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Federalizing Retroactivity Rules: The Unrealized Promise of Danforth v. Minnesota and the Unmet Obligation of State Courts to Vindicate Federal Constitutional Rights

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FEDERALIZING RETROACTIVITY RULES: THE UNREALIZED PROMISE OF *DANFORTH V. MINNESOTA* AND THE UNMET OBLIGATION OF STATE COURTS TO VINDICATE FEDERAL CONSTITUTIONAL RIGHTS

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I. INTRODUCTION

Retroactivity rules in state post-conviction proceedings, although seemingly technical and arcane, affect countless lives and implicate important questions of judicial federalism. This Article argues that state courts can and should provide a forum to vindicate federal constitutional rights for state prisoners whose convictions are already final, even—or especially—when federal courts refuse relief. While recent Supreme Court rulings have eased the limits on retroactive relief for new "substantive" rules that redefine classes of defendants or the

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elements of the underlying criminal conduct,[1] retroactive relief remains elusive for new rules of criminal procedure that are announced only after a criminal defendant's conviction becomes final.[2]

In the quarter-century that has elapsed since the governing federal retroactivity regime was announced in *Teague v. Lane*,[3] the Court has yet to permit the retroactive application of a new criminal procedural rule announced after a conviction has become final, even in federal cases where there are no independent sovereigns to respect,[4] and even when the death penalty is on the line.[5]

In 2008, the Supreme Court decided *Danforth v. Minnesota*,[6] which offered a glimmer of hope for state prisoners to secure post-conviction relief based on new rules of criminal procedure. *Danforth* freed state courts to craft their own retroactive remedies and permitted them to be more generous than their federal counterparts.[7] It did so by delinking the newly announced rule, a question of federal law, from the distinct question of whether a retroactive remedy was available, a proce-

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1. *See* Welch v. United States, 136 S. Ct. 1257, 1259-60 (2016) (holding that the decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which determined that the definition of prior "violent felony" in the residual clause of the Armed Career Criminal Act (ACCA) was unconstitutionally vague under due process principles, announced a substantive rule that applied retroactively on collateral review); Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (holding that the decision in Miller v. Alabama, 132 S. Ct. 2455 (2012), prohibiting Eighth Amendment mandatory life sentences without parole for juvenile offenders, announced a new substantive constitutional rule that was retroactive on state collateral review).

2. A note on terminology: By 'final,' I am using the working doctrinal definition that the direct review process of the state conviction—trial, any state appeals, and any petition for certiorari to the Supreme Court—has concluded. *See* Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."). Later in the argument, I note that there are some types of claims which, because they can be fully and fairly adjudicated for the first time only in post-conviction proceedings, are not truly final until after the completion of at least the state collateral review process and Supreme Court review of state post-conviction proceedings. I refer to these claims as 'initial review post-conviction' claims. By 'new constitutional rules,' I mean federal constitutional rules that are newly announced after a conviction becomes final.

3. 489 U.S. 288, 316 (1989).

4. *See, e.g.*, Chaidez v. United States, 133 S. Ct. 1103, 1113 (2013) (holding that in a federal habeas case, the rule in Padilla v. Kentucky, 559 U.S. 356 (2009), requiring defense counsel to advise the defendant about the risk of deportation arising from a guilty plea, was a new rule of criminal procedure that did not apply retroactively).

5. *See* Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (holding that the Sixth Amendment jury right for capital sentencing that was announced in Ring v. Arizona, 536 U.S. 584 (2002), was properly classified as procedural rather than substantive, was not a watershed procedural rule, and thus did not apply to death penalty cases already final on direct review).

6. 552 U.S. 264 (2008).

7. *Id.* at 280-81.

dural question governed by state law in state post-conviction proceedings and federal law in federal habeas proceedings.[8] Post-*Danforth*, therefore, states are empowered to provide retroactive relief in their own post-conviction proceedings, even when federal courts would be barred from doing so under *Teague*.[9] And just this past Term, the Court clarified that although states can be more generous than federal habeas courts in applying new rules retroactively, they cannot be stingier.[10]

While *Danforth* endorsed state courts' authority to be more generous than federal courts in providing retroactive collateral relief, *Montgomery* confirmed that such flexibility is one-sided only.[11] An important role thus remains for federal oversight to ensure that, at least for substantive federal rights, which require retroactive application in federal court, retroactive relief is also available in state post-conviction proceedings. Federal retroactivity rules thus establish a baseline for the availability of retroactive relief based on new substantive criminal rules, under which the states cannot fall. Part A below, therefore, provides an overview of the evolution of the federal retroactivity regime, which involves both judge-made restrictions to relief first announced by the Court in *Teague*, as well as additional barriers to relief engrafted by Congress in 1996 with the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA).[12]

Against this backdrop, Part B analyzes the Supreme Court's 2008 decision in *Danforth v. Minnesota* and its aftermath in the states. A survey of state court rulings post-*Danforth* shows that many states, including Minnesota itself, on remand in *Danforth*,[13] have declined to abandon the much-criticized *Teague* regime.[14] Although a smattering of states have taken up the offer to be more generous in providing ret-

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8. *Id.*

9. Teague v. Lane, 489 U.S. 288, 308 (1989).

10. *See supra* note 1. Notably, *Montgomery* applies only to new substantive rules. It does not address whether state courts would be bound by any Supreme Court determination that a new procedural rule should be applied retroactively, probably because, at least since *Teague* was decided, the Court has never announced a new rule protecting criminal procedural rights that has been given retroactive application. *See also* Colin Starger, *Doctrinal Desert: A Watershed in Sight?*, IN PROGRESS (Oct. 19, 2015), blogs.ubalt.edu/cstarger/2015/10/.../doctrinal-desert-a-watershed-in-sight [https://perma.cc/T3DR-77QB].

11. Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016).

12. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

13. *See* Danforth v. State, 761 N.W.2d 493, 499-500 (Minn. 2009).

14. Georgetown University Law Library Research Services, 50-State Survey of State Court Retroactivity Regimes (June 12, 2015) (unpublished survey) (on file with author) [hereinafter GULL Survey]; *see also* Brief for the U.S. as Amicus Curiae Supporting Petitioner at 4a, Montgomery v. Louisiana, 136 S. Ct. 718 (2015) (No. 14-280) (describing state retroactivity regimes and corroborating survey results).

roactive relief, the vast majority remain wedded to the *Teague* analysis.[15] I argue that such a wooden or reflexive adoption of crabbed federal retroactivity restrictions by state courts simply makes no sense. Comity concerns that underpin federal habeas courts' reluctance to disturb state court convictions do not arise when a state court is tasked with determining the legality of its own convictions, and finality concerns are overstated and outweighed by the increasingly pressing social need to remedy illegal convictions and detentions. Finality concerns are also more equitably and directly served by other constraints on collateral relief such as statutes of limitations and procedural bars.

Part C argues that state courts can and should make the effort to extract themselves from *Teague*'s gravitational pull. Particularly when state courts are the only forum available for vindicating a federal right—a right that *Danforth* clarified has always existed and is "found," rather than "made," when it disentangled the question of the right's existence from the separate question of availability of a remedy—state courts have a constitutional obligation to provide relief. Such an obligation is especially strong for those claims that can be heard for the first time only in post-conviction proceedings (initial review collateral claims), such as ineffective assistance of counsel (IAC) on appeal claims, or newly-minted *Brady*[16] claims that emerge only after a conviction is final.

Where the *Teague* bar and AEDPA constraints prevent federal courts from offering relief, state courts must step in to fill that remedial void. Once the state court forum exists, it is constitutionally obligated to vindicate federal rights. Affording state prisoners post-conviction relief when their conviction or sentence is revealed to have resulted from unconstitutional procedures or invalidated crimes or penalties, moreover, provides one indirect, yet potentially powerful means to ameliorate the mass incarceration crisis. While sentencing reforms and other measures work on the front end to reduce the number of new prisoners, such reforms leave largely untouched the sentences of those

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15. GULL Survey, *supra* note 14, at 1-3 (stating that five states—Alaska, Florida, Missouri, Utah, and West Virginia—have affirmatively chosen not to apply *Teague*, and instead have adopted some variant of the policy-based approach that preceded *Teague*, announced by the Supreme Court in Linkletter v. Walker, 381 U.S. 618, 636 (1965)); *see* Brief for the U.S. as Amicus Curiae Supporting Petitioner, *supra* note 14, at 10a (listing State v. Smart, 202 P.3d 1130, 1136-38, 1140 (Alaska 2009); Falcon v. State, 162 So. 3d 954, 956, 960-61 (Fla. 2015); State v. Whitfield, 107 S.W.3d 253, 267-68 (Mo. 2003); Labrum v. Utah State Bd. of Pardons, 870 P.3d 902, 911-12 (Utah 1993); and State v. Kennedy, 735 S.E.2d 905, 923-24 (W. Va. 2012)). The Alaska Supreme Court presaged the rule announced this past term in *Montgomery* and uses *Teague* as a floor, applying its own *Linkletter* variant established in *Judd v. State*, 482 P.2d 273 (Alaska 1971), but only after "confirm[ing] that *Judd* is no less protective than the [*Teague*] standard." *Smart*, 202 P.3d at 1138-39.

16. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that it violates the Due Process Clause for the prosecution to withhold exculpatory evidence that is material to guilt or punishment).

already convicted. Breaking free from the yoke of *Teague* and providing retroactive relief for new criminal procedural rules where the Supreme Court refuses to do so offers a pathway towards addressing mass incarceration on the back end by refusing to let unconstitutional convictions or sentences stand.

In hopes of fostering such developments, this Article concludes in Part D by urging the criminal defense bar to more aggressively seek retroactive relief in state post-conviction proceedings. This can be done both by challenging state courts' wooden application of the inapposite *Teague* procedural bar and by urging those state courts that purport to be bound by *Teague* to be more generous than their federal counterparts in how they manipulate the extremely malleable categories for classifying newly-announced federal rules. Questions such as whether a rule is even truly new or merely an application of an old rule, whether a rule should be classified as substantive or procedural, and whether, even if procedural, a rule might nonetheless be considered a watershed rule that is retroactively applicable are all questions that a state can decide for itself under *Danforth* and that allow a state court to award retroactive relief even when such relief was denied by the Supreme Court.[17]

This practice coda urges state prisoners and their attorneys to make the admittedly extraordinary effort to seek certiorari review of state post-conviction rulings if relief is denied at the state level, even though procedural obstacles are abundant, and even though the chances of certiorari are slim. Given the erosion of federal habeas review resulting from the constraints of AEDPA deference and the impossibility of evolving constitutional law after *Teague*, the best hope of shaping favorable new constitutional criminal protections on questions not yet resolved by the Supreme Court is to directly challenge unfavorable state retroactivity rulings.

A. Teague*, AEDPA, and the Erosion of Federal Habeas Relief for State Prisoners*

Of the more than 1.5 million prisoners incarcerated in the United States, some 90% are state or local prisoners, many serving sentences spanning decades.[18] What happens to these prisoners when the Supreme Court decides a case yielding a 'new' constitutional rule, which

17. Of course, under *Montgomery*, if the Supreme Court deems a new rule substantive and retroactively applicable, that decision is binding on the state courts. *See supra* note 1.

18. *See* E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 1 (2014), http://www.bjs.gov/content/pub/pdf/p13.pdf [https://perma.cc/TN82-BTUT]; *see also* Marc Mauer & David Cole, Opinion, *How to Lock Up Fewer People*, N.Y. TIMES, May 24, 2015, at SR6 (arguing that mass incarceration needs to be dismantled one state at a time and noting that ninety percent of those incarcerated are in state or local facilities).

if applied to a prisoner's underlying conviction or sentence, would render it unconstitutional or at least constitutionally suspect? In the vast majority of cases, state prisoners already serving their sentences are unable to obtain relief from the federal courts, even when they remain incarcerated as a result of undisputed constitutional violations.

1. Retroactivity in the Warren Court

This was not always the case.[19] But as the constitutional rights of criminal defendants expanded, along with the willingness of federal courts to reverse state convictions on habeas review, automatic retroactive application of new judicial rules was retracted during the Warren Court.[20] Under the much-criticized *Linkletter/Stovall* regime, the availability of retroactive relief or a newly announced criminal rule, whether on direct or collateral review, turned on case-by-case retroactivity determinations.[21] These ad hoc retroactivity decisions reflected the struggles of a divided Court to deal with the practical effects of the criminal "rights revolution," during a period when federal habeas courts played an active role in reviewing and overturning already final state convictions.[22] Some have argued that the Court's reluctance to allow retroactive remedies for already final convictions was precisely what provided the Court with the continued freedom to expand the constitutional rights available to criminal defendants.[23]

To "settle what has become a most troublesome question in the administration of justice," certiorari was granted in *Linkletter* to decide whether the exclusionary rule announced in *Mapp v. Ohio*[24] applied

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19. Until the retraction of retroactive relief by the Warren Court, a reaction to the 'rights revolution' and concern with the effect of the explosion of new procedural rights on undoing already-final convictions, the default regime was that judicial decisions "had retrospective operation for near a thousand years." Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910).

