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BOOK RECONSIDERATION:

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PAUL J. LARKIN, JR.*

Book reviews strive to analyze new publications that advance the intellectual development of an old or new idea. Their purpose is to see how the author’s proposal accurately captures the current state of knowledge on 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 25 years ago, are, to use the vernacular, so “20 minutes ago” that they generally are not worth reviewing. Over a 20-year-period, the policy and legal discussions in such a book either have become positive law in some or other form (e.g., a statute, a regulation, an official government policy statement, etc.) in which case they 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 still makes sense long after that author first penned his proposal. That course is particularly helpful when what the author proposed is not a new, substantive idea to improve the quality of discussion or to solve a particular policy or legal question, but is a way of analyzing the structural process of policy or legal

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decisionmaking. For example, law schools today generally include as part of their course offerings a class devoted to statutory analysis as a supplement to the common law, case-by-case decisionmaking 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, the legislatures make policy judgment more often than the courts. A publication that critiques this combined case law and statutory analysis approach to legal decisionmaking and teaching could prove valuable long after its recommendations have been adopted or allowed to die a slow death laying on a bookshelf, the fate of most policy reports. The reason is that 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, one 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 1984, in his book Agendas, Alternatives, and Public Policies Professor John Kingdon came up with a new approach to the analysis of public policy

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1 That is not to say that courts do not make policy judgments, even if only from “molar to molecular motions.” Southern Pac. Jenson, 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 policies set by the Constitution how an existing federal program, such as Social Security, Medicare, or Medicaid, can be administered, see, e.g., Califano v. Goldfarb, 430 U.S. 199 (1977) (Social Security Act benefits cannot be apportioned on the basis of sex), and another thing altogether for a court itself to create its own large-scale initiative along those lines. Federal courts are reluctant to supervise the operation of existing large-scale institutions, see Rizzo v. Goode, 423 U.S. 362 (1976), let alone start from scratch to create one out of whole cloth.

decisionmaking. 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 20th Century of the federal government’s authority leaves virtually no aspect of contemporary public policy beyond its reach; at least Congress thinks that no such limit exists. The Congress and the President also enjoy a far greater ability to create that agenda, and are far more directly influenced in doing so by changing public sentiment, than enjoyed by the “nonpolitical” branches, the federal judiciary and bureaucracy. The upshot is that public policy analysts always can find

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3 For a panoramic but concise description of the different public policy decisionmaking theories, see JAMES A. ANDERSON, PUBLIC POLICYMAKING (6th ed. 2006).

4 The Supreme Court, however, disagrees. Recently, the Court has held that there are 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, holding unconstitutional two different federal regulatory laws. See United States v. Morrison, 529 U.S. 598 (2000) (statute making rape a federal crime); United States v. Lopez, 514 U.S. 549 (1995) (statute outlawing possession of a handgun in the vicinity of a school). We soon will learn more about where that line can be drawn. See NFIB v. HHS, certs. granted, Nos. 11-393, 11-398 & 11-400 (granting certiorari to review the constitutionality of the Affordable Protection Act, colloquially known as Obamacare).
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

Kingdon’s book Agendas, Alternatives, and Public Policies starts out with this puzzle: We know that 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.5 Practitioners, academics, and everyday people may know what are the issues that might come into the spotlight, what are the alternatives to the problem raised and answer chosen, and (at least in retrospect) how that chosen answer came to be. Additionally, 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.6 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

5 KINGDON 1.

6 Id. at 71-77. As an example, Kingdon uses the creation of Health Maintenance Organizations (HMOs) during the Nixon presidency. Paul Elwood, the head of InterStudy, a Minnesota-based policy group, which supported prepaid health insurance, happened to sit on a plane next to Thomas Joe, an assistant to then HEW Undersecretary John Veneman. Elwood persuaded Joe of the HMO concept, who then persuaded Veneman, who, in turn, elevated the idea to the national level. To that extent, perhaps the HMO concept can be traced to Elwood. 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.

