2007)).

527. *Frost*, 161 P.3d at 369–71.

528. Frost v. Van Boening, 757 F.3d 910, 915–18 (9th Cir. 2014) (en banc), *rev'd, Glebe*, 574 U.S. at 24.

529. *Glebe*, 574 U.S. at 23–25. For other examples of seemingly clear constitutional error committed by state courts that AEDPA deference leaves intact, see Shay & Lasch, *supra* note 374, at 224–28 & nn.93–95.

. . . in violation of the Constitution."[530] As likely as not, they present Madison's cardinal case of a "[mis]directed jury" rendering "improper Verdicts in State tribunals" swayed by local prejudices against federal constitutional rights they see as overly protective of criminal defendants.[531] Yet, endowed with jurisdiction and judicial power, the Court refused independently to interpret, apply, and effectuate their constitutional right to liberty.

Articles III and VI command that Packer and Frost have a supporter—the extended republic's *law* as independently interpreted, applied, and effectuated by nonpartisan, tenured judges given jurisdiction and thereby endowed with the judicial power to maintain the Constitution as the supreme law of the land *notwithstanding anything* in state law to the contrary. Congress' "pig's ear" drafting and the Court's "highly deferential" interpretation of AEDPA obstruct and distort that power at every turn. By the New Constitutionalists' and *Loper*'s lights, as brightly shone in their relentless exposure of *Chevron* deference's lack of constitutional clothing, AEDPA deference is no less jurisprudentially naked. Here, too, the New Constitutionalists on and off the Court must cry: No clothes! Treason to the Constitution.

530. 28 U.S.C. § 2254(a).
531. 1 Farrand, *supra* note 4, at 124 (James Madison).

APPENDICES

Appendix A: Compromises at the Convention

What Convenors sought, relinquished, accepted

- Mechanisms for constraining factious state law and effectuating national law that James Madison and allies *sought* and *relinquished*: (1) national legislative veto, (2) council of revision, (3) military force, and (4) fullest possible *quantity* of mandated federal–question jurisdiction in mandated supreme and inferior tribunals
- Mechanisms for maintaining state sovereignty that John Rutledge and allies *sought* and *relinquished*: (1) original state-court jurisdiction in all federal-question cases; (2) single ("supreme") federal tribunal responsible only for the "*construction*" of federal law but not empowered actually to "hear and determine" federal-question cases; (3) Congress' power to specify "manner" of supreme tribunal's decisionmaking; and (4) bans on (a) state-court oaths of fealty to federal law, (b) inferior federal courts, (c) original federal-question jurisdiction in any federal tribunal
- Mechanisms both eventually *accepted*: (1) presumptive original state-court jurisdiction over federal-question cases; (2) Congress' discretion to "extend" original or appellate federal question jurisdiction to a mandated supreme court and to any inferior courts that Congress ordains and establishes; (3) state judges' oath to support the Constitution and, in federal-question cases, to treat it and federal statutes and treaties as supreme law of the land, anything in state law to the contrary notwithstanding; and (4) in original and appellate federal-question cases, federal courts have jurisdiction and full "judicial Power" independently to decide—with no constraints on *quality* or "*manner*" of how they decide—cases and effectually maintain supremacy of federal law in appeals from state courts

How Convenors reached these compromises

- 1 Farrand 245 (June 15, 1787) (William Paterson): first proposing to replace Virginia Plan's national veto with provision that all federal laws and treaties "shall be the supreme law of the respective States" by which "the Judiciary of the several States shall be bound in their decision, any

thing in the respective laws of the Individual States to the contrary notwithstanding

- 2 Farrand 22, 21–22, 28 (July 17, 1787): convenors' rejection of the national veto; followed immediately by unanimous adoption of Paterson's supremacy clause quoted above
- 2 Farrand 382, 390–91 (Aug. 23, 1787): final failed effort to restore national veto; followed immediately (id. at 381–82, 389–91, 409, 417 (Aug. 23 and 25, 1787)) by Rutledge and allies' proposal and Convenors unanimous adoption of supremacy clause expanded to include the Constitution and newly made as well as preexisting federal laws and treaties as supreme law of the land; followed immediately (id. at 422–25, 428–31) by (1) revision of arising-under jurisdiction Congress could confer on federal judiciary "*conformably*" to August 23 and 25 Supremacy Clause changes to the definition of the supreme law of the land and (2) clarification that federal-court powers comprehend resolution of cases arising "both in law and equity" and of issues "both as to law and fact"

Key concessions Convenors made on judges' role in protecting against factional influences on state law and its administration

Concessions by Madison and allies

1. State judges would play a role in preventing factious, oppressive state law and its administration (subject to such federal-court original and appellate jurisdiction as Congress established)
2. The quantity of especially original, "arising under," jurisdiction and caseloads would favor state judges not federal judges

Concessions by Rutledge and allies

3. Judges in every state would swear to support the Constitution and treat Constitution, laws, and treaties as supreme law of the land
4. When given jurisdiction over appeals from state courts, federal judges would have full, independent, effectual "judicial Power" to assure that States and their judges adhere to supreme national law

Appendix B: Supreme Court Decisions Recognizing Availability of Habeas Corpus Relief from Unconstitutional Custody, 1867–1922

Justice Holmes' 1923 decision for the Court in *Moore v. Dempsey* recognized that the "question" in habeas cases is "whether [applicants'] constitutional rights have been preserved,"[532] as did many later decisions,[533] including the seventy in Appendix C. Listed here are Supreme Court decisions before 1923 that exercised or recognized the availability of habeas review of prisoners' constitutional claims, whether or not premised on the detaining court's subject-matter or personal jurisdiction. In the bolded decisions, the Court made clear that, regardless of subject-matter or personal jurisdiction, a constitutional violation warranted habeas relief because it placed the detaining court's action "beyond" either its "jurisdiction," "the powers conferred upon it," or its "authority to hold" the prisoner[534]:

---

532. Moore v. Dempsey, 261 U.S. 86, 87–88 (1923).

533. *See, e.g.*, United States v. Hayman, 342 U.S. 205, 212 (1952) (recognizing cognizability on habeas of all constitutional claims); Sunal v. Large, 332 U.S. 174, 178–79 (1947) (addressing merits of claim of due process protection against government-tolerated perjury); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 274–75 (1942) (addressing merits claimed denial of the Sixth Amendment right to counsel); Waley v. Johnston, 316 U.S. 101, 105 (1942) (addressing merits of claim of due process protection against coerced guilty plea); Salinger v. Loisel, 265 U.S. 224, 232–33 (1924) (same).

