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NOTE

Finality, Comity, and Retroactivity in Criminal Procedure: Reimagining the *Teague* Doctrine After *Edwards v. Vannoy*

Jeffrey G. Ho*

Abstract. The Supreme Court's habeas corpus retroactivity jurisprudence has never been a model of clarity or fairness. Ordinarily, if a case is on direct review, a court is bound to apply constitutional law as it currently stands, not the law as it stood at the time of trial, conviction, or sentencing. This rule derives from *Griffith v. Kentucky*, in which the Supreme Court held that the Constitution requires that all new constitutional rules apply to cases on direct review. However, in *Teague v. Lane*, the Court distinguished direct and collateral review, holding that new constitutional rules do not apply to cases on collateral review unless they fall within one of two exceptions. The Court has justified this approach to retroactivity by emphasizing *comity*, respect for the judicial process of the state courts, and *finality*, the closure a judgment of conviction is supposed to bring. This retroactivity test is not only complex but also produces disparate impacts on similarly situated individuals. For this reason and many others, legal scholars have long criticized the *Teague* doctrine; as Justice Gorsuch recently acknowledged, the *Teague* doctrine has been "mystifying . . . from its inception." And in May 2021, the Court walked back the thirty-year-old doctrine in *Edwards v. Vannoy*, recognizing that one of the two *Teague* exceptions is "moribund" and "retain[s] no vitality."

Though scholars have previously criticized the *Teague* doctrine and offered alternatives, this Note is the first to provide a substantial critique of the *Teague* doctrine's underlying assumptions regarding finality and comity interests. After comparing related finality and comity doctrines, this Note argues that the current *Teague* doctrine overvalues both interests, and a reimagining of the retroactivity framework should begin with

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reconsidering the foundational roles of those interests. This Note proposes one such framework—one that is more generous about granting the retroactivity remedy for violations of constitutional rights. Under this proposed framework, new constitutional rules should always apply retroactively on state collateral review and federal habeas review of federal convictions. The proposed framework also revises the *Teague* new-rule doctrine and suggests that a state's discrimination against a federal right vitiates its comity interest, weighing in favor of the retroactivity remedy. This Note concludes with a discussion of *Edwards v. Vannoy*, suggesting that the case highlights the flaws of the *Teague* doctrine and the need to rethink the foundations of retroactivity and to reground the doctrine in first principles.

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Introduction

In February 2020, the Supreme Court held in *McKinney v. Arizona*[1] that when mitigating evidence is not properly considered in a capital case, a state appellate court may conduct an independent review to reweigh the aggravating and mitigating evidence.[2] Though the Court's majority characterized the issue as narrow,[3] its rejection of McKinney's primary argument has sweeping implications for the Court's retroactivity jurisprudence. McKinney argued that when the Arizona Supreme Court granted independent review of his capital sentence in 2018, it necessarily

1. 140 S. Ct. 702 (2020). In 1992, James McKinney was convicted of two counts of first-degree murder by a jury in Arizona. *Id.* at 705. His trial judge found aggravating circumstances for both murders and, after weighing those aggravating circumstances against mitigating circumstances, sentenced McKinney to death for both murders. *Id.* at 706; *see also* Zant v. Stephens, 462 U.S. 862, 876-77 (1983) (holding that a state's capital-sentencing regime may impose the death penalty only if at least one aggravating circumstance is found). The Arizona Supreme Court affirmed McKinney's death sentences in 1996. *McKinney*, 140 S. Ct. at 706. Nearly two decades later, in 2015, a Ninth Circuit en banc panel ruled on habeas corpus review that the Arizona courts had failed to properly consider McKinney's post-traumatic stress disorder "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States" in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). McKinney v. Ryan, 813 F.3d 798, 802-04 (9th Cir. 2015) (en banc) (alteration in original) (quoting 28 U.S.C. § 2254(d)(1)); *see also infra* note 2. The Ninth Circuit reversed the district court's decision and remanded with a conditional writ ordering that McKinney's writ be granted unless the state of Arizona either corrected the constitutional error or vacated the death sentence. *McKinney*, 813 F.3d at 827. In 2018, McKinney's case returned to the Arizona Supreme Court. State v. McKinney, 426 P.3d 1204 (Ariz. 2018), *aff'd sub nom. McKinney*, 140 S. Ct. 702. After reweighing the aggravating and mitigating circumstances, the Arizona Supreme Court upheld both death sentences. *Id.* at 1207-08. McKinney then petitioned for certiorari in the U.S. Supreme Court, which granted his petition in 2019. McKinney v. Arizona, 139 S. Ct. 2692 (2019) (mem.).

2. *McKinney*, 140 S. Ct. at 709. In *Eddings*, the Supreme Court had held that under the Eighth and Fourteenth Amendments, a state's capital-sentencing regime may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U.S. at 110, 114. When it first affirmed McKinney's death sentence in 1996, the Arizona Supreme Court applied a "causal nexus" test that forbade weighing nonstatutory mitigating evidence, such as mental condition, in capital cases unless the mitigating evidence was "causally connected" to the crime. *McKinney*, 813 F.3d at 802. In 2015, the Ninth Circuit found that the Arizona Supreme Court had unconstitutionally applied this "causal nexus" test in affirming McKinney's death sentence—concluding that the test was contrary to the Supreme Court's precedent in *Eddings* and that the court's error was harmful. *Id.* at 804, 822-23. However, the U.S. Supreme Court's *McKinney* decision held that where a court commits an *Eddings* error, a state appellate court may itself conduct a reweighing of the aggravating and mitigating evidence to correct this error. *McKinney*, 140 S. Ct. at 709.

3. *McKinney*, 140 S. Ct. at 706.

reopened direct review[4] of his criminal case.[5] Thus, because his case was on direct review, current law applied, which required that the reweighing of aggravating and mitigating circumstances for his capital sentence be done by a jury, not a judge, and certainly not the Arizona Supreme Court.[6]

Ordinarily, if a case is on direct review, a court is bound to apply constitutional law as it currently stands, not the law as it stood at the time of trial, conviction, or sentencing. This principle derives from *Griffith v. Kentucky*, in which the Supreme Court held that the Constitution requires that all constitutional rules apply to cases on direct review.[7] Two years later, in *Teague v. Lane*, the Court distinguished direct and collateral review, holding that "new" constitutional rules do not apply to cases on collateral review.[8] But

4. All judicial review is either direct or collateral review. *See* Wall v. Kholi, 562 U.S. 545, 547 (2011) ("We hold that the phrase 'collateral review' in § 2244(d)(2) means judicial review of a judgment in a proceeding that is not part of direct review."); *see also* James Bickford, *Opinion Recap: All Judicial Review Is Either Direct or Collateral*, SCOTUSBLOG (Mar. 9, 2011, 2:42 PM), https://perma.cc/4YWF-P6EL. Notwithstanding this distinction, the Supreme Court has never clearly defined direct or collateral review, nor has it proclaimed whether this determination is a question of state or federal law. *See infra* Part II.C. Colloquially, direct review is generally understood to be "judicial review of a case obtained through ordinary appellate procedure rather than through a collateral attack." *Direct review*, MERRIAM-WEBSTER, https://perma.cc/2USK-B28U (archived Apr. 28, 2021). However, the Supreme Court has not illustrated the contours of this circular definition.

5. *See McKinney*, 140 S. Ct. at 711 (Ginsburg, J., dissenting) (agreeing with McKinney's argument that "[r]enewal of direct review cannot sensibly be characterized as anything other than direct review"); Brief for Petitioner at 15-16, *McKinney*, 140 S. Ct. 702 (No. 18-1109), 2019 WL 3958378.

6. Brief for Petitioner, *supra* note 5, at 15-16. The current law of interest here was the Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Ring*, the Supreme Court invalidated Arizona's capital-sentencing regime under which trial judges alone determined the presence of aggravating circumstances necessary to impose the death penalty. 536 U.S. at 609. The Court reasoned that "the Sixth Amendment requires that [aggravating circumstances] be found by a jury." *Id.* The Supreme Court reaffirmed this ruling in *Hurst* in 2016, finding that the Florida capital-sentencing regime at issue there, which "[did] not require the jury to make the critical findings necessary to impose the death penalty," violated the Sixth Amendment. 136 S. Ct. at 619, 622 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). McKinney argued that the *Ring* and *Hurst* holdings should apply to his case, and thus that the Arizona Supreme Court committed error by resentencing him instead of remanding to a jury for resentencing. Brief for Petitioner, *supra* note 5, at 16-17.

7. 479 U.S. 314, 322-23 (1987).

8. 489 U.S. 288, 310 (1989) (plurality opinion). Collateral review of a criminal conviction can come in many forms but commonly takes the form of postconviction habeas corpus, a writ that provides a mechanism to challenge one's unlawful detention. *See generally infra* Part I (detailing the development of the Court's habeas corpus jurisprudence). The writ of habeas corpus may be authorized by state statute, *see, e.g.*,

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Teague only precludes retroactive application of "new" constitutional rules, so "old" constitutional rules still apply on collateral review.[9] And even if the case is on collateral review and the constitutional rule is new, the rule may apply retroactively if it is a substantive rule that "alter[s] 'the range of conduct or the class or persons that the law punishes.'"[10] *Teague* also described a second exception—"'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[11] But in May 2021, the Supreme Court acknowledged in *Edwards v. Vannoy* that the "watershed exception is moribund" and that new procedural rules, besides the right to counsel recognized in *Gideon v. Wainwright*,[12] will never satisfy the watershed exception.[13] The Court has justified this restrictive approach to retroactivity on collateral review compared to direct review by emphasizing *comity*, respect for the judicial process of the state courts, and *finality*, the closure a judgment of conviction is supposed to bring.[14]

CAL. PENAL CODE § 1473 (West 2021), or federal statute, *e.g.*, 28 U.S.C. § 2254 (authorizing federal habeas review of state criminal convictions).

9. The Supreme Court has not clearly defined the distinction between new and old constitutional rules. Thus, the new-rule–old-rule distinction is a complicated doctrinal area subject to heavy criticism. For a discussion and critique of the new-rule doctrine, see generally Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423 (1994) (arguing that the *Teague* new-rule doctrine is incompatible with the common law concept of a "holding" and threatens the legitimacy of the traditional adjudicative process). In Part IV.B below, I outline why a reimagining of the *Teague* bar should revise the new-rule doctrine entirely.

10. Edwards v. Vannoy, No. 19-5807, 2021 WL 1951781, at *10 (U.S. May 17, 2021) (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)).

11. Saffles v. Parks, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311 (plurality opinion)).

12. 372 U.S. 335, 344-45 (1963).

13. *Edwards*, 2021 WL 1951781, at *9. In the years after *Teague*, the Supreme Court had never found a new constitutional rule to satisfy the watershed test for the second *Teague* exception. *See id.* at *6; Whorton v. Bockting, 549 U.S. 406, 421 (2007) ("[I]n the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status."); *see also, e.g.*, Beard v. Banks, 542 U.S. 406, 420 (2004) (rejecting retroactivity for *Mills v. Maryland*, 486 U.S. 367 (1988)); *Schriro*, 542 U.S. at 358 (rejecting retroactivity for *Ring*, 536 U.S. 584); O'Dell v. Netherland, 521 U.S. 151, 167-68 (1997) (rejecting retroactivity for *Simmons v. South Carolina*, 512 U.S. 154 (1994)); Lambrix v. Singletary, 520 U.S. 518, 539-40 (1997) (rejecting retroactivity for *Espinosa v. Florida*, 505 U.S. 1079 (1992)); Sawyer v. Smith, 497 U.S. 227, 241-45 (1990) (rejecting retroactivity for *Caldwell v. Mississippi*, 472 U.S. 320 (1985)).

14. *Teague*, 489 U.S. at 308 (plurality opinion); *see also Edwards*, 2021 WL 1951781, at *4 (emphasizing finality); *id* at *19 (Gorsuch, J., concurring) ("The writ of habeas corpus does not authorize federal courts to reopen a judgment issued by a court of competent jurisdiction once it has become final."); Danforth v. Minnesota, 552 U.S. 264, 279-80 (2008); *infra* notes 26-27.

In *McKinney*, the petitioner argued that the Supreme Court's decisions in *Ring v. Arizona* and *Hurst v. Florida*,[15] decided after direct review of his case had concluded but while collateral review was ongoing, should nonetheless apply to him under *Griffith* because his successful habeas petition had reopened his sentence and, with it, direct review.[16] As Justice Ginsburg's dissent highlighted, the key question was whether "McKinney's case [was] currently on direct review, in which case *Ring* applies, or on collateral review, in which case *Ring* does not apply."[17] The Court, in a majority opinion by Justice Kavanaugh, rejected McKinney's argument, reasoning that the Arizona Supreme Court itself characterized the independent review as a collateral proceeding and that the U.S. Supreme Court could "not second-guess the Arizona Supreme Court's characterization of state law. . . . As a matter of *state* law, the reweighing proceeding in McKinney's case occurred on collateral review."[18] But the Court also reserved the option of overruling a state definition of collateral review that it finds particularly egregious.[19]

The Court's decision in *McKinney* adds yet another rule to its retroactivity jurisprudence and the complicated *Teague* doctrine.[20] The retroactivity test is

15. *See supra* note 6. The Supreme Court had previously held that *Ring* (and thus *Hurst*) does not fall under either *Teague* exception (including the now-defunct watershed exception) and accordingly does not apply on collateral review. *See Schriro*, 542 U.S. at 358.

16. The Supreme Court has previously held that a state court may reopen direct review of a criminal case after it has already reached the point of finality. Jimenez v. Quarterman, 555 U.S. 113, 120 (2009).

17. McKinney v. Arizona, 140 S. Ct. 702, 710 (2020) (Ginsburg, J., dissenting).

18. *Id.* at 708 (majority opinion). Justice Ginsburg, in a dissent joined by three other Justices, disagreed that the question at issue was a matter of state law. *Id.* at 712 (Ginsburg, J., dissenting). Instead, she would have found that the Arizona Supreme Court's independent review was a direct review as a matter of federal law. *Id.* ("Whether the Constitution requires the application of law now in force is a question of federal constitutional law, not an issue subject to state governance.").

19. *See id.* at 709 n.* (majority opinion) ("Our holding here does not suggest that a State, by use of a collateral label, may conduct a new trial proceeding in violation of current constitutional standards.").

