INTRODUCTION AND TIPS
April 14, 2020

Dear Student,

Welcome to the kickoff of the 2020 Harvard Law Review writing competition! The attached tips packet is designed to provide some specific guidance about approaching the case comment and subcite portions of the competition. Together with the two tips presentations, these materials should give you a complete picture of the writing competition. Please note that the sample competition submissions included in this packet are merely representative and are by no means definitive examples.

The following materials are included in this packet:

I. Writing Competition Honor Code

II. Writing Competition Logistics

III. Subcite Information
   A. An overview of the competition subcite and a list of typical subcite errors
   B. Two practice subcite exercises
   C. An excerpt of the answer key and entries from a previous competition
   D. Answer keys to the two practice subcite exercises

IV. Case Comment Information
   A. An overview of the competition case comment and tips for writing a successful one
   B. Sample theses from various published Law Review student case comments
   C. Two case comments submitted in a previous competition by Law Review editors
   D. The case comment published in the Law Review addressing the same case discussed in the sample competition case comments, Carey v. Musladin

In addition, we recommend you review the sample materials, which include full sample case comments and sample completed subcite materials, at harvardlawreview.org/about.

We hope that you find this information helpful. If you have any questions at all, please feel free to get in touch with Shaiba Rather (outreach@harvardlawreview.org), or call the Law Review at (617) 495-7889.

Sincerely yours,

Michaeljit Sandhu  
President, Vol. 134

Bryna Godar  
Vice President  
Treasurer, Vol. 134

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THE WRITING COMPETITION HONOR CODE
(The competition packet will contain more details.)

1. Your entry must reflect your work only. **You may not consult or collaborate with anyone in any way regarding any part of the writing competition.** The Law Review takes very seriously allegations of student dishonesty. Inappropriate conduct will be reported to the Administrative Board of the Law School, which will consider the issue a matter of academic misconduct. Students have been expelled for misconduct on the competition. Information regarding improprieties should be reported immediately by calling the Law Review.

2. All entries are graded anonymously under a doubly anonymized system. We have taken every precaution to ensure that no grader will learn your identity. **Do not put your name or other identifying information on any of the entry materials, except where you are specifically requested to do so.**

3. **Do not distribute or share competition materials with anyone.** Each packet is individualized and can be traced back to you. If the Law Review determines that competition materials have been shared in any way, we will consider it a matter of academic dishonesty. Your entry will be disqualified and your conduct referred to the Law School. Academic misconduct will affect your eligibility for admission to the bar.

4. You may **NOT** conduct outside research for any part of the competition. **Use of any materials outside of the packet — including Lexis, Westlaw, or blog postings — is strictly prohibited.** Thus, you may not do any outside research of any kind, including general background reading, and you may not refer to any other materials that you own or to which you may have access. This includes your first-year course texts and notes. Citing or referring to authorities outside the competition packet is **strictly prohibited** and will result in disqualification from the competition.

5. You may **NOT** use the online Bluebook website or cite to Bluebook rules that are not included in the competition packet.
WRITING COMPETITION LOGISTICS

Registration for the 2020 Harvard Law Review Writing Competition will open on April 23 and will close on May 12 at 11:59 p.m. EST. We will post the registration link on our website and email it to HLS students who are eligible to take the competition.

The 2020 writing competition will begin on Saturday, May 16. You will receive an email with a link to download your competition packet on Saturday, May 16, between 10 a.m. EST and 10:30 a.m. EST. You will be able to download the competition from the time you receive the download email until 12 p.m. EST on May 16.

Your entry must be uploaded on Saturday, May 23, between 10 a.m. and 12 p.m. EST. The email you receive on May 16 will include information on how to upload the competition and an upload link to use at the close of the competition. The upload window will only be open from 10 a.m. to 12 p.m. EST, so please be sure to upload it during that window. Any late submissions will be assessed severe penalties.

If you have an accommodation, we will provide you individualized information regarding download and upload windows.

If you would prefer to work on portions of the competition in paper form but will find the cost of printing to be a hardship, the Law Review will reimburse costs incurred in printing portions of the 2020 competition up to $30. You are encouraged to complete the online form you will receive in your competition materials and submit it to the Harvard Law Review by Friday, May 29. To ensure confidentiality, this reimbursement information will be processed separately from the competition; only permanent Law Review finance staff will see the form and your reimbursement check.

If you are still living in HLS housing amid COVID-19, you may request a housing extension to allow you to stay in your room through the end of the competition (with a move-out date of Saturday, May 25). You can request an extension online at https://harvard.az1.qualtrics.com/jfe/form/SV_cZnO9u1QY6MyjOJ. The deadline to apply is Friday, May 3, at 5 p.m. EST. If you have any questions, please contact the Housing Office at housing@law.harvard.edu or (617) 495-1880.

All participants will be notified of the competition results by late July, and Orientation for new editors will take place from August 3 to August 6.

If you have any questions at all, please do not hesitate to reach out to Shaiba Rather, Vice President/Coordinating & Outreach, at outreach@harvardlawreview.org.
**The Subcite Portion of the Competition**

*(40% of total competition score)*

The basic task of a subcite is to identify and correct both technical and substantive errors in a written piece. As part of the competition, you will receive a portion of text suffering from such errors. You will create a series of comments to the author of the piece, suggesting corrections.

**During the competition, checking the source materials will be essential.** Finding valid and accurately characterized support for each assertion is a major part of a subcite.

In addition to editing for general substantive and technical quality, you will also be asked to apply a small subset of basic Bluebook rules and internal Law Review style guidelines. These will all be provided in the competition materials. Keep in mind, however, that the purpose of the subcite is to measure overall editing quality and attention to detail, not mastery of the Bluebook. **You are not responsible for Bluebook rules that are not included in the actual competition materials.**

This packet contains a non-exhaustive list of the types of errors that may appear in the subcite and the point values awarded for correcting these errors. **Please remember that to receive credit for a correction you must do all of the following:**

1) identify an error,
2) briefly *explain why* it is an error, and
3) offer a *correction* of the error.

An effective suggested correction should 1) identify the error, 2) explain by pointing to a particular quotation from the text or a particular style or citation rule, and 3) offer a suggested correction in polite language, set off by angle brackets (< . . . >). The *exact text* to be replaced should be highlighted. A heading, given in ALL CAPS, should denote the type of error.

For example, if a cited source reads:

“In 1920, the Court decided a key case.”

The following corrections would be appropriate:

A key development in **this** areas came in **1921**. “The Court decided a key case.”

- **AGREEMENT:** The noun is plural. Please consider <these>.
- **SUBSTANTIVE:** The case discussed was decided in 1920. Please consider <1920>.
- **QUOTATION:** The first word is not capitalized in the source. Please consider <“[T]he”>.
GENERAL SUBCITE TIPS

• Before doing anything else, save a clean copy of the subcite file in case anything happens to the file you are working in.

• Be sure to regularly save your work in Adobe to avoid losing corrections.

• Carefully read the instructions for how to leave comments in Adobe. Be sure to use the highlighting tool, NOT the sticky note tool. For nested errors, be sure to highlight the smaller correction first, then highlight over it for the longer correction.

• Review the list of typical subcite errors in this packet. Remember that some of the errors will be substantive; to find them, you will need to check that the statement in the text is supported by the source it cites.

• There are approximately five to fifteen errors per page.

• You will not need to know any Bluebook rules beyond what is included in the competition packet itself. Bluebook rules and internal style guidelines included in the competition may be different from those that have appeared in previous years.

• Make sure that you suggest corrections for any errors you identify, even for simple misspellings. Comments that don’t include a correction will only receive partial credit. To avoid any confusion about quotation marks, set off your suggested fix with <angle brackets>.

• You must also label the general error type before identifying the specific error.

• Highlight the exact text to be replaced. For example, if a punctuation mark or accompanying word is boxed, it should also be included in your <suggested correction>.

• We encourage you to identify only clear errors rather than points of style. If you find yourself consistently flagging errors without being certain whether the error was “clear,” you may be over-editing. Excessive editing may be penalized, but only in egregious cases.

• Please use a polite tone in your comments. Applicants who adopt an actively rude or offensive tone will be penalized. A small number of additional points are possible for thorough and polite comments.

• In the subcite text you are given, text that would be in SMALL CAPS in print (such as journal names and book titles) will be bold and text that would be in italics in print (such as article titles and textual references to case names) will be underlined. Your suggested corrections should follow the adjusted typeface.
**TYPICAL SUBCITE ERRORS AND POINT VALUES**

*Note: This list is non-exhaustive.*

### 1-POINT ERRORS

1. SPELLING
2. WORD CHOICE
3. COLLOQUIALISM (e.g., “dude,” “they suck”)
4. SINGULAR/PLURAL AGREEMENT
5. THAT/WHICH
6. REDUNDANCY (simple)
7. PARALLELISM
8. PUNCTUATION (incorrect or missing)
9. QUOTATION
10. SPLIT INFINITIVE
11. TYPEFACE
12. CAPITALIZATION (incorrect or missing)
13. SPACING (missing space or too many spaces)
14. CROSS-REFERENCE (e.g., incorrect use of *supra* or *infra*)
15. CITATION FORM
16. BLUEBOOK (simple Bluebook form error; provide a reference to the rule number)
17. SUBSTANCE (simple error, e.g., wrong court, judge, disposition, year)
18. SENTENCE FRAGMENT/RUN-ON
19. VERB TENSE
20. ABBREVIATION/ACRONYM

### 2-POINT ERRORS

1. LOGIC (simple error, e.g., incorrect use of words such as *additionally, however, furthermore, nevertheless, thus*)
2. REDUNDANCY
3. SUBSTANCE
4. HEADING (e.g., incorrect or misplaced section headings)
5. SUPPORT (statement lacks support or quotation needs citation; provide support from included materials)
6. DANGLING MODIFIER
7. PINCITE (provide proper page number from supporting material)
8. BLUEBOOK (complex Bluebook form error; provide a reference to the rule number)
9. CHARACTERIZATION (misstatement of source content)
10. SIGNAL ([no signal] if quotation or direct support; see if inferential step needed between source and statement; *see, e.g.*, if one of several directly supporting authorities; *cf.* if support by analogy; *but see* if directly opposing source; *but cf.* if opposing analogy)

### 3- AND 4-POINT ERRORS

1. SENTENCE PLACEMENT
2. PARAGRAPH PLACEMENT
3. (Other structural error)
4. SUBSTANCE (difficult substantive error, e.g., subtle misconstruing of source or case; grossly conclusory claim)
5. LOGIC (subtle error, e.g., conclusion does not follow from premises)
6. REDUNDANCY (subtle, e.g., virtually consecutive sentences saying virtually the same thing)
7. CHARACTERIZATION (subtle misconstruing of source content)
THE SUBCITE EXERCISE

To introduce the competition subcite, we have provided two short excerpts for practice. These excerpts have been taken (with only minor alterations) from previous writing competitions.

Please note that in previous years, competition takers had to draw boxes around each comment and draw a line connecting it to the relevant text that needed to be changed. Since the competition will be digital this year, competition takers will not have to box their corrections. Instead, competition takers will have to highlight the text in need of correction on Adobe and use Adobe’s comment feature to make their suggested correction. We will be providing in-depth instructions on how to make corrections on Adobe in the competition packet itself and posting how-to videos and instructions online prior to the competition.

Before we begin, an important warning: This exercise has been designed as a learning experience only. Our expectation is that you will not be able to identify, explain, and correct every error. (And even in the real competition, no one — literally no one — has ever found all the errors in the subcite.)

In editing the excerpt, please refer to the list of errors and sample rules provided in this packet. We have also provided the source materials relevant to this excerpt.

A special note on typeface errors: Here and throughout the competition subcite, bold typeface is used where large and small caps would appear in the published version of the piece (for instance, in citations of journal titles, book authors, and book titles) and underlining is used where italics would appear in the published version (for instance, in citations of article titles or for case names in the body text). You should mark bold typeface as an error only if you believe that large and small caps would not be appropriate, and you should mark underlining as an error only if you believe that italics would not be appropriate.
STRUCTURE AND USE OF CITATIONS

Provide citations to authorities so that readers may identify and find those authorities for future research. Citations are made in citation sentences and clauses (rule 1.1) and are introduced by signals. Signals organize authorities and show how those authorities support or relate to a proposition given in the text (rule 1.2). Citation sentences and clauses may contain more than one signal. Order signals according to rule 1.3. Within each signal, arrange authorities according to rule 1.4. Parentheticals may be necessary to explain the relevance of a particular authority to the proposition given in the text (rule 1.5). Certain additional information, specific to that authority, may also be appended according to rule 1.6.

Citation Sentences and Clauses in Law Reviews

Citations may be made in one of two ways: in citation sentences or in citation clauses. In law review pieces, all citations appear in footnotes appended to the portions of the text to which they refer. For an explanation of citation sentences and clauses in practitioners’ documents, see Bluepages B2.

(a) Text. Citations to authorities that support (or contradict) a proposition made in the main text (as opposed to footnote text) are placed in footnotes. A footnote call number should appear at the end of a textual sentence if the cited authority supports (or contradicts) the entire sentence. In contrast, a call number should appear within the sentence next to the portion it supports if the cited authority supports (or contradicts) only that part of the sentence. The call number comes after any punctuation mark—such as a comma, semicolon, or period—with the exception of a dash or a colon. In addition to citation to authorities, a footnote may include textual sentences that are related to or tangential to the main text to which the footnote is appended.
1.2 Introductory Signals

(a) Signals that indicate support.

[no signal] Cited authority (i) directly states the proposition, (ii) identifies the source of a quotation, or (iii) identifies an authority referred to in the text. Use “[no signal],” for example, when directly quoting an authority or when restating numerical data from an authority.

E.g., Cited authority states the proposition; other authorities also state the proposition, but citation to them would not be helpful or is not necessary. “E.g.” may also be used in combination with other signals, preceded by a comma:

See, e.g.,

But see, e.g.,

Accord “Accord” is commonly used when two or more sources state or clearly support the proposition, but the text quotes or refers to only one; the other sources are then introduced by “accord.” Similarly, the law of one jurisdiction may be cited as being in accord with the law of another.

See Cited authority clearly supports the proposition. “See” is used instead of “[no signal]” when the proposition is not directly stated by the cited authority but obviously follows from it; there is an inferential step between the authority cited and the proposition it supports.

See also Cited authority constitutes additional source material that supports the proposition. “See also” is commonly used to cite an authority supporting a proposition when authorities that state or directly support the proposition already have been cited or discussed. The use of a parenthetical explanation of the source’s relevance (rule 1.5) following a citation introduced by “see also” is encouraged.
Always use the title of the periodical that appears on the title page of the issue you are citing, even if the title of the periodical has changed over time.

To abbreviate English language periodical titles, use Tables T13.1, T13.2, and T10. Common institutional names (e.g., law schools, professional organizations, and geographic units commonly found in institutional names) are listed in Table T13.1. If an institutional name is not listed in Table T13.1, individual words should be abbreviated using Tables T13.1, T13.2, and T10. If a word in an institutional name is not listed in these tables, use the full word in the abbreviated periodical title. Other words in the periodical title should be abbreviated using Tables T13.1, T13.2, and T10. If a word is listed in neither Table T13.2 nor Table T10, use the full word in the abbreviated title.

