A DARK DAY FOR HABEAS CORPUS: SUCCESSIVE PETITIONS UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

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[I]n April 1996 Congress passed the Antiterrorism and Effective Death Penalty Act...[which] accomplished a decade-long effort to ensure that a...capital sentence imposed by a state court could be carried out without awaiting the disruptive, dilatory tactics of counsel for condemned prisoners.

—Senator Orrin Hatch[1]

INTRODUCTION

In the last several decades, there has been a political obsession with crime.[2] Politicians have built campaigns around getting "tough on crime,"[3]

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1. *A Constitutional Amendment for Crime Victims, 1997: Hearing on S.J. Res. 6 Before the Senate Judiciary Committee*, 105th Cong. (Apr. 16, 1997) (statement of Senator Orrin Hatch), 1997 WL 241160.

2. *See, e.g.*, Lawrence M. Friedman, *Dead Hands: Past and Present in Criminal Justice Policy*, 27 CUMB. L. REV. 903 (1996–1997); Stephen Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997).

3. President Clinton is quoted as saying:

> The crime bill...provides tough punishments for violent criminals, like "Three strikes and you're out," and it provides about $8 billion to build prisons to ensure that violent criminals can be locked up....
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> ....
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> This crime bill will make a real difference across our country in every neighborhood, every city, and every town. It will help to lower the crime rate. It's what the American people are waiting for.

The President's Radio Address, WEEKLY COMP. PRES. DOC. 1493, July 16, 1994.

including victims' rights legislation,[4] alien crimes legislation,[5] and mandatory sentencing legislation such as "three strikes" laws.[6] This focus on crime as a major plank in politicians' platforms has led to criticisms of the amount of procedure granted prisoners in attacking their convictions and sentences.[7] The writ of habeas corpus, historically a major vehicle for challenging a conviction and/or sentence, [8] has attracted an enormous amount of attention,[9] with the focus on "abuse of the writ."[10]

One of the major proponents of habeas corpus reform, Senator Orrin Hatch, stated at a Senate Judiciary Committee News Conference at which many of those personally affected by the Oklahoma City bombing were present:

> At long last, after more than a decade of effort, we're about to curb these endless, frivolous, costly appeals of death sentences, and as so many of the people standing here with us today know, habeus [*sic*] corpus reform is the only substantive provision in this bill that will directly affect the Oklahoma City bombing case.[11]

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4. *See, e.g.*, Victims' Rights & Restitution Act of 1990, Pub. L. No. 104-132, 104 Stat. 4789 (1990); Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12 (1997).

5. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

6. Three strikes legislation aims to curb recidivism by imposing mandatory life sentences for criminals with three felony convictions. *See* Ilene M. Shinbein, *"Three Strikes and You're Out": A Good Political Slogan To Reduce Crime, but a Failure in Its Application*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175, 177 (1996); Bright, *supra* note 2, at 2.

7. *See* Bright, *supra* note 2, at 3–4.

8. *See, e.g.*, *Ex parte* Watkins, 28 U.S. 193, 202 (1830) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment.").

9. *See, e.g.*, *supra* text accompanying note 1.

10. Abuse of the writ occurs when a petitioner brings successive, unfounded petitions that harass the courts or cause unwarranted delays. In *Dorsey v. Gill*, 148 F.2d 857 (D.C. Cir. 1945), the court explains abuse of the writ:

> [P]etitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial, and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third, 24, a fourth, 22, a fifth, 20. One hundred nineteen persons have presented 597 petitions—an average of 5.

Id. at 862.

11. *Senate and House Judiciary Committee News Conference on Webwire-Anti-Terrorism Bill*, (April 15, 1996) (statement of Senator Orrin Hatch), 1996 WL 199479.

Nine days later, on April 24, 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").[12] This act sharply restricts the previous right of a prisoner to challenge his or her conviction.[13] One such limitation imposed by the AEDPA is a new, more stringent "gatekeeper provision," which sharply limits a prisoner's right to bring second or successive habeas corpus petitions.[14] The AEDPA has indeed restricted the availability of habeas corpus to prisoners wanting to challenge their convictions, and perhaps has helped to prevent abuse of the writ, but at what cost?

In enacting the AEDPA, Congress has gone too far in restricting access to the writ of habeas corpus. What was purportedly intended to limit federal claims so as to avoid "abuse of the writ" will in practice do much more. The AEDPA will serve to eliminate habeas corpus relief entirely for several types of claims. Not only is it doubtful that this was the intent of Congress in enacting the AEDPA, but intent aside, there are serious constitutional problems with such restrictions on the writ of habeas corpus.

Most of the scholarship generated from the enactment of the AEDPA has focused on the AEDPA's effect on a state prisoner's right to habeas corpus under 28 U.S.C. § 2254.[15] While issues considered in this Note are very similar to this topic, the focus is somewhat different. This Note will consider the effects of the new gatekeeper provision under the AEDPA, how the gatekeeper provision affects both federal and state petitioners' attempts to bring successive petitions, and the widespread implications of such a restriction.

Part One of this Note will briefly outline the historical evolution of the writ of habeas corpus. Part Two will examine the relevant changes made by the enactment of the AEDPA, focusing in particular on the ambiguities left by the drafters of the Act. Part Three will consider the constitutional implications of the AEDPA on a prisoner's right to bring second or successive petitions. In particular, this section will focus on two scenarios in which the AEDPA's restrictions lead to very disturbing results. These examples raise serious problems as to the constitutionality of the AEDPA. Part Four will conclude that the enactment of the AEDPA has created a no-win situation. If the AEDPA is given the full restrictive power that appears to be written into it, serious constitutional problems arise. It is possible that the Court could "interpret away" these problems. However, such interpretations would have to happen on a case by case basis, which would hand discretion right back to the judiciary, undermining the clear intention of Congress in enacting the AEDPA.

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12. Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. §§ 2241–2255 and adding 28 U.S.C. §§ 2261–2266 (Supp. 1996)).

13. *See* Bright, *supra* note 2, at 7–9.

14. 28 U.S.C. § 2244 (1996). A primary change imposed by the AEDPA is that limits on second or successive petitions have been made mandatory rather than discretionary. *Compare* 28 U.S.C. § 2244 (1994) *with* 28 U.S.C. § 2244 (Supp. 1996).

15. *See, e.g.*, Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997).

I. HISTORY OF HABEAS CORPUS

Habeas corpus relief is based on a simple idea: an individual should be protected from unlawful imprisonment. This simple idea, however, has grown over the last two hundred years into a complex combination of statutory and constitutional rules.[16] Rather than denoting a single concept, the term "habeas corpus," sometimes referred to as the "Great Writ,"[17] actually refers to a collection of related but distinct remedies available to state and federal prisoners. Part of the confusion surrounding habeas corpus is this conflation of remedies—not only do courts not distinguish well between the different statutory remedies, often courts provide support for holdings in habeas corpus cases by way of a combination of constitutional and statutory references without any clear distinction between them.[18] The statutes themselves are written in very general terms and do little to clarify or guide petitioners as to the specifics of habeas corpus practice, and habeas corpus rules and restrictions have been formulated primarily through judicially constructed rules reflected in case law,[19] which in turn have been derived from social policy concerns as they have evolved in the course of the last two centuries.[20]

Initially, the writ of habeas corpus was intended as a remedy only for federal prisoners.[21] With the Judiciary Act of 1789, Congress granted to federal prisoners the right to bring habeas corpus petitions challenging their convictions.[22] In 1833, Congress extended the remedy to some state prisoners, after the New England states threatened to nullify national revenue legislation by arresting and detaining any federal official who enforced the new laws.[23] In 1867, Congress expanded habeas corpus relief to its constitutional maximum, to "any person [who]

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16. *See* 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2, at 10 (2d ed. 1994); Bright, *supra* note 2.

17. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 401 (1963) ("Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty.").

18. *See infra* note 40 and accompanying text. *See also* 1 LIEBMAN & HERTZ, *supra* note 16, at 10–11.

19. *See* 1 LIEBMAN & HERTZ, *supra* note 16, at 10–11.

20. *See id.* at 71–76.

21. *See* Judiciary Act of 1789, Ch. 20, § 14, 1 Stat. 73, 81–82.

22. *Id.* However, this is not to say that state prisoners did not have access to federal review. Section 25 of the Judiciary Act of 1789 established a general writ of error for state litigants (in custody or not) who had exhausted their claims in the highest state courts, for claims challenging the Constitution, a treaty or statute of the United States. This writ of error permitted de novo review of legal claims but no right of review for factual claims. This writ of error is to be distinguished from a federal habeas corpus review as expressly withheld in the 1789 Act. While the text of the writ of error was similar to that of habeas corpus relief, it was generally not used to challenge the validity of a state prisoner's confinement. *See* 1 LIEBMAN & HERTZ, *supra* note 16, at 38–40.

23. Judiciary Act of Mar. 2, 1833, Ch. 57, § 7, 4 Stat. 632, 634.

may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States."[24]

In 1948, Congress codified the already existing habeas corpus doctrine into new judicial code.[25] 28 U.S.C. § 2241 was an acknowledgment of the existence of the basic power of courts to grant the writ of habeas corpus, challenging federal or state custody.[26] 28 U.S.C. § 2254 was a codification of the common law practice of challenging state convictions.[27] 28 U.S.C. § 2255 was a codification of the common law practice of challenging the validity of federal convictions.[28] Until 1996, the text of the habeas corpus statutes remained essentially the same as it stood in 1948.[29] The evolution of habeas corpus between 1948 and 1996 was primarily through case law, rather than through revision of the text of the statutes.[30] In practical terms, this created a complex set of extra-statutory rules for bringing habeas corpus claims. This common law evolution phenomenon is somewhat problematic in that it has created a lack of correlation between statute and practice. This has further complicated the determination of the proper application of the AEDPA to habeas corpus rules as they were developed and practiced by the courts prior to 1996.[31]

Habeas corpus relief available to federal prisoners differs somewhat from that available to state prisoners. The primary means for federal prisoners to bring habeas corpus claims is via § 2255. Section 2255 is a statutory remedy distinct from habeas corpus itself, which is a non-statutory remedy granted under § 2241.[32] Section 2255 has been treated by courts as the remedy of first resort, and only when a court lacks jurisdiction under § 2255 can a federal prisoner bring a habeas corpus petition under § 2241.[33] Between 1950 and the present, courts have

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24. Judiciary Act of Feb. 5, 1867, Ch. 28, § 1, 14 Stat. 385. Congress's aim in 1867 was to expand habeas corpus, along with the writ of error and federal removal jurisdiction, to its constitutional maximum. One year later, Congress withdrew the jurisdiction, concerned that it may have gone too far too quickly. After almost two decades of battles over whether state prisoners should have a federal habeas corpus remedy, Congress reestablished a habeas corpus remedy for state prisoners in 1885. 1 LIEBMAN & HERTZ, *supra* note 16, at 40–48.

25. Judiciary Act of June 25, 1948, Part VI, Ch. 153, §§ 2241–2255.

26. 28 U.S.C. § 2241 (1994).

27. 28 U.S.C. § 2254 (1994) ("The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.").

28. 28 U.S.C. § 2255 (1994).

29. The last major revision of § 2241 was in 1966; it was a jurisdictional change, enacted to alleviate the burden on courts in the districts where prisoners were confined. The 1966 amendment extended jurisdiction for state prisoners in states that have more than one federal judicial district to both the place of confinement and the place of conviction and sentencing. *See* 28 U.S.C. §2241(d).

30. *See* 1 LIEBMAN & HERTZ, *supra* note 16, at 10–11.

31. *See* Yackle, *supra* note 15, at 381.

32. *See* 2 LIEBMAN & HERTZ, *supra* note 16, at 1181–85.

33. 28 U.S.C. § 2255 (1994) states, "an application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section,

consistently articulated the jurisdictional limits of § 2255. In one of the earliest statements of these limits, the District of Columbia Circuit Court held in 1958:

> Although a motion under Section 2255 may be utilized to attack a sentence which is "in excess of the maximum authorized by law," this refers only to the sentence as *imposed*, as distinct from the sentence as it is being *executed*. If appellant's sentence is being executed in a manner contrary to law...he may seek habeas corpus in the district of his confinement. Section 2255 is not broad enough to reach matters dealing with the execution of sentence.[34]

Thus, if a federal prisoner intends to challenge the imposition (or validity) of his sentence, he must bring his claim under § 2255. However, if he intends to challenge the way in which the sentence is being executed, he must bring his claim under § 2241. For a federal prisoner challenging the validity of his sentence, § 2255 is a remedy of first resort, and habeas corpus claims under § 2241 can only be raised as a second resort. In short, claims via § 2241 can be raised by federal prisoners in only two situations: (1) when the prisoner questions the *execution* rather than the *validity* of his sentence,[35] and (2) when the relief afforded by a prior § 2255 petition is somehow inadequate.[36] What exactly is meant by "inadequacy of relief" as grounds to raise a subsequent § 2241 petition has not been very clearly defined.[37] However, courts have asserted that inadequacy is *not* established simply by the fact that the prisoner has been denied relief under § 2255—something more is needed.[38]

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shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." *See also* United States v. Hayman, 342 U.S. 205 (1952).

34. Freeman v. United States, 254 F.2d 352, 353–54 (D.C. Cir. 1958) (emphasis in original) (quoting Costner v. United States, 180 F.2d 892 (4th Cir. 1950)). *See also* United States v. Scott, 803 F.2d 1095 (10th Cir. 1986) ("When an action addresses the execution of a sentence rather than the validity of the sentence, § 2255 relief is unavailable. A claim to immediate release on the ground that a federal sentence has been served in full is a matter properly raised in a 28 U.S.C. § 2241 petition for a writ of habeas corpus." (citations omitted)); Stinson v. United States, 342 F.2d 507 (8th Cir. 1965) (defendant seeking to challenge court's finding that sentence had not run out prior to a parole violation warrant not permitted to raise claim under § 2255); Halprin v. United States, 295 F.2d 458, 459 (9th Cir. 1961) ("Halprin is not attacking the sentences as *imposed* but as they are being *executed*. This being the case, the proper remedy is habeas corpus and not a section 2255 proceeding." (emphasis in original)).

