

**NEGATING PRECEDENT AND (SELECTIVELY)
SUSPENDING STARE DECISIS: AEDPA AND PROBLEMS
FOR THE ARTICLE III HIERARCHY**

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I. INTRODUCTION

At its core, the “province and duty of the judicial department [is] to say what the law is.”¹ Chief Justice Marshall articulated this bedrock principle of judicial independence and operation in *Marbury v. Madison* in 1803. Much less quoted, but no less significant, is the concept that “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.”² Any court, including “such inferior Courts as the Congress may from time to time ordain and establish,”³ that is called on to judge an issue according to a rule should have the power to construe and develop the rule into a statement of what the law is. Over time, the definition of law is extended and constricted and applied to new situations. This definition and redefinition of law over time depends largely on reference to precedent and adherence to the principle of stare decisis. Thus, precedent and stare decisis are integral parts of the judicial department’s power and duty to say what the law is.

In the realm of habeas corpus petitions, however, this power is being contravened. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA)⁴ which, among other things, amended the statutes governing federal habeas corpus law.⁵ AEDPA imposed a statute of limitations on filing a habeas corpus petition⁶ and substantially restricted an inmate’s ability to file successive petitions.⁷ Most pertinent for this Comment, however, is that AEDPA also amended 28 U.S.C. § 2254, which sets the standards for ruling on habeas corpus petitions.

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

2. *Id.*

3. U.S. CONST. art. III, § 1.

4. Pub. L. No. 104-132, 110 Stat. 1214 (current version codified in scattered sections of 28 U.S.C.(2000)).

5. *Id.* at Title I.

6. 28 U.S.C. § 2244(d) (2000).

7. *Id.*

AEDPA added a new section, 28 U.S.C. § 2254(d)(1) (hereinafter “the AEDPA standard”), which mandates that federal district courts reviewing a habeas corpus petition can rely only on Supreme Court case law to determine whether the petitioner’s incarceration violates the United States Constitution.⁸ Does this provision undermine the judicial department’s ability to say what the law is?

The question, as posed by the Ninth Circuit in May 2005, is “whether AEDPA unconstitutionally prescribes the sources of law that the Judicial Branch must use in exercising its jurisdiction or unconstitutionally prescribes the substantive rules of decision by which the federal courts must decide constitutional questions that arise in state habeas cases.”⁹ The answer requires a discussion of the text of the AEDPA standard and how courts have interpreted it. This will be done in Part II. Part III will discuss the operation of the AEDPA standard and the problems it creates for stare decisis and the exercise of the judicial power through an examination of scholarly discussion and case law. Most previous discussions have focused on other issues that the AEDPA standard raises, such as undue deference to state court decisions, and address the above question only obliquely. This Comment will attempt to approach the problem directly. Part IV will contextualize the operation of the AEDPA standard by first developing a hypothetical habeas petition, and then examining how the issues presented in Part III play out in that hypothetical. Part V will conclude that the AEDPA standard unconstitutionally restricts a district court’s ability to refer to its own precedent and the precedent of superior Article III courts when ruling on habeas petitions and thus impinges on the principle of stare decisis.

II. 28 U.S.C. § 2254(D)(1)—THE AEDPA STANDARD

A. Statutory Text

Section 2254(d)(1) describes the standard governing a federal judge’s review of a state court’s ruling on questions of law.¹⁰ The provision

8. 28 U.S.C. § 2254(d)(1) (2000).

9. *Irons v. Carey*, 408 F.3d 1165, 1165 (9th Cir. 2005). As of the time of submission, the Ninth Circuit has not issued a ruling in this case. The Ninth Circuit has, however, decided another case involving the operation of the AEDPA standard that the Supreme Court has accepted on certiorari. *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2005), *reh’g en banc denied* 427 F.3d 647 (9th Cir. 2006), *cert. granted sub. nom.* *Carey v. Musladin*, 126 S. Ct. 1769 (2006) (mem.). The Supreme Court heard oral argument in this case on October 11, 2006, but has not yet reached a decision. The *Musladin* case will be discussed *infra* at Part V.

10. Questions of law include pure questions of law and mixed questions of law and fact. Another subsection, 28 U.S.C. § 2254(d)(2), governs the standards applicable for review of state court’s

states that “[a]n application for a writ of habeas corpus . . . shall not be granted . . . 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.”¹¹ A cursory examination of the statute’s text indicates that the first component creates two different standards. Since each part of a statute should, if possible, be given independent meaning,¹² the AEDPA standard should be read to give the “contrary to” and “unreasonable application of” clauses, set apart in the statute by normal punctuation,¹³ independent meaning and operation. Furthermore, the limiting source of law component referring to “clearly established law” should be read to apply to both the standards of review created by the first component—the “contrary to” and “unreasonable application of” clauses—, as nothing in the statute’s structure indicates otherwise.¹⁴ Thus, the statute should be read as follows: habeas relief should not be granted unless the state court determination (1) resulted in a decision that was (A) contrary to clearly established Federal law, as determined by the Supreme Court of the United States; or (B) involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. The initial phrase “resulted in a decision” would seem to indicate that only the outcome of the state court determination, not its reasoning, is governed by the AEDPA standard.¹⁵ Beyond preliminary impressions, however, the operation of the AEDPA standard quickly becomes confused.

findings of fact. The § 2254(d)(2) standard, however, is not pertinent to this Comment. See Allan Ides, *Habeas Standards of Review Under 28 U.S.C. §2254(D)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 681 (2003).

11. 28 U.S.C. § 2254(d) (2000).

12. See *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (avoid interpreting a provision in a way that would render other provisions of the act superfluous or unnecessary); *United States v. Menasche*, 348 U.S. 528, 538–539 (1955) (same).

13. See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–242 (1989) (Congress is presumed to follow accepted punctuation standards, so that placements of commas and other punctuation are assumed to be meaningful).

14. See *Eli Lilly and Co. v. Medtronic, Inc.*, 496 U.S. 661, 668–669 (1990) (avoid interpreting a provision in a way that is inconsistent with the structure of the statute).

15. This is not a settled question and there has been debate about whether a federal judge should examine the outcome or the reasoning of the state court. Compare Ides, *supra* note 10, at 684 with Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA’s Standard of Review Operate After Williams v. Taylor?*, 2001 WIS. L. REV. 1493, 1495 (2001). This question, however, is not vital to this Comment and is therefore outside its scope.

B. Interpreting the AEDPA Standard

“AEDPA is hardly a model of clarity”¹⁶ and has defied attempts to explain it. The Supreme Court recognized as much when it said that “in a world of silk purses and pigs’ ears, [AEDPA] is not a silk purse of the art of statutory drafting.”¹⁷ After Congress passed the statute, federal circuits split over, among other things, how to interpret and apply the new standards of review, particularly the meaning of the phrases “contrary to” and “unreasonable application of,” and their relationship to one another.¹⁸ Four years after AEDPA’s passage, the Supreme Court attempted to clarify the operation of the AEDPA standard in *Williams v. Taylor*.¹⁹

1. Williams v. Taylor

The decision produced three separate opinions. Justice O’Connor, joined by Justice Kennedy in full and Chief Justice Rehnquist, Justice Scalia and Justice Thomas in part, wrote the majority opinion for the Court interpreting the AEDPA standard. Justice Stevens, despite articulating a different standard, wrote the majority opinion for the Court applying the AEDPA standard and overruling the lower court’s denial of habeas relief. Justices Souter, Ginsburg, and Breyer joined Justice Stevens in full, while Justices O’Connor and Kennedy joined in part. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented from the majority’s reversal of the lower court.

a) Justice O’Connor’s Opinion with Regard to Interpretation

Justice O’Connor’s analysis of the first component of the AEDPA standard stems from the proposition that a court must “‘give effect, if possible, to every clause and word of a statute.’”²⁰ The O’Connor majority thus examined the AEDPA standard and determined that the statute should be read as creating two separate clauses; “contrary to . . . clearly established Federal law, as determined by the Supreme

16. *O’Brien v. Dubois*, 145 F.3d 16, 20 (1st Cir. 1998), *overruled by* *McCambridge v. Hall*, 303 F.3d 24 (1st Cir. 2002).

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

18. *Compare* *Green v. French*, 143 F.3d 865 (4th Cir. 1998) and *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), *superseded on other grounds by statute*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (2000), *as recognized in* *Shute v. Texas*, 117 F.3d 233 (5th Cir. 1997) *with* *O’Brien*, 145 F.3d at 21–25 and *Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997).

19. 529 U.S. 362 (2000).

20. *Id.* at 404 (quoting *Menasche*, 348 U.S. at 538–539).

Court of the United States,” and “involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.”²¹ Justice O’Connor then held that both clauses must be given independent meaning, and attempted to define those meanings.

A state court’s decision can be “contrary to” established federal law, according to *Williams*, in one of two ways. First, if a state court decides a pure question of law differently from the Supreme Court, that decision is “contrary to” the clearly established law of the Supreme Court.²² Alternatively, if a state court “confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to”²³ the decision of the Supreme Court, then the state court’s decision would be “contrary to” federal law. Justice O’Connor noted that “contrary to” usually means “diametrically different” or “opposite in character or nature.”²⁴ To be “contrary to” federal law, then, a state court’s decision on either a question of law or a mixed question of law and fact must be “diametrically different” from or “opposite in character or nature” to federal law in order for a federal court to grant habeas relief. Therefore, “run-of-the-mill state-court decision[s] applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner’s case would not comfortably fit within § 2254(d)(1)’s ‘contrary to’ clause.”²⁵

Such a “run-of-the-mill” decision could still lead to a federal grant of habeas relief, however, if it “involve[d] an unreasonable application[] of clearly established Federal law.”²⁶ This can happen in one of two ways. First, if a state court correctly identifies the governing Supreme Court legal rule but unreasonably applies it to the facts before it, habeas relief would be warranted. Alternatively, “if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply,”²⁷ then such a decision would be an unreasonable application of federal law. The Court expounded on the “unreasonable application” clause by holding that the inquiry should be based on an “objectively unreasonable” standard,

21. *Id.* at 404–405 (quoting § 2254(d)(1)).

