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AEDPA Mea Culpa

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It's all my fault. In an early article, Mark Tushnet and I predicted that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) would prove to be a largely symbolic enactment, albeit generating the occasional untoward outcome.[1] Mark is absolved. We collaborated in a single piece, but I had responsibility for our projections about AEDPA. I doubt that anybody at the Court was so much as aware of our paper. But I tempted fate, and fate reacted. This statute has been a conceptual and practical nightmare—crippling the ability of federal courts to enforce federal rights, disserving legitimate state interests, delivering unjust and bizarre results even in the run of ordinary cases, and, at best, squandering resources on endless and pointless procedural digressions.

Our calamitous experience over the last fifteen years does not want for less cosmic explanations. In Supreme Court cases since 1996, as in earlier cases, the treatment of habeas corpus questions can only be appraised in light of the death penalty, which typically hovers in the background. To many of us, federal habeas is a vitally important vehicle by which federal courts enforce federal law in capital and noncapital cases alike. But to many others, off and (I think) on the Court, habeas is little more than a means by which inmates on death row contrive to postpone the inevitable. So when the justices appear to be quarreling about some aspect of habeas law, they may best be understood to be waging a proxy battle over capital punishment. Here, as in so many other contexts, we translate obdurate questions of substantive value into ostensibly more tractable procedural issues—in this instance, whether federal judges should have authority to adjudicate matters that were or might have been resolved in state court. This is a common observation, and it undoubtedly has real explanatory power.

Coming to AEDPA in particular, everybody acknowledges that the drafters goofed. They didn't understand habeas as it stood at the time and so wrote provisions that could not easily be integrated with arrangements left unchanged. They borrowed haphazardly from various earlier bills without accounting for overlaps and gaps, and, into the bargain, they concocted new language that defied any sensible interpretation at all. I will say that the drafters were given a monumental task that would have been hard to complete successfully in the best of circumstances. Sadly, the surrounding politics didn't make for careful vetting. There doubtless were drafts and drafting conferences, but nothing approaching genuine, hard-headed sessions with specialists on both sides of the policy divide. We should have expected the mishigas we got.

For my money, though, the Supreme Court bears the lion's share of the blame for its approach to interpreting AEDPA's provisions. The Court's methodology, not compelled but deliberately chosen by the justices, produced the colossal mess that federal habeas corpus has become. Specifically, the justices did two things, both of them wrong.

First, they typically focused on the text of AEDPA provisions without sufficient attention to the policy implications. Much has been written about the Court's turn to "textualism" in statutory construction. The idea, championed notoriously by Justice Scalia, is that Congress's authority for lawmaking demands that courts effectuate the plain meaning the text of a statute conveys, however troubling the consequences. The text is the product of political bargaining that cannot be recovered and can only be respected for what it was—namely, democracy at its ugly best. At all events, any policy considerations are not for the judiciary but for the legislative process.

The conventional response is that statutory language is often not clear at all, but rather demands interpretive effort that courts are in business to provide. When the Supreme Court invokes dictionary definitions and disclaims policy, it doesn't respect the legislative function. It prevents Congress from relying on the entirely reasonable expectation that a statute will be read to further sensible, discernible legislative will. The decisions interpreting AEDPA prove what happens when the Court declares that the text of a statute has an unavoidable meaning and that responsibility for bad outcomes must be attributed to inscrutable politics. AEDPA was never a package of finely tuned measures advancing policies adopted via hard political negotiations. This statute was slapped together when there was a fleeting opportunity *not* to treat with political adversaries. All too often, the justices played the "gotcha" game—formally acknowledging Congress's authority to make policy, but frustrating any plausible objective by reading admittedly badly written statutory provisions as an exercise in grammar.