T13 PERIODICALS

T13.2 Common Words

- Academ[ic, y]  
  - ACAD.
- Account[ant, ants, ing, ancy]  
  - ACCT.
- Administrat[ive, or, ion]  
  - ADMIN.
- Advertising  
  - ADVERT.
- Advoca[te, cy]  
  - ADVOC.
- Affairs  
  - AFF.
- Africa[n]  
  - AFR.
- Agricultur[e, al]  
  - AGRIC.
- Amendment  
  - AMEND.
- America[n, s]  
  - AM.
- Ancestry  
  - ANC.
- and  
  - &
- Annual  
  - ANN.
- Appellate  
  - APP.
- Arbitrat[ion, or, ors]  
  - ARB.
- Association  
  - ASS’N
- Attorney  
  - ATT’Y
- Bankruptcy  
  - BANKR.
- Bar  
  - B.
- Behavior[al]  
  - BEHAV.
- British  
  - BRIT.
- Bulletin  
  - BULL.
- Business  
  - BUS.
- Capital  
  - CAP.
- Catholic  
  - CATH.
- Cent[er, re]  
  - CTR.
- Central  
  - CENT.
- Children[‘s]  
  - CHILD.
- Chronicle  
  - CHRON.
- Circuit  
  - CIR.
- Civil  
  - CIV.
<table>
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<th>Periodicals</th>
<th>Abbreviations</th>
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<tr>
<td>Civil Liberty, ies</td>
<td>C.L.</td>
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<td>Civil Rights</td>
<td>C.R.</td>
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<tr>
<td>College</td>
<td>C.</td>
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<td>Commentary</td>
<td>COMMENT.</td>
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<td>Commerce, ial</td>
<td>COM.</td>
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<td>Communication[s]</td>
<td>COMM.</td>
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<td>Comparative</td>
<td>COMP.</td>
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<td>Conference</td>
<td>CONF.</td>
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<td>Congressional</td>
<td>CONG.</td>
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<td>Constitution[al]</td>
<td>CONST.</td>
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<td>Contemporary</td>
<td>CONTEMP.</td>
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<td>Contract[s]</td>
<td>CONT.</td>
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<td>Conveyancer</td>
<td>Conv.</td>
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<td>Corporation, ion</td>
<td>CORP.</td>
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<td>Cosmetic</td>
<td>COSM.</td>
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<td>Counsel[or, ors, or’s]</td>
<td>COUNS.</td>
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<td>Delinquency</td>
<td>DELINQ.</td>
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<td>Department</td>
<td>DEP’T</td>
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<td>Derecho</td>
<td>DER.</td>
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<td>Development[s]</td>
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<td>Digest</td>
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<td>Diplomacy</td>
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<td>Dispute</td>
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<td>Doctor</td>
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<td>Econom[ic, ics, ical, y]</td>
<td>Econ.</td>
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<td>Education[al]</td>
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<td>Employ[ee, ment]</td>
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<td>Entertainment</td>
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<td>Estate[s]</td>
<td>Est.</td>
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<td>Europe[an]</td>
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<td>Faculty</td>
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<td>Family</td>
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<td>Federation</td>
<td>Fed’N</td>
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<td>Finance, ial</td>
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<td>Fortnightly</td>
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<td>Foundation[s]</td>
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For a statement made prior to a custodial interrogation to be admissible, the familiar rule of Miranda v. Arizona is that a suspect must have “voluntarily, knowingly and intelligently” waived certain rights after receiving adequate warnings and before questioning began. These rights are the “right to remain silent” and the “right to the presence of an attorney, whether retained or appointed.” If a suspect indicates that he or she wishes to speak to an attorney or wishes not to be interrogated, the interrogation must stop. Responding to questions or volunteering information waives the right subsequently to consult a lawyer or an attorney before choosing whether to continue the interrogation.

... 


18 Id. at 444; see also Dickerson v. United States, 530 U.S. 428, 432 - 33 (2000) (summarizing Miranda).

19 See Miranda, 384 S. Ct. at 444. Miranda also requires police to warn the suspect “that any statement he does make may be used as evidence against him” Id.

21 Id. at 445.
DICKERSON v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT


In the wake of MIRANDA v. Arizona, 384 U.S. 436, in which the Court held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence, id., at 479, Congress enacted 18 U.S.C. §3501, which in essence makes the admissibility of such statements turn solely on whether they were made voluntarily. Petitioner, under indictment for bank robbery and related federal crimes, moved to suppress a statement he had made to the Federal Bureau of Investigation, on the ground he had not received “Miranda warnings” before being interrogated. The District Court granted his motion, and the Government took an interlocutory appeal. In reversing, the Fourth Circuit acknowledged that petitioner had not received Miranda warnings, but held that §3501 was satisfied because his statement was voluntary. It concluded that Miranda was not a constitutional holding, and that, therefore, Congress could by statute have the final say on the admissibility question.

Held: Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts. Pp. 432–444.

(a) Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress. Given §3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and its instruction for trial courts to consider the totality of the circumstances surrounding the giving of the confession, this Court agrees with the Fourth Circuit that Congress intended §3501 to overrule Miranda. The law is clear as to whether Congress has constitutional authority to do so. This Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure. Carlisle v. United States, 517 U.S. 416, 426. While Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, e.g., Palermo v. United States, 360 U.S. 315, 345, it may not supersede this Court's decisions interpreting and applying the Constitution, see, e.g., City of Boerne v. Flores, 521 U.S. 507, 517–521. That Miranda announced a constitutional rule is demonstrated, first and foremost, by the fact that both Miranda and two of its companion cases applied its rule to proceedings in state courts, and that the Court has consistently done

so ever since. See, e.g., Stansbury v. California, 511 U.S. 318 (per curiam). The Court does not hold supervisory power over the state courts, e.g., Smith v. Phillips, 465 U.S. 205, 221, as to which its authority is limited to enforcing the commands of the Constitution, e.g., McNish v. Virginia, 500 U.S. 416, 422. The conclusion that Miranda is constitutionally based is also supported by the fact that that case is replete with statements indicating that the majority thought it was announcing a constitutional rule, see, e.g., 384 U.S., at 446. Although Miranda invited legislative action to protect the constitutional right against coerced self-incrimination, it stated that any legislative alternative must be “at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.” Id., at 467.

A contrary conclusion is not required by the fact that the Court has subsequently made exceptions from the Miranda rule, see, e.g., New York v. Quarles, 467 U.S. 649. No constitutional rule is immutable, and the sort of refinements made by such cases are merely a normal part of constitutional law. Oregon v. Elstad, 470 U.S. 298, 306— in which the Court, in refusing to apply the traditional “fruit of the stem” doctrine developed in Fourth Amendment cases, stated that Miranda's exclusionary rule serves the Fifth Amendment and sweeps more broadly than that Amendment itself—does not prove that Miranda is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarmed interrogation under the Fifth. Finally, although the Court agrees with the court-appointed amicus curiae that there are more remedies available for abusive police conduct than there were when Miranda was decided—e. g., a suit under Bivens v. Six Unknown Fed. Narcotics Agents, 408 U.S. 388—it does not agree that such additional measures supplement §3501's protections sufficiently to create an adequate substitute for the Miranda warnings. Miranda requires procedures that will warn a suspect in custody of his right to remain silent and assure him that the exercise of that right will be honored, see, e.g., 384 U.S., at 467, while §3501 explicitly eschews a requirement of preinterrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession. Section 3501, therefore, cannot be sustained if Miranda is to remain the law. Pp. 432–443.

(b) This Court declines to overrule Miranda. Whether or not this Court would agree with Miranda's reasoning and its rule in the first instance, stare decisis weighs heavily against overruling it now. Even in constitutional cases, stare decisis carries such persuasive force that the Court has always required a departure from precedent to be supported by some special justification. E. g., United States v. Inter-
n national Business Machines Corp., 517 U. S. 843, 853. There is no such justification here. Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture. See Mitchell v. United States, 526 U. S. 314, 331-332. While the Court has overruled its precedents when subsequent cases have undermined their doctrinal underpinnings, that has not happened to Miranda. If anything, subsequent cases have reduced Miranda’s impact on legitimate law enforcement while reaffirming the decision’s core ruling. The rule’s disadvantage is that it may result in a guilty defendant going free. But experience suggests that § 8801’s totality-of-the-circumstances test is more difficult than Miranda for officers to conform to, and for courts to apply consistently. See, e.g., Hoynes v. Washington, 372 U. S. 503, 515. The requirement that Miranda warnings be given does not dispense with the voluntariness inquiry, but cases in which a defendant can make a colorable argument that a self-incriminating statement was compelled despite officers’ adherence to Miranda are rare. Pp. 443-444.
165 F. 3d 667, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, O’CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, post, p. 444.

James W. Hundley, by appointment of the Court, 528 U. S. 1072, argued the cause for petitioner. With him on the briefs were Carter G. Phillips, Jeffrey T. Green, and Kurt H. Jacobs.

Solicitor General Waxman argued the cause for the United States. With him on the briefs were Attorney General Reno, Assistant Attorney General Robinson, Deputy Solicitor General Dreeben, James A. Feldman, and Lisa S. Blatt.

Paul G. Cassell, by invitation of the Court, 528 U. S. 1045, argued the cause as amicus curiae urging affirmance. With him on the brief were Daniel J. Popio and Paul D. Kamenar.*

*Briefs of amici curiae urging reversal were filed for the American Civil Liberties Union by Jonathan L. Abram, Audrey J. Anderson, Steven R. Shapiro, Vivian Berger, Susan N. Hamann, and Stephen Schulhofer; Cite as: 539 U. S. 428 (2000) 431 Opinion of the Court

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In Miranda v. Arizona, 384 U. S. 436 (1966), we held that certain warnings must be given before a suspect’s statement made during custodial interrogation could be admitted in

for the House Democratic Leadership by Charles Tiefer and Jonathan W. Cuneo; for the National Association of Criminal Defense Lawyers et al. by Paul M. Smith, Diane E. Maynard, Lisa B. Kessler, and John T. Phillipsborn; for the National Legal Aid and Defender Association by Charles D. Weisselberg and Michelle Falkoff; for the Rutherford Institute by James Joseph Lynch, Jr., and John W. Whitehead; for Griffin B. Bell by Robert S. Litt, John A. Freedman, and Daniel C. Richman; and for Benjamin R. Civiletti by Mr. Civiletti, pro se, Kenneth C. Bass III, and John F. Cooney.


evidence. In the wake of that decision, Congress enacted 18 U.S.C. §3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule Miranda ourselves. We therefore hold that Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

Petitioner Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence, all in violation of the applicable provisions of Title 18 of the United States Code. Before trial, Dickerson moved to suppress a statement he had made at a Federal Bureau of Investigation field office, on the grounds that he had not received “Miranda warnings” before being interrogated. The District Court granted his motion to suppress, and the Government took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. That court, by a divided vote, reversed the District Court’s suppression order. It agreed with the District Court’s conclusion that petitioner had not received Miranda warnings before making his statement. But it went on to hold that §3501, which in effect makes the admissibility of statements such as Dickerson’s turn solely on whether they were made voluntarily, was satisfied in this case. It then concluded that our decision in Miranda was not a constitutional holding, and that, therefore, Congress could by statute have the final say on the question of admissibility. 166 F.3d 667 (1999).

Because of the importance of the questions raised by the Court of Appeals’ decision, we granted certiorari, 528 U.S. 1045 (1999), and now reverse.

We begin with a brief historical account of the law governing the admission of confessions. Prior to Miranda, we evaluated the admissibility of a suspect’s confession under a voluntariness test. The roots of this test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy. See, e.g., King v. Rudd, 1 Leach 115, 117-118, 122-123, 168 Eng. Rep. 160, 161, 164 (K. B. 1783) (Lord Mansfield, C.J.) (stating that the English courts excluded confessions obtained by threats and promises); King v. Warickshall, 1 Leach 262, 265-264, 168 Eng. Rep. 234, 235 (K. B. 1783) (“A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt...but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape...that no credit ought to be given to it; and therefore it is rejected”); King v. Parratt, 4 Car & P. 570, 172 Eng. Rep. 829 (N. P. 1831); Queen v. Garner, 1 Den. 329, 169 Eng. Rep. 257 (Ct. Crim. App. 1848); Queen v. Baldry, 2 Den. 430, 169 Eng. Rep. 598 (Ct. Crim. App. 1852); Hopt v. Territory of Utah, 110 U.S. 574 (1884); Pierce v. United States, 160 U.S. 355, 357 (1896). Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.

See, e.g., Bram v. United States, 168 U.S. 532, 542 (1897) (stating that the voluntariness test “is controlled by that portion of the Fifth Amendment...commanding that no person ‘shall be compelled in any criminal case to be a witness against himself’”); Brown v. Mississippi, 297 U.S. 278 (1936) (reversing a criminal conviction under the Due Process Clause because it was based on a confession obtained by physical coercion).

While Bram was decided before Brown and its progeny, for the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. We applied the
due process voluntariness test in "some 30 different cases decided during the era that intervened between Brown and Escobedo v. Illinois, 378 U.S. 478 ([1966])." Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973). See, e.g., Haynes v. Washington, 376 U.S. 505 (1963); Ashcroft v. Tennessee, 325 U.S. 518 (1944); Chambers v. Florida, 309 U.S. 227 (1940). Those cases refined the test into an inquiry that examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession. Schneckloth, 412 U.S., at 228. The due process test takes into consideration "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Ibid. See also Haynes, supra, at 518; Gallegos v. Colorado, 370 U.S. 49, 55 (1962); Reck v. Pate, 387 U.S. 435, 440 (1967) ("[A]ll the circumstances attendant upon the confession must be taken into account"); Malinski v. New York, 324 U.S. 401, 404 (1945) ("If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant."). The determination "depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." Stein v. New York, 346 U.S. 156, 185 (1953).

We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily. But our decisions in Malloy v. Hogan, 378 U.S. 1 (1964), and Miranda changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements. In Malloy, we held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States. 378 U.S., at 6–11. We decided Miranda on the heels of Malloy.

In Miranda, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion.1 384 U.S., at 445–450. Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." Id., at 455. We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself." Id., at 439. Accordingly, we laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." Id., at 442. Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as "Miranda rights") are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id., at 479.

Two years after Miranda was decided, Congress enacted §3501. That section provides, in relevant part:

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial

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1While our cases have long interpreted the Due Process and Self-Incrimination Clauses to require that a suspect be accorded a fair trial free from coerced testimony, our application of those Clauses to the context of custodial police interrogation is relatively recent because the routine practice of such interrogation is itself a relatively new development. See, e.g., Miranda, 384 U.S., at 445–450.
MIRANDA v. ARIZONA.

CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 759. Argued February 28—March 1, 1963.—
Decided June 13, 1966.*

In each of these cases the defendant, while in police custody was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. None of the defendants was given a full and effective warning of his rights at the outset of the interrogation process. In all cases the questioning elicited oral admissions, and in three of them signed statements as well, which were admitted at their trials. All defendants were convicted and all convictions, except in No. 534, were affirmed on appeal. 

Held:

1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination. Pp. 444-491.

(a) The atmosphere and environment of incommunicado interrogation as it exists today is inherently intimidating and works to undermine the privilege against self-incrimination. Unless adequate preventive measures are taken to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. Pp. 445-458.