534. *See* Bator, *supra* note 168, at 470–72 (acknowledging that the Court's nineteenth- and early twentieth-century habeas grants cannot be "easily justified" based on—and provide "a less than luminous beacon" defining what is meant by—a lack of jurisdiction; at times, the Court extended habeas relief to "categories of constitutional errors" by courts with undoubted jurisdiction); Kamin, *supra* note 467 (noting "bevy of pre-[1953] cases in which habeas courts recited the 'jurisdictional-defects-only' maxim—but . . . proceeded to review the merits of convictions that unquestionably *had* been entered by courts of general criminal jurisdiction, vacating those convictions on the basis of (what would strike modern eyes as) substantive or procedural constitutional errors"); Lee Kovarsky, *Habeas Myths, Past and Present*, 101 TEX. L. REV. ONLINE 57, 67–79 (2022) (concluding that the jurisdiction-only interpretation of habeas' availability is "myth but not history," which ignores a "mountain of precedent"); Alexandra Nickerson & Kellen Funk, *When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action*, 111 CAL. L. REV. 1763, 1795 ("[T]he English common law had long understood that the line between jurisdiction and substantive decision-making was murky at best, and grave errors of substance had often been treated as defects of jurisdiction appropriately remedied by the prerogative writs."); Siegel, *supra* note 147, at 510, 530 ("[S]tatement that a federal habeas court

State- and federal-prisoner cases decided under the Act of February 5, 1867

1. Baender v. Barnett, 255 U.S. 224, 225–27 (1921) (deciding Fifth Amendment and Article I, § 8 claims)
2. *Ex parte* Hudgings, 249 U.S. 378, 379 (1919) (deciding a Fifth Amendment claim)
3. **Frank v. Mangum, 237 U.S. 309, 326, 328, 330–31, 345 (1915) (acknowledging availability of habeas relief to any petitioner "shown to have been deprived of any right guaranteed to him by the 14th Amendment or any other provision of the Constitution or laws of the United States"); *id.* at 327, 334–35, 345 (tying habeas corpus to detaining court's lack of "jurisdiction," which—notwithstanding detaining courts'**

---

would not traditionally provide relief . . . unless the sentencing court lacked jurisdiction" meant "a habeas court would provide relief . . . if the sentencing court committed an important error," many of which were "in reality nonjurisdictional."); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 602–30 (1993) (exhaustively reviewing cases, concluding: "While the Court stated repeatedly it would not consider 'mere error' on habeas, it did not limit its review to strict 'jurisdictional' error," instead "grant[ing] relief for mistakes falling somewhere between mere error and strict jurisdictional error—what it called 'not a case of mere error in law, but a case of denying to a person a constitutional right'"); Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 660 (1948) ("By increasingly strained fictions, [nineteenth-century habeas cases] expanded the word jurisdiction far beyond its formal requirements."); *see also Ex parte* Bigelow, 113 U.S. 328, 330 (1885) ("It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of court so as to make its action when erroneous a nullity."); FALLON ET AL., *supra* note 136, at 356 ("Whenever an agency's action violates its governing statute, it seems possible to characterize the agency either as having exceeded its jurisdiction or as having erred substantively [s]o any effort to distinguish those categories will be elusive." (citing examples)).

Just as the presence of personal and subject-matter jurisdiction did not prevent habeas review of constitutional claims, so too its *lack* did not assure habeas review, *absent* a constitutional claim. *See, e.g.*, Whitten v. Tomlinson, 160 U.S. 231, 240, 245–47 (1895) (declining to review alleged lack of personal and subject-matter jurisdiction); *In re* Tyler, 149 U.S. 164, 180–81 (1893) (declining to review alleged lack of subject-matter jurisdiction); Reynes v. Dumont, 130 U.S. 354, 394 (1889) (declining to review alleged lack of "jurisdiction in equity"); *Ex parte* Parks, 93 U.S. 18, 19, 23 (1876) (declining to review alleged lack of subject-matter and personal jurisdiction); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 197, 207 (1830) (declining to review alleged lack of subject-matter and personal jurisdiction).

unquestioned subject-matter and personal jurisdiction— is "lost in the course of proceedings" marred by violation of "any right guaranteed to him by the 14th Amendment"); *id.* at 347 (Holmes, J., dissenting) (similar)