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Second, the justices insisted that every AEDPA provision, in turn, had to be read to alter habeas law in some way (usually to the disadvantage of habeas petitioners). This different, though related, feature of the Court's approach to the new statute was peculiarly inapt, not only because the provisions to be construed were poorly conceived and drafted but also because the Court itself had recently made manifest changes in the habeas landscape and there was no reason to think that anyone in Congress meant those changes to be adjusted.

Here's a roadmap for this essay. In Part I, I will rehearse the conditions that led me to believe that AEDPA would not affect the habeas we knew all so much. In this, I will suggest what the Court might have done with this new statute to avoid the woeful results we have actually suffered. In Part II, I will describe some of the Court's decisions touching procedural matters (by no means all), which demonstrate, I think, the madness the justices' method has brought upon us. Finally, in Part III, I will turn to the Court's work regarding more substantive limits on the ability of federal courts to vindicate meritorious federal claims when they appear.

I.

In the years preceding 1996, Congress considered numerous bills meant to curtail state convicts' use of federal habeas corpus to challenge their convictions and sentences collaterally. In many minds, legislation was needed to discourage prisoners from abusing the writ by needlessly postponing federal habeas petitions, withholding claims or factual allegations from state courts and saving them for the federal forum, filing multiple applications for federal relief, and, perhaps most important, launching and maintaining federal litigation for the sole purpose of delaying execution of capital sentences. On top of these concerns about the habeas process, critics advanced checks on the substance of the federal courts' work—namely, in their view, the authority of federal judges to substitute their judgments about federal rights for the contrary judgments of state courts (especially decisions about the validity of death sentences).

Not everyone was convinced that these concerns were justified. Lots of organizations and individuals lined up to rebut them. There was no evidence that clever prison inmates, most proceeding pro se, were in any way deliberately gaming the system. And when federal courts came to the merits of prisoners' claims, they typically endorsed the conclusions previously reached in state court. In the end, as is often the case, it proved to be harder to enact legislation than to defeat it. All legislative efforts to circumscribe federal habeas corpus were forestalled.

Meanwhile, the Supreme Court addressed its own concerns about the federal writ in decisional law. Acting on an assumed authority to make "equitable" modifications in habeas arrangements under existing statutes, the Court established tough standards for prisoners' obligation to exhaust state remedies before filing applications for federal habeas corpus, strict limits on prisoners' ability to seek federal relief on the basis of claims or factual allegations that had not been advanced properly in state court, and similar restrictions on second or successive federal petitions. Most important, the Court held in *Teague v. Lane*[2] that claims based on "new" rules of federal law would no longer be cognizable in federal court at all, save in exceptional cases unlikely to arise.

Like the restrictive bills advanced in Congress, these decisions by the Supreme Court evoked opposition. The difference was that legislative action could be resisted politically, but judicial decisions were law. The only path open to friends of the writ was to argue in future cases that the Court's innovations were dangerous and should be limited rather than extended. In particular, the justices were urged to restrict "new" rules for *Teague* purposes to genuinely novel shifts in federal law that state courts could not easily anticipate.[3] In short order, however, the Court declared that *any* rule of law was "new" in *Teague*-speak if, at the time a petitioner's conviction and sentence became final on direct review, a state court might reasonably have determined a claim against him. By virtue of this (remarkable) notion of what counted as "new" in habeas corpus, federal courts were deprived of the ability to entertain familiar claims that state courts had (or might have) rejected incorrectly (but not unreasonably).[4]

Whatever their wisdom, the Court's initiatives defused any genuine argument for congressional action to deal with federal habeas. Yet the pent-up desire to curb the writ legislatively lived on, and when Republicans campaigned for control of the House in 1994 they made habeas corpus "reform" part of their signature "Contract with America." Then, when Congress was searching for some way to respond to the Oklahoma City bombing in 1995, the Republican leadership seized the opportunity finally to enact a habeas bill—not (let's be honest) to deal with "terrorism" in any recognizable form, but rather to satisfy long-standing objections to federal collateral attacks on state criminal judgments. This notwithstanding that the Court had already met the same concerns without benefit of legislation.