(b) The privilege against self-incrimination, which has had a long and expansive historical development, is the essential mainstay of our adversary system and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfeathered exercise of his own will," during a period of custodial interpersonal examination as well as in the course of other official investigations. Pp. 455-456.

(c) The decision in Escobedo v. Illinois, 378 U. S. 478, stressed the need for protective devices to make the process of police interrogation conform to the dictates of the privilege. Pp. 465-466.

(d) In the absence of other effective measures the following procedures to safeguard the Fifth Amendment privilege must be observed: The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. Pp. 467-473.

(e) If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present. Pp. 473-474.

(f) Where an interrogation is conducted without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel. P. 475.

(g) Where the individual answers some questions during in-custody interrogation he has not waived his privilege and may invoke his right to remain silent thereafter. Pp. 475-476.

(h) The warnings required and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, exculpatory or inculpatory, made by a defendant. Pp. 476-477.

2. The limitations on the interrogation process required for the protection of the individual's constitutional rights should not cause an undue interference with a proper system of law enforcement, as demonstrated by the procedures of the FBI and the safeguards afforded in other jurisdictions. Pp. 479-491.

3. In each of these cases the statements were obtained under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination. Pp. 491-492.

Subcite exercise #1

John J. Flynn argued the cause for petitioner in No. 759. With him on the brief was John P. Frank. Victor M. Earle III argued the cause and filed a brief for petitioner in No. 760. F. Conger Fawcett argued the cause and filed a brief for petitioner in No. 761. Gordon Ringer, Deputy Attorney General of California, argued the cause for petitioner in No. 584. With him on the briefs were Thomas C. Lynch, Attorney General, and William E. James, Assistant Attorney General.

Gary K. Nelson, Assistant Attorney General of Arizona, argued the cause for respondent in No. 759. With him on the brief was Darrell F. Smith, Attorney General. William I. Siegel argued the cause for respondent in No. 760. With him on the brief was Aaron E. Koota. Solicitor General Marshall argued the cause for the United States in No. 761. With him on the brief were Assistant Attorney General Vines, Ralph S. Spritzer, Nathan Levin, Beatrice Rosenberg and Ronald L. Gainer. William A. Norris, by appointment of the Court, 382 U. S. 952, argued the cause and filed a brief for respondent in No. 584.

Telford Taylor, by special leave of Court, argued the cause for the State of New York, as amicus curiae, in all cases. With him on the brief were Louis J. Lefkowitz, Attorney General of New York, Samuel A. Hirshowitz, First Assistant Attorney General, and Barry Mahoney and George D. Zuckerman, Assistant Attorneys General, joined by the Attorneys General for their respective States and jurisdictions as follows: Richmond M. Flowers of Alabama, Darrell F. Smith of Arizona, Bruce Bennett of Arkansas, Duke W. Dunbar of Colorado, David P. Buckson of Delaware, Earl Faircloth of Florida, Arthur K. Bolton of Georgia, Allan G. Shepard of Idaho, William G. Clark of Illinois, Robert C. Londerholm of Kansas, Robert Matthews of Kentucky, Jack P. F.
We dealt with certain phases of this problem recently in Escobedo v. Illinois, 378 U. S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said, "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions. A wealth of scholarly material has been written tracing its ramifications and underpinnings. Police and prosecutorial have speculated on its range and desirability. We granted certiorari in these cases, 382 U. S. 924, 925, 937, in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give


For example, the Los Angeles Police Chief stated that "If the police are required ... to ... establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees ... a whole Pandora's box is opened as to when it happens: ... can a defendant intelligently waive these rights? ... Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!" Parker, 40 L. A. Bar Bull. 503, 607, 642 (1965). His prosecutor counterpart, District Attorney Younger, stated that "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement." L. A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of Escobedo: "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite." N. Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Abeles, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that "Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Quoted in Herman, supra, n. 2; at 500, n. 370. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., C. & P. S. 21 (1961).
concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in Escobedo, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it," Cohens v. Virginia, 6 Wheat. 264, 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

"The maxim nemo tenetur seipsum accusare had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of inculminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the

questions put to him may assume an inquisitorial character, the temptation to press the witness unduly; to browbeat him if be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udall, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord; made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." Brown v. Walker, 161 U. S. 591, 596-597 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in Weems v. United States, 217 U. S. 349, 373 (1910):

"... our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The
meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in Escobedo, as here, to ensure that what was proclaimed in the Constitution had not become but a "form of words," Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of Escobedo today.

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

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4 This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused.

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process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incriminable interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.
In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions. The Commission on Civil Rights in 1961 found much evidence to indicate that “some policemen still resort to physical force to obtain confessions.” 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. People v. Portelli, 15 N. Y. 2d 235, 205 N. E. 2d 857, 257 N. Y. S. 2d 931 (1965). 7


In addition, see People v. Wakat, 415 Ill. 610, 114 N. E. 2d 706 (1953); Wakat v. Hardin, 253 F. 2d 59 (C. A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); Kier v. State, 213 Md. 556, 132 A. 2d 494 (1957) (police doctor told accused, who was strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); Bruder v. People, 113 Colo. 194, 156 P. 2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); People v. Matlock, 51 Cal. 2d 692, 336 P. 2d 555 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever he appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Potte, The Preliminary Examination and “The Third Degree,” 2 Baylor L. Rev. 191 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub. L. 25 (1955).
are not so likely to use your wits." We agree with the conclusion expressed in the report, that "The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public." IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931).

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since Chambers v. Florida, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U. S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.* These


texts are used by law enforcement agencies themselves as guides." It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation." The efficacy of this tactic has been explained as follows:

"If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

*The methods described in Inbau & Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (2d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1966), were gleaned from long service as observer, lecturer and researcher in police science, and as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

10 Inbau & Reid, Criminal Interrogation and Confessions (1962), a' 1.
more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law."

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance.

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11 O'Hara, supra, at 99.
12 Inbau & Reid, supra, at 34-43, 87. For example, in \textit{Leyra v. Denno}, 347 U. S. 556 (1954), the interrogator-psychiatrist told the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for," \textit{id.}, at 562, and again, "We know that morally you were just in anger. Morally, you are not to be condemned," \textit{id.}, at 552.
13 Inbau & Reid, supra, at 33-55.
14 O'Hara, supra, at 112.
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cation that he was about to pull a gun on you, and that's when you had to act to save your own life.
That's about it, isn't it, Joe?"

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject’s original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense "out" at the time of trial." When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or the "Mutt and Jeff" act:

"... In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can’t hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt’s tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room." 17

15 Inbau & Reid, supra, at 40.
16 Ibid.

MIRANDA v. ARIZONA.

Opinion of the Court.

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. "The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party." Then the questioning resumes "as though there were now no doubt about the guilt of the subject." A variation on this technique is called the "reverse line-up":

"The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." 19

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent im-

18 O'Hara, supra, at 105-106.
19 Id., at 106.
presses the subject with the apparent fairness of his interrogator." 20 After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

"Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over." 21

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

"[T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' " 22

20 Inbau & Reid, supra, at 111.
21 Ibid.
22 Inbau & Reid, supra, at 112.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." 23 When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. 24

23 Inbau & Reid, Lie Detection and Criminal Interrogation 185 (3d ed. 1963).
24 Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: "Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten." N. Y. Times, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. N. Y. Times, Oct. 20, 1964, p. 22, col. 1; N. Y. Times, Aug. 25, 1965, p. 1, col. 1. In general, see Borchard, Convicting the Innocent (1932); Frank & Frank, Not Guilty (1957).
This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our Escobedo decision. In Townsend v. Sain, 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," id., at 307–310. The defendant in Lynam v. Illinois, 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court as in those cases reversed the conviction of a defendant in Haynes v. Washington, 373 U. S. 508 (1963), whose persistent request during his interrogation was to phone his wife or attorney. In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 758, Miranda v. Arizona, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, Vignera v. New York, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, Westover v. United States, the defendant was handed over to the Federal Bureau of Investigation by

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25 In the fourth confession case decided by the Court in the 1962 Term, Fay v. Noia, 372 U. S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See United States v. Murphy, 222 F. 2d 698 (C. A. 2d Cir. 1955) (Frank, J.); People v. Bonino, 1 N. Y. 2d 752, 155 N. E. 2d 51 (1959).

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local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, California v. Stewart, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in Miranda, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in Stewart, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our
Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

Professor Sutherland's recent article, Crime and Confession, 79 Harv. L. Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions of her assertions that she wants to leave her money to Elizabeth, and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"
Legal Ethics and the Changing Role
of the Attorney General

The President’s power to decline to defend statutes in court, though it dates at least to the Ford Administration, became more prominent in the 1970s.¹ Before that, this capacity has continued to evolve, as President Obama’s refusal to defend the

¹ See, e.g., Christopher M. May, Presidential Defiance of Unconstitutional Laws: Reviving the Royal Prerogative, 21 Hastings Constitutional L.Q. 865, 940 - 43 (1994) (discussing historical examples of presidential efforts to test the constitutionality of regulation through enthusiastic advocacy, refusal to defend statutes, or explicit legal opposition).
Defense of Marriage act illustrates\(^2\)

This change has been accompanied by increased scrutiny of the Solicitor General’s role in defending statutes and the determination of government’s litigating positions. One possible reason for this development is a rising awareness of client-focused ethical considerations among lawyers in general and government lawyers in particular.


However, even when administrations attempt to defend statutes, still they may continue to enforce such statutes until courts rules on their constitutionality. See Baker & Duncan, *supra*, at 26.
AS GOES DOMA . . . DEFENDING DOMA AND THE STATE MARRIAGE MEASURES

Joshua Baker
William C. Duncan

THOMAS V. SCALIA ON THE CONSTITUTIONAL RIGHTS OF PARENTS: PRIVILEGES AND IMMUNITIES, OR JUST “SPINACH”?

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A BETTER BEGINNING: WHY AND HOW TO HELP NOVICE LEGAL WRITERS BUILD A SOLID FOUNDATION BY SHIPTING THEIR FOCUS FROM PRODUCT TO PROCESS

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Laura P. Graham

TWENTY-FIFTH ANNIVERSARY COMMEMORATION

COMMENORATIVE ADDRESS: CELEBRATING TWENTY-FIVE YEARS OF GOD’S FAITHFULNESS

Dean Jeffrey A. Brauch

AS GOES DOMA . . . DEFENDING DOMA AND THE STATE MARRIAGE MEASURES

Joshua Baker
William C. Duncan

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INTRODUCTION

On April 22, 2011, a commentator posting on the Los Angeles Times website alleged, “DOMA forces the federal government to discriminate

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** Mr. Duncan is director of the Marriage Law Foundation. J.D., J. Reuben Clark Jr. Law School, Brigham Young University.
continued to defend DOMA in briefs filed in the Smelt case.\textsuperscript{96} Within a few months, however, under fire from gay marriage supporters,\textsuperscript{97} the Department of Justice disclaimed any governmental interest in DOMA related to strengthening marriage, responsible procreation, or child well-being, failing to address these reasons but instead falling back on defenses such as maintaining the status quo or taking an incremental response to new social problems.\textsuperscript{98}

On February 23, 2011, with \textit{Gill} and \textit{Massachusetts} pending in the First Circuit, Attorney General Eric Holder made the controversial announcement that the Department of Justice would no longer defend DOMA in litigation based on President Obama’s new position that DOMA is unconstitutional.\textsuperscript{99} In particular, Attorney General Holder explained that, with new litigation pending in the Second Circuit Court of Appeals, where no binding authority exists on the standard of review for sexual orientation discrimination, the administration was taking the position that sexual orientation deserves heightened scrutiny, and that DOMA is unable to survive such heightened scrutiny.\textsuperscript{100} Attorney General Holder noted that the Department of Justice, while no longer defending DOMA in litigation, would continue to enforce the law unless or until it was repealed or struck down.\textsuperscript{101}

But three months later, Attorney General Holder vacated a Board of Immigration Appeals ruling based on DOMA, asking the Board to reconsider deportation proceedings initiated against a man who had entered into a New Jersey civil union with an American-born partner.\textsuperscript{102} By July 2011, the Obama administration had come full circle in its legal position on DOMA, arguing in \textit{Golinski v. United States Office of Personnel Management} that

Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), unconstitutionally discriminates. It treats same-sex couples who are legally married under their states’ laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons. Under well-established factors set forth by the Supreme Court, discrimination based on sexual orientation is subject to heightened scrutiny. Under that standard of review, Section 3 of DOMA is unconstitutional.\textsuperscript{103}

In response to the Obama administration’s withdrawal, Congress has intervened through the Bipartisan Legal Advisory Group ("BLAG") in the lawsuits and other DOMA challenges to ensure the law receives a robust defense, both with respect to the standard of review and (especially) to the governmental interests in support of DOMA that would be advanced.

\textsuperscript{96} See Reply Memorandum in Support of Defendant United States of America’s Motion to Dismiss at 2, 5–7, Smelt v. United States, No. 0:09-cv-00286-DOC-MLG (C.D. Cal. Aug. 17, 2009) (admitting the administration’s lack of support of DOMA as a matter of policy but arguing that the plaintiffs’ equal protection and due process claims in \textit{Smelt} should be dismissed because DOMA survives rational basis review).


\textsuperscript{99} Letter from Eric H. Holder, Jr., Attorney General of the United States, to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Letter from Attorney General Holder]; Press Release, Dep’t of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Press Release], http://www.justice.gov/opa/pr/2011/February/11-ag-222.html. ("After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President’s determination. Consequently, the Department will not defend the constitutionality of Section 3 of DOMA as applied to same-sex married couples in the two cases filed in the Second Circuit. . . . The Department has a longstanding practice of defending the constitutionality of duly enacted statutes if reasonable arguments can be made in their defense. At the same time, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because—as here—the Department does not consider every such argument to be a ‘reasonable’ one. Moreover, the Department has declined to defend a statute in cases, like this one, where the President has concluded that the statute is unconstitutional."). Earlier debates over the constitutionality of DOMA had centered around Section 2 of the statute, which provides, “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.” Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1788C) (2006).

\textsuperscript{100} Letter from Attorney General Holder, supra note 99.

\textsuperscript{101} Id.

\textsuperscript{102} Dorman, 25 I. & N. Dec. 485, 485 (Dep’t of Justice April 26, 2011).

II. STANDARD OF REVIEW

A. What Is the Appropriate Classification?

In all of the pending challenges to DOMA, plaintiffs have asserted that the law discriminates on the basis of sexual orientation. As Judge Taylor wrote in Smelt, however,

On its face, DOMA does not classify based on sexual orientation... It does not mention sexual orientation or make heterosexuality a requirement for obtaining federal marriage benefits. However, equal protection analysis is not invoked only by a facial classification. A facially neutral law may be subjected to equal protection scrutiny if its disproportionate effect on a certain class reveals a classification.105

As a facial matter, Judge Taylor is undoubtedly correct. Although many analyses overlook this reality, DOMA, in common with the marriage laws of all states, contains no mention of the “orientation” of the parties. And while gays and lesbians are clearly impacted disproportionately by the law, it is also true that at least some people who experience same-sex attraction can and do marry persons of the opposite sex. This is in keeping with the procreative purpose of marriage since such couples can and do have children as a result of their union, and these children benefit from a relationship with their own mother and father.

