MORE THAN "SLIGHTLY RETRO:" THE REHNQUIST COURT'S ROUT OF HABEAS CORPUS JURISDICTION IN *TEAGUE V. LANE*

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INTRODUCTION

Someone I know, more a student of contemporary fashion than I, sometimes describes people dressed in uniformly dark clothing as "slightly retro." I am not sure of the allusion,[1] but what I can discern leads me to think that the Supreme Court's nonretroactivity decisions beginning with *Teague v.*

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1. *See also Edge of Night Life*, THE NEW YORKER, Dec. 31, 1990, at 12 ("Just because you're starting to feel all cozy about New York, don't credit Christmas. In the air there's a feeling of retro").

Lane[2] are — puns aside — more than just "slightly retro."

The Court's innovation may be stated as follows: For 160 years, Congress empowered federal judges to order state officials to release or retry individuals held in custody in violation of federal law *as those federal judges, and not the state officials, interpreted that law.*[3] In 1989 and 1990, in the absence of statutory revision,[4] the Court announced a series of decisions[5] holding that federal judges henceforth may order incarcerated individuals released or retried only if those judges find a violation of federal law not only by their own lights but also by the lights of all "reasonable" state judges, including the

2. 109 S. Ct. 1060 (1989).

3. Support for the 160-year figure may be found in, *e.g.*, 1 J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2b, at 6-13 (1988) [hereinafter J. LIEBMAN (Volume 2 will be cited as 2 J. LIEBMAN)]; Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 806-19 (1965); Peller, *In Defense of Habeas Corpus Religitation*, 16 HARV. C.R.-C.L. L. REV. 579, 604-05, 610-34, 643-53, 661-63 (1982). The 160-year figure is controversial. An alternative figure of 38 years is not. Recent restatements of the view that, until 1953, but not since, the range of constitutional errors cognizable in habeas corpus (assertedly only errors that deprived criminal courts of jurisdiction to try the defendant) was narrower than the range of constitutional errors cognizable generally are, *e.g.*, McCleskey v. Zant, 111 S. Ct. 1454, 1461-62 (1991); Higginbotham, *Reflections on Reform of § 2254 Habeas Petitions*, 18 HOFSTRA L. REV. 1005, 1008-09 (1990); Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 176-77, 179 (identifying Brown v. Allen, 344 U.S. 443 (1953), as watershed case making constitutional errors cognizable on habeas corpus coextensive with those cognizable on direct appeal); Weisberg, *A Great Writ While it Lasted*, 81 J. CRIM. & CRIMINOLOGY 9, 10-11 (1990) (similar). The classic citation is Bator, *Finality in Criminal Law and Federal Habeas Corpus Review for State Prisoners*, 76 HARV. L. REV. 441, 463-99 (1963). Among the pre-*Brown* decisions recognizing the federal courts' power to remedy unlawful custody on grounds coextensive with the limits of due process are: Waley v. Johnston, 316 U.S. 101 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938); McNally v. Hill, 293 U.S. 131 (1934); Moore v. Dempsey, 261 U.S. 86 (1923); *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1867); other decisions cited in J. LIEBMAN, *supra*, § 2.2b, at 7-9 & nn.8-19.

4. Although Congress has had habeas corpus "reform" legislation before it for years, it has not seriously modified the Great Writ since the mid-1960s. *See generally* J. LIEBMAN, *supra* note 3, § 2.2b, at 9 & n.23, § 20.2; *id.* § 2.3 (Supp. 1991); Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609 (1983). Recently, however, the Bush Administration proposed, and the United States Senate passed, legislation limiting habeas corpus jurisdiction to claims that were not "fully and fairly adjudicated in State proceedings." *See* Lewis, *Crime Against Justice: How the Bush Crime Bill Will Roll Back Rights*, N.Y. Times, July 29, 1991, at A15, col. 1. At the time this Article went to press, similar legislation was pending in the House of Representatives but had not yet been acted upon. *See* H.R. 1400, 102d Cong., 1st Sess. (1991). In regard to habeas corpus reform proposals currently before Congress, see *infra* notes 145, 320.

5. *See* Collins v. Youngblood, 110 S. Ct. 2715 (1990); Sawyer v. Smith, 110 S. Ct. 2822 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990); Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Zant v. Moore, 109 S. Ct. 1518 (1989); Teague v. Lane, 109 S. Ct. 1060 (1989). The Court added no important decisions to the *Teague* line of cases during the 1990 Term. It did, however, decide an important *civil* retroactivity case, James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735 (U.S., June 20, 1991), and it granted certiorari to decide an important post-*Teague* issue concerning the application in habeas corpus of two recent eighth amendment decisions, *see* Stringer v. Black, 111 S. Ct. 2009 (1991) (granting certiorari on question of retroactivity of Clemons v. Mississippi, 110 S. Ct. 1441 (1990), and Maynard v. Cartwright, 486 U.S. 356 (1988)).

judges who pronounced and affirmed the applicant's conviction in the first place.[6] In the guise of a series of prudential nonretroactivity holdings,[7] the Court has replaced a statute giving every federal judge jurisdiction to remedy all "custody" that *she* independently determines to be "in violation of the Constitution"[8] with a statute forbidding those judges to remedy custody un-

6. *Butler*, 110 S. Ct. at 1217; *see Parks*, 110 S. Ct. at 1265 (Brennan, J., dissenting) ("the Court has limited drastically the scope of habeas corpus relief"); *Butler*, 110 S. Ct. at 1219, 1225 (Brennan, J., dissenting) (majority "has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime;" the *Teague* doctrine "essentially foreclos[es] habeas review as an alternative 'avenue of vindication,' overrides Congress' will and leaves federal judicial protection of fundamental constitutional rights during the state criminal process to this Court upon direct review"); Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371, 372 & n.3 (1990) (noting view that "*Teague* . . . sounded the death knell of habeas corpus as a vehicle for the protection of defendants' rights"); Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1748-49 (1991) ("*Teague* . . . sharply diminish[es] the role of federal habeas corpus courts in defining and protecting constitutional rights"); Hoffmann, *supra* note 3, at 181 (definition of "new rule" applied by post-*Teague* decisions "would shield most kinds of constitutional error in state criminal trials from federal habeas review"); Patchel, *The New Habeas*, 42 HASTINGS L.J. 941, 941, 942 (1991) (in *Butler* and *Parks*, the "Court did a little Spring cleaning, and one thing it finally decided to throw out was federal habeas corpus review of state court constitutional determinations regarding criminal procedure;" the Court thus "delivered the final blow to . . . habeas [corpus]" as long understood); Weisberg, *supra* note 3, at 9 ("in a pair of decisions handed down this Term, the Supreme Court substantially eviscerated federal habeas corpus jurisdiction as an instrument for constitutional law"); West, *The Supreme Court 1989 Term — Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 58 (1990) (recent decisions "drastically limit the substantive habeas corpus protection provided convicts who are unconstitutionally detained" and constitute "a tragic instance of what began as an exception [to habeas corpus relief] quickly swallowing almost *in toto* the general rule" of relief from unconstitutional incarceration); *Recent Developments, The Supreme Court Declines in Fairness* — Teague v. Lane, *109 S. Ct. 1060*, 25 HARV. C.R.-C.L. L. REV. 162, 182 (1990) [hereinafter *Recent Developments*] ("The *Teague* bar may effectively slam the door on most federal review of state criminal cases and permanently stunt the evolution of constitutional jurisprudence"); *The Supreme Court, 1989 Term — Leading Cases*, 104 HARV. L. REV. 129, 316 (1990) (via new decisions, "the deterrent force of the habeas writ is substantially and unacceptably diminished"); Berger, *Supreme Court Review: Little Sympathy for Defendants in Capital Cases*, Nat'l L.J., Aug. 13, 1990, at S12 ("if expanded beyond the context of retroactivity, the majority's approach would overrule the leading case of Brown v. Allen, which calls for habeas courts to conduct de novo review of [habeas corpus] claims on the law"). For collections of important constitutional criminal procedure holdings that were announced in habeas corpus cases but that the *Teague* doctrine probably would have blocked, see *Teague*, 109 S. Ct. at 1088-89 (Brennan, J., dissenting); *Recent Developments*, *supra* at 164 n.4. *But cf.* Arkin, *supra* at 392 (reviewing 18 months of lower court litigation under *Teague* and concluding that "retroactivity analysis plays a less central role in the disposition of existing habeas corpus petitions than might have been expected"). Other recent commentary on *Teague* includes J. LIEBMAN, *supra* note 3, § 22A.1, at 85 (Supps. 1989 & 1991); Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1990-91); Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to* Teague v. Lane, 1990 B.Y.U. L. REV. 183; Powers, *State Prisoners' Access to Federal Habeas Corpus: Restrictions Increase*, 25 CRIM. L. BULL. 444 (1989); Richardson & Mandell, *Fairness Over Fortuity: Retroactivity Revisited and Revised*, 1989 UTAH L. REV. 11 (1989); Note, *The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. CRIM. L. & CRIMINOLOGY 1128 (1990).

7. *See, e.g.*, *Teague*, 109 S. Ct. at 1069-78 (plurality opinion).

8. 28 U.S.C. § 2254(a) (1988); *see* Miller v. Fenton, 474 U.S. 104, 115 (1985) (recent dis-

less they can say that *all* "reasonable" judges in the country would find a violation.[9]

For anyone who considers habeas corpus to be an important aspect of the nation's structure of judicially enforced civil rights and civil liberties,[10] the Court's jurisdictional innovation is "retro" indeed. It casts a uniformly somber pall over the longstanding right of state prisoners to enlist politically detached judges in assessing the legality of the prisoners' convictions and sentences, and it comes as close as any other event to encapsulating the Rehnquist Court's current fashion of looking darkly upon the rights of individuals — especially condemned individuals[11] — whose liberty has been withdrawn and whose lives have been placed at risk by state criminal justice systems.[12] If

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cussion of federal courts' "independent" review obligation in habeas corpus cases). *See generally* J. LIEBMAN, *supra* note 3, § 8.4. In Stone v. Powell, 428 U.S. 465 (1976), the Court refused to apply a *non*constitutional prophylactic rule (the fourth amendment exclusionary rule) in habeas corpus proceedings. *Stone* accordingly is not an exception to the statement in the text. *See* J. LIEBMAN, *supra* note 3, § 2.2b, at 9 n.18, § 25.2.

9. *See* West, *supra* note 6, at 58 n.95 (Court's 1990 nonretroactivity decisions "impose[] a severe and entirely judicial limit on a congressionally mandated writ"). Among the numerous questions raised by *Teague* that cannot be addressed fully here, *see, e.g.*, *infra* notes 14-36 and accompanying text, is the question of the Supreme Court's jurisdiction under article III to amend a statute that supposedly *defines* its jurisdiction. *Compare Butler*, 110 S. Ct. at 1218, 1224 (Brennan, J., dissenting) (questioning propriety or at least wisdom of what is viewed as majority's "thinly veiled crusade to eviscerate Congress' habeas corpus regime") *with* Hoffman, *supra* note 3, at 177 (because the Court, acting without congressional authorization, dramatically expanded its habeas corpus jurisdiction in Brown v. Allen, 344 U.S. 443 (1953), and Fay v. Noia, 372 U.S. 391 (1963), *Teague* Court had all the authority it needed to curtail that jurisdiction and ignore *stare decisis*). As is true of other cases dating back to the 1960s and increasing in frequency in the 1970s and 1980s, the *Teague* line of cases adopts an exceptionally freewheeling approach to the Court's habeas corpus jurisdiction — an approach that proceeds almost independently of the statute that in theory confers that jurisdiction. *See* J. LIEBMAN, *supra* note 3, § 8.2a, at 86 n.6. Recently, for example, in McCleskey v. Zant, 111 S. Ct. 1454 (1991), the Court (i) all but ignored the statute (28 U.S.C. § 2244) and rule (R. GOV. § 2254 CASES IN U.S. DIST. CTS. 9(b)) that Congress adopted to control the filing of second and successive habeas corpus petitions and that clearly permitted such petitions as to claims the petitioner did not previously waive, *see* J. LIEBMAN, *supra* note 3, §§ 26.3, 26.4; (ii) treated the question of the scope of successive petitions as controlled by the Court's prior cases irrespective of the statute and rule; and (iii) forbade nearly all successive petitions, including ones raising claims that the petitioner did *not* previously waive. McCleskey v. Zant, 111 S. Ct. at 1462-71.

10. *See, e.g.*, THE FEDERALIST No. 83, at 499 (A. Hamilton) (C. Rossiter ed. 1971) (along with right to jury trial, habeas corpus deemed sufficient by itself, without need of additional protections of sort critics of original Constitution sought to have included in a bill of rights, to guard against all manner of "[a]rbitrary impeachments, arbitrary methods of prosecuting . . . offenses, and arbitrary punishment upon arbitrary conviction"); Chafee, *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952).

11. On the link between the *Teague* doctrine and capital litigation, see Hoffman, *supra* note 3, at 187 ("significant effect[] of the *Teague* doctrine . . . in capital cases"); Weisberg, *supra* note 3, at 9 ("though we know no motives for Supreme Court cases other than those announced in the decisions, one can speculate that the Court [in its *Teague* line of cases] was simply frustrated with the inadequacy of the execution rate of America's death row inmates").

12. *See* Weisberg, *supra* note 3, at 18-19 (recent habeas corpus innovations part of "desperate[]" search for "explanations and scapegoats for the perennial perception that violent crime is out of control").

Warren Burger led "The Counter-Revolution that Wasn't,"[13] then *Teague* reveals William Rehnquist in the vanguard of the Thermidor that is.

There are a number of perspectives from which one could assay the impact of the Court's new criminal nonretroactivity holdings. I can only briefly assume most of those perspectives here, leaving more comprehensive analysis for another day.

First, from the standpoint of practical consequences, particularly for the 2500 men and women on death row across the country who form the focus of this Symposium,[14] the Court's innovation threatens to make close to a legal irrelevancy of the fact that many or most state capital sentences in this country are meted out in violation of the Constitution. More specifically, the nonretroactivity doctrine may considerably deflate the existing 40-60% reversal rate in capital cases[15] and considerably inflate existing execution rates.[16]

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13. V. BLASI, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (1983); *see* Kamisar, *The Warren Court (Was it Really So Defense-Minded?), The Burger Court (Is it Really So Prosecution-Oriented?), and Police Investigatory Practices*, in *id.* at 62.

14. Actually, there were 2421 men and 36 women (2457 individuals total) on death row as of April 24, 1991. *See* NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW, U.S.A. 171 (Apr. 24, 1991) [hereinafter DEATH ROW, U.S.A.].

15. Counting only published decisions, the federal courts found constitutional error in *40%* of the 361 capital judgments of conviction and sentence that those courts finally reviewed in habeas corpus proceedings between mid-1976 and mid-1991. The constitutional error rate is *46%* (of 408 cases) when discoverable unpublished decisions also are counted. *See* Memorandum to Senator Joseph F. Biden, Chairman, Senate Judiciary Committee from James S. Liebman (July 15, 1991), *reprinted in* Statement of John J. Curtin, Jr., President of the American Bar Association, and of James S. Liebman, Professor of Law, Columbia University School of Law and Member, ABA Task Force on Death Penalty Habeas Corpus, on behalf of the American Bar Association, *Hearings before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary of the U.S. House or Rep. Concerning Fairness and Efficiency in Habeas Corpus Adjudication*, 102d Cong., 1st Sess (July 17, 1991) appendix [hereinafter *ABA Testimony*]. During that same 1976-1991 period, the reversal rate in capital cases as a whole was probably 60% or more. *See* Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (between 1976 and 1983, approximately 70% of condemned individuals denied federal habeas corpus relief in district courts prevailed in courts of appeals); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, CAPITAL PUNISHMENT 1988, at 8 (July 1989) (hereinafter DEP'T OF JUSTICE) (courts overturned 111 death sentences in 1988 compared to 296 individuals sentenced to death that year); Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, 14 A.B.A. SEC. INDIVIDUAL RTS. & RESP. 14 (1987) ("Between 1978 and 1983, the federal courts of appeals decided a total of 41 capital *habeas* appeals, and . . . ruled in favor of the condemned prisoner in 30, or 73.2% of them."); Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1792 (1987) (Florida Supreme Court reversal rate of 47% in capital cases between 1972 and 1984); Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 111, 144-45 (1979) (between 1974 and 1979, Georgia Supreme Court reversed conviction or death sentence in 30% of all death cases; comparable figure for reversals by Texas Court of Criminal Appeals between 1975 and 1979 was 33%); Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 918 (1982) (between 1972 and 1982, 60% of convictions or sentences imposed under capital punishment statutes after Furman v. Georgia, 408 U.S. 238 (1972), were reversed after trial; comparable reversal rate for federal criminal judgments in noncapital cases was 6.5%). *Cf.* Allen, Schachtman & Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 683 (1982) (just over 3% of noncapital habeas corpus petitioners in six federal districts obtained total or partial relief between 1975 and 1977); Faust, Rubenstein & Yackle, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 681

From the standpoint of Supreme Court practice, the innovation is noteworthy because the Court accomplished it in six decisions,[17] in two-thirds of which[18] — including *Teague* itself — the determinative issue was not briefed by the parties or asserted as a basis for decision by the state.[19]

In addition, the new decisions accomplish a remarkable transformation from the standpoint of constitutional decisionmaking. Before *Teague*, habeas corpus fairly could be described as an adjudicative, quasi- or super-appellate process in which national courts (mainly the lower federal courts acting as surrogates for the Supreme Court[20]) used adversary procedures to establish national constitutional policy in the process of reviewing state court convic-

(1990-91) (rate of reversals of convictions and sentences in noncapital habeas corpus cases in United States District Court for the Southern District of New York only 3% and 4% for periods 1973-1975 and 1979-1981, respectively). Although state appellate and postconviction decisions, which account for a portion of the exceedingly high posttrial reversal rate for capital convictions and sentences, are not immediately affected by *Teague*, they are likely to be affected in the long run as *Teague* diminishes the chances that state court conclusions will be reviewed and rejected in habeas corpus proceedings. *See infra* notes 328-47 and accompanying text.

16. The annual number of post-Furman v. Georgia, 408 U.S. 238 (1972), nonconsensual executions in this country is as follows:

1973-1978	0
1979	1
1980	0
1981	0
1982	1
1983	5
1984	21
1985	14
1986	17
1987	23
1988	10
1989	14
1990	16
1991 (4 mos.)	2

DEATH ROW, U.S.A., *supra* note 14, at 5-7. Recently, the States have been sentencing between 250 and 300 men and women to die each year. *See* DEP'T OF JUSTICE, *supra* note 15, at 1.

17. *See supra* note 5.

18. *See* Saffle v. Parks, 110 S. Ct. 1257 (1990); Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Zant v. Moore, 109 S. Ct. 1518 (1989); Teague v. Lane, 109 S. Ct. 1060 (1989).

19. *Compare Teague*, 109 S. Ct. at 1069 (plurality opinion) (concededly "*sua sponte* consideration of retroactivity" issue) *with* S. CT. R. 15.1 (respondent's failure "*in the brief in opposition*" to raise nonjurisdictional defects "bearing on the question of what issues [are] properly . . . before the Court if certiorari [is] granted" waives consideration of those defects (emphasis in original)) *and Teague*, 109 S. Ct. at 1080 (Stevens, J., concurring in the judgment) ("I question the propriety of making such an important change in the law without briefing or argument") *and id.* at 1084, 1086 (Brennan, J., dissenting) (criticizing Court's haste to decide an issue not presented or briefed). In Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990), the Court acknowledged that the nonretroactivity of the legal rule on which a party relies is not a jurisdictional defect.

20. *See, e.g.*, Schiro v. Indiana, 110 S. Ct. 268, 269 (1989) (Stevens, J., opinion respecting the denial of certiorari); Geagan v. Gavin, 181 F. Supp. 466, 468-69 (D. Mass. 1960) (Wyzanski, J.), *aff'd*, 292 F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1962); Hazard, *Criminal Justice System: Overview*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 465 (1983).

tions and sentences.[21] The *Teague* line of cases has replaced that judicial-appellate process with what amounts to an administrative process: State courts (acting in default by the Supreme Court, given the limits of the Court's certiorari jurisdiction[22]) are delegated the critical day-to-day role in national constitutional policymaking, subject only to the loosest instructions from the Supreme Court and the Constitution;[23] lower federal courts (acting pursuant to what amount to nonadversary bureaucratic procedures[24]) retain only the minimal supervisory task of reviewing state judicial actions for "reasonableness"[25] and substantial evidence.[26]

The Court's innovation is also worth analyzing from the perspective of constitutional history. Modern habeas corpus took shape in one of the great

21. *See* J. LIEBMAN, *supra* note 3, §§ 2.1, 5.2, 7.1b, 26.2, 26.3, 27.1, 28.1 (1988 & Supp. 1991); 2 J. LIEBMAN, *supra* note 3, §§ 30.1, 35.1 (1988 & Supp. 1991); Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988).

22. *See* Hoffmann, *supra* note 3, at 167, 186-87. *But cf.* Spencer v. Georgia, 111 S. Ct. 2276 (1991) (Kennedy, J., concurring in the denial of certiorari) (suggesting that at least one member of the Court interprets *Teague* as expanding the Court's certiorari obligations on direct appeal in criminal cases).

23. *See generally* Hoffmann, *supra* note 3, at 167, 190-92.

24. *See, e.g.*, R. GOV. § 2254 CASES IN U.S. DIST. CTS. 4 (discussed in J. LIEBMAN, *supra* note 3, § 15.2).

25. *See* Sawyer v. Smith, 110 S. Ct. 2822, 2827 (1990); Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990); Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990).

26. *See* 28 U.S.C. § 2254(d) (1988), *interpreted in* Sumner v. Mata, 455 U.S. 591 (1982). *Teague*'s limitation of the federal courts to a "reasonableness" review of state court legal determinations tracks the looser of the two rules that the federal courts use when reviewing the legal determinations of administrative agencies. *See* Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2091-92 (1990) (distinguishing rule requiring reversal "[i]f the court has a firm conviction that the agency interpretation violates the statute" and rule requiring affirmance, despite a firm conviction of error, as long as "a reasonable person might accept the agency's view"). The Justice Department has explicitly defended *Teague* on the ground that the decision requires the federal courts to pay the same deference to state court interpretations of constitutional law that the Supreme Court currently requires the federal courts to pay to administrative agencies' interpretations of their organic statutes. *See* Statement of Andrew G. McBride, Associate Deputy Attorney General, *Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary of the U.S. House of Rep. concerning the Supreme Court's Decision in* Teague v. Lane *and the Standard of Review in Federal Habeas Corpus Proceedings*, 102d Cong., 1st Sess. (June 27, 1991), at 19-20 & n.15 (citing Chevron Inc., U.S.A. v. Natural Resources Defense Committee, 467 U.S. 837 (1984)). Descriptively, the Justice Department is accurate: administrative law indeed supplies the only available analogy for the minimal level of scrutiny of legal determinations that *Teague* imposes on courts. But that interpretation is normatively unsatisfying — even bizarre. The justification for requiring a reviewing court to defer to an administrative agency's interpretation of its organic statute is the agency's comparative advantage as a shaper and interpreter of the statute due to its expertise and experience in the substantive area and the quasi-legislative duties that the organic act assigns the agency. *See* Sunstein, *supra*, at 2085-91, 2096-97. That justification has no application to the *Teague* situation, in which the federal courts are required to defer to state judicial bodies that (i) are *less* expert and experienced in the interpretation of the relevant federal law, (ii) are *no more* legislatively empowered than the federal courts, and (iii) were given *less*, not more, claim to interpretive supremacy by the controlling organic act (in this case, the Constitution) than were the federal courts. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 377, 385-86, 415-19 (1821); THE FEDERALIST No. 81, at 486 (A. Hamilton) (C. Rossiter ed. 1971).

nationalizing statutes, the Habeas Corpus Act of 1867,[27] enacted during one of the country's great nationalizing periods, Reconstruction.[28] *Teague*'s transfer of constitutional policymaking authority from the national to the state courts accordingly is an important step in, and emblematic of, the Court's recent assault on the nationalizing force, not only of the Habeas Corpus Act, but also of the fourteenth amendment and federal judicial review pursuant to that amendment.

The Court's decisions may be most interesting, however, from the standpoint of contemporary legal theory. On one view, the Court's decisions are simply an instance of its current obsession with democratic decisionmaking:[29] As long as the majestic generalities of the fourth, fifth, sixth, and eighth amendments remain in the Constitution and apply to the states, judicial decisionmaking in criminal cases necessarily will include constitutional policymaking; as between state and federal judicial policymakers, state judges (so the Court's credo has it) are democratically preferred to federal judges because the former are elected or at least are more susceptible to local political controls than are the latter. This justification is troublesome enough given that the attributes of state and federal judges on which it relies have heretofore been understood to create strong reasons for preferring *federal* judicial policymakers.[30]

More interesting and more troubling, however, is the linkage that appears to be developing between the modern Court's democratic theory — exalting "will" (the people's, supposedly) over "reason" (the federal courts', usually)[31] — and an almost Critical Legal Studies attitude towards judicial reasoning and the judicial function. At the level of practice, for example, the Court's announcement of these major doctrinal shifts took place (1) without briefing and argument,[32] (2) in opinions that read as if to say that the presence of five votes is a sufficient explanation for the outcome,[33] and (3) with no deference at all to the traditional requirement that judges confine themselves to the issue as

27. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. §§ 2241-54 (1988)).

28. *See* E. FONER, RECONSTRUCTION 1863-1877, at 276-77, 454-58 (1988).

29. *See, e.g.*, Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 61-74 (1989); Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 378-81 (1990).

30. *See, e.g.*, Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1179-88 (1988); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115-30 (1977).

31. *See generally* Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 450-51 (1989).

32. *See supra* note 19 and accompanying text.

33. *See, e.g.*, Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990) (announcing "reasonableness" definition of "new rule" without attempting to locate definition in words, history, or logic of statute or prior decisions); *see also* Weisberg, *supra* note 3, at 22-23, 28 ("Court seems unembarrassed at . . . [defining "new rules" in terms of] a distinction that law students soon learn to deconstruct — the conceptually impossible distinction between a ruling that follows ineluctably from precedent and one which concededly expands precedent — all this in a judicial world

narrowly framed by the facts of the particular case, rather than as posed by all imaginably similar cases.[34] The Court thus dispensed with virtually every procedural and even rhetorical distinction that traditionally has differentiated judging from legislating.

At the level of substance, moreover, the Court even more clearly has obliterated any legitimate or legitimizing distinction between judges and legislators. Thus, by defining the concept of "new rules of law" so broadly, the Court insists that virtually every imaginable act on its part of what used to be called constitutional law-finding or adjudication is exposed instead as an act of lawmaking or legislation that, as such, deserves merely prospective effect. Lest the implication be left that it is only federal judges and Justices whose adjudicative endeavors are legislative acts, the Court has gone on to adopt a "rational basis" level of habeas corpus review of state judges' decisions that mimics the level of review traditionally reserved for legislative, as opposed to judicial, exercises in legalism. If the Court next extends its nonretroactivity presumption to cases requiring the resolution of so-called "mixed questions of fact and law,"[35] the Court's analysis also will threaten the distinction between fact-finding and law-interpreting that judges, but not legislators, traditionally have maintained, and will further legitimate critical attacks on the common law process of incremental decisionmaking as being nothing more than myriad decentralized exercises of political power.[36]

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where courts rarely acknowledge that they do any more than draw ineluctable conclusions from precedent").

34. In Saffle v. Parks, 110 S. Ct. 1257 (1990), for example, the Court probably could have held the principle urged upon it by the petitioner to be "new" under longstanding precedent defining new "rules" as ones establishing a "clear break" with prior precedent. *See* Teague v. Lane, 109 S. Ct. 1060, 1070 (1989) (plurality opinion) (paraphrasing Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971)) ("a case announces a new rule when it breaks new ground or imposes a new obligation on the States"). For, as interpreted by the *Parks* majority, the principle urged by the petitioner "contravene[d] well considered precedents," ran against the grain of "the large majority of federal and state court [decisions] that have rejected challenges to . . . instructions similar to that given at [petitioner's] trial," was "difficult to reconcile . . . with our long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary," and invited the jury "to make the sentencing decision according to its own whims or caprice." *Parks*, 110 S. Ct. at 1259, 1261, 1262-63. *But see infra* note 174 (suggesting that *Parks* majority may have mischaracterized petitioner's claim). Instead, the Court went out of its way *itself* to break new ground in redefining "new rules" by leaving aside the concededly *revolutionary* nature of the principle it took the habeas corpus petitioner to be advocating and stating that its decision would be the same as to principles with even the most modestly *evolutionary* potential. *Parks*, 110 S. Ct. at 1260 (quoting Butler v. McKellar, 110 S. Ct. at 1217) (rule is "new" if it departs from any theretofore " 'reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions' "); *see infra* note 227 (contrasting broad language and narrow holding of other post-*Teague* decisions); *see also Parks*, 110 S. Ct. at 1264 (Brennan, J., dissenting) (criticizing the majority for its "undue eagerness to apply the new standard for retroactivity . . . at the expense of thoughtful legal analysis" leading to "carelessness" that is especially inappropriate "when a life is at stake").

35. *See* Arizona v. Fulminante, 111 S. Ct. 1246, 1252 (1991); Miller v. Fenton, 474 U.S. 104, 113-15 (1985); J. LIEBMAN, *supra* note 3, § 20.3d.

36. *See, e.g., infra* notes 259-305 and accompanying text.

Although I hope to say something about these and other implications of *Teague* elsewhere, I want here simply to describe and draw out the doctrinal implications of *Teague*'s jurisdiction-limiting innovation in all its darkly hued splendor. In keeping with the subject matter of this Symposium, it also will be my intention to alert constitutional lawyers — especially those advocating on behalf of incarcerated and condemned prisoners, those adjudicating their petitions, and those in Congress — to the places at which doctrinal bulwarks remain, or ought to be erected, against the Rehnquist Court's continuing rout of habeas corpus jurisdiction.

Part I provides an overview of the Court's treatment of nonretroactivity in the criminal context, then compares that treatment to the Court's divergent approach to retroactivity in the civil context. Confronting the issues the *Teague* doctrine poses in the order courts and advocates are likely to address them, Part II then discusses whether retroactivity is more properly understood as a threshold issue or a defense; Part III considers what recent or proposed decisions present retroactivity issues because they are "new;" Part IV considers when cases become "final," hence susceptible to *Teague*'s presumptive rule of nonretroactivity of "new" decisions; Part V examines the two exceptional situations in which new decisions *do* apply retroactively in cases that have become final; and Part VI discusses the burden of proving and pleading the *Teague* nonretroactivity bar. Following Part VII's discussion of the retroactivity of new rulings that are *un*favorable to habeas corpus petitioners, the Article concludes with an argument for congressional repeal of *Teague*.

I.
WHAT'S HAPPENING?: AN OVERVIEW OF RETROACTIVITY AND HABEAS CORPUS BEFORE AND AFTER *TEAGUE*

This Part provides an overview of the various issues that arise in the process of deciding whether constitutional violations occurring in the course of state criminal trials are immunized from habeas corpus review by *Teague*'s nonretroactivity defense. Each of the remaining Parts then addresses those issues in more detail.

In contrast to new legislative enactments, which generally apply only prospectively, new judicial rulings generally apply retroactively as well as prospectively.[37] From time to time, however, the Supreme Court has recognized

37. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4736 (U.S., June 20, 1991) (plurality opinion) (practice of according fully retroactive effect to new decision is "overwhelmingly the norm"); American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2343 (1990) (Scalia, J., concurring in the judgment); Solem v. Stumes, 465 U.S. 638, 642 (1984); United States v. Johnson, 457 U.S. 537, 542 & n.7 (1982) (quoting Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), and citing Norton v. Shelby County, 118 U.S. 425, 442 (1886); United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103 (1801); 1 W. BLACKSTONE, COMMENTARIES 69 (15th ed. 1809)) (" 'general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions' "); Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 56-57 (1965). *See generally* Bowen v. Georgetown Hospital Ass'n, 109 S. Ct. 468

a "nonretroactivity" defense to claims premised on newly announced judicial rulings.[38] According to the Court's judge-made and prudential nonretroactivity doctrine,[39] certain new rulings disrupt preexisting law so much that they may not fairly or wisely be applied to cases that commenced — or that reached some specified stage of the proceedings (for example, trial, direct appeal, or collateral review of a prior judgment) — before the new rule was adopted.[40]

(1988). In the minority view of Justices Marshall, Blackmun, and Scalia, the presumption of retroactivity of judicial rulings is both conclusive and constitutionally mandated. *See James B. Beam Distilling Co.*, 59 U.S.L.W. at 4740 (Blackmun, J., concurring in the judgment); *id.* (Scalia, J., concurring in the judgment); *American Trucking Ass'n*, 110 S. Ct. at 2343 (Scalia, J., concurring in the judgment) ("prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be. The very framing of the issue . . . whether [a recent] decision . . . shall 'apply' retroactively — presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is" and "is contrary to th[e] understanding of 'the judicial Power' . . . [in] U.S. Const., Art. III, § 2, cl. 1" (emphasis in original)); *see also James B. Beam Distilling Co.*, 59 U.S.L.W. at 4739 (plurality opinion) (treating as open the question whether Court has the power to withhold full retroactivity from a new decision). *But see id.* at 4739 (White, J., concurring in the judgment) ("in proper cases a new rule announced by the Court will not be applied retroactively"); *id.* at 4740 (O'Connor, J., dissenting) (discussing and following "well-settled precedent in which this Court has refused repeatedly to apply new rules retroactively in civil cases"); *American Trucking Co.*, 110 S. Ct. at 2341-42 (plurality opinion) (although it is only in "relatively rare circumstances where established precedent is overruled . . . [that] the doctrine of nonretroactivity allows a court to adhere to past precedent . . . in order to avoid 'jolting . . . expectations,' " the Court has "[n]ever held that nonretroactivity violates the Article III requirement that this Court adjudicate only cases or controversies"). *See generally infra* note 96 (raising question whether the majority view in *James B. Beam Distilling Co.* that either rejects or resists the Court's power to make new rules nonretroactive can coexist with the *Teague* doctrine).

38. *See* J. LIEBMAN, *supra* note 3, § 8.4, at 106 n.23.

39. *See, e.g., James B. Beam Distilling Co.*, 59 U.S.L.W. at 4736 (plurality opinion) (treating retroactivity as prudential "choice of law" question); *American Trucking Ass'n*, 110 S. Ct. at 2330, 2342 (plurality opinion) (discussing "*our* retroactivity doctrine" and otherwise suggesting that retroactivity is matter of judge-made law (emphasis added)); *Johnson*, 457 U.S. at 542 & n.1; Desist v. United States, 394 U.S. 244, 249-53 (1969); *id.* at 268 (Harlan, J., dissenting). "The determination whether a constitutional decision of this Court is retroactive . . . is a matter of [nonstatutory] federal law." *American Trucking Ass'n*, 110 S. Ct. at 2330 (plurality opinion); *accord* Ashland Oil, Inc. v. Caryl, 110 S. Ct. 3202, 3204 (1990) (per curiam).

40. *See, e.g., James B. Beam Distilling Co.*, 59 U.S.L.W. at 4737 (quoting Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)) (justification for nonretroactivity lies "in its appreciation that '[t]he past cannot always be erased by a new judicial declaration,' . . . and that to apply the new rule to parties who relied on the old would offend basic notions of justice and fairness"); *American Trucking Ass'n*, 110 S. Ct. at 2342 (plurality opinion) ("The utility of our [non]retroactivity doctrine in cushioning the sometimes inequitable and disruptive effects of law-changing decisions is clear."); Hallstrom v. Tillamook County, 110 S. Ct. 304, 312 (1989); Teague v. Lane, 109 S. Ct. 1060, 1069 (1989); Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618, 622-23 (1965); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932); United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103 (1801). *See generally Teague*, 109 S. Ct. at 1069, 1070-71 (plurality opinion) (collecting prior retroactivity decisions and listing the various junctures in the trial, appellate, and postconviction proceedings at which the Supreme Court from time to time has drawn the retroactivity/prospectivity line); *Johnson*, 457 U.S. at 542-48 (similar); Weisberg, *supra* note 3, at 22-23 & nn.68-70 (similar).

Until recently, the nonretroactivity doctrine was not principally a defense to habeas corpus relief based upon new rules of constitutional criminal procedure, but rather a defense to relief of *any* sort based upon *any* and *all* types of new rulings that the Court deemed to be too disruptively novel to be applied retroactively. Whether the retroactivity issue arose in connection with a new criminal or civil ruling, a new constitutional or statutory ruling, or a new substantive or procedural ruling, the Court applied essentially the same test to determine which persons, if any, whose cases had reached the courts prior to the adoption of the new rule would have access to that rule.[41] If, but only if, the Court concluded that a recent ruling was "new," *i.e.*, that it " 'overul[ed] clear past precedent on which litigants may have relied, or . . . decid[ed] an issue of first impression whose resolution was not clearly foreshadowed,' "[42] the Court was prepared to hold the rule nonretroactive on the basis of a three-factor formula. That "formula . . . applied whether a case was on direct review or arose in collateral proceedings, [and] involved consideration of [1] the purpose of the new rule, [2] the extent of reliance on the old rule, and [3] the effect on the administration of justice of retroactive application of the new rule."[43] Under the Court's longstanding methodology, it typically announced a new ruling first and thereafter confronted the question whether the ruling applied retroactively.[44]

Starting in the mid-1960s, Justice Harlan, a number of other Justices,[45] and various commentators[46] began expressing disagreement with the three-factor test for determining the retroactivity of "new rules" — at least in the

41. *See, e.g., Ashland Oil*, 110 S. Ct. at 3204 (traditional test applied to determine retroactivity of recent ruling of constitutional civil substantive law); *Hallstrom*, 110 S. Ct. at 308-10 (traditional test applied to determine retroactivity of recent ruling of statutory civil procedural law); Lemon v. Kurtzman, 411 U.S. 192, 199-200 (1973) (traditional test applied to determine retroactivity of recent ruling of constitutional civil substantive law; drawing upon retroactivity decisions rendered in context of prior constitutional criminal procedure rulings); Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971) (statutory civil substantive law); *Linkletter*, 381 U.S. at 622-23 (constitutional criminal procedural law).

42. *American Trucking Ass'n*, 110 S. Ct. at 2330-31 (plurality opinion) (quoting *Chevron Oil*, 404 U.S. at 106); *see, e.g.*, Hanover Shoe, Inc. v. United States Shoe Machinery Corp., 392 U.S. 481, 498 (1968).

43. Teague v. Lane, 109 S. Ct. 1060, 1078 (1989) (White, J., concurring in part and concurring in the judgment) (discussing Stovall v. Denno, 388 U.S. 293, 297 (1967)); *see, e.g., id.* at 1069 (plurality opinion) (citing cases); *Johnson*, 457 U.S. at 542-45 (citing cases); *Chevron Oil*, 404 U.S. at 106-07; *Linkletter*, 381 U.S. at 622-23.

44. *See American Trucking Ass'n*, 110 S. Ct. at 2337, 2342 (plurality opinion) (citing cases) ("we have generally considered the question of retroactivity to be a separate problem [from the merits], one that need not be resolved in the law-changing decision itself"); cases cited *infra* notes 147-51.

45. *See Johnson*, 457 U.S. at 545-47 & nn.9, 10 (citing opinions); Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting).

46. *See, e.g.*, Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1558 & n.3 (1975) (citing authority); Mishkin, *supra* note 37. *But see* Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966). *See generally* Fallon & Meltzer, *supra* note 6, at 1738-49 (reprising some of the recent history of the nonretroactivity doctrine in the criminal context).

context of constitutional criminal procedure rulings — and began proposing alternatives. In a series of constitutional criminal procedure decisions beginning with *United States v. Johnson*[47] in 1982 and *Shea v. Louisiana*[48] in 1985 and culminating with *Griffith v. Kentucky*[49] in 1987, different majorities of the Supreme Court, following Justice Harlan's earlier dissents, gradually abandoned the retroactivity defense in cases that were pending at trial, on "direct appeal,"[50] or on certiorari to the United States Supreme Court[51] or that otherwise were "not yet final at the time the [new] decision was rendered."[52] In these decisions, particularly *Griffith*, a majority of the Court embraced Justice Harlan's view that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review [at the time the new rule was declared] violates basic norms of constitutional adjudication."[53] The Court accordingly held that " 'a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the rule constitutes a "clear break" with the past.' "[54] Notably, however, the Court — still, apparently, tracking Justice Harlan[55] — continued to define a "new rule" as one that either overruled, or at least was not foreshadowed by, prior precedent.[56]

The Court promoted the approach adopted in *Griffith* and the earlier cases on the basis of the principle's consistency both with the general pre-

47. 457 U.S. 537 (1982).

48. 470 U.S. 51 (1985).

49. 479 U.S. 314 (1987).

50. *See, e.g., Shea*, 470 U.S. at 59; *see also* Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting).

51. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2944 (1989).

52. *Shea*, 470 U.S. at 56; *see, e.g., Griffith*, 479 U.S. at 322 ("distinguishing between cases that have become final and those that have not, and . . . applying new rules retroactively to cases in the latter category"); *Shea*, 470 U.S. at 58 (new decision applied retroactively to cases that had not "become final" when the new decision was announced); Solem v. Stumes, 465 U.S. 638, 650 (1984) (new decision applied retroactively to cases not involving "final convictions").

53. *Griffith*, 479 U.S. at 322.

54. Teague v. Lane, 109 S. Ct. 1060, 1072 (1989) (plurality opinion) (quoting *Griffith*, 479 U.S. at 328); *accord, e.g.*, Davis v. Reynolds, 890 F.2d 1105, 1109 n.4 (11th Cir. 1989); Nieto v. Sullivan, 879 F.2d 743, 746 (10th Cir. 1989) (recent decision in Waller v. Georgia, 467 U.S. 39 (1984), automatically applies to petitioner's case because case was not "final on appeal" until after announcement of *Waller*).

55. Justice Harlan's views on the definition of a "new rule" are not crystal clear, but they did not diverge nearly as drastically from prevailing retroactivity lore as did his views on the means of determining whether "new rules," however defined, should be applied retroactively. *See infra* note 386 and accompanying text (advocating definition of "new rule" extracted from Justice Harlan's analysis).