It was in these circumstances that I contended that AEDPA would be understood as a symbolic gesture. The judicial train had arrived at the station ahead of the legislative train, and the only point of a statute now was to grasp political credit for limitations already in place. I predicted, accordingly, that the Court would treat the new statute largely as an endorsement of the (recently established) status quo. I acknowledged that the justices might hesitate to read AEDPA always to codify existing case law, lest they be charged with giving the statute no practical effect at all. Yet construing AEDPA to make dramatic changes would disrupt the justices' own agenda. I recognized that AEDPA's many provisions would not always fit neatly into extant arrangements and that new statutory language would occasionally produce freakish results in individual cases. But in the main I thought the new statute would have little impact on the Court's previously chosen program.

It was not to be. What I had expected would be unfortunate exceptions became routine. It was as though the Court *wanted* to make Congress look foolish—when looking foolish came naturally enough to Congress without help from the judiciary. I am as cynical as the next person, but I do not believe that anyone in the legislative branch meant to bring this tragedy about—to preserve the federal courts' formal jurisdiction to entertain habeas corpus petitions from state convicts, but to desiccate the courts' authority genuinely to adjudicate prisoners' claims, to stage fights that only wardens can win, and, into the bargain, to condemn our federal courts to wrestle with intricate procedural puzzles that require laborious litigation to sort out.

II.

I begin with procedural issues, not because they are most important. They are not. Yet they vividly illustrate the folly of reading AEDPA's provisions as though they were carefully and knowledgeably constructed IRS regulations plainly meant to change current law for some reason, however obscure.

A.

Long before 1996, state prisoners were required to pursue state avenues for litigating federal claims before seeking federal habeas corpus relief. Nothing in AEDPA purported to dilute the "exhaustion" doctrine, and, as I have explained, the Supreme Court's recent decisions had tightened the rules governing prisoners' obligation.[5] But AEDPA did establish a limitations period for filing federal habeas petitions. Immediately, there was tension. The exhaustion requirement demanded that prisoners file federal petitions late (after exhausting the remedies available in state court), while the limitations period forced prisoners to file early (usually one year from the conclusion of direct review).

At first, the Supreme Court reconciled the new limitations period with the exhaustion doctrine in existing law. The justices acknowledged that an accompanying tolling provision suspended the federal filing period while a "properly filed" application for state post-conviction relief was pending. And they held that an application for state relief was "properly filed" if it met the applicable state rules governing the initiation of legal proceedings.[6] So far, so good.

Soon, however, the Court declared that a state petition was *not* "properly filed" if it was untimely as a matter of state law.[7] Accordingly, an unseasonable state application would not toll the limitations period for a federal habeas petition. If the federal limitations period ran out before the state courts decided that a state application had been filed too late, the prisoner would be barred from federal court. The justices acknowledged that this reading of the tolling provision presented a dilemma, and they offered a solution. A prisoner who worried that his state petition might ultimately be ruled untimely (and thus insufficient to stop the federal clock) could file an immediate federal petition as a hedge against that contingency. Get this now. In order to comply with the limitations period established by AEDPA, a prisoner must knowingly file the very premature petition for federal habeas relief that the exhaustion doctrine discouraged.

Meanwhile, the Court parsed the text of the tolling provision again, now concluding that it stopped the federal clock only while an application for *state* post-conviction relief was pending and thus not while a federal habeas petition was before a federal court.[8] This being so, a prisoner who filed a federal petition within the limitations period remained at risk. If the federal court took a good while to decide that the petition was premature under the exhaustion doctrine and then dismissed it, the prisoner would have no time to pursue state remedies and return to federal court before the limitations period elapsed. To forestall that possibility, a prisoner might simultaneously file an application for state relief—not because he genuinely believed that he must to satisfy the exhaustion doctrine, but because only a petition in state court would toll the filing period for purposes of the federal petition the prisoner actually wanted to press.

