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Visions of Habeas

*David McCord**

In an old fable, several sightless persons who do not know what an elephant is like are asked to examine one and describe it. The first person grasps the beast's trunk and opines, "Ah, an elephant is like a fat snake!" A second feels the elephant's ear and concludes, "Clearly, this creature is like a palm frond." Another grabs hold of the critter's leg and chides, "You're all wrong: an elephant is like a tree trunk!" Yet another feels the elephant's side and proclaims, "No, an elephant is like a wall!" The final candidate seizes the elephant's tail and announces, "Fools! An elephant is like a rope!" The fable is, of course, a cautionary tale about the dangers of reasoning to a conclusion based on incomplete information.

There are striking parallels between this fable and attempts to develop a vision concerning the proper role of federal habeas corpus for state prisoners:¹ both the elephant and the writ have dissimilar components, and one's vision of what the beasts look like is highly dependent upon which component one is grasping. But there is also one striking difference between the elephant in the fable and the writ in the real world. Almost everyone is familiar with an elephant, and thus few are likely to be misled by incomplete or inaccurate descriptions of the beast. But hardly anyone is familiar with the writ, and thus many may be vulnerable to faulty visions based on partial or inaccurate information. This vulnerability is particularly intense when those "in the know" concerning the

* Richard and Anita Calkins Distinguished Professor of Law, Drake Law School; B.A. Illinois Wesleyan University; J.D., Harvard Law School. The author extends thanks to his secretary, Karla Westberg, for her tireless efforts in preparation of this manuscript. The research and writing of this Article was supported by a stipend from the Drake Law School Endowment Trust, for which the author is deeply grateful.

1. Federal habeas corpus actions by state prisoners are authorized by 28 U.S.C. §§ 2241, 2254(a) (1988). This Article does not deal with post-conviction petitions by federal prisoners, as to which habeas corpus has been supplanted by a statutory remedy found in 28 U.S.C. § 2255.

writ—primarily Justices of the United States Supreme Court and selected academic commentators—so often choose (with their eyes wide open) the components of the writ that they wish to grasp and then attempt to convince the uninitiated that those components fairly reflect the whole beast.

This Article is written to enable interested non-ideologues (or ideologues willing temporarily to set their proclivities aside) to get a grip on the elusive body of doctrine that constitutes Supreme Court habeas law. In order to attempt to accomplish this formidable task, this Article is divided into three Parts. In Part I, I set forth the theoretical and practical *issues* that underlie the habeas debate. Part II explains eight *visions* of habeas, and examines how each vision deals with the issues set forth in Part I. In Part III, I examine how the eight visions play out in the ten *contexts* that make up the heart of habeas litigation, then in Part IV I will present my conclusion concerning the relative strengths of the eight visions in contemporary habeas jurisdiction. I hope that a reader who persists with this Article to that point will be in a position to understand current habeas doctrine, to assess its validity, and to be able to reach some tentative ideas about which vision(s) the reader believes to be the superior one(s).

I. ISSUES

One of the great difficulties in understanding habeas is recognizing and keeping track of all the different issues. This is difficult because the varied contexts in which the issues arise can obscure the underlying commonalities and sometimes in Supreme Court habeas opinions the *real* issues swim about beneath the facts and the doctrine, surfacing only occasionally like whales coming up for air. The purpose of this Part of this Article is to identify those important issues.

A. *Three Issues of Constitutional Interpretation Not Specific to Habeas, but Important for Habeas Jurisprudence*

It is important to keep in mind that habeas is a *procedural* device for litigating constitutional claims: habeas does not define the *substance* of criminal defendants' rights. That job is performed by constitutional criminal procedure doctrine, which can be promulgated either in direct review cases or in habeas. This Article cannot begin to set forth the law of constitutional criminal procedure or to list all the considerations of constitu-

tional theory that are significant in determining the content of that doctrine. There are three broad issues of constitutional interpretation, though, that while not peculiar to habeas, recur so prominently in habeas jurisprudence that they need to be set forth at the outset: the expansiveness of rights, their balanceability, and their equality.

The issue of *expansiveness* deals with the all-important questions of how *many* constitutional criminal procedure rights should be recognized, and how *broadly* the recognized rights should be interpreted. For example, the liberal members of the Warren Court could be classified as rights-expansionists, while the conservative members of the Rehnquist Court could be called rights-non-expansionists (or, in some instances, rights-contractionists).

As to the issue of *balanceability* of rights, the opposing viewpoints can be defined by imagining a rights-absolutist and a rights-preferrer. A rights-absolutist contends that rights have many attributes that are traditionally ascribed to God: they are all-good, all-powerful, and their power does not diminish over time. Described by a more earthbound analogy, in the card game of the criminal justice system rights are trumps.² This means that rights are *non-balanceable*: if a constitutional violation is proven—even decades after it occurred—the habeas court should issue the writ, turning a deaf ear to any howls from the prosecuting authorities that the state has some important interests on *its* side. To a rights-preferrer, this is too simplistic. While not denying that rights are valuable, a rights-preferrer does not view them as either all-good (they sometimes prevent convictions of lawbreakers), all-powerful (the state has legitimate interests that should sometimes override them), or as not diminishing in power over time (their power wanes as the ability of the state to retry the claimant diminishes). In short, to a rights-preferrer, rights are not always trumps—they must give way when a sufficiently powerful set of interests is balanced against them.

Concerning the *equality* of constitutional rights, we can imagine a rights-equalist and rights-unequalist. A

2. The notion of rights as trumps has been advocated by philosopher Ronald Dworkin. Ronald Dworkin, *Is There a Right to Pornography?*, 1 OXFORD J. LEG. STUD. 177, 200 (1981) ("Rights . . . are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.").

rights-equalist believes that all constitutional rights are of equal value and thus are equally entitled to vindication whenever a violation is proven. By contrast, a rights-unequalist believes that some rights are more valuable than others and that the favored rights are more entitled to vindication in some contexts.

On one end of the ideological spectrum, an arch-liberal with respect to constitutional criminal procedure doctrine will be an expansionist, a rights-absolutist, and a rights-equalist. At the other end of the spectrum, an arch-conservative will be a non-expansionist (or even a contractionist), a rights-balancer, and a rights-unequalist. Less doctrinaire positions will be composed of less absolute positions on these three interpretational issues. The importance of this, for purposes of this Article, is that one's vision of the *procedural* mechanism of habeas is inevitably colored by one's attitude toward the *substantive* rights that are the subject of habeas litigation. Thus, while it is possible to *imagine* an arch-liberal who construes habeas narrowly, or an arch-conservative who views it expansively, such persons do not exist in real life (or if they do, they don't advertise it). Accordingly, toward the outset of the explanation of each of the visions of habeas, I will attempt to illuminate the positions on these three interpretational issues that are held by the proponents of the vision.

*B. A Cluster of Theoretical Issues Specific to Habeas:
Function, History, Federalism, and Congressional
Versus Supreme Court Authority*

I denominate these theoretical issues as a "cluster" to indicate that while they can be separately identified, they are ultimately inseparably intertwined. The first and most important theoretical issue is, quite simply, what *function(s)* is the writ supposed to serve? The issue of function is the ultimate one—the other three issues in this cluster are significant because they may provide some enlightenment concerning the issue of function. The second theoretical issue is, what does the *history* of the writ tell us about its proper function(s)? In habeas law, function and history are like Mary and her little lamb—wherever one goes, the other is sure to follow. The writ's history is fascinating because it clearly illustrates the fable with which this Article began—depending upon which piece of history one grasps, the writ takes on an entirely different character. The third theoretical issue involves an important aspect

of *federalism*: exactly what does the existence of the writ indicate concerning the proper relation between the state criminal justice systems and the federal courts? Indisputably, the existence of the writ says *something* about the relationship, inasmuch as it empowers a federal court to release a prisoner who is in custody pursuant to a state court judgment. The issue of federalism is closely bound up with the issues of the writ's function and history because one basic point on which persons of every visionary stripe can agree is that the Reconstruction Congress, which enacted the basic statute that governs habeas to this day,³ authorized federal courts to issue writs of habeas corpus on behalf of state prisoners because of distrust of state criminal justice systems.⁴ The fourth theoretical issue is *Congressional versus Supreme Court authority* concerning the habeas statutes. A point of agreement among all visions is that federal habeas for state prisoners is a creature of federal statute and that the primary lawmaking authority belongs to Congress.⁵ The habeas statutes are, however, rather

3. 28 U.S.C. § 2241 (1988).

4. See, e.g., William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 426 (1961) ("In 1867, Congress was anticipating Southern resistance to Reconstruction and to the implementation of the post-war constitutional Amendments."); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 752 (1987) ("After the Civil War, Congress feared that southern states would persecute and even literally imprison former slaves."); Stephen A. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367, 375 (1983) ("These contemporaneous statutes indicate that the 1867 habeas corpus Statute was written at a time when Congress distrusted state officers and enacted legislation to secure federal rights, state law notwithstanding.").

5. See Chemerinsky, *supra* note 4, at 780-81 ("[I]t might be argued that . . . the question of parity [between state and federal courts] is one for Congress to resolve."); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 709 (1990) (suggesting that the tradition of judicial innovations with confirmatory statutory amendment "should be presumed to continue unless and until Congress indicates its dissatisfaction"); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2091 (1992) (stressing Congress's purposefulness in amending the habeas corpus statutes); Saltzburg, *supra* note 4, at 384 ("Assuming that limits may be placed on habeas corpus review without violating the Constitution, this judgment is not the Court's to make. Congress makes this judgment when it enacts a habeas corpus statute.").

There is an interesting question of constitutional law whether Congress is obliged to provide federal habeas corpus to state prisoners or could choose to completely abolish such jurisdiction. For a discussion of this issue that comes to the non-traditional answer that Congress could not abolish habeas jurisdiction, see Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional*

bare-boned—they do not address (or address only tangentially or by inference) many of the key questions that arise in habeas litigation. The crux of the Congressional/Supreme Court issue is how far the Supreme Court can go in creating habeas doctrine without crossing the line into illegitimate *judicial* amendment of the statutes.

C. *The Practical Issue: The Effects of Habeas Litigation*

The practical issue of the real-world effects of habeas litigation surfaces less often than do the theoretical issues, but the effects of habeas litigation constitute a very real subtext for the doctrinal issues with which the court wrestles.⁶ To obtain an

Right to Federal Habeas Corpus for State Prisoners?, 92 MICH. L. REV. 862 (1994).

6. Data concerning the number of habeas corpus filings is compiled annually and published by the Administrative Office of the United States Courts in the *Annual Report of the Director*, which are reprinted in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES COURTS. The individual *Annual Reports* will be cited as 19xx ANN. REP. For several reasons these reports are not totally exact, see Charles D. Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. REV. 131, 161 n.165 (setting forth four reasons why the reports are not totally accurate), but the reports still provide the best available picture of habeas corpus activity. The number of habeas corpus filings in 1986 was 10,724. 1990 ANN. REP. 140. For 1987, the number was 11,368. 1991 ANN. REP. 193. For 1988, the figure was 12,059; for 1989, 12,404; for 1990, 13,068; for 1991, 12,019; and for 1992, 12,806. 1992 ANN. REP. 182. While these are fairly large numbers of filings, only a relatively small percentage of them really engages the federal district courts' attention. For example, a 1990 report found that district courts hold hearings in only 1.1 percent of all habeas corpus cases. *Report of the Subcommittee on the Role of the Federal Courts* (Richard A. Posner, Chair), in 1 Federal Courts Study Committee, Working Papers and Subcommittee Reports, 484 (July 1, 1990).

Certainly over 10,000 filings per year is a significant number. Yet some other observations may help put this number in context. For example, according to Professor Daniel J. Meltzer:

One can then estimate (based on numbers dating from the early 1980s to the present) that of every thousand persons convicted in state prosecutions and committed to custody in any given year, only three to four actually file habeas corpus petitions challenging their custody. Of those persons, the studies from the 1970s suggest that only 3.2 percent of petitions, or 7.3 percent of petitioners, actually obtained relief. So of every 100,000 persons committed to state custody, no more than about 30 obtain federal habeas relief.

Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507, 2524 (1993). Further, Professor Weisselberg demonstrated that "habeas corpus filings per state prisoner remained fairly constant from 1945 to 1962, rose dramatically until 1970, and have steadily declined since. In fiscal year 1945, there were 0.47 federal habeas corpus petitions filed per every hundred state prisoners; in 1961, 0.52; in 1970, 5.05; and 1.85 in 1988." Weisselberg, *supra*, at 162-63. Looking at the figures above, habeas filings have held relatively steady for the

overview of these effects, we need to examine the *costs* and *benefits* of both *unsuccessful* and *successful* petitions.

The *costs* of *unsuccessful* petitions can be divided into those costs that are *certain* and those that are *speculative*. It is *certain* that unsuccessful petitions create costs to the prosecuting authorities in having to respond to them and to federal judges in having to dispose of them. As to *speculative* effects, it is possible that crime victims are somehow upset by the continuing litigation of their victimizer. State judges may chafe at the idea that their decisions continue to be grist for federal litigation years after they were rendered⁷ and the relatively few petitioners with meritorious claims may have their claims buried in an avalanche of unmeritorious petitions.⁸ One additional

period 1989 through 1992, which was subsequent to Professor Weisselberg's calculations. Given that prison populations have been increasing yearly during that period, one assumes that the current rate of habeas filings per 100 state prisoners is less than what it was in 1988. These figures give Professor Meltzer pause to consider whether habeas is really a very useful means of ensuring adequate protection of federal constitutional rights in state criminal trials. Meltzer, *supra*, at 2526.

Habeas corpus filings by death penalty petitioners are a different subject. As Professor Meltzer undoubtedly correctly intuit, the percentage of such cases in which petitions are filed is close to one hundred percent. Meltzer, *supra*, at 2525. Further, there is evidence that the success rate of capital petitioners is quite high. Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1044 n.166 (1993) (citing a collection of sources that put the success rate of capital habeas petitioners between 50 percent and 70 percent). There is some room for skepticism about the validity of this reversal rate. Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 182 n.92 ("I am dubious about the validity of statistics that show a 40 to 60 percent reversal rate in death cases on habeas."). There is little room for doubt, however, that a significant percent of death penalty petitioners do have success in habeas.

7. Compare John W. Winkel III, *Judges as lobbyists: Habeas corpus reform in the 1940s*, 68 JUDICATURE 263, 266-72 (1985) (examining the lobbying efforts of state judges in the 1940s to curtail habeas jurisdiction) with Frank J. Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287, 289 (1983) (arguing that by the 1970s criticism of habeas by state judges had subsided, probably mostly because of increased state court willingness to deal with important federal constitutional questions). See also Frank J. Remington, *Restricting Access to Federal Habeas Corpus: Justice Sacrificed on the Altars of Expediency, Federalism and Deterrence*, 16 N.Y.U. REV. L. & SOC. CHANGE 339, 347 (1987-1988) (reasoning that habeas constitutes a limited affront to state judicial autonomy because of the small percentage success rate and the declining percentage of habeas as a part of the federal docket); Weisselberg, *supra* note 6, at 170 (arguing that state court judges should not take offense at habeas jurisdiction since it is part of their duties to willingly submit their decisions to scrutiny by others and because judges are not infallible).

8. As Justice Jackson once put it with respect to habeas, "[h]e who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J.,

cost for death penalty proponents⁹ is quite prominent in habeas jurisprudence: the delay in execution of death penalty petitioners because of their availing themselves of federal habeas petitions.¹⁰

There may be some *benefits* even to *unsuccessful* habeas litigation, but they fall into the realm of the speculative. First, if more constitutional litigation results in better constitutional jurisprudence, then even unsuccessful habeas petitions have some benefit. Second, the ability to bring a habeas petition, even if ultimately unsuccessful, may provide some psychological benefit to petitioners who feel that they have been aggrieved by the state.

As to *successful* habeas petitions, the costs are all the same, but there is a much more certain *benefit*: a prisoner whose constitutional rights have been violated finally has them vindicated.¹¹ This vindication occurs in the form of an order of release from custody or for resentencing.

Having identified the three general issues of constitutional interpretation that bear on habeas jurisprudence, the four theoretical issues specific to habeas corpus and the subtext of the practical effects of habeas corpus litigation, it is now time to examine the eight visions of habeas corpus that are reflected in current Supreme Court jurisprudence and academic commentary.

concurring).

9. For opponents of the death penalty, of course, delay in execution constitutes a benefit of habeas.

10. It may be that the conservative Justices' discontent with habeas as a mechanism to delay executions has been the tail that has wagged the whole habeas dog over the last decade or so. Most often this connection is seen by death penalty opponents. See, e.g., Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 822 (1992) ("The current Court has expressed its impatience with these [habeas] costs, primarily in the context of death penalty cases."); Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 9 (1990) (speculatively attributing some conservative Supreme Court cases regarding habeas to the fact that "the Court was simply frustrated with the inadequacy of the execution rate of America's death row inmates"); Julia E. Boaz, Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in Federal Courts*, 95 YALE L.J. 349, 356 (1985) ("Members of the Court have repeatedly expressed impatience and irritation with execution delays, an attitude suggesting illegitimate manipulation of procedures on the part of death penalty lawyers.") (citation omitted).

11. Among all the visions I will discuss, only proponents of the one-fair-chance vision would not see federal vindication of a right as a benefit. Those visionaries do not believe there is any ultimate standard of correctness and, thus, do not believe the federal decision vindicating a right is any better than a state decision to the contrary. See *supra* text accompanying note 112.

II. VISIONS

The eight visions set forth below are derived primarily from sifting through Supreme Court cases and, secondarily, from academic literature regarding habeas corpus.¹² As far as I can tell, this listing of visions is exhaustive of current ideas of what habeas corpus should be. I have assigned each a descriptive name of my own devising. In this Part of the Article, I will explain each vision in relation to the issues raised in Part I. Three of the eight visions (Visions One, Two, and Five) have been explained in significant detail by their proponents. As to these, I will need to do little deductive reasoning concerning the visions' positions. The other five visions have not been fully explicated—as to those, I will have to extrapolate many of the visions' stances. This Part should provide the reader with a basic understanding of what the visions are, and thus prepare the reader for the plunge into the case law that will occur in Part III.

A. *Vision One: The De Novo Litigation Vision*

De novo litigation visionaries believe that petitioners should have the opportunity to litigate in federal court, virtually from ground zero, any federal constitutional claim. The federal court should not be bound by procedural straightjackets that may limit state courts, nor should the federal court be bound by state court findings of fact. In this vision habeas is, in one sense, an “extraordinary writ”¹³ because it can look

12. Others have made efforts at divining theories or models of habeas. See, e.g., Fried, *supra* note 6, at 175-76 (arguing that the two dominant models are the “process” model and the “relitigation” model); Evan T. Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 151-54 (1994) (arguing that the four theories of habeas corpus are the process-only theory, the process-plus-innocence theory, the federal forum theory, and the deterrence theory); Jordan Steiker, *Innocence and Federal Habeas*, 41 U.C.L.A. L. REV. 303, 308-9 (1993) (stating as the two familiar understandings of habeas, the full relitigation model, and the model that views habeas as a limited and extraordinary remedy to be available only where the state court lacked jurisdiction); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 577-78 & n.14 (1993) (stating the two primary models of habeas are the “full review” and “institutional competence” models, and the important intermediate models include the “deterrence” model, the “innocence based” model, the “liberty based” model, the “rights based” model, and the “appellate” model). In this Article, I will argue that there are eight significant “visions” or models of habeas that appear in Supreme Court jurisprudence. Thus, I think that all of the authorities just cited oversimplify the richness of available models. The models suggested by Professor Woolhandler come closest to encompassing the “visions” I will discuss.

13. Habeas corpus, along with mandamus, prohibition, quo warranto, and cer-

through all procedural irregularities and cut straight to the heart of the merits of the constitutional issue. In another sense, in this vision habeas is not "extraordinary" at all: it is, in fact, a routine part of the state defendant's post-conviction remedy. The best exemplar of this vision on the Supreme Court bench was Justice Brennan.¹⁴ In academia, this vision has several champions, the most prolific of whom is Professor Larry Yackle.¹⁵

1. *The three general issues of constitutional interpretation*

Advocates of this vision invariably are "liberals" with respect to these issues of constitutional interpretation: they view rights expansively, do not believe that rights should be balanced against other interests, and believe that all rights are equally weighty.

2. *The four theoretical issues specific to habeas*

a. Function. In this vision habeas performs at least six functions. The first function focuses on individual habeas petitioners: the writ vindicates the rights of individuals who have been constitutionally wronged.¹⁶ The remaining five functions

tiorari constitute the "extraordinary" writs. CHESTER J. ANTIEAU, *THE PRACTICE OF EXTRAORDINARY REMEDIES: HABEAS CORPUS AND THE OTHER COMMON LAW WRITS* (1987).

14. Justice Marshall would make an equally good exemplar except that Justice Brennan authored a greater number of significant habeas opinions. Significant majority opinions of Justice Brennan include the following: *Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Sanders v. United States*, 373 U.S. 1 (1963); and *Fay v. Noia*, 372 U.S. 391 (1963). His significant dissents include those in *Butler v. McKellar*, 494 U.S. 407 (1990); *Teague v. Lane*, 489 U.S. 288 (1989); *Murray v. Carrier*, 477 U.S. 478 (1986); *Wainwright v. Sykes*, 433 U.S. 72 (1977); and *Stone v. Powell*, 428 U.S. 465 (1976).

15. See, e.g., Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993) [hereinafter Yackle, *Hagioscope*]; Larry W. Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. LAW & SOC. CHANGE 359 (1987-88) [hereinafter Yackle, *Misadventures*]; Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985) [hereinafter Yackle, *Explaining*]; Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO STATE L.J. 393 (1983). Professor Yackle has also written one of the major treatises concerning federal habeas corpus which contains less advocacy of his position than the afore-cited articles. See LARRY W. YACKLE, *POSTCONVICTION REMEDIES* (1981 & Supp. 1994) [hereinafter YACKLE, *POSTCONVICTION*].

16. See, e.g., *Fay v. Noia*, 372 U.S. 391, 441 (1963) ("Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison."); *Price v. Johnston*, 334

relate to the federal nature of the American court system: the threat of federal habeas relief deters states from construing the *substance* of federal rights too stingily,¹⁷ provides a means to force states to make their *procedures* fairer to criminal defendants,¹⁸ keeps federal district courts involved as to the whole range of issues by regularly providing them with opportunities to litigate constitutional issues that may not arise regularly in federal criminal cases,¹⁹ promotes state/federal dialogue con-

U.S. 266, 291 (1948) ("The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned."); Chemerinsky, *supra* note 4, at 773 ("[T]he Warren Court and defenders of broader habeas [corpus] review have emphasized the importance of collateral review as a method of error correction."); Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 321 (1987-1988) ("According to one view, our greatest fear should be that there are those in prison who have been improperly convicted."). *But see* Yackle, *Explaining*, *supra* note 15, at 992, 1005-1009 (arguing that the physical liberty rationale is not the strongest one for supporting the existence of habeas jurisdiction).

17. *Rose v. Mitchell*, 443 U.S. 545, 562-63 (1979) (stressing that the deterrent value of habeas corpus review of state actions is effective); Chemerinsky, *supra* note 4, at 770-71 (noting that the Warren Court believed that via habeas rights "are enforced as a way of deterring unlawful police practices"); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1787-88 (1991) (arguing generally that one purpose of remedies for constitutional violations is to "redress individual violations," while the second focuses on broader structural interests by establishing a judicial check to ensure that the political branches respect constitutional values); Yackle, *Explaining*, *supra* note 15, at 1039 ("The task [of habeas] is to hold state authorities accountable and to insist that they fashion and enforce substantive criminal policies without denying fair process to individuals haled into court to answer charges.").

18. Joseph L. Hoffmann, *Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133, 145 (1992) (arguing, even though Hoffmann is not a *de novo* litigation visionary, that habeas review should be a mechanism for forcing state courts to improve capital trials); Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1352 (1961) ("On the level of sound policy, one very desirable goal is to define the federal habeas corpus jurisdiction so as to serve as an incentive for improvement of state procedures."); Yackle, *Misadventures*, *supra* note 15, at 360-63 (tracing the Court's efforts in the 1940s to force Illinois to create a viable postconviction remedy); Brennan, *supra* note 4, at 442 (arguing for a rule permitting federal courts to ignore procedural defaults because "an awareness by state tribunals that the procedural barrier to state review would not be deemed necessarily a barrier to federal review, would provide an incentive for state courts to reach serious constitutional claims and vindicate them in proper cases." Of course, two years later Justice Brennan wrote an opinion empowering habeas courts to easily ignore state procedural defaults. *See* *Fay v. Noia*, 372 U.S. 391, 426-427 (1963)).

19. *Teague v. Lane*, 489 U.S. 288, 338-39 (1989) (Brennan, J., dissenting) (arguing that preserving the power of lower federal courts to hear claims for retroactive application of a new rule of constitutional criminal procedure "would not discourage their litigation on federal habeas corpus and thus not deprive ourselves

cerning rights,²⁰ and promotes uniformity of interpretation of federal law.²¹

b. *History.* This vision begins its history by reaching far back into English law for proclamations about the "Great Writ" as the most powerful arrow in the quiver of liberty.²² Proponents of this vision point out that the writ was deemed such an important part of the rights of citizens by the Founders and that the Writ is ensconced, though in a backhanded manner, in the Suspension Clause of the Constitution.²³

The *de novo* litigation vision has to struggle with the fact that during the first two-thirds of the nineteenth century the Supreme Court seemingly viewed the writ as primarily a remedy for legislative or executive detentions and believed that the only legitimate sphere of operation of the writ in the context of imprisonment pursuant to a *judicial* directive was if the sentencing court lacked jurisdiction over the subject matter or the person of the defendant. The key case is *Ex parte Watkins*,²⁴

and society of the benefit of decisions by the lower federal courts when we must resolve these issues ourselves"); Joseph L. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 191 ("[M]ost of the opportunities for the lower federal courts to declare . . . or to expound . . . 'new rules' arise in federal habeas cases. This is because there are many more state criminal prosecutions than federal ones, and because state procedures vary more than do federal procedures, thus raising more interesting and difficult criminal procedure issues.").

20. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048-1053 (1977) (arguing that the Warren Court wisely chose as a path for the continuing definition of constitutional rights a dialogue between the federal habeas courts and the state courts rather than more intrusive controls involving liability rules and equity); see also Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 1016 (1991) (examining the dialectical federalism concept).

21. Yackle, *Explaining*, *supra* note 15, at 1022 ("[T]here is a national interest in the correct and uniform interpretation of federal law.").

22. The classic homage to the writ was penned by Justice Brennan in the majority opinion in *Fay v. Noia*, 372 U.S. 391, 399-406 (1963). In the same opinion, Justice Brennan took the *de novo* litigation visionaries' first bite at the historical apple. *Id.* at 399-426. Justice Brennan's history was subjected to searching criticism by legal historians. See Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965), and Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966). A revised *de novo* litigation visionary history was put forth in Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982).

23. U.S. CONST. art. I, § 9, cl. 2 ("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.").

24. 28 U.S. (3 Pet.) 193 (1830).

where the Court held: "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."²⁵ *De novo* litigation visionaries take two tacks in trying to downplay the *Watkins* principle. First, they argue that the Court narrowly construed its habeas jurisdiction so as to not create a substitute for the appellate criminal jurisdiction that Congress chose not to confer.²⁶ Second, *de novo* visionaries argue that it was not the scope of the writ that was restricted during that time period but rather the scope of *due process*²⁷—the only component of due process cognizable in federal courts then was the right not to be convicted by a tribunal lacking jurisdiction.²⁸ Thus, all that was required for the expansion of habeas jurisdiction was an expanding body of rights²⁹ and an authorizing jurisdictional statute as to state prisoners.

