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## **SYMBOLIC STATUTES AND REAL LAWS: THE PATHOLOGIES OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT AND THE PRISON LITIGATION REFORM ACT**

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### INTRODUCTION

Criminals are not popular. No politician in recent memory has lost an election for being too tough on crime. In 1996, the Republican Congress and the Democratic President collaborated on two major statutes affecting the legal protections available to criminals.<sup>1</sup> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>2</sup> modifies the habeas corpus statute in a number of ways, affecting the disposition of federal post-conviction challenges to all criminal convictions, not just those resulting in death sentences.<sup>3</sup> The

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1. We use the word *criminals* because the statutes apply to people already convicted of crimes.

2. Pub. L. No. 104-132, § 106(b)(3)(E), 110 Stat. 1214, 1221 (1996) (amending 28 U.S.C. § 2244(b) (1994)).

3. See *infra* pp. 21-47.

Prison Litigation Reform Act (PLRA)<sup>4</sup> addresses lawsuits filed by prisoners challenging the conditions of their confinement. The PLRA covers both suits dealing with the complaints of individual prisoners and suits dealing more broadly with conditions at entire institutions or in prison systems.<sup>5</sup>

We suggest that the AEDPA and PLRA may illustrate two broad problems in statutory design and interpretation. First, statutory reform and judicial reinterpretation of existing law are alternative ways of revising existing law. Sometimes efforts to revise existing law proceed along both tracks. When the judicial train arrives at the station before the legislative one, there is little reason to enact a statute from a policy standpoint. Nevertheless, there are often good political reasons to do so: Legislators will have built up an investment in the issue and will want to claim credit for doing something about a problem to which they have been calling public attention.<sup>6</sup>

The enactment of statutory reforms that parallel judicial reinterpretations of existing laws poses an interpretive problem for the courts. Such statutes offer the opportunity for interpretations that lie along a continuum. At one end, the statutes may be read to make dramatic changes that disrupt judicial innovations already completed or largely underway. Sometimes these changes raise serious constitutional concerns. At the other end, the statutes may be understood to do little or nothing to alter the course the courts have chosen. If the courts interpret the statutes merely to restate existing law, they give the statutes no practical effect. But if they interpret the statutes to modify or even to fundamentally alter existing law, they may actually impose meanings these new laws cannot bear. In such circumstances, we hypothesize that courts will interpret the statutes to lie close to the "little change" end of the continuum. As the law develops, the new statutes will tinker at the margins with previous judicial interpretations, but are unlikely to effect large changes as a whole.

Second, sometimes, perhaps often, legislators enact statutes to make a point, or to be able to tell their constituents that they have

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4. Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. § 3626, 28 U.S.C. § 1915, 28 U.S.C. § 1346, 42 U.S.C. § 1997, and other scattered sections).

5. See *infra* pp. 47-70.

6. Cf. Judith Resnik, *Constraining Lawyers and Judges: Reflections on the Civil Justice Reform Act, the Civil Jury, Rulemaking, and Congressional Control over the Federal Judiciary*, 49 ALA. L. REV. 133 (1997) (describing process in which "Congress and the judiciary were really only disputing . . . who should get credit for a new national rule regime trump[et]ed as a 'reform'").

done something about a problem. We call these *symbolic* statutes.<sup>7</sup> Legislators may win politically by enacting symbolic laws, but courts, bureaucrats, and others affected by the statutes—here, criminals—may lose as they try to work out what the statutes mean.<sup>8</sup> Symbolic statutes are real laws, posing real problems of interpretation and administration.

These observations are related. Our case studies of the AEDPA and the PLRA suggest that statutes enacted after substantial judicial reconstruction of the law are likely to be largely symbolic. The prior judicial developments may induce legislators to be inattentive to details of statutory design,<sup>9</sup> which leads to difficulties in integrating the new statutes with the law the courts have developed. These difficulties may in turn induce the courts to interpret the statutes to make only marginal changes in the law they themselves have fashioned. But, we suggest, occasionally the result will be a freakish, almost random result in particular cases, which serves no obviously defensible public purpose.

We think that the AEDPA and PLRA are good examples of these aspects of the legislative process. As with all major pieces of new legislation, the AEDPA and PLRA raise a host of interpretive issues. Courts will defuse those issues by reading the statutes to endorse, and to some degree fortify, the reforms they have already advanced.

Part I of this Article examines a number of interpretive and constitutional issues raised by the AEDPA and PLRA. Section A provides some general background on both statutes. Section B describes the habeas corpus provisions in the AEDPA. It begins with a brief examination of the Supreme Court's first confrontation with that Act

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7. For a further discussion of the meaning of the term "symbolic statutes" see John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233 (1990) (citing § 112 of the Clean Air Act as an example of a symbolic statute).

8. Cynical observers might suggest that legislators win no matter what, for legislators can "run against" judges and bureaucrats who take the teeth out of symbolic laws. If the legislators prevail, of course, at some point the bill comes due, and they will have to enact another symbolic statute. The symbolic statute then becomes a real law, and the process starts again. *Cf.* DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 130-36 (1975) (describing a process whereby legislators create bureaucracies that they expect to be inefficient in order to provide themselves with opportunities to supply services to constituents who will, in turn, gratefully support the legislators as they seek reelection).

9. As one court of appeals has observed, the PLRA "contains typographical errors, creates conflicts with the Rules of Appellate Procedure, and is internally inconsistent. Moreover, the year in its name, 1995, does not correspond to the date of its enactment, 1996." *McGore v. Wrigglesworth*, 114 F.3d 601, 603 (6th Cir. 1997) (citations omitted).



able with what they saw as expansive judicial intervention in the criminal justice process. This judicial intervention manifested itself through the wide availability of habeas corpus as a method of challenging criminal convictions and through institutional reform litigation that led to significant changes in the conditions under which criminals were confined. In response, the conservatives proposed legal reforms, to be adopted either by Congress or by the federal courts through new interpretations of the habeas corpus statute and of the law of equity regulating the issuance of institutional reform injunctions.

1. *Habeas Corpus: Reform Proposals.* Conservative efforts to restrict habeas corpus occurred in both the legislative and judicial branches, in alternating sequence. Early on, the Nixon administration proposed a bill that would have limited habeas by statute.<sup>13</sup> When that plan stalled in Congress, Nixon's appointees to the Supreme Court developed new doctrines that curbed the writ's availability.<sup>14</sup> Those doctrinal innovations addressed most conservative objections to habeas well before the Reagan administration advanced another plan for checking the writ legislatively.<sup>15</sup> As the Court's campaign continued through the early 1990s, conservatives no longer needed to amend the habeas statutes to achieve their policy objectives; they could consolidate their position merely by turning back legislative initiatives launched by congressional liberals and moderates to counter the justices.<sup>16</sup>

By the time conservatives had sufficiently increased their numbers in Congress to pass the AEDPA in 1996, the only remaining point to the exercise was to make a more pungent political statement. As a result, the AEDPA could potentially unsettle the judicial decisions that conservatives presumably meant to endorse and fortify. We support this thesis by tracing the Court's decisions regarding three perennial problems attributed to the habeas system: 1) the delays associated with federal habeas in the wake of state court consideration of prisoners' federal claims; 2) the inefficiencies associated

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13. See S. 567, 93d Cong. (1973); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2353-55 (1993) [hereinafter Yackle, *Hagioscope*].

14. See *Wainwright v. Sykes*, 433 U.S. 72, 72-73 (1977); *Stone v. Powell*, 428 U.S. 465, 493-95 (1976).

15. See S. 2216, 97th Cong. (1982); Yackle, *Hagioscope*, *supra* note 13, at 2355-58.

16. In this, conservatives were successful, although some bills advanced by Democrats came close to passage. See Yackle, *Hagioscope*, *supra* note 13, at 2416-23.

with prisoners' failure to comply with state and federal procedural rules; and 3) the ostensible redundancy of federal adjudication of claims previously rejected in state court.

The delays attending federal habeas had long engaged conservatives' attention. In the absence of a fixed filing deadline, prisoners could postpone federal litigation for years—at best undercutting the finality of state judgments and at worst compromising the state's ability to defend those judgments against collateral attack.<sup>17</sup> The problem of delay was complicated by the "exhaustion doctrine" in habeas corpus, which typically required prisoners to pursue state court opportunities to vindicate federal claims before they sought federal habeas relief.<sup>18</sup> The establishment of filing deadlines to discourage delay would be in tension with the exhaustion requirement.

The Court responded on two fronts. First, the Court promulgated a procedural rule for habeas cases, Rule 9(a), which authorized a district court to dismiss a petition without considering the merits if the prisoner had unduly delayed her filing to the state's prejudice.<sup>19</sup> That flexible rule discouraged procrastination, but avoided the difficulties of reconciling a rigid filing deadline with the exhaustion doctrine's conflicting demand for deliberate delay. In addition, the Court shaped the exhaustion requirement into a device for encouraging prisoners to aggregate claims for efficient federal adjudication. In *Rose v. Lundy*,<sup>20</sup> the Court held that if state remedies had not been exhausted with respect to any single claim in a prisoner's multiple-claim petition, the district court should dismiss the petition in its entirety even though other claims were ripe for federal consideration.<sup>21</sup>

Those innovations were controversial and created confusing complexities of their own.<sup>22</sup> They were, however, instrumental adjustments meant to accomplish real policy ends. Some data suggest, moreover, that they affected habeas practice much in the way the justices presumably anticipated. Given Rule 9(a), prisoners as a group may have begun filing for federal habeas relief sooner than they had

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17. See *Tollett v. Henderson*, 411 U.S. 258, 259 (1973).

18. See *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

19. See Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(a) (printed following 28 U.S.C. § 2254 (1994)).

20. 455 U.S. 509 (1982).

21. See *id.* at 522.

22. For a discussion of the complications introduced by *Lundy*, see Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 424-38 (1983).

previously;<sup>23</sup> given *Lundy*, prisoners had a powerful incentive to aggregate their claims for earlier (and more fully dispositive) litigation in both state and federal court.

The inefficiencies associated with procedural default excited conservatives even more than did needless delay. Under Warren Court precedents, a prisoner who failed to preserve a federal claim properly in state court could usually advance it in federal habeas nonetheless.<sup>24</sup> To the dismay of conservatives, a prisoner who failed to raise a claim in one federal petition could often include it in a second or successive application for federal relief.<sup>25</sup> The specter of unscrupulous jailhouse lawyers deliberately engaging in piecemeal federal litigation often dominated conservative attacks on habeas.<sup>26</sup>

Here again, when congressional attempts to legislate change foundered, the Court took the lead. In a series of decisions beginning with *Wainwright v. Sykes*<sup>27</sup> in 1977, the Court established a set of rules that often foreclosed federal habeas on the basis of a prisoner's procedural default in previous state court litigation.<sup>28</sup> The whole of the matter is a mouthful, but the new (and now familiar) doctrine went like this: If 1) there was a state procedural rule requiring a prisoner to raise a federal claim in a particular way or at a particular time; 2) the prisoner failed to comply with that rule; 3) for that reason, the state courts refused or would refuse to consider the claim in later state proceedings; and 4) the resulting state disposition of the matter would constitute an adequate and independent state ground of decision that would forestall direct review in the Supreme Court of the United States, then a federal habeas court would also typically refuse to consider the claim. The court *would* consider the claim, however, if the prisoner either showed "cause" for his procedural default in state court and "actual" prejudice resulting from that default,<sup>29</sup> or the prisoner demonstrated that the federal error that went uncorrected in state court probably led to the conviction of an innocent person.<sup>30</sup>

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23. See Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 685-87 (1990-1991).

24. See *Fay v. Noia*, 372 U.S. 391, 418 (1963).

25. See *Sanders v. United States*, 373 U.S. 1, 15-19 (1963).

26. See OFFICE OF LEGAL POL'Y, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS 51 (1988).

27. 433 U.S. 72 (1977).

28. See *Murray v. Carrier*, 477 U.S. 478, 487 (1986).

29. See *Sykes*, 433 U.S. at 90-91.

30. See *Murray*, 477 U.S. at 496-97; see also Larry W. Yackle, *Federal Evidentiary Hear-*

This judicially-crafted doctrine rested on the premise that federal habeas corpus, available in tandem with state court litigation, should respect state rules that cut off claims because of procedural irregularities.<sup>31</sup> The Court's doctrine did not constitute an independent body of federal rules governing the conduct of state litigation. It piggybacked on, and reinforced, state law by imposing an additional federal sanction on prisoners who failed to press claims in state court in the manner prescribed by state law.<sup>32</sup> The federal default doctrine thus promoted structural values associated with comity and federalism by adding to the mix an instrumental device for encouraging prisoners to comply with state procedural rules.

The Court's doctrinal manipulations were controversial and, in many ways, more rigid than the circumstances warranted. The Court took an extremely narrow view of the explanations that could count as cause for default in state court. For example, it originally appeared that defense counsel's negligence might suffice, but the Court ultimately rejected that possibility, explaining instead that cause would typically be found only if "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."<sup>33</sup> If a prisoner could not have been aware of a claim in time to raise it properly and seasonably, cause was established;<sup>34</sup> otherwise, the prisoner would be saddled with the mistakes of her lawyer.<sup>35</sup>

Democrats in Congress responded with bills that would have made defense counsel's "ignorance or neglect" the basis for cause.<sup>36</sup> None of those initiatives succeeded, however, and the Court held firm.<sup>37</sup> The justices did recognize an exception when counsel's error amounted to ineffective assistance in the Fourteenth Amendment sense, but that was because the state, rather than the prisoner, was

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*ings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 145 (1996) [hereinafter Yackle, *Evidentiary Hearings*] (discussing fact situations that should allow a petitioner to obtain a federal hearing).

31. See *Sykes*, 433 U.S. at 88.

32. See *County Court v. Allen*, 442 U.S. 140, 148 (1979).

33. *Murray*, 477 U.S. at 488.

34. See *id.*; see also, e.g., *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (holding that a prisoner had shown cause when the state had concealed material evidence from him); *Reed v. Ross*, 468 U.S. 1, 2 (1984) (holding that the novelty of a claim could establish cause).

35. See *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982).

36. See, e.g., H.R. 4737, 101st Cong. § 7 (1990) (proposing that applicant could establish cause based on certain failures by applicant's counsel).

37. See *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991).



responsible for ensuring that its official processes met minimal constitutional standards.<sup>38</sup>

This is not to say that the Court was indifferent to the injustices its doctrine might produce. The Court acknowledged that efficiency goals could not justify the continued incarceration of an innocent person. That understanding accounts for the “or” highlighted in the articulation of the doctrine quoted above.<sup>39</sup> By using the disjunctive in that way, the Court clearly and deliberately signaled that if the circumstances indicated that a prisoner was probably innocent, a federal habeas court should overlook default even if the prisoner failed to show cause.<sup>40</sup> When the actual innocence of a prisoner was in question, the Court found proof of “probable innocence” sufficient to warrant consideration of a claim that would otherwise have been procedurally barred.<sup>41</sup> The Court was less generous to prisoners challenging only the validity of their sentences (as opposed to their underlying convictions). In cases of that kind, the Court required “clear and convincing” proof that would have persuaded any reasonable factfinder that the prisoner was not legally eligible for the sentence received.<sup>42</sup>

In the end, the justices were apparently satisfied that their product struck the proper balance. In *Keeney v. Tamayo-Reyes*,<sup>43</sup> they applied the same formulation to cases in which prisoners had raised claims properly and seasonably in state court, but then failed to develop the facts in support of those claims.<sup>44</sup> In *McCleskey v. Zant*,<sup>45</sup> they extended it to cases in which prisoners had failed to advance claims in an initial federal petition and then attempted to press those claims forward in a second or successive application.<sup>46</sup> In this last move, the Court neatly brought all the situations in which procedural default figured in habeas practice under the control of a single doctrinal formulation, serving a single set of policy objectives. Once

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38. *See id.* at 754.

39. *See supra* note 36 and accompanying text.

40. *See Schlup v. Delo*, 513 U.S. 298, 316 (1995).

41. *Id.* at 323.

42. *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992). Both *Schlup* and *Sawyer* were successive federal petition cases, not cases on the consequences of default in state court. As we explain below, however, the Court had previously explained that it would use the same standards in both contexts. *See infra* notes 184-93 and accompanying text.

43. 504 U.S. 1 (1992).

44. *See id.* at 8.

45. 499 U.S. 467 (1991).

46. *See id.* at 490.

again, the Court acted instrumentally to erect the incentives it thought would enhance the system's efficiency.

The question whether the federal courts should second-guess the state courts on the substance of prisoners' claims was far less tractable. At least since *Brown v. Allen*,<sup>47</sup> federal habeas courts had exercised *de novo* judgment on the merits of claims, regarding previous state court decisions as, at most, persuasive precedent from another jurisdiction.<sup>48</sup> That made theoretical sense, inasmuch as a habeas petition initiated an independent civil action, exempt from ordinary preclusion rules and the full faith and credit statute.<sup>49</sup> Moreover, as a pragmatic matter the *raison d'être* of habeas as a sequel to state court review was intelligible largely on that basis. If the federal courts were to defer in any serious way to state court dispositions, the very existence of their authority to consider claims at all would be drawn into doubt.

Until well into the 1980s, the newly constituted Supreme Court accepted the *de novo* standard as appropriate and built its procedural reforms on that premise.<sup>50</sup> Attempts to curtail the substantive scope of the federal writ were concentrated in Congress, where conservatives repeatedly tried to enact the Reagan administration's proposal to bar habeas relief on the basis of a claim that had been "fully and fairly adjudicated"<sup>51</sup> in state court.<sup>52</sup> When that bill appeared destined to fail, however, the Court itself fashioned a new approach to this most important of all habeas questions.

The Court's strategy was creative. In light of the time required for postconviction litigation, the constitutional principles ostensibly applicable to a claim could develop during the period after a case left state court and before it was ready for decision in federal habeas. The Warren Court had regarded the "retroactive" effect of a "new rule" of constitutional law as a property of the rule itself.<sup>53</sup> Generally, if a novel rule was sufficiently related to innocence, it could be given

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47. 344 U.S. 443 (1953).

48. *See id.* at 458-60.

49. *See* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 998-1110, 1047-49 (1985).

50. *See* *Coleman v. Thompson*, 501 U.S. 722, 730 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 80 (1977).

51. Yackle, *Hagioscope*, *supra* note 13, at 2358-59.

52. *See id.* at 2357-64.

53. *See* *Desist v. United States*, 394 U.S. 244, 249-51 (1969).

effect in habeas.<sup>54</sup> In *Teague v. Lane*,<sup>55</sup> by contrast, the Rehnquist Court held that, henceforth, “new rules” of constitutional law would no longer be enforceable in habeas at all, save in two exceptionally narrow circumstances.<sup>56</sup>

On first blush, that departure did not appear to be a serious threat to the scope of habeas. While such conservative justices were on the bench, it seemed unlikely that the Court would announce many breaks with the past. In *Teague* itself and in subsequent cases, however, the Court elaborated an extremely expansive definition of what would count as “new” for habeas purposes. A rule was new if it “impose[d] a new obligation” on the government.<sup>57</sup> A decision in an individual case announced a new rule if the result had not been “dictated by precedent existing at the time the defendant’s conviction became final,”<sup>58</sup> but, instead, had previously been “susceptible to debate among reasonable minds.”<sup>59</sup> When lower courts had differed over a proposition of federal law, a new rule was created with the emergence of a single, authoritative understanding.<sup>60</sup> A new rule of law could be created in an evolutionary way, as older precedents were applied in a “novel setting.”<sup>61</sup>

The expansive definition of new rules had obvious practical consequences. As the *Teague* doctrine’s implications became clear, the Court was widely criticized in academic circles for simply contriving to circumnavigate *Brown v. Allen*.<sup>62</sup> In effect, *Teague* contemplated that a federal habeas court could no longer award relief if a previous state court decision on the merits was at all close to the mark. For if the state court had not made an egregious error when it held against the prisoner, a district court would have to create a new rule of constitutional law in order to find for the prisoner.

Initially, the Court appeared to acknowledge that it was treating

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54. See *Linkletter v. Walker*, 381 U.S. 618, 636-37 (1965) (declining to give the exclusionary rule retroactive effect).

55. 489 U.S. 288 (1989).

56. See *id.* at 309-13 (excepting rules that go to the state’s authority to criminalize behavior and rules that fundamentally affect the truth-seeking process).

57. *Id.* at 301.

58. *Id.*

59. *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

60. See *Caspari v. Bohlen*, 510 U.S. 383, 393-95 (1994).

61. *Stringer v. Black*, 503 U.S. 222, 228 (1992).

62. See James S. Liebman, *More Than “Slightly Retro:” The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 633 (1990-1991).

ordinary applications of legal principles to the facts of cases as the creation of wholly new rules of law. Indeed, the Court explained that the very purpose of *Teague* was to “validate reasonable, good-faith” state decisions on the merits of federal claims.<sup>63</sup> In time, however, individual justices parted ways. Justice Thomas said in *Wright v. West*<sup>64</sup> that, for his part, the *Teague* cases led plainly, and he thought properly, to the conclusion that the federal courts must ordinarily defer to “reasonable” state court judgments on the merits.<sup>65</sup> Others insisted that *Teague* only controlled the availability of habeas relief when the pertinent legal standard had actually changed. In her own opinion in *West*, Justice O’Connor insisted that a state court’s erroneous decision on a federal issue would not be allowed to stand on the ground that it was “reasonable.”<sup>66</sup> With matters in that posture, it is small wonder that congressional Democrats also proposed to narrow the definition of new rules for *Teague* purposes.<sup>67</sup> Those efforts failed, however, and when legislation finally was enacted it was in a quite different form: the AEDPA of 1996.

## 2. Prisoner Litigation: Developments and Reform Proposals.

Similar reform proposals were made in connection with institutional reform litigation and assertedly frivolous prisoner lawsuits. Republican governors elected in the early 1980s found their options in addressing crime limited by restrictions federal courts had placed upon the operation of prison systems.<sup>68</sup> They could not simply add new prisoners to prisons that the courts had held were unconstitutionally overcrowded, and at least early in their terms they were constrained politically to avoid substantial new expenditures on prison construction. The governors were particularly bothered by

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63. *Butler*, 494 U.S. at 414.

64. 505 U.S. 277 (1992).

65. *See id.* at 291.

66. *Id.* at 305 (O’Connor, J., concurring).

67. *See* H.R. 3371, 102nd Cong. § 1104 (1991) (defining a new rule as a “clear break from precedent . . . that could not reasonably have been anticipated at the time the claimant’s sentence became final in State court”).

68. *See, e.g.*, *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982) (regulating operation of Texas prison system). For an early expression of concern regarding judicially-imposed restraints on executive discretion, see Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661-64, 706-18 (1978) and compare Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 297 (expressing concern that “executive officials in one Administration can set policy today and bind their successors to comply with it tomorrow, by settling a lawsuit on those terms”).

consent decrees agreed to by their liberal predecessors, sometimes on the eve of leaving office. They sought ways to avoid the federal court orders. As Professor McConnell put it, opponents of these types of consent decrees believed that they “should be repudiated before they become a common part of the legal landscape.”<sup>69</sup>

These opponents found support among Republican leaders during the Reagan years.<sup>70</sup> Republican politicians had long campaigned against judicial activism, and took court orders regulating prison conditions as a prime example of judicial overreaching: The federal courts, they asserted, were providing criminals with living conditions far better than many law-abiding people enjoyed, and the courts were micromanaging prisons down to the level of prescribing the temperatures that had to be maintained in cells.<sup>71</sup>

The Reagan administration challenged existing institutional litigation in several ways.<sup>72</sup> It sought to reduce the legal resources available for such litigation by limiting the Legal Services Corporation’s power to provide funds for prison conditions lawsuits, and by reducing the Department of Justice’s participation in prison litigation.<sup>73</sup> The Reagan administration nominated judges to the federal courts whom it expected to be receptive to arguments that judges should intervene less frequently in prison administration. Finally, it developed legal challenges to institutional litigation.<sup>74</sup>

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69. McConnell, *supra* note 68, at 297.

70. Writing in 1982, Senator Robert Dole asserted that “returning control of our prisons and jails from the courts to our cities, counties, and states” was “the major issue for . . . the field of corrections.” Robert Dole, *Reversing Court Control of Corrections*, CORRECTIONS TODAY, Feb. 1982, at 24, 24. Senator Dole’s proposed solution was the Criminal Justice Construction Reform Act, S. 186, 97th Cong. (1981), which sought to provide substantial federal financial and planning assistance to improve prison conditions, so as to eliminate the basis for judicial control. *See id.*

71. *See, e.g.*, Lewis v. Lane, 816 F.2d 1165, 1170 (7th Cir. 1987) (“An allegation of inadequate heating may state an Eighth Amendment violation.”).

72. For an early account, see generally Margaret Gentry, *The Reagan Corrections Program: Less Money, More States’ Rights*, CORRECTIONS MAGAZINE, Dec. 1981, at 29, 30 (discussing Reagan administration proposals that would reduce federal interference with state and local institutional action).

73. *See, e.g.*, United States v. Michigan, 680 F. Supp. 270, 278 (W.D. Mich. 1988) (holding that due process did not require prior hearing before “food loaf” diet was imposed upon prisoner as punishment for throwing food and human waste in cafeteria).