Put all this together for habeas petitioners today. Under the Court's interpretations, a prisoner who worries that an application for state relief won't stop the federal clock must worry, too, that a premature "hedge" federal petition won't do the job, either. And a prisoner who worries that there is a risk that the federal filing period will expire while a federal habeas petition is pending must worry, too, that a concurrent "hedge" application for state relief is not fail-safe. The cautious and conscientious prisoner attempting to navigate competing procedural requirements ends up litigating suits in state and federal court at the same time, when the whole point of the exhaustion doctrine and, I submit, the tolling provision is to encourage a rational sequence—litigation first in state court and then in federal habeas proceedings. No one in Congress knowingly set things up this way. It is only the Supreme Court's interpretive methodology that produces such perverse results.

B.

Before 1996, the Court held that prisoners were obliged to follow state rules for adjudicating the facts said to support federal claims. If a prisoner didn't do that, he or she typically forfeited the opportunity to offer evidence in federal habeas corpus proceedings—unless the petitioner could show "cause" for his default in state court as well as "prejudice," or, in the alternative, probable innocence.[9] A provision in AEDPA stated that a prisoner who "failed" to develop facts in state court could obtain a federal hearing only if he met much more stringent standards that scarcely anyone would be able to satisfy.

At first, there was hope. The Supreme Court essentially reconciled this new provision with its own case law, holding that a petitioner had not "failed" to develop the facts in state court unless he was at fault for inadequate

state fact-finding.[10] On this reading, a prisoner who had exercised diligence in state proceedings didn't have to pass the severe tests set out in the new provision. Thus the Court did essentially what I anticipated.

But it was too good to last. A few years later, the justices seized upon another AEDPA provision and read it largely to deny even diligent petitioners the ability to present newly discovered evidence in federal court. I will call this different provision by name, 28 U.S.C. § 2254(d)(1), because it figures prominently in the AEDPA story, and I mean to discuss it more fully in Part III. In this instance, the Court read § 2254(d)(1) to permit a federal court to grant habeas relief only if a previous state court decision on the merits of a claim was unreasonable in light of the evidence the state court saw. It followed, according to the Court, that a federal court was forbidden to consider additional evidence—even if the prisoner could not be blamed for the inadequacy of the evidentiary record before the state court.[11] Thus § 2254(d)(1) effectively displaced the provision previously read to contemplate that diligent petitioners might present new proof in federal habeas proceedings.

C.

Prior to 1996, the Supreme Court handled multiple federal habeas petitions more or less in the way it treated procedural default in state court. A prisoner could advance another federal petition presenting an additional claim only if he showed "cause" and "prejudice" or probable innocence.[12] A provision in AEDPA specified that another claim could be raised in a "second or successive" federal petition only if extremely stringent standards were satisfied—standards, here again, that few prisoners would ever meet.

Once again, the Supreme Court at first essentially folded the new provision into existing case law on what counted as a "second or successive" petition for federal relief. The Court explained that if a prisoner had no fair chance to include a claim in a previous application, a second-in-time petition raising the claim was not "second or successive" as that label was conventionally used and was therefore not subject to the new criteria.[13] A bit later, however, some of the justices signaled impatience with this reading and a willingness to say, to the contrary, that AEDPA abandoned the settled understanding of what counted as a "second or successive" petition.

There is reason to think that the Court will shortly declare that *any* second-in-time application challenging the same conviction or sentence must meet the demanding standards in the statute.[14] If that view prevails, then in this context, too, AEDPA will be read to alter habeas corpus law, whether or not the change makes sense.

D.

I do not say that the Court has invariably arrived at strange or silly interpretations of AEDPA's procedural provisions or that it has relentlessly demanded that every nuance of language in every provision must bear serious programmatic implications. I do say that the justices have time and again adopted constructions that produce objectionable results and that they have typically read AEDPA to make changes in procedural restrictions the Court itself had established—this last ostensibly for the very purpose of giving AEDPA serious consequences. The illustrations I have sketched here are not alone, not by a long shot.[15]

III.