35. *See Halprin*, 295 F.2d at 459; *Freeman*, 254 F.2d at 353; *Costner*, 180 F.2d at 892.

36. *See Hayman*, 342 U.S. at 223 ("In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing.").

37. *See* Triestman v. United States, 124 F.3d 361, 375–77 (2d Cir. 1997).

38. *See, e.g.*, Williams v. United States, 323 F.2d 672, 673 (10th Cir. 1963); Overman v. United States, 322 F.2d 649 (10th Cir. 1963) ("Failure to obtain relief under § 2255 does not establish that the remedy so provided is either inadequate or ineffective.").

Since 1948, the primary way state prisoners have challenged the validity of their sentences is under § 2254.[39] Unlike the clear division between § 2255 and § 2241 for federal prisoners, the circumstances under which a state prisoner can bring a § 2241 petition have not been well-defined. Although little has been expressly stated regarding the proper use of § 2241 in petitions challenging state custody, the Supreme Court's conflation of the two statutes, both in stating the substance of petitioners' claims and in citing the jurisdiction of the district courts, implies that there is no sharp line to be drawn between the two when a state prisoner brings a petition challenging the validity of his sentence.[40] This lack of precision lends credence to the theory that there is no conceptual difference between § 2241 and § 2254 for claims dealing with the validity of a sentence—the two statutes are essentially co-extensive. The claim that there is no difference in scope between § 2241 and § 2254 is further supported by the fact that there is no case law to support the assertion that state prisoners have access to § 2241 in the case where remedy under § 2254 is inadequate.[41] Only very rarely have courts even *considered* the "adequacy" issue for state prisoners, and when they have, the discussions have been fairly unsatisfactory.[42] Because this § 2241 remedy is so clearly delineated for federal prisoners when a § 2255 remedy is inadequate, it would be logical to conclude that the same conceptual and jurisdictional differences simply do not exist between § 2254 and § 2241.

However, there is some evidence that § 2241 and § 2254 are not exactly co-extensive. In *Newlin v. Helman*,[43] the Seventh Circuit recently stated that while claims challenging the validity of a conviction or a sentence should be brought under § 2254, challenges to conditions of confinement must be raised under § 2241.[44] In two unpublished decisions, the Ninth and Tenth Circuits have also stated that the proper means for challenging the execution of a state sentence is via § 2241 rather than § 2254. In the Ninth Circuit, a state prisoner filed a § 2254 petition attempting to challenge the execution of his sentence, and the court allowed for dismissal without prejudice in order to allow him to refile his claim as

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39. 28 U.S.C. § 2254 (1994).

40. *See, e.g.*, O'Neal v. McAninch, 513 U.S. 432 (1995) (state prisoner brought § 2254 petition, but the Court consistently cites both § 2241 and § 2254 in its discussion of petitioner's claim); Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 505–06 (1982) ("Petitioner then filed the instant proceeding...seeking a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254."). *See also* Castillo v. Baldwin, 101 F.3d 705, No. 96-35178, 1996 WL 660899 (9th Cir. Nov. 7, 1996) (unreported table decision) ("the district court had jurisdiction under 28 U.S.C. §§ 2241, 2254").

41. One might ask the question in the reverse as well—whether state prisoners have access to § 2241 even when § 2254 is adequate. However, there is no case law supporting this. Cases dealing with state prisoners always invoke either § 2254 alone or §2254 in conjunction with §2241.

42. *See, e.g.*, Stewart v. Gilmore, No. 97 C 6672, 1997 WL 695656 (N.D. Ill. Nov. 5, 1997).

43. 123 F.3d 429 (7th Cir. 1997).

44. *Id.* at 438. In some contexts, prisoners may challenge the conditions of their confinement. For a discussion of this as a possible means of avoiding the new habeas corpus restrictions, see *infra* text accompanying note 75.

a § 2241 petition for habeas corpus.[45] The Tenth Circuit expressed a similar viewpoint in an unpublished decision in 1996, asserting that "[t]his case arises under 28 U.S.C. § 2241, which permits challenges to official action affecting execution of sentence, and not under § 2254 or § 2255, which relate to conviction and imposition of sentence."[46] However, very few courts have drawn this distinction, so it is not clear whether other courts have treated challenges to the execution of a state sentence as pursuant to § 2254 or § 2241. The answer to the question of whether § 2241 or § 2254 is the proper means for challenging the execution of a state sentence has important implications for successive petitions under the new restrictions for the AEDPA. This is because courts have treated second petitions arising under § 2255 when the first petition was brought under § 2241 as *not* successive within the meaning of the gatekeeper provision of the AEDPA. Thus, if § 2254 is treated as parallel to § 2255, the same analysis should hold here as well.[47]

II. SUCCESSIVE PETITIONS UNDER THE AEDPA

Prior to 1996, both § 2254 and § 2255 gave the court discretion as to whether it would hear more than one petition: "the sentencing court *shall not be required* to entertain a second or successive motion for similar relief on behalf of the same prisoner."[48] This "gatekeeper" allowed for dismissal of a motion that failed to allege different grounds for relief and where the prior determination was on the merits.[49]

This discretion has been eliminated by the AEDPA. The new Act creates a mandatory rather than a discretionary gatekeeper for second or successive habeas petitions, found in the newly restructured § 2244 and § 2255.[50] The gatekeeper provision for state prisoners is found in § 2244,[51] and the gatekeeper provision for federal prisoners is found in § 2244 and § 2255.[52] In relevant part, the gatekeeper for state prisoners in § 2244 provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless...the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or...the factual predicate for the claim could

45. *See* Greene v. Roe, 103 F.3d 138, No. 96-55283, 1996 WL 671996 (9th Cir. Nov. 5, 1996) (unpublished table decision).

46. Moore v. Perrill, 39 F.3d 1192, 1994 WL 628939 (10th Cir. Nov. 10, 1994) (unpublished table decision).

47. *See infra* notes 58–68 and accompanying text.

48. 28 U.S.C. § 2255 (1994) (emphasis added). *See also* 28 U.S.C. § 2254 (1994).

49. 28 U.S.C. § 2255 (1994). *See also* 28 U.S.C. § 2254 (1994).

50. 28 U.S.C. § 2244(b) (Supp. 1996); 28 U.S.C. § 2255 (Supp. 1996).

51. 28 U.S.C. § 2244(b) (Supp. 1996).

52. *Id.*; 28 U.S.C. § 2255 (Supp. 1996).

> not have been discovered previously through the exercise of due diligence; and...the facts underlying the claim...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.[53]

For federal prisoners, a parallel provision has been established in § 2255.[54] The revised restriction stipulates that for both state prisoners (under § 2254) and federal prisoners (under § 2255), successive petitions are limited to petitions that either are based on newly discovered evidence that would establish by clear and convincing evidence that no trier of fact could find the defendant guilty, or a new rule of constitutional law that has been retroactively applied by the Supreme Court. A three judge appellate panel decides whether, under the new criteria, the petitioner makes a sufficient preliminary showing to warrant return to the district court for full consideration, and if the panel decides that the petition fails the criteria, its decision to deny the petition is unappealable.[55] Thus, under the AEDPA, successive petitions under § 2254 and § 2255 are sharply restricted.

