NOTE

A NEW APPROACH TO THE *TEAGUE* DOCTRINE

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Teague v. Lane *generally precludes the retroactive application of new constitutional rules of criminal procedure to collateral review of criminal convictions. When federal courts reviewing state convictions apply this rule, it has a certain amount of logic: it protects society's interest in federalism and finality. But courts apply this rule to cases in myriad procedural postures, even when the forces motivating Teague are not present. This Note will examine three scenarios where Teague has been blindly invoked. It will then explain why this blind invocation is not only theoretically but also practically problematic, and it will suggest a solution (or a start of a solution) to the problem.*

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INTRODUCTION

Griffith v. Kentucky held that new constitutional rules of criminal procedure always apply retroactively to cases on direct review.[1] By contrast, under the doctrine announced in *Teague v. Lane*, such new rules do not apply retroactively to cases on collateral review.[2] Thus, for example, a defendant whose conviction became final one day before *Batson v. Kentucky*[3] issued could not benefit from *Batson*'s rule, even if the exact timing of both cases was a matter of chance and even if everyone agreed that there was a *Batson* violation in the unfortunate defendant's trial.

Because it produces such results, the *Teague* doctrine has been attacked as fundamentally unfair, overly harsh, and irreconcilable with the idea that courts do not make law.[4] For example, Erwin Chemerinsky, writing shortly after *Teague* was decided, noted that the decision "severely limited the ability of federal courts to hear constitutional claims raised in habeas corpus petitions," notwithstanding the fact that "[c]ountless criminal procedure protections" had previously been "recognized in cases arising from habeas petitions."[5] An unsigned student piece in the *Harvard Law Review* argued that *Teague*'s dramatic reduction in the retroactive application of new rules to cases on collateral review "failed to provide a more principled approach than the one it discarded."[6] Other articles said it all in their titles: *The Court Declines in Fairness*—Teague v. Lane[7] and *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane.[8]

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1. 479 U.S. 314, 316 (1987).

2. 489 U.S. 288, 299 (1989) (plurality opinion).

3. 476 U.S. 79, 100 (1986) (holding that a criminal defendant can establish a prima facie case of unconstitutional racial discrimination based on the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire).

4. *See* Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 206 n.11 (1998) (citing sources).

5. Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 55 n.52 (1989).

6. *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 137, 290 (1989).

7. Eliot F. Krieger, Recent Development, *The Court Declines in Fairness*—Teague v. Lane *109 S. Ct. 1060 (1989)*, 25 HARV. C.R.-C.L. L. REV. 164 (1990); *see also* L. Anita Richardson, *Retroactivity, the Supreme Court, and You*, CRIM. JUST., Summer 1990, at 13, 13 (noting that *Teague* "sacrific[es] fairness to finality").

8. James S. Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1991).

Over time, this criticism softened.[9] Commentators and the Supreme Court explained that *Teague*, while harsh, is suited to the purposes of collateral review. After all, collateral review is not meant to be a substitute for direct review, but is meant merely to provide an "additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[10] To be a sufficient incentive, collateral review need only apply the law controlling at the time the original trial took place; a state court cannot be deterred from doing something that isn't yet known to be unconstitutional. And while *Teague* leaves some defendants without redress for constitutional wrongs, the Court has determined that society's interest in repose and federal court deference to state courts outweighs its interest in readjudicating convictions to ensure they conform to contemporary constitutional law.

These federalism and finality concerns are at their apex in the context in which the *Teague* decision was rendered: when a federal court is reviewing a state court conviction that has already been through a full round of state collateral review on the merits of the claim raised before the federal court. But since Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996,[11] *Teague* has been made less significant in this context.[12] AEDPA explicitly requires federal habeas courts to defer to state court determinations on the merits so long as they are neither "contrary to," nor an "unreasonable application of" Supreme Court precedent that was "clearly established" at the time of the state court decision, nor "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[13] This rule is generally stricter than the *Teague* doctrine for two reasons. First, it limits the source of "old" rules eligible for retroactive application to Supreme Court jurisprudence, whereas *Teague* recognizes that "old" rules may come from other sources.[14] Second, it bars relief not only when the petitioner's claims would require the habeas court to announce or apply a new rule, but also when the pe-

9. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1813-20 (1991).

10. Teague v. Lane, 489 U.S. 288, 306 (1989) (plurality opinion) (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)).

11. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

12. *See* Larry Yackle, *AEDPA Mea Culpa*, 24 FED. SENT'G REP. 329, 333 (2012) (explaining that applying *Teague* and AEDPA independently and seriatim makes little sense, since they both perform effectively the same screening function when a federal court reviews a state court conviction).

13. 28 U.S.C. § 2254(d)(1)-(2) (2012).

14. *See* Williams v. Taylor, 529 U.S. 362, 412 (2000); Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 31 n.229 (2009).

titioner's claims would require the habeas court to reverse a state court decision that, while wrong, is not *unreasonably* wrong.

Nevertheless, the cases in which *Teague* bars retroactivity are not a perfect subset of the cases in which AEDPA bars retroactivity.[15] Accordingly, in recent years, commentators have focused on harmonizing the two doctrines in circumstances where both apply[16] and criticizing AEDPA rather than *Teague*.[17] This focus makes sense: AEDPA controls in a majority of habeas review contexts, and as even the Supreme Court has recognized, "in a world of silk purses and pigs' ears," AEDPA "is not a silk purse of the art of statutory drafting."[18] While the two inquiries are formally distinct,[19] commentators largely agree that AEDPA frequently supersedes *Teague* in the prototypical *Teague* situation—where a federal court is reviewing a state court determination on the merits that has already been perfected by a round of collateral review at the state level.[20]

Perhaps because of the focus on the relationship between AEDPA and *Teague*, neither courts nor scholars have seriously examined how *Teague* is functioning in contexts in which AEDPA's deferential standard of review does not apply. This Note provides that analysis. It focuses on three scenarios—when a federal court is reviewing a federal conviction, when a federal or state court is reviewing a case in "initial-review collateral proceedings,"[21] and when a federal court is reviewing a state conviction in which there was no state court finding on the merits of the claim raised in federal court—to show that *Teague*

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15. *See* BRIAN R. MEANS, POSTCONVICTION REMEDIES § 26:20 (West 2013) (describing situations in which *Teague* is stricter than AEDPA).

16. *See, e.g.*, *id.*; John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 294-95 (2006); A. Christopher Bryant, *Retroactive Application of "New Rules" and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 15-29, 41-49 (2002); Allan Ides, *Habeas Standard of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 704-05 (2003); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 866-68 (1998); Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 223, 232 n.126 (2008); Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 546-50 (2006); Padraic Foran, Note, *Unreasonably Wrong: The Supreme Court's Supremacy, the AEDPA Standard, and* Carey v. Musladin, 81 S. CAL. L. REV. 571, 609-29 (2008).

17. *See, e.g.*, Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 22-47 (1997). *See generally* Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 537, 538-39 (1999) (criticizing AEDPA); *id.* at 541 n.14, 542 n.15 (listing other sources examining AEDPA).

18. Lindh v. Murphy, 521 U.S. 320, 336 (1997).

19. *See* Horn v. Banks, 536 U.S. 266, 272 (2002) (per curiam).

20. *See, e.g.*, Yackle, *supra* note 12, at 333.

21. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012).

is applied in contexts in which federalism and finality cut *against* its application. This approach undermines the fairness of habeas proceedings for individual defendants and compromises principles of integrity in judicial review that the retroactivity doctrine is meant to serve. Although this topic has received virtually no attention, *Teague* remains significant in its own right—indeed, it is dispositive for many criminal defendants.

This Note begins in Part I with a brief history of the Court's approach to retroactivity. Part II analyzes the three contexts mentioned above, all of which show that the *Teague* doctrine is being applied in ways inconsistent with its underlying rationales. Part III explains why the current version of the *Teague* doctrine must change and then suggests reforms. Specifically, it argues that *Teague* must be sensitive to variations in the procedural posture of cases that regularly come before the federal habeas courts if the federalism and finality interests that animate that doctrine are to be vindicated. Such an approach retains *Teague*'s bright-line luster while avoiding methodological inconsistency; it is also fairer to criminal defendants and a more effective means of keeping state prosecutors and courts within the bounds of the law.

I. RETROACTIVITY IN CRIMINAL PROCEDURE: A BRIEF HISTORY

The history of the Supreme Court's retroactivity jurisprudence has been explored in depth elsewhere,[22] and I will not duplicate those efforts. Rather, I provide a brief background that helps explain why contemporary courts have reflexively embraced *Teague* in contexts in which it should not properly apply: they have been engaged in a decades-long struggle over the contours of retroactivity rules, and the *Teague* doctrine appears to offer some stability. But in important respects, *Teague* merely papers over the fact that retroactivity doctrine remains "confused and confusing."[23]

A. *Retroactivity Before* Teague

The backstory to the *Teague* doctrine will be familiar to many. Because the traditional scope of habeas review in the United States was considerably narrower than it is today,[24] courts didn't worry much about whether new rules would apply retroactively on collateral review. Rather, courts routinely applied new constitutional rules of criminal procedure to defendants seeking a new rule in either direct appeal or collateral proceedings, without commenting on the issue of retroactivity.[25] This approach became untenable after the Bill of Rights

22. *See* Lasch, *supra* note 14, at 8 n.17 (citing sources).

23. Danforth v. Minnesota, 552 U.S. 264, 271 (2008).

24. *See, e.g.*, 17B CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4261 (West 3d ed. 2013).

25. Teague v. Lane, 489 U.S. 288, 299 (1989) (plurality opinion).

was incorporated against the states and the Warren Court expanded the procedural rights of criminal defendants. To cite just a few decisions from that Court's tenure: *Mapp v. Ohio* applied the exclusionary rule to the states;[26] *Miranda v. Arizona* required that law enforcement agents follow new procedures when interrogating suspects in custody;[27] and *Gideon v. Wainwright* held that indigents in state felony prosecutions had a right to the assistance of counsel.[28] These decisions made the problem of retroactivity more salient: would *Miranda*, for example, require the reopening of all convictions where the defendant had not received the warnings later deemed constitutionally necessary?[29]

In 1965, the Court held in *Linkletter v. Walker* that the retroactive effect of a new rule should be determined case by case by examining three factors: the purpose of the new rule, reliance placed upon the old rule, and the effect on the administration of justice of retrospective application of the new rule.[30] The Court retained *Linkletter*'s basic framework for nearly a quarter century, but tweaked it repeatedly. Indeed, the *Linkletter* standard delivered such divergent results in similar cases that one could argue—and many commentators did[31]—that the Court didn't just tweak it but altered it in every case. For example, in *Berger v. California*, the Court applied a decision retroactively on the grounds that it had been "clearly foreshadowed" in prior case law.[32] Yet in *Desist v. United States*, the Court rejected the idea that a foreshadowed rule would necessarily have retroactive effect.[33] As another example, in 1981, *Edwards v. Arizona* held that once a person invokes his right to counsel during a custodial interrogation, he does not waive that right by responding to subsequent police-initiated questioning.[34] Not until 1984 in *Solem v. Stumes* did the Court clarify that *Edwards* did not apply retroactively to cases on collateral review;[35] in the meantime, several federal courts reached the opposite conclusion and applied *Edwards* retroactively.[36] The result was that some pre-*Solem* defendants on collateral review received the benefit of *Edwards* while others did not.