20. *Teague* applies to federal habeas review. In *Danforth v. Minnesota*, the Supreme Court held that state collateral review is not limited by *Teague*, and states may choose to apply new constitutional rules retroactively even when federal courts would be otherwise barred under *Teague*. 552 U.S. 264, 266 (2008). However, in *Montgomery v. Louisiana*, the Supreme Court clarified that *Teague* imposes a constitutional obligation on state collateral proceedings to grant retroactive effect to new constitutional rules that fall under the *Teague* substantive-rule exception. 136 S. Ct. 718, 729 (2016) ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."). Thus, *Teague* is best viewed as creating a floor for when state collateral proceedings must apply new constitutional rules retroactively while not limiting state

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not only complex[21] but also requires odd line drawing and produces disparate impacts on similarly situated individuals. As a simple illustration, imagine that McKinney had been convicted in a state that characterized the 2018 independent review as a resentencing procedure and thus reopened direct review of his criminal case. Under the Court's reasoning in *McKinney*, he would be entitled to retroactive application of *Ring* and *Hurst* and thus resentencing by a jury instead of a state appellate court. Commentators have criticized the *Teague* approach for doctrinal inconsistency, arguing that the new-rule–old-rule distinction is irreconcilable with the common law theory that judges interpret the law rather than create it;[22] that the treatment of *Teague* as a threshold question inhibits the development of constitutional law because adjudication of the merits of a claim would constitute an advisory opinion;[23] and that *Teague* fails to address the complex relationship between factual innocence and sentencing innocence.[24]

Powerful as these criticisms of *Teague* are, they remain for the most part internal in the sense that they do not question the underlying premises of

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decisions to apply new constitutional rules retroactively outside of *Teague*'s substantive-rule exception.

21. Further complicating federal habeas corpus law, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code). Practically, AEDPA has rendered *Teague* less significant because it bars federal habeas review of state court determinations unless they are "contrary to, or involve[] an unreasonable application of, clearly established" Supreme Court precedent or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2); *see also* Williams v. Taylor, 529 U.S. 362, 412 (2000) (recognizing that § 2254(d)(1) is generally stricter than *Teague*). However, though AEDPA serves as a bar to federal habeas review, it does not speak to retroactivity like *Teague*. Thus, as this Note will discuss, one way of squaring § 2254(d) with *Teague* is by understanding § 2254(d) as a procedural bar on the front end and *Teague* as a limitation on the remedy at the back end. *See infra* Part I.B.

22. *See* Meyer, *supra* note 9, at 460.

23. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1798-99 (1991).

24. *See* Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 33 (1990) (discussing Justice Stevens's critique that the Court's approach does not distinguish between factual innocence—claims that bear on a defendant's actual culpability for a crime—and sentencing innocence, claims that involve an effect on the jurors' decisionmaking but do not directly speak to a defendant's culpability). Since *Herrera v. Collins*, the Supreme Court has seemingly foreclosed the argument that claims of factual innocence based on newly discovered evidence can form the basis of federal habeas relief outside of a separate constitutional objection. 506 U.S. 390, 400 (1993). Commentators have since attempted to grapple with the disconnect between federal habeas corpus and factual innocence. *E.g.*, George C. Thomas III, Gordon G. Young, Keith Sharfman & Kate B. Briscoe, *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 266-67 (2003) (arguing that the Due Process Clause requires courts to hear "powerful claims of innocence").

finality and comity that justify the Court's strict approach to retroactivity. In this Note, I argue that a wholesale reassessment of the *Teague* bar is needed. At its core, deciding whether to apply a constitutional rule retroactively entails a simple remedial question[25]: Do the interests in redressing constitutional violations outweigh the costs to finality and comity of reopening a final judgment? This Note deeply reexamines these two interests: finality[26] and comity.[27] After comparing related finality and comity doctrines, as well as the relevant scholarly literature, I argue that the current *Teague* doctrine overvalues both interests. A reimagining of the retroactivity framework should thus begin by reconsidering the roles of finality and comity.

In the past year, the Supreme Court once again grappled with the *Teague* doctrine and ultimately walked back the thirty-year-old holding. In *Ramos v.*

25. It has long been understood that retroactivity implicates the law of remedies, not just a choice-of-law question between old and new laws: Habeas corpus is a remedy for constitutional violations, and the *Teague* doctrine adjusts the scope of that remedy. *See* Fallon & Meltzer, *supra* note 23, at 1735-36. In this Note, I suggest that for at least thirteen years, the Supreme Court has already been framing retroactivity as a remedial question beginning with *Danforth*, 552 U.S. 264. The Supreme Court continued to rely on this remedies framework in 2016 when it held in *Montgomery v. Louisiana* that the rule in *Miller v. Alabama*, 567 U.S. 460, 470 (2012), which prohibited a mandatory life sentence without parole for juveniles as a violation of the Eighth Amendment, was a new substantive constitutional rule that should apply retroactively on collateral review. *See* 136 S. Ct. at 731-32.

26. In this Note, I use the terms *finality* and *point of finality* to refer to two similar but distinct concepts. *Finality* refers to the general legal value that disputes should eventually arrive at a resolution without further disruption. *Point of finality* refers more specifically to the conclusion of the direct review process—the trigger point between direct and collateral review. The Court's definition of the point of finality as the line between direct and collateral review is an exercise in *statutory* interpretation; the point of finality is not a *constitutional* matter. *See Danforth*, 552 U.S. at 278. The Court has recognized that, in other contexts, there may be different *statutory* finality requirements and definitions. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 477-83 (1975) (discussing the 28 U.S.C. § 1257 final-judgment rule).

27. Comity and federalism likely refer to similar but distinct concepts. However, the Supreme Court's habeas corpus jurisprudence has largely used the two terms conjunctively or interchangeably. *See, e.g.*, *Danforth*, 552 U.S. at 279 ("Federalism and comity considerations are unique to *federal* habeas review of state convictions."). Existing literature on federal habeas corpus also generally uses the two terms interchangeably. *See generally* 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 (2009) (using "comity" and "federalism" to refer to similar concepts throughout the article); Kendall Turner, Note, *A New Approach to the* Teague *Doctrine*, 66 STAN. L. REV. 1159 (same). Both terms appear to refer to the general interest in the federal government acknowledging and respecting state laws and procedures. Interestingly, none of the opinions in *Teague* use the word "federalism." *See* Teague v. Lane, 489 U.S. 288 (1989). Thus, for the purposes of this Note, I only use the word comity to avoid unnecessary confusion.

Louisiana, decided just two months after *McKinney*, the Court held that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious criminal offense in state criminal proceedings.[28] Under *Griffith*, *Ramos* applies retroactively to all serious criminal cases on direct appeal in Oregon and Louisiana—the two states that previously did not require unanimity.[29] But a year later, in *Edwards v. Vannoy*, the Supreme Court held that the *Ramos* rule, like other criminal-procedure rules that came before it, would not apply retroactively on federal collateral review.[30] The Court went further, acknowledging that the previously recognized watershed exception in *Teague* was "moribund" and announcing that new procedural rules will never apply retroactively on federal collateral review.[31] This recent change of course underscores just one of the many flaws in continuing to rely on *Teague* as the touchstone of the Court's retroactivity jurisprudence.

This Note proceeds in four parts. In Part I, I begin with a brief history of the Court's development of retroactivity law in habeas corpus cases. I also discuss in depth the remedial theory of retroactivity and its acceptance by the Court in *Danforth v. Minnesota*.[32]

In Part II, I examine the finality interest and the point of finality in state criminal proceedings. To begin, I detail and respond to the traditional rationales offered to support the finality interest in our legal system—that it preserves monetary and institutional resources and that it is necessary for deterrence and rehabilitation. I suggest that while these rationales merit consideration, they are substantially less compelling in criminal procedure and state collateral proceedings. In particular, I argue that the reopening of final judgments may actually be a necessary check on a criminal-justice system that

28. 140 S. Ct. 1390, 1397 (2020). When *Ramos* was decided, Oregon was the only state in the United States that allowed for criminal convictions based on nonunanimous jury verdicts. *See id.* at 1394. However, Louisiana had only recently voted on November 6, 2018, to change its Constitution to require unanimous jury convictions. *See* 2018 La. Acts 364, 364-65. This change only applied to all cases where the offense was committed on or after January 1, 2019, *id.* at 365, so many Louisiana criminal convictions based on nonunanimous juries remained on direct and collateral review.

29. *See* Edwards v. Vannoy, No. 19-5807, 2021 WL 1951781, at *4 (U.S. May 17, 2021); Ramos v. Louisiana, 140 S. Ct. 1390, 1406 (2020); *id.* at 1419 (Kavanaugh, J., concurring in part) ("To be sure, in those two States, the Court's decision today will invalidate some non-unanimous convictions where the issue is preserved and the case is still on direct review."); *id.* at 1436 (Alito, J., dissenting); *see also id.* at 1406 & n.68 (majority opinion) (estimating that the number of nonunanimous felony convictions on direct appeal in Oregon and Louisiana number somewhere in the hundreds).

30. *See Edwards*, 2021 WL 1951781, at *6, *11. Notably, the *Edwards* holding did not address whether the *Ramos* rule would apply retroactively on *state* collateral review. *See id.* at *8 n.6.

31. *Id.* at *9-10.

32. 552 U.S. 264.

in recent years has come under heavy scrutiny for convicting innocent defendants, perpetuating racist institutional structures, and contributing to mass incarceration.[33] Then, after examining the Rule 60(b) motion and the *Wheeling Bridge* line of cases,[34] I argue that the finality interest in a criminal conviction is similar to the finality interest in modifying injunctive relief, and thus it should be sensitive to changes in the law. Furthermore, I conduct a substantial critique of how state collateral review fits into the larger system of postconviction review. Lastly, I suggest that the Court's current approach, drawing the retroactivity line at the conclusion of direct review, has led to widespread inconsistency.

In Part III, I shift to an examination of the comity interest. First, I develop the argument explicitly recognized by the Supreme Court in *Danforth*—that comity interests are nonexistent in intrasystem review, such as state collateral review. Next, after examining related comity doctrines, such as the inadequate-state-ground doctrine and the *Testa v. Katt*[35] line of cases about the nondiscrimination principle, I argue that the *Teague* new-rule doctrine fails to fully address the nuance of the comity question. This is because the *Teague* new-rule doctrine does not consider a state's illegitimate reliance on old constitutional rules—for instance, when a state law or procedure discriminates against a federal right. Indeed, American history contains countless examples of state hostility to the vindication of federal rights, especially in cases involving the rights of Black defendants or other minority groups. I then apply my normative argument about illegitimate reliance to two older Supreme Court criminal-procedure cases: *Batson v. Kentucky*[36] and *Duren v. Missouri*.[37]

In Part IV, I introduce my proposed framework. I argue that new constitutional rules should always apply retroactively in state collateral review and federal habeas review of federal convictions because comity interests are nonexistent and finality interests are reduced in those contexts. I critique the *Teague* new-law doctrine and suggest that a state's discrimination against a federal right vitiates its comity interest and should weigh heavily in favor of a retroactivity remedy. I conclude by returning to the retroactivity of the *Ramos* rule, at issue in *Edwards*. I expand on an argument flagged at the end of the petitioner's briefing in *Edwards* that relates directly to the comity interest: illegitimate state reliance. I suggest that the nonunanimous-verdict laws held

33. *See infra* notes 135-47 and accompanying text.

34. Pennsylvania v. Wheeling & Belmont Bridge Co. (*Wheeling Bridge I*), 54 U.S. (13 How.) 518 (1852); Pennsylvania v. Wheeling & Belmont Bridge Co. (*Wheeling Bridge II*), 59 U.S. (18 How.) 421 (1856).

35. 330 U.S. 386 (1947).

36. 476 U.S. 79 (1986).

37. 439 U.S. 357 (1979).

unconstitutional in *Ramos* present an example of state action intended to circumvent the federal right guaranteed in *Strauder v. West Virginia*[38] and that *Ramos* should thus be fully retroactive on federal habeas review.

I. Background on Federal Habeas Review and Retroactivity

The history of the incorporation of the writ of habeas corpus[39] into the U.S. Constitution through the Suspension Clause and the history of federal habeas review are well-documented,[40] as is the Court's retroactivity jurisprudence.[41] In this Part, instead of providing an extended account of this history, I focus on key developments in federal habeas corpus and the Court's related retroactivity jurisprudence—along with relevant scholarly commentary—that form the foundation of my arguments in Parts II, III, and IV.

A. Development of the *Teague* Doctrine

In the United States, the Judiciary Act of 1789 first created statutory authorization for federal habeas corpus but failed to define the substantive scope of the writ.[42] The Supreme Court originally held that criminal defendants could file federal habeas corpus petitions only to challenge the

38. 100 U.S. 303 (1880).

39. In early English law, the writ of *habeas corpus ad subjiciendum* developed as a prerogative writ that expressed the King's desire to understand why one of his subjects was detained. PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 9 (2010). At common law, other forms of the writ of habeas corpus existed, including *ad prosequendum*, *ad testificandum*, and *ad deliberandum et recipiendum*. *Id.* at 39-41. However, the present use of "the writ of habeas corpus" refers to *habeas corpus ad subjiciendum et recipiendum*. *Id.* at 41. The courts that administered the writ acted on bodies, not places, and the writ required that a person detaining another produce the body of that individual for examination and explanation. *Id.* at 48-49. If the detention was not justified, the King could decide to release the detainee. *Id.* at 49. Although the original purpose of habeas corpus was to assess whether extrajudicial, often executive, detention was legally authorized, the use of the writ evolved over time to include review of criminal convictions. *See* Neil Douglas McFeeley, *The Historical Development of Habeas Corpus*, 30 SW. L.J. 585, 586-89 (1976).

40. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 444 n.6, 463-99 (1963).

41. *See, e.g.*, Fallon & Meltzer, *supra* note 23, at 1738-49; 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, 210-25 (1998); *see also* Danforth v. Minnesota, 552 U.S. 264, 271-75 (2008) (documenting the history of the Supreme Court's retroactivity doctrine).

42. Ch. 20, § 14, 1 Stat. 73, 81 (codified as amended at 28 U.S.C. § 2241) ("That all the beforementioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus* . . . ."); *see also* Bator, *supra* note 40, at 465-66.

jurisdiction of the courts that rendered their convictions.[43] But during Reconstruction, Congress, mistrustful of state courts, passed the Habeas Corpus Act of 1867 and extended federal habeas jurisdiction to include the detention of state prisoners,[44] but federal habeas review of state court judgments remained limited to jurisdictional challenges.[45] Through the late nineteenth century and early twentieth century, the Supreme Court gradually softened this limitation and recognized additional claims encompassed by the writ of habeas corpus.[46] Consequently, in 1915, in *Frank v. Mangum*, the Supreme Court affirmed the denial of the writ to the petitioner but acknowledged that habeas relief included a remedy for deprivations of due process.[47]

In 1953, the Supreme Court further departed from the original limitations on habeas corpus in its landmark decision *Brown v. Allen*, which authorized federal courts to review federal constitutional claims previously decided by state courts.[48] In *Brown*, the Supreme Court resolved the merits of two cases where state criminal defendants had previously fully litigated the merits of

43. *E.g.*, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830); *see also* Bator, *supra* note 40, at 465-66; Lasch, *supra* note 27, at 8.