20. 'Warren Court' refers to the Supreme Court decisions between 1953 and 1969, when Earl Warren was Chief Justice. *See History of the Court*, SUPREME COURT HISTORICAL SOCIETY, http://supremecourthistory.org/timeline_court_warren.html [https://perma.cc/V5HN-7UD7].

21. The retroactivity regime for judge-made law in civil cases evolved separately and is not the subject of this Article. Discussions can be found in Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997) and Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143 (1996).

22. Brown v. Allen, 344 U.S. 443, 447 (1953) (announcing a de novo standard of review of legal questions on federal habeas); *see also* Carlos Manuel Vázquez, *Habeas as Forum Allocation: A New Synthesis*, 71 U. MIAMI L. REV. 645 (2017) (describing the evolution of the *Brown v. Allen* standard and its role in shifting de novo habeas review from the Supreme Court to the lower federal courts).

23. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1734 (1991); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99 (1999).

24. 367 U.S. 643 (1961).

retroactively to cases decided before *Mapp*.[25] After first declaring that the Constitution had nothing to say about retroactivity one way or the other,[26] *Linkletter* held that to determine the retroactivity of a given criminal rule, the Court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[27] This is not very clear guidance, to say the least. The exclusionary rule did not apply retroactively to litigants other than Mapp himself, the Court ruled, because to do so would "tax the administration of justice to the utmost."[28] The Court further justified this outcome by noting that "the fairness of the trial [was] not under attack," only "the admissibility of evidence, the reliability and relevancy of which is not questioned . . . ."[29]

In *Stovall v. Denno*,[30] the Court refined the *Linkletter* analysis.[31] The retroactivity regime that governed thereafter for criminal judge-made rules was based on three fairly subjective and policy-laden criteria, which applied to direct appeals and habeas cases alike: "[1] the purpose to be served by the new [rule], [2] the extent of the reliance by law enforcement authorities on the old [rule], and [3] the effect on the administration of justice of a retroactive application of the new [rule]."[32]

Over time, Justice Harlan refined a dissenting view, arguing that application of the three-part test was unpredictable and yielded inconsistent results.[33] He insisted that " 'retroactivity' must be rethought."[34] And so it was.

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25. Linkletter v. Walker, 381 U.S. 618, 620 (1965).

26. *Id.* at 629.

27. *Id.*

28. *Id.* at 637.

29. *Id.* at 639. This unwillingness to enforce the exclusionary rule continued. *E.g.*, Stone v. Powell, 428 U.S. 465, 494-95 (1976) (finding no federal habeas remedy for Fourth Amendment violations).

30. 388 U.S. 293 (1967).

31. *Id.* at 300 (refusing to apply retroactively the rule announced in Wade v. United States, 358 F.2d 557 (5th Cir. 1966), regarding the pre-trial right to counsel under this approach).

32. *Id.* at 297.

33. Desist v. United States, 394 U.S. 244 (1969) (Harlan, J., dissenting). Justice Harlan's dissent in *Desist* argued against purely prospective application of new rules (while making an exception only for the litigant at bar) and also began advocating for non-retroactivity as the general rule in collateral proceedings, without "pretend[ing] to have exhausted . . . all the complexities of the retroactivity problem on habeas." *Id.* at 258, 268. His later opinion in *Mackey v. United States*, 401 U.S. 667 (1971), elaborated on his reasons for why direct review cases required full retroactivity, while habeas cases used a more circumscribed approach. *See Mackey*, 401 U.S. at 675-702 (Harlan, J., concurring in part and dissenting in part).

34. *Desist*, 394 U.S. at 258.

2. The Current Federal Regime: Complete Retroactivity for Direct Appeals and General Non-Retroactivity for Collateral Review

In 1987, the Court began its incremental move towards adopting Justice Harlan's proposed approach. *Griffith v. Kentucky*[35] set the still-governing standard for cases on direct review: New criminal rules apply to all litigants whose convictions were not yet final at the time the new rule was announced, such that similarly situated defendants were treated similarly.[36] Seemingly disavowing its view in *Linkletter* that retroactivity was not constitutionally mandated, the Court asserted, without further explanation, that a failure to apply a newly declared constitutional rule to similarly situated defendants whose cases were on direct appeal "violates basic norms of constitutional adjudication."[37]

As for cases already final and reviewable only through post-conviction proceedings, the other shoe of Justice Harlan's approach to retroactivity dropped two years later. In 1989, *Teague v. Lane* announced the general rule that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[38] Since *Teague*, state prisoners whose convictions have become final are extremely unlikely to obtain relief from criminal procedural rules that were announced in decisions which post-date their convictions.[39] *Teague* also had the effect of freezing the development of constitutional law for criminal defendants by holding that federal habeas courts had to rule on retroactivity as a threshold issue and could not reach the merits once it was determined that no retroactive relief was available.[40] Timing is now everything.

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35. 479 U.S. 314 (1987).

36. *Id.* at 328.

37. *Id.* at 322.

38. 489 U.S. 288, 310 (1989). The *Teague* regime largely adopted the retroactivity rules that Justice Harlan had advocated for in his separate opinions in the *Mackey* and *Desist* cases decided under the *Linkletter/Stovall* regime. *Id.* at 304-07. For general background on retroactivity rules and theories of judging, see, for example, Fisch, *supra* note 21 and Matthew P. Harrington, *Foreword: The Dual Dichotomy of Retroactive Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 19 (1997). *See also* Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 57-58 (1965) (advocating for the approach urged by Justice Harlan and ultimately fully adopted in *Teague*).

39. *See generally* Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161 (2005); Fallon & Meltzer, *supra* note 23; *see also* Ezra D. Landes, *A New Approach to Overcoming the Insurmountable "Watershed Rule" Exception to* Teague*'s Collateral Review Killer*, 74 MO. L. REV. 1, 11-12 (2009).

40. *Teague*, 489 U.S. at 300-01; *see also* Fallon & Meltzer, *supra* note 23, at 1746; 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, 567-76 (1991).

This rethinking of retroactivity, however, did not resolve the problem of inconsistent results that plagued the *Linkletter/Stovall* regime. It just created a different set of problems. To be sure, inconsistencies no longer hinge so blatantly on a reviewing court's policy-based decision as to whether anyone but the defendant at bar should benefit from the new rule. Now, the vagaries of timing, differences in lawyering skills, and duration of state procedures control. For two people convicted of the same crime on the same day, under procedures later revealed as unconstitutional, the availability of relief from a federal court turns on whether they can claim the benefit of the new rule before their convictions become final.[41] Thus, the longer your appeal takes, the more likely you are to benefit from a favorable change in the law. And, the *Teague* categories are arguably just as fuzzy as the *Linkletter/Stovall* three-factor test. Under *Teague*, courts apply extremely malleable classifications that have evolved over the years to shrink the possibilities of federal habeas relief.

But before explaining how *Teague* operates, a few words on its underlying premises are in order. Underpinning the general rule against collateral retroactivity advocated by Justice Harlan and legal scholars of the time, like Professors Mishkin and Bater, and adopted by *Teague*, were principles of comity—or deference to state courts—and a reluctance to second-guess or disturb state convictions that were "correct," i.e., applied the then-governing constitutional doctrine, at the time they were originally made.[42] This foundation reflects an inherently crabbed view of the underlying purposes of habeas corpus relief, which is to assure that courts of first instance follow the right rules (rather than ensure that they get the right result), such that habeas courts "need only apply the constitutional standards that prevailed at the time the original proceedings took place" in order to fairly exercise their function of deterring state procedural violations.[43] As long as state courts 'toed the line,' it did not matter if the line they were toeing was later revealed to have been poorly drawn. Scholars at the time went so far as to argue that federal plenary review was demoralizing to state court judges.[44] Likewise, underpinning the *Teague* regime is

41. *See* Entzeroth, *supra* note 39, at 161-62.

42. *See* Fallon & Meltzer, *supra* note 23, at 1746-49 (discussing the evolution of the *Teague* rule and its underlying premises); Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 25-27 (2009); Liebman, *supra* note 40, at 603-04.

43. *Teague*, 489 U.S. at 306 (quoting Justice Harlan's dissent in Desist v. United States, 394 U.S. 244, 262-63 (1969)).

44. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963) ("I could imagine nothing more subversive of a

an overriding concern for protecting the finality of criminal judgments as an end wholly apart from federalism concerns, but especially because of a reluctance to impose greater costs on states by disturbing already settled judgments.[45]

Under *Teague*, the first step in the analysis is to decide whether a rule is "new" or not, as the retroactivity of the Court's criminal procedure decisions "turn[s] on whether they are novel."[46] If a habeas petitioner can convince a court that the newly announced decision does not create a new rule at all, but rather is merely an application of an existing rule, then there is no retroactivity problem. Over the years, however, the Court has expanded its framing of what constitutes a new rule, making it increasingly difficult to argue that a case is simply applying an existing framework to new facts.[47]

The next escape route from *Teague*'s general prohibition on retroactive relief is to argue that the rule is substantive rather than procedural, meaning it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' "[48] This rarely happens, and examples of substantive 'exceptions' to *Teague*'s bar on retroactive application of new criminal procedural rules have, at least until the recent rulings in *Montgomery* and *Welch*, been few and far between.[49]

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judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.").

45. *Teague*, 489 U.S. at 309-10.

46. Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013).

47. " '[A] case announces a new rule . . . when it breaks new ground or imposes a new obligation' on the government" and when "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (quoting *Teague*, 489 U.S. at 301). After *Teague*, the Court further expanded the range of a new rule, explaining that a holding is not dictated by precedent unless it would have been "apparent to all reasonable jurists." *Id.* (quoting Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997)). In another formulation, the Court has stated that, to decide whether a rule is new, the question is "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Saffle v. Parks, 494 U.S. 484, 488 (1990).

48. *Teague*, 489 U.S. at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)). Substantive rules "decriminalize a class of conduct [or] prohibit the imposition of . . . punishment on a particular class of persons." *Saffle*, 494 U.S. at 495.

49. While courts and scholars sometimes refer to the retroactivity of substantive rules on collateral relief as an exception to the *Teague* retroactivity bar, in *Bousley v. United States*, 523 U.S. 614, 620 (1998), the Court explained that "*Teague* by its terms applies only to procedural rules," (redefining element of a crime substantive rule that is retroactive). Indeed, well before *Teague*, the Court had recognized the principal that an intervening change in substantive law requires retroactive application on collateral appeal. *See* Davis v. United States, 417 U.S. 333, 346-47 (1974); *see also* Ethan Isaac Jacobs, Note, *Is* Ring *Retroactive?*,

Finally, the last way out of the *Teague* bar, one that has never been satisfied in federal court (even in the capital sentencing context), permits retroactive application of "those procedures that . . . are 'implicit in the concept of ordered liberty,' "[50] and that announce a " 'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[51] Although the Supreme Court has yet to find a new procedural rule to be watershed, and has in fact strongly suggested that it may never do so,[52] it has observed in dicta that *Gideon v. Wainwright*[53] would probably qualify if decided today.[54] Criticisms of the Court's steadfast refusal to ever conclude that a new rule satisfies this exception are deserved and many.[55] Given the Court's failure to find any new procedural rules sufficiently fundamental to qualify for retroactive effect, even those that constitute structural error and are automatic grounds for reversal on direct appeal, the *Teague* regime is perhaps best described as allowing only new substantive rules retroactive effect in federal collateral proceedings.[56]

In sum, the norm under *Teague* is that state prisoners serving already final sentences will, more often than not, find no recourse from

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103 COLUM. L. REV. 1805, 1806, 1820 (2003). Prohibitions on executions of classes of defendants announced in decisions such as *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (no death penalty for child rape), *Roper v. Simmons*, 543 U.S. 551 (2005) (no death penalty for juveniles), and *Atkins v. Virginia*, 536 U.S. 304 (2002) (no death penalty for the mentally retarded) would also count as substantive rules not barred by the *Teague* non-retroactivity regime. This past Term the Court declared two other rules to be substantive, and therefore, not barred by *Teague*. *See* Welch v. United States, 136 S. Ct. 1257 (2016); Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

50. *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)).

51. *Saffle*, 494 U.S. at 495 (quoting *Teague*, 489 U.S. at 311). Supreme Court cases denying state habeas petitioners the benefit of new procedural rules are numerous and troubling in that they display the Court's willingness to deny a remedy to people, including people on death row, whose convictions or sentences are constitutionally suspect. *See*, *e.g.*, *Chaidez*, 133 S. Ct. at 1103 (holding the Sixth Amendment violation for IAC in Padilla v. Kentucky, 559 U.S. 356 (2010), did not apply retroactively); Whorton v. Bockting, 549 U.S. 406, 421 (2007) (denying retroactive remedy for confrontation clause Sixth Amendment rights announced in Crawford v. Washington, 541 U.S. 36 (2004) for the same reasons); Schriro v. Summerlin, 542 U.S. 348, 355-58 (2004) (declining to give retroactive relief on federal habeas review to a state death row prisoner because the constitutional rule announced in Ring v. Arizona, 536 U.S. 584 (2002)—that aggravating factors in a death sentencing case had to be proved to a jury not a judge—was a new procedural rule that was not "watershed").