4. Valentina v. Mercer, 201 U.S. 131, 132, 138–39 (1906) (adjudicating merits of claims based on the due process right to instruction on self-defense and voluntary manslaughter)
5. Felts v. Murphy, 201 U.S. 123, 124–26, 129–30 (1906) (addressing and affirming the constitutionality of convicting a deaf prisoner in proceedings he could not understand)
6. Rogers v. Peck, 199 U.S. 425, 433–34, 435 (1905) ("When a prisoner is in jail, he may be released upon habeas corpus when held in violation of his constitutional rights.")
7. Davis v. Burke, 179 U.S. 399, 403–04 (1900) (reviewing on merits and denying request to give state prisoners same Bill-of-Rights protections as federal prisoners)
8. Whitten v. Tomlinson, 160 U.S. 231, 243–45 (1895) (resolving merits of non-jurisdictional Fifth and Fourteenth Amendment double-jeopardy and Fourteenth Amendment Due Process improper-indictment claims)
9. Bergemann v. Backer, 157 U.S. 655, 656–58 (1895) (addressing merits of asserted due process right to notice in indictment of degree of murder being charged)
10. Andrews v. Swartz, 156 U.S. 272, 275 (1895) (addressing merits of asserted due process right to appeal in capital cases)
11. ***In re* Bonner, 151 U.S. 242, 256–59 (1893) (rejecting argument that habeas corpus is limited to "judgment and sentence" that is "void" for want of subject matter or personal jurisdiction; "in all cases where life or liberty is affected by [detaining court's] proceedings," habeas corpus lies to keep that court "strictly within the limits of the law"; granting relief on Sixth Amendment right-to-jury claim); *id.* at 257 (ruling that any action by detaining court that the Constitution "specifically proscribe[s]" withdraws that court's "jurisdiction to render a particular judgment," including any actions "in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence,**

and in rendering judgment" that transgress "limitations prescribed by law")

12. *In re* Tyler, 149 U.S. 164, 181, 189–90 (1893) (in "cause confessedly within [detaining court's] jurisdiction," resolving merits of constitutional claims that contempt conviction violated state officials' Eleventh Amendment immunity and that the court-imposed fine was excessive in violation of the Eighth Amendment)
13. Counselman v. Hitchcock, 142 U.S. 547, 585 (1892) (granting relief on Fifth Amendment self-incrimination claim)
14. McElvaine v. Brush, 142 U.S. 155, 158–59 (1891) (same as Davis v. Burke, 179 U.S. 399 (1900), *supra*)
15. Brimmer v. Rebman, 138 U.S. 78, 80, 84 (1891) (granting relief from conviction for activity protected by Commerce Clause)
16. ***In re* Converse, 137 U.S. 624–25, 628, 631 (1891) (affirming the constitutionality of guilty-plea procedures; acknowledging availability of habeas relief from any "unconstitutional conviction and punishment under a valid law" and "conviction and punishment under an unconstitutional law")**
17. Crowley v. Christensen, 137 U.S. 86, 92–94 (1890) (addressing merits of equal-protection claim)
18. Minnesota v. Barber, 136 U.S. 313, 330 (1890) (similar to *Brimmer*, 138 U.S. 78, *supra*)
19. ***In re* Mills, 135 U.S. 263, 265–69 (1890) (noting that habeas review is justified if, "*apart from any questions as to jurisdiction*," custody "is in violation of the laws of the United States" (emphasis added))**
20. Medley, Petitioner, 134 U.S. 160, 171–73 (1890) (addressing merits of an ex-post-facto claim)
21. Davis v. Beason, 133 U.S. 333, 342–45 (1890) (addressing merits of a First Amendment free-exercise claim)
22. **Nielsen, Petitioner, 131 U.S. 176, 183–84 (1889) (ruling that even "where the detaining court had authority to hear and determine the case," if habeas petitioner "was protected by a constitutional provision" (here, Fifth Amendment double-jeopardy protection) and his was a "case of denying to a person a constitutional right," he is "entitled to be discharged"; habeas lies to correct any "conviction and punishment under an**

unconstitutional law" and any "unconstitutional conviction and punishment under a valid law"); *id.* at 185 (holding that "sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction")

23. *Ex parte* Terry, 128 U.S. 289, 301, 311–14 (1888) (addressing merits of a Fifth Amendment due-process claim of inadequate notice and denial of right to be present when convicted of contempt; stating that habeas "extends to the cases . . . of persons who are in custody in violation of the constitution," including any conviction under an unconstitutional law or unconstitutional conviction under a valid law)

24. *In re* Coy, 127 U.S. 731, 753–55 (1888) (resolving merits of a Fifth Amendment due-process claim that penal statutes must require proof of intent)

25. Callan v. Wilson, 127 U.S. 540, 541 (1888) (ruling that habeas is available for any conviction under an unconstitutional law or unconstitutional conviction under a valid law)

26. *In re* Ayers, 123 U.S. 443, 485–87, 507–08 (1887) (ruling that state officials' unlawful contempt conviction for violating federal-court injunction was offensive to Eleventh Amendment)

27. *Ex parte* Bain, 121 U.S. 1, 5–6, 12–13 (1888) (granting relief on Fifth Amendment right-to-indictment claim; habeas available for any violation of "the positive and restrictive language of the great fundamental instrument by which the government is organized")

28. *Ex parte* Harding, 120 U.S. 782, 783–84 (1887) (same as Davis v. Burke, 179 U.S. 399 (1900), *supra*)

29. *In re* Snow, 120 U.S. 274 (1887) (same as Nielsen, Petitioner, 131 U.S. 176 (1889), *supra*)

30. Yick Wo v. Hopkins, 118 U.S. 356, 356, 365–66, 368 (1886) (addressing non-jurisdictional selective-prosecution claims under Equal Protection Clause by two petitioners convicted of illegally operating San Francisco laundries; although one individual reached the Court on writ of error, and the other reached the Court on habeas, both received the same de novo review on the same question—"whether the plaintiff . . . has

been denied a right in violation of the Constitution, laws, or treaties of the United States"—and the Court granted both the same relief from their unconstitutional convictions)