22. *Id.* at 405 (quoting § 2254(d)(1)).

23. *Id.*

24. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976)).

25. *Id.* at 406.

26. § 2254(d)(1).

27. *Williams*, 529 U.S. at 407.

rather than a subjective standard.²⁸ Justice O'Connor declined, however, to define "unreasonable" beyond noting that it does not mean the same thing as "incorrect."²⁹

As for the second component of the AEDPA standard, "clearly established Federal law as determined by the Supreme Court of the United States," Justice O'Connor simply stated "[t]hat statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."³⁰ The temporal distinction between what is and is not "clearly established law" is somewhat unclear,³¹ but the main point is that the "precedent must predate the judgment of conviction of the person seeking habeas."³² What is more relevant here is Justice O'Connor's "assertion that lower court precedent cannot be used to satisfy the clearly established federal law requirement. On this point the Court is unanimous."³³

b) Justice Stevens' Opinion Regarding Application

Even though Justices Stevens and O'Connor differed in their interpretation of the AEDPA standard, they agreed on its application. Justice O'Connor's description of the AEDPA standard should not be considered entirely dispositive in and of itself, because "the law as applied is sometimes the best gauge of the content of the law . . . [p]resumably, the law established by the *Williams* decision lurks somewhere between these two interlocking majorities of description (Justice O'Connor's Part II) and application (Justice Stevens's Part III)."³⁴

28. *Id.* at 409.

29. This proposition can be read as allowing an incorrect state court ruling on a constitutional issue to stand as long as it is a reasonable error, which is a potentially problematic outcome from a Supremacy Clause standpoint. Legislative history indicates, furthermore, that Congress did not intend to endorse a "wrong but reasonable standard." These problems can be resolved, however, by reading Justice O'Connor's opinion as simply directing the focus of the inquiry to the right question—reasonableness. *See Ides, supra* note 10, at 710.

30. *Williams*, 529 U.S. at 412.

31. The meaning of this statement, in conjunction with other statements in Justice O'Connor's opinion, is somewhat unclear from the standpoint of what constitutes "old" and "new" rules and temporal definitions of what constitutes "clearly established law" in light of past Supreme Court decisions such as *Teague v. Lane*, 489 U.S. 288 (1989). *See, e.g.*, A. Christopher Bryant, *Retroactive Application of "New Rules" and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1 (2002). The full discussion, however, is outside the scope of this Comment, as this Comment focuses on the Supreme Court only limitation, not a temporal limitation.

32. *Ides, supra* note 10, at 704–705.

33. *Id.* at 702.

34. *Id.* at 699.

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A brief explanation of Justice Stevens's description of the AEDPA standard is in order before turning to its application. Justice Stevens declined to construe the first component of the AEDPA standard as establishing two independent categories of review.³⁵ Instead, Justice Stevens emphasized the "contrary to" phrase in an attempt to preserve independent de novo federal review of state court determinations, and subsumed the "unreasonable application of" phrase. Justice Stevens feared that giving the "unreasonable application of" phrase an independent meaning would create a "wrong but reasonable" standard,³⁶ and instead characterized it as creating a "mood" of deference to reasonable state court determinations.³⁷ As for the "clearly established law" component of the AEDPA standard, Justice Stevens disagreed slightly with Justice O'Connor on the temporal distinction between what is and is not "clearly established law." On the "Supreme Court only" clause, however, he agreed completely with Justice O'Connor: "[i]f this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar."³⁸

Turning to the application of the AEDPA standard, Justices Stevens and O'Connor agreed that *Strickland v. Washington*³⁹ qualified as "clearly established law" for Sixth Amendment ineffective assistance of counsel claims, such as the claim in *Williams*, despite the fact that the *Strickland* test required a case-by-case analysis and was not a bright-line solution for every case.⁴⁰ The clarity of the ultimate result is not the focus; rather, the clarity of the governing rule is. Furthermore, the Supreme Court had previously determined the contours of the *Strickland* test.

Justices Stevens and O'Connor also agreed that the state court in *Williams* failed to reasonably apply the *Strickland* test when it neglected to consider the totality of mitigation evidence presented at the original death penalty sentencing phase of the trial and on habeas when determining whether the inmate suffered prejudice as a result of counsel's ineffectiveness under *Strickland*.⁴¹ The state court evaluated

35. *Williams*, 529 U.S. at 384 (Stevens, J., concurring) ("We are not persuaded that the phrases define two mutually exclusive categories of questions.").

36. *Id.* at 385.

37. *Id.* at 386.

38. *Id.* at 381.

39. 466 U.S. 668 (1984).

40. *Williams*, 529 U.S. at 391 (Stevens, J., concurring).

41. *Id.* at 397-398.

the petitioner's introduced and omitted mitigation evidence in isolation, and "thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel"⁴² as *Strickland* and other cases clearly mandated.⁴³

2. Subsequent Interpretations and Clarifications

The Supreme Court has taken steps to clarify some of the holdings in *Williams*. For instance, the Court has expanded on the scope of deference owed to state court determinations of constitutional issues and has encouraged a "presumption that state courts know and follow the law."⁴⁴ The Court has also reiterated Justice O'Connor's admonition to "ask the right question."⁴⁵ "Correctness" is not the baseline of the inquiry—rather, it is reasonableness. Certainly, correctness plays into the equation, but it is not dispositive. As Professor Ides determined,

Instead of asking whether the state court decision was objectively unreasonable, [the lower court erred because] it asked whether that decision was correct and having concluded that it was not correct, labeled it objectively unreasonable. The lesson here is that a federal court must begin with the right question and arrive at its judgment based on an examination of the criteria that might measure objective reasonableness.⁴⁶

The Court has also somewhat clarified the operation of the "unreasonable application of" standard, especially the role that error plays in the determination. When ruling on a habeas claim, a lower federal court must first identify the "clearly established" Supreme Court precedent.⁴⁷ Next, the court must determine whether error occurred in the application of that principle. Only if such an error occurred should a district court determine whether that error was objectively unreasonable.⁴⁸ While the definition of what constitutes "objectively unreasonable" is still vague, the Supreme Court in both *Williams* and in *Wiggins v. Smith*⁴⁹ has followed the principle that "a state court that fails to apply the full range of the applicable federal law standard will be deemed to have acted unreasonably within the meaning of

42. *Id.* at 398.

43. See *Clemons v. Mississippi*, 494 U.S. 738, 751–752 (1990).

44. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam); see also *Bell v. Cone*, 543 U.S. 447 (2005).

45. *Williams*, 529 U.S. at 406.

46. Ides, *supra* note 10, at 723.

47. *Id.* at 731, 760.

48. *Id.*

49. 539 U.S. 510 (2003).

§ 2254(d)(1).”⁵⁰ When determining if a state court decision involved an “unreasonable application of” federal law, a reviewing court must make that determination in light of the record that the court has before it.⁵¹

3. Unresolved Issues

The Court’s opinions in *Williams* and subsequent case law do little to resolve two important, interrelated issues: 1) what is the definition of “objectively unreasonable”; and 2) how does the “unreasonable application of” standard operate in the context of extending a legal principle? Remember that Justice O’Connor in *Williams* articulated two ways that a state court’s decision could fall within the “unreasonable application” context: it could correctly identify the governing Supreme Court rule but unreasonably apply it to the facts of given case, or it could “either unreasonably extend[] a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuse[] to extend that principle to a new context where it should apply.”⁵²

How is a federal habeas court to determine when a state court’s extension of a legal principle or refusal to extend a legal principle is unreasonable? Justice O’Connor described the problem as follows:

[I]t will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context. Indeed, on the one hand, in some cases it will be hard to distinguish a decision involving an unreasonable extension of a legal principle from a decision involving an unreasonable application of law to facts. On the other hand, in many of the same cases it will also be difficult to distinguish a decision involving an unreasonable extension of a legal principle from a decision that “arrives at a conclusion opposite to that reached by this Court on a question of law.”⁵³

Justice O’Connor expressly declined to provide any guidance as to how courts should resolve this issue, simply stating that the case before the Court did not require an answer.⁵⁴ But imagine for a moment how a federal district court should approach such a problem. The court must first identify the “clearly established Federal law,” but only by reference

50. *Ides*, *supra* note 10, at 760.

51. *Holland v. Jackson*, 542 U.S. 649, 652 (2004); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (*per curiam*).

52. *Williams v. Taylor*, 529 U.S. 362, 407 (2000).

53. *Id.* at 408.

54. *Id.* at 408–409.

to the “holdings, as opposed to the dicta”⁵⁵ of the Supreme Court. If the question at issue is one of extension of legal principles, then, by definition, the Supreme Court will not have ruled on the issue—if it had, the inquiry would then be whether the state court’s determination was either “contrary to” that principle or an unreasonable application of that principle to facts, not an extension of that principle. But assuming a district court somehow got around that problem, it would next have to determine 1) whether such an extension/non-extension was erroneous; and 2) whether that erroneous extension was unreasonable—all by reference only to the holdings of the Supreme Court. However, in the unreasonable extension context, such a determination will be virtually impossible, as no Supreme Court case would be directly on point, and “[a] lower federal court simply lacks the power under § 2254(d)(1) to extract threads from concurring and dissenting opinions as a method through which to so characterize the established law.”⁵⁶

In other areas of the law, when developing standards of objective reasonableness and reasonable or unreasonable extension of principle, lower courts construct and define the parameters of reasonableness on a case-by-case basis. They reference, interpret, and refine precedents to shape the contours of and say what “the law” is. Does limiting the set of case law available to a federal habeas court when deciding what an “unreasonable application of” federal law is interfere with the power to say what the law is? What does it mean to exercise the judicial power, and how does that affect these issues?