52. *See Whorton*, 549 U.S. at 417-18.

53. 372 U.S. 335 (1963).

54. *Whorton*, 549 U.S. at 419 (stating that *Gideon* is "the only case that we have identified as qualifying under this exception . . . ."); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1298 (7th ed. 2015).

55. *See supra* note 37.

56. *See* FALLON ET AL., *supra* note 54, at 1299.

federal habeas courts when constitutional rules change in their favor. Their federal rights will not be vindicated although governing constitutional decisions show they have been imprisoned based on unconstitutional procedures, even when they are serving sentences that are constitutionally suspect, including death sentences or mandatory sentences that were imposed under sentencing regimes now recognized as unconstitutional.

3. Is Teague *Even Necessary After AEDPA?*

Teague remains a barrier to federal habeas relief, even though many of the comity and finality concerns that originally motivated its imposition of a general non-retroactivity rule for federal habeas proceedings have subsequently been addressed by what has been dubbed as "surely one of the worst statutes ever passed by Congress and signed into law by a President,"[57] the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[58] The finality concerns that underpinned *Teague*, for example, are largely ameliorated by the combined effect of a one-year statute of limitations for the filing of federal habeas petitions that can be equitably tolled only in the most extraordinary of circumstances,[59] AEDPA's own anti-retroactivity rules, [60] and a prohibition of nearly all second or successive habeas petitions.[61]

Any reluctance to second-guess state court judgments that *Teague* addressed through an unyielding bar on collateral retroactive relief for

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57. Lincoln Caplan, *The Destruction of Defendants' Rights*, NEW YORKER (June 21, 2015), http://www newyorker.com/news/news-desk/the-destruction-of-defendants-rights [https://perma.cc/9V3F-7FJC].

58. Pub. L. No. 104-132, 110 Stat. 1214 (codified as 28 U.S.C. § 2254 (2012)).

59. *See* 28 U.S.C. § 2254(d)(1) (2012); *see also* McQuiggin v. Perkins, 133 S. Ct. 1924 (2013) (holding that actual innocence can serve as a gateway to pass through expiration of statute of limitations); Holland v. Florida, 560 U.S. 631 (2010) (allowing equitable tolling). Federal prisoners who file a second or successive 28 U.S.C. § 2255 motion seeking to take advantage of a new rule of constitutional law will thus usually be time-barred, except in those rare cases where the Supreme Court "announces a new rule of constitutional law *and* makes it retroactive within one year." Dodd v. United States, 545 U.S. 353, 359 (2005) (emphasis added). State prisoners face this same result. *See* 28 U.S.C. § 2244(d)(1)(C) (2012); § 2244(b)(2)(A); Prost v. Anderson, 636 F.3d 578, 591 (10th Cir. 2011); *see also* Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J. OF L. & POL'Y 179, 188 nn.37-40 (2014) (describing all the finality-saving devices of AEDPA, other than retroactivity restrictions).

60. Relief is available only for state court rulings "contrary to or involv[ing] an unreasonable application of clearly established . . . law." § 2254(d)(1).

61. Still unresolved by the Court is whether AEDPA fully codifies *Teague*, including the *Teague* exceptions, *see* Greene v. Fisher, 132 S. Ct. 38, 44 n.* (2011), and whether *Teague* even applies to federal prisoners seeking habeas relief under AEDPA § 2255, an argument that the *Chaidez* court declined to address. *See* Chaidez v. United States, 133 S. Ct. 1103, 1113 n.16 (2013). As discussed more fully below, if AEDPA in fact supplants *Teague* entirely, including nullifying the *Teague* exceptions, that is all the more reason for state courts to hear claims which constitutionally require review and would otherwise have no forum.

criminal procedural rules is now more directly satisfied by AEDPA's extreme deference to state courts' rulings. AEDPA replaced the *Brown v. Allen*[62] regime, under which federal habeas courts reviewed questions of law de novo, with a rule that federal courts reviewing state court convictions must let even constitutionally erroneous rulings stand so long as those rulings are not objectively unreasonable.[63] AEDPA requires that "[a] state court . . . be granted a deference and latitude that are not in operation" in the circumstances of normal appellate review.[64] Such extreme deference all but abdicates the review function of the federal judiciary, because asking whether a state court's application of a legal standard is unreasonable is a far cry from asking whether that standard was correctly applied. Even worse, federal habeas petitioners can find themselves between a rock and a hard place in navigating around barriers to relief: for example, in seeking to escape the *Teague* bar by arguing that a constitutional holding is simply an application of already settled law, and not new, they may then find themselves blocked by the statute of limitations.[65]

In short, AEDPA has tied the hands of the federal judiciary, impeding them from correcting constitutional error, and leaving countless state prisoners incarcerated or permitting their execution even when state courts make constitutional errors in their convictions or sentences while applying the law at the time the decision was made. If deemed not "unreasonable," constitutionally wrong decisions are left standing.[66] As Judge Reinhardt of the Ninth Circuit has observed, this "collapse of habeas corpus as a remedy for even the most glaring of constitutional violations ranks among the greater wrongs of our legal era."[67] In the service of the hallowed and frequently hollow interests of comity and finality, the federal courts' power to vindicate federal

62. 344 U.S. 443 (1953).

63. *See generally* Williams v. Taylor, 529 U.S. 362 (2000) (discussing the standard of review of state court judgments under § 2254(d)(2)). Under AEDPA, federal judges sitting in habeas may not grant relief "unless the [state court's] 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; or . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

64. Harrington v. Richter, 562 U.S. 86, 101 (2011). In *Harrington*, the Court held that federal habeas courts must defer to even unexplained state summary dispositions, reversing the Ninth Circuit's grant of habeas relief in an IAC claim. *Id.* at 113.

65. *See* Transcript of Oral Argument at 19, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820).

66. *See Williams*, 529 U.S. at 379.

67. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1219 (2015).

rights through operation of the 'Great Writ' has all but disappeared. State courts can, and in some instances, arguably must step in to fill the void. The Supreme Court's 2008 decision in *Danforth v. Minnesota* provided one means for them to do so.

B. The Unrealized Promise of Danforth v. Minnesota

1. Federal Retroactivity as a Floor, Not a Ceiling

Against this bleak landscape of the incredibly shrinking federal habeas remedy, a tiny glimmer of hope emerged in 2008. In a ruling that surprised many at the time, the Supreme Court in *Danforth v. Minnesota*[68] pronounced that *Teague*'s retroactivity rule was a remedial (and therefore procedural) regime governing the availability of federal habeas relief and not a substantive federal choice of law rule that determines—in a manner binding upon state courts—the moment when new constitutional rights emerge.[69] In other words, *Danforth* returned to a 'Blackstonian' view of the world, where the proper interpretation of the Constitution was discovered, not made, and the retroactivity question boils down to whether or not a remedy should be available when the correct rule is found.[70]

While preserving, and arguably entrenching the *Teague* remedial framework for federal habeas courts, the *Danforth* majority released the state courts from any wrongly perceived obligation to adhere to *Teague*'s crabbed vision of the general unavailability of retroactive relief during collateral proceedings. As a result of this unraveling of the constitutional rule from the retroactive remedy, state courts are now free to provide post-conviction remedies to state prisoners in their own courts based on 'new' federal rules, even when the federal courts are barred from doing so under *Teague*.

Danforth arose when the Minnesota Supreme Court refused to apply *Crawford*'s Confrontation Clause holding retroactively in state post-conviction proceedings, deeming itself bound by the *Teague* framework.[71] In 1996, Stephen Danforth was convicted in Minnesota

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68. 552 U.S. 264 (2008).

69. *Id.* at 288.

70. For a discussion of *Danforth*'s return to Blackstonian views of lawmaking (as opposed to legal realists' recognition that judges make the law in response to changing circumstances), see, for example, Fallon & Meltzer, *supra* note 23, at 1734-58; Lasch, *supra* note 42, at 46-47; *The Supreme Court—Leading Cases*, 122 HARV. L. REV. 276, 431-35 (2008); and Michael C. Dorf, *Did Justice Stevens Pull a Fast One? The Hidden Logic of a Recent Retroactivity Case in the Supreme Court*, FINDLAW (Feb. 25, 2008), http://supreme.findlaw.com/legal-commentary/did-justice-stevens-pull-a-fast-one-the-hidden-logic-of-a-recent-retroactivity-case-in-the-supreme-court.html [https://perma.cc/JZD7-6CRR].

71. Danforth v. State, 718 N.W.2d 451, 455-56 (Minn. 2006).

state court of first-degree criminal sexual conduct with a child. In securing the conviction, the prosecutor relied on a videotaped interview of the non-testifying victim.[72] It was only in 2004, after Danforth's conviction became final, that the United States Supreme Court decided *Crawford v. Washington*,[73] holding that the Confrontation Clause of the Sixth Amendment prohibits the admission of testimonial, out-of-court statements unless the defendant has been able to cross-examine the speaker.[74]

Danforth sought relief under *Crawford* in state habeas proceedings.[75] In denying post-conviction relief, the Minnesota Supreme Court concluded that even if the rule announced in *Crawford* were violated in his trial, Danforth had no recourse because the state court was bound to apply *Teague*.[76] Under *Teague*, *Crawford* was a new criminal procedural rule that was not watershed, and therefore, unavailable to a petitioner seeking retroactive relief in collateral proceedings.[77]

Stephen Danforth petitioned the United States Supreme Court for certiorari, challenging the position of Minnesota's highest court that it was bound under federal law to apply *Teague*'s retroactivity framework.[78] And although Minnesota refused to join issue on this question in its opposition to certiorari,[79] the Supreme Court asked for supplemental briefing at the certiorari stage—a very rare occurrence signaling a strong interest—and eventually granted certiorari on the question of whether state courts were bound to apply the *Teague* framework in their own post-conviction proceedings.[80] The grant of certiorari was far from surprising, both because of the strong signal from the unusual supplemental briefing request, and most significantly, because at the time the states were deeply divided on the question.[81]

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72. *Danforth*, 552 U.S. at 267.

73. 541 U.S. 36 (2004).

74. *Id.* at 68-69.

75. *Danforth,* 552 U.S. at 267.

76. *Danforth*, 718 N.W.2d at 457.

77. *Danforth,* 552 U.S. at 267-68. The Minnesota Supreme Court's view of *Crawford*'s non-retroactivity under *Teague* was consistent with that subsequently announced by the Supreme Court in *Whorton v. Bockting*, 549 U.S. 406, 421 (2007).

78. Petition for Writ of Certiorari, *Danforth*, 552 U.S. 264 (No. 06-8273).

79. Brief in Opposition to Petition for Writ of Certiorari, *Danforth*, 552 U.S. 264 (No. 06-8273).

80. *See* Supplemental Response in Opposition to Petition for Writ of Certiorari at 1, *Danforth*, 552 U.S. 264 (No. 06-8273) (describing the letter from the Court requesting a supplemental briefing).

81. *See, e.g.*, Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421, 437-48 (1993); *see also* Jason Mazzone, *Rights and Remedies in State Habeas Proceedings*, 74 ALB. L. REV. 1749, 1752-57 (2011) (describing the various state retroactivity regimes pre-*Danforth*).

The resulting 7-2 decision in *Danforth* was authored by Justice Stevens; Chief Justice Roberts dissented, joined by Justice Kennedy.[82] After marching through the tortured history of retroactivity doctrine, the majority opinion pronounced the retroactivity question to be one of remedy alone, declaring that "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law."[83] Moreover, the *Teague* retroactivity bar was inapposite, Justice Stevens confirmed, because "*Teague* speaks only to the context of federal habeas,"[84] and "was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. . . . not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions."[85]

In a fairly dramatic reframing of retroactivity doctrine, moving away from the realist recognition of the Warren era that the Court was 'making' new law and returning to Blackstone's 'declaratory' theory of judging, the majority opinion invoked the Blackstonian model as a means of making the "shift from 'retroactivity' to 'redressability.' "[86] By casting the question of retroactivity as purely one of remedy, states were free to follow their own procedures in determining whether and when collateral relief should be available and were not bound by *Teague*'s constricted framework, which was predicated in large part on inapposite principles of comity and deference to state courts.[87]

Chief Justice Roberts dissented, joined by Justice Kennedy.[88] The dissent bemoaned the loss of federal supremacy and uniformity and decried the majority's relinquishment of the Court's "role under the Constitution as the final arbiter of federal law, both as to its meaning

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82. *Danforth*, 552 U.S. at 265.

83. *Id.* at 288.