The statute came via the Habeas Corpus Act of 1867, by which Congress, for the first time, empowered federal courts to issue writs of habeas corpus on behalf of any person held "in violation of the United States Constitution."³⁰ The basic mandate of this statute—that the writ shall extend to a prisoner who is "restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States"—has not changed in substance from its enactment in 1867 to the present day.³¹ *De novo* litigation proponents point out that the language of the statute is as broad as it could possibly be in protecting constitutional rights³² and note that the Supreme

25. *Id.* at 203. This case involved a petition by a federal prisoner because, except for two limited statutes authorizing federal jurisdiction over a habeas petition by prisoners in state custody, there was no general jurisdictional statute permitting federal courts to hear habeas petitions by state prisoners. Even though *Watkins* involved a federal petitioner, it was viewed at the time as stating a general principle applicable to habeas.

26. *See Fay*, 372 U.S. at 413.

27. *Id.* at 409-11.

28. *Watkins*, 28 U.S. at 203.

29. *See Fay*, 372 U.S. at 413-14.

30. Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386 (1867) (current version at 28 U.S.C. §§ 2241, 2254(a) (1988)).

31. *Id.* The present governing statutes both provide that the writ shall extend to any prisoner who is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3), 2254(a) (1988).

32. *See, Stone v. Powell*, 428 U.S. 465, 503-6 (1976) (Brennan, J., dissenting) (inferring that the "explicit language" of 28 U.S.C. § 2254 extends habeas jurisdiction to encompass all constitutional claims).

Court recognized this breadth virtually immediately after the statute's enactment.³³

Proponents of the *de novo* litigation vision then must plunge into the murky waters of the period from 1867 to 1953, when *Brown v. Allen*³⁴ (the consensus choice of visionaries of all stripes as the starting point for the modern era of habeas litigation) was handed down. As we will see in examining other visions, this period contains signals that point in different directions³⁵ and thus can provide support for several conflicting visions. *De novo* litigation proponents view this as a transitional period during which two important things happened. First, the Supreme Court gradually freed itself of the idea that the only judicially-authorized incarceration that could be unconstitutional was one where the court lacked jurisdiction,³⁶ and worked toward fulfilling the intent of the 1867 Congress that *all* claims of constitutional violations were within the scope of the writ.³⁷ From this perspective, *Brown* is important because it finally laid to rest this "jurisdictional" restriction. The second important process that *de novo* litigation visionaries believe occurred during this period was that the Court began to lay the foundations of the due process criminal procedure revolution that would be brought to fruition by the Warren Court in the 1960s.³⁸

33. *Ex parte McCordle*, 73 U.S. (6 Wall.) 318, 325-26 (1867) ("This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.").

34. *Brown v. Allen*, 344 U.S. 443 (1953).

35. See *infra* notes 74-75, 108, and 126, and accompanying text.

36. *Brown v. Allen* does not specifically recognize the expansion of the writ to allow claims of constitutional error previously adjudicated in state court. *Brown* is only understood as standing for this expansion in scope in light of previous cases. Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 252 & n.27 (1988).

37. *Fay v. Noia*, 372 U.S. 391, 413-14 (1963) (stating that the "possibly grudging scope given [to habeas in some early Supreme Court cases] is overshadowed by the numerous and varied allegations which this Court has deemed cognizable on habeas, not only in the last decades, but continuously since the fetters of the *Watkins* decision were thrown off in *Ex Parte Lange* [85 U.S. (18 Wall.) 163 (1873)]").

38. Peller, *supra* note 22, at 649. Professor Peller gives three examples of pre-Warren Court, expansive, constitutional criminal procedure cases: *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that the due process clause required states to provide counsel for accused persons in capital cases); *Mooney v. Holohan*, 294 U.S. 103 (1935) (*per curiam*) (holding that the prosecution's knowing use of perjured testimony denies due process); and *House v. Mayo*, 324 U.S. 42 (1945) (holding that a coerced guilty plea violates due process).

The *de novo* litigation vision scored a virtually complete triumph when the Warren Court exploded its habeas trilogy bombshell in 1963. In *Fay v. Noia*,³⁹ the Court held that procedural default of a claim at the state level usually does not bar habeas litigation of that claim in federal court. In *Townsend v. Sain*,⁴⁰ the Court held that federal habeas courts have broad powers to relitigate factual issues that were already decided in state proceedings. And in *Sanders v. United States*,⁴¹ the Court held that there was no substantial limitation on the ability of federal habeas courts to entertain subsequent habeas petitions by the same petitioner. It is generally accepted that the Warren Court chose habeas as a key tool to implement its concomitant criminal procedure revolution against what it believed would be recalcitrant state authorities: while the Court's own docket was not large enough to permit regular policing of renegade state prosecutors and judiciaries, the dockets of the federal district courts provided an acceptable surrogate.⁴² *De novo* litigation buffs believe that the 1963 habeas trilogy got things exactly right. They deplore the demise of these principles that began with the advent of Warren Burger as Chief Justice in 1969, and that has steadily continued to the present as other visions have gained ascendancy.

c. *Federalism*. The *de novo* litigation vision believes strongly that *federal* courts are the preferred forum for vindicating *federal* constitutional rights. Proponents have both an abstract and a concrete argument in support of this position. Abstractly, federal courts are superior as to federal law (once Congress has empowered the federal courts to hear those issues) simply because the Supremacy Clause⁴³ says so. Thus, even if federal courts were not qualitatively "better" at propounding federal law, they would still be superior to state courts simply by virtue of the federal structure established by the Constitution.⁴⁴ The second, and more concrete, argument

39. 372 U.S. 391, 426 (1963).

40. 372 U.S. 293, 311-12 (1963).

41. 373 U.S. 1, 15 (1963).

42. See Neil McFeeley, *Habeas Corpus and Due Process: From Warren to Burger*, 28 BAYLOR L. REV. 533, 533-34 (1976).

43. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

44. *Fay v. Noia*, 372 U.S. 391, 424 (1963) ("But conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy

is that federal courts are in fact better at enforcing federal constitutional criminal procedure rights because federal judges have no vested interest in the state criminal justice system, and are thus not as susceptible as state court judges (many of whom have to stand for reelection) to sacrifice federal constitutional rights on the altar of law and order.⁴⁵ *De novo* litigation visionaries stress that the whole idea of federal habeas for state prisoners arose directly out of Congress's distrust of state authorities. In response to the obvious proposition that states are not currently as untrustworthy in enforcing federal constitutional doctrine as were the Southern states in the Reconstruction era, proponents of the *de novo* litigation vision have two rejoinders: first, the 1867 Congress's intent carries down through the decades until some subsequent Congress significantly amends the statute;⁴⁶ and, second, even if most state courts can currently be trusted to enforce federal criminal procedural rights, habeas corpus stands ready to correct the occasional instance in which state courts do not perform their watchdog function.⁴⁷

that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."); Liebman, *supra* note 5, at 2097 ("Federal law is supreme, as is federal adjudication of that law when mandated by Congress. Throughout the nation's history, moreover, Congress *has* mandated final federal adjudication of important federal law whenever life or liberty has depended on the outcome.").

45. See, e.g., Woolhandler, *supra* note 12, at 634 (citing authorities that argue state courts tend to favor enforcement of state substantive criminal law over federal constitutional criminal procedural rights and to be more amenable to political pressure than federal judges); Yackle, *Explaining*, *supra* note 15, at 1031-32 ("The overriding responsibility of the state courts to carry out state law thus deprives them of the neutrality and dispassion demanded for contemporaneous enforcement of the Fourteenth Amendment."). See generally, Abraham Sofaer, Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U. L. REV. 78 (1964) (arguing that federal court offers a better forum for vindication of federal rights because it isolates them from other elements of the criminal process that are matters of state law).

46. Chemerinsky, *supra* note 16, at 781 ("Accordingly, if the Court is to follow congressional views as to parity, the Court should interpret habeas statutes based on the assumption that state courts are to be distrusted.").

47. Patchel, *supra* note 20, at 1054.

We all assume that the current criminal law system is not the one that the Warren Court confronted; indeed, this is so in large part because of the internalization of many of the Warren Court era reforms by the states and their officials. We also know, however, that the current criminal justice process is not the utopia posited by doctrines such as procedural bar and the Rehnquist Court's retroactivity doctrine.

Id. (footnote omitted).

d. Congressional versus Supreme Court authority. Again, *de novo* litigation proponents argue that the intent of Congress in 1867 still governs and that their intent was to make habeas broadly available to state prisoners. Thus, the broad wording of the statute should be given complete effect and, when issues arise which are not directly governed by the statutory language, those issues should be resolved generously in favor of the remedy. Thus, proponents of the *de novo* litigation vision have a response to the charge that is sometimes leveled at them that they are disingenuous because they approve of the petitioner-favorable innovations of the Warren Court habeas trilogy, while disapproving of the judicial innovations in the opposite direction by the Burger and Rehnquist Courts.⁴⁸ The response is simply that the Warren Court innovations were within the spirit of the Congressional intent, while the innovations of the conservative courts fly directly in the face of that intent.⁴⁹

3. *The practical issue—the effects of habeas litigation*

Unsurprisingly, *de novo* litigation visionaries focus on the *benefits* of habeas litigation: that prisoners whose constitutional rights have been violated have them vindicated (although belatedly) in federal court, and subsidiarily, that habeas cases provide more fodder for constitutional criminal procedure litigation. To proponents of this vision, the costs of habeas litigation form no legitimate part of the discussion for two reasons. First, Congress has authorized the broad-ranging habeas remedy and it is up to Congress to assess the costs and benefits, and to amend or repeal the statute if it feels the costs outweigh the

48. See, e.g., *Duckworth v. Eagan*, 492 U.S. 195, 212 (1989) (O'Connor, J., concurring).

The dissent's charges of "judicial activism" and its assertion that "Congress has determined" that collateral review of claims like those at issue in this case outweighs any interests in bringing a final resolution to the criminal process ring quite hollow indeed in the context of the federal habeas statute. The scope of federal habeas corpus jurisdiction has undergone a substantial *judicial* expansion, and a return to what "Congress intended" would reduce the scope of habeas jurisdiction far beyond the extension of *Stone v. Powell* to *Miranda* claims.

Id. (citations omitted).

49. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 106-07 (1977) (Brennan, J., dissenting) ("[L]iberal post-trial federal review is the redress that Congress ultimately chose to allow and the consequences of a state procedural default should be evaluated in conformance with this policy choice.").

benefits.⁵⁰ Second, *de novo* litigation visionaries believe that Congress has been right in not repealing the statute because, since constitutional rights are so important that they cannot be balanced against countervailing interests, the regime that the 1867 Congress authorized is precisely the right one.

B. Vision Two: The Appellate Review Vision

This second vision of habeas holds that the writ should be routinely available to permit federal review of an *appellate* nature regarding claimed constitutional violations alleged to have occurred in state proceedings. In essence, the federal habeas court is conceived of as a higher court than any state court as to federal constitutional issues. Thus, a state petitioner who invokes federal habeas should be treated, to the extent possible, just like any other litigant who brings a claim from a lower court to a higher one.

Before we proceed, there are two conceptual hurdles that must be surmounted before the vision of habeas as a federal appellate review mechanism makes sense. First, habeas does not *look like* an appeal: the appellate process normally involves a pleading at the trial level, with that same pleading being the basis for action as the case progresses through the appellate process. Habeas, by contrast, is commenced by filing a *civil* action in federal district court distinct from the *criminal* pleading in the state court that originally led to the conviction.⁵¹ Habeas is usually considered to be quintessentially a "collateral attack" mechanism, an apotheosis of direct appellate review. Appellate review visionaries argue, though, that while habeas may not look like an appeal, Congress intended that it should *work* like an appeal.⁵²

50. Chemerinsky, *supra* note 16, at 781 (raising a hypothetical argument for judicial deference to congressional intent: "If subsequent developments render this premise [that state courts are to be distrusted] outdated, then it would be for Congress to change its directive by modifying the underlying statute."); Saltzburg, *supra* note 4, at 383 ("Unless and until Congress narrows the statute, federal courts have a duty to identify and protect persons who bring sound claims that they are in custody in violation of the Constitution.").

51. See, e.g., *Murray v. Giarratano*, 492 U.S. 1, 8 (1989) ("Postconviction relief is . . . not part of the criminal proceeding itself, and it is in fact considered to be civil in nature." (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987)); *Riddle v. Dyche*, 262 U.S. 333, 335-36 (1923) ("The writ of *habeas corpus* is not a proceeding in the original criminal prosecution but an independent civil suit.").

52. See Liebman, *supra* note 5, at 2096 (arguing that "[w]hen direct federal appellate review of federal constitutional claims has not been meaningfully avail-

The second conceptual problem with viewing habeas as an appeal is the long-standing idea, prevalent in the law of *state* post-conviction remedies that habeas is "not a substitute for appeal," which indicates that not only is it not an appeal, it is something different and narrower in scope.⁵³ Appellate review visionaries contend that this dogma, however apropos it may be as to state post-conviction remedies, simply does not correctly describe the role Congress has envisioned for habeas ever since the beginning of the republic.⁵⁴

able," habeas corpus has been selected by Congress to fill the breach). For a more detailed discussion of Liebman's thesis, see *infra* notes 58-64 and accompanying text.

53. See, e.g., *Summerville v. Warden, State Prison*, 641 A.2d 1356, 1372 (Conn. 1994); *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. 1993) (en banc); *Ellis v. McMackin*, 602 N.E.2d 611, 612 (Ohio 1992); *Petrilli v. Leapley*, 491 N.W.2d 79, 81-82 (S.D. 1992); *Parsons v. Barnes*, 871 P.2d 516, 519 (Utah 1994), *cert. denied*, 1994 U.S. Lexis 7624; *State ex rel. Phillips v. Legursky*, 420 S.E.2d 743, 744 (W. Va. 1992). The idea that habeas is not a substitute for appeal has a checkered history in the Supreme Court. In *Sunal v. Large*, a federal habeas case involving a non-constitutional claim of error, the Court stated "[T]he writ of habeas corpus will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178 (1947). Six years later in *Brown v. Allen*, Justice Frankfurter called the not-a-substitute-for-appeal doctrine a "jejune abstraction." *Brown v. Allen*, 344 U.S. 443, 558 (1953) (Frankfurter, J., dissenting). At the tail-end of the Warren Court era in *Kaufman v. United States*, the Court rejected the not-a-substitute-for-appeal doctrine and distinguished *Sunal* as involving a non-constitutional claim of error. *Kaufman v. United States*, 394 U.S. 217, 223 & n.7 (1969). But in an opinion in *Mackey v. United States*, 401 U.S. 667, 682-83, (1971) (Harlan, J., concurring in the judgment in two of the consolidated cases, and dissenting in the third), Justice Harlan laid the groundwork for a conservative reversal, stating, "[h]abeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review." This conservative reversal partially arrived in *Teague v. Lane*, 489 U.S. 288, 305 (1989), where Justices Rehnquist, O'Connor, Scalia and Kennedy cited Justice Harlan's position from *Mackey* with approval. Justice Thomas's opinion in *Wright v. West*, 112 S. Ct. 2482, 2490 (1992) shows him to be a believer in the Harlan position as well. When one adds Justice Stevens who, although not characterizable as a conservative regarding habeas corpus, does believe that habeas is different and narrower than direct appeal, there is currently a clear majority on the Court who believe that habeas should not operate as a substitute for appeal and should instead perform a narrower function. See *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) ("It hardly bears repeating that habeas corpus is not intended as a substitute for appeal Instead, it is designed to guard against extreme malfunctions in the state criminal justice systems.") (citation omitted).

On the other hand, *de novo* litigation visionaries believe habeas is not synonymous with appeal because habeas is *broad*er. See *Townsend v. Sain*, 372 U.S. 293, 311 (1963) ("The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review.").

54. See, Liebman, *supra* note 5, at 384.

Appellate review visionaries are staunch friends of habeas, but their vision is, as we will see, much less petitioner-favorable in several key respects than the vision of the *de novo* litigation visionaries because appellate review visionaries have greater regard for procedural barriers in habeas as if those barriers would also exist on direct review. The primary exponents of this vision are academics, particularly Professors James Liebman⁵⁵ and Barry Friedman.⁵⁶

1. *The three general issues of constitutional interpretation*

As to constitutional criminal procedure doctrine, appellate review visionaries often are, but need not be, rights-expansionists. Regarding balanceability of rights, appellate review visionaries are more willing to balance than are *de novo* litigation visionaries—in particular, appellate review visionaries' logic compels them to put the state's interests in state procedural rules on the opposite side of the scale, because those rules are respected by the Supreme Court on direct review as long as the rules are not mere subterfuges designed to insulate federal constitutional claims from meaningful review.⁵⁷ As to equality of rights, the appellate review visionaries' logic dictates that whatever position they take as to direct review, they should also take as to habeas—if all rights are equally weighty on direct review, they should be equally weighty in habeas; if they are not treated equally on direct review, they should not be treated equally in habeas.

2. *The four theoretical issues specific to habeas*

a. *Function.* Appellate review visionaries believe that habeas fulfills *some* of the same functions as the *de novo* litigation visionaries believe, but not all, and not all to the same extent. A function-by-function comparison is in order. First, *de novo* litigation visionaries believe so strongly in the vindication of individual constitutional rights that they are willing to ignore procedural barriers to reach the merits of those claims; appellate review visionaries believe in vindication of rights, but

55. *Id.*

56. Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988).

57. *Henry v. Mississippi*, 379 U.S. 443, 447-48 (1965) (holding that a state procedural rule may not be adequate to bar Supreme Court direct review if the rule does not further a legitimate state interest).

not so strongly as to be willing to so freely ignore procedural barriers that would exist on direct review. Second, appellate reviewers also believe that habeas deters state courts from too narrowly construing the substance of federal rights. But while *de novo* litigation visionaries view habeas as a means to force states to reform their procedures in defendant-favorable ways, appellate review visionaries put little stock in this as a function as long as state procedures are mere subterfuges to avoid vindicating federal rights. As to habeas' effect of allowing federal district courts to litigate constitutional issues with regularity, to stay involved in the constitutional dialogue, and to promote uniformity of federal law, appellate reviewers would concur in these goals. They would then contend that their vision also permits a great deal of federal district court involvement, and that while some petitioners will be barred from raising claims that *de novo* litigators would permit, in the end the appellate review vision will reach most of the same issues in other cases.

b. *History.* The history supporting this vision of habeas is found in a recent law review article by Professor James Liebman.⁵⁸ Liebman's thesis is that ever since 1789, Congress has, by some combination of statutes concerning writs of error, habeas corpus, and certiorari (and, to a lesser extent, removal), sought to assure that state prisoners have one opportunity to litigate federal constitutional claims in federal court. Liebman carefully traces the histories of the successive schemes of federal jurisdiction, and makes a plausible case for this historical interpretation.⁵⁹ Congress's substitution, in a series of statutes enacted from 1914 to 1925, of discretionary writ of certiorari jurisdiction in the Supreme Court for mandatory writ of error jurisdiction is particularly important in Liebman's eyes:⁶⁰ after that, a state convict no longer had the writ of error *right* to have the case reviewed by the Supreme Court, but only the *possibility* of review (which became more evanescent as the Supreme Court's docket swelled with each succeeding decade).⁶¹ Accordingly, in the modern era, the primary means

58. Liebman, *supra* note 5.

59. *Id.* at 2057, 2035 ("Federal habeas corpus is not a substitute for *general* writ of error or other direct appeals as of right. Since 1789, however, it has provided statutorily specified classes of prisoners with a *limited* and *substitute* federal writ of error or appeal as of right.").

60. *See id.* at 2075, 2083.

61. *Id.* at 2084 ("In the state-prisoner context, with direct Supreme Court re-

by which a convict could have the one shot at federal review was via habeas, which had stood ready since 1867 to perform that task. Liebman thus argues for parity: the same standards (to the extent practicable, given the inherent differences in the mechanisms) that would apply to a petitioner if the Supreme Court were to take the case on certiorari review should apply to the federal district court that takes the case in habeas. For example, if the Supreme Court would hold a claim to have been unreviewable because it was not properly preserved, the habeas court should do likewise.⁶²

c. *Federalism*. Appellate review visionaries agree with *de novo* litigation visionaries that Congress unequivocally showed in enacting the 1867 Act that it distrusted state judiciaries, and that Congress's intent has never been retracted—indeed, appellate reviewers trace this distrust all the way back to 1789.⁶³ Further, both appellate review visionaries and *de novo* litigation visionaries agree that it is within Congress's power to enable a single federal habeas judge to overrule a state court decision on a matter of federal constitutional law—even a decision rendered by a unanimous state supreme court. Accordingly, neither *de novo* litigation visionaries nor appellate review visionaries care if state authorities are somehow offended or hindered by the exercise of habeas jurisdiction—state authorities feel that way because they persist in failing to appreciate the basic constitutional principle of federal supremacy. Appellate review visionaries, though, unlike *de novo* litigation visionaries, embed habeas within the entire scheme of federal jurisdiction. This makes appellate review visionaries concerned about parity of direct review and habeas, a concern not shared by *de novo* litigation visionaries.

d. *Congressional versus Supreme Court authority*. For appellate review visionaries, the relevant context for determining congressional intent is not limited to the habeas statute, but encompasses the federal jurisdictional statutes as a whole, of which the habeas statutes form only part of the grand design. Appellate review visionaries thus believe that any interstices in the habeas statute should be filled by the Supreme

view on the merits as of right having gone the way of the snow leopard—but a few sightings each year—the bulk of the review responsibility would fall to the lower federal courts (and, at times, the Supreme Court) on habeas corpus.”).

62. *Id.* at 2007, 2096.

63. *See id.* at 2057-2060.

Court consistent with Congress's understanding of habeas as a federal appellate review mechanism that substitutes for Supreme Court direct review in the vast bulk of cases that do not evoke Supreme Court certiorari review. Accordingly, appellate review visionaries take the Warren Court to task for decisions that destroyed direct review/habeas parity by making the standards in habeas *more* petitioner-favorable than the standards the petitioner would have encountered had the Supreme Court taken the case via direct review.⁶⁴ Appellate review visionaries similarly take later conservative Courts to task for destroying parity in the opposite way.⁶⁵

3. *The practical issue—the effects of habeas litigation*

Since appellate review visionaries see habeas as a litigation opportunity that should be routinely available for properly preserved claims of error, they are not concerned that there may be too many *first-time* habeas petitions filed containing such claims. On direct review, counsel is supposed to assert any remotely arguable ground that was properly preserved, so parity demands no less in habeas.⁶⁶ This means that appellate review visionaries have little sympathy for pleas by prosecutors or federal judges that habeas as to such claims overworks them. In all this they arrive at the same result as the *de novo* litigation visionaries. But appellate review visionaries are concerned about two issues that don't bother *de novo* litigation visionaries: petitions containing procedurally defaulted claims that could not be considered on direct review; and multiple petitions, since on direct review an appellant generally gets only one consolidated appeal for all issues that could be raised.

C. *Vision Three: The Rights-Selectivist Vision*

The rights-selectivist vision has as its touchstone the idea that some constitutional criminal procedural rights are more

64. See *id.* at 2094-95.

65. See Friedman, *supra* note 56, at 286-88 (arguing that *Stone v. Powell*, 428 U.S. 465 (1976), which held that Fourth Amendment claims which the petitioner has the opportunity to fully and fairly litigate in state court cannot be reviewed on habeas, is inconsistent with the appellate review vision).

66. See *Anders v. California*, 386 U.S. 738, 744 (1967) (holding that a court-appointed lawyer who finds no meritorious claim for appeal may request permission to withdraw, but the lawyer must file with that request "a brief referring to anything in the record that might arguably support the appeal").

important than others, and that the important ones are entitled to favored treatment in habeas corpus, while the unfavored ones are not. A doctrinaire version of this vision would be that only the important rights are even *cognizable* in habeas corpus. A less doctrinaire version of the vision would hold that the favored rights are not the only ones cognizable in habeas, but they are entitled to *preferential* treatment, e.g., forgiving a procedural default when no similar forgiveness would be extended to an unfavored right. I will focus on the doctrinaire version, because it most clearly illustrates the characteristics of the vision. The rights-selectivist vision operates identically to the *de novo* litigation vision *as to the rights the selectivists deem favored*, but differs dramatically as to the rights the selectivists deem unfavored. Rights-selectivists share little common ground with the appellate review vision, since the rights-selectivists' key criterion is the *substance* of the claim involved, while the appellate review visionaries' key criterion is *procedural parity* between Supreme Court direct review and habeas litigation.

One key question for rights-selectivists is which rights should be the favored ones? (The other key question is why only the favored ones should be able to be vindicated in habeas, which I will discuss just below under the heading of "History.") There are three distinct answers suggested in habeas law to the question of which rights should be the favored ones: (1) rights that are *fundamental* to the fairness of the criminal proceeding;⁶⁷ (2) rights that relate directly to the *accuracy of the guilt/innocence determination*;⁶⁸ and (3) rights that reflect *structural error* as opposed to *trial error*.⁶⁹ Although no one

67. See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993) (explaining that habeas corpus is an extraordinary remedy against convictions that violate fundamental fairness); *Teague v. Lane*, 489 U.S. 288, 312-13 (1989) (establishing an exception to the bar on procedurally defaulted claims based partially on the idea of fundamental fairness); *Rose v. Lundy*, 455 U.S. 509, 543-44 (1982) (Stevens, J., dissenting) (arguing that habeas corpus is designed to provide relief from errors that rendered the proceedings fundamentally unfair).

68. See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. at 1729-30 (O'Connor, J., dissenting) (arguing that a petitioner-favorable, "harmless-error" standard correctly promotes accuracy and determination of guilt or innocence); *Jackson v. Virginia*, 443 U.S. 307, 323 (1979) (holding that an insufficiency of the evidence claim is cognizable in habeas because it is central to the issue of guilt or innocence); *Stone v. Powell*, 428 U.S. 465, 489-90 (1976) (arguing that illegally seized evidence is usually reliable and probative on the issue of guilt or innocence).

69. *Brecht v. Abrahamson*, 113 S. Ct. at 1717 (holding that structural error on habeas is governed by a more petitioner-favorable "harmless-error" standard

has attempted to define exhaustively which rights fall within these categories, it seems that the second would be a subset of the first: while it is easy to think of rights that are fundamental to the fairness of the proceeding, but that are not related to the accuracy of the guilt/innocence determination—for example, the right not to be placed twice in jeopardy, the right not to be indicted by a grand jury chosen in a racially discriminatory manner—it is hard (perhaps impossible) to think of rights that *are* related to the accuracy of the guilt/innocence determination but that are not fundamental. Thus, fundamental fairness rights-selectivists are selective, while accuracy of the guilt/innocence determination rights-selectivists are even *more* selective. The proposed distinction between structural error and trial error is impossible to classify in terms of its relative breadth. Despite these differences, I will treat all these sub-visions together under the rubric of rights-selectivism, because the visions operate identically except for the scope of the rights which each recognizes. The primary exponent of rights-selectivism is Justice Stevens.⁷⁰

than is a claim of trial error).