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accomplishing any such item. 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. But the public policymaking process is “organized anarchy.” Different participants, ideas, problems, solutions, and practical strategies for adoption and implementation come together like tributaries flowing into a river. Knowing how and why a particular subject makes its way to the top of the public policy agenda and then goes from being just a possibility (of whatever likelihood) to the actuality of the government’s chosen solution to a problem remained a black box. 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? Kingdon devotes Agendas, Alternatives, and Public Policies to figuring out the answer to that question.

7 Id. at 21-70.
8 Id. at 77-83.
9 Id. at 86.
10 Id. at 86-87.
11 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.
12 Id. at 1.
Kingdon starts with the proposition that, despite the oftentimes chaotic operation of the federal policymaking process, a result that he (correctly) attributes to the Framers’ concern with the despotic potential of any one branch of government,\textsuperscript{13} there is at least some organization to this organized anarchy.\textsuperscript{14} Three “families of processes” come together in federal agenda-setting: “problems, policies, and politics.”\textsuperscript{15} Problems – that is, matters of concern that a critical mass of people want to change or affect\textsuperscript{16} – can arise from disasters,\textsuperscript{17} from a sudden, tragic, captivating event,\textsuperscript{18} from intense or long-term media attention to an issue that can be felt or understood by everyone,\textsuperscript{19} from policy choices that, to use the vernacular, may start out with good intentions but later “go south,”\textsuperscript{20} from the dogged tilling of the soil on a particular subject,\textsuperscript{21} from the accumulation of small-scale problems that reaches a critical mass,\textsuperscript{22} from individuals or groups who thrust themselves or their idea(s) into public discussion,\textsuperscript{23} or in other ways.\textsuperscript{24} Policy proposals come from single-issue or wide-ranging policy experts in the academy or

\textsuperscript{13} Id. at 76.
\textsuperscript{14} Id. at 87.
\textsuperscript{15} Id.
\textsuperscript{16} As opposed to a concern that people just suffer through. Id. at 109-13.
\textsuperscript{17} E.g., a bridge collapse.
\textsuperscript{18} E.g., 9.11.
\textsuperscript{19} E.g., crime or health care.
\textsuperscript{20} E.g., the Vietnam War.
\textsuperscript{21} E.g., airline, railroad, and trucking price deregulation.
\textsuperscript{22} E.g., the federal deficit.
\textsuperscript{23} E.g., the Tea Party.
\textsuperscript{24} Id. at 87, 90-115.
think tanks, from the parties (or confederation of their allies) who stand to gain or lose from particular legislation or regulations, and from formal (or informal) coalitions of separate entities who share a common interest. The number of potential options is limited only by the imagination, interest, and energy of those parties. 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, the election of new, charismatic officials, public referenda, and the prevailing mood among the electorate. Each participant in those processes mentioned above theoretically could be involved in all three streams. Ordinarily, however, people specialize in one or two of them. For example, academics, researchers, and current or former bureaucrats generate policies, while elected or politically-appointed officials and political parties work the halls of

25 *E.g.*, the Hoover Institute, the Heritage Foundation, and the Brookings Institute.

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

27 *E.g.*, the Leadership Conference on Civil Rights.

28 KINGDON 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.

29 *E.g.*, House and Senate Committee Chairs.

30 *Id.* at 87, 145-64.

31 *See* pages 4-5 above.

32 “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.

33 *Id.*
politics to see their favored proposals become law.\textsuperscript{34} And each actor can prompt, support, inhibit, scuttle, or undo the work of the others.\textsuperscript{35}

There is no shortage of examples in numerous federal policy fields to illustrate the operation of Kingdon’s theory. Kingdom himself identifies several.\textsuperscript{36} 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. Judicious implementation of sound criminal justice policy also 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 40 years: namely, federal court habeas corpus review of state murder convictions and capital sentences and the Antiterrorism and Effective Death Penalty Act (the AEDPA).\textsuperscript{37} With that in mind, this book flashback considers how well Kingdon’s theory holds up today.

\textsuperscript{34} Id.

\textsuperscript{35} Id. at 87-88.

\textsuperscript{36} Id. at (HMOs; national health insurance; airline, railroad, and trucking deregulation; etc.).

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. 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 murder, for more than two centuries. Some believed that it was inherently moral to execute those who murdered; others thought that the prospect of receiving the death penalty deterred people from committing capital crimes; a third group saw it as the ultimate means

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38 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 for objectionable conduct appears to have its beginnings in private vengeance.”) (footnotes omitted).