74. The administration also developed policy guidelines for federal agencies, describing when they should enter consent agreements. *See, e.g.*, Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 279-84 (discussing policy guidelines directed at the Justice Department). According to Shane, the guidelines “direct Justice Department lawyers not to consent, in the settlement of litigation,

The legal challenges took three forms.<sup>75</sup> First, courts were asked to limit the class of plaintiffs who could obtain relief to those who were currently suffering identifiable constitutional harm. The mere possibility of problems arising in the future—the risk that overcrowding would someday lead to prison riots, for example—would not be enough to constitute identifiable harm. Second, it was argued that injunctions should be limited to remedying identifiable harms; courts should avoid micromanagement by deferring to prison administrators' judgment. Third, courts were asked to modify existing injunctions to allow prison administrators more discretion.

*a. Limiting relief to identifiable violations.* Since at least 1971 the Supreme Court has emphasized that “judicial powers may be exercised only on the basis of a constitutional violation,” and that the “nature of the violation determines the scope of the remedy.”<sup>76</sup> As the Court stated in 1992, “[a] remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation.”<sup>77</sup>

The Court applied this analysis in *Lewis v. Casey*,<sup>78</sup> which involved a claim that Arizona's system of providing access to legal research materials deprived inmates of their constitutional right of access to the courts.<sup>79</sup> The Court held that a prisoner must show actual injury to demonstrate a constitutional violation. A prisoner might

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to commitments that limit otherwise revisable policy-making discretion vested in the executive branch by Constitution or statute.” *Id.* at 279. The guidelines were widely publicized and represented “significant expressions of [the administration's] view of the Constitution.” *Id.* at 280 (quoting Office of Legal Counsel, U.S. Dep't of Justice, Press Release 1 (Mar. 21, 1986)). Shane argues that “the Guidelines were animated less by a precise legal theory than by a relatively nondiscriminating ideological stance.” *Id.* at 283.

One PLRA provision echoes a part of the guidelines. The guidelines allowed settlement agreements that limited executive discretion so long as “the sole remedy for the department or agency's failure to comply with those terms . . . [was] the revival of the suit.” *Id.* at 282-83. PLRA section 802(a) similarly states, “Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.” Pub. L. No. 104-134, § 802(a), 110 Stat. 1321, 1368 (1996) (to be codified at 18 U.S.C. § 3626 (c)(2)).

75. For an overview of the constitutional and political theory on which the administration's challenges rested, see McConnell, *supra* note 68, at 317-22.

76. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

77. Freeman v. Pitts, 503 U.S. 467, 489 (1992).

78. 116 S. Ct. 2174 (1996).

79. See *id.* at 2177-78.

meet this requirement if “a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known.”<sup>80</sup> Examining the record, the Court found that two prisoners had indeed suffered “actual injur[ies],”<sup>81</sup> but this was not enough to justify a remedial order directed at the entire prison system.<sup>82</sup>

This actual injury requirement means that a prisoner cannot establish a constitutional violation simply by showing that prisoners as a group face an unreasonable risk that some of their complaints will be dismissed as a result of the prison library’s inadequacies. At least in dictum the Court indicated that this analysis would apply to health and safety violations as well. Courts “provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm,” the Court wrote, but “it is . . . the role of . . . the political branches[ ] to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”<sup>83</sup> It followed, the Court said, that “[i]f . . . a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care, . . . simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared.”<sup>84</sup>

*b. Limiting “micromanagement.”* In *Lewis*, Justice Thomas mounted a substantial attack on the courts’ remedial role in institutional reform litigation, arguing that it was “at odds with the history and tradition of the equity power and the Framers’ design.”<sup>85</sup> Justice Thomas stated that the Court should go farther than limiting prisoners’ rights to receive judicial assistance, because structural decrees issued by the federal judiciary exceed the judiciary’s constitutional powers.<sup>86</sup> Justice Thomas sought to avoid judicial micromanagement of prisons. A court need not engage in micromanagement to remedy the use of instruments of torture. The

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80. *Id.* at 2180.

81. *Id.* at 2182.

82. *See id.* at 2184.

83. *Id.* at 2179.

84. *Id.* (citation omitted).

85. *Missouri v. Jenkins*, 115 S. Ct. 2038, 2067 (1995) (Thomas, J., concurring); *see also Lewis*, 116 S. Ct. at 2196-200 (Thomas, J., concurring) (opposing sweeping remedial decrees in the context of prison administration).

86. *See Lewis*, 116 S. Ct. at 2187 (Thomas, J., concurring).

courts' role will be different, however, if the Eighth Amendment goes farther than that. For example, according to the Supreme Court, the Eighth Amendment is violated when a prisoner is knowingly exposed to an objectively unreasonable risk of serious injury to his health.<sup>87</sup> To remedy that violation, the courts direct prison administrators to reduce the risk to an acceptable level. There are, however, many ways of satisfactorily reducing risk. An order embodying a remedy designed to "alleviat[e] the initial constitutional violation"<sup>88</sup> may well contain details that look like micromanagement of the prison. The Court directed lower courts to give prison administrators substantial deference in their response to situations posing threats of constitutional violations.<sup>89</sup> Nevertheless, the resulting decrees will necessarily be highly detailed if they are to be more than mere directives.

*Lewis* can be reconciled with the cases finding liability for exposure to unreasonable risks if we emphasize that those cases did not involve mere inadequacy of medical facilities. The actual-injury requirement that *Lewis* imposes, however, may alter the definition of the constitutional violation in a way that decreases the likelihood that a court remedying a constitutional violation would engage in micro-management.

*c. Easing standards for modifying and lifting decrees.* Through the 1980s some lower courts held that a decree governing conditions of confinement could be modified only if the party seeking to modify the decree met the stringent standard of *United States v. Swift & Co.*<sup>90</sup> *Swift* required "a clear showing of grievous wrong evoked by new and unforeseen conditions."<sup>91</sup> In *Rufo v. Inmates of the Suffolk County*

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87. See *Helling v. McKinney*, 509 U.S. 25, 36 (1993); see also *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (indicating that a prison official may be liable under the Eighth Amendment if he knows that inmates face a substantial risk of serious harm and nonetheless fails to abate the risk by reasonable precautions).

88. *Freeman v. Pitts*, 503 U.S. 467, 489 (1992).

89. See *Turner v. Safley*, 482 U.S. 78, 89 (1987); see also *Lewis*, 116 S. Ct. at 2185 (noting that *Turner's* principle of deference has particular force where the affected inmates are among the most violent in a given prison system).

90. 286 U.S. 106 (1932). See also, e.g., *Paradise v. Prescott*, 767 F.2d 1514, 1527 n.13 (11th Cir. 1985) (citing *Swift* as the standard for modification of a consent decree). In 1987, Professor McConnell noted an "emerging consensus" that the *Swift* standard was too stringent for institutional litigation. McConnell, *supra* note 68, at 299 n.12.

91. *Swift*, 286 U.S. at 119.



*Jail*,<sup>92</sup> the Supreme Court considered what standard to use in institutional reform cases. *Rufo* involved a consent decree requiring the county to build a new jail that would hold only one prisoner per cell.<sup>93</sup> Construction was delayed and the jail population grew faster than expected.<sup>94</sup> The county sought to modify the decree to allow the jail to hold two prisoners in some cells.<sup>95</sup> Justice White, writing for the Court, said that district courts should apply a standard “more flexible” than *Swift*.<sup>96</sup> Later cases, Justice White wrote, indicated that the *Swift* standard was not “talismanic.”<sup>97</sup>

The Court pointed to “[t]he upsurge in institutional reform litigation” as another reason justifying flexibility.<sup>98</sup> Institutional decrees remain in place for extended periods, and “a flexible approach is often essential to achieving the goals of reform litigation.”<sup>99</sup> The Court made several general statements about the scope of institutional reform decrees. It suggested that modifications are appropriate if they do not “violate the basic purpose of the decree,” which “was to provide a remedy for what had been found . . . to be unconstitutional conditions.”<sup>100</sup> It acknowledged that “[f]ederal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated.”<sup>101</sup> But, the Court continued, defendants can settle cases “by undertaking to do more than the Constitution itself requires,” and then parenthetically noted that “almost any affirmative decree beyond a directive to obey the Constitution necessarily does that.”<sup>102</sup> Relief “clearly . . . related to the conditions found to offend the Constitution” is permissible.<sup>103</sup>

According to *Rufo*, once a defendant shows that a modification is warranted, the district court should develop a new remedy

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92. 502 U.S. 367 (1992).

93. *See id.* at 375.

94. *See id.*

95. *See id.* at 376. We note that the jail had been designed on the assumption that there would be only one prisoner per cell. *See id.* at 375.

96. *Id.* at 380.

97. *Id.*

98. *Id.*

99. *Id.* at 381.

100. *Id.* at 387.

101. *Id.* at 389.

102. *Id.*

103. *Id.*

“suitably tailored to the changed circumstance.”<sup>104</sup> The district court “should not strive to rewrite a consent decree so that it conforms to the constitutional floor,” but should instead focus on “whether the proposed modification is tailored to resolve the problems created by the change in circumstances.”<sup>105</sup> But “the public interest” requires that district courts “defer to local government administrators.”<sup>106</sup> They should “keep the public interest in mind,” because “[t]o refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief.”<sup>107</sup>

*Rufo* dealt with the standard for modifying institutional decrees, but defendants could obtain relief in another way. They might contend that they had complied with some parts of a decree and should be relieved of judicial supervision of continued compliance with those aspects of the order even though the defendants were not complying with all the decree’s provisions. Again, some lower courts refused to withdraw from supervision in cases of partial compliance. The Supreme Court directed them to do so in *Freeman v. Pitts*,<sup>108</sup> a school desegregation case.<sup>109</sup> In *Freeman*, the district court found that the school board had complied with the parts of its prior orders dealing with student assignment policies and physical facilities, but that the board still had not complied with the decree’s provisions dealing with teacher assignments.<sup>110</sup> The court of appeals held that the district court could not relieve the board of a continuing obligation to comply with the student assignment provisions.<sup>111</sup> The Supreme Court reversed, holding that the district court had discretion to withdraw from supervision of those areas in which the school board had complied with the decree’s requirements.<sup>112</sup>

One aspect of the Court’s analysis was that district courts could withdraw from supervision of compliance with portions of their decrees if they were convinced that continued compliance was no longer necessary to remedy any continuing constitutional violation.<sup>113</sup>

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104. *Id.* at 391.

105. *Id.*

106. *Id.* at 392.

107. *Id.*

108. 503 U.S. 467 (1992).

109. *See id.* at 471.

110. *See id.* at 474.

111. *See id.* at 484.

112. *See id.* at 471.

113. *See id.* at 494 (“The school district bears the burden of showing that any current imbal-

If continued supervision was necessary to ensure compliance with *other* parts of the decree, however, the district court had to exercise supervision.<sup>114</sup> Finally, the Court held in *Board of Education v. Dowell*<sup>115</sup> that district courts could lift their injunctions entirely if they found that defendants had complied with them in good faith, and that the defendants were no longer violating the Constitution.<sup>116</sup> By 1994, advocates of prisoners' rights could summarize the state of the law, with only slight exaggeration, as: "Pay enormous deference to prison administrators and do not intervene unless there is overwhelming evidence of gross constitutional violations."<sup>117</sup>

Even as the courts were revising the law, legislators, prodded by state attorneys general, began to consider ways of limiting what they regarded as frivolous lawsuits brought by prisoners. Chief Justice Warren Burger gave a series of widely publicized speeches in which he criticized the courts for entertaining—or Congress for requiring the courts to entertain—lawsuits by prisoners who wanted cheaper cigarettes.<sup>118</sup> By the 1990s the exemplary case of frivolous litigation was the lawsuit by a prisoner who claimed that he was being treated unconstitutionally because the prison would not serve him the right kind of peanut butter.<sup>119</sup> Vice President Dan Quayle's Council on

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ance is not traceable, in a proximate way, to the prior violation.").

114. *See id.* at 497.

115. 498 U.S. 237 (1991).

116. *See id.* at 249-51.

117. J.D. Dolby & Mark Lopez, *Prison Conditions Litigation—Past, Present, and Future: View From the Plaintiffs' Bar*, CORRECTIONAL L. REP., June 1994, at 1, 15.

118. For one such case, see *Russell v. Bodner*, 489 F.2d 280, 281 (3d Cir. 1973). For an anecdotal report of Burger's views, see Deborah Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1260 (1992).

119. One well documented "peanut butter" case involved a Nevada prisoner who paid for chunky peanut butter from the prison canteen with his own funds, but received creamy peanut butter. *See* Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1. Apparently the prison officials did not offer to refund the prisoner's money or provide him with what he had paid for until after the litigation began. *See id.* The peanut butter cases have some of the characteristics of so-called "urban legends." For example, it is not clear from reports whether critics of frivolous prisoner litigation believe that there were many peanut butter cases or whether all of the reports refer to a single episode. Senator Robert Dole, apparently referring to this case, described it as one in which the prisoner was "served creamy peanut butter." Congressional Press Release, *Prison Litigation Reform Act: Dole Provision Cracking Down on Frivolous Inmate Lawsuits Included in Omnibus Appropriations Bill* (Apr. 27, 1996), available in LEXIS, Nexis Library, HILLPR File. California Attorney General Dan Lungren asserted that "he has had to employ 51 assistants to handle prisoner lawsuits over such grievances as crunchy versus plain peanut butter." Richard A. Serano, *Bid to Revamp Crime Bill Sparks Clash*, L.A. TIMES, Jan. 20, 1995, at A4. For comments on the accuracy of the peanut butter anecdotes, see Kim Mueller, Comment, *Inmates' Civil*

Competitiveness convened a special working group chaired by Solicitor General Kenneth Starr to develop an "agenda for civil justice reform."<sup>120</sup> The agenda included a recommendation to "Reduce Frivolous and Protracted Prisoner Litigation," primarily by requiring the pursuit of administrative grievance procedures.<sup>121</sup> In the spring of 1994, the National Association of Attorneys General published model state legislation "designed to curtail frivolous inmate lawsuits."<sup>122</sup> Deliberately or not, politicians began to assimilate the attack on these kinds of frivolous prisoner lawsuits to their challenges to institutional reform litigation on the ground that both raised questions about the courts' proper role in defining prisoners' conditions of confinement.

Thus, even as courts began responding to arguments in favor of changing the courts' role, politicians continued to pursue programs of legislative change to accomplish the same goals. These were largely programs designed to stake out a position rather than realistic political proposals, because at the national level at least, the primary sponsors were Republicans who lacked the power to enact them.<sup>123</sup> With the arrival of the 104th Congress controlled by Republicans in both House and Senate, however, those politicians could enact the programs they had proposed for a decade.

3. *Adoption of the Proposals.* The Republican Contract with America included a proposed Taking Back Our Streets Act that incorporated proposals concerning prisoner litigation.<sup>124</sup> Arguing that "most petitions are totally lacking in merit," that "thousands upon thousands of frivolous petitions clog the federal district court dockets each year," and that "prisoners on death row [could] almost

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*Rights Cases and the Federal Courts: Insights Derived from a Field Research Project in the Eastern District of California*, 28 CREIGHTON L. REV. 1255, 1283 n.114 (1995); Jon O. Newman, Letter, *No More Myths About Prisoner Lawsuits*, N.Y. TIMES, Jan. 3, 1996, at A14.

120. The text of the Working Group's recommendations is reprinted in *Proposed Civil Justice Reform Legislation*, 60 U. CIN. L. REV. 977, 979 (1992).

121. *Id.* at 1005-06.

122. Jeffrey R. Maahs & Rolando V. Del Carmen, *Curtailling Frivolous Section 1983 Inmate Litigation: Laws, Practices, and Proposals*, FED. PROBATION, Dec. 1995, at 53, 57.

123. *But see infra* note 247 and accompanying text (discussing the Helms Amendment to the Violent Crime Control and Enforcement Act of 1994, enacted Sept. 13, 1994).

124. *See CONTRACT WITH AMERICA: THE BOLD PLAN* BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 43-44, 53 (Ed Gillespie & Bob Schellhas eds., 1994).

indefinitely delay their punishment,”<sup>125</sup> the Contract’s authors sought to impose a one-year deadline for filing habeas corpus claims generally, and a more stringent six-month deadline for capital cases.<sup>126</sup> They also wanted to “force[] federal courts to consider federal habeas petitions within a certain time frame.”<sup>127</sup> The justification for limiting prisoner lawsuits was confined to a single substantive sentence: “States are forced to spend millions of dollars defending prisoner lawsuits to improve prison conditions—many of which are frivolous.”<sup>128</sup> This treated institutional reform litigation as a version of frivolous litigation.

The fact that the courts had already done most of what the Republican legislation sought to accomplish was largely irrelevant from a politician’s point of view. The politicians expected that their constituents would now see prisons operating without substantial federal judicial interference. They could also expect that constituents would not readily distinguish changes in judicial supervision occasioned by the courts themselves from those occasioned by a statute. As with the AEDPA, it made political sense to enact the PLRA even if it accomplished little as a matter of law.<sup>129</sup> Legislators’ comments on the PLRA rarely adverted to the judicial developments over the prior decade and a half.<sup>130</sup>

Accepting the legislation made political sense to President Clinton as well. A so-called “new Democrat,” he had incorporated traditionally Republican criminal justice issues into his political positions while governor of Arkansas and as a candidate for the presidency. He vigorously supported the anti-terrorism provisions of the AEDPA, and was at best indifferent to the inclusion of habeas corpus revisions in the statute. The PLRA was enacted as part of an omnibus appropriations bill, the signing of which represented Clinton’s political victory over the Republican Congress that, he effectively

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125. *Id.* at 44.

126. *See id.* at 43.

127. *Id.*

128. *Id.* at 53.

129. The PLRA’s primary sponsors in the Senate included Senators Jon Kyl of Arizona, Arlen Specter of Pennsylvania, Spencer Abraham of Michigan, and Kay Bailey Hutchison of Texas, all from states in which prison institutional litigation had become a major political issue. (Other sponsors included Senator Robert Dole of Kansas, the majority leader, and Senator Orrin Hatch of Utah, the chair of the Committee on the Judiciary.)

130. There were few echoes of Senator Dole’s 1982 observation that “[r]ecently [the courts] have moved back to a more measured approach in correctional litigation, balancing the interests of the prisoner against legitimate correctional objectives.” Dole, *supra* note 70, at 25.

charged, had closed down the government in its prior budget efforts.

*B. The Habeas Corpus Revisions in the AEDPA*

1. *Felker v. Turpin*. The Supreme Court made its first glancing acquaintance with the AEDPA in *Felker v. Turpin*,<sup>131</sup> and the Court's unanimous opinion may foreshadow the broader difficulties entailed in interpreting the AEDPA and the PLRA. The case involved a provision that, interpreted one way, raised serious questions about the scope of Congress's power to regulate the Supreme Court's jurisdiction. These questions are among the most difficult to resolve in constitutional law.<sup>132</sup> The Court avoided addressing those questions by reading the AEDPA to leave an alternative basis for review in the Supreme Court intact.<sup>133</sup>

One section of the AEDPA deals with successive habeas corpus petitions.<sup>134</sup> A habeas petitioner filing a second or successive petition must satisfy certain requirements concerning the nature of the claim. Initial habeas petitions can be filed directly in the district court. Under the AEDPA, however, second or successive petitions must be presented to the court of appeals for review.<sup>135</sup> The court of appeals acts as a "gatekeeper," deciding which petitions may be filed in the district court.<sup>136</sup> The court of appeals may grant leave to file only if the petitioner "makes a prima facie showing that the application satisfies" the statute's requirements regarding the nature of the claim.<sup>137</sup> The statute also provides that the court of appeals' "grant or denial" of leave to file "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."<sup>138</sup>

Felker filed a motion for leave to file a second petition, which the court of appeals denied. Felker then applied to the Supreme

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131. 116 S. Ct. 2333 (1996). For a more detailed analysis of the Court's opinion, see Mark Tushnet, "The King of France With Forty Thousand Men:" *Felker v. Turpin and the Supreme Court's Deliberative Processes*, 1996 SUP. CT. REV. 163.

132. See *Felker*, 116 S. Ct. at 2337-38 (discussing § 106(b)(3)(E) of the AEDPA).

133. See *id.* at 2338-39.

134. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106, 110 Stat. 1214, 1220-21 (amending 28 U.S.C. § 2244 (1994)).

135. See *id.* § 106(b)(3), 110 Stat. at 1221.

136. See *id.* The Court in *Felker* described those seeking leave to file as "prospective applicants" because they have no right to file a habeas petition until they receive leave to do so. 116 S. Ct. at 2337.

137. Antiterrorism and Effective Death Penalty Act § 106(b)(3)(C), 110 Stat. at 1221.

138. *Id.* § 106(b)(3)(E), 110 Stat. at 1221.

Court for a writ of certiorari and for an original writ of habeas corpus.<sup>139</sup> The Court unanimously held that the AEDPA barred review by writ of certiorari but did not cut off the possibility of an original writ in the Supreme Court.<sup>140</sup> A prospective habeas applicant denied leave to file a second or successive petition by a court of appeals now can file an application for leave to file an original writ in the Supreme Court, instead of filing a petition for certiorari.

*Felker* limits the practical effect of eliminating the ordinary certiorari route to the Supreme Court. Perhaps the 1996 Act changes the standard for obtaining Supreme Court review.<sup>141</sup> Alternatively, the Court's interpretation might mean that the AEDPA directs the Court to substitute the AEDPA's requirements for the unstructured discretionary decision the Court would make in considering either a certiorari petition or an application for an original writ of habeas corpus.<sup>142</sup> The AEDPA's new requirements, the opinion says,

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139. See *Felker*, 116 S. Ct. at 2337.

140. See *id.* at 2338-39.

141. In the absence of the AEDPA provision at issue in *Felker*, a prospective habeas petitioner denied leave to file by a court of appeals would file a petition for certiorari. In considering the petition the Court would apply its Rule 10, which states that certiorari is a matter "of judicial discretion" and "will be granted only for compelling reasons." SUP. CT. R. 10. Rule 20(4)(a), which deals with the original writ of habeas corpus, requires the petitioner to "show that exceptional circumstances warrant the exercise of the Court's discretionary powers," and states that "[t]his writ is rarely granted." SUP. CT. R. 20(4)(a). Perhaps there is a difference between "compelling reasons" and "exceptional circumstances," though the *Felker* opinion does not make that difference apparent.

The standards in Rules 10 and 20 are both discretionary. Perhaps the Court will come to treat the standards differently: Rule 20 may be interpreted as being less stringent than Rule 10 if the justices come to believe that review in some cases is important, or Rule 20 may be interpreted as being more stringent if they come to find the burdens of processing applications for leave to file petitions for an original writ of habeas corpus burdensome.

*Felker* had filed a petition for an original writ of habeas corpus which the Court denied, noting that his claims did not "materially differ" from claims by other habeas petitioners that the Court had reviewed "on stay applications." *Felker*, 116 S. Ct. at 2341. The claims, the opinion said, did not satisfy "the requirements of the relevant provisions of the [1996] Act, let alone the requirement that there be 'exceptional circumstances' justifying the issuance of the writ." *Id.* It is not clear that this language would not be equally appropriate in noting that a petition for certiorari failed to establish "compelling circumstances" for granting review. The Court might examine the petition for leave to file an original writ to see if it made out a prima facie case that the new statutory standards for filing a successive writ were satisfied. If the Court concluded that the petition did so, presumably it could transfer the petition to the appropriate district court which could determine whether the standards were in fact satisfied. There also remains the question of whether the Court will have less, or less usable, information in making such an assessment than it would have in a petition for certiorari.

142. For example, a prospective habeas petitioner who was denied leave to file a successive petition might seek review on the ground that the court of appeals had misinterpreted the AEDPA's requirement that "the factual predicate for the [new] claim could not have been dis-

“inform our authority to grant” relief.<sup>143</sup> The AEDPA could properly “inform” the Court’s exercise of discretionary authority, however; the Court itself has refashioned the writ of habeas corpus in part on the ground that the courts ought to elaborate statutory details in light of contemporary circumstances.<sup>144</sup> So too with the original writ of habeas corpus: Contemporary circumstances, evidenced by congressional action, bear on the appropriate structure of the writ even if Congress did not—and perhaps cannot—dictate that structure to the Court.

A second way to read the AEDPA would be to hold that shifting review from certiorari to the original writ changes the issues the Court will consider. On certiorari the Court would consider whether the court of appeals properly applied the statutory standards for granting leave to file a successive petition. Perhaps on original habeas the Court would consider only the merits of the underlying petition. So, in *Felker*’s case, the Court would consider not whether the federal court of appeals properly denied leave to file but whether the state trial court gave unconstitutional jury instructions.<sup>145</sup>

A serious constitutional question lurked behind the scenes in *Felker*. Precluding review of court of appeals gatekeeper decisions might be unconstitutional because it would impair the Supreme Court’s ability to ensure the supremacy and uniformity of federal

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covered previously through the exercise of due diligence,” 28 U.S.C.A. § 2244(b)(2)(B)(i) (West Supp. 1997), in conflict with some other circuit’s interpretation of that requirement. In addition to asking whether the Court’s usual discretionary standards were satisfied, the AEDPA might direct the Court also to ask whether “the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” *Id.* § 2244(b)(2)(B)(ii).