31. ***Ex parte* Royall, 117 U.S. 241, 253 (1886) (stating that habeas is available "to determine whether the petitioner is restrained of his liberty in violation of the constitution of the United States")**
32. *Ex parte* Wilson, 114 U.S. 417, 422–26 (1885) (same as *Ex parte* Bain, 121 U.S. 1 (1888), *supra*)
33. *Ex parte* Curtis, 106 U.S. 371, 372–73 (1882) (deciding merits of a First Amendment challenge to law forbidding political activity by federal employees)
34. *Ex parte* Rowland, 104 U.S. 604, 616–18 (1881) (similar to *In re* Ayers, 123 U.S. 443 (1887), *supra*)
35. *Ex parte* Siebold, 100 U.S. 371, 374–77 (1879) (granting relief from federal conviction under unconstitutional law of state officials acting pursuant to state law)
36. *Ex parte* Jackson, 96 U.S. 727, 733, 736–37 (1877) (deciding merits of First and Fourth Amendment free-press and illegal-search claims)
37. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 175 (1873) (same as Nielsen, Petitioner, 131 U.S. 176 (1889), *supra*)
38. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 99 (1868) (finding that habeas is available for any claim addressing "lawfulness of detention")

Federal-prisoner cases decided under the 1789 Judiciary Act

39. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 116, 118 (1866) (stating that habeas lies to consider "lawfulness of detention")
40. *In re* Metzger, 46 U.S. (5 How.) 176, 191 (1847) (stating that habeas lies to consider "legality of the commitment")
41. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830) (same as *Metzger*, 46 U.S. (5 How.) 176, *supra*, equating "legality" with constitutionality, while withholding review of non-constitutional criminal procedure issues)
42. *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 705, 710 (1835) (finding a Fifth Amendment double-jeopardy violation by court with unchallenged jurisdiction)
43. *Ex parte* Randolph, 20 F. Cas. 242, 254–55 (Marshall, Circuit Justice, C.C.D. Va. 1833) (No. 11,558) (assuming cognizability

of claims that statute violated Article III and Fourth, Fifth, Sixth, and Seventh Amendments)

44. *Ex parte* Bollman, 8 U.S. (4 Cranch.) 75, 135 (1807) (overturning arrest warrant issued by court with jurisdiction but lacking Fourth Amendment probable cause)
45. United States v. Hamilton, 3 U.S. (3 Dall.) 17, 18 (1795) (similar to Ex parte *Bollman*, 8 U.S. (4 Cranch.) 75, *supra*)

Appendix C: Supreme Court Decisions Addressing Standard of Review and Affording De Novo Review of Legal and Mixed Constitutional Questions, 1915–94

1. Thompson v. Keohane, 516 U.S. 99, 102 (1995) ("[T]he issue whether a suspect is 'in custody,' and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact qualifying for independent review.")
2. Kyles v. Whitley, 514 U.S. 419, 454 (1995)
3. Shiro v. Farley, 510 U.S. 222, 232 (1994) ("The preclusive effect of the jury's verdict [under constitutional collateral estoppel rules] is a question of federal law which we must review *de novo*.")
4. Withrow v. Williams, 507 U.S. 680, 694 (1993)
5. Parke v. Raley, 506 U.S. 20, 35 (1992)
6. Wright v. West, 505 U.S. 284, 294–95, 297, 306 (1992) (plurality opinion and opinions of White, O'Connor, & Kennedy, JJ., concurring in the judgment)
7. Estelle v. McGuire, 502 U.S. 62, 70–75 (1991)
8. Penry v. Lynaugh, 492 U.S. 302, 322–26 (1989)
9. Duckworth v. Eagan, 492 U.S. 195, 201–05 (1989)
10. Maynard v. Cartwright, 486 U.S. 356, 360–65 (1988)
11. Hitchcock v. Dugger, 481 U.S. 393, 397–99 (1987)
12. Kimmelman v. Morrison, 477 U.S. 365, 373–87 (1986)
13. Darden v. Wainwright, 477 U.S. 168, 178–83 (1985)
14. Moran v. Burbine, 475 U.S. 412, 420–34 (1986)
15. Miller v. Fenton, 474 U.S. 104, 112–13, 115 (1985) ("independent federal determination")
16. Francis v. Franklin, 471 U.S. 307, 314 (1985)
17. Wainwright v. Witt, 469 U.S. 412, 429 (1985)
18. Berkemer v. McCarty, 468 U.S. 420, 435–42 (1984)
19. Strickland v. Washington, 466 U.S. 668, 697–98 (1984) (O'Connor, J.) ("The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial."); see Wright v. West, 505 U.S. 277, 302 (O'Connor, J., concurring) (*Strickland* "distinguished state-court determinations of mixed questions of fact and law, to which federal courts

should not defer, from state-court findings of historical fact, to which federal courts should defer")

20. Rushen v. Spain, 464 U.S. 114, 120 (1983) (per curiam)
21. Jones v. Barnes, 463 U.S. 745, 750–54 (1983)
22. Marshall v. Lonberger, 459 U.S. 422, 430 (1983)
23. Sumner v. Mata, 455 U.S. 591, 597 (1982) [*Sumner v. Mata II*]
24. Sumner v. Mata, 449 U.S. 539, 543–44 (1981)
25. Watkins v. Sowders, 449 U.S. 341, 345–49 (1981)
26. Cuyler v. Sullivan, 446 U.S. 335, 342 (1980)
27. Rose v. Mitchell, 443 U.S. 545, 561 (1979) ("independent . . . review by a federal court"); see id. at 580–82 (Powell, J., concurring in the judgment)
28. Jackson v. Virginia, 443 U.S. 307, 318–23 (1979) (rejecting deferential standard of review of insufficiency-of-evidence claim)
29. Wainwright v. Sykes, 443 U.S. 72, 87 (1977)
30. Manson v. Brathwaite, 432 U.S. 98, 109–17 (1977)
31. Casteneda v. Partida, 430 U.S. 482, 492–501 (1977)
32. Brewer v. Williams, 430 U.S. 387, 404 (1977); see id. at 417–20 (Burger, C.J., dissenting); *id.* at 429 (White, J., dissenting); *id.* at 438 (Blackmun, J., dissenting)
33. Stone v. Powell, 428 U.S. 465, 477 (1976) ("full reconsideration of . . . constitutional claim")
34. Mullaney v. Wilbur, 421 U.S. 684, 703–04 (1975)
35. Donnelly v. DeChristoforo, 416 U.S. 637, 642–45 (1974)
36. Cupp v. Naughton, 414 U.S. 141, 147–49 (1973)
37. Schneckloth v. Bustamonte, 412 U.S. 218, 222–49 (1973)
38. Gagnon v. Scarpelli, 411 U.S. 778, 781–91 (1973)
39. Neil v. Biggers, 409 U.S. 188, 191 (1972) (following "principle that each [habeas petitioner] is entitled . . . to a redetermination of his federal claims by a federal court" (citing Congress' 1948 recodification of 1867 Habeas Corpus Act, 14 Stat. 385 (1948))
40. Morrissey v. Brewer, 408 U.S. 471, 480–90 (1972)
41. Barker v. Wingo, 407 U.S. 514, 522–36 (1972)
42. Lego v. Twomey, 404 U.S. 477, 482–90 (1972)
43. McMann v. Richardson, 397 U.S. 759, 766–74 (1970)

