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Christopher N. Lasch

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Abstract

Although the Supreme Court’s 1989 decision in *Teague v. Lane* generally prohibits the application of new constitutional rules of criminal procedure in federal habeas review of state-court judgments, the Court’s 2008 decision in *Danforth v. Minnesota* frees state courts from *Teague*’s strictures. *Danforth* explicitly permits state courts to fashion their own rules governing the retroactive application of new federal constitutional rules in postconviction proceedings, and leaves open the question whether lower federal courts are bound by *Teague* in postconviction review of federal criminal convictions.

In this Article, I examine the doctrinal underpinnings of the Court’s retroactivity jurisprudence, and propose that state courts and the lower federal courts abandon the Supreme Court’s experiment with nonretroactivity. Affording retroactive application to new constitutional rules in state and federal postconviction proceedings promotes fairness to litigants and uniformity in the development of federal constitutional criminal doctrine. Perhaps most importantly, a rule of retroactivity permits the lower state and federal courts to regain a role in the development of constitutional doctrine that had previously been constricted, first by *Teague* and then by the Antiterrorism and Effective Death Penalty Act.

My examination of the *Danforth* opinion leads me to believe that the foundations upon which *Teague* was built are now crumbling. *Danforth* marks a shift in the Court’s conception of the function of habeas corpus which portends well for the reinvigoration of a constitutional dialogue among the lower courts and an increased role in constitutional development for the lower federal courts.

Christopher N. Lasch

Beginning in 1965, the Supreme Court’s decisions on the retroactive application of new constitutional rules of criminal procedure have presented a “confused and confusing” jurisprudence. The Court’s recent decision in Danforth v. Minnesota, however, represents a significant and promising break with the past. Danforth makes clear the Court’s retroactivity rules are binding only on federal courts considering state prisoners’ habeas corpus petitions. State postconviction courts are explicitly declared free to disregard the Court’s jurisprudence. Further, Danforth leaves open the possibility that federal courts considering the postconviction claims of federal prisoners may be similarly unbound.

After providing a brief overview of the processes of postconviction review, this Article examines the Danforth decision and its antecedents, and proposes that among the numerous possible retroactivity rules lower courts may adopt after Danforth, a rule of retroactivity should be preferred. There are several reasons why lower courts – both state and federal – should adopt a rule of retroactive application of new constitutional rules of criminal procedure in postconviction cases.

First, a rule of general retroactivity avoids the unfairness inevitably attendant to nonretroactive application of judicial decisions, ensuring that similarly situated litigants are treated equally.

1 Associate Research Scholar in Law and Clinical Lecturer, Yale Law School. B.A., Columbia College; J.D., Yale. I am deeply indebted to the following scholars who reviewed this article and provided critical comments that assisted me greatly: Giovanna Shay, Eric M. Freedman, David R. Dow, Randy A. Hertz, Kermit Roosevelt III, Adam N. Steinman, Dan M. Kahan, Kate Stith, Scott J. Shapiro, Tracey L. Meares, J.L. Pottenger, Jr., Dennis E. Curtis, Brett Dignam, Robert A. Solomon, Michael J. Wishnie, and Camille Carey. I would also like to thank Anand Balakrishnan for his excellent research assistance and comments. Finally, I am indebted to my mentors and fellow scholars in Yale Law School’s Jerome N. Frank Legal Services Organization, who have provided support to me in ways too numerous to mention. Despite the valuable assistance of others, problems may persist and those, of course, should be attributed solely to me.  
4 Danforth, 128 S. Ct. at 1034 n.4. 
5 Sections I and II, infra. 
6 Section III, infra. 
7 Section IV, infra.
Second, a rule of general retroactivity will allow the lower courts – state and federal – to continue to participate in important doctrinal development. The development of constitutional criminal doctrine has historically depended on lower courts’ ability to expound on the meaning of constitutional provisions, but has been hindered by the Court’s retroactivity jurisprudence and legislation limiting federal habeas review of state-court judgments. A rule of retroactivity will preserve a role for the lower courts in doctrinal development.

Third, a general rule of retroactivity promotes uniformity in the application of constitutional rules of criminal procedure, whereas adoption of retroactivity rules which look to the nature of the constitutional rule at issue (as the Supreme Court’s retroactivity rules have) will lead to disuniformity which threatens the supremacy of federal law.

In reaching these conclusions, I take into account the nature and function of state and federal postconviction proceedings, and particularly the ways in which they differ from the nature and function of federal habeas review of state-court judgments. I also consider whether interests in the finality of criminal convictions outweigh the benefits to be served by a retroactivity regime, and conclude they do not.

After evaluating the impact of Danforth on the lower courts in postconviction proceedings both state and federal, I turn to a brief examination of how Danforth may portend change for the future of the Court’s retroactivity doctrine in federal habeas corpus proceedings reviewing state-court judgments. I conclude that Danforth offers great hope for a return to a more constructive model of state-federal court “dialogue” on constitutional rules, replacing the paternalistic model of habeas review which held the threat of habeas relief as a punishment to be delivered to state courts who failed to “toe the constitutional line” set by the federal courts. Additionally it appears the lower federal courts may, on the logic of the Danforth decision, move away from use of the retroactivity inquiry as a threshold question, which will allow lower federal courts to reintroduce themselves to the constitutional dialogue in federal habeas proceedings.

PROLOGUE: POSTCONVICTION PROCEDURES AS THEY EXIST TODAY

To better understand the issues surrounding retroactivity in state and federal postconviction proceedings, it is critical to keep in mind the structure and functions of those proceedings as they exist today.

The typical lifespan of a criminal case originating in state court can be divided into eleven stages: (1) trial; (2) direct appeal as of right, usually to an intermediate-level court; (3) state habeas corpus proceedings; (4) appeal from the state habeas decision; (5) appeal from the state habeas court’s decision on whether to grant a certificate of relief; (6) appeal from the state habeas court’s decision on the merits of the habeas petition; (7) federal habeas corpus proceedings; (8) appeal from the federal habeas court’s decision on whether to grant a certificate of appealability; (9) appeal from the federal habeas court’s decision on the merits of the habeas petition; (10) appeal from the federal habeas court’s decision on whether to grant a stay of execution; and (11) appeal from the federal habeas court’s decision on the merits of the stay of execution.

8 Section V, infra.
9 Although the United States Constitution does not require the state courts to provide an appeal as of right, see Jones v. Barnes, 463 U.S. 745, 751 (1983), forty-seven states provide for appeal as of right and the other three have procedures “tantamount to an appeal as of right.” Marc M. Arkin, Rethinking the Constitutional Right to a Criminal Appeal, 39 U.C.L.A. L. Rev. 503, 513-14 (1992) (citations omitted).
appellate court\(^\text{10}\); (3) discretionary appeal within the state-court system, usually to the state’s highest court; (4) petition for writ of certiorari in the United States Supreme Court; (5) petition for postconviction review (sometimes called “state habeas corpus\(^\text{11}\)”), usually entertained by a trial-level state court; (6) direct appeal from the denial of postconviction relief, often as a matter of right, and usually to an intermediate-level appellate court\(^\text{12}\); (7) discretionary appeal within the state-court system, usually to the state’s highest court; (8) petition for writ of certiorari in the United States Supreme Court\(^\text{13}\); (9) petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (“federal habeas corpus”), in United States District Court; (10) appeal to the United States Court of Appeals;\(^\text{14}\) and (11) petition for writ of certiorari in the United States Supreme Court.

The first four stages of a state criminal case’s typical lifespan are the “direct review track,” the next four are the “state postconviction track,” and the final three stages are the “federal habeas corpus track.” All of this is depicted in Figure 1 below.

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\(^{10}\) In capital cases it is common for the direct appeal as of right to be taken directly to the state’s highest court, in which case stage 3 is omitted. See, e.g., Cal. Const. art. VI, § 11; 720 Ill. Compiled Stat. Ann. Act 5 § 9-1(i); Or. Rev. Stat. § 138.012(1).


\(^{12}\) Once again, in capital cases it is common for the direct appeal from the denial of postconviction relief to be taken directly to the state’s highest court, in which case stage 7 is omitted. E.g. Commonwealth v. Holland, 556 Pa. 175, 176 n.1, 727 A.2d 563, 564 n.1 (1999); Commonwealth v. Bailey, 71 S.W.3d 73, 84 (Ky. 2002) (state supreme court exercises direct appellate jurisdiction in cases “directly affecting the imposition of the death penalty … as a matter of policy”).

\(^{13}\) In Lawrence v. Florida, 594 U.S. 327, 127 S.Ct. 1079 (2007), the Court held the one-year statute of limitations for filing a petition for writ of habeas corpus in federal district court is \textit{not} tolled during the pendency of a petition for writ of certiorari following state postconviction proceedings. It is likely, given this holding, combined with the rarity of a certiorari grant at this stage, \textit{see Lawrence}, 127 S.Ct. at 1084, that many litigants will choose to forego filing a certiorari petition.

\(^{14}\) Appeal from the denial of federal habeas corpus relief is limited to those issues as to which the petitioner is successful in obtaining a “certificate of appealability” from the district or circuit courts. 28 U.S.C. § 2253.
Figure 1. Typical Lifespan of a State Criminal Case.
By contrast, the typical lifespan of a criminal case originating in federal court only consists of six stages: (1) trial; (2) direct appeal to the United States Court of Appeals; (3) certiorari review by the United States Supreme Court; (4) a motion to set aside, vacate, or correct sentence pursuant to 28 U.S.C. § 2255, in the United States District Court;¹⁵ (5) direct appeal to the United States Court of Appeals;¹⁶ and (6) certiorari review by the United States Supreme Court. The first three stages are the “direct review track,” and the last three are the “federal postconviction track,” as depicted in Figure 2 below.

Figure 2. Typical Lifespan of a Federal Criminal Case.

¹⁵ Federal postconviction proceedings are often referred to as “habeas corpus” proceedings, but the use of this terminology leads to confusion. To differentiate actions involving federal prisoners from those involving state prisoners, I will use “federal postconviction” to refer to proceedings in which a federal prisoner seeks postconviction relief, and “federal habeas corpus” to refer to proceedings in which a state prisoner challenges the constitutionality of his or her confinement.

¹⁶ As in federal habeas cases, a certificate of appealability is required. See supra note 14.
In practice, significant deviations from the typical can occur, in the form of interlocutory appeals, ancillary litigation in the form of writs of prohibition or mandamus, petitions for rehearing, successive postconviction petitions, successive federal habeas corpus petitions, and the like. Yet, for purposes of a general discussion about how the state and federal postconviction review processes function, and how they ought to function, these typical lifespans will suffice.

The critical difference between state and federal criminal cases lies in the existence of extra tiers of review of state cases. As can be seen from Figure 1, state criminal cases are subject to federal court review in two ways – through certiorari to the United States Supreme Court from state-court judgments, and through federal habeas corpus review. This inter-system review, of course, is occasioned by the federal system and the supremacy of federal law. Federal criminal cases are never subjected to inter-system review.

I. HISTORY OF THE SUPREME COURT’S CRIMINAL RETROACTIVITY JURISPRUDENCE BEFORE DANFORTH

A. Brown v. Allen and the expansion of federal habeas review

Inter-system review is a driving force behind the jurisprudence and literature on retroactivity. Indeed, the history of the Court’s criminal retroactivity jurisprudence has been recounted in fine detail by numerous scholars.

17 Giovanna Shay and I have elsewhere described the growing importance of the Supreme Court’s certiorari review of state-court judgments after passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Giovanna Shay & Christopher Lasch, Initiating a New Constitutional Dialogue: The Increased Importance under AEDPA of Seeking Certiorari from Judgments of State Courts, 50 Wm. & Mary L. Rev. 211 (2008). Much of what was said in that article is relevant here, and I am indebted to Professor Shay in this regard.

actually begins with a case that did not address retroactivity at all, but was instead concerned with the scope of inter-system review in criminal cases. I am referring to the Court’s decision in Brown v. Allen.\textsuperscript{19}

Prior to Brown, the processes of inter-system review depicted in Figure 1 above were not fully effectuated. Originally, federal habeas review of state-court judgments was technically limited to cases in which the state court lacked “jurisdiction.”\textsuperscript{20} In the first half of the twentieth century, this concept yielded considerably to the notion that habeas corpus was available to correct deprivations of due process of law.\textsuperscript{21} Where state courts provided adequate “corrective process,” relitigation of issues on habeas corpus was not permitted.\textsuperscript{22}

In Brown, the Court considered two cases wherein the habeas petitioners had fully litigated their federal constitutional claims in the state courts. Instead of adverting to the “corrective process” of those states, however, the Supreme Court plunged headlong into resolution of the merits of the cases. And the Court specifically noted the authority of the federal district courts to conduct evidentiary hearings in such cases, even where the facts had been determined after evidentiary proceedings in the state courts.\textsuperscript{23} In short, Brown v. Allen authorized federal courts to engage in complete relitigation of federal claims previously adjudicated in state-court criminal proceedings.\textsuperscript{24}

\textsuperscript{19} 344 U.S. 443 (1953).
\textsuperscript{20} See Danforth, 128 S.Ct. at 1036.
\textsuperscript{21} Id. & n.7.
\textsuperscript{22} Frank v. Magnum, 237 U.S. 309, 335-36 (1915) (holding that factual determinations of Georgia Supreme Court were exercise of that court’s “corrective process” which “must be taken as setting forth the truth of the matter ….”).
\textsuperscript{23} Brown, 344 U.S. at 463-64.
\textsuperscript{24} See H.L.A. Hart, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 106 (1959) (noting that Brown “manifestly broke new ground” by implying that “due process of law is not primarily concerned with the adequacy of the state’s corrective process … but relates essentially to the avoidance in the end of any underlying constitutional error ….”); but see Eric M. Freedman, Brown v. Allen: The Habeas Corpus Revolution That Wasn’t, 51 Alabama L.R. 1541, 1617 (2000) (“Legally, Brown was an exceedingly minor event.”).
This prompted strong criticism from Professor Paul Bator, who in an influential 1963 article strongly questioned the need for such expansive inter-system review through federal habeas corpus. Bator argued the importance of resisting “the impulse … to make doubly, triply, even ultimately sure that the particular judgment is just, that the facts as found are ‘true’ and the law applied ‘correct.’” A major step in Bator’s argument was the rejection of even the possibility of being “sure” – and the replacement of the goal of confidence in a “true” outcome with the goal of confidence in the criminal adjudicatory process, the “set of arrangements and procedures which provide a reasoned and acceptable probability that justice will be done, that the facts found will be ‘true’ and the law applied ‘correct.’” Once the focus on objective truth is replaced by a focus on process, the question to be asked for each procedure under consideration for inclusion in the adjudicatory process is, simply, whether the benefits of the procedure (including its perceived truth-finding ability) outweigh the costs. Seen in these terms, federal habeas corpus could, and Bator argued should, be addressed “not so much to the substantive question whether truth prevailed but to the institutional or functional one, whether the complex of arrangements and processes which previously determined the facts and applied the law validating detention was adequate to the task at hand?”

Turning to the question of federal habeas corpus review, Bator supported his objection to the relitigation on the merits of federal constitutional questions already decided on the merits by state courts in three ways – by positing the “parity” of state and federal judges


26 Bator did not question the need for United States Supreme Court review of state-court judgments via the writ of certiorari. *See id.* at 510 (noting that certiorari review satisfies “the need for uniform, authoritative pronouncements of federal law”); *see also id.* at 453 (“[R]ecourse in our federal system to the Federal Supreme Court provides the state courts with authoritative and uniform pronouncements of federal law.”). Bator also rejected the view (which he attributed to Professor Hart) that federal habeas should be expansive because the Supreme Court so often denies certiorari, and “a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal constitutional court.” *Id.* at 507. For Bator, the presumption that federal judges are more “correct” was, in fact, incorrect – Bator championed the notion that federal and state judges enjoy “parity” in their ability to address federal constitutional questions. *Id.* at 509-10. Additionally, viewing the lower courts on federal habeas as substitutes for the Supreme Court’s certiorari jurisdiction ignores the essential reason for that jurisdiction – “the need for uniform, authoritative pronouncements of federal law” – which cannot be achieved through habeas corpus. *Id.* at 510.

27 *Id.* at 443.

28 *Id.* at 448.

29 *Id.*
in ability to adjudicate federal questions;\textsuperscript{30} by citing comity concerns;\textsuperscript{31} and, most importantly for this Article, by citing “finality” concerns.

Finality, urged Bator, is essential for the “conservation of resources … not only simple economic resources, but all of the intellectual, moral, and political resources involved in the legal system.”\textsuperscript{32} Among such squandered resources are the “sense of responsibility” among state-court judges,\textsuperscript{33} the deterrent value of the criminal law,\textsuperscript{34} and the rehabilitative value of the criminal law.\textsuperscript{35}

Bator’s discussion of the finality concerns militating against extensive inter-system habeas review has since been canonized in Supreme Court jurisprudence.\textsuperscript{36}

The expansion of habeas corpus criticized by Professor Bator\textsuperscript{37} did not cease, however. In \textit{Fay v. Noia},\textsuperscript{38} the Court held that a prisoner who had failed to litigate his federal constitutional claims in the state courts might nonetheless do so on federal habeas review, provided the prisoner did not deliberately bypass the corrective processes of the state

\textsuperscript{30} See note 26, supra. For a different view, see Burt Neuborne, \textit{The Myth of Parity}, 90 Harv. L. Rev. 1105 (1977) (deriding parity as a “dangerous myth” and a “mistaken assumption”).

\textsuperscript{31} Bator, note 25, supra, at 503-06.

\textsuperscript{32} Id. at 451.

\textsuperscript{33} Bator’s view of the criminal adjudicatory system as process (and not truth-seeking) led him to the belief that each subsequent level of review must be justified by a purpose: “What seems so objectionable is second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the ‘truth.’” \textit{Id.} Appeals, for example, would remain valuable for Bator – despite the potentially corrosive effect on the morale of a trial judge of feeling “that all of the shots will always be called by someone else” – because of their “functional and ethical purposes.” But, for Bator, it would be wrong to allow “still further recourse where these purposes may no longer be relevant.” \textit{Id.}

\textsuperscript{34} Id. at 452.

\textsuperscript{35} Id.


\textsuperscript{37} Professor Freedman takes Bator to task for viewing \textit{Brown v. Allen} as a “radical” step in expanding federal habeas corpus, and argues that \textit{Brown} “was in no way revolutionary.” Freedman, \textit{supra} note 24, at 1545-46.

\textsuperscript{38} 372 U.S. 391 (1963).
courts. Writing for the Court at a later date, Justice Powell described *Fay v. Noia* as removing “[t]he final barrier to broad collateral re-examination of state criminal convictions in federal habeas corpus …”

The expansion of the procedures of federal habeas corpus paralleled an expansion in the substantive bases for habeas relief. As Justice Stevens summarized in *Danforth*:

> The serial incorporation of the Amendments in the Bill of Rights during the 1950’s and 1960’s … created more opportunity for claims that individuals were being convicted without due process and held in violation of the Constitution. Nevertheless, until 1965 the Court continued to construe every constitutional error, including newly announced ones, as entitling state prisoners to relief on federal habeas.

These two historical developments – the expansion of habeas corpus, and the wholesale incorporation of the Bill of Rights against the states – set the stage for the Court to make a “serious mistake,” one which would set the Court on a “retroactivity odyssey” of which *Danforth* is merely the most recent chapter.

**B. The birth of nonretroactivity: *Linkletter v. Walker* and Professor Mishkin’s critique**

The final ingredient in the recipe for disaster was the Fourth Amendment exclusionary rule. In *Mapp v. Ohio* the Court had held the exclusionary rule, long applied to remedy Fourth Amendment violations in the federal courts, to be equally binding on state courts. In *Linkletter v. Walker*, the Court was called upon to decide whether the *Mapp* rule would apply in federal habeas proceedings. The prospect of upsetting “thousands” of final state-court convictions in order to apply the exclusionary rule was too much.

In the words of Professor Roosevelt, “[t]he *Linkletter* result was almost inevitable.” In order to “support a desirable result” -- preventing the feared major disruption

39 *Id.* at 438 (Charles Noia, the habeas petitioner, was entitled to merits determination of federal constitutional issues, where his failure to pursue those claims by appealing within the state system did not amount to a knowing, intelligent, voluntary waiver of those corrective processes).
41 128 S.Ct. at 1037.
43 *Id.*
46 381 U.S. 618 (1965).
47 *Linkletter*, 381 U.S. at 636.
48 In the words of Professor Roosevelt, “[t]he *Linkletter* result was almost inevitable.” Roosevelt (1999), *supra* note 18, at 1091.
application of the *Mapp* rule to habeas petitioners would entail -- the Court cut a "Faustian bargain," 50 abandoning centuries of adherence to a strict rule of retroactivity. 51

The bargain was struck -- the Court in *Linkletter* insisted on a broad authority to determine the retroactivity or prospectivity of judicial rulings, 52 and fashioned a test for making that determination for cases on federal habeas. The test, of course, ensured that *Mapp* would not apply retroactively, by including as relevant considerations the purpose of the rule (the exclusionary rule’s purpose being to deter Fourth Amendment violations, the Court found, describing the rule as “an extraordinary procedural weapon that has no bearing on guilt” 53), the extent to which the parties had relied on the “old” rule (states had relied on the Court’s pre-*Mapp* precedent declining to apply the exclusionary rule to the states 54); and finally the effect retroactive application would have on the administration of justice (retrospective application of the exclusionary rule “would tax the administration of justice to the utmost” 55).

The criticism of *Linkletter* came swiftly and has persisted to date. Professor Paul Mishkin’s immediate assault 56 on *Linkletter* has undoubtedly been the most influential critique. In many ways it was a blueprint for the *Danforth* decision.

Mishkin struck at the very foundation of the *Linkletter* decision -- the Court’s dramatic rejection of the long-accepted “declaratory” theory of judging in favor of a “creative” theory of judging. The declaratory model comes from Blackstone, who “stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'” 57 Thus, “[t]he judge rather than being the creator of the law was but its discoverer.” 58

The *Linkletter* Court, however, heralded the ascendancy of the alternative approach of John Austin, who “maintained that Blackstone could not grasp the idea that judges do in fact ‘make’ law, because of Blackstone's adherence to ‘the childish fiction employed by

51 See *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) (“judicial decisions have had retrospective operation for near a thousand years”).
52 *Linkletter*, 381 U.S. at 622 & n.3 (rejecting criticism that pure prospectivity violates Article III); *id.* at 629 (“We believe that the Constitution neither prohibits nor requires retrospective effect.”).
53 *Linkletter*, 381 U.S. at 636, 637-38.
54 *Id.* at 637.
55 *Id.* at 637.
56 *Supra* note 49.
57 *Linkletter*, 381 U.S. at 622-23 (quoting 1 Blackstone, Commentaries 69 (15th ed. 1809)). Justice Clark was also careful to note that “[w]hile Blackstone is always cited as the foremost exponent of the declaratory theory, a very similar view was stated by Sir Matthew Hale in his History of the Common Law which was published 13 years before the birth of Blackstone.” *Id.* at 623 & n.7 (citing Gray, *Nature and Sources of the Law* 206 (1st ed. 1909)).
58 *Linkletter*, 381 U.S. at 623.
our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by judges.”