It is not clear how the restrictions imposed on bringing successive petitions affect petitions raised under § 2241, as the AEDPA is essentially silent on § 2241.[56] Given the importance of § 2241 as the only means for challenging the execution (as opposed to the validity) of a federal sentence, it is important to determine how successive § 2241 petitions should be treated. One plausible reading of the AEDPA would be to reason that since the amendments say nothing at all about § 2241, the restrictions should not be applied to it. There is an inherent attractiveness to the claim that if Congress meant to restrict the application of § 2241, it would have said so in the AEDPA. Since it was silent on the matter, the Act should not be interpreted as limiting successive petitions under this section. This sort of reasoning was applied by the Court in *Lindh v. Murphy*,[57] in which the Court addressed the retroactivity of the AEDPA. With regard to proper canons of interpretation, the Court asserted that:

> The insertion of [the new rule] with its different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.... [A] thoughtful

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53. 28 U.S.C. § 2244(a) (Supp. 1996).

54. 28 U.S.C. § 2255(b)(2) (Supp. 1996).

55. 28 U.S.C. § 2244(b)(3) (Supp. 1996) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.... The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.").

56. The language of § 2241 remained essentially untouched by the AEDPA revisions, and §§ 2244 and 2255 fail to mention § 2241 in their new gatekeeper provisions.

57. 117 S. Ct. 2059 (1997).

> member of Congress was most likely to have intended just what the later reader sees by inference.[58]

Applying the Court's analysis to the question at hand, one should reach the conclusion that if Congress intended § 2241 to be as restrictive § 2254 and § 2255 now are under the AEDPA, § 2241 would have explicit language to that effect. Thus, under this reasoning, the new AEDPA restrictions on habeas corpus should not extend to § 2241 because although there are explicit restrictions on § 2254 and § 2255, there are no such restrictions on § 2241.

It is fairly clear that the new limitations on successive petitions do not necessarily affect claims brought under two different statutes, one challenging the validity of the conviction (under § 2255) and another challenging the execution of the sentence (under § 2241). Recently, in *Chambers v. United States*,[59] the Second Circuit stated that "a petition asserting a claim to relief available under 28 U.S.C. § 2255 is not a 'second or successive' application where the prior petition(s) sought relief available only under 28 U.S.C. § 2241."[60] The court reasoned that "[b]ecause Sections 2255 and 2241 address different types of claims, filing a Section 2255 motion after filing a Section 2241 motion does not trigger the gatekeeping provisions of Section 2244."[61]

A parallel analysis applies for a § 2241 petition filed subsequent to a § 2255 petition, as the same reasoning holds. This was recognized by the Ninth Circuit in *United States v. Lorentsen*,[62] which held that even under the AEDPA, a defendant had not exhausted his remedies by having previously filed a § 2255 motion, as he still had a § 2241 petition available to him.[63] The court asserted that "Section 2255 expressly provides that a federal prisoner may seek habeas relief if it 'appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.'"[64]

Depending on how one interprets the relation between § 2254 and § 2241, an extension of *Chambers* may also be warranted in the case where a state prisoner files a § 2241 petition subsequent to a § 2254 petition. If the Seventh Circuit is correct that such a parallel should be drawn,[65] then because § 2241 and § 2254 petitions seek relief for different kinds of claims, the second petition should not be considered successive within the meaning of the AEDPA.

However, two recent cases have rejected this reasoning. In *Lorentsen*, the Ninth Circuit found that while it was permissible for a petitioner to bring a § 2241 petition after a § 2255 petition, the same would not be true for a § 2254 petition. The court asserted that "[a]lthough recent decisions hold that state prisoners may not use § 2241 to circumvent the restrictions of 28 U.S.C. § 2254, Lorentsen is a

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58. *Id.* at 2065.
59. 106 F.3d 472 (2d Cir. 1997).
60. *Id.* at 474.
61. *Id.* at 475.
62. 106 F.3d 278 (9th Cir. 1997).
63. *Id.* at 279.
64. *Id.* (quoting 28 U.S.C. § 2255 (Supp. 1996)).
65. *See supra* note 43 and accompanying text.

federal prisoner."[66] The court in *Lorentsen* refers here to the Ninth Circuit's decision in *Greenawalt v. Stewart*.[67] In *Greenawalt*, a petitioner brought a petition under § 2241 challenging the constitutionality of lethal injection as a means of execution.[68] Greenawalt had previously brought a § 2254 petition on other grounds,[69] and the Ninth Circuit denied the second petition, asserting:

> It is clear that Greenawalt is attempting to avoid the limitations imposed on successive petitions by styling his petition as one pursuant to § 2241. The Supreme Court has instructed us that the authority of the federal courts to grant habeas relief to state prisoners under § 2241 is limited by 28 U.S.C. § 2254. We, therefore, treat Greenawalt's notice of appeal as an application for an order authorizing the district court to consider his successive petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2244(b)(3)(A).[70]

The court denied the petition as successive, thus creating a disparity in habeas corpus treatment for federal and state prisoners.

The Ninth Circuit's reasoning in *Greenawalt*, and subsequently in *Lorentsen*, has potentially severe implications under the AEDPA. If state prisoners are limited to bringing claims under § 2254 there, they are denied an entire avenue of relief potentially allowed federal prisoners. Because the gatekeeper under the AEDPA is mandatory rather than discretionary, this becomes a more serious distinction between the treatment of habeas corpus for federal and for state prisoners.

Continued Ninth Circuit reliance on its opinion in *Greenawalt* is unfortunate, given the problematic nature of the court's reasoning. The court in *Greenawalt* relies heavily on the Supreme Court's decision in *Felker v. Turpin*[71] in reaching its conclusion. *Felker* was the first case taken by the Supreme Court addressing second or successive petitions. In that case, the Supreme Court addressed whether the AEDPA unconstitutionally suspended the writ of habeas corpus in restricting second or successive petitions, ultimately concluding that it did not.[72] A major problem with *Greenawalt's* reasoning is that *Felker* does not make the argument attributed to it by the court in *Greenawalt*. *Felker* merely asserts that any limitations on successive petitions imposed by the AEDPA do not deprive the Supreme Court of original jurisdiction to entertain habeas corpus petitions and, therefore, do not constitute an unconstitutional suspension of the writ.[73] Unfortunately, the Court in *Felker* was not clear in its discussion of the relation between § 2241 and § 2254. At one point, the Court stated, "as we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this

66. *Lorentsen*, 106 F.3d at 279 (citations omitted).
67. 105 F.3d 1287 (9th Cir. 1997).
68. *Id.* at 1287–88.
69. *Id.*
70. *Id.* (citing Felker v. Turpin, 518 U.S. 651, 662–63 (1996)).
71. 518 U.S. 651 (1996). *See* discussion *infra* text accompanying note 79.
72. *Felker*, 518 U.S. at 664–65.
73. *Id.*

Court by implication then, we decline to find a similar repeal of § 2241."[74] Here, the Court seems to indicate that the concern is with the effect of the Act on § 2241, implying that § 2241 is not immune from the restrictions imposed by the AEDPA. However, the remainder of the discussion focuses on § 2254 rather than § 2241. The Court is not at all clear about how § 2241 is restricted by the AEDPA. Thus, to conclude as the court does in *Greenawalt*, that *Felker* explicitly establishes that § 2241 is restricted in the same way as § 2254, is premature at best. A second problem with the *Greenawalt* opinion is that it does not recognize that reliance on § 2241 for the second petition may not be "a ploy" to circumvent the new restrictions on successive habeas corpus petitions—Greenawalt's petition challenged the execution of the sentence rather than the validity of the sentence. The case law indicates that it is not entirely clear that the claim even *could* have been brought in the first petition. If the claim could *not* have been raised previously, then to deny the second petition would be to deny a petitioner his only means of relief.