III. SAYING WHAT THE LAW IS

A. *The Exercise of the Article III Power*

In a widely cited 1998 article, Professors James Liebman and William Ryan conducted an exhaustive review of the historical debates and compromises that led to the drafting and ratification of Article III. Their aim was to define the Article III power and its relationship to both Congress and the states.⁵⁷ One of their primary conclusions was that, as used at the Constitutional Convention and in Article III itself, “jurisdiction” did not equal “power.”⁵⁸ “Congress was meant to ‘Regulat[e]’ the Court’s ‘jurisdiction’ but not to control the ‘manner’ in

55. *Id.* at 412.

56. *Id.*, *supra* note 10, at 762.

57. 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 (1998).

58. *Id.* at 708.

which jurisdiction would be exercised.”⁵⁹ This redefinition of “jurisdiction” represented a shift away from a quantitative definition of “the judicial power”⁶⁰ towards a qualitative definition involving the nature of the power exercised when authorized.⁶¹ Under this conception of the judicial power, once Congress conferred jurisdiction on the Judiciary, it could not proscribe or delineate in midstream⁶² the manner in which the Judiciary exercised its power.⁶³

What constitutes the manner in which an Article III court exercises the judicial power? According to Liebman and Ryan,

In cases over which Congress confers jurisdiction, the Constitution vests Article III judges with—i.e., it requires them to exercise and forbids Congress to withdraw—five crucial qualities constituting “the judicial Power”: (1) independent decision of (2) every—and the entire—question affecting the normative scope of supreme law (3) based on the whole supreme law; (4) finality of decision, subject only to reversal by a superior court in the Article III hierarchy; and (5) a capacity to effectuate the court’s judgment in the case and in precedentially controlled cases.⁶⁴

Congress may eliminate the whole of jurisdiction under Article III, but once Congress confers jurisdiction over an area of law, the judicial power must be allowed to operate to its fullest extent. Selective suspension of any one of these areas unconstitutionally interferes with the exercise of the judicial power. Such was the issue in *Marbury v. Madison*, when Congress attempted to prevent the Court from looking at one part of “the supreme law” (i.e. the Constitution) in favor of another (i.e. the 1789 Judiciary Act). The Court considered this congressional action an unconstitutional interference with the exercise of the judicial power.⁶⁵ Forcing the Court to ignore the Constitution in favor of a statute constitutes an unconstitutional interference with the third requirement stated above – an Article III court must be able to refer to the “whole supreme law.” Assuming that stare decisis is a core function of the judicial power, then surely preventing an Article III court from referring to its own precedent, as AEDPA does, and selectively

59. *Id.*

60. Defined by the scope of the Judiciary’s original and appellate jurisdiction and the number of cases the Judiciary could hear.

61. Liebman & Ryan, *supra* note 57, at 768.

62. *Id.* at 822.

63. *Id.* at 760–764.

64. *Id.* at 884.

65. *Id.* at 813 (“The question that most troubled Marshall, thus, was not whether the Court could interpret the governing law independently but, rather . . . whether Congress’ adoption of section 13 imposed a choice of law requiring the Court to ignore . . . the Constitution, leaving only section 13 to qualify as ‘what the law is.’”).

suspending the doctrine of stare decisis also unconstitutionally interferes with the “whole law” requirement.

B. The Role of Stare Decisis in Exercising the Judicial Power

Is the principle of stare decisis, then, a core component of an Article III court’s exercise of the judicial power? Two Supreme Court decisions *City of Boerne v. Flores*⁶⁶ and *Plaut v. Spendthrift Farm, Inc.*⁶⁷ can be read to support this proposition.

1. *City of Boerne v. Flores*

City of Boerne dealt with a challenge to the Religious Freedom Restoration Act of 1993 (hereinafter “the RFRA”), on the grounds that it unconstitutionally exceeded Congress’s authority under § 5 of the Fourteenth Amendment by legislating a substantive change in the meaning of the Fourteenth Amendment.⁶⁸ Congress passed the RFRA in direct response to the Supreme Court’s decision in *Employment Division, Dept. of Human Resources of Oregon v. Smith*,⁶⁹ which held that First Amendment Free Exercise challenges were not subject to strict scrutiny review.⁷⁰ The RFRA sought to compel courts to re-adopt strict scrutiny when ruling on First Amendment Free Exercise challenges.

The Supreme Court declined to do so, and determined that the RFRA was unconstitutional.⁷¹ The Court recognized that Congress has a special grant of power under § 5 of the Fourteenth Amendment to enforce the provisions of that amendment.⁷² Section 5, however, is a grant of remedial power, designed only to enable Congress to enforce the Fourteenth Amendment, not legislate its substantive content.⁷³ “While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern . . . the distinction exists and must be observed.”⁷⁴ The Court decided that the RFRA’s broad scope made it a substantive change to and interpretation of the meaning of the

66. 521 U.S. 507 (1997).

67. 514 U.S. 211 (1995).

68. *City of Boerne*, 521 U.S. at 507.

69. 494 U.S. 872 (1990).

70. *Id.* at 889.

71. *City of Boerne*, 521 U.S. at 536.

72. *Id.* at 517.

73. *Id.* at 519.

74. *Id.* at 519–520.

Fourteenth Amendment, rather than remedial legislation designed to enforce it.⁷⁵ However, the judiciary retains the power to interpret the Constitution, and the Supreme Court had previously interpreted the Constitution with respect to Free Exercise challenges in *Employment Div.*,

[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.⁷⁶

2. *Plaut v. Spendthrift Farm, Inc.*

Plaut v. Spendthrift Farm, Inc. (“*Plaut*”) involved a challenge to a section of the Securities Exchange Act of 1934 that directed federal courts to reopen finalized cases if they met certain criteria.⁷⁷ In *Plaut*, the petitioner had filed a claim against the respondent alleging fraud. The district court dismissed the claim as untimely following a Supreme Court decision handed down while the claim was still before the district court that set forth statutes of limitation in fraud cases.⁷⁸ Shortly thereafter, Congress passed an amendment to the Securities Exchange Act requiring courts to reopen cases that were pending at the time of the Supreme Court’s decision holding them untimely.⁷⁹ The petitioners returned to federal court, where first the district judge and then the Sixth Circuit ruled that the amendments to the Securities Exchange Act were unconstitutional violations of the separation of powers principle.⁸⁰

The Supreme Court agreed. After examining the history surrounding the creation of Article III, the Court found that the Framers had intended to remedy the problem of excessive legislative interference with judicial decisions and functions by establishing a truly independent judiciary that would serve as the final authority on the cases that came before it.⁸¹ The majority reasoned that one of the core ways in which the Founders attempted to establish the independence of the judicial department was to ensure that its judgments, once final, would be authoritative and not subject to legislative oversight. As the opinion of the Court stated,

75. *Id.* at 532–534.

76. *Id.* at 536.

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

78. *Id.* at 213.

79. *Id.* at 214–215.

80. *Id.* at 215.

81. *Id.* at 219–224.

The record of history shows that the Framers crafted this charter of the judicial department [Article III] with an expressed understanding that it gives 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.⁸²

Once a judgment becomes final, either by pronouncement from the Supreme Court or from a lower court after the time for appeal has passed, that decision represents what the judicial department says the law is with regard to that matter. Congress cannot compel courts to revisit final decisions and change what the judiciary said the law was.

3. Application to the AEDPA Standard

Professor Vicki Jackson has argued that *Plaut* and *City of Boerne*, when read together, mean that an Article III court's precedent matters. *City of Boerne* dealt directly with the issue of Congressional interference with stare decisis. Although *Plaut* dealt with the finality of a court's judgment between two parties, its reasoning is easily applicable to preserving a court's final legal conclusions. Calling precedent an "essential element of Article III adjudication," Professor Jackson posits that "*Plaut* and *Boerne* suggest a vision of Article III courts that requires Congress not only to leave their final judgments intact, but also to treat (and allow other courts to treat) their decisions as having ordinary stare decisis effect."⁸³ Two implications follow from such a vision. First, when deciding a novel issue, such as whether an extension of a legal principle is unreasonable or not, a lower court's understanding that it is not only adjudicating the claim before it but is also developing a rule for other courts to follow will encourage responsible decision-making and will help resolve difficult issues. Second, courts faced with similar issues as other courts should be free to refer to those decisions or, given the hierarchy of the judicial department, may be obligated to follow them. "A congressional directive that lower federal courts determine the relevant constitutional law only by reference to the Supreme Court's decisions [as AEDPA's standard of review does], ignoring the decisions of other lower federal courts, may be inconsistent with these ordinary stare decisis requirements."⁸⁴ Such a directive would also seem to violate Professors Liebman and Ryan's "whole supreme law" requirement for exercising the judicial power.

82. *Id.* at 218–219.

83. Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L. J. 2445, 2469–2470 (1998).

84. *Id.* at 2470.

Selective suspension of stare decisis is also constitutionally suspect. Professor Evan Tsen Lee argues that, at least in the habeas context, stare decisis is an all-or-nothing prospect. “It may . . . be assumed [for the sake of argument] that Congress has the power to suspend the doctrine of stare decisis in federal habeas corpus cases”⁸⁵ Any attempt at selective suspension of the principle, however, “reaches deep into the core adjudicatory functions of the federal courts.”⁸⁶ The issue arises in the following manner: A district judge is bound by the AEDPA standard to apply “clearly established Federal law, as determined by the Supreme Court.”⁸⁷ Suppose a circuit court decides that a particular rule satisfies AEDPA’s “clearly established” requirement. Assume also that a lower district court judge disagrees with the circuit’s opinion, and does not think that the rule qualifies as “clearly established.” If the district judge is presented with a habeas claim based on that rule, what does the district judge do? Should the judge follow the circuit court’s ruling in accord with traditional stare decisis principles, as would ordinarily happen, or mutiny and make an independent judgment about what constitutes “clearly established Federal law,” as AEDPA seems to require? Professor Lee argues that “[i]f the ‘Supreme Court only’ clause . . . requires district courts to make an independent determination about whether the circuit has fairly interpreted Supreme Court case law, then it selectively suspends the doctrine of stare decisis. This is a potential violation of Article III.”⁸⁸

C. Circuit Court Rulings

The articles discussed above deal with the issue of the AEDPA standard’s constitutionality in hypotheticals, and decline to take a position as to whether or not AEDPA’s “Supreme Court only” directive unconstitutionally interferes with the ability of lower federal courts to say what the law is. Circuit court opinions directly dealing with the issue are few, but are worth examining.

