BYU Law Review

Volume 1990 | Issue 1 Article 3

3-1-1990

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I. INTRODUCTION

The Great Writ of Habeas Corpus, whose common law history dates back at least as far as the reign of Edward I,[1] has been called "the most celebrated writ in the English law."[2] Enshrined in the United States Constitution,[3] the writ has been pressed into service whenever and wherever the power of the government and the rights of the individual have been placed fundamentally at odds.

Under the statutory version of the writ as enacted by Congress in 1867, the remedy of federal habeas corpus was made generally available to state prisoners who have been convicted of a crime, if their custody is "in violation of the constitution, or of any treaty or law of the United States."[4] The statutory writ, like its common law ancestor, serves the basic purpose of

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This article was originally written during the summer of 1989 as a portion of a report to the Federal Courts Study Committee, Subcommittee on the Role of the Federal Courts and Their Relation to the State Courts. The recommendations made in this article, with several changes, were incorporated into the Subcommittee's report to the Committee. The Committee, however, decided not to include the recommendations in its final report to Congress.

I would like to thank Larry Kramer, the Official Reporter for the Subcommittee on the Role of the Federal Courts and Their Relation to the State Courts, for his helpful comments about my original report to the Subcommittee. I would also like to thank Craig Bradley, Lynne Henderson, Bill Popkin, Lauren Robel, Alex Tanford, and the rest of the participants in the faculty workshop at Indiana University-Bloomington School of Law, for their assistance with this article.

1. Secretary of State for Home Affairs v. O'Brien, 1923 App. Cas. 603, 609 (H.L.) (making reference to the use of habeas corpus as early as the year 1272).

2. 3 W. BLACKSTONE, COMMENTARIES 129 (15th ed. 1809).

3. Article I, section 9, clause 2 of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended unless, when in Cases of Rebellion or Invasion the public Safety may require it."

4. Judiciary Act of 1867, ch. 28, § 1, 14 Stat. 385-386 (codified as amended at 28 U.S.C. §§ 2241-55 (1982)).

"provid[ing] a mode for the redress of denials of due process of law."[5] As Supreme Court Justice William Brennan wrote in 1963:

> Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.[6]

While the historic significance and value of the Great Writ are unquestioned, the proper scope of the statutory writ has been a frequent subject of controversy.[7] The Supreme Court has modified the scope of federal collateral review of state criminal convictions on numerous occasions,[8] dozens of commentators

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5. Fay v. Noia, 372 U.S. 391, 402 (1963).

6. *Id.* at 401-02.

7. Professor Yackle has noted:

> The essential office of the writ as a weapon against unwarranted executive detention prior to trial is assured. No one disputes the availability of the writ in contending with the midnight knock at the door. There is, however, considerable debate over the availability of the writ after trial. . . . Collateral review of criminal convictions by way of postconviction habeas "is, and always has been, a controversial and emotion-ridden subject."

Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 609 (1983) (quoting C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 246 (3d ed. 1976)).

In 1981, Sandra Day O'Connor, then an Arizona appellate judge, wrote a law review commentary in which she suggested that our judicial system could be improved by limiting federal review of adjudications of constitutional questions by state courts:

> If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court.

O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 814-15 (1981) (emphasis in original). Judge O'Connor singled out federal collateral review of state criminal felony cases as a notable example of our judicial system's "strange" and "imperfect" duplication of judicial time and effort, and an area worthy of reform. *Id.* at 801.

8. Thus, the Court has grappled with such difficult questions as whether all or only

have taken up the pen to criticize or defend the broad availability of federal habeas corpus,[9] and Congress has considered several proposals that would have restricted or even eliminated such review.[10] One reason for this controversy has been the

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some kinds of constitutional issues are cognizable in a federal habeas proceeding, *compare* Kaufman v. United States, 394 U.S. 217 (1969) (holding fourth amendment claims are cognizable on habeas) *with* Stone v. Powell, 428 U.S. 465 (1976) (holding fourth amendment claims are not cognizable on habeas unless the state court fails to provide "full and fair" opportunity for hearing on the merits of a claim); whether the prior determination of an issue on the merits by a state court is *res judicata* in a federal habeas proceeding, *see* Brown v. Allen, 344 U.S. 443 (1953) (holding a prior determination of legal issue on merits by the state court is not *res judicata* in later habeas proceeding); whether a procedural default in state court precludes later federal habeas relief, *compare* Fay v. Noia, 372 U.S. 391 (1963) (holding a procedural default does not preclude habeas review absent a "deliberate bypass" of state procedures) *with* Wainwright v. Sykes, 433 U.S. 72 (1977) (holding a procedural default precludes habeas review absent a showing of "cause" for default and "prejudice" resulting therefrom); and whether a state prisoner who has filed one habeas petition may obtain review on the merits of either the same or a different constitutional issue by filing successive habeas petition, *see* Sanders v. United States, 373 U.S. 1 (1963) (establishing standards for determining whether to review successive habeas petitions on the merits).

9. Some of the most influential modern articles dealing generally with federal habeas are Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988); Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985); Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984); Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393 (1983); Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982); Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 STAN. L. REV. 1 (1978); Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on* Schneckloth v. Bustamonte, 1975 WIS. L. REV. 484; Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Lay, *Problems of Federal Habeas Corpus Involving State Prisoners*, 45 F.R.D. 45 (1968); Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286 (1966); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Desmond, *Federal Habeas Corpus Review of State Court Convictions*, 50 GEO. L.J. 755 (1962); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961).

10. *See, e.g.*, *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Committee on the Judiciary*, 97th Cong., 2d Sess. (1982) (proposing various limitations on federal habeas, including one-year statute of limitations and narrower standard of review); Proposed 28 U.S.C. § 2256, OMNIBUS CRIME CONTROL AND SAFE STREETS ACT of 1968, S. REP. No. 1097, 90th Cong., 2d Sess. 63-66, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2150-53 (proposing elimination of federal habeas as a post-conviction remedy for state prisoners); *Habeas Corpus: Hearings on H.R. 5649 Before*

widespread recognition that the benefits of federal habeas review come with a price tag attached. The price includes erosion of the finality of state criminal convictions as well as intrusion upon the important values of federalism and comity. For these reasons, both defenders and critics of expansive federal habeas review agree that reducing the total amount of habeas litigation is desirable so long as it can be achieved without limiting the writ's ability to perform its noble and historic purpose.[11]

Sensitive to these concerns, the Supreme Court and Congress have generally sought a proper balance between the need to preserve and protect the writ and the desire to minimize at least some of its most harmful side effects. Many recent proposals for legislative or judicial reform of federal habeas corpus for state prisoners, however, tip the balance too much to one side. They involve either procedural changes which create an unacceptable risk that a legitimate claim might not be heard on the merits, or the imposition of issue limitations which seem inequitable and arbitrary.[12] Not surprisingly, Congress has been un-

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Subcommittee No. 3 of the House Committee on the Judiciary, 84th Cong., 1st Sess. 1 (1955) (proposing limitation of federal habeas to situations in which no hearing on merits possible in state court either before or after filing of habeas petition). *See generally* Yackle, *supra* note 7.

11. As Justice John Harlan once wrote:

> It is, I believe, a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process. Finality in the criminal law is an end which must always be kept in plain view. . . . A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process.

Mackey v. United States, 401 U.S. 667, 690-91 (1971) (Harlan, J., concurring in the judgment).

Those Justices who have argued for expansive federal habeas review of state convictions have also generally agreed with Justice Harlan that some kind of balance of interests must be struck. *See, e.g.*, Spencer v. Texas, 385 U.S. 554, 583 (1967) (Warren, C.J., dissenting) (noting interest in finality of criminal convictions); Reed v. Ross, 468 U.S. 1, 10 (1984) (majority opinion of Brennan, J.) (noting state's interest in "the integrity of its rules and proceedings and the finality of its judgments, an interest that would be undermined if the federal [habeas] courts were too free to ignore procedural forfeitures in state court.").

Most commentators have also recognized the need to strike a balance of interests with respect to the scope of federal habeas. For example, Professor Yackle, a forceful proponent of expansive federal habeas, has acknowledged that "closer attention to federal claims is purchased at a price: friction between state and federal courts and disruption in the ordinary finality of criminal judgments." Yackle, *supra* note 7, at 610. *See also* Friedman, *supra* note 9, at 269-70 (discussing need to "balance" competing interests in habeas cases); Resnik, *supra* note 9, at 843 (discussing tension between desire for finality and desire to remedy illegal deprivations of liberty).

12. Examples of the former include proposals to establish, after the completion of

willing to enact these kinds of habeas proposals, apparently believing that the costs of the proposed reforms, in terms of infringing upon the constitutional rights of state prisoners, outweigh the federalism and finality benefits.[13]

On February 22, 1989, the Supreme Court introduced into the law of federal habeas a doctrinal change that will significantly reduce the burdens of habeas litigation. The change involves a new solution to a particularly intractable problem which has arisen frequently in habeas cases during the past twenty-five years. Simply put, the problem is whether to apply "new law" retroactively to cases pending on habeas. In other words, should the federal courts, in reviewing a habeas case, apply the standards of constitutional criminal procedure that existed at the time the petitioner was convicted, or those that prevail at the time of the habeas proceeding?

In *Teague v. Lane*,[14] six members of the Court agreed that "new" constitutional rules of criminal procedure generally should not apply retroactively to federal habeas review of state criminal convictions that became "final" before the "new law"[15] was established.[16] This view of habeas retroactivity, which requires habeas courts generally to apply the legal standards that existed at the time of the original state criminal proceedings, was first articulated by Justice John Harlan in the 1960's,[17] but had never before been adopted by the Court. Justice Harlan's approach, which contained two major exceptions allowing full retroactivity for the most important categories of "new" constitutional rules of criminal procedure,[18] effectively established a hierarchy of habeas petitions, and denied relief on retroactivity grounds only in the class of cases in which the petitioner's claim

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the direct review process, a time and/or number limit on the filing of federal habeas petitions. Examples of the latter include recent proposals to exclude *Miranda* and *Massiah* claims from federal habeas review. *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS 65-67 (1988) (Truth in Criminal Justice Series Report No. 7) [hereinafter OFFICE OF LEGAL POLICY]; Stone v. Powell, 428 U.S. 465 (1976) (excluding fourth amendment claims from federal habeas review).

