The New Habeas

Kathleen Patchel

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Article

The New Habeas

by

Kathleen Patchel

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The New Habeas

by
KATHLEEN PATCHEL*

"Procedure is the blindfold of Justice."

Introduction

In Spring 1990, the United States Supreme Court did a little spring cleaning, and one thing it finally decided to throw out was federal habeas corpus review of state court constitutional determinations regarding criminal procedure. 28 U.S.C. § 2254(a) states that

[the Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.]

In 1953, in Brown v. Allen, the Court determined that Congress intended federal habeas to be a mechanism for de novo review of state prisoner's constitutional claims in order to ensure federal courts the "final say" with regard to federal constitutional issues: "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." This view was confirmed ten years later in Fay v. Noia, in which the Court stated that the habeas statute always had evidenced a "clear congressional policy of af-

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* Assistant Professor, Northern Illinois University College of Law. J.D. 1981, University of North Carolina at Chapel Hill School of Law; LL.M. 1987, Yale Law School. This Article is dedicated to The Honorable Frank M. Johnson, Jr., Judge, United States Court of Appeals for the Eleventh Circuit, who taught me to "look to the Pole Star." Thanks also to the "worry beads"—Dan, David, and Vince—and to Professors Lea Brilmayer and W. Michael Reisman of the Yale Law School—they know why.

3. 344 U.S. 443 (1953).
4. Id. at 508 (opinion of Frankfurter, J.).
fording a federal forum for the determination of the federal claims of state criminal defendants."6 The Court thus concluded that habeas jurisdiction "is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may appear in the state court proceedings."7

In 1990, in Butler v. McKellar,8 the Court determined that federal habeas is a mechanism for validating "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."9 Given such a reasonable, though "wrong," state court interpretation, habeas is available only if the petitioner can establish that her constitutional claim alleges that either punishment of her conduct or the particular penalty imposed is beyond the power of the state or that her claim is one of those extremely rare "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."10 The Butler Court dealt with the same statutory language as the Courts in Brown and Fay, yet the Butler majority did not mention, much less overrule, either of those decisions. Nevertheless, the habeas of Butler clearly is not the habeas of Brown and Fay.

More than time separates the decisions in these cases: they reflect fundamentally different views of federalism, of the role of federal courts, and, ultimately, of constitutional adjudication itself. The "old" habeas—the habeas of Brown and Fay—was the procedural counterpart to the Warren Court's expansion of the constitutional protections afforded state criminal defendants, an expansion accomplished through selective incorporation of the Bill of Rights into the fourteenth amendment.11 The broad scope of the old habeas provided a federal mechanism for imposing those new procedural rights upon the states.12 The new habeas provides the mechanism for a new agenda: the return of control over criminal procedure to the states.

Although in Butler the Rehnquist Court apparently delivered the final blow to the old habeas, its demise was a gradual one. The rejection of the vision it embodied was the result of a war of attrition that began long before the Rehnquist Court. Indeed, in true tragic

6. Id. at 418.
7. Id. at 426.
9. Id. at 1217.
12. Id.
fashion, the seeds of its destruction were sown almost at the time of its inception—in *Fay* and the retroactivity doctrine the Warren Court employed to ameliorate the impact of its new criminal procedure requirements.

In this Article, I explore the process by which the habeas of *Brown* and *Fay* became the habeas of *Butler*. I first review the philosophical background that provided proponents of the new habeas with the analytical weapons with which to wage the battle against the old habeas and the cases in which those weapons were used. I then look at the characteristics of the new habeas that emerge from these cases and the way in which the new habeas structures federal-state relations in the area of state criminal procedure. Finally, I look at some of the broader consequences of the process the Court employed in developing the new habeas. Ultimately, I conclude that by restricting habeas, the Court de facto has returned the development of constitutional restrictions on criminal process to the states, and that it has done so through a process that has profound and troubling implications for the future of constitutional adjudication.

I. The Philosophical Grounding of the New Habeas: Bator and Friendly

The philosophical background of the new habeas is found in two extremely influential law review articles: Professor Paul Bator’s *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners* and Judge Henry Friendly’s *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*. The arguments presented in these articles were instrumental in developing the new habeas, although in very different ways. Bator established the test for finality used by the Court to restrict the scope of habeas; Friendly provided the rhetoric necessary to make the concomitant restriction of federal constitutional rights palatable.

A. Professor Bator’s Functional Analysis of Habeas Review

Professor Bator’s article explores the circumstances in which federal habeas review of federal constitutional claims previously adju-

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16. *Id.*
dicated in state criminal proceedings is justified. His analysis begins with two important assumptions. First, he assumes that the scope of habeas jurisdiction must be justified in terms of some unique procedural function that habeas review serves, rather than in terms of whether review is necessary to guarantee correct results in given cases. This assumption follows from Bator's position that it is a "fundamental epistemological error" to assume that a court can make a determination, either of law or fact, that is correct in some ultimate sense. Both as to determinations of fact and determinations of law, "[a] court cannot any more than any other human agency break down the barrier between appearance and reality." Thus, he rejects any attempt to justify the scope of federal habeas in terms of the need to correct state court decisions that are "wrong" or to vindicate rights that exist as a matter of "ultimate reality." Because finality never will occur naturally through discovery of the "truth," it must be created artificially by allocating final authority to decide whether error has occurred to "some complex of institutional processes... even though in the very nature of things no such processes can give us ultimate assurances."

Therefore, the choice between allowing relitigation through habeas review or holding the state determination final must be based on "functional, institutional and political considerations," rather than on the need to correct error. Thus, the initial inquiry as to whether

17. Bator, supra note 13, at 443.
18. Id. at 449.
19. Id. at 450.
20. Id. at 446-50.
21. Id. at 447 (quoting Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953, 966 (1957)).
22. Bator, supra note 13, at 450.
23. Id. at 447.
24. Id. at 449. According to Bator, the task "is to define and create a set of arrangements and procedures which provide a reasoned and acceptable probability that justice will be done, that the facts found will be 'true' and the law applied 'correct.'" Id. at 448. The goal is a set of institutional arrangements that provide "an assurance of justice deemed acceptable by society." Id.

Bator's epistemological observations about our ability to know truth are, of course, widely shared in modern society, and can be viewed as providing a rationale for many of the finality doctrines that we have incorporated into our procedural system. For instance, the following famous rationale for res judicata reflects much of Bator's argument:

Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first. Stoll v. Gottlieb, 305 U.S. 165, 172 (1938). Another famous passage, disagreeing with Brown's
to allow habeas review must examine "whether the complex of arrangements and processes which previously determined the facts and applied the law validating detention was adequate to the task at hand." That is, was adjudication through the state court system a sufficient "set of institutional arrangements" such that society can be satisfied with giving finality to the determination of that court system, or are there "functional, institutional or political considerations" that indicate that federal review is required as well?

Bator's second assumption relates to allocating the burden of persuasion with regard to access to a federal habeas forum. According to Bator, the presumption should be against relitigation because "if a job can be well done once, it should not be done twice." Given that no amount of relitigation can ensure freedom from error, conservation of resources suggests that proponents of redetermination of the merits should bear the burden of providing "some reasoned institutional justification" for not granting finality to the first proceeding, which was decided on the merits through processes "fitted to the task in a manner not inferior to those which would be used in a second proceeding."

Bator believes the costs of "mere iteration of process" also support the presumption against relitigation. The state judge's sense of responsibility can be subverted by "an indiscriminate acceptance of the notion that all the shots will always be called by someone else." The deterrent and rehabilitative functions of the criminal law also may be impaired. Deterrence requires that those violating the law be subject to swift and certain punishment. That threat will be undermined if "we so define the processes leading to just punishment that it can really never be finally imposed at all." Rehabilitation also requires that a prisoner recognize she is subject to sanction and needs rehabilitation. According to Bator, this "cardinal moral predicate" expansive interpretation of the scope of habeas review, also reflects this view: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

25. Bator, supra note 13, at 449.
26. Id. at 448.
27. Id. at 449.
28. Id. at 451.
29. Id.
30. Id.
31. Id.
32. Id. Bator suggests that the "important functional and ethical purposes" served by allowing appeal offset this cost, but that "[t]he acute question is the effect it will have on a trial judge if we then allow still further recourse where these purposes may no longer be relevant." Id.
33. Id. at 452.
34. Id.
will be missing "if society itself continuously tells the convict that [s]he may not be justly subject to reeducation and treatment in the first place."\textsuperscript{35} Finally, relitigation denies society the repose that is "a psychological necessity in a secure and active society."\textsuperscript{36} One aim of a procedural system should be "to devise doctrines which, in the end, do give us repose, do embody the judgment that we have tried hard enough and thus may take it that justice has been done."\textsuperscript{37}

Thus, Bator denies that proceedings are based on "correct" determinations of law and fact. Further, he rejects that mere redundancy of process serves any value that justifies relitigation absent some functional need for federal court redetermination of issues already decided in state court proceedings.\textsuperscript{38}

Bator's functional analysis of habeas review leads him to conclude that relitigation serves a function beyond mere reconsideration of the merits in only two situations: when there is either failure of process or lack of jurisdiction. In these instances, the state court system is not a sufficient "set of institutional arrangements" for society to be satisfied with giving finality to the result. Although Bator finds the precedent in this area somewhat unclear, he also believes that these situations constitute the historic boundaries of habeas jurisdiction.\textsuperscript{39}