Such inconsistencies notwithstanding, a majority of the Court clung to *Linkletter* for more than two decades—but not all members of the Court were pleased with this approach. Shortly after *Linkletter*, Justice Harlan developed

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26. 367 U.S. 643 (1961).

27. 384 U.S. 436 (1966).

28. 372 U.S. 335 (1963).

29. *See* Johnson v. New Jersey, 384 U.S. 719, 733 (1966) (holding that *Miranda* applied only prospectively).

30. 381 U.S. 618, 637 (1965).

31. *See* Teague v. Lane, 489 U.S. 288, 303 (1989) (plurality opinion) (citing authorities).

32. 393 U.S. 314, 315 (1969) (per curiam).

33. 394 U.S. 244, 248-49 (1969).

34. 451 U.S. 477, 484 (1981).

35. 465 U.S. 638, 643 (1984).

36. *See Teague*, 489 U.S. at 305 (plurality opinion) (citing cases).

an alternative approach to retroactivity in his separate opinions in *Desist v. United States* and *Mackey v. United States*. He argued that rules should always apply retroactively to cases still pending on direct review but usually not to cases on collateral review.[37] Justice Harlan stated that this approach was suited to the purpose of habeas corpus, which "is not designed as a substitute for direct review" but rather as an extraordinary remedy.[38] In the habeas setting, "[t]he interest in leaving concluded litigation in a state of repose" may legitimately outweigh the competing interest of adjudicating cases by present constitutional norms.[39] At the same time, the threat of habeas review must be a sufficient deterrent against unconstitutional conduct in trial and appellate courts.[40]

Justice Harlan premised his denial of retroactivity to state prisoners seeking federal habeas review on the assumption that "the petitioner had a fair opportunity to raise his arguments in the original criminal proceeding."[41] This makes sense: while we may be comfortable denying someone the retroactive benefit of a new rule when he had the chance to seek the new rule in his own case but failed to do so successfully, this denial of retroactivity would be unfair if the petitioner had had no such opportunity. This assumption—that a criminal defendant was offered a prior opportunity to litigate a claim—is fundamental to the Court's decisions denying postconviction relief.[42]

Justice Harlan identified two exceptions to the general rule that new rules do not apply retroactively to cases on collateral review. First, a new rule should apply retroactively if it places conduct beyond the government's power to proscribe.[43] For example, imagine you were a gambler in the 1960s, when federal law required you to register and pay an occupational tax. You failed to do so,

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37. Mackey v. United States, 401 U.S. 667, 678-81, 688-92 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part); *Desist*, 394 U.S. at 256-69 (Harlan, J., dissenting).

38. *Mackey*, 401 U.S. at 683 (Harlan, J., concurring in the judgments in part and dissenting in part).

39. *Id.*

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

41. *Mackey*, 401 U.S. at 684 (Harlan, J., concurring in the judgments in part and dissenting in part); *see also Desist*, 394 U.S. at 261 (Harlan, J., dissenting).

42. *See* Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998) (holding that a federal habeas petition filed after the initial habeas filing was dismissed as premature should not be deemed a "second or successive" petition barred under AEDPA, lest dismissal "for technical procedural reasons . . . bar the prisoner from ever obtaining federal habeas review"); Stone v. Powell, 428 U.S. 465, 494 (1976) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." (footnote omitted)); *cf.* Duncan v. Walker, 533 U.S. 167, 192 (2001) (Breyer, J., dissenting) ("[W]e have assumed that Congress did not want to deprive state prisoners of first federal habeas corpus review, and we have interpreted statutory ambiguities accordingly.").

43. *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in the judgments in part and dissenting in part).

and were convicted for your crime. But as it turns out, the government cannot make your failure to register a crime because to do so would—as the Supreme Court held in *Marchetti v. United States*—violate the Fifth Amendment's privilege against self-incrimination.[44] Were you to challenge your conviction on habeas on that basis, you would receive the retroactive benefit of this "new rule" under the first exception to the *Teague* doctrine.

Second, a new rule should also apply retroactively if it requires a procedure that is "implicit in the concept of ordered liberty."[45] Justice Harlan offered *Gideon* as an example that would satisfy this exception. Subsequent case law makes clear that this exception is very narrow. Indeed, the Court has indicated that *Gideon* is the only rule that falls within it.[46]

Justice Harlan's views remained outliers on the Court throughout the Warren era,[47] when the Court favored considerable review of state court decisions, at least on constitutional issues of criminal procedure. But Justice Harlan's frustration with *Linkletter* ultimately proved contagious.[48]

B. Teague v. Lane

In *Teague*, the Court accepted Justice Harlan's invitations to reexamine its approach to retroactivity for all cases on collateral review.[49] It did not, however, adopt his views wholesale, but diverged from them in significant respects.

In *Teague*, an all-white jury convicted a black defendant of murder and other offenses in state court.[50] During jury selection, the defendant challenged the prosecutor's use of peremptory challenges to exclude all the potential jurors who were African American, claiming that it violated his right to a jury from a fair cross-section of the community.[51] Teague's claim failed and his conviction became final in 1983 after an unsuccessful state court appeal.[52] He then sought federal habeas review in district court, raising his fair cross-section claim again, along with an equal protection claim.[53] The Court had recognized the merit of such equal protection claims in *Batson v. Kentucky* in 1986[54]—while Teague's

44. 390 U.S. 39, 48-61 (1968).

45. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in the judgments in part and dissenting in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (internal quotation marks omitted).

46. *See* Whorton v. Bockting, 549 U.S. 406, 419 (2007).

47. Fallon & Meltzer, *supra* note 9, at 1744.

48. *See, e.g.*, Hankerson v. North Carolina, 432 U.S. 233, 246-48 (1979) (Powell, J., concurring).

49. 489 U.S. 288, 310 (1989) (plurality opinion).

50. *Id.* at 192-93.

51. *Id.* at 293.

52. *Id.*

53. *Id.*

54. 476 U.S. 79, 96 (1986).

case was still on collateral review—but the Court had deemed *Batson* non-retroactive.[55] By contrast, the Court had never ruled on the fair cross-section issue Teague raised, and only a single amicus brief suggested that retroactivity rules might bar the Court from addressing it.[56] The Court, however, stated that retroactivity was a threshold question that must be decided before reaching the merits.[57]

In addressing this question, the *Teague* Court renounced *Linkletter* and forged a new doctrine, under which new constitutional rules of criminal procedure generally do not apply to cases on collateral review. Although the Court acknowledged potential difficulties in determining whether a rule is "new," it explained that a rule is "new" whenever it "breaks new ground or imposes a new obligation on the States or the Federal Government."[58] By way of further elaboration, the Court stated that a rule is new whenever it was not "*dictated* by precedent existing at the time the defendant's conviction became final."[59] *Teague* also incorporated Justice Harlan's two exceptions,[60] but emphasized—as has proven true—that they rarely apply.[61]

The two definitions of "new rules" noted in the previous paragraph are quite different, and the tension between them has pervaded the Court's retroactivity jurisprudence. The first definition sounds like Justice Harlan's concept of a new rule; it shields state convictions from collateral attacks based on clear breaks in jurisprudence.[62] *Teague*'s second definition of new rules suggests that virtually all rules should be considered new.

Initially, the Court seemed to lean towards the former definition of new rules, which allowed for a considerable number of rules to be applied retroactively because they were not new. For example, in *Penry v. Lynaugh*, Johnny Paul Penry, who had been convicted and sentenced to death in Texas state court, sought habeas relief. At trial, his attorney introduced evidence that he was moderately mentally retarded and had been abused as a child. At the penalty phase of trial, the sentencing jury was instructed to consider all evidence in-

55. Allen v. Hardy, 478 U.S. 255, 257-58 (1986) (per curiam).

56. *Teague*, 489 U.S. at 300 (plurality opinion).

57. *Id.* at 300-01.

58. *Id.* at 301.

59. *Id.*

60. *Id.* at 311.

61. *Id.* at 311-13. Following *Teague*, the Court has never applied a new rule retroactively on the grounds that it was implicit in the concept of ordered liberty, or what the Court referred to as a "watershed rule[]," *see id.* at 311, and it has only once allowed retroactive application of a new rule on the grounds that it placed conduct beyond the government's prescriptive power, *see* Penry v. Lynaugh, 492 U.S. 302, 329-30 (1989).

62. *See* Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) ("[M]any, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation.").

troduced at trial in answering three "special issues"—essentially questions designed to determine the defendant's culpability. The jury answered "yes" to each question it was asked to consider; a "no" answer to any of the questions would have resulted in a life sentence rather than death. On federal habeas review, Penry argued that the three "special issues" the jury was asked to consider deprived them of an opportunity "to give effect to" evidence of mental retardation and childhood abuse "in determining whether a defendant should be sensentenced to death."[63]

The Supreme Court agreed—and, more important here, it found that Penry's proposed rule was not "new" because it was dictated by *Lockett v. Ohio*[64] and *Eddings v. Oklahoma*,[65] both of which were decided before the prisoner's conviction became final.[66] In *Eddings* and *Lockett*, the Court had invalidated state laws that prevented sentencing juries from affording individualized consideration of all mitigating factors in the defendant's case.[67] Although those two cases dealt with different kinds of mitigating evidence than that at issue in *Penry*,[68] the Court nevertheless concluded that the rule *Penry* sought was "dictated" by those precedents.[69]

Penry has proven to be an anomaly, and its approach contrasts starkly with later applications of *Teague*. For example, in *Butler v. McKellar*, the defendant was arrested on an assault charge and had retained counsel.[70] While in custody, he became the primary suspect in an unrelated murder.[71] He was informed he was the target of that investigation, waived his rights after being given his *Miranda* warnings, and then made incriminating statements about his involvement in the murder.[72] After he was convicted of the murder, he sought habeas relief on the grounds that his Fifth Amendment rights had been violated.[73] To support his position, he cited *Edwards v. Arizona*, which held that police must refrain from further questioning about a particular offense once an accused in police custody invokes his right to counsel.[74] While Butler's case was proceeding on collateral review, the Court decided *Arizona v. Roberson*, which held that the

63. *Penry*, 492 U.S. at 315.