56. *See, e.g.*, Allen v. Hardy, 478 U.S. 255, 258 (1986) (per curiam) (new rule is one that makes "explicit and substantial break with prior precedent"); United States v. Johnson, 457 U.S. 537, 549, 551 (1982) (new rule is one that "explicitly overrules a past precedent of this Court . . . , or disapproves a practice this Court arguably has sanctioned in prior cases . . . , or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved").

sumption of retroactivity[57] and with the included "common-law rule, recognized in civil and criminal litigation, 'that a change in law will be given effect while a case is on direct review.' "[58] Among the issues that *Griffith* implicitly left for later determination and that the Court in *Yates v. Aiken*[59] explicitly identified as open was whether habeas corpus — as to which there assertedly is no "common-law" retroactivity doctrine to fall back on — would be treated, for this purpose, as part of the "direct" appellate or quasi-appellate chain of proceedings that follows a criminal defendant's conviction of a criminal offense.[60] Also left open was the question whether the Court would apply its innovations in regard to the retroactivity of new rulings of simultaneously constitutional, criminal, and procedural law to other kinds of new rulings.

In eleven decisions handed down in 1989, 1990, and 1991,[61] the Supreme Court answered many of these questions. In the first of those decisions (*Teague* itself), the Court took up the question whether to extend *Griffith*'s conclusive presumption of retroactivity of new rules of constitutional criminal procedure to cases then pending in habeas corpus. Still following Justice Harlan,[62] a four-person plurality led by Justice O'Connor,[63] with varying degrees of support from three additional members of the Court,[64] concluded that a sharp divide should be carved between state "direct" appellate and federal postconviction proceedings:[65] Whereas *Griffith* had held that new constitutional rules of criminal procedure always apply retroactively to cases that were not yet final at the time the new rules were announced, the *Teague* plurality concluded that, "[u]nless they fall within [one of two] exception[s] to the gen-

57. *See supra* note 37 and accompanying text.

58. *Johnson*, 457 U.S. at 543 (quoting Linkletter v. Walker, 381 U.S. 618, 627 (1965)).

59. 484 U.S. 211, 215-17 (1988).

60. *See generally* J. LIEBMAN, *supra* note 3, §§ 2.1, 5.2, 7.1b, 7.2b, 16.2, 26.1, 27.1, 28.1; 2 J. LIEBMAN *supra* note 3, § 35.1; *supra* notes 20-21 and accompanying text.

61. James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735 (U.S., June 20, 1991); Ashland Oil, Inc. v. Caryl, 110 S. Ct. 3202 (1990) (per curiam); Sawyer v. Smith, 110 S. Ct. 2822 (1990); Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990); American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990); Hallstrom v. Tillamook County, 110 S. Ct. 304 (1989); Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Zant v. Moore, 109 S. Ct. 1518 (1989); Teague v. Lane, 109 S. Ct. 1060 (1989).

62. *See Teague*, 109 S. Ct. at 1071-76 (plurality opinion) (discussing Justice Harlan's opinions).

63. *Id.* at 1069-78 (plurality opinion of Justice O'Connor, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.).

64. *See id.* at 1078-79 (White, J., concurring in the judgment); *id.* at 1079-82 (Stevens, J., concurring in the judgment, joined by Blackmun, J.).

65. Ironically, the same day the Court in *Teague* refused to treat habeas corpus as an essentially appellate procedure for retroactivity purposes, a majority of the Court strongly endorsed the quasi-appellate treatment of the writ in the procedural-default context. *See* Harris v. Reed, 109 S. Ct. 1038, 1042-43 (1989) (discussed in J. LIEBMAN, *supra* note 3, § 9.4, at 66 n.1.1, § 24.2d, at 188 n.24, § 24.2e, at 193 n.48 (Supp. 1991)) (giving full effect in habeas corpus to "adequate and independent state grounds" jurisprudence that the Supreme Court developed to govern its direct appellate jurisdiction); *see also* Coleman v. Thompson, 59 U.S.L.W. 4789, 4791-92 (U.S., June 24, 1991) (reiterating the applicability to habeas corpus of the "adequate and independent state grounds" doctrine while cutting back on *Harris*).

eral rule, new constitutional rules of criminal procedure will *not* be applicable to cases which *have* become final before the new rules are announced."[66]

In addition, the plurality,[67] subsequently joined by Justice White in regard to confirmatory dicta,[68] with the remaining four Justices in dissent on the point,[69] concluded that the federal courts should treat retroactivity as a threshold question. Under this approach, a petitioner arguing that a claim in

66. *Teague*, 109 S. Ct. at 1075 (plurality opinion) (emphasis added); *see also id.* at 1079 (White, J., concurring in the judgment) ("regret[ting] the course the Court has taken" and noting that, "[i]f we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us," but concluding that Part IV of plurality opinion, which includes the passage quoted in text, "is an acceptable application in collateral proceedings of the theories embraced by the Court in cases [such as *Griffith*] dealing with direct review, and I concur in that result"); *id.* at 1080 (Stevens, J., concurring in the judgment, joined by Blackmun, J.) ("I am persuaded that the Court should adopt Justice Harlan's analysis of retroactivity for habeas corpus cases as well [as] for cases still on direct review."); *infra* Part V (discussing "exceptions" to the *Teague* doctrine).

67. *See Teague*, 109 S. Ct. at 1069-70, 1077-78 (plurality opinion).

68. *See, e.g.*, Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990) (quoting *Teague*, 109 S. Ct. at 1069 (plurality opinion)) ("[g]enerally speaking, '[r]etroactivity is properly treated as a threshold question' " on which Court must rule before reaching merits; Court does not decide retroactivity question, however, because state waived nonretroactivity objection); Saffle v. Parks, 110 S. Ct. 1257, 1259-60, 1262-63 (1990) ("[a]s [petitioner] is before us on collateral review, we must first determine whether the relief sought would create a new rule" because "[i]f so, we will neither announce nor apply the new rule sought by [the petitioner] unless it would fall into one of two narrow exceptions;" in process of characterizing rule for which petitioner contends as "new," however, Court disparages merits of rule as "difficult to reconcile . . . with . . . long-standing" constitutional policies and as designed to "grant the jury the choice to make the sentencing decision according to its own whims or caprice."); *see also* Sawyer v. Smith, 110 S. Ct. 2822, 2827 (1990) ("We need not address the significant questions concerning the merits of petitioner's *Caldwell* claim on these facts" and "address only whether *Caldwell* is available to petitioner as a ground upon which he may seek relief."). The current status of the *Teague* plurality view on this question remains in doubt. Although the majority in fact treated retroactivity as a threshold question in *Teague* and several post-*Teague* cases, in nearly all those cases the majority also violated the Court's own rules (S. Ct. R. 15.1) and practice (*e.g.*, City of Canton v. Harris, 109 S. Ct. 1197, 1202-03 (1989)) by denying relief on the basis of a nonjurisdictional defense (*see* Collins v. Youngblood, 110 S. Ct. at 2718) that was not raised in a timely (or any) fashion by the responding party. The Court thus rather obviously chose to treat this nonjurisdictional matter *as if* it were a jurisdictional, hence necessarily preliminary and nonwaiveable, question in order that it could more quickly complete the process of formulating its new doctrine and entrenching it in the law. Now that the Court has reverted to its usual practice of treating the concededly nonjurisdictional defense of retroactivity as, like most defenses, waiveable, *see id.* (state waived nonretroactivity defense by not raising it), it is possible that the Court also will revert to treating the defense as, like most defenses, a question that arises only after resolution of the merits of the moving party's claims. The doubt surrounding the issue is compounded by the absence of any clear statement on the matter by Justice White; his having recently written one and joined another opinion disavowing the need to treat retroactivity as a threshold question in the civil setting, James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4739 (U.S., June 20, 1991) (White, J., concurring in the judgment); American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2330, 2336-37, 2342 (1990) (plurality opinion); and the post-*Teague* majority's repeated discussion of merits issues even while claiming that the resolution of the retroactivity issue made resort to the merits inappropriate. *See infra* notes 174-76 and accompanying text. *See generally* Arkin, *supra* note 6, at 398 (detecting post-*Teague* majority's "recognition" in *Sawyer* "that the extreme [threshold-question] position of *Teague* was unworkable from the start").

69. *Teague*, 109 S. Ct. at 1090-91 & n.7 (Brennan, J., dissenting in part, joined by Mar-

her petition is controlled by a recent constitutional criminal procedure decision would have to establish first, before the court could reach the merits, that the new decision applied retroactively to the petitioner's case. More consequentially, a petitioner advancing a "new" rule of her own invention almost never would be able to secure federal habeas corpus consideration on the merits of the proposed rule, on the theory that the hypothetical rule's novelty precludes its retroactive application to the habeas corpus petitioner and to all other prisoners whose cases had progressed beyond the point of "finality"[70] and into federal habeas corpus proceedings.

Later in the 1988 Term in *Penry v. Lynaugh*,[71] a five-person majority of the Court extended the reach of the nonretroactivity doctrine announced in *Teague*, a noncapital case, to capital proceedings.[72] The following Term, the same five-person majority made clear not only that it had substantially limited the range of situations in which "new rules" of constitutional criminal procedure would apply retroactively to cases that had reached the habeas corpus stage before the new rule was announced to two "narrow exceptions"[73] but also that it had drastically broadened the definition of a "new rule." Henceforth, "new rules" would consist not only of decisions that overruled, or were not foreshadowed by, prior holdings[74] but also decisions that, while "clearly" and concededly foreshadowed — and even "controlled" — by prior decisions,[75] did not reach the *only* outcome that "reasonable" jurists ineluctably

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shall, J.); *id.* at 1079 & n.2 (Stevens, J., concurring in part and dissenting in part, joined by Blackmun, J.).

70. *See infra* Part IV (defining "finality").

71. 109 S. Ct. 2934 (1989).

72. *Id.* at 2944 ("In our view, the finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity."); *id.* at 2963-64 (Scalia, J., concurring, joined by Rehnquist, C.J., White and Kennedy, JJ.). Although the *Teague* plurality purported to leave for another day the question whether its new nonretroactivity presumption for cases that had become final applied in capital proceedings, *Teague*, 109 S. Ct. at 1077 n.3, the plurality was at pains to reject Justice Stevens' view, expressed in a separate opinion, that the *Teague* doctrine did *not* apply in capital cases. *Id.* (disagreeing with *id.* at 1081 n.3 (Stevens, J., concurring in the judgment)). As had the four-person plurality in *Teague*, the five-person majority in *Penry* ruled on the capital retroactivity question "without the benefit of briefing or oral argument." *Penry*, 109 S. Ct. at 2959 (Brennan, J., concurring in part and dissenting in part). Four justices concluded that the nonretroactivity presumption for final cases should not apply in capital cases. *Id.* (Brennan, J., concurring in part and dissenting in part, joined by Marshall, J.); *id.* at 2963 (Stevens, J., concurring in part and dissenting in part, joined by Blackmun, J.); *Teague*, 109 S. Ct. at 1081 n.3 (Stevens, J., concurring in the judgment, joined by Blackmun, J.).

73. Sawyer v. Smith, 110 S. Ct. 2822, 2831 (1990); Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990); Butler v. McKellar, 110 S. Ct. 1212, 1214 (1990).

74. *See, e.g.*, *Teague*, 109 S. Ct. at 1069 (denying retroactivity of a rule that would overrule clear language in a previous case).

75. *See, e.g.*, *Sawyer*, 110 S. Ct. at 2828, 2330 (quoting Brief for Petitioner 8) (neither the fact "that our earlier Eighth Amendment cases lent general support to the conclusion reached in [a recent decision] . . . nor [the fact] . . . that state courts 'would have found [that decision] to be a predictable development in Eighth Amendment law'. . . suffices to show that [the new decision] was not a new rule," nor does the fact that numerous state court decisions had

had to reach on the basis of prior decisions.[76] As a result, a prisoner can secure relief at the habeas corpus stage only on the basis of legal theories that are so "airtight" as of the time the case became final that the only conclusion one could reach about the state judges who theretofore rejected the theories and affirmed the petitioner's conviction is that those judges acted "unreasonably" or in "bad faith."

At the end of the 1989 Term, therefore, prior to Justice Brennan's resignation, the state of the law with regard to the retroactivity of recent constitutional criminal procedure rulings was as follows: All members of the Court accepted Justice Harlan's general view that "new rules" should apply retroactively to all individuals whose cases had *not* become "final" prior to the time the new rule was adopted.[77] Seven Justices — Chief Justice Rehnquist and Justices White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy — also accepted Justice Harlan's general view that, save in two exceptional circumstances, "new rules" should *not* apply retroactively in noncapital cases to individuals whose cases *had* become "final" prior to the time when the new rule was adopted.[78] Five of these seven Justices — Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy — (1) applied this general approach without exception in capital cases;[79] (2) substantially expanded Justice Harlan's[80] and other previous definitions of "new rule,"[81] drawing within the definition all rulings with which reasonable minds theretofore might have differed;[82] (3) significantly contracted Justice Harlan's understanding of the two exceptional circumstances;[83] and (4) (with the possible exception of Justice White[84]) treated retroactivity as necessarily a threshold question.[85] The remaining two of the seven Justices who generally follow Justice Harlan — Justices Blackmun and Stevens, joined in this regard by Justices Brennan and Marshall — (1) exempted condemned individuals from the post-finality presumption of nonretroactivity;[86] (2) applied the preexisting definition of "new rule," namely, overrulings and not-clearly-foreshadowed innovations;[87] (3)

"pointed toward" or were "congruent with" the new decision as a matter of state law); *Parks*, 110 S. Ct. at 1261; *Butler*, 110 S. Ct. at 1217-18.

76. *See Sawyer*, 110 S. Ct. at 2827 ("The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered."); *Parks*, 110 S. Ct. at 1260 (quoting *Butler*, 110 S. Ct. at 1217) (" 'The "new rule" principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.' ").

77. *See supra* notes 47-56 and accompanying text.

78. *See supra* notes 62-66 and accompanying text.

79. *See supra* notes 71-72 and accompanying text.

80. *See infra* note 380 and accompanying text.

81. *See supra* note 42 and accompanying text.

82. *See supra* notes 74-76 and accompanying text.

83. *See infra* Part V.

84. *See supra* note 68 and accompanying text.

85. *See supra* notes 67-70 and accompanying text.

86. *See supra* note 72.

87. *See, e.g.*, Butler v. McKellar, 110 S. Ct. 1212, 1222-23 (1990) (Brennan, J., dissenting).

read the two exceptions more broadly;[88] and (4) preferred to decide the merits of the constitutional claim first, only thereafter determining whether nonretroactivity poses a defense to relief on any claim that is shown to have merit.[89] Finally, Justices Brennan and Marshall rejected Justice Harlan's nonretroactivity presumption in regard to cases becoming "final" after a new rule's adoption and adhered in this context to the preexisting three-part analysis of the purpose and disruptiveness of the new rule and the extent of the States' reliance on the prior rule.[90]

In a series of decisions in 1989, 1990, and 1991, the Court considered the retroactivity of rulings involving something other than constitutional criminal procedure.[91] For most civil rulings, the Court retains the preexisting (overruling/not-foreshadowed) definition of "new rules" and the preexisting procedure that resolves the merits before addressing retroactivity.[92] Beyond that, the Court is fragmented: A four-person plurality — ironically, the same four Justices (Rehnquist, White, O'Connor, and Kennedy) who are Justice Harlan's most devoted adherents in the criminal context — reject Justice Harlan's view that new *civil* rulings should be treated the same way that he,

88. *See* Sawyer v. Smith, 110 S. Ct. 2822, 2838-39 (1990) (Brennan, J., dissenting).

89. *See supra* note 69 and accompanying text.

90. *See* Teague v. Lane, 109 S. Ct. 1060, 1093-94 (1989) (Brennan, J., dissenting); *supra* notes 41-43 and accompanying text. As of this writing, Justice Brennan's replacement, Justice Souter, has not passed on any of these criminal-retroactivity questions. Justice Souter's views on civil retroactivity coincide with Justice Stevens' views. *See* James B. Beam Distilling Co. v. Georgia, 49 U.S.L.W. 4735, 4736 (U.S., June 20, 1991) (plurality opinion); *infra* note 94 and accompanying text.

91. The Court variously described the subject of its new nonretroactivity doctrine in the *Griffith-Teague* line of cases as "new rules governing criminal procedure," Griffith v. Kentucky, 479 U.S. 314, 326 (1987), "new rule[s] of constitutional law," Saffle v. Parks, 110 S. Ct. 1257, 1258-59 (1990), and "new constitutional rule[s] of criminal procedure," *Teague*, 109 S. Ct. at 1069 (plurality opinion).

92. *See* Ashland Oil, Inc. v. Caryl, 110 S. Ct. 3202, 3205 (1990) (per curiam) (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971)) (*ex post* determination of new decision's retroactivity; recent decision did not announce "new" rule, although it "unquestionably contributed to the development of . . . [existing] jurisprudence" and extended prior law "beyond the context in which it had originated," because it "was not revolutionary" and "neither overturned established precedent nor decided 'an issue of first impression whose resolution was not clearly foreshadowed' "); American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2330-33 (1990) (plurality opinion) (quoting *Chevron Oil*, 404 U.S. at 106) (applying definition of " 'new principle of law' " as one that " 'overul[es] clear past precedent on which litigants may have relied, or . . . decid[es] an issue of first impression whose resolution was not clearly foreshadowed,' " Court holds that recent ruling is "new" because it "left very little of [a prior] . . . line of precedent standing;" balance of equities favors making decision prospective only); *see also* Hallstrom v. Tillamook County, 110 S. Ct. 304, 309-12 (1989) (similar application of retroactivity test). In the Court's most recent civil retroactivity decision, the four Justices who addressed the "new law" question adhered to the "overruling or not clearly foreshadowed" formulation. James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4739 (U.S., June 20, 1991) (White, J., concurring in the judgment); *id.* at 4741-42 (O'Connor, J., dissenting, joined by Rehnquist, C.J. and Kennedy, J.). The six Justices who addressed the order-of-decision question assumed that the merits determination precedes the retroactivity determination. *Id.* at 4736 (plurality opinion of Souter, J., joined by Stevens, J.); *id.* at 4739 (White, J., concurring in the judgment); *id.* at 4741 (O'Connor, J., dissenting).

and now they, treat new criminal rulings, *i.e.*, as automatically retroactive to nonfinal cases. In the civil context, these Justices instead follow the preexisting three-part approach to retroactivity that they roundly rejected in the criminal context in *Teague*.[93]

Another group of Justices (Brennan, Marshall, Blackmun, Stevens, and, apparently, Souter) apply Harlan's automatic retroactivity rule to nonfinal cases, thus unifying those Justices' approaches to retroactivity in criminal and civil prefinality situations.[94] Justice Scalia understands all new *civil* — but, for unexplained reasons, not all new *criminal* — decisions to be fully retroactive as a constitutional imperative under the "judicial Power" language of article III,[95] except when his vote favoring retroactivity would create a majority for retroactive application of a decision with which he disagrees, in which case article III allows him to vote for nonretroactivity.[96]

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93. *See James B. Beam Distilling Co.*, 59 U.S.L.W. at 4739 (White, J., concurring in the judgment); *id.* at 4741 (O'Connor, J., dissenting); *American Trucking Ass'n*, 110 S. Ct. at 2331-32 (plurality opinion); Hallstrom v. Tillamook County, 110 S. Ct. at 312; *see also American Trucking Ass'n*, 110 S. Ct. at 2330-42 (plurality opinion) (quoting *Chevron Oil*, 404 U.S. at 106-07, and *Griffith*, 479 U.S. at 322 n.8, 328) (citations omitted) (new civil rules may be held nonretroactive upon a balancing of several factors, *i.e.*, the new rule's " 'prior history,' " its " 'purpose and effect,' " " 'whether retrospective operation will further . . . [the rule's] operation,' " and whether "substantial inequitable results" can be avoided if the rule is " 'applied retroactively;' " accordingly, "conclusion that [a new decision] established a new principle of law . . . does not necessarily end the inquiry;" "[a]lthough the Court has recently determined that new rules of criminal procedure must be applied retroactively to all cases pending on direct review or not yet final, retroactivity of decisions in the civil context 'continues to be governed by the standard' " of *Chevron Oil*; plurality rejects Justice Harlan's view and refuses to "extend the retroactivity doctrine recently adopted in the criminal sphere to our civil cases").

94. *See James B. Beam Distilling Co.*, 59 U.S.L.W. at 4740 (Blackmun, J., concurring in the judgment); *American Trucking Ass'n*, 110 S. Ct. at 2349-52 (Stevens, J., dissenting); *cf. James B. Beam Distilling Co.*, 59 U.S.L.W. at 4736, 4739 (plurality opinion of Souter, J., joined by Stevens, J.) (reserving question whether there are rare circumstances in which a new civil decision may be denied retroactive application).

95. U.S. CONST. art. III, §§ 1, 2.

96. *See James B. Beam Distilling Co.*, 59 U.S.L.W. at 4740 (Scalia, J., concurring in the judgment); *American Trucking Ass'n*, 110 S. Ct. at 2343-44 (Scalia, J., concurring in the judgment). Justice Scalia believes that, as far as judges are concerned, the meaning of the Constitution, hence its interpretation by courts, never changes (save when the document is formally amended) and, accordingly, that the Court's *current* interpretation of the Constitution must, by assumption, be the *right and only* interpretation. *See id.* Justice Scalia also believes that, when the language of a statute is clear, the statute should be interpreted to mean precisely what it says. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987). Taken together, these two views ought to forbid the result in *Teague*. For the habeas corpus statute says, quite unequivocally, that the courts "shall entertain an application for a writ of habeas corpus on behalf of a person . . . in custody in violation of the Constitution," 28 U.S.C. § 2254(a), which, in Justice Scalia's view, can only mean the Constitution *as the Court currently interprets it*. Yet, applying the Constitution as the Court then interpreted it was exactly what the Court *refused* to do (with Justice Scalia's concurrence) in *Teague*, *Parks*, and especially *Butler*. *See infra* note 108. In theory, at least, the Court's post-*Teague* (and post-*Parks* and *Butler*) forays into the civil retroactivity field create the possibility that the Court, as composed prior to Justice Marshall's retirement, would overrule *Teague*. That result would consist not only with the dissenting views of Justices Marshall, Blackmun, and Stevens in *Parks* and *Butler*, but also with Justice Scalia's, Justice Marshall's, and Justice Blackmun's automatic retroactivity position in *James B. Beam Distilling Co.* and with Justice Souter's hint of an objection to *Teague* in the same case.

On one civil-retroactivity issue that arose during 1989 and 1990, the two groups of multiple Justices arrayed above (minus Justice Souter, who was not then on the Court) literally switched places. Thus, in regard to the retroactivity of the habeas corpus-focused, hence "civil" and statutory,[97] rule of *Teague* itself, Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy (joined by Justice Scalia), *sub silentio*, applied a *conclusive presumption* of retroactivity,[98] notwithstanding *Teague*'s forthright acknowledgement that its ruling was (1) not argued — hence, apparently, was not foreseen or, probably, foreseeable — by the parties, (2) was explicitly designed to shatter the Court's twenty-five-year-old paradigm for addressing retroactivity in identical contexts, and (3) overruled scores of prior decisions.[99] In dissent, Justices Brennan, Marshall, Blackmun, and Stevens resisted *Teague*'s retroactivity on the ground that the losers could not fairly be punished for having reasonably relied on the law's being different theretofore.[100]

Except in the case of new habeas corpus rulings, therefore, the retroactivity rules applied by the Court's various members as of the end of the 1990 Term were as follows: Justices Blackmun and Stevens apply the same set of rules in all (criminal and civil, constitutional and statutory, procedural and substantive) contexts, except where that rule would work to deprive a capitally sentenced prisoner of the retroactive benefit of a new rule. Both Justices apply the traditional definition of "new rules;" endorse Justice Harlan's view that new rules always, or almost always, apply in cases not yet "final" when the new rule was adopted but, with two exceptions, never apply in cases that were "final" when the new rule was announced; and take up the retroactivity question only after resolving the merits. Justice Souter follows a similar line in the

See James B. Beam Distilling Co., 59 U.S.L.W. at 4740 (Scalia, J., concurring in the judgment, joined by Marshall and Blackmun, JJ.); *id.* at 4738 (plurality opinion of Souter, J.) (strongly adhering to the principle that all litigants in court should be treated the same in regard to the applicable law and noting that *Teague* breaks the equal-treatment rule by according "disparate treatment of those cases that come to the Court directly and those that come here in collateral proceedings").

97. *See* J. LIEBMAN, *supra* note 3, § 2.1 (habeas corpus long recognized as a "civil" proceeding governed by federal statute). *Compare* Teague v. Lane, 109 S. Ct. 1060, 1075 n.2 (1989) (plurality opinion) (claiming that special nonretroactivity presumption for cases then pending in habeas corpus is not a rule of habeas corpus but instead a (civil?, criminal?) rule of retroactivity) *with id.* at 1079 (White, J., concurring in the judgment) (acknowledging that *Teague* doctrine is an exercise "in construing the reach of the habeas corpus statutes").

98. The Court applied *Teague* retroactively in the following cases, each of which was pending before the Supreme Court at the time the Court decided *Teague*: Sawyer v. Smith, 110 S. Ct. 2822 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990); Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Zant v. Moore, 109 S. Ct. 1518 (1989) (per curiam).

99. *Teague*, 109 S. Ct. at 1069-75. For discussion of the almost classically legislative, hence presumptively *non*retroactive (*see supra* note 37 and accompanying text) character of the *Teague* line of cases, see *supra* notes 31-36 and accompanying text.

100. *See Parks*, 110 S. Ct. at 1264 n.1 (Brennan, J., dissenting) (citing *Butler*, 110 S. Ct. at 1221 n.4 (Brennan, J., dissenting)) ("The Court's application of the *new* doctrine of retroactivity adopted in *Teague* to bar relief on a claim that was litigated prior to that decision is contrary to basic fairness." (emphasis in original)); *infra* note 480 and accompanying text.

civil context but has not yet ruled on a case in the criminal context.[101]

Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy apply a different set of rules in the criminal and civil context. In criminal cases, these four Justices (joined in this regard by Justice Scalia) adopt Justice Harlan's principles of automatic retroactivity in prefinal cases and presumptive nonretroactivity in final cases. In the process, however, they greatly expand the definition of "new rules" to include rulings with which a reasonable jurist previously might have disagreed, contract Justice Harlan's description of at least one of the two exceptions to the principle of nonretroactivity in "final" cases, and (with the possible exception of Justice White[102]) address retroactivity *before* resolving the merits.[103] By contrast, in the civil context, these Justices adhere to the traditional definition of "new rules" (only overrulings and not-clearly-foreshadowed decisions), reject Justice Harlan's principle that new rules automatically apply in not-yet-final cases, adhere instead to the traditional three-part test of retroactivity that they overruled in the criminal context in *Teague*, and address retroactivity *after* resolving the merits.[104]

Justices Brennan and Marshall favor almost the mirror image of the rules advocated by the preceding set of Justices. Thus, they adopt Justice Harlan's principle that "new" *civil* (as well as criminal) rules apply retroactively in all nonfinal cases (defining "new rules" in the traditional way), while rejecting Harlan's principle that new criminal rules are presumptively nonretroactive in "*final*" cases in favor of the application of the traditional three-part test of retroactivity in that context.[105] In all settings, Justices Brennan and Marshall would address retroactivity only after resolving the merits.[106]

Finally, Justice Scalia considers it an inherent constraint on the article III "judicial Power" that judges limit their decisions to stating what the law *is* and (apparently) always *has* been, such that there are no "new" judge-made rules and the nonretroactivity issue never arises.[107] For reasons not yet explained, however, Justice Scalia *does* consider the "new law" concept to have meaning in the habeas corpus context. In that context, he assumes that virtually all recent rulings are "new" and, on the Harlan model, presumptively

101. *See supra* notes 69, 87, 90, 94 and accompanying text. Justice Blackmun reaches these conclusions based in part on Justice Scalia's view that article III of the Constitution denies federal judges the authority to make their decisions nonretroactive. *See* James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4740 (U.S., June 20, 1991) (Blackmun, J., concurring in the judgment); *id.* (Scalia, J., concurring in the judgment). Justices Stevens and Souter reach these conclusions based on an understanding of the retroactivity doctrine as prudential, rather than constitutional. *See id.* at 4736 (plurality opinion). Justices Stevens and Souter thus contemplate the possibility of rare instances in which nonretroactive treatment might be appropriate. *See id.* at 4736, 4739.

102. *See supra* note 68 and accompanying text.

103. *See supra* notes 67-70 and accompanying text.

104. *See supra* note 92 and accompanying text.

105. *See supra* note 94 and accompanying text.

106. *See supra* note 92 and accompanying text.

107. *See* American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2343 (1990) (Scalia, J., concurring in the judgment) (quoted *supra* note 37).

nonretroactive.[108] Despite his principled position that a nonretroactivity doctrine cannot coexist with article III, Justice Scalia frequently has formed the fifth and decisive vote (along with the Chief Justice and Justices White, O'Connor, and Kennedy) to permit the execution of capitally sentenced habeas corpus petitioners to proceed on the ground that the nonretroactivity defense neutralizes any constitutional violations in their cases.[109]

Still unresolved are the questions of how the Court will treat the retroactivity of (1) new *statutory* criminal law and procedure rulings[110] (an issue on

108. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2964 (1989) (Scalia, J., concurring in part and dissenting in part). Of course, habeas corpus is a creature of statute, and Congress, if it chose, could forbid the courts to apply recent decisions in that context even if, as Justice Scalia contends is *always* the case, those decisions were not "new." But, as yet, Congress has *not* limited the decisions that apply in habeas corpus cases save by requiring that those decisions construe the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (1988). In the absence of any viable statutory explanation, therefore, Justice Scalia cannot coherently claim *both* that article III forbids the courts to announce "new" rules of a sort that do not apply retroactively *and* that virtually all recent rulings announced by the courts are "new" such that they do not apply retroactively to cases then pending in habeas corpus proceedings. *See supra* note 96 (discussing incompatibility of Justice Scalia's recent views on civil retroactivity and his slightly earlier views on criminal, postfinality retroactivity).

109. Justice Scalia supplied the decisive vote to deny relief on nonretroactivity grounds in three criminal retroactivity decisions during the 1989 Term. *See* Sawyer v. Smith, 110 S. Ct. 2822 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990).

110. The lower courts currently are grappling with the question of the retroactivity of three recent decisions that arose in the criminal context but do not involve simultaneously constitutional and procedural issues.

First is the retroactivity of the Court's *statutory* criminal procedure decision in Gomez v. United States, 109 S. Ct. 2237 (1989), which held that magistrates have no authority under the Federal Magistrates Act, 28 U.S.C. § 636 (1988), to select juries in criminal trials. *Compare, e.g.*, United States v. France, 886 F.2d 223, 226-27 & n.2 (9th Cir. 1989) (dicta) (*Gomez* ought to apply retroactively to collateral attacks on convictions by juries selected with magistrates presiding), *aff'd by an equally divided Court*, 111 S. Ct. 805 (1991) *with* Gilberti v. United States, 917 F.2d 92, 94-96 (2d Cir. 1990) (applying *Teague* doctrine and concluding that *Gomez* created a "new rule" and thus does not apply retroactively to section 2255 petitioners whose cases became final before *Gomez* was announced) *and* United States v. Rubio, 722 F. Supp. 77, 84-85 (D. Del. 1989) (*Gomez* should not apply retroactively), *aff'd* 908 F.2d 965 (3d Cir.), *cert. denied*, 111 S. Ct. 523 (1990) *and* other decisions discussed in Arkin, *supra* note 6, at 404-07 (same). Without explaining why or acknowledging the *civil* statutory-procedural analogue in, for example, Hallstrom v. Tillamook County, 110 S. Ct. 304, 309-10 (1989) (applying the Court's pre-*Teague* analysis), all these decisions and the available commentary on them assume that *Teague* provides the only retroactivity analysis that might apply. *See* Arkin, *supra* note 6, at 404-07.

Second is the retroactivity of the Court's *statutory substantive* criminal law decision in McNally v. United States, 483 U.S. 350 (1987), which limited the scope of the federal mail fraud statute. Although the lower courts agree that *McNally* applies retroactively, *see* Lomelo v. United States, 891 F.2d 1512, 1515 n.8 (11th Cir. 1990) (collecting decisions), they arrive at that conclusion by different routes. Some courts essentially apply *Teague*'s first exception. *See, e.g., id.* (quoting Belt v. United States, 868 F.2d 1208, 1211 (11th Cir. 1989)) (*McNally* applies retroactively to collateral attack on conviction because " 'a decision which determines that Congress never intended certain conduct to fall within the proscription of a criminal statute must necessarily be retroactive' "); *see* cases cited *infra* note 440. Other courts assume automatic retroactivity because *Teague* "addresses only the retroactivity of 'new constitutional rules of criminal procedure' and thus does not control" cases involving new rules of substantive crimi-

which the Court may have split 4-4 last Term[111]); (2) new constitutional *substantive* criminal law rulings (a question on which the substance-focused first exception to the *Teague* rule seems to bear heavily[112]); (3) new criminal rulings of all sorts that *federal* prisoners seek to enforce in postconviction proceedings brought pursuant to 28 U.S.C. § 2255;[113] and (4) new rulings of all sorts that litigants seek to enforce in collateral attacks on civil judgments (a subject on which an important 1989 civil rights decision reveals a five-person majority prepared to abandon the nonretroactivity scruples to which the same five Justices religiously adhere in the criminal collateral-attack context[114]).

As fraught with dissensus as the Court appears to be, there is a high

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nal law. Callahan v. United States, 881 F.2d 229, 232 n.1 (6th Cir. 1989), *cert. denied*, 111 S. Ct. 1816 (1990).

Third is the question of the retroactivity of the Supreme Court's habeas corpus — hence civil and either statutory or prudential — ruling in Harris v. Reed, 109 S. Ct. 1038 (1989) (discussed *supra* note 65). Here again, agreement on retroactivity, *see* Shafer v. Stratton, 906 F.2d 506, 509 n.3 (10th Cir.) (assuming retroactive application of *Harris*), *cert. denied*, 111 S. Ct. 393 (1990); Harmon v. Barton, 894 F.2d 1268, 1272 n.8 (11th Cir.), *cert. denied*, 111 S. Ct. 96 (1990), masks disagreement on the retroactivity analysis that applies. *Compare* Young v. Herring, 917 F.2d 858, 862 n.1 (5th Cir. 1990) (*Harris* rule is retroactive because it is quasi-jurisdictional and is not a rule of *criminal* procedure), *aff'd en banc on other grounds*, No. 89-4095 (5th Cir. July 26, 1991) (U.S. App. LEXIS 16661) *and* Peterson v. Scully, 896 F.2d 661, 664 (2d Cir.) (presuming retroactivity because rule of *Harris*, although probably "new" inasmuch as it "changes the law in this Circuit," is not a "new rule of *constitutionally required* procedure" and hence is not subject to *Teague* doctrine (emphasis added)), *cert. denied*, 110 S. Ct. 3301 (1990) *with* Hill v. McMackin, 893 F.2d 810, 814 (6th Cir. 1989) (applying *Teague* rule but holding that *Harris* is not "new" because it was "dictated by the [direct-appeal] precedent" that *Harris* for the first time applied in a habeas corpus context). In Coleman v. Thompson, 59 U.S.L.W. 4789, 4793 (U.S., June 24, 1991), the Supreme Court all but overruled *Harris* — in the process assuming that both *Harris* and the rule with which the Court replaced *Harris* apply retroactively. *See id.* at 4793, 4794-95; *see also* Coe v. Thurman, 922 F.2d 528, 534 (9th Cir. 1991) (supplemental opinion) (per curiam) (circuit's new treatment of exhaustion question applies retroactively; *Teague* inapplicable because its federalism policy has no bearing on new rules that federal courts impose on themselves); Hostler v. Groves, 912 F.2d 1158, 1161-62 & n.4 (9th Cir. 1990) (citing cases) (Supreme Court's new rule governing timing of filing of notices of appeal by incarcerated prisoners, Houston v. Lack, 487 U.S. 266 (1988), applies retroactively), *cert. denied*, 111 S. Ct. 1074 (1991); *infra* note 480.

111. *See* United States v. France, 111 S. Ct. 805 (1991) (aff'g by an equally divided Court United States v. France, 886 F.2d 223 (9th Cir. 1989)).

112. *See infra* notes 435-47 and accompanying text.

113. *See* Teague v. Lane, 109 S. Ct. 1060, 1084 n.1 (1989) (Brennan, J., dissenting) (plurality leaves unsettled question of *Teague* doctrine's application to collateral review of federal-prisoner convictions and sentences under section 2255); *see also infra* note 422 and accompanying text.

114. Observers inclined to believe that the Court's agenda in regard to the expansion and contraction of underlying constitutional and statutory rights drives its treatment of such matters as finality and the breadth of collateral review will find considerable support in the juxtaposition of *Teague* and the Court's decision a few months later in Martin v. Wilks, 109 S. Ct. 2180 (1989). Compare, that is, *Teague*'s substantial narrowing of the capacity of *parties* subject to the loss of *liberty* or even *life* to attack judgments collaterally on the basis of constitutional rights of a sort that are not much in favor with the Court these days to *Martin*'s dramatic expansion of the capacity of *nonparties* subject to the loss of merely *monetary* interests to attack judgments collaterally on the basis of reverse discrimination rights of a sort that are very much in vogue with the Court these days. *See, e.g.*, City of Richmond v. J.A. Croson, Co., 109 S. Ct. 706 (1989).

degree of consensus that favors retroactivity in all but one area. Thus, in cases not "final" as of the date of the new decision, all of the Justices accord automatic retroactivity to all new *constitutional criminal procedure*[115] and (probably) all *constitutional criminal law*.[116] A majority (Marshall, Blackmun, Stevens, Scalia, and Souter) treats all new rules of *civil law* the same.[117] Finally, the remaining members of the Court (Rehnquist, White, O'Connor, and Kennedy) agree that most new *civil* rulings (and *all* new civil *habeas corpus* rulings) are automatically retroactive, thus replacing the majority's principle of automatic retroactivity of all decisions with a rule of automatic retroactivity of most decisions and presumptive retroactivity of the small number of decisions that can be said to be truly novel.[118] Therefore, only in regard to the application of new constitutional criminal procedure rulings to cases theretofore pending in federal habeas corpus proceedings (and perhaps in other post-appellate proceedings) has the consensus in favor of requiring or presuming retroactivity lapsed.[119]

There are four dimensions along which the Court's general — and generous — approach to retroactivity differs from its parsimonious analysis of the retroactivity of new constitutional-criminal-procedure rulings in cases already "final" at the time of the new ruling:

(1) Is retroactivity a threshold question? Generally, never. In the criminal/postfinality context, always.[120]

(2) What constitutes a "new rule?" Generally, only rulings that overrule or were not "foreshadowed" by prior decisions. In the criminal/postfinality context, all rulings with which at least one "reasonable" jurist might disagree.[121]

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115. *See supra* notes 47-60 and accompanying text.

116. *See infra* notes 435-47 and accompanying text.

117. *See supra* notes 94-96 and accompanying text.

118. *See supra* note 93 and accompanying text.

119. *See supra* notes 77-90 and accompanying text.

120. *Compare* American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2337 (1990) (plurality opinion) ("In the civil arena, we have generally considered the question of retroactivity to be a separate problem [from the merits], one that need not be resolved in the law-changing decision itself.") *and* Hallstrom v. Tillamook County, 110 S. Ct. 304, 309-10 (1989) (same, by implication) *with* Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990) (quoting Teague v. Lane, 109 S. Ct. 1060, 1069 (1989)) (dicta) ("[g]enerally speaking, '[r]etroactivity is properly treated as a threshold question' " on which court must rule before reaching merits) *and Teague*, 109 S. Ct. at 1069-70, 1077-78 (because of unfairness of giving relief to party first asking Court to enforce meritorious new rule while thereafter denying relief to similarly situated parties on nonretroactivity grounds, horizontal equity requires courts to decide retroactivity first and deny relief to all parties proceeding on the basis of a nonretroactive new rule).

121. *Compare* James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4739 (U.S., June 20, 1991) (White, J., concurring in the judgment) (decision is not "new" if it was "reasonably foreseeable") *and* Ashland Oil, Inc. v. Caryl, 110 S. Ct. 3202, 3205 (1990) (per curiam) (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971)) (although recent decision "unquestionably contributed to the development of . . . [existing] jurisprudence" and extended prior law "beyond the context in which it had originated," that decision is not new rule because it "was not revolutionary" and "neither overturned established precedent nor decided 'an issue of first impression whose resolution was not clearly foreshadowed' ") *and American Trucking*

(3) Do new rules apply in later cases? Generally, always, or almost always. In the criminal/postfinality context, almost never.[122]
(4) How important are reliance interests? Generally, they are decisive. In the criminal/postfinality context, they are not important at all.[123]

Overall, the trend on the Court is clear if not yet fully realized: The prudential and judge-made nonretroactivity doctrine is receding in importance as the Court comes to treat most of its rulings as either presumptively or conclusively law-finding, not law-making, endeavors. Rather than an increase in judge-made prudence, the nonretroactivity doctrine's recrudescence in the *Teague* line of cases accordingly reflects an anomalous, judge-made revision of the Court's *statutory* habeas corpus jurisdiction.[124] In the ironic guise of a set of rulings cautioning against judicial law-making, the *Teague* Court has remade Congress' habeas corpus law, transforming nonretroactivity from a

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Ass'n, 110 S. Ct. at 2330-31 (plurality opinion) (quoting *Chevron*, 404 U.S. at 106-07) (in civil context, ruling is "new" only if it " 'overul[es] clear past precedent on which litigants may have relied, or . . . decid[es] an issue of first impression whose resolution was not clearly foreshadowed;' " ruling in question is new because it "left very little of [a prior] . . . line of precedent standing;" only relevance of fact that prior precedent provided state courts with "good reason" to rule differently from the way the Supreme Court ultimately ruled is on balancing of equities that applies to decide whether new rules nonetheless should be given retroactive effect) *with* Sawyer v. Smith, 110 S. Ct. 2822, 2827-28 (1990) (quoting Brief for Petitioner 8 and Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990)) (neither fact "that our earlier Eighth Amendment cases lent general support to the conclusion reached in [recent decision] . . . nor [fact] . . . that state courts 'would have found [that decision] to be a predictable development in Eighth Amendment law,' suffices to show that [the new decision] was not a new rule;" rather, rule is new if it is contrary to any " 'reasonable, good-faith interpretations of [prior] precedents made by state courts even though th[ose interpretations] are shown to be contrary to later decisions' ").

