

## John Kingdon's "Three Streams" Theory and the Antiterrorism and Effective Death Penalty Act of 1996

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Book reviews strive to analyze new publications that advance the intellectual development of an old or new idea. Their purpose is to see whether the author's proposal accurately captures the current state of knowledge or suggests a new direction for policy or legal theories already in play. To serve that purpose, book reviews by and large try to follow closely on the heels of the publication date of a new book. Books published five or ten years ago, let alone twenty-five years ago, are, to use the vernacular, so "twenty minutes ago" that they generally are not worth reviewing. Over a twenty-year period, the policy and legal discussions in a book either have become positive law in some form (e.g., a statute, a regulation, an official government policy statement, etc.) and therefore have a history to be assessed, or they have been evaluated and found wanting intellectually or unworkable practically.

Every now and then, however, it makes sense to consider whether an author's idea is still valuable long after that author first penned his proposal. That course is particularly helpful when an author proposes a method for analyzing the structural process of policy or legal decision making, rather than a new substantive idea.

For example, law schools today generally offer a class devoted to statutory analysis as a supplement to the common law, case-by-case decision making process that first-year law students learn in courses on torts, contracts, and property. The impetus for such a change in the law school curriculum likely is due to the recognition that, from the New Deal to the present, legislatures make policy judgments more often than courts.<sup>1</sup>

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<sup>1</sup> That is not to say that courts do not make policy judgments, even if only from "molar to molecular motions." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). They do. But it is one thing for a court to enjoin the government to comply with the Constitution in how it administers a federal program, such as Social Security, Medicare, or Medicaid, *see, e.g., Califano v. Goldfarb*, 430 U.S. 199 (1977) (holding Social Security Act benefits cannot be apportioned on the basis of sex), and another thing altogether for a court itself to create its own initiative along those lines. Federal courts are reluctant to supervise the operation of existing institutions, *see Rizzo v. Goode*, 423 U.S. 362 (1976), let alone start from scratch to create one out of whole cloth.

A publication that critiques this combined case law and statutory analysis approach to legal decision making and teaching could prove valuable long after its recommendations have been adopted or allowed to die a slow death on a bookshelf—the fate of most policy reports. Such a work could prove valuable because it makes sense to ask whether a new way of viewing a subject continues to resonate long after the book is first published. Once in a while, then, it is valuable to see a book “reconsideration” perform that job, a job that a book “review” cannot, precisely because a book review lacks the sense of history necessary to perform a long-term critique of a publication.

In his 1984 book *Agendas, Alternatives, and Public Policies*,<sup>2</sup> Professor John Kingdon came up with a new approach to the analysis of public policy decision making.<sup>3</sup> He developed the theory that the timely confluence of “three streams” – the problem stream, the policy stream, and the political stream – is what creates the momentum necessary to place an issue on the public policy agenda, to move it from the “government agenda” (or “under discussion”) box to the “decision agenda” box, and to lead government finally to change public policy. While it is potentially relevant to the policy decisions of each agency of federal or state government, Kingdon’s theory supplies an especially useful prism for analysis of the political branches of the federal government. The tremendous expansion in the twentieth century of the federal government’s authority leaves virtually no aspect of contemporary public policy beyond its reach; Congress, at least, legislates as if no such limit exists.<sup>4</sup> Congress

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<sup>2</sup> JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984). Kingdon published a second edition in 1995. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 1995) [hereinafter KINGDON]. The second edition adds a new chapter (10) containing Kingdon’s reflections on public policy events and thinking since the publication of his 1984 book, but he kept “the body of the book exactly the same as it was in the first edition.” KINGDON, *supra*, xiii. For the reader’s convenience, I will use the second edition as the template.

<sup>3</sup> For a panoramic but concise description of the different public policy decision making theories, see JAMES E. ANDERSON, *PUBLIC POLICYMAKING* (7th ed. 2010).

<sup>4</sup> In the Gun-Free School Zones Act of 1990, Congress made it a federal offense for a person knowingly to possess a firearm in the vicinity of a school. See 18 U.S.C. § 922(q)(1)(A) (1988 ed. & Supp. V). The statute did not require that the government prove that the act of possession was in or affected interstate commerce, or that the firearm had travelled in interstate commerce. The Supreme Court concluded that Congress had gone too far. See *United States v. Lopez*, 514 U.S. 549 (1995) (holding the act unconstitutional as exceeding Congress commerce power). Recently, the Court has held that there are other material limits as to how far the Congress can reach, under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, to regulate private activity. See *United States v. Morrison*, 529 U.S. 598 (2000) (holding unconstitutional a statute making rape a federal crime). The Court revisited this issue in *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), which involved the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119

and the President also enjoy a far greater ability to create that agenda, and they are far more directly influenced in doing so by changing public sentiment than are the “nonpolitical” branches – i.e., the federal judiciary and the executive bureaucracy. Public policy analysts always can find something of interest in what the federal government already has done or has been asked to do. The work of Congress is a target-rich environment for that industry.

#### I. KINGDON’S THREE STREAMS: PROBLEM, POLICY, AND POLITICS

*Agendas, Alternatives, and Public Policies* starts out with this puzzle: In public policy debates, some discussions are premature, others have become moot or passé, and a few (let’s call them the Goldilocks issues) arise at just the right time for discussion to lead to action.<sup>5</sup> Practitioners, academics, and everyday people may know the issues that might come into the spotlight, the alternatives to a problem raised and answer chosen, and (at least in retrospect) how a chosen answer came to be. Ideas rarely can be traced to the creative thought process of a single individual or group; more often than not, so-called new ideas merely are variations on already-known themes.<sup>6</sup> The President and members of Congress can offer items for the agenda, and they, along with White House staff, executive branch career personnel, congressional staff, the media, lobbyists, private organizations, and even members of the public, can supply other agenda items or alternative ways of accomplishing any such item.<sup>7</sup>

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(2010). There was no majority opinion. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito concluded that Congress lacked authority under the Commerce Clause to adopt that law, *Sebelius*, 132 S. Ct. at 2577-2609 (opinion of Roberts, C.J.); *id.* at 2642-2676 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting), but they were not all on the same side of the judgment. Justices Ginsburg, Breyer, Sotomayor, and Kagan concluded that the Act was a lawful exercise of Congress’ Commerce Clause power. *Id.* at 2609-2642 (opinion of Ginsburg, J.). Five justices therefore continue to believe that Congress’s Commerce Clause power is not plenary.

<sup>5</sup> KINGDON, *supra* note 2, at 1.

<sup>6</sup> *Id.* at 71-77. As an example, Kingdon uses the creation of Health Maintenance Organizations (HMOs) during the Nixon presidency. Paul Ellwood, the head of InterStudy, a Minneapolis-based policy group, which supported prepaid health insurance, happened to sit on a plane next to Thomas Joe, an assistant to then-Department of Health, Education, and Welfare (HEW) Undersecretary John Veneman. Ellwood persuaded Joe of the HMO concept, and Joe introduced Ellwood to Veneman, who in turn elevated the idea to the national level. To that extent, perhaps the HMO concept can be traced to Ellwood. *Id.* at 5-6, 73. But the lineage of the broader concept of national health insurance can be said to go back to a 1927 report on the cost of medical care, to Teddy Roosevelt, or to Bismarck and possibly beyond. *Id.* at 73.

<sup>7</sup> *Id.* at 21-70.

Moreover, there are far more items on the public policy agenda that make small-scale advances or revisions to an existing program than there are new, watershed proposals or paradigm shifts in ongoing policies.<sup>8</sup> The public policymaking process is “organized anarchy.”<sup>9</sup> Different participants, ideas, problems, solutions, and practical strategies for adoption and implementation come together like tributaries flowing into a river.<sup>10</sup> The knowledge of how and why a particular subject makes its way to the top of the public policy agenda, going from being just a possibility (of whatever likelihood) to the actuality of the government’s chosen solution to a problem, remains in a black box.<sup>11</sup> How, then, do all the parts and people come together? How do we know that an idea’s time has come, that a proposal published in a journal, floated over coffee, or stumbled upon by blind luck will become a major topic of consideration by policymaking officials?<sup>12</sup> Kingdon devotes *Agendas, Alternatives, and Public Policies* to figuring out the answer to that question.