143. *Felker*, 116 S. Ct. at 2339 (emphasis added). “Inform” does not mean “dictate” or “constrain,” as the opinion makes clear in its next paragraph: “Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions.” *Id.* The Court might have been so circumspect because interesting separation of powers questions would arise if Congress purported to dictate the Court’s standards for exercising jurisdiction conferred on it by statute.

144. See *infra* Part II.A.1.

145. In his concurrence, Justice Souter suggested that the question of the issues open to Supreme Court review would be important “if the Courts of Appeals adopted divergent interpretations of the gatekeeper standard.” *Felker*, 116 S. Ct. at 2342 (Souter, J., concurring). We are accustomed to thinking that one important role for the Supreme Court is to ensure that federal statutes have the same meaning in Georgia that they have in North Carolina. If the 1996 Act required the Supreme Court to consider only the merits of *Felker*’s unconstitutional instruction claim and ruled out other ways of obtaining review of questions about interpreting the gatekeeper provision, the possibility of lack of uniformity would be real.



law.<sup>146</sup> This constitutional question is a difficult one, however, and it is hardly surprising that the Court chose to interpret the statute in a way that made it unnecessary to decide that constitutional issue. In avoiding the constitutional issues, the Court interpreted the statute to make no more than minor changes to its own standards for reviewing certain cases. The preclusion of review provision interpreted in *Felker* expresses a mood, as symbolic statutes do. The provision, as interpreted by the Supreme Court in *Felker*, does no more than slightly tighten the Supreme Court's standard for deciding whether to consider a death penalty case involving someone who has already had two shots at Supreme Court review. It also slightly restructures the forms in which the Court can consider whether the court of appeals properly interpreted the gatekeeper provision. And it may do much less than that. This interpretive pattern will recur as we examine other provisions in the AEDPA and PLRA.

2. *Revising Habeas Corpus: Some Case Studies.* The AEDPA amends preexisting provisions in Chapter 153<sup>147</sup> and creates a new Chapter 154, addressed exclusively to death penalty cases.<sup>148</sup> The AEDPA's amendments to Chapter 153 became effective when the President signed the AEDPA into law on April 24, 1996.<sup>149</sup> Chapter 154 builds on an innovative model recommended by a committee of the Judicial Conference of the United States, chaired by Justice Lewis Powell.<sup>150</sup> Its provisions apply only to cases arising in states that provide indigent death row inmates with competent lawyers to represent them in state postconviction proceedings.<sup>151</sup>

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146. See Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201 (1960).

147. See 28 U.S.C.A. §§ 2241-2255 (West Supp. 1997).

148. See *id.* §§ 2261-2266.

149. See Pub. L. No. 104-32, § 107(a), 110 Stat. 1214, 1221 (1996) (amending 28 U.S.C.A. Ch. 153 (1994)). But see *Lindh v. Murphy*, 117 S. Ct. 2059 (1997) (holding that the amendments to Chapter 153 are inapplicable to cases that were already pending on April 24).

150. See Ad Hoc Comm. on Federal Habeas Corpus in Capital Cases, Judicial Conf. of the U.S., Report and Proposal 5-7 (1989), reprinted in Report on Habeas Corpus in Criminal Cases, 45 Crim. L. Rep. (BNA) 3239, 3241-42 (Sept. 27, 1989) [hereinafter *Powell Comm. Report*].

151. The AEDPA specifies a variety of tests that states must meet to invoke Chapter 154. As a baseline, a state must establish a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel" for indigent capital prisoners in state postconviction proceedings. 28 U.S.C.A. § 2261(b) (West Supp. 1997). The state must also establish "standards of competency" for the lawyers assigned to capital cases. *Id.* It is not enough, then, that a particular prisoner was given good counsel in state court. The state can take advantage of the provisions in Chapter 154 in an individual case only if it has a system to

The AEDPA's provisions concerning delay, procedural default, and merits adjudication lend themselves to alternative interpretations. Some constructions would severely disrupt the Supreme Court's own recent innovations and would occasionally raise constitutional questions. Other plausible interpretations would leave the Court's work largely undisturbed. We anticipate that courts will typically reject the former in favor of the latter: Courts will eschew sharp breaks with judicially developed reforms and will prefer more modest adjustments in the system.

In the process, courts will recognize that the AEDPA's symbolic function was complete on the date of enactment. When the AEDPA is on the books and must be made to fit into a workable and working adjudicatory system, courts are likely to provide a more moderate, pragmatic assessment of the new law's consequences for the real cases at hand. The AEDPA *will* have serious consequences, and those consequences will be deadly for prisoners who fall victim to its many caprices. Yet we believe that courts will preserve the overarching framework from the kind of devastating impact that the most dramatic interpretations of the AEDPA would entail.<sup>152</sup>

*a. Delays and Timetables.* The AEDPA addresses the problem of delay by establishing two kinds of timetables: It fixes filing deadlines for prisoners seeking federal habeas relief and it instructs federal courts to act on petitions within fixed time periods.

(1) *Filing deadlines for prisoners.* In an amendment to Chapter 153, section 2244(d), the AEDPA requires prisoners in both capital and noncapital cases to file in federal court within one year after the latest of several events: the date on which direct review is concluded; the date on which a state impediment to filing is removed; the date on which the Supreme Court first recognizes the "right" the prisoner seeks to vindicate (provided the right has been "made retroactively applicable to cases on collateral review"); or the date on which the

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ensure that all indigent death row inmates have competent lawyers. At this writing, no state has satisfied the AEDPA's standards and the "mechanisms" in several states have been held (or have been conceded to be) inadequate. See *Death Row Prisoners v. Ridge*, 106 F.3d 35, 36 (3d Cir. 1997) (Pennsylvania); *Mata v. Johnson*, 99 F.3d 1261, 1266-67 (5th Cir. 1996) (Texas).

152. The AEDPA also establishes filing deadlines and procedural bar rules for prisoners attacking federal convictions pursuant to 28 U.S.C.A. § 2255. See Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1221 (1996) (amending 28 U.S.C.A. § 2255 (West Supp. 1997)). Federal law sometimes treats habeas actions by state prisoners differently from section 2255 motions by federal prisoners. We do not consider the AEDPA's provisions regarding the latter.

facts underlying the prisoner's claim can be discovered.<sup>153</sup> The one-year period is tolled while a "properly filed" application for state postconviction relief is pending.<sup>154</sup>

In a section of Chapter 154, applicable only to capital cases in states meeting the standards for invoking that chapter, the AEDPA establishes a filing period that is only half as long and appears to operate more relentlessly—without safeguards for state interference, newly established rights, and newly discovered facts.<sup>155</sup> At the baseline, section 2263 provides that a prisoner attacking a death sentence must file in federal court within 180 days after "final State court affirmance . . . on direct review."<sup>156</sup> That 180-day period can be tolled, but only while the prisoner seeks certiorari review of a conviction in the Supreme Court of the United States, while the state courts consider the prisoner's "first" application for state postconviction relief, and for an additional period, not to exceed thirty days, if the prisoner demonstrates "good cause."<sup>157</sup>

These new provisions raise a host of interpretive questions. The new filing deadlines will have crushing consequences if courts resolve those questions against prisoners. The impact will be much less severe if courts adopt a more balanced approach. Indeed, the system may change very little from what it was under Rule 9(a).<sup>158</sup> For illustrative purposes, we consider only three issues that arise with respect to section 2244(d) and two issues with respect to section 2263.

Initially, courts must determine the temporal reach of section 2244(d)'s one-year filing deadline. The implications will be dramatic if that deadline applies to all cases, without regard to the circumstances. A prisoner whose conviction was affirmed years ago, and who previously might have sought federal habeas relief at any time consistent with Rule 9(a), would simply be cut off by operation of the new deadline. A prisoner who has already filed a federal petition would suffer dismissal if she acted more than a year after direct review was complete. A prisoner who has not yet filed, but whose conviction was affirmed some months before April 24, would have to file on short notice.

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153. See 28 U.S.C.A. § 2244(d)(1).

154. See *id.* § 2244(d)(2).

155. See *id.* § 2263.

156. *Id.* § 2263(a).

157. See *id.* § 2263(b).

158. See *supra* note 19 and accompanying text.

We doubt that courts will read the section 2244(d) deadline to produce results like these. Well-established precedent holds that Congress cannot unilaterally extinguish or impair preexisting rights of action by implementing a new filing deadline.<sup>159</sup> Accordingly, the federal habeas courts will allow prisoners a “reasonable” time after April 24<sup>160</sup> in which to file.<sup>161</sup> The best measure of that reasonable time is the one-year period contemplated by section 2244(d) itself.<sup>162</sup> We anticipate, then, that few federal habeas corpus petitions filed by April 23, 1997, will be dismissed as untimely under section 2244(d).<sup>163</sup>

Next, courts will have to define when “direct review” ends for purposes of starting the one-year period running in typical cases. That will be a more difficult task. The states have divergent appellate schemes for criminal prosecutions, and the proper construction of this federal provision may sometimes depend on the peculiarities of each state’s law. On the whole, however, the key issue is likely to be whether direct review includes certiorari proceedings in the United States Supreme Court. Obviously, section 2244(d) does not explicitly spell that out and it would be possible to interpret the “conclusion” of direct review to occur when the highest state court affirms a prisoner’s conviction. That construction would give prisoners contemplating a federal habeas application relatively little time in which to act.

Here again, courts are likely to reach a result rather more favorable to prisoners. They will take it as significant that the parallel provision in Chapter 154, section 2263, runs that chapter’s 180-day filing period from the state courts’ affirmance of the prisoner’s conviction and then tolls the period during certiorari proceedings in the Supreme Court. Courts are likely to determine, then, that the gen-

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159. See *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 598 (1873); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 n.29 (1994). Of course, the enactment of a new filing deadline cannot upset judgments that are already final. See *Plaut v. Spendthrift Farm*, 115 S. Ct. 1447, 1463 (1995) (holding that Article III bars Congress from ordering federal courts to reopen judgments).

160. April 24, 1996, is the effective date of the AEDPA. See Pub. L. No. 104-132, § 903(a), 110 Stat. 1214, 1318 (1996).

161. See *Peterson v. Demskie*, 107 F.3d 92, 92 (2d Cir. 1997) (giving prisoners a “reasonable” time to file after the effective date of the AEDPA); cf. *Block v. North Dakota*, 461 U.S. 273, 286 n.23 (1983) (indicating that a reasonable grace period is constitutionally required).

162. See *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), *rev’d on other grounds*, 117 S. Ct. 2059 (1997).

163. Prisoners whose reasonable period rightly begins to run from the date on which a new (and retroactively applicable) right is established or new evidence is discovered will have still more time.

eral reference in section 2244(d) to the “conclusion” of direct review extends to proceedings before the Supreme Court of the United States. This reading would contribute to a coherent interpretation of the AEDPA as a whole by harmonizing the key features of the filing period sections. To put it another way, courts will hesitate to construe legislation ostensibly meant to streamline federal habeas actually to make it more complex by establishing different accounts of similar legal events.<sup>164</sup>

Finally, courts must resolve the tension between the new filing deadline in section 2244(d) and the exhaustion doctrine—the very conflict that Rule 9(a)’s relative flexibility was designed to finesse.<sup>165</sup> The filing deadline encourages prisoners to file early, while the exhaustion doctrine demands that they postpone federal habeas petitions until state court opportunities for litigation have been tried.<sup>166</sup> That obvious conflict of purpose is exacerbated in cases in which prisoners have multiple claims, the state remedies for which are exhausted at different times. In cases of that kind, the *Lundy* decision contemplates that prisoners will forbear federal litigation until all claims are ripe for federal adjudication.<sup>167</sup> If the new filing deadline is claim-specific, multiple-claim cases can go one of two ways, neither of which is attractive.

One possibility is that on the eve of the filing deadline, prisoners will be forced to file federal habeas petitions advancing claims that are ready for federal adjudication as well as claims for which some viable state remedy remains available. That result runs full tilt into *Lundy’s* prohibition on “mixed” petitions (containing both “exhausted” and “unexhausted” claims). The other possibility is that prisoners will be forced to split their federal actions, filing one peti-

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164. In a like manner, this construction of section 2244 would be consistent with the definition the Supreme Court gives to “final” judgments in this general field—which includes seasonable proceedings on certiorari. See *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). To date, the courts that have acknowledged this second interpretive question have apparently seen the matter precisely this way. See, e.g., *Alexander v. Keane*, No. 97 Civ. 2526(SS) 1998 WL 17737, at \*4 nn.1-2 (S.D.N.Y. Jan. 16, 1998) (stating that “[t]he timeliness of a prisoner filing is measured from the date the papers were given to prison authorities for mailing” and rejecting respondent’s argument that “the statute of limitations begins to run from the time the Court of Appeals affirmed the conviction without adding the ninety days in which a petition for certiorari could have been filed.” (citations omitted)).

165. The AEDPA retains the exhaustion doctrine and, indeed, recodifies it. See 28 U.S.C.A. § 2254(b)-(c) (West Supp. 1997).

166. See *supra* notes 19-21 and accompanying text.

167. See *supra* notes 20-23 and accompanying text.

tion containing claims ready for federal adjudication and another (and perhaps another still) when state remedies have been exhausted with respect to other claims. That result would also conflict with *Lundy*, whose point is to force prisoners to aggregate all their claims in a single federal petition.

Courts will immediately perceive the folly of starting the filing period at the conclusion of direct review without regard for the exhaustion doctrine. And they will accordingly search for an interpretation that achieves some rough peace between section 2244(d) and the exhaustion requirement. There is a ready way to do it. Courts can hold that the filing period in section 2244(d) begins to run when direct review is concluded, but is tolled while any state postconviction proceeding is pending with respect to any claim touching the judgment. If a prisoner has exhausted state remedies with respect to some claims when direct review is completed, a federal habeas petition advancing those claims still need not be filed within one year. As long as a state postconviction remedy remains available for any of the prisoner's claims, the filing period for all claims will be tolled while the prisoner pursues a remedy for that isolated claim. The filing period will begin running again when all state remedies for all claims have been exhausted.<sup>168</sup>

We anticipate that courts will resolve two additional questions touching the 180-day filing period established by section 2263 in a similar way. That is, courts will reject draconian constructions of the AEDPA in favor of pragmatic interpretations that are comparatively prisoner-friendly. First, courts will have to decide whether the 180-day period begins to run as soon as direct review in state court is

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168. This result is not only plausible and sensible, but it is true to the text and structure of the AEDPA as well. The tolling provision in section 2244(d) expressly states that "any period of limitation" established by that section is tolled while an application for state postconviction review "with respect to the pertinent judgment *or* claim" is pending. 28 U.S.C.A. § 2244(d)(2) (West Supp. 1997) (emphasis added). Clearly, then, the one-year filing period is not (necessarily) claim-specific. While a state postconviction proceeding is under way with respect to a particular claim, the filing period regarding that claim is certainly tolled. Yet the filing period with respect to any claim is also tolled while a prisoner is pursuing state postconviction relief on the basis of a separate claim going to the same judgment.

This is not to suggest, of course, that prisoners can defeat the filing deadline by filing frivolous applications for state postconviction relief regarding trumped-up claims. The tolling provision demands a "properly filed" application in state court, *id.*, and courts will be wary of strategic behavior. Then again, hard cases will arise in which prisoners have relied on postconviction applications pressing some claims to toll the filing period with respect to all—and state's attorneys later contend that those postconviction applications were either procedurally flawed or insufficiently meritorious to count.

complete, even if counsel has not yet been appointed to represent the prisoner. On first blush, section 2263 explicitly has it just that way. That new section states that the filing period runs from the date on which the state courts affirm a prisoner's conviction on direct review and is ostensibly indifferent to whether, and when, the state provides the prisoner with a lawyer.<sup>169</sup> If courts interpret section 2263 in that manner, the AEDPA will collapse the time allowed to initiate federal habeas proceedings for some of the most compelling petitioners imaginable—indigent death row inmates who, for lack of professional representation, may not even be aware that the clock is ticking against their access to federal court.

Courts charged with implementing the AEDPA will almost certainly balk at imposing a tight filing deadline on death-sentenced prisoners who cannot hope to comply. The short filing deadline in section 2263 depends on the rationale offered by the Powell Committee: Capital habeas litigation might be expedited via a 180-day filing deadline if (and only if) the states agreed to appoint attorneys to represent the affected inmates in state postconviction litigation.<sup>170</sup> Assigned counsel would not be responsible for satisfying the filing deadline in federal court, but their involvement in prior state proceedings would enable prisoners to marshal their claims sooner and thus to get to federal court within the prescribed time. In service of that rationale, the Powell Committee recommended that a 180-day filing period should run from the date on which counsel was appointed.<sup>171</sup>

The Powell Committee's idea was that a 180-day filing deadline was workable (and could be justified) because the states concerned would provide a quid pro quo in the form of assigned counsel. Starting the clock when direct review is complete, rather than when counsel is appointed, neglects that underlying rationale and, with it, the new scheme's very integrity. Courts, we think, will reconcile section 2263 with the Powell Committee's theory. They will either read that section to mean that the filing period begins to run when direct review is complete only if counsel is appointed at that time, or they will hold that the filing period is tolled until counsel is provided.<sup>172</sup>

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169. See 28 U.S.C.A. § 2263(a).

170. See *Powell Comm. Report*, *supra* note 150, at 18.

171. See *id.*

172. This result, too, is true to the AEDPA's text and structure. It makes sense that the filing period should run only when the state has kept its part of the bargain and provided the professional representation that makes such a short filing period workable. In addition, this

The second question facing courts is raised by section 2263's failure to repeat the safety valve exceptions contained in the general filing deadline provision, section 2244(d). Recall that section 2263 makes no mention of newly established rights and newly discovered evidence, but rather appears to mandate that the 180-day filing period will run relentlessly from its starting point, regardless of any late-breaking events—even in capital cases, in which it might be anticipated that the law would be more generous to prisoners, not less.

Down in the trenches, courts will resist reading the AEDPA to dictate such arbitrary results. We anticipate that in egregious circumstances, courts will hold that the Constitution commands the flexibility necessary to ensure fundamental fairness. The likely scenarios are easy enough to construct. If, for example, the Supreme Court were to establish a new rule of constitutional law just as a prisoner's deadline was about to expire, a federal court would find a way to allow the prisoner time to build a claim based upon that new rule into a federal petition. A federal court would similarly give the prisoner more time if new evidence supporting a solid claim were discovered as the deadline approached. At the very least, courts will regard events of this kind as sufficient cause for a thirty-day extension.

To be sure, if courts resolve these questions regarding filing deadlines in the ways we anticipate, they will sacrifice the symbolism of breakneck speed at any price in order to arrive at a coherent, pragmatic construction of the AEDPA as it must operate in the real cases that arise. Yet we scarcely suggest that the AEDPA will have no effect at all. It will have significant implications for federal habeas adjudication, and most of the time those implications will not serve prisoners' interests. Some prisoners will suffer for no discernible policy goal. Our claim is only that courts will find sensible ways to assimilate a largely symbolic enactment into a feasible framework for litigation.

(2) *Timetables for federal court action.* The AEDPA also prescribes timetables for federal court action on petitions. Under section 2244(b)(3)(D), a panel of circuit judges has thirty days in which

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construction accounts for another, otherwise unrelated, provision in the AEDPA. In section 2265(c), the AEDPA refers back to previous sections on the appointment of counsel and explains that the 180-day filing period will begin running only after assigned counsel receives a transcript of the prisoner's trial. See 28 U.S.C.A. § 2265(c) (West Supp. 1997). That provision seems plainly to assume that the filing period ordinarily runs from the date of counsel's appointment—and not (necessarily) the date when direct review is concluded.



to perform the gatekeeping function at issue in the *Felker* decision.<sup>173</sup> Section 2266 establishes 120-day timetables for district and circuit court action on habeas petitions in capital cases arising in states that have invoked Chapter 154, subject only to thirty-day extensions on narrowly prescribed grounds.<sup>174</sup> These timing rules appear to augment the filing deadlines that prisoners must meet by expediting consideration of petitions once they are filed. Here again, an emphasis on speed is evident.

In the real world of adjudication, however, symbolism will give way to moderation and pragmatism. Courts are likely to find constitutional reasons aplenty for construing the new timetables to allow time for responsible judicial action. Significantly, neither section 2244(b)(3)(D) nor section 2266 specifies alternatives for a court that cannot reach a decision within the time prescribed. Although three possibilities suggest themselves, only the third is genuinely viable.

First, a court might be compelled to decide the relevant question against the state. That action would sacrifice obvious state interests, but it would have the virtue of ensuring that prisoners are not erroneously denied a judicial forum. Nevertheless, these new timetables would be unconstitutional were they read to mandate any such peremptory judicial action. Once an Article III court is given jurisdiction to decide a legal issue, Congress has no power to compromise that court's ability to decide it lawfully.<sup>175</sup> Second, a court might be compelled to decide the relevant issue against the prisoner without actually adjudicating the prisoner's claim. That response would raise even larger constitutional problems. It would implicate the same Article III concerns, and the court's lawless treatment of the prisoner would be a flagrant due process violation.<sup>176</sup>

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173. See 28 U.S.C.A. § 2244(b)(3)(D) (West Supp. 1997).

174. See *id.* § 2266.

175. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871). Other statutes mandate only that judicial proceedings must be initiated (not completed) within a fixed time. The Speedy Trial Act, for example, specifies only that trial must "commence" within a prescribed time. 18 U.S.C. § 3161(c)(1), (2) (1994). In any event, section 3161 contains numerous tolling provisions and exceptions. Sometimes the Constitution itself requires expeditious adjudication. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (holding that prior restraints on speech must be subject to prompt judicial review). Yet those cases turn on the existence of other, competing constitutional values.

176. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (holding that a state cannot terminate an individual's claim simply because a hearing has not been held within a specified time and that the individual is entitled to an "opportunity to present his case and have its merits fairly judged").

Inevitably, then, courts will turn to the third possibility: If a court has tried and failed to reach a reasoned judgment within the time allotted, the court can simply say so, take the additional time necessary to perform its judicial function, and then render judgment when it can. This understanding is not only constitutionally compelled, but is (as usual) consistent with the text of the AEDPA. Pursuant to various subsections of section 2266, the states are authorized to “enforce” the timetables by petitioning for a writ of mandamus.<sup>177</sup> An appellate court, in turn, can do no more than order a lower court to decide the question properly before that court; it cannot direct the lower court to reach a particular outcome.<sup>178</sup> Courts will, accordingly, read the AEDPA’s reference to mandamus enforcement actions to reinforce the conclusion that section 2266, and by extension section 2244(b)(3)(D), only encourage courts to act as quickly as possible to discharge their Article III duties.<sup>179</sup>

*b. Procedural Bar Rules.* In light of the Supreme Court’s previous decisions, which had been consistent and predictable in their treatment of procedural default, one might have expected the AEDPA to contain a single comprehensive provision designed to govern all situations in which default figures in habeas law. Instead, the AEDPA addresses default in as many as five separate sections, which not only fail to achieve uniformity but, taken literally, appear to create inconsistency. The AEDPA’s principal provision on default, section 2244(b), deals with successive federal application cases like *McCleskey*.<sup>180</sup> This is not surprising at all, of course, given conservatives’ longstanding objection to multiple petitions from the same prisoner. Another new provision in Chapter 153, section 2254(e), treats default in prior state court proceedings, but only with

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177. 28 U.S.C.A. § 2266(b)(4)(B), (c)(4)(B).

178. See *Will v. United States*, 389 U.S. 90, 98 n.6 (1967).

179. Courts will also find this to be consistent with the provisions in section 2266 calling on the Administrative Office of United States Courts to file periodic reports on compliance with the timetables. See 28 U.S.C. § 2266(b)(5), (c)(5). Mechanically, a circuit court may enter a place-keeping order that either authorizes or denies a prisoner’s attempt to file another petition in the district court, but may stay that order pending further study. Then, when the court is able to dispose of the application, it can revisit the initial order *sua sponte* and substitute a final order. This result is not inconsistent with the Act’s prohibition on petitions to rehear circuit court “gatekeeping” decisions. That provision can fairly be read only to bar one of the parties from asking the court to reconsider a decision, but not to disturb the court’s ordinary authority to act *sua sponte*. See *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997).

180. See *supra* notes 45-46 and accompanying text.

respect to the facts that underlie claims—the kind of default the Court considered in *Tamayo-Reyes*.<sup>181</sup> A third new provision, section 2264, addresses common cases, such as *Sykes*, in which prisoners completely fail to raise claims in state court.<sup>182</sup> Yet since that section is located in Chapter 154, it reaches only capital cases.<sup>183</sup>

When courts turn to these new provisions on default, we think the pattern we have been describing will again be apparent. Courts will reject interpretations that would disrupt the Court's doctrine and will choose instead constructions that make more modest adjustments in the habeas system. In the process, courts will construe the many disparate provisions in a way that secures some measure of consistency.