122. *Compare James B. Beam Distilling Co.*, 59 U.S.L.W. at 4736, 4739 (plurality opinion) (new rulings always or almost always apply retroactively) *and id.* at 4740 (Blackmun, J., concurring in the judgment) (new rulings always apply retroactively) *and id.* (Scalia, J., concurring in the judgment) (same) *and American Trucking Ass'n*, 110 S. Ct. at 2331-32 (plurality opinion) (quoting *Chevron*, 404 U.S. at 106-07) ("new" civil rules may be held retroactive upon a balancing of the new rule's " 'prior history,' " its " 'purpose and effect,' " " 'whether retrospective operation will further . . . [the rule's] operation,' " and whether "substantial inequitable results" can be avoided if the rule is " 'applied retroactively;' " accordingly, "conclusion that [a new decision] established a new principle of law . . . does not necessarily end the inquiry") *and Hallstrom*, 110 S. Ct. at 312 (same) *with* Butler v. McKellar, 110 S. Ct. 1212, 1213, 1218 (1990) (new criminal rule not retroactive unless "within one of the two recognized exceptions").

123. *Compare James B. Beam Distilling Co.*, 59 U.S.L.W. at 4737 (plurality opinion) (only reason not to give new decisions full retroactivity is that "apply[ing] the new rule to parties who relied on the old would offend basic notions of justice and fairness") *and American Trucking Ass'n*, 110 S. Ct. at 2334 (plurality opinion) (citing and reviewing numerous civil decisions) ("In determining whether a decision should be applied retroactively, this Court has consistently given great weight to the reliance interests of all parties affected by changes in the law.") *and Hallstrom*, 110 S. Ct. at 312 (new decision retroactive because "petitioners [were] on notice") *with American Trucking Ass'n*, 110 S. Ct. at 2341 (plurality opinion) (recent criminal retroactivity cases "implicitly rejected the rationale of our prior retroactivity doctrine: that new decisions should not be applied retroactively so as to frustrate the expectations of parties who had justifiably relied on prior law") *and Sawyer*, 110 S. Ct. at 2828 (quoting Brief for Petitioner 8) (fact "that state courts 'would have found [that decision] to be a predictable development in Eighth Amendment law' " does not forestall nonretroactivity decision).

124. *See supra* notes 9, 39, 96, 108.

narrow, three-factor defense,[125] applicable to all recent rulings upon which all manner of litigants rely in all types of proceedings, to a far broader defense applicable only to simultaneous or recent constitutional criminal procedure rulings that incarcerated prisoners press in federal habeas corpus proceedings.[126] Given its breadth (in this single context), the nonretroactivity doctrine must now take its place not only among, but at the head of, the list of defenses to the Great Writ.[127]

Although clearly broad, the new habeas corpus defense is not yet fully developed. As the lower federal courts immediately noted, "*Teague* left much of the [nonretroactivity] restriction's content in doubt."[128] Four factors fueled those doubts: (1) the fragmented Court in *Teague*,[129] (2) the terseness of the concurring opinions,[130] (3) the fact that the Court's first application of the new doctrine in *Penry v. Lynaugh* seemed to deprive the doctrine of much of its sting,[131] and (4) the lack of briefing and oral argument on retroactivity in both *Teague* and *Penry*,[132] which prevented the Court from taking its usual cognizance of the objections and unclarities that the parties undoubtedly would have identified. Although the 1990 decisions in *Butler v. McKellar*,[133] *Saffle v. Parks*,[134] and *Sawyer v. Smith*[135] clarified *Teague* to a degree — and restored its original sting and then some — commentators and lower courts still express deep confusion at the contours of the new doctrine, which, as the Court itself acknowledges, remain "difficult" to discern.[136]

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125. *See supra* notes 42-43 and accompanying text.

126. On the question whether new rules of federal constitutional criminal procedure apply retroactively in state postconviction proceedings as a matter of federal law, see *infra* note 428. Even if such rules do not apply in state postconviction proceedings as a matter of *federal* law, they may do so as a matter of state law. *But cf.* Morgan v. State, 469 N.W.2d 419, 422-23 (Iowa 1991) (assuming without analysis that *Teague* doctrine controls retroactivity in state courts of new decision announced while case before court was pending in state postconviction proceedings).

127. *See* J. LIEBMAN, *supra* note 3, Part IV & § 22A.1 (Supps. 1989 & 1991).

128. Sawyer v. Butler, 881 F.2d 1273, 1279 (5th Cir. 1989) (en banc), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

129. *See supra* notes 62-70 and accompanying text.

130. *See supra* note 64.

131. The three Justices who joined Justice O'Connor's plurality opinion in *Teague* vigorously dissented from the Court's first application of *Teague*, in *Penry*, also authored by O'Connor. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2965 (1989) (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White and Kennedy, JJ.) ("It is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same Term.").

132. *See supra* note 19 and accompanying text; *infra* note 466 and accompanying text.

133. 110 S. Ct. 1212 (1990).

134. 110 S. Ct. 1257 (1990).

135. 110 S. Ct. 2822 (1990).

136. *See, e.g., Parks*, 110 S. Ct. at 1260 ("it is . . . difficult . . . to determine whether we announce a new rule when a decision extends the reasoning of our prior cases"); *Butler*, 110 S. Ct. at 1216 (same); *id.* at 1219 (Brennan, J., dissenting) ("Because constitutional interpretation is an evolutionary process, the analytical distinction between legal rules 'prevailing' at the time of conviction and 'new' legal rules is far from sharp."); Williams v. Chrans, 742 F. Supp. 472, 482 (N.D. Ill. 1990) (post-*Butler*, *Parks*, and *Sawyer* decision concluding that "[t]he Supreme Court . . . has yet to provide a clear framework for demarcating the line between a closely

By adopting a far reaching defense to habeas corpus relief in this abrupt manner — no doubt in hopes of simplifying, hence speeding up, habeas corpus and particularly *capital* habeas corpus proceedings[137] — the Court in fact has committed itself and the lower federal courts to lengthy exegesis of a number of difficult concepts included within *Teague*'s nonretroactivity defense. Among the questions *Teague* presents are: (1) Is the retroactivity of the rule of law on which the petitioner relies (and, if so, should it be) a "threshold question"[138] that arises before the courts decide whether the rule *is* in fact the law and whether it applies to the petitioner?[139] (2) What constitutes a "new constitutional rule[] of criminal procedure?"[140] (3) At what point do cases "become final,"[141] hence subject to the *Teague* nonretroactivity doctrine? (4) What are the boundaries of the two exceptions to the nonretroactivity bar that *Teague* identifies?[142] (5) Who bears the burden of pleading and proving the *Teague* defense, and under what circumstances does the state waive that defense?[143] (6) Does the *Teague* doctrine limit the retroactivity of new decisions

analogous application of facts to constitutional principle and an application that is susceptible to debate among reasonable minds"); Arkin, *supra* note 6, at 390 n.159, 399-400 (meaning of *Teague* doctrine "remain[s] murky;" "new rule" definitions are "unusually oblique," "do not appear to be mutually consistent," "give little direction to lower courts," and are in "disarray"); Hoffmann, *supra* note 3, at 180 (definitional issues posed by *Teague*'s reformulation of "new rule" concept "are, to say the least, questions without easy answers"); Weisberg, *supra* note 3, at 22-23, 28 (discussing post-*Teague* Court's "conceptually impossible distinction between ruling that follows ineluctably from precedent and one which concededly expands precedent"). A number of lower federal courts have reacted to the bewildering questions posed by *Teague* by ignoring the decision and applying prior law. *See, e.g.*, Marzano v. Kincheloe, 915 F.2d 549, 552 n.2 (9th Cir. 1990) (20 months after *Teague*, court assesses retroactivity of a prior circuit decision without citing or following analysis in *Teague*); United States v. Dawes, 895 F.2d 1581, 1582 (10th Cir. 1990) (over 11 months after *Teague*, court applies traditional three-part retroactivity test to determine retroactivity of new circuit decision governing constitutional attacks on self-representation by defendants who were incompletely informed about dangers of representing themselves); Allen v. Bunnell, 891 F.2d 736, 737-38 (9th Cir. 1989) (per curiam) (nine months after *Teague*, court applies traditional test to determine retroactivity of new circuit decision governing constitutional attacks on voluntariness of guilty pleas by defendants who were incompletely informed about parole consequences); Medeiros v. Shimoda, 889 F.2d 819, 825-26 (9th Cir. 1989) (more than eight months after *Teague*, court applies traditional test to determine retroactivity of Oregon v. Elstad, 470 U.S. 298 (1985)), *cert. denied*, 110 S. Ct. 3219 (1990). Although one might read three of the four cases just cited for the proposition that the preexisting retroactivity rules apply to new circuit rulings, as opposed to Supreme Court decisions, *Teague* contemplates no such distinction. *See* Walton v. Caspari, 916 F.2d 1352, 1357-58 (8th Cir. 1990) (applying *Teague* to determine retroactivity of recent circuit decision), *cert. denied*, 111 S. Ct. 1337 (1991).

137. *See* Weisberg, *supra* note 3, at 9.

138. Teague v. Lane, 109 S. Ct. 1060, 1069 (1989) (plurality opinion).

139. *See supra* notes 67-70 and accompanying text.

140. *Teague*, 109 S. Ct. at 1075 (plurality opinion).

141. *Id.*

142. *Compare id.* at 1073, 1075, 1076-77 (plurality opinion) (apparently narrow definition of exceptions) *with id.* at 1080 (Stevens, J., concurring in the judgment) (broader definition).

143. *Compare supra* note 19 and accompanying text (habeas corpus respondents given benefit of nonretroactivity defense they never raised in Supreme Court or any other court) *with* Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990) (refusing to address nonretroactivity defense waived by state) *and* Penry v. Lynaugh, 109 S. Ct. 2934, 2963 (1989) (Stevens, J., concur-

(including *Teague* itself[144]) that *cut back* on habeas corpus and constitutional relief? And (7) should Congress adopt Justice White's suggestion that it revise the nonretroactivity doctrine that the Court adopted in *Teague*?[145] The remainder of this Article takes up each of these questions in turn.

II.
WHAT'S FIRST?: THE PROPER ORDER OF THE RETROACTIVITY AND MERITS DECISIONS

Until it decided *Teague*, the Court treated retroactivity in all (including criminal/postfinality) contexts as an issue that a court appropriately could resolve either in the decision announcing a new rule but *after* the new rule was announced[146] or in a subsequent decision in which the court was asked to

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ring in part and dissenting in part, joined by Blackmun, J.) ("Nor am I at all sure that courts should decide the retroactivity issue if it was not raised below.") *and* Zant v. Moore, 109 S. Ct. 1518, 1519 (1989) (Blackmun, J., dissenting) (the state "did not raise nonretroactivity as a defense to respondent's claim for federal habeas relief, and that defense therefore should be deemed waived. . . . I see no reason to give [the state] a second opportunity to interject the issue of nonretroactivity as a defense") *and id.* (Brennan, J., concurring) (expressing "concern as to whether petitioner should be permitted to raise the retroactivity issue at this point in the proceedings").

144. *See supra* notes 97-100 and accompanying text.

145. *See Teague*, 109 S. Ct. at 1079 (White, J., concurring in the judgment) ("[i]f we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us"). Numerous proposals calling for congressional modification of *Teague* have been made. *See, e.g.*, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES, A REPORT CONTAINING THE AMERICAN BAR ASSOCIATION'S RECOMMENDATIONS CONCERNING DEATH PENALTY HABEAS CORPUS AND RELATED MATERIALS FROM THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION'S PROJECT ON DEATH PENALTY HABEAS CORPUS 3, 159-65 (I. Robbins, Project Director 1990) [hereinafter RECOMMENDATIONS OF THE ABA] ("The standard for determining whether changes in federal constitutional law should apply retroactively [in capital cases] should be whether failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination."); LITIGATION SECTION, AMERICAN BAR ASSOCIATION, RESOLUTION REGARDING REFORM OF HABEAS CORPUS IN CAPITAL CASES 4 (Adopted Sept. 9, 1989) (endorsing return to pre-*Teague* three-factor approach for guilt-phase claims in capital cases but recommending that all new constitutional rules affecting sentencing phase of capital cases be made fully retroactive); Association of the Bar of the City of New York, *Statement Concerning Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. A.B. CITY N.Y. 848 (1989) (*all* legal changes should be made fully retroactive in capital cases); Hoffman, *supra* note 6. *See generally* Berger, *Justice Delayed or Justice Denied? — A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1674-713 (1990) (summarizing various proposals); Goldstein, *Expediting the Federal Habeas Corpus Review Process in Capital Cases: An Examination of Recent Proposals*, 19 CAPITAL U.L. REV. 599, 618, 640-45 (1990) (similar). During the last session of Congress, one proposed revision passed the entire Senate but failed in Conference Committee, S. 1970, 101st Cong. § 2267, 2d Sess., 136 CONG. REC. S6807 (1990) (all decisions nonretroactive unless they establish "fundamental rights"); another version passed the Senate Judiciary Committee but was amended on the floor of the Senate, S. 1757, 101st Cong. § 2262, 1st Sess., 135 CONG. REC. S13474 (1989) (adopted by Sen. Jud. Comm. as S. 1970, § 2267) (repealing *Teague* and returning retroactivity analysis to pre-*Teague* three-factor standard); and a similar version passed the House Judiciary Committee, but failed on the floor of the House. H.R. 5269, 101st Cong., 2d Sess. § 1305 (1990); *see infra* note 320.

146. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87-

apply retroactively the rule announced in the previous decision.[147] In the latter situation, when a litigant relied upon a possibly "new" rule adopted in an earlier decision, the court typically decided the retroactivity issue first. Only if the court deemed the rule announced in the prior decision to be retroactive would the court apply the rule to the litigant's case.[148]

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88 (1982); Buckley v. Valeo, 424 U.S. 1, 142-43 (1976); Morrissey v. Brewer, 408 U.S. 471, 490 (1972); Chevron Oil Co. v. Huson, 404 U.S. 97, 105-09 (1971); Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968).

147. *See, e.g.*, Yates v. Aiken, 484 U.S. 211 (1988) (addressing retroactivity of Francis v. Franklin, 471 U.S. 307 (1985)); Brown v. Louisiana, 447 U.S. 323 (1980) (addressing retroactivity of Burch v. Louisiana, 441 U.S. 130 (1979)); Bowen v. United States, 422 U.S. 916 (1975) (addressing retroactivity of Almeida-Sanchez v. United States, 413 U.S. 266 (1973)); Robinson v. Neil, 409 U.S. 505 (1973) (addressing retroactivity of Waller v. Florida, 397 U.S. 387 (1970)); Stovall v. Denno, 388 U.S. 293 (1967) (addressing retroactivity of United States v. Wade, 388 U.S. 218 (1967)); other authority cited in Teague v. Lane, 109 S. Ct. 1060, 1069 (1989) (plurality opinion). Resolving the retroactivity question in the opinion in which the new rule was announced has permitted the Court to choose between three approaches to retroactivity: complete retroactivity, which gives the benefit of the new ruling to all litigants with the same claim, *see, e.g., Witherspoon*, 391 U.S. at 523 n.22; complete prospectivity, which denies the benefit of the new ruling to all litigants whose claims arose prior to the new decision, including the litigant in whose case the new rule was announced, *see, e.g., Northern Pipeline Constr. Co.*, 458 U.S. at 88; and selective prospectivity, which gives the benefit of the new ruling only to the litigant who secured the ruling but denies the benefit to some or all other litigants with pre-existing claims, *see, e.g., Morrissey*, 408 U.S. at 490. Resolving the retroactivity question in a subsequent opinion typically has meant that the Court gave the litigant in the case establishing the new principle the benefit of that principle, thus limiting its choices in the later case to either complete or selective retroactivity. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4741 (U.S., June 20, 1991) (O'Connor, J., dissenting) ("the usual course in cases before this Court is to apply the rule announced to the parties in the case" and to leave for later the question of the rule's applicability to other litigants). *But cf.* American Trucking Ass'n, Inc. v. Scheiner, 483 U.S. 266, 297-98 (1987) (announcing rule and remanding case for determination of rule's retroactivity). During the last 25 years, the Court typically used the complete retroactivity and, less often, the complete prospectivity approaches in civil cases, while frequently resorting to the selective retroactivity approach in constitutional-criminal-procedure cases. *See James B. Beam Distilling Co.*, 59 U.S.L.W. at 4736-37 (plurality opinion). Recently, a plurality of the Court concluded that selective retroactivity is never appropriate in the civil and criminal/prefinality contexts because selective retroactivity inequitably treats similarly situated litigants differently. *See id.* at 4737-38 (plurality opinion); *id.* at 4739 (White, J., concurring in the judgment). Because another plurality of the Court believes that complete retroactivity is required in all civil and criminal/prefinality contexts, *see id.* at 4740 (Blackmun, J., concurring in the judgment); *id.* (Scalia, J., concurring in the judgment), a majority of the Court now rejects the use of selective retroactivity in those contexts. Locating the *Teague* doctrine in this line-up of retroactivity options is difficult. Clearly, rulings falling within one of the two *Teague* exceptions are given complete retroactivity. All other new rulings are "completely" retroactive vis-a-vis prisoners whose cases were *not* final when the ruling was announced and "completely" prospective vis-a-vis prisoners whose cases *were* final when the ruling was announced — adding up to "selective" retroactivity when *all* prisoners are considered. *See id.* at 4738 (plurality opinion) ("With respect to retroactivity in criminal cases, there remains even now the disparate treatment of those cases that come to the Court directly and those that come here in collateral proceedings."). As discussed *infra* notes 178-81 and accompanying text, resolving the merits before the retroactivity question neither precludes the possibility of complete prospectivity nor compels selective retroactivity. Rather, that order of proceedings simply places the moving party in the usual position of having both to win her affirmative case and, thereafter, to defeat the opposing party's defenses in order to prevail.

148. *See, e.g.*, Bowen v. United States, 422 U.S. at 920 (citing cases).

Taken together, the Court's traditional approach to nonretroactivity called for resolution: first, of the question whether a proposed rule of law is constitutionally compelled; second (either in the same or in a subsequent case), whether any new rule adopted is retroactive; and third (in a subsequent case) whether the new rule applies to the same or some other set of facts. The Court *in fact* continues to follow this practice in assessing the retroactivity of new rulings in the civil[149] — and apparently also in the criminal/prefinality[150] — sphere; and a plurality of Justices (the *Teague* plurality plus Justice White and minus Justice Scalia[151]) explicitly said recently that it intends to continue following the established practice in civil situations.[152]

Four of the concurring and dissenting Justices in *Teague* continue as well to support this general approach to the timing of retroactivity adjudication in criminal/postfinality situations on the theory that any other approach would require the Court to render what would amount to advisory opinions on the merits of putative rules of constitutional criminal procedure in order to determine whether the putative rule is "new," and, if so, whether or not it should apply retroactively.[153] Two of those Justices, however, endorsed — and the other two expressed support for — the proposition that a habeas corpus deci-

149. In *James B. Beam Distilling Co.*, a majority of the Court assumed that the merits determination precedes the retroactivity determination in the civil context. 59 U.S.L.W. at 4737 (plurality opinion); *id.* at 4739 (White, J., concurring in the judgment); *id.* at 4741 (O'Connor, J., dissenting); *see also* Ashland Oil, Inc. v. Caryl, 110 S. Ct. 3202 (1990) (per curiam); Hallstrom v. Tillamook County, 110 S. Ct. 304 (1989).

150. *See, e.g.*, Yates v. Aiken, 484 U.S. 211 (1988) (after-the-fact resolution of criminal/prefinality retroactivity of Francis v. Franklin, 471 U.S. 307 (1985)); Truesdale v. Aiken, 480 U.S. 527 (1987) (after-the-fact resolution of criminal/prefinality retroactivity of Skipper v. South Carolina, 476 U.S. 1 (1986)); Griffith v. Kentucky, 479 U.S. 314 (1987) (after-the-fact resolution of criminal/prefinality retroactivity of Batson v. Kentucky, 476 U.S. 79 (1986)).

151. Because Justice Scalia believes there is no such thing as a nonretroactive new *civil* decision, *see supra* notes 96, 106-08 and accompanying text, he has had no cause to express a view on the question of when the nonretroactivity *vel non* of a new civil ruling ought to be confronted. His concern for proper exercises of the "the Judicial power," however, should make him particularly sensitive to avoiding advisory opinions. American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2343 (1987) (Scalia, J., concurring in the judgment).

152. *See American Trucking Ass'n*, 110 S. Ct. at 2330, 2337, 2342 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.) (Court's "practice [is] to abstain from deciding" the retroactivity of civil ruling at time of rendering ruling; "[i]n the civil arena, we have generally considered the question of retroactivity to be a separate problem [from the merits], one that need not be resolved in the law-changing decision itself;" acknowledging that unfairness potentially may arise from announcing new rule in one litigant's case then deciding that the rule is not to be applied retroactively to other, similarly situated litigants, plurality seeks to avoid — and sees no advisory opinion impediment to avoiding — the problem by permitting courts to announce a new rule in a case brought by a party whom the courts thereafter decide not to give the retroactive benefit of the new rule).

153. Teague v. Lane, 109 S. Ct. 1060, 1079 & n.2 (1989) (Stevens, J., concurring in the judgment, joined by Blackmun, J.) (endorsing approach in Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968)); *id.* at 1091 (Brennan, J., dissenting, joined by Marshall, J.) (endorsing analysis in Stovall v. Denno, 388 U.S. 293, 301 (1967)); *see also* Penry v. Lynaugh, 109 S. Ct. 2934, 2958-59 (1989) (Brennan, J., concurring in part and dissenting in part, joined by Marshall, J.); *id.* at 2963 & n.* (Stevens, J., concurring in part and dissenting in part, joined by Blackmun, J.).

sion recognizing a new rule of constitutional criminal procedure ordinarily ought to address the question of the new rule's retroactivity in *that same* decision, but only after the court finds for the petitioner on the merits and concludes that the rule of decision is "new."[154]

The four-person *Teague* plurality also endorsed the proposition that "the question 'of whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.' "[155] But the plurality — in what potentially is its most radical conclusion,[156] and the one that suffered most from the absence of briefing and oral argument[157] — opined that the question of the retroactivity of any putatively "new" rule for which a petitioner contends must be addressed as a "threshold" matter, *before* the Court decides whether the rule the petitioner proposes *is* the law:

> Retroactivity is properly treated as a threshold question .... Thus, before deciding whether [the rule the petitioner seeks is constitutionally compelled], we should ask whether such a rule would be applied retroactively to the case at issue.
>
> ....
>
> Were we to recognize the [substantive constitutional] rule urged by petitioner in this case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated....
>
> If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment described above is "an insignificant cost for adherence to sound principles of decisionmaking." But there is a more principled way of dealing with the problem. We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated.... We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those

154. *Teague*, 109 S. Ct. at 1079 n.2 (Stevens, J., concurring in the judgment) ("The plurality states that retroactivity questions ought to be decided at the same time a new rule of criminal procedure is announced.... I agree that this should be the approach in most instances."); *id.* at 1090-91 n.7 (Brennan, J., dissenting) (expressing support for requirement that courts "decide the retroactivity question *at the same time* that [they] decide[] the merits issue" (emphasis in original)); *accord Penry*, 109 S. Ct. at 2963 & n.* (Stevens, J., concurring in part and dissenting in part). Justice Stevens, along with Justice Souter, would probably limit the court's options, when it reaches the retroactivity question, to either complete retroactivity or complete prospectivity. *See* James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4737-38 (U.S., June 20, 1991) (plurality opinion); *supra* note 147.

155. *Teague*, 109 S. Ct. at 1069-70 (plurality opinion) (quoting Mishkin, *supra* note 37, at 64).

156. *See Recent Developments*, *supra* note 6, at 182; *infra* notes 196-98 and accompanying text.

157. *See supra* notes 17-19 and accompanying text.

> rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated.[158]

In the plurality's view, therefore, the proper order of decision is, first, whether the rule the petitioner advocates — assuming, hypothetically, the rule were adopted — would be "new" and, if so, retroactive; second (in the same case), if the rule would not be new or, if new, would apply retroactively, should the rule *in fact* be adopted; and third (in a later case), should that rule apply in other situations.

Although the *Teague* plurality is at pains to call its discussion of the proper order of decision a "hold[ing]," albeit an "implicit" one,[159] that discussion is *not* a holding. Rather, four Justices expressly rejected the plurality's approach[160] and a fifth Justice (White) expressed no view. Indeed, upon exhaustively reviewing the various opinions in *Teague* and the later decision in *Penry*,[161] the Fifth Circuit concluded en banc in *Sawyer v. Butler*[162] that "[i]t

158. *Teague*, 109 S. Ct. at 1069-70, 1077-78 (plurality opinion) (quoting Stovall v. Denno, 388 U.S. 293, 301 (1967)) (emphasis in original).

159. *Teague*, 109 S. Ct. at 1078 (plurality opinion) (quoted in text accompanying *supra* note 158).

160. *Teague*, 109 S. Ct. at 1079 (Stevens, J., concurring in the judgment, joined by Blackmun, J.) ("When a criminal defendant claims that a procedural error tainted his conviction, an appellate court often decides whether error occurred before deciding whether that error requires reversal or should be classified as harmless. I would follow a parallel approach in cases raising novel questions of constitutional law on collateral review, first determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief . . . [in view of the] factors relating to retroactivity . . . ."); *id.* at 1090-91 & n.7 (Brennan, J., dissenting, joined by Marshall, J.); *accord* Penry v. Lynaugh, 109 S. Ct. 2934, 2963 (1989) (Stevens, J., concurring in part and dissenting in part) ("[I]t is neither logical nor prudent to consider a rule's retroactive application before the rule itself is articulated."); *id.* at 2963 n.* ("I believe that retroactivity should not be considered until after a right is established").

161. In *Penry*, the entire Court subscribed to a passage in Justice O'Connor's opinion in *Teague*, stating that "[u]nder *Teague*, we address the retroactivity issue as a threshold matter because Penry is before us on collateral review." 109 S. Ct. at 2952. In a separate opinion, however, two Justices explicitly rejected the proposition that the question of a new rule's retroactivity should precede the question of a new rule's existence. *Id.* at 2963 & n.* (quoted in *supra* note 160). There are three additional reasons why *Penry* did not resolve the order-of-decision question addressed here: First, a majority of the Court concluded that the only potentially "new" rule discussed in the case actually was not new, and therefore raised no retroactivity question. *Id.* at 2944-52. In other words, the order that the Court decided retroactivity and the merits made no difference to the outcome of the case. Second, the potentially "new" rule at issue in *Penry* arguably arose in a case decided the previous term. Franklin v. Lynaugh, 487 U.S. 164, 183-85 (1988) (O'Connor, J., concurring in the judgment, joined by Blackmun, J.); *id.* at 189-200 (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.) (discussed in *Penry*, 109 S. Ct. at 2945, 2947-49). Consequently, the "threshold" question in *Penry* arguably was not the retroactivity of some potentially "new" rule that might, hypothetically, have been announced in *that* case, but instead the retroactivity of an actual rule of decision promulgated in an earlier decision. On that question — whether a court in a subsequent case should determine a prior decision's retroactivity before determining whether the prior decision applies to the facts of the case now before the court — there was virtual unanimity in *Teague*. *See supra* note 154 and accompanying text. Hence, the unanimity in *Penry* is neither surprising nor interesting. Third, the Court in *Penry* based its retroactivity ruling on an extensive discussion of the underlying constitutional merits of the proposed rule, thus belying the view that it could have decided

remains unclear . . . whether *Teague* necessarily operates as a threshold barrier preempting full analysis of the constitutional claims asserted" and accordingly saw its way clear to address the merits of the proposed constitutional rule *before* addressing retroactivity.[163] By affirming the Fifth Circuit's judgment in *Sawyer* (and much of its analysis) without criticizing the Fifth Circuit's foray into the merits, the Supreme Court did little to clarify the question, although members of the four-person *Teague* plurality did manage to secure a fifth vote (Justice White's) in favor of two post-*Teague* opinions containing dicta endorsing the *Teague* plurality's "threshold question" doctrine.[164]

There are eight reasons why the proper order of decision ought to be, first, the question whether a proposed rule of law is constitutionally compelled; second (in the same case), whether any rule adopted is retroactive; and third (in a later case), whether the rule, if retroactive, applies to other facts.

First, the contrary view advocated by the *Teague* plurality has little support either in prior case law (separate and dissenting opinions included) or in the scholarly literature.[165]

Second, the injunction against "rendering advisory opinions" — which

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the retroactivity of that rule without first adjudicating the rule's nature and scope. *See Penry*, 109 S. Ct. at 2943-47.

162. 881 F.2d 1273, 1280 (5th Cir. 1989) (en banc), *aff'd on other grounds sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

163. *Id.*; *see also infra* note 176. *But see* Hill v. Black, 932 F.2d 369, 372 (5th Cir. 1991) (assuming that the retroactivity issue must be decided first, but denying relief on other grounds without finally resolving the retroactivity question); Hardy v. Wigginton, 922 F.2d 294, 296-98 (6th Cir. 1990) (*Teague* requires resolution of the retroactivity issue prior to resolution of the merits); Newlon v. Armontrout, 885 F.2d 1328, 1331 (8th Cir. 1989) (*Teague* "requir[es] courts to determine retroactivity as a threshold matter in cases on collateral review"), *cert. denied*, 110 S. Ct. 3301 (1990).

164. *See supra* note 68. Treating the "threshold question" issue as open even after *Sawyer* are, *e.g.*, 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 502-06 (1990); Arkin, *supra* note 6, at 395-99. *But see* Fallon & Meltzer, *supra* note 6, at 1746 & n.69.

165. In both places where the *Teague* plurality addresses the order-of-decision question, it cites a single decision, in both instances preceded by a "Cf." signal. Teague v. Lane, 109 S. Ct. 1060, 1069, 1078 (1989) (plurality opinion). The decision cited, Bowen v. United States, 422 U.S. 916 (1975), speaks *not* to the issue of the proper order of the initial announcement of a rule of law and a determination of that rule's retroactivity, but rather to the much less controversial question of the order of a determination of the retroactivity of a potentially new rule announced in an earlier decision and that rule's application in a subsequent case involving different facts. Indeed, in holding that the question of a prior decision's retroactivity should precede the question of the prior decision's application in a subsequent case, *Bowen* relies on the very policy — avoiding advisory opinions, *see id.* at 920 — that has long caused the courts to decide whether a new rule exists before deciding the rule's retroactivity, *see, e.g.*, Stovall v. Denno, 388 U.S. 293, 301 (1967), and that the *Teague* plurality explicitly had to subordinate in contending that the traditional order of decision should be reversed. *See infra* notes 166-76 and accompanying text. Unlike the rest of the *Teague* plurality opinion, therefore, which is peppered with citations of separate opinions by Justice Harlan and of Supreme Court opinions and scholarly articles prefiguring or endorsing the Harlan view, *see Teague*, 109 S. Ct. at 1071-75, the portion of its opinion dealing with the order-of-decision question is devoid of any support at all save the "Cf." citation to a case that is not directly on point and that proceeds from a rationale that cuts against the rule urged by the plurality.

the plurality agrees probably ought to govern the matter[166] — cannot be satisfied (as the plurality proposed) by "simply"[167] deciding whether a putative rule is retroactive *before* deciding whether the rule is in fact the law. For resolving the question whether a proposed rule is retroactive requires courts to decide two subsidiary questions, the resolution of each of which in turn requires a complete and detailed determination of the scope and underlying constitutional merits of the proposed rule. Thus, in order to determine whether the proposed rule is "new" (which in turn determines whether the rule applies retroactively[168]), it is necessary to ascertain the precise extent to which the new rule departs from prior precedent.[169] To make that degree-of-departure determination, it generally is necessary to know the precise boundaries of any rule that the court is prepared to conclude is constitutionally compelled.[170] Likewise, to determine whether to apply the second *Teague* exception to the nonretroactivity of new rules — *i.e.*, in determining whether the proposed rule invokes "procedures without which the likelihood of an accurate conviction is seriously diminished" — it is necessary to understand the precise content and even the effect of any new rule that the court is prepared to adopt.[171]

In short, the *Teague* plurality's assurance notwithstanding, it is impossible for a court to discuss the retroactivity of a putative rule without first defining the sought after rule in the least constitutionally controversial way and then deciding what effect the rule would have in practice. Almost inevitably, both these tasks will require discussion of the merits. If retroactivity is treated as a "threshold" matter, everything the court necessarily will have to say on the constitutional merits of the proposed rule in the process of resolving the retroactivity question will be hypothetical — in direct violation of the injunction that the plurality itself endorsed against "rendering advisory opinions."[172]

The inevitability of advisory opinions under the plurality's threshold-question approach is illustrated by three major post-*Teague* decisions — the Supreme Court's decisions in *Parks* and *Penry* and the Fifth Circuit's *en banc* decision in *Sawyer v. Butler*.[173] In all three cases, the retroactivity analysis

166. *Teague*, 109 S. Ct. at 1078 (plurality opinion) (quoting Stovall v. Denno, 388 U.S. at 301) ("If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment described above is 'an insignificant cost for adherence to sound principles of decisionmaking.' ").

167. *Id.*

168. *See, e.g.*, Penry v. Lynaugh, 109 S. Ct. 2934, 2944-47 (1989) (plurality opinion); Yates v. Aiken, 484 U.S. 211, 216 (1988).

169. *See infra* notes 173-74 and accompanying text.

170. *See Teague*, 109 S. Ct. at 1079-80 n.2 (Stevens, J., concurring in the judgment) ("[U]ntil a rule is set forth, it would be extremely difficult to evaluate whether the rule is 'new' at all.").

171. *Id.* at 1076-77 (plurality opinion); *see* Hardy v. Wigginton, 922 F.2d 294, 297 (6th Cir. 1990) (resolution of retroactivity question "requires the court to take 'a peek at the merits' "); Hopkinson v. Shillinger, 888 F.2d 1286, 1292 (10th Cir. 1989) (en banc) (noting difficulty of adjudicating second exception in advance of merits, given "uncertainty as to the scope of [the underlying rule] itself"), *cert. denied*, 110 S. Ct. 3256 (1990); *infra* Part V.

172. *Teague*, 109 S. Ct. at 1078 (plurality opinion).

173. Saffle v. Parks, 110 S. Ct. 1257 (1990); Penry v. Lynaugh, 109 S. Ct. 2934 (1989);

involved the court — its majority as well as its dissenting judges — in extensive discussions of the constitutional merits.[174] In *Penry*, moreover, the dissenting Justices — who account for three-fourths of the *Teague* plurality — acknowledged that "[t]he merits of [the proposed rule], and the question of whether, in raising [that rule] on habeas, petitioner seeks application of a 'new rule' within the meaning of *Teague*, are obviously interrelated."[175] Even more to the point, the en banc court in *Sawyer* forthrightly concluded that it simply could not assess the "newness" prerequisite to nonretroactivity and the second

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Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

174. *See, e.g., Parks*, 110 S. Ct. at 1259-60, 1262-63 (in course of holding that rule for which petitioner contends is "new," Court disparages proposed rule as "difficult to reconcile . . . with . . . long-standing" constitutional policies and as designed to "grant the jury the [unconstitutional] choice to make the sentencing decision according to its own whims or caprice"); *id.* at 1270 (Brennan, J., dissenting) ("For the same reasons that *Lockett* and *Eddings* compel the conclusion that respondent does not seek a 'new rule' . . . , these cases also compel the conclusion that respondent was denied an individualized sentencing determination as required by the Eighth Amendment."); *Penry*, 109 S. Ct. at 2944-47 (extensive discussion of nature of rule for which petitioner contends and of validity *vel non* of that rule under three prior Supreme Court decisions interpreting the eighth amendment); *id.* at 2964-65 (Scalia, J., concurring in part and dissenting in part) (similar); *Sawyer*, 881 F.2d at 1277-79; *id.* at 1296-301 (King, J., dissenting); *see also infra* note 177 (discussing treatment of merits in *Teague*). The dangers of proceeding by hypothesis in regard to the merits are particularly evident in *Parks*, given that the rule the majority gleaned hypothetically from the lower court opinions and briefs in order to address its retroactivity (and, cursorily and haphazardly, its merits) is *not* the rule that the dissent, counsel for the habeas corpus petitioner Parks, or the commentators thought the petitioner was making in the case. *Compare Parks*, 110 S. Ct. at 1262 (asserting that Parks never claimed that the challenged instruction "barred the jury" from "giving effect to [his] mitigating evidence," which argument, the Court acknowledges, would be "command[ed]" by prior precedent) *with id.* at 1265 (Brennan, J., dissenting) (interpreting Parks to be making precisely that claim and accusing majority of "mischaracteriz[ing Parks'] claim" so as to "address[] the retroactivity of a claim not even raised" by Parks) *and id.* (oral argument of counsel for habeas corpus petitioner, which, in terms, makes the claim the majority says petitioner did not make) *and* Berger, *supra* note 6, at S12 (Court "[m]ischaracteriz[ed] the defendant's claim") *and* Goldstein, *supra* note 6, at 405 ("the majority mischaracterized Parks' claim"). By giving itself license to speculate about the merits without truly deciding them, the Court transcends the "judicial Power" in its article III sense in two ways. First, as discussed in the text, the Court inevitably will render advisory opinions about its likely future resolution of issues that the moving party has posed but that it, assertedly, has chosen not to resolve. Second, the Court frees itself to render advisory opinions not only on issues that the moving party poses but also — in full-blown legislative, as opposed to judicial, style — to define for itself the issues upon which it proposes to advise the world of its current disposition. *See supra* notes 30-35 and accompanying text.

175. *Penry*, 109 S. Ct. at 2964 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White and Kennedy, JJ.); *see* cases cited *supra* note 171. *Parks* and *Penry* are the crucial post-*Teague* decisions on the "threshold question" issue. Both involved the claim that the petitioners were seeking in *that* case to *declare* and *take advantage of* a new rule. *But cf. supra* note 161 (*Penry* arguably involved retroactivity of new rule announced in earlier decision). In the Court's other post-*Teague* decisions, most especially *Butler* and *Sawyer*, the retroactivity issue in fact did not, and could not, arise as a threshold matter, because the petitioners were attempting to take advantage of a rule that the Court already had adopted in an *earlier* case reaching the Court on certiorari from direct appeal. *Butler* and *Parks*, therefore, are entirely consistent with the Court's pre-*Teague* practice, *see supra* notes 146-52 and accompanying text, of addressing retroactivity *after* fully resolving the merits of a proposed and assertedly "new" rule.

Teague exception without first resolving the merits of the underlying constitutional claim.[176]

It is clear, therefore, that no litigant or lower court can read the so-called "retroactivity" discussions in *Parks, Penry*, and *Sawyer* without also learning exactly how the Supreme Court and the en banc Fifth Circuit feel about the merits of the constitutional claims involved in those cases. Inevitably, therefore, litigants and lower court judges confronted with the "retroactivity" discussions in those cases also will be faced with opinions on the constitutional merits — opinions that those litigants and courts cannot be expected to ignore in arguing and deciding future cases, notwithstanding that the merits "opinions" on which those litigants and judges will be relying are explicitly "hypothetical," hence unequivocally "advisory." Because the *Teague* plurality acknowledged that its order-of-decision proposal should be adopted only if the "advisory opinion" problem could be "avoid[ed]," and because it seems clear that the plurality's proposal does *not* avoid the advisory opinion pitfall, there is little to commend the plurality approach.

Third, efficiency as well as prudential concerns argue against the plurality approach. Given that courts effectively must define the constitutional rule in every case in which they make a retroactivity determination with regard to that rule, it makes little sense to insist that they duplicate their "hypothetical" opinion on the issue in the first habeas corpus case with a "real" opinion on the issue when it thereafter reaches the courts on direct review.[177]

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176. *Sawyer*, 881 F.2d at 1276 ("Because we conclude that we cannot apply *Teague* without first defining the scope of [the constitutional rule the petitioner advocates], we turn [first] . . . to the substantive constitutional questions."); *id.* at 1281 ("We thus choose to address the merits of Sawyer's interpretation of [the constitutional rule] before applying *Teague* to [that rule]."); *see also* Arkin, *supra* note 6, at 395-99 (comprehensive review of lower courts' treatment of *Teague* in 1989 and early 1990, concluding that, except when addressing "outlandish novel" claims, post-*Teague* lower court decisions have routinely mixed discussions of merits and retroactivity). Indeed, probably the largest group of lower court nonretroactivity holdings after *Teague* simply recharacterize a traditional *merits* reason for denying relief as a *nonretroactivity* reason for denial. Thus, instead of holding that the challenged conduct violated no specific constitutional provision and did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process," Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974), *see* J. LIEBMAN, *supra* note 3, § 8.4, at 103-04, the courts now simply rule that the claim has so little basis in federal law that granting it would *change* the law. *See, e.g.*, Evans v. Muncy, 916 F.2d 163, 166-67 (4th Cir. 1990) (quoting Wainwright v. Goode, 464 U.S. 78, 83 (1983)) (claim that 1990 execution based on 1982 finding of future dangerousness violates Constitution because petitioner did not in meantime behave dangerously in prison seeks "new" rule because it posits a " 'wrong [that is not] of a constitutional dimension' "); Wickham v. Dowd, 914 F.2d 1111, 1112-13 (8th Cir. 1990) (claim that it is cruel and unusual punishment to revoke parole based on behavior induced by petitioner's alcoholism), *cert. denied*, 111 S. Ct. 2897 (1991); Barker v. Estelle, 913 F.2d 1433, 1440-42 (9th Cir. 1990) (challenge to juvenile fitness hearing procedure), *cert. denied*, 111 S. Ct. 2060 (1991); Ostrosky v. Alaska, 913 F.2d 590, 594 (9th Cir. 1990) (claim that conviction for fishing without a license violates due process because state trial judge — whose decision was on appeal — had ruled (erroneously, it turned out) that license requirement was invalid); Epps v. Iowa, 901 F.2d 1481, 1483 (8th Cir. 1990) (challenge to procedure for change of venue).