44. Sheppard v. Maxwell, 384 U.S. 333, 349–63 (1966)
45. Pate v. Robinson, 383 U S. 375, 384–86 (1966)
46. Boles v. Stevenson, 379 U.S. 43, 44–45 (1964) (per curiam)
47. Gideon v. Wainwright, 372 U.S. 335, 339–45 (1963)
48. Townsend v. Sain, 372 U.S. 293, 318 (1963); *id.* at 326–27 (Stewart, J., dissenting); *see* Fay v. Noia, 372 U.S. 391, 460–61 (1963) (Harlan, J., dissenting in companion case) ("[I]f a petitioner could show that the validity of a state decision to detain rested on a determination of a constitutional claim, and if he alleged that determination to be erroneous, the federal court had the right and the duty to satisfy itself of the correctness of the state decision.")
49. Irwin v. Dowd, 366 U.S. 717, 723 (1961)
50. Rogers v. Richmond, 365 U.S. 534, 546 (1961)
51. Douglas v. Green, 363 U.S. 192, 193 (1960) (per curiam)
52. United States *ex rel.* Jennings v. Ragen, 358 U.S. 276, 277 (1959)
53. Thomas v. Arizona, 356 U.S. 390, 393 (1958)
54. Leyra v. Denno, 347 U.S. 556, 558–61 (1954)
55. United States *ex rel.* Smith v. Baldi, 344 U.S. 561, 565–70 (1953)
56. Brown v. Allen, 344 U.S. 443, 500–01, 506–07 (1953) (majority opinion of Frankfurter, J.) (ruling that on habeas review, federal judge has "final say"—i.e., "must exercise his own judgment," "independent" of state-court ruling; "prior State determination of a claim under the United State Constitution cannot foreclose" independent review; if case "calls for interpretation of the legal significance" of historical facts, "District Judge must exercise his own judgment . . . . [S]o-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge"; state-court determinations on legal questions "cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide")
57. Brown v. Allen, 344 U.S. 443, 458–59 (1953) (majority opinion of Reed, J.) (holding that state-court determinations of law reviewed on habeas are "not res judicata" and are subject to the "power of the District Court to reexamine federal constitutional issues even after trial and review by a state

[court]" to assure that the state-court ruling is "consonant with standards accepted by this Nation as adequate to justify [a] convictions" under "the Due Process and Equal Protection Clauses")

58. Darr v. Burford, 339 U.S. 200, 216–18 (1950)
59. Wade v. Mayo, 334 U.S. 672, 677 (1948)
60. Hawk v. Olsen, 326 U.S. 271, 276, 278–79 (1945) ("When . . . error in relation to the federal questions of constitutional violation, creeps into the record, we have the responsibility to review the proceedings.")
61. United States *ex rel.* McCann v. Adams, 320 U.S. 220, 222 (1943) (remanding case for de novo review of previously unaddressed legal claims)
62. Waley v. Johnston, 316 U.S. 101, 105 (1942) (same as *United States* ex rel. *McCann v. Adams*, 320 U.S. 220, *supra*)
63. Walker v. Johnston, 312 U.S. 275, 287 (1941) (same as *United States* ex rel. *McCann v. Adams*, 320 U.S. 220, *supra*)
64. Bowen v. Johnston, 306 U.S. 19, 28 (1939)
65. Johnson v. Zerbst, 304 U.S. 458, 469 (1938) (same as *United States* ex rel. *McCann v. Adams*, 320 U.S. 220, *supra*)
66. Escoe v. Zerbst, 295 U.S. 490, 492–93 (1935)
67. Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam)
68. Ashe v. United States *ex rel.* Valotta, 270 U.S. 424, 425–26 (1926)
69. Moore v. Dempsey, 261 U.S. 86, 92 (1923)
70. Frank v. Mangum, 237 U.S. 309, 334 (1915); *id.* at 347–48 (Holmes, J., dissenting on other grounds)