44. Ch. 28, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C. §§ 2241-2243, 2251).

45. Legal scholars generally agree that the Habeas Corpus Act of 1867 did not broaden the scope of the writ beyond jurisdictional defects but merely reflected a "softening" of the concept of jurisdiction. *See* Bator, *supra* note 40, at 474-77; Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 36-48 (1965); *see also Danforth*, 552 U.S. at 272 n.6. *But see* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 618-20 (1982) (questioning Bator's account of the Act).

46. *E.g.*, *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 176 (1874) (finding that the sentence imposed exceeded the relevant criminal statute's authorization); *Ex parte* Siebold, 100 U.S. 371, 376-77 (1880) (concluding that the constitutionality of the statute under which the defendant had been convicted was a proper question for consideration on habeas review).

47. 237 U.S. 309, 335-36, 344-45 (1915). Nonetheless, during the early twentieth century, habeas corpus relief was limited to egregious violations of due process that rendered the defendant's conviction void for lack of jurisdiction. *E.g.*, Moore v. Dempsey, 261 U.S. 86, 87, 91-92 (1923) (granting relief for mob domination of a trial); Mooney v. Holohan, 294 U.S. 103, 112, 115 (1935) (per curiam) (denying relief but recognizing a due process violation where the prosecution knowingly used perjured testimony).

48. 344 U.S. 443, 463-65 (1953). Legal scholars disagree over whether *Brown* constituted a dramatic expansion of the writ of habeas corpus or if it was merely confirmation of an evolving understanding of due process. *Compare* Bator, *supra* note 40, at 499-507 (taking the former view), *and* Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106 (1959) (noting that *Brown* "manifestly broke new ground"), *with* Eric M. Freedman, *Milestones in Habeas Corpus: Part III;* Brown v. Allen*: The Habeas Corpus Revolution That Wasn't*, 51 ALA. L. REV. 1541, 1617 (2000) ("Legally, *Brown* was an exceedingly minor event.").

their constitutional claims in state courts.[49] It thus opened the door to broad federal relitigation of issues previously adjudicated in state criminal proceedings. Around the same time, the Court also began to interpret the Fourteenth Amendment to incorporate most of the amendments in the Bill of Rights against the states, including in the landmark criminal-procedure case *Mapp v. Ohio*, which held that the exclusionary rule applies to the states.[50] As a result, new constitutional obligations became enforceable against state governments, creating a path for convicted defendants to allege that they were imprisoned without due process and thus unconstitutionally held.

Between 1953 and 1965, the Supreme Court did not truly grapple with the issue of retroactivity in criminal proceedings, instead generally construing all constitutional errors—even violations of new constitutional rules that had been decided after a criminal defendant's conviction had reached the point of finality—as warranting federal habeas relief.[51] Despite the new opportunities for constitutional claims in the wake of the Supreme Court's incorporation decisions throughout the 1950s and 1960s, the Court continued its full retroactivity approach until 1965, applying new constitutional rules of criminal procedure to all cases on federal habeas review.[52] The consequences for finality and comity, and the accompanying logistical nightmare, came to a head in 1965 when the Supreme Court was confronted with the question of whether *Mapp* should apply in federal habeas proceedings, a decision that had the potential to reopen "thousands" of final state judgments.[53]

In *Linkletter v. Walker*, the Court decided to adopt a case-by-case approach to the retroactive effect of new constitutional rules, one that examined "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[54] The Court applied this test to *Mapp* and determined that the rule could not be applied retroactively to decisions that had become final before the *Mapp* decision.[55]

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49. *Brown*, 344 U.S. at 452-54, 465-87.

50. 367 U.S. 643, 660 (1961). Other landmark criminal-procedure decisions during this period include *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that indigent defendants have a right to the effective assistance of counsel in state felony proceedings), and *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (holding that state law enforcement must follow specific procedures when interrogating suspects in custody).

51. *See* Danforth v. Minnesota, 552 U.S. 264, 272 (2008).

52. *Id.*

53. Linkletter v. Walker, 381 U.S. 618, 636 (1965).

54. *Id.* at 629.

55. *See id.* at 636-40. In particular, the Supreme Court found that: (1) the prior history of the rule weighed against retroactivity because states had relied on the Court's pre-*Mapp* precedent; (2) the purpose of the rule weighed against retroactivity because the exclusionary rule's purpose is to deter Fourth Amendment violations rather than

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The critical response to *Linkletter* was swift and included an influential critique from Paul Mishkin, who cautioned that the "general power of prospective limitation" relied upon in *Linkletter* clashed directly with Blackstone's "declaratory theory" of adjudication[56] and could eliminate the incentive for attorneys to advocate for changes in the law.[57]

In the decades that followed, the scholarly criticism of the *Linkletter* standard compounded as the test resulted in widely inconsistent results.[58] For instance, after *Linkletter*, the Court held that one new rule should be applied to all cases on direct review,[59] another new rule to all cases in which trial had not yet started,[60] another new rule to all cases in which tainted evidence had not yet been introduced at trial,[61] and other new rules to only future cases.[62] In a pair of influential opinions in *Desist v. United States* and *Mackey v. United States*, Justice Harlan questioned whether the decisions after *Linkletter* "may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature."[63] In his revised approach to retroactivity, he suggested that new constitutional rules should always apply retroactively to cases on direct review but generally should not apply to cases on collateral review.[64] But he suggested two exceptions to the general bar on retroactivity

remedy constitutional violations; and (3) retroactive application of the exclusionary rule would "tax the administration of justice to the utmost." *Id.* at 636-38.

56. The Blackstone "declaratory theory" of adjudication postulates that the court is "not delegated to pronounce a new law, but to maintain and expound the old one." 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

57. Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 58-62 (1965).

58. *See, e.g.*, Francis X. Beytagh, *Ten Years of Non-retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1557-58, 1558 nn.4-5 (1975) (citing authorities).

59. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 408-09, 419 (1966).

60. Johnson v. New Jersey, 384 U.S. 719, 721 (1966).

61. Fuller v. Alaska, 393 U.S. 80, 80-81 (1968) (per curiam).

62. *E.g.*, DeStefano v. Woods, 392 U.S. 631, 635 (1968) (per curiam), *abrogated by* Griffith v. Kentucky, 479 U.S. 314 (1987); Stovall v. Denno, 388 U.S. 293, 300 (1967), *abrogated by* United States v. Johnson, 457 U.S. 537 (1982).

63. Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting), *abrogated by Griffith*, 479 U.S. 314; Mackey v. United States, 401 U.S. 667, 680-81 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

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

in collateral review: (1) substantive due process rules;[65] and (2) procedural rules that are "implicit in the concept of ordered liberty."[66]

Over fifteen years later, the Supreme Court finally adopted Justice Harlan's approach in *Griffith v. Kentucky* and *Teague*.[67] In *Griffith*, the Supreme Court addressed the question of whether its decision in *Batson v. Kentucky*[68] should apply retroactively to cases on direct review.[69] Writing for the majority, Justice Blackmun explicitly recognized Justice Harlan's approach as his inspiration and held that as a *constitutional* matter, all new constitutional rules should apply retroactively to cases on direct review.[70] Justice Blackmun provided two primary explanations for the Court's holding. First, hearkening back to Blackstone's declaratory theory,[71] he explained that the Court, "[u]nlike a legislature . . . do[es] not promulgate new rules of constitutional criminal procedure on a broad basis."[72] And second, he reasoned that disparate application of new rules would violate the principle of similar treatment for similarly situated defendants.[73]

The Court completed its embrace of Justice Harlan's approach two years later in *Teague*, which addressed the question of whether a fair-cross-section

65. According to Justice Harlan, substantive due process rules are rules that "place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in the judgments in part and dissenting in part). In a recent example, the Supreme Court held in *Montgomery v. Louisiana* that the rule in *Miller v. Alabama*, 567 U.S. 460, 470 (2012), which prohibited under the Eighth Amendment mandatory life sentences without parole for juveniles, was a new substantive constitutional rule that should apply retroactively on collateral review. 136 S. Ct. 718, 732 (2016). *But see* Jones v. Mississippi, 141 S. Ct. 1307, 1334-35 (2021) (Sotomayor, J., dissenting) (arguing that the majority opinion in *Jones* blurred the line between substantive and procedural rules and recast *Miller* as a procedural rule that "paradoxically" remains substantive for retroactivity purposes).

66. *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)).

67. *See Griffith*, 479 U.S. at 322-23; Teague v. Lane, 489 U.S. 288, 303-10 (1989) (plurality opinion).

68. 476 U.S. 79 (1986). In *Batson*, the Supreme Court held that racially discriminatory prosecutorial jury-selection practices were unconstitutional. *Id.* at 89. Under the *Linkletter* standard, the Court had previously held that the *Batson* rule would not apply retroactively to cases on collateral review. Allen v. Hardy, 478 U.S. 255, 257-61 (1986) (per curiam).

69. *Griffith*, 479 U.S. at 316.

70. *Id.* at 322.

71. *See* 1 BLACKSTONE, *supra* note 56, at *69.

72. *Griffith*, 479 U.S. at 322.

73. *Id.* at 323.

challenge during jury selection could be raised on collateral review.[74] In a plurality opinion,[75] Justice O'Connor adopted Justice Harlan's proposal in *Mackey* with only a slight modification.[76] Justice O'Connor renounced the *Linkletter* standard and agreed with Justice Harlan that new constitutional rules should generally not be applied retroactively on collateral review, with two exceptions.[77] The first exception was effectively identical to Justice Harlan's exception for substantive due process rules,[78] but the second exception was narrower than Justice Harlan's exception for new procedural rules that are "implicit in the concept of ordered liberty."[79] Instead, Justice O'Connor's second exception was limited to "watershed rules of criminal procedure" that also implicate the accuracy of the conviction.[80] The Court justified this restrictive approach to retroactivity on collateral review as compared to direct review because of two interests: comity and finality.[81]

Seven years later, in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA),[82] which has dramatically transformed federal habeas practice.[83] As a practical matter, AEDPA is often more limiting than *Teague* because it generally bars federal habeas review of state court determinations and only allows for two bases of adjudication. AEDPA permits federal habeas review of state court decisions that are "contrary to," or an

74. Teague v. Lane, 489 U.S. 288, 292-93 (1989). Frank Teague, a Black man, was convicted by an all-white jury and challenged the prosecutor's peremptory challenges during jury selection as violating his right to a jury that represented a fair cross section of his community. *Id.* Although the Court had ruled in *Allen v. Hardy*, 478 U.S. 255, 257-61 (1986) (per curiam), that the *Batson* rule was not retroactive on collateral review, it had not yet addressed the fair-cross-section issue that Teague raised.

75. Although endorsed by only a plurality in *Teague*, Justice O'Connor's position was subsequently adopted by a majority of the Court. *See* Penry v. Lynaugh, 492 U.S. 302, 313-15 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

76. *Teague*, 489 U.S. at 305-10 (plurality opinion).

77. *Id.*

78. *Id.* at 311; *see supra* note 65.

79. *Teague*, 489 U.S. at 311 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)).

80. *Id.* at 311-13.

81. *Id.* at 308 ("[W]e have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review."); *see also* Danforth v. Minnesota, 552 U.S. 264, 279 (2008) ("[Justice O'Connor] justified the general rule of nonretroactivity in part by reference to comity and respect for the finality of state convictions.").

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

83. *See, e.g.*, Lincoln Caplan, *The Destruction of Defendants' Rights*, NEW YORKER (June 21, 2015), https://perma.cc/67MB-UV52 (discussing AEDPA's effect on habeas-relief rates).

"unreasonable application of, clearly established" Supreme Court precedent.[84] AEDPA also permits federal habeas review of state judgments that are "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[85] The scholarly criticism of AEDPA is widespread.[86] But because AEDPA is a statutory bar to federal habeas petitions, rather than a constitutional limit on retroactivity, this Note discusses the effects of AEDPA only when relevant to the retroactivity analysis.

Lastly, in May 2021, the Supreme Court altered the core *Teague* framework for the first time in *Edwards v. Vannoy*.[87] In *Edwards*, the Court held that the constitutional rule announced in *Ramos v. Louisiana*—that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious criminal offense in state criminal proceedings[88]—would not apply retroactively on federal collateral review.[89] After discussing previous criminal-procedure rules that were not applied retroactively on federal habeas review, including those announced in *Duncan v. Louisiana*,[90] *Crawford v. Washington*,[91] and *Batson v. Kentucky*,[92] the Court closed the door on the *Teague* "watershed exception."[93] Finding that no new constitutional rule of criminal procedure could ever reach watershed status, the Court held that "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts."[94] Thus, the *Teague* watershed exception for criminal-procedure rules—articulated by Justice Harlan and narrowed by Justice O'Connor—was eliminated altogether.

84. 28 U.S.C. § 2254(d)(1); *see* Williams v. Taylor, 529 U.S. 362, 412 (2000) (recognizing that § 2254(d)(1) is generally stricter than *Teague*).

85. 28 U.S.C. § 2254(d)(2).

86. *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) (discussing numerous interpretative and constitutional issues with AEDPA); Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 539-42, 539 n.14, 540 n.15 (1999) (listing court cases and scholarship).

87. No. 19-5807, 2021 WL 1951781 (U.S. May 17, 2021).

88. 140 S. Ct. 1390, 1397 (2020).

89. *Edwards*, 2021 WL 1951781, at *11.

90. 391 U.S. 145, 149-50, 154-55 (1968) (holding that defendants have a constitutional right to a jury trial in state criminal cases).

91. 541 U.S. 36, 60-69 (2004) (applying the Confrontation Clause to restrict the use of hearsay evidence against defendants).

92. 476 U.S. 79, 89 (1986) (holding that racially discriminatory prosecutorial jury-selection practices are unconstitutional).

93. *Edwards*, 2021 WL 1951781, at *6-11.

94. *Id.* at *9.

B. Retroactivity Through the Law of Remedies and *Danforth*

Within two years of *Teague*, Richard Fallon and Daniel Meltzer published an influential article that advocated for a reframing of the retroactivity question.[95] Fallon and Meltzer proposed that the retroactivity question is better understood through the law of remedies rather than as a choice-of-law question.[96] They argued that the "novelty" of a new law modulates the scope of the remedy.[97] Drawing parallels to other legal doctrines like official immunity, Fallon and Meltzer recognized that the Constitution occasionally tolerates situations where victims of constitutional violations do not receive effective redress if the new constitutional rule is particularly novel.[98]

Decades later, in 2008, the Supreme Court implicitly endorsed and accepted Fallon and Meltzer's reframing of the retroactivity question in *Danforth v. Minnesota*.[99] In *Danforth*, the Court, in a 7–2 opinion authored by Justice Stevens, held that *Teague* did not bind state collateral proceedings and that states may choose to apply new constitutional rules retroactively even when federal courts would be otherwise barred from doing so under *Teague*.[100] In his opinion, Justice Stevens recast the issue of retroactivity as a question of the redressability of new-rule violations.[101] In particular, in a move that appeared to conflict with Justice O'Connor's statement in *Teague* that "[r]etroactivity is properly treated as a threshold question,"[102] Justice Stevens wrote: "It is important to keep in mind that our jurisprudence concerning the 'retroactivity' of 'new rules' of constitutional law is primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies."[103] Treating retroactivity as a

95. Fallon & Meltzer, *supra* note 23.

96. *Id.* at 1735-36.