1. Indirect Opinions and Avoiding the Problem

Multiple circuits have avoided ruling on the constitutionality of AEDPA’s “Supreme Court only” directive by holding that, at least in the

85. Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User’s Manual*, 51 VAND. L. REV. 103, 135 (1998).

86. *Id.*

87. 28 U.S.C. § 2254(d)(1) (2000).

88. Lee, *supra* note 85, at 131–132.

“unreasonable application of” analysis, circuit court precedent retains a role. Pre-*Williams v. Taylor*, the First,⁸⁹ Third,⁹⁰ Eighth,⁹¹ and Ninth Circuits⁹² all held that “although AEDPA refers to ‘clearly established Federal law, as determined by the Supreme Court of the United States,’ we do not believe federal habeas courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court’s application of the law was reasonable.”⁹³ These circuits, and by inference the district courts within the circuits, still looked to district and circuit court opinions to determine whether or not a state court’s application of law to fact, or extension, or non-extension, of legal principle, was objectively reasonable. This may avoid the potential Article III problems discussed above concerning stare decisis by apparently limiting the applicability of the AEDPA standard’s “Supreme Court only” clause to the “contrary to” analysis, while leaving the “unreasonable application of” analysis unfettered by the restriction. While this may avoid constitutional problems, there is no support in the structure of the statute for this reading.⁹⁴

Even if there were some support in the structure of the statute for this reading, the constitutional difficulties may remain unresolved. The First, Third, Eighth, and Ninth Circuits all seem to read AEDPA as allowing their precedent to be persuasive authority. But the real objection to the AEDPA standard is that it seems to prevent circuit precedent from having its *ordinary* stare decisis effect. Ordinarily, circuit court precedent is mandatory, both on other panels of that circuit and on all lower district courts within the circuit. Even if circuit precedent is still persuasive authority, however, that does nothing to solve the problems associated with transforming ordinarily mandatory authority into merely persuasive authority.

Justice O’Connor’s opinion in *Williams v. Taylor* merely stated that the “clearly established” phrase “refers to the holdings, as opposed to the dicta, of this Court’s decisions . . .”⁹⁵ The Court did not address the meaning given the phrase by the First, Third, Eighth, and Ninth Circuits.

89. *O’Brien v. Dubois*, 145 F.3d 16 (1st Cir. 1998), *overruled in part by* *McCambridge v. Hall*, 303 F.3d 24 (1st Cir. 2002).

90. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3rd Cir. 1999).

91. *Long v. Humphrey*, 184 F.3d 758 (8th Cir. 1999).

92. *Duhaime v. Ducharme*, 200 F.3d 597 (9th Cir. 1999).

93. *Matteo*, 171 F.3d at 890 (citations omitted); *see also O’Brien*, 145 F.3d at 21 (holding the same); *Long*, 184 F.3d at 760–61 (holding the same); and *Duhaime*, 200 F.3d at 600 (holding the same).

94. 28 U.S.C. § 2254(d)(1) (2000) (“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”).

95. *Williams*, 529 U.S. 362, 412 (2000).

However, Justice O'Connor's narrow definition of the phrase would seem to disapprove of limiting the phrase's applicability to the "contrary to" analysis only. After *Williams*, the Sixth Circuit held that, "[a]s is dictated by the statute, we may not 'look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.'"⁹⁶ However, the First⁹⁷ and Ninth Circuits⁹⁸ reaffirmed their prior interpretation of the AEDPA standard's "Supreme Court only" clause.

2. A Direct Examination of the AEDPA Standard's Constitutionality

In *Lindh v. Murphy*,⁹⁹ an en banc panel of the Seventh Circuit directly addressed the issue of whether the AEDPA standard interfered with a federal court's ability to interpret the law.¹⁰⁰ Lindh was convicted of two counts of murder and one count of attempted murder. During the penalty phase of his trial, he argued that he was insane at the time of the killings. The jury convicted Lindh and gave him a life sentence.¹⁰¹ On direct appeal, Lindh argued that his limited opportunity to cross-examine the state's psychiatric expert violated both state law and the Confrontation Clause of the Sixth Amendment. The state court of appeals reversed Lindh's conviction and granted him a new sentencing trial on the ground that the Sixth Amendment had been violated.¹⁰² The Wisconsin Supreme Court reversed, and reinstated Lindh's sentence on the Sixth Amendment issue.¹⁰³ Lindh initiated a habeas action in federal district court, which denied his petition. Lindh then appealed to the Seventh Circuit.¹⁰⁴ Shortly after a panel heard oral argument in 1996, Congress enacted AEDPA, and the Seventh Circuit reheard the case en

96. *Doan v. Brigano*, 237 F.3d 722, 729 (6th Cir. 2001) (quoting *Herbert v. Billy*, 160 F.3d 1131 (6th Cir. 1998)).

97. *Phoenix v. Matesanz*, 233 F.3d 77, 83 n.3 (1st Cir. 2000) ("Although decisions issuing from this Court are not 'clearly established' for the purposes of § 2254(d)(1) because they do not issue from the Supreme Court, they provide significant insight on what constitutes reasonableness for a particular fact pattern").

98. *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000), *abrogated on other grounds*, *Lockyer v. Andrade*, 538 U.S. 63 (2003).

99. 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).

100. After the *Lindh* decision, the Fourth Circuit also examined the constitutionality of the AEDPA standard in *Green v. French*, 143 F.3d 865, 874-75 (4th Cir. 1998), *abrogated on grounds by Williams v. Taylor*, 529 U.S. 362 (2000). The Fourth Circuit's opinion was not as extensive as the Seventh Circuit's, however, and has been omitted from this Comment.

101. *Id.* at 860.

102. *State v. Lindh*, 457 N.W.2d 564 (Wis. Ct. App. 1990).

103. *State v. Lindh*, 468 N.W.2d 168 (Wis. 1991).

104. *Lindh*, 96 F.3d at 860.

banc to determine whether the AEDPA amendments applied to Lindh and what effect they had on habeas corpus law in general.¹⁰⁵

The majority held that the AEDPA amendments to § 2254(d)(1) applied to pending cases,¹⁰⁶ that AEDPA did not constitute a “suspension” of the writ of habeas corpus,¹⁰⁷ and that the amendments to § 2254(d)(1) did not require undue deference by federal courts to state court determinations of constitutional issues, all of which were arguments Lindh had raised. The American Bar Association and a group of former federal judges filed *amicus* briefs, however, and raised a different issue. They argued that “§ 2254(d)(1) is unconstitutional to the extent it requires anything less than plenary review of all contentions based on federal law.”¹⁰⁸ The *amici* relied on *Marbury* and *Plaut* for this proposition.¹⁰⁹

The Seventh Circuit dismissed this argument, however, reasoning that AEDPA and the amended § 2254(d)(1) did not alter the right of an inmate to file a petition for habeas corpus. Nor did it alter the right of an Article III court to exercise its independent interpretation of constitutional issues. Rather, the Seventh Circuit found that AEDPA merely regulated the relief available in the habeas context.¹¹⁰ The court reasoned that “Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases . . . [T]his distinction between rights and remedies is fundamental.”¹¹¹ Judge Easterbrook, writing for the court, went further, and declared that “[s]ection 2254(d)(1)’s requirement that judges apply ‘Federal law, as determined by the Supreme Court of the United States’ rather than their own understanding of the law, is consistent with the hierarchical nature of the federal judiciary.”¹¹² Judge Easterbrook stated that discovering the reasoning and application of legal principles of higher courts “makes

105. *Id.* at 860–861.

106. *Id.* at 867. Lindh appealed the Seventh Circuit’s denial of habeas relief to the Supreme Court, which accepted certiorari only for the issue of whether or not the AEDPA amendments applied to pending non-capital cases. *Lindh v. Murphy*, 519 U.S. 1074 (1997). The Supreme Court reversed the Seventh Circuit’s denial of habeas relief on this ground only and remanded to the Seventh Circuit. *Lindh v. Murphy*, 521 U.S. 320 (1997). Lindh was then granted habeas relief. *Lindh v. Murphy*, 124 F.3d 899 (7th Cir. 1997). The Supreme Court did not address the issue of the constitutionality of the AEDPA standard when dealing with the *Lindh* case.

107. *Lindh*, 96 F.3d at 867.

108. *Id.* at 871.

109. *Lindh* was argued before the Supreme Court decided *City of Boerne*, but it is reasonable to assume that the *amici* would have also relied on that case to support their argument.

110. *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc), *rev’d on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997).

111. *Id.*

112. *Id.* at 873.

up the bulk of the work of a federal judge,”¹¹³ and analogized to judges sitting in diversity and in other instances of non-uniform federal law. The majority concluded that “Article III does not establish a system under which judges of the inferior federal courts always must render judgment without regard to the conclusions of other courts.”¹¹⁴

Judge Wood concurred in part and dissented in part. While she joined much of the majority’s analysis of AEDPA’s impact on habeas corpus and the majority’s conclusion that the AEDPA standard is constitutional, Judge Wood disagreed with the majority’s assertion that district and appellate courts “need not shoulder the potentially difficult task of determining when an appellate gloss on a decision of the Supreme Court has so far departed from its wellsprings as to be the ‘real’ source of law.”¹¹⁵ Judge Wood reasoned that since it would be “rare indeed” to find a Supreme Court case exactly on point for any specific set of facts, appellate courts “can and must look for guidance in our own decisions, decisions from other appellate courts (federal and state), and persuasive secondary sources.”¹¹⁶ Judge Wood, then, in accord with the First, Third, Eighth, and Ninth Circuits at the time, and with the First, Second, and Ninth Circuits now, would reserve a place for *stare decisis* and the deciding court’s precedent in the exercise of the judicial power.