Additionally, the category of orientation itself can be analytically problematic,106 in that, as will be explained further, there is no universally accepted definition of homosexuality, there is no consensus that sexual orientation is primarily genetic in origin like race or sex, and there is broad scientific agreement that individual orientation can and does change over time. In an amici curiae brief to the California Supreme Court for In re Marriage Cases, attorney John Stewart addressed the fact that there is no universally accepted definition of homosexuality.107 Stewart pointed out that not only are there three different “basic definitions of sexual orientation,” but also that there are “significant variations” within each definition.108 Stewart also presented


108 Id. at 4–5 (citing EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 296–97 (1994)). The different definitions of sexual orientation are based upon “sexual behavior,” “sexual attraction,” or “self-ascribed social identity.” Variations among these three definitions raise important questions, such as if one uses a “sexual behavior” definition of sexual orientation, should any man who has had sexual relations with another man be considered gay? Based upon information from a psychological study by Edward Laumann, Stewart also asks if one should consider a certain time frame when asking this question. For example, is a man only gay if he has had sexual relations with another man in the last year? What about the past five years? Stewart highlights similar problems with the other definitions of sexual orientation. For instance, he asks whether physical or romantic attraction should be the gauge for defining sexual orientation under the “sexual attraction” definition since “attraction typically exists on a continuum with many individuals recognizing some degree of attraction to both sexes.” Id. at 7–10. “As two scholars recently put it, ‘. . . [T]he assertion that homosexuality is genetic is so reductionistic that it must be dismissed out of hand as a general principle of psychology.” Id. at 8 (alteration in original) (quoting RICHARD C. FRIEDMAN & JENNIFER I. DOWNEY, SEXUAL ORIENTATION AND PSYCHOANALYSIS: SEXUAL SCIENCE AND CLINICAL PRACTICE 39 (2002)). Stewart supported this argument by compiling various studies. In particular, Stewart pointed out that psychologists and sociologists have recognized these shortcomings in a recent study focusing on patterns of behaviors observed in identical twins:

Identical twin studies, used to test out genetic influence, suffer from some of the same recruitment problems that other “convenience” samples face. Identical twins who are more alike are more likely to volunteer for identical twin registries, for example, and several early studies rely on one twin’s estimates of their other twin’s orientation, reports which have been shown to be unreliable. [Professors] Bearman and Bruckner note that “[a] samples become more representative, concordance on sexual behavior, attraction, and orientation, as expected, declines.”

Concordance rates in orientation among identical twins have varied considerably from one study to the next, ranging from 13 percent to 100 percent in the eight small-scale studies (ranging in size from 5 to 71 identical twin pairs in which at least one twin was homosexual) in one recent review of the literature. . . .

For example 1991 and 1993 studies, involving twin pairs recruited through gay publications, reported a concordance rate (similarity across the twins) of approximately 50 percent, which would suggest some heritable influence. . . . However, even a 50 percent concordance rate among identical twins suggests that genetic influences cannot be primary (or if one twin were gay 100 percent of other identical twins are gay, just as 100 percent of identical twins in which one twin is black or female, the other twin is black or female). Moreover, as sociologists Bearman and Bruckner note, using common heritability estimates suggests that many voluntary social actions show signs of genetic influence. They note a study that suggests “substantial heritability for caring for tropical fish (28%), and frequency of various behaviors such as purchasing folk music in the past year (46%), chewing gum (68%), and riding a taxi (38%).”

Id. at 8–10 (citations omitted).
ARTICLES

Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative

By Christopher N. May*

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amended the President's budget to include such funding,332 but it failed to do so. As a result, Title II was not implemented until after Congress amended the Act in 1966 to delete the committee approval requirement.333

However, in more than half the cases where constitutionally-based signing statements were issued, Presidents ultimately confronted the issue of whether to honor the law or defy it.334 In the vast majority of these instances (i.e., 76% of the time) the President chose compliance.335

In many cases where the President honored a statute about which he had constitutional doubts, he at the same time sought to resolve the problem in other ways. The Chief Executive often urged Congress to amend the law in question,336 sometimes submitting an administration bill to this effect.337

On at least five occasions, Presidents complied with a law while at the same time taking steps to have the question of its constitutionality resolved by the courts. The first of these involved Franklin Roosevelt who, in July, 1943, approved an urgent deficiency appropriation bill that contained a rider prohibiting the government from continuing to employ three named individuals after November 15.338 In mid-September, Roosevelt issued a post-signing statement "placing on record" his view that the rider was a bill of attainder, and explaining that he had approved the measure in order "to avoid delaying our conduct of the war."339 Roosevelt complied with the act but made sure that the men would have standing to challenge it in court.340 When they later sued, the Justice Department refused to defend the validity of the act, a task which fell to Congress participating as an amicus curiae. After the Court of Claims found for the plaintiffs without reaching the constitutional issue,341 the Justice Department took the case to the Supreme Court where the Attorney General successfully argued that the rider was unconstitutional.342

President Nixon also turned to the courts to vindicate his constitutional opposition to the Voting Rights Act Amendments of 1970 insofar as they lowered the voting age to 18 in federal, state, and local elections. In his June 22 signing statement Nixon announced that he had "directed the Attorney General to cooperate fully in expediting a swift court test of the constitutionality of the 18-year-old provision."343 In order to produce a test case, the administration immediately undertook to enforce the law despite its opposition to it.344 By the end of August four cases involving the constitutionality of the amendments had been filed directly in the Supreme Court.345 In contrast to the Roosevelt administration, the Nixon Justice Department...
formally defended the Act, but its performance was "lackluster and unenthusiastic." At oral argument, Solicitor General Erwin Griswold told the Justices that both the President and the Attorney General thought the voting rights amendments were unconstitutional, and conceded that in his own mind their validity was "a very close question." Nixon's efforts met with partial success. On December 21, 1970, the Court sustained all of the Voting Rights Act Amendments except the one lowering the voting age in state and local elections, which was held to be unconstitutional.

Two of the other three instances where Presidents complied with the law but sought to have the issue of its validity decided by the courts involved the Ford administration. In October 1974, Ford signed but expressed First Amendment reservations about amendments to the Federal Election Campaign Act, which placed limits on individual contributions and candidate expenditures; however, Ford was confident "such issues [could] be resolved in the courts." When a suit challenging the constitutionality of the amendments was filed, the Justice Department vigorously defended them despite the administration's doubts as to their validity. The Supreme Court partially sustained Ford's position, holding some of the expenditure limits to be unconstitutional.

The same 1974 Federal Election Campaign Act Amendments contained a one-House legislative veto provision which Ford did not oppose at the time. During 1975 and 1976, the Ford administration acquiesced in the provision by routinely submitting proposed Federal Election Commission regulations to Congress where some of them were blocked by the House or the Senate. But when the provision was carried over by the Federal Election Campaign Act Amendments of 1976, Ford now objected that the veto was unconstitutional. He instructed the Attorney General "to challenge the constitutionality of this provision at the earliest possible opportunity." Rather than defend the disputed provision, the administration this time took the offensive by having the United States intervene as a plaintiff in a suit which former Attorney General Ramsey Clark brought against various defendants, including the Federal Election Commission. However, the President failed in this effort to secure a judicial resolution of the issue, for the case was dismissed as not being ripe.

Jimmy Carter likewise turned to the Judiciary, in order to determine the validity of a 1977 rider limiting the Department of Health, Education, and Welfare's authority to enforce Title VI of the 1964 Civil Rights Act. The Carter administration complied with the provision by settling or dismissing proceedings HEW had filed against local school districts to compel bussing. When the provision was challenged in court, the Justice Department vigorously and successfully defended it, apparently satisfied that the case against its constitutionality would be argued capably by the plaintiffs.

There may have been instances where compliance with a law reflected a presidential awareness that the constitutional objection raised in a signing statement was so insubstantial as to border on the frivolous. It is difficult to imagine a President undertaking an official act in jest, yet it is hard to come up with any other explanation for Lyndon Johnson's objection to a section of the Military Construction Authorization Act for Fiscal Year 1968, which barred the Defense Department from closing the Naval Academy's dairy farm at Annapolis. According to the President, "Congress, which has given the Navy Department authority over the world's most powerful fleet, has withdrawn the Department's authority over 380 cows." This, he said,
“raise[s] questions concerning the constitutional separation of powers.” Questions, but not “grave” ones. The plan to sell the Naval Academy’s dairy was dropped.

Presidential compliance with measures to which the President had objected was not always intentional. On two occasions, a White House attempt to defy an allegedly unconstitutional law was thwarted by subordinates in the executive branch. Both cases involved legislative veto provisions which executive officials may have been reluctant to ignore for fear that Congress might retaliate by reducing the agency’s future funding level. On January 8, 1963, John Kennedy issued a memorandum objecting, on the Attorney General’s advice, to the validity of a committee veto provision in an appropriation act that he had signed the previous October. Kennedy instructed David E. Bell, head of the Agency for International Development to whose actions the veto applied, that he was to treat the provision as a mere “request for information” on the part of the congressional committees. The agency nevertheless complied with the provision during Fiscal Year 1963 when it was in effect. AID did so, said Bell, because “the Comptroller General gave an opinion that it was in the act, unconstitutional or not, and we had to abide by it as long as it was in the act . . .” It is unclear whether Kennedy ever learned that this executive agency had ignored his instruction and the advice of the Attorney General in favor of a contrary legal opinion issued by someone who was an agent of Congress.

President Carter was similarly frustrated when he attempted to ignore a two-House legislative veto provision contained in the National Parks and Recreation Act of 1978. A section of the Act required the Department of Agriculture to obtain, by concurrent resolution, House and Senate approval before making certain land exchanges in Montana’s Gallatin-Beaverhead National Forest, if the exchange involved over 6400 acres. Carter’s November 10, 1978 signing statement noted that both he and the Justice Department thought the section was unconstitutional. Carter directed the Secretary of Agriculture that while he should listen to Congress’s views, he should “consume any land exchanges covered by [the section] which are, in his opinion, otherwise authorized by statute, irrespective of the acreage involved.” Senator John Melcher of Montana, who had sponsored the section, took the extraordinary step of appealing the President’s action to the Justice Department, persuading it that “in spite of the President’s direction, the Department and the Forest Service should cooperate with him and the Congress in processing these land exchanges.” The Justice Department then advised the Agriculture Department that it could as a matter of policy elect to comply with the veto provision. On November 22, ten days after Carter had issued his directive to the contrary, the Department of Agriculture ordered the Forest Service “to proceed as if [the section] were applicable, that is, that proposed exchanges exceeding 6,400 acres would have to be approved by concurrent resolution of Congress.” The Forest Service saw the writing on the wall and suspended further consideration of the proposed exchanges.

4. Presidential Noncompliance

Table 4 shows the 12 instances in which Presidents failed to comply with laws to which they had objected in a signing or post-signing statement. What is immediately striking is that a majority of these


364. On the fact that executive agencies sometimes show greater loyalty to Congress than to the President, see FRANKLIN, supra note 123, at 63-64; LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 89-92 (2d ed. 1987); FISHER, supra note 134, at 73.


371. Wilderness Hearings, supra note 369, at 244-45.

372. Id.

373. Id. at 35 (testimony of Bill Cunningham, Wilderness Society); id. at 42-47 (testimony of Jon Costen, U.S. Forest Service).

374. There are a number of well-known incidents that may be thought to involve presidential refusals to honor a law on constitutional grounds, but which do not belong in this category.

Andrew Jackson: In 1830 Jackson signed an internal improvements bill, Act of May 31, 1830, ch. 332, 4 Stat. 427, but issued a signing statement declaring that the $8,000 appropriated for the road from Detroit to Chicago could not be used to extend the road beyond the Michigan Territory (into the state of Indiana). Statement of May 30, 1830, in 3 Messages and Papers, supra note 129, at 1046. This reflected Jackson’s view that Congress had power to provide for improvements in the territories but not within the states. See 3 id. at 1046-56, 1071-77. In this case, Jackson’s concerns were purely hypothetical, for the Chicago Road was still far from the Indiana border. Contrary to later assertions, see, e.g., H.R.
the Supreme Court in a back-and-forth struggle concerning religious land. In 1962, a strict scrutiny test for governmental action as applied to religious individuals was announced by the Supreme Court in Sherbert: no government could enforce a law in a manner that forbade the exercise of a person's religion unless enforcement of the law was the least restrictive means of achieving a compelling governmental interest. Thus, the Court held that unemployment compensation benefits could not be denied to a Seventh-Day Adventist who lost his job for refusing to work on Sunday. The limit of Congress's power, the Court held, was to provide remedies for the

Answer Key
violation of constitutional rights, and not
-- as RFRA apparently sought -- to redefine
the scope of those rights.  

In 1990, the Court in Smith formally
abandoned the compelling interest test and
announced that Sherbert was inapplicable to
an otherwise valid and natural law of
general applicability -- that is, to any law
that was not directly targeted at a
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The Sherbert court noted
that the compelling interest test was
developed in a context that lent itself to
individualized governmental assessment of
the reasons for the relevant conduct.

Reaffirming the Sherbert test, the Court held
in Wisconsin v. Yoder that Wisconsin lacked

Answer Key
a compelling reason to force Amish children to attend public high school against their religious beliefs.\(^{16}\)

In response, Congress passed the Religious Freedom Restoration Act of 1993\(^{17}\) (RFRA), which purported to overrule Smith and reinstate the rule of Sherbert and Yoder.\(^{18}\)

In 1997, the Supreme Court invalidated RFRA as applied to state and local governments, holding in City of Boerne v. Flores\(^{19}\) that RFRA could not force state zoning authorities to give a church a permit to expand its building notwithstanding a generally applicable environmental protection ordinance.\(^{20}\) In an opinion by Judge

48. PARAGRAPH STRUCTURE. This is a very short paragraph. Either merge with previous or following paragraph or add an appropriate sentence. (2)

49. SPACING: Remove extra space between the two paragraphs. (1)

50. MISCHARACTERIZATION OF SOURCE: <local> (2)

51. SIMPLE SUBSTANTIVE ERROR: <historic preservation> (2)

52. WRONG TITLE. <Justice> (1)
O'Connor, the Court held that RFRA exceeded Congress's power under Sec. 5 of the fourteenth amendment to enforce the Free Exercise Clause against the states.\textsuperscript{21} The scholarly and popular reaction to the Court's abandonment of Sherbert was strongly negative.\textsuperscript{22}

Nevertheless, Congress was determined to revive the compelling interest test in any arena in which the Court would permit it to do so. Three years after City of Boerne, seizing on the Smith dicta suggesting a loophole for "individualized governmental assessment[s]," Congress in 2000 enacted RLUIPA to reinstate the Sherbert test in two arenas in which such assessments were common.

\textsuperscript{21} Misplaced sentence. This sentence should be moved to page 5, after "governmental assessment of the reasons for the relevant conduct" and before "Accordingly, Congress passed the..." It can be joined with either paragraph (ending one or beginning the next). (4) Partial credit for identifying that sentence is out of place.

\textsuperscript{22} Redundancy: Delete "Three years after City of Boerne" or "in 2000" (below) or similar. (2).

\textsuperscript{23} Spelling: <sieze> (1)

\textsuperscript{24} Singular/plural: <dicta> (2)

\textsuperscript{25} Punctuation: <assessment[s]."> (add missing comma) (1)

\textsuperscript{26} Support error: Text in n.22 supports TAN 23 and text in n.23 supports TAN 22. Switch text in notes accordingly. (Note: only award credit in one place. If marked here, do not also award credit on footnote pages.)