97. *Id.* at 1764-77.

98. *Id.* at 1749-53. Other scholars have also embraced this approach to retroactivity through the law of remedies. *See, e.g.*, Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CALIF. L. REV. 1677, 1678 (2007) ("We ought not to think in terms of retroactivity at all. Instead, we need only ask, according to our best current understanding of the law, whether [the trial court] violated the constitutional rights of individual defendants, and if so, whether those wrongs merit a remedy.").

99. 552 U.S. 264, 266 (2008).

100. *Id.*

101. *See id.* at 271 n.5.

102. Teague v. Lane, 489 U.S. 288, 300 (1989) (plurality opinion).

103. *Danforth*, 552 U.S. at 290-91. In a paragraph reminiscent of Blackstone's declaratory theory of adjudication, *see supra* note 56, Justice Stevens continued:

> A decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts. It is fully consistent with a government

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threshold question, consistent with Justice O'Connor's older approach, would allow the retroactivity question to be resolved before arriving at the merits of whether a constitutional violation occurred. By contrast, approaching retroactivity through the law of remedies means that the question of whether to apply a constitutional rule retroactively is not a question of whether a constitutional violation occurred but whether retroactivity is the proper remedy for such a violation.

Several years after *Danforth*, in 2016, the Supreme Court held in *Montgomery v. Louisiana* that the rule in *Miller v. Alabama*—which prohibited mandatory life sentences without parole for juveniles as violating the Eighth Amendment[104]—was a new substantive constitutional rule that should apply retroactively on collateral review.[105] Perhaps more relevant to the retroactivity analysis, the Supreme Court initially addressed a jurisdictional issue and clarified that the first *Teague* exception imposes a *constitutional* obligation on *state* collateral proceedings to grant retroactive effect to new substantive due process rules.[106] Like in *Danforth*, the Court did not explicitly cast the retroactivity question in terms of the law of remedies, but the Court's reasoning and explanation in *Montgomery* is best understood with the backdrop of retroactivity as a remedy rather than choice-of-law question.[107]

This framing of retroactivity through the law of remedies—developed by Fallon and Meltzer and recognized in *Danforth*—provides a starting point for restructuring the *Teague* doctrine. At its core, retroactivity is not about

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> of laws to recognize that the finality of a judgment may bar relief. It would be quite wrong to assume, however, that the question whether constitutional violations occurred in trials conducted before a certain date depends on how much time was required to complete the appellate process.

Danforth, 552 U.S. at 291. Christopher Lasch makes the argument that there is an "undeniable analytical divide between *Danforth* and *Teague*" and that *Danforth* represents the beginning of the erosion of the foundations upon which *Teague* was built. *See* Lasch, *supra* note 27, at 33-36.

104. 567 U.S. 460, 470 (2012).

105. Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016).

106. *Id.* at 727-29. Carlos Vázquez and Stephen Vladeck have suggested that this "seemingly innocuous holding" was actually a momentous reading of *Teague* that upended half a century of doctrinal and theoretical habeas analysis because it held that prisoners have a constitutional right to collateral review in some circumstances. Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-conviction Review*, 103 VA. L. REV. 905, 908-10, 915-16 (2017). They suggest that *Montgomery*'s jurisdictional holding opened the door to revisit many of the underlying assumptions about the structure of postconviction remedies. *Id.*

107. *See, e.g.*, *Montgomery*, 136 S. Ct. at 731 ("A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees.").

applying new law to old judgments—that happens all the time—but rather about whether and under what circumstances it is appropriate to reopen an old judgment so as to apply the current understanding of the law. The difference between these two approaches may at first blush seem merely formal, but there are profound implications for how comity and finality factor into the analysis and, ultimately, when retroactivity will apply.

II. The Finality Interest and the Point of Finality

Since 1989, the Court has applied the *Teague* doctrine to constitutional holdings in substantive criminal law and criminal procedure. The Court's jurisprudence in this area has drawn a bright line between direct review before the point of finality[108] and collateral review after the point of finality. Thus, in the Court's current retroactivity jurisprudence, the trigger point is the point of finality in the review process: the moment at which cases shift from benefiting under retroactive application of rules under *Griffith* to generally no retroactive application under *Teague*.[109]

In this Part, I make several normative arguments about the finality interest and the point of finality in state criminal proceedings. I begin by exploring the traditional rationales in support of finality—that finality prevents the endless monetary and institutional costs of relitigation and that finality ensures deterrence and rehabilitation. I then propose that these concerns are overblown, especially given contemporary context and a realistic understanding of how the criminal-justice system presently operates. I develop two normative arguments: first, that finality interests are less weighty in the criminal context than in the civil context, and second, that finality interests are less compelling in state collateral review than in federal habeas review.

I also draw on a body of case law in *civil* procedure that differentiates the reopening of judgments in suits for damages from judgments providing ongoing injunctive relief. Drawing on the historical origins of the writ of habeas corpus and its similarity to equitable remedies, I suggest that where the state elects the remedy of criminal incarceration, that remedy is more analogous to the continuing supervision contemplated in injunctive relief and should be similarly sensitive to changes in the law. Finally, I examine the different state treatments of the point of finality, direct review, and collateral review. I suggest that the current approach of drawing the retroactivity line at the point of finality has led to wide inconsistency in state collateral review and the application of retroactivity.

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108. *See supra* note 26.

109. *See supra* notes 67-81 and accompanying text.

A. Traditional Rationales for the Finality Interest

Finality doctrines exist, in part, because of the understanding that at some point litigation must end to preserve economic and institutional resources.[110] Finality interests are not exclusive to civil procedure, and the Supreme Court and legal commentators have long recognized the importance of finality in criminal procedure, too. In his *Mackey* opinion, Justice Harlan emphasized this concern: "It is, I believe, a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process. Finality in the criminal law is an end which must always be kept in plain view."[111] Justice Harlan's writings on criminal finality, and those of later jurists including Justice O'Connor,[112] drew heavily from a pair of influential articles, one written by Paul Bator[113] and one by Judge Henry Friendly of the Second Circuit.[114]

In a 1963 article, Bator questioned, on finality grounds, the extensive relitigation then occurring in federal habeas review.[115] He emphasized the importance of finality in conserving "economic[,] . . . intellectual, moral, and political resources" and in preventing other damage such as a judge's "sense of responsibility" that would be subverted by repeated relitigation on the merits of a case.[116] He also emphasized that finality was important to ensuring the "effectiveness of the substantive commands of the criminal law," namely the deterrent and rehabilitative values of a final conviction.[117] Bator cautioned that a criminal-procedure system that allowed for repeated reopening of final judgments conflicted with the deterrence message that violations of the law result in swift and certain punishment and argued that "certainty and immediacy of punishment are more crucial elements of effective deterrence

110. Bator, *supra* note 40, at 451.

111. Mackey v. United States, 401 U.S. 667, 690 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part); *see also supra* notes 63-66 and accompanying text.

112. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 308-10 (1989) (plurality opinion) (citing Bator, *supra* note 40, at 450-51). More recently, Justices Kavanaugh and Gorsuch emphasized the importance of criminal finality in their respective majority opinion and concurrence in *Edwards v. Vannoy*. *See* No. 19-5807, 2021 WL 1951781, at *4 (U.S. May 17, 2021); *id* at *18 (Gorsuch, J., concurring) (citing Bator, *supra* note 40, at 446-48).

113. Bator, *supra* note 40; *see also Mackey*, 401 U.S. at 690 (Harlan, J., concurring in the judgments in part and dissenting in part) (citing Bator, *supra* note 40).

114. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); *see also Mackey*, 401 U.S. at 690 (Harlan, J., concurring in the judgments in part and dissenting in part) (citing Friendly, *supra*, at 146-51).

115. Bator, *supra* note 40, at 450-51.

116. *Id.* at 451.

117. *Id.* at 452.

than its severity."[118] Similarly, Bator worried that criminal rehabilitation cannot occur until a conviction becomes final, and "a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place."[119]

Drawing from Bator's work, in a 1970 article, Judge Friendly expressed similar concerns about extensive criminal relitigation and argued that collateral attacks should be limited to those cases where a convicted individual "supplements his constitutional plea with a colorable claim of innocence."[120] Judge Friendly agreed with Bator that finality is a requisite for the deterrent and rehabilitative values of criminal law.[121] He also cautioned that the proliferation of collateral attacks drains monetary and institutional resources[122] and that the delay of finality from collateral review diminishes the reliability of the factual determinations in a case if a retrial were to eventually occur.[123]

1. The finality interest in criminal procedure

Finality doctrines, such as res judicata, collateral estoppel, and stare decisis, arise from the notion that at some point, the "search for truth," be it factual or legal, must give way to the end of litigation for a variety of reasons.[124] But when the consequences of that end implicate personal liberties—the incarceration or even execution of a criminal defendant—we ought to be far more hesitant to subordinate truth to finality.[125] As Louis Pollak wrote many years ago, finality doctrines

> stem from the principle that "in most matters it is more important that the applicable rule . . . be settled than that it be settled right." But where personal liberty is involved, a democratic society employs a different arithmetic and insists that it is less important to reach an unshakable decision than to do justice.[126]

118. *Id.* at 452 & n.21; *see also* Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion) ("Without finality, the criminal law is deprived of much of its deterrent effect.").

119. Bator, *supra* note 40, at 452.

120. Friendly, *supra* note 114, at 142.

121. *See id.* at 146 & n.15 (citing Bator, *supra* note 40, at 452).

122. *See id.* at 148.

123. *See id.* at 146-48.

124. Comment, *Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion*, 68 YALE L.J. 98, 101 n.13 (1958).

125. *See id.*

126. Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 65 (1956) (alteration in original) (footnote omitted) (quoting Comm'r v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

This principle is well-understood in the American legal system—the standard for conviction is much higher in criminal cases than the burden of proof in civil ones, even if that higher standard increases the likelihood that a trial will not result in conviction despite strong evidence of guilt.[127] Of course, this does not mean that finality interests are absent when personal liberties are implicated, but it does provide a different starting point for considering the arguments in favor of finality advanced by those like Bator and Judge Friendly.[128]

To begin, there are good reasons to doubt that criminal finality actually promotes either rehabilitation or deterrence in practice.[129] Indeed, there is no evidence to suggest that the increase in collateral attacks on convictions in the wake of *Brown v. Allen* played any role in undermining criminal deterrence.[130] This lack of evidence makes sense; it is unreasonable to think that individuals would be more likely to commit crimes because they know that if they are caught, convicted, and all of their attempts at direct review fail, they would still have the option of collaterally attacking their convictions.[131]

The rehabilitation rationale is equally suspect. Notwithstanding the fact that, since at least the 1960s, the American legal system has abandoned rehabilitation as a principal goal,[132] incarceration may actually have a

127. *See* J. Harvie Wilkinson III, *The Presumption of Civil Innocence*, 104 VA. L. REV. 589, 597 (2018) ("With reputation, liberty, and at times even life on the line, every legal and moral precept counsels caution in bringing down the hammer of justice on a criminal defendant.").

128. Bator's and Judge Friendly's claims have been criticized. Christopher Lasch, for instance, has argued that these finality concerns are reduced in the context of intrasystem collateral review. *See* Lasch, *supra* note 27, at 56-63. Throughout this Note, I supplement some of his arguments with more contemporary context. In this Subpart, I primarily address Bator's and Judge Friendly's arguments regarding deterrence and rehabilitation. I address their other arguments, including the conservation of resources and the reliability of factual determinations, in Part II.A.2.

129. *See* Lasch, *supra* note 27, at 58.

130. *See id.*

131. *Id.* at 59. There is conflicting empirical evidence about whether even the death penalty has a deterrent effect. *See* John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 843 (2005) (concluding that the available data does not speak to whether the death penalty has a deterrent or antideterrent effect). The availability of collateral review is far more attenuated from the decision to commit a crime, and it would thus seem unlikely that finality from collateral review is related to deterrence.

132. *See* Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 LAW & SOC'Y REV. 183, 187 (2008) (noting the "rejection of rehabilitation as the guiding philosophy of criminal sentencing and . . . the increasing politicization of issues of crime and punishment since the 1960s").

criminogenic effect rather than a rehabilitative effect on some prisoners.[133] The rehabilitation rationale also loses force when discussing individuals who suffer from the greatest deprivations of personal liberty: those sentenced to capital punishment or life in prison without parole.[134] For at least some percentage of incarcerated persons, the prospect that their conviction may one day be rendered nonfinal and they will return to society likely increases the odds of rehabilitation in prison. This seems to be in part the rationale behind institutions such as parole and clemency, which allow for the revision of a final sentence many years after it is entered.

And to the extent that collateral review allows for more opportunities to correct errors in criminal adjudication, reopening the final judgments of a flawed adjudicatory system may actually instill legitimacy and ultimately strengthen the deterrent and rehabilitative effects of the criminal-justice system.[135] In recent years, it has become increasingly clear that many longstanding components of the criminal-justice system have actively contributed to the wrongful convictions of innocent individuals. Wrongful convictions occur as a result of mistaken eyewitness information,[136] false confessions,[137] false informant testimony,[138] faulty forensic science,[139] prosecutorial misconduct,[140] and inadequate defense representation.[141]

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133. *See* Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, *in* 38 CRIME AND JUSTICE: A REVIEW OF RESEARCH 115, 178 (Michael Tonry ed., 2009) (concluding that "the great majority of studies point to a null or criminogenic effect of the prison experience on subsequent offending"); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1053-54 (concluding that "we may be at or near a tipping point where further increases in incarceration will actually generate more crime than they prevent").

134. I do not suggest that there is no rehabilitative interest in individuals sentenced to capital punishment or life in prison, but if the criminal-justice system has deemed some individuals unfit to *ever* return to society, the rehabilitation argument strikes me as less persuasive.

135. *See, e.g.*, Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1348-49 (2003) (concluding that the wrongful conviction of innocent individuals may adversely affect deterrence).

136. *See* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 73 (2000) (reporting that over three-quarters of wrongful convictions in a study of DNA exonerations resulted in part from mistaken eyewitness identification); Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 530 (2005) (finding that 88% of exonerations in wrongful rape convictions included eyewitness misidentification).

137. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 195-236 (2008).