Appendix D: Supreme Court Decisions Applying AEDPA Deference Standard, 2000–24

Case	Citation	Petition granted?	Treatment of Court of Appeals (CA) outcome	Applied AEDPA deference?	Decision:			Found violation?	Deference defined and applied
					Decided merits **or ruled against petitioner on non-2254(d) grounds*	Addressed merits up to a point but left undecided	Did not address merits		
Ramdass v. Angelone	530 U.S. 156 (2000)	No	Aff'd CA4	Yes	X			No	
Weeks v. Angelone	528 U.S. 225 (2000)	No	Aff'd CA4	Yes	X			No	
Williams v. Taylor	529 U.S. 362 (2000)	Yes	Rev'd CA4	Yes (deferred to state trial court; state supreme court decision is unreasonable)	X			Yes	"Under § 2254(d)(1) . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.
Penry v. Johnson	532 U.S. 782 (2001)	Yes and no (remanded on 8thA claim; rejected 5thA claim)	Aff'd CA5 (5thA claim) Rev'd (8thA claim)	Yes (5th A claim) No (8th A claim)	X* (8th A claim)	X (5th A claim)		No (5thA claim) Yes (8thA claim)	"[E]ven if the federal habeas court concludes that the state-court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable." *Id.* at 793 (citation omitted).
Bell v. Cone	535 U.S. 685 (2002)	No	Rev'd CA6	Yes	X			No	"[W]e stressed in *Williams* [*v. Taylor*, *supra*] that an unreasonable application is different from an incorrect one." *Id.* at 694. "The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in Williams that an unreasonable application is different from an incorrect one." *Id.*
Early v. Packer	537 U.S. 3 (2002) (per curiam)	No	Rev'd CA9	Yes		X		Undecided	
Woodford v. Visciotti	537 U.S. 19 (2002)	No	Rev'd CA9	Yes		X		Undecided	"[R]eadiness to attribute error is

	(per curiam)								inconsistent with the presumption that state courts know and follow the law. It is also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt." *Id.* at 24 (citation omitted). "Whether or not we would reach the same conclusion as the California Supreme Court, we think at the very least that the state court's contrary assessment was not unreasonable." *Id.* at 27.
Lockyer v. Andrade	538 U.S. 63 (2003)	No	Rev'd CA9	Yes			X	Undecided	"[T]he Ninth Circuit defined 'objectively unreasonable' to mean 'clear error.' These two standards, however, are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* at 75 (citation omitted). "It is not enough that a federal habeas court, in its 'independent review of the legal question,' is left with a 'firm conviction' that the state court was 'erroneous.'" *Id.* (citation omitted).
Mitchell v. Esparza	540 U.S. 12 (2003) (per curiam)	No	Rev'd CA6	Yes	X			No	"A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Id.* at 17.
Price v. Vincent	538 U.S. 634 (2003)	No	Rev'd CA6	Yes		X		No	
Wiggins v. Smith	539 U.S. 510 (2003)	Yes	Rev'd CA4	No	X			Yes	
Yarborough v. Gentry	540 U.S. 1 (2003) (per curiam)	No	Rev'd CA9	Yes	X			No	
Holland v. Jackson	542 U.S. 649 (2004) (per curiam)	No	Rev'd CA6	Yes			X	Undecided	

Middleton v. McNeil	541 U.S. 433 (2004) (per curiam)	No	Rev'd CA9	Yes			X	Undecided	
Yarborough v. Alvarado	541 U.S. 652 (2004)	No	Rev'd CA9	Yes		X		No	"[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* at 664 (citation omitted). "[T]he deferential standard of § 2254(d)(1)." *Id.*
Bell v. Cone	543 U.S. 447 (2005) (per curiam)	No	Rev'd CA6	Yes	X			No	"§ 2254(d) dictates a "'highly deferential standard for evaluating state-court rulings,'" which demands that state-court decisions be given the benefit of the doubt.'" *Id.* at 455 (citations omitted).
Bradshaw v. Richey	546 U.S. 74 (2005) (per curiam)	No	Vac'd CA6	Yes			X	No	
Brown v. Payton	544 U.S. 133 (2005)	No	Rev'd CA9	Yes	X			No	"Even on the assumption that [the state-court] conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review." *Id.* at 143.
Kane v. Espitia	546 U.S. 9 (2005) (per curiam)	No	Rev'd CA9	Yes	X			No	
Rompilla v. Beard	545 U.S. 374 (2005)	Yes	Rev'd CA3	No	X			Yes	
Carey v. Musladin	549 U.S. 70 (2006)	No	Vac'd CA9	Yes			X	Undecided	
Abdul-Kabir v. Quarterman	550 U.S. 233 (2007)	Yes	Rev'd CA5	No	X			Yes	
Brewer v. Quarterman	550 U.S. 286 (2007)	Yes	Rev'd CA5	No	X			Yes	
Panetti v. Quarterman	551 U.S. 930 (2007)	Yes	Rev'd CA5	No	X			Yes	
Uttecht v. Brown	551 U.S. 1 (2007)	No	Rev'd CA9	Yes	X			No	"The requirements of the Antiterrorism and Effective Death Penalty Act of 1996 . . . create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside

									state-court rulings." *Id.* at 10.
Wright v. Van Patten	552 U.S. 120 (2008) (per curiam)	No	Rev'd CA7	Yes			X	Undecided	
Knowles v. Mirzayance	556 U.S. 111 (2009)	No	Rev'd CA9	Yes	X			No	*Unexplained state-court opinion* "[T]he deferential lens of § 2254(d)." *Id.* at 121 n.2. "[I]t is not 'an unreasonable application of clearly established Federal law' for a state-court to decline to apply a specific legal rule that has not been squarely established by this Court." *Id.* at 122 (citation omitted).
Porter v. McCollum	558 U.S. 30 (2009) (per curiam)	Yes	Rev'd CA11	No	X			Yes	
Waddington v. Sarausad	555 U.S. 179 (2009)	No	Rev'd CA9	Yes	X			No	"[T]he deferential lens of AEDPA." *Id.* at 194.
Berghuis v. Thompkins	560 U.S. 370 (2010)	No	Rev'd CA6	Yes (state-court decision was correct under *de novo* review, thus, reasonable under 2254(d))	X*			No	"AEDPA's deferential standard of review." *Id.* at 390.
Berghuis v. Smith	559 U.S. 314 (2010)	No	Rev'd CA6	Yes	X			No	
McDaniel v. Brown	558 U.S. 120 (2010) (per curiam)	No	Rev'd CA9	Yes	X			No	
Thaler v. Haynes	559 U.S. 43 (2010) (per curiam)	No	Rev'd CA5	Yes		X		Undecided (remanded to CA5 to decide merits)	
Renico v. Lett	559 U.S. 766 (2010)	No	Rev'd CA6	Yes		X		No	"This distinction [between an unreasonable and an incorrect application of federal law] creates 'a substantially higher threshold' for obtaining relief than *de novo* review." *Id.* at 773 (quoting Schriro v. Landrigan, 550 U.S. 465, 473 (2007)). "AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Id.* at 779.
Smith v.	558 U.S.	No	Rev'd CA6	Yes	X	X		No (all	*Unexplained state-*