\textsuperscript{27} Underlining: <Sherbert> (1)

\textsuperscript{28} Wrong punctuation: <:: or <--> (1)
strict scrutiny test embodied in § 2(a)(1) of RLUIPA . . . has not borne fruit in previous religious land use decisions, and there is no reason to believe that this new iteration will fare any better.”); but see Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 24 – 26, 62 – 66 (1993) (predicting that courts would interpret the Religious Freedom Restoration Act of 1993 broadly for the exact same reasons).


Id. at 399, 409 – 10.

congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end.”

14 See Employment Div. v. Smith, 494 U.S. 872, 878 - 79 (1990). Smith held that claimants were entitled to a religious exemption from the application of a law denying them pension benefits on account of their legal drug sales. Id. at 872.

15 406 U.S. 205.

16 See id. at 234.


Cf. id. at 507 – 12.

See id. at 532 – 36. The Court explained that Congress had exceeded its constitutional power. Id.


See, e.g., Ryan, supra note 9, at 1409 – 10 (criticizing the decision); see also id. at 1410 – 11 (summarizing negative reactions).

This Note confines its discussion to RFRA’s land use provisions.


government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise

Answer Key
the Supreme Court in a back-and-forth struggle concerning religious land. In 1952 a strict scrutiny test for governmental action as applied to religious individuals was announced by the Supreme Court in Sherbert: no government could enforce a law in a manner that forbade the exercise of a person's religion unless enforcement of the law was the least restrictive means of achieving a compelling governmental interest. Thus, the Court held that unemployment compensation benefits could not be denied to a Seventh-Day Adventist who lost his job for refusing to work on Sunday. The limit of Congress's power, the Court held, was to provide remedies for the

SUBSTANTIVE ERROR: The back and forth struggle is not limited to religious land, “exemptions from governmental laws” more appropriate.

SUBSTANTIVE ERROR: “1963” not “1962”

SUBSTANTIVE ERROR: “burdened” nor “forbade”

MISSPELLING: “compelling” not “compelling”

CAPITALIZATION: “Seventh-day” not “Seventh-Day”

SUBSTANTIVE ERROR: “her” not “his”

SUBSTANTIVE ERROR: “Saturday” not “Sunday”

MISPLACED SENTENCE: move to page 6 paragraph on City of Boerne
violation of constitutional rights, and not -- as RFRA apparently sought -- to redefine the scope of those rights. 13

In 1990, the Court in Smith formally abandoned the compelling interest test and announced that Sherbert was inapplicable to an otherwise valid and natural law of general applicability -- that is, to any law that was not directly targeted at a religious group. 14 The Sherbert court noted that the compelling interest test "was developed in a context that lent itself to an individualized governmental assessment of the reasons for the relevant conduct." 15

Reaffirming the Sherbert test, the Court held in Wisconsin v. Yoder 15 that Wisconsin lacked
a compelling reason to force Amish children to attend public high school against their religious beliefs.\textsuperscript{16}

In response, Congress passed the Religious Freedom Restoration Act of 1993\textsuperscript{17} (RFRA), which purported to overrule Smith and reinstate the rule of Sherbert and Yoder.\textsuperscript{18}

In 1997, the Supreme Court invalidated RFRA as applied to state and local governments, holding in City of Boerne v. Flores\textsuperscript{19} that RFRA could not force state zoning authorities to give a church a permit to expand its building notwithstanding a generally applicable environmental protection ordinance.\textsuperscript{20} In an opinion by Judge
the Court held that RPRA exceeded Congress' power under Sec. 5 of the fourteenth amendment to enforce the Free Exercise Clause against the states. The scholarly and popular reaction to the Court's abandonment of Sherbert was strongly negative.

Nevertheless, Congress was determined to revive the compelling interest test in any arena in which the Court would permit it to do so. Three years after City of Boerne, seizing on the Smith dicta suggesting a loophole for "individualized governmental assessment[s]" Congress in 2000 enacted RLUIPA to reinstate the Sherbert test in two arenas in which such assessments were common.
strict scrutiny test embodied in § 2(a)(1) of RLUIPA . . . has not borne fruit in previous religious land use decisions, and there is no reason to believe that this new iteration will fair any better.”); but see Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 24 – 26, 62 – 66 (1993) (predicting that courts would interpret the Religious Freedom Restoration Act of 1993 broadly for the exact same reasons).

See Sherbert, 374 U.S. at 406 - 10.

Id. at 399, 409 - 10.

See City of Boerne v. Flores, 521 U.S. 507, 519 - 20 (1997) (“There must be a
congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end.

14 See Employment Div. v. Smith, 494 U.S. 872, 878 - 79 (1990). Smith held that claimants were entitled to a religious exemption from the application of a law denying them pension benefits on account of their legal drug sales. Id. at 872.

15 406 U.S. 205.

16 See id. at 234.


20 cf. id. at 507 - 12.

21 See id. at 532 - 36. The Court explained that Congress had exceeded its constitutional power. Id.


23 See, e.g., Ryan, supra note 9, at 1409 - 10 (criticizing the decision); see also id. at 1410 - 11 (summarizing negative reactions).

24 This Note confines its discussion to RFRA's land use provisions.

25 See 42 U.S.C. § 2000cc(a)(1) (2000) government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise...
the Supreme Court in a back-and-forth struggle concerning religious land. In 1963, a strict scrutiny test for governmental action as applied to religious individuals was announced by the Supreme Court in Sherbert: no government could enforce a law in a manner that forbade the exercise of a person’s religion unless enforcement of the law was the least restrictive means of achieving a compelling governmental interest. Thus, the Court held that unemployment compensation benefits could not be denied to a Seventh-Day Adventist who lost his job for refusing to work on Sunday. The limit of Congress’s power, the Court held, was to provide remedies for the
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\begin{itemize}
  \item MISPLACED SENTENCE: insert sentence from bottom of this page at the end of this paragraph ("Reaffirming the Sherbert test...")
  \item SPACING: remove extra space after period.
  \item MISCHARACTERIZATION: The Court "reigned in" or "limited" the test, not "formally abandoned"
  \item SUBSTANTIVE ERROR: the Court spoke of "neutral" not "natural" laws
  \item SUBSTANTIVE ERROR: this quote is from the "Smith" Court, not the "Sherbert" Court
  \item CAPITALIZATION: "Court" not "court"
  \item MISQUOTE: there are no omitted words here; no ellipsis needed
  \item SUPPORT NEEDED: insert "Smith, 494 U.S. at 884."
  \item MISPLACED SENTENCE: sentence should be moved to page 4, after last sentence of paragraph (see the top of this page for appropriate placement)
\end{itemize}
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strict scrutiny test embodied in § 2(a)(1) of RLUIPA has not fruit in previous religious land use decisions, and there is no reason to believe that this new iteration will fair any better.

Statutes Revolving in Constitutional Law


12 See Sherbert, 374 U.S. at 406 - 10.

12 Id. at 399, 409 - 10.

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15 406 U.S. 205.

16 See id. at 234.


For a statement made prior to a custodial interrogation to be admissible, the familiar rule of Miranda v. Arizona is that a suspect must have "voluntarily, knowingly and intelligently" waived certain rights after receiving adequate warnings and before questioning began. These rights are the "right to remain silent" and the "right to the presence of an attorney, whether retained or appointed." If a suspect indicates that he or she wishes to speak to an attorney or wishes not to be interrogated, the interrogation must stop. Responding to questions or volunteering information waives the right subsequently to consult a lawyer or an attorney before choosing whether to continue the interrogation.


Id. at 444; see also Dickerson v. United States, 530 U.S. 425, 432–33 (2000) (summarizing Miranda).

See Miranda, 384 U.S. Ct. at 444. Miranda also requires police to warn the suspect "that any statement he does make may be used as evidence against him." Id.

Id. at 445.
Legal Ethics and the Changing Role of the Attorney General

The President's power to decline to defend statutes in court, though it dates at least to the Ford Administration, became more prominent in the 1970s. Before that, this capacity has continued to evolve, as President Obama’s refusal to defend the

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1 See, e.g., Christopher M. May, Presidential Defiance of Unconstitutional Laws: Reviving the Royal Prerogative, 21 Hastings L.Q. 865, 940 – 43 (1994) (discussing historical examples of presidential efforts to test the constitutionality of regulation through enthusiastic advocacy, refusal to defend statutes, or explicit legal opposition).
Defense of Marriage act illustrates. This change has been accompanied by increased scrutiny of the Solicitor General’s role in defending statutes and the determination of government’s litigating positions. One possible reason for this development is a rising awareness of client-focused ethical considerations among lawyers in general and government lawyers in particular. For instance, in 1976 the American Bar


However, even when administrations attempt to defend statutes, still they may continue to enforce such statutes until courts rules on their constitutionality. See Baker & Duncan, supra, at 26.
THE LAW REVIEW CASE COMMENT  
(60% of total competition score)

The case comment is a distinctive genre of legal writing. It involves reporting on a particular case and constructing a narrow argument regarding the case. For the writing competition, we will provide you with the case you will be writing about and the sources you can draw from in building your argument. **No outside research is allowed.**

The Case Comment Suggested Format included here offers a template for designing your own case comment. Although there is no one form that comprises the perfect case comment, you should seriously consider this guidance as you begin your writing.

In particular, this information should be helpful as you construct the first half of your case comment — the reporting section, in which you will discuss the facts of the case and what the courts have said. The case for your competition may be from either a U.S. Court of Appeals or a state supreme court. Because the structure of a case comment differs slightly depending upon which level of court decided the case, pay particular attention to these differences as they are described in the following pages.

The second half of the case comment — the argument section — permits more creativity, though, again, the guidance offered in this memo should give you a good idea about the parameters of a strong argument section. The provided sample theses are meant to represent a range of the types of arguments a case comment might make. Also included in this packet is a page of general tips for approaching the task.

In order to get a better sense of the distinctive form that case comments take, it may be worthwhile to skim a few of the full-length case comments (“Leading Cases”) in the November 2019 *Harvard Law Review*, which is available at [https://harvardlawreview.org/issues/the-supreme-court-2018-term/](https://harvardlawreview.org/issues/the-supreme-court-2018-term/).

This packet also includes two sample competition case comments as well as the case comment later published by the Law Review on the same topic. As may be clear, the quality of a successful competition case comment is not like that of a piece ultimately published in the Review. Published work has been through multiple rounds of intensive editing. You should not feel that the competition requires anything approaching a publication-quality submission.
General Case Comment Tips

Formal and Stylistic Tips
- Most successful case comments adhere roughly to the suggested case comment format. Leave originality for the substance of your argument rather than the format of the piece.
- **DO NOT exceed the allowed number of words.** If you do, you will be penalized severely.
- Write clear, declarative sentences. Use active voice. Most published case comments do not use elaborate literary flair. **Most readers look for a straightforward argument, not soaring prose.**

Substantive Tips
- **Do not neglect the facts in your argument section.** Show why the court’s principles apply, or fail to apply, to these facts.
- **Do not shortchange the reporting section of the comment.** It is a precondition to a compelling argument. While you should attempt to cover all of the main issues in the opinion, it may not be necessary to devote the same amount of discussion to each factual issue. Similarly, although you should give every opinion the importance that you feel it is due, you need not spend the same amount of space discussing each opinion in each case (especially for concurring and dissenting opinions).
- **Confine your discussion to the doctrine and you will not go wrong.** Be sure to have the cases before you at all times. Anchor yourself to the black-letter law.
- **The most powerful case comments are often internal critiques.** Published Law Review case comments most frequently argue within a limited scope. For example, a comment might argue that the court’s conclusion does not follow from its premises, that the premises are at war with one another, or that the opinion failed to recognize certain implications.
- **Make sure that your argument relates back to the case** instead of commenting solely on the doctrinal issues raised by the case. It is, after all, a case comment.

Tips for Forming an Argument
- **Try to choose an approach early on and then selectively read the materials.** Skim the materials provided in order to get a sense of the themes that the case addresses.
- **Try arranging precedents chronologically or thematically.** You may discover interesting cross-currents.
- **Focus on making a clear, succinct, and manageably sized argument.** The actual writing for the competition case comment is quite short, especially considering the fact that roughly half of your piece will be footnotes. With half of the text a description of the facts and opinions, your argument section will be quite brief.
- **We do not expect you to be familiar with the issues raised in the case.** One of the skills tested by the case comment is the ability to consider legal issues with which you have had little experience. Scan the sources for helpful introductory and background material.
- **A less ambitious but well supported argument is better than an ambitious but poorly supported argument.** The goal of the case comment is to clarify the legal issues. Don’t feel pressure to contribute to the advancement of legal scholarship. You will not be able to rewrite an area of the law with only a few days and very limited sources. As you develop your argument, review whether each step of it is supported and follows logically from the previous step. Using topic sentences and an outline can help develop the flow of your argument section.
### CASE COMMENT SUGGESTED FORMAT

<table>
<thead>
<tr>
<th>¶ 1</th>
<th>Write a few sentences of background to the case and your argument.</th>
<th>Then write: “Recently, in [insert case name], the [state name] Supreme Court [insert holding].”</th>
<th>Then write: “Recently, in [insert case name], the [insert circuit number] Circuit [insert holding].”</th>
</tr>
</thead>
<tbody>
<tr>
<td>¶ 2</td>
<td>Set out the facts of the case, from the beginning.</td>
<td>Finally, state your thesis succinctly.</td>
<td></td>
</tr>
<tr>
<td>¶ 3</td>
<td>Describe the procedural posture in the trial court or, if there is no trial court opinion, state the legal issue.</td>
<td>Describe the procedural posture in the trial court and explain the trial court’s reasoning.</td>
<td></td>
</tr>
<tr>
<td>¶ 4</td>
<td>Consider the procedural posture in the inferior appellate courts. If there is a relevant dissent, mention it (maybe in a footnote).</td>
<td>Begin discussing the Appeals court opinion.</td>
<td>The first sentence should read: “The [insert circuit number] Circuit [insert “affirmed,” “reversed,” “vacated”, etc.].” The second sentence should read: “Writing for the panel, Judge [insert opinion author’s name] . . . .”</td>
</tr>
<tr>
<td>¶ 5</td>
<td>Begin discussing the Supreme Court opinion.</td>
<td>Continue giving an account of the opinion.</td>
<td></td>
</tr>
<tr>
<td>¶ 6 through ¶ 8</td>
<td>Continue discussing opinion; describe each concurring and dissenting opinion in a separate paragraph.</td>
<td>Describe each concurring and dissenting opinion in a separate paragraph.</td>
<td></td>
</tr>
<tr>
<td>~ ¶ 9</td>
<td>State your thesis. There are several standard approaches editors have taken in the past, including: (a) good reasoning, unclear conclusion; (b) bad reasoning, bad conclusion; (c) good reasoning, bad conclusion; (d) bad reasoning, good conclusion; (e) good reasoning, but missed policy implication X; (f) bad reasoning that may lead to bad outcome Y, etc. You should choose any argument that you find interesting and that allows you to perform a thoughtful, engaging analysis, but make sure to choose a thesis that is about the case, not just general doctrinal or policy issues that are brought up in the case. Try to think creatively, while recognizing the realities of your time and length limitations. (Remember to look at the November issue for a better sense of the variety of possible arguments.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>¶ 10 through the end</td>
<td>Flesh out your argument, drawing upon cases and source materials. For the final paragraph, create some form of a conclusion.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
“The Court’s dicta indicated that the answer to that question might be very different in the personal income tax realm than it is with regard to corporate income taxes, creating uncertainty about what states must do to ‘fairly apportion’ personal income.”