Kingdon starts with the proposition that, despite the oftentimes chaotic operation of the federal policymaking process, a characteristic that he (correctly) attributes to the Framers’ concern with the despotic potential of any one branch of government,<sup>13</sup> there is at least some organization to this anarchy.<sup>14</sup> Three “families of processes” come together in federal agenda setting: “problems, policies, and politics.”<sup>15</sup>

Problems, matters of concern that a critical mass of people want to change or affect,<sup>16</sup> can arise from disasters;<sup>17</sup> from sudden, tragic,

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<sup>8</sup> *Id.* at 77-83.

<sup>9</sup> *Id.* at 86.

<sup>10</sup> *Id.* at 86-87.

<sup>11</sup> *Id.* at 1-2. Kingdon sees all public policy decisions as involving a sequential, four-step process: (1) setting the “agenda,” i.e., the list of subjects to which government officials, and closely-involved private parties, will devote time and political capital (which he further subdivides into the “governmental agenda,” the items for discussion, and the “decision agenda,” the items set up for action); (2) identifying possible alternative resolutions; (3) choosing one option to become positive law (e.g., a statute); and (4) implementation of that decision. *Id.* at 2-4. *Agendas, Alternatives, and Public Policies* deals with the first two stages of this process. *Id.* at 3.

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.* at 76; see, e.g., *Bowsher v. Synar*, 478 U.S. 714, 721-22 (1986) (the separation of powers doctrine protects individual liberty); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); THE FEDERALIST No. 47, at 325 (James Madison) (J. Cooke ed., 1961).

<sup>14</sup> KINGDON, *supra* note 2, at 87.

<sup>15</sup> *Id.*

<sup>16</sup> As opposed to a concern that people just suffer through. *Id.* at 109-13.

<sup>17</sup> E.g., a bridge collapse. *Id.* at 95.

captivating events;<sup>18</sup> from intense or long-term media attention to an issue that can be felt or understood by everyone;<sup>19</sup> from policy choices that start out with good intentions but later “go south”;<sup>20</sup> from the dogged tilling of the soil on a particular subject;<sup>21</sup> from the accumulation of small-scale problems that reaches a critical mass;<sup>22</sup> from individuals or groups who thrust themselves or their idea(s) into public discussion,<sup>23</sup> or in other ways.<sup>24</sup> Policy proposals come from single-issue or wide-ranging policy experts in the academy or think tanks,<sup>25</sup> from the parties (or a confederation of their allies) that stand to gain or lose from particular legislation or regulations,<sup>26</sup> and from formal (or informal) coalitions of separate entities that share a common interest.<sup>27</sup> The number of potential options is limited only by the imagination, interest, and energy of those parties.<sup>28</sup>

The political stream is formed by changes in administrations or the majority party in the House of Representatives and Senate, the retirement or defeat of powerful legislators,<sup>29</sup> the election of new, charismatic officials, public referenda, and the prevailing mood among the electorate.<sup>30</sup> Each participant in the processes mentioned above<sup>31</sup> could theoretically be involved in all three streams.<sup>32</sup> Ordinarily, however, participants specialize in one or two streams.<sup>33</sup> For example, academics, researchers, and current or former bureaucrats generate policies, while elected or politically appointed officials and political parties work the halls of politics to see

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<sup>18</sup> *E.g.*, 9/11. *Id.*

<sup>19</sup> *E.g.*, crime or health care. *Id.*

<sup>20</sup> *E.g.*, the Vietnam War. *Id.*

<sup>21</sup> *E.g.*, airline, railroad, and trucking price deregulation. *Id.* at 102-03.

<sup>22</sup> *E.g.*, the federal deficit. *Id.* at 108.

<sup>23</sup> *E.g.*, the Tea Party.

<sup>24</sup> KINGDON, *supra* note 2, at 87, 90-115.

<sup>25</sup> *E.g.*, the Heritage Foundation, the Hoover Institution, and the Brookings Institution.

<sup>26</sup> *E.g.*, DuPont, Microsoft, the National Audubon Society, and the business and environmental communities.

<sup>27</sup> *E.g.*, the Leadership Conference on Civil and Human Rights.

<sup>28</sup> KINGDON, *supra* note 2, at 87, 116-44. When it comes to choosing from among those options, however, often the dispositive factors are their cost and the room in the budget for any particular proposal. *Id.* at 105-09.

<sup>29</sup> *E.g.*, House and Senate Committee Chairs.

<sup>30</sup> KINGDON, *supra* note 2, at 87, 145-64.

<sup>31</sup> *See supra* pp. 4-6.

<sup>32</sup> “People recognize problems, they generate proposals for public policy changes, and they engage in such political activities as election campaigns and pressure group lobbying.” *Id.* at 87.

<sup>33</sup> *Id.*

their favored proposals become law.<sup>34</sup> Each actor can prompt, support, inhibit, scuttle, or undo the work of the others.<sup>35</sup>

There is no shortage of examples in numerous federal policy fields to illustrate the operation of Kingdon's theory. Kingdon himself identifies several.<sup>36</sup> The criminal justice field, however, is a particularly inviting subject. The reason is that, short of sending the nation to war, the most intrusive action that the federal government can take against any person is to imprison or execute a convicted defendant for a crime. Moreover, judicious implementation of sound criminal justice policy is a cornerstone to any successful political society, since there is no more elementary duty that government has than to protect public safety. And there is no shortage of controversial criminal justice issues potentially subject to illumination by Kingdon's theory. In fact, Kingdon's theory offers a particularly valuable vehicle for analyzing one of the most controversial American criminal justice issues of the last forty years: federal court habeas corpus review of state murder convictions and capital sentences and the Antiterrorism and Effective Death Penalty Act (the AEDPA).<sup>37</sup> With that in mind, this book reconsideration considers how well Kingdon's theory holds up today.

## II. *THE PROBLEM STREAM*: THE DEBATE OVER FEDERAL HABEAS CORPUS REVIEW OF STATE CAPITAL SENTENCES

Throughout history, most societies have used capital punishment as a mandatory or optional penalty for crimes.<sup>38</sup> The United States is no exception. The federal government and a majority of the states have authorized the death penalty to be imposed for various offenses, principally

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 87-88.

<sup>36</sup> *Id.* at 6-12 (discussing HMOs; national health insurance; and airline, railroad, and trucking deregulation).

<sup>37</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 15, 18, 19, 21, 22, 28, 40, 42, 49 and 50 U.S.C.).

<sup>38</sup> *See, e.g.,* *Furman v. Georgia*, 408 U.S. 238, 333 (1972) (Marshall, J., concurring) ("Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization. Its precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members. Thus, infliction of death as a penalty or [sic] objectionable conduct appears to have its beginnings in private vengeance.") (footnotes omitted).

murder, for more than two centuries.<sup>39</sup> Some believe that it is inherently moral to execute those who murder; others think that the prospect of receiving the death penalty deters offenders from committing capital crimes; a third group sees it as the ultimate means of incapacitation.<sup>40</sup> Not surprisingly in a pluralistic nation, some parties object to capital punishment. They challenge the effectiveness of the death penalty as a measured, humane way to implement retribution, deterrence, and incapacitation, and they defend the rehabilitative ideal as the sole or primary justification for criminal punishment.<sup>41</sup>

The debate over the appropriate purposes of punishment, as well as the morality or utility of the death penalty, began in the Colonial Period in America and continued well into the twentieth century.<sup>42</sup> But there was no

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<sup>39</sup> See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (discussing the history of American capital sentencing).

<sup>40</sup> See, e.g., *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion) (“[T]he Constitution does not mandate adoption of any one penological theory. . . . A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Some or all of these justifications may play a role in a State’s sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”) (citations and internal punctuation omitted); *Powell v. Texas*, 392 U.S. 514, 530 (1968) (plurality opinion) (noting that the Court “has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects”).

<sup>41</sup> For discussions of the theories of deterrence, retribution, incapacitation, and rehabilitation as justifications for punishment, efforts to implement practices consistent with those theories, and the (sometimes intermittent, sometimes repeated) failures of those efforts, see, for example, *Mistretta v. United States*, 488 U.S. 361, 363-71 (1989) (canvassing the history of federal sentencing law); *Furman v. Georgia*, 408 U.S. 238, 345-54 (1972) (Marshall, J., concurring) (criticizing the argument in favor of the deterrent and retributive effects of capital punishment); *id.* at 452-56 & nn.43-52 (Powell, J., dissenting) (defending those arguments); FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981); JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 326-26, 336 (1931); WALTER BERNS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* (1991) (principles of justice justify executing murderers); *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE* (HUGO ADAM BEDAU & PAUL G. CASSELL EDS., 2004); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 231-35 (1968); IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 198 (W. Hastrie trans., 1887) (1797); WAYNE R. LAFAVE, *CRIMINAL LAW* § 1.5, at 26-36 (5th ed. 2010); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-70 (1968); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971); 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81-82 (1883 ed.); THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* (1976); JAMES Q. WILSON, *THINKING ABOUT CRIME* 117-21, 145-58 (rev. ed. 1983); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); FRANKLIN E. ZIMRING & GORDON HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973); FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: LEGAL CONFINEMENT AND THE RESTRAINT OF CRIME* (1995).