138. *See* Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 107 (2006) (noting that "45.9 percent of documented wrongful capital convictions have been traced to false informant testimony"); Clifford S. Zimmerman, *From the Jailhouse to the Courthouse: The*

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Moreover, "racial disparity permeates every level of our criminal justice system."[142] Implicit (and, to a lesser extent, explicit) racial bias affects every actor in the criminal-justice system: law enforcement, prosecutors, defense attorneys, juries, and the judiciary.[143] Some scholars suggest that the criminal-justice policies and practices that cause these racial disparities undermine social-control mechanisms within communities, which would otherwise deter crime, and consequently actually promote criminal behavior, rather than deterring it.[144] Similarly, overincarceration in the United States is well-documented not just in legal scholarship[145] but in mainstream media.[146] Mass incarceration in the United States is a consequence of decades of punitive criminal and drug laws, policies, and practices that have now come under intense scrutiny.[147]

Finality interests should lose weight when they work to reinforce the structures and decisions of an inherently flawed system. Thus, as the legal

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Role of Informants in Wrongful Convictions, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 55, 72 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

139. *See, e.g.*, Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 9, 34-84 (2009) (examining flawed forensic trial testimony in 82 of 137 exoneree cases studied, including invalid testimony related to serology analysis, microscopic hair comparison, DNA analysis, and bite-mark comparisons).

140. *See, e.g.*, Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 831-34 (2002).

141. *See* Sheila Martin Berry, *"Bad Lawyering": How Defense Attorneys Help Convict the Innocent*, 30 N. KY. L. REV. 487, 487-90 (2003); *see also* Crim. Just. Section, Am. Bar Ass'n, *Achieving Justice: Freeing the Innocent, Convicting the Guilty—Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process*, 37 SW. U. L. REV. 763, 865-69 (2008).

142. John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 689-92 (2014). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4 (rev. ed. 2012) (advancing a general thesis that the criminal-justice system is "a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow").

143. *See* Clemons, *supra* note 142, at 694-99; ALEXANDER, *supra* note 142, at 133-37.

144. *See, e.g.*, Faye Taxman, James M. Byrne & April Pattavina, *Racial Disparity and the Legitimacy of the Criminal Justice System: Exploring Consequences for Deterrence*, J. HEALTH CARE FOR POOR & UNDERSERVED, Nov. 2005, at 57, 58.

145. *See, e.g.*, ALEXANDER, *supra* note 142, at 8-9.

146. *E.g.*, Campbell Robertson, *Crime Is Down, Yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), https://perma.cc/5AGG-LV42.

147. *See* ALEXANDER, *supra* note 142, at 7-15. In the United States, since 1970, the incarcerated population has increased by 700%, and 2.3 million people are currently incarcerated in jails or prisons. *Mass Incarceration*, ACLU, https://perma.cc/3JSS-38DK (archived Apr. 28, 2021).

community—and the public—continues to scrutinize the criminal-justice system and the criminal-adjudicatory process, including the role of racial bias, the interest in finality should give way to interests in accuracy, dignity, and integrity.[148]

2. The finality interest in state collateral review

Finality interests are further reduced in state proceedings compared to federal proceedings because the other more pragmatic rationales for finality, such as the conservation of resources, are less compelling in state proceedings. In addition to deterrence and rehabilitation, Judge Friendly justified the finality interest on other grounds: the conservation of economic and institutional resources and the diminishing reliability of evidence as time passes.[149] These concerns undoubtedly support finality, but they either lose weight in the state collateral-review context or are separately addressed through other procedural mechanisms, such as procedural-default doctrines and statutes of limitation.

In some situations, federal habeas relitigation of a state final conviction, which requires a new judge and sometimes new counsel to become acquainted with the law and facts of a previously adjudicated case, may understandably be seen as a "drain upon the resources of the community."[150] But state collateral review demands fewer institutional resources.[151] In fact, state postconviction proceedings often occur before the very trial courts in which they were adjudicated.[152] Thus, the judges and attorneys are often the same as those on

148. These flaws in the criminal-adjudicatory process would likely negate many of the concerns expressed by Bator about the conservation of economic, moral, and other resources. *See supra* notes 115-19 and accompanying text.

149. *See supra* notes 120-23 and accompanying text. In *Edwards v. Vannoy*, the Court emphasized these rationales to justify its restrictive approach to retroactivity. *See* No. 19-5807, 2021 WL 1951781, at *4 (U.S. May 17, 2021) (explaining that "conducting scores of retrials years after the crimes occurred would require significant state resources" and "a State may not be able to retry some defendants at all because of 'lost evidence, faulty memory, and missing witnesses'" (quoting Allen v. Hardy, 478 U.S. 255, 260 (1986) (per curiam))).

150. Friendly, *supra* note 114, at 148.

151. Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421, 443-44 (1993) ("It is less complicated to garner the resources to respond to a postconviction proceeding within the system which originally handled the case, particularly if the case has recently been finalized.").

152. *E.g.*, FLA. R. CRIM. P. 3.850(m); IND. R. POST-CONVICTION REMEDIES PC 1, § 2; MO. SUP. CT. R. 29.15(a); MONT. CODE ANN. § 46-21-101(1) (2019).

direct review, and, if not, they are likely more familiar with the applicable law.[153]

Furthermore, the argument that the *Teague* bar prevents excessive state collateral litigation is suspect given present habeas practices. As a practical matter, petitioners will almost always litigate a claim in state collateral review before federal habeas review because AEDPA's exhaustion requirement ensures that habeas petitioners who are in state custody must "exhaust[] the remedies available in the courts of the State" before they can seek a writ of habeas corpus in federal court.[154] Thus, petitioners will often present all of their claims in state collateral review—even those that they are unlikely to win—in order to preserve those claims for federal habeas review. Because the exhaustion requirement already creates an incentive to litigate in state collateral review, it is doubtful that a shift in the *Teague* bar would actually lead to the feared influx of state collateral litigation.

Similarly, the exhaustion requirement ensures that state collateral proceedings almost always occur before federal collateral proceedings,[155] reducing concerns about the reliability of evidence due to the passage of time between a conviction and a subsequent collateral attack. If a criminal conviction is overturned on state collateral review, evidence necessary for a retrial is more likely to be available than if that same criminal conviction were overturned at a much later point in time through federal habeas review. And a growing number of states have implemented statutes of limitation on their collateral proceedings.[156] These statutes of limitation are generally fairly short, ensuring that petitioners cannot file a collateral attack on a conviction decades after evidence has grown less reliable.[157] Likewise, state procedural-default rules also further finality interests by restricting the types of claims that may be brought on collateral review and by limiting the relitigation of issues already previously decided.[158]

To sum up, state collateral review occurs soon after direct review and often before the same judge, meaning that the institutional resource demands

153. Because state collateral review is a form of intrasystem review, it involves state judges reviewing state law. In contrast, federal habeas review of a state conviction involves federal judges reviewing state law, with which they may have less familiarity.

154. 28 U.S.C. § 2254(b)(1)(A).

155. *See id.*; 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.1 (5th ed. 2005).

156. *E.g.*, COLO. REV. STAT. § 16-5-402 (2021); FLA. R. CRIM. P. 3.850(b); 42 PA. STAT. AND CONS. STAT. § 9545(b)(1) (2021); *see also* Holly Schaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 710 (2002).

157. *See supra* note 156.

158. *See* Lasch, *supra* note 27, at 61-63. For a separate discussion about procedural default and the inadequate-state-ground doctrine, see Part III.B.1 below.

and concerns about evidence reliability are not substantially greater than those associated with direct review. Although the finality interest will always be present, the Court ought to recognize that it is less weighty in state collateral review and to treat it accordingly in the retroactivity analysis.[159]

B. Prospective Relief and the *Wheeling Bridge* Cases

Finality doctrines from other contexts also suggest that finality interests in criminal procedure are overstated. In her plurality opinion in *Teague*, Justice O'Connor justified the restrictive approach to retroactivity by appealing to finality interests and noting that "it has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule."[160] In civil procedure, this finality interest manifests in part in the doctrine of res judicata.[161] Under that doctrine, a final judgment generally precludes relitigation of issues that were or could have been raised during the proceeding, even if "the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."[162]

Notwithstanding this strict limitation on final judgments in courts of *law*, courts of *equity* operate differently, and the Supreme Court has drawn a sharp line that differentiates suits for damages from judgments providing prospective injunctive relief. Under Rule 60(b) of the Federal Rules of Civil Procedure, a party may obtain relief from a final judgment if "applying it prospectively is no longer equitable."[163] In *Rufo v. Inmates of Suffolk County Jail*, the Supreme Court permitted modification of a prison institutional-reform injunction that had become final, reasoning that "a significant change in facts or law" had occurred, justifying a "revision of the decree."[164] The Court not only recognized the authority of courts to modify prospective relief but also

159. This reduced finality interest in state collateral review, coupled with a nonexistent comity interest, *see infra* Part III.A, ultimately leads me to conclude that all constitutional rules should be fully retroactive on state collateral review, *see infra* Part IV.A. On the other hand, the analysis here also leads to the conclusion that finality interests are comparatively *increased* in federal habeas review. Thus, constitutional rules should generally *not* be applied retroactively on federal habeas review of state convictions, though I nonetheless argue for a general expansion of the *Teague* new-rule doctrine. *See infra* Part IV.B.

160. Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion).

161. LINDA J. SILBERMAN, ALLAN R. STEIN & TOBIAS BARRINGTON WOLFF, CIVIL PROCEDURE: THEORY AND PRACTICE 785 (5th ed. 2017). Translated from Latin, res judicata means "the thing has been decided." *Id.*

162. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). In *Moitie*, the Supreme Court held that there is no general equitable exception to res judicata for an intervening change in law. *Id.* at 400.

163. FED. R. CIV. P. 60(b)(5).

164. 502 U.S. 367, 393 (1992).

reasoned that prospective relief "*must* . . . be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law."[165]

This different treatment of finality in money judgments and prospective relief is further illustrated by the Court's *Wheeling Bridge* line of cases.[166] In *Wheeling Bridge I*, the Court held that an Ohio River bridge "obstruct[ed] the navigation of the Ohio" and granted injunctive relief ordering that the bridge either be raised or removed.[167] After the decision, Congress passed a law declaring the bridge to be a lawful structure and authorizing the Wheeling and Belmont Bridge Company to maintain the bridge at its current location and height.[168] After the bridge was destroyed in a windstorm, Pennsylvania sued to enjoin its reconstruction, but the Supreme Court rejected the argument in *Wheeling Bridge II*, reasoning that because the underlying law had been changed by Congress, the bridge was no longer unlawful.[169] Importantly, the Court noted that had the *Wheeling Bridge I* decision awarded money damages in a court of *law*, that judgment would be final, and a subsequent change in law could not disrupt that finality.[170] But because *Wheeling Bridge I* provided continuing prospective relief, the validity of that relief depended on the existing law.[171] The *Wheeling Bridge II* holding remains good law today, and the Supreme Court has subsequently reaffirmed the distinction between

165. *Id.* at 388 (emphasis added). In *System Federation No. 91 v. Wright*, the Supreme Court explained not just the authority—but the imperative—of courts to modify the prospective effects of an injunction to reflect a change in law or fact, even in light of finality interests:

> There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief. Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided. Nevertheless the court cannot be required to disregard significant changes in law or facts if it is "satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

364 U.S. 642, 647 (1961) (quoting United States v. Swift & Co., 286 U.S. 106, 114-15 (1932)).

166. Pennsylvania v. Wheeling & Belmont Bridge Co. (*Wheeling Bridge I*), 54 U.S. (13 How.) 518 (1852); Pennsylvania v. Wheeling & Belmont Bridge Co. (*Wheeling Bridge II*), 59 U.S. (18 How.) 421 (1856).

167. *Wheeling Bridge I*, 54 U.S. (13 How.) at 578.

168. *See Wheeling Bridge II*, 59 U.S. (18 How.) at 429.

169. *Id.* at 431-32, 436.

170. *Id.*

171. *Id.* at 431.

money judgments and prospective relief in *Plaut v. Spendthrift Farm, Inc.*[172] and *Miller v. French*.[173]

There is no law–equity divide in criminal procedure, but the concept that finality is sensitive to the nature of the remedy is relevant to how we should view the finality interest in criminal cases. Paul Halliday has argued that the writ of habeas corpus, though not strictly an equitable writ, historically served as an equitable writ in practice.[174] Indeed, he noted, "[n]o one called habeas corpus an equitable writ. But this should not keep us from considering the ways in which its use was equitable in everything but name."[175] If we understand habeas as an equitable challenge to the underlying detention of a person, then the finality interest seems far more similar to that in *Wheeling Bridge II* than to that in a monetary judgment.[176] Incarcerating an individual shares little in common with a civil monetary judgment, a one-time resolution to a dispute between parties intended to redress a past wrong. Unlike a civil judgment, incarceration should not be primarily motivated by the desire to redress past wrongs. Rather, incarceration should be a prospective remedy intended to mitigate future crime, whether that be through incapacitation, deterrence, or otherwise.[177] Thus, incarceration bears a much closer resemblance to injunctive relief, an ongoing and continuous remedy that is prospective in nature. Furthermore, this interest in finality gives way when

172. 514 U.S. 211 (1995). In *Plaut*, the Supreme Court held that a federal statute directing courts to reopen final judgments in private lawsuits violated Article III and the separation of powers. *Id.* at 213-15, 240. The Court reasoned that final monetary judgments of the judiciary should be insulated from legislative revision. *Id.* at 227 ("Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.").

173. 530 U.S. 327 (2000). In *Miller*, the Supreme Court distinguished *Plaut*, holding that the "automatic stay" provision of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 802, 110 Stat. 1321-66, -68 (1996) (codified as amended at 18 U.S.C. § 3626(e)(2)), did not violate the separation of powers, even though it established that a motion to terminate injunctive relief in prison cases would operate as a stay of previous injunctive relief ordered by a court. *Miller*, 530 U.S. at 350. Citing to *Plaut*, *Rufo*, *Wright*, and *Wheeling Bridge II*, the Court held that where Congress revises the underlying substantive law of an injunction, the validity of that injunction lapses. *Id.* at 347 ("The provision of prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law.").

174. HALLIDAY, *supra* note 39, at 87.

175. *Id.* In particular, Halliday pointed to two aspects of the writ that ran parallel to equity: the "telling of stories to gain the writ" and the "insistence of King's Bench that recipients of the writ should do as commanded." *Id.* at 92.

176. *See supra* notes 166-73 and accompanying text.

177. For a detailed criticism of the retributivist theory of punishment, see, for example, Russ Shafer-Landau, *The Failure of Retributivism*, 82 PHIL. STUD. 289, 298-304 (1996).

we consider the rationales behind a strict res judicata bar in cases resulting in money judgments. In such cases, both the winner and loser benefit from a sense of repose.[178] It cannot be said that the government benefits from a sense of repose if that repose entails a continuing obligation to incarcerate an unlawfully detained individual. Because incarceration is a continuing remedy, the government has an interest in terminating that prospective remedy when it becomes clear that the grounds justifying that remedy are no longer lawful, both for legitimacy purposes and—more pragmatically—to conserve resources.