64. 438 U.S. 586 (1978).

65. 455 U.S. 104 (1982).

66. *Penry*, 492 U.S. at 314-15.

67. *See Eddings*, 455 U.S. at 113-14; *Lockett*, 438 U.S. at 608 (plurality opinion).

68. *Lockett* dealt with evidence that the defendant lacked specific intent to cause death and was merely an accomplice, *see* 438 U.S. at 608 (plurality opinion), while *Eddings* concerned evidence of an unhappy upbringing and emotional disturbance, *see* 455 U.S. at 113-15.

69. *Penry*, 492 U.S. at 319.

70. 494 U.S. 407, 409 (1990).

71. *Id.*

72. *Id.*

73. *Id.* at 410-11.

74. 451 U.S. 477, 484-85 (1981).

Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation concerning a different offense.[75] The majority in *Roberson* explicitly stated that *Edwards* controlled the result.[76] Nevertheless, the *Butler* Court deemed *Roberson* to have announced a new rule for *Teague* purposes because its outcome "was susceptible to debate among reasonable minds."[77] The Court has continued to strengthen the *Teague* bar along these lines; in 1997, it declared that a rule was "new" unless it would have been "apparent to all reasonable jurists" before its pronouncement.[78]

In *Teague* and subsequent cases, the Court has offered two primary justifications for a strict bar on retroactivity: federalism and finality.[79] Federal habeas review of state convictions intrudes on states' prerogative to define and enforce the criminal law and to have "initial responsibility for vindicating constitutional rights" in criminal trials.[80] These intrusions also tax the state's coffers and burden judicial administration by "continually forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards."[81] *Teague* minimizes these intrusions by constraining federal courts' ability to upset state convictions through retroactive application of new constitutional rules.

This limitation on federal courts' power also protects society's interest in ensuring the finality of criminal convictions. As Justice Harlan explained: "No one . . . is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."[82] The possibility of perpetual relitigation imposes a heavy financial toll on governments and a heavy psychological toll on defendants, society, and victims. And given the limited resources in our criminal justice system, it is hard to justify devoting substantial time and energy to postconviction review when those assets are so badly needed in defendants' initial trials.[83]

John Jeffries has argued that *Teague* offers a third advantage: by limiting remedies for constitutional violations, it reduces the cost of innovation and en-

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75. 486 U.S. 675, 683 (1988).

76. *Id.* at 685.

77. *Butler*, 494 U.S. at 415.

78. Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997).

79. *See, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 280 (2008); Lockhart v. Fretwell, 506 U.S. 364, 372 (1993); Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion).

80. Engle v. Isaac, 456 U.S. 107, 128 (1982).

81. *Teague*, 489 U.S. at 310 (plurality opinion) (emphasis omitted).

82. Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

83. *See* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 818-27 (2009).

courages the development of constitutional law.[84] On this view, the Court is more comfortable issuing groundbreaking decisions like *Miranda* because it knows that they will not require relitigation of otherwise final criminal convictions and the release of countless prisoners.[85] Consequently, while the denial of retroactive remedies may appear unfair to those who have already been convicted, *Teague* can potentially function as a defendant-friendly doctrine in the long run by opening up additional avenues for relief.

C. *The Antiterrorism and Effective Death Penalty Act*

The Court's approach to federal habeas review and retroactivity evolved again with AEDPA's passage in 1996, shortly after the Oklahoma City bombing. AEDPA further limits the authority of federal courts to grant habeas corpus relief. It requires federal courts to defer to determinations of state habeas courts so long as those decisions are neither "contrary to," nor an "unreasonable application of," "clearly established Federal law, as determined by the Supreme Court" at the time the state court decision was rendered.[86] The state court's factual findings are presumed correct and the habeas petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence."[87] Thus, as the Supreme Court has said, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. If this standard is difficult to meet, that is because it was meant to be."[88]

But AEDPA's attempt to provide a definitive answer to questions of retroactivity has not eliminated jurisprudential instability in this realm. For example, it remains unclear whether AEDPA incorporates *Teague*'s two exceptions.[89] Similarly, although the Supreme Court has said that AEDPA's phrase "objectively unreasonable" means more than incorrect,[90] lower courts have struggled to discern what amount of error actually warrants habeas relief. One has stated that "[e]ven clear error, standing alone, is not a ground for awarding habeas relief,"[91] while another has held AEDPA does not require a "Supreme Court case directly on all fours" with the issue under consideration.[92] Other courts have

84. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment*, 84 VA. L. REV. 47, 79 (1998).

85. *Id.* at 98-100.

86. 28 U.S.C. § 2254(d)(1) (2012).

87. *Id.* § 2254(e)(1).

88. Harrington v. Richter, 131 S. Ct. 770, 786 (2011) (citation omitted).

89. *See* Greene v. Fisher, 132 S. Ct. 38, 44 n.* (2011) (declining to resolve the question). Justice Alito has, however, suggested that these exceptions cannot apply post-AEDPA. *See* Transcript of Oral Argument at 41, Whorton v. Bockting, 549 U.S. 406 (2007) (No. 05-595), 2006 WL 3230265.

90. Lockyer v. Andrade, 538 U.S. 63, 75 (2003).

91. Stephens v. Hall, 407 F.3d 1195, 1202 (11th Cir. 2005).

92. White v. Coplan, 399 F.3d 18, 25 (1st Cir. 2005).

taken various positions along this spectrum.[93] And while the Court has affirmed that the *Teague* and AEDPA inquiries are distinct,[94] this approach has been hard to apply.[95] In short, retroactivity rules remain uncertain and "very complicated,"[96] notwithstanding AEDPA's stark language. This uncertainty has left the courts hungry for clear rules, and this hunger may explain courts' knee-jerk application of the *Teague* doctrine to contexts in which it should not logically apply.

II. THE UNEXAMINED *TEAGUE* IS NOT WORTH USING

This Part explores three contexts in which courts have applied *Teague* where its underlying rationales do not justify its application—namely, when federal courts review federal convictions, when federal or state courts conduct initial-review collateral proceedings, and when federal courts review state convictions where there was no state court finding on the merits of the claim raised before the federal court. The goal of this Part is to support the claim that *Teague* has become unmoored from its core rationales in many of its applications. The next Part will discuss why this is problematic and what to do about it.

To help with the following discussion, I will outline the typical path of a case proceeding through direct to postconviction review. A criminal case in state court will typically proceed as follows: (1) trial in state court; (2) direct appeal as of right to a state intermediate court; (3) discretionary appeal to the state's highest court; (4) petition for a writ of certiorari to the U.S. Supreme Court; (5) petition for postconviction review in the state court system; (6) appeal from the denial of postconviction relief in the state court system; (7) discretionary review of the appeal within the state court system; (8) petition for a writ of certiorari to the U.S. Supreme Court; (9) petition for a writ of habeas corpus in a federal district court pursuant to 28 U.S.C. § 2254; (10) appeal of the federal habeas decision to a federal court of appeals; and (11) petition for a writ of certiorari to the U.S. Supreme Court.[97] Steps one through four are direct

93. *See, e.g.*, Maynard v. Boone, 468 F.3d 665, 671 (10th Cir. 2006) ("[O]nly the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254. In our view, a decision is 'objectively unreasonable' when most reasonable jurists exercising their independent judgment would conclude the state court misapplied Supreme Court law."); Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000) (holding that, for a state court decision to be "objectively unreasonable," "[s]ome increment of incorrectness beyond error is required" but "the increment need not be great").

94. Horn v. Banks, 536 U.S. 266, 272 (2002) (per curiam).

95. *See* Yackle, *supra* note 12, at 333.

96. *Id.*

97. These procedures are beautifully articulated (and laid out in tabular form) in Lasch, *supra* note 14, at 4-5. My description is quite similar to Christopher Lasch's, as there is only one way to skin this cat.

review; steps five through eight are state collateral review (sometimes called "state habeas"); and the remaining steps are federal habeas.

By contrast, a criminal case in federal court will proceed as follows: (1) trial in a federal district court; (2) direct appeal to a federal court of appeals; (3) petition for a writ of certiorari to the U.S. Supreme Court; (4) petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2255; (5) appeal of the habeas decision to a federal court of appeals; and (6) petition for a writ of certiorari to the U.S. Supreme Court. Steps one through three are direct review, and steps four through six are collateral review. Obviously a key difference between the review of state versus federal convictions is that the review of federal convictions involves one less round of collateral review.

A. *Federal Habeas Review of Federal Convictions*

The Supreme Court and all the courts of appeals have assumed without deciding that *Teague* applies when federal courts review federal convictions on collateral review.[98] For example, in *Chaidez v. United States*, the defendant collaterally attacked her federal conviction on the ground that she had received ineffective assistance of counsel; her lawyer had failed to advise her that pleading guilty would subject her to deportation.[99] *Padilla v. Kentucky*, decided in 2010, had found that such a failure constituted ineffective assistance,[100] but Chaidez's conviction had become final in 2004. Chaidez's attorneys argued that even if *Padilla* were a new rule, *Teague* did not bar its application to a federal convict's first postconviction filing under § 2255—at least when that filing asserted a claim that could not have been raised previously.[101] Although Justice Ginsburg asked about this possibility at oral argument,[102] the Court's opinion expressly reserved the question.[103] The majority explained that this portion of Chaidez's arguments had not been properly preserved and, besides, no other federal court had considered the possibility.[104] "[M]indful that [it is] a court of review, not of first view," the Court declined to rule on an argument that had not fully percolated.[105]

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98. *See* Chaidez v. United States, 133 S. Ct. 1103, 1113 n.16 (2013); Danforth v. Minnesota, 552 U.S. 264, 269 n.4 (2008); BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 7:3 (West 2013) (listing cases); MEANS, *supra* note 15, § 26.10 n.6 (same).

99. *Chaidez*, 133 S. Ct. at 1106.

100. 559 U.S. 356, 374 (2010).

101. *See* Brief for Petitioner at 27-39, *Chaidez*, 133 S. Ct. 1103 (No. 11-820), 2012 WL 2948891.

102. Transcript of Oral Argument at 26, *Chaidez*, 133 S. Ct. 1103 (No. 11-820), 2012 WL 5363544.

103. *Chaidez*, 133 S. Ct. at 1113 n.16.