<sup>42</sup> See *Furman*, 408 U.S. at 333-42 (Marshall, J., concurring) (discussing the arguments for and against capital punishment in America).

dispute over its legality.<sup>43</sup> As late as 1958 the Court could say in *Trop v. Dulles* that

[w]hatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment – and they are forceful – the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.<sup>44</sup>

Use of, and public support for, capital punishment, however, began to decline in America in the latter half of the twentieth century. This downturn was due in part to a change in social mores, but it is also attributable to the successful work of a small but dedicated band of lawyers (and their allies) representing inmates on death row.<sup>45</sup> Advocates for abolition of capital punishment and counsel for individual condemned prisoners not only sought to overturn the conviction or sentence for particular death row inmates, but they also challenged the constitutionality of the institution of capital punishment on several broad grounds. Among those arguments were the following: the death penalty is invariably a

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<sup>43</sup> Certainly not if you read what the Supreme Court had to say about it. *See, e.g.,* *McGautha v. California*, 402 U.S. 183, 207 (1971) (“[W]e find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the [C]onstitution.”); *id.* at 226 (separate opinion of Black, J.) (“The Eighth Amendment forbids ‘cruel and unusual punishments.’ In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment.”); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (holding that carrying out a second attempt at execution after first attempt was unsuccessful was not unconstitutional); *In re Kemmler*, 136 U.S. 436 (1890) (upholding electrocution as a permissible method of execution); *id.* at 447 (“Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the [C]onstitution. It implies there something inhuman and barbarous, [ ] something more than the mere extinguishment of life.”); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878) (“Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the [E]ighth [A]mendment.”).

<sup>44</sup> 356 U.S. 86, 99 (1958) (plurality opinion).

<sup>45</sup> For a detailed, insider’s account of the efforts of those lawyers who worked for (and supported the efforts of) the NAACP Legal Defense Fund, *see* MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).



“cruel and unusual punishment” forbidden by the Eighth Amendment,<sup>46</sup> capital punishment lacks a legitimate penological justification;<sup>47</sup> no manner of carrying out an execution can lead to an immediate and painless death,<sup>48</sup> and the death penalty has always been and continues to be imposed and carried out in a manner that discriminates on the basis of race, social class, and wealth.<sup>49</sup>

Defense counsel raised these claims throughout the trial and appellate process in state courts and also in the Supreme Court of the United States,

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<sup>46</sup> The argument was that society deemed brutal and uncivilized the government’s willful taking of human life; that execution of a helpless inmate dehumanizes everyone involved in that process; that the death penalty would be imposed in an arbitrary manner or for illegitimate reasons; and that there was no proof that capital punishment served any legitimate penal interest more effectively than imprisonment. *See, e.g.*, CHARLES BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974); Albert Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH (1960); ARTHUR KOESTLER, REFLECTIONS ON HANGING (1956).

<sup>47</sup> Retribution was said to be an illegitimate ground for punishment, *see, e.g.*, HERBERT PACKER, *supra* note 41, at 43-44 (discussing the issue), and the death penalty supposedly could not, in fact, be carried out with sufficient regularity to have a nontrivial general deterrent effect. Historically, debate over the deterrent effect of capital punishment relied on competing psychological theories and anecdotes. *See, e.g.*, ROYAL COMM’N ON CAPITAL PUNISHMENT 1949-1953, REPORT: PRESENTED TO PARLIAMENT BY COMMAND OF HER MAJESTY, SEPTEMBER, 1953 (1953); THE DEATH PENALTY IN AMERICA (Hugo Adam Bedau ed., 1967). In the 1970s, scholars examined state homicide and execution statistics to determine empirically whether capital punishment had a deterrent effect. Researchers disagreed over the results. *Compare, e.g.*, Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); and Isaac Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975) (finding a deterrent effect); *with, e.g.*, David C. Baldus & James W.L. Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); and William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich’s Research on Capital Punishment*, 85 YALE L.J. 187 (1975). Those scholars wrestled themselves to a draw. This debate has not moved far since then. *See, e.g.*, Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003). *See also* John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005); Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 STAN. L. REV. 847 (2005). *See generally* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 706 & n.9, 711-16 (2005) (collecting authorities finding that capital punishment has a deterrent effect); *id.* at 708-09 n.16 (collecting authorities criticizing the deterrence studies).

<sup>48</sup> *See, e.g.*, Camus, *supra* note 46, at 131, 151-156. *See generally* Furman v. Georgia, 408 U.S. 238, 288 n.36 (1972) (Brennan, J., concurring) (collecting authorities).

<sup>49</sup> *See, e.g.*, THE DEATH PENALTY IN AMERICA 474 (Hugo Adam Bedau ed., 1967); RAMSEY CLARK, CRIME IN AMERICA 335 (1970); LEWIS E. LAWES, LIFE AND DEATH IN SING SING 155-160 (1929) (Written by warden of Sing Sing Correctional Facility in New York). This claim was raised, albeit unsuccessfully, in several cases beginning in the 1960s. *See, e.g.*, McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984), *aff’d sub nom.* McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), *aff’d*, 481 U.S. 279 (1987); Spinkellink v. Wainwright, 578 F.2d 582, 612-16 (5th Cir. 1978); Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970).

traditionally known as the “direct review” process in criminal cases. But the Supreme Court reviews only a limited number of cases each term, so most of this litigation took place either in the state courts or in the federal courts on “collateral review” of state court proceedings. The First Judiciary Act of 1789 authorized the then newly created federal courts to issue writs of habeas corpus “for the purpose of an inquiry into the cause of commitment.”<sup>50</sup> Initially, the federal courts limited their review to the question of whether a federal prisoner was being held under lawful judicial process, even if the process itself rested on an error of fact or law. This review was limited to the inquiry of whether the court had “jurisdiction” to issue the judgment being challenged. Such review was quite limited. Until after the Civil War, the federal courts lacked authority to undertake review of judgments entered in state criminal cases,<sup>51</sup> and even then, federal courts could not reexamine the merits of a state court case.<sup>52</sup>

Eventually, however, the limited scope of federal review of state criminal proceedings started to change in two important ways. The first change was that the Supreme Court gradually began to expand the type of claims that a defendant could raise in a state criminal proceeding. While the Fourteenth Amendment Due Process Clause limited how the states could conduct a criminal trial,<sup>53</sup> the Supreme Court had ruled in 1833 that the particular guarantees specified in the Bill of Rights applied only to federal criminal cases.<sup>54</sup> Starting in 1949, however, the Supreme Court began to apply those guarantees to state criminal defendants by holding that the Fourteenth Amendment Due Process Clause “incorporated” the specific Bill of Rights provisions.<sup>55</sup> The result was a massive increase in the number and type of federal constitutional claims that state defendants and prisoners could assert.

The second change was that the Supreme Court greatly expanded the reach of the federal habeas corpus writ. Abandoning the earlier limitations

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<sup>50</sup> First Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

<sup>51</sup> The Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (codified at Rev. Stat. § 766 (2d ed. 1878)).

<sup>52</sup> See, e.g., PAUL M. BATOR, ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1465-71 (3d ed. 1988).

<sup>53</sup> See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936) (a defendant cannot be convicted on the basis of a coerced confession).

<sup>54</sup> *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

<sup>55</sup> E.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating Sixth Amendment Jury Trial Clause); *Robinson v. California*, 370 U.S. 660 (1962) (incorporating Eighth Amendment Cruel and Unusual Punishments Clause); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating Sixth Amendment Counsel Clause); *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating Fourth Amendment).

on the power of a federal court to review a judgment entered in a state criminal trial, the Supreme Court gradually enlarged the type of claims that a state inmate could assert in federal court, expanding those claims from a narrow challenge to the jurisdiction of the sentencing court, to the fairness of the entire state trial and appellate process, and ultimately to the correctness of a state court’s decision on every federal claim.<sup>56</sup> The result was that, by the 1970s, federal habeas review was independent and plenary, which enabled a state prisoner to re-litigate in federal court any federal claim that he had raised in state court and perhaps even to retry his case.