Spisak	139 (2010)				(faulty instruction claim)	(ineffective assistance claim)		claims)	*court opinion (claim 3)* "[T]he deferential standard of review under § 2254(d)(1)." *Id.* at 155.
Bobby v. Dixon	565 U.S. 23 (2011) (per curiam)	No	Rev'd CA6	Yes	X			No	Holding that a federal court may not grant habeas relief where "it is not clear that the [state court] . . . erred so transparently that no fairminded jurist could agree with that court's decision . . . ." *Id.* at 24.
Bobby v. Mitts	563 U.S. 395 (2011) (per curiam)	No	Rev'd CA6	Yes	X			No	
Cavazos v. Smith	565 U.S. 1 (2011) (per curiam)	No	Rev'd CA9	Yes	X			No	On federal habeas review, "judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold." *Id.* at 2.
Cullen v. Pinholster	563 U.S. 170 (2011)	No	Rev'd CA9	Yes	X			No	*Unexplained state-court opinion*
Felkner v. Jackson	562 U.S. 594 (2011) (per curiam)	No	Rev'd CA9	Yes			X	Undecided	
Greene v. Fisher	565 U.S. 34 (2011)	No	Aff'd CA3	Yes			X	Undecided	
Harrington v. Richter	562 U.S. 86 (2011)	No	Rev'd CA9	Yes	X			No	*Unexplained state-court opinion* "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 102. "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable. If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. "As a condition for obtaining habeas

									corpus from a federal court, a state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.
Premo v. Moore	562 U.S. 115 (2011)	No	Rev'd CA9	Yes	X			No	
Hardy v. Cross	565 U.S. 65 (2011) (per curiam)	No	Rev'd CA7	Yes	X			No	"[D]eferential standard of review set out in 28 U.S.C. § 2254(d)." *Id.* at 72 "Under AEDPA, if the state-court decision was reasonable, it cannot be disturbed." *Id.* at 72.
Coleman v. Johnson	566 U.S. 650 (2012) (per curiam)	No	Rev'd CA3	Yes	X			No	
Howes v. Fields	565 U.S. 499 (2012)	No	Rev'd CA6	Yes	X			No (open question)	
Lafler v. Cooper	566 U.S. 156 (2012)	Yes	Vac'd CA6	No	X			Yes	
Parker v. Matthews	567 U.S. 37 (2012) (per curiam)	No	Rev'd CA6	Yes	X			No	
Wetzel v. Lambert	565 U.S. 520 (2012) (per curiam)	No	Vac'd CA3	Undecided (remanded for consideration of whether AEDPA deference applied to other ground supporting state-court decision)		X		Undecided	Holding that federal habeas relief is not available "unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA." *Id.* at 525.
Burt v. Titlow	571 U.S. 12 (2013)	No	Rev'd CA6	Yes	X			No	"Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Id.* at 19.
Johnson v. Williams	568 U.S. 289 (2013)	No	Rev'd CA9	Yes			X	No	*Unexplained state-court opinion* "[D]eferential standard of review contained in § 2254(d)." *Id.* at 297. "When a state court

									rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits . . . ." *Id.* at 301. In cases where that presumption is not adequately rebutted, "the restrictive standard of review set out in § 2254(d) consequently applies." *Id.* at 293. "[A]ccording respect only to determinations that have for-sure been made is demonstrably not the scheme that AEDPA envisions . . . . [T]he state court may well have applied a theory that was flat-out wrong . . . . That does not matter." *Id.* at 310 (Scalia, J., concurring).
Marshall v. Rodgers	569 U.S. 58 (2013)	No	Rev'd CA9	Yes			X	Undecided	
Metrish v. Lancaster	569 U.S. 351 (2013)	No	Rev'd CA6	Yes	X			No	"To obtain federal habeas relief under AEDPA's strictures, Lancaster must establish that . . . [he] has satisfied [§ 2254(d)(1)'s] demanding standard." *Id.* at 357–58.
Nevada v. Jackson	569 U.S. 505 (2013) (per curiam)	No	Rev'd CA9	Yes	X			Undecided	"In thus collapsing the distinction between 'an *unreasonable* application of federal law' and what a lower court believes to be 'an *incorrect* or *erroneous* application of federal law,' the Ninth Circuit's approach would defeat the substantial deference that AEDPA requires." *Id.* at 512 (citations omitted) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)).
Glebe v. Frost	574 U.S. 21 (2014) (per curiam)	No	Rev'd CA9	Yes		X		Undecided	
White v. Woodall	572 U.S. 415 (2014)	No	Rev'd CA6	Yes			X	Undecided	"[A]n 'unreasonable application of' [Supreme Court] holdings must be 'objectively

									unreasonable,' not merely wrong; even 'clear error' will not suffice." *Id.* at 419 (quoting Lockyer v. Andrade, 538 U.S. 63, 75–76 (2003)). "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *Id.* at 426. "[R]elief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Id.* at 427 (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).
Brumfield v. Cain	576 U.S. 305 (2015)	Yes	Vac'd CA5	No	X			Undecided; remanded to district court to decide merits	*Unexplained state-court opinion* "§ 2254(d)(2) requires that we accord the state trial court substantial deference." *Id.* at 314.
Lopez v. Smith	574 U.S. 1 (2015) (per curiam)	No	Rev'd CA9	Yes			X	Undecided	
White v. Wheeler	577 U.S. 73 (2015) (per curiam)	No	Rev'd CA6	Yes	X			No	Habeas relief should not be granted if state-court ruling "is not beyond any possibility for fairminded disagreement." *Id.* at 80.
Woods v. Donald	575 U.S. 312 (2015)	No	Rev'd CA6	Yes			X	No	"When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions *only* when there could be no reasonable dispute that they were wrong." *Id.* at 317.
Woods v. Etherton	578 U.S. 113 (2016) (per curiam)	No	Rev'd CA6	Yes			X	Undecided	
Dunn v.	583 U.S.	No	Rev'd CA11	Yes			X	Undecided	