70. Justice Stevens voted with the majority in *Stone v. Powell*, 428 U.S. 465 (1976). The majority held that one of the reasons that Fourth Amendment claims, which a petitioner had a full and fair opportunity to litigate in state court, were not cognizable in habeas was because the exclusionary rule does not constitute a personal constitutional right. *Id.* at 486. Stevens also joined the majority opinion in the second, early important Burger Court habeas precedent, *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977), that tightened up the standards permitting a federal court to consider a claim that the petitioner procedurally defaulted in state court. Stevens also wrote a separate concurrence in which the first hints of his rights-selectivist position emerged: he argued that if a claim of error is grave enough even an express personal waiver may be excused. *Id.* at 94-95 (Stevens, J., concurring). He joined with the majority in *Rose v. Mitchell*, 443 U.S. 545, 559-64 (1979), which held that a claim of discrimination in grand jury selection is cognizable in habeas, in part because the right is substantially more compelling than the one in *Stone*. Stevens' fullest explication of his rights-selectivist position came in his dissenting opinion in *Rose v. Lundy*, 455 U.S. 509, 538 (1982). Since then, Justice Stevens has consistently adhered to the rights-selectivist rationale. See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720-22 (1993) (joining in opinion holding that a less petitioner-favorable standard of harmless error should apply on habeas as on direct, because habeas is an extraordinary remedy against violations of fundamental fairness); *Withrow v. Williams*, 113 S. Ct. 1745, 1752-53 (1993) (joining opinion holding that *Stone* should not be expanded to encompass claims of *Miranda* right violations because the warnings protect a fundamental trial right); *Sawyer v. Whitley*, 112 S. Ct. 2514, 2530 (1992) (Stevens, J., concurring) (arguing that fundamental fairness encompasses more than accuracy of the guilt innocence determination); *Coleman v. Thompson*, 501 U.S. 722, 770-72 (1991) (Stevens, J., dissenting) (arguing that habeas should encompass all claims of fundamental constitutional violations); *Teague v. Lane*, 489 U.S. 288, 320-23 (1989) (Stevens, J., concurring in

1. *The three general issues of constitutional interpretation*

Recall that the three general issues of constitutional interpretation are the expansiveness with which rights should be construed, their balanceability against other interests, and their comparative equality. For rights-selectivists, we need to start with the third of these, because the key to the whole vision is that rights-selectivists do not view all constitutional rights as being equally important. Thus, the expansiveness issue fades into the background, since no matter how many rights are recognized or how broadly each right is construed, the key question becomes whether it is one of the favored rights entitled to vindication in habeas. As to balanceability, rights-selectivists view the favored rights as nonbalanceable, while the unimportant rights are balanced right out of habeas jurisdiction.

2. *The four theoretical issues specific to habeas*

a. *Function.* For rights-selectivists, the function of habeas as an extraordinary writ is to vindicate favored rights. As to those favored rights, rights-selectivists believe in all the goals in which *de novo* litigation visionaries believe: vindicating constitutional rights of individual petitioners, deterring state courts from under-construing the substance of federal rights, pressuring states to make their systems more procedurally favorable to claimants, keeping the lower federal courts in practice with respect to those rights and involved in the constitutional rights dialogue, and promoting uniformity in federal law. But as to the rights deemed unfavored, rights-selectivists do not believe that habeas has a function to serve.⁷¹

the judgment) (arguing that the second exception to retroactivity should encompass claims of fundamental unfairness); *Kimmelman v. Morrison*, 477 U.S. 365, 377-78 (1986) (joining majority opinion finding that Stone should not be extended to claims of ineffective assistance of counsel based on failure to raise Fourth Amendment claims, in part because the right to counsel is fundamental); *Murray v. Carrier*, 477 U.S. 478, 498-99 (1986) (Stevens, J., concurring) (arguing that the character of the claim should be central to the habeas inquiry and that a Brady right is fundamental); *Smith v. Murray*, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting) (arguing that the "historic office" of habeas corpus is to remedy violations of fundamental fairness).

71. Even though Justice Stevens is the best example of a rights-selectivist, I do not mean to suggest that he holds the doctrinaire version of the position that would completely exclude from the ambit of habeas any right that was deemed not to be favored. Rather, Justice Stevens adheres to the less doctrinaire position that all rights (except Fourth Amendment ones where the petitioner had a full and fair

b. History. Although Justice Stevens, the primary proponent of the rights-selectivist vision, has never constructed a history of the writ to support his position,⁷² it is possible to generate a plausible history of at least the fundamental fairness version of this vision. One would begin with standard doctrine from the early 1800s that the writ was only available to remedy executive or legislative detentions, or judicial detentions where the court lacked jurisdiction,⁷³ and argue that what these detentions have in common is that they result from the most fundamental sorts of errors. One would then contend that this narrow scope of habeas review prevailed at the time Congress enacted the Habeas Corpus Act of 1867, and must have approximated what Congress had in mind for state prisoners. Then, as to the important but muddled period from 1867 through 1953, One would note that while the Supreme Court expanded the concept of "jurisdiction" to the point that it became a judicial fiction,⁷⁴ these expansions always came

opportunity to litigate in state court) should be cognizable, but the favored ones are entitled to preferential treatment.

72. Justice Stevens' one partial effort to provide a history for his vision is found in *Rose v. Lundy*, 455 U.S. 509, 548 n.18 (1982) (Stevens, J., dissenting). There, Justice Stevens argues that when Congress recodified the habeas statute in 1948 there were relatively few constitutional rules of criminal procedure, and "those that did exist generally were not applicable to the States, and the scope of habeas corpus relief was narrow." *Id.* Case law of the time period indicates that constitutional rules applicable against the states were limited to those that constituted affronts to fundamental fairness. Thus, Justice Stevens concludes, consistent with the intent of the 1948 Congress, which should still control to limit habeas to claims involving fundamental unfairness:

This Court has long since rejected these restrictive notions of the constitutional protections that are available to state criminal defendants. Nevertheless, the point remains that the law today is very different from what it was when the current habeas corpus statute was enacted in 1948. The statute was amended in 1966, but the amendments merely added to, and did not modify, the existing statutory language. Respected scholars may argue forcefully to the contrary, but in my opinion a limitation of habeas corpus relief to instances of fundamental unfairness is consistent with the intent of the Congress that enacted § 2254 in 1948.

Id.

73. See *supra* note 22 and accompanying text.

74. The first expansion came in *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873) (holding that habeas jurisdiction will lie to hear a claim of allegedly illegal sentence). The next expansion came in *Ex parte Siebold*, 100 U.S. 371, 376-77 (1879) (allowing habeas attack on the constitutionality of the statute creating the offense). The fiction of "jurisdiction" was finally dispensed with by the Court in *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942) ("[T]he use of the writ in federal courts to test the constitutional validity of a conviction of crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction for

when rights that were clearly "fundamental" were alleged to have been violated, such as the right to be free of a mob-dominated trial.⁷⁵ Then, one would argue that *Brown v. Allen*⁷⁶ did not radically expand the scope of the writ when it held that *all* constitutional violations were cognizable in habeas because, as of that time, there were relatively few federal criminal procedure constitutional rights and all of them were "fundamental." The final step in this historical reconstruction, which is also the most controversial one, is the assertion that the Warren Court was so protective of rights that it recognized not only rights that were fundamental, but also rights that were important enough to be rights, yet not important enough to be fundamental.⁷⁷ This is not actually a historical assertion,

the trial court to render it.").

75. *Moore v. Dempsey*, 261 U.S. 86, 92 (1923); see also *Johnson v. Zerbst*, 304 U.S. 458, 468-67 (1938) (holding that a claimed denial of counsel can be raised on habeas); *Mooney v. Holohan*, 294 U.S. 103, 112-15 (1935) (holding that a conviction procured through testimony known by the state authorities to be perjured constitutes a violation of due process that will support habeas jurisdiction).

76. 344 U.S. 443 (1953); see *supra* note 36.

77. Although he was not primarily a rights-selectivist, Judge Friendly set forth this tenet of rights-selectivism quite well:

What I do challenge is the assumption that simply because a claim can be characterized as "constitutional," it should necessarily constitute a basis for collateral attack when there has been fair opportunity to litigate it at trial and on appeal. Whatever may have been true when the Bill of Rights was read to protect a state criminal defendant only if the state had acted in a manner "repugnant to the conscience of mankind," [quoting *Palko v. Connecticut*, 302 U.S. 319, 323 (1937), *overruled in part by Benton v. Maryland*, 395 U.S. 784 (1969)] the rule prevailing when *Brown v. Allen* was decided, the "constitutional" label no longer assists in appraising how far society should go in permitting relitigation of criminal convictions. It carries a connotation of outrage—the mob-dominated jury, the confession extorted by the rack, the defendant deprived of counsel—which is wholly misplaced when, for example, the claim is a pardonable but allegedly mistaken belief that probable cause existed for an arrest or that a statement by a person not available for cross-examination came within an exception to the hearsay rule.

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 156-57 (1970).

Justice Stevens made the same point:

I recognize the apparent incongruity in suggesting that there is a class of constitutional error—not constitutionally harmless—that does not render a criminal proceeding fundamentally unfair. It may be argued, with considerable force, that a rule of procedure that is not necessary to ensure fundamental fairness is not worthy of constitutional status. The fact that such a category of constitutional error exists, however, is demonstrated by the jurisprudence of this Court concerning the retroactive application of newly recognized constitutional rights. In ruling that a consti-

but a normative one based upon one's perceptions of the whole panoply of rights recognized by the Warren Court, and in some cases added to by the later, more conservative Court.⁷⁸

Even if one is convinced that some constitutional rights are significantly more important than others, one must still ask whether the historical vision generated provides a convincing rationale explaining why habeas should lie only to remedy violations of favored rights, given that the habeas statute itself does not discriminate among constitutional violations. Perhaps proponents of this vision can attempt to buttress their subjective post-Warren Court history by arguing that habeas has long been considered to be an "extraordinary" writ, which connotes that it is available only to remedy extraordinarily important constitutional violations.⁷⁹ Even here, though,

tutional principle is not to be applied retroactively, the Court implicitly suggests that the right is not necessary to ensure the integrity of the underlying judgment; the Court certainly would not allow claims of such magnitude to remain unremedied. . . .

[T]hese decisions demonstrate that the Court's constitutional jurisprudence has expanded beyond the concept of ensuring fundamental fairness to the accused. My point here is simply that this expansion need not, and should not, be applied to collateral attacks on final judgments.

Rose v. Lundy, 455 U.S. 509, 543 n.8 (1982) (Stevens, J., dissenting) (citations omitted).

78. The greatest expansion of constitutional criminal procedure rights by the post-Warren Court is surely that relating to the death penalty. Since the decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) striking down the Georgia death penalty sentencing scheme, the Court's death penalty jurisprudence has mushroomed. One of the most important cases for generating habeas issues is *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

79. There is little doubt that the writ of habeas corpus is one of the writs that were in earlier days deemed the "prerogative writs" and that more recently have been called the "extraordinary writs." See *supra* note 13 and accompanying text. The question is what the term "extraordinary" means. The idea that the writ is "extraordinary" in the sense that it should be used sparingly has perhaps its earliest voice in a dissent by Justice Reed:

Respect for the theory and practice of our dual system of government requires that federal courts intervene by habeas corpus in state criminal prosecutions only in exceptional circumstances. . . . [D]ue regard for a state's system of justice admonishes federal courts to be chary of allowing the extraordinary writ of habeas corpus where the accused, without excuse, has not exhausted the remedies offered by the State to redress violations of federal constitutional rights.

Wade v. Mayo, 334 U.S. 672, 691-92 (1948) (Reed, J., dissenting). Fifteen years later, Justice Stewart, speaking for himself and three other dissenters in *Townsend*

rights-selectivists run into a problem, because an older understanding of what makes the writ "extraordinary" is that it is able to cut through all procedural forms and go directly to the substance of the constitutional claim at issue, not that it is limited to protecting only extraordinarily important rights.⁸⁰

The version of the selectivist vision that favors those rights related to the accuracy of the guilt/innocence determination fares worse in terms of the writ's history than does the fundamental rights version. To demonstrate this, one need only note that the most firmly grounded historical basis for habeas relief from a judicial detention—that the convicting court lacked jurisdiction⁸¹—does not fall into the category of rights that relate to the accuracy of the guilt/innocence determination. Thus, this version of the rights-selectivist vision is demonstrably *anti*-historical. As to the structural/trial defect vision, it seems equally difficult to make a plausible historical case.

v. Sain, 372 U.S. 293, 327 (1963) sounded the same note: "[Habeas corpus] is essentially an extraordinary writ, designed to do justice in extraordinary and often unpredictable situations." *Id.* (Stewart, J., dissenting). The idea that the writ is extraordinary in this sense was first enunciated in a majority opinion in *Hensley v. Municipal Court*, 411 U.S. 345 (1973). "Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which restraints on liberty are neither severe nor immediate." *Id.* at 351. The idea found voice again through Justice Powell in *Schneekloth v. Bustamonte*, 412 U.S. 218, 257-58 (1973) (Powell, J., concurring) ("This accommodation [of finality concerns with expansions of the role of the writ] can best be achieved, with due regard to all of the values implicated, by recourse to the central reason for habeas corpus: the affording of means, through an extraordinary writ, of redressing an *unjust* incarceration."). By 1983 the conservatives were clearly in control of the Court and a majority held that "[f]ederal courts are not forums in which to 'relitigate state trials.'" *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The majority reiterated, in two recent cases, that the writ is "extraordinary" in this sense. See *McFarland v. Scott*, 114 S. Ct. 2568, 2574 (1994) (citing *Barefoot* for the proposition that "the Great Writ is an extraordinary remedy that should not be employed to 'relitigate state trials'"); *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993) ("In keeping with this distinction [between the primary nature of the state proceedings and the secondary and limited nature of the habeas proceedings], the writ of habeas corpus has historically been regarded as an extraordinary remedy, 'a bulwark against convictions that violate "fundamental fairness."'") (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring))).

80. Justice Holmes expressed this conception when he stated, "that *habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

81. See *supra* note 22 and accompanying text.

c. *Federalism*. As should be clear from the foregoing discussion, rights-selectivists are not at all solicitous of claimed state interests when the error involved is of the favored variety, but are very solicitous of the state's interests when the right at issue is not of the favored variety.

d. *Congressional versus Supreme Court authority*. Rights-selectivists juxtapose the narrow scope of habeas that must have existed in Congress's mind when it enacted the 1867 Act with the broad expanse of constitutional rights that exists in the post-Warren Court era. This is the basis for an argument that because the legal landscape has so significantly changed, the legislative intent of the originating Congress is not particularly enlightening as to the current proper scope of the writ. Thus, according to rights-selectivists, the Court should fill interstices in the habeas statutes to further the basic underlying *policy* of the 1867 Congress, which, they argue, was to assure a federal forum for the vindication of important federal constitutional rights. While this category of important rights is certainly significantly larger than it was in 1867—when the category seemingly only included the right not to be tried by a court acting outside its jurisdiction—the category does not include all of the rights discovered during the due process revolution that began in the 1960s.

3. *The practical issue—the effects of habeas litigation*

When the right involved is one of the favored ones, rights-selectivists show little sympathy for the claimed costs of habeas litigation. If the right is not of the favored kind, however, rights-selectivists view its inclusion within habeas jurisdiction as cluttering the federal docket and distracting district courts from their real mission of vindicating favored rights in habeas cases. In light of the importance of death penalty cases in habeas jurisprudence, rights-selectivists, if Justice Stevens is representative, tend to view the rights pertaining to the sentencing phase in death penalty cases as within the category of favored rights,⁸² either under the theory that they are funda-

82. See, e.g., *Sawyer v. Whitley*, 112 S. Ct. 2514, 2531-36 (1992) (Stevens, J., concurring) (arguing for a broader definition of "actual innocence" of a death sentence than the majority's view); *Coleman v. Thompson*, 501 U.S. 722, 758, 768 (1991) (Blackmun, J., dissenting) (joining the stinging dissent by Justice Blackmun to the Court's handling of issues in a death penalty case); *McCleskey v. Zant*, 499 U.S. 467, 516-18 (1991) (Marshall, J., dissenting) (joining a dissenting opinion de-

mental, or under the theory that the accuracy of the "death guilty"/"death innocent" determination is the functional equivalent of the accuracy of the guilt/innocence determination as to the conviction.

D. Vision Four: The Innocence-Selectivist Vision

We have just seen one way of limiting the writ's availability based on permitting only certain types of constitutional claims to be litigated. Another way to limit the writ's availability is to permit only *certain litigants* to pursue the remedy. This is the approach of the proponents of the fourth vision, who believe that only petitioners who can allege that they are actually innocent⁸³ should be allowed to pursue habeas to vindicate constitutional violations.

As with the rights-selectivist vision, there is a doctrinaire position and a less doctrinaire one. The doctrinaire position contends that *only* persons who have a claim of actual innocence should even be permitted to pursue habeas, while the

ploring a petitioner-unfavorable standard for abusive petitions); *Butler v. McKellar*, 494 U.S. 407, 417 (1990) (Brennan, J., dissenting) (joining a stinging dissent regarding the Court's handling of retroactivity in a death penalty case); *Smith v. Murray*, 477 U.S. 527, 545 (1986) (Stevens, J., dissenting) (arguing that, as on direct review, in habeas "death is a different kind of punishment from any other which may be imposed in this country").

83. A key question, of course, is what exactly does the term "innocent" mean? At least three meanings are possible. The first casts an affirmative burden on the petitioner to show that he or she did not commit the crime. One assumes that such proof would usually consist either of compelling evidence that some other specific person committed the crime, or that the petitioner could not have committed the crime, e.g., petitioner's DNA markers are inconsistent with blood that was concededly left at the scene by the accused killer. The second, much more petitioner-favorable definition, would require the petitioner to show that if everything had gone according to the constitutional rules, the trier of fact might have entertained a reasonable doubt about the petitioner's guilt. Judge Friendly suggested a third definition that is not as tough on petitioners as the first, but tougher than the second:

[T]he petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Friendly, *supra* note 77, at 160. The Court has adopted verbatim Judge Friendly's formulation, at least as to successive petitions. *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.17 (1986). See generally Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 978-86 (1994) (discussing possible definitions of "innocent").

less doctrinaire position asserts that all persons with constitutional claims should be allowed to pursue habeas, but those who can supplement with a claim of actual innocence should be *preferred* when it comes to excusing procedural defaults, allowing multiple petitions, etc. As with the rights-selectivist vision, I will explicate the more doctrinaire version of this vision.

Most of the recent conservative Justices have been at least partially innocence-selectivists, with Justice Powell probably being the leader.⁸⁴ Judge Henry Friendly also championed this idea in a law review article.⁸⁵

1. *The three general issues of constitutional interpretation*

The three issues, expansiveness, balanceability, and equality, virtually fade into the background as to this vision because the key to the vision hinges not on the legal attributes of the rights involved, but upon the factual innocence of the petitioner.

2. *The four theoretical issues specific to habeas*

a. *Function.* Innocence-selectivists have a very narrow vision of the writ's function: it exists solely to vindicate the constitutional rights of petitioners who are factually innocent of the crime. The narrowness of this vision of function is apparent when it is contrasted with the broad vision of functions held by *de novo* litigation visionaries that habeas should be available to vindicate the constitutional rights of *all* constitutionally wronged petitioners. Innocence-selectivists do not believe in any of the functions of habeas that are grounded in the federal nature of our system. Since so few petitioners will be able to allege the necessary claim of innocence, there will not be a great enough number of habeas cases to deter state courts from construing the substance of federal rights too narrowly, force states to reform their post-conviction processes to the benefit of petitioners, keep federal courts involved in constitutional crimi-

84. Justice Powell first expounded his innocence-selectivist vision in *Schneekloth v. Bustamonte*, 412 U.S. 218, 265-66 (1973) (Powell, J., concurring). He wrote innocence as a significant factor into the majority decision in *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) and wrote the opinion in *Kuhlmann v. Wilson*, 477 U.S. 436, 452-54 (1986) which requires a colorable showing of innocence before a habeas court can consider a successive petition.

85. See Friendly, *supra* note 77.

nal procedure adjudication on a broad scale, or promote the uniformity of federal law.

b. History. There was no history supporting this vision until 1968, when Justice Black suggested that only petitioners who have a colorable claim of innocence should be entitled to pursue habeas relief.⁸⁶ Judge Henry Friendly picked up on this suggestion in what turned out to be an influential law review article published in 1970 entitled *Is Innocence Irrelevant?*⁸⁷ Friendly answered this question with a resounding no: a "colorable showing" of innocence should be a prerequisite to a habeas petition.⁸⁸ It is important to note that Friendly put forth this idea as a proposal for *legislative* change, not as a prescription for how *courts* could change the law, let alone as a description of existing law.⁸⁹ Justice Black's and Judge Friendly's suggestion caught the fancy of Justice Powell, and formed the basis for his concurring opinion in a 1973 case.⁹⁰ Innocence as a factor in habeas law made the leap to a majority opinion in *Stone v. Powell*⁹¹ in 1976, and since then has put in regular appearances.⁹² Thus, innocence in habeas law has a history of sorts, though a very short one.

c. Federalism. The upshot of the innocence-selectivist vision is that state criminal processes will be almost completely free of federal court intervention, since it is a very small per-

86. *Kaufman v. United States*, 394 U.S. 217, 242 (1969) (Black, J., dissenting) ("In [habeas corpus] collateral attacks . . . I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt.").

87. Friendly, *supra* note 77.

88. *Id.* at 160.

89. *Id.* at 143 (arguing that the requirement that the petitioner supplement the constitutional claim with a colorable claim of innocence "ought to be the law and . . . that *legislation can and should make it so*") (emphasis added).

90. *Schneekloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

91. 428 U.S. 465, 491 n.31 (1976).

92. See, e.g., *Withrow v. Williams*, 113 S. Ct. 1745, 1767-68 (1993) (Scalia, J., concurring in part and dissenting in part) (stating that innocence is the most significant countervailing consideration to finality); *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1729 (1993) (O'Connor, J., dissenting) (arguing that "[i]f there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity [of actual innocence] on the prisoner's side . . . is sufficient by itself to permit plenary review") (citing *Withrow*, 113 S. Ct. at 1757); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (creating an actual innocence exception to the "cause" and "prejudice" requirement); *Kuhlmann v. Wilson*, 477 U.S. 436, 451-54 (1986) (establishing the requirement of a colorable showing of innocence before a federal court can entertain a successive petition).

centage of petitioners who can, as a practical matter, allege both a constitutional violation and a colorable claim of factual innocence. As to that very small percentage, federal intervention is appropriate.

d. Congressional versus Supreme Court authority. Innocence-selectivists who believe that this vision can be effectuated by the Supreme Court necessarily believe that the Court has broad-ranging power to judicially rework the meaning of the habeas statute, since there is no plausible argument that the 1867 Congress (or any subsequent one) intended the habeas statutes to be limited in their application to petitioners who have an arguable claim of factual innocence.

3. *The practical issue—the effects of habeas litigation*

Innocence-selectivists focus on the costs of habeas litigation, and have a great deal of sympathy for both state authorities, who must combat seemingly endless post-conviction litigation proceedings by convicts seemingly having little better to do to pass the time, and overworked federal courts that are flooded with petitions that are mostly pro se, sloppy, meritless, and, most importantly, do not state colorable claims of factual innocence. Indeed, it was the flood tide of post-Warren Court habeas petitions that evoked Judge Friendly's article in the first place.⁹³ The only countervailing benefit that innocence-selectivists view as capable of outweighing these costs is the benefit of releasing a person who actually did not commit the crime for which that person was convicted.

E. Vision Five: The One-Fair-Chance Vision

The two preceding visions showed two different ways of limiting the scope of habeas: by limiting it to *certain types of claims*, or by limiting it to *certain petitioners*. Yet a third way of limiting habeas is by only permitting litigants whose cases are in a *certain procedural posture* to pursue it. This is the route taken by proponents of this fifth vision, who see habeas as an appropriate remedy only when the petitioner did not have one-fair-chance to litigate the constitutional claim in state court. A basic premise of this vision is stated by its originator and foremost academic champion the late Professor Paul Bator. "[I]f a job can be well done once, it should not be done

93. Friendly, *supra* note 77, at 143-44.

twice."⁹⁴ Most, if not all, of the recent conservative Justices have been strongly influenced by the one-fair-chance vision, with Justices Scalia and Thomas seeming to be most thoroughly convinced.⁹⁵

1. *The three general issues of constitutional interpretation*

While the one-fair-chance vision does not dictate that its proponents be "conservative" with respect to these issues of constitutional interpretation, as a practical matter most proponents of the one-fair-chance vision are conservatives who are non-expansivist as to interpretation of rights, believe that other interests can be balanced against rights, and do not believe that all rights are equally important. It is probable that the coincidence between the one-fair-chance vision and the conservative nature of its proponents lies in the fact that this vision views state courts as the primary adjudicators of issues that arise in state criminal prosecutions, with the federal courts serving only a secondary and backstopping role.⁹⁶ This is the position that accords with the conservative belief in a broad sphere of state authority.

2. *The four theoretical issues specific to habeas*

a. *Function.* Compared with the functions of habeas espoused by the *de novo* litigation vision, the functions envisioned by one-fair-chance visionaries are quite limited. The one-fair-chance vision does believe in the vindication of individual rights, but only when the petitioner did not have a chance to have those rights vindicated during the state proceeding. As a practical matter, since all states have many procedural opportunities for defendants to raise constitutional issues, it is rare that a defendant will not have had one-fair-chance to litigate the constitutional claim.⁹⁷ Since this will be a relatively rare

94. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963).

95. *Withrow v. Williams*, 113 S. Ct. 1745, 1768 (1993) (Scalia, J., concurring in part and dissenting in part) ("Prior opportunity to litigate an issue should be an important equitable consideration in *any* habeas case, and should ordinarily preclude the court from reaching the merits of a claim, unless it goes to the fairness of the trial process or to the accuracy of the ultimate result.").

96. Yackle, *Misadventures*, *supra* note 15, at 389-91 (explaining that Bator's thesis relies on the proposition that state courts are the primary adjudicators of criminal cases).

97. All states provide mechanisms for presenting federal constitutional issues,

circumstance, one-fair-chance visionaries do not believe that habeas serves to deter state courts from too narrowly construing the substance of federal rights. Indeed, one of the most significant aspects of the one-fair-chance vision is that it exercises no control whatsoever over state court interpretations of federal constitutional criminal procedure law: As long as the state has provided a full and fair opportunity to litigate the matter, the state court judgment should stand even if it appears to be patently wrong. One function on which the one-fair-chance proponent can agree with the *de novo* litigation proponent is that habeas should have a tendency to force state courts to provide procedural opportunities for petitioners to have claims resolved at the state level (as discussed above, states have developed such procedures, probably more because of the spectre of direct review of their decisions than the more remote spectre of collateral habeas corpus review). Finally, one-fair-chance visionaries do not see any special benefit in keeping federal district courts involved in litigation of federal constitutional issues. In the view of these visionaries, the state and federal courts are fungible when it comes to making federal constitutional criminal procedure doctrine, and state courts are as likely to promote uniformity as are federal ones.

b. History. Professor Bator provided this vision's history in his famous 1963 law review article.⁹⁸ Bator argued that prior to the 1867 Act it was quite clear that the only kind of defect that could be remedied in habeas corpus, when the incarceration was the result of judicially authorized detention, was failure of jurisdiction.⁹⁹ He then argued that Congress probably did not have more expansive visions of habeas in mind when it enacted the Act of 1867.¹⁰⁰ Bator then plunged

both pretrial and during the trial. "[F]orty-seven states . . . provide the criminal defendant with the right to appeal at least once without obtaining prior court approval. The remaining states furnish discretionary procedures that are tantamount to an appeal as of right." Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 513-14 (1992). Further, all states now provide post-conviction remedies in addition to appeal. See YACKLE, *POSTCONVICTION*, *supra* note 15, § 13.

98. Bator, *supra* note 94, at 463-499.

99. *Id.* at 466 (quoting *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830)).