Citing with approval those who decried the Blackstonian view as “out of tune with actuality,” the Linkletter Court emerged from the Blackstonian “shadow” over its jurisprudence and declared adherence to Austin’s view that “judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law.”

Professor Mishkin, while accepting that “the Blackstonian conception is not entirely valid,” lamented Linkletter’s move toward Austin and political realism:

Despite (and perhaps also because of) its shortcomings as a description of reality, the “declaratory theory” expresses a symbolic concept of the judicial process on which much of courts' prestige and power depend. …[T]his symbolic view of courts is a major factor in securing respect for, and obedience to, judicial decisions. If the view be in part myth, it is a myth by which we live and which can be sacrificed only at substantial cost; consider, for example, the loss involved if judges could not appeal to the idea that it is “the law” or “the Constitution” – and not they personally – who command a given result.

“Prospective limitation of judicial decisions,” wrote Mishkin, “wars with this symbol.”

Mishkin also noted an “institutional consideration” raised by prospectivity – its impact on the development of constitutional law. The prospect of prospectivity, Mishkin believed, might reduce or eliminate the incentives of counsel to argue for change in the law. Indeed, Mishkin valued such change even more highly than he did the symbolism of the declaratory view: “Law must in fact change, and its stultification would be too high a price to pay for maintenance of the symbolism.”

Relegating the “declaratory” view to a symbolic rather than literal one allowed Mishkin to recognize that law does in fact change, whether one lives in a Blackstonian or an Austinian world. What would differ between the two worlds, posited Mishkin, would be the pace of change. While the proponents of an Austinian world of pure prospectivity

60 Linkletter, 381 U.S. at 624.
61 Id.
62 Id. at 623-24.
63 Mishkin, supra note 49, at 60.
64 Id. at 62-63.
65 Id. at 64.
66 Id. at 61.
67 Id. at 66.
would argue its necessity to achieve “needed modernization of the law,” the Blackstonian view would “tend to restrain a court from adopting new law that is neither reflective of current community standards nor adequately foreshadowed by prior judicial developments.” This, for Mishkin, was the appropriate pace of change, particularly in matters of constitutional law. I will return to a discussion of the effect of nonretroactivity rules on doctrinal development later.

Ironically, Mishkin approved of the result reached in Linkletter. But the reasoning – the abandonment of Blackstone in favor of Austin, as a means for rejecting retroactivity in favor of prospectivity – he found intolerable. He also found it unnecessary, as the court’s three-factor retroactivity test failed to distinguish the case at hand, which came to the Court on federal habeas review, from the Mapp decision itself, which arose on direct review. Application of the Linkletter test to Mapp, noted Mishkin, would have resulted in holding enforcement of the exclusionary rule in state-court criminal cases to be prospective, rather than retrospective as held in Mapp.

The problem facing the Court in Linkletter was not whether or not the Mapp rule would apply retroactively – that had already been done in Mapp – but rather how the Court might justify retroactive application on direct review (as in Mapp) while avoiding it on federal habeas corpus (in Linkletter). The Linkletter decision was nonresponsive to this problem. The Linkletter holding would be better justified, wrote Mishkin, not by the shift from Blackstonianism to Austinianism deployed in Linkletter, but by an analysis of the functions of habeas corpus. Mishkin thus recast the problem from one of retroactivity versus prospectivity to one of the availability of habeas corpus relief.

Mishkin viewed the function of habeas corpus as varying, depending on the “intended effects” of the constitutional rule to be enforced. Rules with the intended effects of

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68 Id. at 70.
69 Id.
70 Id. at 70-71.
71 Section III-D, infra.
72 Id. at 102 (“The Linkletter result … seems quite sound – indeed, in part for reasons which its rationale tends to obscure.”).
73 Id. at 76 (“[T]he Court’s basic judgment that the purposes of the Mapp rule would not be advanced by retroactive application would have been equally valid in the Mapp case itself ….”).
74 See Roosevelt (1999), supra note 18, at 1090 (“The Linkletter analysis is deeply unsatisfying. … it draws a distinction between cases on direct review and those in which a judgment is collaterally attacked that is simply impossible to justify within its own theoretical model.”).
75 Id. at 77-78.
76 Mishkin did allow that looking to the “intended effects” of a constitutional rule is not dramatically different from looking to the “purpose” of the rule, as in the Linkletter test. Mishkin, supra note 49, at 90; see also id. at 81 & n.85 (explaining that choice of “intended effects” rather than “purpose” is to allow consideration of the multiplicity of goals that may be served by a constitutional rule).
“insuring that none but those guilty be convicted,” fall within the “prime function” of habeas corpus, freedom from unjustified imprisonment. Because the development of such rules expresses society’s developing standards for confidence in criminal matters, Mishkin believed it sensible that habeas corpus would assess the legality of confinement by the most current standards.

By contrast are rules not intended to promote reliability, but rather to “advance other objectives, such as respect for human dignity and integrity.” Protection of rights served by these constitutional rules, because not related to the reliability of the judgment, is not the central mission of habeas review. However, Mishkin believed there still remained a need to rectify such constitutional violations on habeas – enforcement of federal law requires a federal forum, and the Supreme Court’s limited capacity demands that the district courts fulfill this enforcement role via habeas corpus. Because this “enforcement function” is a substitute for certiorari review, Mishkin found no reason to apply any rules not applicable on direct review.

Two points must be made regarding Mishkin’s focus on a rule’s intended effect with respect to “enhancing the reliability of the guilt-determining process.” The first is to note that Mishkin, like Bator, drew a sharp distinction between factual guilt or innocence and the adjudicative process used to arrive at a conclusion of guilt or innocence, and held that habeas should be concerned with the latter: “[D]espite the problems inherent in retrial of a defendant, especially after many years, there seems substantial basis for the proposition that habeas corpus should only inquire into the reliability of the earlier process of guilt-determination, rather than seek to determine the fact of guilt itself.”

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77 Mishkin, supra note 49, at 80 (quoting Sanford H. Kadish, Methodology and Criteria in Due Process Adjudication--A Survey and Criticism, 66 Yale L. J. 319, 346 (1957)).
78 Id. at 79 (citing Fay v. Noia, 372 U.S. at 401-02).
79 Id. at 81-82. “Valuing the liberty of the innocent as highly as we do, earlier proceedings whose reliability does not measure up to current constitutional standards for determining guilt may well be considered inadequate justification for continued detention.” Id.
80 Id. at 86.
81 Id. at 86-87.
82 Id. at 87. See also Yin, supra note 18, at 240-41 (“Because the lower federal courts are essentially acting in place of the Court on direct review, the applicable constitutional standards are those that were in place at the time that the conviction would have been reviewed by the Court.”) (citing Mishkin, supra note 49, at 87). One criticism of this approach is this: If habeas review is simply a delayed version of certiorari review, why should habeas courts not apply their best understanding of current law, just as the Supreme Court would on certiorari review? See Griffith v. Kentucky, 479 U.S. 314 (1987), discussed infra notes 167-173.
83 Id. at 82.
84 Id. at 85-86.
85 Id. at 86.
The second point flows from the first. Because Mishkin is concerned with the reliability of the adjudicatory process rather than that of the ultimate guilt/innocence determination, it is not necessarily an easy task to determine which rules are intertwined with this reliability and which are not. Thus, some constitutional rules might be primarily concerned with human dignity and integrity, implying a limited role for habeas review, but might nonetheless have a “substantial and intended impact” upon reliability, and therefore implicate the core concern of habeas review.86 I will resume discussion of the difficulty of determining which constitutional rules promote reliable verdicts and which promote other values below.87

C. Expansion of the Linkletter nonretroactivity doctrine

Despite criticism of Linkletter, the Court continued on its “retroactivity odyssey” not by contracting the rule of “selective prospectivity”88 set forth in Linkletter, but by expanding it in Johnson v. New Jersey89 and Stovall v. Denno90 to a rule of general application, no matter the procedural posture of the case.91 Notably, Johnson and Stovall, like Linkletter, involved the question of retroactive application of exclusionary rules to state-court judgments. Johnson concerned the rules announced in Escobedo v. Illinois92 and Miranda v. Arizona,93 requiring exclusion of confessions obtained through custodial interrogations under circumstances not

86 Id. at 81. For example, the exclusion of involuntary confessions as violative of the privilege against self-incrimination is principally justified by a concern with systemic integrity, see, e.g., Rogers v. Richmond, 365 U.S. 534, 540-41 (1961) (stating that the reason for excluding involuntary confessions is “not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system”); Mitchell v. United States, 526 U.S. 314, 325 (1999) (holding defendant may assert privilege in sentencing proceeding concerned with quantity of drugs trafficked, despite having pleaded guilty to the offense) (citing Rogers), but it has also been recognized that the privilege is not “divorced from the correct ascertainment of guilt.” Withrow v. Williams, 507 U.S. 680, 692 (1993) (citations omitted).
87 See infra notes 142, 204-220, 448-451, and accompanying text.
88 “Selective prospectivity” is the application of a new rule to the litigants before the Court but not to others similarly situated.
90 388 U.S. 293 (1967).
91 As Professor Roosevelt writes: “Linkletter created an unstable situation. The inconsistency between its test and the rule of automatic retroactivity for direct review, coupled with the Court's inability to distinguish between the two contexts, meant that either the new test or the old rule would have to give way. Pushing forward might have seemed more productive than pulling back, and rather than rethink Linkletter, the Court expanded it.” Roosevelt (2007), supra note 18, at 1684.
sufficiently protective of the accused’s right to remain silent, and came to the Court on certiorari review from the state postconviction track. The Court applied *Linkletter* and held the *Escobedo* and *Miranda* rules not retroactive. *Stovall* concerned the exclusion of lineup identifications obtained in violation of a defendant’s right to counsel as set forth in *Gilbert v. California*, and *United States v. Wade*. The Court in *Stovall* embraced “selective prospectivity,” announcing the decisions in *Gilbert* and *Wade* would apply retroactively to the litigants in those cases but prospectively in all other cases – i.e. only in cases where the lineups occurred after these decisions. *Stovall* further indicated that the three factors considered in *Linkletter* (the purpose of the “new” rule, the extent of reliance on the “old” rule, and the extent of disruption that would be caused by retroactive application) would comprise the retroactivity test in all cases, regardless of procedural posture.

Another way to read *Linkletter* and subsequent decisions is – rather than as innovative reasoning by the Supreme Court to achieve a “desirable result” – as defensive maneuvering to avoid a federalism crisis. Lower courts had already begun the process of denying retroactive application to the Warren Court’s criminal procedure reforms, as is evident in *Linkletter* and *Johnson*. In both cases, the Court noted that state courts had

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94 The *Danforth* dissent would read *Johnson* as an indication that the Court’s retroactivity jurisprudence was binding on state postconviction courts, 128 S.Ct. at 1049 (Roberts, C.J., dissenting), but the decision does not support this reading. First, the petitioner did not argue against application of *Linkletter*, but instead argued that *Escobedo* broke no significant new ground and that retroactivity analysis was therefore irrelevant. 1966 WL 87737 at *20-*21 (Brief for Petitioner). Second, the procedural posture of the case would not support such a reading. The New Jersey Supreme Court had denied retroactive effect to the *Escobedo* rule, but not on the basis of Supreme Court precedent. The question before the Court, then, was not whether the New Jersey Court was obligated to follow *Linkletter*, but whether the Supreme Court would be required to effectuate *Escobedo* on certiorari review from the denial of state postconviction relief. It is entirely consistent to read *Johnson* as indicating no more than that the Supreme Court would henceforth be applying the *Linkletter* test to cases in that procedural posture. The *Danforth* majority points out that commentators and lower courts reached that conclusion, albeit by misreading a portion of *Johnson* meant to indicate that state courts could determine the retroactive effect of state-law protections more expansive than federal constitutional protections. 128 S.Ct. at 1039 & n.14 (discussing *Johnson*, 384 U.S. at 733).

95 384 U.S. at 721.

96 388 U.S. 263 (1967).

97 388 U.S. 218 (1967).

98 *Stovall*, 388 U.S. at 300-01.

99 Id.


101 The *Danforth* majority’s characterization of *Linkletter* as adopting a “practical approach,” 128 S.Ct. at 1036, appears to be an understatement in this regard.
nearly unanimously declined to give retroactive effect to the Court’s new constitutional rules.\(^{102}\)

These state-court decisions set the stage for the Court’s doctrinal step that would take it away from retroactivity – the move from a declaratory model to a creative model of judging. Writing before *Linkletter*, the New Jersey Supreme Court asserted its general power to legislate from the bench and eschewed Blackstone’s declaratory theory as a “splendid myth.”\(^{103}\) Other state courts presaged *Linkletter*’s rejection of the Blackstonian approach.\(^{104}\)

The Court’s conversion to prospectivity thus can be seen as driven from below, both jurisprudentially and politically. In the face of massive opposition from the state courts, it seems likely the Court was concerned about its ability to actually enforce the retroactive application to the states of its procedural rulings in *Mapp, Escobedo, Miranda, Gilbert* and *Wade*.\(^{105}\) That it was driven by concerns particular to the inter-system review of state-court judgments occasioned by federalism is essential to an understanding of why the *Danforth* decision is correct, and why retroactivity in the intra-system review of state and federal postconviction proceedings should be reconsidered without reference to the Supreme Court’s “retroactivity odyssey.”

\(^{102}\) *Linkletter*, 381 U.S. at 620 n.2; *Johnson*, 384 U.S. at 729 & n.10.

\(^{103}\) *State v. Johnson*, 43 N.J. 572, 582, 206 A.2d 737, 742 (1965) (citation omitted).

\(^{104}\) *E.g.*, *State v. Richter*, 270 Minn. 307, 313, 133 N.W.2d 537, 541 (1965) (“[W]e do not subscribe to the philosophy that *Mapp* was the law in 1951, notwithstanding Blackstone …”); *In re Lopez*, 62 Cal.2d 368, 379, 398 P.2d 380, 388 (1965) (“We no longer subscribe to that ‘splendid myth’ of Blackstone that all constitutional interpretations are eternal verities that stretch backwards and forwards to infinity.”) (citations omitted).

\(^{105}\) Professor Dow notes that prior to *Linkletter*, there were rumblings from individual Justices who believed the retroactivity issue should be addressed. *Dow*, supra note 18, at 33 n.50. Justice Harlan was among them. In *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963), Justice Harlan dissented from the Court’s per curiam grant of relief to two Florida prisoners in light of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding the Sixth Amendment right to counsel binding on the states via the Fourteenth Amendment), arguing that given the “current swift pace of constitutional change, the time has come for the Court to deal definitively with” retroactivity. 375 U.S. at 4 (Harlan, J., dissenting). The next year, in *LaVallee v. Durocher*, 377 U.S. 998 (1964), Justice Harlan would have granted certiorari to decide whether the circuit court erred by giving *Gideon* retroactive effect in federal habeas corpus review of state-court judgments. *Id.* at 998 (Harlan, J., dissenting from denial of certiorari); see *United States ex rel. Durocher v. LaVallee*, 330 F.2d 303 (2d Cir. 1964). Thus, even while the *Gideon* holding had not instigated a federalism crisis (having been widely supported by the states, see *Escobedo v. Illinois*, 378 U.S. 478, 487 n.8 (noting that twenty-two states had urged the Gideon result)), perhaps it was feared that retroactive application of *Gideon* might. See 1962 WL 115122 at *22-23 (amicus brief of twenty-two states in *Gideon*, urging that the Court not give retroactive effect to the proposed rule).
D. Justice Harlan’s criticism of the Stovall-Linkletter doctrine

Criticisms of the Linkletter test – now applicable regardless of the procedural posture of the case – persisted. Two opinions of Justice Harlan would shape the Court’s next steps.\textsuperscript{106}

In \textit{Desist v. United States},\textsuperscript{107} yet another decision concerning the scope of the exclusionary remedy for Fourth Amendment violations, the Court was called upon to consider the retroactivity of its decision in \textit{Katz v. United States},\textsuperscript{108} wherein the Court had abandoned the notion that the Fourth Amendment is only violated by some sort of physical trespass or invasion. \textit{Desist} was a federal narcotics prosecution in which agents used a microphone to record conversations in an adjoining hotel room.\textsuperscript{109} The case came to the Court on direct review, and the Court applied the Linkletter test\textsuperscript{110} to conclude the \textit{Katz} rule should enjoy selective prospectivity – it would apply to the litigants in the case, but to no other case in which the search at issue pre-dated the \textit{Katz} decision itself.\textsuperscript{111}

Justice Harlan dissented, and would have given \textit{Katz} retroactive effect for all cases pending on direct review at the time of the decision. In place of the “doctrinal confusion” spawned by Linkletter, Justice Harlan offered a “rethinking” of the issue.\textsuperscript{112}

Justice Harlan would have cast aside Stovall’s determination that Linkletter applied regardless of procedural posture, and reinstated the divide between cases reaching the Court on direct review and those on federal habeas review. For cases on direct review, Justice Harlan viewed retroactivity as the only possible solution. Pure prospectivity would be a violation of the “case or controversy” requirement, and selective prospectivity offended principles of equality by treating similarly situated defendants differently.\textsuperscript{113}

For cases on federal habeas review, Justice Harlan’s approach relied heavily on Professors Bator and Mishkin. Like Professor Bator, Justice Harlan saw the roots of the

\textsuperscript{106} See \textit{Danforth}, 128 S.Ct. at 1039 (“[T]he opinions of Justice Harlan … provided the blueprint for [Justice O’Connor’s] entire analysis [in \textit{Teague v. Lane}] ….”).
\textsuperscript{107} 394 U.S. 244 (1969).
\textsuperscript{108} 389 U.S. 347 (1967).
\textsuperscript{109} \textit{Id.} at 244-45 & n.2.
\textsuperscript{110} Featuring prominently in the calculus, of course, was the “deterrent purpose of the exclusionary rule,” \textit{id.} at 253, a rule which “‘has no bearing on guilt’ or the ‘fairness of the trial.’” \textit{Id.} at 254 n.24 (quoting \textit{Linkletter}, 381 U.S. at 638); \textit{id.} at 251 (“[T]he deterrent purpose of \textit{Katz} overwhelmingly supports nonretroactivity ….”).
\textsuperscript{111} \textit{Id.} at 254.
\textsuperscript{112} \textit{Id.} at 258 (Harlan, J., dissenting).
\textsuperscript{113} \textit{Id.} at 258-59 (Harlan, J., dissenting) (“We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.”).
retroactivity problem in *Brown v. Allen* and its expansion of federal habeas corpus.\(^{114}\) And like Professor Mishkin, Justice Harlan relied on the functions of habeas review as distinguishing it from direct review and demanding distinct retroactivity rules.\(^{115}\)

Indeed, Justice Harlan adopted nearly entirely Mishkin’s analysis, describing the same functions for habeas review and urging adoption of the same retroactivity rules proposed by Mishkin. Thus, for constitutional rules intended to enhance the reliability of verdicts, Justice Harlan would preserve full retroactivity.\(^{116}\) For rules not serving reliability, and for which the habeas court served merely as an enforcement mechanism,\(^{117}\) “the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.”\(^{118}\)

Justice Harlan’s subsequent opinion in *Mackey v. United States*,\(^{119}\) while restating with increased vigor his belief that retroactivity on direct review was necessary, demonstrated a significant reformulation of his attitude toward retroactivity on habeas review. Because there were actually three cases before the Court—one arising on direct review and two on collateral attack,\(^{120}\) Justice Harlan had ample opportunity to expound on how retroactivity ought to work in both settings.

\(^{114}\) *Id.* at 260-61 (Harlan, J., dissenting) (citing Bator, *supra* note 25, at 463). Ultimately, Justice Harlan believed that the “retroactivity problem” was “spawned” by *Fay v. Noia*. *Id.* at 262 (Harlan, J., dissenting). But, he begins his history with *Brown v. Allen*.  

\(^{115}\) *Id.* at 260, 262-63 (Harlan, J., dissenting).  

\(^{116}\) *Id.* at 262 (Harlan, J., dissenting).  

\(^{117}\) Justice Harlan’s language in describing this function of habeas review is significant. “[T]he threat of habeas,” wrote Justice Harlan, “serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.” *Id.* at 262-63 (Harlan, J., dissenting). Habeas review, in Justice Harlan’s view, served to “deter” state courts from constitutional violations. *Id.* at 263. This view of habeas corpus is quite different from the vision of habeas as a means for “dialogue” between state and federal courts described by Robert Cover and Alexander Aleinikoff, which I discuss below. *See infra* notes 226-228, and accompanying text.  

\(^{118}\) *Id.* at 262-63 (Harlan, J., dissenting). Mishkin’s identical treatment is described above. *See supra* notes 77-82, and accompanying text. Like Professor Mishkin, Justice Harlan does not explain why the “enforcement” function—which simply substitutes habeas review for certiorari review—does not implicate the full retroactivity rule proposed for direct review cases. *See* note 82, *supra*.  


\(^{120}\) The two cases arose from the federal postconviction track. That Justice Harlan used these cases as an opportunity to expound on the proper scope of federal habeas review resulted in some unfortunate consequences, which are discussed below. *See infra* note 463, and accompanying text. Justice Harlan did not consider the significant differences between inter-system collateral review and intra-system collateral review, declaring the
For cases on direct review, Justice Harlan restated his position that the function of the Court – to decide constitutional questions in actual controversies before it – would be inconsistent with either pure prospectivity or selective prospectivity, either of which doctrines would mark an “inexplicable and unjustifiable departure from the basic principle upon which rests the institution of judicial review.” To this, Justice Harlan added a note as to some of the “untoward consequences” on doctrinal development occasioned by prospectivity. Justice Harlan feared prospectivity would vitiate the lower courts’ “responsibility for developing or interpreting the Constitution.” A lower court would not venture to engage in doctrinal development, Justice Harlan believed, if it might be subject to reversal for applying such developments retroactively, even if only to the litigants in the case before the court. The lower courts would be “reduced largely to the role of automatons, directed by [the Supreme Court] to apply mechanistically all then-settled federal constitutional concepts to every case before them.” To Justice Harlan, for the Court to arrogate to itself the exclusive power to develop constitutional law, and eliminate lower courts’ participation in this project, was “intolerable.” Furthermore, Justice Harlan worried that prospectivity would eliminate the incentives of litigants seeking modification of constitutional doctrines to pursue Supreme Court review.

While true to his Desist dissent as to cases arising on direct review, Justice Harlan’s opinion in Mackey with respect to cases arising from collateral attacks beat a significant retreat from his previous position. While retaining a focus on the different function to be served by habeas – as contrasted with direct – review, Justice Harlan otherwise broke with Mishkin’s analysis, which had so heavily influenced his dissent in Desist. The reason appears to be that Justice Harlan, frustrated with “a long course of habeas decisions in this Court which, I still believe, constitute an unsound extension of the historic scope of the writ and an unfortunate display of insensitivity to the principles of federalism which underlie the American legal system,” sought to achieve a restriction of the writ via the retroactivity problem.

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federal postconviction procedure – the motion to vacate pursuant to 28 U.S.C. sec. 2255 – “virtually congruent” to federal habeas review of state-court judgments, and referring to both as “habeas corpus” throughout his opinion. *Id.* at 681 & n.1.

121 *Id.* at 679 (Harlan, J.) (“Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review.”).

122 *Id.* at 681.

123 *Id.* at 680.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.* at 681.

