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Habeas and Hubris

Barry Friedman

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Habeas and Hubris

*Barry Friedman**

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I. INTRODUCTION

In 1965 the Supreme Court made clear that state prosecutors were virtually free to exercise peremptory challenges to remove blacks from criminal juries for no reason other than their race.¹ Roughly twenty years later the Supreme Court changed its mind: "The core guarantee of equal protection . . . would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions [of bias], which arise solely from the jurors' race."²

The right to counsel experienced a similar reversal of fortune. About fifty years ago the Court decided that "fundamental fairness" and a "universal sense of justice" did not require the state to provide

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1. *Swain v. Alabama*, 380 U.S. 202, 212 (1965). *Swain* established an almost impossible burden for one seeking any redress for discriminatory peremptory strikes; subsequent to *Swain* relief was seldom available. Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 151 (Ballinger, 1977).

2. *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986).

counsel to one accused of a felony.³ Some twenty years later the Court recanted: “[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁴

The right to counsel and the right to freedom from discriminatory peremptory challenges are not unique. The same evolution has been evident with regard to the right to a jury trial,⁵ the right to be free from compelled self-incrimination,⁶ and, indeed, virtually all of the rights guaranteed by the Bill of Rights and the due process clause.⁷ Admittedly, the decades between 1950 and 1980 witnessed sea changes in the interpretations of those rights. But contrary to the views of some,⁸ due process always has been a fluid concept; to fix the meaning of due process “would be to deny every quality of the law but its age, and to

3. *Betts v. Brady*, 316 U.S. 455 (1942). The *Betts* Court managed to reach this result in part by framing the question as whether the due process clause required counsel “for any offense, . . . in any court,” *id.* at 473, a question plainly not presented in that case. On *Betts* generally, and critical of the *Betts* Court’s conclusion that *Betts* could receive a fair trial without the assistance of counsel, see Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on “The Most Pervasive Right” of an Accused*, 30 U. Chi. L. Rev. 1, 42-56 (1962).

4. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). In *Gideon*, the Court announced that: “We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights.” *Id.* at 342.

5. Compare *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (stating that “[t]he right to trial by jury and the immunity from prosecution . . . are not of the very essence of a scheme of ordered liberty”) with *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (stating that “[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States”).

6. Compare *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (concluding “that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgment by the States”) with *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (applying “the Fifth Amendment’s exception from compulsory self-incrimination” against the states, thus reversing the effect of *Twining*) and with *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (stating that “the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens” (emphasis added)).

7. Evolution, however, has not always gone in one direction. See *Arizona v. Fulminante*, 111 S. Ct. 1246, 1251 (1991) (applying “harmless error” analysis to coerced confessions, reversing the automatic reversal rule). See generally notes 134-35 and accompanying text.

8. Justice Scalia, for example, would take an historical view of what constitutes due process, thus fixing those rights for all time. See *Schad v. Arizona*, 111 S. Ct. 2491, 2507 (1991) (Scalia concurring); *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). Or, at least, sometimes he says he would; other times it seems that he rejects an historical view when it is contrary to the result he would like to reach. See *California v. Hodari D.*, 111 S. Ct. 1547, 1550 n.2 (1991) (noting that “any arcane knowledge of legal history . . . is irrelevant”). See also James D. Gordon III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91, 93 n.20 (1991) (noting that “Justice Scalia . . . is one of the foremost advocates of the view that the Constitution should be interpreted in light of its original meaning,” except when he chooses to ignore history, as in *Employment Division v. Smith*, 485 U.S. 660 (1988)).

render it incapable of progress or improvement.”⁹

The interpretation of the meaning of “due process” has been the product of ongoing dialogue among state and federal courts and legislatures.¹⁰ In this dialogue the federal district courts have, for the last forty years, played an important if not starring role.¹¹ Ever since the Supreme Court’s decision in *Brown v. Allen*,¹² the lower federal courts have exercised their habeas corpus jurisdiction to define and enforce the commands of the due process clause.¹³

No more. In *Teague v. Lane* and its progeny the Supreme Court

9. *Hurtado v. California*, 110 U.S. 516, 529 (1884).

10. See generally Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L. J. 1035 (1977). The Court’s own decisions frequently take into account the views of state and federal courts and legislatures in defining due process. See, for example, *Gideon*, 372 U.S. at 340, 344-45. I have written elsewhere on the use of institutional dialogue to determine judicial jurisdiction. See Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. Rev. 1 (1990), and on the scope of judicial remedial power, Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. Cal. L. Rev. 735 (1992). I intend shortly to take up the question of dialogue in the definition of rights.

11. See generally Cover and Aleinikoff, 86 Yale L. J. at 1064 (cited in note 10) (addressing the special influence federal constitutional decisions have on state court decisions as the “federal utopian tug”); Barry Friedman, *A Tale of Two Habeas* 73 Minn. L. Rev. 247, 329-40 (1988) (arguing that federal district courts can provide meaningful federal review to habeas corpus petitioners); Judith Resnik, *Tiers*, 57 S. Cal. L. Rev. 837 (1984).

12. 344 U.S. 443 (1953).

13. Friedman, 73 Minn. L. Rev. 247 (cited in note 11). With regard to *Brown v. Allen*, see note 24. There is a wealth of good literature on federal habeas corpus jurisdiction, much of it cited in Friedman, 73 Minn. L. Rev. at 248 n.2. In addition to sources cited there, see the following recent entries and other articles directly relating to habeas and retroactivity: Ann Althouse, *Saying What Rights Are — In and Out of Context*, 1991 Wis. L. Rev. 929; Marc M. Arkin, *The Prisoner’s Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. Rev. 371 (1991); Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 Colum. L. Rev. 1665 (1990); Ellen E. Boshkoff, *Resolving Retroactivity After Teague v. Lane*, 65 Ind. L. J. 651 (1990); David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 Hastings Const. L. Q. 23 (1991); Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-retroactivity and Constitutional Remedies*, 104 Harv. L. Rev. 1731 (1991); Patrick E. Higginbotham, *Reflections on Reform of § 2254 Habeas Petitions*, 18 Hofstra L. Rev. 1005 (1990); Joseph L. Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to Teague v. Lane*, 1990 B.Y.U. L. Rev. 183 (1990) [hereinafter Hoffmann, *Retroactivity*]; Joseph L. Hoffmann, *The Supreme Court’s New Vision of Federal Habeas Corpus for State Prisoners*, 1989 S. Ct. Rev. 165 [hereinafter Hoffmann, *Habeas*]; Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 Ariz. L. Rev. 115 (1991); Daniel J. Meador, *Habeas Corpus and the “Retroactivity” Illusion*, 50 Va. L. Rev. 1115 (1964); Gilbert S. Merritt, *Access to Federal Courts in Habeas Corpus Cases*, 58 Tenn. L. Rev. 145 (1990); Kathleen Patchel, *The New Habeas*, 42 Hastings L. J. 941 (1991); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 Geo. Wash. L. Rev. 362 (1991); Evelyn L. Wilson, *Federal Habeas Corpus: An Avenue of Relief for State Prisoners*, 18 S. U. L. Rev. 1 (1991). One good article that came out too close to publication to cite throughout is James S. Liebman, *More Than “Slightly Retro:” The Rehnquist Court’s Root of Habeas Corpus Jurisdiction in Teague v. Lane*, 17 N.Y.U. Rev. Law & Soc. Change 537 (1990-91).

silenced the habeas courts.¹⁴ The *Teague* cases hold that in federal habeas corpus proceedings the lower federal courts may not define the elements of fair criminal procedure beyond the barriers of clear Supreme Court pronouncements.¹⁵

The decisions in *Teague* and its progeny are subject to criticism on several fronts. The judicial crafting of the *Teague* decision was uneven at best, all too disingenuous at worst. The Court adopted an extremely restrictive view of habeas corpus jurisdiction and did so virtually as a passing aside. For anyone familiar with the climate surrounding the decision it is difficult to conclude that the Court's determination was the product of much more than unseemly impatience with a Congress that was considering related issues, but evidently too slowly for the Court. Moreover, the result in the *Teague* cases plainly was the work of a Court anxious to speed the pace of executions.¹⁶

Although this Article will address all these issues, the focal point is an additional aspect of *Teague* and its progeny that particularly offends—the hubris of the Supreme Court.¹⁷ Implicit, and at times explicit, in the Court's decisions is the message that this silencing of the lower federal courts, this narrowing of habeas, is appropriate in order to recast the balance between crime control and constitutional rights. The Court seems to have concluded that it has identified most of what is fundamental with regard to fair process and that now it is time to halt the expansion of, or even curtail, due process rights in order to address the legitimate needs of law enforcement.¹⁸

What is hubristic about this decision by the Court is the mechanism chosen to effectuate the Court's goals and the impact it will have on the future definition of rights. The Court was not content to address the substance of the rights themselves. Rather, in *Teague* the Court adopted a rule that will stifle the development of due process and crim-

14. 489 U.S. 288 (1989). See Hoffmann, *Habeas*, 1989 S. Ct. Rev. at 191 (cited in note 13) (arguing that “[t]he institutional effect of *Teague* will be to deprive the lower federal courts of most of their opportunities to make ‘new law’ in federal habeas cases, or at least to make ‘new law’ in a criminal defendant’s favor”); Althouse, 1991 Wis. L. Rev. at 944 (cited in note 13) (arguing that “*Teague v. Lane* ended the habeas dialogue by virtually eliminating the federal voice”); Patchel, 42 Hastings L. J. at 1025-28 (cited in note 13).

15. See notes 25-28 and accompanying text. On the lower court's reaction to *Teague*, see Arkin, 69 N.C. L. Rev. 371 (cited in note 13).

16. See notes 137-40 and accompanying text. See also Hoffmann, *Habeas*, 1989 S. Ct. Rev. at 187 (cited in note 13) (noting that one of *Teague*'s most significant effects will be to speed capital cases).

17. As to hubris, see note 162.

18. See notes 143-47 and accompanying text. See also Merritt, 58 Tenn. L. Rev. at 146 (cited in note 13) (arguing that “[i]n habeas corpus cases, the Bill of Rights is now a relic to be encased in its present shroud and frozen in time, no longer a living document to be applied to new situations”).

inal process rights well into the future. *Teague* ties the hands of habeas courts in a fashion that future Courts will find difficult to undo without explicitly overruling *Teague*. In *Teague*, therefore, the Court seeks to reach far into the future, narrowly defining constitutional criminal process not just for today but for future generations.

Whatever one thinks of the due process revolution in all of its particulars, it is difficult to imagine this would be a better world if none of it had happened. The criminal justice system of the early 1900s sanctioned racism,¹⁹ turned a blind eye upon physical and psychological torture of criminal defendants,²⁰ and virtually ignored the limitations of the Fourth Amendment.²¹ No progress would have been made had the Court of 1950 adopted the attitude of the Court of 1990. One can only guess what society in the year 2030 will think of our criminal justice system today, but if the current Supreme Court has its way their system may not be much different.²² At the least district federal courts will have little say in the matter.

This article develops a more convincing rationale for *Teague* than that provided by the Court but nonetheless concludes the Court erred seriously in deciding as it did. Part II of this Article describes the rule and impact of the *Teague* cases and criticizes the disingenuous road the Court took to its decision. Part III offers an alternative explanation for *Teague*. This part explains that just as the Supreme Court created habeas corpus jurisdiction for the very purpose of expanding and protecting due process rights, so the Court may constrict the availability of the writ if it perceives that the job of expanding rights is completed. Part IV analyzes the hubris of a Court so confident that due process has

19. See, for example, *Hernandez v. Texas*, 347 U.S. 475, 481 (1954) (observing that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County"); *Norris v. Alabama*, 294 U.S. 587 (1935) (noting that for generations African-Americans had been excluded from jury service and jury rolls in Jackson County, Alabama); *Hill v. Texas*, 316 U.S. 400, 404 (1942) (recognizing that for over sixteen years in Dallas County there was a "continuous omission of negroes from the grand jury lists").