39 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) (“We find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.”); id. at 207 (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) (second attempt at execution after first attempt 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 Constitution. 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 eighth amendment.”).

of incapacitation. Not surprisingly in a pluralistic nation, some parties objected to capital punishment. They challenged the effectiveness of the death penalty as a measured, humane way to implement retribution, deterrence, and incapacitation, and they defended the rehabilitative ideal as a justification for criminal punishment. 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 20th Century. But there was no dispute over its legality. As late as 1958 the Court could say in *Trop v. Dulles* that “[w]hatever

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43 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
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.”44

Use of, and public support for, capital punishment, however, began to decline
in America in the latter half of the 20th Century. This downturn was due in part to
a change in social mores, but also is attributable to the successful work of a small
but dedicated band of lawyers (and their allies) representing inmates on death
row.45 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 also challenged the constitutionality of the
institution of capital punishment on several broad grounds. Among those
arguments were the following: The death penalty was invariably a “cruel and
unusual punishment” forbidden by the Eighth Amendment46; capital punishment

44 356 U.S. 86, 99 (1958) (plurality opinion).
45 For a detailed, insider’s account of the efforts of those lawyers who worked for (and who
supported the efforts of) the NAACP Legal Defense Fund, see MICHAEL MELTSNER, CRUEL
46 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

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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) (the Court "has never held that
anything in the Constitution requires that penal sanctions be designed solely to achieve
therapeutic or rehabilitative effects.").
lacked a legitimate penological justification; no manner of carrying out an execution would lead to an immediate and painless death; and the death penalty always had been, and still was being, imposed and carried out in a manner that discriminated on the basis of race, social class, and wealth.

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 ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH (1960); ARTHUR KOESTLER, REFLECTIONS ON HANGING (1956).

Retribution was said to be an illegitimate ground for punishment, see, e.g., HERBERT PACKER, PAGE 11 note 41 supra, 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., REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 (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 (June 1975); 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); 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. (2003); 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); see also Carol S. Steiker, No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty, 58 STAN. L. REV. 751 (2005); John J. Donohue & Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 STAN. L. REV. 791 (2005); Cass R. Sunstein & Adrian Vermeule, Deterring Murder: A Reply, 58 STAN. L. REV. 847 (2005).

See, e.g., Albert Camus, Reflections on the Guillotine, in ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 131, 151-156 (1960); see generally Furman v. Georgia, 408 U.S. 238, 288 n.36 (1972) (Brennan, J., concurring) (collecting authorities).

See, e.g., HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 474 (Rev. ed. 1967); RAMSEY CLARK, CRIME IN AMERICA 335 (1970); LEWIS E. LAWES, LIFE AND DEATH IN SING SING 155-160 (1928) (Warden of Sing Sing prison in New York). This claim was raised.
Defense counsel raised these claims throughout the trial and appellate process in state court and also in the Supreme Court of the United States, traditionally known as the “direct review” process in criminal cases. But there are a limited number of cases that the Supreme Court reviews each term, so most of this litigation took place either in the state courts or in the federal courts on “collateral review” 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.”\(^{50}\) Initially, the federal courts limited their review to the question whether a federal prisoner was being held under lawful judicial process, even if the process itself rested on an error of fact or law, an inquiry often termed inquiring whether the court had “jurisdiction” to issue the order under review. Such review was quite limited. As far as federal court review of judgments entered in state criminal cases: The federal courts lacked authority to undertake this review until after the Civil War,\(^{51}\) and even then federal courts could not re-determine the merits of a state court case.\(^{52}\)

\(^{50}\) Act of September 24, 1789, § 14, 1 Stat. 73, 81-82.

\(^{51}\) The Habeas Corpus Act of 1867, Act of Feb. 5, 1887, Ch. 18, 14 Stat. 385 (codified at Rev. Stat. §766 (2d ed. 1878)).