13. *See* OFFICE OF LEGAL POLICY, *supra* note 12, at 29-32 (discussing the failure of Congress to enact several habeas reforms proposed since the 1950s).

14. 109 S. Ct. 1060 (1989).

15. At this point, I make no attempt to define such terms as "final" and "new law." Both of these terms will be discussed in detail in later sections of this article.

16. 109 S. Ct. at 1075.

17. *See* Desist v. United States, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting).

18. *See infra* text accompanying notes 60-61.

to habeas relief was the weakest. The Harlan approach thus sought to reduce some of the problems associated with collateral review of state criminal convictions while preserving the most valued aspects of federal habeas.

Unfortunately, in *Teague* and the follow-up cases of *Penry v. Lynaugh*[19] and *Butler v. McKellar*,[20] the Court did not implement the balanced approach to habeas retroactivity that had been proposed by Justice Harlan. Instead, the Court altered certain crucial aspects of the Harlan approach. Specifically, the Court greatly expanded the definition of "new law" and reduced the scope of Justice Harlan's proposed exceptions to non-retroactivity, thus ensuring that very few criminal procedure decisions will benefit state prisoners whose convictions previously became "final." These modifications of the Harlan approach threaten to impede the statutory writ's ability to fulfill its vital role.

In a recent article in *The Supreme Court Review*, I discussed and evaluated the impact of the Court's decisions in *Teague* and *Penry*.[21] In the present article, I propose that Congress enact reform legislation in response to the Court's new habeas retroactivity doctrine. The general rule of non-retroactivity proposed by Justice Harlan has merit as a reasonable means of reducing the costs of habeas, and may even provide the Court or Congress with an opportunity to reexamine other, more problematic habeas doctrines that have been adopted in the name of efficiency. But prompt congressional action is needed to reverse the course taken by the present Court in altering the Harlan approach to habeas retroactivity. Congress must act quickly to ensure that *Teague* and its progeny do not irreparably damage the statutory writ's ability to vindicate fundamental due process rights.

I will begin by briefly reviewing the history of the habeas retroactivity issue addressed by the Supreme Court in *Teague*, *Penry*, and *Butler*. I will then assess the Court's new habeas retroactivity doctrine, focusing on the values implicated by fed-

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19. 109 S. Ct. 2934 (1989).

20. 58 U.S.L.W. 4294 (1990).

21. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. ____. The article went to press before the Court handed down its decision in Butler v. McKellar, 58 U.S.L.W. 4294 (1990). The *Butler* decision, which is discussed herein, see *infra* text accompanying notes 90-93, confirms many of the viewpoints expressed in the article. *See Butler*, 58 U.S.L.W. at 4297-4301 (Brennan, J., dissenting).

eral habeas review of state convictions. Although some have attempted to address habeas retroactivity in jurisprudential terms, trying to resolve the issue by means of the old Blackstone/Austin debate over the nature of "law" and the effect of a "new" judicial decision,[22] I do not intend to engage in such a philosophical inquiry here. Instead, I intend only to address the question whether our legal system will be better or worse off if one particular habeas retroactivity doctrine prevails over another.

I will argue, based on some of the values implicated by federal habeas corpus, that Congress should ratify the Court's adoption of the general approach to habeas retroactivity proposed by Justice Harlan. I will also argue, however, that Congress must reinstate Justice Harlan's original conception of that doctrine. In particular, I will suggest that Congress substantially amend the definition of "new law" and expand the list of exceptions to non-retroactivity announced by the Court in *Teague*, *Penry*, and *Butler*. I will demonstrate that these changes in the Court's new retroactivity doctrine are needed to ensure the continued fairness and efficacy of the federal habeas remedy. Finally, I will conclude by presenting a specific proposal for habeas reform legislation to implement the aforementioned goals.

II. A Brief History of Retroactivity in Habeas Cases

In *Teague v. Lane*, *Penry v. Lynaugh*, and *Butler v. McKellar*, the Supreme Court grappled with a complicated issue that

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22. According to Blackstone, judges do not create law, but instead discover and declare it. 1 W. Blackstone, Commentaries 69 (15th ed. 1809). *See also* Linkletter v. Walker, 381 U.S. 618, 622-23 (1965). An opinion that changes the law, or overrules an earlier decision, does not, therefore, constitute "new law"; it simply disposes of a prior holding that, having been found erroneous, never represented the true law to begin with. Under the Austinian view, on the other hand, judges *make* law through judicial interpretation. *See Linkletter*, 381 U.S. at 623-24. Such interpretation is always fallible and subject to being overruled, but the prior law remains effective for those cases that have already become "final." This debate over the nature of law is in turn embedded in a philosophical tradition that also includes Plato's hypothesizing of perfect "forms" toward which all things in the world, including laws, should aspire to move, as well as the present-day scholarly writings of Ely and Dworkin on the natural and positive sources of law.

However, past efforts to solve the retroactivity problem in federal habeas corpus by resorting to jurisprudential inquiry have proven futile. This is because the debate between Blackstone and Austin, as interesting as it may be to legal academics and philosophers, is no closer to resolution today than it was two hundred years ago. As the Supreme Court concluded in *Linkletter*, "there seems to be no impediment—constitutional or philosophical—" to the rendering of a decision either for or against retroactive effect in any given situation. *Id.* at 628.

had been simmering on the Court's back burner for more than a quarter of a century. To understand the habeas retroactivity issue and appreciate the thorny problems it has created for the Court, one must return to the early years of the Warren Court's criminal procedure "revolution," and to the case of *Linkletter v. Walker*.[23]

In 1961, the Court held in *Mapp v. Ohio*[24] that the states were required to exclude from use in criminal trials evidence seized in violation of the fourth amendment. The Court applied the new rule to defendants whose cases were pending on direct review at the time *Mapp* was decided.[25] By 1965, however, the lower courts had split over whether the *Mapp* rule was to be applied to defendants whose cases had become "final" by virtue of completing the appeal process prior to the *Mapp* decision, but who subsequently petitioned for relief pursuant to writs of habeas corpus.[26] The Court confronted this issue in *Linkletter*.

The *Linkletter* Court began by discussing two contrasting views of the nature of law as set forth in judicial opinions. According to the so-called Blackstonian view, judges do not "create" law in their opinions, but "discover" it. An opinion overruling an earlier decision does not, therefore, constitute "new law;" the new opinion simply disposes of a holding that, having been found erroneous, never represented the "true" law to begin with. The jurisprudential alternative to the Blackstonian view is the so-called Austinian view, which holds that judges "make" law through judicial interpretation. Such interpretation is always fallible and subject to being overruled, but prior holdings remain effective for cases already "final."[27]

Turning to the history of the American legal system, the *Linkletter* Court noted that the Blackstonian view once held sway, but that since about the mid-nineteenth century, numer-

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23. 381 U.S. 618 (1965).

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

25. *See* Stoner v. California, 376 U.S. 483 (1964); Ker v. California, 374 U.S. 23 (1963); Fahy v. Connecticut, 375 U.S. 85 (1963).

26. *Compare e.g.*, Hall v. Warden, 313 F.2d 483 (4th Cir. 1963) *and* California v. Hurst, 325 F.2d 891 (9th Cir. 1963) (both applying the *Mapp* rule retroactively) *with* Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963) *and* Sisk v. Lane, 331 F.2d 235 (7th Cir. 1964) *and* United States *ex rel.* Angelet v. Fay, 333 F.2d 12 (2d Cir. 1964) *and* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963) (all holding that the *Mapp* rule should not be applied retroactively).

27. *See supra* note 22.

ous civil cases could be found that would support either view.[28] In the area of constitutional criminal procedure, the Court acknowledged that "heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule."[29] But the Court ultimately concluded that "there seems to be no impediment—constitutional or philosophical"—[30] to the refusal to apply such new rules retroactively in habeas cases. In the words of the *Linkletter* Court, "the Constitution neither prohibits nor requires retrospective effect."[31]

What, then, determines the retroactivity of a new constitutional rule of criminal procedure in habeas cases? The *Linkletter* Court proceeded to adopt a three-part analysis for weighing the merits and demerits of retroactivity in each instance. The three-part analysis, subsequently referred to as the "*Linkletter* test," required an examination of (1) the purpose of the new rule, (2) the reliance placed on the old rule, and (3) the effect on the administration of justice of retroactive application of the new rule.[32] In the case of the new *Mapp* rule, the Court concluded that exclusion of evidence seized in violation of the fourth amendment did not serve to enhance the reliability of convictions or reduce coercion, that the old rule had been heavily relied upon by the states, and that many convictions would be upset by retroactive application of *Mapp*. Thus, according to *Linkletter*, the *Mapp* decision should not apply retroactively to cases in which the convictions had already become final, and which were subject to review only on habeas.[33]

After the decision in *Linkletter*, the Court soon faced two additional retroactivity issues. One was the retroactive effect of new decisions for cases pending on direct review. In 1966, the Court decided that the new rules announced in *Griffin v. California*,[34] *Escobedo v. Illinois*,[35] and *Miranda v. Arizona*[36] would

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28. *Linkletter*, 381 U.S. at 622-23. *Compare, e.g.*, Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) (Austinian view) *and* Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) (same) *and* Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863) (same) *with* Norton v. Shelby County, 118 U.S. 425 (1886) (Blackstonian view).

29. *Linkletter*, 381 U.S. at 628 & n.13 (citing examples).

30. *Id.* at 628.

31. *Id.* at 629.

32. *Id.* at 627.

33. *Id.* at 639-40.

34. 380 U.S. 609 (1965) (holding that the fifth amendment prohibits prosecutorial comment on a defendant's failure to testify).