20. See, for example, *Lisenba v. California*, 314 U.S. 219, 229-32, 240 (1941) (writing that "[w]e cannot hold that the illegal conduct in which the law enforcement officers of California indulged, by the prolonged questioning . . . and in the absence of counsel, . . . coerced the confessions, the introduction of which is the infringement of due process"); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (finding that the defendant was held in custody for 36 hours without sleep or rest); *Brown v. Mississippi*, 297 U.S. 278, 281 (1936) (finding that a confession was coerced by whipping and banging).

21. See, for example, *Weeks v. United States*, 232 U.S. 383 (1914) (holding the Fourth Amendment right to be free from unreasonable searches and seizures not binding on the states); *Elkins v. United States*, 364 U.S. 206, 208 (1960) (rejecting the "silver platter doctrine" by which the federal courts admit evidence unlawfully seized by state officers).

22. Given the trend of the current Court's decisions, the criminal process of the year 2000 may look much like the process in 1960. See notes 134-35 and accompanying text.

been defined properly for all time, or even this time, that it is willing to slam shut the doors of habeas courts. This part criticizes the Court's vision of a criminal justice system devoted solely to determining guilt or innocence, and challenges the Court's assumption that even in the realm of guilt and innocence we know all there is to be known. Part V discusses the inevitable "fall" such hubris will precipitate, speculating that there will come a time when future Courts will need habeas courts again, as they once were needed, and will find it difficult to rehabilitate this now-discredited voice in the dialogue of rights-definition.

II. THE WHAT AND WHY OF *TEAGUE*

Ever since the Supreme Court's decision in *Brown v. Allen*,²³ the federal district courts have been available to test the constitutionality of a state court criminal conviction.²⁴ "Constitutionality" refers to a determination of whether the procedures and substance of the state criminal conviction were consistent with prevailing federal constitutional rules. "Prevailing" certainly meant as of the time of trial and conviction, but, before *Teague*, it also commonly meant as of the time of the habeas proceeding. Thus, although habeas courts at a minimum ascertained that the state court had followed constitutional norms governing at the time of trial, the habeas courts also frequently developed and implemented natural extensions of existing constitutional rules—"new" rules if you will.

Teague and its progeny dramatically restricted the power of the habeas courts. In *Teague* the Court held that "new" rules of criminal procedure—rules formulated since the petitioner's original trial—may not be applied retroactively to a case pending in a habeas court.²⁵ *Teague* and its progeny define "new" rule with exceptional breadth; a new rule is any rule that was not on all fours with the state of the law at the time of the habeas petitioner's original trial.²⁶ Because in the criminal process area myriad fact situations constantly pose new questions under existing precedent, few cases can be said to pose precisely the same legal issue resolved in a prior case.²⁷

23. 344 U.S. 443 (1953).

24. Prior to *Brown* the scope of habeas was quite limited; the *Brown* decision assumed, without discussion, that the writ was available to redress any claim of constitutional error in the state criminal proceeding. See Friedman, 73 Minn. L. Rev. at 253-54 (cited in note 11) (noting that the writ "now serves in effect as a federal appeal from every state conviction" (emphasis added)); see also note 33.

25. *Teague*, 489 U.S. at 311.

26. See notes 46-50 and accompanying text.

27. Two recent excellent articles probe the Court's definition of "new law" in a variety of contexts such as qualified immunity, compared with the habeas context. See Fallon and Meltzer, 104 Harv. L. Rev. 1731 (cited in note 13) and Kinports, 33 Ariz. L. Rev. 115 (cited in note 13).

Applying *Teague*, a habeas court is told essentially this: Your job is to do nothing more than ensure that the state proceedings comported with constitutional rules governing at the time of trial.²⁸ Subject to narrow exceptions, discussed below, in the post-*Teague* world a habeas court may not develop or apply a rule of constitutional law that deviates from or goes beyond precedent existing at the time of the original criminal trial. In short, the common law process is foreclosed to habeas courts, who may only apply extant rules in a mechanical fashion.

In so redefining the function of federal habeas courts, the *Teague* cases also define the role of the writ of habeas corpus. After *Teague*, habeas corpus is reduced to a deterrent, existing only to make sure that state courts and other state actors "toe the constitutional line."²⁹ When state courts, state prosecutors, and state police step out of line and deviate from settled norms, federal habeas courts are authorized to put the state actors back in their place. Otherwise, the habeas courts are to do nothing. Certainly their voice in the rights-definition dialogue is muted.

None of the *Teague* decisions seriously discussed this radical redefinition of habeas corpus. Rather, the Court disingenuously characterized *Teague* as nothing more than one further decision in a long line of cases attempting to resolve perplexing problems regarding the retroactivity of criminal constitutional rules. The entire premise of *Teague* was that existing retroactivity rules denied "even-handed justice" to "similarly situated" individuals seeking application of constitutional rules in their cases.³⁰ Thus, *Teague* masqueraded as an exercise in achieving fairness. Moreover, in doing so the *Teague* Court purported to adopt a theory of retroactivity advanced by Justice Harlan twenty years ago.³¹ *Teague*, however, did neither of these things, or at least it did not do them very well.

A. *The Retroactivity Problem*

Teague purports to be a decision that does nothing more than clean up an untidy corner of retroactivity law.³² The ruling, however,

28. There is a serious question about what "governing" means. Does it mean only consistent with Supreme Court decisions, or with circuit court decisions as well? *Butler v. McKellar*, 110 S. Ct. 1212 (1990), suggests, at least, that the former definition applies. See *id.* at 1215 for a discussion of Seventh Circuit precedent. It surely should be ridiculous to hold that state courts need only apply the federal law of their circuit, when the Supreme Court ultimately might reverse the federal circuit's position, and when cases outside the jurisdiction suggested the federal appellate court's rule was incorrect.

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

30. *Teague*, 489 U.S. at 315.

31. *Id.* at 305-16.

32. See *Teague*, 489 U.S. at 292 (stating that the issue in the case was the extent to which

does much more. It is the decision that spelled the end of federal habeas corpus as we had come to know it. To fully appreciate *Teague*, however, it is necessary to understand the Court's purported aim.

The retroactivity problem arises out of the following question: To whom should the benefit of new rules of constitutional law apply? Prior to *Brown v. Allen*, holding that habeas courts could review the convictions of state prisoners for any and all claims of constitutional error,³³ the problem was not acute. Collateral attack was generally unavailable, so retroactivity presented a problem only on direct review. Moreover, due process as applied to the states had a relatively limited meaning and therefore, simply put, there were not many rights to which retroactivity could apply, at least with regard to state prisoners. But once the Supreme Court incorporated the specific guarantees of the Bill of Rights into the due process clause, the meaning of those rights expanded greatly. And, when the Court ruled in *Brown v. Allen* that habeas generally was available to review the convictions of state prisoners for constitutional error, retroactivity became a question that required attention. Particularly because *res judicata* did not apply to habeas corpus, any new criminal constitutional rule could lead to the overturning of countless criminal convictions, even on behalf of those who had been incarcerated many, many years.³⁴

The Court has tried—and ultimately rejected—seemingly every possible approach to retroactivity. The Court has held decisions completely retroactive and applied them even to those incarcerated many years at the time of the decision.³⁵ The Court has decided that a given decision should have absolutely no retroactive effect, applying only to

new decisions will be applied retroactively on collateral review).

33. *Brown* did not "hold" this as much as assumed it. See note 20. Prior to *Brown* some courts had begun to expand the scope of habeas corpus to this breadth, although purporting to adhere to the much narrower common law scope of the writ. See Friedman, 73 Minn. L. Rev. at 263 (cited in note 11) (noting that the Court still exerted some effort to "kiss the jurisdictional book," quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 (1970)).

34. Justice Harlan astutely observed that what appeared to be a retroactivity problem actually arose from confusion about the purpose of the remedy of habeas corpus. *Teague*, 489 U.S. at 307-08 (quoting *Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (Harlan separate opinion)). Professors Fallon and Meltzer have concluded that "new law" questions should be part of the law of remedies. See Fallon and Meltzer, 104 Harv. L. Rev. at 1768 (cited in note 13). In 1964 Professor Meador argued for full retroactivity of new rules. He said: "If the consequences of doing this are deemed undesirable, the remedy lies in reshaping the writ of habeas corpus, not in a refusal to apply the Constitution to a case before the court." Meador, 50 Va. L. Rev. at 1120 (cited in note 13). I can only respond: Be careful what you wish for.

35. See *Griffith v. Kentucky*, 479 U.S. 314 (1987) (holding that new rules shall apply retroactively to all cases on direct review or to those not yet final, even where, as here, the defendant had been imprisoned for five years).

proceedings commencing after the date of the decision.³⁶ The Court has determined the retroactivity of some decisions at the time of the constitutional decision itself,³⁷ but has in other cases postponed the question of retroactive effect until a later date.³⁸

At the root of the trouble discussed—and purportedly addressed—in *Teague* was the approach to retroactivity first espoused in *Linkletter v. Walker*,³⁹ which had prevailed for some time. Under the *Linkletter* approach the retroactivity of a given rule of constitutional law was determined by “examining the purpose of the [new] rule, the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the [new] rule.”⁴⁰ Because of the flexibility inherent in its multifaceted analysis, the *Linkletter* approach led to results that in some instances seemed terribly unfair. For example, the Court might apply some constitutional rules only to the case in which the rule was announced and not even to other cases on direct review at the time of the announcement.⁴¹

Concern about this seeming inequity led the Court, in *Griffith v. Kentucky*, to adopt the position that all new constitutional rules were retroactive to all cases on direct review at the time of decision.⁴² Thus, whether any particular defendant obtained retroactive relief would not depend upon the happenstance of whether the Court granted certiorari to review that defendant’s case or some other case. After *Griffith* the important question left open—and resolved by the *Teague* Court—was the rule of retroactivity on collateral review.

In the *Teague* cases the Supreme Court determined that, unlike

36. See *Desist*, 394 U.S. at 246 (holding that the decision in *Katz* “should be given wholly prospective application”); *Kitchens v. Smith*, 401 U.S. 847 (1971) (indicating that *Gideon v. Wainwright* was fully retroactive).

37. See, for example, *Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968) (granting fully retroactive application of the holding in the case).

38. See *Allen v. Hardy*, 478 U.S. 255, 258 (1986) (deciding that the Court’s previous decision in *Batson* would not apply retroactively to cases on collateral review that became final before the decision in *Batson* was announced).

39. 381 U.S. 618 (1965).

40. *Teague*, 489 U.S. at 302.

41. See *id.* at 302-03 (emphasizing that “[a]pplication of the *Linkletter* standard led to the disparate treatment of similarly situated defendants on direct review”). See also *Desist*, 394 U.S. at 258-59 (Harlan dissenting) (stating that the Court departs from the “basic judicial tradition” of treating similarly situated defendants similarly when “we simply pick and choose from among [them] those who alone will receive the benefit of a ‘new’ rule of constitutional law”).