128 *Id.* at 685; see also *id.* at 684 (stating that the retroactivity issues in the cases before the Court “must be considered as none other than a problem as to the scope of the habeas writ”).
As in *Desist*, Justice Harlan asserted that the starting point for considering retroactivity would be an assessment of the functions of habeas corpus. After once again reciting with some bitterness the recent expansion of the writ in *Brown v. Allen* and *Fay v. Noia*, and pointedly noting that his own views on the proper function of habeas corpus review had not been adopted by the Court, Justice Harlan caricatured the prevailing view as being “that [habeas] provides a quasi-appellate review function” to “inquire into every constitutional defect” not waived or harmless. As in *Desist*, Justice Harlan insisted that nonretroactivity would be an appropriate general rule for such “quasi-appellate review” directed primarily at enforcement of federal constitutional doctrine.

But in *Desist*, Justice Harlan had followed Mishkin and recognized the enforcement function as one of two functions served by habeas review, the other being the enhancement of reliability. Indeed Justice Harlan had advocated for retroactivity in cases where habeas review served to guarantee reliability. By summarizing prevailing habeas jurisprudence as concerned solely with providing “quasi-appellate” enforcement of federal law, Justice Harlan was able to cast aside that part of Mishkin’s analysis which would have preserved a measure of retroactivity on habeas review.

Justice Harlan did insist on two exceptions to his proposed general rule of nonretroactivity on habeas review. First, constitutional developments which place “certain kinds of primary, private individual conduct beyond the power of the criminal-law making authority to proscribe” would enjoy retroactive application. Second, new constitutional rules “implicit in the concept of ordered liberty” would be retroactive as well.

That Justice Harlan did not, in *Mackey*, preserve retroactivity for rules enhancing the reliability of criminal judgments, as he had in *Desist*, is perhaps the single most

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129 *Id.* at 682, 684.
130 *Id.* at 682-85.
131 *Id.* at 685.
132 *Id.* at 687.
133 *Id.* at 685-86.
134 *Id.* at 688-89. Justice Harlan adjusted his proposed rule slightly – where in *Desist* the “enforcement” function of habeas was deemed to require only that the habeas court apply constitutional rules “prevail[ing] at the time the original proceedings took place,” *Desist*, 394 U.S. at 263 (Harlan, J., dissenting), in *Mackey* Justice Harlan would have the “quasi-appellate” habeas court apply rules “prevailing at the time a conviction became final.” *Mackey*, 401 U.S. at 689. This revision goes halfway toward rectifying the illogic of Harlan’s *Desist* position noted above. See note 82, *supra*. Justice Harlan offered no reason why a petitioner who receives a substitute for certiorari review by a habeas court exercising the “quasi-appellate” function should not be entitled to have the habeas court apply the same retroactivity rule the Court would have on certiorari review.
135 See *supra*, notes 116-118, and accompanying text.
136 See *supra*, note 116, and accompanying text.
137 *Id.* at 692-93.
138 *Id.* at 693-94.
surprising shift between the two opinions. Justice Harlan offered three explanations for this departure. First, he once again adverted to his description of the prevailing function of habeas – as determined by Justice Harlan’s brethren on the Court – as no longer principally to inquire into guilt or innocence, but rather to serve the “quasi-appellate” function already discussed.\(^{139}\) Second, Justice Harlan placed an emphasis on finality in \textit{Mackey} that he had not in \textit{Desist}: “Finality in the criminal law is an end which must always be kept in plain view.”\(^{140}\) Justice Harlan believed this interest in finality would often outweigh even the reliability interest that would be served by retroactive application of constitutional rules “purportedly aimed at improving the factfinding process.”\(^{141}\) Finally, Justice Harlan questioned the very distinction he had set forth (following Mishkin) in \textit{Desist}, between rules designed to serve reliability and rules serving other values – in \textit{Mackey}, Justice Harlan declared this distinction “inherently intractable.”\(^{142}\)

Justice Harlan’s emphasis on finality was buttressed by citations to Professor Bator’s work and to a 1970 article by Judge Henry Friendly of the Second Circuit.\(^{143}\) Judge Friendly’s views strongly influenced the Court’s jurisprudence, for they resonated not only with Justice Harlan, but also with a second jurist who would shape the Court’s next attempt to rework retroactivity – Justice Sandra Day O’Connor.

In his article, Judge Friendly took the position that “with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.”\(^{144}\) While Professor Bator’s discussion of finality had been embedded in the context of inter-system review – federal habeas corpus – Judge Friendly began his analysis of finality in the \textit{intra}-system review context, looking first at the federal postconviction track and then the state postconviction track.\(^{145}\)

Drawing heavily on Bator, Judge Friendly believed opportunities for collateral attack would impair the criminal law’s deterrent and rehabilitative functions.\(^{146}\) He also pointed out that the lengthy delays attended to postconviction litigation decreased the likelihood of accurate resolution of the issues raised, and made the possibility of a retrial “a matter of theory only.”\(^{147}\) Postconviction litigation also drains resources,\(^{148}\) Judge Friendly

\(^{139}\) \textit{Id.} at 694.
\(^{141}\) \textit{Id.} at 694-95.
\(^{142}\) \textit{Id.} at 695.
\(^{143}\) \textit{Id.} at 690 (citing Friendly, \textit{supra} note 140, at 146-51, and Bator, \textit{supra} note 25).
\(^{144}\) Friendly, \textit{supra} note 140, at 142.
\(^{145}\) \textit{Id.} at 146.
\(^{146}\) \textit{Id.} at 146 & n.15.
\(^{147}\) \textit{Id.} at 146-47.
\(^{148}\) \textit{Id.} at 148.
wrote, though he was quick to point out that even his proposed reforms would not solve the problem entirely, as “narrow[ing] the grounds available for collateral attack would not necessarily discourage prisoners from trying.”

For all these reasons, Judge Friendly advocated limiting the availability of collateral attack to those prisoners who actually claimed to be innocent. Importantly, though, Judge Friendly recognized four exceptions to this general rule. First, Judge Friendly would permit collateral attack in cases where “the criminal process itself has broken down” – where, for example, there has been an unconstitutional denial of counsel, racial discrimination in jury selection, excessive publicity, or improper influence upon the jury.

Second, Judge Friendly would permit the raising on collateral attack of constitutional claims, the factual bases of which “are dehors the record and their effect on the judgment was not subject to consideration and review on appeal.” Such claims would include claims that a guilty plea was procured by improper means, that the prosecution knowingly introduced false evidence, or that the defendant was incompetent to stand trial.

Third, collateral attack should be available for “claims that the state has failed to provide proper procedure for making a defense at trial and on appeal,” of which Judge Friendly thought *Jackson v. Denno* to be the prime example.

Finally, Judge Friendly believed there could be an exception for new constitutional rules of criminal procedure which might apply retroactively. Interestingly, Judge Friendly did not perceive the lower courts (state or federal) as bound by the Supreme Court’s retroactivity jurisprudence (the issue ultimately decided in *Danforth*) – yet he still urged the lower courts to follow the lead of the Supreme Court: “While neither a state nor the United States is bound to limit collateral attack on the basis of a new constitutional rule of criminal procedure to what the Supreme Court holds to be demanded, I see no occasion to be holier than the pope.”

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149 *Id.* at 150.
150 *Id.* at 151-52.
151 *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)).
152 *Id.* (citing *Brown v. Allen*, supra).
153 *Id.* (citing *Sheppard v. Maxwell*, 384 US. 333 (1966)).
154 *Id.* (citing *Parker v. Gladden*, 385 U.S. 363 (1966)).
155 *Id.* at 152.
156 *Id.*; see also *id.* at 168 (suggesting that failure to permit postconviction review of such claims might amount to a due process violation).
159 *Id.* at 153-54.
160 *Id.* at 154.
Judge Friendly’s views had a profound affect on the shaping of habeas corpus doctrine. His proposition that habeas corpus carried a great cost to other systemic values, in particular the value of finality, which should be borne only for the sake of litigating claims of actual innocence, contributed to decisions of the Court declaring habeas relief unavailable for Fourth Amendment claims already fully litigated in state court, limiting successive habeas petitions to those involving a “colorable claim of factual innocence,” and strengthening the procedural default doctrine as a restriction on habeas. And, after she had referenced Judge Friendly’s article in a number of decisions restricting habeas corpus, Justice O’Connor would rely on it once again in authoring the Court’s overthow of the Linkletter retroactivity analysis in federal habeas corpus cases.

161 The article was not influential for its promotion of the availability of collateral attack in the exceptional circumstances I have identified – a discussion to which I shall return below, see infra notes 321-335, and accompanying text – but rather for its general thesis that the function of collateral attack should be almost exclusively to release the “actually innocent” prisoner. See Irene Merker Rosenberg & Yale L. Rosenberg, Essay, Guilt: Henry Friendly Meets the MaHaRaL of Prague, 90 Mich. L. Rev. 604, 604-09 (1991) [hereinafter “Guilt”]. The Rosenbergs counter Friendly with an argument, the conclusion of which echoes the reliance of Bator and Mishkin on process: “[I]n our imperfect world there is only one kind of ascertainable guilt, and that is legal guilt. The search for more is nothing less than arrogance.” Id. at 624-25 (citations omitted).

162 Stone v. Powell, 428 U.S. 465, 491 & n.31 (1976) (“Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government.”) (citing Friendly, supra note 140).

163 Kuhlmann v. Wilson, 477 U.S. 436, 455 (1986). The Court specifically adopted Judge Friendly’s position that a factual showing of innocence on habeas requires consideration of “all the evidence” – both admissible and inadmissible. Id. at 455 & n. 17 (quoting Friendly, supra note 140, at 160).


165 Murray v. Carrier, supra; Smith v. Murray, supra; Engle v. Isaac, 456 US 107, 126 & n.31 (1982) (“[T]he Great Writ entails significant costs.”) (citing Friendly, supra note 140, at 145); Id. at 127 & n.32 (“Judge Friendly and Professor Bator suggest that this absence of finality also frustrates deterrence and rehabilitation.”) (citing Friendly, supra note 140, at 146; Bator, supra note 25, at 452); Coleman v. Thompson, 501 U.S. 722, 748 (1991) (“[T]he Great Writ entails significant costs.’ The most significant of these is the cost to finality in criminal litigation that federal collateral review of state convictions entails …”) (citations omitted).

166 Teague v. Lane, 489 U.S. 288, 309 (1989) (“The fact that life and liberty are at stake in criminal prosecutions ‘shows only that “conventional notions of finality” should not have as much place in criminal as in civil litigation, not that they should have none.’”) (plurality opinion) (quoting Friendly, supra note 140, at 150).
E. Overthrow of the Linkletter-Stovall regime: 
Griffith v. Kentucky and Teague v. Lane

The Court’s first major step in this direction, in its 1987 decision in Griffith v. Kentucky, was to abandon the Linkletter-Stovall test in cases reaching the Court on direct review. Griffith concerned the retroactive application of the Court’s decision in Batson v. Kentucky, governing challenges to racially discriminatory jury selection practices. The Court had previously determined, applying the Linkletter-Stovall analysis, that the Batson rule would not be given retroactive effect to cases on federal habeas corpus review. Griffith concerned whether the Batson rule would apply retroactively to cases pending on direct review.

Embracing Justice Harlan’s arguments, the Court found that the nature of judicial review, and the principle of treating similarly situated defendants the same, required retroactive application of new constitutional rules to all cases pending on direct review. The latter point was dramatically demonstrated by the facts – petitioner Griffith’s case arose out of the same local court as Batson’s had, and indeed the two cases challenged the discriminatory practices of the same prosecutor. Batson was tried three months before Griffith. “It was solely the fortuities of the judicial process that determined the case th[e] Court chose initially to hear on plenary review.” If ever a case exemplified Justice Harlan’s concern that “[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule” would be an “indefensible departure” from the accepted model of judicial review, it was Griffith’s.

If Griffith put a knife in the heart of the Linkletter-Stovall doctrine, the corpse was officially put to rest with the Court’s decision in Teague v. Lane and its immediate progeny. In a plurality opinion that subsequently garnered a majority of votes on the Court, Justice O’Connor incorporated, with only slight alteration, the retroactivity rules for federal habeas corpus review that Justice Harlan had proposed in Mackey.

170 Griffith, 479 U.S. at 322-23 (citing, inter alia, Desist, 394 U.S. at 256 (Harlan, J., dissenting); Mackey, 401 U.S. at 675 (Harlan, J., concurring in part and dissenting in part)).
171 Griffith, 479 U.S. at 327.
172 Id.
173 Mackey, 401 U.S. at 679 (Harlan, J., concurring in judgments in part and dissenting in part).
176 Teague, 489 U.S. at 305-10; Id. at 310 (“… we now adopt Justice Harlan's view of retroactivity for cases on collateral review.”).
Thus, after *Teague*, new constitutional rules are by default not retroactively applicable to cases on federal habeas review. Like Justice Harlan, Justice O’Connor recognized two exceptions, the first identical to Justice Harlan’s exception for “substantive” changes in the law, the second narrower, demanding for retroactive application not only that a new constitutional rule be “implicit in the concept of ordered liberty” but also that it bear on the accuracy of the conviction.

Justice O’Connor relied on comity considerations in adopting Justice Harlan’s view of the functions of habeas corpus. In addressing finality, she relied not only on Justice Harlan, but also on the antecedent work that had been so influential in Harlan’s *Mackey* opinion – the scholarship of Professor Bator and Judge Friendly. “Application 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,” Justice O’Connor wrote. “Without finality, the criminal law is deprived of much of its deterrent effect.”

*Teague* also broke ranks with the *Linkletter-Stovall* doctrine in its treatment of retroactivity as a threshold question. “Retroactivity is properly treated as a threshold question,” Justice O’Connor explained, “for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.”

177 *Id.* at 311.
178 *Id.* at 311-14. See Roosevelt (1999), *supra* note 18, at 1096 (noting that *Teague* combined Justice Harlan’s *Desist* exception, which questions whether a new rule promotes accuracy, with his *Mackey* exception, wherein he abandoned the former in favor of the “implicit in the concept of ordered liberty” formulation); Roosevelt (2007), *supra* note 18, at 1693-94 (“*Teague* combined the two Harlan formulations, an innovation with little obvious justification other than, perhaps, that a conjunction is harder to satisfy than either element alone.”). But see Hertz & Liebman, *supra* note 18, § 25.7 at 1022 (describing the *Teague* plurality as favoring Justice Harlan’s *Desist* formulation, and the combining of the *Desist* and *Mackey* formulations as occurring post-*Teague*).
179 *Teague*, 489 U.S. at 308; see also *id.* at 310 (noting the burdens on state courts occasioned by retroactive application of new constitutional rules in federal habeas proceedings); see also *infra* notes 248-250, and accompanying text (discussing *Danforth* majority’s reading of *Teague* as primarily concerned with comity).
180 *Teague*, 489 U.S. at 309 (citing Friendly, *supra* note 140, at 150; Bator, *supra* note 25, at 450-51; *Mackey*, 401 U.S. at 691 ((Harlan, J., concurring in judgments in part and dissenting in part)).
181 *Id.* at 300. See *id.* (“In our view, the question ‘whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.’”) (alteration in original) (citing Mishkin, *supra* note 49, at 64).
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retroactively to all defendants on collateral review through one of the two exceptions we have articulated.”182 Under *Linkletter* and *Stovall*, the Court had often announced new constitutional criminal rules in federal habeas cases;183 this would no longer be permitted after *Teague*. Through the recasting of retroactivity as a threshold test, *Teague* permitted the Court to adopt a regime of prospectivity without incurring what the Court may have viewed as the principal cost of prospectivity -- accelerated constitutional change.184

**F. Criticism of Teague**

Although the Court had now “reformed” its retroactivity doctrine, somewhat responsively to the concerns of critics like Professor Bator and Professor Mishkin, the new retroactivity rules set forth in *Teague* prompted scathing criticism.185 There were three aspects of *Teague* that drew fire and are particularly relevant to any discussion of what should happen after *Danforth*.

The critics began by decrying the very first step in the *Teague* inquiry – determining whether the constitutional rule a habeas petitioner seeks to apply is, in fact, a “new” rule. Arguably the *Teague* decision itself is not to blame for this problem; any retroactivity inquiry after *Linkletter* involved a threshold question as to whether a rule was sufficiently “new” to trigger the three-factor test announced there.186 But *Teague* made matters worse, according to its critics, by defining a “new rule” in two contradictory ways, each representing one end of the “newness” spectrum.187 Under *Teague*, a new rule is one which *either* “breaks new ground” or is *not dictated* by precedent.188 The former definition appears relatively narrow, limiting new rules to those which break with past precedent, while the latter is obviously quite broad.189

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182 *Id.* at 316.
184 Prospectivity has been viewed as allowing courts to “cut free from precedent and change the law in much the way that a legislature would.” Fallon & Meltzer, *supra* note 18, at 1802. See also *supra* notes 68-71, and accompanying text.
185 See *Yin*, *supra* note 18, at 206 n.11 (collecting articles).
186 See Fallon and Meltzer, *supra* note 18, at 1742 (describing the “new” rule inquiry as a “threshold uncertainty” contributing to the unpredictability of the *Linkletter*-Stovall era); see also *Solem v. Stumes*, 465 U.S. 638, 646 (1984), cited in Fallon and Meltzer, *supra* note 18, at 1742 n.47 (“At just what point of predictability local authorities should be expected to anticipate a future decision has been unclear, however.”).
187 Blume, *supra* note 18, at 588.
188 *Teague*, 489 U.S. at 301 (emphasis original).
189 See Hertz & Liebman, *supra* note 18, § 25.5 at 974-75.
In a trio of decisions decided the year after *Teague*, the Court seemed to settle definitively on the broader definition of “new rule.” Commentators remarked that “[t]he breadth of the Court's conception of what counts as ‘new’ law has restricted habeas jurisdiction to cases involving routine legal questions.” While subsequent decisions may have retreated from that extreme, the Court’s inconsistency has “left the lower courts floundering,” causing some to declare the “new rule” test “little more than [a] screen[] for covert rulings on the merits ….” Criticism of the Court’s implementation of the “new rule” criterion has been widespread.

A broad concept of “new rule” is particularly troubling when coupled with the very narrow exceptions to *Teague* nonretroactivity – the second point which scholars attacked. The first *Teague* exception – for “substantive” changes in the law – has been noncontroversial. It is *Teague*’s second exception, for “watershed” rules of constitutional criminal procedure, that has been criticized as overly narrow.

The *Teague* plurality’s blending of Justice Harlan’s *Desist* and *Mackey* formulations results in an exception so narrow it has been described as “virtually non-existent.”

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190 *See id. at 979-81* (discussing *Butler v. McKellar*, *supra*; *Saffle v. Parks*, *supra*; and *Sawyer v. Smith*, *supra*).
191 Fallon and Meltzer, *supra* note 18, at 1734; *Id. at 1747-48* (noting that implementation of “new rule” requirement in *Sawyer v. Smith* prevented habeas courts not only from making “clear break” from the past but also from imposing “gradual” developments); *Id. at 1816* (criticizing *Teague* definition of “new rule” as “too expansive”).
192 Hertz & Liebman, *supra* note 18, § 25.5 at 981-93.
193 *Id.* at 993.
194 *Id.; see also Yin, supra* note 18, at 287 (“…*Teague* and its progeny have failed to provide sufficient guidance for determining when a rule is new, thus leaving federal courts a zone of discretion with which they can make outcome determinative decisions without necessarily reaching the merits of the claims.”).
195 *E.g., Roosevelt (2007), supra* note 18, at 1690-93; *Blume, supra* note 18, at 596 (noting the Court’s view “that any resolution and rejection of an intellectually tenable distinction of its cases creates a new rule” would “both distort[] the way constitutional adjudication takes place and circumvents the analytical basis of *Teague*.’’); *Entzeroth, supra* note 183, at 212 (“As fifteen years of *Teague* have taught, the new rule doctrine is interpreted in such an extraordinarily broad manner that it is removed from the traditional concerns and concepts that gave rise to retroactivity limits in general and in the context of habeas corpus proceedings in particular.”).
196 *See, e.g. Roosevelt (2007), supra* note 18 at 1693; *Hertz & Liebman, supra* note 18, § 25.7 at 1021.
197 Hertz and Liebman suggest that the narrow “watershed” exception tracks exceptions to the procedural default and harmless error rules, a point of some interest when one considers whether those doctrines serve the same interests the *Teague* rule purports to.
198 *Supra* note 18, § 25.7 at 1024-28.
199 *See* note 178, *supra* and accompanying text.
Professor David Dow has argued that by framing the second exception in terms of innocence or guilt, the Teague plurality relied on “a deeply flawed epistemology.”\(^{200}\) Echoing the concerns of Professors Bator and Mishkin – that courts are capable of assessing only the process used to determine guilt or innocence, rather than factual guilt or innocence itself\(^{201}\) – Professor Dow takes the Court to task for “confus[ing] ‘guilty’ with an empirical proposition.”\(^{202}\) Teague should exclude from its ambit, in Dow’s view, any rule – procedural or substantive -- that affects the adjudicative process for determining guilt or punishment.\(^{203}\)

To an extent, this formulation is more true to Justice Harlan’s views than Teague. Justice Harlan, after all, had relied extensively on Professors Bator and Mishkin. In Desist, therefore, Justice Harlan’s focus on accuracy was described in terms of process, not actual guilt or innocence.\(^{204}\) And in Mackey, Justice Harlan turned even further toward Bator’s process model, declaring the question of what rules serve accuracy “intractable” and crafting his second exception to embrace rules essential to the “adjudicatory process.”\(^{205}\) While Justice Harlan’s exception is substantially narrower than Professor Dow would have drawn it – principally in order to serve finality\(^{206}\) – the approach is similar.

The Court’s recent retroactivity decisions have demonstrated that the Court will not adhere to the “process” view of reliability. In Schriro v. Summerlin,\(^{207}\) the majority and dissent pitted the actual innocence view against the process view of reliability. The Court held its decision in Ring v. Arizona,\(^{208}\) that the Sixth Amendment requires a jury (not a judge) to find aggravating factors necessary for imposition of the death penalty,\(^ {209}\) is not to be retroactively applied to cases on federal habeas review.\(^{210}\)

The Summerlin dissenters believed the Ring rule satisfied Teague’s second exception for rules “central to an accurate determination,”\(^{211}\) because “a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution.”\(^{212}\) This

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199 Entzeroth, supra note 183, at 195-96; see also Roosevelt (2007), supra note 18, at 1693 (“[N]o new procedural rule has yet satisfied the Teague exception, and the Court has strongly intimated that none shall.”).
200 Dow, supra note 18, at 39-41.
201 See supra notes 28-29 and 84-85, and accompanying text.
202 Dow, supra note 18, at 40.
203 Id. at 41.
204 Desist, supra, 394 U.S. at 262 (Harlan, J., dissenting) (describing habeas as concerned with the “procedure” or “fact-finding apparatus” employed by the trial court).
205 Mackey, supra, 401 U.S. at 693-95.
206 See supra, notes 140-143, and accompanying text.
208 536 U.S. 584 (2002).
209 Id. at 609.
210 Summerlin, 542 U.S. at 358.
211 542 U.S. at 359 (Breyer, J., dissenting) (citing Teague, 489 U.S. at 313).
212 Id. at 360 (citations omitted).
view of an “accurate determination” is process based, recognizing there is no objectively correct answer where capital sentencing is concerned, only a collection of procedures (including jury determination of all facts necessary for the imposition of the death sentence) intended to result in a “community-based judgment.”