35. 378 U.S. 478 (1964) (holding that statements obtained by police during interro-

not apply retroactively in habeas cases.[37] The Court recognized that the new rules in those cases, unlike the one in *Mapp*, would have some impact on the reliability of convictions; but the Court explained that such reliability is "necessarily a matter of degree,"[38] and hence not dispositive of the habeas retroactivity question. The Court also held, significantly, that *Escobedo* and *Miranda* would not apply to cases in which the trials had begun before the new rules were announced, even if those cases were still pending on direct review. The Court justified extending the *Linkletter* rationale to direct review cases by citing the language in *Linkletter* indicating "no jurisprudential or constitutional obstacles" to non-retroactivity.[39] In so doing, the Court ignored the fact that the *Linkletter* decision was limited by its own terms to the habeas context.

A second issue left unresolved in *Linkletter* concerned the scope of the retroactivity doctrine. In other words, when should a rule be considered "new" so that the retroactivity doctrine applies? Subsequent to *Linkletter*, the Court adopted the view that a new decision would be considered "new law" for retroactivity purposes only if it represented a "clear break with the past,"[40] or if it "overrule[d] clear past precedent, or disrupt[ed] a practice long accepted and widely relied upon."[41] Otherwise, the decision would not be considered sufficiently "new" to trigger retroactivity analysis.

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gation may not be used against a defendant at trial if the defendant requested and was denied counsel prior to the interrogation and the police did not warn the defendant of his constitutional right to remain silent).

36. 384 U.S. 436 (1966) (holding that statements given by a defendant during custodial interrogation were not admissible at trial unless police gave defendant certain warnings prior to conducting the interrogation).

37. The retroactivity of *Griffin* was at issue in Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966). The retroactivity of *Escobedo* and *Miranda* was at issue in Johnson v. New Jersey, 384 U.S. 719 (1966).

38. Johnson v. New Jersey, 384 U.S. 719, 729 (1966).

39. *Id.* at 733. One year later, the Court further limited retroactivity in the context of direct review. In Stovall v. Denno, 388 U.S. 293 (1967), the Court held that it possessed the power to announce that a new constitutional rule of criminal procedure would apply "prospectively," that is, only to future cases in which the proscribed conduct had not yet occurred, with the sole exception of the case in which the new rule was announced. The exception was intended to satisfy Article III case-or-controversy concerns and to provide an incentive for litigants to raise such issues for the Court's resolution. In Fuller v. Alaska, 393 U.S. 80 (1968), a direct review case, the Court reached still another result, holding a new rule applicable only to cases in which the introduction of the tainted evidence occurred after the announcement of the new rule.

40. Desist v. United States, 394 U.S. 244, 248 (1969).

41. Milton v. Wainwright, 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting).

By 1969, at least one member of the Supreme Court, Justice Harlan, had become concerned about the propriety of the *Linkletter* test and its progeny. Justice Harlan first raised his concerns about retroactivity in a dissenting opinion in *Desist v. United States*,[42] and then elaborated upon them two years later in a separate opinion in *Mackey v. United States*.[43] *Desist* involved the retroactivity of the rule announced in *Katz v. United States*[44] that a physical intrusion of an enclosure was not a necessary element of a fourth amendment violation. *Mackey* was one of three companion cases involving the retroactivity of *Chimel v. California*,[45] a search-and-seizure decision, and *Marchetti v. United States*[46] and *Grosso v. United States*,[47] two decisions dealing with the privilege against self-incrimination. In each case, the Court resolved the retroactivity issue by applying the *Linkletter* test, prompting Justice Harlan to write separately in *Mackey* and suggest that the Court "pause to consider just where these haphazard developments might be leading us."[48]

According to Justice Harlan, retroactivity should be resolved "upon principles that comport with the judicial function."[49] He thus concluded that new rules should be given full retroactive effect in all cases pending on direct review,[50] whereas habeas cases, in which the reviewing court fulfills a more limited

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42. 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).

43. 401 U.S. 667, 675 (1971) (Harlan, J., concurring in the judgment).

44. 389 U.S. 347 (1967).

45. 395 U.S. 752 (1969).

46. 390 U.S. 39 (1968).

47. 390 U.S. 62 (1988).

48. *Mackey*, 401 U.S. at 677 (Harlan, J., concurring in the judgment).

49. *Id.*

50. According to Justice Harlan, the very nature of appellate judicial review, as explained in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803), entitles the Court to decide constitutional issues only when required to do so in resolving a particular case. The Court may not reverse a state criminal conviction unless a constitutional or other federal error was committed, and it may not decide that such an error was committed without granting relief to the defendant involved. Moreover, should the Court find that such an error was committed and therefore grant relief to a particular defendant, then it must also grant relief to all similarly situated defendants, "or give a principled reason for acting differently." Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting). By a "principled reason," Justice Harlan appeared to mean a reason related to the facts and circumstances of the particular case at hand, not the impact of full retroactivity on the criminal justice system or some similar "policy" argument. Failure to do so, wrote Justice Harlan, is a declaration that "the Court is free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise." *Mackey*, 401 U.S. at 677 (Harlan, J., concurring in the judgment).

role, require a different approach to retroactivity. Unfortunately, since the expansion in *Brown v. Allen*[51] and *Fay v. Noia*[52] of the scope of federal habeas review of state convictions,[53] the Court had not provided a coherent justification for this expanded remedy. As Justice Harlan put it, "while the specific uses of the habeas writ have greatly multiplied, the earlier perception of its general metes and bounds has been swallowed up and gone unreplaced."[54]

Justice Harlan therefore set off in search of the purposes of the modern, expanded federal habeas writ. In his *Desist* opinion, Justice Harlan identified two such purposes: First, the writ serves to ensure against the incarceration of a defendant under any procedure creating an impermissible risk that an innocent defendant might be convicted. Second, the writ serves as an incentive for state trial and appellate courts to "conduct their proceedings in a manner consistent with established constitutional standards."[55] Of course, this second "deterrence" purpose does not require the retroactive application of "new" constitutional rules in habeas cases; so long as the state court decides the case properly under the old rules, no deterrence or incentive is needed. Thus, with the sole exception of any new constitutional rules that would significantly improve fact-finding procedures, Justice Harlan concluded that "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[56]

Two years later, in *Mackey*, Justice Harlan expressed a different view of the function of federal habeas. In light of the Court's decisions holding that the fourth amendment exclusionary rule would apply in habeas cases, even though the rule oper-

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51. 344 U.S. 443 (1953).

52. 372 U.S. 391 (1963).

53. The significance of *Brown v. Allen* was the Court's willingness to allow relitigation of the merits of the federal claims of a habeas petitioner who had previously been provided a fair opportunity to litigate his claims during his state criminal proceedings. The Court explained that "the state adjudication. . . . is not *res judicata*." 344 U.S. at 458.

In *Fay v. Noia*, the Court held that a defendant's failure to raise a federal claim in accordance with state procedural requirements during his state criminal proceedings would not, absent a "deliberate bypass" of the state process, preclude subsequent consideration of the merits of his claim on federal collateral review of his conviction. 372 U.S. at 398-99.

54. *Mackey*, 401 U.S. at 685 (Harlan, J., concurring in the judgment).

55. *Desist*, 394 U.S. at 262-63 (Harlan, J., dissenting).

56. *Id.* at 263.

ated to exclude reliable and probative evidence of guilt,[57] it became apparent to Justice Harlan that "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."[58] Rather, the "primary justification" of the expanded writ is to serve the aforementioned "deterrence" function, providing an incentive for lower courts to "toe the constitutional mark."[59] Reiterating that giving retroactive effect to "new" rules in habeas cases is not necessary in order for habeas to fulfill this "deterrence" function, Justice Harlan concluded that the interests in finality of state convictions outweigh any benefits that might accrue from according such retroactive effect.

Because of this change in his view of the purposes of habeas, Justice Harlan declared in *Mackey* that the exception to non-retroactivity he had suggested in *Desist*, for "new" rules that improve fact-finding procedures,[60] no longer made sense. Instead, he proposed two different exceptions. First, "new" rules should apply retroactively in habeas cases if they are based on "substantive due process," thus placing certain conduct wholly beyond the proper reach of the criminal law. Such "substantive" rules, according to Justice Harlan, trump the otherwise important value of finality of state convictions, because such defendants should never have been tried and convicted by the state in the first place, and since they will not need to be retried after prevailing on habeas. Second, "new" rules should apply retroactively in habeas cases if they are "implicit in the concept of ordered liberty," involving "bedrock procedural elements"[61] of a fundamentally fair trial.

Justice Harlan emphasized, in both *Desist* and *Mackey*, that it would not be easy for the Supreme Court, or for lower federal courts, to determine what constitutional rules are truly "new." To prove the point, he spent several pages in *Desist* reviewing recent Supreme Court decisions in an effort to determine whether conscientious state courts, acting in faithfulness to the spirit of previous Court decisions, would have anticipated

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57. *See, e.g.*, Kaufman v. United States, 394 U.S. 217 (1969) (holding the fourth amendment exclusionary rule applicable to post-conviction relief proceeding under 28 U.S.C. § 2255).

58. *Mackey*, 401 U.S. at 694 (Harlan, J., concurring in the judgment).

59. *Id.* at 687.

60. *See supra* text accompanying note 55.