(1) *Default in successive petition cases.* The standards established in section 2244(b) could hardly be more demanding. Initially, a claim presented in a prior federal petition but offered again in a second or successive petition “shall be dismissed.”<sup>184</sup> A claim raised for the first time in a second or successive petition may be considered, but only in narrow circumstances.<sup>185</sup> The prisoner must prove

181. See *supra* notes 43-44 and accompanying text.

182. See *supra* notes 27-28 and accompanying text.

183. The other two provisions touching default, sections 2255 and 2262(c), address cases in which prisoners file multiple challenges to federal convictions and cases in which stays of execution issued on behalf of state prisoners expire. Of course, it is also true that the conditions attending the filing periods established by section 2244(d) and section 2263 are effectively default provisions as well.

There is no provision dealing forthrightly with noncapital cases like *Sykes*, in which prisoners serving prison terms fail to comply with state rules requiring claims to be raised in state court at a particular time or in a particular manner. The explanation for this surprising gap is almost certainly politics. Conservative proponents of the Act focused exclusively on capital cases and scarcely considered ordinary habeas actions at all. See generally Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996) [hereinafter Yackle, *Primer*]. Recall, too, that in the wake of *Sykes* and related cases, congressional liberals proposed legislation that would have made defense counsel's negligence a basis for finding cause. See *supra* note 36 and accompanying text. Conservatives responded by simply defending the status quo against those measures. See Yackle, *Primer, supra*, at 383. When conservatives then obtained the upper hand and were able to advance their own version of habeas “reform” legislation, they did not regroup and propose an amendment on the *Sykes* issue *per se*, but simply left that ground to be covered by the Court's decisions—decisions that the conservatives had been defending for years.

184. 28 U.S.C.A. § 2244(b)(1) (West Supp. 1997). If this is read literally, a federal court must dismiss a claim that was raised in a prior petition but was dismissed only because the applicant had failed to exhaust state remedies. Inasmuch as a dismissal for want of exhaustion is not on the merits, courts have held that this new section allows prisoners to return to federal court after they have met the exhaustion doctrine's requirements. See *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996).

185. See 28 U.S.C.A. § 2244(b)(2).

either: (A) that the claim rests on a “new rule of constitutional law” that “the Supreme Court” has made “retroactive to cases on collateral review;”<sup>186</sup> or (B) that the petition’s “factual predicate” could not have been discovered earlier *and* that “the facts underlying the claim, if proven and viewed in light of the evidence as a whole,” would establish “by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”<sup>187</sup>

These standards exceed those previously set by the Supreme Court as necessary to discourage multiple trips through the federal courts.<sup>188</sup> Recall that in *McCleskey* the Court held that if a prisoner offered exculpatory evidence, a federal habeas court should overlook his inability to demonstrate cause for failing to raise the claim in a prior application.<sup>189</sup> Under the new formulation in section 2244(b), by contrast, a prisoner must show *both* that the factual basis for a claim could not have been discovered earlier *and* must demonstrate evidence undermining factual guilt. Moreover, under the Court’s prior decisions, a prisoner attacking the validity of a conviction could file a second or successive petition if she offered evidence of “probable” innocence.<sup>190</sup> Yet under section 2244(b), such a prisoner must produce “clear and convincing” evidence that would have persuaded any reasonable jury to acquit.<sup>191</sup> The Supreme Court had previously reserved that standard for claims that go to the validity of a death sentence. In addition, of course, the AEDPA erects the new gatekeeping arrangement the Supreme Court considered in *Felker*.<sup>192</sup>

No doubt these new rules and procedures will bring about the dismissal of almost all successive applications for federal relief. Yet the same conclusion might have been drawn from prior Supreme Court decisions like *McCleskey*. There is a real sense, then, in which section 2244(b) will be ineffectual, if only because the successive-petition door had already been closed by judicial decision. If cases exist in which *McCleskey* would have allowed a successive petition, but in which section 2244(b) will not, there is every reason to think that courts will find the new statute so egregiously rigid as to raise

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186. *Id.* § 2244(b)(2)(A).

187. *Id.* § 2244(b)(2)(B).

188. *See supra* notes 40-42 and accompanying text.

189. *See supra* notes 30, 46, and accompanying text.

190. *See supra* note 30 and accompanying text.

191. *See supra* notes 40-42 and accompanying text.

192. *See supra* notes 136-45 and accompanying text.

constitutional questions. The likely candidate is a case in which a prisoner plainly demonstrates probable innocence, but section 2244(b) purports to demand clear and convincing evidence. A judge who thinks that the weight of the evidence establishes that a prisoner is probably innocent is also likely to think that the same evidence is sufficiently clear and convincing to persuade a reasonable jury to acquit.<sup>193</sup>

(2) *Default with respect to fact development.* The standards established by the AEDPA for default in factfinding cases depart from the Supreme Court precedent of *Tamayo-Reyes*.<sup>194</sup> Under section 2254(e)(2), a prisoner who failed to develop the facts in state court can obtain a federal hearing only on a showing that: (A) the claim rests either on a “new” rule of “constitutional” law that “the Supreme Court” has made “retroactively applicable to cases on collateral review” or on a “factual predicate” that could not have been discovered previously *and* (B) those facts “would . . . establish . . . by clear and convincing evidence” that but for constitutional error, “no reasonable factfinder would have found the applicant guilty.”<sup>195</sup>

This formulation initially appears to track the standards the AEDPA employs in section 2244(b) to dispose of second or successive petitions from a single prisoner. On close examination, however, the rules here are more demanding. Under section 2244(b)(2)(A), a prisoner who wishes to file a second habeas application may do so if his claim rests on a “new” and “retroactive” rule of constitutional law, whether or not the claim is related to innocence.<sup>196</sup> Under section 2254(e)(2), by contrast, if a prisoner seeks a federal hearing on the ground that a claim relies on a new and retroactive rule, the “facts underlying the claim” must clearly and convincingly demonstrate innocence.<sup>197</sup>

The rigidity of this new formulation conveys the now-familiar symbolic message that, henceforth, prisoners must turn square corners if they hope to obtain a foothold in federal court. Read expansively, section 2254(e)(2) might occupy the field previously held by case law. Under that interpretation, the federal courts would be

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193. *Cf. Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995) (stating that strict scrutiny need not always be “fatal in fact” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980))).

194. *See supra* notes 43-44 and accompanying text.

195. 28 U.S.C.A. § 2254(e)(2) (West Supp. 1997).

196. *Id.* § 2244(b)(2)(A).

197. *Id.* § 2254(e)(2).

barred from investigating facts that were not fully explored in state court, except in the narrow circumstances prescribed in paragraphs (A) and (B). Thus Congress would have done by statute what the Court itself has always declined to do: Congress would have established a free-standing federal law of default that bars the federal courts from determining factual questions, whether or not the state courts refused or would refuse to consider them.<sup>198</sup>

Such a construction would be extraordinary. It would eliminate an elaborate body of settled doctrine with no explicit warrant either in new statutory language or in legislative history. We think courts will hesitate to read section 2254(e)(2) that way. Instead, courts will construe this new provision to presuppose the familiar environment and to adjust the Court's default doctrine within that framework. Courts will read section 2254(e)(2) to proceed from the premise that a prisoner's ability to litigate factual issues has been, or would be, foreclosed in state court on the basis of default. Symbolism aside, courts will read the AEDPA to leave this basic feature of the preexisting landscape in place.

In other respects, of course, section 2254(e)(2) does break with the Court's treatment of default regarding factfinding. Given the striking ramifications of some constructions, however, courts are likely to conclude that even those departures are relatively modest. The crucial question will be the circumstances that will excuse a prisoner's default with respect to the development of facts in state court and thus make a federal evidentiary hearing available. This is the concept that the Court's doctrine attempts to capture in the idea of cause.

The text of section 2254(e)(2) does not mention cause but, instead, specifies that a prisoner can overcome default only if he or she relies on a "new rule" of "constitutional" law or shows that he or she could not have discovered the factual basis of a claim earlier.<sup>199</sup> These new statutory standards reflect some, but not all, of the instances in which the Court has found cause in the past.<sup>200</sup> On first reading, the differences appear significant. On reflection, however, courts are likely to conclude that no revolutionary change is afoot.

The word "cause" is a term of art in habeas law, and if that term had been used in section 2254(e)(2), courts would plainly understand

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198. See *supra* notes 43-44 and accompanying text.

199. 28 U.S.C.A. § 2254(e)(2).

200. See *supra* notes 13-67 and accompanying text.

that the statute incorporates the meaning the Court has assigned to cause. Yet the absence of an express reference to cause need not carry the opposite implication. Rather than employing a term of art in hopes its definition will draw the appropriate distinctions, section 2254(e)(2) may simply articulate the circumstances in which incomplete factfinding in state court should not preclude supplemental factfinding in federal habeas corpus. That, we think, is the way that pragmatic courts will see the matter.

It is surely telling that section 2254(e)(2) is, by its own terms, addressed only to cases in which “the applicant has failed to develop” facts in state court. That express language connotes some ascription of responsibility for flawed state court factfinding to the prisoner who later seeks a more thorough exploration of the facts in the federal forum. That, in turn, is consistent with the fundamental idea in all the familiar default cases: a habeas petitioner may fairly bear the consequences of inadequate state court litigation only where the responsibility can be ascribed to the prisoner.<sup>201</sup>

If the facts were not developed for some reason beyond the prisoner’s control, it would be inconsistent with the central purpose of a default rule to visit a forfeiture on the blameless petitioner. We doubt that courts would listen very long to an argument that a federal hearing is precluded in a case in which a tornado interrupted a prisoner’s attempt to litigate facts in state court. Likewise, it would make little sense to foreclose federal factfinding if the state’s own agents caused evidence to be overlooked in state proceedings.

This is what the Supreme Court meant when it said that cause would be found for default if something “external to the defense” interfered with counsel’s efforts to comply with state procedural rules.<sup>202</sup> The same theory undergirded the Court’s acknowledgment that cause could be found if counsel’s error constituted ineffective assistance in the constitutional sense. In that kind of case, too, the prisoner would not be responsible for the shortcomings in state proceedings.<sup>203</sup>

On this basis, courts are likely to conclude that many of the instances in which the Court found cause in prior cases warrant federal factfinding under the new statute even though they are not captured by the standards explicitly established by section 2254(e)(2). The

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201. See *supra* notes 33-38 and accompanying text.

202. See *supra* note 33 and accompanying text.

203. See *supra* notes 33-38 and accompanying text.

only difference is this: The Court found cause in cases in which state court factfinding was inadequate for reasons that could not be ascribed to the petitioner (and thus considered the flawed state proceedings in those cases excusable). The new statute, by contrast, folds its treatment of situations like that into the baseline condition for its application to any case, namely, the understanding that “the applicant” must have been responsible for the lack of adequate fact development in the first instance.<sup>204</sup> If the prisoner was not responsible, then section 2254(e)(2) is inapplicable, and the availability of federal factfinding continues to turn on the Court’s preexisting doctrine.

In the end, courts are likely to read section 2254(e)(2) to authorize federal evidentiary hearings in most of the same circumstances in which hearings were conducted in the past. Some cases will not implicate the new statute at all, because the petitioner bears no fault for deficient state factfinding. Others will fit within section 2254(e)(2)’s two categories of excused defaults ascribable to the prisoner.<sup>205</sup>

(3) *Default in death penalty cases.* The formulation in section 2264 allows federal courts to overlook default in state court in circumstances that more closely track the Supreme Court’s cases on cause.<sup>206</sup> Subject to those exceptions, however, section 2264 explicitly restricts the federal courts to claims (and *a fortiori* the facts underlying claims) that were both “raised” and “decided on the merits” in state court.<sup>207</sup>

If section 2264’s reference to decisions on the merits is taken literally, federal courts would be unable to consider claims that were not the subject of default in state court at all—claims that were

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204. See 28 U.S.C.A. § 2254(e)(2) (West Supp. 1997). The President made precisely this point in his signing statement when he said that “[section 2254(e)] applies to situations in which ‘the applicant has failed to develop the factual basis’ of his or her claim. Therefore, [section 2254(e)] is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court.” President’s Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 24, 1996). Several circuits have already taken this view. See *Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997); *Love v. Morton*, 112 F.3d 131, 135 (3d Cir. 1997).

205. See Yackle, *Evidentiary Hearings*, *supra* note 30, at 142-49 (discussing other features of section 2254(e)(2) and suggesting alternative constructions that would require only modest adjustments in preexisting doctrine).

206. Conspicuously absent, however, is the Supreme Court’s rule that a prisoner need not have a good reason for default in state court, if the prisoner shows that he is probably innocent. See *Schlup v. Delo*, 513 U.S. 298, 322-24 (1995).

207. 28 U.S.C.A. § 2264(a).



pressed on the state courts according to state law, but were nevertheless ignored in the ultimate disposition. Paradoxically, the federal courts would be authorized to examine claims that were *not* raised in state court (for the reasons section 2264 lists as sufficient excuses for default), but they would not be authorized to hear all manner of other claims that *were* raised, but were not decided on the merits.

We think courts will summarily reject that construction because it both conflicts with the ordinary policies attending default doctrine and produces unconstitutional results. Obviously, the drafting in this instance is even worse than usual. The notion that claims should be denied a federal hearing in the absence of default can scarcely be squared with the rest of section 2264, which, again, specifies circumstances excusing default. The core purpose of section 2264 is plainly to prescribe the kinds of default that will not foreclose federal adjudication, and courts will interpret it accordingly.<sup>208</sup>

Moreover, the proposition that the federal courts might be barred from examining claims that were simply neglected by state courts would trigger serious due process concerns. Even the most grudging assessments of the Fourteenth Amendment concede that the states must provide some “corrective process” for violations of fundamental rights.<sup>209</sup> It is inconceivable, then, that the literal text of section 2264 should insulate the states from federal habeas review when they blithely ignore properly preserved federal issues. Here again, courts will give the AEDPA an interpretation that is sensible and workable. They will read section 2264’s reference to state decisions on the merits to assume that the state courts have addressed properly presented claims, and they will not read it to cut off claims when that assumption is unwarranted.

*c. Previous State Court Judgments on the Merits.* The AEDPA plainly address the attention that federal habeas courts must pay to prior state court determinations of the merits. Yet it does so in ambiguous terms. Section 2254(d)(1), applicable to both capital and noncapital cases, bars federal habeas relief on the basis of a claim that was previously “adjudicated on the merits”<sup>210</sup> in state court, unless the

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208. The Powell Committee Report, which provided the model for Chapter 154 and this new section, recommended that the scope of federal review be limited to federal claims that were “actually raised and *litigated*” (not *decided*) in state court. *Powell Comm. Report, supra* note 150, at 3245 (emphasis added).

209. See *Frank v. Magnum*, 237 U.S. 309, 335-36 (1915).

210. 28 U.S.C.A. § 2254(d) (West Supp. 1997).

state adjudication “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.”<sup>211</sup> When courts grapple with that new language, they will have difficult choices to make. Again, we anticipate that they will settle on a construction that leaves fundamental prior arrangements in place. Specifically, we think courts will read this crucial new provision essentially to codify the *Teague* doctrine as articulated by Justice O’Connor.<sup>212</sup>

Obviously, section 2254(d)(1) departs from the process-based approach to habeas advocated by the Reagan and Bush administrations.<sup>213</sup> Nothing in section 2254(d)(1) suggests that the federal habeas courts should accept state court results if the state courts employed “full and fair” procedures in adjudicating prisoners’ federal claims.<sup>214</sup> Rather, section 2254(d)(1) plainly contemplates that the federal courts will examine the substantive outcomes the state courts have produced. The precise character of that examination, however, is unclear. At least three options are available.

First, section 2254(d)(1) may plausibly be read to damage the efficacy of federal habeas as a vehicle for adjudicating claims previously rejected by the state courts. After all, this new section establishes a baseline rule that federal relief is no longer available unless a case fits within one of two exceptions. Those exceptions, in turn, may be read narrowly. Courts may construe the reference to state decisions that were “contrary” to “clearly established” federal law to implicate only decisions based on a serious misapprehension of the abstract legal standard applicable to a prisoner’s claim. And they may construe the reference to state decisions that involved an “unreasonable application” of “clearly established” law to encompass only cases in which the state courts correctly perceived the applicable legal principle, but grossly miscalculated the impact of that standard on a particular case and thus produced a decision that was not only wrong, but unreasonably wrong.

Reducing the federal courts’ role so severely would be startling, but not unprecedented. When citizens sue state executive officers for

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211. *Id.* § 2254(d)(1). Section 2254(d) also permits federal habeas relief if a prior state adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Id.* § 2254(d)(2).

212. *See Wright v. West*, 505 U.S. 277, 304 (1992) (O’Connor, J., concurring).

213. *See infra* notes 230-31 and accompanying text.

214. *See Stone v. Powell*, 428 U.S. 465, 489 (1976).

damages, the federal courts can respond favorably only if the defendant flagrantly disregarded constitutional rights of which any reasonable officer would have been aware.<sup>215</sup> The official immunity that shields state officials in those cases is replicated in the language of section 2254(d)(1). Specifically, defendants can avoid liability for damages, unless they acted unreasonably “in light of the legal rules that were ‘clearly established’ at the time [their allegedly unlawful action] was taken.”<sup>216</sup> Recall, too, that Justice Thomas has taken the view that *Teague* and its progeny have already undermined *Brown v. Allen*, so that the federal habeas courts must defer to “reasonable” state decisions applying constitutional standards to the circumstances of individual cases.<sup>217</sup> In this vein, courts may read section 2254(d)(1) simply to take up the question the Court left open in *Wright v. West* and to side decisively with Justice Thomas rather than Justice O’Connor.<sup>218</sup>

An interpretation along those lines would be plausible, but highly unlikely. After all, most of the habeas provisions in the AEDPA make (or attempt to make) procedural changes in the way the federal courts adjudicate cases. All those procedural provisions would be unintelligible if this single section of the Act desiccated the federal courts’ authority to determine the merits of claims when they are presented in the proper procedural posture. It is hardly necessary to infer from section 2254(d)(1)’s ambiguous language that Congress has arbitrarily lifted a standard out of the immunity cases for use in this entirely different context, and there is no reliable legislative history on the point.<sup>219</sup> Nor are courts obliged to leap to the conclusion

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215. See *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

216. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

217. See *supra* note 65 and accompanying text.

218. See *supra* notes 64-66 and accompanying text.

219. The Court’s reasons for protecting state officers from liability for damages are inapposite in habeas cases. Indeed, the Court has often distinguished habeas from the official immunity cases, where “special federal policy concerns” explain the deference the federal courts give to state officials operating in the field. See *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). Qualified immunity is limited to cases in which public officials are faced with the “specter of damages liability for judgment calls made in a legally uncertain environment.” *Ryder v. United States*, 515 U.S. 177, 185 (1995). The threat of trials and liability in other than extraordinary circumstances might discourage competent people from accepting executive positions or, having done so, from aggressively discharging their duties. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Moreover, if executive officers could be forced to defend themselves at trial, “society as a whole” would have to bear “the expenses of litigation” and “the diversion of official energy from pressing public issues.” *Id.*

that section 2254(d)(1) embraces Justice Thomas's extension of the *Teague* doctrine. The text of the new law scarcely tracks Justice Thomas's opinion in *West*. Certainly, there is no legislative history to suggest that anyone had Justice Thomas's position in mind.

By contrast, we think a much more convincing case can be made for an interpretation at the other polar extreme. Judged by its text, and the legislative history behind that text, section 2254(d)(1) may reinforce the traditional scope of the writ. Far from embracing Justice Thomas's view that *Teague* somehow upsets *Brown v. Allen*, the new statute may actually disclaim any such extension of *Teague* and instead confirm *Brown's* principle of independent federal adjudication. Thus the federal habeas courts may grant relief whenever they conclude that a prisoner's claim is meritorious, no matter what view the state courts previously took.

Briefly stated, the argument goes like this. The new statute bars federal habeas relief unless a prior state court "decision" either was "contrary" to "clearly established" law "as determined by the Supreme Court" or "involved an unreasonable application" of that law.<sup>220</sup> Taken literally, that disjunctive formulation makes the reference to "unreasonable" applications of federal law superfluous.<sup>221</sup> All the action is in the previous reference to state court decisions that are "contrary to" federal law. That reference, in turn, covers both errors of pure law and errors in the application of law.<sup>222</sup> A state court "decision" can be "contrary to" federal law because the state court invoked an incorrect legal standard or because it applied the correct

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During the Senate floor debates on AEDPA, the floor leader did refer to the *Harlow* case on one occasion, see 141 CONG. REC. S7848 (daily ed. June 7, 1995) (statement of Sen. Hatch), but he scarcely explained that the bill was meant to import the immunity model into habeas. For more on the analogy to official immunity, see Yackle, *Primer*, *supra* note 183, at 403-07.

220. 28 U.S.C.A. § 2254(d)(1) (West Supp. 1997).

221. The legislative history suggests that this is precisely what the chief proponents of the AEDPA meant to achieve—and in fact were required to achieve in order to win sufficient votes on the floor of the Senate. See Yackle, *Primer*, *supra* note 183, at 435-43.

222. By this account, section 2254(d)(1) draws no simplistic distinction between state court errors regarding abstract legal rules, on the one hand, and errors regarding the application of legal rules in individual cases, on the other. Nothing in section 2254(d)(1) separates issues out in that way. By its literal terms, section 2254(d)(1) bars the federal courts from awarding relief with respect to a claim, unless a prior state court "decision" was flawed. Obviously, a "decision" embraces both a court's identification of the applicable legal standard and the court's application of that standard to the facts in a particular case. See Yackle, *Primer*, *supra* note 183, at 433-35 (discussing an unsuccessful bill in the House that would have lent itself more readily to a distinction between state court errors of law and state court errors of law application).

standard but still reached an erroneous result in the case at bar.<sup>223</sup> If a state court acts “contrary to” federal law whenever it decides a case incorrectly, this new statute preserves the independence of the federal habeas courts’ judgment on the merits of claims. Suffice it to say, section 2254(d)(1) creates no general rule of deference to “reasonable” state decisions on questions of federal law or on mixed questions of law and fact.<sup>224</sup>

By this account, section 2254(d)(1) changes habeas law primarily by shifting the focus of the federal courts’ work. The new statute directs the federal courts to begin their analysis at a different baseline. Previously, federal courts followed the traditional model of habeas corpus and focused their attention on the validity of the prisoner’s current detention.<sup>225</sup> They went immediately to the merits of the prisoner’s claim, without taking any particular (or necessary) account of what the state courts might have said about that claim in the past.<sup>226</sup> Under this new provision, however, the federal habeas courts must take a previous state court judgment as the starting point for federal adjudication. The federal adjudication remains independent, but the question on which independent federal judgment is exercised is no longer the traditional question whether the prisoner’s custody is valid. Instead, the question is now whether, after adjudicating the merits of the claim, the state courts reached the correct conclusion. In this sense, section 2254(d)(1) incorporates the conventional appellate understanding of *de novo* review into habeas corpus.

In addition, section 2254(d)(1) underscores that the federal habeas courts can properly hold the state courts only to constitutional principles established by the Supreme Court itself. The lower federal courts have no hierarchical authority over the state courts. Accordingly, their decisions are not entitled to the same allegiance.<sup>227</sup> If anyone missed this point before, the new statute spells it out. When the federal habeas courts focus on prior state court judgments under

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223. Cf. 28 U.S.C.A. § 636(b)(1)(A) (West 1994) (using the same “contrary to” formulation to describe the standard that a district court applies when reviewing a magistrate judge’s judgment on a legal issue).

224. The legislative history supports this reading. Previous attempts to establish such a rule of deference to the state courts were unsuccessful. Accordingly, proponents made a calculated decision to drop those attempts in order to win passage of a general habeas bill in the 104th Congress. See Yackle, *Primer*, *supra* note 183, at 422-43.

225. See *Walker v. Wainwright*, 390 U.S. 335 (1968) (stating that the primary historic use of habeas corpus is to test the legality of a prisoner’s current detention).

226. See Yackle, *Primer*, *supra* note 183, at 403 (explaining prior practice).

227. See *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring).

section 2254(d)(1), they now ask only whether the state courts reached the correct conclusion in light of federal law as it has clearly been established “by the Supreme Court of the United States.”<sup>228</sup>

Of course, courts invariably resist interpretive options that entail convulsive change in any direction. Accordingly, courts are likely to reject both of these constructions of section 2254(d)(1). Under the first option, Article III courts would become rubber-stamps for previous state court judgments; under the second option they would resume the posture they had before the Supreme Court began developing the *Teague* doctrine. We anticipate that courts will gravitate toward a third option, the middle ground that Justice O'Connor's understanding of *Teague* now occupies.<sup>229</sup> They will read section 2254(d)(1) essentially to codify *Teague* as a choice-of-law rule. Under the new statute, the federal habeas courts will exercise independent judgment regarding the merits of claims, but they will do so in light of the law as it was clearly established by Supreme Court precedents at the time the state courts acted.<sup>230</sup>

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228. 28 U.S.C.A. § 2254(d)(1) (West Supp. 1997). This does not mean, of course, that lower federal court decisions are irrelevant. They typically provide the state courts with excellent guidance regarding the meaning of the Supreme Court's principles.