177. For example, had the Supreme Court forthrightly said in *Teague* what already was implicit there (and, in places virtually explicit, *see Teague*, 109 S. Ct. at 1069 (plurality opin-

Fourth, by adopting Justice Steven's proposal in his concurring opinion in *Teague*, it is possible to avoid *both* the "advisory opinion" *and* the "likes treated differently" problems to which the various opinions in *Teague* advert. Justice Stevens proposes that the court treat retroactivity in the same manner as the courts routinely treat other affirmative defenses[178] — for example, harmless error[179] — namely, as a matter to be resolved in the same decision as, but sequentially after, the court resolves the merits of the complaining party's claim.[180] Under this approach, as is typically the case in other litigation, the courts first would resolve the moving party's claim on its merits, then, if that resolution is favorable to the moving party, would resolve the opposing party's defenses — including nonretroactivity — and either grant or deny relief. In this way, all petitioners who have the same claim on the merits and are in the same procedural posture vis-a-vis retroactivity not only would receive (or be denied) the same relief but also would do so without the courts being put in the posture of pretending not to resolve constitutional claims that inevitably — and manifestly — *are* being resolved.

Fifth, deciding retroactivity after, but in the same decision as, the merits probably increases somewhat the prisoner's "incentive to seek review" of incarceration that she believes to be unconstitutional — without, at the same time, "breach[ing] the principle that litigants in similar situations should be treated the same . . . ."[181] For the inhibitory effect on potential litigants of the possible nonretroactivity of the ruling they seek would be offset somewhat by

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ion)) — namely, that criminal defendants do not have a right to juries, as opposed to jury pools, that mirror the population — then the Court would not thereafter have had to grant certiorari and disavow that right in a subsequent case. *See* Holland v. Illinois, 110 S. Ct. 803, 810 (1990).

178. *See* Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990) (nonretroactivity treated as essentially an affirmative defense that is waived if not invoked in a timely manner); *supra* note 160.

179. *See, e.g.*, Carella v. California, 109 S. Ct. 2419, 2420-21 (1989) (only after deciding whether constitutional violation occurs is harmless error question reached; "although [the Supreme Court has] the authority to make the harmless error determination [itself, it] do[es] not ordinarily do so," instead remanding to the lower court to make the determination). The example of an authoritative conclusion that a particular set of facts makes out a violation, albeit one that is "harmless" in the particular case, illustrates the broader principle that "a ruling [often] has sufficient authority to 'clearly establish' what the law is," hence to qualify as binding precedent, even though no litigant in the case actually secured relief under the ruling. *See* Fallon & Meltzer, *supra* note 6, at 1818 n.485.

180. The relevant passages from Justice Stevens' opinions in both *Teague* and *Penry* and the supporting language in Justice Brennan's opinion in *Teague* are quoted *supra* notes 154, 160. Justice Stevens' approach conforms to the *Teague* plurality's conclusion that "the question 'of whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.' " *Teague*, 109 S. Ct. at 1069 (plurality opinion) (quoting Mishkin, *supra* note 37, at 64). Justice Stevens' approach also conforms to the procedure that the Court continues to utilize in *civil* nonretroactivity settings. *See* American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2337, 2342 (1990) (plurality opinion); *supra* notes 92, 149.

181. *See* James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4737 (U.S., June 20, 1991) (plurality opinion) (posing following dilemma: absent some opportunity to secure relief from incarceration as "the first successful litigant" of a claim, "the incentive to seek review . . . [is] diluted if not lost altogether;" yet, permitting the successful litigant, but not others in her

the assurance that, at the least, the constitutional merits of their claims would be resolved.

Sixth, there are certain kinds of claims — for example, the absence, or ineffective assistance, of counsel on appeal[182] and the denial of constitutionally mandated appellate procedures[183] — that do not even in theory arise until after the direct appeal is decided; and there are other kinds of claims — for example, most ineffective assistance of counsel allegations — that as a practical matter cannot be raised until after direct appeal.[184] "Furthermore, some irregularities [that could provide the basis for new constitutional rules], such as prosecutorial misconduct, may not surface until after the direct review is complete."[185] Under the plurality view, unless the point of "finality" were extended in such cases,[186] these issues apparently could never become the basis for constitutional decision because "threshold" determinations of nonretroac-

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situation, to gain the retroactive benefit of the new ruling "breaches the principle that litigants in similar situations should be treated the same").

182. *See, e.g.*, Evitts v. Lucey, 469 U.S. 387 (1985) (claim first raised and rule announced in postconviction proceedings); Jones v. Barnes, 463 U.S. 745 (1983) (same); Wainwright v. Torna, 455 U.S. 586 (1982) (per curiam); Ross v. Moffitt, 417 U.S. 600 (1974).

183. *See* Parker v. Dugger, 111 S. Ct. 731 (1991) (claim advanced and first ruled upon in postconviction proceedings); Pulley v. Harris, 465 U.S. 37 (1984) (same). *See generally* J. LIEBMAN, *supra* note 3, § 8.4, at 55 n.17.1 (Supp. 1991), § 8.5, at 59-60 nn.20, 22 (Supp. 1991).

184. *See* Sanders v. Sullivan, 900 F.2d 601, 606 (2d Cir. 1990) (addressing retroactivity of ruling holding that state's treatment of newly discovered exculpatory evidence violates Constitution, a type of violation that "typically do[es] not occur until after the trial and direct review are completed"); J. LIEBMAN, *supra* note 3, § 24.5b, at 355 n.20 (attorney who represents defendant at trial, on appeal, and in certiorari proceedings cannot be expected to allege her own ineffectiveness in prior proceedings); *see also* Coleman v. Thompson, 59 U.S.L.W. 4789, 4798 (U.S., June 24, 1991) (although sixth amendment right to counsel normally does not extend to prosecution of constitutional claims in proceedings after direct appeal, the right to counsel, and to effective assistance of counsel, may attach to the prosecution of claims, such as ineffective assistance of counsel at trial or on appeal, that, for practical or state law reasons, cannot be litigated on direct appeal); Chappell v. United States, 110 S. Ct. 1800 (1990) (per curiam) (accepting Solicitor General's view that ineffective assistance claims generally should be raised in postconviction proceedings and not on direct appeal); Murray v. Giarratano, 109 S. Ct. 2765, 2778 (1989) (Stevens, J., dissenting) ("Virginia law contemplates that some claims ordinarily heard on direct review will be relegated to postconviction proceedings. Claims that trial or appellate counsel provided constitutionally ineffective assistance, for instance, usually cannot be raised until th[e postconviction] stage.") (citations omitted); United States v. Gholston, 932 F.2d 904, 905-06 (11th Cir. 1991) (court refuses to hear ineffective assistance claim on direct appeal and relegates appellant to his postconviction remedy under 28 U.S.C. § 2255); United States v. Murdock, 928 F.2d 293, 298 (8th Cir. 1991) (court "refuse[s] to address Murdock's ineffective assistance of counsel claim [on direct appeal] since it is more properly raised in a petition for habeas corpus" pursuant to which "the district court . . . [can] develop a more complete record on this issue"); United States v. Marroquin, 885 F.2d 1240, 1245-46 (5th Cir. 1989) (federal prisoner's double jeopardy challenge to multiple sentences, initially asserted on direct appeal, is deferred until postappeal filing of postconviction motion under 28 U.S.C. § 2255 so that an evidentiary hearing can be held), *cert. denied*, 110 S. Ct. 1807 (1990); O'Halloran v. Ryan, 835 F.2d 506, 509-10 (3d Cir. 1987) (where state direct appeal court refuses to hear issue, instructing appellant that only proper way to raise claim is in state postconviction proceedings, issue is not exhausted for purposes of federal habeas corpus).

185. *Giarratano*, 109 S. Ct. at 2778 (Stevens, J., dissenting) (citing Amadeo v. Zant, 486 U.S. 214 (1988); Brady v. Maryland, 373 U.S. 83 (1963)).

186. *See infra* Part IV.

tivity at the only stage of the proceedings in which such claims theoretically, or at least practically, can arise would forbid the claims' resolution on the merits.[187] Because Justice Stevens' "affirmative defense" procedure not only serves both prudential interests that the plurality identifies (avoiding advisory opinions and treating likes alike[188]) better than the plurality's own "threshold-question" procedure but also avoids carving out a whole class of constitutional violations that inevitably would avoid adjudication and cure, the affirmative-defense approach is superior to the retroactivity-threshold approach.[189]

Seventh, far from being a merely technical matter, the order in which courts decide the merits and nonretroactivity has a dramatic impact on the legislative definition both of habeas corpus and of the jurisdiction of the lower federal judiciary. Adoption of the plurality approach would forbid lower federal judges from interpreting the United States Constitution in habeas corpus cases and would relegate those judges to the nearly ministerial task of putting into operation decisions that the Supreme Court renders on direct review. If retroactivity decisions not only could, but had to, be made without determining the constitutional merits of "new" claims,[190] then all that district and court of appeals judges could do in habeas corpus cases would be to adjudicate "old" claims, *i.e.*, claims that do not arise directly under the Constitution and instead are "*dictated* by [Supreme Court] precedent existing at the time the defendant's conviction became final."[191]

Given that Congress since 1867 has provided in mandatory terms that district and circuit judges "*shall* entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . in violation of the *Constitution* . . . of the United States,"[192] the vast withdrawal from the lower federal judiciary of congressionally conferred jurisdiction that the *Teague* plurality approach proposes is too much to countenance, both constitutionally[193] and statutorily, even on the part of a Court

187. *See* Teague v. Lane, 109 S. Ct. 1060, 1090 (1989) (Brennan, J., dissenting).

188. *See supra* notes 158, 181 and accompanying text.

189. If retroactivity is treated as a threshold question, the courts — at least, insofar as they seek to avoid countenancing irremediable violations arising after direct appeal — will be tempted to exempt such violations from treatment under *Teague's* nonretroactivity doctrine. *See* Sanders v. Sullivan, 900 F.2d 601, 606 (2d Cir. 1990) (exempting claim that state's treatment of newly discovered exculpatory evidence violates Constitution from rule of *Teague* because violation is one that "typically do[es] not occur until after the trial and direct review are completed").

190. *Cf. supra* notes 166-76 and accompanying text (courts cannot reasonably expect to avoid merits issues when resolving retroactivity questions).

191. *Teague*, 109 S. Ct. at 1070 (plurality opinion) (emphasis in original); *see* Fallon & Meltzer, *supra* note 6, at 1817-19 (lower courts at least should have the discretion to reach the merits before deciding retroactivity).

192. 28 U.S.C. § 2254(a) (1988) (emphasis added); *see* 28 U.S.C. §§ 2241(c)(3), 2255 (1988); J. LIEBMAN, *supra* note 3, §§ 2.2b, 8.4 (lower federal courts' subject-matter jurisdiction under the Habeas Corpus Act of 1867 and modern habeas corpus statutes).

193. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as *the Congress* may from time to time ordain and establish." (emphasis added)).

that considers itself fairly free to amend the habeas corpus statute as it wishes.[194] Congress, that is, intended via habeas corpus to deputize the lower federal judiciary to stand in for the Supreme Court in situations in which the latter Court cannot be expected on its own to maintain the integrity of fundamental national law.[195] The most basic reason for rejecting the *Teague* plurality's "threshold-question" approach, therefore, is that the approach impermissibly countermands Congress' explicit conferral of this important authority on the lower federal courts.

Finally, by withdrawing the responsibility for adjudicating new rules of constitutional law from the federal judiciary generally and assigning that task exclusively to the Court itself, the plurality approach could expand the Court's workload.[196] Given the destruction of the lower federal courts' habeas corpus jurisdiction, criminal defendants must either besiege the Court with direct appeal certiorari petitions raising any and all potentially meritorious constitutional claims that might lie dormant in the case (including claims that did not arise until after the state courts' direct appeal decisions were announced[197]) or lose those claims forever.[198] Given, moreover, that the states are constitutionally permitted to withhold state-financed counsel from indigent direct appeal certiorari petitioners[199] (and most do so), the plurality view would put great pressure on the Court to appoint and fund certiorari counsel itself. Doing otherwise would saddle indigent and untutored pro se certiorari litigants with the absolutely preclusive effect of having failed to raise "new" constitutional claims that those litigants almost assuredly could not divine on their own.

In sum, the "threshold question" doctrine is a bad idea given its own rationale — avoiding advisory opinions — and given the violence it does to Congress' longstanding design of the habeas corpus remedy. If the Court is not disposed to abandon the *Teague* plurality's suggestion in this regard, Congress ought to reclaim its prerogatives in the area and itself reject the Court's suggestion.

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194. *See supra* note 9.

195. *See* J. LIEBMAN, *supra* note 3, § 2.2, at 5, § 28.1, at 439; 2 J. LIEBMAN, *supra* note 3, § 35.1, at 539; *supra* note 20 and accompanying text.

196. *Compare* Hoffmann, *supra* note 3, at 167, 186-87, 190-92 (in wake of *Teague*, Supreme Court will continue to review few habeas corpus cases because few are "certworthy;" predicting downturn in number of certiorari petitions filed by prisoners) *with* Weisberg, *supra* note 3, at 33 ("if the Court believes that the new [retroactivity] cases will get the federal courts out of the general business of creating new rules of constitutional criminal procedure, it may merely have shifted the pressure back to itself — on direct review").

197. *See supra* notes 182-89 and accompanying text.

198. *Compare* Schiro v. Indiana, 110 S. Ct. 268, 269 (1989) (Stevens, J., opinion respecting denial of certiorari) (availability of habeas corpus relief in lower federal courts justifies Supreme Court's denial of certiorari petition presenting what otherwise might be a review-meriting question) *with* Spencer v. Georgia, 111 S. Ct. 2276 (1991) (Kennedy, J., concurring in denial of certiorari) (stating that if *Teague* "would prevent [the Court] from reaching . . . issues on federal habeas review, I would have voted to grant certiorari").

199. *See* Ross v. Moffitt, 417 U.S. 600 (1974).

III.
WHAT'S "NEW?"

A. The Court's New Rule Defining New Rules

1. The Evolution of the Court's New Rule on New Rules

Explaining what constitutes a "new rule" of constitutional criminal procedure for *Teague*-retroactivity purposes has already engaged substantial amounts of attention from the Supreme Court and the lower federal judiciary[200] and no doubt will continue doing so for years to come.[201] The "new rule" terminology is by no means self-defining. One can argue, for example, that there is no, or almost no, such thing as a "new rule" of judge-made law in a system that distinguishes the legislative function from the judicial function and subjects the latter to the principle of stare decisis.[202] On the other hand, one might argue that almost every decision is "new" inasmuch as almost every decision extends preexisting rules to one degree or another simply by applying them to new facts.[203] Even now, the point between these two poles at which the Supreme Court locates the "new rule" divide is not at all clear,[204] although it *is* clear that *Teague* and the later decisions clearly mean to move that point closer than before to the latter, *all*-is-new, understanding.

The confusion begins with the *Teague* plurality opinion itself. The plurality acknowledges that "[i]t is . . . often difficult to determine when a case

200. *See* Sawyer v. Smith, 110 S. Ct. 2822, 2827-30 (1990); Saffle v. Parks, 110 S. Ct. 1257, 1259-62 (1990); Butler v. McKellar, 110 S. Ct. 1212, 1214-18 (1990); Penry v. Lynaugh, 109 S. Ct. 2934, 2944-45 (1989); Teague v. Lane, 109 S. Ct. 1060, 1070, 1077-78 (1989); *infra* notes 241, 249.

201. *See supra* notes 128, 136 & *infra* note 204 and accompanying text (Supreme Court and lower court acknowledgements of "difficulty" and unclarity posed by *Teague*'s reformulation of the "new rule" concept).

202. *See* American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2343 (1990) (Scalia, J., concurring in the judgment) ("[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be."); *Penry*, 109 S. Ct. at 2965 (Scalia, J., concurring in part and dissenting in part) ("In a system based on precedent and *stare decisis*, it is the tradition to find each decision 'inherent' in earlier cases . . . and rarely to replace a previously announced rule with a new one."); *see also Butler*, 110 S. Ct. at 1217 ("Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts.").

203. *See* Moore v. Zant, 885 F.2d 1497, 1517 (11th Cir. 1989) (en banc) (Roney, J., concurring) ("[A]ppl[ication of] an old principle of law to a new fact situation . . . should be treated as new law."), *cert. denied*, 110 S. Ct. 3255 (1990). *But see* United States v. Johnson, 457 U.S. 537, 549 (1982) (decision applying "settled precedents to new and different factual situations" is not a new rule of decision "because the later decision has not in fact altered the rule in any material way").

204. *See* Sawyer v. Butler, 881 F.2d 1273, 1297 (5th Cir. 1989) (en banc) (King, J., dissenting) ("The [*Teague*] plurality recognized that constitutional rules will fall along a 'spectrum' — from those that fit neatly within the rubric of settled law to those that constitute a clear break from prior precedent — but provided little additional guidance for determining at *which* point a rule is not 'dictated' by precedent and, therefore, 'new' for retroactivity purposes." (emphasis in original)), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990); *see also Johnson*, 457 U.S. at 548-54 (demarcating the two poles but noting ambiguity of prior case law as to which rulings falling between the poles constitute "new rules").

announces a new rule,"[205] then sets back analysis by offering conflicting characterizations:

> In general, . . . a case announces a new rule when [1] it breaks new ground or imposes a new obligation on the States or the Federal Government. See, *e.g.*, *Rock v. Arkansas*, 483 U.S. 44 (1987) (*per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his behalf); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (Eighth Amendment prohibits the execution of prisoners who are insane). To put it differently, a case announces a new rule if [2] the result was not *dictated* by precedent existing at the time the defendant's conviction became final.[206]

Obviously, the *Teague* plurality's first definition — a "new" rule is one that "breaks new ground or imposes a new obligation" — tends towards the end of the spectrum of "new rule" definitions characterized by relatively rare overrulings (such as the *Ford v. Wainwright* decision[207]) and announcements of rules to govern newly arisen procedural innovations (such as, arguably, the *Rock v. Arkansas*[208] decision).[209] To this extent, *Teague* fits easily within a

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205. *Teague*, 109 S. Ct. at 1070 (1989) (plurality opinion) ("[W]e do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes."); *accord Penry*, 109 S. Ct. at 2944; *see also Sawyer*, 881 F.2d at 1288 ("[T]he Court's opinions in *Teague* and *Penry* do not immediately yield a clearly articulable definition of a 'new rule.' ").

206. *Teague*, 109 S. Ct. at 1070 (plurality opinion) (emphasis in original). Justice O'Connor twice quoted this same language in her majority opinion in *Penry*, 109 S. Ct. at 2944, 2952, and Chief Justice Rehnquist and Justice Kennedy quoted both *Penry* and *Teague* to like effect in their majority opinions in, respectively, Butler v. McKellar, 110 S. Ct. 1212, 1216 (1990) (quoting *Penry*, 109 S. Ct. at 2944 (quoting *Teague*, 109 S. Ct. at 1070)), and Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990).

207. *See* Solesbee v. Balkom, 339 U.S. 9 (1950), *overruled in* Ford v. Wainwright, 477 U.S. 399 (1986).

208. 483 U.S. 44 (1987). *Rock* was innovative in two ways. Initially, *Rock* was the first Supreme Court decision addressing the difficult evidentiary issues posed by recent qualitative advances in hypnosis technology. *Id.* at 56-61 (extensive discussion of new technology and of state courts' varying reactions to that technology). Given that the strong majority rule among lower courts in the years just preceding *Rock* had been to exclude evidence of posthypnotic memories, *see* C. MUELLER & L. KILPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 551-53 (1988), *Rock* embodies a classic example of a decision that "overturns a . . . widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved," United States v. Johnson, 457 U.S. 537, 551 (1982) — *i.e.*, of a case falling within the narrow, pre-*Teague* definition of a "new rule." *See* Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (new rule established by Court's resolution of "an issue of first impression [in the Supreme Court] whose resolution was not clearly foreshadowed"). Second, *Rock* was the first decision in which the Court applied the sixth amendment right to present defensive evidence to an entire category of evidence, rather than merely to the evidence offered in a particular case. *Cf.* Chambers v. Mississippi, 410 U.S. 284 (1973). *But see* Hoffman, *supra* note 3, at 182 (*Ford* and *Rock* are "relatively minor" advances in the law).

209. *Accord Teague*, 109 S. Ct. at 1067 (plurality opinion) ("In Allen v. Hardy, [478 U.S. 255, 258 (1986) (per curiam)], the Court held that *Batson* [v. Kentucky, 476 U.S. 79 (1986),] constituted an 'explicit and substantial break with prior precedent' because it overruled a portion of *Swain* [v. Alabama, 380 U.S. 202 (1965)]," and hence "concluded that the rule an-

long line of prior retroactivity decisions defining new rules as ones that "overrul[e] clear past precedent on which litigants may have relied . . . or . . . decid[e] an issue of first impression whose resolution was not clearly foreshadowed."[210]

The *Teague* plurality lent further credence to this moderate definition of new rules by approvingly citing *Yates v. Aiken*.[211] In *Yates* the Court unanimously held that the rule announced in *Francis v. Franklin*,[212] which forbade the use of certain *permissive* presumptions in jury instructions on mens rea questions, was not "new" and hence raised no retroactivity issue "because it 'was merely an application of the ["no *mandatory* presumptions"] principle that governed our decision in *Sandstrom v. Montana* . . . .' "[213] Notably, the *Yates* Court reached the "no new rule" conclusion with regard to *Francis* notwithstanding that the "no permissive presumptions" rule announced in *Francis* was sufficiently different from the "no mandatory presumptions" question decided in *Sandstrom* to prompt four Supreme Court Justices to dissent from *Francis*' "extension" of *Sandstrom*.[214]

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nounced in *Batson* should not be applied retroactively on collateral review of convictions that became final before *Batson*."); Milton v. Wainwright, 407 U.S. 371, 381-82 n.2 (1972) (Stewart, J., dissenting) (advocating Justice Harlan's approach to retroactivity, which plurality adopted in *Teague*, and noting that "[a]n issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law [which occurs] . . . only when the decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon . . . ." (citations omitted)); *see also* James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4742 (U.S., June 20, 1991) (O'Connor, J., dissenting) ("new rule" in civil context is one that is "unprecedented" or that "came out of the blue"); *Johnson*, 457 U.S. at 551 (citing authority) (generally a sharp break in the law "has been recognized only when a decision explicitly overrules a past precedent of this Court . . . or disapproves a practice this Court arguably has sanctioned in prior cases . . . or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved" (citations omitted)); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 498 (1968) ("new," hence prospective, rule in civil context requires "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one").

210. *Chevron*, 404 U.S. at 106; *see* other cases cited *supra* notes 42, 121, 209 & *infra* notes 326, 390.

211. 484 U.S. 211 (1988), *cited in Teague*, 109 S. Ct. at 1073.

212. 471 U.S. 307 (1985).

213. *Teague*, 109 S. Ct. at 1073 (plurality opinion) (quoting *Yates*, 484 U.S. at 216-17 (construing Sandstrom v. Montana, 442 U.S. 510 (1979))); *accord, e.g.*, Truesdale v. Aiken, 480 U.S. 527 (1987) (discussed *infra* note 214); *Johnson*, 457 U.S. at 549 (citing numerous cases) (decision applying "settled precedent[] to [a] new and different factual situation[]" is not a new rule of law "because the later decision has not in fact altered . . . [the preexisting] rule in any material way"); Newlon v. Armontrout, 885 F.2d 1328, 1333-35 (8th Cir. 1989) (rule of Maynard v. Cartwright, 486 U.S. 356 (1988), governing the constitutionality of Oklahoma's " 'heinous, atrocious or cruel' " aggravating circumstance, is not "new" because it was "an application not an expansion" of the holding of Godfrey v. Georgia, 446 U.S. 420 (1980), governing the constitutionality of Georgia's " 'vile, horrible or inhuman' " aggravating circumstance), *cert. denied*, 110 S. Ct. 3301 (1990).

214. *See Francis*, 471 U.S. at 330 (Powell, J., dissenting) (majority's interpretation of *Sandstrom* "is neither logical nor justified"); *id.* at 332 (Rehnquist, J., dissenting, joined by Burger, C.J. and O'Connor, J.) ("Today's decision needlessly extends our holding in *Sandstrom* . . . to cases where the jury was not required to presume conclusively [as Sandstrom's jury was

Also supporting this relatively narrow answer to the "new rule" question is Justice Harlan's definition of the concept in the two separate opinions on which the plurality drew so heavily in *Teague*:

> First, it is necessary to determine whether a particular decision has really announced a "new" rule at all . . . . One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against the application of the "new" rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final.[215]

Finally, the *Teague* plurality's application of the "new rule" concept to the facts of that case is consistent with a relatively narrow definition of the "new rule" concept. Thus, the *Teague* plurality declared the rule for which the petitioner contended in that case (namely, that the sixth amendment forbids prosecutors to use peremptory challenges to create juries not representative of the community) to be "a new rule" because its adoption would have required the Court to overrule its own "strong language" and express statements in two prior decisions.[216]

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required to do] an element of a crime under state law."); *accord, e.g., Truesale*, 480 U.S. at 527 (majority opinion); *id.* at 527-28 (Powell, J., dissenting) (decision in Skipper v. South Carolina, 476 U.S. 1 (1986), requiring state courts to permit capital juries to hear evidence of defendant's prior good behavior in jail or prison not new rule because it simply applied rule of Lockett v. Ohio, 438 U.S. 586 (1978), to new circumstances; fact that a number of Justices and lower court cases concluded that the rule of *Lockett* did not reach the circumstances of *Skipper* not sufficient to render *Skipper* a new rule).

215. Desist v. United States, 394 U.S. 244, 263-64 (1969) (Harlan, J., dissenting); *accord* Mackey v. United States, 401 U.S. 667, 697 (1971) (Harlan, J., concurring in part and dissenting in part); Sawyer v. Butler, 881 F.2d 1273, 1297 (5th Cir. 1989) (King, J., dissenting) (en banc) ("[t]he process of constitutional interpretation routinely requires courts to articulate extant law and apply established principles of law to different facts and in different contexts;" rules that are the product of "this gradual process of refining and developing doctrine are not 'new,' [else] the traditional understanding of constitutional jurisprudence as an evolving body of principles rather than [a] jarring series of revolutionary pronouncements" would be overthrown), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990); Mishkin, *supra* note 37, at 72 (retroactivity less controversial "[i]f the course of [law] revision is through a pattern of development and particularly if it is accompanied by an articulation which enables some anticipation of future holdings").

216. *Teague*, 109 S. Ct. at 1070, 1069 (plurality opinion) (citing Taylor v. Louisiana, 419 U.S. 522, 538 (1975), and Akins v. Texas, 325 U.S. 398, 403 (1945)); *see also Johnson*, 457 U.S. at 551 ("clear break" doctrine extends to decision that "disapprove[s] a practice this Court arguably has sanctioned in prior cases," as well as to a decision that "overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved"); Gosa v. Mayden, 413 U.S. 665, 673 (1974) (plurality opinion) (decision nonretroactive because it "effected a decisional change in [an] attitude that had prevailed for many decades").

On the other hand, the *Teague* plurality's second definition — that any rule "not *dictated* by [prior] precedent" is new — tends towards the opposite end of the spectrum of "new rule" meanings. Under that kind of definition, even workaday applications of prior rules to different fact situations might be deemed "new."

Penry further muddied the water. Although Justice O'Connor, who authored the *Teague* plurality, also wrote the majority opinion in *Penry*, her opinion in the latter case was joined only by Justices who had refused to join her opinion in the former case.[217] On the other hand, the three Justices who joined her opinion in *Teague* vigorously dissented on the retroactivity question in *Penry* — concluding, along with Justice White, that Justice O'Connor's opinion in *Penry* "gutted" the principle she had announced only a few months before in *Teague*.[218]

It is not hard to see why the *Penry* dissenters thought they discerned *Teague*'s evisceration — at least if one takes seriously, as the *Penry* dissenters definitely did, the "*dictated* by precedent" language in *Teague*.[219] *Penry* involved the question whether the Texas death penalty statute impermissibly limited the ability of the sentencer to consider mitigating factors in the defendant's background by funneling the jury's consideration of most mitigating circumstances into the jury's determination whether the defendant posed a danger to society in the future. The difficulty with *Penry*'s argument was that the Supreme Court in *Jurek v. Texas*[220] in 1976 had expressly upheld the constitutionality of the Texas statute on its face — including, explicitly, the statute's elision of most mitigating circumstances questions and the "future dangerousness" determination.[221] Following *Jurek*, moreover, at least several score of Texas Court of Criminal Appeals, United States District Court, and Fifth Circuit decisions unanimously ruled that the state's actual treatment of mitigating evidence passed constitutional muster.[222]

Notwithstanding *Jurek* and its progeny, Justice O'Connor concluded in *Penry* — simultaneously resolving both the retroactivity and the merits ques-

217. Penry v. Lynaugh, 109 S. Ct. 2934, 2944-46 (1989) (majority opinion of O'Connor, J., joined by Brennan, Marshall, Blackmun, and Stevens, JJ.).

218. *Id.* at 2965 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J. and White and Kennedy, JJ.).

219. *See id.* at 2964, 2965 (complaining that "*dictated* by precedent" language received only "lip-service" in Justice O'Connor's opinion in *Penry* (emphasis in original)); *id.* at 2965 ("it challenges the imagination to think that today's result is 'dictated' by our prior cases").

220. 428 U.S. 262 (1976).

221. *Id.* at 272-73 (1976) (plurality opinion); *id.* at 277 (White, J., concurring).

222. This statement is based upon conversations with habeas corpus lawyers involved in capital appellate and postconviction litigation in Texas. *See also* Bridge v. Lynaugh, 860 F.2d 162, 164 (5th Cir. 1988) (constitutionality of practice Supreme Court later overturned in *Penry* previously was "settled by [a] Supreme Court decision and by a more recent consideration of the issue by the Texas Court of Criminal Appeals"); Selvage v. Lynaugh, 842 F.2d 89, 92-94 (5th Cir. 1988) (claim on which Supreme Court later granted relief in *Penry* theretofore had "enjoyed virtually no support in this circuit"), *vacated & remanded sub nom.* Selvage v. Collins, 110 S. Ct. 974 (1990) (per curiam).

tions — (1) that the Texas statute as it had come to be applied was unconstitutional and (2) that the Court's decision saying so was not "new." The Court justified both conclusions on the basis that the statute as applied failed to "fulfill the assurance[s]" of *Jurek* and two intervening Supreme Court decisions requiring plenary admissibility and consideration of mitigating evidence.[223] The *Penry* majority opinion, that is, wiped out a good part of the effect — if not any identifiable holding — of *Jurek* and reversed a huge state and lower federal court jurisprudence that *did* in fact hold that *Jurek* permitted the practice the Court disapproved in *Penry*.[224]

Only in the 1990 decisions in *Butler*, *Parks*, and *Sawyer* did a five-person majority of the Court settle upon a single, internally consistent verbal formulation of the "new rule" definition. In those decisions, the Court essentially abandoned the conflicting definitions of "new" that Justice O'Connor set out in *Teague*[225] and adopted the still more encompassing definition that Justice Scalia devised in dissent in *Penry*.[226] Going beyond the analysis demanded by the facts of the cases,[227] the majority defined as "new" any ruling that decided a question susceptible to "debate among reasonable minds"[228] or as to which there previously were, or could have been, "reasonable, good-faith interpretations of existing precedents" going the other way.[229] Under this definition,

223. Penry v. Lynaugh, 109 S. Ct. 2934, 2945 (1989); *see id.* at 2947 (discussing Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Jurek v. Texas, 428 U.S. 262 (1976)).

224. *See Penry*, 109 S. Ct. at 2965 (Scalia, J., dissenting) ("If *Teague* does not apply to a claimed 'inherency' as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling . . . .").

225. Although *Sawyer*, *Parks*, and *Butler* all quoted the "dictated by prior precedent" language from *Teague*, Sawyer v. Smith, 110 S. Ct. 2822, 2827 (1990); Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990); Butler v. McKellar, 110 S. Ct. 1212, 1216 (1990), they went on to criticize the potential breadth of words such as "controlled" or "dictated," *id.* at 1217, refused to "appl[y]" the "dictated" test at a high "level of generality," *Sawyer*, 110 S. Ct. at 2828, and pointedly substituted the "reasonable jurists may disagree" formulation, *id.* at 2827.

226. *See Penry*, 109 S. Ct. at 2964 (Scalia, J., concurring in part and dissenting in part) (paraphrased in *Sawyer*, 110 S. Ct. at 2827; *Parks*, 110 S. Ct. at 1260; *Butler*, 110 S. Ct. at 1217).

227. The *holding* of *Parks*, insofar as it addressed the definition of new law, is discussed *supra* note 34. The holdings of *Sawyer* and *Butler* are as follows: *Sawyer*, 110 S. Ct. at 2824, 2828-29 (quoting Maggio v. Williams, 464 U.S. 46, 49, 56 (1983)) ("*Caldwell* [v. Mississippi, 472 U.S. 320 (1985),] announced a new rule," because prior to its announcement, there were indications in the Court's prior decisions that the *Caldwell* rule "was *not* a requirement of the Eighth Amendment" (citing two previous Supreme Court decisions that appeared to *reject* the rule the Court later adopted), and those decisions "did not put other courts on notice that the Eighth Amendment compelled the . . . result" in *Caldwell* but instead characterized the *Caldwell* claim as worthy of " 'little discussion' " and " 'insubstantial' "); *Butler*, 110 S. Ct. at 1215, 1218 (quoting Butler v. Aiken, 846 F.2d 255, 258 (4th Cir. 1988)) (decision on which petitioner relies adopted "new" rule because, prior to decision's announcement, judges reasonably could and did characterize position adopted in new decision as a " 'dramatic' extension" of existing precedents).

228. *See Butler*, 110 S. Ct. at 1217.

229. All three 1990 decisions recite the same passage stating that the new rule principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 110 S. Ct. at 1217, *cited in Sawyer*, 110 S. Ct. at 2827; *Parks*, 110 S. Ct. at 1260.

every newly announced or currently advocated rule is "new" unless "a state court" previously "would have felt compelled by existing precedent to conclude that the rule . . . was required by the Constitution."[230] Moreover, compulsion to reach the conclusion the Supreme Court ultimately reached is absent as long as there is any "simple and logical difference" between the Court's conclusion and the "precise holding[s]" of prior decisions.[231]

Applying this definition, the majority emphasized that rulings may be "new," and hence are presumptively nonretroactive: (1) although they were "lent general support" by prior decisions,[232] or were "congruent with" those decisions;[233] (2) although prior decisions "inform[ed]"[234] or "pointed to" the rulings; and (3) "even" if the rulings concededly are "control[led] or govern[ed]" by prior decisions.[235] Indeed, under *Butler*, *Parks*, and *Sawyer*, "new" rules include developments that are "within the 'logical compass' of . . . a prior decision"[236] and even minor or "gradual developments in the law [as long as they are ones] over which reasonable jurists [may] disagree."[237] Finally, the majority took as evidence of "reasonable" disagreement not only the fact that circuit courts theretofore had split on the question[238] but also the fact

230. *Parks*, 110 S. Ct. at 1260.

231. *Id.* at 1261.

232. *Sawyer*, 110 S. Ct. at 2828.

233. *Sawyer*, 110 S. Ct. at 2828.

234. *Id.* at 2829-30.

235. Saffle v. Parks, 110 S. Ct. 1257, 1261 (1990). The dissenting Justices in *Butler*, *Parks*, and *Sawyer* did little to disguise the breadth of the majority's "new rule" definition. *See, e.g.*, *Butler*, 110 S. Ct. at 1219, 1221, 1227 (Brennan, J., dissenting) (under majority's definition, "state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist;" majority's labeling as " 'new' any rule of law favoring a state prisoner that can be distinguished from prior precedent on any conceivable basis, legal or factual," and majority's confinement of "old" rules to ones "applying binding precedents to factual disputes that cannot be distinguished from prior cases in any imaginable way" limits habeas corpus actions to "a 'clearly erroneous' standard of review" and leaves habeas corpus "available in only the most egregious cases, in which state courts have flouted applicable Supreme Court precedent that cannot be distinguished on any arguable basis" (emphasis in original)); *see also* Arkin, *supra* note 6, at 389-90 (Court is "committed to an extremely expansive view of novelty" encompassing "[a]lmost any decision handed down after a petitioner's conviction is final"); Fallon & Meltzer, *supra* note 6, at 1816-17 ("*Teague*'s definition of the claims that will be deemed to rest on new law . . . is far too expansive" because it includes as "new" decisions those that "are clearly foreshadowed, or reflect ordinary legal evolution"); Hoffmann, *supra* note 3, at 182-83 (under Justice Scalia's definition in *Penry* "almost all new [decisions] . . . qualify as 'new . . .' "); West, *supra* note 6, at 58 ("Under [*Parks*] virtually any extension of preceding doctrine articulates a 'new rule' that defendants are not entitled to raise on habeas review.").

236. *Butler*, 110 S. Ct. at 1217.

237. *Sawyer*, 110 S. Ct. at 2827. Contrast *Sawyer*'s statement that new rules include "gradual developments in the law," *id.*, with Justice Harlan's conclusion that "many, though not all, of this Court's constitutional decisions [are not new because they] are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation." Desist v. United States, 394 U.S. 244, 263-64 (1969) (Harlan, J., dissenting).

238. *See Butler*, 110 S. Ct. at 1217.

that a few state court decisions previously had gone the other way.[239]

Juxtaposed to the apparent breadth of the Court's recent "new rule" definitions, are: (1) the majority's continued recognition of the interpretive "difficult[y]" posed by the "new rule" concept;[240] (2) the Court's apparent placement of some as yet ill-defined set of rules outside the ambit of "new" — for example, the "mere[] . . . application of the principle that governed" a prior decision to a slightly different set of facts[241] or an outcome disputable only on the basis of "an illogical or . . . grudging application" of existing precedent;[242] (3) the Court's rejection of the state's invitation[243] in another 1990 case, *Lewis v. Jeffers*,[244] to treat the Court's prior decision in *Maynard v. Cartwright*,[245] which applied the rule of *Godfrey v. Georgia*,[246] as a "new" rule;[247] (4) the continued vitality, on paper at least, of *Penry* — which in con-

239. *See Sawyer*, 110 S. Ct. at 2828; *Parks*, 110 S. Ct. at 1261; *see also Butler*, 110 S. Ct. at 1217 (rule is "new" in part because it was characterized by "a significant difference of opinion on the part of several lower courts that had considered the question previously"). *Compare* Weisberg, *supra* note 3, at 29 (under *Butler*, fact "that lower courts had split on the . . . issue was *enough* to establish that the ruling in the defendant's favor was a new rule" (emphasis added)) *with The Supreme Court, 1989 Term — Leading Cases*, *supra* note 6, at 312-13 (under 1990 decisions, "reasonableness" of state-court rulings that are contrary to ruling Supreme Court ultimately makes depends not only upon the question of whether "lower courts reached differing results" but also upon "the Court's own [independent] analysis of the reasonableness of [the lower courts'] debate").

240. *See supra* note 136.

241. Teague v. Lane, 109 S. Ct. 1060, 1073 (1989) (quoting Yates v. Aiken, 484 U.S. 211, 216-17 (1988) (holding that Francis v. Franklin, 471 U.S. 307 (1985), did not announce a new rule)); *see also Butler*, 110 S. Ct. at 1217. A number of lower court decisions, *see infra* note 249, have relied upon this concept to find that newly announced rules were not "new." *See, e.g.*, West v. Wright, 931 F.2d 262, 266 (4th Cir. 1991); Thomas v. Indiana, 910 F.2d 1413, 1416-17 (7th Cir. 1990); Newlon v. Armontrout, 885 F.2d 1328, 1333 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 3301 (1990); Perry v. Lockhart, 871 F.2d 1384, 1393-94 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 378 (1989); Williams v. Chrans, 742 F. Supp. 472, 483-84 (N.D. Ill. 1990); Reddy v. Coombe, 730 F. Supp. 556, 566 (S.D.N.Y.), *aff'd*, 916 F.2d 47 (2d Cir. 1990).

242. *Butler*, 110 S. Ct. at 1218; *see* Spencer v. Georgia, 111 S. Ct. 2276 (1991) (Kennedy, J., concurring in the denial of certiorari) (claim of racial bias in capital sentencing does not seek announcement of new rule, hence is not barred from future habeas corpus review); Dodson v. Zelez, 917 F.2d 1250, 1254-55, 1256-60 (10th Cir. 1990) (violation of Uniform Code of Military Justice warranted habeas corpus relief despite *Teague* because the statutory provision that the court martial violated was clear and permitted no exceptions, the military's own manuals dating back to 1969 interpreted the statute the way the petitioner did, and the lower courts had unanimously followed the same interpretation).

243. *See* Tr. of Oral Argument in Lewis v. Jeffers, 110 S. Ct. 3092 (1990), at 16.

244. 110 S. Ct. 3092 (1990).

245. 486 U.S. 356 (1988).

246. 446 U.S. 420 (1980).