61. *Mackey*, 401 U.S. at 693.

the rules established by the new decisions before they were handed down.[62] Justice Harlan believed this effort, no matter how difficult, to be worth the cost. As he pointed out, a habeas retroactivity doctrine that did not require state courts to anticipate at least some extensions or applications of previous Court decisions would be simpler. The simplicity, however, "would be purchased at the cost of compromising the principle that a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction."[63]

The rest of the Court did not choose to follow Justice Harlan's lead in the area of habeas retroactivity. In fact, after 1971, the Court's focus in habeas cases involving "new law" claims shifted from the retroactivity issue to the issue of procedural default.[64] In 1977, the Court decided *Hankerson v. North Carolina*[65] and *Wainwright v. Sykes*,[66] two habeas cases dealing with "new law" claims. In *Hankerson*, the Court followed a *Linkletter* analysis and held that the rule in *Mullaney v. Wilbur*,[67] that the prosecution is constitutionally required to prove all elements of a crime beyond a reasonable doubt, applies retroactively in habeas cases. But the Court hinted in a footnote that the states could insulate their convictions from such retroactive effect "by enforcing the normal and valid rule that failure to object to a jury instruction [at the original trial] is a waiver of any claim of error."[68]

Later that year, in *Wainwright v. Sykes*, the Court partially implemented the *Hankerson* footnote. *Sykes* held that federal habeas courts may not hear the merits of a claim that would be procedurally barred in state court unless the defendant can demonstrate "cause" and "prejudice" for the procedural default.[69] But the effect of the *Sykes* procedural default doctrine on "new law" claims remained unclear because the Court did not address whether the novelty of a claim not raised at trial would

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62. *Desist*, 394 U.S. at 268 (Harlan, J., dissenting).

63. *Id.*

64. Only Justice Powell continued to raise the concerns about habeas retroactivity that had been articulated by Justice Harlan in *Desist* and *Mackey*. *See* Harlin v. Missouri, 439 U.S. 459, 460 (1979) (Powell, J., concurring); Hankerson v. North Carolina, 432 U.S. 233, 246 (1977) (Powell, J., concurring in the judgment).

65. 432 U.S. 233 (1977).

66. 433 U.S. 72 (1977).

67. 421 U.S. 684 (1975).

68. *Hankerson*, 432 U.S. at 244 n.8.

69. 433 U.S. at 87.

constitute "cause" for the defendant's procedural default. Five years later, in *Engle v. Isaac*,[70] the Court stopped short of adopting the *Hankerson* footnote. *Isaac* rejected a novelty argument on the alternative ground that the allegedly new claim, although not accepted in the defendant's state at the time of the trial, had been raised in other cases and thus the defendant's lawyer should have raised it as well.

In 1984, the Court finally faced the novelty/procedural default issue squarely, resolving the issue in favor of habeas petitioners with defaulted claims. In *Reed v. Ross*,[71] the Court held, contrary to the *Hankerson* footnote, that petitioners whose convictions had become final prior to *Mullaney* could still raise *Mullaney* claims on habeas, regardless of the procedural default rule. According to the Court, "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures."[72]

After *Reed v. Ross*, the states could no longer hope to avoid the potentially disruptive effect of new constitutional criminal procedure decisions on "old" convictions by invoking the procedural default rule in federal habeas cases. Then, in 1987, the longstanding use of the *Linkletter* test to determine retroactivity in direct review cases abruptly came to an end[73] when the Court in *Griffith v. Kentucky*[74] finally adopted Justice Harlan's view that new rules of constitutional criminal procedure should apply retroactively to all cases then pending on appeal. These two decisions set the stage for the Court's reconsideration of the habeas retroactivity issue in the 1989 cases of *Teague v. Lane* and *Penry v. Lynaugh*.

In *Teague* and *Penry*, the Court rejected the *Linkletter*

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70. 456 U.S. 107 (1982).

71. 468 U.S. 1 (1984).

72. *Id.* at 16.

73. The end of the *Linkletter* test for direct review cases had been foreshadowed in United States v. Johnson, 457 U.S. 537 (1982), where the Court held that the fourth amendment rule established in Payton v. New York, 445 U.S. 573 (1980), which held that police cannot enter a suspect's home to make a routine felony arrest without a warrant, applies retroactively to all cases pending on appeal at the time *Payton* was decided. The *Johnson* Court relied heavily on the *Linkletter* opinion, which had limited its retroactivity analysis to habeas cases, and on Justice Harlan's views in *Desist* and *Mackey*. *Johnson* 457 U.S. at 554-55. The *Johnson* Court expressly limited its holding to the fourth amendment context, and did not address the retroactivity of new fourth amendment rules in habeas cases.

74. 479 U.S. 314 (1987).

doctrine, which applied only to new rules that represented "clear breaks with the past" and which required a rule-by-rule determination of retroactivity in habeas cases. In its place, the Court adopted a broadly applicable doctrine of non-retroactivity. Justice O'Connor, writing for a plurality of the Court in *Teague*[75] and for a majority in *Penry*, declared that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[76] She also redefined a "new rule," for retroactivity purposes, as one that "breaks new ground or imposes a new obligation on the States or the Federal Government."[77] Citing the Court's decisions in *Rock v. Arkansas*[78] and *Ford v. Wainwright*[79] as examples, she wrote that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[80] Lastly, she stated that retroactivity is a threshold question that must be resolved before a federal habeas court can reach the merits of the particular issue in question.[81]

Justice O'Connor's opinions in *Teague* and *Penry* recognized three exceptions to the Court's doctrine of non-retroactivity: (1) new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,"[82] (2) new rules "without which the likelihood of an accurate conviction is seriously diminished,"[83] and (3) new rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense."[84] The first of these exceptions is identical to the "substantive due pro-

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75. In *Teague*, six members of the Court, including the Chief Justice and Justices Blackmun, Stevens, O'Connor, Scalia, and Kennedy, agreed with the view that "new" constitutional rules of criminal procedure generally should not apply retroactively in habeas cases. However, only three Justices, the Chief Justice and Justices Scalia and Kennedy, joined those portions of Justice O'Connor's lead opinion that are relevant to the subject of this article.

76. Teague v. Lane, 109 S. Ct. 1060, 1075 (1989) (opinion of O'Connor, J.).

77. *Id.* at 1070. Justice O'Connor noted, however, that this decision was not an "attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes." *Id.*

78. 483 U.S. 44 (1987).

79. 477 U.S. 399 (1986).

80. *Teague*, 109 S. Ct. at 1070 (opinion of O'Connor, J.) (emphasis in original).

81. *Id.* at 1069-70. *See also* Penry v. Lynaugh, 109 S. Ct. at 2944, 2952.

82. *Teague*, 109 S. Ct. at 1073 (citing *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in the judgment)).

83. *Teague*, 109 S. Ct. at 1077 (opinion of O'Connor, J.).

84. *Penry*, 109 S. Ct. at 2953.

cess" exception articulated by Justice Harlan in *Mackey*.[85] The second exception resembles Justice Harlan's *Desist* exception for new rules that improve fact-finding,[86] but the resemblance is only skin-deep. In *Teague*, Justice O'Connor explained that this exception should be reserved for such "classic" habeas grounds as the corruption of a trial by mob violence.[87] She also stated that this exception would likely apply to only a handful of new rules.[88] Finally, the third exception deals primarily with new rules that govern the administration of the death penalty. This exception was adopted in *Penry*, which held that *Teague* applies to capital sentencing proceedings.[89]

The latest Supreme Court decision interpreting the *Teague* habeas retroactivity doctrine was handed down on March 5, 1990. In *Butler v. McKellar*,[90] Chief Justice Rehnquist, writing for a majority of the Court, shed further light on the meaning of "new law." The Chief Justice declared that the definition of "new law," as announced in *Teague*, "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[91] If at the time a defendant's conviction became final the applicability of a particular rule of criminal procedure "was susceptible to debate among reasonable minds,"[92] as evidenced by a split of authority among lower courts, then the state court "reasonably" could have decided the issue either way. In such a case, according to the *Butler* Court, a habeas court may not set aside the defendant's conviction based on the state court's resolution of the issue in dispute.[93] Even if the state court reached the

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85. *See supra* text accompanying note 59.

86. *See supra* text accompanying notes 54-55.

87. *Teague*, 109 S. Ct. at 1077 (opinion of O'Connor, J.).

88. As Justice O'Connor put it, "we believe it unlikely that many such components of basic due process have yet to emerge." *Id.*

89. *Penry*, 109 S. Ct. at 2944.

90. 58 U.S.L.W. 4294 (1990). On the same day that *Butler* was announced, the Court also handed down its decision in *Saffle v. Parks*, 58 U.S.L.W. 4322 (1990), another habeas retroactivity case. In *Parks*, the Court did not elaborate further on the *Teague* doctrine, but simply applied the doctrine to bar a habeas petitioner's claim that the eighth amendment requires allowing a capital sentencing jury to base its sentencing decision on sympathy generated by the defendant's introduction of mitigating evidence. *See Parks*, 58 U.S.L.W. at 4323-4325.

91. *Butler*, 58 U.S.L.W. at 4296.

92. *Id.* at 4297.

93. *Id.* at 4296. The *Butler* majority evidently felt it was unnecessary even to consider the possibility that one side of the debate among the lower courts may have involved an "unreasonable" interpretation of existing federal precedent. *See id.* at 4299 n.5

wrong result, in light of subsequent decisions, it did so "in good faith" and requires no habeas "deterrence" message.

III. Why Congress Should Ratify the Main Premise of *Teague*

Because federal habeas review of state criminal convictions is purely a creature of statute, it would be natural for Congress to want to express its views about the Court's new habeas retroactivity doctrine. Justice White, concurring in *Teague*, called for just such a congressional response, noting that "[i]f we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us."[94] And in *Butler*, Justice Brennan sharply criticized the *Teague* doctrine and hinted that Congress might be an appropriate forum in which to overturn it.[95]

There is, indeed, much to criticize about the Court's decisions in *Teague*, *Penry*, and *Butler*.[96] But the flaws in the Court's decisions should not obscure the merit of the basic approach to habeas retroactivity proposed by Justice Harlan in the 1960's, and adopted by the Court in *Teague*. The Harlan approach, if properly implemented, need not conflict with the nature and purpose of the statutory writ.