- 129 Harv. L. Rev. 181

“[T]he Court’s less-than-satisfying consideration of the role of consent in the separation of powers calculus will likely limit the applicability of the decision outside the Article III context.”

- 129 Harv. L. Rev. 201

“[T]he decision reveals a misalignment between the test the Court applies to identify government speech and the purported rationale for the doctrine.”

- 129 Harv. L. Rev. 221

“[The] Court added to the confusion around the facial versus as-applied forms of judicial review and potentially opened the door to a new generation of facial Fourth Amendment challenges with insufficient guidance to legislatures, courts, and litigants on the proper standard for such challenges.”

- 129 Harv. L. Rev. 241

“Mindful that an open-ended ‘reasonableness’ test might sow confusion — or worse, abuse — both the majority and concurrence sought to cabin the reasonable-mistake-of-law test with additional qualifiers. Such qualifiers allay some but not all concerns over what the Heien test means for judicial administrability and police discretion.”

- 129 Harv. L. Rev. 251

“After Glossip, lower courts may have difficulty justifying a flexible approach to the success-on-the-merits prong of the preliminary injunction test.”

- 129 Harv. L. Rev. 271

“[T]he Court’s decision will require lower courts to police redistricting plans more carefully. This development, however, pales in comparison to the great harm to voting rights in the South resulting from Shelby County and from the difficulty in separating race- and party-based motivations in policing gerrymandering.”

- 129 Harv. L. Rev. 281
Scope of Federal Habeas Review—In 1996, Congress added its legislative voice to a long-running judicial debate over the scope of the federal courts' power to review state-court decisions in habeas proceedings.\(^1\) With the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA),\(^2\) Congress restricted that power to cases where the state decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the [U.S.] Supreme Court . . . .”\(^3\) Four years later, in *Williams v. Taylor*,\(^4\) the Supreme Court laid out its interpretation of this Act. It found, first, that the “contrary to” inquiry was separate from the “unreasonable application” one;\(^5\) and second, that the latter inquiry was itself a two-step process, consisting of a “threshold”\(^6\) inquiry into what the relevant “clearly established law” is, followed by a determination of whether the state court had reasonably applied it.\(^7\)

Last term, in *Carey v. Musladin*,\(^8\) the Court found that there was no relevant “clearly established” law on the question of whether spectator conduct at a trial could violate due process. By allowing the inquiry to fail at the “threshold” question, and

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\(^{3}\) Id. at §2254(d)(1).


\(^{5}\) Id. at 412, CC-222.

\(^{6}\) Id. at 390, CC-211.

\(^{7}\) Id. at 407-10, CC-219-21. The Court also emphasized that “unreasonable” was different from “incorrect,” and that only the holdings (not the dicta) of prior Supreme Court cases could be used in the “unreasonable application” inquiry. Id. at 410-12, CC-221-22.

by using lower court opinions to analyze that question, the Court departed drastically from its prior AEDPA jurisprudence, and pointed the way to a radical constriction of the Federal habeas power.

On May 13, 1994, Mathew Musladin got into an argument with his estranged wife, Pamela, at her home. When her fiancé, Tom Studer, came to her aid, Musladin shot and killed him. He was later to claim, at trial, that he thought Studer was armed and that he shot in self-defense. On the first day of his trial in a California court, members of Studer’s family were found sitting in the front row of spectators, in plain view of the jury, wearing prominent buttons pinned to their shirts showing the dead man’s picture. Musladin’s lawyer immediately asked the trial judge to order the buttons removed, but the judge refused. The family continued to wear the buttons in court throughout the rest of the trial. The jury ultimately found Musladin guilty of first degree murder.

Musladin appealed to the California Court of Appeal, arguing that the presence of the buttons deprived him of his right to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution. The Court of Appeal considered both Supreme Court and Ninth Circuit precedent, and concluded that Federal

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9 Musladin v. Lamarque, 427 F.3d 653, 654, CC-11 (9th Cir. 2003).
10 Id.
11 Id. at 655, CC-12.
12 Id. These buttons were “several inches in diameter” and “very noticeable.” Id.
13 127 S.Ct. at 652, CC-3.
14 427 F.3d at 655, CC-12. At least three members were present each day. Id.
15 Id. He was also convicted of three related offenses.
16 127 S.Ct. at 652, CC-3.
17 The court considered the Supreme Court cases of Estelle v. Williams, 425 U.S. 501, CC-59 (1976) and Holbrook v. Flynn, 475 U.S. 560, CC-77 (1986), and
law did not demand reversal unless the buttons—which it found to have been an “impermissible factor” at trial—also “brand[ed Musladin] with an unmistakable mark of guilt.” It found that they did not, and so affirmed his conviction.

Musladin then petitioned the Federal District Court for the Northern District of California for a writ of habeas corpus. The district court denied his petition, but the Ninth Circuit reversed. Using its own precedent as “persuasive authority” in interpreting the Supreme Court’s decisions in Estelle v. Williams and Holbrook v. Flynn, the Ninth Circuit found established Federal law to the effect that any “unacceptable risk of an impermissible factor” at trial was “inherently prejudicial,” and deprived the defendant of a fair trial. Again relying on its own precedent, it then found that the California Court of Appeal had unreasonably applied this law by not treating the actual presence of an “impermissible factor” as dispositive. It


19 In particular, it found that the jury might have seen them merely as ordinary tokens of mourning. See Musladin v. Lamarque, 427 F.3d 637, 648, CC-7 (9th. Cir. 2005) (dissent from denial of rehearing en banc).

20 427 F.3d at 655, CC-12.

21 Id. at 661, CC-15.

22 Like the California Court of Appeal, The Ninth Circuit also relied on Norris, in which it had found that the presence of spectators wearing “Women Against Rape” buttons at a rape trial rendered it unfair. See 918 F.2d at 834, CC-286.


25 Id. at 656, CC-12.

26 See Id. at 661, CC-15.
thus concluded that habeas relief was permissible under AEDPA.\(^\text{27}\) After the decision, a proposal was made for a rehearing en banc, which was ultimately denied.\(^\text{28}\) Dissenting from that denial, Judge Kleinfeld argued, first, that the plain text of AEDPA forbade the court to consider any precedent not from the Supreme Court; and second, that the Ninth Circuit’s test was not “clearly established” by Estelle and Flynn, since those cases had involved prejudicial actions by the state, rather than by individual spectators.\(^\text{29}\)

The Supreme Court vacated and remanded.\(^\text{30}\) Writing for a majority of six,\(^\text{31}\) Justice Thomas began by defining “clearly established Federal law” for purposes of AEDPA as “the holdings, as opposed to the dicta, of the Supreme Court as of the time of the state-court decision.”\(^\text{32}\) He then turned to the first step of the Williams inquiry: the threshold question of whether any clearly established law applied to the case.\(^\text{33}\) Examining Estelle and Flynn, Justice Thomas, like Judge Kleinfeld, found the private

\(^{27}\) Judge Thompson dissented, on the ground that the state court’s “unmistakable mark of guilt” discussion should have been read not as modifying the rule, but rather as applying it, the “mark of guilt” being a factor in determining whether an “unacceptable risk” had in fact arisen. See 427 F.3d at 662-63, CC-15-16.

\(^{28}\) Musladin v. Lamarque, 427 F.3d 647 (9th Cir. 2005) (denial of rehearing en banc).

\(^{29}\) 427 F.3d at 649 - 51, CC-8 - 9. Judge Bea also wrote a dissenting opinion attacking the Ninth Circuit’s ruling. He argued that the Supreme Court had made it plain that the rule contained an actual as well as inherent prejudice prong. Id. at 652, CC-9.

\(^{30}\) 127 S.Ct. at 654, CC-4.

\(^{31}\) Justice Thomas was joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, and Alito.

\(^{32}\) 127 S.Ct. at 651, CC-2. This definition echoes that in Williams. See supra, note 7.

\(^{33}\) 127 S.Ct. at 653, CC-3.
character of the offending actors to be a key distinguishing factor.34

Justice Thomas adduced two pieces of evidence to support the significance of this factor: the first textual, the other descriptive. As a textual matter, he pointed to language in Estelle and Flynn which indicated that an “essential state interest” could justify even proscribed prejudicial conduct at trial.35 This, he explained, suggested that the Court meant to proscribe only state conduct, not spectator conduct.36 As a descriptive matter, Justice Thomas pointed out that substantial disagreement existed among those lower courts that had considered spectator-conduct claims.37 He explained that this disagreement reflected a “lack of guidance”38 from the Supreme Court, and was evidence that the Court’s precedents could not have been very clear.39 Thus, Justice Thomas concluded, the effect of spectator conduct on fair-trial rights remains an “open question in [Supreme Court] jurisprudence”;40 prior cases did not lay down a test that state courts were “required to apply.”41

Having found no clearly established Federal law, the Court did not have to proceed to the second inquiry under Williams, and ask if the state’s application of that law had been unreasonable.

34 Id.
35 127 S.Ct. at 653, CC-3.
36 Id.
37 Id. at 654, CC-4 (“Some courts have applied [Estelle] and Flynn to spectators’ conduct . . . . [others] have declined [to do so] . . . . and still other[s] have ruled on spectator-conduct claims without discussing [Estelle] or Flynn.”)
38 Id.
39 See Id.
40 Id. at 653, CC-3.
41 Id. at 654, CC-4.
Justices Stevens, Kennedy and Souter individually wrote opinions concurring in the judgment. All three rejected the majority’s contention that no “clearly established Federal law” controlled the case. All three therefore proceeded to the second Williams inquiry, and found the state court’s decision to have been a reasonable application of Federal law.

Justices Stevens and Souter found controlling “clearly established” law in Estelle and Flynn themselves. They argued that those cases should be read broadly, as prohibiting any practice that creates an “unacceptable risk . . . of impermissible factors coming into play . . . .” Unlike the majority, they found “no . . . reason to think” that the private character of the actors in Carey made these precedents inapplicable. Proceeding to the reasonableness question, they found that the state court had been reasonable not to reverse Musladin’s conviction, because a majority of courts to consider similar questions had done the same. Justice Souter (but not Justice Stevens) also felt that some First Amendment interest of the spectators might

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42 Id. at 654-658, CC-4-6.
43 Id.
44 Id.
45 See Id. at 656-57, CC-5.
46 Id. at 657, CC-5.
47 Id.
48 Id. at 658, CC-6. The similarity of this argument to the “descriptive” evidence adduced by the majority is obvious, but it is worth highlighting a crucial difference. Where the majority was willing to consider such evidence at the first step of the Williams analysis (to determine the applicable law), Justices Stevens and Souter reserve that consideration for the second step (to determine if it was reasonably applied). The implications of this are discussed below.
49 Id. at 656, CC-5.
have contributed to the reasonableness of the decision. Justice Stevens wrote separately to express his objection to excluding Supreme Court dicta from consideration when analyzing clearly established law at the first Williams step.

Justice Kennedy advocated a middle ground on the question of clearly established law. Like the other concurring justices, he found that there was clearly established law that governed the case; but, unlike them, he found it not in a narrow and specific test, but rather in the broad principle that trials must be free from intimidation. He also hinted in dicta that he might favor creating a rule against prejudicial spectator apparel if that question ever came before the Court on direct appeal.

Although it makes no ringing new doctrinal pronouncements, Carey represents a radical departure in the Court’s habeas corpus jurisprudence. First, the decision not to find any “clearly established” governing law abandons the cautious approach of the Court’s prior AEDPA decisions. Second, the Court’s use of lower court decisions as evidence of how clearly established the law is, is unprecedented, and could result in vastly expanded deference to the state courts. If the Court follows through on this decision, therefore, the scope of Federal habeas review will be constricted as never before.

The Court’s refusal to find clearly established law at the first step of the Williams analysis is greatly in tension with

50 Id. at 658, CC-6.
51 Id. at 655, CC-4. Justice Stevens explained that dicta were a crucial part of the Court’s decisions, particularly on novel Constitutional questions, and that excluding them from Federal habeas review would discourage state courts from relying on them.
52 Id. at 656, CC-5.
53 Id.
54 See Id. at 657, CC-5.
its prior AEDPA jurisprudence. Not only has the Court never denied habeas relief on this ground before, but no concurring or dissenting opinion has ever argued that it should do so, either. In past AEDPA cases, the Court has always contrived to find some principle—if necessary, a very broad one—to get it over the “threshold.” Where it has divided, it has done so either as the concurring opinions in Carey did—over whether that principle should be narrow or broad—or else over whether the state court reasonably applied the principle. In *Lockyear v. Andrade*, for instance, the Court confronted a question involving its tangled Eighth Amendment jurisprudence, an area in which it admitted it “ha[d] not been a model of clarity.” Acknowledging that it had not laid down a “clear . . . path for courts to follow,” the Court nevertheless did not deny relief for lack of clearly established law. Instead, both the majority and the dissent agreed to extract from this “thicket” a very general unifying principle under which the state court’s reasonableness

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55 Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes “Clearly Established” Law Under the AEDPA*, 54 Cath. U. L. Rev. 747, 789, CC-414 (“the Supreme Court has not [denied] habeas under AEDPA . . . because there was no clearly established law . . . .”); see also *Mitchell v. Esparza*, 540 U.S. 12, 12-18, CC-97-100 (finding insufficiently clear Federal law for the application of the “contrary to” prong of AEDPA, but finding that same law clear enough to pass the threshold of the “unreasonable application” inquiry).


57 529 U.S. at 390, CC-11.


59 Id. at 72, CC-89.

60 Id.

61 Id.

62 That a gross disproportionality test applied to sentences for terms of years. Id.
could be analyzed.\textsuperscript{63} Likewise, in Yarbrough v. Alvarado,\textsuperscript{64} where none of its precedents were precisely on point, the Court used a general principle as clearly established law, and proceeded to deferentially analyze the state-court decision under it.\textsuperscript{65}

There is no reason that the same approach could not have been followed in Carey. Supreme Court precedent on the question at issue was at least as clear as in Alvarado, and much clearer than the legal “thicket”\textsuperscript{66} in Lockyear. The Court’s arguments in support of distinguishing Estelle and Flynn are unconvincing. Its first argument—that the “essential state interest” exception in those cases somehow meant that only state conduct was prohibited—has no logical traction. The scope of an exception does not determine the scope of the rule. The precept “it is forbidden to steal, except to feed one’s starving children,” for instance, does not mean that only those with children are forbidden to steal. As to the Court’s other argument, from disagreement in lower courts, I will argue below that the very use of such evidence is itself a radical departure from the Court’s prior jurisprudence.

Moreover, even if Estelle and Flynn do not control the facts of Carey, broad principles of Supreme Court jurisprudence cer-

\textsuperscript{63} Id. at 75-76, CC-91.
\textsuperscript{64} 541 U.S. 652, CC-227 (2004).
\textsuperscript{65} The question in that case was whether a defendant’s age was relevant to a custody determination under Miranda. The Court had never addressed that particular question before. Nevertheless, the majority, concurrence and dissent all unhesitatingly chose the Mathiason standard—“would a reasonable person have felt free to leave?”—as the controlling law, and disagreed only upon whether a reasonable judge would have applied that standard without taking the defendant’s age into account. Id. See also Berry, supra note 55, at 787, CC-413 (commenting on the Court’s willingness to frame issues so as to find some rule or principle of clearly established law).
\textsuperscript{66} 538 U.S. at 72, CC-89.
tainly do. The Court has previously found that spectator conduct can render a trial unfair in some circumstances, and Justice Kennedy’s proposed principle that trials must be free from intimidation is hardly debatable. To find an absence of clearly established law on these facts, therefore, is to deny the very core of the Court’s Lockyear-Alvarado approach.