104. *Id.*

105. *Id.* (first alteration in original) (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)) (internal quotation marks omitted).

But the assumption that *Teague* applies when federal courts review federal convictions is misguided; federalism and finality do not justify *Teague*'s application in this context.[106] As to federalism, such concerns simply are not implicated when a *federal* court examines a *federal* conviction. *Danforth v. Minnesota*, which held that the states are not bound by *Teague* but are instead free to give broader retroactive effect to new rules of criminal procedure,[107] supports this conclusion. As *Danforth* explained, neither *Teague* nor the Justice Harlan opinions on which it was based hinted that the *Teague* doctrine should limit states' authority to allow broader retroactive application of new rules.[108] Similarly in the context of federal convictions, neither *Teague* nor Justice Harlan's opinions indicated that *Teague* should limit federal courts' authority to allow broader retroactive application of new rules to federal convictions. And because "[f]ederalism and comity considerations are unique to *federal* habeas review of *state* convictions,"[109] these considerations are absent when a *federal* court reviews a *federal* conviction. "If anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*";[110] the same is true for federal courts reviewing federal convictions.[111]

Collateral review of federal convictions also differs from that of state convictions with respect to finality. Such federal review is "an integral part of a continuous criminal proceeding that is segmented by no event or condition decisive of finality."[112] This is evidenced in part by small technicalities: claims under 28 U.S.C. § 2255 are heard in the same court as the one in which the

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106. *See* Lasch, *supra* note 14, at 65-68; Nicholas J. Eichenseer, Comment, *Reasonable Doubt in the Rear-View Mirror: The Case for* Blakely-Booker *Retroactivity in the Federal System*, 2005 WIS. L. REV. 1137, 1161 (stating, but not elaborating on, the idea that "because certain features unique to § 2255 motions assuage some of the concerns underlying the Court's existing retroactivity doctrine—namely the fear of unduly burdening or interfering with state courts—the *Teague* ban loses some of its justification in the federal habeas context" (footnote omitted)).

107. 552 U.S. 264, 280-81 (2008).

108. *Id.* at 277-78.

109. *Id.* at 279 (second emphasis added).

110. *Id.* at 279-80.

111. *See* Reina-Rodriguez v. United States, 655 F.3d 1182, 1190 (9th Cir. 2011) (explaining that, after *Danforth*, "there is now some doubt as to whether Teague applies to federal-prisoner petitioners"); *see also* Valentine v. United States, 488 F.3d 325, 342 (6th Cir. 2007) (Martin, J., concurring in part and dissenting in part) ("Because concerns with comity are reduced—if not nonexistent—in the context of section 2255, however, it would seem to me that a bit more scrutiny is warranted in determining what the legal landscape actually was, and whether a given rule was '*dictated* by precedent existing at the time the defendant's conviction became final.'" (quoting Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion))).

112. 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.6 (LexisNexis 2013); *see also* United States v. Payne, 894 F. Supp. 534, 543 (D. Mass. 1995) (quoting this treatise approvingly).

original conviction was obtained.[113] The prosecutor and judge in the habeas proceedings are already familiar with the relevant factual and legal issues. These proceedings are also criminal and have the same docket number as the original proceeding, unlike federal habeas review of a state conviction under 28 U.S.C. § 2254, which is a civil proceeding with a new docket number in a new court.[114]

More importantly, because federal collateral review of federal convictions is an "integral part of a continuous criminal proceeding," society's interest in finality is less pressing in this context. While some interest in repose always pertains to a judgment that "has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal,"[115] the Supreme Court has acknowledged that federal habeas challenges to federal convictions entail fewer "finality problems" than federal habeas challenges to state convictions.[116] After all, federal defendants only have access to one round of collateral proceedings under § 2255, whereas state habeas petitioners must, in order to satisfy the exhaustion requirements of § 2254, have their habeas claims reviewed by a state court before they can obtain federal habeas review.[117] Section 2255 proceedings thus present a more modest threat to society's interest in finality than § 2254 proceedings because defendants with federal convictions are less likely to get an impermissible second bite at the apple.

Applying *Teague* to habeas review of federal convictions would also unduly restrict federal courts' ability to participate in the development of constitutional rights. Because *Teague* is a threshold question,[118] courts cannot adjudicate the merits of petitioners' claims and then determine that *Teague* bars relief (as they would under a harmless error approach). Rather, courts can only find constitutional error when that error entitles the petitioner to redress. Thus, if *Teague* applies to federal and state convictions, federal courts will have little opportunity to expand current ideas about constitutional issues that arise almost exclusively on collateral review—for example, ineffective assistance or prosecutorial misconduct. Instead, development of these important doctrines will mostly be left to the states, which are not bound by *Teague*.[119] Consequently, *Teague*'s rationales do not support its application in federal habeas review of federal convictions.

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113. United States v. Frady, 456 U.S. 152, 184 (1982) (Brennan, J., dissenting).

114. *Id.* at 182.

115. *Id.* at 164 (majority opinion).

116. *See* Engle v. Isaac, 456 U.S. 107, 134 (1982).

117. *See* 28 U.S.C. § 2254(b)(1)(A), (c) (2012).

118. Caspari v. Bohlen, 510 U.S. 383, 389 (1994).

119. The exception to this rule would be situations in which the government waives *Teague* and the court declines to assert it *sua sponte*. *See id.* It seems profoundly odd that the executive branch should thus be able to dictate when courts can adjudicate the limits of Sixth and Fourteenth Amendment rights.

Of course, in cases involving federal convictions, the defendant has already had the benefit of a federal court reviewing his federal constitutional claims. This might suggest that the scope of federal collateral review of federal convictions should be narrow, but in fact the opposite is true. The argument that the benefit of habeas lies in a federal forum for review relies on the assumption that state courts are inferior to federal courts in some respect, and that defendants have not gotten their due without federal review of their constitutional claims. This assumption, which grounded the Warren Court's expansion of federal habeas corpus during the civil rights era,[120] no longer holds sway. As early as 1976, the Supreme Court was "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. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."[121] The purpose of federal habeas review of state court decisions is not currently to allow "superior" federal courts to review "inferior" state court judgments; it is to provide an extra check on the criminal justice system. One round of these checks is completely absent in the context of federal convictions. And its absence indicates that the scope of federal habeas review of federal convictions should, if anything, be broader than the scope of federal habeas review of state convictions.

B. *Initial-Review Collateral Proceedings*

Teague's application is especially problematic in contexts in which a habeas petitioner seeks to raise a claim on collateral review that could not have been raised earlier on direct review. This can occur within the state criminal system, in the first hearing regarding a state conviction on state collateral review, or in the federal criminal system, in the first § 2255 proceeding regarding a federal conviction. The claims most often brought for the first time in these settings are claims of prosecutorial misconduct or ineffective assistance of counsel, which typically cannot be raised on direct appeal because "[t]he evidence introduced at trial" is "devoted to issues of guilt or innocence" and thus does "not disclose the facts necessary to decide" whether prosecutors engaged in misconduct or the defendant received ineffective assistance.[122] For example, "evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced."[123]

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120. *See* Robert Jerome Glennon, *Justice Sandra Day O'Connor: Democrat with a Small "d,"* 72 A.B.A. J. 55, 57 (1986).

121. Stone v. Powell, 428 U.S. 465, 494 n.35 (1976).

122. Massaro v. United States, 538 U.S. 500, 505 (2003).

123. *Id.* In rare cases—for example, if the trial record demonstrates that defense counsel slept through critical or substantial portions of the trial—the trial record will provide suffi-

Accordingly, the Supreme Court has instructed that "in most cases"—that is, where extra-record evidence is required—"a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance."[124] Although this recommendation by its terms applies only to federal review of federal convictions, most state courts likewise evince a preference for deciding claims of ineffective assistance claims through collateral review.[125] Additionally, while the Supreme Court's instruction by its terms only applies to claims of ineffective assistance, it is equally applicable to other constitutional claims that rely on extra-record evidence, like prosecutorial misconduct. Letting such claims be litigated in the first instance on collateral review allows them to be litigated in a trial court, "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial."[126]

The Supreme Court has termed such proceedings "initial-review collateral proceedings" because they are "the first place a prisoner can present [certain] challenge[s] to his conviction."[127] In these circumstances, the "collateral proceeding [is] a prisoner's one and only appeal as to an ineffective-assistance" or prosecutorial misconduct claim;[128] thus, it makes sense to treat the claim as if it were on direct review for retroactivity purposes. Indeed, in the seminal case on ineffective assistance claims, *Strickland v. Washington*, the Supreme Court said that "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal."[129]

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cient evidence for the defendant to be able to bring an ineffectiveness claim on direct appeal. *See, e.g.*, Moore v. State, 227 S.W.3d 421, 423 (Tex. App. 2007) (citing cases).

124. *Massaro*, 538 U.S. at 504.

125. *See* Brief of Amici Curiae Utah & 24 Other States in Support of Respondent at 7-11, Trevino v. Thaler, 133 S. Ct. 1911 (2013) (No. 11-10189), 2013 WL 314455. As that brief explains, six states completely bar defendants from raising ineffective assistance claims on direct appeal. *Id.* at 7 & n.1. By contrast, one state, Michigan, requires all ineffective assistance claims be brought on direct appeal. *Id.* (citing People v. Ginther, 212 N.W.2d 922, 926 (Mich. 1973)). The remaining forty-three states hear some ineffective assistance claims on direct appeal and others on collateral review. These states can roughly be categorized as follows: Eleven states allow a convicted defendant to file a motion for a new trial based on the ineffectiveness of trial counsel; this allows the state appellate courts to review the ineffectiveness claim on direct appeal. *Id.* at 8. But in at least some of these states, the option of securing relief by filing a motion for a new trial is not a very realistic one. *See Trevino*, 133 S. Ct. at 1918-19. In five states, defendants can, during direct review, ask for a remand to allow the trial court to develop a factual record to support an ineffective assistance claim. Brief of Amici Curiae Utah & 24 Other States in Support of Respondent, *supra*, at 9. And in twenty-seven states, ineffective assistance claims must be raised on direct appeal if they are based on the trial record and on collateral review if they require additional evidence. *Id.*

126. *Massaro*, 538 U.S. at 505.

127. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012) (quoting Coleman v. Thompson, 501 U.S. 722, 755 (1991)) (internal quotation mark omitted).

128. *Id.* (citation omitted) (internal quotation marks omitted).

129. 466 U.S. 668, 697 (1984).