84. *Id.* at 281.

85. *Id.* at 280-81.

86. Lasch, *supra* note 42, at 35.

87. *Teague* in no way "constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion." *Danforth*, 552 U.S. at 266. As noted above, the Court took pains to reserve the question of whether "States are required to apply 'watershed' rules in state post-conviction proceedings." *Id.* at 269 n.4. As there have yet to be any watershed rules (with the exception of the post-hoc anointed *Gideon v. Wainwright*), this reservation was a bit like saying we do not decide whether the States can collect the pot of gold at the end of the rainbow. This same footnote also reserved the question of whether *Teague* applies to federal prisoners and whether Congress can repeal the *Teague* exceptions by statute. Both questions are still open as *Montgomery v. Louisiana* held only that substantive rules must be applied retroactively by state and federal courts alike; it did not address the null set of watershed procedural rules. Recall that the Court has yet to declare any procedural rule sufficiently watershed to be retroactive. *See supra* notes 50-54 and accompanying text.

88. *Danforth*, 552 U.S. at 291-311 (Roberts, C.J., dissenting).

and its reach, and the accompanying duty to ensure the uniformity of that federal law."[89] But this lament at lost uniformity rings hollow, as federal habeas rarely yields the same result to similarly situated defendants across the country. As noted above, vagaries in the timing of state appellate and collateral review processes as well as differences in other state procedures, including those governing procedural default, already destroy the uniformity of results in federal habeas.[90]

The *Danforth* dissent also planted the seed of buyers' remorse, noting that if states are allowed more flexibility to be generous, they should be allowed equal flexibility to deny relief even in the rare circumstances where a federal court would apply a new rule retroactively.[91] But this past term, in *Montgomery v. Louisiana*,[92] Justice Kennedy wrote for a majority that included Chief Justice Roberts and held that *Danforth*'s flexibility was one-way only: state courts are required to give retroactive effect to new federal substantive rules.[93] In other words, federal retroactivity rules now establish a floor, not a ceiling: states may be more generous than federal courts in providing retroactive relief, but they may not be stingier.

2. Danforth*'s Unrealized Promise*

Commentators writing in the wake of the *Danforth* decision recognized that giving states greater freedom to remedy constitutional violations in post-conviction proceedings held promise for state prisoners, providing an alternative forum to obtain relief that would otherwise be denied by federal habeas courts under *Teague*.[94] But the results of

89. *Id.* at 310.

90. Federal courts require exhaustion of state procedures and will not reach the merits if a habeas petitioner procedurally defaults. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722 (1991); Murray v. Carrier, 477 U.S. 478 (1986); Rose v. Lundy, 455 U.S. 509 (1982).

91. *Danforth*, 552 U.S. at 309-10 (Roberts, C.J., dissenting) ("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.").

92. 136 S. Ct. 718 (2016).

93. *Id.* at 729. In doing so, the majority found itself in the odd position of having to rule on the merits of the question presented in order to justify its own exercise of jurisdiction. In order to defend its exercise of jurisdiction, it had to first find that the *Miller* rule was substantive, not procedural, and also decide that the retroactivity of substantive rules was a binding question of federal law, not a state-controlled remedial question. That unusual jurisdictional pivot is more fully addressed elsewhere. *See* Carlos Manuel Vazquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905 (2017).

94. *See e.g.*, Tom Cummins, Danforth v. Minnesota*: The Confrontation Clause, Retroactivity, and Federalism*, 17 GEO. MASON L. REV. 255 (2009); Dorf, *supra* note 70; Lasch, *supra* note 42; *Leading Cases*, *supra* note 70, at 433-34 (arguing that *Danforth*'s remedial focus potentially weakens the Griffith v. Kentucky, 479 U.S. 314 (1987) absolute rule of full retroactivity on direct review, because balancing is always appropriate in a remedial model);

a fifty-state survey are disappointing, showing that *Danforth*'s promise remains largely unrealized.[95]

Teague holds sway despite *Danforth*'s recognition that the *Teague* rule is grounded in comity concerns of federal habeas courts—concerns with no bearing in state court post-conviction proceedings where a separate sovereign is operating in its own sphere and has plenary authority. *Teague* strangely remains the default rule in most states, perhaps in even more than before *Danforth* was decided. *Teague*'s cancer, in other words, has metastasized. Whether employed as a non-binding standard that is nonetheless woodenly applied, the starting place that ends up as an anchor weighing down any independent analysis (think of the anchoring effect of 'advisory' federal sentencing guidelines),[96] or an unthinking rule of thumb, *Teague*, a decision based on the unique vision of the deferential role of federal habeas, is now coin of the realm.

The trajectory of Stephen Danforth's own case proves as much. On remand from the Supreme Court's 2008 decision in *Danforth*, Minnesota, although offered the road to freedom, opted to stick with the *Teague* regime, finding it not to "be a perfect rule, but . . . preferable to the alternatives."[97] In doing so, the Minnesota Supreme Court recognized that *Teague*'s comity rationale had no bearing in state post-conviction proceedings, but doubled down on *Teague*'s other stated goal of serving finality.[98] A purported "bright line" to guide litigants was preferred to case-by-case assessment of the worth of retroactive relief, particularly given the perceived difficulties and cost of reopening stale state convictions.[99] Other states have followed suit. For the vast majority of states, *Teague* bears in some way on the retroactivity analysis. Only in the smallest handful of states does *Teague* play no role whatsoever.[100]

Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in* Danforth v. Minnesota, 102 NW. U. L. REV. 365 (2008).

95. GULL Survey, *supra* note 14. Thanks again to Thanh Nguyen and the GULC law library research team of summer 2015 for their help with the initial research on this.

96. Nancy Gertner, *Judicial Discretion in Federal Sentencing—Real or Imagined?*, 28 FED. SENT'G REP. 165, 165-66 (2016).

97. Danforth v. State, 761 N.W.2d 493, 499 (Minn. 2009); s*ee also* Zorislav R. Leyderman, *Criminal Law: Minnesota Formally Adopts the* Teague *Retroactivity Standard for State Post-Conviction Proceedings*—Danforth v. State, 36 WM. MITCHELL L. REV. 297, 315-16 (2009).

98. Ironically, in defending the importance of the finality interest, the Minnesota Supreme Court quoted not only Justice Harlan, in *Mackey*, but also the Florida Supreme Court, even though Florida is one of the few jurisdictions that had chosen *not* to adopt *Teague*. *See Danforth*, 761 N.W.2d at 498-99 (quoting Witt v. State, 387 So. 2d 922, 925 (Fla. 1980)).

99. *Id.* at 499.

100. Alaska, Florida, Missouri, Utah, and West Virginia. *See supra* note 15. Moreover, the trend has shifted towards rather than away from *Teague*—three states that explicitly declined to follow *Teague* in 1993, now use it as the default rule: New Jersey (State v. Gaitan, 37 A.3d 1089, 1107 (N.J. 2012)); Oregon (Saldana-Ramirez v. State, 298 P.3d 59, 63 (Or. Ct.

Several states even choose to voluntarily bind themselves to *Teague*, notwithstanding their acknowledgement of *Danforth*'s invitation to unyoke themselves from the federal regime. Some states have done so based on the belief that it would be a "totally fruitless folly" to devise their own rule, given "the incredibly daunting task of creating an alternative and independent body of retroactivity doctrine in opposition to *Teague v. Lane*."[101] Other states bind themselves to *Teague* by inertia where lower courts are bound by pre-*Danforth* decisions, but the state's highest court has yet to reconsider the issue post-*Danforth*.[102] Yet other states first apply *Teague* to assure themselves that federal law does not require retroactivity, using *Teague* to set a floor, and only after determining that federal law does not mandate retroactive relief, do they proceed to apply a separate state retroactivity regime to decide whether they nonetheless want to be more generous on state grounds.[103] There are even states that go so far as to use *Teague* as a retroactivity rule not only for federal constitutional decisions, but also to assess whether a retroactive remedy is available in post-conviction proceedings when state law changes.[104]

Most states use *Teague* as a nonbinding standard. In the words of the Idaho Supreme Court, they recognize that they are "not required to blindly follow [the Supreme Court's] view of what constitutes a new rule or whether a new rule is a watershed rule," and instead can "give retroactive effect to a rule of law," using "independent judgment, based upon the . . . 'uniqueness of our state, our Constitution, and our long-standing jurisprudence.' "[105] But even when states explicitly recognize *Teague* as non-binding, anchoring effects induce states to follow the Supreme Court's lead in most cases.

App. 2013)); and South Dakota (Siers v. Weber, 851 N.W.2d 731, 742-43 (S.D. 2014)). Compare with the discussion of those three states in Hutton, *supra* note 81, at 462-64.

101. *See* Miller v. State, 53 A.3d 385, 396 (Md. Ct. Spec. App. 2012) (declining to apply *Padilla* retroactively); *see also* People v. Tate, 352 P.3d 959 (Colo. 2015).

102. *See, e.g.*, Drach v. Bruce, 136 P.3d 390 (Kan. 2006); Petition of State, 103 A.3d 227 (N.H. 2014); State v. Alshaif, 724 S.E.2d 597 (N.C. Ct. App. 2012); Burleson v. Saffle, 46 P.3d 150 (Okla. Crim. App. 2002); Pierce v. Wall, 941 A.2d 189 (R.I. 2008); State v. White, 944 A.2d 203 (Vt. 2007); State v. Walker, 756 N.W.2d 809 (Wis. Ct. App. 2008).

103. For example, the Michigan Supreme Court, in *People v. Maxon* when declining to apply *Padilla* retroactively, first took a *Teague* analysis to ensure that federal law did not require a retroactive remedy and then applied its own version of the *Linkletter/Stovall* test. 759 N.W.2d 817, 820-22 (Mich. 2008).

104. *E.g.*, Leonard v. Commonwealth, 279 S.W.3d 151, 160 (Ky. 2009); Thompson v. State, 625 A.2d 299, 300-01 (Me. 1993); Odegard v. State, 767 N.W.2d 472, 475 (Minn. Ct. App. 2009).

105. Rhoades v. State, 233 P.3d 61, 70 (Idaho 2010) (quoting State v. Donato, 20 P.3d 5, 8 (Idaho 2001)); *see also, e.g.*, Thiersaint v. Comm'r of Corr., 111 A.3d 829, 843 (Conn. 2015) ("[W]hile federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case, but will conduct an independent analysis and application of *Teague*.").

Several states that use *Teague* as a nonbinding starting point, however, treat it as a framework to be tweaked, rather than a roadmap to be strictly followed and explicitly state that they are applying *Teague* on their own terms. These states critique the Supreme Court for its ever-expanding understanding of what constitutes a new rule, or its crabbed definition of what constitutes a watershed rule of criminal procedure, or both. The Massachusetts Supreme Court, for example, held *Padilla* retroactive after the Supreme Court refused to do so in *Chaidez*, and in so doing, adopted an earlier variant of the *Teague* framework that existed before the Court broadened the definition of a 'new rule' in the 1997 *Lambrix* decision to include whether it was "apparent to all reasonable jurists."[106] "Although [it] consider[ed] the retroactivity framework established in *Teague* to be sound in principle," the Massachusetts court explained:

> [T]he Supreme Court's post-*Teague* expansion of what qualifies as a "new" rule has become so broad that "decisions defining a constitutional safeguard rarely merit application on collateral review. . . ." [W]e continue to adhere to the Supreme Court's original construction that a case announces a "new" rule only when the result is "not dictated by precedent."[107]

In *Casiano v. Commissioner of Correction*,[108] the Connecticut Supreme Court concluded that *Miller v. Alabama*[109] was a watershed rule of criminal procedure. This determination of watershed importance was justified on the basis that the pre-*Miller* use of a mandatory sentencing regime created too high a risk of a disproportionate punishment in violation of the Eighth Amendment. In contrast, allowing a sentencing judge full discretion yields the needed accuracy in sentencing procedures to avoid this risk.[110] That Connecticut court also recognized that the *Miller* rule did not fall easily into substantive or procedural exceptions to *Teague* and that most state courts that had found *Miller* retroactive had categorized it as a substantive exception notwithstanding its procedural elements.[111] The Connecticut Supreme Court exercised its autonomy in announcing that *Miller* was a water-

106. Commonwealth v. Sylvain, 995 N.E.2d 760, 769 (Mass. 2013) (quoting Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997)).

107. *Id.* (quoting Teague v. Lane, 489 U.S. 288, 301 (1989); Colwell v. State, 59 P.3d 463 (Nev. 2003)).

108. 115 A.3d 1031 (Conn. 2015).

109. 132 S. Ct. 2455 (2012).

110. *Casiano*, 115 A.3d at 1041-42.