That previous approach to AEDPA was a sensible compromise, which had drawn scholarly applause. On the one hand, it preserved the broad applicability of federal habeas review by refusing to let the habeas inquiry fail at the “threshold”; on the other, it imposed a necessary restraint on federal second-guessing of state court decisions by recognizing that federal law sometimes consists of very broad principles, which may “reasonably” be applied in many different ways. Carey marks the abandonment of that compromise. Under Carey, in domains where the Supreme Court has not specifically ruled, lower courts are not allowed even to consider state-court reasonableness. Thus, in such domains, state court decisions are unreviewable on habe-

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67 See Sheppard v. Maxwell, 384 U.S. 333, 333, CC-163 (1996) (finding that the actions of reporters who had been allowed to “take over” the courtroom, and create a “carnival atmosphere” therein violated the defendant’s Due Process rights.)
68 127 S.Ct. at 657, CC-5 (Kennedy, J. concurring).
69 Berry, supra note 55 at 787, 827, CC-413, 433 (arguing that the Court has been using a “sliding scale of deference to the state court’s application of . . . legal principles, depending on [their breadth]”, and applauding that approach).
70 See Scheidegger, supra note 1 at 945, CC-901 (1998) (analyzing AEDPA’s legislative history, and concluding that Congress meant to scale back federal review of state-court decisions through a deference standard).
71 541 U.S. at 664, CC-233 (“[T]he range of reasonable judgment can depend . . . on the nature of the relevant rule . . . [It] requires consider[ation of] the rule’s specificity.”)
as, no matter how egregious their violation of broader federal norms. If carried forward, this approach has to potential to cripple federal habeas as a tool for enforcing Constitutional norms.\textsuperscript{72}

Carey is also unique in another way. It represents the first time that the Court, or any member of it, has suggested using disagreement among the lower courts as evidence of what the “clearly established” law is. This innovation is problematical in two ways. First, AEDPA refers to the “law[] as determined by the Supreme Court”: it arguably contradicts Congressional intent,\textsuperscript{73} as well as the Court’s holding in \textit{Williams},\textsuperscript{74} to let lower court decisions control what that law is.

Second, the use of such evidence creates a deferential standard of review on this threshold question. Although the Court has applied such a standard at the second step of the \textit{Williams} inquiry\textsuperscript{75} (as even Justices Stevens and Souter were willing to do in Carey),\textsuperscript{76} it has never before applied it at the first step. In \textit{Lockyear}, for instance, the Court extracted its “unifying principle” from the precedential “thicket” without regard to whether lower courts had done the same.\textsuperscript{77} Many commentators,\textsuperscript{78} as

\textsuperscript{72} But see Scheidegger, supra note 1 at 940-44, CC-899-901 (arguing that additional layers of review provide diminishing returns, and that direct review by the Supreme Court is sufficient to enforce Constitutional norms).

\textsuperscript{73} See Scheidegger, supra note 1 at 947-48, CC-902-03 (concluding from the legislative history of AEDPA that Congress meant only Supreme Court precedent to count).

\textsuperscript{74} Supra note 7.

\textsuperscript{75} See, e.g., 541 U.S. at 664, CC-233 (citing AEDPA’s “deferential standard,” and finding application reasonable because “reasonable jurists could disagree”).

\textsuperscript{76} Supra, note 48.

\textsuperscript{77} 538 U.S. at 72, CC-89. Accord \textit{Alvarado}, 541 U.S. at 652, CC-227.
well as some of the justices,\textsuperscript{79} have argued that the use of a deferential standard at any stage of the habeas inquiry is too constrictive. Carey’s decision to extend that standard to yet another stage of the inquiry could constrict the scope of the federal habeas power even further.

Thus, although it purports to be a narrow decision, and seems to eschew bold doctrinal pronouncements in favor of an answer to the specific question before the Court, Carey nevertheless represents a fundamental departure from precedent. By allowing the “unreasonable application” analysis under AEDPA to fail purely for lack of “clearly established” law, and by allowing disagreements between the lower courts to be evidence of that lack, Carey points the way to a radical constriction of the federal habeas power.

Yet, the decision’s superficial doctrinal modesty remains important. For one thing, it goes a long way toward explaining the otherwise puzzling degree of consensus\textsuperscript{80} among members of the Court for so radical a holding: as Prof. Sunstein has argued, courts will often agree on narrow holdings where they would disagree on more ambitious ones.\textsuperscript{81} For another thing, and more importantly, narrow holdings are easily deniable. Facts can always be distinguished; explicit doctrinal statements are harder to avoid. Indeed, although it is still too early to gauge how

\textsuperscript{78} See, e.g., Evan Tsen Lee, Section 2254(d) of the New Habeas Statute: An (Opinionated) User’s Manual, 51 VAND. L. REV. 103, 117, CC-669 (1998) (arguing that AEDPA’s deferential-review requirement should be interpreted narrowly, so that Federal habeas corpus remains an incentive for state courts to follow Federal law).

\textsuperscript{79} See, e.g., 529 U.S. at 377-78.

\textsuperscript{80} It is rare, for instance, to find Justices Thomas and Ginsburg in agreement about a decision affecting the scope of the federal habeas power.

closely the Court will follow Carey, there are already signs that some of the justices are backing away from its more extreme implications. In its most recent habeas case, for instance, the Court proved willing to discern a broad principle of established law in what Justice Roberts termed a “dog’s breakfast” of precedent, over the dissents of four justices who argued that the case should be dismissed for lack of clearly established law, and who cited the confusion of lower courts as evidence of that lack. Thus, it seems likely that Carey’s primary effect will be, not to itself work a radical restriction in the habeas power, but rather to add a new weapon to the arsenals of those justices who want to do so.

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82 Abdul-Kabir v. Quarterman, No. 05-11284 (US 2007).
83 Id. at CC-35 (Roberts, C.J., dissenting).
84 Id.
Habeas Corpus Review – Ever since the creation of 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) and its subsequent interpretation by the Supreme Court in Williams v. Taylor,¹ the proper scope and constitutionality of federal habeas relief for state prisoners has been a highly contested issue.² Codified at 28 U.S.C. § 2254(d)(1), the AEDPA placed significant constraints on the power of a federal habeas court to grant the writ where constitutional error has occurred.³ The restrictions mandated by the AEDPA and applied by the Court illustrate the dissatisfaction with lower federal courts’ general treatment of habeas petitions from state prisoners. Last Term, in Carey v. Musladin,⁴ the Supreme Court advanced habeas restrictions a step

³ § 2254(d)(1) mandates that relief shall not be granted unless a state adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.
further. Grounding its decision on the lack of clearly established federal law concerning spectators’ courtroom conduct, the Court held that the state appellate court’s determination that the habeas petitioner was not inherently prejudiced when spectators wore buttons depicting the murder victim was not contrary to or an unreasonable application of clearly established law.\(^5\) By treating the “clearly established law” inquiry as dispositive and by neglecting to analyze issues relating to the scope of the precedent under the “contrary to” and “unreasonable” application prongs of §2254(d)(1), the Court has further restricted the possibility of habeas relief for state prisoners.

On May 13, 1994, Matthew Musladin shot and killed Tom Struder outside of Musladin’s estranged wife’s home.\(^6\) At trial, Musladin confessed to killing Struder, but claimed that he did so in self-defense.\(^7\) During Musladin’s trial, sitting in the front row of the spectators’ gallery, members of Struder’s family wore buttons containing images of the deceased.\(^8\) Before opening statements, Musladin’s council requested that the trial judge instruct the family members to cease wearing the buttons in court, but the trial court denied the motion, stating that it saw “no possible prejudice to the defendant.”\(^9\) A California jury convicted Musladin of first-degree murder.\(^10\)

\(^{5}\) Id.
\(^{6}\) See id. at 651, CC-2.
\(^{7}\) See id.
\(^{8}\) See id.
\(^{9}\) See id. at 652, CC-3.
\(^{10}\) See id. at 651, CC-2.
On direct appeal, the California Court of Appeal upheld Musladin’s conviction. Citing Holbrook v. Flynn\(^{11}\), the court held that while they “consider[ed] the wearing of photographs of victims in a courtroom to be an ‘impermissible factor coming into play,’ the practice of which should be discouraged,” they did not believe that the buttons “branded defendant ‘with an unmistakable mark of guilt’ in the eyes of the jurors.”\(^ {12}\)

Musladin filed a petition for a writ of habeas corpus in federal court pursuant to § 2254.\(^ {13}\) Musladin alleged that the buttons were inherently prejudicial and that the California Court of Appeals erred in concluding that his right to a fair trial was not violated.\(^ {14}\) The District Court denied the petition for habeas relief.\(^ {15}\) A divided panel of the Ninth Circuit reversed and granted the writ,\(^ {16}\) finding that under § 2254, the Supreme Court’s decisions in Williams and Flynn clearly established a federal rule of law applicable to Musladin’s

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\(^{11}\) 475 U.S. 560, 570 (1986) CC-77.

\(^{12}\) Carey, 127 S.Ct. at 652, CC-3

\(^{13}\) See id.

\(^{14}\) See id.

\(^{15}\) See id.

\(^{16}\) Circuit Judge Reinhardt wrote the majority opinion and was joined by Judge Berzon. Judge Thompson dissented stating that the state court’s comment that the buttons did not “brand[] defendant ‘with an unmistakable mark of guilt’” should be understood as an explanation that the buttons were not “so inherently prejudicial as to pose an unacceptable threat to [the] right to a fair trial.’” Mulsadin, 427 F. 3d at 662-63, CC-15-16 (quoting Holbrook, 475 U.S. at 572.) A petition for a panel rehearing was denied. See Musladin v. Lamarque, 427 f.3d 647 (9th Cir. 2005) CC-7
According to the Court of Appeals, the state court unreasonably applied federal law by “imposing an additional and unduly burdensome requirement—demanding that the challenged practice cause the ‘brand[ing]’ of the defendant with an ‘unmistakable mark of guilty’—even though the Williams test for finding inherent prejudice had already been met.” The Court of Appeals also cited its own precedent as a guide in interpreting Supreme Court law and in determining whether a rule was clearly established.

The Supreme Court vacated and remanded. Writing for the Court, Justice Thomas held that the Ninth Circuit improperly concluded that the California Court of Appeal’s decision was contrary to or an unreasonable application of clearly established federal law. The Court began by reiterating its statement in *Williams v. Taylor* that “‘clearly established Federal law’ in § 2254(d) (1) ‘refers to the holdings, as

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17 *Mulsadin*, 427 F.3d at 656-658, CC-12-13.
18 See *id.* at 658, CC-13.
19 Citing *Norris v. Risley*, 918 F.2d 828, CC-283(9th Cir. 1990)
20 See *Mulsadin*, 427 F.3d at 655, CC-12 (stating that “precedent from this court, or any other federal circuit court, has persuasive value in our effort to determine ‘whether a particular state court decision is an ‘unreasonable application’ of Supreme Court Law and . . . what law is ‘clearly established’”)
21 *Carey* 127 S.Ct. at 649, CC-1.
22 Justice Thomas was joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, Alito.
23 See *Carey*, 127 S.Ct. at 654, CC-4.
opposed to the dicta, of th[e] Court’s decisions.”

Although the Court acknowledged that the state court of appeals had applied *Estelle v. Williams* and *Flynn* as the rules governing the claim, the Court nonetheless found that neither *Williams* nor *Flynn* clearly established a rule that could be applied to the specific facts of this case. The Court reasoned that “[b]oth [Williams] and Flynn dealt with government-sponsored practices.” The Court explained that this case involved spectator conduct as opposed to state-sponsored conduct and since the Court had “never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial” the effect on a defendant’s fair trial rights of the spectator conduct to which Musladin objects is an open question in Supreme Court jurisprudence.

The Court then noted that the lower courts divergence in the treatment of defendants’ spectator-conduct claims reflected the “lack of guidance” from the Court. The Court reasoned that the lack of holdings from the Court concerning the potentially prejudicial effect of spectators’ courtroom conduct precludes the determination that the state court ‘unreasonably applied clearly established Federal law.’

Justice Stevens concurred in the judgment. Justice Stevens distanced himself from the Court’s interpretation that the

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25 *Carey*, 127 S.Ct. at 653, CC-3.
26 425 U.S. 501, CC-59 (1976)
27 475 U.S. 560, CC-77 (1986)
28 *See id.* at 654, CC-4.
29 *Id.* at 653, CC-3.
30 *See Id.*
31 *Id.* at 654, CC-4.
32 *Id.* at 654, CC-4.
statutory phrase “clearly established Federal law, as determined by the Supreme Court of the United States” refers to the holdings, and not the dicta, of the Court’s decisions.\(^{33}\)

Characterizing the Court’s interpretation as “incorrect” and “wholly unnecessary”\(^{34}\) in the present case, Justice Stevens refused to join the majority in their reasoning, but noted that he would reach the same conclusion based on reasoning similar to that of Justice Souter.\(^{35}\)

Justice Kennedy also concurred in the judgment.\(^{36}\) In his view, it is a fundamental principle of due process that trials

\(^{33}\) Id. at 655, CC-4 (Stevens, J., concurring in the judgment).

\(^{34}\) Id. Finding it ironic that the majority is relying on Justice O’Connor’s dictum in Williams to preclude dictum from the ‘clearly established’ analysis, Justice Stevens explains that “it is quite wrong to invite state court judges to discount the importance of such guidance on the ground that it may not have been strictly necessary as an explanation of the Court’s specific holding in the case.” Id. Justice Stevens even uses Justice O’Connor’s previous statements against her as he cites her concurrence in Sheet Metal Workers v. EEOC, 478 U.S. 421, as a comparison (“Although technically dicta, . . . an important part of the Court’s rationale for the result that it reache[s] is entitled to greater weight . . .”) Id. at 490.

\(^{35}\) Justice Stevens did not agree with the suggestion that “the First Amendment may provide some measure of protection to spectators in a courtroom who engage in actual or symbolic speech to express any point of view about an ongoing proceeding.” Id. at 656, CC-5

\(^{36}\) Id. at 656, CC-5 (Kennedy, J., concurring in the judgment).
must be free from a coercive or intimidating atmosphere.\textsuperscript{37} After discounting the majority’s reliance on the public/private actor distinction, Justice Kennedy argued that the Court’s past decisions establish that a new trial must be ordered “when a defendant shows his conviction has been obtained in a trial tainted by an atmosphere of coercion or intimidation similar to that documented in the foregoing cases.”\textsuperscript{38} However, Justice Kennedy explained that there is no indication that the respondent’s trial had an atmosphere of coercion or intimidation similar to the severe extent demonstrated in the cases the Court has previously decided. Therefore, Justice Kennedy concluded that the instant case calls for a new rule, one that can not be grounds for relief in this case until it is “established in the court system, and then established in the Court.”\textsuperscript{39}

Justice Souter also filed a concurring opinion. Agreeing with Justice Kennedy that the Majority’s reliance on the private nature of the spectator’s acts is unfounded\textsuperscript{40}, Justice Souter

\textsuperscript{37} Id. To support his proposition, Justice Kennedy cited Moore v. Dempsey, 261 U.S. 86, CC-101(1923) (where the Court remanded for fact-finding because of a coercive and intimidating atmosphere), Sheppard v. Maxwell, 34 U.S. 333, C-163(1996) (where the disruptive presence of the press required reversal) and Estes v. Texas, U.S. 532 (where the presence of cameras distracted jurors throughout the proceedings).