I come finally to substantive limits on federal court authority. Prior to 1996, it had long been settled that when a federal court was able to reach the merits of a federal claim, the court was authorized and obligated to exercise independent judgment.[16] By common account, that meant de novo judgment—without regard to any previous state court decision regarding the same claim. No serious observer thought federal courts actually ignored state court conclusions about federal rights; the data suggested quite the contrary. Yet the formal freedom to second-guess state courts was well established and accepted. Then again, the *Teague* doctrine bore enormously important practical implications. If a prisoner's claim depended on a "new" rule of law within the meaning of *Teague*—that is, if a state court might reasonably have decided the claim against the prisoner at the conclusion of direct review—a federal habeas court was typically unable to entertain the claim at all.

Into this (already odd) picture entered AEDPA's most important provision, § 2254(d)(1), which stated that a federal habeas application could not be "granted" with respect to a claim that had been "adjudicated on the merits in State court," unless the state adjudication had produced a "decision" that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. . . ." This curious provision, entirely new with AEDPA, excited no end of academic speculation. The crucial question was what, if anything, the Supreme Court would make of it.

In the early going, there was just the chance that the answer would be not much. Justice Souter worried aloud that if the Court interpreted § 2254(d)(1) "literally," it would produce a system so complicated that it would be impossible to administer. He suggested, instead, that Congress had only legislated a "mood." Congress had asked federal habeas courts to "pay attention" to what state judges said about the merits of federal claims, to remember that they were "judges, too."[17] If Souter's view had prevailed, § 2254(d)(1) would have had no great disruptive effect on existing arrangements. Again, federal courts already were typically satisfied with prior state decisions.

Sadly, on this occasion, too, the full Court chose a different course: the precise text of § 2254(d)(1) had to be given operational meaning and a meaning that would break with the known habeas world.[18] According to the Court, this provision did not explicitly uproot a federal court's responsibility to exercise independent judgment. But where a state court had previously rejected a federal

claim on the merits, § 2254(d)(1) established a general prohibition on federal habeas relief. The effect was the same; a federal court wouldn't make its own determination regarding the merits of a claim if it couldn't act on a favorable conclusion by extending relief. There were exceptions. If a prior state decision on the merits was "contrary to" pertinent Supreme Court precedents or amounted to an "unreasonable application" of those precedents, a federal court would be able to grant relief on the strength of its own determination that the claim was meritorious. Incorporating these exceptions into the general rule, the Court explained that a federal court could award relief only if it concluded that a previous state court decision on a claim was not only incorrect but also unreasonable.[19]

One might have thought the Court would say next that § 2254(d)(1) essentially reproduced the *Teague* doctrine in practical effect. Where *Teague* prevented a federal court from considering a claim that might reasonably have been determined against the petitioner, § 2254(d)(1) substituted a prohibition on federal habeas *relief* where a state court had actually held, reasonably, that a claim was without merit. The one thing that would make no sense would be to read this new provision to function in tandem with *Teague*—that is, to govern the availability of federal habeas relief regarding claims *Teague* admitted to the federal forum in the first place. Yet this is precisely what the Court *did* read § 2254(d)(1) to mean. Once again proceeding from the premise that AEDPA must change existing habeas law, the Court soon declared that *Teague* and § 2254(d)(1) were distinct doctrinal ideas operating seriatim.

