blank check proffered by Congress. Such a system neither provides fair notice to citizens about potential changes in policy nor cabins the discretion of unelected administrators and officials, unlike when Congress takes the lead in enacting legislation.[77] By creating an uneven system of review over congressional and executive action, Justice Alito's opinion runs counter to the structural constitutional commitments embodied by nondelegation principles.

Although one may applaud the Supreme Court's gesture to stare decisis of refusing to overrule *Flast* even while severely limiting its reach, Justice Alito's opinion nevertheless contravenes structural constitutional interests. At the heart of constitutional democracy in the United States is the tripartite system of government: in the phrasing of junior high school civics, the legislature makes the laws, the executive enforces the laws, and the judiciary interprets the laws. Such platitudes aside, these divisions should be jealously guarded by the courts, a task that the myriad canons of nondelegation that ensure policy choices are made by Congress seek to do. Justice Alito's opinion, however, steps backward from this structure, potentially incentivizing Congress to evade the costs associated with tough policy choices. As with the croquet game in *Alice's Adventures in Wonderland*, where the mallets become flamingos and the balls become hedgehogs, Justice Alito's opinion, mistaken as an unremarkable attempt to distinguish precedent, has come alive as a decided break with tradition for a Court known to embrace nondelegation principles.

III. FEDERAL STATUTES AND REGULATIONS

A. Antiterrorism and Effective Death Penalty Act

"Clearly Established Law" in Habeas Review. — Designed to promote "comity, finality, and federalism,"[1] the Antiterrorism and Effective Death Penalty Act of 1996[2] (AEDPA) sought to extricate federal courts from a tangled, "tutelary relation"[3] with state courts. Section 2254(d)(1) of AEDPA tightly circumscribes grants of habeas relief to a limited set of state court decisions: those "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[4] Last Term, in *Carey v. Musladin*,[5] the

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[77] *See id.* (noting that the loss of congressional control over the legislative process implicates rule of law values).

[1] Williams v. Taylor, 529 U.S. 420, 436 (2000).

[2] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

[3] Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).

[4] 28 U.S.C. § 2254(d)(1) (2000).

[5] 127 S. Ct. 649 (2006).

Supreme Court held that habeas relief was not available to a defendant who claimed that buttons worn by a murder victim's family violated his right to a fair trial.[6] The Court concluded that none of its prior holdings governed the issue; the state court, therefore, did not contravene or unreasonably apply any "clearly established law" by affirming the defendant's conviction. On its surface, *Musladin* appears to be little more than a reiteration of the Court's prior expositions of § 2254(d)(1). The unanimous outcome seems narrow and unsurprising, with the majority neatly sidestepping the substantive issue posed by the buttons. The Court's ringing affirmation of a holdings-based standard of review, however, may mask an important shift in its implementation of that standard. In defining the relevant "clearly established law" strictly and imbuing it with newfound weight, the Court effectively eliminated the question of whether such law was applied reasonably. Although the Court properly deferred to the state court decision, its truncated reasoning failed to offer a coherent justification for its deference.

In 1994, Mathew Musladin shot and killed Tom Studer, his estranged wife's fiancé.[7] Throughout Musladin's trial, members of Studer's family seated at the front of the spectators' gallery wore buttons bearing the victim's photograph.[8] The trial court denied Musladin's motion to prohibit this display, reasoning that the buttons posed "no possible prejudice to the defendant."[9] The jury convicted Musladin of first-degree murder and three related offenses.[10]

The California Court of Appeal affirmed the conviction.[11] Drawing on the "inherent prejudice" test of *Estelle v. Williams*[12] and *Holbrook v. Flynn*,[13] the court determined that the buttons were "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of [a] family member."[14] The court determined that Studer's photograph, while "an impermissible factor," had not "branded [the] defendant 'with an unmistakable mark of guilt' in the eyes of the jurors."[15] Musladin petitioned unsuccessfully for a writ of habeas corpus in federal district court.[16]

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[6] *Id.* at 654.

[7] *Id.* at 651.

[8] Musladin v. Lamarque, 427 F.3d 653, 655 (9th Cir. 2005). The buttons were "very noticeable," *id.*, spanning two to four inches in diameter, *Musladin*, 127 S. Ct. at 652 n.1.