According to Bator, "it is always an appropriate inquiry whether previous process was meaningful process, that is, whether the conditions and tools of inquiry were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied."\textsuperscript{40} Failure of process includes circumstances in which no opportunity was provided in the initial proceeding to litigate a relevant question and those in which the previous litigation opportunity was tainted, for instance, through mob domination of the trial, bribery of the judge, or a coerced guilty plea.\textsuperscript{41} In these situations, the habeas court does not review the case for substantive error of fact or law, "but [inquires] whether the processes previously employed for de-

\textsuperscript{35.} Id.
\textsuperscript{36.} Id.
\textsuperscript{37.} Id.
\textsuperscript{39.} Bator, supra note 13, at 498-99 ("There can be no doubt that when Brown v. Allen reached the Court in 1952, the central thrust of the law was . . . [that] for purposes of habeas corpus a detention was not to be deemed 'unlawful' if based upon the judgment of a competent state court which had afforded full corrective process for the litigation of questions touching on federal rights.") (citation omitted).
\textsuperscript{40.} Id. at 455 (emphasis omitted).
\textsuperscript{41.} Id. Bator also considered denial of the constitutional right to counsel to be an example of failure of process. Id. at 458.
termination of questions of fact and law were fairly and rationally adapted to that task." Thus, the habeas court is not engaging in mere reiteration of process; the alleged deficiency goes to the heart of the state court's ability to make legitimate determinations at all. Accordingly, "supervisory jurisdiction should exist to test the question whether the processes furnished by the previous tribunal were meaningful and rational." Permitting relitigation in the context of lack of jurisdiction simply requires an application of the black-letter rule that a judgment by a court that does not have jurisdiction or competence to decide the issue before it may be attacked collaterally. Thus, the habeas court can appropriately "deny conclusive effect to a state judgment of conviction" if federal law made the state incompetent to deal with the case.

In contrast to these two historic functions of habeas, Bator finds the broad habeas jurisdiction of Brown v. Allen (which allows relitigation of all federal constitutional questions decided in the state court) is not justified by either history or some functional, institutional or political need beyond mere reiteration of process. In light of the costs incurred through relitigation and the resulting presumption against it, Bator finds all of the justifications offered to support an expansive view of habeas jurisdiction unpersuasive.

Bator readily rejects most of the traditional structural arguments in favor of habeas review. He does not believe that habeas review of state prisoners' constitutional claims is a function of the supremacy clause. The substantive superiority of federal law "does not automatically tell us that it is better for federal judges to pronounce it than state judges, much less that once a state judge has done so on a fair and rational investigation, this should be disregarded and done over again by a federal judge." Nor is habeas justified on the ground that a state prisoner is entitled to have federal claims heard by a fed-

42. Id. at 455 (emphasis added).
43. Id. at 456 (citation omitted). All that is required to correct a failure of process, however, is "one forum concededly unbiased using procedures concededly rational." Id. at 456 n.26. Although that forum could be a state appellate court, Bator believed that normally habeas review would be required because the process of the state appellate courts is likely to have been affected by the error as well. Id.
44. Id. at 460-61. Although the decision may not be erroneous, "allowing it to 'count' would violate the political rules allocating institutional competencies to deal with various matters." Id. at 461.
45. Id. at 461.
46. 344 U.S. 443 (1953).
47. Bator, supra note 13, at 463-65.
48. Id. at 505.
eral tribunal.\textsuperscript{49} State prisoners have no constitutional right to a federal forum to determine the merits of their constitutional claims.\textsuperscript{50} Moreover, state courts routinely finally determine federal issues in civil cases and in criminal cases that do not involve detention, in which the only federal recourse is discretionary certiorari review in the Supreme Court. Neither is habeas review justified by the need to supplement the Supreme Court's certiorari jurisdiction to hear state prisoners' constitutional claims.\textsuperscript{51} Bator does not believe that cases involving constitutional rights and imprisonment can be distinguished sufficiently from civil and non-detention cases such that a right to a federal forum is appropriate in that context although not recognized in the others.\textsuperscript{52} According to Bator, just because a state court's decision on a prisoner's claim is \textit{couched} in terms of constitutional law, it "does not logically tell us anything about the underlying importance of the actual issue canvassed."\textsuperscript{53} If the constitutional issue is, in fact, significant, it already falls within the purpose of the certiorari jurisdiction of the Supreme Court.\textsuperscript{54}

Furthermore, because of his epistemological position, Bator finds "no intrinsic reason"\textsuperscript{55} why a federal court's determination of the state prisoner's constitutional claim would be more "correct" in an

\begin{itemize}
\item \textsuperscript{49} Id. at 507.
\item \textsuperscript{50} Id. Bator believed this proposition necessarily followed from Congress' constitutional powers to control the appellate jurisdiction of the Supreme Court; and to control the very existence of the lower federal courts. \textit{Id.} see U.S. Const. art. III. Bator does recognize that civil cases raising federal questions on the face of the complaint are subject to removal by the defendant to federal court, but states that this "does not qualify the point that if the state court is left to adjudicate the case, it is allowed to adjudicate all the questions, federal and state, in it, and the litigants have no right to a federal-court disposition of the merits of the federal issues therein." \textit{Bator, supra} note 13, at 507 n.190.
\item \textsuperscript{51} Bator, \textit{supra} note 13, at 507-08.
\item \textsuperscript{52} Id. at 507-08.
\item \textsuperscript{53} Id. at 508.
\item \textsuperscript{54} Id. Bator also notes the irony of considering a constitutional issue important enough to require relitigation in a federal forum simply because it is constitutional when the key factual issue of innocence or guilt cannot be relitigated:
\begin{quote}
If a state prisoner claims that he confessed after he was interrogated for six hours, not (as the state court found) for four, the law says he may relitigate the issue and, perhaps, gain release as a consequence, even though the evidence of guilt may be overwhelming. But if a defendant is convicted of murder and ten years later another person confesses to the crime, so that we can be absolutely certain that the defendant was innocent all the time, the law says that he must rely on executive clemency. Why? Why should we pay so little attention to finality with respect to constitutional questions when, in general, the law is so unbending with respect to other questions which, nevertheless, may bear as crucially on justice as any constitutional issue in the case?
\end{quote}
\textit{Id.} at 509. One cannot help feeling that Judge Friendly highlighted this particular passage in his copy of Bator's article. \textit{See infra} text accompanying note 91.
\item \textsuperscript{55} Bator, \textit{supra} note 13, at 509.
\end{itemize}
ultimate sense than the state court’s determination. Although he recognizes that federal judges have certain advantages as decisionmakers over state court judges by virtue of their insulation from political pressures, their presumed sympathy to federal law, and their differing perspective with regard to federal constitutional issues, Bator concludes that these are insufficient to support broad habeas review. Federal law is necessarily a part of state law and “deciding federal questions is an intrinsic part of the business of state judges.” Thus, implicit in the structure of federalism is “the need for confidence that the state courts will conscientiously apply to a case the whole of the applicable law, including the federal law.” Bator thus refuses to accept that “state-court judgments about federal rights bearing on state cases should be automatically ignored on the basis of rather nebulous and open-ended assumptions about their inadequacy.” For Bator, the ability of the habeas court to review state prisoner claims of failure of process sufficiently protects against the possibility of state court abuse.

Finally, Bator addresses whether a broad habeas jurisdiction is needed as the procedural counterpart to the expansion of substantive doctrines limiting the power of the states in their administration of criminal justice. Proponents of broad habeas jurisdiction argue that it is necessary to ensure that new federal rights are not “subtly eroded” by state courts that pay “verbal respect . . . to the principles [while]

56. Id. at 509, 513-14.
57. Id. at 510-11.
58. Id.
59. Id. at 511.
60. Id.
61. Id. Bator distinguishes federal question jurisdiction, which is supported by the rationales he finds unpersuasive in the habeas context—Independence and objectivity of federal judges, as well the ability to provide “specialized and knowledgeable tribunals with procedural and remedial tools which may be more effective in enforcing federal rights than those available in the state system.” Id. at 512. Federal question jurisdiction, either as an original matter or through removal, involves a totally different “calculus” because it deals with the question of “whether an entire lawsuit involving federal issues should originally be adjudicated by a federal or state court.” Id. According to Bator, [T]he calculus which tells us that these advantages justify giving litigants the option to have their lawsuits tried entirely in federal court is surely a different one than where the question is whether a suit which is and must be tried in state court should then be reopened to allow the redetermination of federal questions by a federal judge. The whole point is that in the latter situation we have already made the fundamental decision that we do want the state courts to decide the case. And it is this decision that creates the special problems of waste of resources, strain in federal-state relations and damage to the fabric of criminal law which bear so acutely on the decision whether we should superimpose collateral review on the Supreme Court’s direct supervisory jurisdiction.

Id.
the substance [is] robbed of meaning through a stringent and un-
sympathetic application." Although Bator is troubled by the pros-
pect that state courts might not apply the spirit as well as the letter
of federal law, he rejects this argument based on his belief that a
remedial system "must be tailored for tomorrow as well as today." Bator argues that substantive law will stabilize in the foreseeable fu-
ture and the distrust of state court constitutional interpretations then
will no longer be justified. For the present, the power of federal
habeas courts to consider claims of failure of process provides a fed-
eral mechanism to ensure that procedures exist in state courts to vin-
dicate federal rights. Bator questions whether federal habeas review
should address the further problem that federal court supervision of
state process cannot "guard against cases where there has been the
appearance of fairness but not its inner essence." Indeed, he spec-
tulates that this type of "inner conscientiousness" might be a by-
product not only of supervision from above but also of responsi-
bility," and, therefore, may not be served by removing responsibility
from state judges.

Ultimately, Bator concludes that the proper verdict on the case
for expansive habeas jurisdiction is "not proven" because the
doubtful nature of any institutional necessity for a broad habeas ju-
risdiction is outweighed by its costs. Further, for Bator, a broad
habeas jurisdiction does not promote reform of state criminal pro-
cedures, but rather discourages it by making those reforms irrelevant
to whether relitigation occurs.