The most famous example of this arose from the *Miranda* cases. *Miranda* limited the benefit of the new rule to the defendants and to those in companion cases. 384 U.S. 436, 491-99 (1966). In *Johnson v. New Jersey*, 384 U.S. 719, 721, 733-35 (1966), other similarly situated defendants were not given the benefits even though their cases were on direct review at the time of *Miranda*. Justice O’Connor in *Teague* noted the inequity in this result. 489 U.S. at 303.

42. 479 U.S. at 328.

direct review, new constitutional rules would have no retroactive effect on collateral review, subject to two exceptions. One exception permits the habeas court to apply a new rule if the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"⁴³ The second exception permits application of a new rule if the failure of the trial court to apply the new rule had the effect of "seriously diminish[ing] the likelihood of obtaining an accurate determination" of guilt or innocence.⁴⁴ Subsequent cases indicate these exceptions will be applied infrequently.⁴⁵

The definition the Court gave to what constitutes a "new" rule has had the greatest impact on the scope of habeas review.⁴⁶ In the *Teague* cases the Court determined that a rule is "new" "if the result was not dictated by precedent existing at the time the defendant's conviction became final."⁴⁷ Even if the Court states in a decision that its result is "controlled by" a prior precedent, its result still is a new rule if the result in the case was "susceptible to debate among reasonable minds."⁴⁸ Thus, after *Teague*, virtually every decision not on all fours with prior precedent is a new rule.⁴⁹ And thus, habeas courts have little to do but enforce clearly-established rules in cases very similar to existing precedent—if state courts are recalcitrant enough to flout such rules, which one hopes will not often occur.⁵⁰

The Court's rationale for the change in retroactivity was "even-handed justice."⁵¹ Taking the Court at face value, the entire change wrought by *Teague* was necessary to avoid the unfairness that could and did result from the application of *Linkletter*: sometimes it was a matter of happenstance which habeas petitioner obtained retroactive

43. *Teague*, 489 U.S. at 307 (quoting Harlan's separate opinion in *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

44. *Butler v. McKellar*, 110 S. Ct. 1212, 1218 (1990).

45. With regard to the second exception, at any rate, the Court has made quite clear that instances of its application will be few and far between. See notes 130-33 and accompanying text.

46. Hoffmann, *Habeas*, 1989 St. Ct. Rev. at 180 (cited in note 13) (arguing that "the definition of 'new law' . . . becomes the crucial element of the *Teague* rule").

47. *Teague*, 489 U.S. at 301.

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

49. *Butler*, 110 S. Ct. 1212, is the best example of this. In *Butler*, the defendant argued that the decision in *Arizona v. Roberson*, 436 U.S. 675 (1988), handed down the same day as his rehearing was denied, was an extension of the rule dictated in *Edwards v. Arizona*, 451 U.S. 477 (1981). The Court held that even if *Roberson* was "controlled" by or was within the "logical compass" of *Edwards*, this did not prevent it from being a "new rule." *Butler*, 110 S. Ct. at 1217.

50. Experience unfortunately suggests that police and prosecutors ignore constitutional mandates quite enough already. In a recent article it was noted that officers' practices have changed little even in light of cases which purport to protect defendants' rights. *Next Stage: Court Lite*, *U.S. News & World Rep.* 18 (July 8, 1991).

51. *Teague*, 489 U.S. at 300.

relief. If the Court granted review of one petitioner's case and announced a new rule, that person obtained the benefit of the new rule even if the Court later determined that the rule did not apply retroactively to anyone else now on direct or collateral review. Thus, one defendant on direct review might have obtained the benefit of the new rule while another did not.

Although this scenario does appear to violate the principle of treating people in like circumstances alike, *Teague* does not eliminate the seeming inequity.⁵² Rather, *Teague* just shifts the point of unfairness. Now whether one gets the benefit of a new rule depends on both how quickly one's case happens to move through direct review and also still on the happenstance of which case the Court takes on direct review to announce a new rule. This happenstance is evident in at least two of the four *Teague* cases.⁵³

The problem is not simply that the Court failed to eliminate the happenstance, but that such happenstance is inevitable whenever a rule of retroactivity does anything other than make every rule completely retroactive. Justice Harlan—the Supreme Court's purported guide in *Teague*—recognized that it was impossible to eliminate this happenstance when applying rules of retroactivity: "Some discrimination must always exist in the legal treatment of criminal convicts within a system where the governing law is continuously subject to change."⁵⁴ The truth of Justice Harlan's statement seems so patent that the *Teague* Court's entire effort to hang radical change of habeas corpus on the hook of happenstance is transparent.⁵⁵

52. The principle of treating people in like circumstances alike is violated, of course, only if the "like" circumstances are relevant for the purpose of a comparison under the equal protection clause. See Geoffrey R. Stone, et al., *Constitutional Law* 499-500 (Little, Brown, 1986). This, in turn, depends upon the underlying substantive fairness principle for which we decide likeness is relevant. See Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537, 539-50 (1982). The *Griffith* rule is fair, therefore, only if people on direct appeal but not collateral review are "alike." Yet the Court in *Teague* offers no satisfactory discussion of why people on direct review are alike, but people on collateral review are unlike. Given the happenstance of where one's case might be at a given time, the only explanation the Court could offer would depend on the arbitrary need to draw some point for retroactivity purposes. If the point drawn is arbitrary, however, *Griffith's* rule did not violate the principle of treating people in similar circumstances differently any more than any other retroactivity rule did.

53. See *Teague*, 489 U.S. at 294-96. *Teague's* case was on habeas when the Court established the "new" rule in *Batson v. Kentucky*, 476 U.S. 79 (1986), subsequently held not to be retroactive on collateral review. See also *Butler*, 110 S. Ct. at 1216-18 (deciding on the same day that *Butler's* rehearing was denied the "new" rule in *Roberson* which it later refused to apply to *Butler*). See also Althouse, 1991 Wis. L. Rev. at 949-50 (cited in note 13) (discussing the bad luck of being the second to seek the "new" rule).

54. *Mackey*, 401 U.S. at 689 (Harlan separate opinion).

55. The real question is whether *Teague* minimizes unfairness or promotes "even-handed justice" more than another approach. On its face it seems to do little but trade one arbitrary rule for another. See notes 52-54.

Indeed, if the *Teague* Court truly was concerned about even-handedness and treating similarly-situated defendants similarly it did not have far to look. Frank Teague was as likely a candidate as could exist. From the very beginning of the Court's *Teague* opinion—the Court's statement of the facts—one is compelled to wonder just what the Court was thinking as it talked about “even-handed justice” on its way to denying Teague's petition.

Teague, “a black man, was convicted by an all-white . . . jury”⁵⁶ of attempted murder, armed robbery, and aggravated battery. The Court flatly reports that “[d]uring jury selection . . . the prosecutor used all 10 of his peremptory challenges to exclude blacks.”⁵⁷ Twice while the jury was being struck Teague's lawyer asked for a mistrial because the prosecutor was striking only blacks. In the latter motion Teague's lawyer said Teague was “entitled to a jury of his peers.”⁵⁸ In defense of the challenges, the prosecutor stated that “he was trying to achieve a balance of men and women on the jury.”⁵⁹ The trial court concluded that “the jury ‘appear[ed] to be a fair [one]’ ”⁶⁰ and denied the motion.

Under any standard governing today, Teague's conviction would be reversed. The Court has ruled that the equal protection clause prohibits discriminatory use of peremptory strikes.⁶¹ The prosecutor's explanation for his conduct is transparent: Were there no white women or men to strike to achieve balance? Was the striking of all blacks and no whites an accident? Teague's conviction under such circumstances hardly can be characterized as “even-handed justice.” Rather, the con-

56. *Teague*, 489 U.S. at 292.

57. *Id.* at 293. Teague's lawyer struck one black, who was married to a police officer. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* The entire colloquy between Teague's lawyer and the judge is set out in a concurring opinion by Justice Stevens. *Id.* at 324-25 n.6. It is clear from the transcript that Justice O'Connor's use of the word “reasoning” to refer to the trial court's decision process is generous indeed.

61. *Batson*, 476 U.S. at 89. *Batson* held that the *state* in criminal cases could not use its peremptory challenges to exclude potential jurors solely on the basis of race. *Id.* The Court has recently applied the *Batson* limitation to private litigants in a civil case, *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2088-89 (1991), and has held that the defendant raising a *Batson* claim need not be of the same race as the excluded jurors, *Powers v. Ohio*, 111 S. Ct. 1364, 1366 (1991). Although the Court has not addressed the question of whether prosecutors can challenge criminal defendants' discriminatory use of peremptory challenges, the New York Court of Appeals has held that “use of racially motivated peremptory jury challenges, whether by defense or prosecution, violates New York Constitution's equal protection and civil rights clause.” *New York v. Kern*, 75 N.Y. 2d 638, 554 N.E.2d 1235, 1235 (N.Y. Ct. App. 1990). See also *State v. Levinson*, 795 P.2d 845, 846 (Hawaii 1990) (holding that the use of peremptory challenges by defense counsel to exclude women from a jury because of gender falls outside the bounds of law and requires a non-discriminatory explanation). But see Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 Harv. L. Rev. 808 (1989) (arguing against extending *Batson* to the use of peremptory challenges by criminal defendants).

viction is tainted with overt racial discrimination.

Unfortunately, Teague's timing was off. His lawyer did raise the claim on direct appeal, relying primarily on the Sixth Amendment requirement that a jury represent a fair cross section of the community. This was a reasonable and common tactic of defense counsel in an era when *Swain v. Alabama* apparently foreclosed any equal protection challenge.⁶² Indeed, before Teague's conviction finally was affirmed on appeal, four Justices indicated in a dissent from a denial of certiorari in *McCray v. New York* that the *Swain* rule was unconscionable; the primary basis of argument for these Justices was the fair cross section requirement.⁶³

Although the Supreme Court was poised to change the law, it did not choose Teague's case in which to do so.⁶⁴ Teague brought a habeas action, again raising his fair cross section claim and also arguing *Swain* ought to be reconsidered. One can only speculate why Teague mentioned *Swain* at this time. Perhaps Teague had a new lawyer. More likely, the intervening dissents from certiorari in *McCray* suggested the time was ripe for change. The district court expressed sympathy with Teague's argument but felt bound by precedent.⁶⁵ The Court of Appeals for the Seventh Circuit reversed, holding that the fair cross section requirement gave rise to a valid claim and that Teague had established a prima facie case.⁶⁶

From this point on lightning struck Teague repeatedly. The Court of Appeals, sitting en banc, vacated the panel opinion to rehear—surely a rare event. Rehearing was postponed until after the Supreme Court decided *Batson v. Kentucky*,⁶⁷ in which it ultimately held that the equal protection clause barred the prosecutor's conduct in Teague's case. In *Allen v. Hardy*, however, the Court held that under *Linkletter* the *Batson* rule was not retroactive to cases on collateral review.⁶⁸ Thus, the Court of Appeals, sitting en banc, decided that Teague's *Batson* claim was barred and his cross section claim was without merit.⁶⁹

62. The Court's decision in *Smith v. Murray* would suggest counsel acted properly in not raising a claim that was contrary to settled law. 477 U.S. 527, 535-36 (1986) (finding that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy" (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983))).

63. *McCray v. New York*, 461 U.S. 961, 963 (1983) (Marshall dissenting).

64. The Court denied certiorari in *Teague v. Illinois*, 464 U.S. 867 (1983).

65. *Teague v. Lane*, 820 F.2d 832, 834 (7th Cir. 1987) (en banc).

66. *Id.* at 843.

67. 476 U.S. 79 (1986).

68. *Allen*, 478 U.S. at 257-58.