An evaluation of the new habeas retroactivity doctrine announced by the Court in *Teague* necessarily begins with the question whether this change in the Court's approach represents a step forward or a step back from the *Linkletter* approach. In *Teague*, Justice O'Connor identified several reasons for rejecting *Linkletter*. First, she noted that the *Linkletter* test was complicated and confusing. Second, she pointed out that similarly situated habeas petitioners often were treated differently under *Linkletter* because of disagreements in the lower federal courts over the retroactive effect of a new Supreme Court decision. These

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(Brennan, J., dissenting). *See also Saffle*, 58 U.S.L.W. at 4325 n.2 (Brennan, J., dissenting).

94. *Teague*, 109 S. Ct. at 1079 (White, J., concurring in part and concurring in the judgment).

95. *See Butler*, 58 U.S.L.W. at 4301 (Brennan, J., dissenting) ("It is Congress and not this Court who is 'responsible for defining the scope of the writ.' ") (citations omitted).

96. *See infra* Section IV.

problems, according to Justice O'Connor, militated in favor of a simpler rule.[97]

The main reason given by Justice O'Connor for replacing the *Linkletter* test, however, was a purely theoretical one: If the purpose of federal habeas is to deter state courts from committing constitutional error, then the purpose is not served by the application in a habeas case of "new law" declared after the state courts have finished reviewing the case on appeal. Thus, assuming the state courts have acted properly under the procedural standards that existed at the time of their review, their decision should not be subject to reversal by a federal habeas court simply because the standards have subsequently changed.[98]

Justice O'Connor's theoretical argument in *Teague* employed unassailable logic, but rested on a flawed premise. Justice O'Connor had no basis for concluding, as she wished to do, that *the* purpose of federal habeas is to deter state courts from committing constitutional error. Such deterrence is surely *one* purpose of federal habeas, as courts and commentators have long recognized. At the same time, it has also been recognized that federal habeas serves the separate and vital historic purpose of vindicating the federal constitutional rights of the individual petitioner—a purpose that Justice O'Connor chose to overlook in *Teague*. This "vindication of federal rights/protection of liberty" purpose often coincides with the "deterrence of state courts" purpose. But where the two purposes diverge, as in the habeas retroactivity context, nothing in the history or nature of federal habeas suggests that the "deterrence" purpose inevitably should prevail.[99]

Justice O'Connor's *Teague* opinion failed to adequately address the fundamental policy question whether the *Linkletter* test should be replaced by Justice Harlan's proposed doctrine of non-retroactivity. By treating the answer to this question as self-evident, Justice O'Connor missed the chance to point out some very significant advantages that follow directly from Harlan's approach to the habeas retroactivity issue.

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97. *Id.*

98. *Id.*

99. *See* Hoffmann, *supra* note 21, at ____.

A. The Special Costs of Federal Habeas Review in Habeas Cases Involving "New Law" Claims

There are two reasons why the Harlan approach to habeas retroactivity is superior to the *Linkletter* approach, and why Congress should therefore ratify the main premise of *Teague*. The first reason is that the Harlan approach to habeas retroactivity excludes from the scope of federal habeas review a category of habeas petitions for which the costs of such review are not only significant, but unusually so, in terms of the important values of finality and federalism.

1. The finality of state convictions

The costs of federal habeas review, in general, include the adverse impact on the finality of state convictions and the resulting intrusion upon the values of federalism and comity. The first of these costs, finality, is susceptible to limited quantitative analysis. As the late Professor Paul Bator once noted, one of the primary reasons for valuing finality is that it permits the "[c]onservation of . . . all of the intellectual, moral and political resources involved in the legal system."[100] The time and energy of those who serve on the federal bench are an important part of the resources referred to by Professor Bator.

Federal district and appellate judges have long complained about the burden of reviewing federal habeas petitions, and this burden has apparently increased significantly during the years since the original habeas retroactivity debate during the 1960's. Although separate statistics on federal habeas corpus petitions were not kept until 1971, the Bureau of Justice Statistics has estimated that the total number of federal prisoner petitions filed by state prisoners increased 700% between 1964 and 1984.[101] In 1987, state prisoners filed some 9,542 petitions seeking federal habeas relief.[102]

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100. Bator, *supra* note 9, at 451-52.

101. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: FEDERAL REVIEW OF STATE PRISONER PETITIONS HABEAS CORPUS 2 (1984) [hereinafter BUREAU OF JUSTICE STATISTICS].

102. *See* DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF 1987. During the same year, federal prisoners filed 1,808 petitions for post-conviction review and 1,664 motions to vacate sentence. *Id.*

At the same time that federal habeas filings by state prisoners have increased, federal criminal proceedings have begun to occupy a much larger share of the caseload in the federal courts. Federal crimes have multiplied in both numbers and complexity since

Several recent studies demonstrate that a major component of the increase in federal habeas petitions is due to successive filings by a small number of petitioners. For example, in the 1984 study by the Bureau of Justice Statistics, 30% of all state prisoners who filed federal habeas petitions had filed at least one previous petition.[103] And a 1977 American Bar Foundation report noted that the "high activity of collateral attacks perceived by the various authorities stems from a high number of filings generated by a small proportion of prisoners."[104]

There are no statistics on how many of these successive petitions are based on "new law" claims. But even if the percentage of "new law" cases is less than half the total number of successive petitions, this would constitute a significant subset of all federal habeas petitions. Moreover, successive petitions based on "new law" claims, which by definition must await the declaration of "new law," are far more likely than most habeas petitions to involve convictions that became "final" many years before the "new law" was declared. If successful on habeas, the petitioners who file such petitions are the most difficult ones for state officials to retry because their cases are the most stale. It is in this sense that the finality costs of federal habeas review are more burdensome for the "new law" category of habeas petitions than for almost any other category.

The Court's adoption of Justice Harlan's basic approach to habeas retroactivity in *Teague* will reduce the burden imposed upon the federal courts by successive filings of federal habeas petitions by the same petitioners. *Teague* makes it harder for a petitioner to present a colorable constitutional claim in a second or subsequent habeas petition. Under *Teague*, such a petition generally will have to be based on the same standards of constitutional criminal procedure as the petitioner's first habeas peti-

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the 1960's, particularly in the area of anti-drug laws. New kinds of complicated federal criminal statutes, such as RICO and the CCE laws, have been enacted. Perhaps most significantly, the recent adoption of the federal sentencing guidelines has dramatically impacted the workload of the federal courts. The overall net effect of these changes has led at least some federal district judges to complain that criminal cases, including habeas cases, have completely taken over their docket to the virtual exclusion of civil matters. *See* Robel, *Caseload and Judging: Judicial Adaptions to Caseload*, 1990 B.Y.U. L. REV. 3 (summarizing results of survey of federal district judges).

103. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 101, at 6.

104. Avichai, *Collateral Attacks on Convictions (1): The Probability and Intensity of Filing*, 1977 AM. B. FOUND. RES. J. 319, 347 (1977). *See also* Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 315 (1947) (increases in prisoner filings largely due to successive petitions filed by the same prisoners).

tion, namely, the standards that existed at the time of the original state proceedings.

Teague thus permits a habeas court to deal expeditiously with any second or subsequent petitions that might be filed by a litigious inmate. If a petitioner raises a claim in his second petition that was also contained in his first petition, Rule 9(b), which deals with repetitive claims in successive habeas petitions, will allow a quick dismissal of the petition.[105] If, on the other hand, the petitioner raises a claim in his second petition that was not included in his first petition, such a claim will necessarily be based either on "old" law or on "new" law. If the claim is based on "old" law, which means that a state judge should have known of the existence of the relevant constitutional rule at the time of the original state proceedings, then it is very likely that the petitioner should have included the claim in his first federal habeas petition. Having failed to do so, the doctrine of "abuse of the writ," also expressed in Rule 9(b), will generally permit a quick dismissal of the petition. Finally, if the claim is based on "new" law, the habeas court need only consider, as a threshold matter, whether the claim fits within one of the recognized exceptions to the general rule of non-retroactivity.

2. *The values of federalism and comity*

Federal collateral review also creates the potential for significant friction between state and federal courts, thereby implicating the values of federalism and comity. It is, however, difficult to weigh these values. Federalism and comity have always been important to our legal system, but it may not be possible to quantify their importance. Nevertheless, some observations can be made about the relationship between habeas retroactivity and the values of federalism and comity.

As Justice O'Connor, a former state judge, recognized in *Teague*, it is not the mere possibility of reversal that engenders hostility on the part of state courts.[106] After all, the possibility of

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105. Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts provides that a second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ. *See also* Sanders v. United States, 373 U.S. 1 (1963).

106. "In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions . . . '[s]tate courts are under-

reversal on direct review is often much greater than that on collateral review. Nor is it the fact that reversal on habeas occurs through the command of a federal court; such a result is always possible, albeit less likely, at the hands of the Supreme Court on direct review. Rather, it is the *way* in which the reversal usually occurs on habeas that is particularly likely to rankle a state judge.

No judge likes to be reversed. But when reversal occurs on direct review, a few months or so after the trial, the pain of being reversed is likely to be accompanied by a feeling that at least the review process was a fair one. That is, the trial judge knows that he or she had about the same opportunity as the reviewing court to consider the relevant precedents and other authorities and to choose an appropriate outcome. More often than not, trial judges make the "right" choice, *i.e.*, the same one as made by the reviewing court. If not, the trial judge can chalk it up to an honest mistake and move on to the next case.

Whenever a state conviction is reversed by a federal court on a writ of habeas corpus, however, the state judge may feel "judged," with or without an explicit statement to that effect by the federal court. A reversal on habeas is likely to send the state judge an implicit message that he or she has not "toe[d] the constitutional mark,"[107] because the Supreme Court has emphasized on many occasions that federal habeas serves *both* to vindicate constitutional rights *and* to deter state courts from committing constitutional error.[108]

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standably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.' " *Teague*, 109 S. Ct. at 1075 (opinion of O'Connor, J.) (quoting Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982)).