Treating claims that must be raised in the first instance on collateral review as if they had been raised on direct appeal means allowing the retroactive application of new rules in this context. For just as failing "to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication,"[130] so would failing to apply such rules during initial-review collateral proceedings. After all, if *Teague* applies in initial-review collateral proceedings, then defendants have *no* opportunity to receive unfiltered review of such claims: If a petitioner brings them on direct review, the claims will be dismissed with instructions to raise them in collateral proceedings. But in collateral proceedings, *Teague* prevents defendants from pressing claims that require the court to announce or apply a new rule.[131]

The Supreme Court has already accepted a corollary of this proposition in *Martinez v. Ryan* and *Trevino v. Thaler*, both of which concerned the procedural default doctrine. That doctrine, like the *Teague* doctrine, is a judicially created equitable doctrine governing the availability of habeas relief.[132] And the application of the procedural default doctrine, like the application of the *Teague* doctrine, relies on the assumption that the petitioner had a full and fair opportunity to raise his arguments in the criminal proceeding.[133] Moreover, the procedural default doctrine is also, like the *Teague* doctrine, "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism."[134] Accordingly, one would expect that where the procedural default doctrine was inapplicable, the *Teague* doctrine would be inapplicable, too. Not so—at least not yet.

In *Martinez*, a criminal defendant convicted in an Arizona court sought relief based on ineffective assistance received at trial.[135] Under Arizona law, ineffectiveness claims cannot be raised on direct appeal, but must be raised in the first instance on collateral review.[136] On collateral review, Martinez's attorney failed to assert that trial counsel was ineffective, and his action for postconviction relief was dismissed.[137] The intermediate state court of appeals affirmed his conviction, and the Arizona Supreme Court denied review.[138] After an unsuccessful second attempt at seeking state postconviction relief, Martinez filed a writ of habeas corpus in federal district court, again raising his in-

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

131. *See* Brief for Petitioner, *supra* note 101, at 29-31.

132. *See id.* at 30-31; *see also* 15 CYCLOPEDIA OF FEDERAL PROCEDURE § 86:63 (West 3d ed. 2014).

133. The discussion of *Martinez* and *Trevino* immediately below elucidates this point further.

134. Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012).

135. *Id.* at 1313.

136. *Id.*

137. *Id.* at 1314.

138. *Id.*

effective assistance claim.[139] He conceded that the state courts had dismissed this claim by relying on a clear state procedural rule, which, under the doctrine of procedural default, would prohibit a federal court from reaching the merits of his claims.[140] But he argued that he had cause for the default—namely the ineffectiveness of his first postconviction counsel—and that the default should accordingly be excused.[141] Both the federal district court and the Ninth Circuit rejected this claim.

The Supreme Court, however, held that ineffective assistance in initial-review collateral proceedings on a claim of ineffective assistance at trial may provide cause for procedural default in a federal habeas proceeding[142]—just as ineffective assistance of counsel on direct appeal can amount to "cause" that excuses a defendant's failure to raise a constitutional claim.[143] In other words, because the state collateral proceeding is the first opportunity for the defendant to raise his ineffective assistance claim, it is the equivalent of a direct appeal with respect to that claim.

This result certainly makes sense in terms of fairness. For "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim."[144] The intermediate and highest state courts will not hear it because it has been forfeited. The Supreme Court will not be able to hear it on direct appeal because the state courts' dismissal of the claim will rest on an adequate and independent state ground.[145] And, if ineffectiveness of counsel in initial-review collateral proceedings did not constitute cause to excuse a procedural default, then no court could hear the claim in federal habeas proceedings. By contrast, if counsel errs in non-initial-review collateral proceedings, then at least the defendant has had an opportunity to have his claim adjudicated in some forum on direct review. But where no such opportunity exists, application of the procedural default doctrine would lead to excessively harsh—if not unconstitutional[146]—results.

The Court underscored this point in *Trevino v. Thaler*.[147] There, the Court considered Texas's criminal procedures, which do not *require* that ineffective assistance of counsel claims be raised on collateral review, but make it "'virtually impossible for appellate counsel to adequately present an ineffective assis-

139. *Id.*

140. *See id.* (citing Wainwright v. Sykes, 433 U.S. 72, 84-85 (1977)).

141. *Id.* at 1314-15.

142. *Id.* at 1315.

143. *See* Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000).

144. *Martinez*, 132 S. Ct. at 1316.

145. *See, e.g.*, Fox Film Corp. v. Muller, 296 U.S. 207, 209-10 (1935).

146. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress." (citation omitted) (internal quotation mark omitted)).

147. 133 S. Ct. 1911 (2013).

tance [of trial counsel] claim' on direct review."[148] The majority of states are similar, either because procedural hurdles make raising these claims on direct review difficult or because they rely on evidence outside the trial record and thus require the factfinding capabilities of a trial-level court.[149] In such circumstances, the Court held that the *Martinez* rule must apply to avoid "significant unfairness"[150]: under both Arizona's system in *Martinez* and Texas's system in *Trevino*, "failure to consider a lawyer's 'ineffectiveness' during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim."[151]

Likewise, if *Teague* applies in initial-review collateral proceedings, defendants will have no opportunity for unfiltered review—that is, review without the narrowing lens of *Teague*—of claims that rely on evidence outside the trial record. Perhaps in tacit recognition of the unfairness of this approach, courts have often allowed petitioners raising claims that could not have been raised prior to collateral review to proceed without having their claims subjected to a *Teague* analysis. For example, in *Padilla v. Kentucky*, the defendant—a lawful permanent resident originally from Honduras—alleged that he had received ineffective assistance because his lawyer had not warned him that pleading guilty would render him deportable.[152] Because this claim required evidence outside the trial record, it had to be brought in the first instance on state collateral review. Neither Kentucky's courts nor the federal courts considered whether it was *Teague*-barred, even though Kentucky had adopted the *Teague* doctrine and courts have the authority to raise it *sua sponte*.[153] *Padilla* is not unique in its approach; *Missouri v. Frye* is another prominent example of a court foregoing a *Teague* analysis with respect to claims that could not have been raised prior to collateral review.[154] These cases all reflect an implicit recognition that it would be unfair for a claim to be *Teague*-barred at the first opportunity at which a defendant could raise it. This result is consistent with the assumption underlying the *Teague* doctrine noted earlier—namely, that the defendant has already had an opportunity to fully and fairly litigate the claim as to which retroactivity is barred.

148. *Id.* at 1918 (alteration in original) (quoting Robinson v. State, 16 S.W.3d 808, 810-11 (Tex. Crim. App. 2000)).

149. *See* Massaro v. United States, 538 U.S. 500, 505 (2003).

150. *Trevino*, 133 S. Ct. at 1919.

151. *Id.* at 1921.

152. 559 U.S. 356, 359 (2010).

153. Brief for Petitioner, *supra* note 101, at 33.

154. 132 S. Ct. 1399, 1408 (2012) (holding that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused").

C. *Federal Habeas Review of State Convictions Where There Was No State Court Decision on the Merits of the Petitioner's Claim*

Courts have also applied *Teague* when federal courts review state court convictions where there was no decision on the merits of the claim asserted before the federal court. *Teague*'s rationales, however, do not adequately justify its application in such cases. AEDPA prohibits a federal court reviewing a state conviction from granting habeas relief "with respect to any claim that was *adjudicated on the merits* in State court proceedings unless the adjudication of the claim" satisfies the "contrary to" or "unreasonable application of" law or "unreasonable determination of the facts" standards.[155] AEDPA does not, however, explain how habeas courts should proceed with respect to claims that were *not* decided on the merits by the state court.

Of course, it is extremely rare that a reviewing court will find that a state court has not adjudicated the merits of a claim, given that summary denials are considered merits decisions[156] and that the habeas petitioner must show that her claims were not procedurally defaulted. But such situations do arise[157]—most often when a state prisoner suffered ineffective assistance at trial. This claim could typically be raised in the first instance only on collateral review. If the prisoner's lawyer fails to raise the ineffectiveness claim in the initial state habeas proceeding because he himself is ineffective, then the prisoner is likely to lose on state habeas. When the state prisoner seeks habeas review in federal court, she will assert that she received ineffective assistance at trial (as well as in state habeas).[158] The federal court must now review the claim of ineffective assistance at trial for the first time without any state court decision to guide it.

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155. 28 U.S.C. § 2254(d) (2012) (emphasis added). Although AEDPA's "contrary to" or "unreasonable application of" law standard might seem like a statutory incorporation of *Teague* (albeit with a few additional barriers to relief), the Supreme Court has resisted this view. *See* Horn v. Banks, 536 U.S. 266, 272 (2002) (per curiam) ("[T]he AEDPA and *Teague* inquires are distinct."); Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (expressing the same view); *see also* Blume, *supra* note 16, at 281 n.111. *But see Williams*, 529 U.S. at 380 (plurality opinion) ("It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."). At the same time, the Court has recognized that "whatever would qualify as an old rule under [the Court's] *Teague* jurisprudence will constitute 'clearly established Federal law'" under § 2254(d)(1) with one caveat: "§ 2254(d)(1) restricts the source of clearly established law to th[e] Court's jurisprudence." *Id.* at 412.

156. *See* Harrington v. Richter, 131 S. Ct. 770, 784 (2011).

157. *See, e.g.*, Brady v. Pfister, 711 F.3d 818, 826-27 (7th Cir. 2013); Balsavage v. Wetzel, 936 F. Supp. 2d 505, 516 (E.D. Pa.), *aff'd in part, vacated in part*, 545 F. App'x 151 (3d Cir. 2013); Secrease v. Walker, No. 2:09-cv-299, 2011 WL 2790155, at *52 (E.D. Cal. July 13, 2011).

158. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1313 (2012).

In these contexts, the defendant's claims are reviewed de novo,[159] but are still subject to *Teague*.[160] Thus, a habeas petitioner can obtain relief where there was no state court decision on the merits of his claim if she shows, first, a "'reasonable probability that the error complained of affected the outcome of the trial,' or that the verdict likely would have been different absent the now-challenged [defect],"[161] and, second, that the constitutional error complained of does not require the court to announce or apply a new rule. But *Teague*'s rationales of finality and federalism do not support the denial of unfiltered review when there has been no state court adjudication on the merits. And fundamental fairness demands that habeas petitioners not be denied *all* opportunities to obtain unfiltered review of a constitutional claim.