69. The Court of Appeals also held that the *Swain* claim was barred procedurally because it was not raised in state court and was meritless. *Teague*, 489 U.S. at 294-95. As I have argued elsewhere, this application of procedural default is perverse. It would have been foolish for a com-

As indicated, if the *Teague* Court was trying to eliminate happenstance, the treatment *Teague* received suggests it did not do a very good job of it. It was happenstance that the Court of Appeals for the Seventh Circuit granted an en banc hearing in *Teague's* case; the court might have waited to see how the remand played out before ruling on the merits of the claim. Moreover, *Teague's* case happened to be on collateral review rather than direct appeal when *Batson* was decided, in part because the Supreme Court happened to take another petitioner's case, and not *Teague's*, to establish the new equal protection rule.

Worse yet was the Supreme Court's arbitrary treatment of *Teague*. In *Teague* the Supreme Court happened to break the very rule it was establishing, applying "new" law to *Teague* on collateral review in a case in which the parties neither briefed nor argued the matter.⁷⁰

Finally, the Supreme Court applied its own rules to deny *Teague* relief even though it had granted *Batson* relief under identical circumstances. *Teague's* lawyer on direct review happened to rely upon the fair cross section requirement rather than urging the courts to overrule *Swain*; the basis for the claim was the same, however, and as a litigation tactic the course seems sound. Indeed, *Batson's* lawyer raised a Sixth Amendment cross section claim, not an equal protection claim, and *Batson*, unlike *Teague*, obtained relief on equal protection grounds.⁷¹ Thus, *Teague*, a clear case of racial discrimination, "happened" to fall through the cracks. As a matter of retroactivity policy the validity of this result is debatable. A concern about happenstance, however, hardly is a convincing basis for establishing rules that permitted this result in *Teague's* case.

Of course, happenstance and a concern for "even handed justice" were not really why the Court decided the *Teague* cases the way that it did. Everyone who follows this area of the law knows the *Teague* cases were not really about retroactivity, but about habeas—about curtailing habeas.⁷² Deciding *Teague* as though it were nothing more than a case

petent lawyer to waste an appellate bullet on a *Swain* claim, or even a challenge to *Swain*; yet, the lawyer fashioned an almost identical claim under the cross section requirement. See Friedman, 73 Minn. L. Rev. at 295-98 (cited in note 11) (discussing *Smith v. Murray*, 477 U.S. 522 (1986)). See also note 11 and accompanying text (discussing how the Supreme Court was more lenient with other defendants raising *Swain/Batson* claims).

70. One might surmise from this result that *Teague* holds that rules which would benefit petitioners do not apply retroactively, but rules that would harm them do.

71. *Batson*, 476 U.S. at 85 n.4. The Court in other peremptory strike cases has also been less demanding about exactly how the claim is raised. See *Ford v. Georgia*, 111 S. Ct. 850, 854-55 (1991) (deciding that Ford "must be treated as having raised such a [*Batson*] claim, although he certainly failed to do it with . . . clarity"; although the motion referred to the Sixth Amendment and state courts believed Ford used a cross-section claim, the "allegation could reasonably have been intended and interpreted" to raise an equal protection claim).

72. See part II.

about cleaning up a corner of retroactivity law, while quietly and severely curtailing habeas as an aside, was all too disingenuous and unconvincing.

B. *Teague's Purported Reliance on Justice Harlan*

Justice O'Connor, writing for a plurality in *Teague* (in a part of the decision that a clear majority of the Court embraced in subsequent cases), would have the reader believe that the Court's decision simply adopted a sensible suggestion made twenty years before by Justice Harlan.⁷³ This is unfair to Justice Harlan. What the *Teague* plurality actually did was piece together different things Justice Harlan said about habeas corpus and retroactivity,⁷⁴ including positions that Justice Harlan later discarded, and then, for good measure add some new thoughts of their own.⁷⁵ One might say that the *Teague* decision resembles Justice Harlan's views much like a kidnapping note pasted together from stray pieces of newsprint resembles the newspaper from which it came.

The *Teague* Court deviated from Justice Harlan's approach in three extremely significant ways.⁷⁶ First, the Court's entire retroactivity model hinges on the definition of "new rule." Yet the Court interprets "new rule" in a fashion diametrically opposed to—and thus much narrower than—that of Justice Harlan. Justice Harlan knew that defining "new rule" would be difficult.⁷⁷ He undertook to define the phrase with reference to the purposes of the writ of habeas corpus. To the extent that encouraging state courts to follow federal law was the purpose of habeas, Harlan suggested new rules should be any rules other than settled law at the time of trial *and* rules within the "logical compass" of settled rules.⁷⁸ The logical compass proviso was essential; any narrower definition of "new rule," would permit state courts to evade the

73. *Teague*, 489 U.S. at 303-312.

74. See notes 76-89 and accompanying text.

75. The Court may also have added some of the thoughts of Judge Friendly and Paul Bator. Parts of the Court's view on habeas that fairly cannot even be attributed to Justice Harlan seem to be traceable back to influential writings of these two scholars. See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963).

76. For a probing examination of the differences between *Teague* and Justice Harlan's proposals, see Patchel, 42 Hastings L. J. at 990-1012 (cited in note 13).

77. *Mackey v. United States*, 401 U.S. 667, 695 (1971). (stating that "in *Desist* I went to some lengths to point out the inevitable difficulties that will arise in attempting 'to determine whether a particular decision has really announced a 'new' rule at all.'" (quoting from *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan dissenting))).

78. *Desist*, 394 U.S. at 264.

supremacy of federal law.⁷⁹ Harlan's approach, therefore, would allow habeas courts to continue their evolutionary role in rights-definition within the ambit of the "logical compass" principle. The *Teague* Court, however, adopts an approach opposite to this principle, defining a new rule as any rule not on all fours with prior precedent.⁸⁰

Second, while purporting to adopt Justice Harlan's exception to his theory of retroactivity,⁸¹ the Court actually adopted a narrow exception that Justice Harlan expressly disavowed. Harlan originally proposed that new rules that had an impact on the truth-finding process would still apply retroactively.⁸² Harlan changed his view on this exception, however, because he recognized that the aim of criminal procedure is not limited to determining guilt and innocence. Harlan therefore proposed a broader exception that included any new rule that was "fundamental" or "implicit in the concept of ordered liberty."⁸³ The *Teague* Court rejected Harlan's broader definition in favor of the narrower one he later repudiated.

Finally, the Court professed to agree with Justice Harlan's description of the proper function of habeas corpus, but instead it adopted a view of habeas corpus Justice Harlan himself disavowed. In *Desist v. United States*, Justice Harlan stated that one of the two purposes of the writ of habeas corpus was deterrence—to provide "additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."⁸⁴ The *Teague* Court adopted deterrence as the primary purpose of habeas. Subsequent to *Desist*, in *Mackey v. United States*,⁸⁵ however, Justice Harlan took a different tack. He determined that it was impossible to provide a theoretically sound basis for habeas; habeas could only be defined from the "bottom up," by looking at what it was habeas actually did.⁸⁶ In this context Harlan addressed the argument for full retroactivity—"constitutional updating" of all convictions.⁸⁷ Harlan disapproved, stating his own view that this approach overlooked

79. *Id.* at 263-65.

80. *Teague*, 489 U.S. at 301. Professor Hoffmann is critical of this aspect of *Teague*: "The Court can and should expect more from state courts than simply the ability to read headnotes and follow clear, binding federal precedents." Hoffmann, *Retroactivity*, 1990 B.Y.U. L. Rev. at 211 (cited in note 13). See also Fallon and Meltzer, 104 Harv. L. Rev. at 1796 (cited in note 13) (arguing that the Supreme Court's test for a new law is "far too broad").

81. *Teague*, 489 U.S. at 310.

82. *Desist*, 394 U.S. at 262 (Harlan dissenting).

83. *Mackey*, 401 U.S. at 693 (quoting Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

84. 394 U.S. at 262-63.

85. 401 U.S. 667, 675 (1971).

86. *Id.* at 685.

87. *Id.* at 689.

the importance of finality.⁸⁸ Thus, Harlan determined that only law governing at the time of conviction should be applied.⁸⁹ But Harlan's view of "established" law, again, was far broader than the *Teague* Court's, as were his two exceptions.

The impact of the *Teague* Court's approach to retroactivity on habeas corpus was dramatic. Before *Teague*, even laden with the ever-more-restrictive procedural rules governing habeas, the habeas court was an active participant in the dialogue fashioning new rules of criminal constitutional procedure. Now, the habeas courts are but traffic cops for the Supreme Court, doing little more than denying petitions and chastening the occasional errant state court that strays from the constitutional fold.

In *Teague*, albeit in passing, the Court formally changed its entire approach to habeas corpus. Prior to *Teague* the Court had offered several rationales for habeas. The Court had suggested habeas was necessary to vindicate constitutional rights,⁹⁰ to ensure deprivations of liberty were consistent with constitutional commands,⁹¹ or even—more recently—to ensure innocent people were not incarcerated.⁹² But these prior decisions⁹³ did not foreshadow the "deterrent" theory advanced by the Court in *Teague*.⁹⁴

Nonetheless, the Court attempted to weave its decision into the fabric of prior precedent by relying upon Justice Harlan.⁹⁵ The Court's reliance on Justice Harlan was misplaced, however, for Justice Harlan never advocated the rule rendered in the *Teague* cases, nor did he advocate the result those cases compel.⁹⁶

The Court's clumsy attempt to attribute its views to Justice Harlan is puzzling. It may have wanted simply to paint the entire structure with a gloss of legitimacy, much in the custom of the common law tradition. If so, the Court failed, for the attempt is not even credible.

The value of candor in judicial decisionmaking is much debated.⁹⁷

88. *Id.* at 691 (arguing that "a rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself").

89. *Id.* at 689.

90. See Friedman, 73 *Minn. L. Rev.* at 26 (cited in note 11).

91. *Id.* at 268.

92. *Id.* at 278.

93. Hoffmann, 1989 *S. Ct. Rev.* at 175 (cited in note 13).

94. 489 *U.S.* at 306.

95. See note 73 and accompanying text.

96. Compare Hoffmann, *Retroactivity*, 1990 *B.Y.U. L. Rev.* at 199 (cited in note 13) (stating that the *Teague* exception resembles Harlan's decisions, but the resemblance is "only skin deep").

97. See Nicholas Zeppos, *Judicial Candor and Statutory Interpretation*, 78 *Georgetown L. J.* 353, 359 (1989) (arguing "that judicial candor in statutory interpretation is much more problematic than it seems"). But see David L. Shapiro, *In Defense of Judicial Candor*, 100 *Harv. L. Rev.* 731 (1987) (advocating the need for candor in judicial decisionmaking).

Even those who discount the importance of candor, however, no doubt expect a less-than-candid court to pull it off, i.e., to be convincing. The foregoing criticism of *Teague* has been harsh, but deservedly so. The opinions in the *Teague* cases, particularly *Teague* and *Butler*, are painfully disingenuous. They detract from the Court's credibility. This too might be tolerable if there were no other way for the Court to achieve its objective. In the next section, however, I provide what not only is a more credible rationale for *Teague*, but also a rationale that likely motivated the *Teague* decision.

III. A BETTER EXPLANATION FOR *TEAGUE*

If *Teague* had succeeded in getting a court to address the merits of his claim, the proceedings would have looked something like the following. *Teague* would have pointed to the high number of peremptory strikes used on blacks rather than on whites. The disparity is high enough that the burden would have shifted to the prosecution to offer a legitimate explanation for the strikes that were exercised.⁹⁸ The prosecution's proffered explanation in *Teague* was patently spurious.⁹⁹ Thus, a court would have concluded that, in the absence of a legitimate explanation for what occurred at trial, it was appropriate to presume what the evidence suggested—that the prosecution intended to strike all blacks from the jury in a discriminatory (i.e., racially-motivated and without a nonrace based reason) fashion.