Thus, just as a court's continued enforcement of injunctive relief loses validity when the underlying substantive law supporting the ruling has changed, when the underlying law justifying a detention has changed, the continuing remedy of incarceration cannot be valid.

C. The Point of Finality and State Criminal Procedures

The trigger point of the *Teague* doctrine is the point of finality, the moment when a case shifts from direct review to collateral review.[179] The Supreme Court has held that for the purposes of federal habeas review of state convictions, all review is either direct or collateral; there is no third option.[180] But a problem arises because the Court has not provided precise definitions for the point of finality, direct review, or collateral review. Over the past decade, the Court's precedents on the point of finality of a conviction have been unclear, confusing, and hard to square with one another. In *McKinney v. Arizona*, the Court was primed to address whether the point of finality was a state or federal question, but it did not provide a clear answer.[181] Instead, the Court implied that the point of finality is a question of state law, but it also seemed to reserve authority to overrule a state definition of the point of finality that it finds particularly egregious.[182]

178. *See* SILBERMAN ET AL., *supra* note 161, at 786.

179. *See supra* notes 7-8, 26 and accompanying text.

180. Wall v. Kholi, 562 U.S. 545, 547 (2011) ("We hold that the phrase 'collateral review' in § 2244(d)(2) means judicial review of a judgment in a proceeding that is not part of direct review."); *see also* Bickford, *supra* note 4.

181. *See supra* notes 1-19 and accompanying text.

182. *Compare* McKinney v. Arizona, 140 S. Ct. 702, 708 (2020) ("[W]e may not second-guess the Arizona Supreme Court's characterization of state law. As a matter of *state* law, the reweighing proceeding in McKinney's case occurred on collateral review." (citations omitted)), *with id.* at 709 n.* ("Our holding here does not suggest that a State, by use of a collateral label, may conduct a new trial proceeding in violation of current constitutional standards."). In *Wall v. Kholi*, the Supreme Court included a similar footnote suggesting that it could overrule a state's characterization of the point of finality, but it would not elect to do so in that case because both parties agreed that the procedure in question was not part of direct review, the issue had not been briefed, and a ruling would not affect the disposition of the case. *See Kholi*, 562 U.S. at 555 n.3 ("We

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Generally, direct review of a conviction reaches the point of finality when the Supreme Court "'affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari,' or, if a petitioner does not seek certiorari, 'when the time for filing a certiorari petition expires.'"[183] This simple line was blurred in *Jimenez v. Quarterman*, in which the Supreme Court held that after direct review of a conviction has initially reached the point of finality, a state may reopen the resulting judgment, thus reopening direct review.[184] The arbitrariness of allowing states to define their criminal procedures as direct or collateral was perhaps best illustrated in *McKinney*. When the Ninth Circuit reversed and remanded McKinney's case with a conditional writ, the Arizona Supreme Court itself reweighed the aggravating and mitigating circumstances and upheld both death sentences.[185] While other state criminal-procedure law may have treated this procedure as a resentencing and thus a reopening of direct review subject to new law,[186] this independent review was—according to the Arizona Supreme Court—a collateral proceeding, and old law applied.[187]

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can imagine an argument that a Rhode Island Rule 35 proceeding is in fact part of direct review under § 2244(d)(1) because, according to the parties, defendants in Rhode Island cannot raise any challenge to their sentences on direct appeal; instead, they must bring a Rule 35 motion. That issue has not been briefed or argued by the parties, however, and we express no opinion as to the merit of such an argument." (citations omitted)). In *Gonzalez v. Thaler*, the Court rejected "state-by-state definitions of the conclusion of direct review" as at odds with a "uniform definition" yet nonetheless affirmed that state law procedures are relevant to the definition of the point of finality. 565 U.S. 134, 152 (2012).

183. *Gonzalez*, 565 U.S. at 149 (quoting Clay v. United States, 537 U.S. 522, 527 (2003)); *see also* Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.").

184. 555 U.S. 113, 119-21 (2009). In 1995, Carlos Jimenez was sentenced for burglary, and, in 1996, his conviction became final after his direct review concluded. *Id.* at 115-16. However, in 2002, the Texas Court of Criminal Appeals reopened direct review and permitted Jimenez to file an out-of-time appeal. *Id.* at 116. The Supreme Court held that once the Texas Court of Criminal Appeals reopened direct review in 2002, Jimenez's conviction was rendered nonfinal until 2004 when direct review once again concluded. *Id.* at 120.

185. State v. McKinney, 426 P.3d 1204, 1205, 1207-08 (Ariz. 2018), *aff'd sub nom. McKinney*, 140 S. Ct. 702; *supra* notes 1-19 and accompanying text.

186. *See, e.g.*, State v. Fleming, 61 So. 3d 399, 407 (Fla. 2011) ("[B]ecause resentencing is de novo, the decisional law in effect at the time of the resentencing or before any direct appeal from the proceeding is final applies."); State v. Kilgore, 216 P.3d 393, 398 (Wash. 2009) (en banc) ("We have interpreted RAP 2.5(c)(1) to allow trial courts, as well as appellate courts, discretion to revisit an issue on remand that was not the subject of the earlier appeal. . . . If the trial court elects to exercise this discretion, its decision may be the subject of a later appeal, thereby restoring the pendency of the case." (citation omitted)).

187. *McKinney*, 140 S. Ct. at 708.

Moreover, states diverge from one another in their treatments of retroactivity beyond just their definitions of the point of finality, direct review, and collateral review. States also diverge in what legal claims they permit in direct and collateral proceedings, perhaps best illustrated by disparate treatment of ineffective-assistance-of-counsel claims.[188] There is little uniformity to how such claims must be raised in state criminal proceedings: Some states bar ineffective-assistance-of-counsel claims entirely on direct appeal, many states allow some claims on direct review and others on collateral review, and at least one state requires all claims be brought on direct review.[189] In states where ineffective-assistance-of-counsel claims can only be raised in the first instance on collateral review, such claims will always be subject to the *Teague* bar and will never benefit from *Griffith* retroactivity on direct review. Where collateral review is the first opportunity to litigate a claim, the finality rationale for limiting retroactivity is further weakened because these procedures resemble direct review more than collateral review.[190]

Lastly, the *Danforth* holding[191] affirmed a longstanding phenomenon: Application of the retroactivity remedy in postconviction proceedings could differ dramatically from state to state. While some states felt bound to the *Teague* standard pre-*Danforth*,[192] other states applied their own state law standards[193] or even the antiquated *Linkletter* standard.[194] For instance, the

188. *See* Turner, *supra* note 27, at 1176 n.125 (citing Brief of Amici Curiae Utah & 24 Other States in Support of Respondent at 7-9, Trevino v. Thaler, 569 U.S. 413 (2013) (No. 11-10189), 2013 WL 314455).

189. *Id.*

190. For a detailed overview of why *Teague* should not apply in these "initial-review collateral proceedings," see Turner, *supra* note 27, at 1175-79. Turner suggests that "it would be unfair for a claim to be *Teague*-barred at the first opportunity at which a defendant could raise it." *Id.* at 1179. This argument is also relevant to Bator's concern that finality is important to prevent extensive relitigation of a claim that has already been fully litigated. *See supra* notes 115-19 and accompanying text. In *Martinez v. Ryan*, the Supreme Court suggested that these "initial-review collateral proceedings" may be treated differently in the related habeas equitable doctrine of procedural default, holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. 1, 9 (2012). However, this holding proved to be exceedingly narrow, and in *Davila v. Davis*, the Supreme Court declined to extend the *Martinez* exception to claims of ineffective assistance of appellate counsel. 137 S. Ct. 2058, 2062-63 (2017).

191. *See supra* notes 99-103 and accompanying text.

192. *E.g.*, Porter v. State, 102 P.3d 1099, 1104 (Idaho 2004) (relying on the Supreme Court's application of the *Teague* standard in *Schriro v. Summerlin*, 542 U.S. 348 (2004)); Saylor v. State, 808 N.E.2d 646, 648-49 (Ind. 2004).

193. *E.g.*, Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005).

194. *E.g.*, State v. Whitfield, 107 S.W.3d 253, 268 (Mo. 2003) (en banc), *abrogated by* State v. Wood, 580 S.W.3d 566 (Mo. 2019) (en banc).

Idaho Supreme Court held the Supreme Court rule in *Ring v. Arizona*[195] not to be retroactive under the *Teague* standard;[196] the Florida Supreme Court applied its own state law standard to hold *Ring* not to be retroactive;[197] and the Missouri Supreme Court applied the *Linkletter* standard and held that *Ring would* apply retroactively.[198] As Chief Justice Roberts argued in his *Danforth* dissent, the majority opinion

> invites just the sort of disuniformity in federal law that the Supremacy Clause was meant to prevent. The same determination of a federal constitutional violation at the same stage in the criminal process can result in freedom in one State and loss of liberty or life in a neighboring State.[199]

The current retroactivity approach has led to wide variation in state collateral review and the retroactive application of constitutional rules. These inconsistencies underscore the need to revisit the finality interest and its role in the *Teague* bar.

III. The Comity Interest and Legitimate Reliance

Though the Supreme Court has not provided a concrete definition for comity, the comity interest generally consists of "proper respect for state functions"[200] and the desire to avoid friction between different court systems.[201] Comity has long been recognized by the Court as a primary rationale for the procedural-default doctrine and the exhaustion requirement.[202] This respect for state functions is especially important because the federal habeas statute is powerful: A federal district court judge acting alone can reopen a state court final judgment that has undergone the entire direct-review process up to the state supreme court and has exhausted the entire state collateral-review process.[203] Thus, the comity interest is a crucial

195. 536 U.S. 584 (2002); *see also supra* note 6.

196. *Porter*, 102 P.3d at 1104 (holding that *Ring* "simply established a new procedural rule . . . that is not retroactive" (citing *Schriro*, 542 U.S. 348)).

197. *Johnson*, 904 So. 2d at 412.

198. *Whitfield*, 107 S.W.3d at 268-69.

199. Danforth v. Minnesota, 552 U.S. 264, 302 (2008) (Roberts, C.J., dissenting).

200. Preiser v. Rodriguez, 411 U.S. 475, 491 (1973) (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)).

201. *See supra* note 27.

202. *See* Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977) (emphasizing the importance of respecting state judgments and state procedures for challenging those judgments); *Preiser*, 411 U.S. at 491.

203. *See* Yin, *supra* note 41, at 244 ("Habeas review has the potential to exacerbate such federal-state friction when federal courts free prisoners whose convictions were deemed valid by the state courts, particularly because the reviewing court (initially a United States district court) is of a different system, is seen as lower in the hierarchy

footnote continued on next page

one and is generally more compelling than the finality interest in criminal proceedings.[204]

In this Part, I examine the comity interest in criminal procedure and suggest that the *Teague* doctrine fails to address it with the proper nuance. First, I build on the argument recognized by the Supreme Court in *Danforth*—that there is no comity interest in state collateral review. Because state collateral review involves state review of state action, intersystem dynamics are absent, and comity is not implicated. Then, I propose that though comity concerns are at their peak where a state legitimately relies upon the Supreme Court's articulation of a constitutional rule, this interest gives way where there are reasons to question the legitimacy of a state's reliance interests. I examine related doctrines that similarly rest on comity concerns, including the inadequate-state-ground doctrine and the *Testa* line of cases about the nondiscrimination principle, and I suggest that reliance interests are illegitimate where state action appears calculated to circumvent a federal right. I conclude by applying the legitimate-reliance standard to past criminal-procedure rules.

A. The Comity Interest in State Collateral Review

The Supreme Court has recognized that the comity interest is nonexistent in the context of state collateral review of state criminal proceedings. This observation was explicitly made in *Danforth*: "Federalism and comity considerations are unique to *federal* habeas review of state convictions."[205] While federal habeas review requires a federal court to exercise its authority to reopen a state court judgment, thus raising comity concerns, there are no similar concerns when a state court exercises its authority to reopen a state judgment. Intrasystem review, including state collateral review, does not implicate comity because a state court's decision to reopen a state court judgment does little to undermine respect for state functions or foster friction between court systems. Indeed, state collateral review often occurs before the same judge who issued the judgment.[206]

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than state supreme courts, and is less attuned to local interests."); *see also* Edwards v. Vannoy, No. 19-5807, 2021 WL 1951781, at *19 (U.S. May 17, 2021) (Gorsuch, J., concurring) ("The writ of habeas corpus does not authorize federal courts to reopen a judgment issued by a court of competent jurisdiction once it has become final.").

204. *Cf. supra* Part II.A.1 (arguing that finality interests are less weighty in the criminal context).

205. Danforth v. Minnesota, 552 U.S. 264, 279 (2008); *see also* Lasch, *supra* note 27, at 43-44 (explaining that "intra-system postconviction proceedings raise no comity concerns").

206. *See supra* notes 151-52 and accompanying text.

One could argue that intrastate retroactivity nonetheless implicates comity because a determination that a rule must apply retroactively effectively forces a change in procedural law upon a state's courts. But such an argument misunderstands the nature of retroactivity. As discussed in Part I.B, retroactivity is not a choice-of-law question between old and new laws but rather a question of constitutional remedies. When the Supreme Court announces a new law of criminal procedure, it must apply to all future cases and to all cases on direct review. Requiring a new rule to apply to cases on collateral review does little more to upset interests in comity than the analogous requirement under *Griffith* that the new rule apply to cases on direct review.[207]

As a concluding note, the above argument also suggests that comity interests are nonexistent in federal habeas review of federal convictions.[208] Like state review of state convictions, a federal court's review of a federal conviction does not implicate the relationship between different court systems.

B. Legitimate Reliance and State Avoidance of a Federal Right

Comity interests are undoubtedly implicated in federal habeas review of state convictions because a federal district court judge acting alone has the authority to uproot a state final judgment that has undergone several layers of review in a state's court system. This comity interest is particularly weighty in those situations where a state actor has reasonably relied upon an authoritative pronouncement of the law by the Supreme Court. As Fallon and Meltzer write, under the law of remedies, the newness of a rule affects the fault and moral blame that we place on a state government for relying upon an old rule.[209] This, in turn, affects the scope of the remedy and the appropriateness of withholding it.[210] Therefore, comity interests should be at their peak in those situations where the state courts have fully and faithfully adjudicated a criminal case in accordance with the well accepted understanding of constitutional rules at the time.

This concern for comity motivates the distinction between old and new constitutional rules under *Teague*.[211] For instance, where the petitioner alleges

207. *See supra* notes 68-73 and accompanying text.

208. Federal prisoners can bring a § 2255 habeas action challenging their convictions in federal court. 28 U.S.C. § 2255(a).

209. *See* Fallon & Meltzer, *supra* note 23, at 1791-97.

210. *See id.* at 1797.