Bator does not, however, reach his conclusion easily. In partic-
ular, he remains troubled by the argument that federal habeas review
is necessary to ensure compliance with the spirit as well as the letter
of federal law:

62. Id. at 523.
63. Id. at 525.
64. Id. at 523.
65. Id.: at 524. Thus, Bator asserts that the scope of habeas should not be "premised on
unceasing and revolutionary change" and the lack of sympathy found in state courts for federal
law.
66. Id.
67. Id.
68. Id. at 524-25.
69. Id. at 525.
70. These costs include what Bator terms the "abrasions and conflicts created by federal
interference with the states' administration of criminal justice" and the "very real claims which
the need for finality and repose ... make on the criminal process," particularly in light of the
"philosophically faulty premises about justice which are often at the heart of the demand that
we repeat inquiry endlessly to make sure that no mistake has been made." Id.
71. Id.
Nevertheless, I cannot pretend that the case the other way is weightless. Our traditional doctrines of judicial review do rest on the premise of good-faith judging. Whenever good faith is questioned, strain is put on the ordinary rules of review; and maybe untraditional and extraordinary accommodations should therefore be made. There is surely appeal in the notion, and perhaps it makes sense at a time when there still is a justified suspicion and distrust of state-court rulings as to federal constitutional rights, to have a jurisdiction with a large and roving commission "to prevent a complete miscarriage of justice"....

Bator suggests it may be "well that a writ the historic purpose of which is to furnish 'a swift and imperative remedy in all cases of illegal restraint'... should be left fluid and free from the definiteness appropriate to ordinary jurisdictional doctrines." 72 Perhaps there is a need for a broad grant to the federal courts of the power "to re-determine the merits to assure that covert unfairness does not lurk behind the appearance of fairness." 73 If Bator's verdict is that the case for broad habeas jurisdiction has not been proven, this passage constitutes a substantial modification of his opinion upon rehearing. 75

Bator believes that the power to act as a "roving commission" for justice would give the federal district courts a function similar to that intended to be served by executive clemency, a power that he notes the states have failed to utilize. 76 If the habeas court serves as a federal substitute for state executive clemency, a body to prevent the miscarriage of justice in individual cases, then its decision should be based not only on whether a redetermination of the merits of the case would suggest error in the state court decision, 77 but also on whether "the district judge can be morally assured that [the petitioner] was guilty." 78 Because Bator views this "roving commission" function as the only convincing institutional justification for a broad habeas jurisdiction, he suggests:

If Brown v. Allen is to remain the law, it should be modified to make clear that where a federal constitutional question has been fully canvassed by fair state process, and meaningfully submitted for possible

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72. Id. (citation omitted).
73. Id. (quoting Sunal v. Large, 332 U.S. 174, 187 (1947) (Frankfurter, J., dissenting)).
74. Id. at 526.
75. This passage also forms one of the bases of Friendly's article, for Bator suggests that, if avoidance of injustice is to be the rationale for habeas review, "all the factors which bear on justice should be put on the scales," id. at 527, including whether the defendant is in fact guilty as charged. Id. See infra text accompanying note 91.
76. Id. at 525-26.
77. Id. at 526.
78. Id. at 527. Bator suggested, "what is called for... is a decision, based on all the facts, whether justice really does call for release in the particular case." Id. at 526.
Supreme Court review, then the federal district judge on habeas, though entitled to redetermine the merits, has a large discretion to decide whether the federal error, if any, was prejudicial, whether justice will be served by releasing the prisoner, taking into account in the largest sense all the relevant factors, including his conscientious appraisal of the guilt or innocence of the accused on the basis of the full record before him.79

Thus, despite his previous finding that the costs of a broad habeas jurisdiction outweigh its benefits, Bator cannot completely convince himself of his own conclusion. Even though he admonishes that ensuring the "accuracy" of state court determinations of federal constitutional rights cannot support a procedural system, he is unable to resist presenting what he considers the blueprint for such a system.

At first glance, it seems rather odd that Bator finds an argument based on the difference between appearance and reality more persuasive than more traditional institutional arguments for federal habeas review. One can certainly argue that Bator has fallen into his own "epistemological error," as the essence of his argument closely resembles one that he rejected out of hand: that federal habeas review is needed to ensure "correct" interpretations of federal constitutional law. Bator would respond that his concern is not that a state court determination was "incorrect," but rather that it was the product of a hidden bias and, therefore, suffers from a defect closely akin to a failure of process. Ultimately, however, the apparent strict dichotomy between Bator's focus on process and his proposal for use of the federal courts as a roving commission is illusory: rather than presenting a dichotomy, the concepts of a state court's erroneous legal determination and its failure to provide adequate corrective process for the vindication of federal rights at some point merge.80 Nevertheless, the idea that a federal district judge can be "morally assured" as to a petitioner's guilt is fundamentally inconsistent not only with the idea that truth is unknowable, but also with Bator's central focus on the importance of process to which his basic epistemological position led him.

79. Id. at 527-28.
80. Professor Seidman makes this point in his discussion of Stone v. Powell, 428 U.S. 465, 482 (1975), which held that federal habeas is not available to challenge fourth amendment claims when the state court has provided the petitioner with a full and fair hearing on the issue. Seidman, supra note 15, at 459 n.133. He argues that a state's legal judgment regarding a fourth amendment claim is erroneous because it is an inadequate mechanism for the vindication of fourth amendment rights. Id. If a state court announced that it no longer would honor fourth amendment claims as a matter of law, it clearly would be unable to provide an adequate corrective mechanism for fourth amendment violations; why should the result differ if the state court's refusal is limited to a narrow category of fourth amendment claims? Id.
Bator's article was published just as the Court rendered its decision in *Fay v. Noia,*\(^8\) which reaffirmed that federal habeas jurisdiction extends to any allegation of unconstitutional restraint.\(^9\) Bator later described this article as having "had the strange history of being pronounced dead almost as soon as it was written, only to enjoy a mysterious recent resurrection."\(^10\) That description was more apt than Bator could have known, for although Bator's arguments for a limited habeas jurisdiction were rejected by the holding in *Fay,* the limits on habeas he proposed in his article profoundly influenced the subsequent course of the Court's habeas corpus jurisprudence. Indeed, while Bator may have lost the battle with the rejection of limited habeas in *Fay,* his ideas as to the appropriate scope of habeas won the war with the decision in *Butler v. McKellar.*\(^4\)

B. Judge Friendly's Innocence Standard

Judge Friendly's article, written seven years after Professor Bator's, relies heavily on Bator's arguments, although it employs them to support a very different proposal as to the proper scope of habeas jurisdiction.\(^5\) In his article, Friendly agrees with Bator that habeas has expanded beyond its historic application to cases of failure of process and lack of jurisdiction.\(^6\) Like Bator, he believes that ex-

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82. Id. at 426.
84. 110 S. Ct. 1212 (1990).
85. Friendly acknowledges that he has "drawn heavily" upon Bator's article. Friendly, supra note 14, at 146 n.15. Friendly also relies heavily on arguments made by Justice Black in *Kaufman v. United States,* 394 U.S. 217 (1969) (Black, J. dissenting). In dissenting from the *Kaufman* Court's refusal to hold that fourth amendment search and seizure claims were not cognizable in federal collateral proceedings under 28 U.S.C. § 2255, the federal prisoner counterpart of § 2254, Justice Black stated that he "would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt." Id. at 242 (Black, J., dissenting). This test for habeas review is based on Black's assertion that "the great historic role of the writ of habeas corpus has been to insure the reliability of the guilt-determining process," and, therefore, it is the "element of probable or possible innocence that . . . should be given weight in determining whether a judgment after conviction and appeal and affirmation should be open to collateral attack." Id. at 234 (citation omitted). Because fourth amendment claims are not guilt-related, Justice Black would have limited the availability of federal collateral proceedings for both state and federal prisoners alleging search and seizure violations to those situations in which special circumstances, such as the inability to have the claim adequately considered in the former proceedings, could be shown. Id. at 241-42 & 242 n.11. This approach to habeas review of fourth amendment claims later was adopted by the Court in *Stone v. Powell,* 428 U.S. 465 (1975). See infra Part II. A.
86. Friendly, supra note 14, at 142, 151.
panded habeas "carries a serious burden of justification" because of its related costs: impairment of the deterrent and rehabilitative functions of the criminal law; loss of reliability in factual determinations (both on habeas and on retrial because of delay in filing for collateral relief); drain on resources of judges, prosecutors, and attorneys; difficulty in separating meritorious from frivolous petitions because of the volume of filings; and lack of respect for criminal judgments. Finally, like Bator, he believes that neither the constitutional label carried by rights subject to habeas review under Brown and Fay nor the life and liberty interests at stake in criminal proceedings provide an adequate justification for the lack of finality resulting from such broad habeas review. According to Friendly, the expansion of constitutional rights through selective incorporation of the Bill of Rights did away with the validity of

the assumption that simply because a claim can be characterized as "constitutional," it should necessarily constitute a basis for collateral attack when there has been fair opportunity to litigate it at trial and on appeal. Whatever may have been true when the Bill of Rights was read to protect a state criminal defendant only if the state had acted in a manner "repugnant to the conscience of mankind," the rule prevailing when Brown v. Allen was decided, the "constitutional" label no longer assists in appraising how far society should go in permitting relitigation of criminal convictions. It carries a connotation of outrage—the mob-dominated jury, the confession extorted by the rack, the defendant deprived of counsel—which is wholly misplaced when, for example, the claim is a pardonable but allegedly mistaken belief that probable cause existed for an arrest . . . . A judge's overly broad construction of a penal statute can be much more harmful to a defendant than unwarranted refusal to compel a prosecution witness on some peripheral element of the case to reveal his address. If a second round on the former is not permitted, and no one suggests it should be, I see no justification for

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87. Id. at 146.
88. Id. at 146-49.
89. Friendly believes that the costs of broad habeas are not at all answered by the Supreme Court's conclusory pronouncement: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Why do they have no place? One will readily agree that "where life and liberty are at stake," different rules should govern the determination of guilt than when only property is at issue. . . . I would agree that even when he has had [the benefit of these rules] at trial and on appeal, "[t]he policy against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation." But this shows only that "conventional notions of finality" should not have as much place in criminal as in civil litigation, not that they should have none.