Judge Ripple, joined by Judge Rovner, dissented. Beginning with the proposition that *Marbury*’s definition of the function of the “judicial department” applies to all the courts that make up the judicial department, and not just the Supreme Court, the dissent asserted that “[a]lthough Congress has the authority to create and abolish the lower federal courts and to regulate their jurisdiction, it has no power to dictate how the content of the governing law will be determined within the judicial department.”¹¹⁷ Criticizing the majority’s approach as treating the inferior Article III courts as having an “agency relationship” with the Supreme Court analogous to the relationship between the President and executive agencies,¹¹⁸ Judge Ripple argued instead that the relationship between the various federal courts is one of “reasoned elaboration disciplined by the doctrines of *stare decisis* and precedent.”¹¹⁹ This elaboration develops from the interaction of the different levels of the

113. *Id.*

114. *Id.*

115. *Id.* at 878 (quoting *id.* at 869) (Wood, J., concurring in part and dissenting in part). The majority’s position, then, implicitly disagreed with the First, Third, Eighth, and Ninth Circuits.

116. *Id.* (Wood, J., concurring in part and dissenting in part).

117. *Id.* at 887 (Ripple, J., dissenting).

118. *Id.* at 886 (Ripple, J., dissenting).

119. *Id.* at 887 (Ripple, J., dissenting).

judiciary. For the dissent, separation of powers dictated that Congress not interfere with the judicial department's operation and functions of the various courts. The dissent would find the AEDPA standard unconstitutional, and stated

[t]o require the federal judiciary to hold that there is no constitutional violation simply because there is no case of the Supreme Court . . . directly on point, is to deny it the right to refer to the corpus of jurisprudence to which it turns when it must 'say what the law is' The amended statute requires that we decide whether a person is in custody in violation of the Constitution without consulting the body of law that determines what the judicial department says the Constitution requires.¹²⁰

IV. A HYPOTHETICAL CASE—*CORLEONE V. WARDEN*¹²¹

COPPOLA, District J.

This is a habeas corpus action initiated in the Southern District of New York by petitioner Michael Corleone. Corleone was convicted of multiple counts of murder by the state courts of New York, and sentenced to life in prison. Corleone alleges that his Sixth Amendment right to the assistance of counsel was violated at trial because his trial counsel's performance was impaired by a conflict of interest arising out of his prior representation of a government witness. Corleone's petition is governed by the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996. Because this court finds that the standard of review set forth in that Act unconstitutionally impairs the ability of the federal courts to exercise their Article III power, habeas relief is appropriate.

A. *Statement of Facts and Procedural History*

Late one evening at Louie's Restaurant in the Bronx, New York, an unidentified man killed his dinner companions Virgil Sollazzo and Capt. Mark McCluskey. The killer apparently was unarmed upon entering the restaurant with Sollazzo and McCluskey, as witnesses said they observed Sollazzo frisk the killer before the killer went to the men's

120. *Id.* at 887–888 (Ripple, J., dissenting).

121. This hypothetical case uses character names from the movie *The Godfather*, directed by Francis Ford Coppola and distributed by Paramount Pictures, 1972. It also includes some elements of the plot of *The Godfather*, modified to fit the needs of the hypothetical, which was designed to contextualize and illustrate some of the issues and problems with the AEDPA standard discussed above.

room. After returning from the men's room, however, the killer pulled out a revolver and shot both Sollazzo and McCluskey. Sollazzo was a member of the Tattaglia crime family, a mafia organization operating in New York, and McCluskey was a corrupt New York City police officer on the Tattaglia payroll. They were killed in an apparent mob dispute between the Tattaglia and Corleone crime families over the control of potential distribution of narcotics in New York.

Suspicion for the double murder quickly fell on the Corleone family, as Don Vito Corleone, the head of the family, had recently been shot by Tattaglia associates on Sollazzo's orders over the same narcotics dispute. Detectives interviewed witnesses to the murders and other patrons of the restaurant. Although no definitive identification of the killer emerged, one patron described a suspicious man who entered the restaurant before Sollazzo, McCluskey, and the killer. According to the eyewitness, the unidentified man immediately went to the men's room, re-emerged, and left. The detectives matched this identification to Salvatore Tessio, a Corleone family underboss. Tessio was arrested and charged with having planted the gun in the men's room at Louie's Restaurant, thus making him an accomplice to the murders of Sollazzo and McCluskey. Attorney Tom Hagan represented Tessio at trial. During the course of his representation, Hagan learned a great deal about the organization and operation of the Corleone crime family from Tessio in confidential discussions. At the trial, with Judge (later Senator) Pat Geary presiding, Hagan discredited the government's eyewitness identification of Tessio as the man who planted the gun at Louie's, and a jury acquitted Tessio.

Several years after the murders at Louie's Restaurant, Michael Corleone officially became the head of the Corleone crime family following the illness and death of Vito Corleone. Members of the other New York mafia families, known as "the Five Families," formed a conspiracy to assassinate Corleone and divide the Corleone territory and operations among themselves. Salvatore Tessio, who defected from the Corleone family and joined the Barzini family, aided the Five Families in this conspiracy. The conspiracy failed, and Michael Corleone responded by ordering a multitude of hits on the heads of the Five Families and Tessio. Most of the attempts succeeded, but Tessio survived and, after authorities apprehended him for his part in the mob violence, he agreed to cooperate with the government in their case against Michael Corleone. Corleone was arrested and charged with multiple murders. Tom Hagan represented him. At trial, Tessio became the government's star witness because of his extensive knowledge of both the Barzini and Corleone families and their activities. He also

presented evidence at trial that Corleone was the person responsible for the double murder of Sollazzo and McCluskey at Louie's Restaurant.

Tom Hagan attempted to discredit Tessio at trial, but his prior representation of Tessio and the existence of the attorney-client privilege that protected their prior conversations hampered Hagan's efforts. Corleone was unaware that Hagan had represented Tessio previously in the Louie's Restaurant case because Corleone, after murdering Sollazzo and McCluskey, immediately fled to Sicily and received no information regarding that case. Corleone insisted on having Hagan as his attorney. Even though Hagan did not notify the trial judge of this conflict of interest, the judge at the Corleone trial had also presided at Tessio's trial and thus independently knew of the conflict. At trial, because of Hagan's inability to undermine Tessio's testimony, Corleone was convicted on all counts and sentenced to life in prison.

During his state appeals, Corleone learned of Hagan's prior representation of Tessio. On appeal to the New York State Court of Appeals,¹²² Corleone argued that Hagan's prior representation of Tessio constituted an actual conflict of interest, and that the trial court committed reversible error by failing to investigate and remedy the conflict. The New York Court of Appeals recognized the principle, established by the U.S. Supreme Court, that attorney conflicts of interest could constitute a violation of the Sixth Amendment's right to counsel.¹²³ Despite state law precedent concluding that prior representation could form the basis for a conflict of interest Sixth Amendment claim,¹²⁴ the New York Court of Appeals distinguished the Supreme Court authority concerning conflicts of interest on the ground that it applied only to instances of an attorney representing multiple defendants, not prior representation. The New York Court of Appeals held that Judge Geary had no duty to inquire or investigate the conflict, as prior representation could not form the basis for a conflict of interest in violation of the Sixth Amendment.

Corleone filed this habeas corpus petition, *Corleone v. Warden*, in the Southern District of New York alleging a violation of the Sixth Amendment. Under AEDPA, Corleone's petition can be granted only if the state court's decision "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."¹²⁵ At issue is the New York Court of Appeals' decision that prior representation does

122. New York's highest state court is named the Court of Appeals.

123. *See, e.g.*, *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

124. *See, e.g.*, *People v. Ortiz*, 564 N.E.2d 630 (1990).

125. 28 U.S.C. § 2254(d)(1) (2000).

not constitute a conflict of interest under the Sixth Amendment. Corleone argues that this decision is an unreasonable refusal to extend a legal principle established by the Supreme Court to a context in which it should apply.¹²⁶

B. Legal Analysis

1. Identifying the Legal Principle

The first step in the AEDPA analysis for a lower federal court is to identify the clearly established Supreme Court precedent and legal principle.¹²⁷ The general standard governing Sixth Amendment claims was articulated in *Strickland v. Washington*,¹²⁸ which held that to prove a deprivation of the Sixth Amendment right to the assistance of counsel, a defendant must show that 1) counsel's performance was deficient; and 2) the deficient performance resulted in prejudice to the defendant in the form of a probable effect on the outcome of the trial.¹²⁹ An exception to the *Strickland* standard exists, however. When the assistance of counsel has been denied entirely, or denied at critical stages of the adversarial process, or in other "circumstances of that magnitude,"¹³⁰ a defendant need not make a showing of prejudice affecting the trial outcome under the *Strickland* test, as an effect on the outcome is presumed. The Supreme Court has held that "'circumstances of that magnitude' may also arise when the defendant's attorney actively represented conflicting interests."¹³¹

The principle that an attorney conflict of interest constitutes a violation of the Sixth Amendment was clearly established in *Cuyler v. Sullivan*.¹³² *Sullivan* held that when a trial court either knows or reasonably should know of a particular conflict, the trial court judge has a duty to inquire about that conflict.¹³³ The *Sullivan* Court also held that, if a defendant failed to raise an objection to counsel's representation at trial, "[i]n order to establish a violation of the Sixth Amendment, a defendant . . . must demonstrate that an actual conflict of

126. See, e.g., *Williams v. Taylor*, 529 U.S. 362, 407 (2000).

127. See *supra* text accompanying note 47.

128. 466 U.S. 668 (1984).

129. *Id.* at 687, 694.

130. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); see also *United States v. Cronin*, 466 U.S. 648, 659 (1984).