Madison	10 (2017) (per curiam)								
Kernon v. Cuero	583 U.S. 1 (2017) (per curiam)	No	Rev'd CA9	Yes			X	Undecided	
McWilliams v. Dunn	582 U.S. 183 (2017)	Yes	Rev'd CA11	No	X			Yes	
Virginia v. LeBlanc	582 U.S. 91 (2017) (per curiam)	No	Rev'd CA4	Yes			X	Undecided	
Sexton v. Beaudreaux	585 U.S. 961 (2018) (per curiam)	No	Rev'd CA9	Yes			X	Undecided	*Unexplained state-court opinion* "[D]eference to the state court" is at "its apex" in federal habeas cases involving ineffective assistance of counsel claims. *Id.* at 968.
Wilson v. Sellers	584 U.S. 122 (2018)	No	Rev'd CA11	Yes			X (cert. granted to resolve circuit split on proper level of deference under 2254(d))	Undecided	*Unexplained state-court opinion*
Shoop v. Hill	586 U.S. 45 (2019) (per curiam)	No	Vac'd CA6	Undecided (remanded for consideration of whether AEDPA deference applied based on rules "clearly established" when state court ruled)			X	Undecided	AEDPA "imposes important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases." *Id.* at 48.
Shinn v. Kayer	592 U.S. 111 (2020)	No	Vac'd CA9	Yes			X	Undecided	"Perhaps some jurists would share [the Ninth Circuit's] views, but that is not the relevant standard. The question is whether a fairminded jurist could take a different view." *Id.* at 121. "The court below exceeded its authority in rejecting [state-court] determination, which was not so obviously wrong as to be 'beyond any possibility for fairminded disagreement.' Under § 2254(d), that is 'the only question that matters.'" *Id.* at 124 (quoting Harrington v. Richter, 562 U.S. 86, 103, 102

									(2011)).
Dunn v. Reeves	594 U.S. 731 (2021)	No	Rev'd CA11	Yes		X		Undecided	"[A] federal court may grant relief only if *every* 'fairminded juris[t]' would agree that *every* reasonable lawyer would have made a different decision." *Id.* at 740 (quoting *Richter*, 562 U.S. at 101).
Mays v. Hines	592 U.S. 385 (2021) (per curiam)	No	Rev'd CA6	Yes		X		Undecided	"All that mattered was whether the *Tennessee court*, notwithstanding its substantial 'latitude to reasonably determine that a defendant has not [shown prejudice],' still managed to blunder so badly that every fairminded jurist would disagree." *Id.* at 392 (citations omitted). "If this rule [that state-court decision must be so lacking in justification beyond any possibility for fairminded disagreement to be considered unreasonable under § 2254(d)(1)] means anything, it is that a federal court must carefully consider all the reasons and evidence supporting the state court's decision." *Id.* at 391–92.
Brown v. Davenport	596 U.S. 118 (2022)	No	Rev'd CA6	Yes			X	Undecided	"[I]t is not enough that the state-court decision offends lower federal court precedents" for it to be "contrary to" or an "unreasonable application" of established law under § 2254(d)(1). *Id.* at 136. "AEDPA asks whether *every* fairminded jurist would agree that an error was prejudicial . . . ." *Id.* at 136.

Summary of Outcomes (Overall and by Federal Circuit Court of Origin) and Rationales for Supreme Court Decisions Applying AEDPA Deference Standard, 2000–24

Writ granted	10.5	15%
Writ denied, vacated	61.5	85%
Total	**72**	

Lower federal court **did apply** AEDPA deference; Supreme Court **affirmed** that AEDPA deference applied	3.5	5%
Lower federal court **did apply** AEDPA deference; Supreme Court **reversed** and said AEDPA deference did not apply	9.5	13%
Lower federal court **did not apply** AEDPA deference; Supreme Court **reversed** and said AEDPA deference did apply	57	79%
Lower federal court **did not apply** AEDPA deference; Supreme Court **reversed and remanded for further consideration** of whether AEDPA deference should apply	2	3%
Decided under "contrary to" clause	12	17%
Decided under "unreasonable application" clause	47	65%
Decided under both clauses	13	18%
Ineffective assistance of counsel claims	25	35%
State-court decision unaccompanied by reasoning	7	10%

1st Circuit	**0**	**0**
2d Circuit	**0**	**0**
3d Circuit	**4**	**6%**
Reversed grant of relief	2	
Reversed denial of relief	1	
Affirmed denial of relief	1	
4th Circuit	**5**	**7%**
Reversed grant of relief	1	
Reversed denial of relief	2	
Affirmed denial of relief	2	

5th Circuit	**6**	**8%**
Reversed grant of relief	1	
Reversed denial of relief	4	
Affirmed denial of relief	1	
6th Circuit	**24**	**33%**
Reversed grant of relief	23	
Reversed denial of relief	1	
7th Circuit	**2**	**3%**
Reversed grant of relief	2	
8th Circuit	**0**	**0**
9th Circuit	**26**	**36%**
Reversed grant of relief	26	
10th Circuit	**0**	**0**
11th Circuit	**5**	**7%**
Reversed grant of relief	3	
Reversed denial of relief	2	
DC Circuit	**0**	**0**