Id. at 149-50 (citations omitted).
one on the latter in the absence of a colorable showing of innocence.90

While Bator argues that the scope of federal habeas review should be limited by allowing review only to assure the adequacy of state process, Friendly argues that habeas should be limited by allowing review only to prevent the incarceration or execution of the innocent. Thus, Friendly's central thesis is that, with the exception of four types of cases, the petitioner must supplement her constitutional claim with "a colorable claim of innocence" in order to obtain federal habeas review of a criminal conviction.91

This test is not satisfied merely by a showing that a defendant would not have been convicted in the absence of the admission of evidence that allegedly was unconstitutionally obtained.92 Friendly thus does not envision the innocence standard as being a form of harmless error doctrine.93 Instead, the petitioner must establish a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.94

This test thus suggests an individualized inquiry into the actual, factual guilt of each petitioner as the jurisdictional threshold for habeas review of her claim. Such an approach is consistent with Bator's "roving commission" rationale for broad habeas jurisdiction. Friendly

90. Id. at 156-57 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
91. Id. at 142. Friendly's proposal is not limited to federal habeas review: he proposes that innocence be made the test for access to any form of collateral attack, state or federal, and, within the federal system, for both review of federal and state convictions. Moreover, his proposal is not limited to review of constitutional error: he would apply this "exception to the concept of finality where a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man." Id. at 160.
92. Id.
93. The harmless error doctrine permits a conviction to stand despite a constitutional error if the court finds beyond a reasonable doubt that the error did not affect the outcome of the case. Harrington v. California, 395 U.S. 250, 251-52 (1969). Friendly states that, while harmless error "affords relief against constitutional claims on immaterial points, the test on collateral attack generally should be not whether the error could have affected the result but whether it could have caused the punishment of an innocent man." Friendly, supra note 14, at 157 n.81.
94. Friendly, supra note 14, at 160. As the triers of fact already have failed to entertain a reasonable doubt about the petitioner's guilt, this would seem to limit challenges to those concerning wrongly excluded or newly discovered evidence, or those in which evidence was not only illegally admitted, but also unreliable. Friendly gives as an example the situation of an involuntary confession, suggesting that collateral review should be allowed if the prosecution had no other substantial evidence in the case. Review would be denied, however, if the state had so much other evidence, even if some were obtained as a result of an involuntary confession, as to eliminate any reasonable doubt of guilt. Id. at 163-64.
refers elsewhere in the article, however, to the relevance of whether
the claim is "‘the kind of constitutional claim that casts some shadow
of doubt’ upon the defendant’s guilt.”

Thus there is some ambiguity
as to whether the inquiry under Friendly’s innocence standard should
be individualized or categorical.

As discussed in Part II of this Ar-
ticle, the Supreme Court has utilized it in both forms.

Despite his general belief that innocence should be the touchstone
for habeas review, Friendly proposes four exceptions to this rule: (1)
"‘cases where the attack concerns the very basis of the criminal pro-
cess,’” including “all those in which the defendant claims he was with-
out counsel to whom he was constitutionally entitled;”
(2) cases in which
the denial of constitutional rights is based on facts outside of
the record whose "‘effect on the judgment was not open to consid-
eration and review on appeal;’”
(3) cases “where the state has failed
to provide proper procedure for making a defense at trial and on
appeal;”
and (4) cases based on new constitutional developments
relating to criminal procedure that the Supreme Court has held should
have retroactive application.

Beyond these “four important but lim-
ited lines of decision” collateral attack would be justified only if
invoked by one whose innocence was in doubt.

Commentators have noted that the basic approaches advocated
by Bator and Friendly are fundamentally inconsistent.

Bator’s ap-

95. Id. at 163 (quoting Kaufman v. United States, 394 U.S. 217, 242 (1969)).
96. See Seidman, supra note 15, at 457 n.126.
97. Friendly, supra note 14, at 152. Other examples cited by Friendly include allegations of
racial discrimination in jury selection and claims that the jury was subjected to improper influences
by a court officer or had been overcome by excessive publicity. In these cases “the criminal
process itself has broken down; the defendant has not had the kind of trial the Constitution
guarantees.” Id. at 151.
98. Id. at 152. Examples of situations in which

[] the original judgment is claimed to have been perverted, and collateral attack is the
only avenue for the defendant to vindicate his rights . . . are convictions on pleas of
guilty obtained by improper means, or on evidence known by the prosecution to be
perjured, or where it later appears the defendant was incompetent to stand trial.

Id. (citations omitted).
99. Id. at 153.
100. Id.
101. Id. at 154.
102. The first three of these categories basically overlap with Bator’s limitation of the writ
to situations involving failure of process and lack of jurisdiction. Bator’s analysis does not
indicate how retroactive application of new constitutional rules would fit into his functional
analysis of the scope of the writ, although he certainly is aware of the retroactivity problem,
and, in fact, suggests that his “roving commission” justification for habeas might be useful as
a way to deal with that problem. See Bator, supra note 13, at 527 n.220. The Court had not
yet adopted its retroactivity doctrine at the time of Bator’s article. See infra text accompanying
notes 262-269.
103. Seidman, supra note 15, at 458; see also Cover & Aleinikoff, supra note 11, at 1077-78
proach focuses on process and argues that habeas relief should be “geared to only those instances where the state’s own mechanism for adjudicating the claims presented in the habeas petition has been inadequate.”¹⁰⁴ His theory constitutes a general attack on the idea of relitigation: it is “a plea for certainty, finality and efficiency understood in linear terms,” which is content free, and thus says nothing about the nature of rights that are to exist or their relative ordering.¹⁰⁵ Friendly’s approach focuses on result. It assumes “the basic goal of the criminal justice system is to separate the guilty from the innocent and that the flood of habeas petitions raising claims that are not guilt-related is interfering with the realization of that goal.”¹⁰⁶ It focuses on the substance of claims presented and would substitute “for the universal scope of Fay’s solicitude for constitutional rights a preference for rights which are related to a trial’s truth-finding process.”¹⁰⁷

The distinctive means and ends focuses of Bator and Friendly are the products of the authors’ differing positions regarding the ability to determine truth. Bator makes his epistemological position explicit, while Friendly’s logically follows from his proposal:

whereas Judge Friendly wishes to limit habeas to questions of ultimate fact, Professor Bator wishes to limit habeas because questions of ultimate fact are ultimately unanswerable. Whereas Judge Friendly’s preoccupation with result leads him to denigrate the importance of procedural regularity, Professor Bator’s epistemological skepticism leads him to focus wholly on procedure. Judge Friendly’s result orientation argues for a willingness to relitigate factual determinations supporting a conviction; Professor Bator’s doubt that any procedures will ever resolve such issues to everyone’s satisfaction argues for the virtues of finality. For Judge Friendly, the petitioner’s factual guilt or innocence is crucial; for Professor Bator, it is unknowable and, therefore, in the end, irrelevant.¹⁰⁸

Yet, despite the inconsistency of their fundamental approaches and their very different epistemological assumptions, the tension between a process-oriented approach and a result-oriented approach that exists between the theories of Bator and Friendly is found within each theory as well. As discussed above, Bator’s “roving commission” justification for habeas is inconsistent with his own epistemological as-

¹⁰⁴ Seidman, supra note 15, at 458; see also Bator, supra note 13, at 455-59.
¹⁰⁵ Cover & Aleinikoff, supra note 11, at 1077.
¹⁰⁶ Seidman, supra note 15, at 457.
¹⁰⁷ Cover & Aleinikoff, supra note 11, at 1077-78.
¹⁰⁸ Seidman, supra note 15, at 458.
sumptions because it assumes that habeas can be justified in terms of the need to reach a "correct" result. Similarly, Friendly's four exceptions to his innocence requirement reflect a concern with process that is not consistent with protection of the innocent as the purpose of habeas jurisdiction.

The logical inconsistency of Bator's and Friendly's proposals also has not prevented the Court from combining them as rationales for its decisions limiting habeas. Thus, an intellectual irrationality lies at the heart of the Supreme Court decisions creating the new habeas. Yet, to the extent this irrationality is hidden, the Court has used the fundamental inconsistency of the two theories to its advantage. The focus of the one theory on process and the other on result means that decisions can be justified by the combination of the two theories in a way that will satisfy those to whom either of those values is important. At the same time, the practical inconsistency between the two positions means that their combination into a single test for the scope of habeas jurisdiction allowed the Court to narrow habeas jurisdiction much more than the use of either test alone would permit. Thus, the Court's decisions in this area have a "have your cake and eat it too" quality about them. Finality of state court determinations is achieved, but through a rationale that appears to place value on assuring that "justice," defined in terms of "innocence," is not lost in the process.