Whatever the problems with the opinion, the court in *Greenawalt* made it clear that, at least in the Ninth Circuit, state prisoners will be restricted from raising a second claim under the AEDPA, even if the first claim goes to the validity of the conviction and the second claim goes to the execution of the sentence.[75] However, it is simply too early to know how other courts will decide this same issue. There is some indication that the Seventh Circuit might follow its reasoning in *Newlin*[76] and find that if a § 2254 petition and a § 2241 petition raise different types of claims, then the second petition is not a successive petition within the meaning of the gatekeeper provision of the AEDPA.[77]

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74. *Id.* at 664.

75. The district court in *Greenawalt v. Stewart* suggested that as an alternative to habeas corpus Greenawalt could have brought his challenge to lethal injection as a means of execution as a civil rights action under 42 U.S.C. § 1983: "A state prisoner also may be able to challenge the method of execution under 42 U.S.C. § 1983." Greenawalt v. Stewart, No. CIV-97-0135-PHX-SMM (D. Ariz. Jan. 22, 1997) (order dismissing Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241). While challenging the execution of a sentence is sometimes available under 42 U.S.C. § 1983, it is doubtful that this avenue will be available post-AEDPA as a means of bringing restricted claims. Although the Supreme Court had held previously that such an avenue may be legitimate (*see* Preiser v. Rodriguez, 411 U.S. 475 (1973)), it becomes suspect when the petitioner could bring the claim as a petition for habeas corpus instead. *Preiser*, 411 U.S. at 489–90. Further, in *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653 (1992), the Court asserted that

> this action is an obvious attempt to avoid the application of [procedural bar rules] to bar this successive claim for relief.... Whether his claim is framed as a habeas petition or as a § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation.

Id. at 653–54.

76. Newlin v. Helman, 123 F.3d 429 (7th Cir. 1997).

77. *See supra* text accompanying note 43.

The way in which courts interpret the new gatekeeper restrictions and the parallel or lack of parallel between state and federal prisoners will have a major impact on prisoners' remedies under habeas corpus. The lower courts have been cautious in making assertions about successive petitions under the new habeas corpus, perhaps waiting for guidance from the Supreme Court. What little guidance has come from the Supreme Court on this issue hints that the Court will favor a strict interpretation of the new AEDPA restrictions that would curtail the availability of § 2241 petitions under the new gatekeeper as well, thus effectively unconstitutionally suspending the writ of habeas corpus.[78]

For example, the Court's willingness to accept the AEDPA can be seen in *Felker v. Turpin*.[79] In that case, a petitioner had filed a habeas corpus petition under § 2254 prior to the enactment of the AEDPA. After the AEDPA came into effect, the petitioner sought to file a second habeas corpus petition; his request was denied as an impermissible successive habeas corpus motion.[80] He then filed with the Supreme Court a petition for habeas corpus and for certiorari review. The Court granted certiorari to consider whether the AEDPA effectively established an unconstitutional suspension of the writ of habeas corpus.[81] The Court held that because the AEDPA does not preclude it from entertaining original applications of writs of habeas corpus it is not unconstitutional on those grounds.[82] With *Felker*, the Court interprets the Suspension Clause extremely narrowly: only if the Supreme Court were stripped entirely of the power to hear a given case would the Court find a suspension of the writ.[83]

III. CONSTITUTIONAL IMPLICATIONS OF THE AEDPA

The constitutional implications of the AEDPA's restriction on successive petitions are far from clear.[84] On first glance, restricting petitioners from bringing

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78. *See* Felker v. Turpin, 518 U.S. 651 (1996) (holding that a petitioner's being denied access to habeas corpus is not a suspension of the writ, because the Supreme Court maintains original jurisdiction to hear habeas corpus petitions); Greenawalt v. Stewart, 105 F.3d 1287 (9th Cir. 1997) (holding that the AEDPA precluded the court from allowing a second petition for a state prisoner, even though the second challenge related to the execution rather than the validity of the sentence).

79. 518 U.S. 651 (1996).

80. Felker v. Thomas, 52 F.3d 907 (11th Cir. 1995).

81. Felker v. Turpin, 517 U.S. 1182 (1996).

82. *Felker v. Turpin*, 518 U.S. at 660–61 (1996).

83. Other courts have demonstrated their disinclination to find a suspension of the writ. For instance, in *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997), the Second Circuit rejected a Suspension Clause challenge to the AEPDA, asserting that "to alter the standards on which writs issue is not to 'suspend' the privilege of the writ." *Id.* at 379 n.21 (quoting Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996)). Courts have also reacted to the Supreme Court's decision in *Felker*. In *In re Vial*, 115 F.3d 1192, 1197 (4th Cir. 1997), the Fourth Circuit asserted that the Suspension Clause argument "is foreclosed by the recent decision of the Supreme Court in *Felker*." *Id.*

84. However, it is clear that potential constitutional problems were perceived prior to the AEPDA's enactment. For instance, even President Clinton expressed his

second or successive petitions does not seem to raise any constitutional problems because petitioners appear to be getting at least one chance to bring their claims—they simply are not allowed to do it piece-meal in order to extend the post-conviction process. However, as the remainder of this section will show, this is not nearly as clear as it first appears. Two examples in particular will demonstrate that the AEDPA's gatekeeper provision effectively prevents some classes of claims from being raised at all. Before considering these examples, however, it is necessary to briefly examine the debate surrounding the Suspension Clause itself.

The Suspension Clause, found in Article I of the United States Constitution, states that, "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[85] At the time the Suspension Clause was ratified, the writ of habeas corpus only applied to federal prisoners.[86] However, since the enactment of a habeas corpus remedy for state prisoners in 1867, courts have taken the constitutional protection to extend beyond the original scope of the writ. Specifically, the Suspension Clause has been judicially and legislatively interpreted to restrict the limitation of the availability of habeas corpus for both federal and state prisoners. In the 1960s, for example, the Court had occasion to consider the constitutional issues surrounding the Suspension Clause in several cases, and the Court repeatedly found that the limitations of habeas corpus at issue in those cases might very well have Suspension Clause implications.[87] In 1969, Congress abandoned a proposal for the withdrawal of habeas corpus from state prisoners, after scholars advised Congress that this would constitute a violation of the Suspension Clause.[88] However, in the years immediately preceding the enactment

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concern over the constitutionality of the Act, but expressed his confidence that the Court could resolve any potential problems through interpretive devices:

> I expect that the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read section 104 [of the AEDPA] to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws.