The Summerlin majority, by contrast, believes in objective accuracy, rejecting the dissent’s focus on “community-based judgment” and focusing on whether juries are so superior to judges in their factfinding abilities as to “so ‘seriously diminish[]’ accuracy that there is an ‘‘impermissibly large risk’’ of punishing conduct the law does not reach.”

The Court’s rejection of the process model of reliability is also apparent in Whorton v. Bockting. There the Court held its 2004 decision in Crawford v. Washington, dramatically revising its Confrontation Clause jurisprudence, would not be applied retroactively on habeas review. The Court’s 1980 ruling in Ohio v. Roberts had permitted courts to admit into evidence the out-of-court statement of an unavailable witness – dispensing with confrontation – in situations where the statement bore “adequate ‘indicia of reliability.’” In Crawford, the Court retrenched, discarding the Roberts focus on “indicia of reliability” and holding that confrontation is required where the out-of-court statement is “testimonial” in nature, unless the prosecution can demonstrate both the unavailability of the declarant and a prior opportunity for cross-examination of the declarant by the defendant.

In Bockting, however, the Court once again distinguished actual reliability from the process model of reliability. Although Crawford held that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation,” the Court in Bockting downplayed the relationship between the Crawford rule and accuracy.

Summerlin and Bockting thus demonstrate that the Court will continue to hew to an overly narrow interpretation of the second Teague exception.

Finally, Teague’s recharacterization of retroactivity as a “threshold” test has also drawn enormous critical attention. While commentators have found plenty of reasons to
dislike the threshold test concept, perhaps the most widely shared criticism is based on a recognition that treating the retroactivity inquiry as a threshold test has dramatic implications for the development of constitutional doctrine. As I have already noted, Justice Harlan observed the doctrine-freezing effect of prospectivity – fearing it would reduce the lower courts to “automatons” and relieve them of their obligation to develop constitutional doctrine. Teague’s threshold test accomplished this with a flourish.

Prior to Teague, it was possible to conceive of federal habeas review as a “dialogue” between state and federal courts, one which “required both to speak and listen as equals,” and to treat the other with “mutual respect and awareness.” This dialogue was the

222 Id. at 963-71 (discussing eight reasons for abandoning the threshold test rule).
223 Toby Heytens, for example, while noting the serious problems that accompany a selective prospectivity regime, Toby J. Heytens, Managing Transitional Moments in Criminal Cases, 115 Yale L.J. 922, 987-90 (2006), nonetheless advocates for selective prospectivity, in large part because of his belief that “applying new rules in the cases in which they are announced is necessary to promote development in the law.” Id. at 983-84.
224 Supra note 125 and accompanying text. Justice Harlan made these in Mackey while arguing for retroactivity on direct review – on federal habeas review, he apparently felt these concerns would be outweighed by the finality interest that motivated him to propose a rule of general prospectivity with limited exceptions.
225 See James S. Liebman, More Than “Slightly Retro:” The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in Teague v. Lane, 18 N.Y.U. Rev. L. & Soc. Change 537, 575 (1990/1991) (predicting Teague’s threshold test 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.”); Hertz & Liebman, supra note 18, § 25.5 at 970-71 (“The plurality approach forbids judges to interpret the United States Constitution in habeas corpus cases and relegates those judges to the virtually ministerial task of putting into operation decisions that the Supreme Court renders on direct review.”)
226 Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L. J. 1035, 1036 (1977). Professor Giovanna Shay and I have thoroughly discussed the “dialectical federalism” paradigm described by Cover and Aleinikoff, and its demise at the hands of AEDPA. Shay & Lasch, supra note 17.
227 Cover & Aleinikoff, supra note 226, at 1048. This vision of habeas review as a dialogue between equals is radically different from the vision expressed by Justice Harlan in Desist, of habeas as a “threat” which would “serve[] as a necessary incentive for [state] courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.” Desist, 394 U.S. at 262-63 (Harlan, J., dissenting). This “deterrence function” view led Justice Harlan to believe a habeas court “need only apply the constitutional standards that prevailed at the time the original proceedings took place.” Id. at 263. This is not a dialogue between mutually respecting equals, but a parent-child relationship in which the federal courts serve to correct the misbehavior of the state courts. Allowing the habeas court to “say what the law is” (i.e. apply current,
engine for doctrinal development: “[T]he Supreme Court might ‘define the values from which a dialogue will proceed,’ but it would be the ‘ensuing dialogue’ between lower federal courts and state courts that would have the ‘profound impact on the development of constitutional law.’”

Teague’s threshold test, however, substantially impairs this process.229 “[I]t eliminates a previously available federal forum in which state prisoners may argue for new federal procedural rules.”230 Thus, even if a federal habeas court is inclined to narrowly define what constitutes a “new rule,”231 the incentive for litigators after Teague is to avoid arguing for doctrinal development, framing habeas claims instead, insofar as possible, as dictated by precedent.232 (In 1996, Congress took one more doctrine-freezing step, codifying in AEDPA an even stricter version of the Teague rule).233

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228 Shay & Lasch, supra note 17 at 219 (quoting Cover & Aleinikoff, supra note 226, at 1065).

229 This is not surprising, given that Justice O’Connor’s plurality opinion explicitly endorsed the view of habeas review as serving a “deterrence function.” Teague, 489 U.S. at 306 (O’Connor, J.)(quoting Desist, 394 U.S. at 262-63 (Harlan, J., dissenting)).

230 Entzeroth, supra note 183, at 191. I quote this passage because I find it a suitably modest statement of the impact of the threshold test. While I believe this impact is quite significant, it is surprisingly easy to overstate the case. For example, Entzeroth goes on: “If habeas is no longer an avenue for the establishment of new rules, only those few direct appeal cases in which the Court grants certiorari will be available for the development of criminal procedure rules.” Id. This ignores the opportunities for doctrinal development in the lower courts when they consider cases on direct (and possibly postconviction) review. Such doctrinal development can even be effectuated on federal habeas. Under Teague (but not under AEDPA), the decisions of the lower federal courts developing doctrine constitute the body of “old law” which federal habeas courts can apply. See Shay & Lasch, supra note 17, at 223, 232 n.126 (noting difference between AEDPA and Teague); Alan K. Chen, Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules, 2 Buff. Crim. L. Rev. 535, 588-93 (1999) (discussing AEDPA’s more restrictive provisions). Similarly, I find some overstatement in Professor Yin’s assertion that Teague’s threshold test means “the lower federal courts are essentially removed from the development of constitutional law. … [T]he dialogue between federal courts and state courts … is lost.” Yin, supra note 18, at 283 (citing Cover & Aleinikoff, supra note 226, at 1050-53; Kathleen Patchel, The New Habeas, 42 Hastings L. J. 941, 1016-18 (1991)). Even after Teague, lower courts still have opportunities for developing the law – certainly on direct review and, as I discuss below, also on postconviction review, thanks to the Danforth decision.

231 See supra notes 186-195, and accompanying text (noting malleability of “new rule” concept).

232 Fallon & Meltzer, supra note 18, at 1804 (“[D]octines that withhold remedies when a claimant relies on new law curtail the incentive for litigants to raise novel arguments...
Removing federal habeas review as a “locus for the development of new rules of criminal procedure” creates pressures elsewhere in the system. As will be discussed more fully below, unless the lower courts ensure that state postconviction and federal postconviction review continue as loci for doctrinal development, the general tendency is, as Justice Harlan noted, for consolidation of interpretive power in the Supreme Court. This is particularly troublesome because without the constitutional dialogue that occurs when lower courts are empowered to develop doctrine, the Supreme Court will be unguided in this task.

All of these criticisms ultimately reflect the fact that the Teague rule is more a product of historical happenstance than a coherent jurisprudential doctrine. Its roots are in the expansion of federal habeas review, well nourished by strong reaction to the dramatic developments in constitutional criminal doctrine effected by the Warren Court – especially the exclusionary rule. One sad irony to this tale is that the Court in its 1976 decision in Stone v. Powell effectively abolished federal habeas review of Fourth Amendment claims, demonstrating – if one assumes the concerns about application of the exclusionary rule to the states were well founded – an entirely different solution to the initial problem the Court faced in Linkletter. The story of the Court’s retroactivity jurisprudence might have been entirely different – indeed, it might never have taken place at all had the Court not been facing political forces agitated by the enforcement of the exclusionary rule within the federalist structure of the justice system.

…..”); Id. at 1819; see also Mishkin, supra note 49, at 61; Mackey, 401 U.S. at 681 (Harlan, J.).


235 See supra notes 123-126, and accompanying text.

236 Blume, supra note 18, at 584 (“Since the lower courts will be removed from the process of interpreting the Constitution, the burden of this task will fall onto the Supreme Court –.. But the Court will have to render its judgments on ‘new’ rules without the benefit of the opinions of the lower federal courts.”). See also Chen, supra note 230 at 633 (“Teague’s decisionmaking structure … diminished the deliberative function of constitutional standards, impeded the growth of constitutional law, and may, ironically, have undermined the very deterrent impact it heralded by clouding understanding of law.”).


238 I do not, but that is neither here nor there for purposes of this Article.

239 See Mishkin, supra note 49, at 57-58 (describing the Court's prior instincts in taking retroactivity for granted as “overborne [in Linkletter] by the felt need to support a desirable result”); Roosevelt (2007), supra note 18, at 1679 (describing Linkletter as “crafted to solve a particular problem-- to prevent habeas petitioners from claiming the benefits of new rules of constitutional criminal procedure.”).
II. THE DANFORTH DECISION: TEAGUE DOES NOT BIND THE STATE COURTS

What brought the parties in Danforth to the Supreme Court, at bottom, was the question whether Crawford v. Washington,\textsuperscript{240} and its dramatically revised Confrontation Clause jurisprudence, would be applied retroactively to invalidate the final judgment of a state prisoner.

Stephen Danforth, a Minnesota inmate who had been convicted on the strength of a videotaped interview with a six-year-old child who did not testify at trial, filed a state postconviction petition claiming this trial procedure failed the newly announced Crawford test.\textsuperscript{241} Both the state postconviction trial court and the intermediate appellate court applied Teague and concluded that Crawford was a “new rule” that would not be applied retroactively to Danforth’s case on collateral review.\textsuperscript{242} On discretionary review, the Minnesota Supreme Court considered – and rejected – Danforth’s argument that Teague applies only to limit the scope of federal habeas review “and does not limit the retroactive application of new rules in state postconviction proceedings.”\textsuperscript{243} The United States Supreme Court granted certiorari to consider this single issue: “Are state supreme courts required to use the standard announced in Teague [] to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law- or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by Teague?”\textsuperscript{244}

A. The key notes struck by the majority opinion

Justice Stevens delivered the opinion for a 7-2 majority, with Chief Justice Roberts writing a dissent joined by Justice Kennedy. The decision holds Teague does not bind the state courts: \textsuperscript{245} Teague “limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a

\textsuperscript{240} 541 U.S. 36 (2004), discussed supra notes 216-220 and accompanying text.
\textsuperscript{241} Danforth, 128 S.Ct. at 1033. Danforth had previously argued that the introduction of the child’s videotaped statement violated his Confrontation Clause rights as set forth in Ohio v. Roberts; this argument was rejected on direct review. Id.
\textsuperscript{242} Id.; Danforth v. State, 700 N.W.2d 530 (Minn. App. 2005).
\textsuperscript{243} Danforth, 128 S.Ct. at 1033-34 & n.2 (quoting Danforth v. State, 718 N.W.2d 451, 455-57 (Minn. 2006)).
\textsuperscript{244} Danforth v. Minnesota, 127 S.Ct. 2427 (Mem) (2007); 2006 WL 4541279 at *i (Petition for Writ of Certiorari). As noted above, see supra notes 216-220, and accompanying text, the Court had already held Crawford to be nonretroactive on federal habeas review.
\textsuperscript{245} My discussion of the Danforth opinion is not intended to be exhaustive. There are many interesting facets to the decision; however, I have attempted – no doubt not entirely successfully – to limit my discussion to that which is necessary for the discussion in Sections III-V, infra.
state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under Teague.”

The result was not surprising. As the majority correctly noted, the Teague rule is rooted in considerations of comity. It is “abundantly clear,” wrote the Court, “that the Teague rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions ….” Even Chief Justice Roberts in dissent conceded the majority correctly found Teague’s roots in comity. Because the rule is an attempt to reconcile the functions of federal habeas review with considerations of comity, it makes little sense to hold the rule binding upon state postconviction courts.

But while the outcome of Danforth was no surprise, there are two striking features of the majority opinion which evidence a shift in the Court’s retroactivity analysis – a return to the Blackstonian “declaratory” theory of judging, and a movement toward consideration of the retroactivity question through the lens of the law of remedies.

The opinion begins and ends with an assertion of the “declaratory” theory of judging. “We begin with a comment on the source of the ‘new rule’ announced in Crawford,”

246 Danforth, 128 S.Ct. at 1042.
247 Id. at 1040-41; see Section I, supra.
248 Id. at 1041; see generally id. at 1040-42.
249 Danforth, 128 S.Ct. at 1052 (Roberts, C.J., dissenting) (citing Teague, 489 U.S. at 308). The Chief Justice argued, however, that “there was more to Teague than [comity],” stressing finality concerns. Id. I address the dissent’s finality argument below. See Section III-F, infra.
250 Id. at 1041 (“Federalism and comity considerations are unique to federal habeas review of state convictions.”) (citing State v. Precioso, 129 N.J. 451, 475, 609 A.2d 1280, 1292 (1992) for the proposition that comity and federalism concerns “simply do not apply” to intra-system review in state court).
251 The return to Blackstone’s “declaratory” model is, of course, thanks to Professor Mishkin. See Section I-B, supra.
252 Although the Court does not explicitly acknowledge the impetus for this conceptual shift, the focus on remedies marks an implicit attempt to adapt the Court’s retroactivity jurisprudence to the post-Teague suggestions of commentators. Professors Fallon and Meltzer advocated this reframing of the retroactivity question, see supra note 18, and Professor Roosevelt also employs the approach. Roosevelt (1999), supra note 18, at 1108 (“[R]emedial analysis is the only acceptable route to prospective results …”); Roosevelt (2007), supra note 18, at 1678 (“We ought not to think in terms of retroactivity at all. Instead, we need only ask, according to our best current understanding of the law, whether [the trial court] violated the constitutional rights of individual defendants, and if so, whether those wrongs merit a remedy.”). The roots of the argument can be traced to Professor Mishkin. See supra note 75.
Justice Stevens wrote. The point of this comment, it turns out, is not so much to trace the history of Crawford (that is done quite cursorily), but rather to embrace Blackstone’s declaratory theory: The Crawford rule was emphatically not, concluded Justice Stevens, “a rule ‘of our own devising’ or the product of our own views about sound policy.” After setting the stage in this dramatic manner, the opinion moves directly into a discussion of the “somewhat confused and confusing ‘retroactivity’ cases decided in the years between 1965 and 1987.” The reference to 1965, of course, is a reference to Linkletter, the decision assailed by Professor Mishkin for its abandonment of the Blackstonian “declaratory” theory.

Yet, the opinion’s emphasis on declaring rather than creating constitutional law portends something more than a simple repudiation of the theoretical misstep which launched some twenty years of “confused and confusing” doctrine. This is particularly evident given the prominent return to Blackstonian theory at the end of the opinion, immediately before announcing the Court’s judgment:

A decision by this Court that a new rule does not apply retroactively under Teague does not imply that there was no right and thus no violation of that right at the time of trial – only that no remedy will be provided in federal habeas courts. It is fully consistent with a government of laws to recognize that the finality of a judgment may bar relief. It would be quite wrong to assume, however, that the question whether constitutional violations occurred in trials conducted before a certain date depends on how much time was required to complete the appellate process.

The return to Blackstone’s “declaratory” theory of judging is emphasized because it is intended to do serious work for the Court. Although Chief Justice Roberts criticized the majority’s adherence to declaratory judging as having “nothing to do with the question” before the Court, the majority opinion uses the Blackstonian model as a means of accomplishing the second shift apparent in Danforth – the shift from “retroactivity” to “redressability.” Because “new rules” are discovered, not created – and are therefore not

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253 Danforth, 128 S.Ct. at 1034.
254 Id. at 1035.
255 Id.
256 See supra notes 57-65, and accompanying text.
257 Twenty-two years, per Justice Stevens. Forty-three years and counting, per the commentators (including myself).
258 Danforth, 128 S.Ct. at 1047. The opinion also quotes extensively Justice Scalia’s concurring opinion in American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 201 (1990), in which Justice Scalia embraced the declaratory theory, arguing that the contrary view – “a view of our decisions as creating the law, as opposed to declaring what the law already is” – violates Article III. Danforth, 128 S.Ct. at 1044. Justice Scalia also wrote, “the Constitution does not change from year to year, since it does not conform to our decisions, but our decisions are supposed to conform to it . . . .” Id. (quoting American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring)).
259 Danforth, 128 S.Ct. at 1056 (Roberts, C.J., dissenting)
really “new,” the “retroactivity” determination is “not [a determination of] the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.”

The shift from “retroactivity” to “redressability” pervades the majority opinion and, as the dissent noted, allows the Danforth majority to cast the retroactivity question as a state law question: “[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law.” The shift is most evident in the subtle difference in terminology between the question presented to the Court, framed in terms of the applicability of new decisions, and the Court’s holding, framed in terms of state courts’ authority to provide a remedy for violation of a constitutional rule. As the opinion points out, “retroactivity” questions are framed as questions of whether new law applies to create new error in old convictions, whereas “redressability” questions recognize the error of the past and simply wonder whether a remedy will be provided.

Intent on recasting retroactivity as redressability, the Danforth majority engaged in a bit of revisionist history. Surveying the history of the Court’s retroactivity jurisprudence from Linkletter to Teague, Justice Stevens concluded with this astonishing statement: “It is clear that Linkletter and then Teague considered what constitutional violations may be remedied on federal habeas.” To read Linkletter and Teague as redressability decisions, however, is impossible. The opinions are framed in terms of the application of new rules to old judgments, and not in terms of availability of remedies. While Justice Stevens did urge an analysis that would first consider whether error had occurred, and then proceed to the question of remedy, in his concurring opinion in Teague, this

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260 Danforth, 128 S.Ct. at 1035.
261 Danforth, 128 S.Ct. at 1056 (Roberts, C.J., dissenting) (quoting Danforth, 128 S.Ct. at 1045).
262 See supra, note 244, and accompanying text.
263 See supra, note 246, and accompanying text.
264 Danforth, 128 S.Ct. at 1035 & n.5.
265 Danforth, 128 S.Ct. at 1038.
266 E.g. Teague, 489 U.S. at 310 (O’Connor, J.) (“new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced”); Linkletter, 381 U.S. at 622 (“[W]e are concerned only with whether the exclusionary principle enunciated in Mapp applies to state court convictions which had become final before rendition of our opinion”) (citation omitted); Id. at 640 (“After full consideration of all the factors we are not able to say that the Mapp rule requires retrospective application.”).
267 Teague, 489 U.S. at 318-19 (Stevens, J., concurring). It must be noted that the position put forth by Justice Stevens in Teague is only superficially related to the position set forth in Danforth, however. Justice Stevens’ emphasis on the ordering of the inquiry was a pragmatic response to Justice O’Connor’s insistence that retroactivity should be a threshold issue (thus allowing avoidance of merits rulings in cases involving “new”
opinion did not garner support. Justice O’Connor’s plurality opinion, framed in terms of the application of new rules to old judgments, carried the day and became the accepted foundation of the Court’s retroactivity jurisprudence. This jurisprudence is simply not susceptible to being recast as a redressability jurisprudence, as the Danforth majority opinion attempts. There is an undeniable analytical divide between Danforth and Teague.

B. The key notes struck by the dissent

The Danforth case presented an opportunity for the Court to arrogate an enormous power to itself. A decision holding Teague binding on the states would have restricted the states’ opportunity to participate in the development of constitutional criminal procedure to the direct review track. Because the postconviction track is the first opportunity for litigants to raise certain constitutional claims and the first opportunity for state courts to address those types of claims – exclusion of the states from doctrinal development in postconviction proceedings would have significantly expanded the territory under exclusive Supreme Court control. Furthermore, because it would have been unlikely that federal postconviction courts would be held not bound by Teague if state postconviction courts were bound, a victory for the state of Minnesota in Danforth would have likely led to the lower federal courts being excluded from doctrinal development of postconviction claims as well. The Supreme Court would then have been the only court in the country left with the power to develop constitutional criminal doctrine in those areas of law particularly susceptible to development in postconviction proceedings.

Chief Justice Roberts’ dissent indicates an awareness of this missed opportunity for consolidating doctrinal development in the Court. Roberts identified the Court’s “role under the Constitution as the final arbiter of federal law, both as to its meaning and its reach” as one of the “fundamental issues at stake” in the case. Throughout, the Chief Justice pointedly refers only to the Supreme Court where he might have mentioned the federal courts collectively. Teague did not emphasize the Supreme Court as the sole source of federal law – indeed Justice O’Connor later differentiated Teague from the choice-of-law rule embodied in the Antiterrorism and Effective Death Penalty Act rules), and was not apparently rooted in the Blackstonian model that lies at the heart of the Danforth opinion. A Blackstonian would not have written that “[a]mong other things, until a rule is set forth, it would be extremely difficult to evaluate whether the rule is ‘new’ at all” – because for a Blackstonian all rules are old. Id. at 319 n.2.  

268 Only Justice Blackmun joined Justice Stevens’ concurrence.  

269 Wright v. West, 505 U.S. 277, 291 (1992) (noting that Justice O’Connor’s analysis had been endorsed by a majority of the Court in Penry v. Lynaugh, 392 U.S. 302 (1989)).  

270 The Court’s recent description of the analysis in Whorton v. Bockting, 127 S.Ct. 1173 (2007), is illustrative. The availability of remedies or relief is simply not discussed. Id. at 1180.  