II. The Cases: The Rhetoric of Innocence and the Result of Finality

In a series of cases decided from 1975 to 1990, the Court chipped away at, and eventually destroyed, the broad habeas jurisdiction of Brown v. Allen and Fay v. Noia. Although the Burger Court's first foray into this area focused on the nature of the right being asserted on habeas, the Burger Court's primary focus became eliminating constitutional claims from habeas review because of some procedural defect in the way the claims were raised. Ultimately, it was left to the Rehnquist Court to come up with a theory that would restrict habeas across-the-board through the formulation of a new retroactivity doctrine. Thus, the cases developing the new habeas are not tied together by the legal doctrine they use to restrict habeas. What binds them and makes them steps in a process of development is their

109. See supra text accompanying notes 79-80.
110. See Seidman, supra note 15, at 457 n.127.
111. 344 U.S. 443 (1953).
consistent use of the rhetoric of innocence to achieve the result of finality of state court determinations of state prisoners' constitutional claims.

A. Stone v. Powell and Guilt-Related Claims

The dual rationales of finality and innocence first were employed by the Court to limit the scope of habeas review in Stone v. Powell. In Stone, the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Justice Powell's opinion for the Court focused on the nature of the fourth amendment exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect," rather than "a personal constitutional right." As a remedial device, its application should be limited "to those areas where its remedial objectives are thought most efficaciously served," and that determination should be made by "weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims."

The costs of the exclusionary rule stem from its role in thwarting the truth-finding process: it deflects the truth-finding process by diverting attention "from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding" and excludes evidence that "is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." Thus, while the purpose of the exclusionary rule is to deter unlawful police activity, the disparity "between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule" in particular cases can generate instead disrespect "for the law and administration of justice."

To these costs of the exclusionary rule, the Stone Court added the costs of federal habeas review itself. The majority found these

114. Id. at 482.
115. Id. at 486-87 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).
116. Id. at 486.
117. Id. at 486-87 (quoting Calandra, 414 U.S. at 348).
118. Id. at 489.
119. Id. at 490.
120. Id. at 490.
121. Id.
costs substantial, especially when habeas review is used "for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty." The Court believed that federal habeas review causes "serious intrusions on values important to our system of government," including: "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."

The Court balanced these costs with the utility of the exclusionary rule, which the Court determined lay in its deterrent function. Although it noted the "absence of supportive empirical evidence" regarding the efficacy of the exclusionary rule, the Court assumed that the exclusion of evidence has the immediate effect of discouraging fourth amendment violations and, more importantly, the long-term effect of encouraging those who formulate and implement law enforcement policies "to incorporate[] Fourth Amendment ideals into their value system."

The Stone majority concluded that on balance these purposes are sufficient to support application of the exclusionary rule at the trial and appellate levels, but are insufficient to support its application in federal habeas proceedings in light of the costs "to other values vital to a rational system of criminal justice." While acknowledging that each consideration of a fourth amendment claim might increase awareness of the values underlying the fourth amendment, the Court did not believe that either the "overall educative effect" of the rule or "any specific disincentive" created by the risk of exclusion of evidence would be enhanced by application of the rule on habeas.

Similarly, the majority concluded that the need for habeas review of fourth amendment claims was outweighed by the costs of that re-

122. Id. at 491 n.31.
123. Id.
124. Id. (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1972) (Powell, J., concurring)).
125. Id. at 492.
126. Id.
127. Id. at 493-94.
128. Id. at 493. According to the majority, it was "a dubious assumption [to think] that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal." Id. "As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance." Id. at 493 n.34 (quoting Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. PA. L. REV. 378, 389 (1964)).
view. According to the Court, the costs of broad habeas review are tolerated because of fear that an innocent party will suffer an unconstitutional loss of liberty. In the typical fourth amendment case, however, "a convicted defendant is usually asking society to re-evaluate an issue that has no bearing on the basic justice of his incarceration." 

Finally, the Stone Court rejected the argument that habeas review of fourth amendment claims was necessary to assure a federal forum for hearing those claims. Echoing Bator, the majority asserted that this argument was based on "a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights," a mistrust that the Court did not share.

The Stone holding results from an amalgam of Friendly's focus on innocence and Bator's test for finality. The rhetoric of innocence permeates the opinion: it supplies the "costs" of the exclusionary rule, as well as the justification for habeas review. As Professor Seidman points out, however, the innocence focus fails to explain why the Court should except fourth amendment claims in which the state has not provided the opportunity for full and fair litigation of the claim. The failure of the state to provide an opportunity to litigate the claim in state court does not change the fact that fourth amendment claims are not guilt-related. Nor can that exception be explained in terms of the deterrent purpose of the exclusionary rule: it is unlikely that a police officer would be more willing to commit a fourth amendment violation because she hoped that the state courts might subsequently fail to provide an opportunity to litigate the issue. The "full and fair litigation" exception articulated in the Stone majority opinion is a process, not a result-oriented rationale for habeas review. It is pure Bator. Indeed, if one focuses on the result in Stone—no federal habeas corpus review of a claim, unless the state has failed to provide an adequate process for its adjudication—then one can easily see why Stone has been described as a combination of "Judge Friendly's rhetoric with Professor Bator's test for finality."

129. Stone, 428 U.S. at 491 n.31.
130. Id.
131. Id. at 493 n.35. "Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." Id.
133. Id.
134. See id. at 458.
135. Id. Seidman states that the hearing requirement comes from Bator's idea that the
In his dissenting opinion in *Stone*, Justice Brennan expressed concern that the majority's holding "portends substantial evisceration of federal habeas corpus jurisdiction."\(^{136}\) *Stone* was in fact followed by the predictable series of cases arguing that enforcement of other rights in habeas proceedings should be restricted by analogy to *Stone*,\(^{137}\) but ultimately, a majority of the Court never coalesced to extend *Stone* in a manner that would block habeas review of any other constitutional right. Nevertheless, Justice Brennan was not wrong in his prediction, for *Stone* represented a significant step toward the new habeas.

The *Stone* Court's use of a cost-benefit analysis to determine the effective scope of habeas jurisdiction was a clear break with the manner in which habeas jurisdiction had been analyzed in the past. The Court in *Brown v. Allen*\(^{138}\) viewed relitigation of constitutional claims raised in state criminal proceedings as the necessary consequence of the congressional mandate that federal courts have the last say on constitutional issues.\(^{139}\) Congress could have left enforcement of federal constitutional rights exclusively to the state courts, as those courts have the same duty to uphold the Constitution as the federal courts; however, by extending habeas to defendants held in state custody as a result of a state court judgment, Congress instead chose to give this power ultimately to the federal courts.\(^{140}\) According to the *Brown* Court, the wisdom of that decision was for Congress to consider, not the Court: "it is for th[e] Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress."\(^{141}\)

In *Brown*, concern for state interests could not alter this basic duty. The Court noted that although the "'[a]buse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization,'"\(^{142}\) abuses by law enforcement agencies also occur and go unchecked even by

\(^{136}\) *Stone*, 428 U.S. at 503 (Brennan, J., dissenting).

\(^{137}\) *Stone* was in fact followed by the predictable series of cases arguing that enforcement of other rights in habeas proceedings should be restricted by analogy to *Stone*, but ultimately, a majority of the Court never coalesced to extend *Stone* in a manner that would block habeas review of any other constitutional right. Nevertheless, Justice Brennan was not wrong in his prediction, for *Stone* represented a significant step toward the new habeas.


the highest state courts.\textsuperscript{143} The writ of habeas corpus thus serves a critical function for "the moral health of our kind of society."\textsuperscript{144} Further, although most constitutional claims by state prisoners were meritless and most were dealt with adequately by the state courts, these facts did not indicate that redetermination of the merits of claims should not be allowed. The fact that most habeas petitions were frivolous could not be a justification for establishing procedures that in effect assumed that all were frivolous: "[t]he meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities."\textsuperscript{145} The guilt of the petitioner also could not overcome the congressional mandate:

For surely it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and may be invoked by those morally unworthy. Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts. Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction.\textsuperscript{146}

Similarly, the Court in \textit{Fay v. Noia}\textsuperscript{147} viewed habeas jurisdiction as evidencing "a clear congressional policy of affording a federal forum for the determination of the federal claims of state criminal defendants."\textsuperscript{148} Habeas jurisdiction was invoked by the mere allegation of a violation of a constitutional right.\textsuperscript{149}

While the decisions in \textit{Brown} and \textit{Fay} focused on congressional intent and enforcement of rights, \textit{Stone} focused on discretionary judicial control and utilitarian justification of rights. The rule established in \textit{Stone} was "\textit{not} concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally," and did not "mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation."\textsuperscript{150} \textit{Stone} thus established a discretionary doctrine, similar to an abstention doctrine, that left the congressional mandate un-

\textsuperscript{143}. \textit{Id.} at 510-12.
\textsuperscript{144}. \textit{Id.} at 512.
\textsuperscript{145}. \textit{Id.} at 497-99.
\textsuperscript{146}. \textit{Id.} at 498-99.
\textsuperscript{147}. 372 U.S. 391 (1963).
\textsuperscript{148}. \textit{Id.} at 418.
\textsuperscript{149}. \textit{Id.} at 426. The availability of "habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest in the enforcement of criminal justice or procedure." \textit{Id.} at 440.
touched, but also irrelevant. This focus on discretionary limits on habeas jurisdiction subsequently became a hallmark of the Court's decisions limiting the scope of habeas review. As discussed in Part IV, this technique allowed proponents of the new habeas to place effective limits on habeas jurisdiction without directly addressing the inherent inconsistency between those limits and the Court's previous interpretations of the congressional intent behind 28 U.S.C. § 2254 in Brown and Fay. 151

Further, the Stone Court demanded a utilitarian justification before a right would be enforced in habeas proceedings: if the right did not further the truth finding process, then its enforcement on habeas must further some other goal, such as deterrence, in order to rationalize the attendant infringement upon state interests caused by the enforcement of constitutional rights in habeas proceedings. 152 The Stone analysis thus represented a shift in focus from the discourse of rights, to the discourse of interests; 153 a shift in focus that was borne out in the Court's subsequent decisions with serious consequences for the Court's philosophy of rights. 154

Stone also rejected the idea that "federal habeas relief is available to redress any denial of asserted constitutional rights, whether or not denial of the right affected the truth or fairness of the factfinding process." 155 Instead, its view of habeas as primarily intended to protect innocent defendants seems to "be based upon the idea that the remedial form—habeas corpus—has a substantive integrity;" 156 that habeas protects the innocent, while other constitutional values are protected by other remedial devices—in the case of the fourth amend-

151. See id. at 519-20 (Brennan, J., dissenting) (Stone went against the import of decisions like Brown, Fay, and Kaufman v. United States, 394 U.S. 217 (1969), which considered and rejected the policies relating to judicial resources and federalism relied upon by the Court.). Justice Brennan stated:

[These were] reasoned decisions that those policies were an insufficient justification for shutting the federal habeas door to litigants with federal constitutional claims in light of such countervailing considerations as "the necessity that federal courts have the 'last say' with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, [and] the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions" as well as the fundamental belief "that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief."