100. *Id.* at 475. Bator states that:

It would, then, require rather overwhelming evidence to show that it was the purpose of the legislature to tear habeas corpus entirely out of the context of its historical meaning and scope and convert it into an ordinary writ of error with respect to all federal questions in all criminal

into the murky waters of the period from 1867 to 1953, subdividing it into segments, and examining first the era from 1867 to 1915.¹⁰¹ During this period the Supreme Court judicially stretched the definition of "jurisdiction" to encompass attacks on illegal sentences¹⁰² and statutes alleged to be unconstitutional.¹⁰³ Then, in 1915, the Court decided *Frank v. Mangum*,¹⁰⁴ a case that is "crucial" to Bator's analysis.¹⁰⁵ In that case, according to Bator,

[f]or the first time the Court explicitly added a crucial weapon to the arsenal of the habeas corpus court: if that court finds that a state tribunal has failed to supply "corrective process" with respect to the full and fair litigation of federal questions, *whether or not "jurisdictional,"* in a state criminal proceeding, a court on habeas may appropriately inquire into the merits in order to determine whether the detention is lawful.¹⁰⁶

According to Bator, the Court in *Frank* divined the true mission of federal habeas corpus: to examine the merits of constitutional claims where the petitioner did not have an opportunity to litigate those claims fairly in state court.¹⁰⁷ Bator proceeds to attempt to harmonize subsequent cases with this proposition from *Frank*, and concludes that as of 1953 the power of federal habeas courts extended only to claims of lack of jurisdiction, illegal sentences, unconstitutionality of statutes, and claims as to which the state had failed to provide one fair opportunity for litigation.¹⁰⁸ Thus, to Bator, the 1953 decision in

cases.

The strikingly sparse legislative history does not seem to me to furnish such evidence.

Id.

101. *Id.* at 463-99.

102. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176-77 (1873), discussed in Bator, *supra* note 94 at 467-74.

103. *Ex parte Siebold*, 100 U.S. 371, 376-77 (1879); see Bator, *supra* note 94, at 468-74.

104. 237 U.S. 309 (1915).

105. Bator, *supra* note 94, at 484. See generally *id.* at 484-93.

106. *Id.* at 486-88.

107. *Id.*

108. *Id.* at 488-96. The most difficult case for Bator to harmonize is *Moore v. Dempsey*, in which one of the dissenters accused the majority of overruling *Frank*. See *Moore v. Dempsey*, 261 U.S. 86, 93-95 (1923) (McReynolds, J., dissenting). Both *Moore* and *Frank* involved claims that the defendants' trials in the state court had been overtaken by mob domination. The Court in *Frank* had held that the state court verdict would be permitted to stand because the state appellate court, upon full investigation, had determined that the trial was not mob-dominated. *Frank v.*

*Brown v. Allen*¹⁰⁹ constituted a radical expansion of federal

Mangum, 237 U.S. at 335-36. In *Moore*, the state appellate court apparently had made no findings with respect to the mob domination claim, and the Supreme Court held that in that situation the federal habeas court must litigate the claim *de novo*. As to *Moore*, Bator says:

Though the opinion is admittedly far from clear, all *Moore v. Dempsey* may be saying, then, is that a conclusory and out-of-hand rejection by a state of a claim of violation of federal right, without any process of inquiry being afforded at all, cannot insulate the merits of the question from the habeas corpus court: if the state's findings are to "count," they must be reasoned findings rationally reached through fair procedures. So viewed, the case is entirely consistent with *Frank*.

Bator, *supra* note 94, at 489.

Bator then deals with *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), which held "that a conviction procured through testimony known by the state authorities to be perjured, results in a [violation] of due process." Bator, *supra* note 94, at 490. According to Bator, the holding of the case is that "the state is 'required' under *Frank* and *Moore* to afford corrective process, and in its absence, federal habeas will be available." Bator, *supra* note 94, at 491. Bator then turns to a trio of cases, *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (holding that a claim of denial of counsel can be heard in habeas), *Walker v. Johnston*, 312 U.S. 275, 286 (1941) and *Waley v. Johnston*, 316 U.S. 101, 104-5 (1942) (both permitting litigation in habeas of the claim that the defendant was forced to plead guilty). See Bator, *supra* note 94, at 493-96. According to Bator, these cases are consistent with the one-fair-chance vision because denial of right to counsel, or a coerced guilty plea, deprives the defendant of the one-fair-chance to contest the charges. Bator, *supra* note 94, at 493-95. Finally, Bator finds language in three state prisoner habeas cases supporting the proposition that the federal court should hear the claim in habeas only if the state courts did not give the petitioner a fair opportunity to litigate the claim. See *Ex parte Hawk*, 321 U.S. 114, 117-18 (1944); *House v. Mayo*, 324 U.S. 42, 46-48 (1945); *White v. Ragen*, 324 U.S. 760, 766-67 (1945); Bator, *supra* note 94, at 495-99.

Bator acknowledges, however, that the case law of the era does not unambiguously support his position:

I do not mean to give a picture of the law of this time which is neater than it actually was. The Court did not, after *Frank*, give any rounded consideration to the reaches and purposes of the habeas jurisdiction. Most of the cases of the period are explicitly concerned not with the problem of relitigation of federal questions already canvassed in state courts, but with the complications created by the exhaustion doctrine and with the vexing question whether a prisoner must seek direct Supreme Court review of a state judgment as a condition of the right to seek habeas corpus. . . . And there are some opinions which could be taken to intimate that the writ automatically reaches the merits of all federal constitutional questions. Furthermore, there can be no doubt that, by 1952, the integrity and continuing authority of the doctrine of *Frank v. Mangum* had been endangered, as it were, on several occasions.

Bator, *supra* note 94, at 496-98 (citations omitted). The cases Bator cites, which he believes could be taken to stand for the proposition that the writ reaches the merits of all federal constitutional questions, are *Darr v. Burford*, 339 U.S. 200 (1950), *overruled in part by* *Fay v. Noia*, 372 U.S. 391 (1963); *Wade v. Mayo*, 334 U.S. 672 (1948); and *Jennings v. Illinois*, 342 U.S. 104 (1951). See Bator, *supra* note 94, at 497-98 n.155.

109. 344 U.S. 443 (1953).

habeas power to encompass *all* claims of federal constitutional violation, even if those claims had been fully and fairly litigated in state court.¹¹⁰ To Bator the result in *Brown* was anomalous, both in terms of being inconsistent with the writ's history, and being contrary to the common sense proposition that if a job has been done once in state court there is no good reason to do it again in federal court, given that state and federal courts are essentially fungible in determining the merits of federal constitutional issues.¹¹¹

Bator's article was published at an unpropitious moment: at the height of the Warren Court-activist era, just before the Warren Court's 1963 habeas trilogy.¹¹² More than a decade later, however, when the conservatives on the Burger Court gained influence, Bator's thesis was resurrected and since has become a bedrock statement of both the writ's history and function for several conservative Justices.¹¹³

c. *Federalism*. The foregoing discussion makes clear the one-fair-chance vision's view of federalism: state courts and federal courts are fungible when it comes to adjudicating federal constitutional issues—after all, state court judges are equally bound to uphold the Federal Constitution. As Bator put it,

[t]here is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the applicable federal law than his neighbor in the state courthouse. The federal judge is more "correct" under the present system only because our institutional arrangements make him authoritative.¹¹⁴

d. *Congressional versus Supreme Court authority*. Proponents of the one-fair-chance vision necessarily believes that there is great power in the Supreme Court to create the boundaries of federal habeas power. This is true inasmuch

110. Bator, *supra* note 94, at 500.

111. *Id.* at 502-06.

112. The liberal majority in *Fay* took note of Bator's article and disagreed with the point it noted, finding the argument that *Frank* established a one-fair-chance principle that was left untouched by *Moore* "untenable." *Fay v. Noia*, 372 U.S. 391, 421 n.30 (1963).

113. Eighteen years later, looking back on his own article, Bator noted that it "had the strange history of being pronounced dead almost as soon as it was written, only to enjoy a mysterious recent resurrection." Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 613 (1981).

114. Bator, *supra* note 94, at 509.

as the one-fair-chance principle that Bator purports to have found in *Frank v. Mangum*¹¹⁵ was clearly not part of the original legislative intent of the Congress that passed the 1867 Act. This is also borne out by the fact that even as the one-fair-chance doctrine has grown in ascendancy in Supreme Court case law, at the same time Congress has repeatedly rejected proposed amendments to the habeas corpus statute that would essentially embody the one-fair-chance principle.¹¹⁶

3. *The practical issue—the effects of habeas litigation*

Proponents of the one-fair-chance vision see benefits from habeas jurisdiction only where the federal court is deciding an issue as to which the petitioner did not have a fair chance to litigate in state court. In that situation, one-fair-chance proponents acknowledge the benefit of vindicating the rights of the petitioner. But when a petitioner brings a claim that has already been litigated unsuccessfully in state court, proponents of the one-fair-chance vision see no benefits to federal jurisdiction, only costs. The costs, of course, are the well known ones of burdening the prosecuting authorities and federal judges, as well as undermining the very notion that a criminal case can reach a *final* judgment of guilt.¹¹⁷ No benefit can be derived from such proceedings, according to these visionaries, even if the petitioner is successful in federal court: there is no reason to believe that the federal court's decision in the petitioner's favor is any more "correct" than the state court decision against

115. 237 U.S. 309 (1915). See *supra* notes 100-02 and accompanying text.

116. Liebman, *supra* note 5, at 2084 & n.526 (noting that at least 34 times between 1953 and 1992 Congress considered bills that would have limited habeas jurisdiction, many of which were based on the one-fair-chance principle).

117. Bator, *supra* note 94, at 444-53.

the petitioner's claim.¹¹⁸ Thus, the relitigation results only in a *different* result, not a *better* one.

F. *Vision Six: The Inverse Correlation Vision*

The inverse correlation vision postulates that federal habeas power should be broad when state courts are not properly enforcing the substance of federal constitutional rights, but should be narrow when state courts are doing a good job of enforcing those rights. Under this vision the federal habeas power is not static, but expands when it is needed to counteract state recalcitrance, and then contracts when state recalcitrance diminishes. Hints of this vision appear in academic literature,¹¹⁹ and in the Court's habeas jurisprudence,¹²⁰ when

118. As Bator puts it:

After all, there is no ultimate guarantee that *any* tribunal arrived at the correct result; the conclusions of a habeas corpus court, or of any number of habeas corpus courts, that the facts were X and that on X facts Y law applies are not infallible; if the existence *vel non* of mistake determines the lawfulness of the judgment, there can be no escape from a literally endless relitigation of the merits because the possibility of mistake always exists. . . . What seems so objectionable is second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the "truth."

Id. at 447, 451.

119. See Friedman, *supra* note 10, at 818 ("If the habeas courts were indeed the Supreme Court's footsoldiers [during the Warren Court era] in the due process revolution, then a change in the nature of that conscription logically should follow the Court's changing philosophy of criminal constitutional law and renewed trust of state courts."); Hughes, *supra* note 16, at 328 ("The federal habeas revolution has been attacked and curbed and is now being turned around. Swings of the pendulum are a natural part of the rhythm of affairs and need not always be viewed with great alarm."); Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 364 (1983) (explaining that while the Warren Court habeas cases broadening the scope of the writ "may now seem extreme to some, but they may, nonetheless, have served a useful and important purpose when they were announced. The new rules helped implement a widely heralded civil rights movement that had begun in the early 1950s to arouse the conscience of America."). Even Professor Bator acknowledged the seductiveness of the idea of expanding federal habeas jurisdiction when state courts are untrustworthy in enforcing federal rights.

There is surely appeal in the notion, and perhaps it makes sense at a time when there still is a justified suspicion and distrust of state-court rulings as to federal constitutional rights, to have a jurisdiction with a large and roving commission "to prevent a complete miscarriage of justice"

Bator, *supra* note 94, at 525 (citation omitted). Bator, however, was stalwart enough to resist this notion:

Similarly, I resist the notion that sound remedial institutions can be built on the premise that state judges are not in sympathy with federal law.

the Court discusses whether state court judges need to be deterred from too narrowly construing federal constitutional protections.

1. *The three general issues of constitutional interpretation*

The three issues of constitutional interpretation—expansiveness, balanceability and equality—are not as important in this vision because the focus is on the trustworthiness of state courts rather than on the characteristics of rights. For example, a person could be a liberal expansivist as to constitutional rights, yet still be satisfied with a limited role for habeas if that person were convinced that the state courts were enforcing constitutional rights effectively. As a practical matter, however, liberals generally tend to favor federal power and, thus, do not tend to be inverse correlationists.

2. *The four theoretical issues specific to habeas*

a. *Function.* Inverse correlation visionaries believe in the first three functions of habeas in which *de novo* litigation visionaries believe: vindicating individual rights, deterring state courts from too narrowly construing the substance of federal rights, and pressuring state courts into improved procedures for vindication of federal rights. The big difference between *de novo* litigation visionaries and inverse correlation

Again we must think in terms of tomorrow as well as today. Hopefully we will reach the day when the suspicion will no longer be justified that state judges—especially Southern state judges—evade their responsibilities by giving only the appearance of fairness in their rulings as to state defendants' federal rights.

Id. at 524.

120. In *Fay*, the majority never explicitly stated a distrust of state courts, but the whole thrust of the opinion indicates this belief. *Fay v. Noia*, 372 U.S. 391 (1963). The pendulum swung by the time of *Stone*, where the majority stated, "We are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976). Since then the pendulum has swung back and forth. Contrast, for example, two 1993 cases, *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1721 (1993) (opining that state judges do not need deterring), with *Withrow v. Williams*, 113 S. Ct. 1745, 1755 (1993) (arguing that permitting the enforcement of *Miranda* claims through habeas will act as a beneficial deterrent to state courts). See also *Teague v. Lane*, 489 U.S. 288, 306-07 (1989) (acknowledging the need to deter state courts as a significant aspect of habeas); *Rose v. Mitchell*, 443 U.S. 545, 563 (1979) (holding that there is beneficial deterrent value from enforcing claims in habeas relating to the selection of a grand jury).

visionaries with respect to function is that the former believe the federal courts constitute a *front line* forum in the battle for constitutional rights, while the latter believe that federal courts provide a *backup* mechanism in case the front-line state courts fail to fulfill their obligations. Thus, inverse correlationists don't put much stock in the other three habeas functions urged by *de novo* litigation visionaries: keeping federal courts in practice, promoting state-federal dialogue, and seeking uniformity in federal law.

b. History. Although I know of no existing attempt to provide a history for the inverse correlation vision, a plausible one can be created. One would begin in the Reconstruction era and state the unassailable conclusion that the 1867 Act was promulgated for the very reason that state courts in the South were refusing to enforce federal constitutional obligations. One would then note that Congress signaled the Supreme Court, once Reconstruction fervor had died down, to judicially limit the wide scope of habeas corpus,¹²¹ which the Supreme Court promptly did when it established the exhaustion of state remedies requirement.¹²² We would then skip ahead to *Frank v. Mangum*¹²³ in 1915 as an indication that the federal courts would stand ready to remedy egregious constitutional violations for which the state courts did not provide a remedy. The gradual expansion of the writ thereafter until the culmination in *Brown v. Allen*¹²⁴ could be explained as a result of the increasing recognition that state court criminal justice was in many ways primitive and in need of unifying federal oversight. The Warren Court met this need by federalizing criminal procedure law, and expanding habeas via its 1963 trilogy to empower federal district courts to police this criminal procedure revolution. Our history would finish with an assertion that is ac-

121. Professor Liebman synthesizes the history on this point. Liebman, *supra* note 5, at 2064-69. In 1868, Congress passed an act that withdrew the Supreme Court's jurisdiction under the 1867 habeas corpus statute. See Act of March 27, 1868, ch. 34, 15 Stat. 44. In 1885 Congress restored the Court's appellate jurisdiction under the 1867 statute. See Act of March 3, 1885, ch. 353, 23 Stat. 437. At the same time Congress invited the Supreme Court, in light of the restored right to appeal, to define "the true extent of the Act of 1867, and the true limits of the jurisdiction of the Federal courts and judges under it" so that Congress could determine "whether further legislation is necessary." H.R. REP. NO. 730, 48th Cong., 1st Sess., at 6 (1885).

122. *Ex parte Royall*, 117 U.S. 241, 252-53 (1886).

123. 237 U.S. 309, 329-30 (1915).

124. 344 U.S. 443 (1953); see *supra* note 36.

knowledge even by most liberals: generally state courts have, for the last couple of decades, tried their best to correctly apply constitutional criminal procedure doctrine as promulgated by the Supreme Court.¹²⁵ Based on this perception, inverse correlationists contend that federal habeas today should be a rather limited remedy that exists to catch those relatively few instances in which the state courts have egregiously failed to perform their constitutional duties.

c. *Federalism.* To an inverse correlation visionary, state courts have the *capacity* to be just as effective in enforcing federal constitutional rights as are federal courts. The key question for an inverse correlationist is whether the state courts at a given point in time have the *inclination* to fulfill that capacity. If they do, then the federal habeas role is of a secondary nature.

d. *Congressional versus Supreme Court authority.* Proponents of the inverse correlation vision can argue that their vision most truly fulfills the actual intent of the 1867 Congress. This vision relies not on the explicit language of the statute—which is quite broad and gives no indication that the writ's scope should expand and contract in changing circumstances—but rather on the underlying purpose of Congress that the federal courts stand ready to enforce constitutional rights when state courts were unwilling to do so. Proponents of this vision would point out that Congress has, for the most part, acquiesced to both the expansions of the writ by the Warren Court, and the subsequent contractions by more conservative courts.¹²⁶ This could be taken as an indication that Congress

125. See *supra* note 45 and accompanying text.

126. See Jeffries & Stuntz, *supra* note 5, at 707 ("[V]irtually all ingredients of federal habeas law were announced without statutory authority. At least since 1886, federal habeas law has developed by judicial innovation, followed (sometimes) by legislative ratification."). The habeas statutes have been significantly revised only twice. The first significant amendments after 1867 occurred in 1948, but they altered the basic form and function of federal habeas corpus very little. "Indeed, most of the new provisions only wrote the specifics of Supreme Court decisions into the statute book." YACKLE, *POSTCONVICTION*, *supra* note 15, § 19 at 90. The second significant revision occurred in 1966. At least some of the 1966 amendments were prompted by the Warren Court's 1963 habeas trilogy and signified Congress's intent to tighten habeas jurisdiction. Probably the most significant of the 1966 revisions was the addition of 28 U.S.C. § 2254(d), which granted a presumption of correctness to properly arrived at state court factual determinations. As Professor Weisselberg has demonstrated, this amendment had a dramatic effect on the percentage of state petitioners who received evidentiary hearings. Weisselberg, *supra* note 6, at 167-68.

has accepted and, indeed, ratified the Court's role as expander and contractor of habeas doctrine in keeping with the relative willingness of state courts to enforce federal rights.

3. *The practical issue of the effects of habeas litigation*

Under the inverse correlation vision the costs and benefits of federal habeas litigation change over time. When state courts are unwilling to enforce federal rights, then the benefits of habeas litigation far outweigh its costs. On the other hand, when state courts show themselves generally willing to enforce federal rights the costs of redundant and protracted litigation outweigh the benefits.

G. *Vision Seven: The Equitable Remedy Vision*

The vision of habeas as an equitable remedy argues that each habeas case is unique, and that few, if any, general principles of habeas law are necessary to justly decide habeas cases. Rather, the habeas court should look at several factors including, but not limited to, the importance of the right involved, the egregiousness of the claimed violation, the skill with which the petitioner was represented in the state courts, the penalty imposed on the petitioner (with particular concern for whether the sentence was death), the diligence of the petitioner's attempt to assert the claim, and the inability of the petitioner to state a claim because the state authorities have somehow obstructed the process. After considering these and other pertinent factors, the federal habeas court should render a just decision. Thus, for example, with respect to a procedurally defaulted claim, the habeas court should not apply a general rule that defaulted claims are barred, but instead should look at all factors to see whether justice requires that the federal court honor the procedural bar in the particular case before it. Justice Stevens is the best exemplar of this vision along with, as was pointed out earlier,¹²⁷ being a rights-selectivist. In-

127. Justice Stevens' rights-selectivist ideas are discussed *supra*, notes 66-68. The most prominent landmarks along the trail of Justice Stevens' equitable remedy vision include *Wainwright v. Sykes*, 433 U.S. 72, 95-96 (1977) (Stevens, J., concurring).

[I]f the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused. Matters such as the competence of counsel, the procedural context in which the asserted waiver occurred, the character of the constitutional right at stake, and the

deed, the two visions are highly compatible because one of the significant factors equity considers is the nature of the right claimed to have been violated.

1. *The three general issues of constitutional interpretation*

A proponent of the equitable remedy vision need not espouse any particular position concerning expansiveness of interpretation of constitutional rights, but necessarily needs to espouse a particular position concerning their balanceability and equality. Clearly, such a visionary must believe rights to be balanceable, inasmuch as other factors which equity considers can outweigh a right's vindication. Similarly, such a visionary believes that rights are unequal, with some rights more powerful and thus in need of vindication than are others.

2. *The four theoretical issues specific to habeas*

a. Function. To an equitable remedy visionary, the mission of habeas corpus is to do justice. Thus, it focuses on the vindication of individual rights, and pays little heed to proposed systemic goals such as deterring state courts, spurring state systems to change their procedures, and keeping federal courts involved in the dialogue. The equitable remedy vision implicitly eschews uniformity of federal law as a goal, since justice may require, for example, on the facts of one case, that a procedural default be respected, while on different facts in another case an identical procedural default should be ignored. Further, different federal district judges will have different ideas of what is just on the facts of any given case.

b. History. The idea that habeas is an equitable remedy has a relatively short history. The first connection between habeas and equity in Supreme Court jurisprudence occurred in an opinion by Justice Frankfurter in 1953.¹²⁸ The habe-

overall fairness of the entire proceeding, may be more significant than the language of the test the Court purports to apply.

Id. (footnote omitted); see *Kuhlmann v. Wilson*, 477 U.S. 436, 476 (1986) (Stevens, J., dissenting) (arguing that a colorable claim of innocence is but one of the factors, and not always an essential one, in determining whether the "ends of justice" require a federal habeas court to consider a successive petition); *Murray v. Carrier*, 477 U.S. 478, 498-506 (1986) (Stevens, J., concurring in the judgment) (arguing that several factors should go into determining whether the federal court should ignore a state procedural default).

128. *U.S. ex rel. Smith v. Baldi*, 344 U.S. 561, 573 (1953) (Frankfurter, J., dissenting) ("I need hardly point out that in a court of equity causes are disposed

as/equity connection made its debut in a majority opinion in *Fay v. Noia*,¹²⁹ and since then the idea that habeas is governed by equitable principles has become a recurring motif in Supreme Court opinions.¹³⁰ It is crucial to note, though, that many of the references to "equitable principles" in opinions by conservative Justices have a far different meaning than the idea of equity espoused by Justice Stevens. Justice Stevens' notion of equity in habeas is a case-by-case concept; the conservative Justices use the concept of "equitable principles" when they establish generic rules governing habeas, e.g., a procedural default cannot be excused unless very narrowly defined "cause and prejudice" is established.¹³¹ Such rules reflect primarily the one-fair-chance vision. With all due respect to the conservatives, the idea of *generic equity* is a contradiction in terms: while equity can support vague and general maxims, such as that the equitable claimant must not have "unclean hands," the idea of equity loses its essential meaning when a court establishes inflexible rules applying to all cases.¹³²

of on the facts as they appear at the time of the disposition, and that habeas corpus is certainly to be governed by the rules of fairness enforced in equity."). *But see* 1 JAMES LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 3 (1988) ("[H]istorically habeas corpus developed as 'a legal, not an equitable, remedy.'").

129. 372 U.S. 391, 438 (1963) ("Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles.").

130. *See, e.g., Withrow v. Williams*, 113 S. Ct. 1745, 1766-67 (1993) (Scalia, J., concurring in part and dissenting in part) (stating that equitable treatment pervades the law of habeas); *id.* at 1757 (O'Connor, J., concurring in part and dissenting in part) (making a similar argument); *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1729 (1993) (O'Connor, J., dissenting) (stating that equitable principles have governed habeas); *McCleskey v. Zant*, 499 U.S. 467, 484 (1991) (holding equitable principles govern abuse of the writ); *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (stating that equitable principles traditionally governed in habeas); *Stone v. Powell*, 428 U.S. 465, 478 n.11 (1976) (noting the equitable nature of the writ).

131. The following cases are the leading ones in development of the standard: *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991); *Murray v. Carrier*, 477 U.S. 478, 485-89 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977).

132. *See Patchel, supra* note 20, at 1034.

Equitable doctrines involve the balancing of the respective interests of particular parties in a particular case. The "balancing" utilized by the Court to come up with limits on habeas review, however, is an entirely different kind of balancing. The Court "balances" the generic interests of a class of individuals—habeas petitioners—against the generic interests of the states in order to define the limits on habeas review and formulate a rule that then is applied as a mandatory requirement in all cases. This type of "balancing of interests" is an argument of policy, not of principle. It does not involve consideration of, and decision regarding, rights of the parties before the Court, but rather a utilitarian compromise of individual

c. *Federalism.* To an equitable remedy visionary, federal courts need not be conceived as being *better* at dispensing justice than state courts, but are conceived of as being *freer* to do so. For example, state appellate courts often feel obligated to enforce procedural defaults no matter how serious the claimed conditional violation, because they envision that the failure to consistently uphold procedural defaults could result in significant damage to the orderliness of the state system. A federal court can, if circumstances warrant, overlook the procedural default without doing any lasting harm to the state's interest in orderliness, since the state rule would still be that such defaults are enforceable on direct appeal.

d. *Congressional versus Supreme Court authority.* There is no indication that the 1867 Congress thought of habeas as an equitable remedy. Instead, equitable remedy visionaries rely on a 1948 amendment to section 2243¹³³ as the primary authority for the equitable nature of the writ: "The Court shall summarily hear and determine the facts, and dispose of the matter as law *and justice* require."¹³⁴ There is virtually no legislative history concerning what Congress meant by the term "and justice," but it is not implausible to equate "justice" with equity or equitable principles.

3. *The practical issue—the effects of habeas litigation*

Proponents of the equitable remedy vision, focusing on habeas issues on a case-by-case basis, are not overly interested in assessing systemic costs associated with habeas corpus. They do see the definite benefit of vindicating constitutional rights in those relatively few cases in which such vindication was not accomplished at the state level.

H. *Vision Eight: The Death-is-Different Vision*

The premise of this vision is that just as "death-is-different" from all other punishments as a matter of Eighth Amendment law,¹³⁵ so death-is-different for purposes of the writ of

rights in light of broader societal goals.

Id.

133. 28 U.S.C. § 2243 (1988).

134. *Id.* (emphasis added).

135. The idea that "death-is-different" was implicit in *Furman v. Georgia*, 408 U.S. 238 (1974) and became explicit shortly thereafter in *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (explaining that *Furman* had recognized that death was differ-

habeas corpus in the sense that the writ has an especially important function to perform in cases where the petitioner is death-sentenced.¹³⁶ This vision differs from the others we have discussed in that it is only a partial vision: it must adopt one of the other visions as to non-death penalty petitioners. The most common coupling is of the *de novo* litigation vision with the death-is-different vision, given that most liberal adherents of the *de novo* litigation vision are also death penalty opponents.