131. *Mickens*, 535 U.S. at 166.

132. 446 U.S. 335 (1980).

133. *Id.* at 347.

interest adversely affected his lawyer's performance."¹³⁴ In *Mickens v. Taylor*, the Supreme Court clarified the *Sullivan* rule by holding that a defendant must still "establish that the conflict of interest adversely affected his counsel's performance"¹³⁵ at trial regardless of whether the trial court neglected its duty to inquire about a conflict.

The Supreme Court has applied this principle—that an actual conflict of interest that adversely affects a lawyer's performance constitutes a violation of the Sixth Amendment—to cases involving multiple representation.¹³⁶ *Mickens* involved a claim of prior representation, but the Court expressly declined to hold that the *Sullivan* principle extended to claims of successive representation.¹³⁷ AEDPA commands that we look only to the holdings, not the dicta of the Supreme Court,¹³⁸ and thus it cannot be said that extension of the conflict of interest principle to the context of prior representation has been clearly established. The general principle, however, is clearly established. Whether it should be extended to this new context is at issue.

2. Determining Whether Unreasonable Error was Committed

After defining the legal principle or clearly established federal law, a district court must next determine whether the state court committed error in applying that principle, and if so, whether the error was objectively unreasonable.¹³⁹ According to AEDPA, this must be done only through reference to the holdings of the U.S. Supreme Court.

The Supreme Court's holdings in *Strickland*, *Sullivan*, and *Mickens* arguably support a finding that the New York Court of Appeals committed error by declining to extend the conflict of interest principle to the context of successive representation. *Sullivan* held that a trial court has a duty to inquire about a conflict when it knew or reasonably should have known about that particular conflict.¹⁴⁰ It also held that a defendant must prove that a conflict adversely affected his counsel's performance in order for that conflict to constitute a Sixth Amendment violation.¹⁴¹ *Mickens* held that the showing of adverse effect must still

134. *Id.* at 348.

135. *Mickens*, 535 U.S. at 174.

136. *See, e.g.*, *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Sullivan*, 446 U.S. at 341–342.

137. *Mickens*, 535 U.S. at 176 ("Whether *Sullivan* should be extended to [claims of successive representation] remains, as far as the jurisprudence of this Court is concerned, an open question").

138. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

139. *See supra* text accompanying notes 47–48.

140. 446 U.S. at 347.

141. *Id.* at 348–349.

be made even if the trial court failed to satisfy its duty to inquire.¹⁴² Judge Geary clearly knew of Hagan's conflict involving his prior representation of Tessio, as Geary presided at Tessio's original trial. Judge Geary also failed to satisfy his duty to inquire about and remedy that conflict. Corleone has, this Court thinks, successfully shown that Hagan's inability to cross-examine Tessio impaired his performance at Corleone's trial, thus satisfying the *Mickens* requirement. Corleone has also established a causal link between Hagan's conflict of interest and his deficient performance. The Supreme Court has defined the purpose of the *Sullivan* exception as "[applying the] needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel."¹⁴³ The facts of the case before this court justify invoking the *Sullivan* exception. Whether the New York Court of Appeals' determination that prior representation cannot constitute a basis for a Sixth Amendment conflict of interest has improperly denied Corleone a remedy, however, is a question that is dependent on whether or not that decision was unreasonable.

The Supreme Court has held that "unreasonable" does not mean the same thing as "incorrect,"¹⁴⁴ although correctness forms an element of the unreasonableness inquiry. The main focus of the analysis, however, must be on whether the state court's decision was unreasonable.¹⁴⁵ Reference only to the holdings of *Strickland*, *Sullivan*, and *Mickens* cannot answer the reasonableness question. None of these holdings addresses the questions of whether and how far to extend the principle that an attorney's conflict of interest can violate the Sixth Amendment's right to counsel. *Strickland* does not address attorney conflicts of interest, and *Sullivan* involved claims of multiple representation.

Mickens did involve a conflict of interest claim rooted in an instance of prior representation,¹⁴⁶ but the Supreme Court's holding related only to the petitioner's burden of proof under *Sullivan* when claiming a violation of the Sixth Amendment. The Court declined to rule on the issue of whether *Sullivan* extended to successive representation claims.¹⁴⁷ The *Mickens* opinion contained interesting comments about the reasonableness of such an extension, however. The Court said "[t]he case was presented and argued on the assumption that . . . *Sullivan*

142. 535 U.S. at 173–174.

143. *Id.* at 176.

144. *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

145. *See supra* text accompanying notes 45–46.

146. 535 U.S. at 165.

147. *Id.* at 174–175.

would be applicable That assumption was not unreasonable in light of the holdings of Courts of Appeals, which have applied *Sullivan* ‘unblinkingly’ to ‘all kinds of alleged attorney ethical conflicts.’”¹⁴⁸ The Court went on to give an extensive list of areas to which circuit courts had applied the *Sullivan* principle.

Additionally, the Second Circuit in *United States v. Lussier* has held that conflicts of interest constituting a violation of the Sixth Amendment may be rooted in claims of prior representation.¹⁴⁹ The Second Circuit considered this principle clearly established, which suggests that the New York Court of Appeals’s decision not to extend the *Sullivan* principle to claims of successive representation is unreasonable. However, because the language from *Mickens* is dicta and not holding, and the Second Circuit precedent is not law as determined by the Supreme Court, AEDPA commands us to ignore both these sources of authority when conducting the unreasonableness inquiry.

This Court believes that a colorable argument can be made that the New York Court of Appeals’s decision was reasonable. *Sullivan* created the original exception to the *Strickland* standard to address instances in which the assistance of counsel had been completely denied or denied at critical stages of the criminal proceedings against a suspect. The Court noted that the exception could extend to other “circumstances of that magnitude.”¹⁵⁰ A conflict of interest rooted in an instance of prior representation, when the attorney’s contact with the prior client is attenuated by the passage of time, is not of the same magnitude as a conflict rooted in concurrent multiple representation as occurred in *Sullivan* and *Holloway*. In the instant case, although the passage of time and Tessio’s betrayal of Corleone did not diminish Hagan’s duties to Tessio, Hagan’s subjective feelings of conflict would surely be less than if Hagan were representing Tessio and Corleone concurrently. Thus, Hagan’s ability to zealously represent Corleone and attack Tessio’s testimony would not have suffered such a degree of impairment as to violate the Sixth Amendment. In its independent judgment, this Court determines that the *Sullivan* principle should not be extended to claims of prior representation, as the Supreme Court has not clearly established this principle.

This Court is mindful of its place in the Article III hierarchy, however, and notes that mandatory authority from a superior court, namely the Second Circuit, has established that the *Sullivan* principle

148. *Id.* at 174 (quoting *Beets v. Scott*, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc)).

149. 71 F.3d 456, 462 (2nd Cir. 1995), *cert. denied*, 517 U.S. 1105 (1996); *see also* *Ciak v. United States*, 59 F.3d 296, 305–306 (2nd Cir. 1995).

150. *Mickens*, 535 U.S. at 166.

does indeed extend to claims of prior representation, and is clearly established.¹⁵¹ AEDPA's "Supreme Court only" clause may give this Court the opportunity to decline to follow the holding of a superior Article III court by requiring the Court to make an independent evaluation about whether the *Sullivan* principle extends to a new context. This court, however, agrees with the argument that such a requirement would "selectively suspend[] the doctrine of stare decisis [and would constitute a] potential violation of Article III"¹⁵² We turn now to an analysis of whether AEDPA does in fact require such an independent evaluation.

C. AEDPA's Constitutionality—An Independent Evaluation?

1. A Return to the Text

As an initial matter, this Court substantially agrees with Justice O'Connor's textual analysis of the AEDPA standard. Under a well known canon of statutory construction, a court should avoid interpreting a statutory provision in such a way that would create surplusage.¹⁵³ Thus, the "contrary to" and "unreasonable application of" clauses must be given independent meaning. More relevantly, the Court also agrees that the structure of the statute indicates that the "Supreme Court only" clause applies to both the "contrary to" and "unreasonable application of" clauses. The AEDPA standard reads that habeas relief should be denied unless the state court decision "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."¹⁵⁴ Congress, when drafting statutes, is assumed to follow ordinary rules of punctuation.¹⁵⁵ The commas separating the "unreasonable application of" clause merely establish that clause's independent meaning, and do not exempt it from the "Supreme Court only" clause that follows both the "contrary to" and "unreasonable application of" clauses. Virtually all Supreme Court decisions that considered the issue agree that the "Supreme Court only" clause prohibits lower federal court judges from referring to their own

151. See *Lussier*, 71 F.3d at 462.

152. Lee, *supra* note 85, at 131–132.

153. See *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994); *United States v. Menasche*, 348 U.S. 528, 538–539.

154. 28 U.S.C. § 2254(d)(1) (2000).

155. See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–242 (1989).

precedent when engaging in habeas review.¹⁵⁶ Such a strict interpretation of the “Supreme Court only” clause, however, creates substantial issues from an Article III standpoint.¹⁵⁷

In addition to the canons discussed above that support this strict reading of the AEDPA standard, another accepted canon of statutory interpretation counsels against interpreting a statute in such a way as to make the statute unconstitutional when other valid interpretations resolve the constitutional difficulties.¹⁵⁸ Are there such other interpretations?

2. Problems with Other Interpretations

Professors Liebman and Ryan propose one possible alternative interpretation. They state that,

the least controversial understanding of an inferior federal court’s appellate review of state decisions is as a surrogate for Supreme Court direct review – a view of habeas that section 2254(d)(1) suggests . . . by requiring habeas courts to apply a rough approximation of the law the Supreme Court assumedly would have applied in the case on direct appeal certiorari.¹⁵⁹

They also assert, however, that when exercising the judicial power, an Article III court must make its own independent decision regarding the issue. Additionally, that decision must be based on the whole supreme law.¹⁶⁰ Requiring a habeas court (such as this one) to simply approximate what the Supreme Court would do strips the lower court of its ability to make an independent decision on the issue before it, as the lower court would simply be standing in the shoes of the Justices of the Supreme Court. A court’s ability to make an independent judgment, however, is one of the requirements for an exercise of the Article III power, according to Liebman and Ryan. Likewise, the lower court would not be passing judgment in reference to the “whole supreme law” if it could consider only the holdings of the Supreme Court.