1996 U.S.C.C.A.N. 961–63.

85. U.S. CONST. art. I, § 9, cl. 2.

86. *See supra* text accompanying note 21.

87. *See, e.g.*, Sanders v. United States, 373 U.S. 1, 11–12 (1963) ("[I]f construed to derogate from the traditional liberality of the writ of habeas corpus...§ 2244 might raise serious constitutional questions."); Fay v. Noia, 372 U.S. 391, 405 (1963) ("We need not pause to consider whether it was the Framers' understanding that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ. There have been some intimations of support for such a proposition in decisions of this Court." (citations omitted)); Jones v. Cunningham, 371 U.S. 236, 238 (1963) ("The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available.").

88. *See* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 863 n.6 (1994) (citing Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 606–07 (citing testimony)).

of the AEDPA, the Court has either explicitly or implicitly overruled many of the historical and traditional constructions of the Suspension Clause that had provided more liberal constitutional protection for habeas corpus.[89] With the enactment of the AEDPA, Congress has gotten involved in limiting the writ of habeas corpus as well. Given the Court's recent pronouncements on the status of the constitutionality of habeas corpus restrictions, the AEDPA may very well be applauded by the current Court.[90]

One might argue that *Felker v. Turpin* resolves the debate over the Suspension Clause because the Court did not find a constitutional violation.[91] However, *Felker* does not resolve all of the constitutional problems with the AEDPA. *Felker* focuses on the average case of a successive petition—a case in which the petitioner *could* have raised his claim earlier but for some reason did not.[92] What if it were the case that the AEDPA denies all avenues for entire classes of claims to be heard? If it did, would there not be an unconstitutional suspension of the writ in those cases?

The answer to this question hinges on the answers to two narrower questions. First, to which version of habeas corpus does the Suspension Clause apply—habeas corpus as it stood at the time of the framing of the Constitution or habeas corpus as it stands today? If the Suspension Clause is taken to apply only to habeas corpus as it stood in the 1700s, then the constitutional protections of habeas corpus are extremely narrow, and a constitutional violation would rarely—if ever—be found. For instance, state prisoners would have no constitutional right to habeas corpus whatsoever. The second narrower question is how far can habeas corpus be restricted before it is considered "suspended"? On the one hand, any denial of meaningful access to habeas corpus might be taken as an unconstitutional suspension of the writ. On the other hand, habeas corpus might be found to be suspended only if *all* access to the writ has been denied. [93]

With regard to the question of which version of the writ of habeas corpus the Suspension Clause applies to, there has been strong debate on both sides of this issue.[94] Those who argue that the Suspension Clause should apply only to the writ of habeas corpus as it stood at the framing of the Constitution base their argument on two related claims: first, the text of the Constitution obviously refers to habeas corpus as it stood at that time—a pre-detention remedy for federal prisoners

89. *Id.* at 862–63.

90. *See, e.g.*, Felker v. Turpin, 518 U.S. 651 (1996); Lindh v. Murphy, 117 S. Ct. 2059 (1997).

91. *Felker*, 518 U.S. at 664.

92. *Id.* at 665.

93. This is the interpretation the Court seems to favor in *Felker*, 518 U.S. at 664.

94. *See* Steiker, *supra* note 88; Michael A. Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451 (1990–1991); Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493 (1996).

only[95]—and second, essentially contemporaneous with the ratification of the constitution, Congress would not have wanted us to extend the remedy beyond that scope.[96] After all, Congress explicitly denied federal habeas corpus relief to state prisoners,[97] and it was not until three-quarters of a century later that habeas corpus was extended to state prisoners.[98] Thus, the second argument asserts, Congress clearly did *not* intend the remedy to extend beyond its scope at the time of ratification.[99] Thus, those who argue that the Suspension Clause would not be implicated unless the restriction is in violation of habeas corpus as it stood in 1789 conclude that the evolution of habeas corpus is, essentially, constitutionally irrelevant.

On the other side, those who argue that the Suspension Clause requires more than protection of the writ as it stood in 1789 rely on a broader notion of intent—Congress intended in 1789 to provide federal review as of right for constitutional claims.[100] At that time state prisoners did not have the same need for federal protection of federal rights.[101] Nonetheless, state prisoners *were* given federal judicial protection at that time through general writs of error.[102] These writs of error were intended to provide federal review *as of right* to state prisoners,[103] meaning that such review was not discretionary.[104] Over the course of the next century, the writ of habeas corpus was widely expanded, and the codification of habeas corpus in 1948 reflected a continued intention to protect both federal and state prisoners.[105] Thus, it is far too simplistic to assert that all the Suspension Clause constitutionally protects is habeas corpus as it stood in 1789. Another argument in favor of the Suspension Clause applying to habeas corpus as it stands today focuses on the evolution of habeas corpus over the course of the last two centuries. For example, at least one commentator has argued that the historical evolution of habeas corpus is anything but irrelevant in the determination of constitutional protections of habeas corpus—the original intent argument only gets us so far.

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95. Brief of Amicus Curaie State of California et al., in Support of Petitioners at 17, Stewart v. Martinez-Villareal, 118 S. Ct. 1619 (1998) (No. 97-300).

96. *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 317 (1995) ("[T]he writ originally performed only the narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention."); McCleskey v. Zant, 499 U.S. 467, 478 (1991) ("In the early decades of our new federal system, English common law defined the substantive scope of the writ." (citing *Ex parte* Watkins, 28 U.S. 193 (1830)).

97. *See supra* text accompanying note 21.

98. *See supra* text accompanying note 23.

99. *See, e.g.*, Brief for the United States as Amicus Curiae at 36–38, Felker v. Turpin, 518 U.S. 651 (1996) (No. 95-8836).

100. Brief of Amicus Curiae American Bar Association in Support of Respondent at 16–17, Stewart v. Martinez Villareal, 118 S. Ct. 1619 (1998) (No. 97-300).

101. *Id.* at 17.

102. *Id.* at 17–18. *See also supra* text accompanying note 22.

103. Judiciary Act of 1789, Ch. 20, § 25, 1 Stat. 73, 85–86.

104. *See* 1 LIEBMAN & HERTZ, *supra* note 16, at 39–40.

105. Judiciary Act of June 25, 1948, Part VI, Ch. 153, §§ 2241–2255.

> We can no longer assume that the scope of the constitutional protection corresponds to the scope of the writ in 1789. Nor can we assume that the writ protected is the federal writ for federal prisoners. Ultimately, we must reconstruct the constitutional right against "suspension" in light of the unique role that habeas occupied prior to the adoption of the Fourteenth Amendment and in accordance with contemporary practice and doctrine.[106]

This argument is based on the Fourteenth Amendment—when the Fourteenth Amendment was written, it was intended to be read in conjunction with the Suspension Clause to constitutionally require habeas corpus review for state prisoners.[107] Under this argument, the Suspension Clause reaches state prisoners via incorporation through the Fourteenth Amendment.[108] Thus, state prisoners have constitutionally protected access to the writ of habeas corpus.

In light of this scholarship, one might argue that the constitutional protections of habeas corpus should be taken to apply to state prisoners. There is a strong argument that the Suspension Clause accomplishes this alone. However, even if there is not a pure Suspension Clause violation, the Suspension Clause can be made applicable to state prisoners through the Fourteenth Amendment.