The combination of these two developments effectively brought executions in this country to a halt through the 1960s and 1970s. By persuading federal habeas courts to consider a variety of novel legal theories challenging the states’ efforts to execute any inmate on death row, counsel kept condemned prisoners alive as the federal courts grappled with new and difficult legal challenges to this established criminal justice institution. The clearest example of the abolitionists’ success came during the period from 1972, when capital punishment barely survived being struck down by the Supreme Court in *Furman v. Georgia*,<sup>57</sup> to 1976, when the Supreme Court finally upheld the constitutionality of the death penalty in *Gregg v. Georgia*.<sup>58</sup> During those four years, no one was executed.

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<sup>56</sup> *E.g.*, *Fay v. Noia*, 372 U.S. 391 (1963); *Brown v. Allen*, 344 U.S. 443 (1953); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Moore v. Dempsey*, 261 U.S. 86 (1923); *Frank v. Mangum*, 237 U.S. 309 (1915).

<sup>57</sup> 408 U.S. 238 (1972). *Furman* was unique in the history of the Supreme Court. Not only was there no majority opinion, no opinion of the Justices in the majority was signed by more than one Justice. Justices Douglas, Brennan, Stewart, White, and Marshall each wrote a separate opinion, joined by no one else. Justices Brennan and Marshall would have held the death penalty per se unconstitutional. Justices Douglas, Stewart and White did not go that far, concluding, instead, that capital punishment was then being applied in an unconstitutional manner. In contrast, the *Furman* dissents were united in their conclusions that the death penalty was constitutional. Chief Justice Burger and Justices Powell, Blackmun, and Rehnquist each wrote a separate opinion ruling that capital punishment was constitutional.

<sup>58</sup> 428 U.S. 153 (1976). In *Gregg*, the Supreme Court, by a 7-2 vote, effectively did an about-face from its then-four-year-old decision in *Furman* and rejected the claim that the death penalty invariably violates the Eighth Amendment Cruel and Unusual Punishments Clause. Some thought that the war over capital punishment was over and the states had won. They were wrong. It turned out that the battle between the states and the death penalty abolitionists was not over; it just entered a still ongoing phase of guerilla warfare. “When the Supreme Court upheld the constitutionality of modern death penalty statutes in 1976, capital punishment’s supporters might have believed that executions would resume after a relatively brief shakedown period. They were wrong. To adopt a military analogy, death penalty abolitionists continued to fight even as they were forced to retreat. They fought in two ways: relatively large-scale fixed battles over whether the death penalty was administered in a racially discriminatory manner, whether those who were mentally retarded or juveniles at the time they murdered others could

The abolitionists' initial success at staving off executions lasted as long as the constitutionality of capital punishment itself was in question and while other across-the-board structural challenges to the death penalty were still being litigated (e.g., racial discrimination). But as the courts began to reject legal claims advanced by abolitionists, inmates' lawyers were forced to advance ever more novel (some would say ever more frivolous) theories on behalf of their clients in order to prevail.<sup>59</sup> Yet, despite seeing a reduction in the type of large-scale claims that could be re-litigated in federal court, there was no tsunami of executions.

Perhaps this result was due to the nature of the criminal litigation process. A condemned prisoner may need to prevail at only one point in the direct and collateral review process in order to escape execution, while the state must win at every step of the way. Even if a federal court merely orders a new trial for a condemned prisoner, the delay between the time of the trial and retrial may have weakened the state's case, due to a loss of witnesses or evidence, to the point that a retrial on a capital charge is impossible. Or perhaps the federal courts needed additional time to apply ever-changing constitutional law in state cases. Whatever the cause of this delay, the states began to believe that while the Supreme Court had upheld the validity of capital punishment as an abstract matter of constitutional law, the lower federal courts had effectively kept any capital sentence from being carried out.

As a result, the question arose whether to clip back the authority of federal habeas courts to re-adjudicate state court decisions. Why should federal courts be free to second-guess facially reasonable judgments of state courts in criminal cases? Moreover, why should federal judges be allowed to invalidate state court judgments on the basis of legal theories

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be executed, and the like; and guerilla campaigns against the execution of almost anyone sentenced to death, on the ground that particular problems in the defendant's trial invalidated either the conviction or the death sentence." Mark Tushnet, *"The King of France with Forty Thousand Men": Felker v. Turpin and the Supreme Court's Deliberative Processes*, 1996 SUP. CT. REV. 163, 166.

<sup>59</sup> Consider the 13-year litigation of California's capital murder prosecution of Robert Harris. See John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011, 1011-20 (1993). Harris raised a fistful of claims throughout those years, but he first challenged the longstanding California method of execution – the gas chamber – eleven years after his trial. Harris so tied up the lower federal courts that, by the end, the U.S. Supreme Court issued an order disempowering any lower federal court from further staying Harris' execution. See *Vasquez v. Harris*, 503 U.S. 1000, 1000 (1992) ("No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."). All that even though there never was any doubt of Harris' guilt of the crime. See Noonan, *supra*, at 1012 ("In all the proceedings that followed in the next thirteen years, it was never seriously disputed that Robert Harris had done the deeds . . .").

that no one could have expected at the time the issue first arose at trial? Although the states continued to defend their judgments on the merits in federal habeas proceedings as being reasonable and correct, the states also sought to challenge the ability of the federal courts to second-guess state court decisions. This was an area, they believed, that was ripe for Congress to intervene on their behalf. And so the states sought to persuade Congress to do just that.

### III. *THE POLICY STREAM: THE CONTROVERSY OVER FEDERALISM-BASED LIMITATIONS ON FEDERAL HABEAS CORPUS REVIEW*

Critics of the Supreme Court’s new habeas jurisprudence argued that second-guessing the presumptively good faith decisions of state courts wreaked massive systemic costs to the federalist structure of our judicial process and reflected a smug sense of condescension in the assertedly superior ability of federal judges to enforce federal law.<sup>60</sup> The states also viewed last-minute use of successive federal habeas corpus petitions as a particularly irritating feature of capital litigation in the 1970s, 1980s, and 1990s.<sup>61</sup> Repetitive challenges to a prisoner’s conviction or sentence had become the norm in capital cases,<sup>62</sup> even in convictions involving heinous crimes with no doubt about the prisoner’s guilt or the appropriateness of a capital sentence.<sup>63</sup> Some condemned prisoners delayed their execution for more than a decade.<sup>64</sup> Moreover, habeas actions in capital cases were often filed shortly before a prisoner was to be executed, thereby creating a type of “hydraulic pressure” on the courts to stay an execution.<sup>65</sup> Such last-

<sup>60</sup> See, e.g., Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441 (1963); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); OFFICE OF LEGAL POL’Y, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS (1988).

<sup>61</sup> For a discussion of those costs, see, for example, *McCleskey v. Zant*, 499 U.S. 467 (1991).

<sup>62</sup> E.g., *Vasquez v. Harris*, 503 U.S. 1000 (1992); *Gomez v. United States Dist. Ct.*, 503 U.S. 653 (1992) (fifth action for relief by condemned prisoner); *Delo v. Stokes*, 495 U.S. 320 (1990) (fourth habeas petition by condemned prisoner). See, e.g., *Federal Habeas Corpus Reform: Eliminating Prisoners’ Abuse of the Judicial Process: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 7, 33, 37, 67 (1995) [hereinafter *1995 Senate Hearing*].

<sup>63</sup> The case of William Andrews is a good example. See *Andrews v. Carver*, 798 F. Supp. 659 (D. Utah 1992); *Andrews v. Deland*, 943 F.2d 1162 (10th Cir. 1991).

<sup>64</sup> *1995 Senate Hearing*, *supra* note 62, at 1-3 (opening statement of Sen. Orrin Hatch).