At least one habeas petitioner has challenged the application of *Teague* where there was no state court adjudication on the merits. In *Brown v. Polk*, the petitioner reasoned that in these circumstances, "there is no basis for denying criminal defendants the benefit of new constitutional protections."[162] Specifically, Brown contended that "in the absence of a state court adjudication of the merits of a defendant's constitutional claims, the application of new constitutional protections cannot undermine the state's efforts to apply then-existing precedent" and thus cannot contravene *Teague*'s concern for comity.[163] A federal ruling on a constitutional issue cannot, in any direct sense, induce friction between state and federal interpretations where there is no state ruling with which to conflict. One could argue that the federal court's adjudication of constitutional claims that were presented to but not decided by the state court still undermines states' prerogative to define and enforce the criminal law and to have "initial responsibility for vindicating constitutional rights" in criminal trials.[164] But it is surely less intrusive for a federal court to adjudicate a constitutional claim when a state has not already done so than for it to adjudicate that claim when the state has already done so. Brown also argued that declining to apply *Teague* in this context was consistent with AEDPA's legislative history.

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159. Cone v. Bell, 556 U.S. 449, 472 (2009). As the Seventh Circuit noted, "the pre-AEDPA standard was also quite deferential to the state courts. If the record as a whole supports the state court's outcome, then even under *de novo* review the correct result would be to deny the petition for a writ of *habeas corpus*." *Brady*, 711 F.3d at 827 (citations omitted).

160. *See* Weeks v. Angelone, 176 F.3d 249, 263 (4th Cir. 1999) ("Even though Weeks's claim for expert assistance is not subject to 28 U.S.C.A. § 2254(d), we still must determine whether resolving Weeks's claim for experts in his favor would require this Court to announce a new rule in violation of *Teague v. Lane* . . . ."), *aff'd on other grounds*, 528 U.S. 225 (2000); *see also* Daniel v. Cockrell, 283 F.3d 697, 702, 705 (5th Cir. 2002); Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1258-59 (11th Cir. 2002).

161. Robinson v. Crist, 278 F.3d 862, 866 (8th Cir. 2002) (quoting Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir. 1987) (en banc)).

162. Brief of Appellant at 11, Brown v. Polk, 135 F. App'x 618 (4th Cir. 2005) (No. 04-30), 2005 WL 6726792.

163. *Id.* at 18.

164. Engle v. Isaac, 456 U.S. 107, 128 (1982).

That history evidenced an intention to "give only a single bite at the apple through the Federal court system,"[165] but not to deny *any* bite at the apple to habeas petitioners in the federal court system.

Brown's petition did not address *Teague*'s concern for finality, and the Fourth Circuit focused on that issue in denying his request for relief. It asserted that, if *Teague* did not apply when there had been no state court decision on the merits, "a state court judgment could never truly be 'final,' because it would always be subject to collateral attack" on the basis of an unadjudicated claim.[166] This lack of finality would frustrate state courts as much as having federal courts overrule them on matters that the states had actually decided.[167] In conclusion, the Fourth Circuit explained that it could

> find nothing in the language of *Teague* that would make the concerns for comity and finality dependent upon whether the state court had occasion to or otherwise adjudicated the constitutional issue on the merits, and no indication that a third "exception" to the nonretroactivity principle was ever contemplated by the Court.[168]

The Fourth Circuit's opinion overlooks several key points, all of which indicate that *Teague*'s concern for preserving the repose of criminal judgments would not be undermined by declining to apply *Teague* to claims that state courts had not decided on the merits. First, it is inaccurate to say that a state court judgment would never truly be final. After all, state prisoners seeking federal habeas review under § 2254 must do so within a very short timeframe, as AEDPA imposes a one-year statute of limitations.[169] Additionally, a number of procedural doctrines—discussed more fully in Part III.B—limit these prisoners' ability to bring new claims on federal habeas. For example, they cannot raise claims that were procedurally defaulted below.[170] The universe of claims is thus limited to those that the petitioner properly preserved and that were not decided on the merits. This will tend to be a very small universe, especially in light of how summary dismissals are treated. It is true that procedural default may be excused where the defendant can show cause for the default and prejudice resulting from it, or where the lawyer's failure to raise the claim below is ineffective assistance of counsel.[171] But this rule hardly destroys the finality of

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165. Brief of Appellant, *supra* note 162, at 32 (quoting 142 CONG. REC. S3376 (daily ed. Apr. 16, 1996) (statement of Sen. Slade Gorton)) (internal quotation mark omitted).

166. *Brown*, 135 F. App'x at 625.

167. *Id.* at 626.

168. *Id.*

169. 28 U.S.C. § 2244(d)(1) (2012).

170. *See* 16A FEDERAL PROCEDURE, LAWYER'S EDITION § 41:314 (West 2014).

171. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984); Wainwright v. Sykes, 433 U.S. 72, 84 (1977). *See generally* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990). Additionally, if a prisoner receives ineffective assistance of counsel in his initial-review collateral proceeding, he may be excused from what would otherwise be considered

criminal judgments, for "[s]urmounting *Strickland*'s high bar is never an easy task."[172] Final judgments are presumed reliable,[173] and inquiries into attorney performance must be highly deferential.[174] Thus, deeming *Teague* inapplicable to claims presented below but not decided on the merits would not seriously jeopardize the finality of criminal decisions: habeas petitioners would not get the second bite at the apple that so worried the *Teague* Court and the Congress that passed AEDPA; they would simply have one fair opportunity to raise their arguments.

Finally, the Fourth Circuit was wrong to label *Teague*'s potential inapplicability in this context an "exception" to that doctrine. As noted earlier, an assumption underlying the *Teague* doctrine is that any claim to which it is applied has already been heard at least once. Indeed, the Supreme Court has never applied *Teague* to a constitutional claim not adjudicated on the merits below. Thus, a preexisting decision is a precondition of *Teague*'s application, not an exception to it. To illustrate the point: we wouldn't say that *Teague*'s inapplicability to civil cases is another "exception" to *Teague*; we would say that a case's criminal nature is a prerequisite to *Teague*'s application. In the same way, the existence of a decision on the merits is a precondition of *Teague*'s application. In the absence of such a decision, the rationales behind *Teague*'s strict bar on retroactivity do not apply.

III. THE PROBLEM WITH THE *TEAGUE* DISCONNECT

As the previous Parts reflect, there is a disconnect between the rhetoric used to justify the *Teague* doctrine and the ways in which this doctrine is applied. Even when federalism and finality do not support the denial of retroactive application of a new rule, the Court often denies retroactivity. While the *Linkletter* regime of retroactivity may have been problematic because it did not deliver "consistent results,"[175] the *Teague* regime is also problematic because it delivers results that are *too* consistent.

A. *Bright-Line Rules*

The merits of bright-line rules are not, of course, to be dismissed.[176] Bright-line rules have the virtues of being certain, uniform, and easy to apply.

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procedural default of a claim of ineffective assistance at trial. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012).

172. Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (quoting Padilla v. Kentucky, 559 U.S. 356, 371 (2010)) (internal quotation marks omitted).

173. *See, e.g.*, *Strickland*, 466 U.S. at 696.

174. *See* Kimmelman v. Morrison, 477 U.S. 365, 382 (1986).

175. Teague v. Lane, 489 U.S. 288, 302 (1989) (plurality opinion).

176. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Jef-

So perhaps *Teague* could be defended on these grounds, even if its rule leaves some unfortunate defendants out in the cold. But *Teague* is not as bright a line as it seems, and its alternatives are at least as appealing along this dimension.

As to the first point, *Teague* arguably "failed to provide a more principled approach than the one it discarded."[177] After all, it still requires case-by-case analysis of whether particular rules are "new." Although *Teague*'s test has become so demanding that virtually no holdings are considered "dictated by precedent," determining the reach of existing precedent still "requires resolution of complex questions of degree."[178] For example, the Court has affirmed that most applications of *Strickland*'s test for assessing claims of ineffective assistance will not produce new rules; this makes sense, given that *Strickland* was designed to be a general standard applicable to myriad factual circumstances.[179] Yet the Court's holding in *Chaidez* shows that applications of *Strickland will* sometimes constitute new rules.[180] Going forward, distinguishing between applications of *Strickland* that constitute a new rule and those that do not will be a conceptually tricky exercise.

Additionally, the *Teague* doctrine does not bar retroactivity when it apparently "should," as the earlier discussion of *Padilla* and *Frye* shows. These cases are explicable on the grounds that *Teague* has an unarticulated exception that the courts intuitively abide. This exception may be quite reasonable—as I have suggested—but it reinforces the conclusion that "it would be overly optimistic to find a bright-line rule in *Teague*'s progeny."[181] Because *Teague* is applied in ways that cannot be defended on the doctrine's own terms, nor on the grounds that it is a bright-line rule, there are no legitimate grounds for failing to make it more consistent with habeas doctrine, fairer to individual defendants, and more precisely tailored to induce government agents to act in accordance with reasonably foreseeable changes in constitutional law.

B. *Docket Management*

Another argument in favor of the *Teague* doctrine's broad bar against retroactivity is that it helps federal courts—and state courts that have endorsed the *Teague* framework—manage their dockets by restricting their ability to grant

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frey L. Fisher, *A* Blakely *Primer: Drawing the Line in* Crawford *and* Blakely, CHAMPION, Aug. 2004, at 18.

177. *See The Supreme Court, 1988 Term—Leading Cases*, *supra* note 6, at 290.

178. Davis v. United States, 131 S. Ct. 2419, 2437 (2011) (Breyer, J., dissenting) (writing in the related context of what constitutes "binding appellate precedent" in lawsuits brought under 42 U.S.C. § 1983).

179. *See* Chaidez v. United States, 133 S. Ct. 1103, 1107-08 (2013).

180. *Id.* at 1108.

181. Kara B. Murphy, Comment, *Representing Noncitizens in Criminal Proceedings: Resolving Unanswered Questions in* Padilla v. Kentucky, 101 J. CRIM. L. & CRIMINOLOGY 1371, 1384 (2011).

habeas relief. Not only may *Teague* allow courts to dispose of habeas petitions more expeditiously, but it may also deter prisoners from filing them in the first place.[182] Perhaps, then, the doctrinal inconsistencies noted in Part II of this Note are worth tolerating because, even though they are theoretically messy, they are practically beneficial.