107. Mackey v. United States, 401 U.S. 667, 687 (Harlan, J., concurring in the judgment). Judge Ruggero Aldisert, formerly of the Third Circuit, has criticized the Supreme Court for failing to send a clear message to state courts in federal habeas cases:

> *Fay v. Noia* is a classic example of a Supreme Court opinion that did not express publicly the true motivation for its decision. A distrust of state court fact-finding and a lack of confidence that state courts would vindicate the constitutional rights of unpopular litigants, namely those convicted of crime, were the unexpressed motivations for the decision.

Aldisert, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 821, 835 (1981).

108. During the 1960's, the Court was not always completely honest about its motivations in expanding the availability of federal habeas. Later, however, Justice Brennan admitted, for example, that "[e]nforcement of *federal* constitutional rights that redress constitutional violations directed against the 'guilty' is a particular function of *federal* habeas review, lest judges trying the 'morally unworthy' be tempted not to execute the

From the viewpoint of a state judge, the judgment rendered by a federal court in a habeas case involving a "new law" claim is not likely to be fair. If a new constitutional rule applies retroactively, then the federal court will review the decision made by the state court with the benefit of twenty-twenty hindsight. New precedents will have been issued and new secondary authorities will have been published. Consequently, whenever a federal court overturns a state conviction in a habeas case involving a "new law" claim, the state judge is likely to feel that his or her best attempt to make the "right" choice, based on the materials and information available at the time, is unappreciated, and impliedly if not expressly criticized by the federal habeas court.

The Harlan approach to habeas retroactivity, as adopted by the Court in *Teague*, makes a finding of retroactive application less likely than under the *Linkletter* test. Therefore, the majority of habeas cases after *Teague* will involve review of the state court's decision in light of the law that existed at the time the original decision was rendered. Habeas review will thus more closely resemble the kind of review that occurs on appeal, in which the appellate court stands in the same shoes (in terms of the available precedent and secondary authorities) as the trial court. If, as suggested by Justice O'Connor, state judges see this kind of review process as more fair, then the *Teague* doctrine is more likely than the *Linkletter* test to serve the values of federalism and comity.

B. The Advantages of Establishing a Hierarchy of Habeas Claims Based on Relative Merit

There is a second and even more important reason for Congress to ratify the main premise of the Court's decision in *Teague*. The Harlan approach to habeas retroactivity, adopted by the Court in *Teague*, represents an essential step toward allocating federal habeas review according to the relative worth of a habeas petitioner's claim for relief. In this regard, *Teague* is a major departure from the recent history of federal habeas, in which the chance to obtain habeas review often has depended on procedural technicalities having little or nothing to do with the worth of the underlying claim.

There is undeniably some value in applying "new" constitu-

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supreme law of the land." Stone v. Powell, 433 U.S. 465, 525 (1976) (Brennan, J., dissenting).

tional rules of criminal procedure to the benefit of all defendants, including those whose convictions have already become "final." As Justice Harlan acknowledged in *Mackey*, retroactive application of such new constitutional rules on habeas

> tends to assure a uniformity of ultimate treatment among prisoners; provides a method of correcting abuses now, but not formerly, perceived as severely detrimental to societal interests; and tends to promote a rough form of justice, albeit belated, in the sense that current constitutional notions, it may be hoped, ring more 'correct' or 'just' than those they discarded.[109]

At the same time, it is highly desirable for both the Court and Congress to recognize the basic principle that not all claims for habeas relief are created equal. This principle applies both in the context of retroactive application of "new law" and to habeas cases generally. Even under the *Linkletter* test not all new constitutional rules were given retroactive effect on habeas. The issue is not whether drawing a distinction between different classes of habeas claims or claimants is appropriate; such distinctions have always been drawn.[110] Instead, the question is, what kind of distinction should be drawn?

The Harlan retroactivity doctrine draws, for the most part, a principled distinction between different categories of habeas claims and claimants. Under almost any reasonable view of the purpose of federal habeas, one of the strongest claims for habeas relief belongs to those petitioners whose constitutional rights were denied because the state courts knew the governing federal law, but deliberately chose not to obey it. Only slightly less strong are the claims of those petitioners whose rights were denied because the state courts were ignorant of the governing federal law, even though such law was well-established at the time

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109. *Mackey*, 401 U.S. at 689 (Harlan, J., concurring in the judgment).

110. The idea of establishing a hierarchy of habeas claims is not incompatible with the historic role of the Great Writ. Even the most loyal defenders of the writ have agreed that its use is limited to the most serious kinds of violations of a petitioner's rights. For example, as Justice Brennan wrote in *Fay v. Noia*: "It is of the historical essence of habeas corpus that it lies to test proceedings *so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void.*" 372 U.S. 391, 423 (1963) (emphasis added). According to Justice Brennan, federal habeas provides a remedy for "persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Id.* at 441. These statements, although expressed in an opinion that expanded the availability of federal habeas, suggest that at least some differentiation between habeas petitioners on the basis of the relative worth of their respective claims is appropriate.

of the original state proceedings. These categories of habeas claims warrant relief more than any other claim, except that of true factual innocence,[111] because they involve situations in which the petitioner's rights were denied *and* the state court misbehaved badly. Appropriately, petitioners who raise such claims are entitled to habeas relief under the Harlan approach, because their claims are not based on "new law."

Within the category of habeas claims based on law that *is* "new," the three exceptions to the habeas retroactivity doctrine recognized by Justice O'Connor in *Teague* and *Penry*[112] establish additional levels of relative worth. Under *Teague* and *Penry*, those petitioners whose claims are based on new rules that impose substantive limitations on the state's power either to convict or to punish are entitled to habeas relief, as are those petitioners whose claims are based on new rules that seriously affect the likelihood of an accurate conviction. Whatever might be said about other potentially worthy habeas claims or claimants, these three exceptions encompass situations in which claims for habeas relief based on a change in the governing law are strong, despite the absence of a need to "deter" the state courts.

These exceptional categories of "worthy" habeas claims should be expanded.[113] Nevertheless, *Teague* at least represents an attempt to base the availability of habeas relief on relative worth, rather than on the basis of extraneous factors such as the quality of the petitioner's trial attorney (a factor that has become increasingly important in the application of the Court's procedural default doctrine[114]). *Teague* is superior in this regard to the *Linkletter* test, which permitted denial of habeas relief on the grounds that retroactive application of a new rule, no matter how vital to petitioners, would be too "disruptive" of state justice administration.

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111. *See* Note, *Resolving Retroactivity after Teague v. Lane*, 65 IND. L.J. ____ (1990). The Note argues for an additional exception to the *Teague* doctrine to deal with individual cases in which a petitioner can demonstrate that the adoption or application of "new law" by a habeas court is necessary to avoid a fundamental miscarriage of justice, *i.e.*, the continued confinement of a prisoner who is probably factually innocent. The proposed exception is a sound one, and would bring the *Teague* doctrine into conformity with the Court's existing doctrine of procedural default, which already contains such an exception. *See* Murray v. Carrier, 477 U.S. 478, 496 (1986).

112. *See supra* text accompanying notes 82-84.

113. *See infra* notes 128-34 and accompanying text.

114. *See supra* text accompanying notes 64-73.

If federal habeas were costless, habeas relief could perhaps be granted to all petitioners whose constitutional rights have been violated. But, as noted previously,[115] federal habeas is not costless. The primary advantage of the Harlan approach to retroactivity as a means of limiting habeas litigation, and the advantage that makes Congressional ratification of the main premise of *Teague* so desirable, is that the Harlan approach distinguishes between habeas petitioners on the basis of the relative worth of their respective claims. The Harlan approach grants habeas relief in the most important categories of habeas claims and denies habeas relief only to those petitioners who seem comparatively least deserving of it. By setting up a hierarchy of habeas claims based on relative worth, the Harlan approach minimizes its own potential negative impact upon the writ's ability to protect the rights of defendants.

By adopting the Harlan approach to habeas retroactivity, the *Teague* Court took a desirable step in the direction of drawing principled distinctions between habeas claimants based on the relative worth of their claims. However, it should not be the last step. Rather, the Court should apply the same "relative worth" reasoning to a number of its recent habeas decisions, most prominently the line of procedural default cases beginning with *Wainwright v. Sykes*.[116] Surely, as between a petitioner whose trial was conducted in accordance with all then-applicable federal constitutional standards and one whose trial was botched as a result of defense counsel's errors, the latter petitioner is more deserving of habeas relief than the former.[117] Now that *Teague* has excluded the former category of petitioners from the scope of federal habeas, the Court should revisit the question whether petitioners in the latter category should be entitled to habeas relief. Because *Teague* reduces the time habeas courts must spend reviewing relatively worthless second and subsequent petitions, it should "free up" those courts to review potentially worthwhile claims that have been procedurally defaulted by the errors of the petitioner's trial attorney.

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115. *See supra* notes 100-08 and accompanying text.

116. 433 U.S. 72 (1977).

117. For an insightful critique of the Court's current procedural default docrine, see Jeffries & Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. ___ (1990).

IV. Why Congress Should Modify Certain Aspects of *Teague*

The major problem with the Court's decisions in *Teague*, *Penry* and *Butler*, which virtually compels prompt congressional remedial action, is that the Court did not implement the balanced approach to habeas retroactivity as proposed by Justice Harlan in the 1960's. As noted previously, the Court substantially altered certain crucial aspects of the Harlan approach. These changes threaten to impede the ability of the statutory writ to perform its vital role of vindicating the federal constitutional rights of state prisoners. Congress must act quickly to restore the relevant aspects of Justice Harlan's original views about habeas retroactivity.[118]

A. Modifying the Definition of "New Law:" What is the Proper Standard of Care for State Judges Deciding Federal Constitutional Issues?