247. *But cf.* Stringer v. Black, 111 S. Ct. 2009 (1991) (granting certiorari to consider whether *Maynard*, taken together with Clemons v. Mississippi, 110 S. Ct. 1441 (1990), constitutes a new rule of law). The *Jeffers* Court's unanimous silence on nonretroactivity is revealing because at least a plurality of Justices believes that the Court must postpone discussion of the merits until after resolving any retroactivity questions in the case, *see supra* notes 67-70 and accompanying text, and because the Court — *sua sponte* — did just that, not only in *Teague* itself but also in Saffle v. Parks, 110 S. Ct. 1257 (1990), Penry v. Lynaugh, 109 S. Ct. 2934 (1989), and Zant v. Moore, 109 S. Ct. 1518 (1989). *See supra* note 19 and accompanying text; *infra* note 466 and accompanying text. The Court's implicit refusal to characterize *Maynard* as

junction with the later cases stands for the admittedly curious proposition that a rule that the lower courts previously were *unanimous* in *rejecting* and over which the Court itself split 5-4 is not a matter over which "reasonable minds" could differ;"[248] and (5) the lower courts' willingness, even after announcement of *Butler*, *Parks*, and *Sawyer*, to place outside the "new rule" concept a number of recent Supreme Court decisions that were not free of controversy.[249] Apparently, there remains some class of rulings by the Court —

a new rule hardly seems controversial. As of now, all 27 federal judges who have considered the matter *on the merits* — the nine Justices in *Maynard* itself, the nine judges of the en banc Tenth Circuit in the lower court decision in that case, six Eighth Circuit judges, and three Tenth Circuit judges in a subsequent case addressing *Maynard*'s retroactivity — have treated the *Maynard* holding as squarely within the *Godfrey* holding. *Maynard*, 486 U.S. at 362-64; Davis v. Maynard, 911 F.2d 415, 418 (10th Cir. 1990); Newlon v. Armontrout, 885 F.2d 1328, 1331-33 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 3301 (1990); Mercer v. Armontrout, 864 F.2d 1429, 1435 (8th Cir. 1988); Cartwright v. Maynard, 822 F.2d 1477, 1489 (10th Cir. 1987) (en banc), *aff'd*, 486 U.S. 356 (1988). Both *Davis* and *Newlon* actually addressed the retroactivity question, concluding that *Maynard* is not "new" because it was "an application, not an expansion, of *Godfrey*." *Newlon*, 885 F.2d at 1333; *accord Davis*, 911 F.2d at 418. *Compare* Stringer v. Jackson, 909 F.2d 111 (5th Cir. 1990) (combination of *Maynard* and Clemons v. Mississippi, 110 S. Ct. 1441 (1990), the latter of which overturned Mississippi's practice of automatically affirming death sentences that were based on an invalid "heinousness" aggravating circumstance as long as other, valid circumstances were present, constitutes a new rule), *cert. granted sub nom.* Stringer v. Black, 111 S. Ct. 2009 (1991) *and* Smith v. Black, 904 F.2d 950, 982-86 (5th Cir. 1990) (same) *with* Parker v. Dugger, 111 S. Ct. 731, 738-39 (1991) (implicitly giving *Clemons* retroactive effect) *and* James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4737-39 (U.S., June 20, 1991) (plurality opinion) (Court's retroactive application of new decision to one litigant automatically obliges Court, in order to assure horizontal equity, to apply decision retroactively to all other similarly situated litigants, even if the initial retroactive application was implicit only, ill-considered, and erroneous) *and id.* at 4739 (White, J., concurring in the result) (same).

248. *See* Williams v. Chrans, 742 F. Supp. 472, 484 (N.D. Ill. 1990) (*Penry* stands for proposition that "even though only a majority of the [Supreme Court, rather than a unanimous Court] may have rendered [a] decision . . . , [the decision] nonetheless may be construed as not having announced a new rule. The fact that there was disagreement in the court as to the validity of a specific application of a more general principle does not in and of itself mean that the rule adopted was either a break with prior law or not compelled by existing precedent").

249. *See, e.g.*, Zettlemoyer v. Fulcomer, 923 F.2d 284, 306 n.19 (3d Cir. 1991) (rule of Mills v. Maryland, 486 U.S. 367 (1988), not "new"). Walton v. Caspari, 916 F.2d 1352, 1358-61 (8th Cir. 1990) (quoting *Teague*, 109 S. Ct. at 1073 (quoting Yates v. Aiken, 484 U.S. 211, 216-17 (1988))) (recent circuit decision, which held that prosecutors' announcement of reasons for exercising peremptory challenges to prospective jurors automatically bursts the presumption that peremptory challenges are exercised lawfully, is not " 'new . . . because it was "merely an application of [existing] principle[s]" ' "), *cert. denied*, 111 S. Ct. 1337 (1991); Thomas v. Indiana, 910 F.2d 1413, 1416-17 (7th Cir. 1990) (despite split in circuits on some of the issues presented by the application of the rule of Doyle v. Ohio, 426 U.S. 610 (1976), in Wainwright v. Greenfield, 474 U.S. 284 (1986), latter decision is not "new" and is merely an application of former decision); Hill v. McMackin, 893 F.2d 810, 814 (6th Cir. 1989) (rule of Harris v. Reed, 109 S. Ct. 1038 (1989), not "new," although it overruled considerable circuit precedent, because it was "dictated" by prior Supreme Court precedent announced in direct-appeal context, which *Harris* simply applied for first time in habeas corpus context); Moore v. Zant, 885 F.2d 1497, 1506-08 (11th Cir. 1989) (en banc) (plurality opinion) (majority of court concludes that rule of Estelle v. Smith, 451 U.S. 454 (1981), is not "new" although it was Court's first application of *Miranda* principle to "interrogations" conducted by psychiatrists and its first decision excluding fruits of improper interrogation from capital sentencing, as opposed to guilt-phase, proceedings), *cert. denied*, 110 S. Ct. 3255 (1990); *id.* at 1527 (Johnson, J., dissenting) (same); *Newlon*,

including rulings that do more than simply replicate a prior holding in a factually identical case — that even the majority does not consider "new," and that it is prepared to apply retroactively to cases that had become "final" before the Court issued the new ruling. What, then, constitutes that class of cases?

Fully answering this question may be impossible. As one commentator suggests, the Court has reason to be

> embarrassed at invoking a distinction that law students soon learn to deconstruct — the conceptually impossible distinction between a ruling that follows ineluctably from precedent and one which concededly expands precedent — all this in a judicial world where courts rarely acknowledge that they do any more than draw ineluctable conclusions from precedent.[250]

At risk, however, of venturing forth into the "jurisprudential morass involved in distinguishing cases dictated by precedent from those merely 'informed' by

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885 F.2d at 1333 (because recent decision in Maynard v. Cartwright, 486 U.S. 356 (1988), is "an application, not an expansion of," Godfrey v. Georgia, 446 U.S. 420 (1980), *Maynard* rule is not "new"); Perry v. Lockhart, 871 F.2d 1384, 1393-94 (8th Cir.) (Lowenfield v. Phelps, 484 U.S. 231 (1988), not a new rule although it overruled circuit precedent because it "merely . . . applied settled precedents to new and different factual situations" and did "not in fact alter[] that [previous] rule in any material way"), *cert. denied*, 110 S. Ct. 378 (1989); Singleton v. Lockhart, 871 F.2d 1395, 1401 (8th Cir.) (same), *cert. denied*, 110 S. Ct. 207 (1989); *Williams*, 742 F. Supp. at 483-84 (rule of Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989), adopted by 5-4 majorities in both cases, not new because decisions "merely applied" "well settled [rule] that the state cannot submit evidence that is not relevant to the . . . defendant and the . . . crime . . . to a specific type of evidence — victim impact evidence"); Reddy v. Coombe, 730 F. Supp. 556, 566 (S.D.N.Y.) (quoting Cruz v. New York, 481 U.S. 186, 193 (1987)) (*Cruz* rule not new because it " 'reaffirmed the central proposition' " of prior precedent), *aff'd*, 916 F.2d 47 (2d Cir. 1990); cases cited *supra* notes 241, 242; *see also* Parker v. Dugger, 111 S. Ct. 731, 738-39 (1991) (discussed *supra* note 247) (implicitly giving retroactive effect to rule of Clemons v. Mississippi, 110 S. Ct. 1441 (1990)); Granviel v. Texas, 110 S. Ct. 2577, 2578 (1990) (Marshall, J., dissenting from denial of certiorari) (decision in Ake v. Oklahoma, 470 U.S. 68 (1975) (state must provide indigents with resources necessary to prove colorable psychiatric defenses), is not new and dictates conclusion that providing indigent defendant with psychiatric assistance on condition that any report psychiatrist files is available to state as well as defense violates Constitution). *But cf.* McDougall v. Dixon, 921 F.2d 518, 539 (4th Cir. 1990) (rule of *Mills* is "new" and not retroactive), *cert. denied*, 111 S. Ct. 2840 (1991); Bassette v. Thompson, 915 F.2d 932, 938-39 (4th Cir. 1990) (decisions in *Ake* and *Estelle v. Smith* constitute "new" rules; so would holding that petitioner has right to confront author of report used as basis for sentencing petitioner to die), *cert. denied*, 111 S. Ct. 1639 (1991); Harris v. Vasquez, 913 F.2d 606, 620 (9th Cir. 1990) (claim seeking extension of *Ake* to require assistance of *competent* state-provided psychiatric expert is "new"); Stringer v. Jackson, 909 F.2d 111 (5th Cir. 1990) (in combination, decisions in *Maynard* and *Clemons*, constitute a "new" rule), *cert. granted sub nom.* Stringer v. Black, 111 S. Ct. 2009 (1991); Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990) (dicta) (rule of Cruz v. New York, 481 U.S. 186 (1987), may be "new" because *Cruz* was a "close case" under existing precedent); Collins v. Zant, 892 F.2d 1502, 1510 (11th Cir.) (extension of Edwards v. Arizona, 451 U.S. 477 (1981) (request for counsel during interrogation forbids police thereafter to question defendant outside presence of attorney), in Michigan v. Jackson, 475 U.S. 625 (1986) (request for counsel at arraignment forbids police thereafter to question defendant about indicted offense outside presence of attorney), probably constitutes "new rule"), *cert. denied*, 111 S. Ct. 225 (1990); cases cited *supra* note 176.

250. Weisberg, *supra* note 3, at 22-23.

it,"[251] I propose a partial answer to the question posed above, an answer that proceeds by identifying three categories of cases that federal courts typically confront in habeas corpus proceedings.

2. *The Court's New Rule on New Rules Applied: Three Paradigmatic Situations*

One type of habeas corpus case applies an established rule of law that is framed in terms of one or more elements of historical fact that the trier must find in each case in order to determine the outcome under the rule. For example, criminal defendants have longstanding sixth and fourteenth amendment rights to trial by "impartial" jurors[252] and to forego trial when they are "incompetent" to understand the proceedings and to assist in their defense.[253] In both situations, the Supreme Court has held recently that the circumstances upon which the right turns — the "impartiality" *vel non* of the challenged juror and the "competency" *vel non* of the defendant — are questions of historical fact.[254] In such cases, if the state courts have made factfindings on the controlling questions on the basis of "full and fair hearings," then federal habeas corpus courts are bound by statute to abide by those findings unless the findings are shown to be erroneous by "clear and convincing" evidence.[255]

Rather evidently, cases falling into this first category are not subject to the *Teague* nonretroactivity defense. To begin with, the habeas corpus statute already requires federal court deference to state court decisions in this category of cases, inasmuch as those decisions turn upon findings of historical fact. Accordingly, this is not a category of cases in which "the application of new rules . . . forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards."[256] Rather, (1) the federal court is required to respect the outcome of the state court's *initial* marshaling of resources because the state court made the determinative factfinding in a "full and fair" manner;[257] *or* (2) that marshaling of resources did *not* conform to existing legal standards and is not due deference because it was not "full and fair;" *or* (3) the fact-finding made by the state courts so "clearly" required those courts to decide the case in favor of

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251. *Id.* at 28.

252. *See, e.g.*, Wainwright v. Witt, 469 U.S. 412, 416 (1985); Patton v. Yount, 467 U.S. 1025, 1031 (1984).

253. *See, e.g.*, Drope v. Missouri, 420 U.S. 162, 171-72 (1975).

254. *See, e.g.*, Demosthenes v. Baal, 110 S. Ct. 2223, 2225 (1990) ("competency" a question of historical fact); *Witt*, 469 U.S. at 429 (juror "impartiality" a question of historical fact).

255. 28 U.S.C. § 2254(d) (1988); Sumner v. Mata I, 449 U.S. 539, 550 (1981); J. LIEBMAN, *supra* note 3, §§ 20.2, 28; *see also* Burden v. Zant, 111 S. Ct. 862 (1991) (per curiam) (district court must defer to findings favorable to petitioner as well as to state).

256. Teague v. Lane, 109 S. Ct. 1060, 1075 (1989) (quoted in, *e.g.*, Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990)).

257. In certain circumstances, state appellate as well as trial court factfindings are due a presumption of correctness under section 2254(d). *See, e.g.*, Parker v. Dugger, 111 S. Ct. 731, 739 (1991); Cabana v. Bullock, 474 U.S. 376, 388-89 n.5 (1986); Sumner v. Mata II, 455 U.S. 591, 593 (1982); *Mata I*, 449 U.S. at 546.

the defendant that their failure to do so is an issue on which reasonable minds cannot differ. Because of the unequivocally determinative nature of one or more well-specified historical facts in this situation, granting relief does not even require the "mere[] . . . application of [preexisting law] to a slightly *different* set of facts,"[258] and only requires the application of preexisting law to the very *same* set of determinative facts that the Court's prior decisions have identified.

A second category of cases is similar in many respects to the preceding category. In these cases, however, the Court has said that the circumstances that prior precedent makes determinative of whether the claim succeeds or fails is a " '*mixed* question of law and fact,' " which is subject to *de novo* review in appellate and habeas corpus proceedings.[259] In this category, for example, the Court has placed the questions whether a confession made by a criminal defendant was "involuntary" in violation of the fifth and fourteenth amendments;[260] whether the police lacked "reasonable suspicion" or "probable cause" for a stop, search, seizure, or arrest in violation of the fourth and fourteenth amendments;[261] whether a pretrial identification procedure used by the police was "suggestive" or "unreliable" in violation of the fourteenth amendment;[262] whether jury selection procedures resulted in a *jury* (as distinguished from individual *jurors*) that was not "fair and impartial" in violation of the sixth and fourteenth amendments;[263] whether jury instructions were insufficient to inform "reasonable juror[s]" of their fourteenth amendment responsibility to find each element of the offense "beyond a reasonable doubt;"[264] whether the legal assistance rendered the defendant at trial or on appeal was "ineffective" in violation of the sixth and fourteenth amendments because it was "not reasonably competent" and "prejudiced" the defendant;[265] whether the evidence used to convict the petitioner was constitutionally "sufficient;"[266] whether the defendant lacked the "intent to kill" or degree of participation in "actually kill[ing]" that is necessary to elevate a homicide to the level of culpability for which the eighth and fourteenth amendments allow the

258. *Butler*, 110 S. Ct. at 1217 (emphasis added).

259. Miller v. Fenton, 474 U.S. 104, 112-13 (1985) (emphasis added).

260. *See, e.g.*, Arizona v. Fulminante, 111 S. Ct. 1246, 1252 (1991); *Miller*, 474 U.S. at 112-13; Mincey v. Arizona, 437 U.S. 385, 398 (1978).

261. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 343 (1985) (independent review of "reasonable suspicion"); Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (same); Aguilar v. Texas, 378 U.S. 108, 111 (1964) (independent review of "probable cause"), *overruled on other grounds*, Illinois v. Gates, 462 U.S. 213 (1983).

262. *See, e.g.*, Sumner v. Mata II, 455 U.S. 591, 597 (1982); Neil v. Biggers, 409 U.S. 188, 198-200 (1972).

263. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 168-69 n.3 (1986); Irwin v. Dowd, 366 U.S. 717, 723 (1961).

264. *See, e.g.*, Francis v. Franklin, 471 U.S. 307, 315-16 (1985).

265. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 378 (1986); Strickland v. Washington, 466 U.S. 668, 686 (1984); Cuyler v. Sullivan, 446 U.S. 335, 342 (1980).

266. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 323 (1979).

death penalty;[267] whether state law or practice impedes "consideration of mitigating circumstances" at the penalty phase of capital trials in violation of the eighth and fourteenth amendments;[268] and whether the jury instructions were sufficient to inform "reasonable jurors" of their ability to vote against a death sentence on the basis of mitigating circumstances even as to which the entire panel of twelve jurors did not reach consensus.[269] The lower courts have added to this list, for example, the questions whether evidence improperly suppressed by the prosecution before trial is "material;"[270] whether the state denied the petitioner a "speedy" trial;[271] whether admission of hearsay statements violated defendant's sixth amendment right to "confrontation;"[272] whether the defendant's guilty plea was "involuntary;"[273] whether the defendant "requested counsel" during interrogation, thereby requiring the police to suspend further questioning;[274] whether the "functional equivalent" of interrogation occurred;[275] whether the petitioner "waived" her right to silence[276] and to a lawyer;[277] whether the defendant was sufficiently "indigent" to require provision of counsel at state expense;[278] whether prosecutorial, judicial, or other "misconduct"[279] occurred that "prejudiced"[280] the defendant sufficiently to violate due process;[281] and whether any error committed in the case was "harmless beyond a reasonable doubt."[282]

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267. *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 155-56 n.11 (1987); Cabana v. Bullock, 474 U.S. 376, 382, 390 (1986).

268. *See, e.g.*, Penry v. Lynaugh, 109 S. Ct. 2934, 2950 (1989).

269. *See, e.g.*, Mills v. Maryland, 486 U.S. 367, 375, 384 (1988).

270. *See, e.g.*, United States v. Buchanan, 891 F.2d 1436, 1440 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1829 (1990); Carter v. Rafferty, 826 F.2d 1299, 1306 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988).

271. *See, e.g.*, Cain v. Smith, 686 F.2d 374, 380 (6th Cir. 1982).

272. *See, e.g.*, Haggins v. Warden, 715 F.2d 1050, 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

273. *See, e.g.*, Moore v. Jarvis, 885 F.2d 1565, 1570 n.9 (11th Cir. 1989); Oppel v. Meachum, 851 F.2d 34, 38 (2d Cir.), *cert. denied*, 488 U.S. 911 (1988).

274. *See, e.g.*, Bailey v. Hamby, 744 F.2d 24, 26 (6th Cir. 1984).

275. *See, e.g.*, Endress v. Dugger, 880 F.2d 1244, 1249 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1923 (1990).

276. *See, e.g.*, Terrovona v. Kincheloe, 852 F.2d 424, 428 (9th Cir. 1988). *But cf.* Miller v. Fenton, 474 U.S. 104, 108 n.3 (1985) (reserving question).

277. *See, e.g.*, Hance v. Zant, 696 F.2d 940, 947 (11th Cir.), *cert. denied*, 463 U.S. 1210 (1983).

278. *See, e.g.*, Barry v. Brower, 864 F.2d 294, 299 (3d Cir. 1988).

279. *See, e.g.*, United States ex rel. Shaw v. De Robertis, 755 F.2d 1279, 1282 n.2 (7th Cir. 1985).

280. *See, e.g.*, Nichols v. Sullivan, 867 F.2d 1250, 1253 (10th Cir.), *cert. denied*, 109 S. Ct. 3169 (1989); Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1988).

281. *See, e.g.*, Williams v. Maggio, 730 F.2d 1048, 1049-50 (5th Cir. 1984).

282. *See, e.g.*, United States *ex rel.* Lee v. Flannigan, 884 F.2d 945, 950-51 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 3277 (1990); *see also* Gunn v. Newsome, 881 F.2d 949, 964 (11th Cir.) (en banc), *cert. denied*, 110 S. Ct. 542 (1989); Coleman v. Saffle, 869 F.2d 1377, 1388-89 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1835 (1990). The Supreme Court recently acknowledged that harmless error is a mixed question of fact and law. *See* Yates v. Evatt, 111 S. Ct. 1884, 1893-94 (1991); Arizona v. Fulminante, 111 S. Ct. 1246, 1257 (1991). *See generally* J. LIEBMAN, *supra* note 3, § 20.3d.

The "mixed question" rubric, and the *de novo* review that follows from it, are apparently designed to allow appellate and habeas corpus courts to exercise continuing control over legal principles that are suffused with a " 'complex of values' " and that "can be given meaning only through . . . application to the particular circumstances"[283] presented by "a series of closely related situations."[284] Because this definition of a "mixed question" proceeds from the need in unsettled areas of law for additional "norm elaboration" via "case-by-case development of constitutional [standards],"[285] one might predict that the Court will conclude that the self-conscious legal "elaboration" and "development" invited in "mixed question" situations constitutes the announcement of "new" rules. After all, the premise for retaining appellate control via the "mixed question" rubric is the presence of a legal principle sufficiently unclear or unsettled that one could anticipate "debate among reasonable minds" in regard to the principle's application to new sets of facts.[286]

Were this approach taken, the end of habeas corpus would be at hand. Either the Court would characterize a question reaching the federal courts via habeas corpus as "factual," in which case the habeas corpus statute would require presumptive deference to the state courts' determination of the question as long as that determination was fairly rendered.[287] Or, the issue would be deemed legal, in which case the Court's recent revision of habeas corpus jurisdiction via the *Teague* line of cases would require conclusive deference to the state courts' determination, no matter *how* that determination was rendered. The traditional argument by habeas corpus petitioners in favor of *de novo*, as opposed to deferential, federal review[288] — namely, that the questions involved are ones of law, or are "mixed" with questions of law — would constitute an escape from the frying pan of presumptive deference to state court factual findings into the fire of conclusive deference to state court legal determinations.[289]

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283. Miller v. Fenton, 474 U.S. 104, 114, 116 (1985) (quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1960)).

284. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 273 (1985) (cited in *Miller*, 474 U.S. at 114).

285. *Id.*

286. Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990). *See generally* West, *supra* note 6, at 58 ("It is a well-worn truism that the application of precedent to new facts always requires judgment and that no case is literally compelled by precedent. Consequently, [under the 1990 decisions,] almost every habeas petition, if successful, would create a new rule.").

287. *See supra* note 255 and accompanying text.

288. *See, e.g., Miller*, 474 U.S. at 114-18 (collecting numerous cases in which petitioners secured or attempted to secure habeas corpus relief on this basis); cases cited *supra* notes 260-82 (same).

289. A new parlor game among habeas corpus writers is to identify *Teague's* "whipsaw," or "frying-pan-into-fire" effect on arguments that used to discourage federal courts from deferring to state court determinations. *See, e.g.*, RECOMMENDATIONS OF THE ABA, *supra* note 145, at 163 n.698 (*Teague* undermines prisoners' "new-law" response to state's procedural default defense); Arkin, *supra* note 6, at 407-08 (by arguing that a "decision was sufficiently 'new' to excuse [the filing of] a second habeas petition[, prisoner] virtually . . . mandate[s] a finding of novelty under *Teague*"); Hoffmann, *supra* note 3, at 186 ("any claim in a second or subsequent

Although not without support in the Court's post-*Teague* decisions, this understanding of "new" ultimately seems misguided. To begin with, the Court recently declined to give up *de novo* habeas corpus review of one of the longest recognized "mixed questions" — the voluntariness of confessions — on the ground that "Congress patterned [28 U.S.C.] § 2254(d) after . . . case [law] that clearly assumed that . . . voluntariness . . . was an issue for independent federal determination."[290] For the Court now to ignore this acknowledged "congressional guidance" on the "independent" review due mixed questions, and for it to preclude not only independent, but *all*, "federal determination" of voluntariness and similar "mixed" questions, would flout "congressional intent" in ways that at least some members of the post-*Teague* majority would find offensive.[291] Moreover, the Court simultaneously recognized that "mixed question" review is not an exercise of a questionable judicial power to *make* new law,[292] but rather part of the Court's routine and "*primary* function as an *expositor* of law" already made.[293] The mixed question function, that is, calls only for the "elaboration"[294] or "exposit[ion]" of a previously settled "legal principle . . . through its application to the particular

petition based on a new rule that is sufficiently 'dictated' by prior precedent to avoid the label, 'new law,' will be barred because it either was or should have been raised in the first petition"); Weisberg, *supra* note 3, at 32 n.138 ("Catch 22 is that a new rule is not cognizable on habeas unless it is so new as to be one of the last remaining unrecognized watersheds. Catch 22A is that a petitioner may suffer a procedural default . . . unless his 'cause' for default is that he did not anticipate a new intervening constitutional ruling, in which case that ruling may be a 'new rule' to which he is not entitled" under *Teague*); *infra* note 457. Consider also the following: Until *Teague*, any lawyer worth her salt knew that the most reasonable method of rationing space among equally strong Supreme Court precedents was to emphasize the most recent one. By penalizing petitioners who cite *recent* decisions that "*control*" the result relative to those who cite *older* decisions that "*dictate*" the outcome, *Teague* changes this rule of practice. Over the long run, the new rule of practice will simply send lawyers back to the books to seek support in older Supreme Court, circuit court, and district court precedents and back to their thesauruses to find words to convey the extent to which those cases "dictate," "ordain," and "command" the desired result. In the short run, however, *Teague's* effect is a whipsaw: Prisoners with the good fortune to have lawyers partial to state-of-the-art, as opposed to passe, citations and leery of verbal escalation from "supports" to "dictates" and beyond are more likely to lose. Illustrating the extent to which subtle characterizations of the rule being promoted has become the name of the game are, *e.g.*, West v. Wright, 931 F.2d 262, 271 (4th Cir. 1991) (court chides state's attorney for "erroneous" characterization of petitioner's run-of-the-mill constitutional sufficiency of the evidence claim as a challenge to the "facial validity of a permissive inference" in order to establish a nonretroactivity defense); Harriman v. Lynn, 901 F.2d 64, 67 (5th Cir. 1990) (court sees through petitioner's effort to rely on earlier precedent, rather than upon later decision that is on all fours with petitioner's claim but is not retroactive).

290. *Miller*, 474 U.S. at 115 (citing Townsend v. Sain, 372 U.S. 293 (1963)).

291. *Id.* (opinion for the Court by O'Connor, J.); *see* Teague v. Lane, 109 S. Ct. 1060, 1079 (1989) (White, J., concurring) (expressing commitment to follow Congress' lead in regard to retroactivity of new decisions in habeas corpus proceedings); Autry v. Estelle, 464 U.S. 1301, 1303 (1983) (White, Circuit Justice, in Chambers) (questioning wisdom of rule permitting successive petitions absent proof of deliberate bypass, but acceding to Congress' intention to adopt that rule).

292. *See supra* note 107 and accompanying text.

293. *Miller*, 474 U.S. at 114 (emphasis added).

294. Monaghan, *supra* note 284, at 274.

circumstances of a case"[295] or to a series of closely related cases.[296]

Decisions based upon established constitutional principles defined in terms of "mixed" questions accordingly embody the "mere[] . . . application of [preexisting law] to a slightly different set of facts" — an endeavor that the post-*Teague* majority suggested does not qualify as the making of "new" legal rules.[297] An endeavor of this sort, indeed, may explain the Court's actions in the otherwise perplexing *Penry* and *Jeffers* cases, which, as noted above, establish that even controversial rulings — that is, rulings that controversially apply noncontroversial or well-established rules to new facts — are not, by their controversial nature alone, rendered new.[298]

Based on the above analysis, one rough and ready way to describe a type of claim that escapes "new rule" difficulties is this: A claim is not premised on a "new" rule as long as a court can grant relief simply by reciting some relatively, but not wholly, inelastic verbal "principle" that was announced in a case decided before the petitioner's conviction became final. In other words, assuming some substantial definiteness in regard to both the constitutional provision being applied and the overall factual scenario being scrutinized, incongruity between the individual facts giving rise to the current claim and the individual facts giving rise to the earlier, prefinality decision should not defeat the claim.[299] Thus, for example, if a claim can be granted simply by stating that it is an instance of the rule that *X*, where *X* is the rule of a decision rendered before the petitioner's case became final — for example, the rule that "involuntary confessions violate the fifth and fourteenth amendments," or that "precluding capital sentencers from considering mitigating evidence" violates the eighth and fourteenth amendments,[300] or that the eighth and fourteenth amendments forbid "aggravating circumstances that focus generally on the egregiousness of the offense but do not provide a meaningful basis for distinguishing murders that deserve the death penalty from those that do not"[301] —

295. *Miller*, 474 U.S. at 114.

296. Monaghan, *supra* note 284, at 274-75.

297. Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990).

298. *See supra* notes 217-24, 244-48 and accompanying text. Also explained by this analysis are the *Yates* and *Truesdale* decisions discussed *supra* notes 211-14 and accompanying text.

299. This approach is not a new one. *See* Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) (rulings are not new if they are "grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation"); T. COOLEY, COOLEY ON TORTS 16 (2d ed. 1888) (quoting Palsey v. Freeman, 3 T.R. 51, 63, 100 Eng. Rep. 450, 456 (1789)) (" 'Where cases are new in their *principle*, . . . it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle.' ").

300. The latter rule is the one the Court extracted from Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion), and Eddings v. Oklahoma, 455 U.S. 104 (1982), and applied in Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989), the conviction in which became final after *Lockett* and *Eddings* were decided. *See supra* notes 217-24 and accompanying text.

301. This rule is the one the Court extracted from Godfrey v. Georgia, 446 U.S. 420 (1980), and applied in Lewis v. Jeffers, 110 S. Ct. 3092, 3102 (1990), and Maynard v. Cart-

then the claim is immune to the nonretroactivity defense.[302]

This interpretation helps explain the statement in *Parks* that a necessary, if perhaps not sufficient, attribute of "newness" is a "simple and logical difference between [the] *rule*[]" in question and the "precise *holding[s]*" of prior cases.[303] A simple and logical difference between the *facts* of the two cases will not suffice. Or, as the Court phrased the concept in *United States v. Johnson*, a precursor of *Teague*,[304] the application of a rule to "new and different factual situations" does not render the result itself "new" as long as the process did "not in fact alter[] [the existing] rule in any material way."[305]

The third category of cases that habeas corpus courts can expect to confront are ones in which the petitioner cannot secure relief unless a court adopts a verbal standard different from the standards contained in cases decided before the petitioner's conviction became final. Although most cases in this category satisfy the prevailing post-*Teague* definition of "new rules," some cases do not, because they present situations in which no reasonable jurist could fail to realize that an existing holding or set of holdings predestines the

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wright, 486 U.S. 356 (1988), the convictions in both of which became final after the announcement of *Godfrey*. *See supra* notes 244-48 and accompanying text.

302. The Court in *Sawyer* refused to apply the "dictated by precedent" test at too high a "level of generality." Sawyer v. Smith, 110 S. Ct. 2822, 2827-28 (1990). That refusal, however, accompanied the petitioner's attempt to bring a number of prior cases under the umbrella of a principle that was broader than the holding or "rule" of each of the cases and that was stated as such in none of them. *See id.* Still, the test proposed in text remains rough and ready. Consider Butler v. McKellar, 110 S. Ct. 1212 (1990). The issue there was the novelty *vel non* of Arizona v. Roberson, 486 U.S. 675 (1988), given the Court's earlier decision in Edwards v. Arizona, 451 U.S. 477 (1981). In *Edwards*, the Court stated its "holding" as follows: "We . . . hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him . . . ." *Id.* at 484-85. The Court did *not* "hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further [uncounseled] interrogation by the authorities *on the same charge that was the subject of the interrogation during which he asked for counsel* . . . ." Accordingly, when confronted with a defendant who had been interrogated on a second charge following a request for counsel on the first charge, the *Roberson* Court not only could and did grant the defendant relief using the precise verbal holding of *Edwards* but also could and did characterize its decision as a refusal to create an "exception" to *Edwards* for separate investigations. *Roberson*, 486 U.S. at 677, 685. How, then, could the Court in *Butler* rule that *Roberson* created a new rule? Perhaps, the best answer, other than that *Butler* is wrong, is this: The *Edwards* standard clearly had to be time constrained in some way. Otherwise, the case would stand for the clearly unintended rule that a request for counsel would immunize an arrestee from "further interrogation by the authorities" for the rest of her life. Once it was clear that the verbal holding of *Edwards* was incomplete, the missing "term" could only be supplied by the overall factual scenario of the case, which involved subsequent interrogation about the same offense. On this reading, the holding of *Roberson* (prohibiting further interrogation during "continuous custody," 486 U.S. at 690-91) went beyond the rule of *Edwards* as that rule was supplemented by *Edwards*' facts in regard to a missing, but clearly implied, limitation on the rule.

303. Saffle v. Parks, 110 S. Ct. 1257, 1261 (1990) (emphasis added).

304. *See supra* note 47 and accompanying text.

305. United States v. Johnson, 457 U.S. 537, 549 (1982); *accord, e.g.*, Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) (retroactivity appropriate if new decision "simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").

rule for which the petitioner contends. It is not hard to imagine a decision, for example, that presents its "holding" or "rule" no more broadly than the facts of the case require but that on its face or in its historical context establishes — perhaps even beyond peradventure — that the principle lying behind the holding or rule will take the law further as soon as a case arises that calls for the extension.[306]

Take, as an example, the Court's move from *Lockett v. Ohio*[307] to *Eddings v. Oklahoma*,[308] a move that the Court in both *Penry* and *Parks* implied had nothing new about it.[309] In *Lockett*, the Court held that the state could not by statute preclude the defendant from presenting evidence of any mitigating circumstance about herself and her offense that supplied a potential basis for a sentence less than death.[310] In *Eddings*, the Court held that, having let the defendant introduce all the mitigating evidence he had, the sentencing judge could not then refuse to consider that evidence.[311] A holding requiring the admission of mitigating evidence at the capital-sentencing phase logically assumes that the sentencer must be required to consider that evidence. *Lockett* thus seems to dictate the result in *Eddings*, notwithstanding that *Lockett* did not in terms express the *Eddings* holding.

Take as a second example, the Court's move from *Edwards v. Arizona*,[312] which held, under the fifth amendment, that a request during police interrogation for an attorney forbids subsequent uncounseled questioning, to *Michigan v. Jackson*,[313] which held, under the sixth amendment, that a request at arraignment for an attorney forbids subsequent uncounseled questioning. Consider that the Supreme Court recognized the sixth amendment right to counsel during postarraignment interrogation, the right at stake in *Jackson*, *before* recognizing the fifth amendment right to counsel at prearraignment interrogation, the right at issue in *Edwards*.[314] Consider next that the Court has generally treated the scope of the sixth amendment right to counsel as either

306. For example, although the Court expressly limited its initial ruling that racial segregation laws violate the fourteenth amendment to "the field of public education," *see* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954), the lower courts understood immediately that the decision also outlawed laws segregating public parks, beaches, and golf courses, and when they so ruled, the Supreme Court summarily affirmed without opinion. *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).

307. 438 U.S. 586 (1978).

308. 455 U.S. 104 (1982).

309. *See* Saffle v. Parks, 110 S. Ct. 1257, 1261-62 (1990); Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989).

310. *Lockett*, 438 U.S. at 605.

311. *Eddings*, 455 U.S. at 110-11.

312. 451 U.S. 477 (1981).

313. 475 U.S. 625 (1986).

314. *Compare* Massiah v. United States, 377 U.S. 201 (1964) (first recognizing automatic sixth amendment right to counsel during postindictment interrogation) *with* Miranda v. Arizona, 384 U.S. 436 (1966) (recognizing more limited fifth amendment right to counsel during preindictment interrogation). Although Escobedo v. Illinois, 378 U.S. 478 (1964), looked for a time as if it would extend the sixth amendment right to counsel back to the preindictment

equal to,[315] or greater than,[316] the scope of the fifth amendment right. Consider finally that the *Jackson* Court explicitly found that the postindictment context in *Jackson* presented a "stronger" case for application of the no-further-interrogation rule than the prearraignment context of *Edwards*.[317] Under these circumstances, *Jackson* is a classic case of a "lesser included rule" that follows *a fortiori* from the "greater including" rule of *Edwards*.[318]

B. A Newer New Rule on New Rules: A Policy-Based Proposal

Having slogged through the "jurisprudential morass"[319] created by the Court's new rule on "new rules," let me suggest a way around the difficulty on the firmer ground of retroactivity and habeas corpus policy. Although the Court is unlikely soon to consider alternative retroactivity routes, Congress may still be on the lookout.[320]

1. Deterrence

The *Teague* plurality and the post-*Teague* majority justify the nonretroactivity defense on the basis of a deterrence policy attributed to Justice Harlan:

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interrogation stage, that case since has been treated "as nothing more than a 'false start.'" W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 275 (1985).

315. *See, e.g.*, Patterson v. Illinois, 487 U.S. 285 (1988); Maine v. Moulton, 474 U.S. 159 (1985); Estelle v. Smith, 451 U.S. 454 (1981).

316. *See, e.g.*, Michigan v. Jackson, 475 U.S. 625 (1986) (discussed *infra* note 317); Maine v. Moulton, 474 U.S. 159 (1985) (police informant's "interrogation" of accused on offenses already formally charged violates sixth amendment right to counsel, but same interrogation on offenses not already formally charged does not violate fifth amendment right to counsel); Brewer v. Williams, 430 U.S. 387 (1977) (unlike preindictment interrogation, which may proceed, upon waiver of right to silence, in absence of counsel, postarraignment interrogation cannot properly occur upon waiver of right to silence in absence of counsel, and courts should be more reluctant in postarraignment than in prearraignment setting to find waiver of right to counsel); Kirby v. Illinois, 406 U.S. 682 (1972) (no fifth amendment right to counsel at lineups conducted prior to arraignment, by contrast to existence of sixth amendment right to postindictment lineups). *But see* McNeil v. Wisconsin, 59 U.S.L.W. 4636, 4638 (U.S., June 13, 1991) (because sixth amendment right to counsel is "offense-specific," while fifth amendment right to counsel is not, invocation of sixth amendment right does not, although invocation of fifth amendment right does, forbid subsequent interrogation on different offense in absence of counsel).

317. *Jackson*, 475 U.S. at 631 ("the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged").

318. *But cf.* Collins v. Zant, 892 F.2d 1502, 1510 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 225 (1990) (rule of *Jackson* probably is "new" and nonretroactive in postfinality cases).

319. Weisberg, *supra* note 3, at 28.

320. Both the House and the Senate Judiciary Committees heard testimony during the last two sessions of Congress calling for *Teague* to be overruled. *See, e.g., ABA Testimony, supra* note 15, at 25-26, 42-43, 47; Lay, *Statement of Chief Judge Donald P. Lay, Eighth Circuit Court of Appeals, Before the Senate Judiciary Committee in re: Habeas Corpus Reform in Capital Cases*, 19 CAP. U.L. REV. 659, 672-73 (1990). In 1990, both Committees reported out legislation, which failed on the floor, proposing that *Teague* be overruled, at least in capital cases. *See* S. 1757, 101st Cong., 1st Sess. § 2262, 135 CONG. REC. S13474 (1989); H.R. 5269, 101st Cong., 2d Sess. § 1305 (1990). *See generally supra* note 145; *infra* Part VIII.

> As [Justice Harlan] had explained . . . , 'the threat of habeas serves as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles. In order to perform this deterrence function, the habeas court need only apply constitutional standards that prevailed at the time the original proceedings took place.' 394 U.S. at 262-263. See also [Solem v.] Stumes, 465 U.S. [638], . . . 653 [(1984)] . . . (Powell, J., concurring in judgment) ("Review on habeas to determine that the conviction rests upon correct application of the law in effect at the time of the conviction is all that is required to 'forc[e] trial and appellate courts . . . to toe the constitutional mark.' ") (citation omitted).[321]

The deterrence policy is helpful to a degree. Clearly, the Great Writ is designed to deter police officers, prosecutors, jury commissioners, state judges, and other actors in our decentralized criminal justice system from ignoring or flouting established Supreme Court interpretations of constitutional edicts. Consequently, new decisions reversing state-level practices that clearly were proscribed by existing law deserve fully retroactive application in habeas corpus.

Just as clearly, habeas corpus is designed, and full retroactivity is necessary, to give state-level participants in the criminal justice system an incentive to apply existing federal constitutional precedents to reasonably analogous circumstances — or, as the Court phrased the concept in *United States v. Johnson*, to "new and different factual situations" that do "not in fact alter the [existing] rule in any material way."[322] Otherwise, the procession of moderately different fact situations confronting actors in the criminal justice system each day would present them with a continuous parade of opportunities to apply the law as they please, regardless of prior federal precedents, and would remove any " 'incentive . . . to conduct their proceedings in a manner consistent with established constitutional principles.' "[323] A nonretroactivity rule in situations involving the application of old law to reasonably analogous new facts also would put an overwhelming burden on the Supreme Court. Such a rule would make the Court, on certiorari review, the single federal judicial arbiter not simply of basic principles of constitutional law but also of the application of that law to each and every one of the myriad slightly distinctive fact patterns that arise in tens of thousands of police stations and courthouses

321. Teague v. Lane, 109 S. Ct. 1060, 1073 (1989) (plurality opinion) (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)); *accord* Sawyer v. Smith, 110 S. Ct. 2822, 2827, 2830, 2831 (1990); Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990); Butler v. McKellar, 110 S. Ct. 1212, 1216 (1990); Penry v. Lynaugh, 109 S. Ct. 2934, 2964-65 (1989) (Scalia, J., concurring in part and dissenting in part).

322. United States v. Johnson, 457 U.S. 537, 549 (1982) (citing authority).

323. *Teague*, 109 S. Ct. at 1073 (plurality opinion) (quoting *Desist*, 394 U.S. at 262-63 (Harlan, J., dissenting)).

across the country on a daily basis.[324] Likewise, such a nonretroactivity rule would denigrate the *Teague* plurality's injunction against treating "*similarly* situated" persons differently by turning it into a meaningless proscription against treating *identically* situated persons differently.[325]

This same habeas corpus policy of holding state criminal justice participants to prior federal precedents supports a firm *non*retroactivity rule for a new decision that "[1] explicitly overrules a past precedent of th[e] Court . . . , [2] disapproves a practice th[e] Court arguably has sanctioned in prior cases . . ., [3] overturns a longstanding and widespread practice to which th[e] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved,"[326] or [4] violates "assurance[s]" found in prior law that the case would be decided differently.[327] Thus, the same deterrence policy that prompts habeas corpus courts to send a negative message (reversal of the relevant state-level practice or decision) whenever state-level actors have deviated from existing federal constitutional law also should prompt habeas corpus courts to send a positive message (affirmance of the relevant state-level action) whenever state-level actors have adhered to existing, even if later modified, federal law.[328]

The deterrence policy does not by itself solve the "new rule" mystery, however. For the policy does not by itself specify what state-level practices habeas corpus is designed to deter and how habeas corpus should do so.[329] On

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324. *See, e.g.*, J. LIEBMAN, *supra* note 3, § 22A.1h (Supp. 1991); *see also* Spencer v. Georgia, 111 S. Ct. 2276 (1991) (Kennedy, J., concurring in the denial of certiorari) (implying that *Teague* obliges Court to grant certiorari on direct review to consider substantial claims seeking establishment of new rules as to which *Teague* would forbid habeas corpus review).

325. *Teague*, 109 S. Ct. at 1070, 1078 (plurality opinion).