271 See infra notes 321-335, and accompanying text.  

272 Danforth, supra, 128 S. Ct. at 1058 (Roberts, C.J., dissenting).
(AEDPA)\textsuperscript{273} by noting that AEDPA, unlike \emph{Teague}, “restricts the source of clearly established law to this Court’s jurisprudence.”\textsuperscript{274} But imposing \emph{Teague} on the states (and likely the lower federal courts), would have tended in that direction. Chief Justice Roberts’ vision is that the rules of decision and the rules governing their applicability should come not from the federal courts generally, but specifically only from the Supreme Court.\textsuperscript{275}

Avoiding the wholesale consolidation of Supreme Court power over a vast portion of constitutional criminal procedure doctrine may prove to be the great victory of the \emph{Danforth} decision. But, as I discuss in depth below, whether the lower courts seize the opportunity of \emph{Danforth} to participate in doctrinal development is entirely up to them.\textsuperscript{276}

Aside from the supremacy of the Court, Chief Justice Roberts saw the other “fundamental issue[] at stake” in \emph{Danforth} as ensuring uniformity in the application of federal law.\textsuperscript{277} The \emph{Teague} approach, in its inception, stemmed from the concern that \emph{Linkletter} permitted disparate treatment of similarly situated defendants on collateral review.\textsuperscript{278} Quoting Justice O’Connor, Chief Justice Roberts emphasized “the ‘fundamental principle’ of our Constitution” – that federal law “should be applied equally to all.”\textsuperscript{279} The non-uniformity promoted by the majority’s decision, Chief Justice Roberts wrote,

\begin{enumerate}
\item \bibitem{273} 28 U.S.C. § 2254(d)(1)(2007) provides: “An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless … the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” (emphasis added). \textit{See generally} Shay & Lasch, \textit{supra} note 17.
\item \bibitem{274} \textit{Williams v. Taylor}, 529 U.S. 362, 412 (2000) (O’Connor, J., opinion for the Court). \textit{See also Bell v. Hill}, 190 F.3d 1089, 1091-92 (9\textsuperscript{th} Cir. 1999) (holding circuit precedent can be used to determine whether constitutional rule is “new” or “old”) (citing \textit{Gilmore v. Taylor}, 508 U.S. 333 (1993)); \textit{but see Soffar v. Cockrell}, 300 F.3d 588, 598 (5th Cir. 2002) (because state courts are not “compelled” to follow circuit precedent, \emph{Teague} analysis must look only to Supreme Court precedent).
\item \bibitem{275} \textit{Danforth}, 128 S.Ct. at 1048 (Roberts, C.J., dissenting) (arguing the majority result “is contrary to the Supremacy Clause and the Framers’ decision to vest in ‘one supreme Court’ the responsibility and authority to ensure the uniformity of federal law”); \textit{id.} at 1053 (interest in uniformity “is the very interest that animates the Supremacy Clause and our role as the ‘one supreme Court’ charged with enforcing it”); \textit{id.} at 1057 (“[W]hen the question is what federal rule of decision from this Court should apply to a particular case, no Court but this one – which has the ultimate authority ‘to say what the law is’ – should have final say over the answer.”) (citation omitted).
\item \bibitem{276} \textit{See Section III-D, infra.}
\item \bibitem{277} \textit{id.} at 1058 (Roberts, C.J., dissenting).
\item \bibitem{278} \textit{id.} at 1053 (quoting \emph{Teague}, 489 U.S. at 305, 316).
\item \bibitem{279} \textit{id.} (quoting Sandra Day O’Connor, \textit{Our Judicial Federalism}, 35 Case W. Res. L. Rev. 1, 4 (1985)) (emphasis added).
\end{enumerate}
allows federal constitutional law “to be applied differently in every one of the several states.” Similarly situated litigants might be treated entirely differently: “The same determination of a federal constitutional violation at the same stage in the criminal process can result in freedom in one State and loss of liberty or life in a neighboring State.”

Chief Justice Roberts noted a second non-uniformity promoted by the majority rule in Danforth, in addition to the non-uniform awarding or withholding of remedies – a non-uniformity more closely related to the substantive content of the underlying constitutional rights than to the application of those rights. Retroactivity determinations, wrote the Chief Justice, invariably depend on the “nature of the substantive federal rule at issue.” The Linkletter test, for example, turns in part on the perceived purpose for the constitutional rule, while Teague’s “watershed” exception requires a determination of whether the constitutional rule serves a truth-seeking function “implicit in the concept of ordered liberty.” The majority’s ceding to the states the power to undertake their own retroactivity analysis, the Chief Justice proceeded, raises the possibility that state-court determinations of the “nature” of constitutional rules will be at odds with the Supreme Court’s determination – in violation of the Supremacy Clause.

The majority did not seriously engage the Chief Justice’s arguments on non-uniformity. Instead, the majority sidestepped the objection that “two criminal defendants … whose convictions became final on the same day, and each of whom raised an identical claim at the same time under the Federal Constitution” might not be similarly afforded relief.

The non-uniformity objected to by the Chief Justice, wrote the Court, “is a necessary consequence of a federalist system of government.”

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280 Id. at 1053-54.
281 Id. at 1053.
282 Id. at 1054.
283 Id. (citing, inter alia, Linkletter, 381 U.S. at 629; Teague, 489 U.S. at 311-15).
284 Id.
285 The majority focused on that description of the hypothetical defendants I have omitted at the ellipsis – “each of whom committed the same crime, at the same time” – dispensing with this by noting that “the two hypothetical criminal defendants did not actually commit the ‘same crime.’ They violated different state laws, were tried in and by different state sovereigns, and may – for many reasons – be subject to different penalties.” Id. at 1047. The dissent rightly complained that the majority focused on an unimportant part of the hypothetical – “[D]isparate treatment under substantively different state laws is something we expect in our federal system; disparate treatment under the same Federal Constitution is quite a different matter.” Id. at 1053 n.2 (Roberts, C.J., dissenting).
286 Id. at 1047; see also id. at 1041 (noting that while there is a federal interest in “reducing the inequity of haphazard retroactivity standards and disuniformity in the application of federal law,” this interest yields to federalism and the inevitable acceptance that “States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees.”).
Whether “necessary” or not, non-uniformity in the application of federal constitutional rules, and in the determination of the “nature” of such rules, appears to be a serious consequence of the Danforth decision. Below, I will consider whether such non-uniformity can be avoided after Danforth.287

C. Important questions left open by Danforth

The Danforth decision, naturally, leaves several questions remaining to be answered. For example, the decision explicitly leaves unaddressed whether Congress can alter the rules of retroactivity by statute.288

The decision also explicitly leaves open the question whether Teague, though not binding on state postconviction courts, might yet be binding on federal postconviction courts considering motions to vacate pursuant to 28 U.S.C. § 2255.289 I will answer that question in the negative below.290

Also explicitly left open is whether states are required to give retroactive effect to rules that satisfy Teague’s “watershed” requirement.291 Chief Justice Roberts, in dissent, finds in that explicit question a larger question implicitly left open – whether states are free to deny retroactivity when the Supreme Court has held retroactive application is mandated under Teague.292 This seems implausible, for three reasons.

First, while the Danforth majority opinion does contain some sweeping statements that suggest the absolute independence of state collateral review from the Teague calculus,293 there are strong suggestions that state courts are free only to consider Teague as a

287 See Section III-E, infra.
288 Danforth, 128 S.Ct. at 1034 n.4. While the answer to this question is not within the scope of this Article, I would offer two observations. First, the Danforth majority declares Teague to be exercise in statutory interpretation. Id. at 1039-40; see also 128 S.Ct. at 1040 (“… Teague is based on statutory authority that extends only to federal courts applying a federal statute …”). Second, Congress already has altered the Teague rule. See notes 273-274, supra, and accompanying text (discussing AEDPA’s restriction of the sources of “clearly established federal law” to Supreme Court precedent).
289 Danforth, 128 S. Ct. at 1034 n.4.
290 See Section IV, infra.
291 Id. at 1034 n.4.
292 Id. at 1058 (Roberts, C.J., dissenting) (“Lurking behind today’s decision is of course the question of just how free state courts are to define the retroactivity of our decisions …. I do not see any basis in the majority’s logic for concluding that States are free to hold our decisions retroactive when we have held they are not, but not free to hold that they are not when we have held they are.”).
293 E.g. 128 S.Ct. at 1040 (“Since Teague is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts.”).
baseline and offer broader remedial effect than Teague would. Despite the focus on the states’ ability to offer broader remedies than Teague as a matter of state law, at the end of the day the majority holds that the availability or nonavailability of remedies is a “mixed question of state and federal law.” The majority recognizes that the uniformity concerns raised by Chief Justice Roberts in dissent implicate federal interests. Although those federal interests are outweighed by the states’ interest in choosing to grant broader remedial effect to federal law, it is doubtful that the federal interest in uniformity would remain unoffended if a state or states were to grant less remedial effect to a federal constitutional rule than the federal courts – having taken comity into consideration – are required to grant on habeas review of the state courts.

Second, there are textual indications in the majority opinion that would support viewing Teague retroactivity as a constitutional “floor” below which the states may not fall. States should be free to develop state-law retroactivity rules, the majority writes, “in any fashion that does not offend federal law.” Additionally, the tolerance of disuniformity is not unlimited, but will be granted only “as long as [the states] do not infringe on federal constitutional guarantees.”

Most directly, the majority opinion suggests

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294 E.g. 128 S.Ct. at 1046 (“States that give broader retroactive effect to this Court’s new rules of criminal procedure do not do so by misconstruing the federal Teague standard. Rather, they have developed state law to govern retroactivity in state postconviction proceedings.”) (citation omitted).
295 128 S.Ct. at 1047 (citing American Trucking Assns., Inc. v. Smith, 296 U.S. at 205 (Stevens, J., dissenting)).
296 Id. at 1041 (citing id. at 1053 (Robert, C.J., dissenting)).
297 Id. at 1041. It is significant, I believe, that the analogy the Danforth majority uses to emphasize the point is that of states offering broader personal rights under state law than required by the Federal Constitution. Id. (“Any State could surely have adopted the rule of evidence defined in Crawford under state law even if that case had never been decided. It should be equally free to give its citizens the benefit of our rule in any fashion that does not offend federal law.”). On this analogy, “equally free” would not encompass the freedom to offer less remedial effect to federal law than required by Teague, just as states are not “equally free” to offer fewer personal rights than offered by the Federal Constitution.
298 It might be argued that states ought to be permitted to offer less retroactivity than Teague requires because states are not required to offer any postconviction remedies. See Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987) (citation omitted). Yet, a state’s freedom to fashion procedures that are not constitutionally mandated is nonetheless subject to minimum constitutional guarantees of fairness. “[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause.” Evitts v. Lucey, 469 U.S. 387, 401 (1985) (rejecting argument that defendant ought not to be entitled to effective assistance of appellate counsel where appeal itself is not constitutionally mandated).
299 128 S.Ct. at 1041.
300 Id.
Teague is the constitutional floor in its approving cite of the Oregon Supreme Court’s opinion in State v. Fair\(^{301}\) – the Oregon Supreme Court “correctly stated,” wrote the majority, that it was free to fashion its own retroactivity rules “so long as [the state] give[s] federal constitutional rights at least as broad a scope as the United States Supreme Court requires.”\(^{302}\)

Third, Supreme Court precedent cited by the dissent demonstrates the Court’s retroactivity decisions have been held to be binding on the states in postconviction proceedings.\(^{303}\)

A question perhaps more interesting than whether the states are constitutionally bound to provide at least as much retroactive effect as Teague does, is whether the constitutional floor might be higher than the baseline set by Teague. It does, after all, seem odd that Teague – not a constitutional rule in and of itself, but rather an interpretation of the federal habeas statute dictated by considerations of comity and federalism – should set a constitutional baseline for the state courts. Teague dials back retroactivity levels based on a calculus “tailored to the unique context of federal habeas”\(^{304}\) – but might it not offend the Constitution for state courts to dial back retroactivity as far, in the absence of the “unique context” and concerns underpinning Teague?

The majority opinion suggests a negative answer to this question. The majority states that Whorton v. Bockting\(^{305}\) “makes clear” that state courts are not required to give retroactive effect to the Crawford Confrontation Clause right on collateral review.\(^{306}\) This is a mistake, however: Whorton only makes clear that federal courts are not required to give retroactive effect to Crawford on habeas corpus review of state-court judgments.\(^{307}\)

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303 Id. at 1050 (Roberts, C.J., dissenting) (“[W]hen we found that a state court erred in holding that a particular right should not apply retroactively, the state court was bound to comply.”) (citing Kitchens v. Smith, 401 U.S. 847 (1971) (per curiam) (reversing state court decision erroneously holding right to counsel under Gideon v. Wainwright, 372 U.S.335 (1961) not retroactive); McConnell v. Rhay, 393 U.S. 2 (1968) (per curiam) (reversing state court decision finding denial of right to counsel under Mempa v. Rhay, 389 U.S. 128 (1967) but declining to give retroactive effect); Arsenault v. Massachusetts, 393 U.S. 5 (1968) (per curiam) (reversing state court decision holding White v. Maryland, 373 U.S. 59 (1963) not retroactive).
304 Danforth, 128 S.Ct. at 1039.
305 127 S.Ct. 1173 (2007).
306 Danforth, 128 S.Ct. at 1034.
307 While the Court’s language in Whorton broadly referred to Crawford’s applicability in “a collateral proceeding” rather than “a federal habeas corpus proceeding,” 127 S.Ct. at 1180, Whorton was in fact a federal habeas corpus proceeding, and its application of Teague was typical in that regard.
Chief Justice Roberts provides an example of state-court innovation that might demonstrate the existence of a constitutional baseline somewhere between *Teague* and *Griffith* for state (or federal) postconviction courts.

[S]uppose we hold that the Sixth Amendment right to be represented by particular counsel of choice, recently announced in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), is a new rule that does not apply retroactively. Under the majority's rationale, a state court could decide that it nonetheless will apply *Gonzalez-Lopez* retroactively, but only if the defendant could prove prejudice, or some other criterion we had rejected as irrelevant in defining the substantive right. Under the majority's logic, that would not be a misapplication of our decision in *Gonzalez-Lopez* – which specifically rejected any required showing of prejudice, *id.*, at 147-148, 126 S.Ct. 2557 – but simply a state decision on the scope of available remedies in state court.  

The extent to which state postconviction proceedings (or federal postconviction proceedings under 28 U.S.C. § 2255) create a “unique context” which might justify the withholding of remedies for a Federal constitutional violation is an open question. Because I argue below that state and federal courts should dispense with retroactivity analysis and give full remedial effect to “new” rules, I do not find it necessary to attempt to answer this question here.

### III. THE FUTURE OF RETROACTIVITY IN STATE POSTCONVICTION PROCEEDINGS

Prior to *Danforth*, most states were applying *Teague* to determine whether federal constitutional rules would apply retroactively in state postconviction proceedings,  

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308 *Id.* at 1058 (Roberts, C.J., dissenting).

309 See Sections III and IV, infra.

310 Shortly after *Teague*, Professor Hutton surveyed state approaches to retroactivity. See Hutton, supra note 234 at 460-76. She argued that *Teague* “is an inappropriate standard for states to adopt for their postconviction processes,” and urged states to “exercise their prerogative to develop their own rules and to adopt a position toward retroactivity which enables them to be an effective guarantor of their citizens' constitutional rights.” *Id.* at 424-25. She reported that 8 of 12 states to consider the question after *Teague* chose to follow *Teague*. *Id.* at 458 (table). At present, it appears that 37 states now apply the *Teague* rule when considering claimed federal constitutional violations in state postconviction proceedings. *Ex parte Harris*, 947 So.2d 1139 (Ala. 2005); *State v. Stimmer*, 823 P.2d 41 (Ariz. 1991); *People v. Bradbury*, 68 P.3d 494, 498 (Colo. App. 2002); *Duperry v. Solnit*, 803 A.2d 287, 317-19 (Conn. 2002); *Bailey v. State*, 588 A.2d 1121 (Del. 1991); *State v. Gomes*, 113 P.3d 184 (Hawai’i 2005); *Porter v. State*, 102 P.3d 1099, 1102 (Idaho 2004); *People v. Flowers*, 561 N.E.2d 674 (Ill. 1990); *Daniels v. State*, 561 N.E.2d 487, 489 (Ind. 1990); *Brewer v. State*, 444 N.W.2d 77 (Iowa 1989); *State v. Neer*, 795 P.2d 362 (Kan. 1990); *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky.)
though many of those states did so out of convenience, recognizing that *Teague* was not binding upon the states. A small minority of states recognized they were not bound by *Teague* and applied a more relaxed retroactivity analysis, usually a version of the three-factor *Linkletter-Stovall* test. Danforth’s declaration that the state courts are not bound by the Supreme Court’s retroactivity jurisprudence frees state courts to consider the question anew.

Among the various options from which state courts may choose, full retroactivity is far


313 Following Danforth, the Minnesota Supreme Court ordered supplemental briefing and held oral arguments on September 8, 2008. The case remains pending. At oral argument, Assistant State Public Defender Benjamin Butler argued for Stephen Danforth that Minnesota should apply the *Linkletter-Stovall* test in state postconviction proceedings. Oral Argument, State v. Danforth (available at [http://www.tpt.org/courts/MNJudicialBranchvideo_NEW.php?number=A04-1993(b)](http://www.tpt.org/courts/MNJudicialBranchvideo_NEW.php?number=A04-1993(b))). Deputy Hennepin County Attorney Pat Diamond, representing the State of Minnesota, argued the Minnesota Supreme Court should adopt *Teague* as a matter of state law. Id. I owe thanks to Attorney Butler for providing me with copies of his supplemental briefing and directing me to the online oral argument video.
and away the best choice, offering fairness to litigants, a voice for state courts in the development of federal constitutional doctrine, and uniformity in the application of constitutional rules announced by the federal courts. Concerns that retroactivity undermines finality are overstated. Finally, retroactivity avoids the problems of administration that the Supreme Court’s attempts at non-retroactivity have engendered.

As a preliminary matter, it is necessary to note the important differences between the functioning of intra-system postconviction proceedings and the inter-system federal habeas proceedings to which Teague applies.

First, intra-system postconviction proceedings raise no comity concerns. “Federalism and comity considerations are unique to federal habeas review of state convictions.”\(^ {314}\) This of course was one of the bases for the Court’s holding in Danforth that Teague does not bind the states.\(^ {315}\) Because Teague was rooted in large part on considerations of comity, it is inappropriate to use Teague as a starting point on considering what retroactivity rules should apply in intra-system postconviction review.\(^ {316}\) Judge Friendly’s view – that state postconviction proceedings offered “no occasion to be holier than the pope,”\(^ {317}\) i.e. to afford greater retroactivity to new constitutional rules than offered in federal habeas proceedings – must be rejected, because Judge Friendly did not consider that the “pope” might have founded its rule on considerations irrelevant to the question.\(^ {318}\) As will be shown, there is every reason for the state courts to be holier than the Supreme Court is in federal habeas proceedings when it comes to the question of retroactivity in state postconviction proceedings.\(^ {319}\)

\(^{314}\) Danforth, 128 S.Ct. at 1031.

\(^{315}\) Id. (“If anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by Teague.”).

\(^{316}\) Honorable Laura Denvir Stith, A Contrast of State and Federal Court Authority to Grant Habeas Relief, 38 Valparaiso U. L. Rev. 421, 447-48 (2004); see also Giovanna Shay, State Courts May Choose Different Paths: Justices Offer Flexibility in Handling Habeas Cases, Ct. L. Trib. Vol. 34, No. 26 at 16 (June 30, 2008) (“State courts possess different interests than federal courts when reviewing state prisoners' convictions. As a result, state courts need not adopt wholesale the procedural rules used in federal habeas ….”).

\(^{317}\) Friendly, supra note 140, at 154.

\(^{318}\) Judge Friendly, of course, wrote at a time when the Linkletter-Stovall standard was the prevailing retroactivity rule. However, the Linkletter-Stovall standard, like the Teague standard, was founded primarily on considerations of comity. See Linkletter, 381 U.S. at 637 (stating that to hold Mapp retroactive would not “add harmony to the delicate state-federal relationship”).

\(^{319}\) Stith, supra note 316, at 446 (“While merely adopting the federal test for retroactivity to cases on collateral review is certainly simpler and may ensure that the results in state habeas proceedings are consistent with the results that would be obtained on habeas review by the federal courts, this approach ignores the difference in function of state versus federal habeas review.”).
A second difference between intra-system collateral review and inter-system collateral review is that intra-system postconviction proceedings are a second round of litigation, whereas federal habeas proceedings are a third round. Intra-system postconviction proceedings therefore generally are closer in time to the trial or guilty plea and the events underlying the criminal charges. This has a strong bearing on the finality calculus, which I discuss below.

Third, and most importantly, state and federal postconviction proceedings have an important additional function lacking in federal habeas review – to provide an initial forum for the litigation of certain constitutional claims. In federal habeas proceedings, every claim presented to the federal courts will typically have been previously presented to another court – indeed, exhaustion of available state-court remedies is a precondition for habeas relief. In intra-system postconviction proceedings there are significant exceptions, owing to the division of labor between trial and appellate courts. Because appellate courts cannot find facts, claims that depend on evidence outside the record on appeal cannot be raised; state postconviction proceedings are usually initiated in a trial-level court because the claims cognizable in postconviction proceedings are those that require evidence outside the record, and findings of fact by the court considering such evidence.

Thus, most states have a general bar against bringing claims in postconviction proceedings which could or should have been raised on direct review. Yet it is also

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320 See Figure 1, supra.
321 28 U.S.C. § 2254(b)(1)(A); see generally, Hertz & Liebman, supra note 18, Chapter 23. There are, of course, exceptions to the exhaustion requirement, which may occasionally result in claims being presented for the first time on federal habeas review. 28 U.S.C. § 2254(b)(1)(B) (relieving petitioner of exhaustion requirement where there is “an absence of available State corrective process” or circumstances make “such process ineffective to protect the rights” of the petitioner).
322 E.g. State v. Smith, 17 Ohio St. 3d 98, 101 & n.1, 477 N.E.2d 1128, 1131 & n.1 (1985) (deciding ineffective assistance of counsel claim on direct appeal, but noting that because “it is possible that the issue of competency herein could not fairly have been determined without resort to evidence dehors the record” defendant would be entitled to relitigate the claim in postconviction proceedings); People v. Thomas, 38 Ill.2d 321, 323-24, 231 N.E.2d 436, 437 (Ill. 1967) (to require issues to be presented on direct review when the evidentiary basis for the issues lies outside the record would frustrate purposes of state’s postconviction procedures); State v. Straw, 709 N.W.2d 128, 133 (Iowa 2006) (ineffective assistance claim would be “more properly addressed” in postconviction proceedings where appellate record was inadequate to resolution of the claim). See also Opsahl v. State, 710 N.W.2d 776, 782 (Minn. 2006) (appellate court must defer to postconviction court’s credibility determinations); McElroy v. State, 864 N.E.2d 392, 395-96 (Ind. App. 2007) (same); Farina v. State, 937 So. 2d 612, 623 (Fla. 2006) (same).
323 E.g., Carter v. Galetka, 44 P.3d 626, 630 (Utah 2001); Baze v. Commonwealth, 23 S.W.3d 619, 626 (Ky. 2000); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989). A similar procedural bar is applied in federal postconviction proceedings. See United States
recognized, as Judge Friendly pointed out, that those claims which are theoretically impossible – and those which are *practically* impossible – to raise during the direct review stages of litigation,\(^{324}\) are properly raised for the first time in postconviction proceedings.\(^{325}\) Among those claims not susceptible to litigation on direct review are the two types of claims most closely linked to serious error in capital cases\(^{326}\) – ineffective assistance of trial counsel\(^{327}\) and government suppression of exculpatory evidence (at least where the evidence continues to be suppressed throughout litigation on direct review).\(^{328}\) Other claims which typically rely on evidence “dehors the record”\(^{329}\) and are therefore not susceptible to presentation before collateral review include ineffective assistance of appellate counsel;\(^{330}\) claims that trial or appellate counsel had a conflict of

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\(^{324}\) Professors Hertz and Liebman discuss these claims in the context of arguing against *Teague*’s characterization of retroactivity as a threshold issue, Hertz & Liebman, *supra* note 18, § 25.4, at 969-70, and in arguing that in applying *Teague* to these claims on federal habeas review, the dividing line between presumptive retroactivity (under *Griffith*) and presumptive prospectivity (under *Teague*) should not be the conclusion of direct review, “because those claims cannot possibly arise, or at least usually do not arise – until after the direct appellate process has ended.” *Id.* § 25.6 at 1015-16.

\(^{325}\) See *supra* notes 155-156, and accompanying text.