111. *Id.* at 1040.

shed procedural rule, even though the *Teague* procedural exception remains a nullity under federal law.[112] Missouri has also found the Supreme Court's decision in *Ring v. Arizona* retroactive under its own retroactivity regime, and did so pre-*Danforth*.[113] The year after the *State v. Whitfield* decision, the Supreme Court refused to give retroactive effect to the same rule when applying *Teague*.[114]

Such maverick decisions, however, remain the exceptions that prove the rule. Given the heaviness of *Teague*'s shadow, it is much less likely for states to grant retroactive relief for a new federal rule after the Supreme Court has already denied retroactive relief under *Teague*. Whether or not the rule announced in *Padilla v. Kentucky*[115] (that IAC claims can be brought during deportation proceedings) should be retroactive is one example. Most states have, like the Supreme Court did in *Chaidez*, denied retroactivity to this decision, which expanded the scope of IAC claims to include bad advice on the deportation consequences of a guilty plea.[116] Only Massachusetts, while working within the *Teague* framework, broke from the Supreme Court's narrow definition of a new rule to hold *Padilla* retroactive after *Chaidez*.[117] Interestingly, although many of these states decided the *Padilla* issue before the Supreme Court's decision in *Chaidez*, the *Chaidez* court did not cite any of the state decisions (or distinguish those concluding *Padilla* should apply retroactively) in its reasoning.[118]

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112. *Id.* at 1041.

113. *See* State v. Whitfield, 107 S.W.3d 253, 269 (Mo. 2003) (en banc).

114. Schriro v. Summerlin, 542 U.S. 348, 358 (2004).

115. 559 U.S. 356 (2010).

116. States denying retroactive relief for the rule announced in *Padilla* before the Supreme Court ruled in *Chaidez* include: Arizona (State v. Poblete, 260 P.3d 1102 (Ariz. Ct. App. 2011)), Georgia (State v. Sosa, 733 S.E.2d 262 (Ga. 2012)), Michigan (People v. Gomez, 820 N.W.2d 217 (Mich. Ct. App. 2012)), Minnesota (Campos v. State, 816 N.W.2d 480 (Minn. 2012)), New Jersey (State v. Gaitan, 37 A.3d 1089 (N.J. 2012)), Oregon (Saldana-Ramirez v. State, 298 P.3d 59 (Or. Ct. App. 2013)), and Tennessee (Rodriguez v. State, No. M2011–02068–CCA–R3–PC, 2012 WL 4470675 (Tenn. Crim. App. Sept. 27, 2012)). New Mexico granted retroactive relief before the Supreme Court ruled in *Chaidez* in *Ramirez v. State*, 333 P.3d 240 (N.M. 2014). Other states, like Connecticut in *Thiersaint v. Comm'r of Corr.*, 111 A.3d 829 (Conn. 2015); Nebraska, in *State v. Osorio*, 837 N.W.2d 66 (Neb. 2013); New York, in *People v. Baret*, 16 N.E.3d 1216 (N.Y. 2014); Ohio, in *State v. Bishop*, 7 N.E.3d 605 (Ohio Ct. App. 2014); and Texas, in *Ex parte De Los Reyes*, 392 S.W.3d 675 (Tex. Crim. App. 2013) followed the Supreme Court's lead in *Chaidez* in denying relief. The dissenting opinion in *Baret* criticizes the majority for declining to accept *Danforth*'s invitation, and "instead applying *Teague* in lock-step with the Supreme Court." *Baret*, 16 N.E.3d at 1233; *see also* Kate Lebeaux, Note, Padilla *Retroactivity on State Law Grounds*, 94 B.U. L. REV. 1651 (2014).

117. Commonwealth v. Sylvain, 995 N.E.2d 760, 766 (Mass. 2013) (concluding that under its own application of the *Teague* exceptions, *Padilla* did not announce a new rule and was therefore retroactively applicable on collateral review).

118. Chaidez v. United States, 133 S. Ct. 1103 (2013).

Similarly, before the Supreme Court finally resolved the issue in *Montgomery v. Louisiana*,[119] the states were fairly evenly divided over whether the Eighth Amendment's prohibition of mandatory life without parole for juveniles (the rule announced in *Miller v. Alabama*) should apply retroactively, and if so, why. Courts in eleven states had held that *Miller* is retroactively available in collateral proceedings, the majority concluding that it is a substantive rule.[120] Although Connecticut, as detailed above, deemed it a *Teague* watershed exception.[121] Florida and Missouri concluded it was retroactive after applying their own variants of a *Linkletter/Stovall* three-part test.[122] At least five states applying *Teague* denied retroactivity, deeming *Miller* a non-retroactive procedural rule.[123] When the Supreme Court finally stepped into the fray and resolved the issue with its decision in *Montgomery v. Louisiana*, it ruled in a form binding upon all state courts that *Miller* was a substantive rule requiring retroactive application.[124]

The case presented the opportunity for the Supreme Court (foregone in *Chaidez*) to engage in a dialogue with the state courts on the *Miller* retroactivity analysis, a type of "polyphonic federalism" where the fact that the states had gotten ahead of the Supreme Court on the issue generated a more engaged debate.[125]

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119. 136 S. Ct. 718 (2016).

120. *See* In re Willover, 186 Cal. Rptr. 3d 146 (Cal. Ct. App. 2015); People v. Morfin, 981 N.E.2d 1010 (Ill. App. Ct. 2012); Diatchenko v. Dist. Attorney for Suffolk Dist., 1 N.E.3d 270 (Mass. 2013); Jones v. State, 122 So. 3d 698 (Miss. 2013); State v. Mantich, 842 N.W.2d 716 (Neb. 2014); Petition of State, 103 A.3d 227 (N.H. 2014); Aiken v. Byars, 765 S.E.2d 572 (S.C. 2014); *Ex Parte* Maxwell, 424 S.W.3d 66 (Tex. Crim. App. 2014); State v. Mares, 335 P.3d 487 (Wyo. 2014) (after applying *Teague* by the parties' consent). As described in Robert S. Chang et al., *Evading* Miller, 39 SEATTLE U. L. REV. 85, 95 (2016), some states have also resolved the issue legislatively by abolishing mandatory LWOP juvenile sentencing regimes and making that legislative fix retroactive.

121. Casiano v. Comm'r of Corr., 115 A.3d 1031, 1041 (Conn. 2015).

122. In *Geter v. State*, 115 So. 3d 375, 376 (Fla. 3d DCA 2012), a district court of appeals in Florida declared *Miller* non-retroactive under that state's standard. This decision is no longer good after *Montgomery* has been quashed. *See* Geter v. State, 177 So. 3d 1266 (Table) (Fla. 2015). Missouri, in contrast, held *Miller* retroactive under its own retroactivity regime. Although the reasoning is different than that of the Supreme Court in *Montgomery*, this decision can stand. *See* Branch v. Cassady, No. WD 77788, 2015 WL 160718 (Mo. Ct. App. Jan. 13, 2015). Some states have also resolved the issue legislatively by abolishing mandatory life without parole (LWOP) juvenile sentencing regimes and making that legislative fix retroactive.

123. The following state courts held that the *Miller* rule was procedural and non-retroactive, all decisions that are no longer good law under *Montgomery v. Louisiana*: Ex parte Williams, 183 So. 3d 220 (Ala. 2015); People v. Tate, 352 P.3d 959 (Colo. 2015); Chambers v. State, 831 N.W.2d 311 (Minn. 2013); Beach v. State, 348 P.3d 629 (Mont. 2015); Commonwealth v. Cunningham, 81 A.3d 1 (Pa. 2013).

124. *Montgomery*, 136 S. Ct. 718, 732 (2016).

125. *See* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 288 (2005) (arguing that overlap of state and federal power provides "a valuable opportunity for dialogue," as can be seen, for example, in Justice Kennedy's opinion in Lawrence v. Texas, 539 U.S. 558 (2003) (reversing Bowers v. Hardwick, 478 U.S. 186 (1986)), which

In sum, the shadow of *Teague* looms disturbingly large in state court proceedings, notwithstanding *Danforth*'s invitation to cast aside this federal statute-specific limitation on the availability of a remedy for constitutional violations, a limitation that is grounded largely in inapposite comity concerns. The failure of state courts to unyoke themselves from *Teague* is understandable, perhaps given the difficulties of forging a new path. Whether legal rules are retroactive presents a complicated question that has perplexed legal scholars for centuries, and generated scores of articles and conflicting Supreme Court decisions. Unthinking bright lines are easy to implement, and the seeming path of least resistance is to apply the same framework used by the federal courts.

But there are structural constitutional concerns at issue here that counsel strongly against following *Teague*. Basic principles of equity, social justice, and pragmatism, too, offer good reasons to eschew blind adherence to *Teague* given that much, if not all, of the underpinnings of that decision have no bearing in the context of state post-conviction proceedings. Under certain (if not all) circumstances, state habeas courts must provide relief precisely because federal habeas courts will not. Otherwise, litigants will lack any forum to vindicate their constitutional rights, particularly for those claims that are not truly "final" until after at least one round of post-conviction proceedings.[126]

As Justice Anstead of the Supreme Court of Florida (one of the few states that chose not to follow *Teague*) has observed, as federal habeas protections dissolve, the more important the role of state post-conviction review in the constitutional scheme becomes:

> It would make little sense for state courts to adopt the *Teague* analysis when a substantial part of *Teague*'s rationale is deference to a state's substantive law and review. If anything, the more restrictive standards of federal review place increased and heightened importance upon the quality and reliability of the state proceedings. In other words, if the state proceedings become the only real venue for relief, as they in fact have become, it is critically important that

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reflected on the diverse experience of state courts interpreting their own constitutions to forbid prohibiting homosexual sex); *see also id.* at 302-03 (discussing how Article III standing limits prevent vindication of federal rights in federal courts, but state courts are not so limited and provide an alternative forum for vindication of federal rights).

126. In doing so, it will be important to distinguish concepts of waiver and forfeiture, etc., in cases where there has been a voluntary relinquishment of the opportunity to fully and fairly litigate through litigation choices, from instances where the petitioner had no previous opportunity to raise the claim because it had not yet been discovered. Erica Hashimoto addresses this in her article on how the *Teague* bar is the only barrier to habeas relief not grounded in equity and proposes a substitute rule that sounds in equitable principles, taking account of waiver and forfeiture problems but providing retroactive relief otherwise. *See* Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 142 (2014).

> the state courts provide that venue and "get it right" since those proceedings will usually be the final and only opportunity to litigate collateral claims. In fact, it is the presumed heightened quality of state proceedings that allows the federal courts to defer to the state proceedings as adequate safeguards to the rights of state prisoners. To then further restrict the state proceedings would undermine the entire rationale for restricting federal proceedings because of the reliability of state proceedings.[127]

Justice Anstead's point that state courts have no warrant to blindly follow *Teague* is well taken, and echoes the basic logic that informs *Danforth*. But, it can be taken even further. As I argue below, the Supreme Court's retroactivity decisions in *Teague* nonetheless matter a great deal in the state court analysis—not as a default regime to woodenly follow—but rather as a spur to action, an oppositional lodestar if you will. It is precisely when a claim is *Teague*-barred in federal habeas that state courts should be prompted to more seriously consider relief, so as to ensure that at least one forum is available to vindicate constitutionally protected rights. A federal *Teague* bar, in other words, should serve not as a blindly followed restraint, but as a call to retroactive action in state court.

C. Why State Courts Should (and Sometimes Must) Free Themselves from Teague*'s Constraints*

Henry M. Hart famously observed in 1953 that, "we really would be sunk," if the state courts failed to fulfill their role in "the scheme of the Constitution . . . [as] the primary guarantors of constitutional rights, and in many cases . . . the ultimate ones," in circumstances where "Congress ha[s] taken away the Supreme Court's appellate jurisdiction and been upheld in doing so."[128] The Supreme Court's draconian enforcement of the *Teague* retroactivity bar, especially when combined with AEDPA's piled-on restrictions of federal habeas review, arguably pose precisely such circumstances. State courts, in other words, just might have occasion to become "holier than the pope,"[129] in providing post-conviction opportunities to review constitutional claims that would be otherwise barred by *Teague* in federal court. This is particularly true for those claims that do not become truly final until after direct appeal is concluded, what I call here 'initial collateral review

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127. Hughes v. State, 901 So. 2d 837, 863 (Fla. 2005).

128. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

129. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 154 (1970) (arguing that although state courts could in theory be more generous than federal courts in providing post-conviction relief, there was no need for them to be "holier than the pope").

claims.' Even apart from this class of claims where retroactivity in state collateral proceedings is required by structural constitutional concerns, there are compelling reasons that the default rule should be one of full retroactivity. Finality qua finality is an insufficient reason to deny retroactive relief when there are credible claims of constitutional error resulting in a punishment greater than that authorized by law. [130]

1. Circumstances Where State Habeas Courts Must Provide a Retroactive Remedy

My first claim is strong but narrow: in some circumstances, state courts not only can, but must, apply rules that the Supreme Court has deemed 'new' and thus ineligible for federal habeas relief retroactively. Failure to do so would violate Article III's guarantee that at least one forum be provided for the full and fair vindication of a federal constitutional right. As Chief Justice Marshall wrote long ago, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[131]

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130. The argument might be made that state court judges are less able to fairly vindicate constitutional rights than their federal counterparts, because federal judges are "as insulated from majoritarian pressures as is functionally possible." Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127 (1977). But where, as here, they are also straitjacketed—not only by the text of AEDPA itself, but by the Supreme Court's ever-more crabbed interpretations of that statute—state courts may provide the only available, and therefore preferable, forum to afford constitutionally required relief. Although a majority of state courts have some form of electoral process to select their judges, *see* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015), thirty-nine states, and judges in those states, are therefore arguably more subject to majoritarian pressures. State courts also remain the last resort for state prisoners to pursue (and develop) new constitutional claims in post-conviction proceedings, absent waiver of the *Teague* bar by the state defendant in federal habeas proceedings—a rare occurrence. *See* Danforth v. Minnesota, 552 U.S. 264, 289 (2008) (citing cases of *Teague* waivers). Such state court willingness to be more generous than their federal counterparts in providing relief is not unimaginable, particularly given the wave of reforms on the front end of resolving the mass incarceration crisis, including abolishing mandatory minimums and truth in sentencing laws (reforms that are supported by the right and left alike) and the recognized mass incarceration crisis. *See, e.g.*, RAM SUBRAMANIAN & RUTH DELANEY, PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES, VERA INSTITUTE FOR JUSTICE (2014), http://archive.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v2b.pdf [https://perma.cc/8CM8-J39Z]. It is conceivable that the winds have changed. Elected state court judges could arguably begin to face greater pressure to resist draconian sentencing regimes, and favor earlier release, particularly for those who are serving unconstitutional sentences or who have been convicted based on constitutional error. It may be that state jurists will be more generous in providing retroactive relief precisely because state legislators are also engaging in active "front-end" reforms to eliminate draconian mandatory sentencing schemes, for example. This issue can be addressed in future empirical work.

131. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

The rules that fall into this category are those like the 'new' ineffective assistance of counsel (IAC) rule announced in *Padilla*, which present claims that can only be fairly adjudicated for the first time after the case is "final"—that is, direct appeal is concluded. It is also possible to conceive of other sorts of claims that can be heard only in post-conviction proceedings—such as certain types of *Brady* claims involving prosecutorial misconduct on appeal or claims specifically related to abuse of appellate processes—that, if covered by procedural rules confirmed only after the conviction, would be *Teague*-barred in federal habeas courts. For such claims, state post-conviction proceedings would stand as the only available forum to vindicate a federal constitutional right.[132]

Recent Supreme Court decisions like *Martinez v. Ryan*[133] and *Trevino v. Thaler*,[134] for example, have made increasingly clear that IAC claims are ideally brought in post-conviction proceedings. And, as a practical matter, state post-conviction proceedings can only be brought after the direct appeal, typically handled by the original counsel of record, is concluded.

In *Martinez*, the Court held that where IAC claims must be raised in an initial collateral proceeding under state law, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial review of collateral proceedings, there was no counsel or counsel in that proceeding was ineffective.[135] Put simply, defendants are entitled to one fair shot to litigate IAC claims, and that fair shot is sometimes not possible until the direct appeal is over.

The Court reinforced this principle in *Trevino*, holding that where a state's procedural framework makes it highly unlikely for a defendant to have a meaningful opportunity to raise on direct appeal a claim that his trial counsel provided ineffective assistance, the good cause exception recognized in *Martinez* applies.[136] Together, these cases suggest

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132. Although the focus of this Article is the availability of relief for state prisoners through state post-conviction proceedings, especially when federal habeas relief is *Teague*-barred, these arguments would apply with equal force to preclude *Teague* from barring relief to federal prisoners that, under the current regime, would similarly have no opportunity for full and fair litigation of certain types of IAC or other claims, in instances where the 'new' rule emerges after direct proceedings were finalized but before post-conviction proceedings have begun. The Supreme Court has explicitly left open whether the *Teague* retroactivity bar would apply in such a circumstance. In *Chaidez*, the petitioner argued that it should not, particularly for IAC claims that are ideally (or arguably, can only be) raised after direct appeal has been exhausted, but the Court declined to reach the question. Chaidez v. United States, 133 S. Ct. 1103, 1113 n.16 (2013).

133. 132 S. Ct. 1309, 1320 (2012).

134. 133 S. Ct. 1911, 1921 (2013).

135. *Martinez*, 132 S. Ct. at 1320.

136. *Trevino*, 133 S. Ct. at 1921; *see also* Massaro v. United States, 538 U.S. 500, 508-09 (2003) (holding that federal prisoners may bring IAC claims in habeas proceedings under § 2255

that for certain types of claims that are not truly final, meaning they have not had a full and fair process to be litigated on direct appeal,[137] the proper retroactivity rule should be that of *Griffith v. Kentucky*,[138] because litigants in such circumstances are similarly situated to litigants whose direct appeals are still pending. "[B]asic norms of constitutional adjudication"[139] entitle them to their first bite at the apple.

Imagine a *Padilla* claim where a criminal defendant was improperly advised about the deportation consequences of a guilty plea, but the case became "final," meaning direct appeal was concluded, before *Padilla* was decided. Under *Teague*, as applied to *Padilla* claims in *Chaidez*, there is no opportunity to bring a Sixth Amendment claim in federal habeas proceedings. And, although *Danforth* allows state courts to hear the claim in their post-conviction proceedings, as demonstrated above, the vast majority of states follow the Supreme Court's lead in denying relief. The result (at least in the many states that follow the Supreme Court's lead): a constitutional violation that has never been—and never even had the opportunity to be—fully and fairly litigated because post-conviction proceedings are the first practical opportunity to present such a claim. But failure to allow even a single opportunity to present a claim of constitutional injury is something that cannot be countenanced in a legal system that purports to be governed by a binding Constitution.[140]

Nor would earlier proponents of restrictions on habeas retroactivity, like Justice Harlan, think otherwise. Because such initial review collateral claims are not truly "final" until after post-conviction review has concluded, the more appropriate retroactivity rule is that of *Griffith v. Kentucky*, one grounded in "basic norms of constitutional adjudication," which demands that all cases pending for similarly situated

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whether or not the claim could have been raised on direct appeal, given that, collateral proceedings are the "forum best suited" for IAC claims for a variety of reasons); Rebecca Sharpless & Andrew Stanton, Teague *New Rules Must Apply in Initial-Review Collateral Proceedings: The Teachings of* Padilla, Chaidez *and* Martinez, 67 U. MIAMI L. REV. 795 (2013) (making this argument).

137. Justice Harlan's memorable ode to finality, that "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved," Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part), hinges on the last two words: "already resolved."

138. Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

139. *Id.* at 322.

140. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

litigants receive the benefit of the 'new' rule.[141] The reasoning underpinning the finality and repose interests protected by *Teague* is, in short, utterly inapposite when the constitutionally injured party has not yet had an opportunity to litigate the claim.

Those who advocated for more stringent retroactivity regimes on habeas, in the context of the Warren Court's criminal rights revolution, all started from the basic premise that the federal habeas petitioner had already had at least one opportunity to fully and fairly litigate his or her claim in state proceedings.[142] These proponents of finality recognized that reasonable jurists could and would disagree on a platonic 'correct' result, creating the possibility of unending review with no repose, as long as opportunities for challenge remained.[143] They therefore saw the goal of habeas not as error correction, but rather as assurance of adequacy of process—a view that is enshrined in AEDPA and today's federal habeas jurisprudence.[144]

But such exaltation of process, above all else, hinges on the premise that some process has been offered. Cases such as *Stone v. Powell*[145] and *Swaine v. Presley*[146] confirm that federal habeas relief can be denied only when a full and fair alternative forum is truly available. And although state courts may not even be constitutionally required to hold

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141. *Griffith*, 479 U.S. at 322. Note too that this constitutionally mandated "equal treatment" rule of *Griffith* could very easily be extended to mandate full retroactive availability of relief in collateral proceedings as well, given that it is only the vagaries of appellate practice that lead one person's conviction to become final years before another's, allowing two defendants—who committed an offense on the same day, or who plead guilty on the same day, or who were tried at the same time—to nonetheless not have the same resort to retroactive relief. The defendant whose appeal process goes more slowly is able, even under *Teague*, to take advantage of a retroactive remedy (assuming the claim can be brought on direct appeal), while the defendant who is in state proceedings that move faster, or whose lawyer is more efficient, will be out of luck because her conviction becomes final before the new rule is announced.

142. *See, e.g.*, Bator, *supra* note 44, at 443; Mishkin, *supra* note 38, at 57.

143. "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result).

144. *See supra* notes 43-45 and accompanying text.

145. 428 U.S. 465, 482 (1976) (holding that Fourth Amendment violations were not cognizable in federal habeas proceedings where "the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim"); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring) (proposing that the substantive scope of federal habeas jurisdiction for search-and-seizure claims be limited "solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts").

146. 430 U.S. 372, 383-84 (1977) (finding no § 2255 federal habeas review of District of Columbia criminal convictions given the availability of collateral proceedings in the District of Columbia and recognizing "the settled view that elected judges of our state courts are fully competent to decide federal constitutional issues," and that "collateral relief available in the Superior Court is neither ineffective nor inadequate simply because the judges of that court do not have life tenure").

post-conviction proceedings, or even appeals, once they do provide a forum, that forum must be fully available to vindicate federal rights.

It follows that where there has been no prior opportunity to litigate the federal claim in state proceedings on direct appeal, a habeas remedy is constitutionally required. The finality line drawn in *Griffith* does not govern for these initial review, collateral claims. And if the federal courts are barred from review under *Teague*, given the arbitrary drawing of a finality line at the conclusion of direct appeal proceedings, even when the claim in question is not truly final, the state courts must step in.[147]

To be sure, instances where 'new' procedural rules barred by *Teague* can be heard only in post-conviction proceedings are likely rare. Until *Chaidez* so characterized the *Padilla* rule, there were over three decades of Supreme Court decisions addressing IAC claims,[148] yet the Supreme Court had never concluded that they created new rules. Instead the Court concluded that such claims involved applications of foreseeable evolution of settled doctrine.[149] And to my knowledge, the Court has yet to hold that a case enforcing *Brady*'s prohibition against prosecutorial misconduct constitutes a new rule that would be *Teague*-barred, versus an application of existing precedent.[150]

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147. State courts may not even be constitutionally required to hold post-conviction proceedings, or even appeals, as found in *Pennsylvania v. Finley*, 481 U.S. 551, 557-58 (1987), although the ruling in *Montgomery* casts some doubt on that proposition. *See* Vazquez & Vladeck, *supra* note 93, at 910. In all events, it is settled law that once state courts do provide a forum, that forum must be available to vindicate federal rights. *See, e.g.*, Testa v. Katt, 330 U.S. 386, 393 (1947) (finding that the policy of the federal law is the prevailing policy in every state); Gen. Oil Co. v. Crain, 209 U.S. 211, 222-25 (1908) (finding relief for federal violations must be available in state court, especially when precluded by the Eleventh Amendment in federal court); *see also* Mondou v. N.Y., N.H. & Hartford R.R., 223 U.S. 1, 56-57 (1912) ("[W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure."). Moreover, Vazquez and Vladeck, in their forthcoming piece on *Montgomery v. Louisiana*, make the argument that the import of the Court's decision is that state courts *are* now constitutionally required to provide post-conviction relief. *See* Vazquez & Vladeck, *supra* note 93, at 937.

148. Transcript of Oral Argument, *supra* note 65; *see* Brief of Petitioner at 16, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820).

149. This does not mean, of course, that such claims will necessarily prevail. Precisely because IAC claims are predicated on the already deferential *Strickland* standard, it is very difficult for a federal court, constrained by AEDPA deference, to reverse a state court on the merits. Strickland v. Washington, 466 U.S. 668 (1984).

150. Note also that these claims are likely to present not only retroactivity problems, but statute of limitation problems where the question of untimeliness may or may not be resolved through AEDPA's exceedingly narrow "newly discovered evidence" window—if they involve guilt. *Brady* sentencing claims, however, would have no recourse. *See* 28 U.S.C. § 2255(h)(1)

New rule problems, moreover, will ultimately time out: at some point any new rule becomes an old one as future cases come down the pike and new litigants are able to take advantage of already existing rules. Yet even if few and far between, when initial review collateral claims present themselves, there are solid arguments that state courts should follow the *Griffith* rule rather than the *Teague* rule. The reasoning behind any opposing argument does not withstand scrutiny, given that it is predicated solely on finality interests that have no bearing.[151]

A solitary footnote in *Greene v. Fisher*, moreover, raises the specter of another class of cases where state courts would have the structural constitutional obligation to review claims that Congress has deprived the federal courts of habeas jurisdiction to review.[152] There, Justice Scalia, writing for a unanimous court, affirmed the Third Circuit's denial of federal habeas relief, holding that AEDPA's deployment of the term "clearly established Federal law" is limited to the Supreme Court's decisions as of the time of the relevant state-court adjudication on the merits, and not when the decision was truly final (with the expiration of the period for seeking Supreme Court review from the direct appeal).[153] But the Court also noted that "[w]hether § 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague* . . . is a question we need not address to resolve this case."[154]

If the Court were to hold that AEDPA effectively repealed the *Teague* exceptions (something I even hesitate to utter, like he-who-shall-not-be-named, for fear of bringing the possibility to life), then state courts would be the only forum available to provide the due process protections that underpin the *Teague* exceptions themselves. Here too, state courts would be required to fulfill their role in the constitutional scheme as the 'ultimate guardians' of constitutional rights.[155]

(providing an AEDPA limitation on second and successive federal habeas claims against those who "establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense" which by its terms precludes sentencing claims).