1. *The three general issues of constitutional interpretation*

A death-is-different visionary need not hold any particular viewpoint concerning how expansively the rights of death sentenced petitioners should be defined, but does necessarily believe that those rights, given the life at stake in a death penalty case, should not be easily counterbalanced by any counter-vailing interest. This necessarily means that death-is-different visionaries view the rights of death-sentenced petitioners with greater weight than the claims of non-death sentenced petitioners.

ent). The Court has continued to adhere to this position. *Harmelin v. Michigan*, 501 U.S. 957 958-59 (1991); *Lankford v. Idaho*, 500 U.S. 110, 125-26 (1991); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

136. See *Sawyer v. Whitley*, 112 S. Ct. 2514, 2529-30 (1992) (Blackmun, J., concurring in the judgment) (arguing that the ever-shrinking power of federal courts to review claims of error in state death penalty cases "undermines the very legitimacy of capital punishment itself"); *Smith v. Murray*, 477 U.S. 527, 523-25 (1986) (Stevens, J., dissenting) (arguing that the majority gives insufficient weight to the fact that the petitioner has been death sentenced); *Murray v. Carrier*, 477 U.S. 478, 525-26 (1986) (Brennan, J., dissenting) (arguing that if inadvertence of counsel should constitute "cause" in a non-capital case a fortiori it should constitute cause in a capital case); Richard J. Bonnie, *Preserving Justice in Capital Cases While Streamlining the Process of Collateral Review*, 23 U. TOL. L. REV. 99, 100 (1991) (arguing that, at least in capital cases, federal habeas jurisdiction should not throw barriers in front of the petitioners); Hoffmann, *supra* note 18, at 147-50 (arguing that the capital jurisprudence law is so complex, changing, and that national standards are so important that difference should be given to the federal courts with their particular expertise to avoid constitutional error); cf. Jeffries & Stuntz, *supra* note 5, at 720-21 (urging broad forgiveness of procedural defaults concerning the sentencing stage of capital proceedings, not necessarily because death-is-different, but because the decision whether to impose the death penalty is so rife with subjectivity and discretion that the concept of factual reliability loses its clarity and harshness).

2. *The four theoretical issues specific to habeas*

a. *Function.* According to death-is-different visionaries, a special function of habeas is to assure that no state executes an inmate unless that state has scrupulously protected the death-sentenced petitioner's constitutional rights.

b. *History.* The history of this vision is only slightly more than two decades old, because it was not until the 1970s that the Supreme Court began to make significant Eighth Amendment law concerning the death penalty.¹³⁷ Over the succeeding two decades, the Supreme Court made many pronouncements concerning the constitutional requirements of death sentencing procedures, resulting in one of the more complicated bodies of constitutional criminal procedure law.¹³⁸ To death-is-different visionaries the combination of the ultimate nature of the sanction, the complicated nature of the governing law, and the suspicion that state authorities are particularly susceptible to political pressure in death penalty cases,¹³⁹ makes a strong argument for assigning the federal courts a special watchdog function as to death penalty cases.

c. *Federalism.* As was just pointed out, death-is-different visionaries believe that states are in particular need of federal oversight with respect to the highly volatile cases that result in death sentences. Indeed, there is a clear historical resonance here with the Reconstruction era, since most of the states that have high death row populations and that most often carry out executions are in the Deep South. Further, there is statistical¹⁴⁰ as well as anecdotal evidence that racial factors still

137. *Gregg v. Georgia*, 428 U.S. 153, 188-95 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

138. Hoffmann, *supra* note 18, at 147 (arguing that Eighth Amendment death penalty jurisprudence is "more elaborate and confusing than almost any other area of constitutional law").

139. Steven B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 Mo. L. REV. 849, 864 (1992) (arguing that one of the reasons why state courts tolerate injustices in death penalty cases, such as shoddy representation and racial discrimination, is that "courts do not function well when they are caught up in the passions and politics of the moment. And no case involves the passions of the moment more than a death penalty case, particularly one involving an interracial crime.").

140. See *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987) (discussing statistical data showing that defendants charged with killing white victims were 4.3 times more likely to receive death sentences than defendants charged with killing blacks).

loom large in determining who gets the death sentence and who doesn't.¹⁴¹

d. Congressional versus Supreme Court authority. A death-is-different visionary necessarily believes that the Supreme Court has significant power to structure habeas jurisdiction, since there is no indication in any of the habeas statutes, or in the congressional intent, that death penalty petitioners should be treated any different than other petitioners.

3. *The practical issue of the effects of habeas litigation*

Death-is-different visionaries believe that the potential benefits of habeas litigation for death penalty petitioners—the vindication of a constitutional right that saves a prisoner from being unconstitutionally executed—far outweigh any attendant costs.

I. *A Note About Adherence to Multiple Visions*

A word is in order about the possibility that a person might credibly adhere to more than one vision. Some of the visions are obviously incompatible, such as the *de novo* litigation vision and the one-fair-chance vision. Others could rationally be combined, as Justice Stevens has done with the rights-selectivist and equitable remedy visions. Even some visions that do not at first glance appear to be compatible could rationally be combined by utilizing one as an exception to another. For example, one could be primarily a one-fair-chance visionary, while at the same time believing that a petitioner with a colorable claim of factual innocence should have the one-fair-chance principles applied less rigorously than a petitioner who does not have such a claim of innocence. Similarly, one could be generally an inverse correlationist, yet find that certain states, or certain courts within states, are so hostile to federal constitutional rights that federal habeas cases involving decisions of those courts should be treated in line with the *de novo* litigation vision.¹⁴² Numerous other combinations are also possible.

141. See Bright, *supra* note 139, at 853-862.

142. See Craig M. Bradley, *Are State Courts Enforcing the Fourth Amendment? A Preliminary Study*, 77 GEO. L.J. 251, 286 (1988) (concluding that most states are enforcing the Fourth Amendment, but that Georgia, and possibly Arizona and South Carolina, are not).

III. VISIONS IN CONTEXTS

So far I have examined the eight visions in the abstract. It is now time to become more concrete and see how these visions unfold with respect to the ten contexts in which they arise in habeas litigation: exhaustion of state remedies, the scope of cognizable claims, then-existing law claims, new-rule claims, mixed question claims, pure fact claims, procedurally defaulted claims, abuse of the writ, successive petitions, and the standard for obtaining relief.¹⁴³ The task I will undertake with respect to each of these contexts is threefold. First, I will set forth the nub of the context, which includes an analysis of what is at stake, along with any governing statutes. Second, I will examine how each vision would resolve the nub of the context. And third, I will analyze the case law to attempt to determine which vision or visions of habeas it reflects.

A. *Context One: Exhaustion of State Remedies*

1. *The nub of the context*

As Reconstruction ardor waned, Congress invited the Supreme Court to judicially constrict the broad habeas jurisdiction of the 1867 Act.¹⁴⁴ The Court responded in *Ex parte Royall*¹⁴⁵ in 1886 by creating the "exhaustion of state reme-

143. I have chosen these ten contexts because they encompass the key issues that are peculiar to habeas law and thus permit discussion of all the significant Supreme Court habeas cases. One might argue about the omission of the issue whether a claim of innocence, pure and simple, is cognizable in habeas. See *Herrera v. Collins*, 113 S. Ct. 853, 869-70 (1993) (wrestling with this issue with a majority of the Court concluding that such a claim is cognizable, at least in a death penalty case). This issue, however, concerns whether a right of innocence should be recognized as a right under constitutional criminal procedure law. This issue is not peculiar to the habeas context even though it seems more likely to arise on habeas than on direct review. It is not difficult to imagine such an issue arising on direct review, however. Imagine that the petitioner has been convicted and then shortly thereafter finds what the petitioner believes to be convincing evidence of innocence. The petitioner then files a motion for a new trial based on this newly discovered evidence, which is denied. The petitioner then appeals both the conviction and the denial of the new trial motion. The petitioner loses through the state appellate system. The petitioner could then seek certiorari in the United States Supreme Court and one of the claims would be that the petitioner's constitutional right not to be incarcerated when provable innocence was denied by the state court's failure to grant the new trial motion. For a discussion of whether the Court should recognize a constitutional right to innocence, see Steiker, *supra* note 5, at 305 n.12.

144. See *supra* note 115 and accompanying text.

145. 117 U.S. 241 (1886).

dies" requirement. The Court reasoned that as a matter of comity between separate sovereigns, the state should have the first opportunity to remedy claims of error arising from a state criminal proceeding.¹⁴⁶ In 1948 Congress codified the exhaustion requirement.¹⁴⁷ The Court proceeded, without a great deal of controversy, to work out the basic principles governing exhaustion.¹⁴⁸ There is only one exhaustion-related issue that has proven to be doctrinally controversial: whether a petitioner can proceed in habeas with a "mixed" petition, that is, one that contains both exhausted and unexhausted claims. Our discussion will focus on that issue.

2. *How each vision could respond to the nub of this context*

a. *The de novo litigation vision.* The *de novo* litigation vision is essentially inconsistent with the exhaustion requirement: if it is important for a violated right to be vindicated, and vindicated sooner rather than later, and if the federal courts are superior at vindicating those rights, then it makes no sense to force petitioners to attempt to vindicate those rights in the "inferior" state courts.¹⁴⁹ If *de novo* litigation vi-

146. *Id.* at 253.

147. 28 U.S.C. § 2254(b), (c) (1988). This section provides:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Id.

148. See LIEBMAN, *supra* note 128, at 45-52 (setting forth the fundamental rules of exhaustion of remedies, some of the more important of which are that "[e]xhaustion does not require a petition for a writ of certiorari to the . . . Supreme Court," that "raising a claim on direct appeal—or in one complete round of state post-conviction proceedings—exhausts it, even if other state remedies remain available;" that "[r]aising a claim on direct appeal exhausts it even if the claim was not presented at trial;" that "[a]ctually presenting the claim on direct appeal exhausts it whether or not the state courts explicitly ruled on it;" and that a petitioner is not required "to pursue state remedies that are inadequate or futile").

149. See Yackle, *Misadventures*, *supra* note 15, at 363 ("[T]he states have established and now employ postconviction remedies that all too often frustrate the adjudication of federal claims. Accordingly, I contend that petitioners should be relieved of any responsibility to pursue those remedies before seeking federal habeas relief.").

sionaries started with a clean slate, they would likely create a system in which a defendant who raised a constitutional claim would be removed to federal district court litigation, or, less radically, would permit a convicted petitioner with a constitutional claim to appeal directly to federal court, bypassing state appellate procedures.¹⁵⁰ But *de novo* litigation visionaries are not writing on a clean slate: the statute clearly requires exhaustion.¹⁵¹ The statute does not, however, speak explicitly to mixed petitions: as to those, *de novo* litigation visionaries should argue vigorously for permitting federal habeas litigation as to the unexhausted claims as well as the exhausted ones, because the petitioner has paid the required obeisance to state procedures by submitting at least some of the claims to state corrective processes. To force a petitioner to rerun the state gauntlet as to unexhausted claims unjustifiably risks the continued incarceration of a person whose constitutional rights have been violated.

b. *The appellate review vision.* Appellate review visionaries are quite happy with the exhaustion requirement because it makes a habeas petitioner follow normal appellate channels by raising the issue in the "lower" courts—state courts—before raising the issue in the "higher" court—that is, the federal habeas court. Thus, as to a mixed petition, an appellate review visionary should staunchly advocate that the federal court not hear any unexhausted claim

c. *The rights-selectivist vision.* A rights-selectivist is likely to be neutral as to the exhaustion requirement in general. As to mixed petitions, though, a rights-selectivist should be more inclined to permit litigation of the unexhausted claim if the claim involves a right favored by the rights-selectivist. The possibility of a petitioner with a valid claim of a violation of a favored right languishing in prison, particularly on death row, while undergoing another round of state litigation, is not a comfortable one for a rights-selectivist.¹⁵²

150. See Yackle, *Explaining*, *supra* note 15, at 1028-40 (considering but ultimately rejecting removal as a desirable option).

151. 28 U.S.C. § 2254(b) (for applicable text, see *supra* note 147).

152. See *Rose v. Lundy*, 455 U.S. 509, 545 (1982) (Stevens, J., dissenting) (arguing for flexible application of the exhaustion requirement and contending that if the already exhausted claims state good grounds for relief, then "postponing relief until another round of review in the state and federal judicial systems has been completed is truly outrageous").

d. The innocence-selectivist vision. The innocence-selectivist is likewise likely to be neutral with respect to the exhaustion requirement in general. As to a mixed petition, the innocence-selectivist vision would suggest that the federal court should hear an unexhausted constitutional claim only if the petitioner also has a colorable claim of factual innocence.

e. The one-fair-chance vision. A one-fair-chance visionary should applaud the exhaustion requirement since it forces petitioners to seek to have their claims vindicated in the forum favored by one-fair-chance visionaries: the state courts. As to mixed petitions, one-fair-chance visionaries should have no hesitancy in sending the petitioner back to state court to exhaust the unexhausted claims.

f. The inverse correlation vision. Inverse correlationists believe in the exhaustion requirement to the extent that they believe the state courts are generally enforcing federal constitutional rights. Thus, at least during the past couple of decades, an inverse correlationist who is convinced of the good faith of state courts should be in favor of forcing a petitioner with an unexhausted claim to exhaust that claim in the state system.

g. The equitable remedy vision. To the extent possible, an equitable remedy visionary would want to interpret the exhaustion statute in a flexible manner allowing consideration of the equities of the particular case. Since the statute could plausibly be interpreted to permit the litigation of a mixed petition, an equitable remedy visionary would argue for that interpretation and then look at the equities of each mixed petition to see whether it would be just to require the petitioner to resort to state court to exhaust the unexhausted claims. If, for example, the unexhausted claim is also a patently valid one (that is, if the petitioner exhausted it in state court and lost, but on proceeding to federal court will inevitably win), then it would be unjust to require the petitioner to exhaust the claim.¹⁵³

h. The death-is-different vision. We should start here by noting that while non-death sentenced petitioners, whose motive is to end the litigation as soon as possible by getting out of prison, are likely to view as highly undesirable a second round

153. This may well have been the situation in *Duckworth v. Serrano*, 454 U.S. 1, 3-5 (1981) where the Court in a *per curiam* opinion required a petitioner in such a position to exhaust the claim in state court.

of state litigation over an unexhausted claim, death penalty petitioners will not view a second round of state litigation as necessarily bad. Certainly there are some death penalty petitioners who have real hope of getting their sentences overturned in federal court, and who will view with dismay a second round of state litigation with the death sentence hanging over their heads. Just as clearly, petitioners who do not have much hope of getting their sentences overturned, and who are simply trying to prolong their lives through litigation, may be more than happy to undertake another round of litigation in state court. But focusing on the group that desires to have their claims expeditiously litigated in federal court, a death-is-different visionary should contend that the federal court has broad power to hear unexhausted claims of death penalty petitioners.

3. *The case law analyzed*

The Court addressed the nub of this context in the 1982 case of *Rose v. Lundy*,¹⁵⁴ holding six-to-three¹⁵⁵ that the policy against piecemeal litigation requires that a petitioner with a mixed petition either dismiss the petition and return to state court to exhaust the unexhausted claim, or proceed only with the exhausted claims in federal court.¹⁵⁶ This result is consistent with the appellate review, one-fair-chance, and inverse correlation visions. It is inconsistent with the *de novo* litigation vision, the rights-selectivist vision (since the opinion gives no indication that the resolution depends upon the nature of the unexhausted claim), the innocence-selectivist vision (the opinion also contains no indication that the case should be handled differently if the petitioner has a colorable claim of innocence), and the equitable remedy vision (since the requirement of exhaustion of the unexhausted claim is an inflexible one). Since the petitioner in that case had not been sentenced to death, the case does not directly indicate whether it is consistent with the death-is-different vision, but there is no indication in the opinion that resolution of the issue depends upon whether the petitioner has been sentenced to death.

154. 455 U.S. 509 (1982).

155. In the majority were Justices Burger, Brennan, Marshall, O'Connor, Powell, and Rehnquist. Justices Blackmun and White concurred in the judgment. Justice Stevens dissented.

156. *Lundy*, 455 U.S. at 520-21.

A real oddity of *Lundy* is that two of the six adherents to the majority opinion were Justices Brennan and Marshall, who were *de novo* litigation visionaries.¹⁵⁷ Given the inconsistency of this result with the *de novo* litigation vision, it is difficult to understand why these Justices voted in favor of the total exhaustion requirement. One would instead have expected them to join the opinion of Justices Blackmun and White, which would permit piecemeal litigation unless it rose to the level of abuse of the writ.¹⁵⁸

The dissenting opinion of Justice Stevens in *Lundy* bears comment because it constitutes his most full-blown exposition of the rights-selectivist portion of his combination rights-selectivist/equitable remedy vision. The essence of his position bears quotation:

In my opinion claims of constitutional error are not fungible. There are at least four types. The one most frequently encountered is a claim that attaches a constitutional label to a set of facts that does not disclose a violation of any constitutional right. . . . The second class includes constitutional violations that are not of sufficient import in a particular case to justify reversal even on direct appeal, when the evidence is still fresh and a fair retrial could be promptly conducted. A third category includes errors that are important enough to require reversal on direct appeal but do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment. The fourth category includes those errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained. This category cannot be defined precisely; concepts of "fundamental fairness" are not frozen in time. . . . Errors of this kind justify collateral relief no matter how long a judgment may have been final and even though they may not have been preserved properly in the original trial.

. . . . The doctrine of nonretroactivity, the emerging "cause and prejudice" doctrine, and today's "total exhaustion" rule are examples of judicial lawmaking that might well have been avoided by confining the availability of habeas corpus relief to cases that truly involve fundamental unfairness.¹⁵⁹

157. See *supra* note 14 and accompanying text.

158. *Lundy*, 455 U.S. at 528-30 (Blackmun, J., concurring).

159. *Id.* at 543-47 (Stevens, J., dissenting) (citations and footnotes omitted).

Stevens then states the rights-selectivist position in a nutshell: "The availability of habeas corpus relief should depend primarily on the character of the alleged constitutional violation and not on the procedural history underlying the claim."¹⁶⁰

*B. Context Two: What Constitutional Claims
Are Cognizable In Habeas*

1. The nub of the context

The nub of this context is whether *all* constitutional claims are cognizable in habeas. The governing statutes provide that a person who is "in custody in violation of the Constitution . . . of the United States"¹⁶¹ is entitled to the writ. They give no indication that anything less than all constitutional violations are cognizable in habeas. Yet this issue has provoked several significant Supreme Court opinions over the past two decades.

2. How each vision could respond to the nub of this context

a. The de novo litigation vision. This vision, of course, with its belief in expansive, nonbalanceable, and equal constitutional rights, believes that the governing statute should be taken at face value and that all claims of constitutional violation should be cognizable in habeas.

b. The appellate review vision. Appellate review visionaries are aligned with *de novo* litigation visionaries in this context because the appellate reviewers' cardinal principle of parity demands it: on direct review, all constitutional claims are cognizable, so similarly all claims should be cognizable in habeas.

c. The rights-selectivist vision. The rights-selectivist visionary would argue that only the favored rights should be cognizable in habeas. This is the heart of the rights-selectivist position. Non-favored rights should not be cognizable in habeas because they simply clutter the habeas docket and distract courts from vindicating favored constitutional rights.

d. The innocence-selectivist vision. The essence of the innocence-selectivist position is that the only constitutional claims that should be cognizable are those that are supplemented with the colorable claim of factual innocence. Put suc-

160. *Id.* at 547-48 (Stevens, J., dissenting).

161. 28 U.S.C. §§ 2241(c)(3), 2254(a) (1988).

cinctly, innocence-selectivists would contend that a petitioner who is clearly guilty of the crime is simply not held "in violation of the Constitution . . . of the United States."¹⁶²

e. The one-fair-chance vision. In substance, the one-fair-chance vision provides that the only constitutional claims that should be cognizable are those which the petitioner did not have a full and fair opportunity to litigate in state court. In terms of the statutory language, a one-fair-chance visionary must argue that a state court decision against the petitioner's constitutional claim means that the petitioner is not being held "in violation of the Constitution . . . of the United States."¹⁶³

f. The inverse correlation vision. An inverse correlationist has no plausible means of interpreting the statute more narrowly than to encompass all constitutional claims. An inverse correlationist would likely implement the vision by indulging in strong presumptions that the way the case was handled in state court was constitutionally acceptable.

g. The equitable remedy vision. The equitable remedy visionary would likewise have no basis for excluding any constitutional claim from the ambit of habeas. The equitable remedy visionary would implement the vision by looking at all factors bearing on the justice of the incarceration. Under this vision, a petitioner might be able to establish a constitutional violation, yet still not be able to show that the incarceration is so unjust as to be "in violation of the Constitution . . . of the United States."¹⁶⁴

h. The death-is-different vision. The death-is-different visionary has an *a fortiori* argument: the statute makes all constitutional claims cognizable in habeas, and policy dictates that this be even more true with respect to constitutional claims raised by death penalty petitioners.

3. *The case law analyzed*

*a. Stone v. Powell.*¹⁶⁵ *Stone* was the first major conservative counterattack against the Warren Court's habeas jurisprudence. *Stone* was a radical departure from anything that had come before, and the majority opinion has, if anything, become even more remarkable over time. The issue in *Stone*

162. *Id.*

163. *Id.*

164. *Id.*

165. 428 U.S. 465 (1976).

was whether a petitioner who had litigated and lost a Fourth Amendment search and seizure claim in state court could bring that claim in federal habeas. By a vote of six-to-three,¹⁶⁶ the Court held that the Fourth Amendment claim as to which a petitioner had a full and fair opportunity for litigation in state court is not cognizable in habeas.¹⁶⁷ The underpinning of the decision was that, while the defendant has a "personal constitutional right" not to be subjected to an illegal search or seizure, the right to have that evidence excluded at trial is *not* a "personal constitutional right."¹⁶⁸ Since the right is not a personal constitutional one, it may be counterbalanced by opposing interests.¹⁶⁹ The Court identified extensive costs from enforcing the exclusionary rule in habeas, including diverting attention from the issue of guilt or innocence; the exclusion of reliable evidence of guilt which leads to freeing of the guilty; the disproportionality between the harm and the remedy; the encouragement of scorn of the criminal justice system; and perhaps most importantly, the fact that the Court found very little, if any, additional deterrence to police misconduct from enforcing the right years after the fact via federal habeas.¹⁷⁰

The fascinating aspect of *Stone* for purposes of this Article is the melange of different visions employed in the majority opinion. The opinion adopted the one-fair-chance history espoused by Professor Bator,¹⁷¹ and the holding that a Fourth Amendment claim can only be litigated in federal habeas if the petitioner did not have a full and fair opportunity to litigate it in state court is pure Bator as well. The holding that a Fourth Amendment exclusionary rule claim does not constitute a "personal constitutional right" seems consistent with a fundamental rights-selectivist vision, while the assertion that suppression of evidence often frustrates the truth-seeking function smacks of the accuracy of the guilt/innocence rights-selectivist variant. The Court also adverted to the equitable nature of the writ, thereby invoking the equitable remedy vision.¹⁷² The majority further suggested that the primary function of habeas should

166. In the majority were Justices Burger, Blackmun, Powell, Rehnquist, Stevens, and Stewart. Justices Brennan, Marshall, and White dissented.

167. *Stone*, 428 U.S. at 481-82.

168. *Id.* at 486.

169. *See id.* at 488.

170. *Id.* at 489-94.

171. *Id.* at 475-77.

172. *Id.* at 478 n.11.

be to "assure that no innocent person suffers an unconstitutional loss of liberty," thereby invoking the innocence-selectivist vision.¹⁷³ Finally, the opinion also stated:

[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. . . . Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems.¹⁷⁴

This assertion seems to come directly from the inverse correlation vision. Thus, the opinion can be seen as precedent for five of the visions (or six, if one counts both of the rights-selectivist variants). On the other hand, the opinion clearly rejects the *de novo* litigation vision. It also rejects the appellate review vision because Fourth Amendment claims that have been litigated in state court are often reviewed by the Supreme Court on direct review. Thus, *Stone* destroys direct appeal/habeas parity as to Fourth Amendment claims. The opinion does not speak directly to the death-is-different vision since, although both petitioners involved in the consolidated cases had been convicted of murder, there is no indication in the opinion that either had been sentenced to death. Still, there is nothing in the opinion to indicate that the Court believed that death was different for habeas purposes.

Because *Stone* embraced aspects of at least five different visions that were more restrictive than the *de novo* litigation vision dear to the heart of the Warren Court, there were any number of nightmare scenarios that *de novo* litigation visionaries might imagine subsequent to *Stone*. Probably the most likely fear was that the conservative majority would be willing to pursue an accuracy of the guilt/innocence rights-selectivist course that would result in the exclusion from the scope of habeas many constitutional rights not directly related to guilt or innocence. Justice Brennan articulated this concern in dissent:

I am therefore justified in apprehending that the groundwork is being laid today for a drastic withdrawal of federal habeas

173. *Id.* at 491 n.31.

174. *Id.* at 494 n.35.

jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double jeopardy, entrapment, self-incrimination, *Miranda* violations, and use of invalid identification procedures—that this Court later decides are not “guilt related.”¹⁷⁵

But, surprisingly, Justice Brennan’s prediction has not been borne out.

Despite a conservative majority ever since *Stone* was handed down, one will see in reviewing the four Supreme Court decisions subsequent to *Stone* that it has never been expanded to exclude any other claim of constitutional violation from the scope of habeas. *Stone* remains a burr under the saddle of *de novo* litigators, however, both because it has never been overruled as to Fourth Amendment claims, and because the conservative majority has proceeded to use other visions articulated in *Stone*, particularly the innocence-selectivist and one-fair-chance strands.

b. *Jackson v. Virginia*.¹⁷⁶ The first of two prosecution efforts in 1979 to expand *Stone* involved a petitioner who sought to argue on habeas that there was insufficient evidence presented at trial to warrant a verdict of guilty beyond a reasonable doubt. State authorities argued that because the petitioner already had a full and fair opportunity to litigate the sufficiency of evidence claim in state court, he should not be permitted to raise the same claim on habeas. The Court voted five-to-three¹⁷⁷ not to extend *Stone*, for two primary reasons. First, the full and fair opportunity argument was contrary to Congressional intent.¹⁷⁸ Thus, the majority seemingly rejected the one-fair-chance vision, but as we will see, this rejection had no staying power. Second, unlike the Fourth Amendment claim in *Stone*, the issue of the sufficiency of evidence was central to the petitioner’s guilt or innocence.¹⁷⁹ The holding that *Stone* was distinguishable because the issue in *Jackson* was central to guilt or innocence could be taken as an endorsement of the guilt-related rights-selectivist position, but since

175. *Id.* at 517-18 (Brennan, J., dissenting) (footnote omitted).

176. 443 U.S. 307 (1979).

177. In the majority were Justices Blackmun, Brennan, Marshall, Stewart, and White. Justices Burger, Rehnquist, and Stevens concurred in the judgment. Justice Powell did not take part in the case.

178. *Jackson*, 443 U.S. at 323.

179. *Id.*

three of the five members of this majority had dissented in *Stone*,¹⁸⁰ this should more likely be viewed as simply an attempt to distinguish *Stone* even on its own terms, rather than to embrace the rights-selectivist guilt related vision.

c. *Rose v. Mitchell*.¹⁸¹ The second prosecutorial effort in 1979 to expand *Stone* involved whether a petitioner could raise in habeas the argument that the grand jury that had indicted him was selected in a racially discriminatory manner. Again, a five-person majority¹⁸² voted not to extend *Stone*. In doing so, however, the majority did not so much criticize *Stone*'s rationale as distinguish it. The majority held that it doubted whether the petitioner could expect a full and fair hearing from the very state judiciary that was responsible for the claimed violation in the first place.¹⁸³ This argument seems to reflect the one-fair-chance vision. The majority also held that the right at issue was not just a judicially created remedy, and was substantially more compelling than the one in *Stone*.¹⁸⁴ Both of these smack of the rights-selectivist position.

d. *Kimmelman v. Morrison*.¹⁸⁵ The next attempted extension of *Stone* came in this 1986 case. There, the petitioner alleged that his counsel had been constitutionally ineffective under the Sixth Amendment for failing to properly raise a Fourth Amendment exclusionary claim. State authorities argued that since the Fourth Amendment claim itself could not support habeas litigation, and the petitioner had opportunity to raise the claim in state court, the petitioner's claim of ineffective assistance of counsel could not support habeas jurisdiction either. All nine members of the Court rejected this argument in an opinion that could be read to embrace three different visions of habeas. First, the Court said the Sixth Amendment right to counsel is fundamental, in contradistinction to the exclusionary rule in *Stone*,¹⁸⁶ a position that seems fundamentally rights-selectivist in nature. Second, the Court noted that constitutional rights are accorded to the innocent and guilty alike,

180. Justices Brennan, Marshall, and White.

181. 443 U.S. 545 (1979).