This type of analysis is common in discrimination cases, but it is not unique to that context. It is a common-sense approach to separating real explanations from contrived ones that is relied upon frequently in law. The process of litigating is, in essence, one of fitting arguments to facts. Similarly, academics take theoretical constructs and fit them to evidence. In both instances logic suggests that success is achieved when there is a certain "fit" between the evidence available and the proffered explanation; absent that fit we suspect the truth eludes us still.

Applying this "fit" analysis suggests that the *Teague* Court's explanation of why it was adopting a new theory of habeas corpus was not candid, and that we must look further for the true rationale. Put simply, the "fit" between what the Court did and what it said it was doing is not very good. The Court's deterrence theory is so ill-defined that it is difficult to match decisions to the theory.¹⁰⁰ Moreover, some of the

98. *Batson*, 476 U.S. at 97.

99. *Teague*, 489 U.S. at 293. The prosecutor said he was trying to achieve a balance between men and women. *Id.* But as noted earlier, there were other ways to achieve this balance, even if such balance made any difference. See notes 61-62 and accompanying text.

100. The Court states that "[w]e agree with Justice Harlan's description of the function of habeas corpus." *Teague*, 489 U.S. at 308. But which description? Justice Harlan offered several

Court's claims are demonstrably incorrect; for example, the Court erroneously states that it "never" has defined the scope of the writ solely to ensure trials free of constitutional error.¹⁰¹

More important, however, to the extent that the Court tried to articulate a theory of habeas corpus it really provided two separate theories, neither of which accord with the language of the statute, with history, or with common sense. The Court held that only "old" rules may be applied by habeas courts.¹⁰² This rule rests on a deterrence theory of the writ: In order to ensure that state courts adhere to constitutional commands, habeas corpus exists to reverse convictions obtained in state courts that did not toe the constitutional line.¹⁰³ Although there is some support for such a theory in the habeas statute,¹⁰⁴ the theory has little or no historical antecedent.¹⁰⁵ Finally, the deterrence theory seems to fly in the face of the current Court's philosophy of judicial federalism. In the view of the current Court, state and federal courts have both the same duty to adhere to constitutional commands and equal ability to apply constitutional rules.¹⁰⁶ Why then adopt a theory

descriptions of habeas corpus. See notes 84-89 and accompanying text. The Court clearly adopts none of them, instead piecing together bits and pieces of things Harlan said. See *Teague*, 489 U.S. at 305-10. The Court talks of balancing the need for finality with considerations of comity, explores the use of habeas as a threat to force state courts to adhere to constitutional norms, and adopts "exceptions" that suggest even other theories such as guilt/innocence. *Id.* at 305-14.

101. *Id.* at 308 (quoting Harlan from *Kuhlmann v. Wilson*, 477 U.S. 436, 477 (1986)). Subsequent to *Brown v. Allen* the Court did just that. True, claims still could be procedurally-defaulted, but contrary to the Court's occasional protestations, see, for example, *Kuhlmann*, 477 U.S. at 448 n.8 and *Teague*, 489 U.S. 308-09, this had nothing to do with the writ's scope. Rather, in the post-*Brown*, pre-*Fay v. Noia*, 372 U.S. 391 (1963), era such defaults were seen as jurisdictional bars, an application of the adequate and independent state ground doctrine to habeas corpus. See *Daniels v. Allen*, decided sub nom. *Brown v. Allen*, 344 U.S. at 482-87 (refusing to address the merits of the petitioner's claim because the independent doctrine bars a habeas court from hearing a procedurally defaulted claim in state court). The distinction is concededly a technical one, but it is important, and—after all—the Court created the distinction in the first place. It could at least be charged with remembering and understanding. Compare Althouse, 1991 Wis. L. Rev. at 933 (cited in note 13) (discussing the "Court" as a continuous institution).

Moreover, one could interpret the rule in the *Teague* cases as defining the writ "solely" with regard to ensuring a trial free from constitutional error. That is precisely what *Teague* does, it just defines "constitutional error" far more narrowly than prior cases.

102. See notes 46-50 and accompanying text.

103. See notes 84-94 and accompanying text.

104. The habeas statute commands federal courts to grant the writ to anyone "in custody in violation of the Constitution." 28 U.S.C. § 2254(a) (1988). This language could be interpreted to mean in custody in violation of constitutional rules existing at the time of conviction, but it never has been interpreted this way.

105. The historical basis for the theory seems only to be Justice Harlan's single dissent in *Desist*. 394 U.S. at 262-63. See notes 84-94 and accompanying text. See also Kinports, 33 Ariz. L. Rev. at 178 (cited in note 13).

106. See *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977) (stating that "state courts have the solemn responsibility equally with the federal courts' to safeguard constitutional rights" and to restrain a state court from doing so would "reflec[t] negatively upon the state court's ability")

premised explicitly on state court disobedience, particularly in light of countervailing finality concerns recognized by the Court?¹⁰⁷ Why not just get rid of habeas altogether?

The Court's exceptions to the *Teague* rule rest on a completely different theory of habeas review. These exceptions rely on habeas to weed out the guilty petitioners from the unjustly convicted, or the innocent. This "innocence" theme runs through many of the Court's recent habeas decisions,¹⁰⁸ although innocence is defined differently in different cases.¹⁰⁹ Regardless, an innocence approach finds no support in the statute, and its only historical pedigree is a 21-year-old law review article.¹¹⁰

This innocence approach also clashes with the Court's philosophy on federalism. It strongly suggests that habeas courts will rehash exactly what happened in the state courts. How this shows respect for state courts is very difficult to explain. Why have federal review of state decisions only to test for what typically is seen as appellate error? After all, as the Court stated in *Teague*, habeas "is not designed as a substitute for direct review."¹¹¹

The absence in *Teague* of a convincing theory of habeas corpus does not distinguish it from other habeas decisions. This failure to explain adequately the purpose of habeas is commonplace. From 1867 until 1953 the Court applied a theory of habeas that limited the writ's scope to that at common law, despite enactment in 1867 of a habeas statute considerably broader on its face.¹¹² The Court never explained

(citations omitted)).

107. See notes 137-42 and accompanying text.

108. See *Kuhlmann*, 477 U.S. at 454 (concluding "that the 'ends of justice' require federal courts to entertain [habeas] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence"); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (stating that "even in the absence of a showing of cause for the procedural default" a federal court could grant a writ to those actually innocent). On the "rhetoric of innocence" and the Court's habeas decisions, see generally Patchel, 42 *Hastings L. J.* at 958-83 (cited in note 13).

109. Sometimes the theory suggests habeas exists to separate the guilty from the innocent. See, for example, *Murray v. Carrier*, 477 U.S. at 496. Other opinions suggest habeas exists to enforce constitutional rules that go to accurate determinations of guilt or innocence. See, for example, *Stone v. Powell*, 428 U.S. 465, 490 (1976) (stating that "the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant").

110. See Friendly, 38 *U. Chi. L. Rev.* at 142 (cited in note 75). Judge Friendly's premise was that "convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence." *Id.*

111. *Teague*, 489 U.S. at 306 (quoting *Mackey*, 401 U.S. at 683 (Harlan separate opinion)).

112. See Friedman, 73 *Minn. L. Rev.* at 262 (cited in note 11) (stating that "[d]espite its broad language, for some sixty years after its enactment the Act of 1867 found almost no application to convicted prisoners held in state custody"); Friedman, 85 *Nw. U. L. Rev.* at 10 (cited in note 10) (stating that even after enactment of the Habeas Act of 1867 "the Court confined federal habeas jurisdiction to its extremely narrow common law scope").

its seeming disregard of Congress's command. In 1953 the Court broadened the scope of habeas to include review of every constitutional claim, an interpretation quite consistent with the statutory language, but the Court never explained the reason for the dramatic shift.¹¹³ After 1953, the Court, as it continued to remove procedural restrictions on the writ, offered at least two distinct theories of habeas corpus, neither of which "fit" the facts or made complete sense.¹¹⁴ Then, in the 1970s, 1980s and 1990s the Court narrowed the writ's scope and replaced procedural barriers, both trying to square its decisions with prior explanations and offering new views of the scope of the writ.¹¹⁵ Thus, *Teague* may be read as only the latest chapter in a winding treatise concerning the chameleon-like writ.

There is, however, one explanation for habeas corpus that explains the writ's tortured course. Elsewhere I have offered a closely-related explanation for the Court's unexplained expansion of the scope of the writ in *Brown v. Allen*.¹¹⁶ That explanation, however, is perhaps more interesting when applied to *Teague*, which is, one might say, at the latter end of the rise and fall of habeas. Nonetheless, to understand the explanation we must return briefly to *Brown*.

Brown v. Allen marked the beginning of the "due process revolution."¹¹⁷ Hindsight makes quite clear what might only have been dimly perceived at the time. The Court was poised both to apply the Bill of Rights to the states and to expand dramatically the meaning of those enumerated rights. But the Court rapidly discovered it could not do the job alone. Thus, in *Brown*, the Court enlisted the assistance of the lower courts in the task.¹¹⁸

There were two reasons the habeas courts were needed to move the due process revolution along. One reason is evident in much that fol-

113. Friedman, 73 Minn. L. Rev. at 264-65 (cited in note 11) (discussing *Brown v. Allen*, 344 U.S. 443 (1953)).

114. See *id.* at 267-73 (addressing the rights-based theory and the liberty-based theory).

115. See *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (holding that a rule "barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver, [shall] be applied to a waived objection to the admission of a confession at trial"); *Kuhlmann v. Wilson*, 477 U.S. at 454 (see note 108 for holding); *Murray v. Carrier*, 477 U.S. at 497 (holding that a defendant's claim defaulted without cause can be heard for habeas relief only if he can show actual innocence).

116. Friedman, 73 Minn. L. Rev. at 273-77 (cited in note 11).

117. See *Brown*, 344 U.S. at 500 (recognizing "the expanding concept of due process") (Frankfurter separate opinion). Of course, the formal beginning may have come sometime after the first shots were fired. On the due process revolution generally, see Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. Pa. L. Rev. 711, 712 (1971) (arguing that the heart of the constitutional revolution is found in the Fourteenth Amendment's due process clause); Fred P. Graham, *The Self-Inflicted Wound* 26-66 (MacMillan, 1970).

118. See Friedman, 73 Minn. L. Rev. at 274 (cited in note 11).

lowed; the Court did not trust state courts to adhere to established rules, let alone to be progressive with regard to formulating new rules. Habeas courts could supervise state court adherence to constitutional commands. Such an explanation—supervision of state courts—rings far truer out of the mouth of the Warren Court than that of the Burger and Rehnquist Courts.¹¹⁹

Additionally, the habeas courts were vitally important to the central task of invigorating the Bill of Rights. Criminal constitutional law involves myriad factual situations in which subtle factual differences lead to dramatically different legal treatment.¹²⁰ Fashioning rules in this context required a bevy of courts that could gain familiarity with police practices and accommodate new rules to law enforcement needs. Moreover, it is consistent with the common law tradition to let matters percolate in lower courts before the Supreme Court makes a pronouncement.¹²¹ Not much percolation was likely in the state courts; thus, the Supreme Court drafted the lower federal courts into service.