211. Though Fallon and Meltzer agreed that the novelty of a rule should affect the availability of the retroactivity remedy, they objected to the breadth of the definition of new law, argued that different standards should apply based on the underlying constitutional violation, and objected to the narrowness of the *Teague* exceptions. *Id.* at 1793-96, 1816-17.

that the state violated an old constitutional rule, comity interests are low. If anything, the state and its actors have run afoul of the Supremacy Clause by acting contrary to the then-existing understanding of the Constitution. Thus, under *Teague*, violations of old constitutional rules always allow for the reopening of a final judgment.[212] On the other hand, where the petitioner alleges that the state violated a new constitutional rule, *Teague* precludes the remedy of retroactivity unless the rule is a substantive rule, in which case the need to remedy the violation of individual constitutional rights outweighs the finality and comity concerns.[213]

Teague's new-rule doctrine fails to fully address the comity inquiry. The distinction between old and new rules assumes that states are relying on Court precedent in good faith when, in fact, there may be reasons to question the legitimacy of state reliance. This inquiry should influence how much courts weigh the comity interest. For instance, hundreds of years of history illustrate that states can be openly hostile to vindicating federal rights, especially in cases involving the rights of Black defendants or other unpopular minority or political groups. In other doctrinal contexts, the Supreme Court has indicated that comity interests give way when states discriminate against federal rights. So too here.

1. Procedural default and the inadequate state ground

Take, for instance, a close cousin of the *Teague* doctrine—the intersection between procedural default and the inadequate-state-ground doctrine—which also rests in part on interests in comity.[214] In general, state law dictates how and when federal claims may be asserted in state courts. Thus, if under state law, a prisoner has committed procedural default in failing to raise a federal claim, the Supreme Court will respect the state procedure and reject review because there is an adequate and independent state ground to preclude jurisdiction.[215]

However, the Supreme Court has recognized limited exceptions to this general rule in cases where the state procedural law was "inadequate."[216] These exceptions include cases where state laws were facial or as-applied violations of

212. *See supra* note 9 and accompanying text; *see also* Edwards v. Vannoy, No. 19-5807, 2021 WL 1951781, at *5 (U.S. May 17, 2021).

213. *See supra* notes 78-81 and accompanying text.

214. *See* Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977).

215. *See* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 145 (10th ed. 2013).

216. *See* Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 943 (1965).

the Due Process Clause.[217] Beyond constitutional grounds for inadequacy, the Court has also recognized that a state procedural requirement may be inadequate where it failed to serve a "legitimate state interest."[218] For instance, in *Douglas v. Alabama*, the Supreme Court found inadequate a state requirement that a defendant repeat the same constitutional objection after every question to a witness when that objection had already been made three times.[219] The Court reasoned that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair."[220]

Of course, whether a state interest is "legitimate" is an exceedingly difficult legal question. It can be imprudent, if not impossible, to attribute a motive to a law or procedure that has been voted on by a large group of individuals who may each have individual reasons for supporting the rule. Furthermore, these motives and justifications for a law can evolve over time, so the Court has generally avoided inquiring about a state's reasoning for enforcing a rule or participating in a certain practice as long as some legitimate interest could conceivably exist.[221] Notwithstanding these concerns, the Court has consistently held that state interests are illegitimate in at least one circumstance: state rules that "appear[] to be calculated to discriminate against federal law."[222]

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217. *E.g.*, Reece v. Georgia, 350 U.S. 85, 89-90 (1955) (holding that a state procedural rule requiring that an Equal Protection Clause challenge to grand-jury selection be made prior to an indictment violated the Due Process Clause as applied to a Black defendant, who had not been appointed an attorney until after his indictment).

218. Douglas v. Alabama, 380 U.S. 415, 422 (1965); *see also* Lee v. Kemna, 534 U.S. 362, 378-85 (2002) (applying the "legitimate state interests" principle and finding that requirements that a motion for continuance be in writing and make certain showings did not serve legitimate interests as applied to the circumstances of the case); Osborne v. Ohio, 495 U.S. 103, 123-25 (1990) (holding that a state requirement that a defendant make a specific objection to jury instructions would serve "[n]o legitimate state interest" where the defendant had previously raised the same objection in a motion to dismiss (alteration in original) (quoting *Douglas*, 380 U.S. at 421-22)).

219. *Douglas*, 380 U.S. at 422-23.

220. *Id.* at 422.

221. *See Lee*, 534 U.S. at 391-92 (Kennedy, J., dissenting); *see also* Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE. L.J. 754, 755-61 (1966) (discussing the difficulty of discerning legislative intent); *cf. Osbourne*, 495 U.S. at 124; *Douglas*, 380 U.S. at 422-23.

222. *See Lee*, 534 U.S. at 391-92 (Kennedy, J., dissenting) ("Most state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law, or, as one treatise puts it, they did not afford the defendant 'a reasonable opportunity to assert federal rights.'" (quoting 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4027, at 392 (2d ed. 1996))).

For instance, in *Williams v. Georgia*, Aubry Williams, a Black man, was convicted in a county where the Supreme Court subsequently held that the jury-selection process was discriminatory and unconstitutional in a different case.[223] Williams filed an extraordinary motion for a new trial after affirmance of his conviction, the trial court dismissed the motion, and the Georgia Supreme Court ruled that Williams had procedurally defaulted by failing to challenge the jury-selection process before the trial.[224] In concluding that the state court's discretionary decision to deny the motion was inadequate and that the U.S. Supreme Court had jurisdiction to consider the substantive issue,[225] the Court reasoned that it was not precluded

> from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.[226]

In essence, the Court determined that even if the Georgia state court may have had other legitimate reasons for dismissing Williams's motion, it had acted in avoidance of a federal right in Williams's case because it had denied the right to Williams while upholding that right for other similar defendants.

2. The nondiscrimination principle and the *Testa* line of cases

The *Williams* decision tracks closely with a series of cases in which the Supreme Court has recognized that the Supremacy Clause prevents states from discriminating against federal claims.[227] In *Testa v. Katt*, Rhode Island refused to enforce the Emergency Price Control Act of 1942 in its state courts because it regarded federal law as "foreign."[228] But as the Court explained in *Testa*, "[federal] policy is as much the policy of [a state] as if [it] had emanated from its own legislature, and should be respected accordingly in the courts of the State."[229]

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223. 349 U.S. 375, 376-79 (1955). The Court held in *Avery v. Georgia* that the county's jury-empaneling procedure displayed prima facie evidence of discrimination. 345 U.S. 559, 562-63 (1953).

224. *Williams*, 349 U.S. at 377-79.

225. *Id.* at 389. However, the Court, though recognizing its jurisdiction to consider the issue, decided to remand the case back to the Georgia courts. *Id.* at 389-91.

226. *Id.* at 383 (footnote omitted).

227. *See, e.g.*, Testa v. Katt, 330 U.S. 386, 394 (1947); McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 233-34 (1934) (holding that state courts may not refuse enforcement of the Federal Employers' Liability Act).

228. *Testa*, 330 U.S. at 387-88.

229. *Id.* at 392 (quoting Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 57 (1912)).

In *Haywood v. Drown*, the Court further clarified that even if a state can point to a "valid" reason for its law, a state's jurisdictional rule cannot discriminate against a federal right.[230] In *Haywood*, New York passed a procedural law that converted all damages claims against state corrections officers into claims against the state itself.[231] The consequence of the New York law was to foreclose state court jurisdiction over § 1983 damages claims against corrections officers because § 1983 had been interpreted by the Supreme Court to create a right of action against individuals and not states.[232] The state argued that its legislation, which treated state and federal damages actions against correction officers the same, was neutral and therefore a "valid excuse" for dismissing § 1983 claims.[233] But the Court rejected the argument, holding that the neutrality of the law was not dispositive of constitutionality.[234] The Court emphasized that "[a] jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear."[235]

These related comity doctrines suggest that when deciding the retroactivity of constitutional rules, courts should inquire into the legitimacy of a state's reliance on an old rule. In those rare circumstances where the state law or procedure appears—at least in part—to circumvent a federal right, that fact is relevant to adjusting the comity consideration. And where state reliance interests are not legitimate, and thus the comity interest is at its lowest, the argument for full retroactivity is at its strongest.

C. Examples of State Discrimination Against Federal Rights

A few examples of criminal-procedure rules help demonstrate the discrimination principle as applied to the *Teague* doctrine. For instance, the *Batson* rule is one of several rules that illustrates illegitimate reliance because of state discrimination in criminal procedure.[236] Over a century before *Batson*, the

230. 556 U.S. 729, 737-40 (2009) ("We therefore hold that, having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy.").

231. *Id.* at 731-34.

232. *Id.* Section 1983 permits individuals to sue the government for civil rights violations. It applies when a person acting "under color of" law has deprived another person of a federal right. 42 U.S.C. § 1983.

233. *Haywood*, 556 U.S. at 732 (quoting Haywood v. Drown, 881 N.E.2d 180, 183 (N.Y. 2007), *rev'd*, 556 U.S. 729).

234. *Id.* at 737-38.

235. *Id.* at 739.

236. Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding unconstitutional prosecutorial jury-selection practices that were racially discriminatory). Notably, the nonretroactivity of *Batson* on collateral review was actually decided prior to *Griffith* and *Teague* under the

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Supreme Court held, in *Strauder v. West Virginia*, that the purposeful exclusion of Black jury members deprives a Black defendant of equal protection under the Fourteenth Amendment.[237] Some state prosecutors then turned to peremptory challenges to exclude Black jurors in an attempt to circumvent *Strauder*'s holding.[238] Under the Court's holding in *Swain v. Alabama*, this practice was permissible because proof of systemic exclusion is required for a violation of the Equal Protection Clause.[239] Of course, some—perhaps even most—prosecutors did not utilize the peremptory challenge to circumvent *Strauder*. But while there may have been legitimate rationales for relying on the *Swain* rule, the Supreme Court recognized that the "common and flagrant" practice of using peremptory strikes to exclude Black jurors was a direct attempt to discriminate against the federal right established in *Strauder*.[240]

Therefore, even though some prosecutors may have relied on the *Swain* rule in using peremptory strikes to exclude Black jurors, the question of *Batson*'s retroactivity should have considered whether this reliance was illegitimate. The Court should have examined whether there was evidence that the practice was an attempt to circumvent a federal right—in this case, the right guaranteed in *Strauder*. As Justice Thurgood Marshall deftly explained in his dissent to *Allen v. Hardy*, "[e]ven if the Court is willing to consider prosecutors to have relied on the effective unenforceability of the pronouncements in *Swain*, it should at least give some thought as to whether that reliance should be deemed legitimate."[241]

In contrast, consider the Court's decision in *Duren v. Missouri*, which held unconstitutional a Missouri statute that provided an automatic exemption from jury service for any women requesting not to serve.[242] In its opinion, the Court recognized that Missouri may have had a legitimate interest in its law: "We recognize that a State may have an important interest in assuring that those members of the family responsible for the care of children are available to do so."[243] Furthermore, unlike in *Batson*, where the Court recognized that state prosecutors used peremptory strikes to circumvent *Strauder*,[244] the Court

Linkletter standard. Allen v. Hardy, 478 U.S. 255, 257-61 (1986) (per curiam); *see supra* note 68.

237. 100 U.S. 303, 310 (1880).

238. *Batson*, 476 U.S. at 103 (Marshall, J., concurring) ("Although the means used to exclude blacks have changed, the same pernicious consequence has continued. Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant.").

239. Swain v. Alabama, 380 U.S. 202, 222-24 (1965), *overruled by Batson*, 476 U.S. 79.

240. *Batson*, 476 U.S. at 103 (Marshall, J., concurring); *see id.* at 87-89 (majority opinion).

241. 478 U.S. at 264 (Marshall, J., dissenting).

242. 439 U.S. 357, 359-60 (1979).

243. *Id.* at 370.

244. *Batson*, 476 U.S. at 88-89, 96-100.

in *Duren* acknowledged instead that "the Missouri Supreme Court misconceived the nature of the fair-cross-section inquiry set forth in *Taylor* [*v. Louisiana*]."[245]

Of course, there may have also been many problematic rationales for the Missouri law, including the stereotypical and patriarchal view that women should reserve their time for household responsibilities. But as with the inadequate-state-ground doctrine and the nondiscrimination principle in the *Testa* line of cases, a reliance interest is not illegitimate merely because courts could hypothesize at least one problematic rationale for a state's rule. As the Court has long recognized, the comity interest loses force only where state action appears calculated to explicitly avoid enforcing a federal right.

IV. Reimagining the *Teague* Doctrine

The Court's retroactivity jurisprudence under the *Teague* doctrine is arbitrary, confusing, and riddled with doctrinal inconsistencies. But after the Court's endorsement of Fallon and Meltzer's remedial framework in *Danforth* and *Montgomery*[246]—and with the Court explicitly altering the *Teague* framework for the first time in *Edwards v. Vannoy*[247]—the Court is primed to reexamine the thirty-year-old doctrine. Reimagining the *Teague* doctrine means returning to first principles about habeas corpus and its purpose. At its core, retroactivity is a simple remedial question: Do the costs to finality and comity outweigh the benefits of vindicating constitutional rights?

In this Part, I offer a revised framework that both simplifies the retroactivity inquiry and more thoroughly engages with the finality and comity interests. The Table below compares the current *Teague* doctrine with my proposed revised framework.

First, as discussed in Part II, my observations about the finality interest and the point of finality inform my conclusion that although the direct-review point of finality may serve some important purposes, those purposes are unrelated to the retroactivity of constitutional rules. Given the absence of comity interests[248] and the weakened finality interest in state collateral review, I suggest that the trigger point for the redressability of federal constitutional violations should be tied to the conclusion of the state collateral-

245. *Duren*, 439 U.S. at 363. In *Taylor v. Louisiana*, the Supreme Court held that the systematic exclusion of women during the jury-selection process denied a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a jury selected from a fair cross section of the community. 419 U.S. 522, 526-32 (1975).

246. *See supra* Part I.B.

247. Edwards v. Vannoy, No. 19-5807, 2021 WL 1951781, at *9-11 (U.S. May 17, 2021).

248. *See supra* Part III.A.

review process, when review of the constitutionality of a criminal judgment shifts from the state to the federal government. Thus, constitutional rules should always apply retroactively on state collateral review. For similar reasons, constitutional rules should also apply retroactively to federal habeas review of federal convictions, another form of intrasystem review with no comity interests and a weakened finality interest.

On federal habeas review of state convictions, the retroactivity question is more complicated because comity interests are present and finality interests are amplified. However, I nonetheless argue that the current *Teague* approach is too narrow for at least one reason: It does not consider whether comity interests should be diminished where state reliance on old constitutional rules was illegitimate.[249] Thus, I propose that the *Teague* new-law doctrine is too narrow because it fails to consider whether a state's reliance interests may be illegitimate because the state discriminated against a federal right.