[9] *Musladin*, 127 S. Ct. at 652 (internal quotation marks omitted).

[10] *Id.* at 651.

[11] *Id.* at 652.

[12] 425 U.S. 501, 503–05 (1976).

[13] 475 U.S. 560, 570 (1986).

[14] *Musladin*, 127 S. Ct. at 652 (alteration in original) (internal quotation mark omitted).

[15] *Id.* (internal quotation marks omitted).

[16] *Id.*

The Court of Appeals for the Ninth Circuit reversed and remanded.[17] In an opinion by Judge Reinhardt, the court held that the state court had unreasonably applied Supreme Court precedent. In its view, *Estelle* and *Flynn* "clearly established" the law on spectators' courtroom conduct, and, to find a constitutional violation, required only that an impermissible factor be introduced before the jury — not that the defendant be additionally "branded . . . with an unmistakable mark of guilt."[18] The Ninth Circuit denied rehearing en banc.[19]

The Supreme Court vacated and remanded.[20] In a brief opinion for the Court, Justice Thomas[21] invoked the statement from *Williams v. Taylor*[22] that "clearly established Federal law refers to the holdings, as opposed to the dicta," of Supreme Court decisions "as of the time of the relevant state-court decision."[23] Turning to its precedents, *Estelle* and *Flynn*, the Court distilled a general principle: that "inherent[] prejudic[e]" is the touchstone for whether courtroom practices violate a defendant's fair trial rights.[24] The Court proceeded, however, to deem the *Estelle* and *Flynn* holdings inapposite. Drawing a distinction between state and private actors, Justice Thomas noted that the Court had thus far "never applied that test to spectators' conduct."[25] Justice Thomas thus contended that the effect of the Studer family's conduct on Musladin's right to a fair trial was "an open question in our jurisprudence."[26] Given the "lack of holdings" on this issue, the Court concluded that the state court's decision was neither contrary to, nor an unreasonable application of, clearly established law.[27]

Justice Souter concurred in the judgment, but challenged the majority's characterization of the governing law.[28] He interpreted *Estelle* and *Flynn* as piecing together a "clearly established" principle — albeit

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17 Musladin v. Lamarque, 427 F.3d 653, 661 (9th Cir. 2005). Judge Thompson dissented.

18 *Id.* at 652 (internal quotation marks omitted). The court noted that its own decision in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), had "persuasive weight" in its determination of what constitutes "clearly established federal law." *Musladin*, 427 F.3d at 656–57.

19 Musladin v. Lamarque, 427 F.3d 647, 647 (9th Cir. 2005). Seven judges dissented from the denial of rehearing en banc.

20 *Musladin*, 127 S. Ct. at 654.

21 Justice Thomas was joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, and Alito.

22 529 U.S. 362 (2000).

23 *Musladin*, 127 S. Ct. at 653 (quoting *Williams*, 529 U.S. at 412).

24 *Id.* at 651.

25 *Id.* at 654. Justice Thomas also observed that the "inherent prejudice" test entailed "asking whether the practices further an essential *state* interest." *Id.* He thus asserted that *Estelle* and *Flynn* must be limited to *state-sponsored* courtroom conduct. *Id.*

26 *Id.* at 653. The Court, however, acknowledged that it had previously considered cases involving private actors in which "the proceedings were a sham or were mob dominated." *Id.* at 653 n.2 (citing Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915)).

27 *Id.* at 654.

28 *See id.* at 657 (Souter, J., concurring in the judgment).

a general one[29] — that courtroom practices must not present "'"an unacceptable risk . . . of impermissible factors coming into play"' in the jury's consideration of the case."[30] There was "no serious question," Justice Souter maintained, that the standard extended to spectators generally and to Studer's family members specifically.[31] Nonetheless, Justice Souter concluded that the risk of improper influence posed by the buttons had not clearly risen to an "unacceptable" level.[32] Additionally, he raised the possibility that the spectators might have a valid First Amendment interest in wearing the buttons.[33]