<sup>65</sup> The Supreme Court recognized that scenario. “A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent.” *Woodard v. Hutchins*, 464 U.S. 377, 380 (1984).

minute habeas petitions often were motivated, the states argued, by a simple desire for delay or to defeat the state's ability to carry out a lawful sentence.<sup>66</sup>

The states were not alone in believing that the federal habeas process was in great need of reform in capital cases. The Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, chaired by retired Supreme Court Justice Lewis Powell, reached the same conclusion. The Ad Hoc Committee found that "our present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law."<sup>67</sup> Not surprisingly, the Committee concluded that "[t]he resulting lack of finality undermines public confidence in our criminal justice system."<sup>68</sup>

The states also thought that they had history on their side. In 1908, faced with a similar delay in the execution of state capital sentences, Congress modified the federal habeas procedures to prevent use of the judicial process to defeat capital punishment.<sup>69</sup> The new law, codified at 28

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<sup>66</sup> See, e.g., *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Comm. on the Judiciary*, 101st Cong., 43, 65, 253, 283, 345-46 (1989 & 1990) [hereinafter *1990 Senate Hearings*]; *id.* at 724-26 (statement of Florida Governor Martinez). See also *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983) ("It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts.") (quoting *Lambert v. Barrett*, 159 U.S. 660, 662 (1895)).

<sup>67</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, THE AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES 1 (Aug. 29, 1989), reprinted in *1990 Senate Hearings*, *supra* note 66, at 7-30.

<sup>68</sup> *Id.* at 1.

<sup>69</sup> At that time, condemned state prisoners were abusing the Habeas Corpus Act of 1867 to forestall their executions. That law authorized federal courts to review state court judgments and provided that any such judgment would be stayed automatically whenever a state prisoner filed a habeas petition until all federal proceedings had been completed. § 1, 14 Stat. 386. The result was that state prisoners could fend off execution as long as they could file a last minute habeas petition before the sentence was carried out. *E.g.*, *Rogers v. Peck*, 199 U.S. 425 (1905). Concerned that condemned state inmates were frustrating the States' ability to enforce their capital sentencing laws, in 1908 Congress revised the Habeas Corpus Act of 1867 in two ways: It eliminated the automatic right to appeal the denial of a habeas petition to the United States Supreme Court; and it imposed the requirement, now found at 28 U.S.C. § 2253, that a prisoner obtain from the sentencing court or a Supreme Court justice a certificate of probable cause to appeal. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40; see H.R. Rep. No. 60-23, at 1-2 (1908); 42 CONG. REC. 608-09 (1908). See generally *Barefoot*, 463 U.S. at 892 n.3. A certificate of probable cause thus became a jurisdictional pre-requisite for appealing to the Supreme Court a circuit court's denial of a state prisoner's habeas petition. See *House v. Mayo*, 324 U.S. 42, 44 (1945); *Ex parte Patrick*, 212 U.S. 555 (1908); *Bilik v. Strassheim*, 212 U.S. 551 (1908). In 1925, as part of an overall modification of federal appellate jurisdiction, Congress extended the probable cause requirement to the courts of appeals. Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940; e.g., *Garrison v. Patterson*, 391 U.S. 464 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Nowakowski v. Maroney*,

U.S.C. § 2253, limited the appellate review process in capital cases. The statute requires a prisoner whose application for habeas relief had been denied by the district court to obtain from that court, a circuit court (or judge thereof), or the Supreme Court (or one of its Justices) a “certificate of probable cause” in order to perfect an appeal.<sup>70</sup> This required the prisoner to show that he had a substantial claim.<sup>71</sup> Otherwise, the litigation would come to an end.

But there also were parties who defended the expansion of federal habeas corpus review of state court criminal judgments in the 1960s. Civil libertarians saw a state prisoner’s opportunity to re-litigate a federal claim in federal court as being the only chance that the prisoner would have to receive a full and fair adjudication of his case. Such advocates believed that state court judges, who often are elected to a term of office and lack the life tenure enjoyed by federal judges,<sup>72</sup> were unduly suspicious of criminal defendants’ claims of mistreatment at the hands of the police, were overly sensitive to unproven claims of law enforcement officials that enforcement of federal rights hampered effective crime fighting, and were illegitimately affected by (even fearful of) a potential adverse public reaction to a ruling potentially freeing an “obviously guilty” defendant.<sup>73</sup> Accordingly, those parties argued, only federal judges could satisfactorily protect a state prisoner’s federal rights.

Defense counsel and scholars also argued that the states were using habeas corpus as a punching bag when their real objection was to the Supreme Court’s decisions in the 1960s applying the Bill of Rights

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386 U.S. 542 (1967). *See generally* Davis v. Jacobs, 454 U.S. 911, 916-17 (1981) (Rehnquist, J., dissenting); Jeffries v. Barksdale, 453 U.S. 914, 915 (1981) (Rehnquist, J., dissenting); 28 U.S.C. § 2253 Historical and Revision Notes; H.R. REP. NO. 80-308, at A179-A80 (1947).

<sup>70</sup> *See Barefoot*, 463 U.S. at 893.

<sup>71</sup> The probable cause standard of 28 U.S.C. § 2253 required a prisoner to make a “substantial showing of the denial of [a] federal right,” which was more than just showing that a claim was not frivolous. *Barefoot*, 463 U.S. at 893 (citation omitted).

<sup>72</sup> All federal judges hold their office during “good behavior,” U.S. Const. art. III, § 1, while most state court judges hold their office only for a term of years, *see* Richard Briffault, *Judicial Campaign Codes after Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004) (“87% of the state and local judges in the United States have to face the voters at some point if they want to win or remain in office”).

<sup>73</sup> *See, e.g.*, Henry M. Hart, *The Supreme Court, 1958 Term – Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982); Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Curtis R. Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960). *See generally* *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

guarantees to the states.<sup>74</sup> Federal courts were not applying new rules to the states, nor were those courts discriminating against the states in their interpretations of constitutional law. Instead, these parties argued that the federal courts were merely applying to the states the same rules for law enforcement conduct and trial procedure that the federal courts had applied to the federal government since the Bill of Rights became law in 1793. That result, counsel and scholars argued, eliminated the patent unfairness that resulted from having a different set of rules, weighted against a defendant, apply when a prosecution is brought in state, rather than federal, court.

The debate went on for two decades without leading to any change in statutory federal habeas law. Congress considered and debated reform of federal habeas corpus without curtailing, codifying, or expanding the relief that a state prisoner could obtain from a federal court.<sup>75</sup> There seemed to be no likelihood that the stalemate could be resolved. Neither side in the debate proved able to swing a majority of the House of Representatives

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<sup>74</sup> See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 794-99 (1970) (arguing that in the 1960s the Supreme Court applied the Bill of Rights to the states, but did not expand the scope of those protections).

<sup>75</sup> See, e.g., 1995 Senate Hearing, *supra* note 62; *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. (1993 & 1994); *Innocence and the Death Penalty: Hearing on S. 221 Before the S. Comm. on the Judiciary*, 103d Cong. (1993); *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. (1991); *Race Claims and Federal Habeas Corpus: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. (1991); *Violent Crime Control Act of 1991: Hearings on S. 618 and S. 635 Before the S. Comm. on the Judiciary*, 102d Cong. (1991); *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. (1990); 1990 Senate Hearings, *supra* note 66; *Habeas Corpus Legislation: Hearings on H.R. 4737 et al. Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. (1990); *Habeas Corpus Reform: Hearing on S. 238 Before the S. Comm. on the Judiciary*, 99th Cong. (1985); *Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 98th Cong. (1983); *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 98th Cong. (1983); *Federal Criminal Law Revision, Parts 2 & 3: Hearings on H.R. 1647 et al. Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 97th Cong. (1981 & 1982); *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the S. Comm. on the Judiciary*, 97th Cong. (1982); *Habeas Corpus Procedures Amendments Act of 1981: Hearing on S. 653 Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 97th Cong. (1981); *Federal Habeas Corpus: Hearing on S. 1314 Before the Subcomm. on Improvements in the Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. (1978); *Habeas Corpus: Hearing on H.R. 15319 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 94th Cong. (1976).



and a supermajority of the Senate to its side.<sup>76</sup> Ironically, the Supreme Court in the meantime had begun to cut back on the reach of federal habeas corpus law.<sup>77</sup> But what that Court contracted (or expanded) it later could expand (or contract), so each side in the debate hoped to see its view of the proper scope of federal habeas codified, making further judicial revision impossible at best or unlikely at worst.

In 1995, however, an event occurred that made Congress feel compelled to act. The bombing of the Alfred P. Murrah Federal Building created an opportunity for Kingdon’s political stream finally to join with the problem and policy streams that had been flowing for the prior twenty years. When that event occurred, the opportunity arose not only to place habeas reform on the federal agenda but also to see reform enacted into law.