182. Justices Blackmun, Brennan, Marshall, Stevens, and White were in the majority. Justices Powell, Rehnquist, and Stewart concurred in the judgment. Justices Stevens and White dissented in part.

183. *Rose*, 443 U.S. at 561, 563.

184. *Id.* at 563-64.

185. 477 U.S. 365 (1986).

186. *Id.* at 376-77.

which seems a rebuff of the innocence-selectivist position. Finally, the Court noted that the Sixth Amendment claim could prevail on direct appeal and thus should be cognizable in habeas, a position supportive of the appellate review vision.¹⁸⁷

Three conservative Justices concurring in the judgment alluded to yet another vision of habeas, arguing that *Stone* should not be extended because the Sixth Amendment guarantees a fair opportunity to contest the charges, which does not exist when counsel is ineffective.¹⁸⁸ This, of course, derives from the one-fair-chance vision

e. *Withrow v. Williams*.¹⁸⁹ In this most recent effort to expand *Stone*, prosecuting authorities argued that a claim of defective *Miranda* warnings fell squarely within the *Stone* principle. This argument seemed to have the best chance of winning an extension of *Stone* of any of the cases thus far discussed. Like the exclusionary rule, the *Miranda* warnings are prophylactic in nature and can easily be characterized as not personal constitutional rights. The state authorities' claim came close to prevailing, losing five-to-four.¹⁹⁰ The majority gave four reasons for rejecting the expansion of *Stone*, three of which can be connected with different visions of habeas. First, the Court noted that even though *Miranda* created a prophylactic rule, that rule still protects a defendant's Fifth Amendment privilege against self incrimination which is a "fundamental trial right," whereas the right protected by the prophylactic exclusionary rule—the right not to be subjected to an unconstitutional search or seizure—does not protect any fundamental trial right.¹⁹¹ This argument seems fundamentally rights-selectivist in nature. Second, the Court said that unlike illegally seized evidence, the exclusion of which invariably makes more difficult the correct ascertainment of guilt, the *Miranda* warnings serve to guard against the use, at trial, of unreliable statements obtained during in-custody interrogation, which might hinder the correct ascertainment of guilt.¹⁹² This

187. *Id.*

188. *Id.* at 393 (Powell, J., concurring in the judgment; Burger & Rehnquist, JJ., joining).

189. 113 S. Ct. 1745 (1993).

190. In the majority were Justices Blackmun, Kennedy, Souter, Stevens, and White. Justices Rehnquist, O'Connor, Scalia, and Thomas concurred in part and dissented in part.

191. *Withrow*, 113 S. Ct. at 1753.

192. *Id.*

argument seems to be of the guilt/innocence determination rights-selectivist in nature. The third and primary reason given by the majority for not extending *Stone* to *Miranda* warnings was that such an extension would not decrease the habeas workloads of the federal courts, since almost all *Miranda* claims would simply be recast as Fifth Amendment involuntary confession claims.¹⁹³ This argument is puzzling in terms of visions because it adverts to the practical effects of habeas litigation in the abstract, seemingly without connection to any vision whatsoever. While the court considered this the most important of the criteria examined in deciding this case, it appears unlikely that the court really intended to elevate the examination of costs of habeas to federal court dockets to the status of a separate vision.

The opinion of Justice O'Connor, joined by Justice Rehnquist, concurring in part and dissenting in part, is intriguing because it encompasses a smorgasbord of visions comparable to that of the majority opinion in *Stone*. The opinion begins with the assertion that habeas is "significantly different" from, and narrower than, direct appeal, a rejection of the appellate review vision.¹⁹⁴ Justice O'Connor then notes that habeas is governed by equitable principles, an invocation of the equitable remedy vision.¹⁹⁵ The opinion argues that, as was the case in *Stone*, *Miranda* warnings impede the accuracy of the guilt/innocence determination,¹⁹⁶ an invocation of the guilt-related rights-selectivist vision. Justice O'Connor continues by asserting that since the police and the state courts have grown accustomed to *Miranda*, and usually comply with it, "it is precisely because the rule is well accepted that there is little further benefit to enforcing it on habeas."¹⁹⁷ This statement is the most explicit one to be found anywhere in habeas jurisprudence of the inverse correlation vision. Justice O'Connor concludes by arguing that *Miranda* warnings do not implicate a "fundamental trial right," thereby invoking the fundamental rights-selectivist vision.¹⁹⁸

193. *Id.* at 1754.

194. *Id.* at 1757 (O'Connor, J., dissenting).

195. *Id.*

196. *Id.* at 1758-59.

197. *Id.* at 1765.

198. *Id.* at 1761.

Justice Scalia's opinion, joined by Justice Thomas, concurring in part and dissenting in part, is instructive because it clearly sets forth the visions upon which these two arch-conservatives rely. Justice Scalia begins by noting that habeas corpus is an extraordinary writ governed by equitable principles,¹⁹⁹ thereby seemingly invoking the equitable remedy vision. Yet as Justice Scalia's voting in other cases indicates, his use of the term "equitable" refers to generic equity, which I have argued is not equitable at all, but rather an indirect means of propounding the one-fair-chance vision.²⁰⁰ Indeed, Justice Scalia directly says that, in almost all cases, the most powerful equitable consideration is whether petitioner has had a full and fair opportunity to litigate the claim in state courts. "Prior opportunity to litigate an issue should be an important equitable consideration in *any* habeas case, and should ordinarily preclude the court from reaching the merits of a claim, unless it goes to the fairness of the trial process or to the accuracy of the ultimate result."²⁰¹ The exception suggested by Justice Scalia as to errors that go to the "fairness of the trial process" is unclear in its provenance while the second exception for claims relating "to the accuracy of the ultimate result" refers to petitioners with colorable claims of factual innocence, and thus reflects the innocence-selectivist vision. Justice Scalia leaves no doubt, however, that he views these exceptions as narrow ones. Thus, he and Justice Thomas can fairly be characterized as strong proponents of the one-fair-chance vision.

4. Summary

No context in habeas law more fully illustrates the profusion of visions that vie for supremacy in habeas doctrine: language in various majority opinions supports the appellate review, fundamental rights-selectivist, accuracy of the guilt/innocence determination rights-selectivist, innocence-selectivist and one-fair-chance visions. One is tempted to say that this jurisprudence manifests *confusion* as well, since the language appears not in any easily ascertainable progression. Still, the bottom line can be stated with clarity: all constitutional claims are within the scope of habeas, except for

199. *Id.* at 1767 (Scalia, J., concurring in part and dissenting in part).

200. *See supra* notes 126-127 and accompanying text.

201. *Withrow*, 113 S. Ct. at 1768.

Fourth Amendment claims as to which the petitioner has had a full and fair opportunity to litigate in state court.²⁰²

*C. Context Three: Pure Law Claims Based on
Then-Existing Law*

1. The nub of the context

In this context the petitioner's claim is that the state court applied the wrong rule of decision to the petitioner's claim under the law that existed at the time the issue was decided. Claims of this sort are relatively infrequent, since state judges usually manage to correctly perform the relatively easy task of determining the correct constitutional rule to apply to an issue.

2. How each vision could respond to the nub of this context

a. The de novo litigation vision. Obviously, visionaries of this stripe believe in *de novo* review of all issues, including pure issues of then-existing law.

b. The appellate review vision. Equally obvious, appellate review visionaries believe in *de novo* review of pure issues of a then-existing law because that is the standard used on direct review and the parity principle requires no less in habeas.

c. The rights-selectivist vision. As to the favored rights that are cognizable in habeas, rights-selectivists would also be in favor of *de novo* review of pure issues of an existing law since those rights are particularly worthy of vindication.

d. The innocence-selectivist vision. Similarly, as to the relatively few cases that make the cut because the petitioner is able to allege a colorable claim of factual innocence in addition to the claim of constitutional violation, innocence-selectivists would argue for *de novo* review of the pure issues of then-existing law, because those issues are particularly worthy of vindication when the petitioner may be innocent.

e. The one-fair-chance vision. One of the key characteristics of the one-fair-chance vision that distinguishes it from the

202. I have chosen not to include a discussion of the Court's latest decision concerning the cognizability of claims in habeas, *Reed v. Farley*, because it involved a statutory claim (breach of the speedy trial provision of the Interstate Agreement on Detainers), not a constitutional one. *Reed v. Farley*, 114 S. Ct. 2291 (1994). The Court, while ruling that the claim was not cognizable, eschewed reliance on *Stone*, and argued that analysis of statutory violations was quite different. *Id.* at 2296-97.

four visions thus far discussed, is that its proponents do *not* believe in *de novo* review of pure issues of then-existing law if the petitioner had a full and fair chance to litigate the issue in state court. Adherents of this vision would tolerate the possibility that a state court could use the wrong constitutional rule under then existing law, and still have its judgment insulated from federal habeas review as long as the defendant was afforded a fair procedural opportunity to litigate the issue. A one-fair-chance visionary would likely contend that the possibility of this happening is remote since trial courts are usually smart enough to figure out the correct rule to use, and if they aren't, state appellate courts are almost certain to correct their decisions.

f. The inverse correlation vision. This vision reposes a lot of trust in state courts—at least at this point in history—but does allow for correction of the occasional case in which the state commits a serious blunder. Certainly the application of the wrong constitutional rule under then existing law would fall into the category of blunders that an inverse correlationist would wish to remedy via habeas.

g. The equitable remedy vision. The equitable remedy visionary would certainly opt for *de novo* review of pure law claims of error based on then existing law, although such a visionary might ultimately conclude that other factors in the case would render it unjust to award relief.

h. The death-is-different vision. Certainly as to claims raised by death penalty petitioners, visionaries of this stripe believe in *de novo* review of pure law claims based on then existing law.

3. *The case law analyzed*

The power and obligation of the habeas court to review *de novo* pure law claims based on then existing law has been an accepted part of habeas law at least since *Brown v. Allen*.²⁰³ "State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide."²⁰⁴ This is consistent with every vision except the one-fair-chance

203. 344 U.S. 443 (1953).

204. *Id.* at 506; see also *Townsend v. Sain*, 372 U.S. 293, 318 (1963) ("[T]he district judge . . . may not defer to [a state court's] findings of law.").

vision, and is particularly supportive of the *de novo* litigation and appellate review visions. Given the remarkable success of the one-fair-chance vision in other contexts, it is perhaps surprising that not even the most conservative of Justices, who tend to be predominantly adherents of the one fair chance vision, have yet had the temerity to suggest that pure law claims based on then existing law should be accorded anything less than *de novo* federal review.²⁰⁵ Nor did Professor Bator suggest as much,²⁰⁶ even though his vision, carried to its logical conclusion, would deny *de novo* review (indeed any review at all) to such issues if the petitioner had a full and fair opportunity to litigate them in state court.

D. Context Four: Pure Law Claims Based on New Rules

1. The nub of the context

A pure law claim based on a new rule asserts that while the state court ruled against the defendant's claim using the correct constitutional rule under the law that existed as of the time of the state court adjudication, the Supreme Court subsequently established a new, more defendant-favorable rule which should be applied retroactively to the petitioner's claim, and that will result in a finding of a constitutional violation. Retroactive application of constitutional criminal procedure rules became a major issue for both direct review and habeas purposes when the Warren Court began identifying new rights with regularity.²⁰⁷ Subsequent conservative courts have not

205. The closest they have come was Justice Thomas, Rehnquist and Scalia's recognition of the argument that "mixed questions" of law and fact should be accorded "deferential review" by the habeas court. *Wright v. West*, 112 S. Ct. 2482, 2491 (1992).

206. Bator, *supra* note 94.

207. Prior to the Warren Court's constitutional criminal procedure revolution all decisions regarding the rights of criminal defendants were retroactive. Steiker, *supra* note 5, at 354 ("Prior to the mid-1960s, the Court simply did not inquire into retroactivity of decisions regarding the rights of criminal defendants; all such decisions were retroactive."); Yackle, *Hagioscope*, *supra* note 15, at 2382.

There was a time when the Supreme Court followed the common law practice and assumed that current understandings of the law would apply to any pending case, irrespective of the means by which the case came before the bar. Yet in the 1960s, when the Court began interpreting the Constitution in innovative ways, there was pressure to apply its new precedents only to future cases and thus to deny their retroactive effect on judgments already in place.

been nearly as active in creating new constitutional rules of criminal procedure favorable to criminal defendants, except with respect to the death penalty, where the expansion of defendants' rights picked up steam *after* the Warren Court era.²⁰⁸ Thus, while pure law claims based on new rules do not arise across the board as frequently as they did in the Warren Court era, such claims are not rarities, particularly in death penalty cases. The nub of this context, then, is whether habeas petitioners should be entitled to the benefit of new constitutional rules that went into effect after their convictions became final.

2. *How each vision could respond to the nub of this context*

a. *The de novo litigation vision.* A *de novo* litigation visionary, being a rights expansionist, should argue that all defendants who have been constitutionally wronged should be entitled to a remedy even if the wrong was not recognized until the petitioner's case was already finalized. But even some of the most liberal members of the Warren Court were not comfortable with the idea of retroactively applying all of the cases expanding criminal procedure constitutional rights, given that such retroactive application would likely have freed a large percentage of the prison population.²⁰⁹ Still, *de novo* litigation

Id. See also Friedman, *supra* note 10, at 804 (Friedman states that "[p]rior to *Brown v. Allen* [344 U.S. 443 (1953)] the retroactivity problem was not acute. . . . [because] [c]ollateral attack was generally unavailable, so retroactivity presented a problem only on direct review. Moreover, due process as applied to the states had a relatively limited meaning and therefore, simply put, there were not many rights to which retroactivity could apply, at least with regard to state prisoners."); Hoffmann, *supra* note 19, at 175-76 (arguing that before the mid-1960s "[f]ederal habeas, in short, was rarely available to state prisoners. And, of course, until the 1960s and the rise of the incorporation doctrine, the Court simply did not have much constitutional law to apply to state criminal proceedings").

208. See *supra* note 135 and accompanying text.

209. Justices Black and Douglas argued for virtually complete retroactivity. The other liberals, Justices Warren, Brennan, Fortas, Goldberg, and Marshall were willing to hold major constitutional rulings to be non-retroactive. For example, in *DeStefano v. Woods*, 392 U.S. 631, 634-35 (1968), the Court held that the right to a jury trial in serious cases established in *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968), and the right to a jury trial in serious criminal contempt cases as established in *Bloom v. Illinois*, 391 U.S. 194, 208 (1968), were not to be applied retroactively. Justices Warren, Brennan, Fortas and Marshall joined the decision. Justices Douglas and Black dissented. *De Stefano v. Woods*, 392 U.S. at 635 (Douglas, J., dissenting). In *Stovall v. Denno*, 388 U.S. 293, 297 (1967), the Court held the right to the exclusion of evidence of tainted identifications in the absence of counsel, established in *Gilbert v. California*, 388 U.S. 263 (1967), and *United States v.*

visionaries are likely to be as favorable or more favorable than any other visionaries to the liberal retroactive application of new constitutional rules.

b. *The appellate review vision.* In this context appellate review visionaries radically part company from *de novo* litigation visionaries. To an appellate review visionary the principle of parity dictates that if the defendant would not have been entitled to the benefit of the rule had the Supreme Court chosen to take the defendant's case on *certiorari* from the defendant's direct appeal, then the habeas petitioner should not be entitled to benefit from the new rule because that would make habeas review more favorable to the petitioner than direct review.²¹⁰

c. *The rights-selectivist vision.* As to favored rights, a rights-selectivist would be in favor of relatively liberal retroactive application of new constitutional rules.

d. *The innocence-selectivist vision.* The innocence-selectivist must argue that retroactivity should be judged on a case-by-case basis: a petitioner who can allege a colorable claim of innocence should get the benefit of a new constitutional rule, but retroactive effect should not have any precedential value to petitioners who cannot allege the colorable claim of innocence.

e. *The one-fair-chance vision.* The one-fair-chance visionary should be adamantly opposed to retroactive application of new constitutional rules: if the petitioner had a full and fair opportunity to litigate the claim, and had the correct constitutional rule applied at the time, that is all to which the petition-

Wade, 388 U.S. 218 (1967), not to be retroactive. This decision was joined by Justices Brennan and Warren, while Justice Douglas dissented. *Gilbert v. California*, 388 U.S. at 302 (Douglas, J., dissenting). Justice Black also dissented. *Id.* at 303 (Black, J., dissenting). In *Johnson v. New Jersey*, 384 U.S. 719, 721 (1966), the Court held that the right to warnings established in the case of *Miranda v. Arizona*, 384 U.S. 436 (1966) was not to be applied retroactively. Justices Warren, Brennan and Fortas joined this decision. Justices Black and Douglas dissented. *Miranda*, 384 U.S. at 736 (Black, J., dissenting). In *Linkletter v. Walker*, 381 U.S. 618, 636-37 (1965), the Court held that the rule in *Mapp v. Ohio*, 367 U.S. 643 (1961) (stating that illegally seized evidence is required to be excluded at trial), was not to be applied retroactively. Justices Warren, Brennan and Goldberg joined this decision. Again, Justices Black and Douglas dissented. *Walker*, 381 U.S. at 640 (Black, J., dissenting).

210. Liebman, *supra* note 5, at 2095-96 ("*Teague's* nonretroactivity doctrine restores parity [between direct appeal and habeas] by ensuring that the sum total of the law that the prisoner can draw upon in seeking release on habeas corpus is the same as would have been available on direct appeal in the Supreme Court.").

er was entitled. There is no such thing as absolute truth, and thus no reason to believe that the Supreme Court was any wiser when it promulgated the new rule than it was when it promulgated the old one.

f. The inverse correlation vision. Inverse correlationists should also vigorously oppose the retroactive application of new rules for the benefit of habeas petitioners. The key question for inverse correlationists is whether the state courts are faithfully upholding federal constitutional rights, and this is certainly the case if the state court has correctly applied the federal constitutional rule as it existed at the time the state court rendered a decision.

g. The equitable remedy vision. An equitable remedy visionary would examine several factors in determining whether a new rule should be retroactively applied including: the importance of the right created by the new rule, the damage of the violation to the petitioner in that particular case, and the damage to the state interests by applying the new rule retroactively.

h. The death-is-different vision. Death-is-different visionaries would argue for wide-ranging retroactive application of new rules to the benefit of death penalty petitioners because it would be wrong to execute a defendant who was the victim of constitutional violation, even if that violation becomes manifest after the defendant's conviction has already become final.²¹¹

3. *The case law analyzed*

The Warren Court opted for a solution to the retroactivity problem that was applicable equally to direct review and habeas. In *Linkletter v. Walker*,²¹² the Court stated that the retroactive application of a new constitutional rule must depend upon "weigh[ing] the merits and demerits in each case"²¹³ based upon the prior history and purpose of the new rule, the reliance placed by state authorities on previous doctrine, and the effect on the administration of justice of retroactively apply-

211. Hughes, *supra* note 16, at 333 ("In a constitutional system, putting to death a person whose conviction or sentence rests upon a non-harmless constitutional error should be viewed with as much abhorrence as executing a person who is 'factually' innocent.").

212. 381 U.S. 618 (1965).

213. *Id.* at 629.

ing the new rule.²¹⁴ As to direct review, the Court banished the *Linkletter* test in 1982,²¹⁵ and five years later substituted yet another rule, both times seeking more predictability and uniformity in retroactivity doctrine.²¹⁶ But as of 1989, *Linkletter* still governed retroactivity in habeas. *Linkletter*'s sway was ended that year, though, by *Teague v. Lane*,²¹⁷ and a new body of retroactivity case law quickly developed.²¹⁸ Through *Teague* and its progeny, the Court delivered a triple

214. *Id.* at 636.

215. *United States v. Johnson*, 457 U.S. 537, 562 (1982). The Court held that subject to three exceptions a decision of the Court is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered. *Id.* The first two exceptions: (1) when a decision did nothing more than apply settled precedent to different factual situations, and (2) when the new ruling was that a trial court lacked authority to convict the defendant in the first place—were always to be applied retroactively. *Id.* at 549-50. The third exception, where the new rule was a "clear break" with past precedent, was not to be applied retroactively even on direct review if the new rule explicitly overruled a past precedent or disapproved a practice the Court had arguably sanctioned in prior cases or overturned a long standing practice that lower courts had uniformly approved. *Id.* at 551.

216. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (abolishing the "clear break" exception of *Johnson* and holding that a new constitutional rule should be applied retroactively to all cases not yet final or pending on direct review at the time the decision was rendered).

217. 489 U.S. 288 (1989).

218. *See Caspari v. Bohlen*, 114 S. Ct. 948, 954-57 (1994) (stating application of the Double Jeopardy Clause to a non-capital sentencing proceeding would extend the rule of *Bullington v. Missouri*, 451 U.S. 430 (1981), and would constitute a new rule that could not be applied retroactively); *Gilmore v. Taylor*, 113 S. Ct. 2112, 2118-19 (1993) (holding that as a new rule, rule of *Falconer v. Lane*, 905 F.2d 1129 (1990), which requires an instruction that the jury cannot return a murder conviction if it finds the defendant possessed a mitigating mental state, cannot be applied retroactively); *Graham v. Collins*, 113 S. Ct. 892, 898-903 (1993) (holding petitioner's contention, which was that the three special issues the Texas capital sentencing procedures require the jury to answer prevented the jury from adequately considering certain mitigating evidence, would, if accepted, require announcement of a new rule that would not be entitled to retroactive application); *Sawyer v. Smith*, 497 U.S. 227, 232-45 (1990) (holding that rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that it is unconstitutional to pronounce a death sentence based on a jury's false belief that the determination of the appropriateness of a capital sentence rests elsewhere, is entitled to retroactive effect); *Butler v. McKellar*, 494 U.S. 407, 411-16 (1990) (stating that the holding of *Arizona v. Roberson*, 486 U.S. 675 (1988), which was that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation, was a new rule that would not be applied retroactively); *Saffle v. Parks*, 494 U.S. 484, 489-93 (1990) (contention that a jury is required to be permitted to base its decision in a death penalty case on sympathy would announce a new rule that would not be retroactive); *Perry v. Lynaugh*, 492 U.S. 302, 318-19 (1989) (holding that absence of an instruction informing the jury it could consider and give weight to defendant's mitigating evidence did not announce a new rule and thus did not call into question the doctrine of retroactivity).

whammy to "new rule" claimants. First, the question whether a proposed new rule should be retroactively applied is a threshold one to be considered *before* the merits of the claim and, if the decision would not be applied retroactively to all persons whose right to direct appeal has expired, then the habeas court may not consider the merits of the claim.²¹⁹ Second, the only "new rule" decisions that can be given retroactive effect for the benefit of all persons whose right to direct appeal has expired are those that fall into one of two very narrow categories: (a) those that place primary conduct beyond the power of the law-making authority to proscribe, or (b) those "without which the likelihood of an accurate conviction is seriously diminished."²²⁰ The rationale for permitting these two exceptions was the need to deter state courts from too narrowly construing federal rights.²²¹ And third, a rule is "new" if the result "was not *dictated* by precedent existing at the time the defendant's conviction became final."²²²

To see how *Teague* works in practice, we need to start with the third precept first: the very expansive definition of when a rule is "new." The typical situation raising the retroactivity issue is the situation in which there was no directly controlling Supreme Court precedent on the point at the time the state court made its constitutional ruling. Then, after the defendant's conviction became final, the Supreme Court announced a rule on that issue that is more defendant-favorable than the rule

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

220. *Id.* at 311-13 (plurality opinion).

221. *See id.* at 305-06.

222. *Id.* at 301. "In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.* The definition of a new rule was arguably made even more restrictive in *Butler v. McKellar*, 494 U.S. 407, 413 (1990) ("The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."). Even some people who could hardly be classified as liberals with respect to habeas believe that the Court has defined "new rule" too restrictively. *See, e.g.,* Joseph L. Hoffman, *Retroactivity and the Great Writ: How Congress Should Respond to Teague v. Lane*, 1990 B.Y.U. L. REV. 183, 211.

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.

Id.

that was applied by the state court. The defendant then becomes a habeas petitioner, urging that the trial court's error of law, viewed retrospectively, warrants habeas relief. Clearly such a petitioner prefers to try to characterize the argument as a pure law claim based on *then-existing* law.²²³ The petitioner will attempt to do this by claiming that the later announced Supreme Court rule should have been anticipated by the state court based on then-existing precedent. If the petitioner can succeed in this attempt, then the petitioner avoids the whole "new rule" quagmire, because the rule was not a "new" one at all. *Teague's* expansive definition of "new rule" almost invariably defeats the petitioner's efforts to shoehorn the case into the then-existing law context, because only if there were a Supreme Court case virtually on point contrary to the state court's handling of the issue would the claim fit into the then-existing law category.²²⁴ Once the case is forced into the new rule context, the other two holdings of *Teague* go to work. Not only will most such claims fail because they do not fall within the two narrow exceptions for when a rule can be applied retroactively, but most such claims will not even be decided on the merits since retroactive effect is a threshold issue. If the new rule would not be entitled to full retroactive effect, then the habeas court cannot even consider the merits of the proposed rule.

The regime established by *Teague* and its progeny is consistent with the appellate review and one-fair-chance visions. The two exceptions for when a rule is entitled to retroactive effect even on collateral review are consistent with a rights-selectivist vision, albeit one with a narrow definition of what constitute the favored rights. *Teague* and its progeny are not at all supportive of the *de novo* litigation, innocence-selectivist, or death-is-different visions. Surprisingly, *Teague* rebuffs the inverse correlation vision in its assumption that state judges need deterring.

223. See *supra* part III.C.

224. *Teague*, 489 U.S. at 333 (Brennan, J., dissenting) ("Few decisions on appeal or collateral review are 'dictated' by what came before. Most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case in more than one way.").

E. Context Five: Mixed Question Claims

1. The nub of the context

In the gray area between pure law claims and pure fact claims lies what are referred to either as "mixed questions of law and fact" or "law application" claims.²²⁵ To understand this context we need to first examine the governing law with respect to pure fact questions, and then move on to mixed questions.

A key question in habeas law is what power the federal habeas court should have to determine issues of fact on which constitutional claims depend. Prior to 1963, the law on this point could be summed up in two precepts: (1) contested issues of fact that were raised but not decided in the state courts required that the federal court hold an evidentiary hearing;²²⁶ and (2) as to contested issues of fact on which there were state court findings, the district court had discretion either to rely on the state court fact-finding or to conduct its own evidentiary hearing.²²⁷ The Warren Court found these two principles not to be precise enough to guide district courts in the way the Court wanted those courts to behave. The Court therefore handed down one of its 1963 trilogy of cases, *Townsend v. Sain*,²²⁸ specifying six circumstances in which a district court was *obligated* to hold an evidentiary hearing,²²⁹ and reiterat-

225. *Miller v. Fenton*, 474 U.S. 104, 112 (1985). For example, if the question is whether a defendant's confession was voluntary, the definition of "voluntary" is a matter of pure law, while the question whether the defendant's allegation that he or she was denied food and sleep for twenty-four hours is true is a pure question of fact. If the defendant's allegation of fact is found to be true, then the question whether the confession meets the legal definition of "voluntary" is a matter of applying the law to the facts and falls into the category of a mixed question of law and fact. This example illustrates the grayness of the line between pure questions of fact and mixed questions, since it is not semantically or logically unreasonable to contend that the question whether the particular defendant's confession was "voluntary" under the circumstances is a pure question of fact. Nonetheless, in *Miller v. Fenton* the Supreme Court held that determining whether a confession was voluntary was a mixed question of law and fact. For discussions of the topic of mixed questions and law application questions see 1 LIEBMAN, *supra* note 128, at 275-83; Liebman, *supra* note 5, at 2000-01 & n.12; and Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234-38 (1985).