Justice Stevens filed another concurrence, taking issue with the majority's focus on holdings — to the exclusion of dicta — in construing "clearly established law."[34] In his view, the statement from *Williams v. Taylor* defining "clearly established law" as Supreme Court "holdings, as opposed to . . . dicta," was a mere "dictum about dicta."[35] Justice Stevens expressed concern that under a holdings-based standard of review, state courts could discount "explanatory language . . . intended to provide guidance to lawyers and judges in future cases," simply by characterizing it as not "strictly necessary as an explanation of the Court's specific holding."[36] He nonetheless joined in the judgment for "essentially the same reasons as Justice Souter," with the caveat that he could foresee no First Amendment protection for spectator speech in a courtroom.[37]

Justice Kennedy also concurred in the judgment. He identified a "fundamental principle of due process" that "[t]rials must be free from a coercive or intimidating atmosphere" to safeguard fair trial rights; this was a "rule settled by [Supreme Court] cases" over the past century.[38] In Justice Kennedy's view, habeas relief was theoretically available under this general principle in both state- and private-actor contexts; however, the atmosphere in Musladin's trial did not rise to a

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[29] Based on his reading of the cases, Justice Souter found that "[t]he Court's intent to adopt a standard at this general and comprehensive level could not be much clearer." *Id.*

[30] *Id.* (omission in original) (quoting Holbrook v. Flynn, 475 U.S. 560, 570 (1986)).

[31] *Id.*; *see also id.* ("There is no suggestion in the opinions . . . that it should matter whether the State or an individual may be to blame for some objectionable sight . . . .").

[32] *Id.* at 658.

[33] *Id.* Justice Souter declined to elaborate on this possibility, however, noting "the absence of developed argument" on the issue. *Id.*

[34] *See id.* at 655 (Stevens, J., concurring in the judgment).

[35] *Id.* (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)) (internal quotation marks omitted); *see also id.* (referring to the "holdings, as opposed to the dicta" statement as "an incorrect interpretation of the statute's text").

[36] *Id.* (citing Crawford v. Washington, 541 U.S. 36 (2004); Miranda v. Arizona, 384 U.S. 436 (1966); and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), as examples of cases containing such explanatory language).

[37] *Id.* at 656.

[38] *Id.* (Kennedy, J., concurring in the judgment) (describing the rule as the "square holding" of Moore v. Dempsey, 261 U.S. 86, 91 (1923)).

sufficiently coercive or intimidating level to warrant such relief.[39] Justice Kennedy observed that any "general" or "preventative" rule governing the issue of "buttons proclaiming a message relevant to the case" had not been clearly established by Supreme Court cases to date.[40] Musladin's case thus called for a "new rule" to be "explored in the court system" as a basis for future grants of relief.[41]

Despite the fissures evident in the Court's four opinions, the decision ostensibly did little more than reaffirm an interpretation of the habeas review standard repeated thrice before.[42] The majority skirted the substantive question of whether the buttons violated Musladin's right to a fair trial, narrowing its focus to a technical discussion of the relevant AEDPA provision. This apparent straightforwardness, however, belies an unspoken shift in the Court's implementation of § 2254(d)(1). The Court reached only the first prong of a *two*-pronged inquiry;[43] although the Court asked whether any clearly established law governed the Studer family's conduct, it failed to ask whether the state court unreasonably applied the relevant law.[44] To be sure, the Court often has pragmatic or strategic reasons to stop short of addressing all the issues presented.[45] Yet *Musladin* is an instance not of the minimalist approach of "saying no more than necessary,"[46] but rather of truncating a standard of review without announcement or justification. The majority properly upheld the state court's decision, but reached the right result under the wrong prong. Rather than basing its deference on the reasonableness of the state court's application of the

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[39] *See id.* at 657.

[40] *Id.*

[41] *Id.*

[42] *See* Yarborough v. Alvarado, 541 U.S. 652, 660–61 (2004) (citing Williams v. Taylor, 529 U.S. 362, 412 (2000), for the proposition that "clearly established law" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions"); Lockyer v. Andrade, 538 U.S. 63, 71 (2003) (same); Tyler v. Cain, 533 U.S. 656, 664 (2001) (same).

[43] Notwithstanding some variations, the prevailing norm is to describe "clearly established law" as the first prong or step of § 2254(d)(1), and both "contrary to" and "unreasonable application of" as the second. *See, e.g.*, *Williams*, 529 U.S. at 379–84 (opinion of Stevens, J.) (using subheadings "[t]he 'clearly established law' requirement" and "[t]he 'contrary to, or an unreasonable application of,' requirement"); Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 679 (2003).