This analysis not only describes the circumstances at the time of *Brown*, but it also suggests a more fluid and dynamic view of habeas than the Court has provided.¹²² If the habeas courts were indeed the Supreme Court's footsoldiers in the due process revolution, then a change in the nature of that conscription logically should follow the Court's changing philosophy of criminal constitutional law and renewed trust of state courts.

The Court has been saying for some time that state courts are to be trusted with claims of constitutional right. The assertion of parity arises

119. It is ironic, therefore, that the Rehnquist Court trumpets this rationale (but does not mean it), while the Warren Court meant this rationale but had the decorum to be delicate about it. See Michael Wells, *Is Disparity a Problem?*, 22 Ga. L. Rev. 283, 311-12 (1988) In the sixties, many, including the Warren Court, felt state law criminal procedure was woefully inadequate.

120. Compare *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (finding that a warrantless search hours after the initial seizure was unjustified when the object of the search was a footlocker incidentally seized from inside an auto) with *United States v. Ross*, 456 U.S. 798, 820-24 (1982) (finding that a warrantless on-the-spot search supported by probable cause was constitutional when the object of the search was an automobile, and the search incidentally turned up bags of marijuana) and with *California v. Acevedo*, 111 S. Ct. 1982, 1991 (1991) (rejecting the "curious line [drawing] between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile" by holding that police can search both when they have probable cause to believe contraband is contained in either). Compare also *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that once the defendant invoked his rights under *Miranda* for questioning about one offense, he could not be later questioned regarding any offense until he was provided with counsel) with *McNeil v. Wisconsin*, 111 S. Ct. 2204, 2208 (1991) (finding that a defendant invoking the Sixth Amendment right to counsel for the charge at issue can be questioned later for other offenses when he waived *Miranda*).

121. *Althouse*, 1991 Wis. L. Rev. at 941 n.63 (cited in note 13).

122. Several commentators support such a theory of dynamic statutory construction. See William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987); Zeppos, 78 Georgetown L. J. at 359 (cited in note 97).

not only in the habeas context, but in the litigation of civil rights claims as well.¹²³ This view of parity differs from judicial statements of twenty or thirty years ago—or fifty years ago—that evinced less trust of state courts.¹²⁴ If the Court believes parity now exists, the necessity of habeas courts to ensure state courts adhere to constitutional requirements is limited somewhat.

Parity, however, is a controversial topic. Academics debate whether parity really exists.¹²⁵ Perhaps more important, many argue that parity questions are for Congress to decide.¹²⁶ Because Congress has assigned habeas courts to the task of hearing collateral attacks on state judgments, some commentators question the Court's authority to unravel that decision.¹²⁷

With regard to parity, however, the Court is uniquely positioned to evaluate and address changes in state court sensitivity. The Court, after all, reviews countless decisions from the state courts. Furthermore, the Court's concerns about parity evidently led in part to the incorporation of the Bill of Rights into the due process clause and the extension of the breadth of habeas review. Thus, the Court should have the authority to continue to evaluate and address parity as it moves in the other direction.

In addition to the parity rationale the dynamic view of habeas has another component—the use of habeas courts to expand constitutional rights. *Teague* suggests—finally—that this may have been the heart of the Court's agenda for some time. In this regard, it is instructive to look at what *Teague* does, rather than what the Court says. *Teague*, by limiting the power of habeas courts to applying only clearly established rules, ensures that the federal say on criminal constitutional rights will

123. See, for example, *Trainor v. Hernandez*, 431 U.S. at 443 (stating that state courts are responsible, with federal courts, for protecting rights, and presuming that state courts are able to do so).

124. See, for example, *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (holding that federal rights need to be enforced in federal courts because state courts might not enforce those rights).

125. See Wells, 22 Ga. L. Rev. at 324 (cited in note 119) (contesting the notion of parity between state and federal courts); Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1105 (1977) (stating that the "assumption of parity is . . . a dangerous myth"); Michael E. Solimine and James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 Hastings Const. L. Q. 213 (1983) (arguing that there is parity). See also Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233, 237 (1988); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329, 330 n.4 (1988); Erwin Chemerinsky, *Federal Courts, State Courts and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. Rev. 369, 381-82 (1988).

126. See Redish, 36 UCLA L. Rev. at 342-46 (cited in note 125) (recognizing that Congress has constitutional authority to establish the extent of jurisdiction).

127. See *id.* at 343 (arguing that such action would "constitute judicial lawmaking of the most sweeping nature" (citation omitted)).

come primarily from the Supreme Court.¹²⁸ This narrowing of the role of habeas courts coincides with and complements the Court's obvious effort to narrow and to curtail constitutional rights, particularly in the criminal context.¹²⁹

Motives aside,¹³⁰ it undoubtedly is the Court's prerogative to determine the level of constitutional rights. The Court is, after all, the "ultimate arbiter" of the meaning of the Constitution.¹³¹ The primary functions of the Court are to determine the content of constitutional rights and to defend those rights against governmental action.

Thus, the Court might have told us in *Teague* that it had concluded that criminal constitutional rights had reached their apex. For that reason, the habeas courts were now out of business. The habeas courts had been drafted, had served their function, and could now retire from the field. That is what *Teague* did. It took habeas courts out of the business of defining rights.¹³²

Here, then is a view of *Teague*, and habeas, that bears some relationship to *Brown*. This dynamic view of habeas serves to explain *Brown* and *Teague* together, and to reconcile the flow and ebb of habeas.¹³³ Indeed, this explanation ties *Teague* to *Brown*, and makes some coherent sense out of the history of the writ.

IV. THE HUBRIS OF *TEAGUE*

The preceding section explains why a Court might decide to take the habeas courts out of the business of defining rights. The next important question is why *this* Court decided at *this* time to do so.

There are two possible reasons why this Court might have decided that the time was ripe for a decision like *Teague*. One reason relates to

128. The lower federal courts still can fashion new rules in the context of federal criminal trials. But this eliminates an institutional advantage of the habeas courts, which is that they could review the claims of right with a relatively dispassionate eye. In federal criminal cases the federal courts serve as enforcement courts just like the state trial courts. See Althouse, 1991 Wis. L. Rev. at n.68 (cited in note 13).

129. See note 134.

130. The Court's motives will be addressed in the next section.

131. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that the Court's pronouncements are "the supreme law of the land").

132. Hoffmann, *Habeas*, 1989 S. Ct. Rev. at 190-92 (cited in note 13) (arguing that *Teague* will have a "far-reaching" "institutional effect" on the development of criminal procedure rules).

133. Judge Higginbotham has expressed the view that "the *Teague* ruling . . . comports well with" my appellate model of habeas, discussed at length in Friedman, 73 Minn. L. Rev. 247 (cited in note 11). See Higginbotham, 18 Hofstra L. Rev. at 1015-16 (cited in note 13). I do not agree that an appellate model leads where *Teague* and its progeny have taken us. As my prior work makes clear, I approve of limiting habeas generally to one trip to a habeas court. But because I see the habeas courts as a surrogate for Supreme Court review in most cases, I would apply new rules to this one trip to a habeas court.

the content of criminal procedure rights. The other reason relates to a concern about the costs of the habeas process. Both reasons appear to have motivated the *Teague* Court's decision.

First, it is evident that this Court has a great hostility to the rights of criminal defendants.¹³⁴ The Court appears to see criminal procedure rights as juxtaposed against the legitimate need of crime-fighting police forces.¹³⁵ Decision after decision suggests the Court believes that balance has been struck incorrectly in the past. Thus, the Rehnquist Court is overruling and stepping around the decisions of the Warren Court, and even the Burger Court, scaling back in dramatic fashion the rights accorded criminal defendants.

For a Court with the mission of restriking the crime control/constitutional rights balance, the habeas courts pose a problem. Habeas tends to be a one-way ratchet with regard to rights, moving primarily in the direction of expansion. Because the question in habeas cases is whether rights were violated, the habeas courts generally have greater occasion to expand settled rights (or to simply demur on the question put), rather than to cut back on rights.¹³⁶

Second, habeas may have costs associated with it beyond the expansion of rights. For example, habeas often is said to interfere with principles of federalism because federal courts overturn the judgments of state courts and release convicted prisoners.¹³⁷ More often, habeas is

134. Surely the big story from the 1990 Term will be the speed with which the Court moved to remove constitutional protections from criminal defendants. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2608 (1991) (allowing juries to consider "victim impact" evidence); *California v. Acevedo*, 111 S. Ct. 1982, 1991 (1991) (permitting a search of a container in a car without a warrant); *Harmelin v. Michigan*, 111 S. Ct. 2680, 2701-02 (1991) (upholding Michigan's imposition of a life sentence with no possibility of parole for a defendant convicted of possessing 650 grams of cocaine); *California v. Hodari D.*, 111 S. Ct. 1547 (1991) (restricting the meaning of seizure under the Fourth Amendment); *Florida V. Bostick*, 111 S. Ct. 2382 (1991) (finding that Florida police tactics in searching a boarded bus passenger for drugs did not necessarily constitute a seizure).

135. See, for example, *McNeil*, 111 S. Ct. at 2207 (balancing in favor of the police the interest in "investigating new or additional crimes" after an individual is formally charged with one crime against a defendant's Sixth Amendment right to counsel (quoting *Maine v. Moulton*, 474 U.S. 159, 179-80 (1985)); *Riverside v. McLaughlin*, 111 S. Ct. 1661, 1670-71 (1991) (balancing in the state's favor the time it takes police to determine probable cause for a warrantless arrest and the defendant's right to a "prompt" determination). See also *Miranda*, 384 U.S. at 541 (White dissenting) (arguing that "[t]he rule announced today will measurably weaken the ability of the criminal law to perform these tasks").

136. Habeas courts obviously cannot cut back on rights by reversing Supreme Court determinations of rights, but it is not wholly accurate to say that habeas courts cannot narrow rights; they can do so by giving narrow construction to the principles set out in prior cases as myriad fact situations come before them. Thus, in the course of adjudicating a number of habeas cases, a habeas court actually may narrow a right beyond the compass it had been thought to have.

137. See Friedman, 73 Minn. L. Rev. at 271, 334-37 (cited in note 11) (summarizing the federalism argument that it is "demeaning to allow the lower courts of one sovereign to supervise the work of another sovereign's highest courts"); Hoffmann, *Retroactivity*, 1990 B.Y.U. L. Rev. at 204-06 (cited in note 13).

attacked because it gives too little respect to the principle of finality: Because *res judicata* theoretically does not apply,¹³⁸ habeas results in potentially repetitive review that thwarts the state's interest in finality of its criminal process.¹³⁹

The current Court has expressed its impatience with these costs, primarily in the context of death penalty cases. In nondeath cases supposedly unending review does not pose a great finality problem, given that the prisoner remains in prison while litigating. Thus, punishment does not await the end of habeas proceedings. In the death penalty context, however, habeas is seen as slowing the process toward imposing the death sentence, which is the state's ultimate goal. The Rehnquist Court has not been shy to express its concern that federal habeas is slowing the death process.¹⁴⁰ Indeed, in a display of what might strike one as remarkable impropriety, members of the Court have offered similar opinions extrajudicially.¹⁴¹

138. The Court continually refers to this problem. See, for example, *McCleskey v. Zant*, 111 S. Ct. 1454, 1468 (1991) (stating that "[o]ne of the law's very objects is the finality of its judgments"). The finality problem, however, is much more theoretical than real in light of recent decisions limiting the circumstances under which a prisoner can come to a habeas court more than one time. See *id.* at 1469 (stating that "abuse of the writ" by successive petitions is prohibited).