229. See *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring).

230. Lower court discussions of section 2254(d)(1) have, to date, been inconclusive. Most of those cases appeared before the Supreme Court held that section 2254(d)(1) did not apply to cases already pending on the date of enactment. See *supra* note 149. Two of these treatments have attracted attention. Writing for an en banc court in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *rev'd on other grounds*, 117 S. Ct. 2059 (1997), Judge Easterbrook dismissed the suggestion that the statute establishes a general rule of deference to state judgments and disclaimed reliance on any analogy to the official immunity cases. See *id.* at 869-70. He also recognized that section 2254(d)(1) focuses attention on the Supreme Court's own precedents, rather than on decisions rendered by the lower federal courts. See *id.* at 869. He stated that in deciding whether a prior state decision is “contrary to” the law as determined by the Supreme Court, the federal habeas courts are required to “listen carefully” to what the state courts have to say, but then must themselves decide whether the state courts have correctly understood the Supreme Court. *Id.* Perhaps even more importantly, however, Judge Easterbrook stated that section 2254(d)(1)'s reference to “unreasonable” applications means that the federal courts cannot award habeas relief unless a prior state court “unreasonably” applied the correct legal standard to a particular case. *Id.* at 870.

Judge Easterbrook was (deliberately?) vague regarding the relationship between section 2254(d)(1) and *Teague*. He stated that the statute “extends” *Teague* inasmuch as it focuses the federal habeas courts on state court adherence to Supreme Court precedents alone. *Id.* at 869. He also stated that it is unlikely that a habeas court would face “a different kind of interpretive challenge” when deciding whether the Supreme Court had “clearly established” a rule at the time the state court acted, instead of the question presented under *Teague* (i.e., whether a judgment for the prisoner was compelled by then-existing law). *Id.* Coming to the “unreasonable application” standard, Easterbrook stated initially that the statute might “perhaps” be understood as “another variation on *Teague*.” *Id.* That is, it might require the

Once again, another of the AEDPA's provisions produces marginal results. This is only to be expected. Symbolic statutes must nonetheless fit into the legal landscape. The AEDPA associates Congress with restrictive initiatives already undertaken by the Court. Small wonder that when the AEDPA's contributions are stirred into the mix, they change the flavor rather little. Some courts, however, may fail to do the interpretive work they should and, instead, may interpret the statute to embed Congress's mood in the statute books. If that happens, some criminals will fail to receive the relief they deserve under the statute as properly interpreted.

### C. *The Prison Litigation Reform Act*

The Prison Litigation Reform Act<sup>231</sup> has two components. The first, originally labeled the Stop Turning Out Prisoners Act, appears to define the circumstances under which courts may enter injunctions against unconstitutional prison conditions such as overcrowding and

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federal courts to respect "reasonable" state judgments without pausing to determine whether they comport with more recent decisions. *Id.* at 870. Later he intimated that federal relief should be denied if the state courts gave the prisoner "a full opportunity to litigate" a claim and thus suggested the kind of process-based approach to habeas that section 2254(d)(1) seems plainly to have discarded. *Id.* at 871. Still, Judge Easterbrook plainly did not state that the "unreasonable application" language in the statute codifies Justice Thomas's opinion in *Wright v. West* or that it revives the failed Reagan administration approach.

Writing for a divided panel in *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997), Judge Jolly followed more or less the first approach we discussed in the text. He stated that section 2254(d)(1) distinguishes state court treatments of legal and mixed questions and, with respect to the latter, bars federal habeas relief unless the state courts "unreasonably applied" a clearly established legal standard to a particular case. *Id.* at 767-68. Such an unreasonable application should be found, he said, only if "reasonable jurists considering the question would be of one view that the state court ruling was incorrect." *Id.* at 769. That, in all fairness, suggests that Judge Jolly reads section 2254(d)(1) to establish the very general rule of deference that Judge Easterbrook eschews. *See id.* at 767 n.21 (finding it ironic to suggest that "after all the years of failed attempts by Congress to adopt a deferential standard of review in this area," this new provision "represents no more than the codification of existing Supreme Court precedent"). Yet even Judge Jolly declined explicitly to hold that section 2254(d)(1) embraces Justice Thomas's argument in *West*. *See id.* at 778-79 (Garza, J., dissenting) (insisting that section 2254(d)(1) cannot be read to upset the *de novo* standard established in *Brown*). Moreover, in a subsequent Fifth Circuit case, Judge Wiener stated: "In effect, a reasonable, good faith application of Supreme Court precedent will immunize the state court conviction from federal habeas reversal, even if federal courts later reject that view of the applicable precedent. The AEDPA essentially codified the Supreme Court's current position on the scope of the Great Writ." *Mata v. Johnson*, 99 F.3d 1261, 1268 (5th Cir. 1996) (emphasis added).

231. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at 18 U.S.C.A. § 3626(d), 28 U.S.C.A. § 1346, 42 U.S.C.A. § 1997 and other scattered sections).

inadequate medical care.<sup>232</sup> The second component addresses individual suits by prisoners, and the alleged problem of frivolous prisoner litigation.<sup>233</sup>

1. *Restricting Institutional Litigation: The Statute.*

a. *Introduction.* As with the AEDPA's habeas corpus provisions, one cannot understand the interpretive issues posed by the PLRA without viewing it against the backdrop of the law in effect at its enactment. Harmonizing the AEDPA's provisions with preexisting law, we argued, was likely to lead courts to interpret those provisions to make marginal changes. The Constitution plays a somewhat larger role in supporting a similar conclusion about the PLRA. To avoid constitutional questions, we suggest, courts are likely to interpret the PLRA's institutional litigation provisions to make similarly marginal changes to preexisting law.<sup>234</sup>

b. *General Considerations.* The PLRA applies to litigation surrounding conditions of confinement brought in both federal and state courts.<sup>235</sup> Yet state courts have rarely micromanaged their own state's prisons and jails, and the rhetoric of the PLRA's sponsors never focused on problems they saw in state court litigation. The PLRA's

232. See *id.* § 802, 110 Stat. at 1321-65 (codified as amended at 18 U.S.C.A. § 1626 (West Supp. 1997)).

233. See *id.* § 803(d), 110 Stat. at 1321-71 (codified as amended at 42 U.S.C.A. § 1997e (West Supp. 1997)).

234. The House Committee on the Judiciary's report regarding the bill that was eventually incorporated into the 1996 budget agreement as the PLRA states that its requirement that relief be granted "only if that prisoner can prove a violation of his own federal rights . . . is in complete harmony with federal standing requirements," and "remind[s] courts that standing must be the threshold inquiry in prison cases . . ." H.R. REP. NO. 104-21, at 23 (1995). The report also asserts that the statute's substantive standard for relief, that the relief "extend no further than necessary to remove the conditions that are causing the deprivation," is "not a departure from current jurisprudence concerning injunctive relief" and "codif[ies] the existing Supreme Court law that is being trampled by some courts." *Id.* at 14, 21.

235. The PLRA's savings clause provides that "[t]he limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law." 18 U.S.C.A. § 3626(d) (West Supp. 1997). The natural inference is that the limitations do apply to relief entered in state court based on claims arising under federal law. Compare 18 U.S.C.A. § 3626(a)(3)(A) ("In any civil action with respect to prison conditions, no prisoner release order shall be entered unless [certain conditions are satisfied].") with 18 U.S.C.A. § 3626(a)(3)(B) ("In any civil action *in Federal court* with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court . . ." (emphasis added)). See also *infra* note 298 and accompanying text (describing possible effects of interpreting consent decrees as contracts enforceable under state law).



application to state court procedures raises no general constitutional questions, because the statute prescribes procedures for dealing with federal constitutional and statutory claims.<sup>236</sup> It does, however, suggest that something relatively unusual motivated the PLRA's enactment—symbolism more than substance.

Two PLRA provisions do raise interesting federalism questions, and the ease with which a Congress devoted to returning power to the states enacted them again illuminates the deeper problems of legislative process that concern us. These provisions change the contours of prison litigation. The first provision bars consent decrees unless they comply with the PLRA's substantive standards.<sup>237</sup> Under these standards, plaintiffs and prison administrators can no longer agree to address arguably unconstitutional conditions unless the administrators consent to the entry of an order that the conditions are indeed unconstitutional.<sup>238</sup> Perhaps the rationale is that prison administrators agreed too readily to remedy conditions that they found troubling as professionals, even though the conditions did not violate the Constitution. Prison administrators are bureaucrats, among other things, and they may not seriously oppose an order from a federal court that would prod the legislature into appropriating more money

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236. See, e.g., 18 U.S.C.A. § 3626(a)(3) (West Supp. 1997) (setting forth the requirements for entering a prisoner release order). Cf. *Felder v. Casey*, 487 U.S. 131, 139-40 (1988) (holding that 42 U.S.C. § 1983 preempts state procedures in civil rights cases litigated in state courts).

237. See 18 U.S.C.A. § 3626(c)(1) (West Supp. 1997).

238. See *id.* § 3626(a)(1)(A). We note the litigation difficulties that attend the raising of these federalism objections. A state official who wants to enter a consent agreement that does not concede liability but is unwilling to agree to the entry of a judgment that does concede liability can raise the federalism objection. The provision's theory, however, is that there are political costs to making a high visibility decision, and the motion containing the federalism objections would carry with it nearly the same political costs. Given the statute's effects on defendants' incentives, few, if any, state officials will raise the federalism objection.

We think that a plaintiff could raise the federalism objection as well. Federalism is a set of structural guarantees, held by the nation's people in their capacity as state citizens, not by state officials. Cf. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944-46 (1983) (noting that one president's signature on statute creating legislative veto cannot "waive" later objections to the statute, which can be asserted by individuals as well as by executive officials). The clearest case would be if a plaintiff alleges that a state was willing to enter a consent decree prior to PLRA but is unwilling to agree to the entry of a judgment expressly finding liability post-PLRA. We think this raises the same questions as when a state moves for relief from a prior consent decree, but we acknowledge that courts are not as likely to favorably view a plaintiff who raises a federalism objection to a course of conduct that state officials appear quite willing to pursue. Cf. *Printz v. United States*, 117 S. Ct. 2365, 2372 (1997) (suggesting that states may agree to comply with a congressional directive that would violate the Constitution if it were imposed on unconsenting state officials).

to improve the prisons.<sup>239</sup>

Barring consent decrees changes the context of litigation. Prison administrators unschooled in the law may fear that admitting liability might expose them to personal damage suits.<sup>240</sup> More likely, settlement negotiations will be more difficult if the administrators have to acknowledge publicly that their prisons have unconstitutional conditions. Such acknowledgments may be difficult to make for both personal and political reasons.

A second PLRA provision of interest here confers standing and a right to intervene in pending litigation on a wide range of state and local officials, including prosecutors and legislators, to "oppose the imposition or continuation in effect" of orders directing the release of prisoners, and to "seek termination of such relief."<sup>241</sup> This provision responds directly to a circuit court's denial of standing to Philadelphia prosecutor Ronald Castille, and his successor Lynne Abraham, to challenge an order structuring admissions to Philadelphia's jails.<sup>242</sup>

Congress appears to have told state officials that no matter how they assess their situation, they may not consent to the entry of an order against them if the order lacks certain characteristics. Congress has also apparently authorized intervention in pending litigation by officials who, under state law, may have no interest in the litigation, and indeed who may be denied authority to intervene by state law.<sup>243</sup>

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239. Cf. R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 148 (1994) ("Changes sought through litigation may be very similar to directions the party named as 'defendant' has tried to achieve. . . . Litigation (or the threat of litigation) may be used as a lever to bring about the action desired by both the potential defendant and the plaintiff." (quoting Alan Abeson, *Litigation, in PUBLIC POLICY AND THE EDUCATION OF EXCEPTIONAL CHILDREN* 240 (Frederick J. Weintraub et al. eds., 1977)) (omission in original)).

240. Such a fear would be unrealistic, though, because the Court's official immunity doctrine would almost certainly shield individual administrators from liability for unconstitutional conditions resulting from inadequate appropriations. Cf. *Wilson v. Seiter*, 501 U.S. 294, 311 (1990) (suggesting that inadequate appropriations might be a defense to a finding of an individual constitutional violation).

241. 18 U.S.C.A. § 3626(a)(3)(F).

242. See *Harris v. Pernesley*, 820 F.2d 592, 602-03 (3d Cir. 1987).

243. According to the Third Circuit, the "scope" of an official's interest "is defined by the scope of his duties under . . . [state] law." *Id.* at 597 (holding that a local prosecutor had no responsibility for the prison conditions that led the district court to issue its order structuring the admission of prisoners). After the Third Circuit denied intervention because state law did not give the prosecutor an interest in orders of that kind, see *id.* at 604, Pennsylvania adopted a statute expressly stating that prosecutors had such an interest. See *Harris v. Reeves*, 946 F.2d 214, 217 (1987). The Third Circuit again affirmed an order denying intervention, this time on the ground that the statute did not actually grant the prosecutor new authority (independent of its purported effect on her right to intervene). See *id.* at 222-24.

It does not stretch the metaphor to suggest that both provisions commandeer state officials in a way analogous to that held unconstitutional in *New York v. United States* and *Printz v. United States*.<sup>244</sup> The intervention provision arguably alters the states' decisionmaking processes directly. Although a state might prefer to reduce the sources of political pressure on its prison administrators, particularly from local prosecutors, Congress, through the PLRA, has apparently displaced the state's authority to allocate some responsibilities to prison administrators and others to local prosecutors.<sup>245</sup>

The provision barring consent decrees arguably alters state decisionmaking processes indirectly. It changes the *political* incentives that local officials have for choosing among courses of conduct. Congress may alter local officials' incentives by offering financial inducements in the form of conditional spending statutes.<sup>246</sup> The theory of state autonomy underlying *New York* and *Printz* may be that states must be able to organize themselves so that their citizens clearly understand who has political responsibility for the choices state officials make. This suggests that Congress may not alter state officials' political incentives to induce the state officials to change their conduct. In *New York*, the problem may have been that New York's citizens would be unable to get a clear answer to the question "Why did you dump this nuclear waste here rather than there?" Under the PLRA's approach to consent decrees, a state's citizens might not be able to get a clear answer to the questions, "Why did you go through such an expensive lawsuit, which you lost, rather than work-

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244. See *New York v. United States*, 505 U.S. 144, 161 (1992) (holding that the federal government cannot compel states to enact regulatory programs); *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997) (holding that the federal government cannot compel state executive officials to enforce national law).

245. Where state law gives the designated officials an interest in the litigation, pre-PLRA law gave them standing and a right to intervene if asserted in a timely manner. See 18 U.S.C.A. § 3626(a)(3)(F) (West Supp. 1997). The PLRA provision therefore changes existing law only when state law does not give the officials such an interest. A state might attempt to sanction a local prosecutor who exercised her federal right to intervene. The claim that the PLRA pre-empts such a sanction would directly raise the constitutional federalism issue described here.

The federalism difficulty is exacerbated by the fact that the statute allows intervention only by the designated officials if they seek to oppose prisoner releases. See 18 U.S.C.A. § 3626(a)(3)(F) (West Supp. 1997). It is not difficult to imagine legislators or even prosecutors with constituencies such that they would wish to intervene to support a release order. Congress appears to have placed its weight on one side of internal political controversies. If one-sided intervention is constitutionally problematic, either on federalism or equal protection grounds, presumably the remedy is to allow automatic intervention by the designated officials no matter which side they wish to support.

246. See *New York*, 505 U.S. at 171-73.

ing out some sort of consent decree much earlier and more cheaply?" As the Court put it in *New York*, federalism requires that the public know on whom to place "the brunt of . . . disapproval."<sup>247</sup> Whom should the people blame if the state engages in expensive litigation—the officials or Congress?

The Court's federalism jurisprudence is in flux, and we do not contend that the Supreme Court would in fact find these PLRA provisions unconstitutional. These provisions do suggest, however, that the statute is something other than an ordinary exercise of lawmaking authority by a Congress purportedly committed to devolving power to the states.

*c. Prospective Relief Generally, Including Modification.* The PLRA begins with a statement of the substantive standard for granting relief against unconstitutional conditions of confinement. The relief awarded must be "narrowly drawn," "extend[] no further than necessary to correct the violation of the Federal right," and be "the least intrusive means necessary to correct the violation of the Federal right."<sup>248</sup> This provision follows the model of the Helms Amendment to the Violent Crime Control and Enforcement Act of 1994, which provided that a federal court "shall not hold prison or jail overcrowding unconstitutional . . . except to the extent that an individual plaintiff proves that the crowding causes the infliction of cruel and unusual punishment of that inmate."<sup>249</sup> Facially, neither the Helms Amendment nor the PLRA provision do much more than restate existing law.<sup>250</sup>

The Court expressed its understanding of the application of the Eighth Amendment's ban on cruel and unusual punishment to prison confinement conditions in *Rhodes v. Chapman*.<sup>251</sup> According to *Rhodes*, plaintiffs challenging prison conditions must show that the conditions either involve "the wanton and unnecessary infliction of pain," or that the conditions are "grossly disproportionate" to the prisoner's crime.<sup>252</sup> The Court later explained that these requirements can be

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247. *Id.* at 169.

248. 18 U.S.C.A. § 3626(a)(1)(A) (West Supp. 1997).

249. 139 CONG. REC. S10,426 (daily ed. Aug. 4, 1993).

250. See *Smith v. Arkansas Dep't of Correction*, 103 F.3d 637, 647 (8th Cir. 1996) ("[W]e are satisfied, and the parties agree, that the Act merely codifies existing law and does not change the standards for determining whether to grant an injunction.").

251. 452 U.S. 337, 347 (1981).

252. *Id.*

satisfied if a prisoner is “exposed . . . to a sufficiently substantial [risk of harm].”<sup>253</sup> Constitutional violations that consist of exposing prisoners to such risks can be remedied only by eliminating the risks.

The PLRA requires that relief can be granted to correct only violations of “a particular plaintiff[’s]” rights.<sup>254</sup> This provision, however, does not restrict relief unless the definition of *rights* is restrictive as well. In *Helling v. McKinney*, the Court refused to adopt such a restrictive definition.<sup>255</sup> In *Helling*, a prisoner claimed that his prolonged exposure to second-hand smoke in his cell violated his constitutional right to be free of cruel and unusual punishment because the second-hand smoke posed a real threat to his health.<sup>256</sup> The Court agreed, holding that the Constitution protected prisoners from exposure to *risks* of severe medical harm.<sup>257</sup>

The PLRA’s substantive standard also requires that a court ordering relief “shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”<sup>258</sup> Initially, one might think that public safety considerations are irrelevant to a determination of whether a particular punishment is cruel and unusual. *Turner v. Safley*<sup>259</sup> held that federal courts should defer to prison authorities in determining whether prison regulations are unconstitutional, because “[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources.”<sup>260</sup> The Court made it clear in *Lewis v. Casey*<sup>261</sup> that this requirement applies to injunctive orders about conditions of confinement.<sup>262</sup> It would be natural to interpret

253. *Farmer v. Brennan*, 511 U.S. 825, 843 (1994); *see also Helling v. McKinney*, 509 U.S. 25, 33-34 (1993) (explaining that harm need not have occurred as long as there is great likelihood of serious harm).

254. 18 U.S.C.A. § 3362(a)(1)(A) (West Supp. 1997).

255. *See Helling*, 509 U.S. at 35.

256. *See id.* at 28.

257. *See id.* at 35.

258. 18 U.S.C.A. § 3626(a)(1)(A).

259. 482 U.S. 78 (1987).

260. *Id.* at 84-85.

261. 116 S. Ct. 2174 (1996).

262. *See id.* at 2185 (applying the *Turner* standard). *Lewis* involved a claim that prison regulations restricted prisoners’ access to the courts in violation of their First and Sixth Amendment rights. *See id.* at 2177. A fair reading of the opinion makes it clear, however, that the Court would apply a similar approach to claims that prison conditions violate the Eighth Amendment. *See id.* at 2185 (noting that courts should respect the limits of their roles and allow “[p]rison administrators [to] exercis[e] wide discretion within the bounds of constitutional requirements.” (quoting *Bounds v. Smith*, 430 U.S. 817, 832-33 (1977) (alterations in origi-

the PLRA's substantive standard as a restatement of *Turner's* requirement that courts defer to the judgment of prison administrators.

There may be some tension between the PLRA's requirement that relief "extend[ ] no further than necessary to correct the violation"<sup>263</sup> of federal rights, and *Rufo's* assertion that consent decrees that require more than direct compliance with the Constitution necessarily "do more than the Constitution itself requires."<sup>264</sup> A detailed consent decree, that is, might "extend no further than necessary" even though it contains requirements not themselves spelled out in the Eighth Amendment or the Due Process Clause.

Much here turns on the meaning of "necessary." No particular remedial provision is ever necessary in the strictest sense. Consider a remedy directed at the accumulation of human waste in cells that is so severe as to pose serious threats to the health of inmates. The waste disposal problem could be remedied by installing new toilets, or by making sure that the existing toilets operate properly. Surely a defendant could not reasonably contend that an order directing the installation of new toilets was not necessary because an equally efficacious remedy existed. As Justice White suggested in *Rufo*, defining necessary in its strictest sense would require courts to enter orders that said no more than that the defendant had to comply with the Constitution.<sup>265</sup>

What then should necessary mean? It makes sense to look to *McCulloch v. Maryland*<sup>266</sup> for guidance. In *McCulloch*, the Court rejected the argument that the Necessary and Proper Clause limited Congress to that means "which is most direct and simple."<sup>267</sup> Rather, in interpreting the word necessary, the Court allowed Congress to choose methods that were "convenient, or useful, or essential."<sup>268</sup>

It is also unclear how courts will apply the PLRA to the standards governing institutional decrees. The PLRA allows defendants

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263. 18 U.S.C.A. § 3626(a)(1)(A).

264. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992).

265. *See id.* at 387.

266. 17 U.S. (4 Wheat.) 316 (1819).

267. *Id.* at 413. Of course *McCulloch* involved interpreting a constitutional provision, and Chief Justice Marshall famously emphasized, albeit in connection with another argument, that "we must never forget, that it is a *constitution* we are expounding." *Id.* at 407. Still, we believe that *McCulloch's* discussion of possible meanings of the word *necessary* illuminates the interpretive problem in the PLRA.

268. *Id.* at 413.

to seek to terminate injunctive orders two years after they were first entered, and at one-year intervals thereafter.<sup>269</sup> Under pre-PLRA law, of course, defendants could seek modification, including termination, at any time. The PLRA's standard for termination restates the substantive standard for prospective relief, with one important qualification. Termination is required "if the relief was approved or granted in the absence of a finding by the court" that the PLRA's substantive standards were satisfied.<sup>270</sup> Termination is not required, however, "if the court makes written findings . . . that prospective relief remains necessary to correct a current or ongoing violation" and otherwise satisfies the PLRA's substantive standards.<sup>271</sup> This provision probably requires defendants to move for termination or modification, after which the district court would hold a hearing to determine whether to make the required findings.

Consider first a case in which a defendant claims that it has complied with portions of an institutional decree. *Freeman v. Pitts*<sup>272</sup> provides the standard for obtaining relief: a district court has discretion to lift this part of its order if it concludes that continued supervision is no longer necessary to ensure compliance with the Constitution.<sup>273</sup> According to the Court, district courts could lift the order, because partial compliance eliminated the constitutional violation with respect to the provisions at issue.<sup>274</sup> Nevertheless, continued relief is justified when there are continuing violations. Substantively this is no different from the PLRA's acknowledgment that district courts may not terminate relief if they find that "prospective relief remains necessary to correct a current or ongoing violation."<sup>275</sup>

Suppose, however, that the defendant admits that it has not complied with some part of a remedial order but contends that compliance with that portion of the order is not necessary, in the appropriate sense, to remedy a current constitutional violation. The defendant might argue, for example, that the relief was broader than necessary from the outset. In cases litigated to judgment, the response is straightforward: Appeals exist so that such issues may be raised. Allowing a defendant to obtain relief when circumstances

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269. See 18 U.S.C.A. § 3626(b)(1)(A) (West Supp. 1997).

270. *Id.* § 3626(b)(2).

271. *Id.* § 3626(b)(3).

272. 503 U.S. 467 (1992).

273. See *id.* at 489.

274. See *id.* at 491.

275. 18 U.S.C.A. § 3626(b)(3).

have not changed would render the initial order meaningless, reducing it, once again, to a simple statement that defendants have to comply with the Constitution. If the PLRA actually directed district courts to grant the defendants' motion, it would raise serious separation-of-powers concerns, as we discuss in the next subsection.

One can readily avoid these difficulties by interpreting the PLRA to restate existing law in large measure. Nevertheless, there is one difference between the existing law regarding altering decrees and the PLRA's approach. Under the Court's pre-PLRA holdings, district courts had *discretion* to grant partial relief or a similar remedial measure. The PLRA requires them to do so. We are unconvinced that this makes much practical difference. It would be the rare district judge, and the even more rare court of appeals, that found *Freeman's* standards satisfied but found it a sound exercise of discretion to continue to supervise compliance.<sup>276</sup> To the extent that the PLRA converts a discretionary decision into a mandatory one, it has some legal effect but rather little practical effect.