#### IV. *THE POLITICAL STREAM: THE OKLAHOMA CITY BOMBING AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT*

On April 19, 1995, acting out of hatred for the federal government and seeking revenge for its role in the deaths that occurred two years earlier at the Branch Davidian complex in Waco, Texas, Timothy McVeigh parked a truck containing a homemade bomb with more than two tons of explosives at the curb outside the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. Set off just after 9 a.m. CST as McVeigh drove away, the blast destroyed more than one-third of the building and killed 168 persons. The attack resulted in what then was the largest mass murder in American history. Apprehended shortly after the attack, McVeigh was charged with murder. He was convicted and sentenced to death, and he ultimately was executed.<sup>78</sup>

Just eight days after the Oklahoma City bombing, Senate Majority Leader Robert Dole introduced the bill that ultimately became the

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<sup>76</sup> The House operates by majority rule, but the Senate allows any member to engage in unlimited debate on a bill – known in the lingo as a “filibuster” – unless sixty members agree to cut off debate. S. Comm. on Rules & Admin., 112th Cong., Standing Rules of the Senate, XIX.1(a), XXII.2 (2012). The filibuster was one reason why the states and other habeas reformers could not achieve their goal: They could not muster sixty votes to change the law.

<sup>77</sup> See, e.g., *Teague v. Lane*, 489 U.S. 288 (1989) (novel rulings of federal constitutional law would be applied on direct review but not in federal habeas corpus, with exceptions for rules that place certain kinds of private individual conduct beyond the power of the criminal law-making authority to proscribe, and those that require observance of procedures “implicit in the concept of ordered liberty”).

<sup>78</sup> The crime and legal proceedings are described at *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998), *United States v. Fortier*, 180 F.3d 1217 (10th Cir. 1999), and Note, *Blown Away?: The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074 (1996).

Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA).<sup>79</sup> The AEDPA contained numerous titles dealing with various aspects of the criminal justice system's response to domestic and foreign terrorism, but the lead title of the bill dealt with federal habeas corpus reform.<sup>80</sup> Expressing its frustration with the lengthy delays in the execution of validly imposed capital sentences,<sup>81</sup> Congress amended the statutory habeas corpus laws in two principal ways in order to help the federal and state governments implement their capital sentencing statutes. The AEDPA prohibited federal courts from granting a state prisoner relief unless the state court's ruling on an issue was clearly unreasonable. The AEDPA also limited a prisoner's opportunity to file successive habeas petitions as a means of hamstringing a State's efforts to carry out a capital sentence.

Why did Congress now enact habeas corpus reform? What was different this time? More particularly, what new twist on the "problem" did the states present? What new "policy" argument did the states advance this time that turned the tide in their favor? Or is that the wrong way to look at this problem? Was it just a matter of now having a favorable political climate for the states' view of habeas corpus reform? Did the "politics" of the issue change in such a way that habeas reform became inevitable?

The last two questions focus on the underlying cause of the public policy change. The explanation of why the AEDPA became law does not lie in what the states did differently in framing the problem or phrasing their policy arguments. The explanation rests on the ability of the states and their supporters in Congress, particularly the Senate, to mobilize

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<sup>79</sup> S. 735, 104th Cong. (1995), enacted as Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 15, 18, 22, 28, 40, 42, and 50 U.S.C.). Congress passed the Senate bill in lieu of two separate House bills. See H.R. Rep. 104-518 (1996) (Conf. Rep.) (House Conference Report on the bill passed by the Senate and agreed to by the House); H.R. Rep. No. 104-23 (1995) (report on Effective Death Penalty Act of 1995, 104th Cong. (1995)); H.R. Rep. No. 104-383 (1995) (report on Comprehensive Antiterrorism Act of 1995, H.R. 1710, 104th Cong., 1st Sess. (1995)). For a section-by-section analysis of the AEDPA, see Charles Doyle, *Antiterrorism and Effective Death Penalty Act of 1996: A Summary* (June 3, 1996), available at <http://www.fas.org/irp/crs/96-499.htm>.

<sup>80</sup> Habeas corpus reform constituted Title I of the AEDPA. Title II involved victim restitution, victim assistance, and lawsuits against terrorist states. Title III concerned international terrorism. Title IV dealt with the exclusion and removal of terrorist and criminal aliens. Title V addressed nuclear, chemical, and biological weapons. Title VI involved plastic explosives. Title VII revised the substantive and procedural criminal law regarding terrorists. Title VIII concerned assistance to law enforcement. Title IX held miscellaneous provisions.

<sup>81</sup> "The absurdity, the obscenity of 17 years from the time a person has been sentenced till that sentence is carried out through endless appeals, up and down the State court system, and up and down the Federal court system, makes a mockery of the law. It also imposes a cruel punishment on the victims, the survivors' families, and we seek to put an end to that." 104 Cong. Rec. H3606 (daily ed. Apr. 18, 1996) (statement of Rep. Henry Hyde).

passionate and sympathetic support for their reform proposal and to capitalize on the prevailing “national mood.”<sup>82</sup>

After the Oklahoma City bombing, the states and their congressional allies had two new sources of political support. The murder of 168 people generated an even larger number of surviving victims among the immediate families and friends of those deceased, and those parties could be mobilized personally to support reforms ensuring that McVeigh would be brought to justice.<sup>83</sup> Also, the massive number of lives lost, the graphic depictions of the office building shredded by the bombing, the cowardly, unjustified attack on innocent civilians, and the realization that any office worker could suffer the same fate at the hands of other deranged anti-government extremists all combined to persuade the general public that a message had to be sent to anyone else contemplating a similar crime.<sup>84</sup>

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<sup>82</sup> See 142 CONG. REC. 7963 (1996) (statement of Rep. Steve Buyer) (“We have a paradox in our society whereby someone serves on death row for life. If, in fact, we are going to have a strong deterrence, retribution so that the victim can actually feel as though they have been vindicated, we need an effective death penalty. This bill will give it for America.”); *id.* at 7971 (statement of Rep. Wayne Allard) (“I want to strongly commend the death penalty reform measures of this conference agreement. I have always supported and cosponsored legislation to limit frivolous, repetitive appeals of convicted murderers on death row.”); KINGDON, *supra* note 2, at 146-64.

<sup>83</sup> See 142 CONG. REC. 7963 (1996) (statement of Rep. Bob Barr) (“No, Mr. Speaker, the families of those victims, of those people who have lost loved ones, colleagues and friends to acts of terrorism, came to us and said give us justice, give us habeas and death penalty reform because the very credibility, all of the confidence that we want to have in our criminal justice system, is being eroded by the failure to deliver that to the American people. And that is what this bill is about.”); *id.* at 7968 (statement of Rep. Frank Lucas) (“As you vote today and reflect on the events of tomorrow, I implore you to remember those who perished and have long since been laid to rest. Our citizen’s [sic] scars are deep and open wounds still abound. Oklahoma City is an innocent slowly rebuilding itself back to the greatness it strives to attain. Although we cannot turn back the clock and prevent this horrendous act from occurring, we must pass this antiterrorism conference report. This bill will bring an end to the abuse of our Nation’s appeals process. It will ensure this country has an effective and enforceable death penalty. It means justice will be served, and that the guilty will receive their punishment in a swift manner.”); *id.* at 7971 (statement of Rep. Ron Packard) (“Mr. Speaker, today we will take up the most pro-victim bill Congress has considered in almost a decade. H.R. 2703 establishes tough new statutes to allow Federal law enforcement officials to combat and punish acts of domestic and international terrorism. This measure combines crime legislation from the Contract With America and additional provisions designed to bring criminals to justice while getting justice for victims.”); KINGDON, *supra* note 2, at 150-53 (discussing the role of “organized political forces”).