139. See *McCleskey*, 111 S. Ct. at 1469 (stating that "the power of a State to pass laws means little if the State cannot enforce them").

140. See Ruth Marcus, *On Death Row, How Many Appeals Are Enough?*, Wash. Post, A1 (June 9, 1990) (repeating Chief Justice Rehnquist's complaints that capital crimes are handled chaotically, "with . . . seemingly endless rounds of eleventh-hour appeals"); Sandra Torry, *Retired Justice Powell: No Constitutional Right to Own Handguns*, Wash. Post, A4 (Aug. 8, 1988) (reporting that Justice Powell criticizes the "enormous delays between sentencing and execution" with multiple habeas reviews available). See also Comment, *The Reform of Federal Habeas Corpus in Capital Cases*, 29 Duquesne L. Rev. 61, 71 (1990) (quoting Justice Powell):

The hard fact is that the laws of 37 states are not being enforced by the courts. About 20,000 murders are committed in our country each year. Only a fraction of the worst murderers—even those convicted—are sentenced to die. . . . [I]t seems irrational to retain the penalty and frustrate its fair implementation. . . . Capital cases should be subject to one fair and complete course of collateral review through the state and federal systems

(emphasis added) (citations omitted);

Robert Weisberg, *A Great Writ While it Lasted*, 81 J. Crim. L. & Criminol. 9 (1990) (speculating that the decisions of *Butler* and *Saffle* were motivated by the Court's "frustrat[ion] with the inadequacy of the execution rate of America's death row inmates"). For an intriguing argument that *Teague* should not apply to death cases, primarily because of the poor quality of counsel, see Dow, 19 Hastings Const. L. Q. 23 (cited in note 13).

141. See, for example, Al Kamen, *Rehnquist Presses for Quicker Executions; Delay in Hearings on Limiting Death Row Appeals is Opposed*, Wash. Post, A17 (Oct. 13, 1989) (reporting that in a letter to Senate Judiciary Committee Chairman Joseph R. Biden, Chief Justice Rehnquist urged Congress to clear up the "problem of delay and confusion in federal habeas corpus review of state [death] sentences"); Ruth Marcus, *Rehnquist Urges Limits on Death Row Appeals; Chief Justice Attacks Sen. Biden's Alternative*, Wash. Post, A17 (May 16, 1990) (reporting that in a speech to the ALI, Rehnquist said that review of death sentences poses a "serious malfunction in our legal system"); W. John Moore, *Death Row Delays*, 21 Nat'l J. 768 (1989) (reporting that in a speech to the ABA, retired Justice Powell said the appeals process in death penalty cases has been abused). Chief Justice Rehnquist's comments are particularly ironic in light of the fact that he

Thus, this is a Court that was bound to see habeas as a problem. So seeing, the Court took action. The Court ruled that habeas courts no longer would devise new rights. Thus, finality concerns would be reduced by narrowing significantly the reach of the habeas writ.¹⁴²

The problem with *Teague* is how the Court went about solving its "problem" with the habeas courts. The Court has taken, and no doubt will continue to take, a large number of criminal procedure cases in order to scale back constitutional protections.¹⁴³ The Court also has decided a number of cases that curtail repetitive review by habeas courts.¹⁴⁴ But in *Teague* the Court went one giant step further. Simply put, *Teague* shuts down the habeas courts. Where once these courts played an active, important role in defining the content of criminal procedure, they now can do little but patrol the perimeters of criminal constitutional law.

Moreover, *Teague* slams shut the doors of the habeas court for a good long time. The only way for the Court to "get around" *Teague* in the future will be to overrule the decision. Many Supreme Court decisions have tests that contain wiggle room to permit common-law evolution as circumstances change. *Teague*, however, fixes a firm barrier; *Teague* redefines the purpose of habeas courts in a way that seemingly will require flat-out repudiation to change. In the past, the Court has shown a greater reluctance to overrule prior decisions, preferring merely to work around them.

The dramatic impact of the *Teague* decision does not appear to be an accident. The *Teague* Court suggested, with one incredibly telling statement, that in its view the balance between crime control and constitutional rights needed to be altered not only for this time but for the future. In *Teague*, Justice O'Connor flatly stated that with regard to the *Teague* exception for rights critical to the correct finding of guilt or

declined to express opinions on matters that could come before the Court when appearing before Senate confirmation committees. See *Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States: Hearings Before the Committee on the Judiciary*, 99th Cong., 2nd Sess. (1986). When asked a question about his dissenting opinion in *Batson*, Justice Rehnquist refused to defend his position or delve into his reasoning behind his dissent. *Id.* at 359-61.

142. This is because not permitting "new" rules to apply on habeas would eliminate the reason many habeas petitioners return to habeas courts. See, for example, *Kuhlmann*, 477 U.S. at 452, 461 (Burger concurring) (emphasizing the importance of the state's interest in finality and the need to curb the "sporting contest" the writ has turned into). Simultaneously the Court has taken action to eliminate the return of petitioners with claims that do not involve "new" rules but involve other grounds for relief instead, such as claims that state officials hid evidence of misconduct. See *McCleskey*, 111 S. Ct. at 1460 (dismissing a claim as abuse of the writ in which the defendant alleged that the police "deliberately elicited" incriminating statements without the presence of counsel).

143. See note 134 and accompanying text.

144. See note 138 and accompanying text.

innocence: "we believe it unlikely that many such components of basic due process have yet to emerge."¹⁴⁵

What hubris!¹⁴⁶ Here is a Court saying that further development of constitutional rights in the area it believes to be the core element of fair criminal procedure—the determination of guilt—is unlikely. Thus, the Court limits the mechanism by which such rights might change and expand in the future. Moreover, if the Court believes the core of criminal process is settled, one can only speculate that the Court believes further development of rights it deems less worthy also is unlikely. The *Teague* Court's hubris lies in its confidence that it has such a clear notion of the correct meaning of criminal procedure rights that it not only can define the meaning of those rights for the present, but also can put in place a mechanism calculated to stunt the growth of those rights in the future.¹⁴⁷

The Court seems to suggest that enlightenment has come upon us and we need look no further. Yet recent history indicates that a court which takes this stance ultimately will be embarrassed by its hubris.

The primary and most explicit statement from the *Teague* Court relates to rights essential to the factfinding processes. One would expect this because the Court has been moving in recent years toward a narrow vision of the criminal justice system as directed only toward determining guilt and innocence of the accused.¹⁴⁸ This position seems to conflict with the Constitution's text¹⁴⁹ and most of its history, but even if the Court were correct in its premise, there is little reason to believe due process has been defined fully in the factfinding, or guilt and innocence, context.

Nevertheless, the *Teague* Court evidently believed we have found the best way to get at the truth. According to the Court, it is unlikely that the future will suggest to us any new means of more accurately determining guilt or innocence. Thus, the judiciary need not seriously

145. *Teague*, 489 U.S. at 313.

146. Indeed, one might say, what chutzpah.

147. The phrase "stunt the growth" is Erwin Chemerinsky's. Indeed, I am indebted to Professor Chemerinsky for helping me define with clarity the impact the Court's hubris will have on its role in developing constitutional law in the future.

148. See, for example, *Arizona v. Fulminante*, 111 S. Ct. 1246, 1253 (1991) (holding that a coerced confession can be harmless error); *Kuhlmann* 477 U.S. at 454 (requiring a "colorable showing of factual innocence").

149. After all, many provisions of the Bill of Rights have little to do with the guilt/innocence determination. Most noteworthy is the Fourth Amendment, which, if enforced, actually stands in the way of an "accurate" assessment of guilt. Not surprisingly, the Fourth Amendment has borne the brunt of the Court's attack on criminal constitutional rights. See, for example, *Acevedo*, 111 S. Ct. at 1991 (permitting the search of a container in a car without a warrant); *Riverside*, 111 S. Ct. at 1668 (allowing detention pending a probable cause hearing); *Bostick*, 111 S. Ct. at 2388 (finding that a police search of a boarded bus does not necessarily constitute a seizure).

trouble itself with the possibility of an expansion of constitutional rights in this area.¹⁵⁰

The *Teague* Court need not have looked back very far, however, in order to get an idea of how quickly it might regret this vision. The Court might have pointed to *Gideon v. Wainwright*¹⁵¹ as the prototypical decision concerned with ensuring the accuracy of factfinding.¹⁵² But a mere twenty years before *Gideon* mandated that indigent defendants be provided with counsel to ensure a fair trial, a predecessor Court took the opposite position. In *Betts v. Brady* the Court stated there was nothing fundamental about the right to counsel.¹⁵³ Yet the *Betts* Court undoubtedly believed itself every bit as enlightened as the *Gideon* Court.

Since *Gideon* the Court has continued to expand rights critical to the accuracy of the factfinding. For example, it was not until some seven years ago, in *Ake v. Oklahoma*,¹⁵⁴ that the Court first recognized that an indigent defendant might require state-provided expert assistance to get at the truth.¹⁵⁵ And less than fifteen years ago, in *Sandstrom v. Montana*,¹⁵⁶ the Court prohibited burden-shifting instructions.¹⁵⁷

Reconstructing past events is a tricky business, but the technology for doing so is evolving rapidly. Hypnosis and DNA testing are in their infancy.¹⁵⁸ Just as fingerprinting did in its infancy, these techniques surely will present difficult due process questions, as will videotape, incident reconstruction, and breathalyzers. Yet, the *Teague* Court seems content to ignore the possibility that the meaning of due process may

150. A more mean-spirited interpretation would be that whether or not we discover more accurate ways of determining guilt or innocence, the Court simply does not care whether future criminal defendants obtain such a fair process.

151. 372 U.S. 335 (1963).

152. The Court in fact points to "the classic grounds for the issuance of writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Teague*, 489 U.S. at 313 (citations omitted).

153. 316 U.S. 455, 473 (1942).

154. 470 U.S. 68 (1985).

155. *Id.* at 83. Lower courts have been probing *Ake's* application in specific situations beyond the facts of *Ake*. See, for example, *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987) (finding that *Ake* extends to nonpsychiatric experts). Query whether this comes to a stop because all such decisions are "new rules."

156. 442 U.S. 510 (1979).

157. *Id.* at 524.

158. Compare *Burns v. Reed*, 111 S. Ct. 1934, 1939-44 (1991) (discussing prosecutorial immunity in the context of a case in which a state judge held that obtaining hypnotic testimony violated the Constitution). On the use of DNA testing in criminal trials, see Richard Lempert, *Some Caveats Concerning DNA as Criminal Identification Evidence: With Thanks to the Reverend Bayes*, 13 *Cardozo L. Rev.* 303 (1991).

evolve with technological and epistemological advances. Thus, the *Teague* Court was willing to quiet the voice of the habeas courts in which the need for such new rights frequently becomes evident.

The Court's hubris is equally troubling with regard to rights not implicated in the factfinding process. There are many rights which provide credibility and dignity to the criminal justice system. It is no accident that these rights are imbedded in the Constitution. They preserve the legitimacy of the entire process. Yet they may have little or nothing to do with the accurate finding of guilt or innocence.

Batson v. Kentucky makes clear just how problematic is the Court's refusal to accept the continued development of these nonguilt related rights. A mere twenty years before *Batson*, the Court decided *Swain*, which foreclosed any equal protection challenge to the prosecutor's racially discriminatory use of peremptory strikes of potential jurors. But in *Batson* the Court rejected its position in *Swain* and recognized that our society could not stomach a criminal process which systematically barred blacks from participating as jurors. Interestingly, *Batson* was not the brainchild of a liberal Warren Court. *Batson* was decided in 1987 by the Burger Court, and it was strongly reaffirmed recently by the Rehnquist Court.