This choice of law problem was actually one of Justice Marshall’s primary concerns in *Marbury v. Madison*, where the dispute was whether Congress could impose a choice of law requirement on the

156. See, e.g. *Williams v. Taylor*, 529 U.S. 362, 384 (2000) (Stevens, J., concurring); Commentators agree with this analysis. See, e.g., *Ides*, *supra* note 10, at 702.

157. See *infra* discussion at note 177.

158. See *Pub. Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 465 (1989) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

159. Liebman & Ryan, *supra* note 57, at 882–883.

160. *Id.* at 884.

Supreme Court compelling it to disregard the Constitution in favor of an act of Congress.¹⁶¹ Is an act of Congress that compels lower federal courts to disregard ordinarily mandatory circuit precedent when interpreting the Constitution in favor of the Supreme Court's holdings any less burdensome? The principle remains the same, as reinforced in *Plaut* and *Boerne* – an Article III court's precedent matters, and Congress cannot selectively suspend it.¹⁶² Directing a lower court to approximate what the Supreme Court would do on direct appeal interferes with the exercise of the judicial power.

Prohibiting this Court from referencing and following the mandatory authority from the Second Circuit is an even more troubling choice of law problem. *Plaut* stands for the proposition that once a judgment becomes final, either by pronouncement from the Supreme Court or lower court after the time for appeal has passed, that decision represents what the judicial department says the law is with regard to that matter.¹⁶³ Congress cannot compel courts to revisit final decisions and change what the judiciary said the law was.¹⁶⁴ The Second Circuit in *United States v. Lussier* has established that a Sixth Amendment conflict of interest claim can be rooted in a claim of prior representation.¹⁶⁵ The time for an appeal of that decision has passed, as the Supreme Court denied certiorari and has not yet ruled on the issue in another case. Thus, in this Circuit at least, the Second Circuit's position in *Lussier* is what the judicial department says the law is with regard to prior representation and Sixth Amendment conflict of interest claims. Under *Plaut*, Congress does not have the power to compel this Court to disturb the Second Circuit's final judgment concerning that issue by making an independent determination of what constitutes clearly established federal law in habeas corpus review.¹⁶⁶

161. 5 U.S. (1 Cranch) 137 (1803).

162. See *supra* text accompanying notes 82–85.

163. 514 U.S. 211, 218–219 (1995).

164. *Id.*

165. 71 F.3d 456, 462 (2nd Cir. 1995).

166. The Fourth Circuit has held that “reliance on *Plaut* is misguided . . . because unlike the statute at issue in that case, the amendments to section 2254(d)(1) do not offend the separation of powers by purporting to legislatively reopen a final judgment. In amending section 2254(d)(1), Congress has simply adopted a choice of law rule that prospectively governs classes of *habeas* cases; it has not subjected final judgments to revision, nor has it dictated the judiciary's interpretation of governing law and mandated a particular result in any pending case.” *Green v. French*, 143 F.3d 865, 874 (4th Cir. 1998), *abrogated on other grounds by Williams v. Taylor*, 529 U.S. 362 (2000). True, but *City of Boerne*, decided less than a year before *Green* and not mentioned by the Fourth Circuit, supports the analogy between *Plaut* and respecting a court's interpretation of the law, not just its ruling.

The rights versus remedies distinction drawn by the Seventh Circuit in *Lindh*¹⁶⁷ also runs afoul of the Liebman and Ryan requirements, one of which is an Article III court's ability to create a remedy that effectuates the court's judgment.¹⁶⁸ This Court has determined that the New York Court of Appeals' decision was (plausibly) erroneous. Thus, Corleone had a constitutional right that was probably violated at his trial. Nevertheless, the AEDPA standard prevents a court from remedying that violation because the Supreme Court has not yet specifically recognized such a violation. If this Court determines that Corleone's Sixth Amendment right was violated, then, that determination would be rendered ineffective and meaningless by the operation of the AEDPA standard. Once Congress has decided to establish lower Article III courts, *Plaut* and *Boerne* make clear that lower Article III courts' judgments must be given ordinary precedential and stare decisis effect. *Plaut* especially supports the proposition that any Article III court must have the ability to conclusively and authoritatively *decide* a case.¹⁶⁹ Denying a court the ability to craft a remedy is an unconstitutional infringement on the judicial power an Article III court exercises.

Some circuits have held that reference to circuit court precedent is still allowed in the habeas context, despite the clear language of the AEDPA standard and the Supreme Court's ruling in *Williams v. Taylor*. The Ninth Circuit's opinion in *Van Tran v. Lindsey*¹⁷⁰ is illustrative. Pre-*Williams*, the Ninth Circuit had held that courts could refer to circuit court precedent as persuasive authority when applying the holdings of the Supreme Court.¹⁷¹ After *Williams*, the Ninth Circuit stated that the AEDPA standard "does not mean that Ninth Circuit caselaw is never relevant Our cases may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law."¹⁷² The Ninth Circuit explained this holding by noting that, pre-*Williams*, the Third Circuit in *Matteo v. Superintendent, SCI Albion*¹⁷³ had held that circuit court precedent remained relevant for the "unreasonable application of" clause of the AEDPA standard. *Matteo* also held that the AEDPA standard should be

167. 96 F.3d 856, 872 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).

168. Liebman & Ryan, *supra* note 57, at 883.

169. 514 U.S. at 218–219.

170. *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000), *abrogated on other grounds by* *Lockyer v. Andrade*, 538 U.S. 63 (2003).

171. *See* *Duhaime v. Ducharme*, 200 F.3d 597, 600–601 (9th Cir. 1999).

172. *Van Tran*, 212 F.3d at 1154. *See also* *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2006) discussed *infra* at Part V.

173. 171 F.3d 877, 889 (3rd Cir. 1999).

governed by an objectively unreasonable standard.¹⁷⁴ In *Williams*, the lower court had adopted an “all reasonable jurists” subjective test, which the Supreme Court overruled.¹⁷⁵ The Supreme Court stated that the objectively unreasonable standard should control, but it never cited to *Matteo*.¹⁷⁶ The Ninth Circuit reads the Supreme Court’s adoption of an objective standard of review, like the one proposed in *Matteo*, as an implicit adoption of *Matteo*’s holding regarding the relevance of circuit court precedent.

This is questionable reasoning. The Supreme Court simply never discussed the Third Circuit’s holding concerning the continued relevance of circuit court precedent, or even the general issue. The Court cursorily examined the impact of the “Supreme Court only” clause and construed it strictly.¹⁷⁷ Furthermore, an interpretation of the AEDPA standard that reads the “Supreme Court only” clause as applying only to the “contrary to” clause and not the “unreasonable application of” clause has no real support in the structure of the statutory provision, and such a reading should be avoided.¹⁷⁸ If the Court’s interpretations of the “Supreme Court only” clause were more lenient then the substantive canon against unconstitutional interpretations of a statute could justify the Ninth Circuit’s holding. But the judicial opinions are clear and have almost unanimously held that “consistent with § 2254(d)(1), lower court opinions not mandated by Supreme Court precedent cannot serve as the basis for habeas relief.”¹⁷⁹

Even if the Ninth Circuit is correct, *Van Tran* does nothing to ameliorate the problem that this Court confronts. If *Van Tran* were the law in this Circuit, *Lussier* would be persuasive authority for this Court, instead of mandatory, binding authority. Thus, this Court would still be free to disregard *Lussier* if it found the Second Circuit’s reasoning unpersuasive. This Court finds a colorable argument that instances of prior representation do not violate the Sixth Amendment.¹⁸⁰ Thus, even if the reasoning in *Van Tran* is correct, this Court still faces the same problems that it confronted at the started.

174. *Id.* at 890.

175. *Williams v. Taylor*, 529 U.S. 362, 409–410 (2000) (discussing *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)).

176. *Id.*

177. *See supra* notes 30–33 and accompanying text.

178. *See supra* note 14 and accompanying text.

179. *Ides, supra* note 10, at 684.

180. *See supra* notes 150–151 and accompanying text.

D. Conclusion

The problems that the AEDPA standard creates seem unavoidable. All efforts to address the independent judgment problem that the standard's "supreme Court only" clause creates are suspect. This Court concludes, then, that the statute should be construed as Justice O'Connor did in *Williams*, which puts the problem of independent evaluation front and center. Absent an alternative, as yet undeveloped solution, the only possible conclusion is that the AEDPA standard requiring district courts ruling on constitutional issues to refer only to Supreme Court holdings unconstitutionally interferes with the district court's exercise of the judicial power by denying precedents their ordinary stare decisis effect, thereby limiting the choice of law that district courts may use when deciding what the law is. This Court is bound by the Second Circuit's opinion in *Lussier* that Sixth Amendment conflict of interest claims can be rooted in instances of prior representation. Corleone has shown that Hagan's conflict of interest adversely affected Hagan's performance at trial, thus satisfying the *Sullivan* standard and establishing a violation of the Sixth Amendment right to the assistance of counsel. Accordingly, Corleone's habeas corpus petition is GRANTED.

V. RECOMMENDATIONS

"AEDPA largely owes its existence to long-standing Republican dissatisfaction with lower federal courts' general treatment of habeas petitions from state prisoners."¹⁸¹ AEDPA has, of course, made it more difficult for state prisoners to obtain habeas relief. Congress, as the Seventh Circuit noted in *Lindh*, has the right to regulate the relief available in classes of cases.¹⁸² The current interpretations and operations of the AEDPA standard, however, go beyond regulating relief and impermissibly interfere with the ability of an Article III court to exercise the judicial power. The "Supreme Court only" clause's limiting effect on the use of lower court precedent violates the stare decisis and precedential principles that the Supreme Court recognized in *City of Boerne* and *Plaut*. A clear statement from the Supreme Court that circuit and district court precedent still has a place in the context of habeas review would resolve this problem.¹⁸³ The Supreme Court has so

181. Lee, *supra* note 84, at 136. Prior to AEDPA's passage, Republican legislators complained that federal district courts granted state prisoners habeas relief too frequently.