But this docket-management rationale is exaggerated and cannot support application of the *Teague* doctrine in the scenarios described above, where the doctrine's rationales are irrelevant or less pressing. First of all, as mentioned in Subpart A, applying *Teague*'s bar is not as simple as it seems; it still requires courts to spend considerable effort determining what is a new rule and what is not. Indeed, at least some empirical research suggests that *Teague* has only decreased the efficiency of federal courts in disposing of meritless claims.[183]

Second, a broad bar on retroactivity may perversely crowd the docket by encouraging defendants to shoehorn claims into their direct appeals to avoid losing them forever, even when their claims should more properly be raised on collateral review.[184] Indeed, defense counsel might have a professional obligation to bring these claims on direct review: if a lawyer knows a claim is meritorious but will not be heard on the merits on collateral review, how could she stand by and let the opportunity for merits adjudication pass? The resulting expansion of claims brought on direct appeal hardly makes things easier for courts—including the Supreme Court. As Robert Weisberg explained: "[I]f the Court believes that [*Teague*] will get the federal courts out of the general business of creating new rules of constitutional criminal procedure, it may merely have shifted the pressure back to itself—on direct review."[185]

Additionally, plenty of other mechanisms already substantially winnow the habeas docket—and the effort courts need to expend considering cases on this docket. As to petitions from state prisoners, AEDPA was intended to reduce their volume.[186] To this end, it not only erects a high substantive barrier to re-

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182. *See* JoAnn Lee, *An Empirical Analysis of Habeas Corpus: The Impact of* Teague v. Lane *and the Anti-Terrorism and Effective Death Penalty Act on Habeas Success Rates and Judicial Efficiency*, 15 CORNELL J.L. & PUB. POL'Y 665, 681 (2006).

183. *Id.*

184. *See* Liebman, *supra* note 8, at 576.

185. Weisberg, *supra* note 4, at 33.

186. *See* Woodford v. Garceau, 538 U.S. 202, 206 (2003); *see also* 142 CONG. REC. 7963 (1996) (statement of Rep. Steve Buyer) (describing "the reform of habeas corpus" as the "crown jewel" of AEDPA—in particular, the fact that prisoners could no longer file "petition after petition" with the courts); *id.* at 7798 (statement of Sen. Arlen Specter) (lamenting the fact that "multiple habeas corpus filings" in a single case could delay the execution of death sentences, and praising AEDPA for "[p]utting an end to these excessive delays"); *id.* at 7562 (statement of Sen. Dianne Feinstein) ("I also must say that I view the habeas corpus reform also as an important step forward. Abuse of the writ of habeas corpus, most egregiously by death row inmates who file petition after petition after petition on groundless charges will come to an end with the passage and the signature of this bill. I believe it is long overdue.").

lief, but also implements a one-year statute of limitations for the filing of habeas corpus claims;[187] makes it more difficult for indigent prisoners to secure leave to hire and secure compensation for court-funded experts, investigators, and other providers of support services;[188] makes it easier for courts to dismiss unexhausted claims on the merits and harder for federal courts to find that a state waived the exhaustion requirement;[189] makes it significantly more difficult to obtain a federal evidentiary hearing;[190] and greatly limits the ability of prisoners to file successive habeas corpus petitions.[191] Subsequent Supreme Court decisions have further narrowed the availability of habeas relief under AEDPA: For example, *Harrington v. Richter* held that even summary denials of state prisoners' claims will constitute decisions "on the merits" that cannot be reversed in federal habeas unless they rise (or sink) to the egregiously wrong level outlined in § 2254(d).[192] *Cullen v. Pinholster* has limited review under § 2254(d)(1) to the record that was before the state court that adjudicated the claim on the merits.[193] And *Lockyer v. Andrade* held that the "unreasonable application" standard for habeas relief in § 2254(d) requires more than clear error.[194]

Moreover, the government may assert several procedural defenses to § 2254 relief: that the state court decision rests on an adequate and independent state ground; that the defendant procedurally defaulted his claim; or that the defendant failed to exhaust his state remedies. A variety of more discrete doctrines also limit federal habeas corpus review: *Stone v. Powell* bars state prisoners from obtaining habeas corpus relief on the grounds that certain evidence should have been excluded, so long as the state provided a full and fair litigation of the Fourth Amendment claim.[195] And under *Brecht v. Abrahamson*, habeas relief may only be granted if a constitutional error "had substantial and injurious effect or influence in determining the jury's verdict."[196]

As to federal prisoners seeking habeas relief under § 2255, it bears mentioning at the outset that there are relatively few such petitions, at least compared to the number of petitions from state prisoners. In 2000, roughly 85% of federal habeas petitions were filed by state prisoners, and 15% by federal pris-

187. 28 U.S.C. § 2244(d) (2012).

188. 21 U.S.C. § 848(q)(10) (2012).

189. 28 U.S.C. § 2254(b)(2)-(3).

190. *Id.* § 2254(d)-(e).

191. *Id.* § 2244(b)(1)-(2).

192. 131 S. Ct. 770, 784 (2011); *see* 28 U.S.C. § 2254(d).

193. 131 S. Ct. 1388, 1402 n.11 (2011).

194. 538 U.S. 63, 75 (2003).

195. 428 U.S. 465, 494 (1976).

196. 507 U.S. 619, 638 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)) (internal quotation marks omitted); *see also* NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 63 n.116 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.

oners.[197] Assuming that breakdown has remained somewhat steady, federal prisoners would have filed fewer than 3000 habeas petitions during a recent one-year period.[198] Additionally, AEDPA imposes a strict statute of limitations on federal prisoners' federal habeas corpus petitions and severely limits the availability of second or successive petitions.[199] And the government, as in the context of state prisoners, may assert several procedural defenses, including: prematurity; waiver by a plea of guilty or nolo contendere; procedural default; the *Stone v. Powell* defense to Fourth Amendment exclusionary rule claims; and previous rejection of the claim on appeal.[200]

On a purely practical level, the less overwhelming a particular caseload is, the less important the finality of that docket. As Jeffries might say, the costs of innovation are lower.[201] Moreover, when state or federal prisoners seek relief in initial-review collateral proceedings, the doctrines underlying those claims already protect society's interest in the finality of criminal convictions. Generally, on direct review, if an appellate court finds that there was a nonstructural constitutional error—for example, a wrongful denial of a suppression motion or an illegal interrogation under the Fifth Amendment—then the conviction must be reversed unless the appellate court finds the error harmless beyond a reasonable doubt.[202] This approach makes sense: it recognizes that some constitutional errors may be "so unimportant and insignificant" that convictions sullied by them can be affirmed without offending the Constitution,[203] but it also forces the government to bear the burden of proving that the error is harmless, thus avoiding the "very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one."[204]

But when a defendant seeks to prove ineffective assistance of counsel or prosecutorial misconduct on direct appeal, the defendant rather than the government bears the burden of showing that the constitutional error was prejudi-

197. *See* JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000, at 2 (2002), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=882.

198. *See* OFFICE OF JUDGES PROGRAM, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 126 tbl.C-2 (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf (providing statistics for the one-year period that ran from September 30, 2010, to September 30, 2011).

199. 28 U.S.C. § 2255(f), (h) (2012).

200. *See* 2 HERTZ & LIEBMAN, *supra* note 112, § 41.7.

201. *See* Jeffries, *supra* note 84, at 79.

202. *See* Chapman v. California, 386 U.S. 18, 23-24 (1967).

203. *Id.* at 22.

204. *Id.*

cial or material.[205] If she fails to bear this burden, her conviction cannot be reversed. "Th[is] standard," as the Supreme Court explained in *Strickland v. Washington*, "reflects the profound importance of finality in criminal proceedings."[206] Similarly, "the major reason for a materiality standard (as opposed to the full effectuation of *Brady* rights that a mere favorability standard would provide) is to protect the finality of judgments."[207] In other words, the same finality interest that *Teague* is designed to serve is already protected by the substantive doctrines of ineffective assistance and prosecutorial misconduct. There is no need to apply *Teague* on top of these other doctrines in initial-review collateral proceedings.

In sum, while docket management is arguably a legitimate concern for courts to consider in structuring the scope of habeas review,[208] a number of doctrines and procedural barriers already achieve this goal. *Teague* is not additionally necessary, and declining to apply that doctrine in the three contexts discussed above is unlikely to overwhelm the courts.

C. *The Way Forward*

Abandoning the current *Teague* doctrine where its rationales do not support its application does not mean a return to *Linkletter*; other approaches can provide guidance at least as clear as *Teague*'s. One can, for example, formulate a rule to address the situation in *Chaidez*: when defendants raise claims—like ineffective assistance or prosecutorial misconduct—that they could not have raised prior to collateral review, those claims must be adjudicated as if they had been raised on direct review. This rule, along with the other rules discussed in Part II, are presented in Table 1 below.

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205. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984); Brady v. Maryland, 373 U.S. 83, 87 (1963).

206. *Strickland*, 466 U.S. at 693-94.

207. Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 414 (1984).

208. *But see* Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 378 (2003) ("[I]n almost all situations, the fear of increased litigation is not a valid judicial argument.").

TABLE 1

		Posture	Current Standard	Proposed Standard
State Conviction	§ 2254	No state court decision on the merits of the issue presented to the federal court.	*Teague* applies.	Court applies state court retroactivity rules to determine if new rule should apply to petitioner's case.
	State Collateral	Claim raised on state collateral review and could not have been raised prior.	*Teague* applies.	Court treats claim as if it were raised on direct review before the state court. Full retroactivity applies.
Federal Conviction	§ 2255	Claim could not have been raised prior to collateral review.	*Teague* applies.	Court treats claim as if it were raised on direct review before the federal court. Full retroactivity applies.
		Claim could have been raised prior to collateral review.	*Teague* applies.	Apply rule retroactively only if court decides Supreme Court would not have ruled differently at the time the petitioner's conviction became final.

The first thing to note about these scenarios is that the federalism and finality interests implicated in each are different, and it thus makes sense to have different rules. Federalism and finality concerns are greatest when a state court conviction has already been reviewed on the relevant merits by the state courts on direct and collateral review, and is before the federal courts on federal habeas review. *Teague*'s harsh bar makes the most sense in this context. But where the state prisoner could not have raised his claim until state collateral review—as will be the case for most ineffective assistance and prosecutorial misconduct claims—finality is not a controlling interest; after all, the claims will go through one less round of state court review before reaching the federal courts. Federalism concerns are reduced as well; they are equivalent to those that would be implicated if the federal court reviewed a state court claim on direct review. *Teague*'s rigid bar is thus inappropriate in this context.