152. See id. at 490-95 (majority opinion).
153. See Cover & Aleinikoff, supra note 11, at 1091.
154. See infra Part IV.
155. Stone, 428 U.S. at 518 (Brennan, J., dissenting).
156. Cover & Aleinikoff, supra note 11, at 1086.
ment, by state court enforcement and the Court’s certiorari jurisdiction on direct review. This denial of the trans-substantive nature of habeas review in favor of tests based on the nature of the constitutional claim also characterizes the new habeas and has had serious consequences for the concept of the neutrality of procedure.

Stone thus became a precedent to be dealt with. It neither has been extended nor overruled. Instead, it has been distinguished and confined to situations coming within its particular holding. Yet, in distinguishing it, the Court was forced to deal with its “gravitational force” and to explain why subsequent cases were not “like cases” that should come within its rule. Thus, through the very act of distinguishing it, the Court dealt with Stone on its own terms, thereby confirming its basic premises, so very different from those of Brown and Fay. Stone therefore fundamentally altered the analysis of the scope of habeas jurisdiction and set the stage for the new habeas. The Court used the methodology developed in Stone in its subsequent decisions to limit habeas review. Use of the rhetoric of innocence to reach the result of finality through the development of discretionary limits on habeas review became the standard mode of analysis utilized by proponents of the new habeas.

B. Factual Innocence and Waiver

Stone made innocence relevant with regard to the nature of particular constitutional claims: the Court disfavored fourth amendment claims because they did not further the truth-finding process. Although the Court doubted that defendants asserting fourth amendment claims were innocent, it made no individualized inquiry to determine if that was in fact the case. Judge Friendly’s proposal, however, focused on whether the prisoner raising the constitutional claim was in fact innocent, not on whether the constitutional claim raised was guilt-related. Proponents of the new habeas used this factual innocence approach to limit habeas review in cases involving both procedural bar and successive habeas petitions.

(1) Procedural Bar

Both Professor Bator and Judge Friendly developed their theories in the context of a defendant petitioning a federal court to relitigate

157. Id.
158. See infra Part IV.
159. See supra text accompanying note 137.
160. See R. Dworkin, TAKING RIGHTS SERIOUSLY 111-13 (1977) (precedent has not only an enactment force, based on the interpretation of its precise holding, but a gravitational force grounded in the fairness of treating like cases alike).
a constitutional claim that was decided against her on the merits in the state courts. Another significant issue that arises in federal habeas review of state court proceedings is the appropriateness of federal review of the merits of constitutional claims when state courts have refused to consider the merits because the claims were waived under state law through failure to comply with state procedural rules governing the manner in which they should be raised. Should federal habeas review of the merits of constitutional claims be affected by a state court's refusal to consider the claims because of the petitioner's procedural default under state law?

The Court addressed this question in *Fay v. Noia*. The petitioner in *Fay* was denied relief in the state courts because he failed to pursue an appeal of his conviction. The *Fay* Court held that the state's refusal to hear the merits of a claim based on procedural default did not affect the jurisdiction of the federal habeas court to consider the merits of the constitutional claim. The Court stated that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review," and "[s]tate procedural rules plainly must yield to this overriding federal policy." Nevertheless, the *Fay* Court recognized a limited discretion in the federal habeas court to decline consideration of the merits of a procedurally defaulted claim based on principles of comity, equity, and federalism. The Court therefore held that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."

The Court believed that this deliberate by-pass standard was sufficient to meet the "exigencies of federalism" in the form of the state's interest in the orderly administration of its criminal process:

A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his

161. Bator expressly stated that he did not plan "to deal with the vexing question whether a state prisoner who fails to raise his federal contentions in accordance with state procedural law loses his right to raise them on federal habeas corpus." Bator, supra note 13, at 444.
163. *Id.* at 394, 399.
164. *Id.* at 434.
165. *Id.* at 424.
166. *Id.* at 426-27.
167. *Id.* at 424-26.
168. *Id.* at 438.
all on the outcome of a federal habeas proceeding, which, in many respects, may be less advantageous to him than a state court proceeding. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State’s valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, embodied both in the Federal Constitution and in the habeas corpus provisions of the Judicial Code, and consistently upheld by this Court, of affording an effective remedy for restraints contrary to the Constitution.169

Although the Court never has departed from Fay’s holding that federal habeas courts have the power to hear defaulted constitutional claims, it subsequently rejected the Fay intentional by-pass standard as the appropriate standard for the federal habeas court’s exercise of its discretion to deny review. In Wainwright v. Sykes,170 the Court held that a petitioner whose constitutional claim was held procedurally barred in the state courts could not obtain federal habeas review of the defaulted claim unless he could show both cause for the default and actual prejudice as a result.171

The Sykes Court found that the intentional by-pass standard accorded too little respect to state procedural rules and might encourage lawyers to sandbag—to “take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.”172 Failure to enforce state procedural rules in habeas proceedings also detracted from the state court trial “as a decisive and portentous event” in the criminal process, as the time and place at which society’s resources are concentrated to decide the defendant’s guilt or innocence.173 State procedural rules such as the contemporary objection rule invoked in Sykes encourage “the result that those proceedings be as free of error as possible” and, thus, are “thoroughly desirable.”174 The stricter cause and prejudice standard would “have the salutary effect of making the state trial on the merits the ‘main event’ . . . rather than a ‘tryout on the road’ for what will later be the determinative federal habeas hearing.”175

169. Id. at 433-34.
171. Id. at 87.
172. Id. at 89.
173. Id. at 90.
174. Id.
175. Id. The Sykes Court expressed its confidence that the cause and prejudice standard
Sykes and Stone share a preference for finality based on concern for the interests of the state. Sykes also echoes the rhetoric of innocence, both in the Court's emphasis on the need for a stricter procedural bar rule to ensure that the trial as to guilt or innocence is the focus of the criminal proceedings, and in its emphasis on state procedural rules as furthering the goal of error-free proceedings. Yet, the concept of waiver that underlies procedural bar is inconsistent with the idea that habeas protects against incarceration of the innocent. Waiver is a general attack on the idea of relitigation and is content free—it bars claims without regard to their relation to the defendant's guilt. As Justice Brennan noted in his dissent in Sykes, the Court's emphasis on guilt in Stone was inconsistent with allowing "an unintentional procedural default . . . to stand in the way of vindication of constitutional rights bearing upon the guilt or innocence of a defendant." Thus, in the procedural bar cases the focus on finality seems predominant. Further, the definition of finality created by application of the Sykes rule reflects Bator's test for finality. The Sykes Court indicated that to establish "cause" for a procedural default, the petitioner must establish either ineffective assistance of counsel or "some external impediment preventing counsel from constructing or raising the claim." Therefore, although the Court has not limited "cause" to situations of failure of process, the general concept behind "cause" is similar to Bator's philosophy: finality of state court determinations should be disturbed only when there is some justification for doing so beyond mere reconsideration of the decision made by the state court.

Despite the predominance of finality, the innocence standard has found its way into the Court's procedural bar cases as well. In Murray v. Carrier, the Court confirmed that the cause and prejudice standard "is fully applicable to constitutional claims that call into question the reliability of an adjudication of legal guilt." Yet Carrier also established a connection between procedural bar and innocence, would "afford an adequate guarantee . . . that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." Id. at 90-91.

176. Cover & Aleinikoff, supra note 11, at 1077.
177. Sykes, 433 U.S. at 110 (Brennan, J., dissenting).
179. See, e.g., Reed v. Ross, 468 U.S. 1, 16-17 (1984) ("where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures").
181. Id. at 495; accord Engle v. Isaac, 456 U.S. 107, 129 (1982).
as the Court acknowledged that ""[i]n appropriate cases"" the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.""182 The Carrier Court expressed its confidence that those whose incarcerations were the result of ""a fundamental miscarriage of justice would meet the cause-and-prejudice standard,"" but also recognized that this would not always be the case.183 Therefore, the Court stated that ""in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.""184 Thus, while a claim related to the reliability of the determination of ""legal guilt"" would not excuse compliance with the Sykes cause and prejudice test, a showing of the probability of actual innocence would.