226. *Walker v. Johnson*, 312 U.S. 275, 284-86 (1941).

227. *Brown v. Allen*, 344 U.S. 443, 458-61 (1953).

228. 372 U.S. 293 (1963).

229. In *Townsend* the Court stated:

[A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual

ed that habeas courts always have the *power* to hold evidentiary hearings and make new findings of fact, even if not obligated to do so.²³⁰ In response to *Townsend*, Congress enacted subsection (d) of section 2254 in 1966.²³¹ That statutory provision

dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.

230. *Id.* at 312.

231. 28 U.S.C. § 2254 (1988) states in part:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

- (1) that the merits of the factual dispute were not resolved in the State court hearing;
- (2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
- (3) that the material facts were not adequately developed at the State court hearing;
- (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
- (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
- (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
- (7) that the applicant was otherwise denied due process of law in the State court proceeding;
- (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the

does not directly affect *Townsend* inasmuch as that case continues to govern the question as to when a habeas court is obligated to, or has the discretion to, hold an evidentiary hearing. The statute instead kicks in at the point at which the court has decided to hold an evidentiary hearing, and says that state court findings of fact that are not defective in any one of eight ways are entitled to a presumption of correctness that can only be overcome by "convincing evidence" offered by the petitioner that the factual determination was erroneous.²³² While section 2254(d) does not overrule *Townsend*, its presumption of correctness was clearly intended to decrease the frequency with which petitioners could succeed at such hearings and to have an indirect effect on the willingness of habeas judges to exercise their discretion to permit such hearings.²³³

The resolution of pure fact claims is one of the areas of habeas law that is most closely governed by case law and statute. The upshot is that habeas petitioners will find it difficult to obtain an evidentiary hearing, and if successful in doing so, will find it hard to overcome a properly-arrived-at state court factual determination—the federal court exercises deferential, not *de novo* review. This brings us to the nub of the context regarding mixed issues: are they entitled to *de novo* review like then-existing pure law claims, or are they governed by *Townsend* and section 2254(d)?

2. *How each vision would respond to the nub of this context*

a. *The de novo litigation vision.* *De novo* litigation visionaries, true to their name, argue for *de novo* review of mixed questions. Further, they will bend over backwards to character-

record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

232. See Weisselberg, *supra* note 6, at 152-53.

Townsend and section 2254(d), however, govern separate successive stages in a habeas corpus case: the six criteria of *Townsend* determine whether a petitioner is entitled to an evidentiary hearing, while the eight factors enumerated in section 2254(d) determine whether the state court's findings must be presumed correct if such a hearing is held.

Id.

233. *Id.* at 166-68 (citing statistics showing that the frequency of evidentiary hearings "plummeted" after the 1966 amendment).

ize a claim on the border between pure fact and mixed question as a mixed question, thereby evoking federal *de novo* review.

b. The appellate review vision. In keeping with the cardinal principle of parity, appellate review visionaries would argue that the same standards for determining what is a "pure fact" issue and what is a "mixed question" issue should be applied in habeas as on direct review.

c. The rights-selectivist vision. A rights-selectivist visionary would incline toward classifying factual issues relating to favored rights as within the mixed question category so as to evoke *de novo* review.

d. The innocence-selectivist vision. An innocence-selectivist would be inclined to nudge determinations into the "mixed question" category whenever it appeared that the petitioner had a colorable claim of factual innocence so as to garner *de novo* federal review.

e. The one-fair-chance vision. A one-fair-chance visionary would attempt to cast wide the net of "pure fact" determinations so as to minimize *de novo* review: to these visionaries if a job has been done well once there is no reason to do it twice.

f. The inverse correlation vision. These visionaries, believing as they do that in the present day state courts are generally trustworthy with respect to litigation of federal constitutional issues, would follow one-fair-chance visionaries in casting wide the net of "pure fact" determinations.

g. The equitable remedy vision. The equitable remedy visionary likely would put little stock in the distinction between "pure fact" and "mixed question" determinations and, instead, would look to see how important the determination was in the context of the case and how well, and fully, it had been dealt with in state court. The better and more full the treatment in state court, the less likely an equitable remedy visionary would be to want to grant a federal evidentiary hearing.

h. The death-is-different vision. Death-is-different visionaries would be more likely to categorize debatable issues in death penalty cases as ones of "pure fact" so that the petitioner could be afforded *de novo* federal review.

3. *The case law analyzed*

The Supreme Court understandably has had difficulty drawing a clear line between issues of "pure fact" and "mixed

issues."²³⁴ The most well-known and oft-cited case on the issue is *Miller v. Fenton*,²³⁵ wherein the Supreme Court decided, in an eight-to-one²³⁶ decision, that whether a confession is voluntary is a mixed question entitled to *de novo* review.²³⁷ There are two aspects of the Court's opinion that are of interest to us from a visionary perspective. The first is that the Court saw an unbroken line of precedent, both in direct appeal and habeas cases, for treating the voluntariness of the confession as a "mixed question."²³⁸ This implies acceptance of the appellate review vision, since it indicates that *de novo* review on direct appeal should likewise evoke *de novo* review in habeas. Second, the Court noted that often the characterization of a determination turns upon whether the lower court was in a better position to make that determination, such as if it hinges on demeanor or credibility.²³⁹ Since the state court judge will generally be in no better position to make the determination of "voluntariness" than will the federal court judge, *de novo* review is appropriate.²⁴⁰ This is an implicit rejection of the one-fair-chance vision, and probably the inverse correlation vision as well: both would argue that one should strain to categorize a fully and fairly litigated issue as one of "pure fact" in order to evoke the presumption of correctness, and thus, if not avoid the relitigation, at least have some assurance that the relitigation will not reach a different result. Yet in some cases less well-known than *Miller v. Fenton*, the conservative Court has tended to push debatably categorizable issues into the category of "pure fact."²⁴¹ Thus, perhaps the one-fair-chance

234. See *Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("In the § 2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive.").

235. 474 U.S. 104 (1985).

236. In the majority were Justices Burger, Blackmun, Brennan, Marshall, O'Connor, Powell, Stevens, and White. Only Justice Rehnquist dissented.

237. *Miller*, 474 U.S. at 112.

238. *Id.* at 109.

239. *Id.* at 114-17.

240. *Id.* at 117.

241. Yackle, *Hagioscope*, *supra* note 15, at 2380. Yackle argues that the Court has categorized debatable issues as pure fact, particularly in two cases, *Wainwright v. Witt*, 469 U.S. 412, 429 (1985) (holding that the partiality or bias of jurors is a pure question of fact), and *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (holding that the competency of a defendant to stand trial is a pure question of fact). Yackle then states, "Since this Court is inclined to think that most issues should be decided in state court, it strains to characterize state decisions as findings of fact, rather than applications of law to fact, and thus invokes the statutory pre-

and inverse correlation visions are at work in this context, after all. Nothing in this context seems supportive of the rights-selectivist, innocence-selectivist, equitable remedy, or death-is-different visions.

F. Context Six: Pure Questions of Fact

1. The nub of the context

As was noted in the discussion of mixed question claims,²⁴² once an issue is characterized as one of pure fact, the habeas court's handling of it is closely controlled by *Townsend v. Sain*²⁴³ and section 2254(d).²⁴⁴ The key threshold question under both the case and the statute is whether the state fact-finding is flawed in any one of the enumerated ways. The one controversial issue in this context, then, is how the habeas court should handle the situation where one of the state factfinding defects exists, but that defect is *petitioner's* fault for failing to properly present the issue at the state level. This is the issue on which our discussion in this context will focus.

2. How each vision could respond to the nub of this context

a. *The de novo litigation vision.* *De novo* litigation visionaries desire the habeas petitioner to have a fresh start in federal court and, thus, are not at all bothered by the prospect of a petitioner relitigating an issue that the petitioner litigated badly in state court.

b. *The appellate review vision.* Appellate review visionaries, on the other hand, believe that a habeas court which is in most respects acting in an appellate capacity, should not provide a forum for permitting petitioners to bolster the record regarding a factual issue which the petitioner failed to properly present in the "lower" court. There may be some wiggle room for an appellate review visionaries here, though, given that they recognize that a habeas court, unlike a normal appellate court, *does* have the power and the tools necessary to make findings of fact. Thus, it could be argued that even for an ap-

sumption in favor of the result reached in state court." Yackle, *Hagioscope*, *supra* note 15, at 2380.

242. See *supra* part III.E.

243. 372 U.S. 293 (1963).

244. 28 U.S.C. § 2254(d) (1988).

pellate reviewer, the very nature of the habeas court militates against a strict view that facts cannot be relitigated.

c. *The rights-selectivist vision.* A rights-selectivist would favor permitting relitigation of a factual issue pertaining to a favored right that was badly presented by the petitioner in the state courts.

d. *The innocence-selectivist vision.* The innocence-selectivist would favor the relitigation of a badly-litigated factual issue when the petitioner was able to supplement the constitutional claim with a claim of colorable factual innocence.

e. *The one-fair-chance vision.* The one-fair-chance visionary, of course, would be adamantly opposed to permitting relitigation of a badly-litigated issue, since the petitioner by definition had the one-fair-chance to litigate that issue in the state courts.

f. *The inverse correlation vision.* This vision would be more favorable to permitting such relitigation when the state courts appear generally hostile to federally-protected rights.

g. *The equitable remedy vision.* The equitable remedy visionary would look at how important such a factual issue is in the context of the case, how much control the petitioner personally had over the litigation of that issue, and then examine other factors in the case to arrive at an equitable resolution to the question whether the litigation should be permitted.

h. *The death-is-different vision.* Death-is-different visionaries would, of course, argue for broadly permitting relitigation of factual issues when the petitioner is laboring under a death sentence.

3. *The case law analyzed*

The Supreme Court decided this issue in *Keeney v. Tamayo-Reyes*²⁴⁵ in 1992. In a five-to-four²⁴⁶ decision the Court held that a petitioner who has badly litigated a factual question in state court cannot relitigate that question in federal court unless the petitioner can show "cause" for the failure to properly litigate, and "prejudice" from the failure to properly litigate.²⁴⁷ The majority was convinced that the cause and

245. 112 S. Ct. 1715 (1992).

246. In the majority were Justices Rehnquist, Scalia, Souter, Thomas, and White. Justices Blackmun, Kennedy, and Stevens joined with Justice O'Connor's dissenting opinion.

247. *Keeney*, 112 S. Ct. at 1719.

prejudice standard would "appropriately accommodate concerns of finality, comity, judicial economy and channeling the resolution of claims into the most appropriate forum."²⁴⁸ The majority also saw the exhaustion requirement as a reason for reaching this result because a petitioner's merely having stated the claim in state court, but then failing to properly litigate it, does not accord the state system its one-fair-chance to resolve the claim properly.²⁴⁹

The majority's decision is consistent with the appellate review vision, the one-fair-chance vision and an inverse correlation vision that believes that state courts are currently doing a good job of enforcing federal constitutional rights. Implicitly, the majority decision is also consistent with a very narrow innocence-selectivist vision, since there is an exception to the requirement of "cause and prejudice" for a petitioner who can put forward a colorable claim of factual innocence.²⁵⁰ The majority's decision is inconsistent with the *de novo* litigation vision, the rights-selectivist vision (since there is no indication that permitting relitigation depends upon the nature of the right at issue), the equitable remedy vision (the "cause-and-prejudice" standard is an across-the-board rule, not one that is applied on a case-by-case basis), and the death-is-different vision (there is no indication that a death sentenced petitioner should be permitted broader opportunities to relitigate).

Tamayo-Reyes is an interesting case because two Justices who normally vote conservatively in habeas cases, Justices O'Connor and Kennedy, joined more liberal Justices Blackmun and Stevens in dissent.²⁵¹ The linchpin of Justice O'Connor's dissent is that "[h]abeas corpus is not an appellate proceeding, but rather an original civil action in a federal court."²⁵² From this, Justice O'Connor reasoned that a trial level court in an original civil action has broad powers to determine factual issues and should use those powers to arrive at the best decision possible.²⁵³ To Justice O'Connor, once the petitioner has presented a properly preserved claim to the federal court that

248. *Id.*

249. *Id.* at 1720.

250. *Murray v. Carrier*, 477 U.S. 478, 493-96 (1986).

251. *Keeney*, 112 S. Ct. at 1721 (O'Connor, J., dissenting).

252. *Id.* at 1722.

253. *See id.* at 1725.

the state courts were given the opportunity to litigate, federalism concerns diminish.²⁵⁴ Justice O'Connor also argued that Congress implicitly adopted the holding of *Townsend v. Sain*²⁵⁵ when it enacted section 2254(d), and thus the liberal *Townsend* standards for granting a hearing continued to govern.²⁵⁶ Surprisingly for Justices O'Connor and Kennedy, this dissent in large part embraces the *de novo* litigation vision. It also constitutes an explicit rejection, at least in part, of the appellate review vision.

*G. Context Seven: The Squandered State Court
Opportunity—Procedurally Defaulted Claims*

1. The nub of the context

This context deals with the situation in which the habeas petitioner has squandered the opportunity to litigate an issue in the state system. In habeas law this squandering goes by the name "procedural default" and most often occurs when a defendant fails to properly raise an issue at the trial level. It can also occur at later stages of the state proceeding, however, for instance failing to appeal a properly preserved issue²⁵⁷ or failing to appeal at all.²⁵⁸ This context looms large in Supreme Court habeas jurisprudence and has provoked more significant opinions than any other habeas topic over the last two decades.

2. How each vision could respond to the nub of this context

a. The de novo litigation vision. *De novo* litigation visionaries, in favor of giving petitioners a fresh start in federal court, would ignore procedural defaults unless it can be shown that the default constituted a knowledgeable waiver that was the result of the defendant's personal choice. Even in that circumstance a *de novo* litigator would want the habeas court to have the power to ignore the waiver if the reasons for doing so were compelling.

b. The appellate review vision. Appellate review visionaries would be very intolerant of petitioners who try to bring

254. *Id.*

255. 372 U.S. 293, 310-18 (1963).

256. See *Keeney*, 112 S. Ct. at 1724 (O'Connor, J., dissenting).

257. See, e.g., *Murray v. Carrier*, 477 U.S. 478, 482-83 (1986).

258. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 727-28 (1991).

procedurally defaulted claims because those claims generally cannot be pursued on direct review.

c. *The rights-selectivist vision.* The rights-selectivist would be forgiving of defaults that relate to the favored rights.

d. *The innocence-selectivist vision.* An innocence-selectivist would be inclined to forgive procedural defaults when the petitioner is able to supplement the constitutional claim with a claim of innocence.

e. *The one-fair-chance vision.* One-fair-chance visionaries are inalterably opposed to permitting litigation of an issue in federal court if the petitioner had failed to take advantage of a fair chance to litigate the issue in state court.

f. *The inverse correlation version.* Inverse correlationists, at this point in time being satisfied with state court handling of federal constitutional issues, would not be tolerant of procedurally-defaulted claims.

g. *The equitable remedy vision.* A proponent of the equitable remedy vision would examine how important the claim is in the context of the case and how responsible the petitioner was for having defaulted it, then consider other factors in arriving at an equitable decision whether to enforce the procedural default.

h. *The death-is-different vision.* Death-is-different visionaries favor federal courts broadly ignoring state procedural defaults.

3. *The case law analyzed*

The first time the Supreme Court dealt with the issue of procedural default in the habeas context was in 1953 in *Daniels v. Allen*,²⁵⁹ a lesser-known companion case to *Brown v. Allen*.²⁶⁰ In *Daniels*, without much discussion, the Court held that a claim procedurally defaulted in state court should not be reviewed by the habeas court.²⁶¹ The *de novo* litigation visionaries of the Warren Court could not, of course, live with this result and a decade later overruled it in the most famous of the Warren Court era habeas decisions, *Fay v. Noia*.²⁶² In the *Noia* majority opinion, Justice Brennan penned the quintessential *de novo* litigation visionary sentence:

259. 344 U.S. 443 (1953).

260. *Id.*

261. *Id.* at 482-87.

262. 372 U.S. 391 (1963).

"[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."²⁶³ The Court held that the federal habeas court *must* hear a procedurally defaulted claim unless the state can show that the petitioner "knowingly and deliberately bypassed" the state court remedy.²⁶⁴ Further, the federal habeas court *may* hear a claim even where the petitioner "deliberately bypassed" the state remedy.²⁶⁵

Just as the Warren Court liberals could not live with the rule in *Daniels*, so the later conservative Court could not live with the *de novo* litigation position adopted by *Noia*. The Burger Court delivered a blow to *Noia* in 1977 in *Wainright v. Sykes*.²⁶⁶ In the majority opinion Justice Rehnquist argued that since the adequate and independent state ground rule would prevent the Supreme Court on direct review from deciding the merits of a constitutional claim that the state had validly held to be procedurally barred under state law, it would be similarly improper for a federal habeas court to consider an issue that had been procedurally defaulted by the petitioner in state court, since the state court's upholding of the procedural bar would be an analog of an adequate and independent state ground.²⁶⁷ Justice Rehnquist also stressed the legitimate state interest in enforcing the contemporaneous objection rule,²⁶⁸ and noted the possibility of defense counsel sandbagging by intentionally failing to litigate a constitutional claim so as to build in error reversible at the federal level.²⁶⁹ He also noted that federal courts' litigation of procedurally defaulted claims would "detract from the perception of the trial . . . in state court as a decisive and portentous event."²⁷⁰

The majority decision in *Sykes* is consistent with the appellate review, one-fair-chance, and inverse correlation visions. The decision did leave open one narrow door for federal review of a procedurally defaulted claim: if the petitioner can show

263. *Id.* at 424.

264. *Id.* at 438.

265. *Id.*

266. 433 U.S. 72 (1977).

267. *Id.* at 87.

268. *Id.* at 88-89.

269. *Id.* at 89.

270. *Id.* at 90.

"cause" and "prejudice" for the default, then federal review should be available.²⁷¹ The opinion, however, left the definitions of "cause" and "prejudice" open,²⁷² and thus as of 1977 it was not possible to tell whether the Court would, via the "cause and prejudice" exception, partially endorse one of the selectivist visions.

In concurring, Justice Stevens gave an early indication of his rights-selectivist/equitable remedy vision:

[I]f the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused. Matters such as the competence of counsel, the procedural context in which the asserted waiver occurred, the character of the constitutional right at stake, and the overall fairness of the entire proceeding, may be more significant than the language of the test the Court purports to apply.²⁷³

Justice White, concurring in the judgment, would have stuck with the *Noia* "deliberate bypass" standard, but would have tightened *Noia* by not requiring that the defendant have been personally involved in a waiver in order for the waiver to be enforceable.²⁷⁴ Justices Brennan and Marshall, in dissent, championed *Noia*.²⁷⁵ The heart of the dissent, which turned out to be prescient, is that "the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel."²⁷⁶ Indeed, all subsequent significant Supreme Court decisions regarding procedural default have involved situations in which the petitioner claims that the procedural default occurred due to arguably substandard performance by counsel.

The procedural default principle of *Sykes* has been proven by later cases to be as powerful and lasting as its "cause and prejudice" exception has been proved to be narrow. In *Engle v. Isaac*,²⁷⁷ in 1982, the Court declined to limit *Sykes* to issues that did not affect the truth finding function of the trial, thus rejecting an accuracy based rights-selectivist exception to the general rule.²⁷⁸ In *Murray v. Carrier*,²⁷⁹ in 1986, the Court

271. *Id.* at 87.

272. *Id.*

273. *Id.* at 95-96 (Stevens, J., concurring) (footnote omitted).

274. *Id.* at 98-99 (White, J., dissenting).

275. *Id.* at 107 (Brennan, J., dissenting).

276. *Id.* at 104 (Brennan, J., dissenting).

277. 456 U.S. 107 (1982).

278. *Id.* at 129.

reaffirmed that the "cause" requirement must be met by a petitioner even where the claim calls into question the reliability of the guilt determination.²⁸⁰ But the more significant aspect of *Carrier* is that the Court explicitly held that substandard performance by counsel that causes the procedural default only constitutes "cause" if it was the result of constitutionally ineffective assistance of counsel.²⁸¹ Further, while not defining "prejudice," the Court held that the showing must be "greater than that necessary under 'the more vague inquiry suggested by the words "plain error."'"²⁸² Finally, the Court held that there was an exception to the "cause and prejudice" exception: a defendant who has procedurally defaulted the claim and cannot show "cause" or "prejudice" can nonetheless have the claim considered on the merits if that petitioner can allege a colorable claim of actual innocence.²⁸³

The issue whether death-is-different for habeas purposes was explicitly raised in *Smith v. Murray*,²⁸⁴ a companion case to *Murray v. Carrier*.²⁸⁵ *Smith* had no claim that he was actually innocent of having committed the homicide for which he was convicted, but argued that he was actually innocent of the death sentence in that he likely would not have been sentenced to death had not his attorney failed to object at sentencing hearing to the admission of privileged statements that Smith had made to a court appointed psychiatrist.²⁸⁶ A majority of the Court held that the actual innocence exception to the "cause and prejudice" requirement for procedural default encompassed not only factual innocence of the act itself, but also actual innocence of the death penalty.²⁸⁷ By this holding the Court at least partially embraced the death-is-different vision, since the Court could logically have limited the actual innocence exception to actual innocence of the underlying act. The Court tempered this recognition of the death-is-different vision, however, by stating: "[W]e reject the suggestion that the principles of *Wainright v. Sykes* apply differently depending on the

279. 477 U.S. 478 (1986).

280. *Id.* at 495.

281. *Id.* at 492.

282. *Id.* at 493-94 (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

283. *Id.* at 496.

284. 477 U.S. 527 (1986).

285. 477 U.S. 478 (1986).

286. *Smith*, 477 U.S. at 528-32.

287. *Id.* at 537.

nature of the penalty a State imposes for the violation of its criminal laws."²⁸⁸

In *Carrier*, the claim of attorney error was that the attorney had left out a claim from an otherwise timely appeal. The Court left open the question whether *Noia*'s "deliberate bypass" standard should continue to govern when counsel completely defaulted the appeal.²⁸⁹ The Court addressed this issue in 1991 in *Coleman v. Thompson*²⁹⁰ and concluded that no different standard should apply: "[F]ederal habeas review of the [procedurally defaulted] claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."²⁹¹ The majority clearly rejected the idea that the "cause-and-prejudice" standard itself, rather than the actual innocence exception to it, should be interpreted differently and more leniently when the petitioner is death sentenced. *Coleman* was the final nail in the coffin of *Noia*.

The most recent important decision in the procedural default line of cases is *Sawyer v. Whitley*²⁹² in 1992. There, the Court revisited the issue first raised *Smith v. Murray*²⁹³ of what constitutes "actual innocence" of the death penalty so as to permit the habeas court to consider on the merits a procedurally-defaulted claim. A six-person conservative majority²⁹⁴ held that such a showing requires the petitioner to allege a claim that he or she was completely ineligible for the death penalty under the governing criteria, not merely that the constitutional error may have resulted in the imposition of a death sentence that would not otherwise have been imposed on a petitioner who was in fact eligible.²⁹⁵

The current state of the law in the procedural default context is that it is consistent with the appellate review, one-fair-chance, and inverse correlation visions, but with a narrow innocence-selectivist component and a partial

288. *Id.* at 538.

289. *Carrier*, 477 U.S. at 492.

290. 501 U.S. 722 (1991).

291. *Id.* at 750-51.

292. 112 S. Ct. 2514 (1992).

293. 477 U.S. 527 (1986).

294. In the majority were Justices Rehnquist, Kennedy, Scalia, Souter, Thomas, and White. Justices Blackmun, O'Connor, and Scalia concurred in the judgment.

295. *Sawyer*, 112 S. Ct. at 2522-23.

death-is-different component. The law is inconsistent with the *de novo* litigation vision, except in the narrow circumstances in which the petitioner can show "cause" and "prejudice." The rights-selectivist and equitable remedy visions have no support in this context's current law.

H. Context Eight: "Abuse of the Writ"

1. The nub of the context

A habeas corpus petitioner sometimes will file additional petitions after the first one is denied. If a subsequent petition contains a claim that was not alleged in an earlier petition, the question becomes, in habeas vernacular, whether the petitioner has "abused the writ" by not having included the later claim in the earlier petition. The governing statute is section 2244(b) as amended in 1966. It states that a subsequent application for the writ that contains a claim not included in an earlier petition

need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.²⁹⁶

The statute strongly suggests that the court should not entertain the new claim if the petitioner deliberately withheld it from an earlier petition.²⁹⁷ The key question for a statutory interpretation is whether the final phrase "or otherwise abuse the writ" expands the abuse of the writ doctrine to encompass claims that were not deliberately withheld.

2. How each vision could respond to the nub of this context

a. The de novo litigation vision. *De novo* litigation visionaries would attempt to construe the phrase "or otherwise abused the writ" as encompassing very little, if any, more than

296. 28 U.S.C. § 2244(b) (1988).

297. Because the statute says that the court "need not" consider the claim, not that it "cannot," there is still discretion even to hear a claim that was earlier withheld.

grounds that were deliberately withheld, because such visionaries wish constitutional claims to be aired, however belatedly.

b. The appellate review vision. Appellate review visionaries would tend to construe the statutory language broadly as encompassing a large realm of behaviors beyond deliberately withholding a claim, since appellate review visionaries contend that each petitioner generally gets one, and only one, appeal. In the habeas context the petitioner's "one appeal" is the initial habeas petition.

c. The rights-selectivist vision. A rights-selectivist would tend to construe the statutory language more favorably to petitioners who were presenting claims involving favored constitutional rights.

d. The innocence-selectivist vision. The innocence-selectivist would attempt to construe the statutory language more favorably to petitioners who also present a colorable claim of innocence.

e. The one-fair-chance vision. One-fair-chance visionaries don't even believe in *initial* habeas petitions if the petitioner had a full and fair opportunity to litigate that claim in state courts. Further, they are no more favorable to petitioners who had that fair chance but did not raise the claim. Thus, a fortiori, one-fair-chance visionaries are unalterably opposed to the idea that a petitioner can make additional federal habeas filings after the initial one. Thus, one-fair-chance visionaries would construe the statutory language "or otherwise abuse the writ" very expansively to encompass many behaviors beyond deliberate withholding.

f. The inverse correlation vision. This vision has no applicability to this context because it speaks only to what effect an earlier *state* proceeding should have on a federal habeas court, not what effect an earlier *federal* proceeding should have on a *later* federal proceeding.

g. The equitable remedy vision. As always, proponents of this vision would argue for a flexible definition of "abused the writ" that would permit the habeas court to consider a variety of factors in making that determination.

h. The death-is-different vision. A death-is-different visionary would go out of the way to find that a death penalty petitioner had not "otherwise abused the writ."