Although the appropriateness of *Teague*'s bar varies depending on a case's procedural posture, previous proposals to reform the doctrine have tended to be of the blanket variety. For example, Richard Fallon and Daniel Meltzer have argued that the definition of "new rules" should be narrower such that more

holdings apply retroactively.[209] Specifically, they assert that rules should apply retroactively whenever they are "clearly foreshadowed, or reflect ordinary legal evolution," and not merely when they are "dictated by precedent."[210] This approach aligns with Justice Harlan's suggestions in *Desist* and *Mackey*. Larry Yackle, by contrast, has argued that "federal courts [should] have authority to announce and apply whatever legal standards are needed to determine a claim correctly"—in other words, that there should be no *Teague* doctrine.[211] Both of these options are across-the-board solutions. The problem with them is not just that they are relatively insensitive to how different procedural postures implicate the federalism and finality concerns underlying *Teague*, but also that, if the Court is—as it seems to be—happy with how the *Teague* doctrine works in its prototypical context, it is unlikely to be willing to engage in across-the-board reform. Discrete rules carry a greater promise of change.

Each rule proposed in this Note is superior as a replacement to the reflexive application of *Teague*. The first scenario is modeled on *Martinez v. Ryan*. Recall that in that case, the federal habeas court was presented with a claim of ineffective assistance at trial that had never been adjudicated on state habeas review. Because there was no state court decision on the merits, AEDPA's deferential standard of review did not apply—but *Teague* still did. As explained earlier, this makes little sense: society's interest in the finality of criminal convictions is already adequately protected by the procedural default doctrine, and federal adjudication of the claim is minimally offensive to the state's criminal law prerogatives.[212] After all, the state didn't decide the issue, so it is less disruptive for a federal court to consider it in the first instance.

At the same time, there is still some federalism interest here. Because the state never has an opportunity to decide the issue, it is arguably being deprived of its prerogative to have "initial responsibility for vindicating constitutional rights" in criminal trials.[213] In other words, while it's less intrusive for a federal court to decide a constitutional issue when the state hasn't done so, the state still has an interest in having some say. One option would be for the federal court to remand the case to the state courts to decide the remaining question.[214] But this approach seems rather cumbersome and undermines the finality of criminal convictions by drawing out the criminal adjudication process. Rather, I would suggest that in this situation, federal habeas courts proceed as follows: If the petition does not require it to announce or apply a new rule, the court simply should adjudicate the petitioner's claim under controlling law. If the petition

209. *See* Fallon & Meltzer, *supra* note 9, at 1816-17.

210. *Id.* at 1817 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion)) (internal quotation marks omitted).

211. Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2427 (1993).

212. *See supra* notes 135-46 and accompanying text.

213. Engle v. Isaac, 456 U.S. 107, 128 (1982).

214. I thank Robert Weisberg for this suggestion.

does require the court to announce or apply a new rule, the court should look to the state's retroactivity rules to determine its capacity to do so. This approach is, as discussed above, appropriately deferential to state courts.

The second scenario is not modeled on any particular case. Rather, imagine that a state defendant rejected a plea deal on the advice of counsel and was convicted at trial. He seeks state postconviction relief, claiming ineffective assistance of counsel. This claim could not have been raised prior to collateral review, as is true of most ineffective assistance and prosecutorial misconduct claims. As explained earlier, because such claims must be brought in the first instance on collateral review, collateral review effectively *is* direct review for these claims. Indeed, federal courts—as mentioned earlier in the context of *Padilla* and *Frye*—often already do treat ineffectiveness claims as if they had been raised on direct review by not applying *Teague*'s bar to them. This is a tacit recognition of the validity of the approach proposed for the states here: *Teague* should not apply to claims that must be raised in the first instance on collateral review.

Similarly, as suggested in the third scenario in Table 1 and in Part II.B of this Note, *Teague* should not apply when a federal court reviews a claim brought by a federal prisoner pursuant to § 2255 if the claim must be brought in the first instance on collateral review. Rather, these claims should be treated as if they were raised on direct review, and new constitutional rules of criminal procedure should be fully retroactive.

The remaining situation—which is the fourth scenario in Table 1—is federal habeas review of federal convictions. I think most would agree that *some* nonretroactivity framework should apply in this context.[215] Even though the number of prisoners with federal convictions is much smaller than the number of prisoners with state convictions, full retroactivity for federal prisoners would still be hugely disruptive—and thus would discourage courts from expanding the rights of criminal defendants. Additionally, courts are unlikely to accept a scheme in which AEDPA and *Teague* apply when a federal court reviews a state court conviction, but full retroactivity is allowed when that court reviews a federal conviction. It smacks of unfairness, especially where the defendant has committed a crime that could have been charged at either the state or the federal level. Such a scheme would also likely be limited in its efficacy, as it would simply encourage the government to charge defendants with state crimes whenever possible.

The problem, then, is *what* retroactivity regime to apply in this context. I suggest that when federal habeas courts review federal convictions, they should adopt Justice Harlan's approach to retroactivity, which—as noted earlier—provided the foundations for the *Teague* doctrine but differs from that doctrine's current instantiation in meaningful ways. Whereas the Court believes a rule is "new" whenever it was not "*dictated* by precedent existing at the time

215. *Cf.* Lasch, *supra* note 14, at 65-68 (arguing for full retroactivity in this context).

the defendant's conviction became final,"[216] Justice Harlan believed that a decision should be deemed to "announce[] a 'new' rule" only when one could say with "assurance that this Court would have ruled differently at the time the petitioner's conviction became final."[217] Indeed, he suggested that most of the Court's constitutional decisions are not new because they are largely "grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly."[218]

Although some scholars have already suggested that Justice Harlan's approach should take the place of the current *Teague* doctrine,[219] none have suggested it should function in lieu of that doctrine only when a federal court reviews a federal conviction. But this seems to me the most sensible way forward. After all, the difference between Justice Harlan's approach and the Court's current approach can be explained by the fact that Justice Harlan developed his analysis in the context of federal review of federal convictions, where the importance of comity between state and federal courts—which Justice Harlan never mentions—was irrelevant. By contrast, the Supreme Court developed *Teague* in the context of federal review of state convictions, where federalism concerns are pervasive. Accordingly, the *Teague* Court held that state convictions would only be disrupted if the state court failed to follow Supreme Court precedent, not if the state court failed to anticipate a subsequent Court decision. But this accommodation is unnecessary where federal courts are concerned; they are expected to anticipate applications of established constitutional principles to contexts that are "closely analogous to those which have been previously considered."[220]

Congress, like Justice Harlan, has recognized that the standard for retroactive application of new rules should be more lax when a federal court is reviewing a federal conviction than when a federal court is reviewing a state conviction. As the Senate noted when it passed the original version of § 2255, this distinction is appropriate because, among other things, "a motion under § 2255 is a further step in the movant's criminal case and not"—like motions under § 2254—"a separate civil action."[221] This distinction has carried over to AEDPA, which provides that a federal court may only overturn a state conviction if the state court's decision was contrary to or an unreasonable application of clearly established federal law,[222] but declines to impose a similar restriction

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216. Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion).

217. Desist v. United States, 394 U.S. 244, 263-64 (1969) (Harlan, J., dissenting).

218. *Id.* at 263.

219. *See* Bryant, *supra* note 16, at 41-49; Fallon & Meltzer, *supra* note 9, at 1810, 1813, 1816-17; *see also* Karl Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160, 162 n.14 (1991).

220. *Desist*, 394 U.S. at 263 (Harlan, J., dissenting).

221. 28 U.S.C. § 2255 Rule 1 advisory committee note (citing S. REP. NO. 80-1526, at 2 (1948)).

222. 28 U.S.C. § 2254(d)(1) (2012).

on federal courts reviewing federal convictions. This reflects the fact that the finality and federalism concerns prevalent when a federal court reviews a state conviction are negligible when a federal court reviews a federal conviction.[223]

Justice Harlan's approach would be no more difficult to apply than the current *Teague* doctrine. Instead of asking whether a holding would have been "apparent to all reasonable jurists" before its pronouncement,[224] courts would simply ask whether one could say with "assurance that this Court would have ruled differently at the time the petitioner's conviction became final."[225] Both are counterfactual analyses, which courts routinely perform,[226] and if anything the latter analysis is easier to conduct than the former, since it focuses on the Supreme Court rather than all reasonable jurists. My suggested approach, in other words, offers at least as many of the bright-line benefits as the *Teague* doctrine, and also has the virtue of being methodologically consistent with the context in which it's applied.

Although it is true that this approach will allow more convictions to be overturned on collateral review, that fact alone does not indicate that it is inappropriate. After all, while the Supreme Court has "long recognized that States have an interest in securing the finality of their judgments, finality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens."[227] Surely Justice Harlan was right that at some point the legal system must say "stop" even if a defendant has a meritorious claim—but that point simply has not been reached in all of the situations in which *Teague* is currently applied.

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223. One possible rebuttal to this argument is that the retroactivity regime used for federal review of state convictions is already stricter than the standard used for federal review of federal convictions, even if the *Teague* standard is the same in both contexts. Whereas § 2254(d)(1) provides that an application for a writ of habeas corpus will be granted only if the state's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," rules can—at least in theory—be "dictated by precedent" under *Teague* even if they do not stem from Supreme Court precedent. But this objection ignores an important fact: although *Teague* technically does not require Supreme Court precedent on point to find that something was an "old" rule, in practice courts almost uniformly rely on Supreme Court precedent to determine whether a rule is old. *See, e.g.*, Garland v. Roy, 615 F.3d 391, 396 (5th Cir. 2010); Reyes-Requena v. United States, 243 F.3d 893, 900 (5th Cir. 2001). In other words, this distinction between *Teague* and AEDPA is collapsing, at least in some jurisdictions.

224. Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997).

225. *Desist*, 394 U.S. at 263-264 (Harlan, J., dissenting).

226. *See* Amy Knight Burns, Note, *Counterfactual Contradictions: Interpretive Error in the Analysis of AEDPA*, 65 STAN. L. REV. 203, 210-18 (2013).

227. Dist. Attorney's Office v. Osborne, 557 U.S. 52, 98 (2009) (Stevens, J., dissenting) (citations omitted).

CONCLUSION

Retroactivity doctrines present many difficult questions for the courts: they threaten to expose as fiction the mantra that courts don't make law but merely say what the law is; they leave prisoners in prison when everyone agrees they were convicted via unconstitutional procedures; and they implicate the tension of authority between the federal government and the states. Moreover, these doctrines have changed considerably over the past quarter century, leaving courts uncertain about how to apply them and lawyers unclear about how to argue them. Courts are now understandably hungry for clear rules regarding questions of retroactivity.

But such hunger does not justify applying *Teague* where its underlying rationales do not support its application—especially since alternatives to *Teague* can provide equally clear guidance while avoiding *Teague*'s methodological instability. Nor does AEDPA mean that we get to ignore the impact the *Teague* doctrine still has. Indeed, AEDPA's operation in the prototypical *Teague* context has only illuminated the many problems that remain with the *Teague* doctrine and the need for reform.