With regard to the second question that arises under the inquiry of whether the AEDPA is an unconstitutional suspension of the writ—how much restriction is required before it becomes constitutionally impermissible—the debate is equally polarized. One side argues that only a total denial of habeas corpus would create a suspension of the writ. Thus, even if practical impediments were erected in such a way as to effectively deny a petitioner access to federal review, such a denial would not necessarily invoke the Suspension Clause.[109]

However, such a narrow reading of what triggers the Suspension Clause conflicts with constitutional analysis in many other areas. For instance, in *Ake v. Oklahoma*,[110] the Court held that a constitutional requirement of access for indigent defendants to the criminal justice system requires "meaningful access."[111] With regard to the First Amendment, the Court has held that the constitutional rights afforded by the First Amendment also require that access to those rights must be meaningful: "There can be no question but that the First Amendment secures the

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106. Steiker, *supra* note 88, at 924.

107. *Id.* The historical context provided by the recently fought Civil War and Reconstruction legislation bolsters Steiker's argument. Much of the congressional intent behind Reconstruction legislation evinced a strong desire to reassert federal authority over the states. Thus, it would seem incongruous with this general congressional intent to deny state prisoners the constitutional protections of the Suspension Clause.

108. *Id.*

109. This seems to be the route taken by the Supreme Court in *Felker v. Turpin*, 518 U.S. 651 (1996), and in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), and by the Fourth Circuit in *In re Vial*, 115 F.3d 1192, 1197 (4th Cir. 1997).

110. 470 U.S. 68 (1985).

111. *Id.* at 77. *See also* Ross v. Moffitt, 417 U.S. 600, 612 (1974) (stating that States cannot extend to indigent defendants "merely a 'meaningless ritual'" instead of real access to an appeal (quoting Douglas v. California, 372 U.S. 340, 358 (1970))).

right of individuals to communicate with their government. And the First Amendment was intended to secure something more than an exercise in futility—it guarantees a meaningful opportunity to express one's views."[112] Thus, if there is a constitutional right to habeas corpus, then access to that right must be meaningful—prisoners must be afforded more than a mere hypothetical chance to access the writ.

Assuming that there is a constitutional guarantee to federal review as of right, and assuming that this guarantee requires that there be meaningful access to that right, the following scenarios serve to illustrate a constitutional problem with the AEDPA's restrictions on second or successive habeas corpus petitions.

In *Martinez-Villareal v. Stewart*,[113] the Ninth Circuit considered the case of Ramon Martinez-Villareal, a mentally retarded Mexican national who participated in a robbery in which two men were shot and killed.[114] Mr. Martinez-Villareal was convicted of murder and sentenced to death in the state of Arizona.[115] Mr. Martinez-Villareal attempted at several points during the course of the post-conviction process to bring a petition for habeas corpus challenging his competency to be executed under *Ford v. Wainwright*.[116] In the early stages of post-conviction, the claim was found to be unripe and was dismissed because a petition based on competency will be premature until execution is imminent.[117] Consequently, Mr. Martinez-Villareal was barred from raising his mental competency claim in his first petition for habeas corpus relief, as this sort of claim can never be raised in a first petition. However, when Mr. Martinez-Villareal attempted to bring the claim in a later, successive petition, when execution had become imminent, the district court held that the claim could no longer be raised, as it was prohibited under the new AEDPA rules regarding second or successive petitions.[118] Thus, on the district court's reasoning, under the AEDPA, a petitioner can never raise a challenge to execution based on competency in a second petition because it is neither based on new facts which go to the petitioner's innocence, nor based on a new rule of constitutional law made retroactive by Congress.[119] If the district court is correct in its interpretation of the new restrictions, serious questions are raised regarding the constitutionality of the AEDPA. Such a reading of the

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112. Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 308–09 (1984).

113. 118 F.3d 628 (9th Cir. 1997) (per curiam).

114. State v. Martinez-Villareal, 145 Ariz. 441, 702 P.2d 670 (1985).

115. *Martinez-Villareal v. Stewart*, 118 F.3d at 629.

116. *Id.* at 629–30; Ford v. Wainwright, 477 U.S. 399 (1986) (holding execution of an individual who is not competent at the time of execution unconstitutional as cruel and unusual punishment).

117. The Ninth Circuit explicitly stated that such a dismissal would not affect the ability to raise the claim later: "[T]o eliminate any ambiguity, we reiterate that the claim of Martinez-Villareal's current incompetence was denied as premature by the district court. That decision was not challenged on appeal. Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question." Martinez-Villareal v. Lewis, 80 F.3d 1301, 1309 n.1 (9th Cir. 1996).

118. *Martinez-Villareal v. Stewart*, 118 F.3d at 630.

119. *See supra* text accompanying note 53.

gatekeeper provision would implicate due process issues as well as the suspension of the writ of habeas corpus because all avenues to habeas corpus have been blocked for competency claims. The Ninth Circuit circumvented this problem by holding that this narrow class of competency claims "does not fall within the rubric of § 2244."[120] Thus, according to the Ninth Circuit:

> [A] competency claim must be raised in a first habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim—and only that claim—because it was originally dismissed as premature and therefore falls outside of the rubric of 'second or successive' petitions.[121]

The Ninth Circuit's analysis reflects a recognition of the severity of the problems left by the AEDPA's gatekeeper provision. The State appealed the Ninth Circuit's finding that Mr. Martinez-Villareal's petition does not constitute a second or successive petition within the meaning of the statute, and the Supreme Court granted certiorari to consider the question of whether Mr. Martinez-Villareal's petition should constitute an impermissible second or successive habeas corpus petition.[122] In an opinion authored by Chief Justice Rehnquist, the Supreme Court held that Mr. Martinez-Villareal should be allowed to raise his competency claim in federal court.[123] However, the opinion is extremely narrow. While it granted Mr. Martinez-Villareal the relief he sought, the Court limited its reasoning to the facts of this case, granting relief only because Mr. Martinez-Villareal had raised the claim previously and had had the claim dismissed.[124] The Court explicitly declined to take a stand in the situation in which a prisoner had not brought the claim previously.[125]

Mr. Martinez-Villareal's case provides a vivid example of the unforeseen consequence of the new gatekeeper provision of the AEDPA. While Congress's aim was presumably to avoid abuse of the writ, there is no way that Mr. Martinez-Villareal's actions can be construed as abuse of the writ. He did not present his claims piece-meal, claim by claim. He did not attempt to raise this claim after an unsuccessful disposition of that claim on the merits. He did not attempt to raise the claim for the first time in a second, third, or fourth habeas corpus petition. Mr. Martinez-Villareal attempted repeatedly to raise his competency claim in the federal courts, and he was told several times that his attempts were premature.[126] Further, he was explicitly told by the Ninth Circuit that its not deciding on his claim would *not* impair his right to raise the claim later.[127] In this case, the

120. *Martinez-Villareal v. Stewart*, 118 F.3d at 632.
121. *Id.* at 634.
122. Stewart v. Martinez-Villareal, 118 S. Ct. 294 (1997).
123. Stewart v. Martinez-Villareal, 118 S. Ct. 1619 (1998).
124. *Id.* at 1622.
125. *Id.*
126. *Martinez-Villareal v. Stewart*, 118 F.3d at 629–30.
127. *Id.* at 629 n.1.

language of the AEDPA works to totally deny Mr. Martinez-Villareal habeas corpus relief. Only because the Supreme Court stepped in and granted relief can Mr. Martinez-Villareal raise his claim at all. While Mr. Martinez-Villareal is allowed to bring his *Ford* claim, the decision does little to resolve the problems created by the AEDPA.