326. *Johnson*, 457 U.S. at 551 (citations omitted); *accord, e.g.*, *Teague*, 109 S. Ct. at 1070 (plurality opinion) ("case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government"); *id.* (rule of Ford v. Wainwright, 477 U.S. 399 (1986), which overruled portion of Solesbee v. Balkom, 339 U.S. 9 (1950), constitutes "new rule"); *id.* (rule of Rock v. Arkansas, 483 U.S. 44 (1987), which overturned Court's prior practices of (1) treating sixth amendment right to present defensive evidence as a matter for case-by-case, not categorical, adjudication, *e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973), and (2) leaving the states free to treat hypnotically induced or affected testimony as they chose, free of constitutional constraints constitutes "new rule"); Allen v. Hardy, 478 U.S. 255, 258 (1986) (per curiam) (Batson v. Kentucky, 476 U.S. 79 (1986), not retroactive because it constituted an "explicit and substantial break with prior precedent" and overruled a portion of Swain v. Alabama, 380 U.S. 202 (1965)); Solem v. Stumes, 465 U.S. 638, 646-47 (1984) (decision nonretroactive if it "has explicitly overruled past precedent;" holding that rule of Edwards v. Arizona, 451 U.S. 477 (1981), is nonretroactive because it replaced established practice of treating custodial requests for counsel as only one aspect of the case-by-case analysis of whether the suspect invoked or waived *Miranda* rights with a bright line rule interpreting all requests for counsel as automatically invoking *Miranda* rights); other cases cited *supra* notes 42, 121, 209.

327. *Desist*, 394 U.S. at 264 (Harlan, J., dissenting).

328. *See* Sawyer v. Butler, 881 F.2d 1273, 1288-89 (5th Cir. 1989) (en banc) (no justification for overturning decisions reached "in complete conformity to constitutional standards in place when the convictions became final"), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

329. *See, e.g.*, Butler v. McKellar, 110 S. Ct. 1212, 1222 & n.5 (1990) (Brennan, J., dissenting) (majority opinion begs question, "deterrence of what?;" majority's approach deters only

one view, habeas corpus is intended only to deter state courts from defying clear prior law. On this view, whenever existing law is ambiguous, a state judge can be said to have acted responsibly if she reached any one of the almost certainly plural conclusions that a reasonable jurist could reach based on existing law. If the state judge's conclusion turns out to be different from the one the Supreme Court ultimately reaches, the federal judiciary should not subject the state judge to the negative message of reversal because of the state judge's responsible, albeit erroneous, interpretation of ambiguous prior law. Put the other way around, the deterrent policy simply does not come into play unless the state judge acted in demonstrable "bad faith"[330] — the very concept the post-*Teague* Court adopted, citing the Court's decision limiting the deterrent exclusionary remedy for some fourth amendment violations to "bad faith" police conduct.[331]

Consider some of the problems with viewing habeas corpus from this minimal-deterrence perspective. To begin with, the view either deprives habeas corpus of virtually *all* deterrent impact[332] or invites an insulting and

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"completely indefensible rejections of federal claims" and " 'illogical' defiance of a binding precedent precisely on point"); Hoffmann, *supra* note 3, at 180 ("Beneath this [deterrence-based definition of new rule] lurks the following question: What is the appropriate standard of care [to which] state judges deciding federal constitutional issues . . . should be held by their federal counterparts?"). The only answer the *Teague* plurality and *Butler-Parks-Sawyer* majorities give to Justice Brennan's question "deterrence of what?," *Butler*, 110 S. Ct. at 1222 (Brennan, J., dissenting), is circular — the habeas corpus statute is designed to deter state courts from failing to apply "existing" law defined as that law which the habeas corpus statute is designed to deter state judges from ignoring. The majority, that is, does not explain why, for example, habeas corpus is " ' "a necessary additional incentive [for state] trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with *established* constitutional standards" ' " — with "established" defined to mean fully formed and entirely dispositive — rather than in a manner consistent with, say, "obviously *developing*" or "manifestly foreshadowed" standards? *Id.* at 1217 (majority opinion) (quoting *Teague*, 109 S. Ct. at 1073 (quoting *Desist*, 394 U.S. at 262-63 (Harlan, J., dissenting))) (emphasis added).

330. *See* Hoffmann, *supra* note 3, at 181 (pre-1989 Term analysis predicting that "[t]he only kind of case that [could] be reversed on federal habeas, under [the] 'reasonable good faith' standard" that Justice Scalia advocated in his *Penry* dissent, "is one in which the state judge misapplies clear, binding federal precedent," a view "analogous to the minimal duty imposed on a police officer in a search warrant case under the current construction of the Fourth Amendment exclusionary rule").

331. *See* Sawyer v. Smith, 110 S. Ct. 2822, 2827 (1990); Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990) (quoting *Butler*, 110 S. Ct. at 1217 (citing with "Cf." signal United States v. Leon, 468 U.S. 897, 918-19 (1984))) (" 'The "new rule" principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.' "). Discussing the deterrence policy in the fourth amendment context is, *e.g.*, *Leon*, 468 U.S. at 906-13; discussing deterrence in both the fourth amendment and habeas corpus contexts is Stone v. Powell, 428 U.S. 465, 480-82 (1976).

332. *See generally* Fallon & Meltzer, *supra* note 6, at 1816 (Court's "too expansive" definition of new rules in the *Teague* line of cases "reduces the incentives for state courts, and state law enforcement officials to take account of . . . [federal] law"); West, *supra* note 6, at 86 (Court's 1990 decisions "*explicitly* undermine judicial responsibility . . . [by] strip[ping] the state judge of responsibility for all but the most egregious constitutional errors and [by] strip[ping] the federal judge of the duty to do anything but reverse patently unreasonable decisions" (emphasis in original)); *The Supreme Court, 1989 Term — Leading Cases*, *supra* note 6, at 316 (under Court's 1990 decisions, "there is little incentive for state courts to interpret Supreme

unadministrable case-by-case inquest into the good faith of state judges.

On the one hand, a categorical rule that simply assumes that state judges *did* in fact arrive responsibly at any conclusion at which a court potentially *could have* arrived responsibly, would have little deterrent effect; it would immunize state judges who, for example, proceeded according to the "principle" that all, even slightly, ambiguous legal questions should be resolved as a matter of course, and without further legal inquiry, against criminal defendants. Although this "principle" might well be the most politically prudent one for elected state judges to follow, it is legally indefensible, hence precisely the kind of rule that habeas corpus is meant to deter.[333]

On the other hand, a case-by-case inquiry into the *bona fides* of state judges' motivations is a palpably unsatisfactory means of avoiding this problem. How, for example, can habeas corpus petitioners expose state judges who are determined to find for the state whenever even the slightest ambiguity in the law exists? May the federal courts, by analogy to the burden *Batson v. Kentucky*[334] places on prosecutors in the peremptory challenge arena, require state trial and appellate judges, on the occasion of every ruling against a defendant, to intone a "neutral" explanation for their actions?[335] Or, must the federal courts, by analogy to the *Swain v. Alabama*[336] rule — the deterrent unworkability of which prompted the *Batson* substitute[337] — forbid a prisoner to recover until scores of other prisoners have laid down their liberty and lives in the course of establishing a "pattern" on the part of a given state judge of deciding for the state whenever ambiguity in the law allowed her to do so?[338]

Court precedent in a way that gives a criminal defendant the full benefit of current constitutional protections," so that "the deterrent force of the habeas writ is substantially and unacceptably diminished").

333. *See* J. LIEBMAN, *supra* note 3, § 2.2c, at 17 n.62 and accompanying text; *see also* Hoffmann, *supra* note 3, at 191 & nn.92, 94 (citing authority) ("state courts . . . continue to construe both their state constitutions and the federal constitution narrowly, recognizing defendants' claims only when compelled to do so by controlling precedent"); Neuborne, *supra* note 30, at 1105-06. *But see Sawyer*, 110 S. Ct. at 2827, 2831 (Court eschews "skepticism of state courts['] willingness to "recognize federal constitutional protections [when] . . . they are [not] compelled to do so" because "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution"). Generally reviewing the lively debate over the last 15 years concerning the existence *vel non* of "parity" between state and federal courts in the exposition of federal constitutional law is Chemerinsky, *supra* note 30.

334. 476 U.S. 79 (1986).

335. *See id.* at 97-98. The common preference of state appellate judges — not to mention state trial judges — to rule by one-sentence orders, even in situations involving multiple claims, is revealed in the line of procedural-default cases, typified by Coleman v. Thompson, 59 U.S.L.W. 4789 (U.S., June 24, 1991), and Harris v. Reed, 109 S. Ct. 1039 (1989), in which difficulties are encountered because the ground of the state-court decision is ambiguous. *See* J. LIEBMAN, *supra* note 3, §§ 24.2c, 24.2d (collecting cases).

336. 380 U.S. 202 (1965).

337. *See Batson*, 476 U.S. at 100.

338. Consider, for example, the track record of the Georgia state court judge who is elected by citizens of the rural county in which the correctional facility housing death row sits and who hears all state postconviction petitions filed by capitally sentenced prisoners in the state. A study of the 49 capital postconviction petitions that the judge adjudicated between

And what would such a pattern look like? Moreover, even assuming federal judges could identify adherents of the rule "when in any doubt, decide for the state" — and even assuming federal judges could or should brand such adherence bad faith — it is hard to imagine a greater indignity inflicted upon state judges by a federal inquisition into the *bona fides* of state judges' motives.[339]

Nor does the Court's fourth amendment analogy help. For in the fourth amendment context, the Court has limited the good faith defense to police officers proceeding under a warrant.[340] These situations arise only after a separate, more neutral and detached judicial[341] process has been substituted for a lower-level bureaucratic process that we have reason to distrust.[342] The use of a "good faith" defense to habeas corpus relief has exactly the opposite effect. It does not encourage resort to a separate, broader-minded, and more neutral and detached process to supplement a process that is locally embedded, highly charged politically, and subject to doubts about its neutrality.[343] Rather, the "good faith" defense to habeas corpus relief acts entirely to *deprive* persons victimized by the more suspect process of access to the less suspect one.

Remember, too, that a sanction's deterrent effect is a function not only of the sanction's certainty but also of its severity.[344] In this regard, there is reason to doubt the deterrent effect of a rule that forbids federal court intervention until the unlikely discovery of an egregious, essentially nose-thumbing

1983 and 1988 reveals that the judge granted relief in only one case (and the Georgia Supreme Court granted relief in only one other case), leaving the federal courts to correct constitutional errors in 16 of the 35 cases (12 cases remaining under consideration) that the federal courts had resolved as of the date of the study. Thus, the 2% rate (1/49) at which the trial judge (and the 4% rate (2/49) at which Georgia postconviction courts as a whole) found constitutional error in *all* capital cases may be compared with the 46% rate (16/35) at which the federal courts found constitutional error in *only* those cases in which the Georgia courts found none. Statement of Elaine R. Jones, Deputy Director-Counsel, NAACP Legal Defense and Educational Fund, Inc., Concerning Reform of the Capital Habeas Corpus Review Process, *Hearings Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (June 6, 1990), at 11-12 n.35; *see also supra* note 15 (overall, federal courts find constitutional error in 40-46% of the capital cases in which state courts find none).

339. Among the numerous decisions seeking to avoid indignities that habeas corpus might inflict on state judges are Coleman v. Thompson, 59 U.S.L.W. 4789, 4793 (U.S., June 24, 1991) (explicitly invoking the state courts' "dignitary interest" as a basis for limiting habeas corpus review); Sawyer v. Smith, 110 S. Ct. 2822, 2831 (1990); Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982).

340. *Compare* United States v. Leon, 468 U.S. 897, 923-25 (1984) ("bad faith" requirement applied to police officer proceeding under judicial warrant) *with* United States v. Curzi, 867 F.2d 36, 44 (1st Cir. 1989) (citing *Leon*, 468 U.S. at 921, and Illinois v. Krull, 480 U.S. 340, 349 (1987)) (rejecting "bad faith" requirement for police conduct undertaken without judicial warrant or specific legislative authorization).

341. Or legislative. *See* Illinois v. Krull, 480 U.S. at 349 (good faith defense for officers acting in objectively reasonable reliance upon state statute specifically authorizing search). Or administrative. *See* United States v. Ortiz, 714 F. Supp. 1569, 1577-80 (C.D. Cal. 1989) (good faith defense for officers acting in objectively reasonable reliance upon FAA regulation specifically authorizing search), *aff'd*, 899 F.2d 19 (9th Cir. 1990).

342. *See* J. ELY, DEMOCRACY AND DISTRUST 172 (1980).

343. *See supra* note 338.

344. *See, e.g.*, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 288 (1968).

violation, then limits the intervention permitted to telling the offending party to "run the play over again." Things might have been different had the courts during the first half of this century refrained from replacing the traditional habeas corpus remedy — "*un*conditional release" orders actually liberating victims of unlawful incarceration — with "conditional release" orders freeing only those prisoners whom the state fails to retry within a reasonable period.[345] But now that retrial, not release, is the presumptive result of successful habeas corpus litigation, the deterrent penalty exacted for a state official's constitutional violation is not — as one proponent of the "deterrence" rationale mistakenly argues — to "set" the prisoner "free,"[346] but merely to prosecute or sentence the defendant again. Accordingly, as Professors Cover and Aleinikoff have so elegantly demonstrated, it is not the federal judge's occasional slap on the state judge's wrist that improves the quality and tempers the parochialism of constitutional adjudication in state criminal courts, but rather the routine, continuous — indeed, repetitive — "dialogue" in which habeas corpus traditionally has impelled the two judiciaries to engage.[347]

An alternative view of the deterrence policy might define responsible constitutional interpretation and adjudication as an effort to bring the Constitution and prior precedents to bear on the question at hand and to replicate, as best the interpreter can, the decisionmaking process that a responsible and legally adroit Supreme Court assumedly will apply when that Court finally resolves the question.[348] This view holds that the only truly effective way to give state-level actors an incentive to treat ambiguous questions of federal constitutional law responsibly is to require state-level decisions to be remade whenever they deviate from the Supreme Court's ultimate resolution of the question, as long as the Supreme Court's resolution is not clearly inconsistent with preexisting law.[349] Assuming, as the drafters of the Constitution arguably did,[350] that the Supreme Court's decisions interpreting the Constitution are authoritative precisely because that Court is best placed to interpret federal law responsibly, the most effective way to encourage state courts to conduct constitutional interpretation consistent with Supreme Court precedent is

345. *See* J. LIEBMAN, *supra* note 3, § 5.2, at 39-40, § 8.5, at 108-09; 2 J. LIEBMAN, *supra* note 3, §§ 31.4c, 31.4d.

346. Hoffmann, *supra* note 3, at 178; *see also The Supreme Court, 1989 Term — Recent Decisions*, *supra* note 6, at 319 ("to set the guilty free").

347. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1049 (1977). This same concept lies behind the appellate understanding of habeas corpus. *See supra* notes 20-21 and accompanying text; *infra* notes 367-69 and accompanying text.

348. *See generally* Fallon & Meltzer, *supra* note 6, at 1816 (criticizing Court's "new rule" definition for muting state officials' "incentives . . . to take account of the evolving direction of the law"); West, *supra* note 6, at 59 (criticizing Court's "new rule" definition because it does not encourage "state []or federal judges . . . [to] understand the prevailing law to include the articulation and enforcement of principles not yet formulated as positive law").

349. *See infra* note 351.

350. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 386-87 (1821); THE FEDERALIST No. 81, at 486 (A. Hamilton) (C. Rossiter ed. 1961).

to give them negative feedback whenever they resolve ambiguous questions differently from the way the Supreme Court has resolved those questions.[351]

Although the words,[352] if not the actual holdings,[353] of the Court's *Butler*, *Parks*, and *Sawyer* decisions tend towards the former, minimal-deterrence approach to habeas corpus, and *Teague* is of two minds on the issue,[354] the Court's "full retroactivity" decisions in *Yates v. Aiken*[355] and *Penry v. Lynaugh*[356] seem to reject the minimal-deterrence approach.[357] In both *Yates* and *Penry*, the Supreme Court refused to characterize rulings as "new." In both cases, moreover, the majority did so although four members of the Court vigorously dissented on the explicit ground that the rulings were not justified by prior law and on the ground that many — in the case of *Penry, all* — lower state and federal courts had reached conclusions contrary to the Supreme Court's 5-4 rulings.[358] In neither case was it possible to conclude that the four Justices in dissent and the various lower state and federal judges whose decisions were reversed or overruled had proceeded "irresponsibly," under the minimal-deterrence understanding of the term,[359] in reaching a conclusion contrary to that eventually reached by a majority of the Supreme Court under conditions of precedential ambiguity. As Justice Scalia, a partisan of the minimal-deterrence understanding, put the matter in his *Penry* dissent, "[i]t . . . [is] utterly impossible to say that a judge acting in good faith and with care should have known the rule announced today, and that future fault similar to that of which the Texas courts have been guilty must be deterred by making good on the 'threat' of habeas corpus."[360]

The deterrence policy thus provides neither a clear definition of "new law" nor a principle that harmonizes the Court's recent criminal retroactivity decisions. Rather, it is possible to reason from a deterrence policy to two

351. *See Cohens*, 19 U.S. (6 Wheat.) at 377, 415-19. This interpretation of the deterrence policy regarding new Supreme Court decisions on previously *ambiguous* constitutional issues does not require retroactive application of Supreme Court decisions that constitute a clear break with theretofore *unambiguous* prior law. For, in the latter instance, unlike the former, responsible lower court adjudication deviates from responsible Supreme Court adjudication because of the greater latitude available to the highest court than to lower courts to reconsider and reject the highest court's prior precedents. The "new rule" definition that a "maximal deterrence" understanding would require — that a Supreme Court ruling is not "new" unless reasonable state judges would have been compelled to decide the case differently on the basis of preexisting law — is something like the opposite of the Court's current definition — that a Supreme Court ruling is "new" unless reasonable state judges would have been compelled to decide the case the same way on the basis of preexisting law.

352. *See supra* notes 225-39 and accompanying text.

353. *See supra* notes 34, 227.

354. *See supra* note 321 and accompanying text; *infra* note 384 and accompanying text.

355. 484 U.S. 211 (1988).

356. 109 S. Ct. 2934 (1989).

357. For an attempt to bring *Penry* within something like the minimal-deterrence approach, see *supra* notes 297-98 and accompanying text.

358. *Penry* and *Yates* are discussed *supra* notes 211-14, 217-24 and accompanying text; *accord, e.g.*, Truesdale v. Aiken, 480 U.S. 527 (1987) (discussed *supra* note 214).

359. *See supra* notes 329-30 and accompanying text.

360. *Penry*, 109 S. Ct. at 2965 (Scalia, J., concurring in part and dissenting in part).

polar positions on the "new rule" question — and to the varying points in between that the Court's recent decisions arguably occupy. Accordingly, resort to supplementary policy considerations is necessary, whether to provide a clearer understanding of the malefactions habeas corpus is designed to deter, to indicate how much deterrence is enough, or simply to resolve the uncertainty left after both questions are answered.[361] In *Teague* and subsequent cases, the Court mentioned two policies in addition to deterrence. Both, however, are unsatisfactory.

2. Finality

First, the Court made the traditional genuflection[362] in the direction of "finality." " ' "The interest in leaving concluded litigation in a state of repose" ' " and in relieving the States of having " ' "*continually* . . . to marshal resources in order to keep in prison [convicted] defendants," ' " the Court said, " ' "may quite legitimately be found by [the officials] responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when the habeas petition is filed." ' "[363]

This statement wears the difficulties with the "finality" policy on its (slightly retro?) sleeve. To begin with, the passage does not identify the "officials responsible for defining the scope of the writ." But surely those officials include the drafters of the habeas corpus statute, who (1) extended federal jurisdiction to *all* "custody pursuant to the judgment of a State court . . . [that] violat[es] . . . the Constitution;"[364] (2) directed federal courts to remedy unlawful custody "as law and justice require;"[365] and, more recently, (3) identified all pertinent legal and "mixed" legal-factual issues as matters "for independent federal determination."[366] Whatever else Congress meant by these actions, it surely did *not* intend to make "final" either the judgments of state courts establishing custody or the legal conclusions those courts reached in holding that custody to be constitutional. Indeed, the evolution of habeas

361. *See generally The Supreme Court, 1989 Term — Leading Cases*, *supra* note 6, at 315 (criticizing Court's 1990 decisions for their "reluctance to recognize that habeas corpus serves purposes other than deterrence").

362. *See, e.g.*, McCleskey v. Zant, 111 S. Ct. 1454, 1468-69 (1991); Stone v. Powell, 428 U.S. 465, 489-94 (1976).

363. Butler v. McKellar, 110 S. Ct. 1212, 1216-17 (1990) (quoting Teague v. Lane, 109 S. Ct. 1060, 1072, 1075 (1989) (quoting Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in part and dissenting in part)) (emphasis and bracketed material in original)); *accord* Sawyer v. Smith, 110 S. Ct. 2822, 2831 (1990) (quoting *Teague*, 109 S. Ct. at 1074) (" '[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system' ").

364. 28 U.S.C. § 2254(a) (1988).

365. *Id.* § 2243.

366. Miller v. Fenton, 474 U.S. 104, 115 (1985) (interpreting 28 U.S.C. § 2254(d)) (discussed *supra* note 290 and accompanying text).

corpus from a pretrial means of *substituting* federal for state jurisdiction[367] to a post-appeal means of *supplementing* state constitutional remedies, once exhausted, with federal remedies[368] suggests that Congress more recently has intended to place federal courts in an *appellate* relationship to state courts (insofar as federal legal issues are involved) such that finality does not arise in the normal course until completion of habeas corpus review.[369]

Moreover, as the previously mentioned Court's discussion of finality goes on to acknowledge, the best that can be said about finality interests is that they "may quite legitimately be found by the officials responsible for defining the scope of the writ to outweigh in *some, many,* or *most* instances the competing interest in readjudicating convictions according to legal standards in effect when the habeas petition is filed." Finality analysis thus ends at the same unsatisfactory point as deterrence policy: On a continuum running from 0 to 100% of all decisions being counted as "new," the proper placement of the "new rule" definition is such that either "some, many, or most" decisions ought properly to be so categorized.

3. *Judicial Counterweight to Congressional Remedies*

The last policy that one may extract from *Teague* and later decisions is no more satisfactory. It may, however, expose the pretense in the Court's reliance on the deterrence and finality policies and reveal the Court's true attitude towards what "the officials responsible for defining the scope of the writ" actually wrought. " 'Given the "broad scope of constitutional issues [that Congress has made] cognizable on habeas," ' " the Court says, " 'it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." ' "[370] In other words, Congress made the range of issues cognizable on habeas corpus so broad that it behooves the Court to do what it can to narrow those issues. Precisely, that is, because Congress wanted something more like maximal than minimal deterrence to occur — and because Congress apparently meant to defer to finality in only "some," and not in "many or most," respects — the Court seems to feel both compelled and empowered to adjust the scale dramatically in the opposite direction.

The Court thus made a policy out of what commentators have identified as the principal effect of *Teague*: It took the constitutional violations that "previously [were] viewed by some as virtually deontological in their signifi-

367. *See* Fay v. Noia, 372 U.S. 391, 416 (1963); Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86; Amsterdam, *supra* note 3, at 819-25.

368. *See* 28 U.S.C. §§ 2254(b), 2254(c) (1988).

369. *See* J. LIEBMAN, *supra* note 3, §§ 5.2, 26.1, 26.2, 27.1, 28.1, 35.1; Friedman, *supra* note 22, at 254, 329; Higginbotham, *supra* note 3, at 1012-16.

370. Butler v. McKellar, 110 S. Ct. 1212, 1216-17 (1990) (quoting Teague v. Lane, 109 S. Ct. 1060, 1072, 1075 (1989) (quoting Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part))).

cance" and "*reduced* [them] to instruments of deterrence of certain forms of state misconduct, instruments whose value might . . . be exceeded by their costs . . . ."[371] The question the Court's motivation raises is not whether in an ideal, or in our own, world deterrence of judges disposed to ignore the law deserves deontological significance while remedying constitutional violations does not. Indeed, a system — for example, the pre-*Teague* habeas corpus system — can give *both* values significance by using constitutional remedies not only for their own sake but also as a means of deterring state court disrespect of federal law.[372] Rather, the question is whether the Court is authorized to deemphasize constitutional remedies in favor of the "lesser included" concern for deterrence on the ground that Congress' opposite emphasis is immoderate or misguided.[373]

For me, the answer to this question is not difficult. However spacious the Court's power to interpret, revise, and refine the habeas corpus statute may be,[374] that power ought not to extend to the deliberate frustration of the legislative body's express statutory intention.[375] The nonretroactivity doctrine supports this proposition. An important basis for giving lesser, *i.e.*, nonretroactive, status to some decisions and greater, *i.e.*, retroactive, status to other decisions is that the lower-status decisions tend toward the law-*making* side of the spectrum of judicial conduct while the higher-status decisions tend toward the law-*elaborating* side of the spectrum. Moreover, however one ranges judicial conduct along that spectrum when a constitution is being expounded, surely when instead a *statute* is being construed, the lowest-status — or most clearly law-*making* — activity of all is a court's deliberate decision to counter the policy, especially a constitution- and liberty-protecting policy,[376] that con-

371. Weisberg, *supra* note 3, at 14 (emphasis added); *see also* Hoffmann, *supra* note 3, at 167, 170, 178 (*Teague* proceeds on a " 'deterrence of state courts' theory" of habeas corpus and devalues "the 'vindication of federal rights/protection of liberty' theory"); *The Supreme Court, 1989 Term — Leading Cases*, *supra* note 6, at 315-16 (*Teague* substitutes weak deterrence policy for policy of remedying denials of constitutional rights of personal liberty).

372. *See* Hoffmann, *supra* note 3, at 178-79 ("In the typical habeas case, . . . a grant of habeas relief . . . vindicates the petitioner's federal rights, and by doing so it serves to deter the state courts from ignoring or misconstruing such rights in the future.").

373. Nor is there any question about Congress' "broad" remedial emphases, even had the Court not so candidly acknowledged them. For the habeas corpus statute manifests those emphases in its two jurisdictional prerequisites: "custody" — the state's consequential withdrawal of personal liberty or life — and a "violation of the Constitution or laws or treaties of the United States." *See supra* note 364 and accompanying text.

374. *See supra* note 9.

375. It is perhaps the Court's acknowledged transformation of what Congress deemed the major virtue of habeas corpus into a vice that led a strong supporter of *Teague* to criticize the "reasonable minds could differ" approach to new rules as "inappropriately crabbed" and "unseemly." Hoffmann, *supra* note 3, at 181-84 (advocating "new rule" test requiring "conceptual faithfulness" and not "mere decisional obedience" to prior law).

376. When statutory policy clearly clashes with constitutional — and even, possibly, with historically and culturally accepted — policy, then some interpretive accommodation might be required. Here, however, the constitutional and statutory policies run in the *same* direction, and the only other policies the Court has identified either are accommodated by the vindication of the conjoint constitutional and statutory policies, as is true of the "deterrence" policy, *see*

cededly motivated the legislature's design of the statute.

Even if, in law and logic, the post-*Teague* majority's preference for narrowing the breadth of issues cognizable in habeas corpus may supersede Congress' opposite preference when the matter is before the Justices, the ball is not now in law's and logic's or even the Justices' court but, rather, in Congress'.[377] And there is no reason why Congress must concede judicial supremacy as it contemplates revising or codifying *Teague*. The question remains, therefore, what *Congress* ought to do and, as we have seen, the policies discussed by the Court in *Teague* — deterrence, finality, and the need to moderate the existing statute's violation-remedying emphases — do not provide sufficient answers to that question. Against the possibility that Congress will want to inform its judgment on the question with additional policy considerations, let me turn to one such consideration that charts the way to a middle ground between the two polar nonretroactivity positions to which both the deterrence and the finality rationales led us above.[378]

4. Reliance

The policy I have in mind does not underpin habeas corpus but rather nonretroactivity. As noted above, the usual presumption is that judicial decisions are fully retroactive.[379] The one generally recognized exception to this rule comes into play when a party disadvantaged by the new decision reasonably relied to its detriment on the law being other than the new decision states.[380] As Justice O'Connor recently noted in the *civil* retroactivity context,

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supra note 372 and accompanying text, or have insufficiently clear historical or cultural acceptance to overcome the other policies, as is true of the "finality" policy. *See* J. LIEBMAN, *supra* note 3, § 26.2 (Supp. 1991) (300-year-old Anglo-American practice of subordinating finality to habeas corpus remedies). *But see* McCleskey v. Zant, 111 S. Ct. 1454, 1462-70 (1991) (noting, then rejecting, that longstanding practice). Although *Teague* refers to a potentially competing value with constitutional status, namely, federalism, *see infra* note 418 and accompanying text, that policy is not necessarily competing. Rather, because of the close historical link between the habeas corpus remedy and the fourteenth amendment's extension of national constraints upon the states, I am inclined to think that a broad habeas corpus remedy does not offend, but rather implements, the arrangement of federal and state powers that the post-bellum Constitution contemplates. *See* J. LIEBMAN, *supra* note 3, §§ 2.2a, 2.2b.

377. *See supra* notes 146, 320 and accompanying text.

378. *See supra* text following notes 360, 369.

379. *See* American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2343 (1990) (plurality opinion); *supra* note 37 and accompanying text.

380. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4737 (U.S., June 20, 1991) (plurality opinion) (nonretroactivity is most appropriate when "apply[ing] the new rule to parties who relied on the old would offend basic notions of justice and fairness"); *id.* at 4741 (O'Connor, J., dissenting) (rule before Court ought to be held nonretroactive because "every jurisdiction in the Nation . . . reasonably relied" on a contrary rule); Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (ruling that portions of 1978 Bankruptcy Act were unconstitutional is nonretroactive, else the Court "would . . . visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts"); Lemon v. Kurtzman, 411 U.S. 192, 199 (1973) (although statute requiring state to reimburse private religious schools for certain educational services is unconstitutional, state could reimburse religious schools for expenses incurred in reasonable reliance on statute before it was ruled unconstitutional; a "fact of legal life [that] underpins our

"[i]n determining whether a decision should be applied retroactively, th[e] Court has consistently given great weight to the reliance interests of all parties affected by changes in the law."[381] "When the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disrup-

modern decisions recognizing a doctrine of nonretroactivity" is that "statutory or even judge-made rules of law are hard facts on which people must rely in . . . shaping their conduct"); Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (congressional enactment adopting short statute of limitations would not be applied retroactively to cut off rights of litigants who had relied on longer preexisting limitation periods; nonretroactivity appropriate when the "new principle of law . . . overrul[ed] clear past precedent on which litigants may have relied"); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (per curiam) ("Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 496 (1968) (similar to *Chevron Oil*); Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932) ("decisions of . . . [the] highest court, though later overruled, are law none the less for intermediate transactions"); Douglass v. County of Pike, 101 U.S. 677, 686 (1879) ("we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected"); Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 206 (1863) (quoting The Ohio Life & Trust Co. v. Debolt, 57 U.S. (16 How.) 416, 432 (1853)) (bonds valid under judicial decisions in place when bonds issued remain valid and enforceable even after those decisions were overruled and the legislature's issuance of the bonds was deemed constitutionally *ultra vires*: " 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law;' " "[t]o hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal"); Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. REV. 745, 769 (1983) (discerning in Court's cases a "heightening" of the importance of "reliance" in retroactivity adjudication); Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 COLUM. L. REV. 230, 243 (1918) (courts "do not, with but few exceptions, allow a change of construction of a statute or constitutional provision to retroact to the impairment of rights acquired in reliance on the first construction"); Mishkin, *supra* note 37, at 73 ("The most commonly accepted ground for denying retroactive operation to new judicial precedent . . . is that such operation might unjustly inflict harm on those who justifiably relied on preexisting authority."); Note, *Limitation of Judicial Decisions to Prospective Operation*, 46 IOWA L. REV. 600, 601 (1961) ("The bond common to almost all cases refusing to apply a decision retroactively is the element of justifiable reliance;" nonretroactivity designed "to prevent the impairment of rights acquired in reliance on a prior decision"); Note, *Retroactive Application of Statutes: Protection of Reliance Interests*, 40 MAINE L. REV. 183 (1988); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 919 & n.68, 923 (1962) (citing extensive authority) (*Gelpcke v. Dubuque* and succeeding cases "recognized that state courts may sometimes and for some purposes be regarded as making law prospectively, much as legislatures do, rather than merely as declaring it retroactively, and that such regard would particularly be forthcoming when significant reliance had been placed upon the overruled decisions;" *Great Northern Ry. v. Sunburst Oil & Ref. Co.* encouraged state courts to "honor *bona fide* reliance and reasonable expectations"). Although the Warren and Burger Courts narrowed the nonretroactivity doctrine somewhat in regard to new constitutional criminal procedure decisions, they continued to treat reasonable reliance as *a*, if not always the only, consideration. *See, e.g.*, Solem v. Stumes, 465 U.S. 638, 646, 647-50 (1984); Stovall v. Denno, 388 U.S. 293, 297 (1967); decisions cited *infra* note 390. The analysis presented here thus seeks to restore to reliance the *determinative* status that it once enjoyed in the retroactivity sphere generally and that it continues to enjoy in the civil sphere.

381. *American Trucking Ass'n*, 110 S. Ct. at 2334-35 (plurality opinion).

tive effect on those who relied on prior law."[382] This same principle, focused in the present context on reasonable reliance by state-level participants in the criminal justice system,[383] also helps explain much of the plurality's discussion of "new rules" in *Teague*, the otherwise errant-seeming decisions in *Yates* and *Penry*, and even the narrow holdings, if not the broad language, of *Butler*, *Parks*, and *Sawyer*.

Consider, first, the *Teague* plurality opinion. Although the plurality uses the term "finality," its exegesis of the concept draws instead upon the Court's longstanding equitable policy of avoiding the frustration of interests that arose because of an actor's reasonable reliance on existing law:

> [I]t has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule. In *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 . . . (1940), the Court held that a judgment based on a jurisdictional statute later found to be unconstitutional could have *res judicata* effect. The Court based its decision in large part on finality concerns. "The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have *consequences which cannot justly be ignored.* The past cannot always be erased by a new judicial declaration. . . . Questions of . . . prior determinations deemed to have finality and *acted upon accordingly* . . . demand examination." *Id.*, at 374.
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> . . . [T]he application of new rules to cases on collateral review [is] . . . intrusive . . . [because] it *continually* forces the States to marshall resources in order to keep in prison defendants whose trials and appeals conformed to *then-existing constitutional standards.* Furthermore, as we recognized in *Engle v. Isaac*, [456 U.S. 107 (1982),] "[s]tate courts are understandably frustrated when they faithfully apply *existing constitutional law* only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." 456 U.S. at 128 n.33.[384]

These passages focus the retroactivity doctrine and its "new rule" concomitant on the extent to which, if applied retroactively, a new decision would undermine consequences that legitimately accrued when state judges justifiably relied upon "then-existing constitutional standards." On the other hand — quoting now from Justice O'Connor's more forthrightly reliance-based retroactivity jurisprudence in the civil sphere — when state judges can "be expected to foresee that a decision of th[e Supreme] Court would overturn" their

382. *Id.* at 2338.

383. These authorities can roughly be said to be the "real responding parties in interest" in habeas corpus cases.

384. Teague v. Lane, 109 S. Ct. 1060, 1074, 1075 (1989) (plurality opinion) (all emphases added, except on word "continually").

resolution of a matter, their "reliance interests may merit little concern," and retroactivity may be appropriate.[385]

Under a reliance-based analysis, the critical question is whether, when state judges imposed and affirmed the prisoner's conviction, those judges justifiably relied on the law's being other than the Supreme Court subsequently declared it to be. Or, to use Justice Harlan's formulation — which in so many other respects the *Teague* Court is disposed to follow — a rule is "new" only if, "at the time the petitioner's conviction became final," the state courts could predict "with any assurance that this Court would . . . rule [] differently" from the way the Court actually ruled thereafter.[386] If such "assurance" is lacking — that is, if the state courts were reasonably forewarned of the possibility of legal development or change, and accordingly cannot be said *reasonably* to have relied on the law being other than the Supreme Court subsequently declared it to be — then retroactive application is appropriate.

This approach not only assimilates "finality" to reliability[387] but also connects reliability to deterrence. For making a decision's retroactivity turn on the absence of justifiable state court reliance on the law's previously being different gives the state courts an incentive, when the law is ambiguous, to try conscientiously to predict the direction the Supreme Court's authoritative interpretation will take the law. As another authority whom the *Teague* plurality considers persuasive[388] writes:

> The key to this analysis lies in the concept of "justified" reliance. For if the old law is clearly unjust or immoral by community standards or if adequate judicial warning has been given that it is subject to imminent reconsideration, reliance upon it should not be considered justified . . . .
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> . . . .
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> [T]he fact that . . . holdings will have retroactive operation can produce an advantage in a different direction. For, if such holdings can be reasonably anticipated, some incentive may be provided for those who will be affected in the future to seek to conform in advance to the expected standards.[389]

Defining "new rules" in terms of reliance thus effectuates Congress' deterrence policy:[390] A reliance-focused definition simultaneously gives state

385. *American Trucking Ass'n*, 110 S. Ct. at 2333 (plurality opinion); *accord* James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4739 (U.S., June 20, 1991) (White, J., concurring in the judgment) ("reasonably foreseeable" rulings deserve retroactive application); Hallstrom v. Tillamook County, 110 S. Ct. 304, 312 (1989) (prior "notice" of demands recognized in recent decision favors making the decision retroactive).

386. Desist v. United States, 394 U.S. 244, 264 (1969) (Harlan, J., dissenting).

387. *See supra* note 384 and accompanying text.

388. *See Teague*, 109 S. Ct. at 1069, 1074-75 (plurality opinion) (relying on Mishkin, *supra* note 37).

389. Mishkin, *supra* note 37, at 70, 72.

390. Defining "new rules" in terms of reliance is not innovative. Rather, that kind of

courts an incentive (the "reward" of nonretroactivity of later, contrary decisions) to follow existing constitutional precedents, when such precedents are available to be relied upon, and another incentive (the " 'threat' "[391] of reversal) to try to predict and emulate the Supreme Court's likely future interpretation, when the Court's existing precedents do not by themselves provide or suggest a rule that the Court can be expected to follow when it thereafter addresses the issue.

Next, consider the capacity of the reliance policy to explain the outcome in *Teague* and in other recent criminal nonretroactivity decisions. In *Teague*, a seven-person *majority* reiterated the Court's earlier holding that its decision in *Batson v. Kentucky*[392] — which overruled part of *Swain v. Alabama*[393] in regard to the standard for proving that a prosecutor unconstitutionally exercised her peremptory challenges on the basis of race — announced a new rule.[394] Given *Batson*'s overruling of *Swain*, the "new rule" question would seem to have been an easy one. Yet, even after making the "overruling" point, the majority felt compelled to address the petitioner's claim that the Court had telegraphed its *Batson* ruling three years earlier (before the petitioner's case became final) in *McCray v. New York*.[395]

In *McCray*, five Justices, in two separate opinions respecting the denial of certiorari, stated that the rule of *Swain* either did, or might soon, deserve reexamination.[396] The argument Teague bottomed on *McCray* was, of course, a reliance-based argument — that, after *McCray*, state courts could not reasonably rely on *Swain*. The Court's explanation for rejecting the petitioner's argument *also* relies on a "*justifiable* reliance" rationale, however — namely, that opinions accompanying the denial of certiorari, like the denial itself, have

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definition is implied by the frequent characterizations of decisions deemed not to be "new" as ones that were "evident from" or "anticipated" or "foreshadowed" by prior decisions, hence ones that upset no reasonable state court expectations. Lee v. Missouri, 439 U.S. 461, 462 (1979); Johnson v. New Jersey, 384 U.S. 719, 734 (1966); *accord, e.g.*, Ashland Oil, Inc. v. Caryl, 110 S. Ct. 3202, 3205 (1990) (per curiam) (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971)); American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2330-31 (1990) (plurality opinion); Solem v. Stumes, 465 U.S. 638, 646 (1984); United States v. Johnson, 457 U.S. 537, 549-50 (1982); Brown v. Louisiana, 447 U.S. 323, 336 (1980). Reliance analysis also explains the "out of the blue," "revolutionary," " 'substantial' " or "sharp break in the web of the law," and "disrupt[ive]" formulations long used to refer to "new" decisions. James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4742 (U.S., June 20, 1991) (O'Connor, J., dissenting); *Ashland Oil*, 110 S. Ct. at 3205 (per curiam); *Teague*, 109 S. Ct. at 1067 (majority opinion) (quoting Allen v. Hardy, 478 U.S. 255, 258 (1986) (per curiam)) (" 'substantial break with prior precedent' "); Milton v. Wainwright, 407 U.S. 371, 382 n.2 (1972) (Stewart, J., dissenting).

391. *Teague*, 109 S. Ct. at 1073 (plurality opinion) (quoting Desist v. United States, 394 U.S. 244 262-63 (1969) (Harlan, J., dissenting)).

392. 476 U.S. 79 (1986).

393. 380 U.S. 202 (1965).

394. *Teague*, 109 S. Ct. at 1066-67 (reaffirming Allen v. Hardy, 478 U.S. 255 (1986) (per curiam)).

395. 461 U.S. 961 (1983).

396. *Id.* at 963 (Stevens, J., concurring in denial of certiorari, joined by Blackmun and Powell, JJ.); *id.* at 964-70 (Brennan, J., dissenting from denial of certiorari, joined by Marshall, J.).

no "precedential values," hence provide no basis for undermining the state courts' reasonable reliance on existing and directly controlling precedent.[397] (Likewise, the Court held nonretroactive the alternative principle for which Teague contended, namely, that the sixth amendment's representativeness requirement, as well as the fourteenth amendment's discrimination proscription, applies to the process of configuring actual juries, because the Court had "expressly" rejected that principle in a prior leading case.[398])

Consider, finally, the ability of the reliance policy to explain the Court's outcome, if not its language, in the otherwise errant-seeming decisions in *Penry* and *Yates* and also, possibly, in its most recent decisions in *Parks* and *Sawyer*. Recall that in *Penry* the Court held retroactive a ruling that the application of Texas' death sentencing statute violated the Constitution by narrowly channeling the consideration of mitigating circumstances.[399] The difficult question — starkly posed in Justice Scalia's dissent[400] — was how the rule of *Penry* could be anything other than "new" given (1) the Court's prior decision in *Jurek* upholding Texas' death sentencing statute on its face, (2) the statute's fairly clear intention to divert most mitigation questions into the narrow channel the Court found unconstitutional in *Penry*, (3) the state and lower federal judiciaries' unanimous interpretation of *Jurek* as validating the practice the *Penry* Court ruled unconstitutional, and (4) the like interpretation given by four of the Court's members in *Penry* itself.