One of the key elements of the Court's new habeas retroactivity doctrine is its broad definition of "new law."[119] In *Teague*, *Penry*, and *Butler*, the Court defined "new law" quite differently

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118. A secondary reason for congressional action is simply to clarify the new *Teague* doctrine. Almost all Supreme Court rulings produce at least some uncertainty as the lower courts adjust their practices to conform to the new ruling. *See generally* Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 Duke L.J. 1. But the opinions in *Teague*, *Penry*, and *Butler* are especially confusing and complex, and are thus virtually certain to span much litigation over the next several years as habeas courts around the country attempt to sort them out. Prompt action by Congress may save hundreds or even thousands of federal judge-hours, by removing at least some of the uncertainty surrounding the meaning and scope of the *Teague* doctrine.

Perhaps most troubling for lower courts attempting to figure out the *Teague* doctrine is the very fact that the Court lined up the way it did in *Teague*, *Penry*, and *Butler*. The Court is obviously deeply divided over many aspects of the habeas retroactivity issue. Chief Justice Rehnquist and Justices White, Scalia, and Kennedy seem to prefer a general approach that would bar all but the most obvious claims of state-court misconduct, while Justices Brennan, Marshall, Blackmun, and Stevens oppose much of what was contained in *Teague*, including the definition of "new law," the scope of the exceptions, and the treatment of retroactivity as a threshold issue. Justice O'Connor stands in the middle, attempting to steer a straight course while being buffeted from both sides. This is not the kind of situation that portends a happy future for the issue of habeas retroactivity. Rather, it seems obvious that, without help from Congress, the Court is destined to bounce back and forth, as it did from *Teague* to *Penry* to *Butler*, with shifting majorities deciding particular cases but failing to provide either doctrinal clarity or consistency of results. In short, if the lower courts are having trouble making sense out of the *Teague* doctrine now, they had better not count on the Court to help them anytime soon.

119. *See* Hoffmann, *supra* note 19, at ____.

from the "clear break" standard that had previously been used in connection with the *Linkletter* test.[120] "New law," as defined in *Teague* and *Penry*, is the result of any case that "breaks new ground or imposes a new obligation on the States or the Federal Government,"[121] or in which "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." [122] In *Butler*, the Court went even further, defining "new law" by reference to a "reasonable good-faith" standard. Under *Butler*, unless a state court acts "unreasonably" or "in bad faith," there is no basis for reversal of the state court's judgment by a habeas court.

Beneath the definition of "new law" lurks a crucial question that will determine the ultimate impact of *Teague* on the future of the statutory writ: what is the appropriate standard of care for state courts deciding federal constitutional issues? The suggestion in *Teague*, *Penry*, and especially *Butler*, is that the current Court expects extremely little of state courts. All that state courts need do, in order to avoid reversal on habeas, is to obey the most obvious federal constitutional precedents.

Surely, however, the Court can and should expect more from state courts than simply the ability to read headnotes and follow clear, binding federal precedents. The words of Justice Harlan in *Desist* provide a far more reasonable and balanced approach to the issue of "new law." In a footnote responding to Justice Fortas's dissent, Justice Harlan suggested he would be willing to accept the idea that "it is proper for a habeas court to require 'conceptual faithfulness' to our opinions and 'not merely decisional obedience' to the rules they announce."[123]

As Justice O'Connor wrote in *Teague*, "[i]t is admittedly often difficult to determine when a case announces a new rule."[124] A definition of "new law" based on "binding precedent" and "reasonable good faith" might be more workable than a definition that requires a careful analysis of extensions of prior cases. As Justice Harlan pointed out, however, simplicity ought not be purchased "at the cost of compromising the principle that

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120. *See* Note, *United States v. Johnson: Reformulating the Retroactivity Doctrine*, 69 CORNELL L. REV. 166, 176-78 (1983) (discussing the "clear break" threshold inquiry in retroactivity cases under the *Linkletter* test).

121. *Teague*, 109 S. Ct. at 1070 (Opinion of O'Connor, J.).

122. *Id.* (emphasis in original).

123. Desist v. United States, 394 U.S. at 265-66 n.5 (Harlan, J., dissenting) (quoting *id.* at 277 (Fortas, J., dissenting)).

124. *Teague*, 109 S. Ct. at 1070 (opinion of O'Connor, J.).

a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction."[125]

Even though the contours of "new law," under either approach, will need to be fleshed out via the common-law judicial process,[126] Congress can speed the process along by enacting a definition of "new law" based on Justice Harlan's original *Desist* language.[127] Such a definition will (1) ensure that state judges

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125. *Desist*, 394 U.S. at 268 (Harlan, J., dissenting).

126. The purpose of proposing legislation to modify the Court's definition of "new law" is not to resolve the question once and for all, but instead to send a message to the Court that Justice Harlan's views in *Desist* about the role of a state judge are more appropriate than those expressed by the Court in *Teague*, *Penry*, and *Butler*. The Court will no doubt develop a full-fledged body of precedent on the subject of "new law," and will not long be constrained by the language of any particular habeas reform statute. But, at least by enacting such a statute, Congress can ensure that the Court will start its evolution from a point closer to Justice Harlan's position.

The issue of "new law" in the habeas retroactivity context parallels, but is not the same as, two definitional issues in the contexts of *Reed v. Ross* "novelty" habeas claims, *see supra* notes 70-72 and accompanying text, and § 1983 qualified immunity cases. The reason the *Reed v. Ross* definition of "new law" should not carry over into the retroactivity context is because of the difference between the kinds of claims we reasonably expect a defendant's attorney to be able to make, and the kinds of claims we reasonably expect a state judge to adopt as part of the governing law.

The analogy between *Teague* and the § 1983 qualified immunity cases is fairly close. In the § 1983 context, as will likely occur in the context of federal habeas, the courts have struggled to define the "novelty" required to exonerate a municipal defendant from liability for failing to obey "new law." The qualified immunity cases, like *Teague*, involve an attempt to define through a common-law process the duties of an individual who is engaged in the interpretation of federal law. One lesson to be learned from the qualified immunity cases is that the "new law" issue, because of its inherent lack of precision, allows the Supreme Court to manipulate the extent of oversight of the decisions of local officials by federal courts. All the Court must do to get its point across to the lower federal courts is reverse several lower-court decisions imposing, or refusing to impose, liability. Similarly, in the habeas context, the Court will be able to increase or decrease the likelihood of federal habeas relief by periodically reviewing the lower courts' interpretations of the term "new law."

127. One indirect effect of returning to the original, narrower view of "new law" expressed by Justice Harlan in *Desist* will be to increase the likelihood that a petitioner's trial attorney might fail to recognize and raise an issue that the petitioner otherwise might have been able subsequently to rely upon for purposes of obtaining federal habeas relief. Because the Court's current definition of "new law" in *Teague* is so broad, its corresponding category of "old" law is necessarily quite narrow, consisting only of those rules and procedures that are "*dictated* by prior precedent." Any minimally competent trial attorney should be able to recognize that a constitutional error has been committed by the trial court under such a broad definition of "new" law. Thus, under Justice O'Connor's view, many petitioners will lose the ability to press meritorious habeas claims because of non-retroactivity, but few petitioners will lose because of their attorneys' mistakes.

Under Justice Harlan's views, the category of "new law" is narrower, and the category of "old" law is correspondingly broader. For example, any rule that a "conscientious" state court would anticipate, based on Supreme Court precedent, constitutes

are held to an appropriate standard of care, (2) narrow the focus of the inevitable litigation over the "new law" issue, and (3) give the Supreme Court and lower federal courts an appropriate place to start the debate over the meaning of "new law."

B. Restoring the Exception for Claims Based on New Procedures that Are "Implicit in the Concept of Ordered Liberty"

Justice Harlan, in *Mackey*, suggested an exception to the general rule of non-retroactivity for those new procedural rules that are "implicit in the concept of ordered liberty."[128] In *Teague*, however, Justice O'Connor severely limited the "ordered liberty" exception to those fundamental procedures without which "the likelihood of an accurate conviction is seriously diminished."[129] By focusing on the guilt-innocence issue, Justice O'Connor denied habeas relief to that class of habeas petitioners whose trials were, by today's standards, "fundamentally unfair," even though the unfairness may not call into doubt the factual accuracy of the petitioners' convictions.

Justice O'Connor's striking of this particular balance between finality and the vindication of constitutional rights is incompatible with the historic role of the writ as a remedy for all fundamentally unlawful detentions. If a habeas petitioner's trial did not comport with what is now believed to be required as one of the so-called "bedrock procedural elements" of fundamental due process, or what is now believed to be "inherent in the concept of ordered liberty," then the mere fact that the missing element did not serve primarily to ensure the factual reliability of the trial should not be used as an excuse to deny habeas relief. Moreover, Justice O'Connor's limitation of the exception is unnecessary; very few new procedural rules that are unrelated to the guilt/innocence determination will constitute "bedrock procedural elements" of due process.

As Justice Stevens explained in his concurring opinion in

"old" law, and is available to a habeas petitioner absent a procedural default. Under the Harlan doctrine, it is more likely that a petitioner's attorney will overlook such "old" law, and thus trigger the procedural default doctrine. This suggests that if the proposed change is enacted, the Court or Congress may have an even more compelling reason to reconsider, within a few years, the extent to which petitioners should be held accountable for the mistakes of their attorneys. *See supra* text accompanying notes 104-05.

128. 401 U.S. at 693 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

129. *Teague*, 109 S. Ct. at 1076-77 (opinion of O'Connor, J.).