This focus on the factual innocence of particular petitioners has consequences significantly different from those that arise from use of the categorical approach of Stone v. Powell.185 While the categorical approach, if applied affirmatively, would allow consideration of habeas claims that Bator would not have allowed because there was no failure of process in the state courts' adjudication, the categorical approach is consistent with Bator's epistemological position that the truth is unknowable. It simply involves prioritizing the rights that will receive a certain amount of process.186 Further, because these ""guilt-related"" constitutional rights are themselves rights governing the procedure by which states must conduct their process of criminal adjudication, the very existence of these rights underlines and affirms a belief in the importance of process. A categorical approach, however, eliminates the innocence standard's chief attraction because, if availability of habeas turns on the nature of the claim, ""it can no longer be said that the Writ has been reserved for those who are factually innocent.""187 Innocent defendants could be denied relief if they raised the wrong kind of constitutional claim, whereas guilty defendants could obtain relief if they raised a guilt-related claim.188

183. Id.
184. Id. at 496.
186. Cf. Cover & Aleinikoff, supra note 11, at 1089-90 (If the categorical approach is utilized, the concern would be ""with the systemic relations of rights to guilt/innocence judgments"" and would ""entail drawing distinctions between alternative formulations of rights which either do or do not have the requisite connection to guilt/innocence."").
188. Id.
On the other hand, an inquiry into the actual, factual innocence of a particular state prisoner is entirely contrary to both Bator's epistemological position and his concomitant focus on the adequacy of process. The underlying assumption of a factual innocence standard is that the truth can be discovered, and, therefore, that finality need not be created artificially by satisfactorily process, but will result from a decision that is true in some ultimate sense. A factual innocence standard thus rejects the notion that an inquiry into the fairness of legal determinations must focus on the adequacy of process because a court is simply incompetent to ever know whether the result reached is "adequate." Indeed, the innocence standard denigrates the importance of process by suggesting that, although a prisoner has been found guilty beyond a reasonable doubt after a process that the Court considers adequate, the prisoner still can prove her innocence.

The shift in the procedural bar cases from a focus on process to a focus on result (accomplished by shifting attention from the guilt-relatedness of claims to the factual innocence of petitioners) is a masterful rhetorical manoeuvre on the Court's part. After all, the procedural bar cases deal with situations in which process for the adjudication of the merits of constitutional claims is completely denied. The state courts have refused to adjudicate the merits of the petitioner's constitutional claims because of her failure to comply with state procedural rules. The federal courts will refuse to hear the claims as well—even if the claims are meritorious, even if they are guilt-related, and even if the result of the trial might have been different if the alleged constitutional error had not occurred—unless the petitioner also can establish cause for her attorney's failure to raise the claims in the appropriate manner in the state proceedings. Further, what probably is the most common cause of such failures—attorney mistake or inadvertence—is insufficient to establish cause, unless it rises to the level of ineffective assistance of counsel, a level to which relatively few such mistakes ascend. Thus, if the Court provides an

189. Cf. Resnik, Tiers, 57 S. Cal. L. Rev. 837, 891 (1984) ("Be the judgments of defense attorneys, judges, prosecutors, or police good or bad; be the processes by which state courts and their police, judges, prosecutors, and defense attorneys arrive at decisions constitutional or unconstitutional; federal courts today are generally not permitted to consider a state prisoner's claim of constitutional error unless the prisoner had the foresight or luck to be represented by an informed attorney who raised a claim of illegality at trial.").


191. Cf. Wainwright v. Sykes, 433 U.S. 72, 104 (1977) (Brennan, J., dissenting) ("any realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel," a reality Fay v. Noia, 372 U.S. 391 (1963), recognized by refusing "to credit what is essentially a lawyer's mistake as a forfeiture of constitutional rights").
“out” for the petitioner that focuses on the result of hearing the claims of the innocent, that seems to make what otherwise appears to be an extremely harsh forfeiture rule much more palatable.

Use of the factual innocence standard, however, has its problems. First, a focus on factual innocence is inconsistent with the habeas court’s jurisdictional grant, which extends only to allegations of custody in violation of the Constitution. What if the Court determined that the petitioner was innocent, heard her constitutional claim, and determined that it was without merit? What does the Court do then? Create a constitutional right not to be convicted if innocent? “If . . . the result ought to turn on the ultimate question of factual guilt, then it is hard to see why the availability of relief should depend on the fortuity of a procedural violation.”

Second, how does a federal district court on habeas, let alone the Supreme Court on certiorari review, determine the factual innocence of a petitioner who has been found guilty beyond a reasonable doubt by a jury of her peers? In other words, by what other means than accepted adjudicatory process or gut feeling can one determine the truth? Bator’s epistemological skepticism is sufficiently ingrained in our world view that we are unlikely to think that a federal district judge or five members of the Supreme Court necessarily have a better handle on ultimate truth than a twelve-person jury. It is simply impossible to think of factual determinations that have legal import outside the context of an accepted process for reaching them. Would the standard require the federal district court considering the habeas petition to conduct a second trial “with federal judges re-determining questions of ultimate fact traditionally thought to be the exclusive province of state juries”? This hardly would comport with either the goal of finality or the comity considerations upon which procedural bar is based.

More likely, the inquiry “would degenerate into a weaker variant of the harmless error rule, [as t]he Court’s focus would almost certainly be upon the particular facts and the weight of the evidence.” This seems to be what Friendly had in mind. This type of inquiry,

194. Id.; cf. Kuhlmann v. Wilson, 477 U.S. 436, 471 n.7 (1986) (Brennan, J., dissenting) (The factual innocence standard “requires the federal courts to function in much the same capacity as the state trier of fact—the federal courts must make a rough decision on the question of guilt or innocence. This requirement diverts the federal courts from the central purpose of habeas review—the evaluation of claims that convictions were obtained in violation of the Constitution.”).
195. Cover & Aleinikoff, supra note 11, at 1089.
196. See supra text accompanying notes 91-96.
however, would not be an inquiry into actual innocence, but rather into the adequacy of the record to convict.197 It thus would move the inquiry back into the realm of process. Further, while the inquiry might be similar to that for harmless error (except with its focus on the likelihood of innocence rather than on the likelihood of a different result) it differs from the harmless error inquiry in two important respects. First, if Friendly's test were followed, any evidence admitted as a result of the alleged constitutional error would be considered in making the determination; and second, and more importantly, instead of the state having to establish the harmlessness of the error beyond a reasonable doubt, the petitioner would have the burden of proof to show factual innocence.198

Finally, the factual innocence standard shares with its categorical cousin an assumption that the only values worthy of habeas protection are those relating to the reliability of the determination of guilt, although other values in fact exist.199 Thus, for instance, the factual innocence standard cannot be applied in any meaningful way to challenges that relate not to the determination of guilt, but to constitutional errors occurring in the sentencing phase of a death penalty case. In those cases, the sentence imposed—not the conviction—is challenged, and the relief sought would not require retrial of the petitioner, but rather resentencing. “Guilt or innocence is irrelevant in that context; rather, there is only a decision made by representatives of the community whether the prisoner shall live or die.”200 Thus, the actual guilt of the petitioner seems totally inappropriate as the standard for determining whether manifest injustice will occur if the Court denies federal habeas review of a petitioner’s challenge to her death sentence.

197. The Court has stressed that the actual innocence concept relates to “actual,” not “legal” innocence. Smith v. Murray, 477 U.S. 527, 537 (1986).
198. Cf. Wainwright v. Sykes, 433 U.S. 72, 98 (1977) (White, J., concurring). Justice White argues that the prejudice prong of the Sykes test is not needed because of the harmless error doctrine and expresses concern that the prejudice requirement shifts the burden of proof to the defendant: “I see little if any warrant, having in mind the State's burden of proof, not to insist upon a showing that the error was harmless beyond a reasonable doubt,” for “[a]s long as there is acceptable cause for the defendant's not objecting to the evidence, there should not be shifted to him the burden of proving specific prejudice to the satisfaction of the habeas corpus judge.” Id. This distinction between the harmless error doctrine and the innocence standard was brought to my attention by Professor Joel H. Swift.
199. See Smith v. Murray, 477 U.S. 527, 545 (1986) (Stevens, J., dissenting) (“[T]he Court's exaltation of accuracy as the only characteristic of 'fundamental fairness' is deeply flawed” because “[o]ur criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve 'law and justice' should similarly reflect those values.”).
Despite these problems with the factual innocence standard, the Court has continued to apply it as the standard for manifest injustice, and in Smith v. Murray,\textsuperscript{201} did so in the context of a death sentence challenge. The petitioner in Smith invoked the fifth amendment right against self-incrimination to challenge the introduction at the sentencing phase of his capital trial of testimony of a psychiatrist to whom the petitioner had talked without being informed that what he said subsequently could be introduced against him.\textsuperscript{202} After determining that Smith had failed to establish cause for his attorney's failure to raise the claim on appeal, the Court considered whether failure to hear the merits of Smith's claim would result in a fundamental injustice under the factual innocence standard.\textsuperscript{203} While acknowledging that the concept of actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense," the Court nevertheless applied that standard to find that no fundamental miscarriage of justice would result.\textsuperscript{204} The Court rejected the suggestion that there is anything "fundamentally unfair" about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination. In view of the profound societal costs that attend the exercise of habeas jurisdiction, such exercise "carries a serious burden of justification." When the alleged error is unrelated to innocence, and when the defendant was represented by competent counsel, had a full and fair opportunity to press his claim in the state system, and yet failed to do so in violation of a legitimate rule of procedure, that burden has not been carried.\textsuperscript{205} Smith thus established a test for the actual innocence standard that looked at whether "the alleged error undermined the accuracy of the guilt or sentencing determination."\textsuperscript{206} That test, however, returns the focus of inquiry to the type of error alleged, a result that

\textsuperscript{201} 477 U.S. 527 (1986).
\textsuperscript{202} Id. at 530.
\textsuperscript{203} Id. at 536-37.
\textsuperscript{204} The Court stated:
There is no allegation that the testimony . . . was false or in any way misleading. Nor can it be argued that the prospect that [the psychiatrist] might later testify against him had the effect of foreclosing meaningful exploration of psychiatric defenses . . . . In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, [the] testimony should not have been presented to the jury, its admission did not serve to pervert the jury's deliberations concerning the ultimate question whether . in fact petitioner constituted a continuing threat to society.
Id. at 537-38 (citations omitted).
\textsuperscript{205} Id. at 538-39 (quoting Friendly, supra note 14, at 146).
\textsuperscript{206} Id.
is not surprising, given the epistemological and other difficulties inherent in a standard that focuses instead on an individual determination of ultimate fact. But a focus on the type of claim alleged ultimately returns one to a focus on process.