Eventually, however, all that 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, the Supreme Court had ruled in 1833 that the particular guarantees specified in the Bill of Rights applied only to federal criminal cases. 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. 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 on the power of a federal court to review the judgment entered in a state criminal trial, the Supreme Court gradually expanded the type of claims that a state inmate could assert, expanding the type of cognizable 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. The result was that, by the 1970s, federal habeas review was “plenary,” which enabled a state prisoner to relitigate in federal court any federal claim that he had raised in state court and perhaps to retry his case.

The combination of those two developments effectively brought executions in this country to a halt through the period in the 1960s and 1970s. By persuading federal habeas courts to consider a variety of novel legal theories challenging the states’ efforts to execute any condemned inmate, counsel for death row prisoners 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*. From 1972 to 1976, when the Supreme Court finally upheld

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56  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 Douglas, Brennan, and Marshall would have held the death penalty per se unconstitutional. Justices Stewart and White did not go that far, concluding, instead, that capital punishment was not then being applied in an unconstitutional manner. By 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, and each one joined the opinion of the other three members.
the constitutionality of capital punishment in *Gregg v. Georgia*, no one was executed.

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’ counsel were forced to advance ever more novel (some would say ever more frivolous) theories on behalf of their clients in order to prevail. Yet, despite seeing a reduction in the type of large-scale claims that could be relitigated 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 might have to prevail at only one point in the direct and collateral review process in order to escape execution, while the state had to win at every step of the

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57 428 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 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.
way. Even if a federal court merely ordered a new trial for a condemned prisoner, the delay between the time of the trial and retrial may have weakened the state's case, via a loss of witnesses or evidence, to the point that a retrial was impossible. 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 the result, question arose whether the authority of federal habeas courts to readjudicate state court rulings should be clipped back. 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 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. Here 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 of the presumptively good faith decisions of state courts wrecked 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.\textsuperscript{58} The states also saw last-minute use of successive federal habeas corpus petitions as a particularly irritating feature of capital litigation in the 1970s, 1980s, and 1990s.\textsuperscript{59} Repetitive challenges to a prisoner’s conviction or sentence had become the norm in capital cases,\textsuperscript{60} even in cases involving heinous crimes with no doubt about the prisoner’s guilt or the appropriateness of a capital sentence.\textsuperscript{61} Some condemned prisoners delayed their execution for more than a decade.\textsuperscript{62} Moreover, habeas actions in capital cases often were filed shortly before a prisoner was to be executed, thereby creating a type of “hydraulic pressure” on the courts to stay an execution.\textsuperscript{63} Such late-filed, successive 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.\textsuperscript{64}

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 and 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.\textsuperscript{65} Not surprisingly, the Committee concluded that “[t]he resulting lack of finality undermines public confidence in our criminal justice system.”\textsuperscript{66}

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

\textsuperscript{64} See, e.g., \textit{Habeas Corpus Reform: Hearings on S 88, S. 1757, and S. 1760 Before the Senate Comm. on the Judiciary, 101st Cong., 1st & 2d Sess. 43, 65, 253, 283, 345-46, 724-25 (1989 & 1990) (hereinafter \textit{1990 Senate Hearings}); id. at 726 (statement of Florida Governor Martinez); compare \textit{Barefoot v. Estelle}, 463 U.S. 880, 888 (1963) (“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 \textit{Lambert v. Barrett}, 159 U.S. 660, 662 (1895)).

\textsuperscript{65} Judicial Conference of the United States, \textit{The Ad Hoc Committee on Federal Habeas Corpus in Capital Cases} 1, 10 (Aug. 29, 1989) (hereinafter Powell Committee), reprinted in \textit{1990 Senate Habeas Hearing}.

\textsuperscript{66} \textit{Id.} at 1.
punishment.  The new law, codified at Section 2253 of Title 28, limited the appellate review process in capital cases. The new law required a prisoner, whose application for habeas relief has been denied by the district court, to obtain from that court, from a circuit court (or judge thereof) or from the Supreme Court (or one of its Members) a "certificate of probable cause" in order to perfect an appeal. This required the prisoner to show that he had a substantial claim. 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