Teague, "I cannot agree that it is 'unnecessarily anachronistic' . . . to issue a writ of habeas corpus to a petitioner convicted in a manner that violates fundamental principles of liberty."[130] Congress should restore Justice Harlan's "ordered liberty" exception to its original scope, in order to ensure that the writ will continue to be available to remedy "whatever society deems to be intolerable restraints."[131]

C. *Adding an Exception for Claims Capable of Repetition Yet Evading Federal Review*

The third proposed modification of the *Teague* doctrine is the addition of a new exception along the lines of the well-established exception to the mootness doctrine for claims capable of repetition yet evading review. As noted elsewhere,[132] one of the less visible side effects of *Teague* is that the lower federal courts will be prevented from deciding the merits of "new law" claims on habeas, unless one of the *Teague* exceptions applies. This means, in turn, that at least with regard to *state* criminal cases the lower federal courts will be less involved in the development of new constitutional criminal procedure rules than they were previously.[133]

Teague will not completely foreclose federal review of most constitutional criminal procedure issues arising in state cases, since the Court can always review the merits of such issues on direct review from the state courts, and since the lower federal courts can always make "new law" on appeal in the increasing number of federal criminal cases. But some kinds of claims are by their very nature virtually impossible for a defendant to raise on direct review. For example, claims of ineffective assistance of counsel on appeal, almost by definition, cannot be raised on appeal because the appellate attorney who is alleged to be constitutionally ineffective is very unlikely to raise this issue. Other kinds of claims that might be included in this category are alleged *Brady* violations,[134] jury composition claims, some claims challenging grand jury procedures, claims of intentional prosecutorial misconduct if the evidence of such misconduct did

130. *Id.* at 1081 (Stevens, J., concurring in part and concurring in the judgment).

131. Fay v. Noia, 372 U.S. 391, 401-02 (1963).

132. *See* Hoffman, *supra* note 21, at ____.

133. *Id.* at ____.

134. Brady v. Maryland, 373 U.S. 83 (1963) (holding that a prosecutor must disclose potentially exculpatory evidence to defendant upon request).

not surface until after the appeal was completed, and perhaps even some ineffective-assistance-of-trial-counsel claims.

The need for an exception to the *Teague* doctrine to cover these kinds of claims arises because without it the development of federal constitutional law in these areas would inevitably stagnate. The Supreme Court would have very few cases from which to choose a vehicle for extending or changing the law in these areas, and the lower federal courts, in turn, would be unable to assist in the development of "new law." Congress should therefore enact the proposed exception, not only for the benefit of those habeas petitioners whose cases will be heard on the merits under the exception, but more importantly for the benefit of the federal courts themselves.

V. The Proposal for Congressional Action

Congress should enact habeas reform legislation ratifying the main premise of *Teague* as articulated by Justice O'Connor, but with the aforementioned modifications to ensure the continued fairness and efficacy of federal habeas for state prisoners. Specifically, Congress should amend 28 U.S.C. § 2244 as follows:

> Section 2244 (d) (*NEW*) — Subject to the exceptions set forth in subsection (e) of this section, in a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, the court, justice or judge entertaining the application for a writ of habeas corpus shall evaluate the legality of the detention under the legal standards that had been established by the United States Supreme Court prior to the decision of the State court of last resort affirming the judgment pursuant to which the applicant is in custody. In determining the legal standards applicable at the time of the decision of the State court of last resort, the court, justice or judge entertaining the application for a writ of habeas corpus shall incorporate any extensions or applications of the decisions of the United States Supreme Court that would have been adopted by a State court of last resort acting in conceptual faithfulness to such decisions. The court, justice or judge entertaining the application for a writ of habeas corpus shall determine the applicable legal standards before resolving the merits of the applicant's claim.
>
> Section 2244 (e) (*NEW*) — Notwithstanding the rule set forth in subsection (d) of this section, in a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, the court, justice or judge entertaining

> the application for a writ of habeas corpus shall evaluate the legality of the detention under the legal standards currently in effect if the legal standards either have been changed by the United States Supreme Court since the decision of the State court of last resort affirming the judgment pursuant to which the applicant is in custody, or are proposed by the applicant in the habeas corpus proceeding to be changed, in order to
> (1) place certain individual conduct beyond the power of the criminal law to proscribe;
> (2) prohibit the imposition of a certain kind or amount of punishment against a class of individuals because of their status or offense;
> (3) implement a component of fundamental due process that is implicit in the concept of ordered liberty; or
> (4) satisfy any other requirement of the Constitution or the laws or treaties of the United States, where the claim at issue is the kind of claim that no applicant can reasonably be expected to raise by means of an appeal from the judgment pursuant to which the applicant is in custody, and is therefore the kind of claim that is likely to be reviewable only by means of an application for a writ of habeas corpus.
> The court, justice or judge entertaining the application for a writ of habeas corpus shall determine the applicable legal standards before resolving the merits of the applicant's claim.

The proposed amendment, in section (d), states the general rule derived from *Teague*: federal habeas courts must evaluate the legality of the petitioner's custody in light of the federal law as declared by the Supreme Court at the time of the decision of the state court of last resort affirming the judgment of conviction. Section (d) clarifies the meaning of the term "final,"[135] and also establishes, as does section (e), that a habeas court must determine the applicable law before ultimately resolving the merits of whatever claims are contained in the petition.[136]

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135. As I have noted elsewhere, Justice O'Connor in *Teague* and *Penry* refers to at least three different ways of determining when a state criminal conviction is "final" for retroactivity purposes. *See* Hoffmann, *supra* note 21, at ____. The theoretical underpinnings of *Teague*, however, virtually compel the conclusion that the proper time for determining the applicable law is when the state courts have rendered their final decision affirming the petitioner's conviction on direct review. As Justice Harlan wrote in *Desist v. United States*, "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." 394 U.S. 244, 263 (1969) (Harlan, J., dissenting). A later change in the law is not relevant to the propriety of the decision of the state courts.

136. In Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989), *cert. granted on other issues sub nom.* Sawyer v. Smith, 58 U.S.L.W. 3449 (1990), the *en banc* Fifth Circuit split over

Section (d) narrows the definition of "new law" set forth in *Teague*, *Penry*, and *Butler*, by requiring that the state courts extend and apply existing Supreme Court decisions in "conceptual faithfulness" to such precedents. This language is drawn from Justice Harlan's opinion in *Desist v. United States*,[137] and is intended to capture the sense of the discussion in *Desist* of the novelty of several Supreme Court criminal procedure decisions.

Section (e) contains the exceptions to the general rule of non-retroactivity. Subsection (e)(1) incorporates Justice Harlan's exception for claims based on substantive rules prohibiting the conviction of certain defendants, and subsection (e)(2) contains Justice O'Connor's extension of that exception to punishments. Subsection (e)(3) restores Justice Harlan's original view, expressed in *Mackey*, of an exception for procedures "implicit in the concept of ordered liberty." Finally, subsection (e)(4) contains a new exception for claims capable of repetition yet evading federal review.

VI. The Relationship Between the Proposed Habeas Reform Legislation and Other Federal Habeas Reforms

For the reasons discussed in this article, Congress should move quickly to ratify the main premise of *Teague*, but should also modify those aspects of the *Teague* doctrine that are inconsistent with the important values implicated by federal habeas. Once Congress has accomplished these goals, it should refrain from further substantial reform of federal habeas until the impact of the modified *Teague* doctrine can be more fully studied. The *Teague* doctrine has the potential to reduce, quite signifi-

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the question whether retroactivity should be treated as a threshold issue in habeas cases, or whether a federal habeas court should instead decide the merits of a petitioner's claim first, and address the retroactivity issue only after it decides that the claim has merit. The *Sawyer* majority noted that, in *Teague*, four Justices agreed that retroactivity should be treated as a threshold issue on habeas, four Justices declared that it should not be so treated, and Justice White expressed no opinion on the subject. In *Penry*, on the other hand, Justice White joined a section of Justice O'Connor's opinion that described retroactivity as a threshold issue; the "threshold" question was not a major one in *Penry*, however, and Justice White did not expressly indicate whether he had changed his mind on the subject. The *Sawyer* majority ultimately concluded that, in light of the Court's indecisiveness and the nature of the particular constitutional issue raised by *Sawyer*, retroactivity should not be treated as a threshold issue. *Id.* at 1280-81. The majority proceeded to affirm the district court's denial of habeas relief on retroactivity grounds, finding *Caldwell* inapplicable to the petitioner's habeas case. *Id.* at 1295.

137. 394 U.S. 244 (1969).

cantly, the burdens imposed on the federal courts by review of federal habeas petitions. Moreover, the federal courts will need time to work out the precise contours of "new law" and the exact scope of the exceptions to the *Teague* doctrine. Congress must act promptly to restore the delicate habeas balance that the Court disturbed in *Teague*, *Penry*, and *Butler*; but it should wait to find out more about the impact of the modified *Teague* doctrine before trying to make further adjustments to the balance.

After further study on the effects of the *Teague* doctrine, Congress may want to consider amending the definition of "new law" to increase or decrease the availability of habeas relief, adding more exceptions to the doctrine,[138] or enacting other kinds of federal habeas reform.[139] But the new habeas retroactivity doctrine adopted by the Court, coupled with the legislative modifications proposed in this article, should be sufficient to warrant a temporary moratorium on any further habeas reform.

VII. Conclusion

As Justice Harlan wrote in *Mackey v. United States*:

> In sum, while the case for continually inquiring into the current constitutional validity of criminal convictions on collateral attack is not an insubstantial one, it is by no means overwhelming. Most interests such a doctrine would serve will be adequately protected by the current rule that all constitutional errors not waived or harmless are correctable on habeas and by defining such errors according to the law in effect when a conviction became final. Those interests not served by this intermediate position are, in my view, largely overridden by the interests in finality.[140]

I believe that Justice Harlan was right, and that the adoption of his basic approach to habeas retroactivity has been long overdue. Although the Court in *Teague*, *Penry*, and *Butler* departed from the spirit of some of Justice Harlan's views about habeas retroactivity, Congress can easily modify the Court's new retroactivity doctrine to correct those problems. This article proposes

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138. *See* Note, *supra* note 111, at ____. (proposing an exception to *Teague* for individual cases in which a habeas petitioner can demonstrate probable factual innocence).

139. *See supra* text accompanying notes 104-05 (proposing reconsideration of the Court's procedural default doctrine).

140. 401 U.S. at 691-92 (Harlan, J., concurring in the judgment).

such legislation. Congress should enact the proposed legislation, ratify the main premise of *Teague*, and help the federal courts in their efforts to deal with the lingering problem of habeas retroactivity. No other proposed reform of federal habeas is currently as significant.