151. *See* Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. 473, 475 (2013) (making a similar argument).

152. 132 S. Ct. 38, 44 n.* (2011).

153. *Id.* at 45; 28 U.S.C. § 2254(d)(1). This of course further illustrates the arbitrariness of setting a moment in time that determines whether a rule is new or old. See the opening example in Entzeroth, *supra* note 39.

154. *Greene*, 132 S. Ct. at 44 n.*. *Montgomery* did not expressly address this open question but strongly suggests that the answer is no.

155. *See* Hart, *supra* note 128, at 1401.

2. Why State Habeas Courts Should Provide Retroactive Relief When a Claim Is Teague*-Barred in Federal Court*

My second proscriptive point is broader. I contend that state courts would be well advised to look to the Supreme Court's *Teague* rulings not as a default rule to unquestioningly apply, but as a map of landmines that should be studied carefully so as to avoid further damage. Recall that *Teague* is grounded on two fundamental concerns: comity and finality. As *Danforth* recognized (as do many state courts that rely on *Teague*), the comity interest that calls for deference to and respect for the decisions of co-equal sovereigns has no bearing where state courts exercise their role as independent sovereigns in evaluating the legality of continued detention of state prisoners.[156] What state courts following *Teague* fail to recognize, however, is that *Teague*'s other main supporting principle—an interest in finality and repose, and a desire to avoid the disturbance or second-guessing of state court judgments for claims that have at least arguably been correctly decided under the then-current law—is too slim a reed upon which to base unquestioned fealty to the *Teague* regime. Particularly, given *Danforth*'s recognition of the law-declaring function of federal courts,[157] it is arguable that state court rulings under the 'old' rule were never correctly decided.[158]

In short, even if not constitutionally required to do so, state courts should avoid rote application of the *Teague* retroactivity bar. Comity concerns are nonexistent when a sovereign is reviewing its own judgments, and finality interests are overrated, particularly in an era where mass incarceration rates are ever more subject to criticism. State jurists need to take an exceptionally hard look at the touted finality interests that undergird *Teague*—a decision that was written before AEDPA (hence, there was no statute of limitations that separately took care of finality and repose concerns) and which predated

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156. "It is thus abundantly clear that the *Teague* rule of non-retroactivity 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—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions." Danforth v. Minnesota, 552 U.S. 264, 280-81 (2008).

157. *Id.* at 284-88 (discussing Justice Scalia's opinion in Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987)).

158. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1769) (stating that the duty of a court is not to "pronounce a new law, but to maintain and expound the old one"). Under Blackstone's declaratory approach, adopted by *Danforth*, a "decision interpreted a law [and] did no more than declare what the law had always been." Notes and Comments, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 907 (1962).

the shrinkage of federal habeas review, as federal courts were still examining convictions anew under the *Brown v. Allen*[159] standard. Unless they can independently justify a retroactivity rule that forecloses relief even when the constitutionality of the underlying conviction or sentence is called into serious doubt under the newly found, but always constitutionally required rule, state courts should not default to *Teague*, but should instead pursue an anti-*Teague* regime. The default rule should be the availability of a remedy for a recognized constitutional wrong, unless there are independent equitable reasons to deny it, so as to avoid entrenchment of constitutionally suspect convictions and sentences under the proper understanding of what the Constitution has always demanded.[160]

States should thus not acquiesce in *Teague* retroactivity restrictions based solely on a purported finality interest (even though that is precisely what Minnesota did on remand after *Danforth*, and many other states have followed suit).[161] First, much of the 'finality' work that *Teague* had to do is now superfluous, as statutes of limitations, more stringent procedural default rules, and bans on second and successive petitions, etc., provide a more direct means of achieving the same ends.[162] *Teague* and its immediate progeny were intent on narrowly defining new rules in an era where federal habeas review was much less deferential and other tools to cabin relief were unavailable. The flood of federal habeas petitions that *Teague* was built to guard against has now been more effectively gated by other devices, as well as state-level post-conviction procedures, which can better serve these purposes.

Thus, in today's constricted habeas regime, the goal of preserving presumptively correct final judgments is more directly carried out by a slew of other procedural barriers than it is by restricting the retroactive application of newly discovered constitutional rules. This is especially true for rules that, while short of satisfying *Teague*'s elusive watershed exception, nonetheless cast serious doubt on the accuracy of the underlying conviction or sentence. If a petitioner seeking habeas relief can satisfy all the other procedural gauntlets and bring a colorable claim that her conviction or sentence is constitutionally suspect

159. 344 U.S. 443 (1953).

160. *Cf.* Hashimoto, *supra* note 126, at 139 (arguing that in lieu of the absolute *Teague* bar applicable to federal habeas claims, the Supreme Court should adopt three individualized equitable exceptions that take into account the applicants' conduct in pursuing claims, the merits of the claim and the stakes involved, and the unavailability of alternative remedies).

161. *See supra* Part B.2.

162. *See supra* Part A.2. (describing federal limits on habeas). *See generally* LARRY W. YACKLE, POSTCONVICTION REMEDIES 13 (1981 & Cum. Supp. 2007/2008) (surveying state post-conviction proceedings).

based on a correct understanding of the law, then finality interests, alone, provide insufficient grounds on which to deny review.[163]

Recall, too, that Justice Harlan's views in *Desist* and *Mackey* (that were ultimately adopted (and narrowed) by Justice O'Connor's crafting of the *Teague* retroactivity bar) arose at a time when the federal habeas statute had no statute of limitations, and the federal courts were operating under the *Brown v. Allen* regime of de novo review for state court legal errors. Thus, Judge Friendly, writing in 1970, urged the cabining of federal habeas relief through more deferential review rather than restrictions on retroactive relief.[164] In Judge Friendly's view, federal habeas review should be limited to claims that went to the heart of the accuracy of proceedings or were grounded in actual innocence.[165] But once these criteria were satisfied, Judge Friendly had no qualms in allowing retroactive application of new criminal procedural rules that would be barred under *Teague* today, including Confrontation Clause, jury selection, and IAC claims that are now *Teague*-barred.[166] That universe of rules—where rights go to the heart of the integrity of criminal proceedings and, therefore, should be remedied whenever a violation is discovered—is far broader than that allowed today by the Supreme Court. Even contemporaries pre-*Teague* recognized that there was no need for a high bar on retroactive relief once other direct mechanisms to curtail habeas were in place. With reason, decisions predicated on an erroneous reading of the Constitution should not stand. Period.

The inevitable criticism of an approach that allows retroactivity only for particularly serious rules is the dilemma posed when deciding

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163. At least in federal habeas proceedings, a credible claim of actual innocence can excuse any procedural default or waiver based on failure to raise the claim earlier in the proceedings. *See* Welch v. United States, 136 S. Ct. 1257, 1264-66 (2016); McQuiggin v. Perkins, 133 S. Ct. 1924, 1932 (2013); Bousley v. United States, 523 U.S. 614, 620-21 (1998); Schlup v. Delo, 513 U.S. 298, 321 (1995). An actual innocence claim is more straightforward to make in circumstances like *Bousley* or *Welch*, where the claim is one of substantive factual innocence, that is, a claim that the defendant did not commit the newly defined crime at all. For procedural violations or sentencing errors, even ones of constitutional magnitude, claims of actual innocence are more of a stretch. Therefore, procedural barriers to review could be more intractable, unless the definition of actual innocence is relaxed, for example, to encompass claims of actual innocence of a sentence. The Supreme Court has expanded the concept of actual innocence to embrace actual innocence of a capital sentence. *See* Sawyer v. Whitley, 505 U.S. 333, 339-40 (1992). But it has yet to condone the expansion of the concept to the non-capital sentencing context. This issue is percolating in the circuits, which are deeply divided on the question. *See, e.g.*, Webster v. Daniels, 784 F.3d 1123, 1148, 1148 n.1 (7th Cir. 2015); Prost v. Anderson, 636 F.3d 578, 586, 589-90 (10th Cir. 2011); *In re* Jones, 226 F.3d 328, 333-34 (4th Cir. 2000).

164. Friendly, *supra* note 129, at 154-56.

165. *Id.* at 154.

166. *Id.* at 153-54.

where to draw the line as to which constitutional errors are serious enough to merit a remedy after the direct appeal has been concluded. A more direct and obvious course that avoids the line-drawing problem is to hold that any conviction resulting from constitutional error should not stand.

The reasoning goes as follows: *Danforth*'s holding, predicated on the Blackstonian law-declaring view of judging, recognized that the correct understanding of the Constitution is timeless, distinct from the retroactive remedy, and always in existence.[167] The Court has also ruled that the states have an obligation to give full effect to binding federal law, as articulated in *Griffith*, *Montgomery*, and *Yates*.[168] The import is that the default regime in state post-conviction proceedings should be one of full retroactivity. Thus, if *Danforth* is correct that the pronouncement of federal law is separate from the question of remedy, then once a constitutional norm is properly identified by the Supreme Court, the states have an obligation to enforce it in real time because the rule was always so. This is true even if the rule is later discovered, meaning that the underlying conviction was not correctly decided at the time. I therefore advocate for a default regime of full retroactivity, absent equitable reasons based on sandbagging, waiver, or other litigation conduct by the applicant that would otherwise counsel against allowing the petitioner to benefit from the newly found rule.[169]

Any asserted interest in finality qua finality, moreover, is ever more suspect given the recognized mass incarceration crisis this country is facing, the increasing condemnation of the carceral state, the growing awareness of the flaws and racial bias in the criminal justice system, and the recognition that mandatory minimum sentences are unfair and ineffective.[170] It simply makes no sense to keep people imprisoned

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167. *See supra* notes 83-84 and accompanying text.

168. Montgomery v. Louisiana, 136 S. Ct. 718 (2016); Yates v. Aiken, 484 U.S. 211, 211-12 (1988) (pre-*Teague* decision authored by Justice Stevens reversing the South Carolina Supreme Court for declining to apply a new application of an old procedural rule retroactively); Griffith v. Kentucky, 479 U.S. 314, 314-15 (1987). There are no convincing reasons why application of a newly discovered (but always correct) procedural rule is not binding upon state post-conviction courts. The general *Teague* bar is not binding under *Danforth*, and its rationale is baseless once in state court, given other interests that better protect finality.

169. Hashimoto, *supra* note 126, at 172-75 (advocating for an equitably grounded substitute for *Teague* that could take account of waiver and forfeiture, but otherwise allow retroactive application of newly discovered rules for those that sought relief that was wrongly foreclosed during their direct appeal).

170. *See* Marc Mauer & David Cole, Opinion, *How to Lock Up Fewer People*, N.Y. TIMES (May 23, 2015), http://www.nytimes.com/2015/05/24/opinion/sunday/how-to-lock-up-fewer-people.html; *see also* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 1 (2014); Michael Meranze, *Pathology of the Carceral State*, L.A. REV. OF BOOKS (Feb. 4, 2015), https://lareviewofbooks.org/article/pathology-carceral-state/ [https://perma.cc/Y3V6-TFUD]; Attorney General Eric Holder, Remarks at the Annual Meet-

when there are serious concerns that their constitutional rights have been violated or when they are demonstrably serving sentences that would be illegal if imposed today.[171] Jettisoning of the federally grounded *Teague* regime, for example, would allow those who were sentenced under constitutionally suspect regimes to benefit from the current—and always correct, per *Danforth* and *Montgomery*—understanding of what the Constitution requires. The import of this logic is that 'procedural rules,' such as the *Apprendi*/*Blakely* Sixth Amendment line of cases that federal courts and most state courts have declined to apply retroactively in collateral proceedings, should not be deemed new but rather newly discovered.[172] The similarly situated litigant from *Griffith*, entitled to be treated similarly under constitutional norms, should, in other words, include post-conviction petitioners for relief who were never able to have their claims decided under the correct understanding of the Constitution.[173]

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ing of the American Bar Association's House of Delegates (Aug. 12, 2013) [hereinafter Attorney General Eric Holder speech], http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html [https://perma.cc/AWL8-REL3] (summarizing the evolving research that mandatory minimums do not work for either rehabilitation or deterrence purposes, as well as ongoing state sentencing reform initiatives).