Finally, the PLRA prescribes a preferred sequence when courts order prisoners released to eliminate unconstitutional overcrowding. First, the statute says, the court must enter a "less intrusive"<sup>277</sup> order. The defendant must have been given "a reasonable amount of time to comply"<sup>278</sup> with such an order. If the constitutional violation persists, a three-judge court can order prisoners released only if it finds "by clear and convincing evidence"<sup>279</sup> that overcrowding is "the primary cause"<sup>280</sup> of the constitutional violation, and that no other relief will remedy the violation.<sup>281</sup> The three-judge court provision, of

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276. When a consent decree, by its terms, requires full compliance before judicial modification, *see, e.g.*, *Heath v. DeCourcy*, 992 F.2d 630 (6th Cir. 1993) (holding that district court lacked authority to terminate its supervision over prison compliance with consent decree), the statute may have an effect.

277. 18 U.S.C.A. § 3626(a)(3)(A)(i).

278. *Id.* § 3626(a)(3)(A)(ii).

279. *Id.* § 3626(a)(3)(E).

280. *Id.* § 3626(a)(3)(E)(i).

281. One might note some drafting problems here. Under the basic substantive standard courts must order "the least intrusive" remedy of any sort. *Id.* § 3626(a)(1). When a court enters a prison release order, it must be the least intrusive remedy. How, then, could "a less intrusive remedy," *id.* § 3626(a)(3)(A)(i), have failed? More curiously, the statute's definition of *prisoner release order*, "any order . . . that directs the release from . . . a prison," *id.* § 3626(g)(4), would appear to encompass ordinary habeas corpus orders. It would, however, make hash of the three-judge court requirement, *see id.* § 3626(a)(3)(B), to interpret the definition in this way; the conditions on entering a prisoner release order include a required finding that "crowding is the primary cause of the violation of a Federal right," *id.* § 3626(a)(3)(E)(i),



course, is an innovation, although prior experience with three-judge courts suggests that it is unlikely to be a happy one.<sup>282</sup> No court had yet described the prescribed sequence of relief in precisely the terms Congress did, but it is surely implicit in the Court's decisions reviewed above. For example, in *Lewis*, the Court criticized the district court's approach. The district court found a constitutional violation, had a special master prepare a plan, and incorporated into its order a set of provisions that had been used successfully, according to the district court, in parallel litigation.<sup>283</sup> "This," the Supreme Court said, "will not do,"<sup>284</sup> quoting an earlier case stating that the states must be given "the first opportunity to correct [their] own errors."<sup>285</sup>

Suppose, however, that the PLRA's substantive provisions do more than restate existing law because, for example, public safety needs are irrelevant in determining when the Eighth Amendment has been violated.<sup>286</sup> Then it might be unconstitutional. The argument comes in two parts. It is a premise of judicial review that "[i]t is emphatically the province and duty of the [courts] to say what the law is."<sup>287</sup> Congress may not override the Court's own definitions of the substance of constitutional rights.<sup>288</sup> If public safety concerns are irrelevant to determining when prison conditions violate the Eighth Amendment, Congress's direction to take such concerns into account in making such a determination is inconsistent with the premises of judicial review.

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which would never be possible in an ordinary habeas corpus action.

282. One familiar with practice under the now-repealed general three-judge court statute, see 28 U.S.C. § 212 (1940) (amended at 28 U.S.C. § 212 (1948)) (codifying decision of U.S. Supreme Court in *Textile Mills Securities Corp. v. Commissioner of Internal Revenue*, 314 U.S. 326 (1941), which held that a panel of a U.S. Court of Appeals could consist of more than three judges; the revised section 212 stated that courts could sit with more than three judges only if they had provided for a hearing en banc), could quickly enumerate some of the administrative problems likely to arise under this provision. May a single judge enter a temporary restraining order? If the three-judge court finds a release order unnecessary, may it nonetheless enter some other form of relief? To what court would a non-release order entered by a three-judge court be appealed?

283. See *Casey v. Lewis*, 834 F. Supp. 1553, 1569 (D. Ariz. 1993).

284. *Lewis v. Casey*, 116 S. Ct. 2174, 2186 (1996).

285. *Id.* (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)).

286. As another example, perhaps courts would not require that a constitutional violation be established by clear and convincing evidence, but only by a preponderance of the evidence.

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

288. See, e.g., *City of Boerne v. Flores*, 117 S. Ct. 2157, 2160-72 (1997) (holding the Religious Freedom Restoration Act unconstitutional on the ground that Congress has no power under section 5 of the Fourteenth Amendment to specify the substantive scope of constitutional rights); see also *supra* notes 216-19 and accompanying text.

Second, most of the PLRA's provisions do not purport to alter the judicial definition of the underlying constitutional right to be free from cruel and unusual punishment. Rather, they purport to prescribe the procedures by which remedies for constitutional violations can be obtained. It is hornbook law that Congress has substantial power to define remedies for constitutional violations.<sup>289</sup> That power, however, runs up against one key limit: The courts will determine whether the remedies Congress prescribes are effective to remedy the constitutional violation.<sup>290</sup>

One would think that, as an initial matter, the courts would not have developed a law of remedies that went beyond what was necessary to remedy constitutional violations. If so, however, statutory provisions restricting remedies more than existing law does would violate the Constitution.<sup>291</sup>

There is one caveat: As we saw, the Court in *Felker* suggested that its interpretation of the scope of the original writ of habeas corpus might be influenced though not dictated by statutory limits on the scope of habeas corpus.<sup>292</sup> Similarly, the courts might conclude that their judgment about what remedies were constitutionally required could be appropriately influenced, though not dictated, by statute. On this assumption whatever changes the PLRA makes in the standards governing relief might go a bit beyond existing law, and the courts would accept the changes.

Note, however, that the courts retain the power to conclude that, in their judgment, the statutory changes go too far. Whatever the PLRA achieves, then, cannot be very far different from what existing law prescribes—or what the courts would themselves prescribe were they faced with some of the issues the statute addresses. The basic standard set out in the PLRA with respect to prison conditions litigation either restates existing law, is unconstitutional, or changes existing law in minor ways.

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289. See, e.g., CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 10, at 43 (5th ed. 1994) (stating that “[Congress] can take away from the courts power to grant a particular remedy”).

290. See, e.g., *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) (“[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law . . .”).

291. Cf. *Plyler v. Moore*, 100 F.3d 365, 372 (4th Cir. 1996) (stating that the “[PLRA] provides only the standard to which district courts must adhere, not the result they must reach”).

292. See *supra* notes 140-41 and accompanying text.

In sum, the PLRA establishes a timetable that does not substantially differ from the existing time requirements. Both the PLRA and existing law require motions by defendants before district courts will consider modifying decrees; further, the PLRA specifies substantive standards for modification that differ from existing law only on the margins. A district court not inclined to modify a decree under pre-PLRA standards would not be compelled to do so now.

*d. Modifying Decrees Now in Force.* The PLRA's termination provisions apply retroactively to injunctive orders that were in force when it was enacted.<sup>293</sup> Not surprisingly, few of those orders contain the "findings"<sup>294</sup> that the PLRA requires, although to the extent that the PLRA restates existing law such findings would be implicit in the decision to issue injunctive relief. Must a district court terminate its injunction unless it makes the required findings?

This question is made even more urgent because of additional PLRA procedural requirements. The statute directs courts to rule "promptly" on motions to terminate relief.<sup>295</sup> To prod the courts into action, the statute also provides that existing relief "shall be automatically stayed" after 30 days have passed, unless the district court makes the required findings.<sup>296</sup> One can imagine a district court entering a prompt order pro forma, reciting the required findings and stating that they were implicit in the existing order. But nothing in the existing order can establish that its provisions "remain[ ] necessary."<sup>297</sup> Given the complexity of this type of litigation, it is unrealistic to believe that judges can make *that* finding within 30 days.

In practice, then, the PLRA appears to direct federal courts to dissolve nearly all existing injunctions against unconstitutional prison conditions, subject to a requirement that for all practical purposes cannot be satisfied within the time period Congress prescribes. Substantial constitutional arguments can be mounted against attributing such a power to Congress.

For example, the requirement that existing relief be stayed unless the court makes the required finding within a short time may violate the core procedural due process right to a hearing. Existing

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293. See 18 U.S.C.A. § 3626(b)(1)(A)(iii) (West Supp. 1997).

294. *Id.* § 3626(a)(1)(C)(2).

295. *Id.* § 3626(e)(1).

296. *Id.* § 3626(e)(2)(A)(1).

297. *Id.* § 3626(b)(3).

injunctions give their beneficiaries a presumptive right to continued relief, which can be taken away from them only after a hearing that allows them a realistic opportunity to establish that they remain entitled to relief.<sup>298</sup> The short time limit created by the automatic stay provision seems unlikely to offer such an opportunity.

More fundamentally, the requirement that injunctive orders be terminated unless the prescribed findings are made may violate the core separation-of-powers concept the Supreme Court enforced in *Plaut v. Spendthrift Farm, Inc.*<sup>299</sup> *Plaut* held unconstitutional a statute that effectively reopened cases in which final judgments had been entered. According to the Court, this violated the “fundamental principle” that the Constitution gives the judiciary “the power, not merely to rule on cases, but to *decide* them conclusively, subject to review only by superior courts in the Article III hierarchy.”<sup>300</sup>

When a federal court enters a judgment obligating state authorities to alter prison management and operations, the court appears to have *decided* a case. The PLRA’s termination provisions appear to deprive the federal courts of the power that, according to *Plaut*, Article III gave them.

There is one large difference between the statute at issue in *Plaut* and the PLRA. The former affected actions for damages that would historically have been brought at law, while the latter affects equitable actions. The decrees covered by the PLRA remain open to modification or termination, and so may not seem “final” in the sense used in *Plaut*. Further, in its opinion, the Court distinguished *Plaut* from earlier cases that upheld the congressional power to alter injunctive decrees.<sup>301</sup> The key case is *Pennsylvania v. Wheeling & Belmont Bridge Co.*<sup>302</sup> In 1852, the Supreme Court affirmed a judgment enjoining the bridge’s construction, on the ground that it would be a public nuisance, obstructing navigation on rivers subject to congres-

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298. See *Benjamin v. Jacobson*, 124 F.3d 162, 179-80 (2d Cir. 1997) (requiring a hearing prior to termination). Beneficiaries of consent decrees might also argue that the decrees give them a vested right in the relief they have obtained that cannot be taken away without violating their substantive rights, except in accordance with standards existing at the time the right was created. Cf. Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 586-89 (1997) (arguing that individual plaintiffs “have a constitutionally protected [property] interest in a structural decree” because the “legal obligation to enter an injunction consistent with the obligations of the law . . . creates a constitutionally protected interest”).

299. 514 U.S. 211 (1995).

300. *Id.* at 219.

301. See *id.* at 232.

302. 59 U.S. (18 How.) 421 (1855).

sional regulation.<sup>303</sup> A few months later, Congress enacted a statute declaring that the bridge was “lawful.”<sup>304</sup> The Supreme Court held that the earlier injunction had to be dissolved in light of the statute.<sup>305</sup>

*Plaut* described *Wheeling Bridge* as a case in which Congress had “altered the prospective effect of injunctions entered by Article III courts,” and said that *Plaut* did not call that decision into question.<sup>306</sup> But *Plaut’s* analysis suggests that *Wheeling Bridge* cannot stand for the broad proposition that Congress may alter *any* injunction whatsoever. That broad proposition would mean that the fundamental separation-of-powers principle articulated in *Plaut* does not apply to injunctive actions at all. But nothing in the Court’s statement of the principle suggests why congressional interference with actions at law is more problematic than congressional interference with equitable remedies.<sup>307</sup>

The Court in *Plaut* indicated the way out. Those defending the statute at issue pointed to Federal Rule of Civil Procedure 60(b), which authorizes the federal courts to relieve parties from a final judgment for specified reasons. They argued that Rule 60(b) demonstrated that there was no absolute bar to a legislative directive that some cases—those falling within the Rule’s terms—be reopened. One might say that Rule 60(b) shows that even judgments in damage cases are not final for separation-of-powers purposes, because the Rule allows any judgment to be reopened when its conditions are satisfied. Justice Scalia distinguished Rule 60(b): It “does not impose any legislative mandate-to-reopen upon the courts, but merely reflects and confirms the courts’ own inherent and discretionary power.”<sup>308</sup>

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303. *See id.* at 429-30.

304. *Id.* at 429.

305. *See id.* at 435-36.

306. *Plaut*, 514 U.S. at 232; *see also* *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 439 (1992) (explaining that Congress may “change” statutes in a way that requires courts to dissolve existing injunctions). The Court in *Plaut* also distinguished *Counsel v. Dow*, 849 F.2d 731 (2d Cir. 1988), as involving “a court-entered consent decree [which had] not yet [been] fully executed” when Congress enacted a law authorizing attorneys’ fees awards. *Plaut*, 514 U.S. at 236. The statute became effective before the 30-day period for filing appeals from the consent decree expired, so *Counsel* did not involve a final judgment in any sense. *See Counsel*, 849 F.2d at 734 (stating that the statute became retroactively effective for all cases filed after July 4, 1984; *Counsel* did not file case until 1985, with consent decree entered in 1986).

307. *But see Plyler v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996) (“A judgment providing for injunctive relief . . . remains subject to subsequent changes in the law.”); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997) (stating that a consent decree is never really final).

308. *Plaut*, 514 U.S. at 233-34.

The Court's emphasis on judicial discretion, which might be understood in this context as an essential attribute of the judicial power protected by *Plaut's* separation-of-powers holding, explains the limits of *Wheeling Bridge's* holding. In *Wheeling Bridge* the interstate commerce clause gave Congress the power to declare that the bridge did not interfere with interstate commerce.<sup>309</sup> But Congress lacks the power to change the underlying law of the Eighth Amendment in prison conditions cases. It follows that the courts, which do have the authority to develop the underlying law in that area, also have the power to determine the criteria for modifying injunctive decrees. The PLRA, in contrast, deprives the courts of their discretionary power to modify consent decrees pursuant to judicially-developed standards. Finally, the distinction between rules Congress has the power to change and those it does not—the distinction between statutory and constitutional rules—responds directly to the separation-of-powers principle in *Plaut*, while the distinction between damage and equitable relief does not.<sup>310</sup>

These constitutional arguments are not sure winners in the abstract, but they are also not inconsequential. Under these circumstances we would expect judges to interpret the PLRA in a way that would not require automatic termination of existing decrees. A number of courses seem possible. Under the PLRA relief need not be terminated if there is “a current or ongoing violation of *the Federal right*.”<sup>311</sup> What is this federal right? The term on its face seems to refer to more than a violation of the prisoners' constitutional or statutory rights. Beneficiaries of existing decrees can argue, albeit with some strain, that those decrees confer a federal right on them, and that noncompliance with any provision of an existing decree amounts to an ongoing violation of *that* federal right.<sup>312</sup>

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309. See *Wheeling Bridge*, 59 U.S. (18 How.) at 430-31.

310. But see *Plyler*, 100 F.3d at 372 (stating that the “[PLRA involves] the authority of the district court to award relief . . . greater than that required by the Eighth Amendment”). The argument here is that Congress may not have the power to alter the underlying law of the Eighth Amendment, but that it may require courts to confine themselves to that law as they elaborate it. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992) (emphasizing that courts cannot encourage parties to enter consent judgments unless such judgments provide relief by the parties' “undertaking to do more than the Constitution itself requires . . . [and] also more than what a court would have ordered absent the settlement”). To the extent that *Rufo's* encouragement of consent judgments rests on a judicially developed rule, Congress may not have the power to alter it either. Cf. *id.* at 391 (holding that “a consent decree is a final judgment that may be reopened only to the extent that equity requires”).

311. 18 U.S.C.A. § 3626(b)(3) (West Supp. 1997) (emphasis added).

312. The Department of Justice initially took this position. See Letter from Senator Orrin

More ingeniously, the Second Circuit held, in an opinion by Judge Calabresi, that the termination provisions are constitutional, but only because an existing consent decree creates rights under state law that are enforceable in state court.<sup>313</sup> According to the Second Circuit, the PLRA alters the remedial consequences of such a consent decree, directing its enforcement in state rather than federal court, but does not alter the decree itself.<sup>314</sup>

Alternatively, judges may hold that: i) the PLRA's substantive provisions substantially restate existing law; ii) that the required findings were therefore implicit in the existing orders; iii) that the burden of establishing that the relief is no longer necessary lies with state defendants; and iv) that until the district judge finds that the defendants have satisfied their burden the relief remains necessary.<sup>315</sup> Judges who find the constitutional arguments against automatic termination substantial may be inclined to pursue one of these alternatives, to avoid holding these parts of the PLRA invalid.

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G. Hatch, Chairman of the Senate Judiciary Committee, et al., to Janet Reno, Attorney General, U.S. Dep't of Justice, 2 n.5 (July 23, 1996) (on file with author). It withdrew its position after eighteen Senators sent a letter to the Attorney General expressing their "great dismay" at the position, which the Senators said "threatens to undermine . . . promising developments" as district judges began to vacate existing orders." *Id.* In *Plyler*, 100 F.3d at 370, the United States Court of Appeals for the Fourth Circuit stated that this interpretation would make the automatic termination provision "nonsensical because under it, the district court would never be able to terminate a consent decree." This is an overstatement: Courts could terminate consent decrees if judicial standards for termination were satisfied; they simply need not automatically do so when the existing decree fails to incorporate the findings the PLRA requires. The proposed Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 902(7)(G) (1997), would explicitly provide that "[t]he term 'violation of a Federal right' does not include a violation of a court order that is not independently a violation of a Federal statutory or Federal constitutional right."

313. See *Benjamin v. Jacobson*, 124 F.3d 162, 170 (2d Cir. 1997), followed by *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997). But see *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997) (declining to follow *Benjamin*).

314. See *id.* One might fairly wonder about the scope of this holding. Judge Calabresi pointed out that state courts cannot discriminate against state law rights created in a federal consent decree by refusing to enforce such rights, see *id.* at 179 & n.24, and we assume that no state will have a general rule refusing to enforce *all* consent decrees. Suppose, however, that a state court enforcing a consent decree provides more vigorous enforcement than a federal court would. To the extent that the PLRA directs enforcement in the state forum, which is (by hypothesis) less effective in protecting the rights under the decree than the federal court would be, is the PLRA unconstitutional? In this scenario, would the prisoner be able to invoke federal jurisdiction notwithstanding the PLRA?

315. The proposed Omnibus Crime Control Act of 1997, S. 3, 105th Cong., would provide that the plaintiff bears the burden of establishing the necessity for retention of relief by a preponderance of the evidence. See *id.* § 902(2)(A).

2. *Limiting Frivolous Litigation.* Frivolous litigation played a far larger role in congressional discussions of the PLRA than did institutional reform litigation. By creating a category of “prisoner lawsuits” that encompassed both individual and institutional reform litigation, conservatives won the battle of sound bites: law suits focusing on peanut butter sandwiches and premium cable became the central images rather than lawsuits that attempted to keep cells free of raw sewage. Yet the PLRA’s provisions dealing with frivolous individual litigation probably will have even less practical impact than its revisions in institutional reform litigation. The reason is simple: The reforms are mainly designed to increase the costs and decrease the benefits of *filing* a lawsuit. But there is not much reason to believe that the demand for this kind of litigation is significantly sensitive to price.<sup>316</sup> As in prior sections, we focus on only a few provisions to illustrate the theme that symbolic statutes may not have systematic real-world effects.

The PLRA’s major provision alters the *in forma pauperis* (ifp) filing system for prisoners. Ordinarily persons filing ifp lawsuits must demonstrate by affidavit that they are unable to pay court filing fees, which range from \$105 to \$120. The PLRA now requires prisoners to file “a certified copy of the trust fund account statement” for the six-month period prior to the filing, “obtained from the appropriate official of each prison at which the prisoner is or was confined.”<sup>317</sup> Prisoners are no longer entitled to file without ever paying filing fees. Instead, prisoners must pay fees in installments. The courts are to collect an initial partial fee, which is to be one-fifth of the greater of the prisoner’s average monthly deposits or average monthly balance in the preceding half year.<sup>318</sup> Then the prisoner must make “monthly payments of 20 percent of the preceding month’s income credited to the prisoner’s account.”<sup>319</sup> This obligation is administered by “[T]he

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316. One report shows a significant decline in the rate of increase of prisoner lawsuits in 1996. *Reform Act Cuts Prisoner Suits*, NAT’L L.J., Aug. 18, 1997, at A10. This may be attributable to the effects of the PLRA, passed in April of 1996, but we think that evidence from a more extended period of time is necessary before one could confidently attribute such a decline to the statute.

317. 28 U.S.C.A. § 1915(a)(2) (West Supp. 1997).

318. See *id.* § 1915(b)(1). The provision is modeled on an Arizona statute. See Maahs & Del Carmen, *supra* note 122, at 57. Other provisions in the PLRA are drawn from the National Association of Attorneys General’s model statute. See *Recent Legislative Developments in Utah Law*, 1996 UTAH L. REV. 1335, 1367 n.43 (discussing similarity of goals between model statute and PLRA).

319. 28 U.S.C.A. § 1915(b)(2).



agency having custody of the prisoner," which must forward payments "each time the amount in the account exceeds \$10 until the filing fees are paid."<sup>320</sup> Finally, these duties are released if "the prisoner has no assets and no means by which to pay the initial partial filing fee."<sup>321</sup>

These provisions force prisoners to choose between the amenities they can purchase from their institutional accounts, which typically hold only small amounts of money, and the benefits they receive from filing lawsuits.<sup>322</sup> Some courts may find that these provisions raise substantial questions about violations of the prisoners' constitutional rights.<sup>323</sup> They also impose a substantial administrative burden on state prisons, which are hardly equipped to make the monthly calculations and payments the statute requires.<sup>324</sup> Again the language of "commandeering" does not seem out of place: Congress has forced state prisons to devote nontrivial resources in the service of a federal

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320. *Id.*

321. *Id.* § 1915(b)(4).

322. Other PLRA provisions make whatever monetary relief a prisoner gets subject to pre-existing legal obligations, such as an order of restitution. Section 807 requires that compensatory damages be "paid directly to satisfy any outstanding restitution orders," with the balance forwarded to the prisoner. Pub. L. No. 104-134, § 807, 110 Stat. 1321, 1321-75 to 1321-76 (1996). Section 808 requires that reasonable efforts be made to notify "the victims of the crime for which the prisoner was convicted and incarcerated" that the prisoner is about to receive compensatory damages, *id.* § 808, 110 Stat. at 1321-76, presumably so that the victims may make whatever claims they have against the prisoner. As in many victims'-rights statutes, questions will inevitably arise about who falls within the class of victims.

323. Creating a system in which prisoners are required to pay filing fees in installments when no one else must do so might be thought to raise an equal protection question. If the distinction is tested by rationality standards, imposing the requirement only on prisoners might not be minimally rational. The question would be whether the states' argument that the existence of institutional trust accounts makes it easier to collect fees in installments from prisoners than from others who lack funds to pay the full fee up front is sufficient. An additional reason, that prisoners file more frivolous lawsuits than others who seek in forma pauperis status, is more questionable, though perhaps sufficient to satisfy the Court's loose rationality standard. Further, the provision might be tested against a more stringent standard because it impedes access to the courts. *Cf. M.L.B. v. S.L.J.*, 117 S. Ct. 555, 569-70 (1997) (holding that since a proceeding for the termination of parental rights worked such a unique form of deprivation against the litigant, she must be allowed to appeal in forma pauperis).

324. For descriptions of the administrative problems, see, for example, *Leonard v. Lucy*, 88 F.3d 181, 187 (2d Cir. 1996) (enumerating the administrative requirements to obtain appellate filing fees and the steps the court took to minimize administrative difficulties); *In re Prison Litigation Reform Act*, 105 F.3d 1131, 1133, 1138-39 (6th Cir. 1997) (discussing problems inherent in keeping up with prisoner trust accounts and with assessing filing fees to prisoners released before they finish paying); *McGore v. Wrigglesworth*, 114 F.3d 601, 604-8 (6th Cir. 1997) (discussing the trust fund system and the nature of the problems that may arise); FEDERAL JUDICIAL CTR., RESOURCE GUIDE FOR MANAGING PRISONER CIVIL RIGHTS LITIGATION, WITH SPECIAL EMPHASIS ON THE PRISON LITIGATION REFORM ACT (1996).

policy of discouraging prisoner lawsuits.