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67 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 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 this Court, and it imposed the requirement, now found at 28 U.S.C. § 2253, that a prisoner obtain from this Court, a certificate of probable cause to appeal. Act of Mar. 10, 1908, Ch. 76, 35 Stat. 40; see H.R. Rep. No. 23, 60th Cong., 1st Sess. 1-2 (1908); 42 Cong. Rec. 608-09 (1908). 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. 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; see generally Davis v. Jacobs, 454 U.S. 911, 916-17 (1981) (opinion of Rehnquist, J.); Jeffries v. Barksdale, 453 U.S. 914, 915 (1981) (opinion of Rehnquist, J.); H.R. Rep. No 308, 80th Cong., 1st Sess. A179-A80 (1947); Historical and Revision Notes Following 28 U.S.C. § 2253; Barefoot v. Estelle, 463 U.S. 880, 892 n.3 (1963); e.g., Garrison v. Patterson, 391 U.S. 464 (1968); Carafax v. LaVallee, 391 U.S. 234 (1968); Nowakowski v. Maroney, 386 U.S. 542 (1967).

68 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).
a state prisoner’s opportunity to relitigate 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, as elected officials by and large, 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 of theirs potentially freeing an “obviously guilty” defendant.\(^{69}\) Accordingly, those parties argued, only life-tenured federal judges could satisfactorily protect a state prisoner’s federal rights.\(^{70}\)

Defense counsel and scholars also argued that the states were using habeas corpus as a punching bag when their real objection went elsewhere: to the Supreme Court’s decisions in the 1960s applying the Bill of Rights guarantees to the states. Federal courts were not applying new rules to the states, nor were those courts discriminating against the states in their interpretations of constitutional law. No, those parties argued, the federal courts were merely applying to the states the same rules for law enforcement conduct and trial procedure that the federal courts had


\(^{70}\) All federal judges hold their office during “good behavior,” U.S. Const. Art. III, while most state court judges hold their office only for a term of years.
applied to the federal government since the Bill of Rights became law in 1793. That result, counsel and scholars also said, eliminated the patent unfairness that resulted from having a different set of rules, ones weighted against a defendant, apply when a prosecution is brought in state, not federal, court.

the stalemate could be resolved. Neither side in the debate proved able to swing a majority of the House of Representatives and a supramajority of the Senate to its side. \(^{72}\) Ironically, in the meantime the Supreme Court had begun to cut back on the reach of federal habeas corpus law. \(^{73}\) 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 stream” and “policy stream” that had been flowing for the prior 20 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

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\(^{72}\) 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 60 members agree to cut off debate. U.S. Senate, Standing Rule XIX.1(a), XXII.2. The filibuster was one reason why the states and other habeas reformers could not achieve their goal: They could not muster 60 votes to change the law.

\(^{73}\) 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).
containing a homemade bomb with more than 2 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.74

Just eight days after the Oklahoma City bombing, Senate Majority Leader Robert Dole introduced the bill that ultimately became the Antiterrorism and Effective Death Penalty Act (the AEDPA).75 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.76 Expressing its frustration with the lengthy delays in the execution of

74 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).


76 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
validly imposed capital sentences, 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, and the AEDPA 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.

What was different this time? Why now did Congress enact habeas corpus
reform? More particularly, what new twist on the “problem” did the states come up
with? 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 why the AEDPA became law lies not in what the states
did differently to frame the problem or to phrase their policy arguments. It rests on
the ability of the states and their supporters in Congress, particularly the Senate, to

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regarding terrorists. Title VIII concerned assistance to law enforcement. Title IX held
miscellaneous provisions.

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mobilize passionate and sympathetic support for their reform proposal and to capitalize on the prevailing “national mood.”77

After the Oklahoma City bombing, the states and their congressional allies had two new sources of political support. The murder of 168 people had the effect of generating 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 book.78 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 of those factors combined to persuade the general public that, to use the vernacular, “a message had to be sent” to anyone else contemplating a similar crime.79

Together those factors gave Senators 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. The former was a useful policy argument that could be advanced 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

77 See KINGDON 146-64.
78 See KINGDON 150-53 (discussing the role of “organized political forces”).
79 See KINGDON 146-49 (discussing the importance of policymakers’ ability to sense the “national mood”).
“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 let members switch sides without making the switch appear purely political. The other even more powerful new tool, however, 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 to outlive the Oklahoma City survivors by avoiding the gallows. The potential practical force of that argument – especially in 1996, a Presidential and Congressional election year, 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.80

80 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
Ultimately, that combination of factors proved too much for the traditional opponents of habeas reform to succeed this time. The public outrage at McVeigh’s crimes and the fear that he would use habeas corpus to string out his time on death row proved too much for reform opponents to oppose. Republican members of Congress were the principal supporters of the AEDP; they were able to overcome past Senate filibusters and bring the bill to a floor vote; and, when a vote became inevitable, the bill passed easily in each chamber. President Clinton signed the AEDPA into law on April 24, 1996, just three days shy of one year after it was introduced.