171. There is an ever-growing consensus across right and left alike that long-term incarceration is neither efficient nor effective. Executive clemency programs like President Obama's clemency initiative that has already commuted scores of mandatory minimum drug sentences, *see* Press Release, Department of Justice, Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants (Apr. 23, 2014), https://www.justice.gov/pardon/clemency-initiative [https://perma.cc/2HRR-XM2G], and legislative fixes, state sentencing reform, and similar clemency initiatives at the state level, *see* SUBRAMANIAN & DELANEY, *supra* note 130, are of course alternative and more direct approaches. But these reforms on the front end do suggest that the balancing of interests could and should be restricted by a post-conviction court in a time in which society is increasingly suspicious of the criminal justice system. Maintaining a constitutionally suspect sentence just for the sake of not disturbing it, and allowing vindication of a constitutional right that would otherwise go unremedied seems increasingly unjustifiable.

172. *See* Jacobs, *supra* note 49; *see also* Mark S. Hurwitz, *Much Ado About Sentencing: The Influence of* Apprendi*,* Blakely*, and* Booker *in the U.S. Courts of Appeals*, 27 JUST. SYS. J. 1, 81-93 (2006).

173. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (refusing to apply the jury right to capital sentencing proceedings announced in Ring v. Arizona, 536 U.S. 584 (2002)), is perhaps the most glaring example. *See also* Shon Hopwood, *Preface—Failing to Fix Sentencing Mistakes: How the System of Mass Incarceration May Have Hardened the Hearts of the Federal Judiciary*, 43 GEO. L.J. ANN. REV. CRIM. PROC. iii (2014). More positive outcomes occurred this past term in *Montgomery v. Louisiana* and *Welch v. United States*, where the Court declared the rules in question to be retroactive, and therefore retroactively applicable during collateral proceedings. *See supra* note 1. States are bound to follow these decisions under *Montgomery*, and to the extent that states have ACCA clones with similar residual clauses, this issue will also arise at the state level. The federal precedent set in *Welch* will be, at the least, persuasive and arguably binding. *See also* Beckles v. United States, 137 S. Ct. 23 (2016) (granting certiorari in a case asking whether *Johnson v. United States* applies retroactively to collateral cases challenging sentences enhanced under the federal sentencing guidelines residual clause).

Consider the following hypothetical: If Congress passed a law that increased the punishment of those already convicted and imprisoned—let's say it doubled everyone's sentences—such legislative action would violate the Ex Post Facto Clause, even though the prisoners' convictions were already final, because it would result in the imposition of a punishment greater than that allowed at the time of conviction.[174] Yet, refusing to allow a prisoner to take advantage of governing law that has 'found' the correct understanding of the Constitution, and which would lessen her sentence if applied to her situation (or, in the extreme, prevent her execution), has the same ultimate effect, just in the opposite direction. In the first scenario, application of a new law increasing punishment violates the Constitution. In the second, the *Teague* regime countenances refusal to abide by an old, but newly discovered law that would clearly diminish punishment. The net effect, a punishment longer than that which is constitutionally permissible, is the same.

In neither scenario does the fact that the prisoner's conviction is already 'final' matter much to the fundamental question of whether a prisoner is serving a punishment more severe than that allowed by the Constitution. To be sure, the ex post facto legislative prohibitions are not only constitutionally mandated, but grounded in fair notice and deterrence functions that are purportedly served by linking crimes to set punishments. But the strength of any 'reliance' interest by wrongdoers on the nature of the punishment is dubious at best.[175] Notice rationales, moreover, have been steadily undermined by the malleability of plea bargains and abuses in the exercise of prosecutorial discretion, etc.[176] The growing wave of opposition to draconian mandatory minimums and unyielding truth in sentencing schemes also demonstrates skepticism about the independent value of preserving initial sentences that are today viewed as unfair and ineffective.[177] At bottom, the fundamental fairness concerns that are constitutionally protected by the Ex Post Facto

174. Calder v. Bull, 3 U.S. (1 Dall.) 386, 397 (1798) ("The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty; and therefore they may be classed together."); *see also* Peugh v. United States, 133 S. Ct. 2072, 2088 (2013) (finding that the Ex Post Facto Clause prohibits federal courts from sentencing a defendant based on guidelines promulgated after a crime was committed, when the new version of the guidelines provides a higher sentencing range than the version in place at the time of the offense).

175. For general discussions of the rationales for and against retroactive relief, see Fisch, *supra* note 21; Harrington, *supra* note 38; and Harold J. Krent, *Should Bouie be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 73-74 (1997) (discussing the oddity of suggesting that there is a legitimate reliance interest in the criminal context).

176. *See, e.g.*, Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980).

177. *See* Attorney General Eric Holder speech, *supra* note 170.

Clause appear to be equally offended by allowing a prisoner to continue to serve a sentence that is, under the correct understanding of the Constitution, beyond the constitutionally permissible limits.[178]

D. Why Defense Counsel Should Care More About State Post-Conviction Proceedings

Hypotheticals aside, while recognizing the inertial pull of *Teague* and the difficulties of convincing state courts to change their course, I nonetheless close with this practical coda, joining others who have stressed the need for the criminal defense bar to press the battle against *Teague*, and take full advantage of the potential opportunities for relief provided in state post-conviction proceedings (and the unfettered Supreme Court review that can follow).[179]

Judgments from state court post-conviction proceedings are rarely the source of Supreme Court cases, and as a leading habeas treatise observes, when they are, it is usually because the state, not the criminal defendant, has successfully petitioned for review.[180] But every now and again, a state habeas petitioner gets certiorari granted from a state post-conviction loss, which allows the law to evolve on direct review in a way that it never could on habeas review given the constraints imposed by *Teague* and AEDPA.[181]

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178. There are also strong arguments that finality interests are greatly reduced when the challenge is to the length of the sentence rather than the underlying conviction, as questions such as stale witnesses, etc., do not arise. *See* Douglas Berman, *Distinguishing Finality Interests Between Convictions and Sentences*, SENT'G L. & POL'Y BLOG (Dec. 15, 2006, 9:51 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2006/12/distinguishing_.html [https://perma.cc/ETA7-V2ZD]; Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 139-40 (2012).

179. *See, e.g.*, Shay, *supra* note 151, at 474. Shay calls *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the "*Gideon* for state postconviction" and makes the point that state post-conviction proceedings both provide the best opportunity for certain federal law claims to be litigated and act as a vehicle that provides lower courts, and ultimately the Supreme Court, with the cleanest opportunity, shorn of the veil of AEDPA deference, to decide open questions of federal constitutional procedure. *See also*, 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) (making the unfettered review point and also noting that state defendants can choose to waive the *Teague* defense in federal court, but rarely do so).

180. 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 6.1, at 341-43 (6th ed. 2011).

181. It also bears noting that, under AEDPA, a federal court will only reach questions decided by the state courts under "clearly established . . . law" and reverse such decisions under a highly deferential standard. 28 U.S.C. § 2254(d)(1) (2012). *Teague* prohibits federal courts not only from applying new procedural rules retroactively, but also from making new rules during habeas proceedings, thereby severely stunting the lawmaking function of the lower federal courts. Teague v. Lane, 489 U.S. 288, 299, 316 (1989); Fallon & Meltzer, *supra* note 23, at 1746-48.

Padilla v. Kentucky,[182] which expanded the boundaries of the Sixth Amendment right to counsel to encompass ineffective assistance in deportation proceedings, was one such case. In *Padilla*, more aggressive pursuit of state post-conviction remedies allowed a new rule expanding the right to counsel to evolve by the Supreme Court's direct review of a state post-conviction proceeding. This ruling allowed constitutional norms to evolve, as the Supreme Court can review such legal decisions de novo, unencumbered by AEDPA's filters.[183] If the *Padilla* issue had arisen during review of a federal habeas case, the Court would never have reached it.

But there is a time trap for the unwary. In *Lawrence v. Florida*,[184] the Court held that AEDPA's one-year statute of limitations is not subject to tolling during the pendency of state post-conviction proceedings.[185] In her dissent, one of the points made by Justice Ginsburg was that this rule would pose a procedural obstacle thwarting completion of state post-conviction proceedings through Supreme Court review, and "unnecessarily encumber the federal courts with anticipatory filings and deprive unwitting litigants of the opportunity to pursue their constitutional claims."[186]

Such a barrier to crafting federally uniform law on issues that can only arise in post-conviction settings impedes the evolution of constitutional protections. Supreme Court review of state post-conviction proceedings is arguably the only opportunity that the Court has to correct constitutional errors on those claims (like ineffective assistance on appeal or post-appeal *Brady* claims) that can be litigated for the first time only in post-conviction proceedings—the initial review collateral claims.[187] This opportunity to move the law forward, one unavailable in federal habeas proceedings, cannot be overstated—nor can the importance of seeking Supreme Court review of state post-conviction rulings, notwithstanding the procedural gauntlets that must be overcome to do so without running afoul of AEDPA's statute of limitations.[188] The preferred course is thus to seek certiorari on the judgment of the state post-conviction court from the Supreme Court, while simultaneously pursuing a federal habeas remedy, and then to move for a

182. 559 U.S. 356 (2010).

183. *Teague*'s bar against making new rules on habeas is grounded, at least in part, in Article III's prohibitions against advisory opinions, which may be inapposite in many states. *See* Schapiro, *supra* note 125, at 302-04.

184. 549 U.S. 327 (2007).

185. *Id.* at 337.

186. *Id.* at 345 (Ginsburg, J., dissenting).

187. *See also* McFarland v. Scott, 512 U.S. 1256, 1261 (1994) (Blackmun, J., dissenting) (dissenting on the importance of state post-conviction review).

188. 1 HERTZ & LIEBMAN, *supra* note 180, at 343.

stay of the federal proceedings pending resolution of the state action. As Justice Ginsburg observed in *Lawrence*, this is of course unnecessarily cumbersome and burdensome on litigants and courts alike.[189] But, I would argue, it is worth the effort to ensure that the law continues to evolve, or be rightly 'discovered.'

State courts, moreover, as the 'ultimate guardians' of federal rights in our constitutional scheme, ought to be reminded of their obligation to fill a constitutional void left by the erosion of federal habeas relief. To date, I am unaware of any state court decision that has expressly considered this structural constitutional obligation in determining whether to follow *Teague* or chart an independent course. Particularly for those state courts that have yet to rule on whether *Teague* applies (about one-third of jurisdictions), a viable litigation strategy would be to propose an "anti-*Teague*" regime of full retroactivity, absent equitable reasons precluding relief, precisely because federal courts offer no forum. Fundamental to our constitutional structure is the principal that every right demands a remedy.[190]

In sum, seeking certiorari of state post-conviction rulings provides the best clean shot for development of new constitutional rules governing post-conviction procedures. State post-conviction proceedings may also provide the last clear shot of adding to the factual record.[191] Aggressive pursuit of retroactive relief in state post-conviction proceedings—including pressing the arguments that state statute of limitations and other procedural bars are better suited to serve finality interests than arbitrary retroactivity restrictions designed for another purpose—may also, with the arc of history, provide the basis for the Supreme Court to rethink the *Teague* bar, or at the very least, become less stingy with respect to the *Teague* exceptions.

That over half the states had held that the rule announced in *Miller v. Alabama* (that juveniles could not be constitutionally sentenced to mandatory life without parole) should be given retroactive effect before the Supreme Court even ruled in *Montgomery* could not have escaped

189. *Lawrence*, 549 U.S. at 343-45.

190. On the flip side, I would strongly advocate against any concession by a petitioner in state post-conviction proceedings that *Teague* governs, as was the case, for example, in *State v. Mares*, 335 P.3d 487, 499 (Wyo. 2014).

191. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1410-11 (2011), which held that review under AEDPA is limited to the record that was before the state court which ruled on the claim on the merits, reinforces the importance of building a complete record in state post-conviction proceedings. *See also In re* Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila., et al., 790 F.3d 457, 461 (3d Cir. 2015) (approving the use of federal public defenders in state post-conviction relief appeals in an opinion questioning why Pennsylvania would see a problem with additional resources from the federal government, given the importance of such procedures in building the correct record for subsequent federal review).

the notice of the Court, when Justice Kennedy wrote for the majority confirming the same as a matter of now-binding federal law.[192] State courts can serve as working laboratories to demonstrate, through their evolving considered practice, that allowing habeas petitioners to benefit from the increasing recognition of constitutional protections that cast doubt on the legality of their convictions and sentences is not only fundamentally fair, but also practically achievable.

192. Although the *Montgomery* majority opinion did not cite any state court rulings in support of its holding that *Miller* was a substantive rule, there was ample briefing in the case from states on both sides of the issue. *See Montgomery v. Louisiana*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/montgomery-v-louisiana/ [https://perma.cc/XN3H-3U3K].