<sup>84</sup> See 142 CONG. REC. 7962 (1996) (statement Rep. Barr) (“I also say, Mr. Speaker, that to those warped minds who might today or tomorrow or 1 year from now or 10 years from now contemplate, irrationally as it may be, an act of terrorism against one of our citizens, against one of our Federal employees, against one of the greatest institutions of this Federal Government, let them think longer and harder about it, as I believe they will, knowing that we have passed this legislation, because it will tell them in no uncertain terms, and they do listen to this; this thought process goes on in their mind. They will know that no longer will they be able to, within our borders or come into our country, and kill our citizens, and destroy our government institutions and know that they will be able to spend the next 25 years laughing at us, thumbing their nose at the families of victims, because they will know because of the work of the gentleman from Illinois and our colleagues on both sides, 91 strong in the

Together those factors gave members of Congress seeking to change federal habeas law two new weapons to use. One was the argument that only federal habeas reform could guarantee justice for the victims and survivors of the Oklahoma City attack,<sup>85</sup> a useful policy argument in debate. It was useful because it was brand new, and that feature of the debate was valuable politically regardless of its merits as a policy matter. In fact, the real value of that “policy” argument was its “political” weight. It gave prior congressional habeas reform opponents a facially valid way of explaining why they changed their position on a matter of life and death. The need to ensure that justice would not be denied in the Oklahoma City case offered members of Congress a face-saving rationale for changing their position in this old debate. The new focus on ensuring justice for the Oklahoma City victims allowed members to switch sides without making the about-face appear purely political.

The other, even more powerful new tool was implicit in this new policy argument and emphasized its political utility. The need to guarantee justice for the Oklahoma City victims gave habeas reformers the ability to portray their opponents not as benighted defenders of the Constitution, but as heartless obstructionists who would permit McVeigh (and others like him)

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Senate, has stood up this day and said no more, never again, enough is enough.”); *id.* at 7967 (statement of Rep. Bill McCollum) (“[W]hen the President signs this bill into law after years and years of struggle, we will have limited the appeals that death row inmates can take and we will have assured that sentences of death in this country will be carried out expeditiously, as the American public wants.”); *id.* at 7966 (statement of Rep. Steven H. Schiff) (“[T]he fact of the matter is that terrorists have more in common than they would like to admit to themselves. Regardless of whether they are terrorists from the extreme left or terrorists from the extreme right, they all have a hatred of democratic governments, and they will all attack any democratic government that they have the opportunity to attack.”); *id.* at 7969-70 (statement of Rep. Bill Martini) (“Mr. Speaker, I rise today in support of the conference report to S. 735, the Terrorism Prevention Act, and to honor the victims and salute the survivors of the Oklahoma City bombing. Those 168 innocent people who died in the most heinous act of terrorism committed on American soil; 19 children and 149 adults perished. The destruction does not end with these haunting figures. Hundreds of lives have been altered and the mindset of the entire Nation has changed because of one irrevocable act. The entire country has been suffering together for 1 year.”); *id.* at 7970 (statement of Rep. Martini) (“The rise of extremism and militant fundamentalism within our borders is horrifying and sickening. We must not surrender to terrorism, we must conquer it. We cannot allow the seeds of destruction to be sewn in our country. We must send the message loud and clear that the United States will act decisively against those who attempt to undermine civility. While the antiterrorism bill is not a panacea, it is a step in the right direction.”); KINGDON, *supra* note 2, at 146-49 (discussing the importance of policymakers’ ability to sense the “national mood”);

<sup>85</sup> See 142 CONG. REC. 7961 (1996) (statement of Rep. Hyde) (“The survivors want the habeas corpus. Habeas corpus is tied up with terrorism because when a terrorist is convicted of mass killings, we want to make sure that terrorist ultimately and reasonably has the sentence imposed on him or her. It is not incommensurate with the Constitution, it follows the Constitution and due process.”); *id.* at 7971 (statement of Rep. Allard) (“This bill helps focus our criminal justice system to where it should be, on swift and certain punishment for criminals and justice for victims.”).

to outlive the Oklahoma City survivors by avoiding the gallows. The potential practical force of that argument, especially in the presidential and congressional election year of 1996 (in which the AEDPA’s chief sponsor, Senate Majority Leader Bob Dole, would become the Republican presidential opponent of incumbent Democratic President Bill Clinton), was inestimable.<sup>86</sup>

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<sup>86</sup> The following remarks are illustrative. Start with this excerpt from the Remarks of Senate Majority Leader Dole on the introduction of the bill:

Today’s legislation also contains comprehensive habeas corpus reform, which is something the Senator from Utah, the chairman of the committee, has long sought, which should go a long way in preventing violent criminals from gaming the system—with more delays, more unnecessary appeals, and more grief for the victims of crime and their families. [¶] In fact, the President said justice is going to be swift. I am not certain how swift it is going to be if they can appeal and appeal and appeal in the event they are apprehended, tried and convicted—continued appeals for 7, 8, 10, 15 years in some cases. [¶] During a recent television interview, the President did say we needed strong, comprehensive habeas reform so that those who committed this evil deed will get what they deserve—punishment that is swift, certain, and severe. This legislation will help accomplish this goal.

141 CONG. REC. 11,407-08 (1995). Consider also the later remarks by Senator Hatch, floor leader on the bill:

To be sure, there are many other important antiterrorism measures which will be included in the final terrorism bill[,] including increased penalties, antiterrorism aid to foreign nations, plastic explosives tagging requirements, and important law enforcement enhancements. But let us make no mistake about it—habeas corpus reform is the most important provision in the terrorism bill. In fact, it is the heart and soul of this bill. It is the only thing in the Senate antiterrorism bill that directly affected the Oklahoma bombing. If the perpetrators of that heinous act are convicted, they will be unable to use frivolous habeas petitions to prevent the imposition of their justly deserved punishment. The survivors and the victims’ families of the Oklahoma tragedy recognized the need for habeas reform and called for it to be put in the bill.

142 CONG. REC. 6847 (1996). And Representative Bob Barr:

That is the importance of this legislation, and there is no clearer link, no stronger link, Mr. Speaker, between effective antiterrorism legislation and deterring criminal acts of violence in this country than habeas and death penalty reform. The American people are demanding it. Future generations who will have to face the constant problem of terrorism demand it. They know that it will work. They know we must have it.

142 CONG. REC. 6847 (1996).

This combination of factors ultimately proved too much for the traditional opponents of habeas reform to succeed this time.<sup>87</sup> The public outrage over McVeigh's crimes and the fear that he would use habeas corpus to string out his time on death row were too much for reform opponents to defeat.<sup>88</sup> Republican members of Congress were the principal supporters of the AEDPA, and they were able to succeed where past Senate filibusters had blocked them and bring the bill to a floor vote. When a vote became inevitable, the bill passed easily in both chambers. President Clinton signed the AEDPA into law on April 24, 1996, just three days shy of one year after it was introduced.<sup>89</sup>

A condemned prisoner quickly challenged the constitutionality of the AEDPA. The inmate argued that the act violated the Suspension Clause of the Constitution<sup>90</sup> because it was an invalid limitation on the scope of the writ of habeas corpus. The case rapidly made its way to the United States Supreme Court, where, in 1997, the Court upheld the statute over the prisoner's Suspension Clause challenge in *Felker v. Turpin*.<sup>91</sup>

What has happened in this policy field since 1997? Nothing major. The Supreme Court has granted review in a variety of cases to construe the terms of the AEDPA and to monitor the lower federal courts' application of the Act.<sup>92</sup> None of those decisions, however, is as important as the

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<sup>87</sup> See 142 CONG. REC. S3438-39 (daily ed. Apr. 17, 1996) (statement of Senator Daniel Patrick Moynihan); 142 CONG. REC. H3612 (statement of Rep. Nydia M. Velazquez) ("Mr. Speaker, rushing this bill to the floor just to meet a publicity deadline is irresponsible. Once again we are sacrificing our people to play election year politics.")

<sup>88</sup> See 142 CONG. REC. S3439 (daily ed. Apr. 17, 1996) (statement of Sen. Moynihan) (inserting Anthony Lewis, *Abroad at Home: Is It a Zeal to Kill?*, N.Y. TIMES, Dec. 8, 1995: "The country's agitated mood about crime, fed by demagogic politicians, makes Congress—and Presidents—want to look tough on crime. One result is zeal for the death penalty.")

<sup>89</sup> Pub. L. No. 104-132, Apr. 24, 1996, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

<sup>90</sup> U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). For a discussion of that argument, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 7.2d, 378 (5th ed. 2005); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862 (1994). For the contrary view, see Bator, *supra* note 60, at 466; Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 344 (1952); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 n.244 (1991); Friendly, *supra* note 60 at 170.

<sup>91</sup> 518 U.S. 651 (1997); see Tushnet, *supra* note 58.