\textsuperscript{38} Carey, 127 S.Ct. at 656, CC-5.

\textsuperscript{39} Id. at 657, CC-5

\textsuperscript{40} Id. (Souter, J., concurring in judgment). Justice Souter noted that it should not matter whether the State or an individual was to blame for the disturbance, but either way, the trial judge’s duty is to control the courtroom and “keep it free of improper influence.” Id.
reserved no doubt about the applicability of the *Williams-Flynn* standard.\(^{41}\) However, considering that the majority of the lower courts that have considered the influence of spectator’s buttons have left convictions standing and the future implications about First Amendment issues, Justice Souter concluded that the state judge’s application of Supreme Court law was not unreasonable.\(^{42}\)

Rather than directly confronting the complicated and relevant issues presented by AEDPA, the Court reversed the Ninth Circuit decision by focusing narrowly on what constitutes “clearly established law.” Because the Supreme Court has interpreted §2254(d)(1) as limiting the source and timing of clearly established law to Supreme Court precedent,\(^{43}\) by not allowing the lower courts to apply an existing Supreme Court ruling, the Court is further restricting the power of lower federal courts to grant relief. Instead of conducting the required in-depth analysis of the “unreasonable” and “contrary to” prongs, the Court haphazardly disposed of the case on the unstable grounds that there was no Supreme Court precedent governing the case. Disagreement over the scope of the precedent can have significant consequences when courts treat the clearly established law inquiry as a dispositive issue because they will not continue with the analysis under § 2254 (d)(1) to determine whether it was objectively unreasonable for the state court not to extend the rule.\(^{44}\)

\(^{41}\) See id.

\(^{42}\) See id. at 658, CC-6


\(^{44}\) See Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes “Clearly Established” Law*
Although the majority viewed the Supreme Court as never having directly addressed the issue of private spectator conduct,\(^45\) to find clearly established law, the Court does not have to previously address the identical factual circumstances at issue. Under §2254(d) (1), relief may be granted “based on an application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.”\(^46\) In *Williams*, Justice Stevens recognized that “[R]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule.”\(^47\) General principles,

Under the Antiterrorism and Effective Death Penalty Act, 54 Catholic U. L. Rev. 747, 827, CC-433

\(^{45}\) *Carry*, 127 S.Ct. at 654, CC-4 (2006) (“[g]iven the lack of holdings from th[e] Court regarding the potentially prejudicial effect of spectators’ courtroom conduct . . . it cannot be said that the state court ‘unreasonabl[y] appli[ed] clearly established Federal Law’”)


\(^{47}\) *Williams*, 529 U.S. 362, 382 (2000) (opinion of Stevens, J.) Justices Stevens referred to Justice Kennedy’s concurring opinion in *Wright v. West*, 505 U.S. 277, (1992): “If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.”; see also, Kathleen M. Sullivan, *The Supreme Court, 1991 Term–Foreword: The
similar to the one established in Williams and Flynn, may be applied in different contexts without producing a new rule or ceasing to be clearly established.\(^{48}\) As Justice Kennedy noted in Yabrough v. Alvarado, “the difference between applying a rule and extending it is not always clear.”\(^{49}\) However, “[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.”\(^{50}\) This is such a case. In fact, prior to the Court’s decision, there was no dispute that the state court correctly identified the decisions in Williams and Flynn as providing the clearly established principle that “when the consequence of a courtroom practice is that an ‘unacceptable risk is presented of impermissible factors coming into play,’ there is ‘inherent prejudice’ to a defendant’s constitutional right to a fair trial.”\(^{51}\) The only question that remained, was whether, the state court’s holding added an additional requirement to the Williams and Flynn test.\(^{52}\) However, the Court ignored both the state court and the Ninth Circuit’s finding that there was in fact a clearly established principle.

The Court’s meager distinction between state-sponsored courtroom practices and private spectator conduct is not enough

\(^{48}\) See Williams, 529 U.S. at 382, CC-207 (Stevens, J.)


\(^{50}\) Id.

\(^{51}\) Musladin, 427 F.3d at 656, CC-12 (citing Flynn, 475 U.S. at 570).

\(^{52}\) See id., at 661
to place Carey beyond the clearly established rule of Williams and Flynn. Rather than focusing on the importance of state action, the Court in Williams emphasized the effect prison clothes may have on the jury’s judgment and the fairness of the trial. The Court neglected to explore similar concerns that may have been present in Carey.

Even if there is a valid distinction between private and public actor cases, the majority still failed to take into account the fact that the state is responsible for establishing and maintaining fair trial conditions. Events occurring in a courtroom that are overseen and approved by a judge by their very nature attain a state action status. Therefore, the judge’s denial of Musladin’s counsel’s request to instruct the family members to refrain from wearing the buttons in court would qualify as state action.

Instead of discontinuing the analysis prematurely on such questionable grounds, the Court could have simply shifted the concern about the clarity of the law to its analysis under the unreasonable application prong of § 2254(d)(1).

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54 Carey, 127 S.Ct. at 652, CC-3.
55 See Lockyer v. Andrade, 538 U.S. 63, at 72, CC-89, where the Court found that although its noncapital Eighth Amendment proportionality decisions were not a “model of clarity,” the governing legal principle that a gross disproportionality principle is applicable to sentences for terms of years is still “clearly established” under § 2254(d)(1); See also Melissa M. Berry, Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes “Cleary Established” Law Under the Antiterrorism and Effective Death Penalty Act, 54 Catholic U. L. Rev. 747, 782 (2005) CC- 410 (stating that the Court was
habeas relief under § 2254(d) (1), the state court’s application of clearly established law must be more than erroneous – it must be objectively unreasonable.\textsuperscript{56} Therefore, the more general the rule, the more deference should be given to state courts in reaching outcomes based on case-by-case determinations.\textsuperscript{57} Because the state court’s ruling is consistent with a large body of jurisprudence from other jurisdictions\textsuperscript{58}, it would be difficult to declare that it is an unreasonable application of clearly suggesting that “clearly established law is a spectrum running from very general to very specific principles,” and “[a]s long as the petitioner identifies a principle in Supreme Court precedent, the petitioner will pass through the threshold determination, but questions about the clarity and specificity of the principle will affect the reasonableness of the state court’s decision applying that principle.”

\textsuperscript{56} Andrade, 538 U.S. at 75, CC-91 (2003); see also, Williams, 529 U.S., at 410, CC-221; Alvarado, 541 U.S. 652, 665, CC-233.

\textsuperscript{57} Alvarado, 541 U.S. at 644, CC-233 (2004)

\textsuperscript{58} See e.g., Buckner v. State, 714 So.2d 384, 387, CC-242 (Fla. 1998) (per curiam) (jury’s exposure to photographs was not prejudicial); Davis v. State, No. 07-03-0457-CR, 2006 WL 1211091, 16, CC-253 (Tex. App. May 3, 2006) (spectators wearing medallions with victim’s picture was not prejudicial); In re Woods, 114 P.3d 607, 616-618, CC-259-60 (Wash. 2005) (en banc) (ribbons worn in memory of victim did not express any conclusion about the defendant’s guilt or innocence); State v. Braxton, 477 S.E.2d 172, 176-177, CC-289 (N.C. 1996) (spectators wearing badges with victims image was not prejudicial); State v. Speed, 961 P.2d 113, (Kan. 1998) (spectators wearing t-shirts and buttons with victim’s image was not prejudicial)
established law. Even though the Court cited several cases in which the lower courts have diverged in their treatment of spectators’ conduct, the majority did so only to prove that there was no clear standard not to prove that the standard followed by the state court was reasonable.

Although the Court’s failure to engage in a complete § 2254 analysis may arguably be irrelevant to the outcome of this case, the Court’s actions have greater policy implications that reach far beyond one specific case. Under the current ruling, there can never be any federal habeas corpus review of spectator conduct no matter how prejudicial their actions appear. Victim and spectator participation can pose serious threats to defendants’ Sixth Amendment rights. Trial courts should safeguard the trial process by preventing the jury from being exposed to anything that would prejudice a defendant’s ability to a fair trial. However, this does not mean that the trial court’s decision should be exempt from habeas review. Because fundamental liberty interests are in the balance, courts should be reluctant to draw the line at denying relief for what they feel is a lack of clearly established law.

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59 See Musladin, 127 S.Ct. at 658, CC-6 (Souter, J., concurring in the judgment) ("I am wary of assuming that every trial and reviewing judge in those cases was unreasonable as well as mistaken in failing in failing to embrace a no-risk standard") Id.

60 See, e.g., Christopher R. Goddu, Victim’s “Rights” or a Fair Trial Wronged?, 41 Buff. L. Rev. 245, 255-66, CC-526-31 (1993) (stating that victim and spectator participation are a threat to defendants’ Sixth Amendment rights to a fair trial and impartial jury).
Through the passage of AEDPA, Congress has controversially curtailed the ability of federal courts to grant habeas relief.\(^{61}\) The Court’s decision in Carey further restricts habeas courts’ review of state criminal judgments. Even though a constitutional right may have been violated, the AEDPA standard, as applied in Carey, prevents a court from remedying that violation because the Supreme Court has not specifically recognized that violation. As a result of the Court’s failure to go through the proper steps of the AEDPA analysis, more prisoners under sentence of death will now be denied access to the federal courts for the adjudication of their federal constitutional claims.

\(^{61}\) See, e.g., Lindh v. Murphey, 96 F. 3d 856, 869, CC-271 (7th Cir. 1996) (analyzing the meaning of §2254(d)(1) clause “Federal law as determined by the Supreme Court of the United States” ) The Seventh Circuit stated in Lindh that the new scope of review in §2254(d)(1) “significantly interfere[s] with the judicial role and to a great extent prevents the judicial department from accomplishing its ‘constitutionally assigned functions.’” 96 F. 3d at 890, CC-282; Evan Tsen Lee, Section 2254(d) of the New Habeas Statue: An (Opinionated) User’s Manual, 51 VAND. L. REV. 103, 135, CC-678 (1998) (stating that Congress could simply suspend the doctrine of stare decisis in habeas corpus cases and “prohibit the stare decisis effect of circuit decisions, eliminating the law declaration function of the courts of appeals and leaving them only in the business of error correction”).
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,” the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) sought to extricate federal courts from a tangled, “tutelary relation” 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.” Last Term, in Carey v. Musladin, the

3 Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).
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. 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. Throughout Musladin’s trial, members of Studer’s family seated at the front of the spectators’ gallery wore buttons bearing the victim’s photograph. The trial court denied Musladin’s motion to prohibit this display, reasoning that the buttons posed “no possible prejudice to the defendant.” The jury convicted Musladin of first-degree murder and three related offenses.

The California Court of Appeal affirmed the conviction. Drawing on the “inherent prejudice” test of Estelle v. Williams and Holbrook v. Flynn, 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.” 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.” Musladin petitioned unsuccessfully for a writ of habeas corpus in federal district court.

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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.
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[ ] prejudice” 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 654 (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— that courtroom practices must not present “‘an unacceptable risk . . . of impermissible factors coming into play’” in the jury’s consideration of the case. There was “no serious question,” Justice Souter maintained, that the standard extended to spectators generally and to Studer’s family members specifically. Nonetheless, Justice Souter concluded that the risk of improper influence posed by the buttons had not clearly risen to an “unacceptable” level. Additionally, he raised the possibility that the spectators might have a valid First Amendment interest in wearing the buttons.

Justice Stevens filed another concurrence, taking issue with the majority’s focus on holdings — to the exclusion of dicta — in construing “clearly established law.” 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.” 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.” 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.

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. 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

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. 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. Musladin’s case thus called for a “new rule” to be “explored in the court system” as a basis for future grants of relief.

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. 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; 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. To be sure, the Court often has pragmatic or strategic reasons to stop short of addressing all the issues presented.

Yet Musladin is an instance not of the minimalist approach of “saying no more than necessary,” 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

39 See id. at 657.
40 Id.
41 Id.
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.
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

\(^{47}\) Williams, 529 U.S. at 390.


\(^ {49} \) See, e.g., Lopez v. Wilson, 355 F.3d 931, 939–41 (6th Cir. 2004), aff’d en banc, 416 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).

\(^{50}\) 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. Scheidgger, 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.”).

\(^{51}\) 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.

\(^ {52} \) 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).

\(^ {53} \) Id. at 654.
outside the precedents’ holdings, the Court ignored the inconsistencies riddling how broadly or narrowly precedents are construed.\textsuperscript{54}

The Court’s fine line-drawing between state and private actors lays bare this malleability. Prior to \textit{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 \textit{Yarborough v. Alvarado},\textsuperscript{55} the Court discerned a clearly established “custody test” from a “matrix” of decisions spanning several decades.\textsuperscript{56} In \textit{Lockyer v. Andrade},\textsuperscript{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.”\textsuperscript{58} Moreover, the \textit{Andrade} Court unearthed this “clearly established” principle from a “thicket” of factually distinct Eighth Amendment precedents.\textsuperscript{59} The \textit{Musladin} Court, however, declined even to delve into the thicket.\textsuperscript{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.\textsuperscript{61}

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

\textsuperscript{54} See Michael C. Dorf, \textit{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, \textit{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.”).

\textsuperscript{55} 541 U.S. 652.

\textsuperscript{56} Id. at 664–65.

\textsuperscript{57} 538 U.S. 63 (2003).

\textsuperscript{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)).

\textsuperscript{59} Id.

\textsuperscript{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,” \textit{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 . . . \textit{buttons proclaiming a message relevant to the case} ought to be prohibited.” Id. at 657 (emphasis added).

spectators’ courtroom conduct of the kind involved here, it cannot be said that the state court “unreasonabl[y] appl[ied] 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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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).
“sap[ping] [a] . . . clause of any meaning.” 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,” 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.

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 ‘unreasonably applied clearly established Federal law.’” 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. 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. The inquiry involves effectively calibrating a sliding scale of objective reasonableness upon evaluating whether a governing rule is specific, general, or somewhere in between. “The more general the rule, the more leeway courts have in reaching outcomes in

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, and the farther off the mark the state court must be to warrant reversal. 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. “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. 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. 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

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 ‘re-trials’ on federal habeas”\textsuperscript{80} and “restrict the power of the lower federal courts to overturn fully reviewed state court criminal convictions.”\textsuperscript{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\textsuperscript{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].”\textsuperscript{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.”\textsuperscript{3} Federal courts have interpreted the residual clause broadly, holding that the ACCA covers a panoply of fel-

\textsuperscript{80} Id. at 386.
\textsuperscript{81} Musladin v. Lamarque, 427 F.3d 647, 647 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc).
\textsuperscript{2} 18 U.S.C. § 924(e)(1).
\textsuperscript{3} Id. § 924(e)(2)(B)(ii).