\(^{327}\) The Supreme Court, implementing the principle that “[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time,” held that in federal criminal cases, it is proper to raise ineffective assistance of trial counsel claims for the first time on federal postconviction review pursuant to 28 U.S.C. § 2255. *Massaro v. United States*, 538 U.S. 500 (2003). State courts have similarly held that ineffective assistance of trial counsel claims are best suited for postconviction review. See, e.g. *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872-73 (Ky. 1998); *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001); *State v. Howard*, 751 So. 2d 783, 802 (La. 1999); *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn.2000); *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002).

\(^{328}\) E.g. *Banks v. Dretke*, 540 U.S. 668 (2004) (reaching merits of claim where factual predicate remained unavailable to habeas petitioner throughout state postconviction proceedings); *Simon v. State*, 857 So. 668, 679 (Miss. 2003); *Buenoano v. State*, 708 So.2d 941, 947-48 (Fla. 1998) (permitting claim to be raised in *successive* postconviction motion where factual basis not previously available to defendant); *State ex rel. Winn v. State*, 685 So.2d 104 (La. 1996) (per curiam) (otherwise untimely claim allowed where factual basis not available to defendant earlier).

\(^{329}\) Friendly, *supra* note 140, at 152.

interest; \(^{331}\) claims of involuntary guilty pleas that were not knowing, intelligent, or voluntary; \(^{332}\) claims of juror misconduct; \(^{333}\) incompetence of the defendant; \(^{334}\) and the knowing use of false evidence by the prosecution. \(^{335}\)

### A. The Court’s return to Blackstone

As a preliminary matter, I note that one could argue that the Court’s embrace of the “declaratory” theory of law supports a return to retroactivity. Chief Justice Roberts makes the point in his *Danforth* dissent. That the Court does not create the law, but merely declares it, writes the Chief Justice, “may lead to the conclusion that nonretroactivity of our decisions is improper ….” \(^{336}\) Indeed, the Court’s initial move away from Blackstone in *Linkletter* was thought necessary to support prospectivity. \(^{337}\) Logically, therefore, a return to Blackstone would suggest a return to retroactivity.

I do not find this to be a particularly compelling case for retroactivity, however, for three reasons. First, the *Danforth* majority finds no inconsistency between the Blackstonian view and prospectivity, and indeed recasts the *Teague* decision as consistent with the Blackstonian view (supplemented by the law of remedies). State courts could similarly reconcile the declaratory view with prospectivity. Second, the Supreme Court’s adoption of Blackstone or Austin is not binding on the states. Some states currently apply the


\(^{333}\) *E.g.* *Commonwealth v. Wood*, 230 S.W.3d 331, 334 (Ky. App. 2007) (awarding postconviction relief based on juror misconduct not discovered until two years after trial); see also *Ex parte Pierce*, 851 So. 2d 606, 616 (Ala. 2000) (juror misconduct claim would be cognizable in postconviction proceedings if factual basis could not have been reasonably discovered in time for presentation on direct review).


\(^{335}\) *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996) (holding defendant entitled to postconviction evidentiary hearing on claim that prosecution knowingly presented perjured testimony).

\(^{336}\) *Danforth*, 128 S.Ct. at 1056 (Roberts, C.J., dissenting). Chief Justice Roberts quickly dismisses the argument, noting “everyone agrees that full retroactivity is not required on collateral review.” *Id.* Why this is true is not immediately apparent. Justices have argued that *Stovall*’s application of a single rule to direct review and collateral review was correct. *See infra* note 349. Assuming the Chief Justice is relying on *Teague* as establishing a sharp divide between direct review and collateral review, it is not entirely clear that *Teague* will survive *Danforth* in the long run. *See Section V, infra.*

\(^{337}\) *See supra* notes 59-65, and accompanying text.
Linkletter analysis in their postconviction proceedings, indicating a widespread acceptance of the Austinian model. Nothing in Danforth requires those states to convert back to Blackstone’s declaratory model. Third, and most importantly, the abandonment of Blackstone was justified. As Professor Roosevelt has so eloquently put it: “The Blackstonian model, in its full metaphysical glory, is something of a legal unicorn. Its transcendentally brooding common law does not exist now, and never really did, although there are still rare reported sightings and sideshow simulacra.”

Even Professor Mishkin defended the declaratory view not as an “accurate description of reality,” but as a “myth by which we live.” But that myth – that we live in a nation of laws, not men or women, that it is “the law” or “the Constitution” (and not the passing whim of a particular judge or judges) that produces the result in a given case – can be well served without adhering to Blackstone. Thus, while explicitly disavowing Blackstone, Justice Harlan crafted a compelling case for retroactivity on direct review partly in terms of the equality that is at the heart of the myth of a nation of laws: “We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.”

Thus, while the Court’s return to Blackstone should be of little concern for state courts reconsidering nonretroactivity, the principle of equality that underlies the Blackstonian “myth” provides a compelling reason for abandoning nonretroactivity in intra-system postconviction review.

B. Prospectivity and the problem of equality

In abandoning prospectivity in cases arising on direct review, the Court relied heavily on the equality principle outlined by Justice Harlan: “[S]elective application of new rules violates the principle of treating similarly situated defendants the same.” Allowing one

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338 See supra note 312.
339 Roosevelt (1999), supra note 18, at 1083 (citing, inter alia, ANTONIN SCALIA, A MATTER OF INTERPRETATION 40 (1997); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 85 (rev. ed. 1978)).
341 Id. at 63.
342 Id. at 62-63.
343 Mackey, 401 U.S. at 677 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) (“... I do not subscribe to the Blackstonian theory that the law should be taken to have always been what it is said to mean at a later time ...”); see also Puckelsimer, 375 U.S. at 4 (Harlan, J., dissenting) (“Surely no general answer [to the retroactivity question] is to be found in ‘the fiction that the law now announced has always been the law.’”) (citation omitted).
344 Desist, 394 U.S. at 258-59 (Harlan, J., concurring).
345 Griffith, 479 U.S. at 323 (citing Desist, 394 U.S. at 258-59 (Harlan, J., dissenting)). Professors Fallon and Meltzer argue that “given the dim prospects for another Warren-
litigant to be the “‘chance beneficiary’ of a new rule” while denying that benefit to others results in “actual inequity,” held the Court.\textsuperscript{346}

*Teague*, of course, implements a prospectivity regime. Indeed, the plurality’s justification for making the retroactivity inquiry a threshold question was to avoid the “actual inequity” that necessarily accompanies selective prospectivity: “Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.”\textsuperscript{347}

Commentators have noted, however, that *Teague* did not eliminate the equality problem. While *Teague* avoids the most basic problem of selective prospectivity – “generating different answers for litigants in identical procedural postures”\textsuperscript{348} – it engenders inequality in a different way.

Nonretroactivity approaches … create deeply unfair distinctions between defendants. All of these doctrines require selection of a trigger point – a way of separating those who will benefit from a new decision from those who will not – which will almost invariably make a claimant’s eligibility for relief depend on something over which she had little, if any, control.\textsuperscript{349}
In the Court’s current retroactivity jurisprudence, the “trigger point” selected is finality—the conclusion of direct review. Cases on direct review enjoy retroactive application of new rules under *Griffith*, while cases beyond direct review generally do not, under *Teague*. The selection of this “trigger point” is, arguably, informed by some appropriate considerations. For example, if one agrees with Justice Harlan that the nature of judicial review requires retroactive application of new rules, then the end of direct review might appropriately “trigger” nonretroactivity. Similarly, if one believes that finality is a factor that informs the choice between retroactive application and nonretroactive application, then arguably setting the “trigger” at the end of direct review is appropriate.

But other considerations that ought to inform the selection of a “trigger point” are not taken into account. Most obviously, in the case of the postconviction claims discussed above, the selection of a “trigger point” before the claims may even be raised makes little sense. To accommodate this concern would require selection of different trigger points for different claims.

subject to different constitutional rules, depending on just how long ago unconstitutional conduct occurred and how quickly cases proceed through the criminal justice system. *The disparity is no different in kind from that which occurs when the benefit of a new constitutional rule is retroactively afforded to the defendant in whose case it is announced but to no others ....* *Griffith*, 479 U.S. at 331-32 (White, J., dissenting) (emphasis added). That this was expressed in a dissenting, rather than a concurring opinion in *Griffith*, is important, for it reflects the dissent’s belief that conversion to full retroactivity on direct review was misguided, and that retroactivity of new rules should be limited both on habeas and direct review. *Id.* at 332-33. This view did not prevail, and in Justice plurality opinion in *Teague*, joined by Chief Justice Rehnquist (but not Justice White, who continued to lament the demise of the *Stovall-Linkletter* test, see *Teague*, 489 U.S. at 317 (White, J., concurring in part and concurring in the judgment)), Justice O’Connor sacrificed the insistence on uniform retroactivity rules for both direct and habeas review, which would have required either overruling *Griffith* or extending it to habeas review, in favor of adopting a rule of general prospectivity in cases on habeas review.


See *Roosevelt* (1999), *supra* note 18, at 1108 (“[D]istinguishing between direct and collateral review requires more than an appeal to the value of finality and the danger of disruption.”).

Hertz & Liebman, *supra* note 18, § 25.6 at 1015-16.

Professor Yin suggests the procedural default doctrine peculiar to habeas corpus review can function as a superior substitute for the *Teague* retroactivity inquiry, in part
Additionally, accidents of timing will make a crucial difference where they ought not. For example, two litigants, one of whom is successful in obtaining discretionary review of a claim arguing for a new rule and one who is not, will obtain different outcomes despite raising the claim in identical postures.\textsuperscript{354} Or, more troubling, two codefendants convicted on the same day may be treated differently. If one enjoys greater delay in the courts’ processing of his direct review applications, she will reap the benefit of retroactive application of a new rule of constitutional criminal procedure while her codefendant, whose direct review has already run, will not.

The accidents of time created by the \textit{Teague} “trigger point” were most dramatically criticized by four Justices dissenting in \textit{Schriro v. Summerlin}.\textsuperscript{355} While \textit{Ring v. Arizona}\textsuperscript{356} had the potential to invalidate the death sentences of 168 prisoners; in \textit{Summerlin}, the Court cut off availability to \textit{Ring}’s new rule for all but about sixty of them.\textsuperscript{357} Justice Breyer railed against the obvious inequity in treating similarly situated defendants differently:

Is treatment “uniform” when two offenders each have been sentenced to death through the use of procedures that we now know violate the Constitution – but one is allowed to go to his death while the other receives a new, constitutionally proper sentencing proceeding? Outside the capital sentencing context, one might understand the nature of the difference that the word “finality” implies: One prisoner is already serving a final sentence, the other’s has not yet begun. But a death sentence is different in that it seems to be, and it is, an entirely future event – an event not yet undergone by either prisoner. And in respect to that event, both prisoners are, in every important respect, in the same position. I understand there is a “finality-based” difference. But given the dramatically different nature of death, that difference diminishes in importance.\textsuperscript{358}

Part of Justice Breyer’s criticism of the result in \textit{Summerlin} is based on the particular nature of the death penalty – and his view that the \textit{Teague} “trigger point” would need to

\textsuperscript{354} Yin, \textit{supra} note 18, at 283-84.
\textsuperscript{355} 542 U.S. 348 (2004).
\textsuperscript{356} 536 U.S. 584 (2002), discussed \textit{supra} at note 208 and accompanying text.
\textsuperscript{358} \textit{Summerlin}, 542 U.S. at 363 (Breyer, J., dissenting).
be adjusted accordingly. But at bottom, Justice Breyer’s concern is with the symbolism or myth associated with Blackstonian retroactivity—that we are a nation of laws, not lawmakers. “How can the Court square this spectacle,” wrote Justice Breyer, “with what it has called the ‘vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason’?”

If the Ring decision promised a cure for the disease of being condemned to death, Summerlin was the hospital board’s decision to deny the cure to all patients except those recently diagnosed with the disease.

Not only does the Teague “trigger point” create dissimilar treatment of litigants similarly situated in all relevant respects, it also creates perverse incentives for litigants to string out direct review litigation—which run counter to the finality concerns which supposedly inform the selection of the trigger. Suppose two codefendants are convicted on the same day. One does not appeal, while the other seeks direct review based on a frivolous claim. If a new rule is announced, which would benefit both, only the codefendant who initiated a frivolous appeal will be entitled to retroactive application. The same hypothetical might involve one defendant convicted two years ago, who is still pursuing direct review, and a second defendant convicted forty-five days ago, who does not appeal. The outcome—retroactive application of a new rule in the older case but not the newer—illustrates that finality is not always served by the Teague “trigger point.”

Because Griffith commands the retroactive application of new rules on direct review, any employment of prospectivity in state postconviction proceedings will raise the difficulty of selecting a “trigger point” between Griffith retroactivity and prospectivity which will group together defendants who are similarly situated in respects relevant to the inquiry. This counsels for retroactive application of new rules in state postconviction proceedings.

C. The nature of judicial review

With respect to postconviction claims not ordinarily litigated on direct review, like ineffective assistance of counsel and government suppression of exculpatory evidence, Justice Harlan’s argument for retroactivity of judicial decisions to cases pending on direct review, based on the nature of judicial review, is fully applicable to intra-system postconviction review.

The heart of the matter is this. With respect to postconviction claims, the postconviction track in both state and federal courts serves the same functions as the direct review track does with respect to all other claims. There is an opportunity for presentation of the claim and factual development in a trial-level court, followed by one or more appeals and the possibility of certiorari review in the United States Supreme Court. Although the

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359 Id. (citation omitted).
360 See supra notes 321-335, and accompanying text.
361 See supra notes 113, 121-127, and accompanying text.
362 See Figures 1 and 2, supra.
criminal defendant, or the criminal case, is seen as being in stages 5 through 8 of the lifespan of the case (4 through 6 in federal cases), the postconviction claims are effectively in stages 1 through 4 (or 1 through 3 in federal cases).\textsuperscript{363}

Because the postconviction claims are, during the postconviction track, effectively on direct review, Justice Harlan’s logic applies, and there is no meaningful way to distinguish Griffith retroactivity on direct review.

**D. A voice for state courts in the development of federal constitutional criminal procedure**

State courts already enjoy an important role in the development of constitutional criminal doctrine in cases on direct review. As Professor Shay and I have noted elsewhere, empirical analysis suggests the “codification” of Teague in AEDPA\textsuperscript{364} – and its elimination of federal habeas review as a locus for doctrinal development – has resulted in, and will continue to result in, the Supreme Court using state-court criminal cases on the direct review track as a vehicle for announcing new rules of constitutional criminal procedure.\textsuperscript{365}

Logic suggests that state postconviction proceedings will be of similar importance to doctrinal development after Teague and AEDPA – particularly with respect to postconviction claims not ordinarily litigated on direct review.\textsuperscript{366} Just as Teague and AEDPA eliminated the federal-state court “dialogue” with respect to direct review claims, requiring the initiation of a new constitutional dialogue that will “increasingly feature conversations among state courts,”\textsuperscript{367} the elimination of federal habeas review as a focal point for dialectical federalism with respect to postconviction claims demands a similar response. State and federal postconviction proceedings present the only opportunities for the lower courts to participate in development of doctrine with respect to postconviction claims. Adopting Teague prospectivity would leave doctrinal development in these areas exclusively in the hands of the Supreme Court, unguided by lower court approaches.\textsuperscript{368}

In order to preserve opportunities for courts – and incentives for litigants – to engage in doctrinal development, state courts must adopt either full retroactivity or selective

\textsuperscript{363} \textit{Id.}

\textsuperscript{364} AEDPA did not codify Teague precisely, and indeed is even more stifling of doctrinal development than Teague. \textit{See supra} note 274; \textit{see also} Shay \& Lasch, \textit{supra} note 17, at 232-33 \& nn. 62-64, 232 n. 126; Chen, \textit{supra} note 230, at 588-93.

\textsuperscript{365} Shay \& Lasch, \textit{supra} note 17, at 240-46; \textit{see also} Chen, \textit{supra} note 230, at 629-31, 634 (discussing AEDPA’s “subversive impact on the exposition of criminal procedure law”).

\textsuperscript{366} \textit{See supra} notes 321-335, and accompanying text.

\textsuperscript{367} Shay \& Lasch, \textit{supra} note 17, at 265

\textsuperscript{368} Cf. Blume, \textit{supra} note 18, at 584 (quoted in note 236, \textit{supra}).
prospectivity. With its inequality problem, selective prospectivity is a singularly unattractive choice.

State courts have a particular interest in contributing to the development of federal constitutional criminal procedure, for two reasons. First, state courts are subject to the Federal Constitution because it describes the constitutional “floor” below which the states may not go in offering procedural protections. Second, while states are permitted to go above this constitutional “floor” and offer greater procedural protections than the Federal Constitution requires, state courts have not heeded calls to action. Instead, state courts have persistently engaged in “lockstep interpretation,” construing state constitutional provisions as offering procedural protections that are merely coextensive with the Federal Constitution.

Had the State of Minnesota prevailed in Danforth, states would have been disenfranchised from influencing federal constitutional doctrine, and might have been forced to reconsider whether state constitutional provisions ought to be coextensive with their federal counterparts. Indeed the majority and dissent in Danforth engaged in battle over precisely this point. Chief Justice Roberts would have held that while states are free

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369 See Stovall, 383 U.S. at 301 (using selective prospectivity to preserve the “incentive of counsel to advance contentions requiring a change in the law”) (citing Mishkin, supra note 49, at 60-61); see also supra note 232 and accompanying text.

370 See Section I-D, supra.

371 The amicus briefs filed by some states in Danforth suggest the recognition of a state interest in participating in the development of federal criminal law may be far from universal. Eleven states and the Commonwealth of Puerto Rico urged the Court to hold Teague binding on the states. 2007 WL 2428382 (Brief Amicus Curiae of the States of Alaska, Colorado, Delaware, Florida, Hawaii, Missouri, Montana, New Hampshire, New Mexico, Oregon, South Dakota, and the Commonwealth of Puerto Rico in Support of Respondent). Eight other states urged the Court to hold Teague not binding, but did so by way of argument that states have the power to abolish postconviction review altogether, and therefore have the right to fashion whatever retroactivity rules they choose – whether less or more restrictive than Teague. 2007 WL 2088650 at *7 - *10 (Brief of Kansas and the Amici States in Support of Neither Party).


375 Schapiro, supra note 374, at 692-93 (and authorities cited therein); Robert F. Williams, State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping? 46 Wm. & Mary L. Rev. 1499, 1502 & n.11 (2003) (state courts engage in “lockstep interpretation” in “the clear majority of cases”).
to extend greater protection under their own laws, the retroactivity of federal law is a question of federal law. On this view, if a state court wished to apply Ring or Crawford retroactively in state postconviction proceedings, for example, it would have to do so by announcing a state-law protection analogous to Ring or Crawford in every respect but its retroactivity on collateral review.

The Danforth majority, however, does not seek to force state courts to go their own way. “Any State could surely have adopted the rule of evidence defined in Crawford under state law even if that case had never been decided. It should be equally free to give its citizens the benefit of our rule in any fashion that does not offend federal law.” While the second statement neither necessarily follows from the first, nor meets the dissent’s objections, finding the retroactivity question to be a state-law question allows the majority to keep the states invested in the development of the Federal Constitution.

Preserving state postconviction proceedings as a locus for constitutional doctrinal development would allow state courts to influence the development of important doctrines such as those concerning ineffective assistance of counsel and the government’s suppression of material exculpatory evidence. Retroactive application of new rules in state postconviction proceedings preserves litigants’ incentives to raise novel arguments and allows state courts to protect their stake these doctrines, and avoid a schism between state and federal constitutions.

E. Retroactive application of new rules in state postconviction proceedings ensures uniformity

Retroactive application of new rules in state postconviction proceedings would also circumvent what will otherwise be a significant detriment flowing from the Danforth decision – non-uniformity in application of federal constitutional rules. Just as employing a “trigger point” to separate cases that will receive the retroactive benefit of new rules from those that will not creates an equality problem, so also does Danforth’s allotment to the states of the power to fashion their own retroactivity rules in postconviction proceedings.

Chief Justice Roberts posed the following hypothetical:

Of two criminal defendants, each of whom committed the same crime, at the same time, whose convictions became final on the same day, and each of whom raised an identical claim at the same time under the Federal Constitution, one may be executed while the other is set free – the first despite being correct on his claim, and the second

376 Danforth, 128 S.Ct. at 1057 (Roberts, C.J., dissenting); see also id. at 1053 (“A State alone may ‘evaluate, and weight the importance of’ finality interests when it decides which substantive rules of criminal procedure state law affords; it is quite a leap to hold, as the Court does, that they alone can do so in the name of the Federal Constitution.”) (citation omitted) (emphasis original).
377 Id. at 1041.
because of it. That result is contrary to the Supremacy Clause and the Framers' decision to vest in “one supreme Court” the responsibility and authority to ensure the uniformity of federal law.\(^{378}\)

This hypothetical problem was actualized, even before \textit{Danforth} was announced, in state-court decisions considering the new rule announced in \textit{Ring v. Arizona}.\(^{379}\) Some state courts considered themselves bound by \textit{Teague};\(^{380}\) others did not.\(^{381}\) In each camp the results were mixed. Of those courts following \textit{Teague}, some held \textit{Ring} prospective,\(^{382}\) while one court held itself bound by \textit{Teague} but in essence afforded retroactive application to \textit{Ring} under state law.\(^{383}\) Among state courts declaring independence from \textit{Teague}, results varied as well. Florida, applying a state-law retroactivity test akin to \textit{Linkletter}, held the \textit{Ring} rule would not be applied retroactively in state postconviction proceedings.\(^{384}\) Missouri, by contrast, adopted the \textit{Linkletter-Stovall} test for postconviction proceedings, and declared \textit{Ring} retroactive.\(^{385}\) Thus, while postconviction litigants in Florida and Idaho were not granted the benefit of \textit{Ring} retroactively, those in Missouri and Indiana were. The inequality identified by the \textit{Danforth} and \textit{Summerlin} dissents is real, not hypothetical.

The majority’s answer in \textit{Danforth} – that “such nonuniformity is a necessary consequence of a federalist system of government”\(^{386}\) – is no answer at all. It is one thing to believe that state courts can serve as laboratories of experimentation\(^{387}\) and thereby  

\(^{379}\) 536 U.S. 584 (2002), discussed supra at note 208 and accompanying text.  
\(^{382}\) \textit{E.g.} \textit{Porter}, supra note 380.  
\(^{383}\) \textit{Saylor}, supra note 380. The \textit{Saylor} court noted that certiorari had been granted by the Supreme Court in \textit{Summerlin}, yet declined to await a ruling, instead exercising its power under the Indiana Constitution to revise a criminal sentence. 808 N.E.2d at 649-50. The court held: “[W]e conclude it is not appropriate to carry out a death sentence that was the product of a procedure that has since been revised in an important aspect that renders the defendant ineligible for the death penalty.” \textit{Id.} at 650-51.  
\(^{385}\) \textit{State v. Whitfield}, 107 S.W.3d 253 (Mo. 2003).  
\(^{386}\) \textit{Danforth}, 128 S.Ct. at 1047.  
\(^{387}\) \textit{New State Ice Co. v. Liebmann}, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may,
participate in a dialogue which contributes to the Supreme Court’s reasoned development of constitutional criminal doctrine. But this is quite different from experimentation with respect to the retroactive application of a clear new rule announced by the Supreme Court, where it results in the kind of non-uniformity seen in the decisions applying Ring.