The way in which the Supreme Court handled Mr. Martinez-Villareal's case avoided serious constitutional questions about suspension of the writ. The Court concluded (though more narrowly than the Ninth Circuit) that because the nature of this particular claim is such that it can never be raised in a first petition for habeas corpus, it does not fall within the rubric of "second or successive" petitions. However, this does not eliminate the grave implications of the AEDPA gatekeeper restrictions. Competency to be executed claims (that were raised previously and dismissed) are not unique in the problem they pose for habeas corpus under the AEDPA. The extent to which the AEDPA gatekeeper provision will exclude certain sorts of claims altogether is much more far-reaching. For instance, challenges to the means of execution that could not be raised earlier because of changes in execution practices; challenges to the fairness of process at discovery, trial, or sentencing phases that could not have been raised earlier; and challenges to administrative decisions by the prison system, such as parole revocation, will not be allowed under the language of the AEDPA. Any successive claim that could not have been raised earlier, going not to the petitioner's guilt or innocence but instead to whether the petitioner received a fundamentally fair trial, will be barred under the AEDPA because it does not meet the gatekeeper's criteria.

Consider the following case by way of illustration. In *Bracy v. Gramley*,[128] William Bracy was tried, convicted, and sentenced to death for armed robbery, aggravated kidnapping, and murder.[129] Mr. Bracy was tried before then-Judge Thomas J. Maloney.[130] Maloney was convicted shortly thereafter for conspiracy, racketeering, extortion, and obstructing justice because he had been accepting bribes from defendants.[131] Mr. Bracy had not bribed Maloney.[132] Mr. Bracy filed a first habeas corpus petition four months after Maloney's conviction, claiming that because Mr. Bracy did not participate in the bribery he was denied a fair trial. Mr. Bracy claimed that Maloney was biased in his case because Maloney used cases like Mr. Bracy's to alleviate suspicion that he was "soft" on criminal defendants, and that, consequently, he compensated by being quick to convict.[133] The Supreme Court granted Mr. Bracy's habeas corpus petition, stating that there is a floor established by the Due Process Clause which "clearly requires a 'fair trial in a fair tribunal'...before a judge with no actual bias against the defendant or interest in the outcome of his particular case."[134]

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128. Bracy v. Gramley, 117 S. Ct. 1793 (1997).
129. *Id.* at 1795.
130. *Id.*
131. *Id. See* United States v. Maloney, 71 F.3d 645 (7th Cir. 1995).
132. *Bracy*, 117 S. Ct. at 1797.
133. *Id.*
134. *Id.* at 1797 (citation omitted).

However, suppose the timing in Mr. Bracy's case had been a little bit different. Suppose the judge's conviction occurred, not months later, but instead several years later. Suppose further that Mr. Bracy had filed a previous habeas corpus petition challenging other aspects of his trial but not bringing a claim of judicial bias because he did not yet have access to that information. Only after Mr. Bracy's first habeas corpus petition had been denied was Judge Maloney arrested for extortion. Under the new restrictions imposed by the AEDPA, Mr. Bracy would not be allowed to raise his claim (about being denied a fair trial) in a subsequent habeas corpus petition. The post-AEDPA § 2244 requires that a second petition be allowed *only* if there is a new, retroactive constitutional rule of law or only if there is new clear and convincing evidence which points to the petitioner's *innocence*. Mr. Bracy's second petition does not meet either criterion: no new constitutional law retroactively applies, nor does his claim go to guilt or innocence. Instead, his subsequent petition concerns whether he received a fundamentally unfair trial.

Thus, while in reality the Supreme Court found that the violation of Mr. Bracy's right to due process rose to a constitutional level and merited relief, had Mr. Bracy previously brought a petition for habeas corpus, no federal court could even hear Mr. Bracy's claim under the new restrictions imposed by the AEDPA on successive habeas corpus petitions. To draw an arbitrary line based on timing, over which the petitioner had absolutely no control, is to deny the petitioner his constitutional rights. The petitioner would be denied access to habeas corpus altogether, through no fault of his own, and with no recourse because the gatekeeper is unappealable.

CONCLUSION

If such denials of access to habeas corpus review were an extremely limited problem, perhaps courts could make a few narrow exceptions for claims like those presented in the two scenarios presented above. One might argue that the restrictions imposed by the AEDPA could simply be read to not include competency claims in the class of claims that count as second or successive petitions. One might also argue that claims such as that raised in the *Bracy* hypothetical will be equally rare, so courts can treat them as mere exceptions to the new gatekeeper rule. However, this reasoning has several flaws. I submit that the problem is *not* a limited one. [135] The same result would be reached *any* time there is a second claim involving the question of whether the petitioner received fair process—a fair trial, a fair sentencing, a fair appeal—where the new claim does not go to the guilt or innocence of the defendant. I have provided two examples of ways in which a petitioner would be denied the right to raise his constitutional claim at all, but there are a multitude of other such scenarios.

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135. As discussed above, the potential implications are very broad—the AEDPA restrictions could reach discovery, trial, sentencing, execution, and parole. With regard to parole, although the Supreme Court has held that individuals on parole are entitled to a hearing prior to revocation of their parole (Morrissey v. Brewer, 408 U.S. 471 (1972)), a petitioner likely could not raise such a claim in a second habeas petition post-AEDPA.

Where do these arguments leave us? Perhaps courts could simply adopt a position similar to that taken by the Ninth Circuit in *Martinez-Villareal* and conclude that these types of claims do not fall under the rubric of second or successive petitions within the meaning of the statute. The court could find that although the claim does not go to guilt or innocence, the second habeas corpus petition is not a successive petition within the meaning of the AEDPA because it could not have been raised previously. However, this solution undermines the core of the new gatekeeper restrictions of the AEDPA. The primary revision to the gatekeeper for second or successive habeas corpus claims is to make denial of such claims mandatory rather than discretionary, such that judges can no longer choose to hear a successive habeas petition on the merits unless it meets the narrow requirements of the gatekeeper. Thus, if resolution of the problem cases proposed in this paper requires giving courts the power to make exceptions for those cases in which justice seems to require consideration of the claim, then the AEDPA would be stripped of the teeth Congress intended to provide it. Thus, it looks like the safeguard intended by habeas corpus and the new AEDPA restrictions have reached an impasse: either a whole class of constitutional claims which otherwise would be legitimate under habeas corpus must be denied because of timing issues over which the petitioner had no control, or the explicit gatekeeper provisions of the AEDPA must be ignored, reestablishing judicial discretion (as was the treatment of habeas corpus prior to the AEDPA) to hear successive petitions if the interest of justice so required.