[44] A state court decision is "contrary to" clearly established law on a mixed question of law and fact if it is "diametrically different" from the precedent or "opposite in character or nature." *See Williams*, 529 U.S. at 405 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976)). *Musladin*, however, does not concern whether the California decision was diametrically different or opposed to *Estelle* and *Flynn*, but rather the *applicability* of those cases.

[45] *See generally* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996).

[46] *Id.* at 6.

law, the Court rested on reasoning in tension with its prior precedents, and AEDPA's statutory text and underlying policies.

In *Williams v. Taylor*, the Supreme Court instructed that the "clearly established law" inquiry should be a "threshold question."[47] The Court thus clarified that the question should be the first one addressed; lower courts[48] and commentators,[49] however, divided over whether the question should also be dispositive. But until *Musladin*, this was effectively a non-issue: the "threshold" appeared easily met. Indeed, none of the Court's leading cases on § 2254(d)(1) turned on the lack of clearly established law.[50]

By contrast, "clearly established law" was both the beginning and end of the *Musladin* analysis. The Court's reasoning under this prong diverged from its prior approach in several ways. First, the Court used greater *specificity* in defining the relevant "clearly established law" for purposes of § 2254(d)(1). Notably, the majority pinpointed the pertinent legal principle[51]: that "inherent prejudice" is the gauge for whether courtroom practices amount to a deprivation of a defendant's fair trial rights.[52] But Justice Thomas swiftly narrowed this principle, stressing that *Estelle* and *Flynn* dealt only with *state-sponsored* practices.[53] The Court offered no explanation for the merits of this distinction — namely, for why it was "unreasonable" to extend the principle to the private-actor context. In stating simply that private actors lie

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47 *Williams*, 529 U.S. at 390.

48 *See* Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 788–816 (2005) (citing examples of courts taking dispositive and non-dispositive approaches to the "clearly established law" prong). Several lower courts addressed clearly established law at the beginning of their analyses but proceeded to consider issues about the scope of precedent under the second prong. *See, e.g.*, Lopez v. Wilson, 355 F.3d 931, 939–41 (6th Cir. 2004), *aff'd en banc*, 426 F.3d 339, 357 (6th Cir. 2005); Gilchrist v. O'Keefe, 260 F.3d 87, 97 (2d Cir. 2001); Jones v. Stinson, 229 F.3d 112, 119–20 (2d Cir. 2000).

49 *Compare* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 866–67 (1998) ("When . . . the rule governing the situation at issue was *not* established and had to be extrapolated by applying clearly established law governing *different* situations — the federal court must ascertain whether the state 'decision . . . involved an unreasonable application of [the] clearly established Federal law.'" (alteration and second omission in original)), *with* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 949 (1998) ("If there were no clearly established law governing the situation, then nothing the state court did could possibly be an unreasonable application of nonexistent law.").

50 *See* Yarborough v. Alvarado, 541 U.S. 652, 660 (2004); Lockyer v. Andrade, 538 U.S. 63, 72 (2003); *Williams*, 529 U.S. at 391.

51 Even the warden conceded that *Estelle* and *Flynn* "established a *general principle* that courtroom practices sometimes might be so inherently prejudicial as to violate the defendant's right to a fair trial," but argued that neither case was "factually similar" to Musladin's. Brief for Petitioner at 10, *Musladin*, 127 S. Ct. 649 (No. 05-785), 2006 WL 1746418 (emphasis added).

52 *Musladin*, 127 S. Ct. at 651.