Freeing the state courts from Teague not only permits the unequal treatment of postconviction petitioners from one state to the next, it also raises a second non-uniformity concern – the possibility of eroding the clarity of federal law. This argument is raised by the Danforth dissenters. Because retroactivity rules like those announced in Linkletter and Teague involve an examination of the “nature of the substantive federal rule at issue,” even state courts adopting the same retroactivity test may arrive at different results by virtue of different opinions as to the nature of the underlying constitutional rule.

The Nevada Supreme Court, for example, concluded that the Ring rule does not seriously diminish the likelihood of an “accurate” death sentence. Similarly, the Florida Supreme Court (deferring to the Supreme Court’s characterization of the purpose of Ring in Summerlin) found the purpose of the Ring rule was not to promote accuracy. But another state court might conclude, as did four Justices of the United States Supreme Court, that the rule does promote a form of “accurate” resolution. Should such a split occur, it would be debatable whether the Ring rule applied in different jurisdictions would remain substantively the same.

Chief Justice Roberts’ view, that such divergent application of a clear rule like Ring produces intolerable inequities and threatens to undermine the supremacy of federal law, is compelling. His argument that uniformity ought to be ensured by holding Teague binding on the states, however, is part and parcel of his view that the responsibility for constitutional development should reside almost exclusively in the Supreme Court, and was rightly rejected. Such a structure would ensure uniformity not only by having the Supreme Court “say what the law is,” but also whether or not the law is to be applied retroactively.

This top-down view of doctrinal development can be rejected, however, without rejecting uniformity. A rule of retroactivity in state postconviction proceedings simultaneously preserves a state’s power to develop federal constitutional doctrine, while supporting – if

if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

388 See supra notes 226-228, and accompanying text; see Hutton, supra note 234, at 446-47.
389 Danforth, 128 S.Ct. at 1054 (Roberts, C.J., dissenting).
390 See supra notes 211-212 and accompanying text.
391 Danforth, 128 S.Ct. at 1053 (Roberts, C.J., dissenting) (arguing uniformity in application of federal law “is the very interest that animates the Supremacy Clause and our role as the ‘one supreme Court’ charged with enforcing it”).
392 See supra notes 272-275 and accompanying text.
universally applied by all states – the supremacy of that doctrine by ensuring its uniform application nationwide. Why should state courts be concerned? Uniformity, suggests Chief Justice Roberts, is “quite plainly a predominantly federal interest.” My only answer to this is that the very interest I have already noted the states have in developing federal constitutional doctrine, implies an equal interest in the healthy maintenance of that body of law.

Retroactivity in postconviction proceedings should therefore be the preferred approach.

F. Finality, the only Teague concern that remains

While the comity concern discussed in Teague is not an issue when considering state postconviction proceedings, “there was more to Teague than that.” Even after Danforth, the finality concern is alive and kicking: “It is a matter that states should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts.” There is good reason, however, to believe that finality concerns are not an impediment to retroactive application of new rules in state postconviction proceedings. Finality concerns in state postconviction actions are not as weighty as in habeas review, are outweighed by competing considerations, and are already adequately addressed through other procedural mechanisms.

1. The value of “finality” in state postconviction proceedings

Assuming, for the moment, the validity of the finality concerns of Professor Bator and

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393 Here I advert to the Kantian “categorical imperative.” A state, in choosing its retroactivity rules, should adhere to the rule: “I should never act except in such a way that I can also will that my maxim should become a universal law.” IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 14 (James W. Ellington trans., 3d ed. 1993), quoted in Donald L. Beschle, Kant's Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing, 31 Pepperdine L. Rev. 949, 965 (2004). Because I believe the concern that a diversity of retroactivity schemes (or universal adoption of a retroactivity rule which requires inquiry into the “nature of the substantive federal rule at issue” which may produce a diversity of results across jurisdictions) will engender non-uniformity is a serious concern, I do not share the view that state courts should accept the Court’s invitation to “fashion rules which respond to the unique concerns of that state.” Danforth, 128 S.Ct. at 1042 (quoting Hutt on, supra note 234, at 422-23); see also Stith, supra note 316, at 449 (“Other states [than Missouri], in light of their own concerns and jurisprudence, may more narrowly interpret the right to habeas review under state law.”) (emphasis added).

395 Danforth, 128 S.Ct. at 1052 (Roberts, C.J., dissenting). The Danforth majority was correct to understand Teague as primarily concerned with comity, given its historical and theoretical underpinnings. See Section I, supra.

396 Danforth, 128 S.Ct. at 1041.
Judge Friendly which proved so influential in shaping the Court’s retroactivity jurisprudence, it is a relatively simple matter to demonstrate the weakened force of those concerns in state postconviction proceedings. This is true by virtue of the intra-system nature of state postconviction review, and because state postconviction review generally occurs earlier in time than federal habeas review.¹³⁷

The intra-system quality of state postconviction review substantially lessens the resource problems occasioned by collateral attack.¹³⁸ Most importantly, the postconviction judge and the prosecutor defending the postconviction action will be familiar with the state law applicable to the case, and quite likely the facts as well, as state postconviction proceedings are often brought before the same trial court that imposed judgment.¹³⁹ Intra-system postconviction proceedings “bear[] the markings of an integral part of a continuous criminal proceeding that is segmented by no event or condition decisive of finality.”¹⁴⁰

Furthermore, intra-system postconviction proceedings occur earlier in time than federal habeas review.¹⁴¹ This reduces Judge Friendly’s concern that accurate factfinding would not be possible in collateral proceedings and on retrial, as his concern increases in direct proportion to the amount of time that elapses between conviction and subsequent litigation events.¹⁴²

Professor Bator and Judge Friendly also argued that opportunities for collateral attack corrode the criminal law’s deterrent and rehabilitative functions.¹⁴³ I believe those concerns are overstated. Professor Amsterdam, whose article discussing finality was relied upon by Judge Friendly,¹⁴⁴ shared the concerns enumerated by Judge Friendly as to resources and the diminished accuracy of factfinding,¹⁴⁵ but was more “tentative” than

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¹³⁷ See Figure 1, supra.
¹³⁸ Hutton, supra note 234, at 443-44 (“It is less complicated to garner the resources to respond to a postconviction proceeding within the system which originally handled the case, particularly if the case has recently been finalized.”).
¹³⁹ E.g. Missouri Supreme Court Rule 29.15; Fla. R. Crim. P. Rule 3.850; Mont. Code Ann. § 46-21-101(1); Indiana Postconviction Rule PC 1.
¹⁴⁰ Hertz & Liebman, supra note 18, § 25.6, at 1014 (discussing federal postconviction actions under 28 U.S.C. § 2255).
¹⁴¹ It is of course possible for state prisoners to bypass the state postconviction track and proceed directly to federal habeas review, but they do so at the cost of forfeiting any claims not exhausted on direct review. See generally Hertz & Liebman, supra note 18, § 5.1a, at 216.
¹⁴² Friendly, supra note 140, at 146-47. See also Lonchar v. Thomas, 517 U.S. 314, 325 (1996) (second and successive habeas petitions “pose a greater threat to the State's interests in ‘finality’” than first habeas petition).
¹⁴³ See supra notes 34-35, 146, and accompanying text.
¹⁴⁴ Friendly, supra note 140, at 146 & n.15, 161 (citing Amsterdam, supra note 140).
¹⁴⁵ Amsterdam, supra note 140, at 383-84 (identifying as “aspects of a ‘finality’ factor”: “(a) duplication of judicial effort; (b) delay in setting the criminal proceeding at rest; (c)
Professor Bator in embracing the claim that collateral attack undermines deterrence and rehabilitation. “[W]e know virtually nothing about the actual operation of the deterrent and rehabilitative principles,” Amsterdam wrote, though he was willing to adopt the “working assumption that long-protracted adversary litigation of an issue in the nature of a plea in bar hardly furthers the deterrent or rehabilitative efficacy of the law.”—Amsterdam,

I believe the claims of Professor Bator and Judge Friendly as to deterrence and rehabilitation – claims that have been repeated, without empirical analysis, by the Court—are, in Professor Bator’s words, simply “not proven.” Indeed I find them implausible, and take issue even with Professor Amsterdam’s “tentative” conclusion that the availability of collateral attack “hardly furthers” deterrence or rehabilitation. Unless there is evidentiary support for an actual weakening of deterrence or rehabilitation, I propose that the availability of collateral attack for the correction of error, because it serves to ensure the accuracy of convictions, also serves deterrence or rehabilitation.

Bator’s claim is that a “procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands.” Given that we live in an age in which the effect of the death penalty as a deterrent to crime is hotly debated, it seems at a minimum naïve inconvenience and possibly danger in transporting a prisoner to the sentencing court for hearing; (d) postponed litigation of fact, hence litigation which will often be less reliable in reproducing the facts (i) respecting the postconviction claim itself, and (ii) respecting the issue of guilt if the collateral attack succeeds in a form which allows retrial (the burden of proof of guilt on retrial, of course, remaining with the prosecutor.).

Professor Bator declared this the “proper verdict” on the wisdom of Brown v. Allen. Bator,

See generally, Katherine J. Strandburg, Deterrence and the Conviction of Innocents, 35 Conn. L. Rev. 1321 (2003) (arguing that conviction of the innocent decreases deterrence); see also Issachar Rosen-Zvi & Talia Fisher, Overcoming Procedural Boundaries, 94 Va. L. Rev. 79 (2008) (“The realization of the goals of both criminal and civil litigation is contingent upon accurate fact-finding by the court. … From the criminal perspective, convicting innocent defendants impairs the social goals of deterrence, incapacitation, and rehabilitation.”).

See generally, John J. Donohue III & Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 Stanford L. Rev. 791 (2005). Professors Donohue and Wolfers conclude: “The U.S. data simply do not speak clearly about whether the death penalty has a deterrent or antideterrent effect. … As to whether executions raise or lower the homicide rate, we remain profoundly uncertain.” Id. at 843 (citation omitted).
to accept on faith the idea that the availability of collateral attack weakens deterrence. And, as a matter of commonsense, I would suggest that the hypothesis – that would-be criminals would decide to engage in prohibited behavior even in part because of the theoretical possibility of postconviction relief after a number of years of incarceration – seems far-fetched.

Judge Friendly deftly changes the subject to rehabilitation at this point, indicating the weakness of the argument as to deterrence: “It is not an answer that a convicted defendant generally remains in prison while collateral attack is pending,” he writes. “Unbounded willingness to entertain attacks on convictions must interfere with at least one aim of punishment – ‘a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation.’”

There are two answers to the suggestion that the availability of collateral attack undermines rehabilitation. First, rehabilitation is no longer a principal goal of our criminal justice system. Judge Friendly acknowledges this as a “serious problem, demanding our best thought,” but dismisses the argument as “irrelevant.” Why it is irrelevant is hard to fathom – that collateral attack should be truncated for its purported harm to a rehabilitative ideal no longer meaningfully served by any other aspect of our criminal system seems difficult to justify.

Second, the argument that collateral attack undermines rehabilitation is equally applicable to direct review. On Bator’s theory, the rehabilitation of a prisoner cannot begin “if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place.” On this view, the delays in exhausting direct review are such that many prisoners would be released due to the expiration of

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413 Yin, supra note 18, at 238 & n.265 (citing Frank H. Easterbrook, Criminal Procedure As a Market System, 12 J. Legal Stud. 289 (1983)).
414 Friendly, supra note 140, at 146 (quoting Bator, supra note 25, at 452).
415 See Austin Sarat, Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State, 42 Law & Society Rev. 183, 187 (2008) (noting the “rejection of rehabilitation as the guiding philosophy of criminal sentencing and … the increasing politicization of issues of crime and punishment since the 1960s.”); Austin Sarat, Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency, 82 N. Carolina L. Rev. 1345, 1350 (2004) (“Just deserts, not deterrence or rehabilitation, becomes the primary, if not the sole, norm governing punishment.”). In contrast, one note suggests the rise of “problem-solving courts” reflects a return to the rehabilitative ideal. Developments in the Law – The Law of Mental Illness: Mental Health Courts and the Trend Toward a Rehabilitative Justice System, 121 Harv. L. Rev. 1168, 1174-76 (2008). Such courts have little to do with the argument at hand, however, because they present an alternative to the structured criminal justice system of trials, appeals, and collateral review that is the concern of this Article.
416 Friendly, supra note 140, at 146.
417 Bator, supra note 25, at 452.
their sentences, before rehabilitation could begin.\textsuperscript{418} Bator recognizes his argument sweeps too broadly, and justifies this sacrifice of the rehabilitative ideal as outweighed by the benefit of direct review.\textsuperscript{419} As is discussed in the next section, Bator’s argument is equally applicable to collateral review, where there are significant benefits which outweigh any of the finality concerns identified by Bator and Friendly.

\section*{2. Benefits of retroactivity on collateral review outweigh finality concerns}

Both Professor Bator and Judge Friendly recognized that their concerns with finality would give way to the extent that direct review fails to provide a forum for postconviction claims such as ineffective assistance of counsel and government suppression of material exculpatory evidence.\textsuperscript{420}

Professor Bator, concerned with the “process” model of reliability, crafted a significant exception to his general view that habeas review was superfluous, for occasions where

\textsuperscript{418} See, e.g., \textit{U.S. ex rel. Green v. Washington, et al.}, 917 F.Supp. 1238, 1272 (N.D. Ill. 1996) (noting, in class action brought by state prisoners, that delays in processing of appeals were such that “approximately 45\% of the members of petitioner class will likely have served all of their sentences even before a decision is rendered in their appeals”). A cursory survey of average lengths of incarceration compared to average processing time for the initial appeal suggests the time it takes to complete the three appellate stages of the direct review track (appeal as of right, discretionary review, and certiorari review, see Figure 1) may often be as long or longer than a prisoner’s sentence. \textit{Compare People v. Rios}, 43 P.3d 726 (Colo. App. 2001) (13-month time for filing of transcripts and 2-year time to resolve initial appeal as of right not “inordinate delay”) \textit{with Colorado Legislative Council, “An Overview of the Colorado Adult Criminal Justice System: Report to the General Assembly,“} Research Publication No. 487 (January 2001) (available online at http://www.law.du.edu/images/uploads/library/CLC/487a.pdf) at 61 (average length of incarceration for Colorado in FY 98-99 was 49 months); \textit{compare State Court Administrative Office, Judicial Resources Recommendations} (August 2007) (available online at http://courts.michigan.gov/scao/resources/publications/reports/JRRSummary2007.pdf) at 53-54 (noting average time from filing of appeal in Michigan Court of Appeals to decision was 653 days in 2001 and 423 days in 2006) \textit{with Citizens’ Research Council of Michigan, Corrections Growth: A Long-Term Analysis of Growth in Michigan’s Department of Corrections} (May 2, 2008) (available online at www.crcmich.org/PUBLICAT/2000s/ 2008/ Corrections_Presentation_05-02-2008.ppt) at 11 (average length of incarceration for Michigan during same time period around 45 months).

\textsuperscript{419} Bator, \textit{supra} note 25, at 453. For Bator, that benefit is that intra-system appellate review “provides authoritative and uniform pronouncements on the law of that jurisdiction” while certiorari review “provides the state courts with authoritative and uniform pronouncements of federal law.” \textit{Id.}

\textsuperscript{420} See \textit{supra} notes 321-335, and accompanying text.
direct review afforded no corrective process for claims of constitutional error. Examples offered by Bator included claims of judicial bias (not discovered until after direct review), mob domination of the court and jury (with no remedy available on direct review), and coerced guilty pleas. Similarly, Judge Friendly recognized the appropriateness of state postconviction proceedings to address constitutional claims not open to consideration on direct review, such as coerced pleas, the use of perjured testimony by the prosecution, or the incompetence of the defendant to stand trial.

Not only did Bator and Friendly concede that providing a forum for litigating such claims outweighs the finality concerns they outlined, they also recognized that providing such a forum might be constitutionally required. Thus, while Bator argues against federal habeas review of such questions, he can do so only by placing the burden of such litigation on the state courts: "[T]he state itself must provide a postconviction forum for the canvassing of these questions, and … the refusal of a state to do so is simply ‘error’ subject to reversal by the Supreme Court.” Judge Friendly similarly noted the possibility that “there are circumstances, such as post-trial discovery of the knowing use of material perjured evidence by the prosecutor or claims of coercion to plead guilty, where failure to provide [postconviction process] would deny due process of law.”

Just as finality is not a strong enough interest to overcome the need for retroactive application of new rules on direct review, so too to the extent state postconviction proceedings serve as a first round of litigation for certain types of claims, finality must fail as a justification for nonretroactivity.

3. Addressing finality through procedural mechanisms other than nonretroactivity

Finality is sufficiently addressed through procedural mechanisms other than nonretroactivity. Statutes of limitation and procedural default doctrine are two examples. I wish to emphasize that I am in no way endorsing the use of these restrictions on postconviction relief; well-founded criticism of these doctrines abounds.

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421 Bator, supra note 25, at 455-60.
422 Id. at 456.
423 Friendly, supra note 140, at 152.
424 Id. at 459-60.
425 Friendly, supra note 140, at 168.
426 See supra notes 417-419 and accompanying text.
427 The one-year statute of limitations imposed by AEDPA on federal habeas petitions, for example, has been declared “an unmitigated disaster.” Peter Sessions, Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners, 70 So. Cal. L. Rev. 1513, 1567 (1997); see also id. at 1555-67 (examining practical difficulties occasioned by a statute of limitations); Christopher Flood, Closing the Circle: Case v. Nebraska and the Future of Habeas Reform, 27 N.Y.U. Rev. L. & Soc’l Change 633, 658 (2001-02) (arguing state postconviction statutes of limitations periods are “far too short to ensure that violations of constitutional rights are redressed”);
where such impediments to relief grounded in finality already exist, a state taking the opportunity provided by Danforth to reconsider its approach to retroactivity should question whether finality has already been adequately served.

The criticisms of Professor Bator and Judge Friendly, and the Supreme Court’s development of its retroactivity doctrine through Teague, all occurred at a time when there was no statute of limitations for the bringing of a federal habeas corpus petition. Under such circumstances, Bator could complain that federal habeas review afforded the opportunity for “endless repetition of inquiry into facts and law,” while Judge Friendly viewed the idea of a statute of limitations on collateral attack as among the “most drastic” suggestions for reform.


The most common criticism of default doctrines is that they punish prisoners based on the quality of their counsel. Sessions, supra, at 1562 n.268 (collecting criticisms of procedural default); Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1234-36 (1986) (arguing that because “a procedural default frequently reflects, quite simply, a breakdown in the adversary process,” forfeiture rules should be modified to place costs of forfeiture on the prosecution in more instances); see also Andrew Hammel, Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas, 39 Amer. Crim. L. Rev. 1, 82 (2002) (writing that the Supreme Court has permitted procedural default doctrines “to become so drastically uncompromising that they permit states to deprive state death row inmates of any meaningful post-conviction review”); id. at 78 (“Procedural default rules now roam the landscape like wild beasts, devouring claims without regard to the fact that the reasons for the default are often either trivial or, worse, completely beyond the inmate's control.”).


In 1996, as part of AEDPA, Congress imposed a one-year statute of limitations on federal habeas review. 28 U.S.C. § 2244(d)(1).

Bator, supra note 25, at 452.

Friendly, supra note 140, at 130 & n.34.
Many states have imposed statutes of limitation on postconviction actions. Such statutes serve to mitigate any costs to finality occasioned by retroactive application of new rules to cases on state postconviction review. Furthermore, through such statutes of limitation, states can take a nuanced approach to finality – for example, according finality in proportion to the severity of the offense, granting equitable tolling, or exempting claims based on new evidence or alleging actual innocence. Some states also afford litigants an exemption to statutes of limitation for claims based on new judicial decisions. Existing statutes of limitation thus provide a state-law mechanism for delineating finality concerns that do not implicate the non-uniformity concerns raised by the Danforth dissent with respect to a multiplicity of state retroactivity rules.

State-law procedural default rules also serve the finality interests raised by Bator and Friendly. As is noted above, most states prohibit claims from being raised in postconviction proceedings that “could or should” have been raised on direct review. This rule serves generally to ensure that postconviction proceedings are not a second round of litigation for the claims raised on direct review, but rather a first round of litigation for postconviction claims, and largely eliminates finality concerns in postconviction proceedings.

Like statutes of limitation, procedural default doctrines are arguably superior to nonretroactivity doctrines as mechanisms for serving finality concerns. Principal among the benefits of procedural default is that, whereas nonretroactivity requires selection of a “trigger point” which inevitably creates irrelevant distinctions between otherwise similarly situated litigants, procedural default is aimed at the conduct of the

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433 Cf. Yin, supra note 18, at 306 (noting AEDPA’s statute of limitations severely reduces costs to finality of Yin’s proposed approach to retroactivity on federal habeas review).
435 E.g. Ky. R. Crim. P. 11.42(10)(a); Iowa Code § 822.3.
438 See supra notes 277-284, and accompanying text.
439 See generally Yin, supra note 18 (arguing that procedural default doctrine serves all the functions of Teague and should replace the retroactivity analysis in cases on federal habeas review).
440 See supra notes 321-335, and accompanying text.
441 See Section III-C, supra.
442 Yin, supra note 18, at 256-91.
443 See Section III-B, supra.
litigant or her lawyer, and therefore tends to draw more meaningful distinctions between litigants.\footnote{Yin, supra note 18, at 288-91. This is not to say that procedural default is free of problems. Toby Heytens rightly points out that “[b]ecause they impose draconian consequences on criminal defendants, and because they do so based on lawyer inaction rather than client choice, forfeiture rules bear a heavy burden of justification.” Heytens, supra, note 223, at 942. That defendants are blamed for their lawyers’ inaction due to state-law postconviction rules prohibiting claims that “could or should” have been raised on direct review is somewhat mitigated in that a lawyer’s deficient performance at trial, or on appeal as of a matter of right, might constitute cognizable grounds for excusing the procedural default. That this might be true, however, does not address Professor Roosevelt’s criticism of forfeiture for not accommodating the “paradigm case of a new rule… -- where the Supreme Court overrules its prior precedent—‘timely’ trial presentation of the claim is frivolous (because the prior precedent foreclosed it), and penalizing litigants for failing to raise frivolous claims serves neither fairness nor efficiency.” Roosevelt (2007), supra note 18, at 1688. Professor Dow summarizes the problem aptly: “[A]lthough the constitutional demand of the Sixth Amendment imposes an extremely low threshold, under new rule jurisprudence a defendant will be fairly treated only if his attorney is brilliant.” Dow, supra note 18, at 27-28 (citation omitted).} Furthermore, procedural default doctrine lacks some of the problems attendant to administration of a nonretroactivity regime,\footnote{See Yin, supra note 18, at 256-82 (discussing problems in defining what is a “new rule” for purposes of retroactivity analysis).} a subject I address in the next section.

The wisdom of such procedural limits is open to question,\footnote{See supra note 427.} and I do not intend for this Article to advocate the adoption of these limits. Yet, for purposes of deciding what retroactivity regime to adopt after Danforth, suffice it to say that the finality concerns thought to justify a nonretroactivity regime may already be amply protected by existing statutes of limitation and procedural default rules.