Nor is *Batson*, with its condemnation of pervasive racial prejudice, the only case of recent vintage recognizing a nonfactfinding related right. Indeed, it may be difficult to tell the difference between those rights that relate to factfinding and those that do not. Within the last ten years, the Court recognized that prosecutors should not be able to alleviate the responsibility of capital sentencing juries by convincing them that the ultimate decision as to life or death would rest somewhere else.¹⁵⁹

These decisions are important proof that due process is an evolving concept, not a static one. These decisions suggest that although the Court thinks that we have reached the limits of the constitutional guarantees,¹⁶⁰ one properly may doubt this. Similarly the Court seems to think that the evolution of due process does not require the participation of the habeas courts. But the limitations of the Supreme Court's docket suggest otherwise.¹⁶¹

159. *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). For further discussion of the evolution of rights and the impact of *Teague*, see Wilson, 16 S. U. L. Rev. at 17-19 (cited in note 13).

160. See *Teague*, 489 U.S. at 313 (stating that "we believe it unlikely that many such components of basic due process have yet to emerge") (plurality opinion).

161. See generally Samuel Estreicher and John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984).

V. WHAT COMES OF HUBRIS

Everyone knows what comes of hubris in the world of literature—the hubristic fall.¹⁶² The questions then become whether this fate is also inevitable in the legal world, and if so, what will cause the Court's fall, and what form will it take?

While possible, it is unlikely that the Court's "fall" will be precipitated by Congress. Congress certainly could use its control over the jurisdiction of the federal courts to give back what the *Teague* Court has taken away. Congress could revise the habeas statute in some way that would put the habeas courts back in business. It is unrealistic, however, to expect Congress to brave the political waters that would be necessary to overcome *Teague*. The *Teague* decision, as unfortunate as it is, largely is a product of a society extremely concerned about crime and hostile to the rights of criminal defendants.¹⁶³ If the Court was so swayed, it is unlikely that Congress will act differently. In fact, recent maneuvering on the crime bill and its habeas provisions suggest Congress will not soon take any action to overrule *Teague*.¹⁶⁴

Moreover, even if Congress did speak there is little reason to suspect that the Court would honor Congress' commands. As I have documented elsewhere, contrary to the traditional view that Congress controls the jurisdiction of the habeas courts, the Court unquestionably has been the leading partner in defining the scope of habeas jurisdiction.¹⁶⁵ The Court has twisted more than one statutory phrase to define

162. Actually, this itself is a tricky question, for what we all know may actually be incorrect. I was taught that hubris meant "overweening pride" and was a fatal flaw common in many of the classical Greek works. But I thank Professor Bill Race for setting me straight. There is some debate in the academy as to where exactly this commonly-held notion of hubris comes from, but it does not come from Greek literature. See Richmond Lattimore, *Story Patterns in Greek Tragedy* at 23-27 (U. of Mich., 1964). See also D.M. MacDowell, *HYBRIS in Athens*, 23 *Greece & Rome* 14, 14-31 (1976); N.R.E. Fisher, *HYBRIS and Dishonor: I*, 23 *Greece & Rome* 177 (1976). More likely, this sense of hubris is a creation of our far more recent Judeo-Christian tradition.

163. The Rehnquist Court is comprised largely of members appointed by presidents who have made crime control a major plank in their platforms. See, for example, Jonathan Kaufman, *Crime Pays as an Issue for GOP; Republicans Talk Tough While Democrats Dither*, *Boston Globe*, Focus 75 (May 21, 1989) (stating that President Bush intended to focus on crime and criminal defendants by providing more federal agents, more prisons, and tougher sentencing); *Now the Red Flag of Racism Has Been Unfurled*, *Chi. Trib.*, Perspective, 23 (Oct. 26, 1988) (noting that President Bush had two running mates—Dan Quayle and Willie Horton (a Massachusetts murderer and rapist)); Stuart K. Spencer, *If Economy is the Issue, GOP Chances Looking Up*, *L.A. Times*, Opinion, pt. 5, at 3, col. 1 (Jan. 17, 1988) (stating that President Reagan emphasized crime control and provictim defense in his policy choices); David Lauter, *Crime Issues Becoming Election Battleground; Dukakis Camp Determined to Counter Bush's Attack on Death Penalty, Prison—Furlough Stands*, *L.A. Times*, pt. 1, at 1, col. 4 (June 13, 1988) (noting that President Nixon ran as a "law and order" candidate in 1968).

164. See Violent Crime Control Act of 1991, S. 1241, 102nd Cong., 1st Sess. (1991). See generally Berger, 90 *Colum. L. Rev.* 1665 (cited in note 13) (discussing legislative habeas proposals).

165. See Friedman, 85 *Nw. U. L. Rev.* at 13 (cited in note 10).

habeas as it wishes.¹⁶⁶ Although a relatively clear statute might constrain the Court, it is difficult to imagine firm guidance from Congress actually forcing the Court to toe the statutory line.

Nor is the fall likely to be instigated by the body politic any time soon. Political clamoring for strong anticrime measures appears to reflect deep societal concern about crime, and particularly about drugs and crime. Although societal outrage at the recent beating of a Los Angeles citizen, captured on videotape by a bystander, suggests a public tolerance threshold for crime control methods,¹⁶⁷ it also suggests that with regard to the criminal justice system out of sight tends to mean out of mind. The simple fact remains that the public's concern about crime, as communicated to its representatives, reveals that the balance has been struck in favor of crime control over protection of constitutional rights.

In literature, the fall is precipitated by the protagonist's own actions, a product of her own hubris. Thus, despite the blessings of Congress and the general public, the *Teague* Court likewise may be fatally flawed and may yet do injury to itself and the federal judiciary. The fall will not occur any time soon, but *Teague* ultimately may do great harm to the Court as an institution.¹⁶⁸

Although the role of the federal courts in protecting individual rights has been evolutionary, that role is fairly well ensconced at present. The general perception of the Supreme Court and the federal courts is that of an institution whose role it is to protect minority rights against majority actions. Certainly the Court has built its stock on playing this role, on acting as a counterweight to the decisions and actions of the political branches.

Teague, in word and effect, runs the risk of undermining this capital not only for the present, but also for the future when the capital may well be needed. *Teague* signals the federal courts' retreat from the position of defender of individual rights. *Teague* tells us we have enough rights¹⁶⁹ and thus withdraws the lower federal courts from the mission of protecting and defining those rights.

Indeed, in its zeal to restrict habeas, the Court has declared open

166. See, for example, *id.* at 10-20.

167. See *The Christopher Commission on Tuesday Issued a 228-Page Report on the Activities of Los Angeles Police Department. Here are Excerpts*; L.A. Times, July 10, 1991, pt. A, at 12, col. 1 (detailing how the King beating provoked public outcry against police brutality); Jesse Katz, *King Beating Makes Police's Job Harder*, L.A. Times, Apr. 7, 1991, pt. J, at 1, col. 2 (stating that youths now follow police with video cameras); Cecilia Rasmussen, *Crisis in the LAPD: The Rodney King Case*, L.A. Times, Apr. 5, 1991, pt. B, at 2, col. 3 (listing supporters and nonsupporters—those who want his resignation—of Los Angeles Police Chief Gates).

168. I thank Erwin Chemerinsky for suggesting this.

169. See note 146 and accompanying text.

season on federal jurisdiction. Congress, with unabashed encouragement from Chief Justice Rehnquist, now vociferously has joined the fray, passing measures draconian in their curtailment of habeas jurisdiction.¹⁷⁰ In its hubris the Court has failed to think of itself as an institution, whose needs in the future might differ from temporal preferences. Carried away with its own zeal to implement current preferences, the Court lost the foresight it needed to make prudent jurisdictional decisions.

For this reason *Teague* stands in sharp contrast to another jurisdictional decision outside the habeas context, *Webster v. Doe*,¹⁷¹ in which foresight appears to have triumphed over passing preference. The issue in *Webster* was whether federal courts have jurisdiction to review the decisions of the Director of the Central Intelligence Agency to dismiss employees. An employee alleged that the Director violated numerous statutory and constitutional rights by dismissing him shortly after he disclosed his homosexuality. Although the Court held that Congress intended to preclude judicial review of the CIA Director's actions on statutory grounds, the Court carefully protected its right to review constitutional claims.¹⁷² The decision was remarkable in this regard because the very same statutory language that deprived the Court of jurisdiction to review statutory claims appeared to deprive it of jurisdiction to review constitutional claims as well.¹⁷³ Nonetheless, the Court asserted that any congressional attempt to remove jurisdiction over constitutional claims would itself raise "serious constitutional question[s]" about the separation of power and the role of the Court.¹⁷⁴ As a result, the Court refused to attribute to Congress any intent to preclude review of constitutional claims.¹⁷⁵

I do not mean to equate the circumstances of *Webster* and *Teague*. With regard to maintaining judicial supremacy, there is some difference between refusing to acquiesce in a congressional removal of jurisdiction and establishing a judicial limitation. The difficulty with *Teague* is that the difference is not as great as it looks.

The *Webster* Court, and Justice Rehnquist writing for the majority, does not appear to be any more sympathetic to the claims of gay people than it is to the claims of criminal defendants. The widely condemned decision in *Bowers v. Hardwick* displays the Court's lack of

170. See note 164.

171. 486 U.S. 592 (1988).

172. *Id.* at 603-04.

173. See Friedman, 85 Nw. U. L. Rev. at 57 n.263 (cited in note 10) (noting that despite this apparent preclusion, "the Court consistently finds a gap that permits constitutional review").

174. *Webster*, 486 U.S. at 603.

175. *Id.*

sensitivity to the circumstances of gay individuals and the lack of concern for their rights.¹⁷⁶

In *Webster*, however, despite its lack of sensitivity for the plaintiff, the Court saw beyond the circumstances of the specific case to the implications for the Court's institutional role. Whether the Court cared or not about Doe, the Court was concerned about a precedent that curtailed its ability to hear constitutional claims. In order to preserve that power, the Court ruled in Doe's favor.

The Court did not display such foresight in *Teague*. Particularly in the last few years the Court repeatedly has exposed its hostility to criminal defendants and its eagerness to see that habeas corpus not stand in the way of the death penalty.¹⁷⁷ Blinded by these concerns, the *Teague* Court lost sight of any possibility that habeas jurisdiction, jealously cultivated for many years, might again be of any importance. Under the circumstances in which it wrote, habeas was but a nuisance, expanding the rights of criminals and providing repetitive review.

Those circumstances might change. If history is any guide, they almost certainly will. And where then will be the habeas courts, which may have inspired anger but also wielded important power? If the Court's recent shortsighted opinions in *Teague* and other habeas decisions are any indication, the habeas courts will be dark, with an "out of business" sign hanging in the front. This, then, will be the legacy of the Rehnquist Court for future Courts and federal jurisdiction.

176. 478 U.S. 186 (1986). See Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 Yale L. J. 1073, 1087 (1988) (criticizing the close-mindedness of the Court and noting that "'homosexuality' is a cultural and historical artifact"); Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915, 916-18 (1989) (arguing that the courts, under "the mandate of the equal protection clause," are obliged to protect "the despised minority"); Comment, *The Louisiana Constitution's Declaration of Rights: Post Hardwick Protection for Sexual Privacy?*, 62 Tulane L. Rev. 767, 768 n.3 (1988) (stating that "'homophobia rather than law seems to have controlled decisions in the court'" (citations omitted)).

177. See note 140.