3. *The case law analyzed*

In the last of the Warren Court's 1963 habeas trilogy, *Sanders v. United States*,²⁹⁸ the Court held that the habeas court has a *duty* to hear a claim that was not presented in an earlier habeas petition unless the petitioner had deliberately withheld the claim in the earlier petition.²⁹⁹ Further, even if the claim had been deliberately withheld, the habeas court had the *discretion* to entertain the claim if the ends of justice so required.³⁰⁰ Three years later Congress enacted section 2244(b), which was not explicitly inconsistent with *Sanders*, but which also was accompanied by legislative history indicating that the purpose of the amendment was to "introduc[e] a greater degree of finality" in habeas.³⁰¹ Neither the statute nor the legislative history, however, clarifies whether the "or otherwise abused the writ" language was designed to cut back on the *Sanders* holding.

The Supreme Court construed the "or otherwise abused the writ language" in *McCleskey v. Zant*³⁰² in 1991. Justice Kennedy stated for the majority that "the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions."³⁰³ The Court then decided that "[a]buse of the writ is not confined to instances of deliberate abandonment."³⁰⁴ The doctrine instead encompasses *all* claims not presented in an earlier habeas petition unless the petitioner can show "cause" and "prejudice" for failing to raise the claim in the earlier proceeding or can show a probable claim of actual innocence of the crime.³⁰⁵ The Court imported the holdings from the procedural default cases to the abuse of the writ context, because both contexts "imply a background norm of procedural regularity binding on the petitioner."³⁰⁶

The holding in *McCleskey* is consistent with the appellate review and one-fair-chance visions. Further, it creates a narrow exception that reflects an innocence-selectivist vision. It is

298. 373 U.S. 1 (1963).

299. *Id.* at 17-18.

300. *Id.* at 18-19.

301. S. REP. NO. 1797, 89th Cong., 2d Sess. 2 (1966).

302. 499 U.S. 467 (1991).

303. *Id.* at 489.

304. *Id.*

305. *Id.* at 493.

306. *Id.* at 490.

flatly inconsistent with the *de novo* litigation, equitable remedy, and death-is-different visions (McCleskey was in fact death-sentenced), and impliedly inconsistent with the rights-selectivist vision, since there is no indication in the opinion that it matters what the right is that is involved in the newly asserted claim.

I. Context Nine: Successive Petitions

1. The nub of the context

The preceding context involved the situation in which the petitioner asserts in a subsequent petition a claim that was not asserted in an earlier petition. The current context, by contrast, involves a situation in which the petitioner raises the *same* claim in a later petition that was raised and rejected in an earlier petition. This context is governed in a backhanded sort of fashion by section 2244(b),³⁰⁷ which states that a habeas court "need not" entertain a "subsequent application for a writ" unless the subsequent application contains a newly asserted ground that is not an abuse of the writ. The phrase "need not" entertain implies that the court *may* entertain a subsequent petition raising the same ground, and the question becomes when a habeas court should exercise its power to do so.³⁰⁸

2. How each vision could respond to the nub of this context

a. The de novo litigation vision. As always, *de novo* litigation visionaries favoring adjudication of constitutional claims on the merits, virtually whenever and however they are raised, would argue that the statute should be interpreted so as to require the habeas court to consider the successive petition if there is any reason to think that the result might be different.

b. The appellate review vision. Appellate review visionaries are not fans of permitting habeas petitions beyond the initial one and, thus, would argue that the statutory language should be construed so as to minimize the number of successive petitions that habeas courts are required (or even permitted) to consider.

c. The rights-selectivist vision. The statutory language is nebulous enough to allow rights-selectivists to argue that the

307. See *supra* notes 284-85 and accompanying text.

308. See *Kuhlmann v. Wilson*, 477 U.S. 436, 449-52 (1986).

habeas courts should be more inclined to consider a successive petition when it involves a claim relating to a favored right.

d. *The innocence-selectivist vision.* The statute leaves plenty of room for an innocence-selectivist to claim that the circumstance in which a habeas court "need" consider a successive petition is one in which the petitioner alleges an accompanying colorable claim of innocence that was not alleged earlier.

e. *The one-fair-chance vision.* Obviously, one-fair-chance visionaries do not believe in permitting successive petitions and, thus, would argue that the statutory language should be construed so as to virtually never permit a habeas court to consider a successive petition.

f. *The inverse correlation vision.* As was the case with respect to the abuse of the writ context, the inverse correlation vision does not address this context, which does not involve state/federal relations, but federal/federal relations.

g. *The equitable remedy vision.* Equitable remedy visionaries would look first to see if anything had changed between the decision on the earlier petition and the successive petition. If it had, then they would argue for reweighing the equities of the case. If nothing had changed it would be hard to see what equity would exist in reconsidering the claim.

h. *The death-is-different vision.* A death-is-different visionary would urge that the statute be interpreted to permit reexamination of a claim raised by a death-sentenced petitioner if there were any conceivable reason to believe that the result might be different.

3. *The case law analyzed*

The 1948 predecessor of section 2244(b)³⁰⁹ addressed only the issue of successive petitions, while the current version of the statute includes successive petitions and those claimed to constitute an abuse of the writ. As to successive petitions, the statute stated that a habeas court, "shall [not] be required to entertain an application for a writ of habeas corpus,"³¹⁰ alleging a claim already decided adversely to the petitioner in an earlier petition if the court "is satisfied that the ends of justice will not be served by such inquiry." The key question under this statute is when the "ends of justice" would be served by

309. 28 U.S.C. § 2244(b) (1948) (amended 1966).

310. *Id.*

adjudicating a successive petition. The Warren Court answered this question in *Sanders*³¹¹ in a manner mostly, but not entirely, favorable to habeas petitioners. According to the Court, the "ends of justice" required reexamination if the prior evidentiary hearing had not been full and fair, or if there had been an "intervening change in the law" favorable to the petitioner, or "some other justification for having failed to raise a crucial point or argument in the prior application."³¹² The Court noted that these two grounds did not exhaust the "ends of justice" inquiry because the test "cannot be too finely particularized."³¹³ Unfavorably to habeas petitioners, however, the Court held that the burden is on the petitioner to show that the ends of justice would be served by the relitigation.³¹⁴

In 1966 Congress amended section 2244 to its present form, deleting the "ends of justice" inquiry.³¹⁵ The amended statute does not on its face provide any more guidance concerning when successive petitions should be permitted, although the history of the amendment seems to indicate that it was part of a Congressional plan to make habeas at least somewhat less easily available to petitioners.³¹⁶ This is certainly the way the conservative majority saw the congressional intent when it handed down its key successive petition case, *Kuhlmann v. Wilson*, in 1986.³¹⁷ The heart of the opinion was joined by only four members of the Court, but as the Court added more conservative members it became clear that those key portions were accepted by a clear majority of the Court.³¹⁸ For the plurality, Justice Powell—always the most outspoken innocence-selectivist on the Court—balanced the interests of subsequent petitioners against countervailing state interests and concluded that only petitioners who have a colorable claim of factual innocence have any legitimate interest that counterbalances the weighty interests of the state in finality and repose.³¹⁹ This is the one instance in current habeas

311. *Sanders v. United States*, 373 U.S. 1, 17 (1963).

312. *Id.*

313. *Id.*

314. *Id.*

315. See *supra* note 296 and accompanying text.

316. *Kuhlmann v. Wilson*, 477 U.S. 436, 450-51 (1986) (examining the history of the statute and coming to this conclusion).

317. *Id.* at 436.

318. The plurality opinion in *Kuhlmann* is clearly accepted as good law by the majority in *McCleskey v. Zant*, 499 U.S. 467, 488-90 (1991).

319. *Kuhlmann*, 477 U.S. at 451-52, 454.

jurisprudence in which the innocence-selectivist vision provides the primary rationale for the result rather than simply providing a rationale for an exception to the general rule. The decision is also consistent with the appellate review and one-fair-chance visions, while it is inconsistent with the *de novo* litigation, rights-selectivist, equitable remedy, and (probably) death-is-different visions.

J. Context Ten: The Question of Harmless Error

1. The nub of the context

A prisoner cannot get relief from a conviction either by reversal on direct appeal or by issuance of a writ of habeas corpus on collateral review, even for error of constitutional magnitude, unless that error was harmful.³²⁰ On direct review the law is favorable to petitioners who have established constitutional error: the burden is on the state to prove that the error was harmless, and the level of the burden is that the state must show harmlessness beyond a reasonable doubt.³²¹ The nub of this context is whether the same petitioner-favorable standard should apply to habeas. No federal habeas statute gives any guidance on this point.

2. How each vision could respond to the nub of this context

a. The de novo litigation vision. In their heart of hearts, *de novo* litigation visionaries are likely to disapprove of the whole concept of harmless error: If error was of constitutional magnitude, then it by definition was harmful.³²² But given that the law recognizes the doctrine of harmless error, *de novo* litigation visionaries would argue that the same

320. *Chapman v. California*, 386 U.S. 18, 24 (1967). There are, though, some constitutional errors that are so basic that they defy harmless error analysis and require automatic reversal. See *Arizona v. Fulminante*, 499 U.S. 279, 289-90 (1991) (White, J., dissenting as to part III only) (collecting authorities).

321. *Chapman*, 386 U.S. at 24.

322. Perhaps surprisingly, Justices Warren, Brennan, Douglas and Fortas joined the majority in *Chapman*. It was left for Justice Stewart, hardly a liberal in matters of constitutional criminal procedure or habeas corpus, to argue that the Court had never before recognized constitutional error as harmless and that the error found in *Chapman* was not the sort for which a harmless error doctrine should be adopted in any event. *Chapman*, 386 at 42-45 (Stewart, J., concurring). Justice Stewart, however, noted that he would not rule out the doctrine of harmless error in all circumstances. *Id.* at 44 (Stewart, J., concurring).

petitioner-favorable rule that applies on direct review should apply in habeas.

b. The appellate review vision. Under their cardinal principle of parity, appellate review visionaries would strenuously contend that the same standard for harmless error should govern on direct review and in habeas.

c. The rights-selectivists vision. Rights-selectivists would argue that as to the favored rights that make the cut, they should be treated no less favorably than the same rights are treated via direct review.

d. The innocence-selectivist vision. Innocence-selectivists would argue that as to the favored petitioners who have alleged a colorable claim of innocence, the same petitioner-favorable standards should apply in habeas as on direct review.

e. The one-fair-chance vision. One-fair-chance visionaries should hold a bifurcated position regarding this context. On the one hand, these visionaries do not even believe habeas jurisdictions should extend to claims as to which the petitioner had a full and fair opportunity to litigate in state court, and thus would argue for a much less petitioner-favorable standard of harmless error as to those petitions where the petitioner litigated in state court and lost, and then litigated in federal court and won. But as to errors established by a petitioner on habeas who did not have the one fair opportunity to litigate the claim in state court, the one-fair-chance visionary should argue for the same harmless error standard that would be applicable on direct review.

f. The inverse correlation vision. An inverse correlationist would not admit many cases through the federal habeas door, but as to those that entered and prevailed, an inverse correlationist should argue for the same petitioner-favorable standard as on direct review.

g. The equitable remedy vision. To an equitable remedy visionary the harmfulness of the error should simply be one factor in the equation on a case-by-case basis. Thus, such a visionary might argue for a range of different definitions of harmfulness to apply to different circumstances.

h. The death-is-different vision. While a death-is-different visionary might be willing to admit that error at the *guilt* stage of a capital trial could be found to be harmless, such a visionary would certainly argue that the standard for harmfulness should be just as petitioner-favorable in habeas as on direct review. A death-is-different visionary would find it hard to

imagine that error occurring at the *sentencing* phase of a capital trial could be harmless, and if writing on a blank slate, would likely simply banish the harmless error doctrine from the sentencing phase of capital cases. Given that the law does recognize that an error at capital sentencing can be harmless,³²³ a death-is-different visionary would certainly contend for the same petitioner-favorable standard for harmless error in habeas as on direct review.

3. *The case law analyzed*

The Supreme Court dealt with the nub of this context in *Brecht v. Abrahamson*³²⁴ in 1993. The majority held in a five-to-four³²⁵ decision that, at least as to "trial error," the less petitioner-favorable test for harmless error from *Kotteakos v. United States*³²⁶ should apply: that the error "had substantial and injurious effect or influence in determining the jury's verdict."³²⁷ It is unclear from the decision whether the prosecution bears the burden of proving that the error is harmless under this test, or the defendant bears the burden of proving that it was harmful. The reason for this uncertainty is that the majority opinion, in which Justice Stevens concurred and was the necessary fifth vote, states that the burden is on the petitioner,³²⁸ while in a separate concurring opinion Justice Stevens stated that the burden is on the prosecution.³²⁹ The majority opinion argued that a growing body of Supreme Court case law recognizes that habeas is different from, and less petitioner-favorable than, direct review.³³⁰ Unlike direct review, habeas has a limited role as an extraordinary remedy against violations of fundamental fairness.³³¹ The costs to the state of a federal habeas court granting the writ because the

323. *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990) (holding that a state appellate court can constitutionally uphold a death sentence that was "based in part on an invalid or improperly defined aggravating circumstance by either reweighing the aggravating and mitigating evidence or by [engaging in] harmless error review").

324. 113 S. Ct. 1710 (1993).

325. In the majority were Justices Rehnquist, Kennedy, Scalia, Thomas, and Stevens. Justices Blackmun, O'Connor, Souter, and White dissented.

326. 328 U.S. 750 (1946).

327. *Brecht*, 113 S. Ct. at 1722 (quoting *Kotteakos*, 328 U.S. at 776).

328. *Id.*

329. *Id.* at 1723 (Stevens, J., concurring).

330. *Id.* at 1719.

331. *Id.*

state cannot prove that the error was harmless are heavy, while petitioners who get to this point do not fall into the category of persons who have been "grievously wronged."³³² The Court also dismissed the argument that the petitioner-favorable harmless error rule was necessary to deter state court judges, stating "[a]bsent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner's argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution."³³³

The majority opinion is clear in its disaffirmation of the appellate review vision. The result is also inconsistent with the *de novo* litigation, innocence-selectivist, equitable remedy, and death-is-different visions. The opinion is at least partially compatible with a rights-selectivist vision, since it applies only to "trial error" claims whose affect on the jury may be quantitatively assessed, but not to defects such as deprivation of right to counsel, which "require[] automatic reversal of the conviction because they infect the entire trial process."³³⁴ It is unclear whether the category of "trial error" accords with either the fundamental version of the rights-selectivist position or the accuracy version of the rights-selectivist vision. The majority opinion is also consistent with one-half of the bifurcated vision that a one-fair-chance visionary should hold: in *Brecht*, the petitioner *had* litigated the issue at the state level and, thus, could be held to a higher standard in habeas. The opinion gives no indication whether the result would differ if the petitioner had *not* had the opportunity to litigate the issue in state court. The decision is also quite supportive of the inverse correlation vision in its assertion that, as far as the Court can tell, state judges are not in need of deterrence.

Justice Stevens' vote with the majority here bears scrutiny. This is the only instance in recent memory in which Justice Stevens joined a majority opinion that reached a conservative result.³³⁵ It is certainly debatable whether Justice Stevens

332. *Brecht*, 113 S. Ct. at 1721.

333. *Id.* (citing *Robb v. Connolly*, 111 U.S. 624, 637 (1884)).

334. *Id.* at 1717 (citing *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991), a direct review case in which the "trial error" category was created).

335. Justice Stevens did concur in part and concur in the judgment in *Teague v. Lane*, and was conservative in that he would have adopted Justice Harlan's retroactivity analysis on habeas. *Teague v. Lane*, 489 U.S. 288, 319-20 (1989) (Stevens, J., concurring in part and concurring in the judgment). He rejected, however, the rest of the majority's retroactivity analysis. *Id.* at 320-23.

correctly followed the logic of his own chosen visions in reaching this result. While the decision is consistent in some respects with a rights-selectivist vision, the dichotomy between trial error and "structural error" does not seem to accord with the dividing line that Justice Stevens has consistently espoused between favored "fundamental" rights and unfavored non-fundamental rights.³³⁶ Nor does the result in *Brecht* accord easily with the equitable remedy vision, since it establishes a rule common to all claims of "trial right" error. On the other hand, in support of Justice Stevens, it could be argued that even equitable remedy visionaries must state generally applicable principles on some issues, one of which is the standard for harmless error. Perhaps Justice Stevens' vote is generally consistent with a broader premise underlying both his rights-selectivist and equitable remedy visions, that habeas is an extraordinary writ that does not serve the same purpose as direct appeal.

In a dissent joined by Justices Blackmun and Souter, Justices who generally vote conservatively in habeas cases, Justice White argued that there should be parity between the standards for direct appeal and habeas, apparently invoking the appellate review vision.³³⁷ Yet a third conservative, Justice O'Connor, penned a lengthier dissent in which she invoked a potpourri of theories. She agreed with the majority that habeas review is different from, and less petitioner-favorable than, direct review but argued that under equitable principles the nature of the right involved is important.³³⁸ She then argued for a distinction between rights critical to the reliability of the process and prophylactic rules.³³⁹ Continuing this theme, she argued that the *Chapman* harmless error standard promotes the accuracy of guilt/innocence determinations, while the *Kotteakos* standard does not offer "adequate assurances of reliability."³⁴⁰ She then suggested that logically the *Kotteakos* standard could apply to claims of error that do not involve the accuracy of the guilt determination process, but concluded that this would cause more confusion than it would be worth.³⁴¹

336. See *supra* note 70 and accompanying text.

337. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1726-27 (1993) (White, J., dissenting).

338. *Id.* at 1728-29 (O'Connor, J., dissenting).

339. *Id.* at 1729 (O'Connor, J., dissenting).

340. *Id.* at 1730 (O'Connor, J., dissenting).

341. *Id.* at 1730-31 (O'Connor, J., dissenting).

This whole disquisition is reflective of the accuracy of the rights-selectivist vision, a vision with which Justice O'Connor had not earlier affiliated herself in any significant degree.

IV. CONCLUSION: A SUMMARY OF THE STATUS OF THE VISIONS

Thus far I have examined how each of the eight visions fares in each of the ten contexts peculiar to habeas law. I will now attempt to take a step back and summarize how powerful each of the visions is under current habeas doctrine. I will begin with those visions that seem to have the least power and progress to the most powerful ones.

There are two visions that clearly have little power in current habeas jurisprudence. The first is the equitable remedy vision, which claims only Justice Stevens as an adherent. Admittedly, some of the more conservative Justices bandy the term "equity" about, but they are not really talking about equity, but rather about generic interest balancing.³⁴² Under current law, there is no license for a federal district judge to rule on issues in any of the contexts by considering the equity of the individual case.

The second vision that has virtually no power in current habeas jurisdictions is the death-is-different vision. Its only inroad is to provide a rationale for ignoring a procedural default of a defendant who is "actually innocent" of the death penalty. Given the narrowness with which the Court has defined "actual innocence" of the death penalty, it seems unlikely that this exception will be of much benefit to death-sentenced petitioners. In no other context is a federal court authorized to treat a death-sentenced petitioner any more favorably than a petitioner not sentenced to death.

Moving up one notch, I would characterize the innocence-selectivist vision as having only somewhat more than minimal power in habeas jurisprudence. Despite the Court's many invocations of innocence as an important factor, in reality innocence only operates as a narrow exception to save a petitioner who is somehow at fault, either by procedurally defaulting a claim, failing to properly present all facts supporting the claim, or filing a subsequent petition.³⁴³ The Court has never

342. See *supra* note 70 and accompanying text.

343. Berger, *supra* note 83, at 986 n.232 ("My informal survey covered 1987 through the first nine months of 1992. Although I kept no exact tally, failures of claims of likely innocence clearly outnumbered successes by a large multiple.").

made innocence a guardian of habeas' front door: there is no requirement that in order for a claim to be cognizable the petitioner must accompany it with a colorable claim of innocence. The role of innocence as a factor is, instead, relegated to admitting only a handful of petitioners in through the back door despite their earlier, improvident litigation activities.

Moving another step up the ladder, there are two visions that I would classify as exerting moderate power in habeas jurisprudence. The first is the rights-selectivist vision. Despite the fact that Justice Stevens seemingly has been unsuccessful in recruiting additional rights-selectivists among members of the Court, there are still three particular issues for which the rights-selectivist vision is perhaps more explanatory of current doctrine than any other—and at least two of these issues are significant ones. The first significant issue over which rights-selectivism has explanatory power is the exclusion of Fourth Amendment claims from the purview of habeas (as long as the petitioner had a full and fair opportunity to litigate those claims in state court). One of the prime bases of *Stone v. Powell* was that Fourth Amendment exclusionary claims did not constitute a "personal constitutional right," an argument that is rights-selectivist at its core. The second significant aspect of habeas doctrine that may be explained by the rights-selectivist vision is the less petitioner-favorable harmless error rule that the Court established in *Brecht v. Abrahamson* for claims of "trial" error. While it is not clear what sorts of errors comprised the category of "trial" error, this is clearly a category that must be composed by valuing some rights over others. The third issue, which I think is less significant, which rights-selectivism explains, is the two *Teague* exceptions for when a new rule can be applied retroactively. These exceptions are so narrow, however, that they do not seem to be nearly as significant as the rights-selectivist aspects of *Stone* and *Brecht*.

The second vision I would rank as having moderate power is, perhaps surprisingly, the *de novo* litigation vision. While its proponents have been understandably outraged by many of the conservative Court's attacks on the 1963 Warren Court habeas trilogy, there are four important areas where habeas doctrine is still consistent with the *de novo* litigation vision. First, all constitutional claims are cognizable in habeas except Fourth Amendment exclusionary claims that the petitioner had a full and fair opportunity to litigate in state court. While the *Stone v. Powell* principle is obviously hateful to *de novo* litigation

visionaries, the fact remains that the principle is an anomaly. All subsequent efforts to expand *Stone* to other rights have failed, even the attempted expansion to *Miranda* claims which, it seems to me, fall squarely within the rationale of *Stone*. Second, pure law claims based on then-existing law are entitled to *de novo* review, and not even the most conservative of Justices has suggested otherwise. Third, mixed question claims still evoke *de novo* review, and while some conservatives on the Court wish it were otherwise, they do not seem to have the votes to carry the day, although they may have sufficient clout to get debatable issues classified as pure fact rather than as mixed questions. Fourth, pursuant to *Townsend v. Sain* and section 2254(d), there will be *de novo* factfinding if the state proceeding was flawed in any of the enumerated ways.

I now move with trepidation to trying to analyze the power of the appellate review vision. Prior to 1993, this vision seemed to have as much explanatory power as any in the lineup. There were then, and still are, many significant areas of habeas jurisprudence that can be explained by the appellate review vision, including the exhaustion rule regarding mixed petitions, *de novo* review of pure law claims based on then-existing law, *de novo* review of mixed questions, vigorous restrictions on retroactive application of new rules to benefit habeas petitioners, strict rules holding petitioners to the consequences of their procedural defaults, and narrow availability of review for subsequent petitions. Admittedly, there was one important way in which habeas was narrower than direct review that violated the parity principle, namely, Fourth Amendment claims that the petitioner had a full and fair opportunity to litigate in state court. Further, the loopholes that permit the habeas court to ignore procedural defaults and entertain subsequent petitions if the petitioner can establish "cause and prejudice" are also inconsistent with the principle of parity because they make habeas review *broadier* than direct review. But despite these instances of lack of parity in both directions, as of 1993 a proponent of the appellate revision vision could contend that the vision provided a powerful explanatory principle. To my mind, though, the result in *Brecht* in 1993 of a less petitioner-favorable standard of harmless error, at least as to claims of "trial error," significantly undermines the power of the appellate review vision. There now seems to be a majority of the Court that is willing to stand for the proposition that while habeas generally cannot be *broadier* than direct review

(with the "cause" and "prejudice" exception), it can and should be *narrower* in significant ways, not all of which presumably have been spelled out as of yet.

We are left, then, with what I believe to be the two most powerful visions currently operating in habeas doctrine: the one-fair-chance and inverse correlation visions. These visions can account for many significant doctrines of habeas jurisprudence: the rule of exhaustion with respect to mixed petitions; the principle of *Stone v. Powell*; the very stingy rules regarding retroactive effect of new rules in habeas; the perceived tendency to categorize debatable issues as ones of pure fact, rather than as mixed issues; the doctrine of *Tamayo-Reyes* that a petitioner is stuck with earlier, faulty litigation of an issue unless due to constitutional ineffective assistance of counsel; the strict enforcement of state procedural defaults; the strict limits on consideration of subsequent petitions; and the rule in *Brecht* establishing a less petitioner-favorable standard for harmless error in habeas than on direct review. But while these visions are the most powerful, they have not taken over habeas jurisprudence as completely as opponents of the Court's conservatives have suggested. I have already noted above four important ways in which the *de novo* litigation vision has power. Further, whenever the conservative Court has established a strict rule it has always accompanied that rule with exceptions that would not be approved of by a strict one-fair-chance visionary. The whole idea that there is an exception for "cause" and "prejudice" that will allow a petitioner to avoid the effects of earlier substandard litigation is inconsistent with both these visions, as are the two *Teague* exceptions permitting retroactive application of a new rule in habeas in narrow circumstances. Further, the narrow areas in which the innocence-selectivist vision has power also undercuts any claim of overweening power of the one-fair-chance and inverse correlation visions.

For further study: One thing that this Article has not done, due to my desire to keep it to manageable proportions, is to examine whether the conservatives on the Court have been intellectually honest in deciding habeas cases. Their opponents have certainly contended vocally that the conservatives are on a mission to destroy habeas and will expediently adopt *any* vision that will serve that purpose as to the issue at hand. The charge is a serious one: not just that the conservative Justices are *wrong* as a matter of history and policy, but that they are so

result-oriented as to be *intellectually dishonest*.³⁴⁴ It is certainly true that the conservatives have invoked many different visions and that the progression of visions employed over the years does not seem to be linear. I hope to scrutinize this claim of intellectual dishonesty in a follow-up Article.³⁴⁵

344. See, e.g., Barry Friedman, *Pas De Deux: The Supreme Court and the Habeas Courts*, 66 S. CAL. L. REV. 2467, 2496 (1993) ("The *Teague* decision was painfully disingenuous. It was disingenuous to pretend the decision was about inequity in retroactivity law. . . . Rather, the *Teague* Court was adopting its own approach to serve its own purposes.") (footnotes omitted); Friedman airs his opinion in an earlier article also, claiming that:

For anyone familiar with the climate surrounding the decision [in *Teague*] it is difficult to conclude that the Court's determination was the product of much more than unseemly impatience with a Congress that was considering related issues, but evidently too slowly for the Court. Moreover, the result in the *Teague* cases plainly was the work of a Court anxious to speed the pace of executions.

Friedman, *supra* note 10, at 800; Patchel, *supra* note 20 at 1045-46 ("[T]he Court's main concern in the cases developing the new habeas has not been to render a principled decision in the particular case, but rather to use each case as a vehicle for rewriting its jurisdictional statutes."); Weisberg, *supra* note 10, at 9 (speculating that some of the conservative habeas decisions can be explained by the fact "that the Court was simply frustrated with the inadequacy of the execution rate of America's death row inmates"); Yackle, *Hagioscope*, *supra* note 15, at 2331-32 ("The objection in 'conservative' circles is not so much that habeas petitions are heard by national tribunals that have better things to do, but that collateral litigation is undertaken at all, particularly in death penalty cases, and, accordingly, that criminal defendants may effectively upset their convictions and sentences."). Yackle finds the current Supreme Court conservative majority to be a party to this agenda. *Id.* at 2333; Yackle, *Misadventures*, *supra* note 15, at 393:

The Court's "conservatives" may simply be hostile to the claims that litigants wish to press in *any* court and thus squeeze from both ends at once—forcing petitioners out of federal court on the promise of state process while at the same time signaling the state courts that most anything they do will suffice.

Id. (footnote omitted).

345. Tentatively entitled *Confusion, Evolution, or Mission?: The Conservative Court and Habeas Corpus* (forthcoming).