How can this work? At the outset, *Teague* determines whether a claim is cognizable in federal court. Then, if a claim is cognizable and meritorious (in the federal court's view), § 2254(d)(1) governs the court's authority to award habeas relief.[20] But consider that a claim is cognizable under *Teague* only if, at the time a prisoner's conviction and sentence became final on direct review, no court could reasonably have held against him. In a case in which a state court actually rejected a claim on the merits, it follows that the state court must have acted unreasonably, else the claim wouldn't have made it through the door. It's a mystery, then, what function is left for § 2254(d)(1) to perform. There are cases (more than one would think) in which wardens don't argue that claims are *Teague*-barred. But when a state court decided a claim against the petitioner and the warden does contend that the claim is foreclosed by *Teague*, the reasonableness of the state court's decision is entailed in the threshold *Teague* analysis.

I gloss over lots of details here, and I set aside other troubling scenarios that the Court's interpretation of § 2254(d)(1) produces. Suffice it to say for present purposes that we now have the very complicated, the very unnecessarily complicated, system that Justice Souter warned us against. And we have this system for no better reason than that the justices now occupying seats on the Supreme Court persist in a method of statutory construction that is sorely ill-suited to this ham-handed statute.

Postscript

It's hard to think that things habeas could be worse than they are. But they will be soon. AEDPA not only introduced the provisions I have discussed here (and more), but also included numerous additional provisions applicable exclusively in death penalty cases. So far, those provisions have not come into play, because they are triggered only if a state establishes a qualifying system for providing indigents on death row with competent, properly compensated counsel in state post-conviction proceedings. The Department of Justice will soon announce the conditions a state's program must meet. Some state systems are bound to measure up, and then the Supreme Court will have another raft of statutory habeas provisions to interpret. If experience is any guide, we are in for more textualist analysis and, alas, more insistence that every provision on the list must be given a meaning that changes already bad habeas arrangements for the worse.

Still, I do not despair. At some point, professionals will surely draw back, take stock, and set about reconstructing federal habeas corpus in a sensible, coherent form. The academic literature is filled with helpful ideas. As this symposium goes to press, the ABA is preparing revised standards to guide genuine reform efforts. The writ, meanwhile, is surprisingly resilient, stubbornly hanging on to serve us and what we hold dear, if we will only set it free.

Notes

* Readers should know that I filed amicus briefs in some of the cases discussed in this essay—always on behalf of the ACLU, always pressing prisoner-friendly interpretations of habeas corpus law. I currently serve as Reporter to the ABA Task Force on Post-Conviction Remedies. That work is ongoing. Nothing in this essay should be ascribed to the Task Force or to the ABA.

1 Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 Duke L.J. 117 (1997).

2 489 U.S. 288 (1989).

3 *See, e.g.*, Wright v. West, 505 U.S. 277 (1992).

4 *See, e.g.*, O'Dell v. Netherland, 521 U.S. 151, 156 (1997).

5 *See, e.g.*, Rose v. Lundy, 455 U.S. 509 (1982).

6 Artuz v. Bennett, 531 U.S. 4 (2000).

7 Pace v. DiGuglielmo, 544 U.S. 408 (2005).

8 Duncan v. Walker, 533 U.S. 167 (2001).

9 Wainwright v. Sykes, 433 U.S. 72 (1977); Murray v. Carrier, 477 U.S. 478 (1986); Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

10 Michael Williams v. Taylor, 529 U.S. 420 (2000).

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

12 McCleskey v. Zant, 499 U.S. 467 (1991).

13 Panetti v. Quarterman, 551 U.S. 930 (2007).

14 *See* Magwood v. Patterson, 130 S. Ct. 2788, 2799 n.11 (2010) (deflecting the issue).

15 *See* Larry Yackle, Federal Courts 621–85 (3d ed. 2009) (citing other examples).

16 Brown v. Allen, 344 U.S. 443 (1953).

17 Terry Williams v. Taylor, 529 U.S. 362 (2000) (oral argument). *See also* 529 U.S. at 386 (opinion of Stevens, J.).

18 *Terry Williams*, 529 U.S. at 403–04 (opinion for the majority by O'Connor, J.).

19 *Id*. at 411.

20 Horn v. Banks, 536 U.S. 266 (2002) (per curiam).