Another PLRA provision may, however, violate a prisoner's constitutional rights, although we doubt that the issue will be well-litigated.<sup>325</sup> Adapting the popular "three strikes and you're out" rule, the PLRA automatically makes ifp status unavailable to a prisoner who has brought three or more prior actions as a prisoner that were "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted, unless the prisoner [was] under imminent danger of serious physical injury."<sup>326</sup> This provision deals with a group of prisoners known pejoratively in the courts and attorneys generals' offices as "frequent filers."<sup>327</sup>

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325. Another provision deserves note as well. Section 803(d) (to be codified at 42 U.S.C. § 1997e(e)) provides: "No Federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C.A. § 1997e(e) (West Supp. 1997). In *Hudson v. McMillian*, the Supreme Court held that the use of excessive physical force against a prisoner violates the Eighth Amendment even though the prisoner does not suffer serious injury. See 503 U.S. 1, 9-10 (1992). According to the Court's analysis, "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Id.* at 9. It was concerned that any other standard would allow "diabolic or inhuman" uses of force, calculated to inflict pain without crossing some "arbitrary" threshold. *Id.* This concern seems equally applicable to the statute's threshold requirement of physical injury. The Court agreed that the Eighth Amendment "excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'" *Id.* at 9-10 (quoting *Whitley v. Albers*, 475 U.S. 312, 327 (1986)); see also *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (holding that statute requires showing of more than *de minimis*, but not necessarily significant, injury). The Court's proviso suggests that even some *de minimis* uses of force may violate the Eighth Amendment. Read as a limitation on remedies rather than an elimination of a cause of action, the statutory provision appears to deprive those subject to cruel psychological punishment (for example, extreme sexual harassment) of their only effective remedy; neither nominal damages nor injunctive relief would seem sufficient for someone who has suffered such punishment. The statute's reference to "Federal civil action[s]" may be read as a jurisdictional provision, routing these cases to state courts, although there is no indication in the legislative history that Congress was interested in shifting the burden of hearing these cases from federal to state courts. The proposed Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 903(a)(6) (1997), would eliminate the jurisdictional interpretation by replacing the phrase with "civil action arising under federal law." For a general discussion of the statutory provision, see Stacey Heather O'Bryan, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189 (1997).

326. 28 U.S.C.A. § 1915(g) (West Supp. 1997). For an example of how courts have interpreted this "imminent danger" standard, see *Gibbs v. Roman*, 116 F.3d 83, 85-87 (3d Cir. 1997) (holding that "imminent danger" proviso was satisfied by allegations of past attacks six months before suit was filed and allegations that plaintiff's "life is in constant danger").

327. We note that Pearly Wilson and Dee Farmer, the petitioners in two important Supreme Court cases, are frequent filers. See *Wilson v. Seiter*, 501 U.S. 294, 296 (1991) (concerning petitioner Wilson's allegations of cruel and unusual punishment); *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (concerning Farmer's suit under the Eighth Amendment against

The Constitution requires that prisoners, like the rest of us, have access to the courts, at least to file challenges to their convictions or “to challenge the conditions of their confinement.”<sup>328</sup> An absolute ban on filing a prisoner lawsuit would presumably violate the Constitution. Congress did not go that far, however. Note that under the PLRA every prisoner must pay the complete filing fee. Some may do so in installments. The statute allows others to do so in a single advance payment. And, notably, the statute allows any prisoner who can pay the complete filing fee in advance to file as many frivolous or malicious lawsuits as she wants. Perhaps the distinction between rich prisoners who file frivolous lawsuits and indigent ones who file equally frivolous lawsuits is itself an unconstitutional violation of equal protection: What reason is there to place an obstacle in the way of impecunious prisoners who frequently file frivolous lawsuits but not rich ones?<sup>329</sup>

The response, we suppose, is that Congress has no obligation to subsidize frivolous litigation even though it may not block those who can afford to purchase access to the courts from doing so.<sup>330</sup> That response, however, suggests another difficulty with the “three strikes and you’re out” provision. Conceding that Congress need not subsidize access to the courts, a prisoner might contend that the provision

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prison officials for their alleged “deliberate indifference” to the threat of serious harm to him from other inmates). For courts of appeals cases involving Wilson and Farmer, see, for example, *Wilson v. Schwarz*, No. 96-3264, 1996 U.S. App. LEXIS 27561, at \*1 (6th Cir. Oct. 24, 1996) (mem.); *Wilson v. Lane*, No. 95-4185, 1996 U.S. App. LEXIS 11631, at \*1 (6th Cir. April 17, 1996) (mem.); *Farmer v. Haas*, 990 F.2d 319, 322 (7th Cir. 1993) (describing Farmer as “an experienced litigator”).

328. *Lewis v. Casey*, 116 S. Ct. 2174, 2182 (1996).

329. *Cf. Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956) (holding that the Constitution is violated by a requirement, applicable to impecunious defendants, that all convicted defendants purchase trial transcript); *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971) (holding that the Constitution is violated by requiring a filing fee for divorce of both indigents and others). *But see United States v. Kras*, 409 U.S. 434, 446 (1973) (holding that the Constitution is not violated by requiring a filing fee for bankruptcy; the *Boddie* decision was distinguished on the ground that it involved a subject—divorce—over which state government had exclusive authority). The Constitution may, however, require that impecunious prisoners be allowed to pay court fees in installments when they file some particularly important claims, other than those seeking relief from imminent physical danger. *Cf. M.L.B. v. S.L.J.*, 117 S. Ct. 555, 556 (1996) (holding that the Constitution requires states to allow indigents to appeal without paying the cost of providing a transcript in an action terminating parental rights).

330. The courts of appeals have so far unanimously upheld the ifp provisions against equal protection and due process attacks. *See Nicholas v. Tucker*, 114 F.3d 17, 19-21 (2d Cir. 1997); *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997); *Roller v. Gunn*, 107 F.3d 227, 234 (4th Cir. 1997); *Norton v. Dimazana*, 122 F.3d 286, 292-93 (5th Cir. 1997); *Hampton v. Hobbs*, 106 F.3d 1281, 1286-88 (6th Cir. 1997).

actually obstructs his or her access. After all, by incarcerating the prisoner the state itself has made it effectively impossible for her to accumulate the resources to pay the filing fee in advance.<sup>331</sup> In *Lewis v. Casey*, the Court held that a prisoner would establish a constitutional violation if a state's inadequate prison library "hindered his efforts to pursue a legal claim."<sup>332</sup> Incarceration coupled with the "three strikes and you're out" provision seems to constitute just such a hindrance unless, as the Court in *Casey* said, the prisoner's inability to earn enough money to pay filing fees "is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration."<sup>333</sup>

These constitutional concerns suggest that courts may well interpret this provision narrowly.<sup>334</sup> Two possibilities suggest themselves. The more obvious has a limited scope: Because prisoners who filed frivolous lawsuits before 1996 had no reason to believe that their choices would forever bar them from filing again without prepayment of filing fees, the statute's sanctions should be invoked only after a prisoner files three frivolous post-PLRA actions. Indeed, to the extent that the sanctions are designed to deter, they can sensibly be invoked only in such cases. *Landgraf v. USI Film Products*<sup>335</sup> defined the standard for determining when legislation is to be applied retroactively: New statutes will not be applied retroactively, without clear congressional direction, if they would "increase a party's liability for past conduct."<sup>336</sup> This appears to be a fair description of the effect of counting pre-PLRA dismissals as strikes.<sup>337</sup>

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331. *Cf. Myers v. Hundley*, 101 F.3d 542, 545 (8th Cir. 1996) (holding that a prison policy limiting "idle pay" to \$7.70 per month, which prisoners may use for hygiene supplies and for stamps and supplies for legal mail, may violate right of access to courts of prisoners who can show that amounts "left over . . . after purchasing personal necessities" actually prevented them from filing claims).

332. *Lewis*, 116 S. Ct. at 2180.

333. *Id.* at 2182. In the context of *Lewis*, the Court did not spell out what the incidental consequences of incarceration are. Presumably the inability to earn a market wage is such a consequence. The inability to earn enough to pay court filing fees might not be, although we confess to puzzlement about how courts could actually go about distinguishing between incidental and nonincidental consequences of incarceration.

334. *But see Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997) (rejecting constitutional challenge to "three strikes" provision, without considering interpretive issues).

335. 511 U.S. 244 (1994).

336. *Id.* at 280.

337. *But see Green v. Nottingham*, 90 F.3d 415, 420 (10th Cir. 1996) (ruling that pre-PLRA dismissals count as strikes because section 1915(g) is not retroactive in effect because it simply "imposes stricter requirements for proceeding in forma pauperis in future actions on those

Another possibility arises from the statute's apparent stringency. We begin with the standard for determining when a prisoner's claim is frivolous. Courts might look to the law they have developed to enforce Federal Rule of Civil Procedure 11, which authorizes courts to impose sanctions<sup>338</sup> on attorneys who file pleadings not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."<sup>339</sup> Rule 11 creates an objective test for frivolity, but as the law has developed the courts "are reluctant to set clear boundaries stating which legal arguments are substantively frivolous. Instead, they prefer to . . . ask whether [lawyers] have done the necessary research, cited the relevant authorities, and presented a cogent, well-thought-out argument."<sup>340</sup> There appears to be a concern that classifying an argument as substantively frivolous runs the risk of freezing the law in its present state.

Two aspects of the focus on process in Rule 11 cases suggest how courts may interpret the PLRA's standard. First, courts may be inclined to say that a prisoner who has done all that could reasonably be asked, given the prisoner's circumstances,<sup>341</sup> has not filed a frivolous claim. Second, the concern about freezing the law may have particular bite with respect to claims that prison conditions violate the Eighth Amendment. The Court has repeatedly said that the constitutional standard here "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>342</sup> Courts must be concerned that denominating a particular claim as substantively frivolous might impede the responsiveness of future courts to changing social norms.

Courts may sensibly interpret the PLRA's standard to mandate an inquiry into the objective reasonableness of the prisoner's efforts

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prisoners who have shown a propensity toward filing meritless lawsuits in the past"). *See also* Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996) (holding that pre-PLRA dismissals count as strikes); Adepegba v. Hammons, 103 F.3d 383, 385-87 (5th Cir. 1997) (same); McKibben v. Parsons, No. 96-1468, 1997 U.S. App. LEXIS 20674, at \*5 (10th Cir. Aug. 5, 1997) (relying on *Green*). We are not sure why "imposing stricter requirements" predicated on inferences from past behavior is not "increasing a party's liability for past conduct."

338. *See* FED. R. CIV. P. 11(c).

339. FED. R. CIV. P. 11(b)(2). Other federal provisions referring explicitly or implicitly to frivolous claims are collected in Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1480 n.40 (1996).

340. Meyer, *supra* note 339, at 1485.

341. Including substantial limits on resources for legal or factual research.

342. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

to frame a constitutional claim, taking the prisoner's circumstances into account. There seems to be little reason to impose a sanction on a litigant who pursued a non-frivolous but legally mistaken claim.<sup>343</sup> This is particularly so when the litigant is proceeding *pro se* and may have difficulty formulating her claim in the way that courts accept.<sup>344</sup> Courts may, therefore, interpret the provision to refer to claims that, though neither frivolous nor malicious, are plainly insubstantial.

Doing so, however, might undermine the provision. Invoking the sanction when prior claims were dismissed for failure to state a claim responds to concerns about *judicial* behavior, not prisoner behavior. Judges aware of, and uncomfortable with the "three strikes and you're out" provision, may be reluctant to dismiss claims as frivolous. They might choose instead to dismiss for failure to state a claim. In the end, we think that judges may fairly interpret the statute in light of constitutional concerns to refer to a category of insubstantial claims that would be encompassed within the set of cases dismissed for failure to state a claim.<sup>345</sup>

## II. THE AEDPA AND THE PLRA AS CASE STUDIES IN LEGISLATIVE AND JUDICIAL PROCESS

The AEDPA and the PLRA suggest a broader perspective on questions of statutory design and implementation. Part I offered what might be described as a legal process account of the course we believe courts will follow in interpreting these statutes. On that account, the need to integrate the statutes with prior decisional law pro-

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343. We note that no sanctions are applied to nonindigent plaintiffs, including corporations, that file numerous actions dismissed for failure to state a claim.

344. For example, prisoners continue to be caught short by *Heck v. Humphrey*, which requires that constitutional claims that *effectively*, though not explicitly, challenge the prisoner's criminal conviction be dismissed unless the conviction has been reversed, expunged, declared invalid, or "called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. 477, 487 (1994). Because the distinction between claims that effectively call a conviction into question and those that do not is sometimes obscure, it seems quite harsh to count a claim dismissed pursuant to *Heck* as a "strike" under the "three strikes and you're out" provision.

345. *Cf. Bell v. Hood*, 327 U.S. 678, 682 (1946) (stating that a claim may be sufficiently substantial to support federal jurisdiction, but still may fail to state a claim). We must add an important caveat. These provisions of the PLRA differ from the institutional reform provisions because these cases will be pressed by prisoners acting *pro se*, while institutional reform cases are brought by prisoners with lawyers. Judges are nearly as impatient with frivolous prisoner suits as state attorneys general are. See *Green v. Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996) (applying three strikes provision to a prisoner described as "the most prolific prisoner litigant in recorded history"). Thus, they are unlikely to search for creative ways to interpret the statute to avoid constitutional difficulties.

vides the structure for the courts' interpretations. In Section A of this Part, we supplement that account with one drawn from positive political theory. Both accounts are informal "social scientific" predictions about the courts' likely behavior, and may therefore illuminate more general questions about the legislative and judicial processes.

Section II.B then identifies three categories of statutes: instrumental, expressive, and symbolic. We argue that although the AEDPA and the PLRA may not substantially alter the course the courts were already following, they may produce some freakish results, virtually random impositions of severe harm on individuals, without substantial policy justifications. We argue that this pathology results from the fact that the statutes are largely symbolic; even though courts will attempt to integrate them with the rest of the law, they will find some places where the statutes simply do not fit well. At those places, irrational harm will result.<sup>346</sup>

#### A. Accounting for the Judicial Responses

Positive political theory treats public policy as the result of repeated interactions among legislatures, executives, and courts.<sup>347</sup> For expository purposes, it adopts the radically simplifying assumption that each branch, including the judiciary, simply aims to achieve the policy outcome it prefers; it gives no weight to doctrinal concerns, such as judicial deference to majority will, except insofar as doctrinal concerns are part of the judiciary's policy preferences.<sup>348</sup> Drawing on positive political theory,<sup>349</sup> we will first provide an informal explanation of why courts are likely to follow that course.<sup>350</sup> Then we will de-

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346. It may be that the pathology results because Congress acted in areas that are already heavily judicialized, not because it enacted largely symbolic statutes. We suspect, however, that statutes dealing with such areas are likely to be largely symbolic, making it difficult to sort out the effects of the two possible sources of pathology.

347. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528 (1992).

348. Concerns for stability in the law, concerns about judicial management of cases, and concern about preserving the courts' reputation and role may be among the judiciary's policy preferences.

349. See generally Eskridge & Ferejohn, *supra* note 347, at 528-56 (explaining a model of government action where statutes reflect the preferences of the median legislator, the President, and the courts and where the status quo changes depending on the alignment of the branches of government).

350. We could translate the account we offer into the formal language of positive political theory, but we think that the formalization would actually obscure the intuitions that make the positive political theory account plausible.

scribe some general methods that the courts may use to achieve our anticipated results.

1. *Two Positive Accounts.* A positive political theory account begins with the state of the law on the eve of the adoption of the AEDPA and the PLRA. There are two scenarios. (a) Unconstrained, the courts would have adopted more stringent rules: Habeas corpus would have been more limited, and remedies in institutional reform litigation would have been more restricted. The courts, however, were concerned about the response of a Congress controlled by Democrats to such stringency. The courts therefore went as far as they could without facing a legislative reaction, but not as far as the judges' policy preferences alone would have taken them.<sup>351</sup> Under this scenario, the courts would welcome new statutes sponsored by conservative Republicans and the opportunity new statutes presented to curtail prisoners' access to the federal courts. Accordingly, they would interpret the AEDPA and the PLRA to make dramatic changes consistent with the judges' preferences, which they earlier were unable to embody in decisional law.

We think this scenario does not fairly represent the political realities. Democrats in Congress had not succeeded in enacting legislation to respond to the Supreme Court's gradual tightening of habeas corpus over the decades that preceded 1996. Moreover, the Democratic Congress was not the only player. The President had the power to veto any further congressional efforts to frustrate judicially inspired limits on the writ. We believe that Presidents Reagan or Bush would have vetoed any Democratic reactions to stringent Court decisions. Finally, some key justices expressed concern that the Court had already gone too far in its revisions of habeas corpus,<sup>352</sup> which suggests that the Court's policy preferences were not far from the doctrines it had created by 1996.

That, then, is the second scenario: (b) The law on the eve of the new statutes' adoption fairly represented the courts' policy preferences. In this scenario, the courts would interpret the AEDPA and the PLRA generally to endorse the policies the Supreme Court had already established and, at most, to command only minor variations

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351. Proponents of this scenario would explain the acceleration of change in decisional law after President Reagan took office by noting that he was more likely to veto any liberal legislative response to the Supreme Court's initiatives.

352. See, e.g., *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 18-19 (1992) (O'Connor, J., dissenting) (arguing that the Court has become excessively deferential to state procedures).



on familiar themes.<sup>353</sup> As in the first scenario, the risk of congressional reaction would be small. Again the President played a role. Because both the habeas corpus revisions and the PLRA were bundled together with provisions President Clinton cared deeply about, he might not sign free-standing legislation that went much further than the courts were willing to go.<sup>354</sup> Under this scenario, then, the courts would interpret the new statutes to chart no new directions, and their interpretations would stick.

2. *Methods of Interpreting the Statutes as Stabilizers of the Law.* The courts are likely to view the AEDPA and the PLRA through several lenses.

a. *The “constitutional” lens.* Although constitutional concerns about Congress’s power to restrict the Supreme Court’s appellate jurisdiction lurked in the background of *Felker*, the court avoided a discussion of the issues by interpreting the preclusion of review provision in a way that substantially reduced its impact.<sup>355</sup> The retroactivity issues in the PLRA raise similar problems and may meet similar responses, as may the prospective consent decree provisions.

b. *The “administrative” lens.* Courts will have to deal with cases under these statutes for the indefinite future. They have an interest in interpreting them to reduce any new administrative burdens.<sup>356</sup> Judges are interested in assuring that the law they administer makes sense as a whole. They will therefore be inclined to interpret

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353. The courts hold in reserve the power to find new statutes unconstitutional, thereby increasing the size of the majority needed to establish Congress’s policy preferences as law. For reasons we discuss in the text, we think it unlikely that courts will use that power. *See supra* p. 2.

354. We note that President Clinton’s signing statement expressed concern about some aspects of the AEDPA. *See* Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 720-21 (Apr. 24, 1996). Yet his ultimate decision to sign the bill shows that he was unwilling to expend much political capital on these issues.

355. *See Felker v. Turpin*, 116 S. Ct. 2333, 2337-39 (1996) (interpreting review preclusion provisions narrowly).

356. The provision requiring that special masters in prison cases be paid from the federal courts’ budget is an example. *See infra* notes 376-79 and accompanying text. One might think that this provision would give federal judges an incentive to refrain from appointing special masters. It differs from the provision requiring prisoners to pay filing fees, *see supra* notes 327-30 and accompanying text, however, in one important way: Federal judges, unlike prisoners, control the provision’s interpretation. If judges have independent reasons to want to appoint special masters, they are likely to interpret the provision narrowly.

statutes, particularly symbolic statutes, in ways that harmonize the new provisions with preexisting law.<sup>357</sup> The interaction between the AEDPA's filing deadlines and the exhaustion requirement is a good example of how and why harmonization is likely to occur.

*c. The "policy" lens.* In at least some instances, federal judges may disagree with the policies enacted by Congress. Most dramatically, various provisions in both statutes reflect congressional suspicion that federal district judges have given too little weight to federalism and crime control.<sup>358</sup> The statutes impose procedural barriers designed to induce judges to give appropriate weight to those matters. But the statutes cannot confront the problem that the very judges of whom Congress is suspicious will interpret the statutes.

*d. The "realistic" lens.* Judges may treat these statutes as symbolic laws. They may believe that the statutes achieve their ends by the mere fact of having been enacted. Judges may be comfortable in interpreting the statutes to do rather little, because, seen through this lens, they were not designed to have significant effects.<sup>359</sup>

### *B. Instrumental, Expressive, and Symbolic Statutes*

As we have suggested, we believe that courts will interpret the AEDPA and the PLRA to require few dramatic changes to be made in the law as a whole. But the statutes will have some effects that we believe can fairly be described as pathological. To explain the pathologies, we think it helpful to distinguish three categories of statutes. *Instrumental* statutes take their targets' preferences and values as given, and alter the costs and benefits associated with courses of action taken pursuant to those preferences and values.<sup>360</sup> For example, a statute that doubles the penalty for embezzlement is ordinarily

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357. For a discussion of this issue in a related context, see Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1360-61 (1990) (contrasting federal statutes and constitutional amendments as means of outlawing flag desecration).

358. See *supra* notes 139-51 and accompanying text; note 245 and accompanying text.

359. In their extreme version, these interpretive strategies might lead to the effective nullification of the statutes. See Dwyer, *supra* note 7, at 304-06 (describing judicial nullification). We do not believe that we have described a recipe for nullification. The interpretations we have suggested courts might adopt are compatible with the statutes' language, and often are the most plausible reading.

360. For further discussion of instrumental statutes and their meaning, see Edward L. Rubin, *Legislative Methodology: Some Lessons From the Truth-In-Lending Act*, 80 GEO. L.J. 233, 298 (1991).

nearly purely instrumental: The existing penalties already express moral judgments, and the change in penalties is designed almost entirely to change the cost-benefit analysis undertaken by potential embezzlers.

*Expressive* statutes also alter costs and benefits, but they do so while simultaneously attempting to change their targets' values and preferences.<sup>361</sup> For example, statutes creating liability for race-based denials of housing opportunities have an expressive element: Their enactment signals social disapproval of such discrimination, in the hope that the signal will itself change values.

*Symbolic* statutes simply make a statement. They do not have targets as instrumental and expressive statutes do. Instead, they define for the public what its *own* values and preferences are.<sup>362</sup> Stat-

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361. See Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021, 2022 (1996) [hereinafter Sunstein, *Expressive Function*]. Although we would prefer to call these statutes *second-order* instrumental statutes, Professor Sunstein uses the term *expressive*, and we think it best to attempt to standardize usage. See *id.*; see also Richard Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2057-58 (1996) (describing Sunstein's analysis in instrumental terms). Unfortunately, scholars in other fields sometimes use the term *expressive* to describe what, constrained by Sunstein's terminology, we call *symbolic* actions. See, e.g., Robert P. Abelson, *The Secret Existence of Expressive Behavior*, in THE RATIONAL CHOICE CONTROVERSY: ECONOMIC MODELS OF POLITICS RECONSIDERED 25, 27 (Jeffrey Friedman ed., 1996) ("I intend 'expressive' to refer to spontaneous enjoyment or *value-expressive* action, performed for its own sake, with no apparent rational consideration of material consequences for the actor." (emphasis added)); Michael Taylor, *When Rationality Fails*, in *id.* at 223, 230 (stating that "commitment-derived behavior is *expressive* of a self-constituted by commitments"). For an example of our usage of "symbolic" actions, see JOSEPH GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* 4 (1963) ("Even if the law is not enforced or enforceable, the symbolic import of its passage is important to the reformer. It settles the controversies between those who represent clashing cultures.").

Sunstein is sometimes ambiguous as well. He describes expressive statutes as those that "make a statement," Sunstein, *Expressive Function*, *supra*, at 2024, but his central concern is with "norm management," *id.* at 2045. He points out that proponents of a constitutional amendment to ban flag-burning "appear to want to make a statement about the venality of the act of flag burning, perhaps in order to affect social norms, perhaps because they think that making the statement is intrinsically good," *id.* at 2023, and that "the Endangered Species Act has a special salience as a symbol of a certain conception of the relationship between human beings and their environment," *id.* at 2024. See also Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 69 (1996) [hereinafter Sunstein, *Foreword*] (describing the expressive function of law as "communicating certain messages," and asserting that such laws "have major social effects just by virtue of their status as communication").

362. See GUSFIELD, *supra* note 361, at 11 ("Issues which seem foolish or impractical items are often important for what they symbolize about the style or culture which is being recognized or derogated. Being acts of deference or degradation, the individual finds in governmental action that his own perceptions of his status in the society are confirmed or rejected."). The

utes banning flag-burning, for example, are not really directed at changing anyone's behavior; there is too little of the activity to think that flag-burners would be significantly responsive to the enactment of a statute. Nor are such statutes designed to change the values of those who would, absent the statute, burn flags. Instead, anti-flag-burning statutes send a message of social disapproval, which fully satisfies the statutes' supporters.<sup>363</sup>

We do not contend that these three categories are sharply distinguishable. Every statute is likely to contain a mix of instrumental, expressive, and symbolic content.<sup>364</sup> But, we believe, the larger the symbolic content, the more problematic the statute is likely to be when it is implemented as a real law.<sup>365</sup> The difficulty with symbolic statutes is captured by the Hollywood quip about movies with a message: "If you want to send a message, use Western Union."<sup>366</sup> To understand the difficulty, it will be helpful to explore difficulties associated with instrumental and expressive statutes.<sup>367</sup>

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term *symbolic statute* is sometimes used pejoratively. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 72 (1988) (referring to "symbolic laws never intended to have any effect"); Carolyn McNiven, Comment, *Using Severability Clauses to Solve the Attainment Deadline Dilemma in Environmental Statutes*, 80 CAL. L. REV. 1255, 1295 (1992) (describing "laws that express goals that we wish we could achieve, rather than what we can realistically achieve"). Except to the extent that we are concerned about the adverse effects symbolic statutes have on the achievement of instrumental goals, we do not intend a pejorative meaning.