182. 96 F.3d 856, 872 (7th Cir. 1996).

183. Lee *supra* note 10, at 135-136 ("The most plausible interpretation of the clause is that district courts must still grant relief based on rules recognized by courts of appeals, even if, in the judgment of

far declined to make such a statement, however, instead commenting in *Williams v. Taylor* that “[i]f this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar.”¹⁸⁴ Until either the Supreme Court interprets the AEDPA standard to allow lower federal courts access to their past precedent or the AEDPA standard is modified by Congress to provide a clearer authorization for such use, the AEDPA standard is an unconstitutional proscription on the sources of law that the Judicial Branch must use in exercising the judicial power under Article III.

The Supreme Court has, however, given itself an opportunity to clarify the operation of the AEDPA standard by accepting certiorari in *Carey v. Musladin*.¹⁸⁵ Musladin was charged with first degree murder in California. At trial, members of the victim’s families wore buttons with the victim’s picture on them. Musladin’s attorney asked the trial judge to prohibit the family members from wearing the buttons, but the trial judge refused. Musladin was convicted of murder.¹⁸⁶ After exhausting his state remedies, Musladin filed a petition for a writ of habeas corpus in federal court. He alleged that the California Court of Appeals unreasonably refused to extend the application of clearly established federal law that prohibited courtroom practices that created an unacceptable risk of allowing impermissible, inherently prejudicial factors to influence a jury’s decision and thus rendering the trial fundamentally unfair.¹⁸⁷ The magistrate and district court judges denied Musladin’s petition, and he appealed to the Ninth Circuit.

A panel of the Ninth Circuit granted the writ and held that the California courts had unreasonably refused to extend clearly established federal law. The panel cited to the decisions of the Supreme Court in *Estelle v. Williams* and *Holbrook v. Flynn* for the proposition that “certain practices attendant to the conduct of a trial can create such an ‘unacceptable risk of impermissible factors coming into play,’ as to be ‘inherently prejudicial’ to a criminal defendant”¹⁸⁸ has been clearly

the district courts, those rules are not clearly established by Supreme Court opinions. A contrary interpretation would be surprising and constitutionally troublesome”).

184. 529 U.S. 362, 381 (2000) (Stevens, J., concurring).

185. 126 S. Ct. 1769 (2006) (mem.).

186. *Musladin v. Lamarque*, 427 F.3d 653, 654-55 (9th Cir. 2006).

187. *Id.* The Supreme Court has previously held that forcing a defendant to appear at trial in prison clothing was inherently prejudicial and violated the defendant’s right to a fair trial, *see Estelle v. Williams*, 425 U.S. 501, 503-506 (1976), and that the presence of uniformed state troopers sitting directly behind the defendants was not inherently prejudicial, *see Holbrook v. Flynn*, 475 U.S. 560, 563-564 (1986). The Supreme Court has never decided a case concerning buttons, however.

188. *Musladin*, 427 F.3d at 656.

established by the Supreme Court. The panel went further, however, and cited to one of its own cases to support its articulation of what “clearly established federal law” is. In *Norris v. Risley*,¹⁸⁹ the Ninth Circuit applied *Estelle* and held that at a rape trial, the fact that several women sitting in the courtroom wearing buttons that read “Women Against Rape” created an unacceptable risk of influencing the jury’s decision and rendering the trial fundamentally unfair to the defendant.¹⁹⁰ The panel justified its reliance on *Norris* by arguing that “the last reasoned state court opinion identified *Norris* as setting forth the operative law as announced by the Supreme Court, and the state court sought to apply *Norris* when reaching its determination.”¹⁹¹ The panel then specifically relied on *Norris* to hold that the California Court of Appeals’s attempt to distinguish *Norris* and *Estelle* was unreasonable, saying “it was objectively unreasonable in light of *Norris* for the state court to [excuse the wearing of the buttons].”¹⁹²

Dissenting from a denial of rehearing en banc, Judge Kleinfeld argued that the panel’s decision had “effectively turned [the Ninth Circuit] into the supreme court of the nine states in our circuit”¹⁹³ and violated AEDPA.¹⁹⁴ Judge Kleinfeld relied on a strict reading of the AEDPA standard similar to Justice O’Connor’s interpretation in *Williams*, and argued that the panel’s decision effectively erased the “clearly established” prong of the AEDPA standard by relying on Ninth Circuit precedent. Noting that “[o]ur tools for statutory construction are many, but they do not include an eraser,”¹⁹⁵ Judge Kleinfeld interpreted the panel’s decision as an unwarranted arrogation of power in violation of a clear statutory limit on federal courts’ ability to overturn state convictions. Judge Kleinfeld foresaw confusion and uncertainty for the state court systems within the Ninth Circuit and argued for a rehearing en banc, where presumably he would have voted to overturn the panel’s decision.¹⁹⁶

The Supreme Court heard oral argument in *Carey v. Musladin* on October 11, 2006. The petitioner warden, in the briefs, argued simply that the panel’s reliance on *Norris* contravened AEDPA, and that “[c]ircuit and state precedent have no role in defining or shaping ‘clearly

189. 918 F.2d 828 (9th Cir. 1990).

190. *Id.* at 831.

191. *Musladin*, 427 F.3d at 657-58.

192. *Id.* at 661.

193. *Musladin v. Lamarque*, 427 F.3d 647, 652 (9th Cir. 2006).

194. Judge Kleinfeld was joined by Judges Kozinski, O’Scannlain, Tallman, Bybee, Callahan, and Bea. *Id.* at 647.

195. *Id.*

196. *Id.* at 652.

established' federal law for purposes of § 2254(d)(1)."¹⁹⁷ Furthermore, the petitioner argued that state and circuit court precedents decided before AEDPA's passage¹⁹⁸ had no role in determining the reasonableness of a state court's application of Supreme Court precedent, and criticized the Ninth Circuit for relying on *Norris* to answer the reasonableness question as well.¹⁹⁹ Musladin as respondent primarily argued that the Ninth Circuit panel had not actually relied on *Norris* to determine the scope of clearly established law or the reasonableness of its application.²⁰⁰ Musladin stated that the references to *Norris* were supplementary, and that the panel's decision rested entirely on *Estelle* and *Flynn*, two Supreme Court cases.

At oral argument, the Court addressed the unreasonable application prong of the AEDPA analysis primarily through hypothetical situations, and did not discuss the role that circuit court precedent could play in that analysis. Justices Stevens, Kennedy, and Ginsburg, however, directly addressed how circuit court precedent could operate in determining what is clearly established law for the AEDPA analysis. Justice Ginsburg framed the issue by saying, "[w]e're concerned here with role of, if any . . . opinions of courts other than this Court have in determining whether law is clearly established."²⁰¹ She then asked petitioner's counsel, "[d]o you exclude entirely from the province of what is proper for the Federal court to consider any court of appeals, Federal court of appeals decisions?" The answer was a clear "[y]es, we do, Your Honor."²⁰² Likewise Justice Stevens seemed concerned with the stare decisis problems for lower courts that the AEDPA creates. The following exchange with the petitioner's counsel is illustrative:

JUSTICE STEVENS: May I ask this question? Supposing we all thought that this practice in this particular case deprived the defendant of a fair trial, but we also agreed with you that AEDPA prevents us from announcing such a judgment.

What if we wrote an opinion saying it is perfectly clear there was a constitutional violation here, but Congress has taken away our power to

197. Petitioner's Brief on the Merits at 14, *Carey v. Musladin*, No. 05-785 (U.S. June 22, 2006), 2006 WL 1746418.

198. Such as *Norris*. The petitioners argued more obliquely that even a circuit or state precedent decided post-AEDPA would have no authority in determining that a state court's application of Supreme Court precedent was unreasonable. *Id.* at 22.

199. *Id.*

200. Brief for Respondent at 10-11, *Carey v. Musladin*, No. 05-785 (U.S. August 21, 2006), 2006 WL 2506636.

201. Transcript of Oral Argument at 9, l. 6-9, *Carey v. Musladin*, No. 05-785 (U.S. October 11, 2006).

202. *Id.* at 9, l. 10-13.

reverse it[?]

Then a year from now, the same case arises. Could we follow—could the district court follow our dicta or could it—would it be constrained to say we don't know what the Supreme Court might do?

MR. OTT [Petitioner's counsel]: It could not follow this Court's dicta under this Court's statement in *Williams v. Taylor*.²⁰³

The majority of the discussion in *Musladin* centers on how a circuit court should handle a habeas petition under AEDPA, which is certainly an important and interesting question. But Justice Stevens's question cuts more directly to the heart of the issues presented by this Comment, namely, the impact that the AEDPA standard has on the operation of stare decisis and the nature of the relationship between the district and circuit courts in the Article III hierarchy. While whatever opinion the Court issues in *Musladin* will address in some way the issues presented here, it is unclear if the Court will directly address this particular issue. The Court may clarify the role that circuit court precedent plays, but such an opinion would not necessarily answer the question of whether AEDPA requires a district court to make an evaluation of constitutionality independent from the ordinarily controlling decisions of a superior Article III court. If AEDPA permits the Ninth Circuit to refer to Ninth Circuit precedent as persuasive authority, is that authority mandatory for the district court or does AEDPA require the district court to independently interpret Supreme Court case law and treat that Ninth Circuit precedent as merely persuasive? This Comment urges the Supreme Court to go beyond the limited issue presented in *Musladin* and clarify this troubling issue.

203. *Id.* at 17, 1. 9-23. See *supra* note 38 and accompanying text for Justice Stevens's language to the same effect from *Williams v. Taylor*.