53 *Id.* at 654.

outside the precedents' holdings, the Court ignored the inconsistencies riddling how broadly or narrowly precedents are construed.[54]

The Court's fine line-drawing between state and private actors lays bare this malleability. Prior to *Musladin*, the AEDPA line of cases suggested that the Court would not find a lack of clearly established law where it could discern a legal principle in Supreme Court precedent — even if that principle was general, or even manifestly unclear. In *Yarborough v. Alvarado*,[55] the Court discerned a clearly established "custody test" from a "matrix" of decisions spanning several decades.[56] In *Lockyer v. Andrade*,[57] the Court similarly gleaned a "governing legal principle" of gross disproportionality, albeit one whose "precise contours . . . [were] unclear and applicable only in the 'exceedingly rare' and 'extreme' case."[58] Moreover, the *Andrade* Court unearthed this "clearly established" principle from a "thicket" of factually distinct Eighth Amendment precedents.[59] The *Musladin* Court, however, declined even to delve into the thicket.[60] Under the Court's approach in its precedents, the "inherent prejudice" test should have satisfied the definition of "clearly established law," notwithstanding the test's lack of "precise contours" in the private spectator context.[61]

Second, the Court placed unprecedented *weight* on the "clearly established law" prong. Distinguishing the *Estelle* and *Flynn* holdings as inapplicable, the Court abruptly concluded that "[g]iven the lack of holdings from this Court regarding the potentially prejudicial effect of

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[54] *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003 (1994) (noting that "no universal agreement exists as to how to measure the scope of judicial holdings" or "how to distinguish between holdings and dicta"); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987) ("In order to assess what is a precedent for what, we must engage in some determination of the relevant similarities between . . . two events. In turn, we must extract this determination from some other organizing standard specifying which similarities are important and which we can safely ignore.").

[55] 541 U.S. 652.

[56] *Id.* at 664–65.

[57] 538 U.S. 63 (2003).

[58] *Id.* at 72–73 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

[59] *Id.*

[60] Although Justice Kennedy took pains to emphasize that "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied," *Musladin*, 127 S. Ct. at 656 (Kennedy, J., concurring in the judgment) (citing Wright v. West, 505 U.S. 277, 308–09 (1992) (Kennedy, J., concurring in the judgment)), he proceeded to frame the issue in a highly fact-specific manner. Indeed, he found no case governing "whether . . . *buttons proclaiming a message relevant to the case* ought to be prohibited." *Id.* at 657 (emphasis added).

[61] The *Estelle* Court never mentioned "essential state policy" in describing the "inherent prejudice" rule, but rather in conceding an *exception* to that rule. Estelle v. Williams, 425 U.S. 501, 505–06 (1976) (discussing the inherent prejudice principle, acknowledging that the practices of shackling and gagging described in *Illinois v. Allen*, 397 U.S. 337 (1970), apparently violate that principle, and distinguishing *Allen* as a "state policy" exception).

spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'"[62] In effect, the Court indicated that further analysis under the "unreasonable application" prong was unnecessary once it answered the "clearly established law" prong in the negative. The lack of a sufficiently encompassing Supreme Court holding proved dispositive.[63]

The Court would have reached the same result had it adhered to the two-pronged standard of review as previously implemented. After explaining that clearly established law comprises "holdings, as opposed to the dicta," of Supreme Court precedent,[64] and that the clearly established "inherent prejudice" test comes from *Estelle* and *Flynn*,[65] the Court should have moved to the second prong: specifically, the reasonableness of application. The pivotal issue in the case — the applicability of the "inherent prejudice" test to private spectators — belonged squarely in the realm of "unreasonable application" analysis. Under the second prong, the Court should have acknowledged that the test provided only broad due process principles governing courtroom conduct generally, and therefore that the state court's finding that the buttons were merely "a sign of . . . the normal grief occasioned by the loss of [a] family member"[66] was a reasonable application of that guidance. Placing dispositive weight on the "clearly established law" prong was thus unwarranted and unnecessary to bar the Ninth Circuit from overturning the state court's decision.

If the Court's implementation of the § 2254(d)(1) standard signals a shift in direction, the trajectory deviates from the structure and policies of AEDPA. As an initial matter, construing the first prong of a two-pronged provision as the end of the review is strikingly at odds with a textualist reading of § 2254(d)(1).[67] The elevation of the "clearly established law" clause into a dispositive test also diverges from the Court's pronouncement in *Williams v. Taylor* that "[w]e must, . . . if possible, give meaning to *every clause* of the statute" to avoid

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[62] *Musladin*, 127 S. Ct. at 654 (alterations in original) (quoting 28 U.S.C. § 2254(d)(1) (2000)).