Finally, I illustrate the implications of the new framework by returning to a discussion of the *Ramos* rule at issue in *Edwards v. Vannoy*. I suggest that the nonunanimous-verdict laws held unconstitutional in *Ramos* represent an example of a state's illegitimate reliance on an old constitutional rule because the Louisiana and Oregon laws were crafted for the purpose of discriminating against the federal right established in *Strauder*.

249. *See supra* Parts III.B-.C.

Table
Remedial Framework for Constitutional Violations

	Direct Review	**State Collateral Review**	**Federal Habeas Review**	
			Federal Conviction	*State Conviction*
Old Rules	Full retroactivity	Full retroactivity	Full retroactivity (except Fourth Amend. rules)	Full retroactivity (except Fourth Amend. rules)[250]
New Rules				
Substantive	Full retroactivity	Full retroactivity	Full retroactivity	Full retroactivity
Procedural	Full retroactivity	Depends on state law and procedure[251]	No retroactivity	No retroactivity
New Framework	Full retroactivity	Full retroactivity	Full retroactivity	Depends[252]

A. Redrawing the Retroactivity Line

Full retroactivity on state collateral review supports the constitutional interests of individuals and the integrity of a criminal-justice system that treats similarly situated defendants equally. As discussed in Part II, finality as a

250. Fourth Amendment violations are an odd exception because the Supreme Court held in *Stone v. Powell* that state prisoners typically cannot be granted federal habeas relief on the grounds that "evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. 465, 494 (1976).

251. The Supreme Court held in *Danforth v. Minnesota* that *Teague* does not bind state collateral proceedings, and states may choose to apply new constitutional rules retroactively even when federal courts would be otherwise barred under *Teague*. 552 U.S. 264, 266 (2008). For a discussion of different state approaches to retroactivity, see Part II.C above.

252. *See infra* Part IV.B. Generally, the Court should decide whether a constitutional rule applies retroactively on federal habeas review of a state conviction by weighing the comity and finality interests against remedial interests: the interests of the individual and interests in the integrity of the criminal-justice system. This suggestion is admittedly vulnerable to the same legitimate criticisms of the old *Linkletter* standard. *See supra* notes 54-66 and accompanying text. However, I provide the following responses: (1) the original *Linkletter* standard was not entirely flawed and its underlying consideration of different interests ought to be revived; (2) the proposed framework is less susceptible to a wide variety of retroactivity rules because the inquiry is binary—rules either apply retroactively on federal habeas review or they do not (compare this with the *Linkletter* standard, which allowed rules to apply retroactively in cases before trials, cases before evidence was presented in trial, etc.); and (3) the current *Teague* doctrine already allows for case-by-case inquiries into individual claims, both during the litigation over whether a rule is new or old and during the litigation over whether a rule is substantive or procedural.

general interest should be less weighty in criminal procedure and state collateral review—and different approaches to the point of finality have resulted in widely differing approaches to the retroactivity question in state courts. Thus, the trigger point of the *Teague* bar should not be at the end of direct review[253] and, in fact, the retroactivity question should be untethered entirely from the point of finality. As a *constitutional* matter, new constitutional rules should always apply retroactively in state collateral proceedings.

The Court has recognized that its decision in *Teague* was an exercise in statutory interpretation of the federal habeas statute, which now includes components of AEDPA.[254] Because the federal habeas statute authorized federal courts to grant the writ of habeas corpus but failed to define its substantive scope,[255] the Court interpreted this congressional silence as "authorization to adjust the scope of the writ in accordance with equitable and prudential considerations."[256] Importantly, the Supreme Court clarified in *Danforth* that "[s]ince *Teague* is based on statutory authority that extends only to federal

253. Tung Yin proposes that shifting this trigger point to the procedural-default line addresses many of the flaws inherent in *Teague* and AEDPA: (1) the Court's struggle with defining new rules, (2) *Teague*'s operation as a threshold question, (3) *Teague* and AEDPA allowing state courts to "shirk their duties of developing constitutional law," and (4) prisoners' lack of control over the date their conviction becomes "final." Yin, *supra* note 41, at 207-08. Although I find these arguments compelling, I take issue with many aspects of the procedural-default doctrine and thus do not share in the same conclusion. For scholarly criticism of the procedural-default doctrine, see, for example, R. Lea Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741, 770 (1982) (noting the injustice of procedural-default rules in immediate cases and their deterrent effect for future cases); Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 266 (1989) (arguing that procedural default is an unjustified form of abstention); Laura Gaston Dooley, *Equal Protection and the Procedural Bar Doctrine in Federal Habeas Corpus*, 59 FORDHAM L. REV. 737, 753-63 (1991) (arguing that procedural default leads to Equal Protection Clause violations because similarly situated prisoners can be treated differently depending on the state in which they were convicted); and Jack A. Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 696-97 (1984) (noting that procedural-default rules punish defendants for the errors of their attorneys).

254. *See, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 278 (2008) ("Justice O'Connor's opinion clearly indicates that *Teague*'s general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute."); *see also* AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code).

255. *See supra* note 42 and accompanying text.

256. *Danforth*, 552 U.S. at 278; *see, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 631-38 (1993) (harmless-error standard); McCleskey v. Zant, 499 U.S. 467, 477, 489-96 (1991) (abuse-of-the-writ bar to relief), *superseded by statute*, AEDPA, 110 Stat. 1214, *as recognized in* Banister v. Davis, 140 S. Ct. 1698 (2020); Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977) (procedural-default doctrine).

courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts."[257]

In contrast, the Supreme Court's decisions in *Griffith* and *Montgomery* rest on constitutional grounds. In *Griffith*, the Court affirmed that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication,"[258] and nearly thirty years later, in *Montgomery*, it held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."[259] As Carlos Vázquez and Stephen Vladeck argue, the *Montgomery* decision was monumental because it held for the first time that prisoners, both state and federal, have a constitutional right to a collateral postconviction remedy under certain circumstances.[260] These decisions make sense; as previously discussed, the retroactivity question is not a question of whether a constitutional violation occurred—it did—but rather a question of "the availability or nonavailability of remedies."[261] In the case of new constitutional rules on direct review (*Griffith*) or new substantive rules on collateral review (*Montgomery*), the constitutional violation of individual rights outweighs any countervailing interests in comity or finality.

The Court's underlying reasoning in *Griffith*, *Teague*, *Danforth*, and *Montgomery* thus supports the conclusion that new constitutional rules should apply retroactively on state collateral review. Because the comity interest is nonexistent in the context of state collateral review of state criminal proceedings, the only remaining interest under *Teague* is finality, and this reduced finality interest fails to outweigh the interest in vindicating an individual's constitutional rights.

B. *Teague*'s New-Law Doctrine and State Discrimination Against Federal Rights

The inadequate-state-ground doctrine and the *Testa* line of cases illustrate that comity between the state and federal government is a powerful interest that the Court will rarely disturb. That is, the Court is hesitant to speculate about a state's intentions and will often respect a state's law or procedures as long as there is a conceivable legitimate interest. But the Court has been clear

257. *Danforth*, 552 U.S. at 278-79.

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

259. Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016) ("*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts.").

260. *See* Vázquez & Vladeck, *supra* note 106, at 910; *see also supra* note 106.

261. *Danforth*, 552 U.S. at 290-91; *see also* Part I.B.

on one exception: Where at least one state interest appears to be discrimination against a federal right, the Court will strike down state action as a violation of the Supremacy Clause.[262]

That the Court should similarly consider the legitimacy of reliance interests in the retroactivity question is a natural extension of its treatment of other comity doctrines. Where a state's laws or procedure appear calculated to avoid a federal right, such as the use of racist peremptory strikes in *Batson* to circumvent *Strauder*, the state's interests in comity are vitiated, even if it relied on an old constitutional rule. This result makes sense: A state that acts in this manner effectively attempts to a create a legal loophole to avoid enforcing a federal right. In such a situation, the state's interest in nonretroactivity is low, and the Court should generally hold that new constitutional rules in these circumstances warrant full retroactivity on federal habeas review.

C. Retroactivity of the *Ramos* Rule

In conclusion, I return to the retroactivity of the *Ramos* rule, the issue in *Edwards v. Vannoy*.[263] In *Edwards*, the Court addressed two questions: whether the bar on nonunanimous jury verdicts (1) could qualify as an old rule or (2) otherwise fell under the *Teague* exception for watershed rules of criminal procedure.[264] The Court, in an opinion written by Justice Kavanaugh, answered no to both questions.[265] In response to the first question, the Court found that *Ramos* renounced the Court's previous decision in *Apodaca v. Oregon*, a 1972 decision upholding state nonunanimous verdicts,[266] and thus announced a new rule for the purposes of retroactivity.[267] And as discussed previously, the Court not only found that the *Ramos* rule was not a watershed rule but also held that no future criminal-procedure rule would ever qualify under that exception.[268]

Under the proposed new framework, the old-rule–new-rule distinction is not the pertinent one. Indeed, even assuming that *Apodaca* was a precedential rule, there are good reasons to question whether Louisiana and Oregon's reliance on *Apodaca* was legitimate. As Justice Gorsuch detailed at the beginning of his opinion, Louisiana's nonunanimous-verdict rule was adopted at an 1898 constitutional convention.[269] The express purpose of that

262. *See supra* Parts III.B-.C.

263. No. 19-5807, 2021 WL 1951781, at *5 (U.S. May 17, 2021).

264. *Id.*

265. *Id.* at *5-9.

266. 406 U.S. 404, 406 (1972) (plurality opinion), *abrogated by* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

267. *Edwards*, 2021 WL 1951781, at *5-6.

268. *Id.* at *6-11; *see supra* notes 87-94 and accompanying text.

269. *Ramos*, 140 S. Ct. at 1394.

convention was to "'establish the supremacy of the white race,'" a purpose that led it to enact many other Jim Crow laws, including a poll tax, a literacy test, a property-ownership test, and a grandfather clause that "in practice exempted white residents from the most onerous of these requirements."[270] The convention adopted the "facially race-neutral" nonunanimous-verdict rule "to ensure that African-American juror service would be meaningless."[271] In Oregon, the story was similar: The nonunanimous-verdict rule was adopted alongside "the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'"[272] Both states' courts explicitly recognized the role of racism in the adoption of their nonunanimous-verdict rules.[273] Thus, the nonunanimous-verdict rules were no different from the racist peremptory strikes at issue in *Batson*—a direct attempt to discriminate against and circumvent the *Strauder* holding that the purposeful exclusion of Black jury members deprives a Black defendant of equal protection under the Fourteenth Amendment.[274]

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270. *Id.* (quoting OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 374 (H.J. Hearsey ed., 1898)).

271. *Id.* (quoting State v. Maxie, No. 13-CR-72522, at 28 (La. Dist. Ct. Oct. 11, 2018)).

272. *Id.* (quoting State v. Williams, No. 15-CR-58698, 2016 WL 11695154, at *10 (Or. Cir. Ct. Dec. 15, 2016)).

273. *Id.*

274. The Court considered a related argument in *Edwards* but rejected the racial-discrimination argument by comparing the *Ramos* rule to the *Batson* rule, which the Court had previously held was nonretroactive under the older *Linkletter* standard. *See* Edwards v. Vannoy, No. 19-5807, 2021 WL 1951781, at *8 (May 17, 2021). I agree that *Batson* is an apt comparison, but because I argue that *Batson* is an example of state discrimination against a federal right, *see supra* Part III.C., this comparison cuts in favor of full retroactivity of the *Ramos* rule. In his opinion concurring in part in *Ramos*, Justice Kavanaugh identified the racist origins of the nonunanimous jury and recognized it as an attempt to circumvent the *Strauder* right, much like the discriminatory peremptory strike:

> In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors. After all, that was the whole point of adopting the non-unanimous jury requirement in the first place. And the math has not changed. Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors "can simply ignore the views of their fellow panel members of a different race or class." That reality—and the resulting perception of unfairness and racial bias—can undermine confidence in and respect for the criminal justice system. The non-unanimous jury operates much the same as the unfettered peremptory challenge, a practice that for many decades likewise functioned as an engine of discrimination against black defendants, victims, and jurors. In effect, the non-unanimous jury allows backdoor and unreviewable peremptory strikes against up to 2 of the 12 jurors.

Ramos, 140 S. Ct. at 1417-18 (Kavanaugh, J., concurring in part) (citation omitted) (quoting Johnson v. Louisiana, 406 U.S. 356, 397 (1972) (Stewart, J., dissenting)). Justice Kavanaugh concluded his opinion by stating, "[i]n sum, *Apodaca* is egregiously wrong, it has significant negative consequences, and overruling it would not unduly upset reliance interests." *Id.* at 1420.

Thus, the nonunanimous-verdict rules in Louisiana and Oregon—adopted decades after *Strauder* guaranteed the constitutional right against race-based exclusion of jurors—were direct, deliberate, and surreptitious attempts to discriminate against this established federal right.[275] A searching inquiry into the history of the nonunanimous-verdict provisions counsels against deferring to a state's reliance on old rules. A federal court does little to upset comity interests by reopening a state final conviction that rests on a rule that was motivated by white supremacy and explicitly crafted with the purpose of discriminating against a federal right. In light of these facts, the Court should have ruled that *Ramos* has full retroactivity on federal habeas review.

Conclusion

Legal scholars have long criticized the *Teague* doctrine, and as Justice Gorsuch recently wrote in his *Edwards* concurrence, the Court's precedents "illustrate how mystifying the whole *Teague* project has been from its inception."[276] With the Supreme Court altering the *Teague* framework for the first time in *Edwards*, I argue for a reimagining of how the Supreme Court approaches the retroactivity question. Any reimagining must adopt a new approach to finality and comity, two interests that are currently overvalued in the *Teague* doctrine. When compared to the Court's approach in other legal doctrines, the interests in finality and comity in criminal procedure lose substantial weight.

In light of the weighty remedial interests—not just in accuracy but in human dignity and judicial integrity—a revised retroactivity framework should be more generous about granting retroactivity remedies for violations of constitutional rights. New constitutional rules should always apply retroactively on state collateral review and federal habeas review of federal convictions, and the Court should inquire more carefully into whether a state's reliance on an old constitutional rule was legitimate. During a time when the criminal-justice system is, justifiably, under more scrutiny than ever, the Court should recognize the importance of reopening once-final convictions and sentences that were adjudicated under unconstitutional regimes.

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275. In fact, along with the federal courts, the other forty-eight states all required unanimous verdicts for conviction. *See Ramos*, 140 S. Ct. at 1394; *see also* Patton v. United States, 281 U.S. 276, 288 (1930) (holding that the Sixth Amendment guarantees the right to a trial by jury and "that the verdict should be unanimous"), *abrogated by* Williams v. Florida, 399 U.S. 78 (1970).

276. *Edwards*, 2021 WL 1951781, at *19 (Gorsuch, J., concurring) ("The test itself has been fraught with contradictions from the start.").