<sup>92</sup> See, e.g., *Hardy v. Cross*, 132 S. Ct. 490 (2011); *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011); *Greene v. Fisher*, 132 S. Ct. 38 (2011); *Jimenez v. Quarterman*, 555 U.S. 113 (2009); *Schiro v. Landrigan*, 550 U.S. 465 (2007); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Horn v. Banks*, 536 U.S. 266 (2002); *Williams v. Taylor*, 529 U.S. 362 (2000).

Court’s holding in *Felker v. Turpin* that the AEDPA is a constitutional limitation on federal habeas corpus. In fact, as far as litigation is concerned, the Act has become a staple and settled aspect of federal habeas corpus law. In regards to the political branches of the federal government, the debate over the proper role of the federal habeas courts in cases involving state criminal convictions has largely disappeared from the scene on Capitol Hill.<sup>93</sup> Perhaps we are in roughly the same position today that existed before the Oklahoma City bombing: Neither side has the supermajority necessary to change the law. The only difference is in the default position. Before the Oklahoma City bombing, the federal habeas law was expansive and encouraged state prisoners to challenge their convictions in federal court. Now federal habeas review is more limited, and the courts, if not hostile, are not nearly as receptive to federal court review of state convictions.<sup>94</sup>

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<sup>93</sup> Congress and the courts have shown no interest in revisiting the constitutional issues underlying the AEDPA, but the academy has fought a rear guard action against the statute in an attempt to maintain the relevancy of this issue. *See, e.g., Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1838 (2002); John H. Blume, *AEDPA: the “Hype” and the “Bite,”* 91 CORNELL L. REV. 259 (2006); Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 DUKE L.J. 1 (2008); 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 (1998); Krystal M. Moore, Note, *Is Saving an Innocent Man a “Fool’s Errand”? The Limitations of the Antiterrorism and Effective Death Penalty Act on an Original Writ of Habeas Corpus Petition*, 36 U. DAYTON L. REV. 197 (2011); David Rubenstein, Comment, *AEDPA’s Ratchet: Invoking the Miranda Right to Counsel After the Antiterrorism and Effective Death Penalty Act*, 86 WASH. L. REV. 905 (2011); Symposium, *Pro Se Litigation Ten Years After AEDPA*, 41 HARV. C.R.-C.L. L. REV. 289 (2006); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997); Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578 (1998); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997). *Contra* Kent Scheidegger, Response, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888 (1988). Whether that debate someday will prompt Congress to revisit the AEDPA remains to be seen.

<sup>94</sup> Granted, even before the Oklahoma City bombing the Supreme Court had cut back on the easy availability of federal habeas review. *See, e.g., Sawyer v. Whitley*, 505 U.S. 333 (1992) (holding that a state prisoner may, and sometimes must establish, by clear and convincing evidence, that he is “actually innocent” of a crime to raise a second habeas petition); *McCleskey v. Zant*, 499 U.S. 467 (1991) (holding that state prisoners cannot automatically file a second or repeat habeas petition); *Teague v. Lane*, 489 U.S. 288 (1989) (holding that, with limited exceptions, new Supreme Court decisions cannot be applied retroactively in federal habeas); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (holding that a federal claim not presented in a timely manner in the state courts cannot be raised for the first time on federal habeas unless it falls under an exception); *Stone v. Powell*, 428 U.S. 465 (1976) (holding that state prisoners, after an opportunity for full and fair consideration, cannot raise on federal habeas corpus Fourth Amendment claims concerning evidence from an unconstitutional search or seizure). But the AEDPA imposed even far higher hurdles for a state prisoner to overcome. *See*

Ironically, the domestic terrorism concerns that birthed the AEDPA have been replaced by the international terrorism concerns evidenced by the 9/11 attacks on the World Trade Center and the Pentagon. In the wake of those events, the government took a variety of steps to enhance the nation's ability to spot, intercept, and hunt down international terrorists. Those steps included passage of the USA PATRIOT Act, and creation of the Transportation Security Agency and the Department of Homeland Security.<sup>95</sup> Public policy concern with federal habeas corpus review in cases involving state court judgments of convicted defendants has been superseded by concern (and litigation) over federal habeas review in cases involving executive detention of suspected terrorists held without a trial or sometimes even any type of hearing.<sup>96</sup> Life marches on.

#### CONCLUSION

The provenance of the AEDPA is a useful illustration of Kingdon's "three streams" theory of policy decision making. States with capital sentencing laws on the books found themselves frustrated by the federal courts. To them, the states' inability to carry out capital sentences imposed by juries and trial judges meant that the Supreme Court's 1976 decision upholding the constitutionality of capital punishment was just an abstract decision of little practical effect. Stymied by the ability of condemned prisoners and their counsel to prevent executions by persuading the federal courts to overturn, or at least postpone, death sentences, the states hoped that their policy arguments for limiting the reach of federal habeas corpus would persuade Congress to restrict the power of the federal courts. Yet despite the popularity of capital punishment among the public in most

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Greene v. Fisher, 132 S. Ct. 38, 43-44 (2011); Horn v. Banks, 536 U.S. 266, 272 (2002) (holding that the AEDPA retroactivity bar exists atop the one recognized in *Teague*).

<sup>95</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 2001 U.S.C.C.A.N. (115 Stat.) 272 (2001).

<sup>96</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008); Daniel J. Freeman, *The Canons of War*, 117 YALE L.J. 280 (2007); Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006); Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163 (2008). Compare Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004), with Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004), and David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004).



states and the ready access that elected state officials have to their congressional delegations, the states could not persuade Congress to change the law in their favor. The legislative stalemate endured until the massive loss of life in the Oklahoma City bombing broke the political logjam that had prevented the states from attaining their favored political solution.

The AEDPA is an interesting illustration of Kingdon’s “three streams” theory for other reasons, too. It shows how the theory can describe circumstances under which the federal government reforms how it does business—here, how the federal judiciary acts—and how decision making power is allocated between the federal and state governments when one of them resists giving up that power. Moreover, the AEDPA ironically shows how the streams can fold back on one another. Remember that, at least from the states’ perspective, the “problem” stemmed from their inability to carry out their capital sentencing laws without the acquiescence of the federal judiciary, but the problem ultimately became the states’ inability to persuade the federal legislature to revise the federal habeas corpus statutes to incorporate later, more favorable Supreme Court doctrine. Also, the political stream oddly enough involved an assault on the federal government, not the states, that proved decisive only because of the ability of reformers to hypothesize that this predominantly state-oriented reform also could affect the federal government’s ability to hold a federal defendant fully accountable for his heinous crimes.

The AEDPA also shows that the reform advocates need to know where particular decision makers stand in the flow of the “political stream” and how to persuade them to take a different position. Issues can percolate on the public policy agenda for years, and members of Congress may take a stance on an issue at some point in that process. When the subject has a strong moral overtone to it—capital punishment is one example, but there are others as well (e.g., abortion, torture of captured terrorists)—members who have staked out a position may find themselves personally locked into it even if they later have a change of heart. That poses a problem for parties seeking to change public policy. The need to achieve a majority or supermajority of the members of Congress in order to pass legislation may force advocates to persuade a member to change his or her position. In such circumstances, it may be necessary to offer those members a new, facially legitimate rationale for changing their vote. In the case of the AEDPA, the argument that only habeas reform would help guarantee justice for the deceased and surviving victims of the Oklahoma City bombing played that role. In other words, events may create a fertile

opportunity for actors in the political stream to change public policy, but the need to convince the decision makers to change a prior position may force advocates to do more than just rely on the force of politics. Policy arguments matter, too.

The ultimate value of Kingdon's "three streams" theory may rest in its breadth and flexibility. Kingdon's theory can be used to explain why elected officials do not change public policy even when there is a consensus that a problem needs fixing and when there are competing but reasonable policy arguments for different remedies. What is missing in those situations is a triggering event that demands action. Whether the event is the occurrence of a natural or man-made disaster (e.g., a flood or aircraft accident), the discovery of a new disease (e.g., AIDS), the occurrence of crime on a previously unforeseen scale (e.g., Enron), or some other event that grips the public because of the injury suffered (e.g., 9/11), the "Don't just stand there, *do something!*" mentality spawned by such events can prompt elected officials to take action, even if only for their own political self-preservation.

Kingdon's simple, yet elegant and powerful theory gives policy analysts the ability to describe a broad range of government actions, perhaps especially ones involving the need to persuade Congress to act. Kingdon's three-stream analysis is not the public policy equivalent of Einstein's hoped-for field theory, but it is nevertheless superbly useful.