[63] To be sure, the "clearly established law" prong might necessarily be dispositive in extreme cases in which there is no relevant law or only a principle so manifestly broad — for example, due process — that its relevance is highly attenuated. It is clear, however, that under the narrow view of "clearly established law" set forth in *Musladin*, the first prong would prove dispositive in an increasing number of cases.

[64] *Musladin*, 127 S. Ct. at 653 (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)).

[65] *See id.* at 653–54.

[66] *Id.* at 652 (alteration in original) (internal quotation mark omitted).

[67] In *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), Justice Thomas stated in his opinion for the Court that "[w]hen the words of a statute are unambiguous . . . 'judicial inquiry is complete.'" *Id.* at 254 (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)). *See generally* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

"sap[ping] [a] . . . clause of any meaning."[68] While the *Williams* Court aimed its criticism at an interpretation of "the 'contrary to' clause . . . that ensures that the 'unreasonable application' clause will have no independent meaning,"[69] it plainly viewed "clearly established law" as a separate clause with its own independent function:

> Throughout this discussion the *meaning of the phrase "clearly established Federal law*, as determined by the Supreme Court of the United States" has been put to the side. That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.[70]

The *Musladin* Court, however, collapsed the "clearly established" and "unreasonable application" clauses into one: "*Given the lack of holdings* . . . it cannot be said that the state court '*unreasonabl[y] appli[ed]* clearly established Federal law.'"[71] In short, the Court failed to heed the spirit of its own warning.

In fact, the Court risked sapping the very meaning it previously ascribed to the "unreasonable application" clause. In *Williams*, the Court explained that "unreasonable application" might connote three scenarios. A court could: identify the correct rule but unreasonably apply it to the facts; unreasonably extend a principle from precedent to a novel context; or unreasonably decline to extend a principle to a novel context where it ought to apply.[72] In *Musladin*, however, the Court stopped short of analyzing whether the California court's refusal to extend the "inherent prejudice" principle to the private-actor context was unreasonable. Placing dispositive weight on the "clearly established law" prong thus swallowed up this third category.

Indeed, "unreasonable application" review entails an inquiry quite distinct from ensuring that a rule is clearly established by Supreme Court precedent.[73] The inquiry involves effectively calibrating a sliding scale of objective reasonableness upon evaluating whether a governing rule is specific, general, or somewhere in between.[74] "The more general the rule, the more leeway courts have in reaching outcomes in

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[68] *Williams*, 529 U.S. at 407 (emphasis added). The Court noted that questions concerning the application of federal law should be analyzed under the "unreasonable application" rather than "contrary to" clause, lest "the 'unreasonable application' clause become[] a nullity." *Id.*

[69] *Id.*

[70] *Id.* at 412.

[71] *Musladin*, 127 S. Ct. at 654 (alterations in original) (emphases added).

[72] *Williams*, 529 U.S. at 407.

[73] *See* Scheidegger, *supra* note 48, at 949 ("The 'unreasonable application' branch was purposely included and vigorously debated. It must have a meaning.").

[74] *See* Yarborough v. Alvarado, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity."); *see also* Wade v. Herbert, 391 F.3d 135, 145 (2d Cir. 2004) ("Where the Supreme Court has spoken only in general terms . . . various outcomes may be reasonable applications of the Court's precedents.").

case-by-case determinations,"[75] and the farther off the mark the state court must be to warrant reversal.[76] In preserving this independent function of the second prong, a non-dispositive reading of the "clearly established law" clause hews more closely to the text of § 2254(d)(1).

Relatedly, the Court's apparent move toward a heightened "clearly established law" threshold may come at the expense of greater guidance for lower courts.[77] "Unreasonable application" review requires judges to provide more detailed analysis than a mere recitation of the facts of factually similar or dissimilar Supreme Court precedents.[78] Such elaboration not only disciplines the Court to further explicate its ultimate conclusion, but also provides valuable guidelines as to the bounds of constitutional law.[79] When the inquiry stops at the first prong, therefore, the Court is less likely to grapple with, and elaborate on, the merits of the state court's extension or non-extension of the law in light of underlying constitutional policies — namely, what the law should say with respect to the given circumstances. If habeas courts are unlikely even to broach these second-prong questions, governing law in criminal cases will largely be made on direct review, with very little being explored — much less made — in habeas jurisprudence.