A condemned prisoner quickly challenged the constitutionality of the AEDPA.

The inmate argued that the act violated the Suspension Clause of the Constitution. The legislation will help accomplish this goal.”

104 Cong. Rec. S5841 (Apr. 27, 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.”


81 Article I, § 9, Cl. 2 of the Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” For a discussion of that argument, see RANDY HERTZ & JAMES S. LIEBERMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 7.2d, at 378 (5th ed.
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 in *Felker v. Turpin*[^82] upheld the statute over the prisoner’s Suspension Clause challenge.[^83]

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 that statute.[^84] None of those decisions, however, is as important as the Court’s ruling 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. As for 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.[^85]


[^85]: 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:*
Perhaps, we are in roughly the same position today that existed before the Oklahoma City bombing: neither side has the supramajority 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 as previously to federal court review of state convictions.\(^6\) Ironically, the domestic terrorism

\(^6\) Granted, even before the Oklahoma City bombing the Supreme Court had cut back on the easy availability of federal habeas review. \textit{See}, e.g., Sawyer v. Whitley, 505 U.S. 333 (1992) (a state prisoner may, and sometimes must, 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) (state prisoners cannot automatically file a second or repeat habeas petition); Teague v. Lane, 489 U.S. 288 (1989) (with limited exceptions, new Supreme Court decisions cannot be applied retroactively in federal habeas); Wainwright v. Sykes, 433 U.S. 72 (1977) (a federal claim not presented in a timely manner in the state courts cannot be raised for the first time on federal habeas); Stone v. Powell, 428 U.S. 465 (1976) (state prisoners cannot raise Fourth Amendment claims on federal habeas corpus). But the AEDPA imposed even far higher hurdles for a state prisoner to overcome. \textit{See} Greene v. Fisher, 132 S. Ct. 38, 44 (2011), and Horn v. Banks, 536 U.S. 266, 272 (2002) (the AEDPA retroactivity bar exists atop the one recognized in \textit{Teague}).
concerns that birthed the AEDPA have been replaced by the international terrorism concerns evidenced by the 9/11 attack on the World Trade Center and the Pentagon that later gave rise to the USA PATRIOT Act, the Transportation Security Agency, and the Department of Homeland Security.\textsuperscript{87} 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.\textsuperscript{88} Life marches on.

V. CONCLUSION

The provenance of the AEDPA is a useful illustration of Kingdon’s “three streams” theory of policy decisionmaking. 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

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ability of condemned prisoners and their counsel to prevent executions by persuading the federal courts to overturn death sentences (or at least to postpone them), 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 states and the ready access that elected state officials have to their congressional delegation, the states could not persuade the Congress to change the law in their favor. The legislative stalemate endured until the massive loss of life in the Oklahoma City bombing metaphorically exploded 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 that theory can describe circumstances under which the federal government reforms how it does business – here, how the federal judiciary acts – and how decisionmaking power is allocated between the federal and state governments when one of them is resistant to 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 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. Moreover, the political stream oddly enough directly 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 be aware of where particular political decisionmakers stand in the flow of the “political stream.” Issues can percolate on the public policy agenda for years, and members of Congress may take a position 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 supramajority 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 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 decisionmakers to change a prior position may force advocates to do more than just rely on the force of the politics of the matter.

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 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 theory gives policy analysts the ability to describe a broad range of government actions, perhaps particularly ones involving the need to persuade the Congress to act, by reference to its simple, yet powerful, framework. Kingdon’s three-stream analysis is not the public policy equivalent of Einstein’s hoped-for field theory, but it does not need to be in order to be superbly useful.