G. Problems in administration avoided by the return to retroactivity

The final reason I offer for abandoning nonretroactivity is simply the avoidance of the problems of administering a nonretroactivity regime, such as defining what constitutes a “new rule” and determining the purpose of a rule. Lower courts would be well advised to avoid the new rule question, which I have already noted has confounded the Court.\footnote{Hertz & Liebman, supra note 18, § 25.5 at 981-93. See supra notes 186-195 and accompanying text.}

Beyond the “new rule” question lurks more uncertainty. The prospectivity rules used by the Supreme Court – from Linkletter-Stovall to Teague – have required the Court to examine the purpose of a new constitutional rule, an inquiry as suited to indeterminacy as the question of whether a rule is new. Generally the “purpose” inquiry degenerates into a
question of whether the “new rule” promotes accuracy. The question of whether a rule promotes accuracy is “intractable,” in part because of the epistemological divide between actual guilt or innocence and Bator’s “process” guilt or innocence, exemplified by the difference in the majority and dissenting opinions in *Summerlin*, and in part because society’s perception of the processes that are important to accuracy are subject to constant revision.

The inquiry into the purpose of a “new rule” is also, I submit, unnecessary. A heightened contribution to the accuracy of verdicts is found, under Supreme Court doctrine, to counterbalance the finality concerns thought to justify nonretroactivity. But, like the states’ interests in finality, the states’ interests in promoting accuracy are, or could be, adequately served through other procedural mechanisms. Chief among the mechanisms that serve accuracy are harmless error doctrine and the prejudice component of the

448 In *Linkletter*, for example, the deciding factor was that the exclusionary rule has “no bearing on guilt.” *Linkletter*, 381 U.S. at 636, 637-38. Similarly, *Teague*’s “watershed” exception requires inquiry into whether the new rule bears on the accuracy of the conviction. *Teague*, 489 U.S. at 311-14.

449 *Mackey*, 401 U.S. at 695 (Harlan, J., concurring in judgments in part and dissenting in part).

450 See supra notes 355-359 and accompanying text. This epistemological divide can also be seen in comparing accounts of *Miranda*’s exclusionary rule. In her dissent in *Withrow v. Williams*, 507 U.S. 680 (1993), Justice O’Connor lamented the fact that *Miranda* results in the suppression of trustworthy statements and thereby “impairs the pursuit of truth.” *Id.* at 703 (O’Connor, J., dissenting). This account looks to whether *Miranda* serves the pursuit of objective truth. But in *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court adhered to a “process” view of reliability, describing *Miranda* as an effort “to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.” *Id.* at 433. See also supra note 86 (discussing competing views of interests served by Fifth Amendment privilege).

451 See, e.g., Timothy P. O’Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 Valparaiso L. Rev. 109 (2006) (demonstrating current rule of decision is out of step with intervening social science research); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate L. Rev. 107 (2006) (arguing for pre-trial hearings to examine reliability of jailhouse “snitch” testimony, based on recent evidence of wrongful convictions based on such testimony). Our constantly evolving understanding of what factors contribute to wrongful convictions means a rule believed today to serve reliability may be found tomorrow to be unrelated to reliability tomorrow, or a rule believed today to serve only dignity or some other systemic interest may be found tomorrow to be correlated to reliability.

452 *Chapman v. California*, 386 U.S. 18, 24 (1967) (even constitutional error may be held harmless if court can find it harmless “beyond a reasonable doubt”). The federal courts have added a layer of harmless error for cases on federal habeas review. *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (citing comity and finality concerns, announcing that
constitutional rule to be applied.\footnote{453}

Here again, I do not intend to advocate for the procedural mechanisms that are already in place. Instead, with state courts faced with the opportunity to revise their retroactivity doctrines, I simply note that the interests thought to be served through nonretroactivity doctrines are already well served by existing rules and should not stand as an impediment to adopting retroactivity for cases in postconviction proceedings.

IV. THE FUTURE OF RETROACTIVITY IN FEDERAL POSTCONVICTION PROCEEDINGS

The Danforth majority, while explicitly leaving open the question of Teague’s applicability in federal postconviction proceedings,\footnote{454} suggests that “[m]uch of the reasoning applicable to applications for writs of habeas corpus filed pursuant to § 2254 seems equally applicable in the context of § 2255 motions.”\footnote{455} Similarly, Justice Harlan in his Mackey opinion considered § 2255 proceedings “virtually congruent” to federal habeas review of state-court judgments.\footnote{456}

Judge Friendly, by contrast, correctly associated federal postconviction proceedings not with federal habeas review but with state postconviction proceedings. A desire to consider the “basic principle of collateral attack” required Judge Friendly to center his analysis “in the context of a unitary system,” and not with “the special problem of federal habeas relief will not be granted unless error had “substantial and injurious effect or influence in determining jury’s verdict”); \textit{see also} Fry v. Pliler, 127 S.Ct. 2321, 2328 (2007) (holding that Brecht harmlessness standard will apply to all claims raised on federal habeas review, “whether or not the state appellate court recognized the error and reviewed it for harmlessness” under \textit{Chapman}). At least one state court has done the same. \textit{Ex parte Fierro}, 934 S.W.2d 370, 375 & n.11 (Tex. Cr. App. 1996) (applying heightened harmless-error standard in collateral proceedings). \footnote{453} \textit{E.g. Strickland v. Washington}, 466 U.S. 668, 694 (1984) (requiring defendant alleging ineffective assistance of counsel to demonstrate not only that counsel’s performance was deficient, but also that “but for counsel's unprofessional errors, the result of the proceeding would have been different”). Other redundant protections of the accuracy interest are seen in rules delineating what claims may even be presented in collateral proceedings, \textit{see Stone v. Powell}, 428 U.S. 465 (1976) (Fourth Amendment claims generally not cognizable on federal habeas review), and in procedural default rules, to the extent they embody a “cause and prejudice” exception which looks to the accuracy of the underlying judgment. \textit{E.g. Wainwright v. Sykes}, 433 U.S. 72, 87 (1977). For a general discussion of how Friendly’s “innocence” argument has been incorporated into procedural and substantive law, \textit{see} Guilt, supra note 161, at 604-09. \footnote{454} \textit{Danforth}, 128 S.Ct. at 1034 n.4. \footnote{455} \textit{Id.} at 1041 n.16. \footnote{456} 401 U.S. at 681 & n.1 (Harlan, J., concurring in judgments in part and dissenting in part).
relief for state prisoners." Beginning with an analysis of federal postconviction proceedings, Judge Friendly then advocated the same model for state postconviction proceedings.

Federal postconviction proceedings differ in function from federal habeas review in the same three important ways that state postconviction proceedings do: there are no comity concerns presented, they constitute a second round of litigation (not a third, as federal habeas review does), and they provide an initial forum to litigate claims particular to postconviction proceedings such as ineffective assistance of counsel and government suppression of material exculpatory evidence. In all relevant respects, then, federal postconviction proceedings are like state postconviction proceedings and unlike federal habeas review.

One federal district court has recognized the critical differences between § 2255 proceedings and § 2254 proceedings, and declined to apply Teague in federal postconviction actions. The court noted that “the section 2255 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.” The other lower courts to consider the question have all held Teague is binding in federal postconviction actions.

Unfortunately some lower federal courts have seized upon Justice Harlan’s announcement of principles pertaining to habeas review in Mackey, which arose in part from federal postconviction proceedings, as an indication that the Court’s Teague rule, based upon Justice Harlan’s reasoning in Mackey, applies in § 2255 proceedings. Yet, perpetuation of the illogic that federal postconviction is analogous to federal habeas review is but one of the reasons given by the lower courts for following Teague in § 2255 proceedings.

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457 Friendly, supra note 140, at 146.
458 Id.
459 See supra notes 314-335, and accompanying text.
460 United States v. Payne, 894 F.Supp. 534, 542-43 (D. Mass. 1995); Fisher v. United States, 931 F.Supp. 53, 57 (D. Mass. 1996) (citing Payne). It is worth noting that Payne concerned a claim the district court held could not have been raised on direct review, and thus the postconviction action was essentially substituting for direct review. 894 F. Supp. at 541. Cf. Section III-C, supra (noting that postconviction proceedings serve the same function as direct review with respect to certain postconviction claims).
461 Payne, 894 F.Supp. at 543 (quoting JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 22A.6, at 272-74 (Michie Supp.1993)).
462 Sanabria v. United States, 916 F.Supp 106 (D. P.R. 1996); Gilberti v. United States, 917 F.2d 92, 95 (2d Cir. 1990); United States v. Martinez, 139 F.3d 412, 416 (4th Cir. 1998); Valentine v. United States, 488 F.3d 325 (6th Cir. 2007); Van Dalhuyk v. United States, 21 F.3d 179, 183 (7th Cir. 1994); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002); Daniels v. United States, 254 F.3d 1180, 1194 (10th Cir. 2001); United States v. Swindall, 107 F.3d 831 (11th Cir. 1997); United States v. Ayala, 282 U.S. App. D.C. 266, 894 F.2d 425, 429 n.8 (D.C. Cir. 1990).
463 Gilberti, 917 F.2d at 94; Martinez, 139 F.3d at 416; Sanabria, 916 F.Supp at 110.
proceedings.

Another reason commonly given by the lower federal courts for applying Teague in postconviction proceedings is the notion that “even in the absence of comity concerns, the need for finality is equally as great for federal convictions as for those issued by state courts.” While this statement may be true, it is true only to the extent that the comparison is between the finality interests measured at the time of state postconviction proceedings and those measured at the time of federal postconviction proceedings. Because federal postconviction proceedings are a second round of litigation – not a third round, as in federal habeas review of state-court judgments – the finality interests attaching in such proceedings are not as great as a state’s interest in finality at the time of federal habeas review. Accepting that the federal government has as strong a finality interest in federal postconviction proceedings as a state does in state postconviction proceedings, it does not follow that Teague applies to federal postconviction proceedings. I have demonstrated that state interests in finality are insufficient reason to adopting a Teague-like prospectivity regime in state postconviction actions. For the same reasons, the argument that federal finality interests compel adoption of Teague in federal postconviction actions must fail.

Federal courts applying Teague in § 2255 proceedings also cited a concern for equality which is no longer applicable after Danforth. It would be unfair, the argument went, for state prisoners, and not federal prisoners, to be subject to Teague: “Exempting federal prisoners from the Teague doctrine of retroactivity would result in the courts treating federal prisoners more favorably than state prisoners.” After Danforth, which frees states to afford more retroactivity to state prisoners in postconviction actions than Teague permits in federal habeas cases, this equality argument demands that federal postconviction courts enjoy a similar freedom to extend retroactivity to federal prisoners. This is especially so given the functional equivalence between federal and state postconviction actions.

464 Sanabria, 916 F.Supp at 111; see also, e.g., Gilberti, 917 F.2d at 94 (Teague’s “primary reason for restricting collateral review . . . the goal of finality . . . is common to both federal and state applications”); Van Daalwyk, 21 F.3d at 182 (“strong finality values attach to federal convictions when avenues of direct review are closed”); Sanchez-Cervantes, 282 F.3d at 667 (“The rule against retroactive application of new laws supports important interests of finality that pertain to both the federal system and the state system.”).

465 See supra notes 401-402, and accompanying text.

466 See Section III-F, supra.

467 Elortegui, supra, 743 F. Supp. at 831; see also Sanchez-Cervantes, 282 F.3d at 667 (noting inequity of “deny[ing] use of a new rule to state prisoners but allow[ing] such use to federal prisoners”); Martinez, 139 F.3d at 416 (“It would be wrong to create an anomaly whereby new rules would apply retroactively to those in federal custody but not to state prisoners.”); Gilberti, supra, 917 F.2d at 95 (“Injecting a federal/state dichotomy into the picture would defeat rather than further [Teague’s] goal of consistency”).
Broadly speaking, because the federal postconviction track is identical to the state postconviction track in all relevant respects, the reasons for favoring retroactive application of new rules in federal postconviction proceedings are the same as those for favoring retroactivity in state postconviction proceedings.\textsuperscript{468} I would submit, however, that the case for retroactivity in federal postconviction proceedings has an added urgency. First, federal courts have a greater interest in preserving the uniformity of federal law – unlike state courts (which, I have demonstrated above, also share a commitment to the uniformity of federal law\textsuperscript{469}), federal courts have no local law to develop as an alternative to federal law.

Second, following the same reasoning, federal courts have a greater interest in developing federal law than do the state courts. As is amply documented here and elsewhere, the lower federal courts have already been severely restricted in their ability to contribute to the development of constitutional criminal doctrine, by the one-two punch of \textit{Teague} and AEDPA.\textsuperscript{470} The inability of federal courts to use federal habeas review of state court judgments as a vehicle for developing doctrine dramatically reduces their opportunity for participation, both with respect to direct review claims and postconviction claims. Lower federal courts can use federal criminal cases on the direct review track for doctrinal development, but the number of cases tried\textsuperscript{471} is miniscule compared to the number of federal habeas corpus petitions considered.\textsuperscript{472} The number of federal postconviction actions handled each year,\textsuperscript{473} while much smaller than the number of habeas petitions, is still larger than the number of trials. Preserving federal postconviction proceedings as a locus for doctrinal development is critical, and it is the only way for the lower federal courts to participate in developing doctrine with respect to postconviction claims like ineffective assistance of counsel and government suppression of material exculpatory evidence. Because state courts will be free to engage in such doctrinal development after \textit{Danforth}, it makes little sense for federal courts to refrain from doing the same.

V. CONCLUSION: THE FUTURE OF RETROACTIVITY IN FEDERAL HABEAS CORPUS REVIEW OF STATE-COURT JUDGMENTS

\textsuperscript{468} See Section III, \textit{supra}.
\textsuperscript{469} See Section III-E, \textit{supra}.
\textsuperscript{470} See \textit{supra} notes 221-236; see \textit{generally}, Shay & Lasch, \textit{supra} note 17.
\textsuperscript{471} While guilty plea cases will afford some opportunity for doctrinal development, even on direct review, the range of issues that present through guilty pleas is narrower than at trial.
\textsuperscript{473} \textit{Id.}, tbl.C-2 (5,832 federal postconviction proceedings initiated in 12-month period ending Sept. 30, 2003).
The main purpose of this Article – to explore the possibilities *Danforth* creates for the lower state and federal courts to dispense with retroactivity analysis and participate in doctrinal development across the entire field of constitutional criminal procedure – has now been served. But, before closing, it is worth noting that *Danforth* marks a possible transition point for federal habeas review as well.

First – and this may well be wishful thinking – it may be that the long-term vitality of *Teague* is in doubt. There are some interesting currents flowing beneath the surface waters of the *Danforth* opinion, which may portend poorly for *Teague*’s longevity. The Court’s emphatic return to the Blackstonian “declaratory” model of judging is one; the similarly wholehearted embrace of the law of remedies as a vehicle for deciding questions of retroactivity is another.

Both of these currents work to undermine the foundations of *Teague*. In tandem they erode Justice Harlan’s view of federal habeas corpus as serving a “deterrence function” whereby the “threat” of being overturned on habeas review would force state courts to “toe the constitutional line.” This view was the principal reason Justice Harlan believed a habeas court “need only apply the constitutional standards that prevailed at the time the original proceedings took place.”

The return to Blackstone is inconsistent with this view, at least on a theoretical level. Under a Blackstonian view, announcement of a “new” constitutional rule does not, in fact, “imply that there was no right and thus no violation of that right at the time of trial.” To the contrary, the Blackstonian view implies that a state court that did not reach the same result as would be reached under a “new rule” simply got it wrong. Combining this theory with the view that habeas relief is a punishment to state courts for their failure to “toe the constitutional line” would require retroactive application of new rules. It was the departure from Blackstone that permitted Justice Harlan to embrace the “deterrence” view of habeas and yet insist that “new rules” need not be applied. Under the Austinian model, “new rules” are truly new – and therefore trial courts cannot be faulted for having applied “old” law, which was in fact correct at the time of trial. It would make no sense to punish state courts by awarding habeas relief in such circumstances.

As a consequence, although references to the “threat” of habeas and the need to make state courts “toe the constitutional line” feature prominently in Justice O’Connor’s plurality opinion in *Teague*, the “deterrence” function of habeas disappears entirely in *Danforth*. In its stead the Court shifts to a remedial analysis.

The abandoning of the “deterrence function” of federal habeas review should logically result in a repudiation of the conclusion Justice Harlan drew from that function – that a

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474 *Desist*, 394 U.S. at 262-64 (Harlan, J., dissenting).
475 *Id.* at 263.
476 *Danforth*, 128 S.Ct. at 1047.
477 489 U.S. at 306-07.
habeas court “need only apply the constitutional standards that prevailed at the time the original proceedings took place.” Additionally, it opens up the field for a reinvigoration of the view of state and federal courts as engaged in a constitutional dialogue, “speak[ing] and listen[ing] as equals,” and each treating the other with “mutual respect and awareness.” This dialogue is much more likely to occur if the lower courts embrace retroactivity in intra-system postconviction proceedings, as I have urged here.

Make no mistake, the Court does not appear to be ready to give up on the retroactivity experiment, as full adherence to the Blackstonian model would require. Nor does the Court appear inclined to adopt the selective prospectivity urged by those commentators who have most forcefully advocated for the current mode of thinking adopted by the Court – the use of the law of remedies, rather than retroactivity, to limit the availability of federal habeas relief.

It is significant that Justice Stevens described the period of “somewhat confused and confusing ‘retroactivity’ cases” as “the years between 1965 and 1987.” Teague, of course, was decided in 1989. There is no repudiation of Teague on the horizon in Danforth – indeed, I have pointed to Justice Steven’s revisionist history in bringing Teague into the fold of the Court’s current Blackstonian, remedy-centered retroactivity jurisprudence. If it is ultimately to come, however, the theoretical dissonance between the logic underlying Teague and that underlying Danforth may well be a contribution to Teague’s timely demise.

A more modest, yet important change in the Court’s retroactivity jurisprudence may be that the lower federal courts are empowered to abandon the requirement that Teague retroactivity be considered a threshold question, as a consequence of Danforth’s conversion to the Blackstonian “declaratory” model. Under the Austinian model employed in Teague, the proposed “new” rule would only come into existence if announced by the Court. It thus made no sense to explicate the contours of a proposed

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478 Id. at 263.
479 Cover & Aleinikoff, supra note 226, at 1036.
480 Cover & Aleinikoff, supra note 226 at 1048. See supra note 227.
481 See generally, Fallon & Meltzer, supra note 18; Roosevelt (2007), supra note 18.
482 That Justice O’Connor ascribed to the Austinian model is fully evident in her opinion in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991). “I reiterate … that precisely because this Court has “the power ‘to say what the law is,’” when the Court changes its mind, the law changes with it. If the Court decides, in the context of a civil case or controversy, to change the law, it must make the subsequent determination whether the new law or the old is to apply to conduct occurring before the law-changing decision.” Id. at 550 (O’Connor, J., dissenting) (emphasis added) (quoting Id. at 2451) (Scalia, J., concurring) (quoting Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)).
constitutional rule that “would not be applicable” to the case at hand even if held to exist; such a declaration would be mere dicta – an advisory opinion.

On the Blackstonian model, however, the “new” rule’s existence or non-existence is declared – not created – and is deemed always to have been thus. The rule, if it exists, “applies” to every case, and the only question is whether the federal habeas remedy will be given or withheld. As Justice Stevens has noted, the ordinary method of judging is first to determine whether there has been a constitutional violation and then determine what remedy, if any, will be given. There is a strong argument that, especially under the Blackstonian model, a reversed “order of battle” for Teague questions results in unnecessary advisory opinions. The Teague analysis requires a federal habeas court to determine whether the proposed “new” constitutional rule meets one of the two Teague exceptions to nonretroactivity – which involves “carefully examining the underlying federal right” – to determine whether the “new” rule “would be applied retroactively to the defendant in the case and to all others similarly situated.” It makes no sense – in a Blackstonian world – for a habeas court to engage in an investigation of a proposed new rule’s connection to accuracy and the fundamental fairness of a criminal trial before deciding whether the rule exists. If the rule does not exist, the question of remedy is irrelevant and advisory; if the rule does exist, but does not warrant the federal habeas remedy, there seems little point in a court’s engaging in falsely hypothetical discussion, when the court could as easily issue binding precedent. A holding that the proposed constitutional rule exists, of course, would serve one of the functions of federal habeas corpus – to promote state courts’ adherence to federal constitutional law – even if not in the case at bar, in future cases.

Lower federal courts undertaking the Teague inquiry after Danforth would be justified, in light of Danforth’s explicit adoption of the declaratory model of judging, in undertaking the Teague inquiry in the order suggested by Justice Stevens – first, to consider whether the constitutional rule at issue exists, and then to consider whether the habeas remedy is available for the rule’s violation. This can fairly be described as a major advance, and

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483 Teague, 489 U.S. at 311 (“[T]he rule petitioner urges would not be applicable to this case, which is on collateral review, unless it would fall within an exception.”).
484 Id. at 316 (refusal to announce “new” constitutional rule in case to which rule would be inapplicable “eliminate[s] any problems of rendering advisory opinions ….”).
485 Teague, 489 U.S. at 318-19 (Stevens, J., concurring).
486 Commentators have written that the Teague threshold test violates the prohibition on advisory opinions. Hertz & Liebman, supra note 18, § 25.4 at 964-67; Blume, supra note 18, at 583.
487 Danforth, 128 S.Ct. at 1054 (Roberts, C.J., dissenting).
488 Teague, 489 U.S. at 316.
489 See Teague, 489 U.S. at 312.
490 Desist, 394 U.S. at 262-63 (Harlan, J., dissenting) (federal habeas serves “deterrent” function by judging state-court judgments according to “constitutional standards that prevailed at the time the original proceedings took place.”).
will help preserve lower federal courts’ role in doctrinal development.\textsuperscript{491}

CONCLUSION

The \textit{Danforth} decision affords great hope for a redistribution of interpretive power from the Supreme Court to the lower state and federal courts. Unbound by \textit{Teague}, there is no impediment to those courts affording full retroactivity in postconviction proceedings to “new rules” of federal constitutional doctrine. This result serves the goals of according fairness to similarly situated litigants, allowing lower courts to participate in doctrinal development, and promoting uniform development of federal constitutional law.

\textit{Danforth} also holds promise for a reworking of the Court’s retroactivity doctrine in federal habeas review of state-court judgments. The premises of \textit{Danforth} are inconsistent with the underpinnings of \textit{Teague}, and leave a dissonance in the Court’s jurisprudence that calls for resolution. Finally, abandonment of retroactivity analysis as a threshold inquiry, as the logic of \textit{Danforth} permits, will allow the lower federal courts to resume the business of doctrinal development in federal habeas cases.

\textsuperscript{491}Of course, the most significant impediment to lower courts’ participation in doctrinal development is AEDPA, as Giovanna Shay and I have explained. Shay & Lasch, \textit{supra} note 17. Congressional revision of AEDPA’s “clearly established law” provision could help augment of the role of the lower federal courts., but eliminating the \textit{Teague} preference for avoiding determinations of the existence or non-existence of “new” constitutional rules, however, will also be required, because \textit{Teague}’s impediment to doctrinal development applies even when AEDPA’s restrictions do not. See \textit{Kater v. Maloney}, 459 F.3d 56, 58-59 (1\textsuperscript{st} Cir. 2006) (applying \textit{Teague} where AEDPA did not apply because constitutional claim not decided by state courts “on the merits”).