The answer to this question is found in Justice O'Connor's opinion for the Court in *Penry*. Although *Jurek* indeed upheld the Texas statute on its face, it did so based on the stated assumption that the statute as applied would permit the jury to consider fully and rely upon all mitigating circumstances in the defendant's background. Moreover, when capital sentencing procedures used in other states were subsequently found to violate that assumption, the Court in *Lockett v. Ohio*[401] and *Eddings v. Oklahoma*[402] reversed the resulting death sentences.[403] In sum, although *Jurek* surely permitted a court responsibly to

397. *Teague*, 109 S. Ct. at 1066-67 (majority opinion). Although this ruling is patently formalistic, hence contrary to the flexible and practical approach that typically informs equitable reliance analysis, the Court may be forgiven, perhaps, for attempting to maintain some control over the uses to which its members' least constrained flights of *obiter dicta* may be put.

398. *See id.* at 1065 (majority opinion); *id.* at 1069 (plurality opinion) (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

399. *See supra* notes 219-24 and accompanying text.

400. *See supra* note 218 and accompanying text.

401. 438 U.S. 586 (1978).

402. 455 U.S. 104 (1982).

403. Justice O'Connor put the point as follows in *Penry*:

> Thus, at the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty. Moreover, the facial validity of the Texas death penalty statute had been upheld in *Jurek* on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present. . . . [I]n light

conclude that the Texas practice was constitutional — indeed, that conclusion was the only one drawn by *any* Texas court prior to the Supreme Court's ruling on the issue over a decade after *Jurek* — *Jurek*'s own discussion of mitigation, together with the holdings of *Lockett* and *Eddings*, clearly put courts on notice that an alternative interpretation might also be appropriate. In the face of *Jurek*, *Lockett*, and *Eddings*, therefore, the lower courts could not reasonably have relied on the law being different from that announced in *Penry*.

Likewise, in *Yates v. Aiken*,[404] the Court faced the retroactivity of a rule that a number of lower courts and four members of the Supreme Court did not theretofore consider to be compelled by the Court's prior case law, most notably *Sandstrom v. Montana*.[405] *Sandstrom* ruled unconstitutional an instruction telling a jury to presume that the defendant intended the natural consequences of his actions. One could read *Sandstrom* to rule unconstitutional either (1) instructions requiring jurors *irrebuttably* to presume the existence of the intent element of an offense,[406] or (2) in addition, instructions requiring the defendant, in order to overcome a *rebuttable* presumption, to bear the burden of disproving the intent element.[407] Although prior to the 5-4 decision in *Francis v. Franklin*,[408] courts responsibly could — and some did — adopt the first interpretation, the Court in *Yates* unanimously recognized that the latter approach also was a viable "application of the principle that governed our decision in *Sandstrom v. Montana*."[409] Hence, in essence, the *Yates* majority determined that courts prior to *Francis* could not justifiably have relied on the law being different from that which the Court announced in *Francis*.[410]

Finally, the Court's own characterizations of the rules on which the prisoners relied in *Parks* and *Sawyer* also bring the nonretroactivity *outcomes* in those cases, if not all aspects of the Court's *language*, within a reliance-driven analysis. Thus, the Court concluded that the rule contended for in *Parks* "would contravene well considered precedents" and would be "difficult to reconcile . . . with our long-standing recognition that . . . capital sentencing must be reliable,"[411] while it noted that the Court previously had held the claim on

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of the assurances upon which *Jurek* was based, we conclude that the relief Penry seeks does not "impos[e] a new obligation" on the State of Texas.

Penry, 109 S. Ct. at 2946-47 (quoting *Teague*, 109 S. Ct. at 1070 (plurality opinion)).

404. 484 U.S. 211 (1988).

405. 442 U.S. 510 (1979); *see supra* notes 211-14 and accompanying text.

406. *See, e.g.*, Francis v. Franklin, 471 U.S. 307, 327 (1985) (Powell, J., dissenting); *id.* at 332-33 (Rehnquist, J., dissenting).

407. *See Francis*, 471 U.S. at 313-14 & n.2.

408. 471 U.S. 307 (1985).

409. Yates v. Aiken, 484 U.S. 211, 217 (1988).

410. A like analysis can explain the retroactivity holding in Truesdale v. Aiken, 480 U.S. 527 (1987) (discussed *supra* note 214).

411. Saffle v. Parks, 110 S. Ct. 1257, 1259, 1260, 1262 (1990) (discussed *supra* note 34). *But cf. supra* note 174 (to reach this conclusion, Court arguably had to mischaracterize the petitioner's claim).

which Sawyer relied to be " 'insubstantial' " and deserving of " 'little discussion.' "[412]

5. Summary

The "new rule" formulation that best accommodates the relevant deterrence, finality, remedial, and reliance policies, and the words and acknowledged intent of the habeas corpus statute, is this: A decision is "new" if, prior to the decision's announcement, the state courts can be said reasonably to have relied on the law being different from that which the decision declared the law to be.

IV.
WHAT'S "FINAL?"

Under current doctrine, all new decisions announced prior to the time a criminal conviction and sentence becomes "final" apply retroactively to that conviction and sentence; all new decisions announced after the point of finality are nonretroactive unless one of the two *Teague* exceptions is present.[413] The point at which "finality" sets in is accordingly critical for nonretroactivity purposes. Clearly, convictions and sentences are *not* final for nonretroactivity purposes until they have been (1) rendered at trial, (2) upheld on direct appeal by the highest available state court (unless an appeal was not filed on time), (3) reviewed on petition for a writ of certiorari (unless certiorari was not sought on time), *and* (4) if the certiorari petition was granted, reviewed on the merits in the United States Supreme Court.[414]

What existing case law does not completely resolve is whether there are some cases or claims that must get beyond the four steps delineated above before "the curtain of finality [is] . . . drawn."[415] *Teague* permits an affirmative answer to that question, given its description of nonfinal cases as ones " 'pending on direct review *or* not yet final.' "[416] Moreover, as Justice Powell

412. Sawyer v. Smith, 110 S. Ct. 2822, 2824, 2828-29 (1990) (quoting Maggio v. Williams, 446 U.S. 46, 49, 56 (1983)) (discussed *supra* note 227); *see also supra* notes 227, 302 (discussing possible notice- or reliance-based interpretation of Butler v. McKellar, 110 S. Ct. 1212 (1990)).

413. *See supra* note 66 and accompanying text.

414. *See, e.g., Sawyer*, 110 S. Ct. at 2826 (petitioner's "conviction and sentence became final on April 2, 1984, when we denied certiorari . . . ."); *Parks*, 110 S. Ct. at 1260 (petitioner's "conviction became final in 1983," the year the Supreme Court denied the direct appeal certiorari petition in his case, and the year after the Oklahoma high court denied his direct appeal); Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986) (per curiam) (quoting Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965)) (focusing on time "judgment of conviction was rendered, the availability of appeal [was] exhausted, and the time for petition for certiorari had elapsed"); Hamilton v. Jones, 907 F.2d 807, 808 (8th Cir. 1990) (petitioner, whose direct appeal was denied on March 25, 1986, given retroactive benefit of Batson v. Kentucky, 476 U.S. 79 (1986), decided on April 30, 1986, because time for certiorari petition did not expire until May 24, 1986).

415. Shea v. Louisiana, 470 U.S. 51, 60 (1985).

416. Teague v. Lane, 109 S. Ct. 1060, 1072 (1989) (plurality opinion) (quoting Griffith v. Kentucky, 479 U.S. 314, 328 (1987)) (emphasis added); *accord* American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2331 (1990) (plurality opinion) (discussing *Griffith*) (new criminal

noted in 1987, "[t]he Court [has not] decided whether the same retroactivity rules should apply to state post-conviction proceedings . . . [as] apply to federal habeas corpus proceedings."[417]

There are a number of reasons why equating "finality" with the end of the direct appeal process is troublesome, at least in some cases. First, certain policy concerns favor a line between state and federal, not direct and postconviction, proceedings.[418] Second, state law sometimes extends the period of nonfinality of criminal judgments beyond direct appeal.[419] Third, in contrast

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decisions are fully retroactive to cases "pending on direct review, *or* not yet final" (emphasis added)).

417. Truesdale v. Aiken, 480 U.S. 527, 529-30 (1987) (Powell, J., dissenting); *see also* Mallett v. Missouri, 110 S. Ct. 1308, 1310 (1990) (Marshall, J., dissenting from denial of certiorari) (suggesting that state postconviction court's decision to address merits of claim based upon new law creates exception to nonretroactivity rule forbidding federal habeas corpus court to do same); Solem v. Stumes, 465 U.S. 638, 651 (1984) (rule of Edwards v. Arizona, 451 U.S. 477 (1981), nonretroactive to case pending on federal habeas corpus at time *Edwards* announced, but noting that Court had not defined "[j]ust where the [retroactivity] line should be drawn as to *Edwards*"). Nor do Justice Harlan's separate opinions help in this regard, because the sharp distinction they draw between "RETROACTIVITY ON DIRECT REVIEW" and "RETROACTIVITY ON [FEDERAL] HABEAS CORPUS" leaves a good bit of uncharted territory in between. Desist v. United States, 394 U.S. 244, 258, 260 (1969) (Harlan, J., dissenting); *see also* Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part).

418. *See* Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990) ("*Teague* rule is grounded in important considerations of *federal-state* relations" (emphasis added)); *see also* Coleman v. Thompson, 59 U.S.L.W. 4789, 4790 (U.S., June 24, 1991) (as is true of most of Court's recent habeas corpus jurisprudence, "[t]his is a case about federalism"). The equal status that federal habeas corpus courts adjudicating exhaustion questions have given state direct appeal and postconviction proceedings supports a state-federal rather than direct-collateral line. *See, e.g.*, Pitchess v. Davis, 421 U.S. 482 (1975) (case not ripe for federal habeas corpus review because petitioner failed to exhaust state postconviction remedies); J. LIEBMAN, *supra* note 3, § 5.3a; *see also* Rose v. Lundy, 455 U.S. 509, 518-19 (1982) (federal habeas corpus review is of reduced importance because petitioner previously has secured review either in state appellate or postconviction setting). The state-federal line squares as well with policies that favor (1) giving *all* state courts an "incentive" to follow federal law, *see supra* notes 321-61 and accompanying text; (2) discouraging federal, and promoting state, judicial (including, it would seem, state postconviction) oversight of state criminal justice systems, *e.g.*, Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring); Mackey v. United States, 401 U.S. 667, 680 (1971) (Harlan, J., concurring in part and dissenting in part); and (3) drawing as bright a finality line as possible. *But cf.* Murray v. Giarratano, 109 S. Ct. 2765, 2769 (1989) (plurality opinion) (quoting Pennsylvania v. Finley, 481 U.S. 551, 556 (1987)) (state " '[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review' " and " 'is not part of the criminal proceeding itself, and . . . is in fact considered to be civil in nature' "). Generally discussing federalism notions of a sort that distinguish state from federal, not direct from collateral, proceedings are, *e.g.*, Teague v. Lane, 109 S. Ct. 1060, 1075 (1989); Francis v. Henderson, 425 U.S. 536, 538-39 (1976); Prieser v. Rodriguez, 411 U.S. 475, 491-92 (1973); Darr v. Burford, 339 U.S. 200, 205 (1950); *Ex parte* Royall, 117 U.S. 241, 252 (1886).

419. For example, North Carolina's postconviction remedy, a "motion for appropriate relief," is considered part of the original criminal action. N.C. GEN. STAT. § 15A-1411(b) (1988) ("A motion for appropriate relief, whether made before or after the entry of judgment, is a motion in the original cause and not a new proceeding."). Likewise, Tennessee postconviction proceedings are "criminal in nature," not "civil," *see* State v. Scales, 767 S.W.2d 157, 158 (Tenn. 1989), and are part of a single, continuous process that gives the same trial and appellate courts the same remedial powers with regard to two nonoverlapping sets of issues, the first set

to the "civil" and "collateral" section 2254 remedy for state prisoners,[420] the section 2255[421] remedy for federal prisoners bears the markings of an integral part of a continuous criminal proceeding that is segmented by no event or condition decisive of finality.[422] This characteristic of section 2255 proceed-

cognizable at trial and on direct appeal, the second set cognizable only in trial-level and appellate postconviction proceedings. *See, e.g.*, TENN. CODE ANN. § 40-30-103 (1988) (criminal trial judge who presided at trial also generally hears postconviction motion); *id.* §§ 40-30-114(a), 40-30-114(d)(1) (local prosecutor not state attorney general represents state); *id.* § 40-30-102 (postconviction motions must be filed within three-year time limit); *id.* §§ 40-30-111, 40-30-112 (postconviction motion limited to issues that were not and could not have been raised at trial and on appeal); *id.* §§ 40-30-105, 40-30-118 (trial and appellate postconviction courts have same powers they have immediately after trial and on direct appeal to "void," "vacate," "set aside," and hear a (delayed) direct appeal from conviction and sentence); *id.* § 40-30-122 (postconviction appeals heard by Tennessee Court of *Criminal* Appeals). *But cf.* Johnson v. Tennessee, 797 S.W.2d 578, 580 (Tenn. 1990) (court might have "decid[ed] against retroactive application" of new United States Supreme Court ruling handed down during petitioner's state postconviction proceedings but instead reaches and rejects merits under state's "plain error" rule). Virginia also effectively has bifurcated the appellate process of reviewing the constitutionality of criminal judgments, relegating some claims to direct appeal and other claims (which *cannot* be heard on direct appeal) to the postconviction process. *See, e.g.*, Coleman v. Thompson, 59 U.S.L.W. 4789, 4798 (U.S., June 24, 1991); Frye v. Commonwealth, 231 Va. 370, 345 S.E.2d 267 (1986); *see also* Koosed, *Some Perspectives on the Possible Impact of Diminished Federal Review of Ohio's Capital Sentences*, 19 CAP. U.L. REV. 695, 734-37 (1990) (similar analysis of Ohio's postconviction procedures). Accordingly, if the state-federal line discussed, *supra* note 418, is eschewed in favor of a line between remedies that are and are " 'not part of the criminal proceeding itself,' " and that are and are not " 'considered to be civil in nature,' " *Murray*, 109 S. Ct. at 2769 (plurality opinion) (quoting *Finley*, 481 U.S. at 556), then postconviction processes of the sort discussed in this footnote still may, and perhaps must, be said to precede finality.

420. 28 U.S.C. § 2255 (1988); *see* J. LIEBMAN, *supra* note 3, § 2.1.

421. 28 U.S.C. § 2255 (1988).

422. When it adopted section 2255, the Senate Judiciary Committee contrasted that procedure with the civil and collateral habeas corpus remedy, describing section 2255 as being "*in* the criminal proceeding [such that] this section affords the opportunity and expressly gives the broad powers," typically given criminal judges after trial, but not given habeas corpus judges after appeal, "to set aside the judgment" and to "discharge the prisoner or resentence him or to grant a new trial or correct the sentence as may appear appropriate." S. REP. NO. 1526, 80th Cong., 2d Sess. 2 (1948) (emphasis added). *Compare* Advisory Committee Note to R. GOV. § 2255 PROCEEDINGS IN U.S. DIST. CTS. 1 ("motion under § 2255 is a further step in the movant's criminal case and not a separate civil action") *and, e.g.*, Grady v. United States, 929 F.2d 468, 470 (9th Cir. 1991) (challenges to probation revocation generally not cognizable in section 2255 proceedings because such proceedings are "a further step in a criminal case, rather than a separate civil action") *with Ex parte* Tom Tong, 108 U.S. 556, 560 (1883) (habeas corpus motion is *not* part of criminal process and initiates separate, *civil* proceeding). *See generally* J. LIEBMAN, *supra* note 3, § 2.1; 2 J. LIEBMAN, *supra* note 3, § 36.2. This allocation of authority not only gives section 2255 judges the trial judge's traditional power, withheld from section 2254 judges, to release prisoners on grounds of insufficient evidence, *see id.* § 2.2c, but also means that retrial relief ordered under section 2255, unlike section 2254, immediately nullifies the original judgment and returns the case to a pretrial status such that conceptually no appealable final judgment exists. *See* Andrews v. United States, 373 U.S. 334, 340 (1963); *cf.* Browder v. Director, 434 U.S. 257, 265-67 (1978) (habeas corpus relief requiring retrial is final order appealable before retrial). In addition, section 2255's drafters designed it to "restate[], clarif[y] and simplif[y] the procedure in the nature of the ancient writ of coram nobis," 1948 Revisor's Note to 28 U.S.C. § 2255, which the Supreme Court long had treated as part of the original criminal process. *See* United States v. Morgan, 346 U.S. 502, 505 n.4 (1954). Also connecting trial, appellate, and section 2255 proceedings and removing any meaningful point of "finality" between them, are the following attributes of section 2255 motions, each of which is contrasted

ings creates the possibility, ignored by most courts and commentators that have faced the issue,[423] that *Teague* does not apply either to section 2255 proceedings or to cases that, at the time the "new" rule was announced, were pending in state postconviction proceedings patterned after section 2255. Finally, irrespective of when the finality of criminal judgments generally or formally sets in, finality as to some kinds of attacks on those judgments cannot possibly set in — because those claims cannot possibly arise, or at least usually do not arise — until after the direct appellate process has ended.[424]

Pending further clarification from Congress or the Supreme Court, the following three-part approach to the finality question seems most consistent with the relevant policy concerns. First, finality ought not to set in with regard to claims as to which state law does not provide an "opportunity for full and fair litigation" at "trial and on direct review"[425] or that the petitioner could not theretofore have raised because of " 'interference by officials' " or some other "objective [impediment] external to the defense."[426] Otherwise, state officials effectively could forestall the federal courts from considering, declaring, and enforcing new constitutional rules by excluding claims seeking

with the contrary attribute of section 2254 petitions: (1) *Compare* 2 J. LIEBMAN, *supra* note 3, § 36.4b (parties to section 2255 proceedings are same as parties to trial and appeal and have same status — moving party, in case of government, responding party, in case of defendant; docket number and caption are the same) *with* J. LIEBMAN, *supra* note 3, §§ 2.1, 10.1 (in habeas corpus, warden substitutes for state as party; government and prisoner exchange places procedurally and in caption; new docket number is used). (2) *Compare* Advisory Committee Note to R. GOV. § 2255 PROCEEDINGS IN U.S. DIST. CTS. 3 (section 2255 proceedings begin with filing of "motion" and without payment of fee) *with* R. GOV. § 2254 CASES IN U.S. DIST. CTS. 3(a) (habeas corpus proceedings inaugurated by filing of "petition" together with fee required to initiate new proceedings). (3) *Compare* Martin v. United States, 273 F.2d 775, 777 (10th Cir. 1960) (discussing United States v. Hayman, 342 U.S. 205, 212-14 (1952)) (section 2255 gives "[t]he court which heard the case and gave judgment thereon . . . the opportunity and responsibility of hearing and determining attacks against the judgment") *with* Riddle v. Dyche, 262 U.S. 333, 337 (1923) (habeas corpus is a civil proceeding designed to secure review of original judgment in different court). (4) *Compare* R. GOV. § 2255 PROCEEDINGS IN U.S. DIST. CTS. 12 (Federal Rules of *Criminal* Procedure govern section 2255 proceedings) *with* R. GOV. § 2254 CASES IN U.S. DIST. CTS. 11 (Federal Rules of *Civil* Procedure govern habeas corpus). (5) *Compare* R. GOV. § 2255 PROCEEDINGS IN U.S. DIST. CTS. 2(c) (section 2255 movants incarcerated under multiple criminal judgments may *not* challenge judgment of conviction or sentence other than one entered in first phase of same criminal proceeding in which motion is filed) *with* R. GOV. § 2254 CASES IN U.S. DIST. CTS. 2(d) (habeas corpus petitioner *must* challenge all bases of prisoner's current incarceration, including, where applicable, as many separate judgments of conviction and sentence as petitioner contends are unlawful). (6) *Compare* the Rules Governing § 2255 *Proceedings with* the Rules Governing § 2254 *Cases*.

423. *See, e.g.*, Gilberti v. United States, 917 F.2d 92, 94-95 (2d Cir. 1990) (*Teague* doctrine applies in section 2255 proceedings); United States v. Ayala, 894 F.2d 425, 429 n.8 (D.C. Cir. 1990) (same); Hrubec v. United States, 734 F. Supp. 60, 63-65 (E.D.N.Y. 1990) (same). *Compare* Teague v. Lane, 109 S. Ct. 1060, 1084 n.1 (1989) (Brennan, J., dissenting) (identifying as open question whether *Teague* applies in section 2255 proceedings) *with* Arkin, *supra* note 5, at 395 & n.172 ("well established" similarity between section 2254 and section 2255 suggests that *Teague* applies in both contexts).

424. *See supra* notes 181-85 and accompanying text.

425. Stone v. Powell, 428 U.S. 465, 494-95 & n.37 (1976).

426. Murray v. Carrier, 477 U.S. 478, 488 (1986) (quoting Brown v. Allen, 344 U.S. 443, 486 (1953)); *see* McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991).

declaration of a new rule from direct appellate consideration and relegating those claims to postconviction proceedings at which time the rule sought could not be applied retroactively and, in one view, would not even be justiciable.[427]

Second, the onset of finality always should await the Supreme Court's denial of (or expiration of the time for seeking) certiorari following the last nonfinal state court ruling in order, again, to assure that the petitioner has at least one opportunity for *federal* judicial declaration of a new rule following the state courts' refusal to declare it.[428]

Third, the nonretroactivity defense serves the interests of *the states*, not the federal courts.[429] Accordingly, if a state legislature or the state courts choose to delay the point of finality of criminal judgments beyond the first opportunity for United States Supreme Court review, the federal courts should — and may be required to — respect the state's implicit conclusion that a conviction's and sentence's constitutionality is more important to the state than the conviction's and sentence's finality.[430] Consequently, although "fi-

427. *See supra* Part II. Reaching a similar conclusion by a different route are: Sanders v. Sullivan, 900 F.2d 601, 606 (2d Cir. 1990) ("*Teague* does not come into play when the state's constitutional violation" — here, the state courts' unconstitutional response to a critical witness' recantation of decisive trial testimony — is of a sort that "typically do[es] not occur until after the trial and direct review are completed;" otherwise, *Teague* would "emasculate[]" the right in question); Hoffman, *supra* note 6, at 213-15 (advocating exception to *Teague* for claims capable of repetition yet evading review). Established lines of habeas corpus authority explicate the "no opportunity for full and fair litigation" and the "objective impediments" exceptions to finality. *See* J. LIEBMAN, *supra* note 3, § 24.5b, at 354 n.17, 356 n.22 and accompanying text, § 25.3.

428. *See generally* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 377, 386-87, 415-19 (1821). *But see* Hoffmann, *supra* note 3, at 184 ("finality" should set in following highest *state* court decision on direct appeal, not following certiorari proceedings thereafter). Under the Supreme Court's rules, finality generally will occur upon the denial of certiorari, not the later denial of a petition for rehearing of the certiorari decision. *See* S. CT. R. 16.3 ("The order of denial [of certiorari] will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.").

429. *See* Teague v. Lane, 109 S. Ct. 1060, 1075 (1989) (plurality opinion) ("The 'costs imposed upon *the State[s]* by retroactive application of new rules . . . on habeas corpus . . . generally far outweigh the benefits' . . . for it *continually* forces *the States* to marshall resources in order to keep in prison defendants whose [cases are final]." (citation omitted) (emphasis added, except on word "continually")); *see also* Butler v. McKellar, 110 S. Ct. 1212, 1216 (1990).

430. *See* Ulster County Court v. Allen, 442 U.S. 140, 154 (1979) ("purpose of" defenses to habeas corpus relief "is to accord appropriate respect to the sovereignty of the States in our federal system. . . . But if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state [interest], a federal court implies no disrespect for the State by entertaining the claim" (citation omitted)). Thus, just as the federal courts are bound by a state legislature's or state court's decision to forego enforcing a procedural bar against the defendant in a particular case or type of case, *see, e.g.*, Ylst v. Nunnemaker, 59 U.S.L.W. 4808, 4810-11 (U.S., June 24, 1991); Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985); *Ulster County Court*, 442 U.S. at 154, and just as the federal courts are bound by a state legislature's decision to make certain remedies discretionary, not mandatory, and thus to allow prisoners to exhaust their state remedies without taking advantage of the procedure, *see, e.g.*, Harris v. Reed, 109 S. Ct. 1038, 1040, 1043 & n.9 (1989); Betts v. Brady, 316 U.S. 455, 460 (1942), so, too, should the federal courts be bound by a state legislature's or state court's decision to sus-

nality" should not set in before defendants have had one full and fair opportunity to litigate claims seeking declaration of a new rule in the state courts and in at least one federal court (the first and second points above), neither should finality be *required* to set in at that time as a matter of federal law when it is the policy or practice of the state to delay the onset of finality until some later juncture in the proceedings.[431]

V.
WHAT'S LEFT?: THE TWO *TEAGUE* EXCEPTIONS

Again following Justice Harlan, *Teague* identifies two exceptional types of constitutional rulings that always apply retroactively, including in cases that were final when the new ruling was announced: "First, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' "[432] This exception "should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[433] "Second, a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are "implicit in

pend finality in a case or class of cases. *See also* Townsend v. Sain, 372 U.S. 293, 312-18 (1963) (state courts' decision to forego holding evidentiary hearings on controverted factual questions both allows and requires federal courts to conduct such hearings themselves). This analysis is not undermined by recognizing that "[t]he determination whether a constitutional decision of this Court is retroactive . . . is a matter of federal law" and by "requiring that state courts adhere to [federal] retroactivity decisions." American Trucking Ass'n, Inc. v. Smith, 110 S. Ct. 2323, 2330 (1990) (plurality opinion); *cf. id.* at 2348, 2353 n.10 (Stevens, J., dissenting) (state may not give new decision less effect than federal law requires but may give "effect greater than that which a federal court would provide"). For the analogous federally governed requirements that "procedural defaults" generally bar habeas corpus relief and "unexhausted petitions" require dismissal (*see, e.g.*, J. LIEBMAN, *supra* note 3, § 24.5e) have not prevented the Supreme Court from religiously following the state legislatures' and state courts' lead in determining the precise point at which "procedural defaults" and "exhaustion" occurs. The reliance-based approach to retroactivity advocated above, *see supra* notes 379-412 and accompanying text, also demands federal sensitivity to state definitions of finality inasmuch as state law will determine whether or not state judges justifiably can expect their decisions to terminate the case or, simply, to make it ripe for review by another state court. *Cf.* Linkletter v. Walker, 381 U.S. 618, 627 (1965) (presumptive availability of appeal contributes to common law rule that case is not final and new legal developments apply pending appeal).

431. *See, e.g.*, the North Carolina, Ohio, Tennessee, and Virginia rules discussed *supra* note 419.

432. *Teague*, 109 S. Ct. at 1073 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)); *accord* Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989); *Teague*, 109 S. Ct. at 1080 (Stevens, J., concurring in the judgment).

433. *Penry*, 109 S. Ct. at 2952-53 ("a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all"); *accord* Sawyer v. Smith, 110 S. Ct. 2822, 2831 (1990) ("The first [exception] applies to new rules that place an entire category of primary conduct beyond the reach of the criminal law . . . or . . . prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense . . . ." (citations omitted)); Saffle v. Parks, 110 S. Ct. 1257, 1263 (1990); *cf.* Butler v. McKellar, 110 S. Ct. 1212, 1218 (1990) (first excep-

the concept of ordered liberty." ' "[434]

Explaining the first exception, Justice Harlan stated that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose," and gave as an example "[n]ew 'substantive due process' rules" that "free[] individuals from punishment for conduct that is constitutionally protected."[435] Justice Harlan's supporting citations refer to rules immunizing from prosecution: (1) expressive conduct protected by the first amendment;[436] (2) silence protected by the fifth amendment;[437] (3) intimate or personal behavior protected by the penumbral rights in various constitutional amendments;[438] (4) conduct carried on in the constitutionally protected privacy of one's home;[439] (5) conduct beyond that which the legislature has defined as criminal;[440] and (6) persons selected for prosecution not because of their actions but because of their race, ethnicity, or some other characteristic or status not legitimately made the basis for criminal punishment.[441]

Penry likewise listed examples of new penalty-focused rules that are fully retroactive under the first exception, including rules immunizing from execu-

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tion does not apply to rule that allows state to punish, but restricts means by which it assesses guilt of, capital murder).

434. *Teague*, 109 S. Ct. at 1073 (plurality opinion) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.))); *see also Teague*, 109 S. Ct. at 1080 (Stevens, J., concurring in the judgment).

435. *Mackey*, 401 U.S. at 692-93 (Harlan, J., concurring in part and dissenting in part).

436. *Id.* at 692 n.7 (citing Street v. New York, 394 U.S. 576 (1969)).

437. *Id.* at 692 n.7, 693, 700-01 (discussing United States v. United States Coin & Currency, 401 U.S. 715 (1971); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968)).

438. *Id.* at 692 n.7 (citing Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965)).

439. *Id.* (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

440. *Id.* at 693 n.8 (citing Crowley v. Christensen, 137 U.S. 86 (1890); *Ex parte* Siebold, 100 U.S. 371 (1880); cases collected in Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 384 n.30 (1964)). Applying this rule, a number of circuit courts recently have held fully retroactive the decision in McNally v. United States, 483 U.S. 350 (1987), which held that Congress did not intend the mail fraud statutes to criminalize actions depriving persons of purely intangible rights. *See, e.g.*, United States v. Osser, 864 F.2d 1056, 1058 (3d Cir. 1988) ("A ruling that a trial court lacked power to convict a defendant for proven activity must necessarily be retroactive."); cases cited *supra* note 110; *see also* Ostrosky v. Alaska, 913 F.2d 590, 594-95 (9th Cir. 1990) (given constitutional principle that behavior cannot amount to a crime absent a culpable mental state, claim that petitioner was convicted of crime without any criminal intent falls within first *Teague* exception).

441. *Mackey*, 401 U.S. at 693 n.8 (Harlan, J., concurring in part and dissenting in part) (citing Crowley v. Christensen, 137 U.S. 86 (1890); Yick Wo v. Hopkins, 118 U.S. 356 (1886)); *see also* Robinson v. California, 370 U.S. 660 (1962) (criminal sanctions for status of being a drug addict held unconstitutional under eighth and fourteenth amendments). Recent decisions holding retroactive rules defining the double jeopardy immunity against conviction for certain conduct previously subjected to criminal prosecution also seem to fall within the first exception. *See* Dubois v. Lockhart, 859 F.2d 1314, 1316 n.2 (8th Cir. 1988) (pre-*Teague* decision holding double jeopardy decision in Burks v. United States, 437 U.S. 1 (1978), retroactive).

tion persons who are (7) too young[442] or (8) mentally impaired.[443] *Penry*'s discussion suggests that the exception also would cover rules immunizing from execution persons (9) whose offenses did not rise to the level of culpability constitutionally required to justify a death sentence because (a) the defendant did not participate in the homicidal act or intend that life be taken,[444] or because (b) no statutory aggravating circumstance or other factor meaningfully distinguished the offense from the class of all first-degree murders.[445]

As the *Erie* rule classically demonstrates on the civil side,[446] a distinction between substance and procedure is not always easy to apply. Nonetheless, the first exception might be interpreted as distinguishing new rules of substantive criminal law (which always apply retroactively) from new rules of criminal procedure (which generally do not apply retroactively in cases that were final when the time the new rule was announced).[447]

In defining the second exception, Justice Harlan disagreed with himself,[448] the *Teague* plurality (favoring Harlan's earlier view) disagreed with the

442. Penry v. Lynaugh, 109 S. Ct. 2934, 2953 (1989) (citing Thompson v. Oklahoma, 487 U.S. 815 (1988) (execution of defendants under 16 years old at time of offense is unconstitutional)).

443. *Id.* at 2952-53 (citing Ford v. Wainwright, 477 U.S. 399, 410 (1986) (execution of insane constitutionally forbidden)) ("if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry . . . [, then] such a rule would fall under the first exception").

444. *See* Tison v. Arizona, 481 U.S. 137 (1987) (death penalty for murder absent proof that defendant acted with extreme recklessness, or some higher degree of culpability, is unconstitutionally disproportionate); Enmund v. Florida, 458 U.S. 782 (1982) (cited in *Penry*, 109 S. Ct. at 2953) (death penalty for murder absent proof that defendant killed, intended to kill, or foresaw that life would be taken is unconstitutionally disproportionate); Coker v. Georgia, 433 U.S. 584 (1977) (cited in *Penry*, 109 S. Ct. at 2953) (death penalty for rape forbidden as disproportionate).

445. As a prerequisite to a death sentence, the eighth amendment requires the state, in each case, to establish an aggravating circumstance that "provide[s] a ' "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." ' " Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring in the judgment))). Because this rule "circumscribe[s] the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 878 (1983), the rule falls within the first *Teague* exception: It places "a certain class of individuals" — those as to whom the state has not established a valid aggravating circumstance — "beyond the State's power to punish by death . . . at all." *Penry*, 109 S. Ct. at 2952. *But cf.* Smith v. Black, 904 F.2d 950, 986-87 (5th Cir. 1990) (taken together, rule forbidding state to execute defendant based on invalid "heinousness" aggravating circumstance and rule requiring state courts to reweigh additional, valid aggravating circumstances against mitigating circumstances once "heinousness" circumstance is invalidated are "new" and not within *Teague* exceptions), *followed in* Stringer v. Jackson, 909 F.2d 111 (5th Cir. 1990), *cert. granted sub nom.* Stringer v. Black, 111 S. Ct. 2009 (1991).

446. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); *see, e.g.*, Hanna v. Plumer, 380 U.S. 460, 471-74 (1965); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

447. *See supra* note 110 and accompanying text (lower courts reaching this result in practice, if not in theory).

448. *Compare* Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) *with* Mackey v. United States, 401 U.S. 667, 693-95 (1971) (Harlan, J., concurring in part and dissenting in part).

concurring Justices (endorsing Harlan's later view),[449] and the post-*Teague* majority (fusing *both* Harlan views) disagreed with all prior views.[450] Proceeding from the same formulation of rules "implicit in the concept of ordered liberty,"[451] the *Teague* plurality emphasized factfinding reliability — "procedures without which the likelihood of an accurate conviction [or sentence] is seriously diminished;"[452] the concurring Justices emphasized fundamental fairness — " ' "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions;" ' "[453] and the post-*Teague* majority demanded *both* — a contribution to factfinding reliability *and* a place in the pantheon of "fundamental," "bedrock," or "watershed" rules.[454]

The second exception is narrow, probably encompassing only a handful of rulings, at least outside the eighth amendment area,[455] that have been ren-

449. *Compare* Teague v. Lane, 109 S. Ct. 1060, 1075-78 (1989) (plurality opinion) *with id.* at 1080-81 (Stevens, J., concurring in the judgment).

450. *Compare id.* at 1076-77 (plurality opinion) (rulings retroactive under second exception if they overturn procedures that "undermine the fundamental fairness that must underlie a conviction *or* seriously diminish the likelihood of obtaining an accurate conviction" (emphasis added)) *with* Sawyer v. Smith, 110 S. Ct. 2822, 2831 (1990) (quoting *Teague*, 109 S. Ct. at 1076, 1077 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part))) ("A rule that qualifies under this exception must *not only* improve accuracy, *but also* 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." (emphasis added; original emphasis deleted)). *See generally* Saffle v. Parks, 110 S. Ct. 1257, 1263-64 (1990) ("the precise contours of this exception may be difficult to discern").

451. *See supra* note 434 and accompanying text.

452. *Teague*, 109 S. Ct. at 1076-77 (plurality opinion); *see id.* at 1076, 1077 (quoting *Desist*, 394 U.S. at 262 (Harlan, J., dissenting)) (rulings forbidding procedures that " 'create[] an impermissibly large risk that the innocent will be convicted' " or "seriously diminish the likelihood of obtaining an accurate conviction;" rulings that " 'significantly improve the pre-existing factfinding procedures' " and are "central to an accurate determination of innocence or guilt"); *see also* Penry v. Lynaugh, 109 S. Ct. 2934, 2944 (1989) ("the two exceptions to [the] general rule of nonretroactivity" are "applicable in the capital sentencing context"); Hopkinson v. Shillinger, 888 F.2d 1286, 1291 (10th Cir. 1989) (en banc) ("Presumably, the [second] exception applies to the accuracy of the defendant's sentence as well, and to Eighth Amendment violations."), *cert. denied*, 110 S. Ct. 3256 (1990); Sawyer v. Butler, 881 F.2d 1273, 1292 (5th Cir. 1989) (en banc) (similar), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990); *id.* at 1303 (King, J., dissenting) (similar).

453. *Teague*, 109 S. Ct. at 1080 (Stevens, J., concurring in the judgment) (quoting Palko v. Connecticut, 302 U.S. 319, 328 (1937) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926))); *see also* Hoffmann, *supra* note 6, at 213-15 (advocating return to "implicit in the concept of ordered liberty" approach to second exception).

454. *Sawyer*, 110 S. Ct. at 2831-32; *Parks*, 110 S. Ct. at 1263 (quoting *Teague*, 109 S. Ct. at 1076 (plurality opinion)) ("second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding"). An important attribute of all three versions of the second exception is that they are rule-specific, not petitioner-specific. All three, that is, apply to *rules* that *in the run of cases* affect reliability or fairness, irrespective of whether the rule would have that effect in the particular case before the Court. In this respect, the second exception is distinguishable from recent habeas corpus proposals to limit the exceptions to other habeas corpus defenses to particular *cases* in which individual *petitioners* can demonstrate a "colorable claim of factual innocence." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion); *see* McCleskey v. Zant, 111 S. Ct. 1454, 1470, 1474-75 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986). *See generally* J. LIEBMAN, *supra* note 3, § 2.2c, at 20 n.83 (distinguishing claim- and individual-focused innocence tests).

455. Obvious candidates for inclusion within the second exception are the eighth amend-

dered since Earl Warren left the bench.[456] I do not agree, however, that the

ment decisions in Lockett v. Ohio, 438 U.S. 586 (1978) (discussed *supra* note 310 and accompanying text), and Furman v. Georgia, 408 U.S. 228 (1972).

456. *See Sawyer*, 110 S. Ct. at 2832 (quoting *Teague*, 109 S. Ct. at 1077 (plurality opinion)) ("because the second exception is directed only at new rules essential to the accuracy and fairness of the criminal process, it is 'unlikely that many such components of basic due process have yet to emerge' "). The Court already has held nonretroactive a number of decisions that might have been thought to qualify under the second exception. *See, e.g., Sawyer*, 110 S. Ct. at 2832 (quoting *Teague*, 109 S. Ct. at 1077) (rule of Caldwell v. Mississippi, 472 U.S. 320 (1985), rule forbidding inaccurate prosecutorial argument that diminishes responsibility of jurors in regard to capital-sentencing duties, is not within second exception because, although "directed toward the enhancement of reliability and accuracy," it is not "an 'absolute prerequisite to fundamental fairness' "); Butler v. McKellar, 110 S. Ct. 1212, 1218 (1990) (rule derived from Edwards v. Arizona, 451 U.S. 477 (1981), forbidding interrogation following invocation of right to counsel, not within second exception because its violation "would not seriously diminish the likelihood of obtaining an accurate determination"); Allen v. Hardy, 478 U.S. 255 (1986) (Batson v. Kentucky, 476 U.S. 79 (1989), forbidding racial discrimination in prosecutorial exercise of peremptory challenges, not retroactive); Solem v. Stumes, 465 U.S. 638 (1984) (rule of *Edwards v. Arizona* not retroactive). *See generally* Arkin, *supra* note 6, at 390 ("only decisions which radically alter the legal terrain regarding procedural fairness and accuracy fit within the second *Teague* exception as now formulated"); Berger, *supra* note 6, at S12 (second exception is "lip service"); Weisberg, *supra* note 3, at 24 ("Put . . . bluntly, if the claimed right did not seem as essential as that of Clarence Gideon, then it [is] not fundamental enough;" Court has "adopted about as stringent a test as imaginable"). Among the remaining contenders for application of the second exception, assuming it is "new," is the rule of Ake v. Oklahoma, 470 U.S. 68 (1985), requiring states to provide indigent defendants with necessary expert assistance. *Compare* Harris v. Vasquez, 901 F.2d 724, 726-27 (9th Cir. 1990) (argument that *Ake* falls within second exception sufficiently strong to justify stay of execution) *with* Bassette v. Thompson, 915 F.2d 932, 939 (4th Cir. 1990) (*Ake* rule "new" and not within second exception), *cert. denied*, 111 S. Ct. 1639 (1991) *and* Harris v. Vasquez, 913 F.2d 606, 622-25 (9th Cir. 1990) (decision on merits, one judge dissenting, holding that the "extension" of *Ake* sought by the petitioner (establishing a right to *competent* expert assistance for indigents) does not fall within second exception). *See also* Swindler v. Lockhart, 110 S. Ct. 1938, 1940 n.* (1990) (Marshall, J., dissenting from denial of certiorari) (requirement of impartial jurors falls within second exception); *Allen*, 478 U.S. at 259 (same, by implication); Sanders v. Sullivan, 900 F.2d 601, 606 (2d Cir. 1990) (right to reversal of conviction manifestly premised upon credibly recanted testimony falls within second exception); United States v. Dawes, 895 F.2d 1581, 1582 (10th Cir. 1990) (United States v. Allen, 895 F.2d 1577 (10th Cir. 1990), holding that failure to advise defendants of dangers of proceeding to trial pro se can never be harmless error, is retroactive "[b]ecause the right to counsel is fundamental to insuring the very integrity of the fact finding process"); Sulie v. Duckworth, 864 F.2d 1348, 1354-56 (7th Cir. 1988) (pre-*Teague* holding that Wainwright v. Greenfield, 474 U.S. 284 (1986), is retroactive because inference of guilt based on exercise of privilege against self-incrimination, which *Greenfield* rule forbids, impairs truth-finding function of trial), *cert. denied*, 110 S. Ct. 93 (1989). *Compare* United States v. France, 886 F.2d 223, 228 (9th Cir. 1989) (Gomez v. United States, 109 S. Ct. 2237 (1989), forbidding federal magistrates to pick juries, retroactive because it "touches on one of the most 'basic rights' of the accused, the right to a fair and accurate trial"), *aff'd by an equally divided Court*, 111 S. Ct. 805 (1991) *with* Gilberti v. United States, 917 F.2d 92, 95-96 (2d Cir. 1990) (*Gomez* not within second exception and not retroactive). *Compare also Bassette*, 915 F.2d at 938-39 (neither of following rules fits within second exception: rule of Estelle v. Smith, 451 U.S. 454 (1981), forbidding state psychiatrists to interview capital defendants without warning them that statements they make may be used against them at sentencing; and sentencing phase confrontation rule of Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002 (1983)) *and* Moore v. Zant, 885 F.2d 1497, 1514, 1516, 1517 (11th Cir. 1989) (en banc) (neither of following rules fits within second exception: rule of *Proffitt*; and rule of Gardner v. Florida, 430 U.S. 349 (1977), establishing defendant's right to access to presentence report in capital

second exception is so narrow that a prisoner cannot take advantage of it without conceding that the rule for which she contends is both "new" and nonmeritorious.[457] For I can imagine rules that are simultaneously meritorious, not "new," and yet "fundamental" — rules that never before were announced precisely because they are so fundamentally the law that no one previously thought of violating them.[458] Rules falling into this category might be ones called forth by previously untried investigative and prosecutorial methods that " 'recall[] the classic grounds for the issuance of a writ of habeas corpus — that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods.' "[459] An attempt to sentence a defendant to death at a penalty proceeding that was not bifurcated from the guilt-innocence phase of trial might call forth another example.[460]

Other examples of rules combining reliability and fundamental-fairness attributes are found in the sources cited in *Teague* that advocate confining habeas corpus relief of *any* sort to violations of just such rules — most particularly, the writings of Paul Mishkin[461] and Henry Friendly[462] and the opinions

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cases), *cert. denied*, 110 S. Ct. 3255 (1990) *with Moore*, 885 F.2d at 1522-23 (Johnson, J., dissenting) (*Proffitt* and *Gardner* fit within second exception because former is critical to reliability and latter is part of "bedrock" procedures in capital cases; *Estelle* is not a new rule) *and id.* at 1525-26 (Kravitch, J., dissenting) (same).