363. The example may suggest that symbolic statutes are also simple ones, consisting of straight-forward expressions about narrow topics. Our examples of the AEDPA and the PLRA demonstrate that we disagree: They are symbolic statutes in large part because they address many issues the courts had already addressed, without substantially adverting to previous judicial developments.

364. Indeed, even a purely instrumental law might be understood to symbolize the legislature's commitment to instrumental rationality above all else. See Sunstein, *Expressive Function*, *supra* note 361, at 2022-25 (describing the inevitable expressive dimensions of legislation).

365. Although the categories are, to some degree, simply ideal types designed to help us think about statutes, we think they describe something substantive in the statutes legislatures enact. We note that acknowledging the symbolic dimensions of enacted statutes is an analytic dead end. As we have said, whatever our legislatures enact expresses who we are. Nothing more can be said, except perhaps to express the hope that someday we will be something else.

366. One version of this statement is quoted in *Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099, 1113 (D.C. Cir. 1991) (Silberman, C.J., dissenting).

367. John P. Dwyer offers a perspective on environmental legislation similar to the one we develop here. He argues that symbolic statutes allow legislators to "reap the political benefits of voting for 'health and the environment' . . . and successfully sidestep the difficult policy choices that must be made." Dwyer, *supra* note 7, at 233. Those choices "are passed on to the regulatory agency or to the courts." *Id.* Our perspective leads us to suggest that symbolic statutes are fully effective upon their enactment. They leave none of Dwyer's difficult policy choices to be made, and the courts can therefore interpret them so as to harmonize them with

1. *First-Order Instrumental Statutes.* Most laws are designed to accomplish some goal. They provide incentives to encourage behavior that conforms to the statutory standards they establish. These statutes are concerned with *behavior*, not values or attitudes. The legislature is quite indifferent to the feelings of the laws' targets, as long as the targets act appropriately.

a. *Direct effects on incentives.* Instrumental statutes can directly offset the costs and benefits of their targets' courses of action. They can increase the benefits and decrease the costs of the behavior the legislature prefers, and decrease the benefits and increase the costs of disfavored behavior. For example, some pretrial hearings require a prisoner's attendance. A prisoner who might otherwise not care enough to file a lawsuit may decide to do so, anticipating enjoyment from briefly leaving the institution. One provision in the PLRA, however, authorizes courts, "[t]o the extent practicable," to conduct pretrial hearings at which a prisoner's attendance is required by telephone or video conference.<sup>368</sup> Telephonic or video hearings decrease the potential benefits of filing lawsuits, and may reduce the number filed. Similarly, requiring prisoners to pay filing fees in installments out of their institutional accounts<sup>369</sup> increases the costs associated with filing lawsuits: Prisoners can no longer enjoy both lawsuits and prison amenities, and some may choose the amenities over the lawsuits.

More interesting are the PLRA provisions barring consent decrees in institutional litigation.<sup>370</sup> Here too the aim is to increase the costs of institutional litigation. Of course no one can force any defendant to fight *hard*, and discouraging consent decrees does not eliminate the possibility of a lawsuit in which the defendants accede to the plaintiffs' demands. But under the PLRA, judgments must contain an admission of liability.<sup>371</sup> This potentially increases the costs of settlement in two ways. The first is rather unlikely: An admission of constitutional liability might form the predicate of a dam-

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other aspects of law, or to achieve the judges' own policy preferences, without violating any normative constraints the statutes impose on them. Cf. Sunstein, *Foreword*, *supra* note 361, at 71 (referring to "beneficial expressive effects" of a decision in the short run).

368. 42 U.S.C.A. § 1997e(f)(1) (West Supp. 1997).

369. See *supra* notes 320-27 and accompanying text.

370. See 18 U.S.C.A. § 3626(a)(1)(A).

371. See *id.*

age action seeking compensation from the institution's warden.<sup>372</sup> The other is more interesting: Admitting liability may be more costly for the institution in political terms than consenting to the entry of a judgment without an admission of liability.

First-order instrumental statutes can misfire, however.<sup>373</sup> They may not identify their targets' values and preferences with enough precision to have much effect, even on the margin. If the prospect of attending a court hearing plays a small role in a prisoner's decision to file suit, for example, authorizing telephonic hearings will have little effect on the number of suits filed. Similarly, if prisoner demand for litigation is not especially price-sensitive, the primary effect of the PLRA's ifp fee provisions may be to shift some of the costs of litigation from attorneys generals' budgets to prison budgets, as corrections departments are forced to absorb the costs of administering the installment payment system.<sup>374</sup>

First-order instrumental statutes may also miss their targets. Consider here a PLRA provision we have not yet mentioned. The Court in *Lewis v. Casey* appeared to disparage the appointment of "a law professor from Flushing, New York," in a case involving the Arizona prison system.<sup>375</sup> The PLRA structures the process of choosing special masters,<sup>376</sup> and limits the hourly rate of compensation for special masters, directing that the special master be paid "with funds ap-

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372. This is unlikely for two reasons. An admission of liability need not eliminate a possible defense that the warden's actions were taken in good faith, which would protect the warden against damage liability. Further, nothing in the PLRA bars the plaintiffs from making an enforceable agreement not to seek damages from specific defendants. There might, however, be ethical problems, or problems under the class action rule, from the side of the plaintiffs' lawyers, in negotiating such an agreement. *But see* *Evans v. Jeff D.*, 475 U.S. 717, 730-38 (1986) (finding no statutory or Rule barrier to negotiating an agreement in which an attorney forgoes statutory fees).

373. Our concept of misfiring is a close cousin to Justice Breyer's "mismatch," which he defines as "a failure to correctly match the tool to the problem at hand." STEPHEN BREYER, *REGULATION AND ITS REFORM* 191 (1982).

374. *See* Jim Thomas, *Inmate Litigation: Using the Courts or Abusing Them?*, *CORRECTIONS TODAY*, July 1988, at 124, 126 (asserting that "there is little evidence that attempts to curtail litigation by imposing or [sic] filing fees have succeeded, and this may only penalize indigent litigants with meritorious claims while doing little to deter abuse by filers who are sufficiently clever to circumvent established policies" (citation omitted)).

375. 116 S. Ct. 2174, 2186 (1996).

376. Plaintiffs and defendants are to submit lists of up to five proposed special masters, and each side can strike up to three from the other's list. *See* 18 U.S.C.A. § 3626(f)(2)(A), (B) (West Supp. 1997). The judge must select the special master from those who remain. *See id.* § 3626(f)(2)(C). Either side has a right to an interlocutory appeal to challenge the choice of the special master "on the ground of partiality." *Id.* § 3626(f)(3).

propriated to the Judiciary.”<sup>377</sup> Students of the administrative process have sometimes emphasized the importance of budgetary considerations in structuring an agency head’s incentives, but their models treat an agency as having a single decisionmaker at its head, who responds to these incentives.<sup>378</sup> The federal courts lack such a decisionmaker, and it is unclear why any individual federal judge should care much about the effects of his or her actions on the general budget for the federal judicial branch.

*b. Indirect effects on incentives: reconstitutive law.* Instrumental statutes can affect costs and benefits indirectly, without affecting underlying values and preferences. Building on the earlier work of German social and legal theorists Nicklas Luhmann and Gunter Teubner,<sup>379</sup> Richard Stewart has described a species of regulatory legislation that he calls *reconstitutive law*.<sup>380</sup> Reconstitutive statutes change decisionmaking structures, sometimes with the effect of altering the decisionmaker’s calculation of costs and benefits; they do not “dictat[e] conduct.”<sup>381</sup> For example, a statute might mandate that all corporations employing more than 100 persons have a health and safety officer. Once such an officer is a regular part of the corporation’s decisionmaking structure, she can be expected to voice concerns about health and safety, which at least occasionally may change the corporation’s course of action.<sup>382</sup>

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377. *Id.* § 3626(f)(4).

378. The origin of incentive-based analyses of agency action is WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971). For a criticism of Niskanen’s model as treating all agencies as “command organizations run in a completely top-down manner,” see PATRICK DUNLEAVY, *DEMOCRACY, BUREAUCRACY AND PUBLIC CHOICE: ECONOMIC EXPLANATIONS IN POLITICAL SCIENCE* 156, 162-65 (1992).

379. See NICKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW*, 227-54 (Martin Albrow ed. & Elizabeth King & Martin Albrow trans. 1985); Gunter Teubner, *After Legal Institutionalism? Strategic Models of Post-Regulatory Law*, 12 *INT’L J. SOC. L.* 375 (1985).

380. For discussions, see Richard Stewart, *Reconstitutive Law*, 46 *MD. L. REV.* 86, 86-89, 92-93 (1986); Richard Stewart, *Madison’s Nightmare*, 57 *U. CHI. L. REV.* 335, 352-55 (1990) [hereinafter Stewart, *Madison’s Nightmare*]. For a version of reconstitutive law from the left side of the political spectrum, see Jerry Frug, *Administrative Democracy*, 40 *U. TORONTO L.J.* 559, 562 (1990) (proposing a four-part reform of government: 1) the transformation of internal governmental organization to promote workplace democracy; 2) more effective public control of government administration; 3) decentralization of political power; and 4) more democratically run agencies of newly decentralized government).

381. Stewart, *Madison’s Nightmare*, *supra* note 380, at 352.

382. We do not intend to romanticize this sort of solution. Understanding that their long-term prospects depend on not rocking the boat too often, health and safety officers might be captured by higher corporate officials. Still, the bureaucratic phenomenon that people try to

Both the AEDPA and the PLRA have modest reconstitutive elements. The provisions authorizing shorter time limits in capital cases in states with acceptable capital representation systems may change structures within the states.<sup>383</sup> Perhaps a better example, however, is the PLRA provision that authorizes a wide range of state officials to reopen institutional decrees after they have been in place for two years.<sup>384</sup> A local sheriff, supported by a sympathetic state attorney general, might be willing to let the decree operate unimpeded. But, under the PLRA, the sheriff and the state attorney general cannot make the decision themselves. They must be sure that the local district attorney agrees. This provision thus expands the decision-making structure at the local level. The increased cost of sustaining a decree's operation should be clear.

Reconstitutive law solutions, like first-order instrumental statutes, may misfire. The new decisionmaking structures may be ineffective, as their processes are absorbed into more resilient bureaucratic structures. They may alter cost-benefit calculations in unexpected ways. Perhaps prison bureaucrats have been too willing to roll over in the face of litigation, seeing it as a way to prod their state legislatures to increase prison budgets.<sup>385</sup> It is less clear that the incentives of state governors and attorneys general are so skewed as to require the introduction of local mayors and prosecutors into the decisionmaking structure.

2. *Expressive or Second-Order Instrumental Statutes.* Expressive or second-order statutes are another form of instrumental statutes.

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do the jobs to which they are assigned suggests that this sort of solution may occasionally make a difference. Thomas Emerson's observation that censorship is problematic in part because "the function of the censor is to censor," and that censors therefore seek out occasions to do their job, seems apt here. Thomas Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS., Autumn 1955, at 648, 659.

383. See 18 U.S.C.A. § 2261 (West Supp. 1997) (outlining what constitutes an "acceptable" capital representation system).

384. See 18 U.S.C.A. § 3626(b)(1)(A)(i).

385. As stated by Peter M. Shane:

It is by no means unthinkable that an administrative agency might find a consent decree a useful device for "binding" itself to something it wants to do anyway, perhaps to avoid conspicuous responsibility for an unpopular policy initiative, to prevent a change of policy by a subsequent administration, or as leverage in inter- and intra-branch negotiations over budgeting.

Shane, *supra* note 74, at 273; accord McConnell, *supra* note 68, at 316 (describing a case in which a court speculated that officials "frustrated by their inability to win political approval for the construction of a new city hall" entered a consent decree requiring construction of a new jail and city hall complex (quoting *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986))).



They too are designed to change their targets' behavior, but they operate by changing their targets' values and preferences rather than by changing the costs and benefits associated with the targets' existing values and preferences.<sup>386</sup> Liberals are often appropriately nervous about the ineffectiveness of expressive statutes in ways that illuminate our concerns about symbolic statutes.

Expressive statutes do not take the targets' values and preferences as given. Instead, they attempt to change those values. In this sense they are second-order instrumental statutes. Exactly how they change values is something of a puzzle. Some targets may wish to conform their behavior to what a majority of the population desires, but may simply be ignorant of what that is. An expressive statute may serve as a public statement of the majority's values, thereby clarifying the situation for these otherwise clueless targets. As Sunstein puts it, such laws may "signal[ ] appropriate behavior" and lead their targets to believe correctly that failure to act in the indicated way will subject them to criticism by others.<sup>387</sup> An expressive statute, then, is a means of public education.<sup>388</sup>

Why, however, need such a statute be reinforced by sanctions? Perhaps the educational message will not be taken seriously unless it is backed up by a sanction.<sup>389</sup> Or perhaps once targets change behavior to avoid the sanction, they may change values as well, to avoid being continually in a state in which their behavior conflicts with their values.<sup>390</sup>

As Sunstein demonstrates, well-designed expressive statutes can be instrumentally effective.<sup>391</sup> Libertarians and liberals have tradi-

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386. Neither the AEDPA or PLRA has significant expressive components, and we discuss problems with expressive statutes only to provide background for our discussion of symbolic statutes. None of their provisions seem aimed at changing prisoners' preferences as to the conditions in which they live, or at changing the degree to which criminals regard their incarceration as justified.

387. Sunstein, *Expressive Function*, *supra* note 361, at 2032.

388. A slight variant occurs when people have a large number of divergent preferences, but know they would be better off if they all had a single preference. The difficulty lies in selecting which of the various preferences everyone should embrace. An expressive statute can serve as a focal point, arbitrarily selecting the preference on which all immediately converge. Sunstein discusses this as an example of law serving to solve collective action problems. *See id.* at 2031.

389. *See id.* (stating that some regulatory laws employ the "moral weight" of sanctions to "work directly against existing, [undesirable] norms").

390. *Cf.* Pildes, *supra* note 361, at 2065 (describing de Tocqueville's analysis of how "local participatory associations become the mechanism for generating general social norms organized around principles of reciprocity").

391. *See* Sunstein, *Expressive Function*, *supra* note 361, at 2045 (stating that "good expres-

tionally been uneasy about expressive statutes, however. Libertarians oppose efforts by one adult to change another's values by any method other than rational persuasion, and believe that any sanction associated with an expressive law violates this condition.<sup>392</sup> Liberals have been concerned that expressive statutes will rarely be so well-designed as to satisfy the dual requirements that they be effective on the instrumental level without being excessively coercive.<sup>393</sup>

Expressive statutes may fail to achieve first-order instrumental effects for two reasons.<sup>394</sup> Real laws are detailed because they are the result of political processes in which demands from many sources are articulated.<sup>395</sup> Those details can adversely affect their first-order instrumental effects.<sup>396</sup> This is particularly true where the targets of the expressive statutes are sophisticated enough to understand what the legislation is about. The target's self-consciousness that results from being subjected to the process may undermine the law's expressive

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sivists are consequentialists too"); *id.* at 2046 (rejecting expressivist concern about a statute with good consequences); *id.* at 2047 (accepting criticism of an expressive statute with bad consequences).

392. See Pildes, *supra* note 361, at 2057 (criticizing the view that approval of expressive laws entails "a more expansive conception of the proper ends of government").

393. The latter concern is straightforward. The United States War in Vietnam was sometimes said to be a struggle for the hearts and minds of the Vietnamese. Some who sought to increase the level of U.S. military involvement pointed out accurately enough, "Once you have them by the balls, their hearts and minds will follow." JONATHON GREEN, *SAYS WHO? A GUIDE TO QUOTATIONS OF THE CENTURY* 349 (1988). There is little doubt that severe sanctions can sometimes change values, but at a high cost. Well-designed expressive laws probably ought to incorporate only modest sanctions at most. Yet there appears to be no safeguard in principle against escalating the sanctions if the mild ones fail. And, in practice, the political pressures that generate expressive statutes in the first place may lead to increased sanctions in cases of failure rather than abandonment of the attempt. Liberals worry that there are political-structural reasons to think that expressive statutes will not be well-designed. *Cf.* Sunstein, *Expressive Function*, *supra* note 361, at 2033 (describing the use of expressive laws when "the intrinsic utility of the [targeted] act is low" and the target engages in the act primarily because of its effect on reputation). Sunstein appears to set the limit at the point where coercion "invade[s] rights," *id.* at 2049, and presumably would invoke some sort of proportionality standard linked to notions of cruel and unusual or otherwise excessive punishment. The Supreme Court has been reluctant to develop a robust law of proportionality in the context of constitutional adjudication. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) ("[T]he Eighth Amendment contains no proportionality guarantee.").

394. For a discussion of how some parts of the 1996 welfare law, understood as an expressive statute, might be instrumentally ineffective or have effects its sponsors probably did not desire, see Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 *GEO. L.J.* 155, 165-85 (1996).

395. See *supra* notes 243-45 and accompanying text (describing the origins of the PLRA provision allowing intervention by a wide range of state and local officials).

396. See Pildes, *supra* note 361, at 2073 (emphasizing the complexity of the set of norms affected by a single expressive statute).

effects. Moreover, to the extent that judges themselves are both targets and interpreters of the law, they have opportunities to deal with the statutes in ways that limit first-order effects.

*a. Searching for “loopholes” in the details.* The details may simply overwhelm second-order calculations. Instead of changing values, targets will seize upon exceptions that allow them to continue as they always have. Consider here intricate taxation statutes that fill some gaps, but also create new ones to be exploited by incorrigible taxpayers whose zeal for evading liability never wavers. In the classic illustration, Congress limited the percentage depletion allowances that oil companies could deduct each year, but failed to specify a maximum over time.<sup>397</sup> As a result, some oil and gas deposits could be depleted more than once.<sup>398</sup> Although this behavior is sometimes pejoratively described as exploiting loopholes, it results from fair interpretations of the statutes Congress has enacted. So, for example, in response to the PLRA, a federal judge who does not want an outside expert to be paid from the court’s budget can invoke the Federal Rules of Evidence and call a court-appointed expert with the same powers a special master would possess.<sup>399</sup>

*b. Obscuring the message through the details.* Statutory detail may also undermine the clarity of the message expressive statutes are thought to send.<sup>400</sup> Consider here anti-discrimination laws that exempt employers with fewer than fifteen employees.<sup>401</sup> Does such a jurisdictional requirement tell targets—both large and small employers—how strong the anti-discrimination principle is? Or does it tell them something different, about the importance of principles limiting the state’s power to regulate quasi-intimate associations? Suppose a different anti-discrimination law contains a different jurisdictional limit. What message is then sent? Muddled messages do no instrumental good.<sup>402</sup>

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397. See Rex G. Baker & Erwin N. Griswold, *Percentage Depletions—A Correspondence*, 64 HARV. L. REV. 361, 376 (1951).

398. See *id.*

399. See FED. R. EVID. 706(a).

400. See Sunstein, *Expressive Function*, *supra* note 361, at 2050-51 (discussing problems associated with the effective communication of expressive laws’ messages).

401. See 42 U.S.C. § 2000e(b) (1994).

402. Cf. Pildes, *supra* note 361, at 2073 (noting that social norms may be “finely calibrated” and implicitly suggesting that real laws may not be as well calibrated).

3. *Symbolic Statutes.* Symbolic statutes are not truly instrumental.<sup>403</sup> They do not have targets in the way first- and second-order instrumental statutes do. Rather, symbolic statutes define—or express—who we are as a society. In an important sense symbolic statutes cannot misfire as instrumental and expressive statutes can. Because symbolic statutes have nothing to accomplish, they can hardly fail. Whatever they express, they tell us who we are.

Symbolic statutes can have undesirable effects.<sup>404</sup> As real laws, they must be administered and integrated into a legal system with many instrumental laws as well. But proponents of symbolic statutes are likely to have been relatively indifferent to their proposals' first-order effects.<sup>405</sup> Judges have to make the symbolic statutes compatible with the first-order instrumentalism of the rest of the law. In so doing, courts may produce some peculiar results.<sup>406</sup>

In the main, however, courts will reconcile symbolic laws with the prevailing order. In the cases we have been exploring, courts are likely to read the AEDPA and the PLRA to make only modest adjustments to the policies the judiciary had already adopted. The effect is that the new laws will have no systematic first-order effects.<sup>407</sup> This may serve two apparently conflicting interests. Prisoners and their advocates will not see the AEDPA and PLRA as desirable statutes on the whole, but they will not find them insuperable barriers either.<sup>408</sup> Politicians who sponsored the statutes may benefit as well

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403. Again, a purely symbolic statute might affect values and preferences simply as a public statement of the majority's views.

404. Dwyer describes the undesirable effects of symbolic environmental statutes in these terms: "By making promises that cannot be kept, and by leaving no middle ground for accommodation, the legislature makes it more difficult to reach a political compromise . . . that would produce a functional regulatory program." Dwyer, *supra* note 7, at 234. Dwyer's interest in ensuring that the regulatory program be functional is compatible with our concern about the adverse effects symbolic statutes have on instrumental goals.

405. *But see* Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079, 2129 (1996) (arguing that instrumental concerns may be implicit in "social theories" held by those supporting apparently symbolic statutes).

406. The choice between unconstitutionality and ineffectiveness stands as the core example, but the search for loopholes we have described is another. *Cf.* Dwyer, *supra* note 7, at 281-82 (describing how symbolic statutes may "Undermin[e] the Integrity of the Regulatory Process").

407. It might be thought that the statutes will have the effect of freezing the judicially developed law as it was in 1996, guarding against the possibility that a future Supreme Court more receptive to claims by prisoners and criminal defendants would start revising the law in a more liberal direction. We acknowledge this possibility, but note as well that some provisions in the statutes use terms like *necessary* and *unreasonable* that such a court could readily interpret to allow liberalization.

408. They may, however, have to develop new litigation strategies, calling on the talents

from their symbolic nature: The statutes' redundancy in practice may keep the issues that their sponsors purported to address alive and available for further political exploitation.<sup>409</sup>

At the same time, however, we do not contend that these two statutes will be meaningless. As we have said, some judges may not be inclined to do the interpretive work that would be necessary to integrate the statutes into a coherent body of law. Other judges may dismiss as insubstantial the constitutional concerns that we believe ought to influence interpretation. The result will be that the statutes will occasionally have essentially random adverse effects, serving no discernible public purpose.<sup>410</sup>

Finally, the consequences that flow from symbolic statutes—their first-order effects—are not intrinsic to the statutes themselves. The statutes only “send a message,” but the instrumental effects arise from the laws as they are interpreted and applied. The symbolic nature of a law influences judges' interpretation of the law, and therefore will influence its effects.

#### CONCLUSION

Our argument in this Article is a simple one: The broad thesis is that although symbolic laws are not undesirable in the abstract, they do have real consequences, and their consequences generally ought to count heavily in our assessment of their wisdom; the narrow thesis applies that argument to the AEDPA and the PLRA. Because they are symbolic statutes, the AEDPA and the PLRA are unlikely to have large-scale, systematic effects on the outcomes in habeas corpus and prison cases.

Because they are real laws, however, the AEDPA and the PLRA will affect individual cases in an essentially random way. A handful of prisoners who might have gotten some relief from unconstitutional conditions before the PLRA was enacted will not get it

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associated more with tax lawyers than with public interest litigators.

409. Within months after the enactment of the PLRA, for example, and well before one could reasonably expect the statute to have had any significant effects, if for no reason other than the existence of unresolved retroactivity questions, some of the PLRA's primary sponsors held hearings on the statute's implementation. See *The Role of the U.S. Department of Justice in Implementing the Prison Litigation Reform Act: Hearing Before the Senate Comm. on the Judiciary*, 1996 WL 556489 at \*1 (Sept. 25, 1996) (Introductory Statement of Sen. Orrin Hatch).

410. These effects will visit some harms on particular litigants, but there is no reason to think that the ones who suffer deserve to do so more than any other prisoner. It is in that sense that we think the random results serve no public purpose.

now. They will continue to live in conditions that may threaten their lives. And some of them will die from unconstitutionally inadequate medical care or unconstitutionally inadequate protection of personal security.

Sometimes randomness is itself a constitutional concern. The Supreme Court appears to remain committed to the proposition that the freakish imposition of the death penalty violates the Eighth Amendment's ban on cruel and unusual punishments.<sup>411</sup> Under the AEDPA someone randomly chosen from the population of criminals will be executed who would not have been in the absence of the statute.<sup>412</sup> That itself might violate the Constitution.

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411. See *McKoy v. North Carolina*, 494 U.S. 433, 454 (1990) (Kennedy, J., concurring).

412. Identifying that person will be extraordinarily difficult. The easiest case would be one in which the Supreme Court acknowledged that the habeas petitioner would have received a new trial or a new sentence under pre-AEDPA law but cannot under the AEDPA. The psychological pressures against such an acknowledgment are obvious, and are likely to be reduced, when necessary, by statements to the effect that the Court will assume without deciding that the petitioner would not have received relief under pre-AEDPA law.