Furthermore, when the Court uses greater specificity in its search for "clearly established" precedents, highly fact-specific rules will be more readily deemed "clearly established law" for § 2254(d)(1) purposes than broad principles or standards. These narrower precedents

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[75] *Alvarado*, 541 U.S. at 664; *see also id.* ("[T]he range of reasonable judgment can depend in part on the nature of the relevant rule.").

[76] *See, e.g.*, Mitchell v. Esparza, 540 U.S. 12, 17 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."); Walker v. Litscher, 421 F.3d 549, 557 (7th Cir. 2005) ("Confrontation Clause standards are very general, making it difficult to call a state court ruling in this area 'objectively unreasonable.'"); Serrano v. Fischer, 412 F.3d 292, 300 (2d Cir. 2005) ("[W]here the governing rule remains . . . roughly defined, we are less likely to conclude that a given interpretation or application of Supreme Court law is 'contrary to' or an objectively 'unreasonable application of' Supreme Court precedent for purposes of § 2254(d)(1).").

[77] State courts avoid egregious constitutional violations in part because they know that they will receive deference so long as they follow clear mandates from the Supreme Court. *See* Teague v. Lane, 489 U.S. 288, 306 (1989) (plurality opinion) ("[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)) (internal quotation mark omitted)).

[78] *See* Berry, *supra* note 47, at 805 ("The range of factual situations to which a rule may apply in each context is a question about the scope of the precedent. These questions cannot be answered at a threshold or abstract level; they must be addressed under the contrary to or unreasonable application prongs of § 2254(d)(1).").

[79] *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 398 (2000) (opinion of Stevens, J.) (deeming the state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984), unreasonable because it failed to "accord appropriate weight to the body of mitigation evidence available" in assessing prejudice, and elaborating on specific pieces of mitigating evidence that might have "influenced the jury's appraisal of Williams's moral culpability").

will directly support a more limited range of lower-court decisions. A habeas regime in which primarily fact-bound holdings constitute the "clearly established law" will increasingly resemble a fact lottery: if cases fit into particular fact sets, state courts will be heavily bound; if cases fall beyond those narrow areas, state courts will enjoy greater latitude to apply standards based on judges' intuitions. The regime of broader, more generalized governing law, conversely, has constrained this arbitrary element and ensured greater uniformity in the degree and extent of state court autonomy.

The *Musladin* Court's abridged standard of review thus may hold significant — though subtle — ramifications, both doctrinally and practically. Even if the more stringent AEDPA review standard signaled by the majority opinion does not materialize in later habeas cases, the Court injected unnecessary confusion into the § 2254(d)(1) inquiry. Indeed, § 2254(d)(1) was designed to simplify and streamline the tangled morass of habeas claims. Congress sought to "prevent 'retrials' on federal habeas"[80] and "restrict the power of the lower federal courts to overturn fully reviewed state court criminal convictions."[81] With these goals in sight, however, the *Musladin* Court advanced a stricter view of what constitutes "clearly established law" and simultaneously placed inordinate emphasis on that determination. Although *Musladin* merely rearticulated prior statements about "clearly established law" comprising "holdings, as opposed to . . . dicta," the Court's truncated implementation of the AEDPA review standard threatens the tenuous relationship between federal and state courts.

B. Armed Career Criminal Act

Definition of "Violent Felony." — The Armed Career Criminal Act of 1984[1] (ACCA) imposes a mandatory minimum sentence of fifteen years for federal firearm offenders who hold three prior convictions that qualify as "serious drug offense[s]" or "violent felon[ies]."[2] The Act defines violent felonies to include burglary, arson, extortion, felonies "involv[ing] use of explosives," and a residual category of felonies "otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another."[3] Federal courts have interpreted the residual clause broadly, holding that the ACCA covers a panoply of fel-

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[80] *Id.* at 386.

[81] Musladin v. Lamarque, 427 F.3d 647, 647 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc).

[1] Pub. L. No. 98-473, tit. II, ch. XVIII, 98 Stat. 2185, 2185 (codified as amended at 18 U.S.C. § 924(e) (2000 & Supp. IV 2004)).

[2] 18 U.S.C. § 924(e)(1).

[3] *Id.* § 924(e)(2)(B)(ii).