457. *Cf.* Weisberg, *supra* note 3, at 24 (second exception requires petitioners "to stretch [claims] to something so hyperbolic" that claims will "undermine the very premise of state prosecution in first place" and probably lose on the merits).

458. *Cf.* Swindler v. Lockhart, 110 S. Ct. 1938, 1940 n.* (1990) (Marshall, J., dissenting from denial of certiorari) (rule forbidding second change of venue following initial transfer to equally tainted county falls within second exception).

459. *Teague*, 109 S. Ct. at 1076-77 (quoting Rose v. Lundy, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting) (footnotes omitted)).

460. Although the Court upheld nonbifurcated capital sentencing procedures in McGautha v. California, 402 U.S. 183 (1971), and has never formally overruled that holding, *see* Gregg v. Georgia, 428 U.S. 153, 193 & n.43, 195 n.47 (1976) (noting that *McGautha* has not been overruled), the decisions in Furman v. Georgia, 408 U.S. 228 (1972), and *Gregg* make clear that bifurcated capital sentencing proceedings are constitutionally required and fundamental. *See Gregg*, 428 U.S. at 190-92, 195; Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 306 & n.5, 309 & n.16, 315 & n.36, 319 & n.59.

461. *See* Mishkin, *supra* note 37, at 79-86 (cited in *Teague*, 109 S. Ct. at 1069, 1074 (plurality opinion)) (citing numerous cases) (retroactivity and habeas corpus relief tied to "constitutional requirements of procedural due process" that "have a substantial and intended impact upon the degree of reliability of the conviction process for establishing guilt;" giving as examples decisions upholding (1) "the right of an indigent criminal defendant to counsel during the process that adjudicates his guilt," (2) the right of indigent criminal appellants to a trial transcript and to freedom from "discriminat[ion] against [them] . . . on the basis of poverty in controlling access to appellate review," and (3) the protection against "introduction of confessions extracted in violation of due process").

462. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151-52 (1970) (cited in *Teague*, 109 S. Ct. at 1074 (plurality opinion)) (citing numerous cases) (habeas corpus relief should be reserved for violations of rules that improve accuracy and reliability; giving as examples "failure to complete the court" and proof that "the criminal process itself has broken down," as when "the defendant . . . lacked the assistance of

of Lewis Powell.[463] Indeed, a nascent jurisprudence exists on the question of what types of procedures are so fundamental to the truth-seeking and other critical aspects of our criminal justice system that their absence should almost always result in reversal no matter what procedural obstacles otherwise would stand in the way. The components of this jurisprudence may be found not only in the sources listed above but also in the Court's recent decisions recognizing exceptions to the procedural default[464] and harmless error rules.[465] Recourse also may be had to preexisting retroactivity law, which long has made "[r]etroactive effect . . . 'appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials' " and " 'goes to the heart of the truthfinding function.' "[466] Perhaps the core attribute of rules that are

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counsel," there was "racial discrimination in the selection of the jury," the "jury was subjected to improper influences by a court officer or had been overcome by excessive publicity," or "where the state has failed to provide a proper procedure for making a defense at trial and on appeal").

463. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 491-92 n.31 (1976) (quoted in *Teague*, 109 S. Ct. at 1076 (plurality opinion)) (habeas corpus should favor rules that "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"); *see* Rose v. Mitchell, 443 U.S. 545, 586 (1979) (Powell, J., concurring in the judgment); Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring) (quoting *Stone*, 428 U.S. at 490) ("[m]any Fifth and Sixth Amendment claims arise in the context of challenges to the fairness of a trial or to the integrity of the factfinding process," but "Fourth Amendment claims uniformly involve evidence that is 'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant' ").

464. *See, e.g.*, Smith v. Murray, 477 U.S. 527, 538 (1986) (" 'fundamental miscarriage of justice' " exception to procedural default rule for errors that "preclude[] the development of true facts [or] result[] in the admission of false ones;" "foreclos[e] meaningful exploration" of "defenses;" result in the admission of evidence that "was false or . . . misleading;" or "serve to pervert the jury's deliberations"); J. LIEBMAN, *supra* note 3, § 24.6.

465. *See, e.g.*, Arizona v. Fulminante, 111 S. Ct. 1246, 1264-65 (1991) (majority opinion on this point of Rehnquist, C.J.) (in addition to violations discussed in Rose v. Clark, 478 U.S. 570 (1986), *see infra*, denials of rights to self-representation and public trial can never be harmless); *id.* at 1255-56 (opinion of White, J.) (in addition to violations discussed in Chief Justice Rehnquist's opinion and in *Rose*, following violations can never be harmless: state's failure to adduce enough evidence to establish guilt beyond a reasonable doubt, court's failure to instruct jury on state's reasonable doubt burden, denial of right to counsel at preliminary hearing); Rose v. Clark, 478 U.S. 570, 577-78 & n.6 (1986) (citing numerous cases) (harmless error rule does not apply to procedures that "necessarily render[ed the] trial fundamentally unfair" because they "aborted the basic trial process . . . or denied it altogether" or they "cannot reliably serve [the trial's basic] function as a vehicle for determination of guilt or innocence;" examples include denial of counsel, denial of trial by jury, adjudication by biased judge or jury, trial by jury selected in racially discriminatory manner, and procedures that effectively direct verdict for state); *see* J. LIEBMAN, *supra* note 3, §§ 24.5d, 24.6.

466. Allen v. Hardy, 478 U.S. 255, 259 (1986) (per curiam) (quoting Solem v. Stumes, 465 U.S. 638, 643-45 (1984)); *accord* United States v. Johnson, 457 U.S. 537, 544 (1982) (citing numerous authority) (quoting Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion)) ("Court has regularly given complete retroactive effect to new constitutional rules whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials' "); Hankerson v. North Carolina, 432 U.S. 233, 240-42 (1977) (rule of Mullaney v. Wilbur, 421 U.S. 684 (1975), forbidding state to place burden of persuasion on defendant fully retroactive because rule contributes to reliability of convictions); Ivan v. City of New York, 407 U.S. 203 (1972) (rule of *In re* Winship, 397 U.S. 358 (1970), placing burden of proof beyond a

fully retroactive under the second exception is those rules' inclusion among the components of "the basic trial [and appellate] process" that enable the trial and appeal "reliably [to] function as a vehicle for determination of guilt or innocence."[467]

VI.
WHOSE BURDEN?: PLEADING AND PROVING THE *TEAGUE* DEFENSE

In two 1988 Term decisions and one 1989 Term decision, the Supreme Court denied habeas corpus relief on nonretroactivity grounds notwithstanding the state's failure to raise the defense in a timely fashion.[468] Thereafter, a few lower court decisions excused habeas corpus respondents' failure to raise *Teague*-type defenses in advance of the " 'novel' " decision in *Teague*.[469] More recently, however, the Supreme Court and the lower courts have indicated that, in litigation occurring *after* February 22, 1989 (the date *Teague* was announced), the burden of asserting nonretroactivity belongs to the state and not to the federal courts *sua sponte*.[470]

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reasonable doubt on state in juvenile delinquency settings, fully retroactive because rule contributes to accuracy of truth-determining function); *Williams*, 401 U.S. at 653 n.6 (plurality opinion) (citing numerous decisions holding retroactive, on accuracy/reliability grounds, rulings establishing and extending rights to counsel and to cross-examine one's accusers and protection against state efforts to secret witnesses and evidence relevant to the proceedings).

467. *Rose*, 478 U.S. at 577-78.

468. Saffle v. Parks, 110 S. Ct. 1257 (1990); Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Teague v. Lane, 109 S. Ct. 1060 (1989); *see supra* note 19 and accompanying text. Criticizing this practice are: *Parks*, 110 S. Ct. at 1264 n.1 (Brennan, J., dissenting); *Penry*, 109 S. Ct. at 2959 (Brennan, J., concurring in part and dissenting in part); *Teague*, 109 S. Ct. at 1084, 1086 (Brennan, J., dissenting); *id.* at 1080 (Stevens, J., concurring in the judgment).

469. Hopkinson v. Shillinger, 888 F.2d 1286, 1288-91 (10th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 3256 (1990); *accord* Hill v. McMackin, 893 F.2d 810, 813 (6th Cir. 1989); Moore v. Zant, 885 F.2d 1497, 1525 (11th Cir. 1989) (en banc) (Johnson, J., dissenting) (assuming *arguendo* that state did not waive defense because "the proper time to raise it ha[d] not arrived"), *cert. denied*, 110 S. Ct. 3255 (1990).

470. *See* Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990) ("[a]lthough the *Teague* rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, *must* raise and decide the issue *sua sponte*; Court accordingly does not reach retroactivity issue because state "did not address retroactivity in its petition for certiorari or its briefs on the merits, and when asked about the issue at oral argument, counsel answered that the State had chosen not to rely on *Teague*" (emphasis in original); Falconer v. Lane, 905 F.2d 1129, 1137 (7th Cir. 1990) ("The State has not made an objection under *Teague* . . . to the retroactive application of [prior decision] . . . and therefore there is no need to address that issue."); Hanrahan v. Greer, 896 F.2d 241, 244-45 (7th Cir. 1990) (court need not determine whether decision handed down after petitioner's case became final is "new," because state did not preserve an objection to decision's retroactive application; "[n]ot phrasing an objection to retroactivity in the precise terms the Court adopted in *Teague* is one thing; not phrasing *any* objection to retroactivity is another" (emphasis in original)); *see also* Thomas v. Indiana, 910 F.2d 1413, 1415-16 (7th Cir. 1990) (by conceding retroactivity of recent decision in initial brief and by waiting until "much too late" — oral argument on appeal — to raise *Teague* issue, the state "waived" nonretroactivity defense; court expresses uncertainty whether it has discretion to raise the waived issue itself but avoids the problem by concluding that the recent court ruling is not "new").

This allocation of the burden of raising the nonretroactivity defense, and the concomitant assignment to the state of the burden of proving the facts necessary to establish the defense,[471] are appropriate in light of several established principles. First, the nonretroactivity rule is nonjurisdictional.[472] Second, in *Granberry v. Greer*,[473] the Supreme Court placed upon state's attorneys the presumptive burden of raising comity-based defenses in habeas corpus contexts.[474] Third, the responding party typically bears the burden of pleading and proving not only all habeas corpus defenses[475] but all civil affirmative defenses generally.[476] Finally, and most importantly, the reliance- and finality-based interests that the nonretroactivity defense serves belong to the states, not the federal courts, and ought therefore to be the responsibility of the states and their representatives to assert or not assert, as they choose.[477]

VII.
WHAT ELSE?: THE RETROACTIVITY OF *TEAGUE* AND OTHER RULES LIMITING PRISONERS' RIGHTS

Violating their own expressions of concern that like habeas corpus peti-

471. *See* J. LIEBMAN, *supra* note 3, § 22.1b.

472. Lacking either constitutional or statutory status, retroactivity is not a " 'jurisdictional' " bar that applies irrespective of the actions of the party benefited thereby. *Collins*, 110 S. Ct. at 2718; *Thomas*, 910 F.2d at 1416; *see* 28 U.S.C. §§ 2241(c)(3), 2254(a) (1988) (habeas corpus statute extending relief to prisoners "in custody in violation of the Constitution" without mention of retroactivity); Linkletter v. Walker, 381 U.S. 618, 629 (1965) ("the Constitution neither prohibits nor requires retrospective effect" and "has no voice upon the subject"); *Moore*, 885 F.2d at 1524 (Johnson, J., dissenting) (citing United States v. Francischine, 512 F.2d 827, 830 (5th Cir.), *cert. denied*, 423 U.S. 931 (1975)) (nonretroactivity is an affirmative defense that is lost if not timely raised); *see also* Relford v. Commandant, 401 U.S. 355, 369-70 (1971) (pretermitting retroactivity issue and applying earlier decision of uncertain retroactivity); *supra* note 39 and accompanying text (retroactivity is a judge-made prudential doctrine).

473. 481 U.S. 129 (1987).

474. *See id.* at 132 ("unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding [a] . . . defense in reserve for use on appeal if necessary"); Smith v. Zant, 887 F.2d 1407, 1438 (11th Cir. 1989) ("The state has never in the entire course of the direct appeal or collateral proceedings raised the argument that [the dissenting judge] now takes up. The state selected its defenses and arguments on appeal, and it must accept the ramifications of those choices. Waiver of claims is not a principle that works only to the detriment of [habeas corpus] petitioners.").

475. *See, e.g.*, McClesky v. Zant, 111 S. Ct. 1454, 1461, 1470 (1991) ("the government has the burden of pleading abuse of the writ" defense to second or successive habeas corpus petitions); Amadeo v. Zant, 486 U.S. 214, 228 n.6 (1988) (state "conceded" absence of procedural default bar to habeas corpus claim "in both courts below . . . [and] will not be heard to dispute it here"); Strickland v. Washington, 466 U.S. 668, 684 (1984) (exhaustion bar is not jurisdictional and was forfeited because the state failed to raise it in a timely fashion); Sanders v. United States, 373 U.S. 1, 10 (1963) ("abuse of the writ" bar is nonjurisdictional and unavailable if not asserted by state); J. LIEBMAN, *supra* note 3, §§ 16.2, 23.2b, 24.3, 25.3a, at 374 n.3, § 26.5 (state's burden to raise nonexhaustion, prejudicial-delay, procedural-default, *Stone v. Powell*, and successive petition defenses to habeas corpus).

476. *See, e.g.*, City of Canton v. Harris, 109 S. Ct. 1197, 1202-03 (1989); Oklahoma City v. Tuttle, 471 U.S. 808, 815-16 (1985); Berkemer v. McCarty, 468 U.S. 420, 443 (1984); FED. R. CIV. P. 12(b), 12(h); SUP. CT. R. 15.1.

477. *See supra* notes 429-30 and accompanying text.

tioners be treated alike,[478] the *Teague* plurality and the post-*Teague* majority repeatedly have given retroactive application to *Teague*'s own unequivocally " 'novel' "[479] rule.[480] Accordingly, a habeas corpus petitioner who completed her direct appeal proceedings, for example, in 1987 and, prior to the announcement of *Teague*, was on the verge of securing habeas corpus relief in 1989 on the basis of decisions announced in 1988 is now liable to be denied relief, even if that same petitioner's codefendant had the luck to draw a quicker district judge and to be granted relief on the same claims *prior* to *Teague*.[481] As Judge King wrote in dissent in the Fifth Circuit decision in *Sawyer*:

> It is indeed ironic that the majority invokes *Teague*, undoubtedly a new rule, to prevent us from applying *Caldwell* [a recent Supreme Court decision]. If any case should be considered as having established a new rule not retroactively applicable to habeas petitioners whose convictions have become final, it is *Teague* itself. Had the majority decided [the petitioner's] case on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted to this court, the majority opinion would have granted him a

478. Teague v. Lane, 109 S. Ct. 1060, 1071-72, 1077-78 (1989) (plurality opinion) ("harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated").

479. Hopkinson v. Shillinger, 888 F.2d 1286, 1288 (10th Cir. 1989) (en banc) (quoting *Teague*, 109 S. Ct. at 1084 (Brennan, J., dissenting), *cert. denied*, 110 S. Ct. 3256 (1990).

480. The Court applied *Teague's* nonretroactivity rule retroactively not only to Frank Dean Teague himself, but also to the habeas corpus petitioners in Sawyer v. Smith, 110 S. Ct. 2822 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990); Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Zant v. Moore, 109 S. Ct. 1518 (1989). *See supra* notes 97-100 and accompanying text; *see also* McCleskey v. Zant, 111 S. Ct. 1454, 1472-74 (1991) (retroactively applying new and drastically narrower approach to successive habeas corpus petitions to capitally sentenced petitioner in whose case new rule was announced); *id.* at 1485 (Marshall, J., dissenting) ("The Court's utter indifference to the injustice of retroactively applying its new, strict-liability standard to this habeas petitioner stands in marked contrast to this Court's eagerness to protect States from the unfair surprise of 'new rules' that enforce the constitutional rights of citizens charged with criminal wrongdoing." (citing *Butler*, *Parks*, and *Teague*)). Because the *Teague* and *McCleskey* "new rules" are civil, statutory rules, not rules of constitutional criminal procedure, *see supra* note 110, the Court presumedly should apply its civil retroactivity standards to those innovations. Those standards are in flux. *See supra* notes 91-100 and accompanying text. Nonetheless, a majority of the Court acknowledges that some "new" civil rulings may deserve nonretroactive treatment because — as is arguably true of the new *Teague* and *McCleskey* rules — the rulings violate settled expectations upon which litigants relied to their detriment. *See* James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735, 4736-37, 4739 (U.S., June 20, 1991) (plurality opinion); *id.* at 4739 (White, J., concurring in the judgment); *id.* at 4742 (O'Connor, J., dissenting); *infra* text accompanying notes 484-86.

481. This outcome mirrors exactly the example Justice O'Connor gave of the "unfortunate disparity in the treatment of similarly situated defendants on collateral review" that the *Teague* plurality assertedly was endeavoring to avoid. *Teague*, 109 S. Ct. at 1072 (between the time the Court announced Edwards v. Arizona, 451 U.S. 477 (1981), and ruled *Edwards* nonretroactive in Solem v. Stumes, 465 U.S. 638 (1984), some habeas corpus petitioners secured relief under *Edwards*, while others, including Stumes, did not). Petitioners blindsided by *Teague* include those in, *e.g.*, Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 3255 (1990); Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 1835 (1990).

> new sentencing hearing. The majority instead reaches out to an opinion rendered by the Supreme Court 16 months after submission of [petitioner's] case and 8 1/2 years after Sawyer's trial to find a reason to deny him constitutional protection. That to us is a finality of sorts, a final and irretrievable absurdity.[482]

Yet another irony is that the courts, although not disposed to view *Teague*'s novelty as a basis for applying that decision nonretroactively to *petitioners*, already have held the decision's "novelty" sufficient to excuse *respondents* who failed to raise the nonretroactivity defense in a timely fashion prior to *Teague*.[483] This retroactive application of *Teague* against *petitioners*, but not against *respondents*, offends not only the principle that like habeas corpus petitioners ought to be treated alike but also the even clearer principle that opposing litigants in the *same case* ought to be treated alike.

Another irony appears upon consideration of reliance interests of the sort discussed above.[484] Prior to the Court's announcement of *Teague*, criminal defendants justifiably relied upon the broad availability of habeas corpus review as a sufficient reason for not seeking direct-review certiorari or not raising all potentially "new" claims in their page-constrained certiorari petitions.[485] *Teague*'s retroactive application makes that reasonable reliance detrimental — in some cases, fatally so. For, by applying *Teague* retroactively, the Court deprives defendants who forbore raising all available claims in direct appeal certiorari petitions of any federal review whatsoever of claims subsequently denominated "new." This attachment of unforeseeable and severely preclusive consequences to defendants' reasonable reliance upon preexisting law clearly contravenes the policies behind the habeas corpus statute, as well as established nonretroactivity notions, and arguably offends the due process and suspension clauses of the United States Constitution.[486]

A final irony involves the juxtaposition of *Lewis v. Continental Bank*

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482. Sawyer v. Butler, 881 F.2d 1273, 1305 (5th Cir. 1989) (en banc) (King, J., dissenting), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

483. *See supra* note 469 and accompanying text.

484. *See supra* notes 379-412 and accompanying text.

485. *See* S. CT. R. 33.3. In regard to the justifiability of a decision to withhold certain claims from certiorari petitions because the claims — for example, ones requiring evidentiary hearings — might more appropriately be litigated in postconviction proceedings, see generally Spencer v. Georgia, 111 S. Ct. 2276 (1991) (Kennedy, J., concurring in the denial of certiorari); Schiro v. Indiana, 110 S. Ct. 268, 269 (Stevens, J., concurring in the denial of certiorari).

486. U.S. CONST. art. I, § 9, cl. 2 (suspension clause); U.S. CONST. amend. V, cl. 3 (due process clause); *see* Saffle v. Parks, 110 S. Ct. 1257, 1264 n.1 (1990) (Brennan, J., dissenting) (due process critique of Court's retroactive application of *Teague*; critique not addressed by majority); Butler v. McKellar, 110 S. Ct. 1212, 1221 n.4 (1990) (Brennan, J., dissenting) (same); J. LIEBMAN, *supra* note 3, § 7.2d (general suspension clause analysis); *supra* notes 370-78 (discussing habeas corpus policies offended by retroactive application of *Teague*); *supra* notes 379-412 (discussing retroactivity policies offended by retroactive application of *Teague*); *supra* notes 424-31 and accompanying text (due process-related analysis). That *Teague* reached its conclusion in a case in which the decisive issue was not presented on certiorari or briefed by the parties only increases the unfairness of applying it retroactively to unwitting defendants. *See* Teague v. Lane, 109 S. Ct. 1060, 1086-94 (1989) (Brennan, J., dissenting).

Corp.[487] and the post-*Teague* decisions in *Butler* and *Parks*. All three decisions were announced the same day, and *Lewis* will forever sit between *Butler* and *Parks* in the pages of the *United States Reports*. In *Butler* and *Parks*, the majority saw nothing amiss in allowing two men to be executed on the basis of a nonretroactivity defense of which neither man had any reason to be aware when his case was pending in the court of appeals.[488] Contrast the Court's solicitude for the plaintiff in *Lewis*, a bank holding company aggrieved because a Florida official would not process the holding company's application to operate an industrial savings and loan.[489] While the company's case was *still pending* in the court of appeals, Congress passed a statute that mooted the company's claim for relief. The holding company failed to inform the court of appeals of the new statute, and the court ruled in the company's favor. After granting certiorari and reversing on the basis of the new statute, a unanimous Supreme Court had this to say about the unfairness of dismissing the case and ruling the company out of court on the basis of the change in law:

> Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. . . . However, in instances where the mootness is attributable to a *change in the legal framework governing the case*, and where the plaintiff *may have some residual claim under the new framework that was understandably not asserted previously*, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, *amend their pleadings* or *develop the record more fully*.[490]

Teague's retroactivity ought to be rethought — by Congress, if not by the courts. To assure prisoners an opportunity to raise all of their federal claims in at least one federal forum, the decision ought to be restricted to cases not yet final in the state courts as of February 22, 1989.[491] At the least, steps should be taken to give prisoners in the wake of *Teague* the same chance the holding company was given in the wake of *Lewis* to amend their pleadings and develop the record in regard to residual theories that the prisoners understandably did not assert before *Teague* toppled the legal framework that previously defined their cases.

A final retroactivity question involves the application of *Teague*'s nonretroactivity principle to "new rules" of constitutional criminal procedure that *cut back* on the rights of criminal defendants and habeas corpus petitioners.[492] As acknowledged in dicta by the lone circuit court to address the issue thus

487. 110 S. Ct. 1249 (1990).

488. *See Parks*, 110 S. Ct. at 1264 n.1 (Brennan, J., dissenting); *Butler*, 110 S. Ct. at 1221 n.4 (Brennan, J., dissenting). *Teague* was announced on February 22, 1989, after the dates of the final court of appeals decisions in *Butler* (December 2, 1988) and *Parks* (October 25, 1988).

489. *Lewis*, 110 S. Ct. at 1252.

490. *Id.* at 1256 (emphasis added).

491. *See supra* notes 424-31 and accompanying text; *supra* note 480.

492. *See Butler*, 110 S. Ct. at 1221 n.4 (Brennan, J., dissenting) (raising question whether

far,[493] *Teague's* policy of treating like litigants alike[494] impels the conclusion that new rules cutting back on rights should not be applied retroactively to postfinal convictions. Any other approach would even further erode habeas corpus' deterrence policy because it would increase the "incentive" on the part of state courts to ignore existing constitutional law based on the probability that some part of that law will be retroactively cut back by the increasingly large and cohesive conservative majority of the Supreme Court.[495]

VIII.
WHO'S IN CHARGE?: THE CASE FOR CONGRESSIONAL REPEAL

However hopeful the *Teague* Court may have been that its new nonretroactivity rule would speed habeas corpus cases through the courts,[496] the preceding discussion suggests that the innovation's immediate and middle-term effect will be more, not less, litigation. First, by casting its newest attempt to cut back on habeas corpus as a defense,[497] the Court simply creates a new issue for litigation in most or all cases. The time the parties and courts devote to this issue will simply add to the time they now spend addressing the merits — along with the exhaustion,[498] procedural default,[499] *Stone v. Powell*,[500] successive petition,[501] and other defenses that arose out of earlier judicial efforts to move habeas corpus cases along or to keep them out of the courts altogether.[502] This prediction has particular force in capital cases, in which, ac-

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Court intends to apply *Teague* to decisions cutting back on constitutional criminal procedure rights).

493. *See* Perry v. Lockhart, 871 F.2d 1384, 1393-94 (8th Cir.) (quoting United States v. Johnson, 457 U.S. 537, 548-49 (1982)) (followed in Singleton v. Lockhart, 871 F.2d 1395, 1401 (8th Cir.), *cert. denied*, 110 S. Ct. 207 (1989)) (assuming that new rules of constitutional criminal procedure favoring state are subject to *Teague* rules, but concluding that the rule of Lowenfield v. Phelps, 484 U.S. 231 (1988), is not new because it " 'merely has applied settled precedents to new and different factual situations' " and " 'has not in fact altered that [previous] rule in any material way' "), *cert. denied*, 110 S. Ct. 378 (1989); *see also* Snethen v. Nix, 885 F.2d 456, 459 n.4 (8th Cir. 1989) (noting, but not deciding, question of retroactivity of Wainwright v. Sykes, 433 U.S. 72 (1977), which limited petitioner's ability to raise claims in habeas corpus proceedings that petitioner failed to raise at trial or on appeal), *cert. denied*, 110 S. Ct. 3223 (1990).

494. *See supra* note 478 and accompanying text.

495. *See supra* notes 333-47 and accompanying text. *But cf.* Carbray v. Champion, 905 F.2d 314, 315 (10th Cir. 1990) (on rehearing) (withdrawing habeas corpus relief granted petitioner under precedent in effect at time his conviction became final on basis of new decision, handed down while appellee's petition for rehearing was pending), *cert. denied*, 111 S. Ct. 796 (1991).

496. *See* Weisberg, *supra* note 3, at 9.

497. *See supra* note 470-77 and accompanying text.

498. *See* J. LIEBMAN, *supra* note 3, §§ 5.1-5.3, 9.3, 16.2, 13.3, 23.2.

499. *See id.* §§ 9.4, 24.1-24.6.

500. 428 U.S. 465 (1976); *see* J. LIEBMAN, *supra* note 3, §§ 9.5a, 25.1-25.4.

501. *See* J. LIEBMAN, *supra* note 3, §§ 9.5b, 26.1-27.4.

502. *See, e.g.*, McCleskey v. Zant, 111 S. Ct. 1454 (1991) (revising successive petition defense); Rose v. Lundy, 455 U.S. 509 (1982) (extending exhaustion defense); Wainwright v. Sykes, 433 U.S. 72 (1977) (creating procedural default defense); Stone v. Powell, 428 U.S. 465 (1976) (creating defense to fourth amendment claims); Sanders v. United States, 373 U.S. 1

cording to a recent American Bar Association report, "it is asking too much — and may be demanding an ethical violation — to expect an attorney to forgo a valid . . . claim that renders the client's execution illegal" until counsel "has explored every possible avenue around" defenses to the claim.[503]

Second, as is amply borne out above, the numerous subsidiary issues that the nonretroactivity doctrine now funnels into most or all habeas corpus cases promise to be even more complex than the subsidiary issues that, as it is, require hundreds of pages of intricate discussion in habeas corpus treatises covering existing defenses.[504] How long, for example, will it take the courts to decide which retroactivity issues are and are not "threshold" issues and how those issues differ from the merits;[505] what constitutes a "new rule;"[506] which outcomes are available to "reasonable" jurists acting in "good faith" and which are not;[507] what difference there is between rules "dictated" by prior law (which are retroactive) and rules "governed" and "controlled" by prior law (which are not);[508] what constitutes "finality" as a matter of federal and as a matter of state law, and how the federal and state conceptions interact;[509] what it means for the Constitution to set certain behaviors and statuses beyond the reach of the criminal law, and which behaviors and statuses qualify;[510] which rules are "fundamental," which contribute to "accuracy," and how those two requirements interact with each other and with the Court's definition of "new;"[511] how and when the state's tardy invocation of the nonretroactivity bar prevents a court from relying on that bar;[512] how the courts should treat the retroactivity of new rules of constitutional criminal procedure cutting back on constitutional law;[513] and how the courts should distinguish between new rules cutting back on preexisting rights, new rules expanding those rights, and new rules revising those rights in ways that help some defendants and harm others?

All in all, therefore, the declaration of a new habeas corpus defense can only aggravate the conditions that the ABA recently attributed to habeas corpus defenses already in existence: "lengthy and time-consuming litigation

(1963) (refining successive petition defense); *Ex parte* Royall, 117 U.S. 241 (1886) (creating exhaustion defense). *See generally* Stidum v. Trickey, 881 F.2d 582, 584 (8th Cir. 1989) ("Although the magistrate's analysis of the procedural bar was probably correct, we believe it to be more expeditious to go to the substance of the matter, violation of the Confrontation Clause, thus avoiding a review of the quagmire presented by a cause and prejudice analysis."), *cert. denied*, 110 S. Ct. 1151 (1990).

503. RECOMMENDATIONS OF THE ABA, *supra* note 145, at 94.

504. *See, e.g.*, J. LIEBMAN, *supra* note 3, §§ 22A.1-28.2; L. YACKLE, POSTCONVICTION REMEDIES §§ 52-87, 96-100, 150-56 (1981).

505. *See supra* Part II.

506. *See supra* Part III.

507. *See supra* notes 333-39 and accompanying text.

508. *See supra* notes 227-35 and accompanying text.

509. *See supra* Part IV.

510. *See supra* Part V.

511. *See id.*

512. *See supra* Part VI.

513. *See supra* Part VII.

of threshold questions," " 'sisyphean' . . . procedural" maneuvers, and " 'satellite' " proceedings that "prevent the federal courts from reviewing [the merits of] constitutional claims" and "delay the process of . . . review."[514] *Teague*, thus, is less a workable way to speed up habeas corpus proceedings than an exceedingly effective way to slow them down. All that *Teague* accomplishes, therefore, is its *second* probable purpose:[515] to assure — slowly but ever more surely — that noncapital prisoners convicted in violation of the Constitution lose even the tiny proportion of habeas corpus actions that they currently win[516] and that capital prisoners convicted and condemned in violation of the Constitution lose a good deal more of the 40% of the cases in which they currently prevail.[517]

As this and the Court's other efforts to create new habeas corpus defenses repeatedly have demonstrated over the last fifteen years,[518] the Court's ability to limit the number of prisoners (particularly capital prisoners) afforded new trials, *without* at the same time extending the length and cost of habeas corpus proceedings, is severely constrained. Although the Court could simply reverse most of the rights it has afforded criminal defendants over the past sixty years, it thus far has been reluctant to do so.[519] The Court also could nullify the habeas corpus statute, or at least the series of since-codified[520] decisions leading up to *Brown v. Allen*,[521] and thereby cut off access to constitutional remedies after completion of direct appeal. Although, the Court has tried to do just that *sub silentio* via *Teague*, the need to obscure the extent to which it is intruding on Congress' prerogatives has forced it to structure what is intended as a restriction on federal jurisdiction as instead a *defense* to state liability. As we have seen, although that artifice works well enough as a means of limiting relief, it works terribly as a means of streamlining and expediting review.

Teague's clearest lesson, therefore, is that Congress is better placed than the Court to achieve real habeas corpus reform, because only Congress has the unfettered ability to transform the statutory structure as a whole. *Teague* thus presents Congress with three stark and potentially decisive options:[522]

If, on the one hand, Congress, like the Court, wants to see constitutional rights cut off, then it should repeal the habeas corpus statute. The disastrous

514. RECOMMENDATIONS OF THE ABA, *supra* note 145, at 94-95.

515. *See supra* notes 370-73 and accompanying text.

516. *See* J. LIEBMAN, *supra* note 3, § 2.2d, at 23 n.97, § 5.2, at 43 n.33; Faust, Rubenstein & Yackle, *supra* note 15, at 681.

517. *See supra* note 15 and accompanying text.

518. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976).

519. *See, e.g.*, Minnick v. Mississippi, 111 S. Ct. 486 (1990) (reaffirming principle of Miranda v. Arizona, 384 U.S. 436 (1966)); Kamisar, *supra* note 13. *But see* Payne v. Tennessee, 59 U.S.L.W. 4814 (U.S., June 27, 1991) (overruling Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989)).

520. *See* 28 U.S.C. § 2254(d) (1988) (discussed *supra* notes 290-91 and accompanying text).

521. 344 U.S. 443 (1953); *see supra* note 3.

522. *See supra* note 145.

effects that would accompany this act of setting back the clock anywhere from 120 to 600 years[523] are revealed not only by the serious state criminal justice abuses that continue to be uncovered in habeas corpus proceedings,[524] but also

523. *See* J. LIEBMAN, *supra* note 3, § 2.2b.

524. *See, e.g.*, Amadeo v. Zant, 486 U.S. 214 (1988) (jury selection pursuant to district attorney's deliberate scheme, set forth in handwritten memorandum to jury commissioners, to underrepresent blacks and women); Ford v. Wainwright, 477 U.S. 399 (1986) (petitioner's competency to be executed not adequately adjudicated; behavior while on death row indicated serious mental disorder); Vasquez v. Hillery, 474 U.S. 254 (1986) (grand jury selection process systematically excluded blacks); Francis v. Franklin, 471 U.S. 307 (1985) (jury instructions on intent violated due process requirement that state prove offense beyond reasonable doubt); Solem v. Helm, 463 U.S. 277 (1983) (petitioner given life sentence for uttering a "no account" check for $100 following six minor prior convictions); Estelle v. Smith, 451 U.S. 454 (1981) (state-employed psychiatrist's testimony at penalty phase based on petitioner's pretrial statements that were not freely and voluntarily given and were made without counsel or waiver of counsel); Castaneda v. Partida, 430 U.S. 482 (1977) (Mexican-American petitioner suffered intentional discrimination in grand jury selection process; only 39% of those summoned for grand jury service were Mexican-American although that group accounted for 79% of county population); Brewer v. Williams, 430 U.S. 387 (1977) (police driving petitioner from site of arraignment to jail and aware of petitioner's background as former mental patient obtained confession by violating promise to counsel not to interrogate petitioner and by delivering an impassioned speech to the prisoner stating that kidnapping victim was entitled to a "Christian burial"); Blackledge v. Perry, 417 U.S. 21 (1974) (misdemeanor assault charge dismissed by prosecutor and refiled as felony after petitioner successfully appealed conviction on misdemeanor charge); Buttrum v. Black, 908 F.2d 695 (11th Cir. 1990) (17-year old woman induced to confess by psychiatrists who failed to warn her that what she told them could be used as a basis for sentencing her to die; state hired independent psychiatrists to examine petitioner but denied her resources to hire her own expert; after putting on evidence that petitioner, and not her husband, was the guiding force in the rape and killing, prosecutor successfully objected to evidence petitioner introduced showing that her husband was the guiding force); Julius v. Jones, 875 F.2d 1520 (11th Cir. 1989) (blatant prosecutorial suppression of exculpatory evidence), *cert. denied*, 110 S. Ct. 258 (1989); McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988) (police withheld fact that chief prosecution witness, who at trial identified petitioner, a dark-skinned black man, as the assailant, originally told the police the assailant was white), *cert. denied*, 489 U.S. 1033 (1989); Carter v. Rafferty, 826 F.2d 1299 (3d Cir. 1987) (prosecution suppressed statement of its most crucial witness corroborating other witnesses' trial testimony favorable to defendant), *cert. denied*, 484 U.S. 1011 (1988); Thomas v. Kemp, 796 F.2d 1322 (11th Cir.) (counsel's failure to discover or seek sentence less than death based on defendant's long and well-documented history of mental disorder and difficult home environment held to be ineffective), *cert. denied*, 479 U.S. 996 (1986); Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986) (state deliberately withheld fact that chief witness against petitioner repeatedly failed polygraph test; petitioner thereafter released from prison after charges dropped); Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985) (defendant convicted and sentenced to death by jury composed almost entirely of friends of the victims who attended their funeral), *cert. denied*, 476 U.S. 1164 (1986); Carter v. Montgomery, 769 F.2d 1537 (11th Cir. 1985) (jury instruction relieved state of burden of proving all elements of the crime); Wallace v. Kemp, 757 F.2d 1102 (11th Cir. 1985) (capitally sentenced petitioner found to have been incompetent to stand trial; on retrial, after petitioner's sanity was restored, petitioner was acquitted); Sabel v. Stynchcombe, 746 F.2d 728 (11th Cir. 1984) (state statute used to punish abrasive but legal speech); House v. Balkcom, 725 F.2d 608 (11th Cir.) (capitally sentenced petitioner's counsel filed no pretrial motions, sought no defense witnesses, failed to interview either the petitioner's family or the state's witnesses, did not visit the crime scene, made no use of possibly exculpatory evidence available from state's own scientific tests, and failed to move for new trial after being presented with strong evidence indicating that victims were alive after last time when petitioner could have been in contact with them), *cert. denied*, 469 U.S. 870 (1984); Fair v. Zant, 715 F.2d 1519 (11th Cir. 1983) (state trial judge promised capitally sentenced petitioner that his guilty plea could be withdrawn upon hearing

by the Court's inability — despite its many recent attempts[525] — to render habeas corpus relief a rarity.

If, on the other hand, Congress, *unlike* the Court, simply wants to speed up habeas corpus adjudication, it needs take only two actions: First, it should repeal *Teague*, as well as, probably, the exhaustion and procedural default doctrines, and direct federal courts to move immediately and expeditiously to the constitutional merits of habeas corpus petitions.[526] Second, in capital cases, in which the incarcerated prisoner's otherwise sufficient incentive to secure prompt adjudication of his petition for release or retrial[527] is lacking, Congress should adopt strict deadlines for filing federal petitions upon the completion of trial, direct appeal, and such postconviction remedies as the states permit capital prisoners to invoke before being executed.[528]

If, on the third hand — the hand that usually wins — Congress prefers to deal incrementally with the problems *Teague* tries to solve but instead aggravates, Congress should: (1) above all, undertake some modification of *Teague* simply to reclaim Congress' 201-year-old status as the maker of habeas corpus law in this country;[529] (2) make clear that federal habeas corpus courts retain their statutorily given jurisdiction to adjudicate novel constitutional claims;[530] (3) codify a reliance-based interpretation of the "new rule" concept that affords retroactivity to decisions that state and lower courts heretofore had reason to assume were the law or were about to become the law;[531] and (4) define finality so as to assure prisoners one full and fair opportunity to secure federal

his sentence, then refused to withdraw guilty plea, on petitioner's request, after sentencing petitioner to die); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982) (trial counsel failed to challenge manifestly unconstitutional jury-selection procedures for fear of upsetting the trial judge), *cert. denied*, 460 U.S. 1098 (1983); Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980) (prosecutor suppressed corrected statement of crucial witness and witness's psychiatric records; petitioner (a civil rights activist) denied opportunity to cross-examine critical prosecution witnesses about special treatment witnesses received); Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980) (en banc) (police produced two vastly different confessions allegedly given by mentally deficient petitioner during a 42-hour period of interrogation without counsel; exculpatory version appeared voluntary and to be in defendant's words; inculpatory version was involuntary and in prose beyond defendant's ken), *cert. denied*, 450 U.S. 1001 (1981); Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980) (police detective knowingly concealed whereabouts of eyewitness to crime, visited her frequently before and near time of trial, and married her one year after trial); J. LIEBMAN, *supra* note 3, § 2.2d, at 23 n.95 (collecting information on apparently innocent prisoners freed recently as a result of habeas corpus proceedings).

525. *See, e.g.*, cases cited *supra* note 502.

526. *See* RECOMMENDATIONS OF THE ABA, *supra* note 145, at 94.

527. *See* J. LIEBMAN, *supra* note 3, § 21.1b.

528. *See id.*, § 2.3 (Supp. 1991) (discussing capital prisoners' disincentive to file quickly and proposals for 60, 180, and 365 day statutes of limitations on filing capital habeas corpus petitions).

529. Congress included a habeas corpus remedy in the Judiciary Act of 1789, and has exercised responsibility over the writ ever since. *See id.*, § 2.2; *see also supra* notes 374-78 and accompanying text.

530. *See supra* Part II.

531. *See supra* notes 379-412 and accompanying text.

adjudication of their right to relief under new rules of constitutional law.[532]

532. *See supra* note 425-31 and accompanying text.