In *Dugger v. Adams*, the Court once again addressed the question of what constitutes a fundamental miscarriage of justice that will allow consideration of an alleged error in the sentencing phase of a capital case. While the *Smith* Court emphasized that "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones," in finding no fundamental miscarriage of justice, the *Adams* Court made it clear that, whatever the factual innocence test might mean, it was not satisfied by a constitutional claim that challenges the reliability of the sentencing determination.

In *Adams*, the constitutional claim was that the state trial judge had misinformed the jury as to its role in the sentencing process. The judge told the jurors that he was free to disregard the jury's recommendation with regard to life or death, when in fact he could overturn the jury's determination only if he found that no reasonable jury could have reached that conclusion as to the appropriate sentence. The sentencing decision had been a close one, with the trial judge finding an equal number of aggravating and mitigating circumstances. Further, two state supreme court justices had dissented on direct appeal from imposition of the death sentence.

Prior to its decision in *Adams*, the Court in *Caldwell v. Mississippi* had held it constitutionally impermissible under the eighth amendment to rest a death sentence on a determination by a sentencer who has been led to believe that responsibility for determining appropriateness of the death sentence rests elsewhere. The *Caldwell* Court found that the false belief that responsibility for the sentence rested elsewhere created "substantial unreliability as well as bias in favor of death sentences," and, thus, an "unacceptable risk that the death sentence may have been 'meted out arbitrarily or capriciously.'" The court of appeals had found a clear violation of *Caldwell* in Adams's case.

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208. *Smith*, 477 U.S. at 538 (emphasis added).
211. *Id.*
213. *Id.* at 328-29.
214. *Id.* at 330.
215. *Id.* at 343 (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983)).
216. *Adams*, 489 U.S. at 413 n.3 (Blackmun, J., dissenting).
The Supreme Court found the court of appeals erred in holding that Adams had established cause for the failure to raise his claim in state court. It then summarily rejected the argument that, because a Caldwell violation goes to the reliability of the jury’s determination that the petitioner should be sentenced to death, a fundamental miscarriage of justice would result from failure to hear the claim. Noting that cases in which a writ is granted in spite of a procedural default were intended to be “extraordinary,” and the “difficulty of translating the concept of ‘actual’ innocence from the guilt phase to the sentencing phase of a capital trial,” the Court stated:

We do not undertake here to define what it means to be “actually innocent” of a death sentence. But it is clear to us that the fact that the trial judge in this case found an equal number of aggravating and mitigating circumstances is not sufficient to show that an alleged error in instructing the jury on sentencing resulted in a fundamental miscarriage of justice.

The dissent “assumes arguendo” that a fundamental miscarriage of justice results whenever “there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision.” According to the dissent, since “the very essence of a Caldwell claim is that the accuracy of the sentencing determination has been unconstitutionally undermined,” the standard for showing a fundamental miscarriage of justice necessarily is satisfied. We reject this overbroad view. Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is “actually innocent” of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the “extraordinary case,” into an all too ordinary one.

The Court thus indicated that somehow a petitioner challenging her death sentence must make a factual demonstration that she is probably “actually innocent” of that sentence, although the Court did not give any guidance as to how a petitioner could make that showing. Whether the petitioner committed the crime with which she is charged is a question of fact that has, at least theoretically, one true, discoverable answer. The decision whether the petitioner’s crime was sufficiently heinous that she should die, although made in light of facts, is not, other than in some technical sense, a decision of ultimate fact at all. Rather, it is a moral judgment of the community. How can one possibly suggest this moral judgment is wrong in any

217. Id. at 406.
218. Id. at 412 n.6 (quoting id. at 415 n.4, 423 (Blackmun, J., dissenting).
way other than by showing an error in the process by which it was made?

The dissenters in *Adams* argued that the Court in effect had overruled the test for factual innocence established in *Smith*. Certainly, it is hard to reconcile that test with the result in *Adams*. As Justice Blackmun pointed out, "the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined," and thus it would appear that Adams's claim necessarily would meet the *Smith* requirements. Indeed, the error alleged by Adams concerned "a detailed and repeated explanation of the jury's [lack of] responsibility . . . in the sentencing process," and thus was "global in scope: it necessarily pervades the entire sentencing process" and "could not help but pervert the sentencing decision."

The *Adams* majority opinion does not respond to this argument; indeed, it does not even attempt to reconcile *Smith* and *Adams*. While the Court notes "the difficulty of translating the concept of 'actual' innocence from the guilt phase to the sentencing phase of a capital trial," it feels no need to "undertake here to define what it means to be 'actually innocent' of a death sentence." Indeed, the Court's entire discussion of this issue is contained in a footnote.

Further, the rationale that the Court does give is a blatant exercise in instrumentalism. The existence of an unacceptable level of unreliability in the sentencing decision when a *Caldwell* violation has occurred does not result in a miscarriage of justice because, if the Court held that it did, that would allow federal habeas courts to hear too many defaulted claims. As the Court states, it "would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' into an all too ordinary one."

The *Adams* Court in effect takes the weaknesses of the factual innocence standard as a measure for when a fundamental miscarriage

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221. *Id.* at 423-24.

222. *Id.* at 423.

223. Indeed, it seems the only way to reconcile these two decisions would be to say that a miscarriage of justice occurs at the sentencing stage if a constitutional error results in the exclusion of a particular piece of relevant evidence or the inclusion of false evidence, but does not occur when, instead of perverting the consideration of one factual detail, the error perverts the entire decisional process. A test for a fundamental miscarriage of justice that leads to these results is illogical.


225. See *id.*

226. *Id.* One wonders how any case can be ordinary when it involves an unacceptable level of unreliability as to the decision to execute a human being.
of justice occurs and, by refusing to address these weaknesses, turns them to its advantage. The difficulty of making the requisite innocence showing, because of the epistemological difficulties and lack of any rational relationship between actual innocence and error in the sentencing phase of a death penalty case, makes the standard all the more effective in achieving the finality that lies at the heart of waiver doctrines. As Justice Blackmun explains:

By refusing to apply [the Smith] standard, the Court today effectively discards its own opinion in Smith. Yet, in also refusing to define “actual innocence” in the sentencing context, the Court offers nothing in its place. In this way, the Court both leaves the law in shambles and reinstates respondent’s death sentence without ever bothering to determine what legal principle actually governs his case.227

As in Stone v. Powell,228 the Court in the procedural bar cases has combined Bator’s focus on process and Friendly’s focus on innocence to achieve the result of finality through the rhetoric of innocence.

(2) Successive Petitions

A plurality of the Court also has proposed the factual innocence standard as the test for determining when a successive habeas petition should be heard. A successive petition is one that “raises grounds identical to those raised and rejected on the merits on a prior petition.”229 The standard for determining whether to hear a successive petition was established in 1963 in Sanders v. United States.230 In Sanders, the Court held that a successive petition need not be entertained if the “ends of justice” would not be served by reconsideration of the claim.231 The Sanders Court did not attempt to define “ends of justice”; instead, it left this determination “to the sound discretion of federal trial judges”232 because of the Court’s belief that the phrase’s meaning should not be “too finely particularized.”233

In Kuhlmann v. Wilson,234 a plurality of the Court proposed that “ends of justice” should be given a more definite content—the ends of justice should require a federal court to entertain a successive petition only “where the prisoner supplements his constitutional claim

227. Id. at 424 n.15 (Blackmun, J., dissenting).
231. Id. at 16.
232. Id. at 17-18.
233. Id. at 17.
with a colorable showing of factual innocence.'"235 Unlike the majority in Murray v. Carrier,236 which did not attempt to justify adoption of factual innocence as the standard for manifest injustice, the Kuhlmann plurality engaged in a balancing approach similar to the one utilized in Stone v. Powell237 to justify equation of the ends of justice with actual innocence.

Justice Powell, writing for the Kuhlmann plurality, argued that both Stone and Fay v. Noia238 supported the proposition that the Court had never "defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error."239 Rather, the Court "has performed its statutory task through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims determined adversely to the prisoner by the state courts."240 According to Justice Powell, the Court in Fay, as much as in Stone, engaged in "‘a practical appraisal of the state interest’ . . . , weighing that interest against the other interests implicated by federal collateral review."241 That the Fay Court’s appraisal led it to adopt "‘an expansive reading of the scope of the writ does not undercut the fact that it did so by balancing competing interests.’"242 Justice Powell’s weighing of the interests led him to conclude that the petitioner’s interest in having a claim reconsidered outweighed the state’s interest in maintaining finality of the prior judgment only when the petitioner could make a colorable showing of factual innocence to supplement her constitutional claim.243

Like the Carrier majority, the Kuhlmann plurality sought to employ the innocence standard to further the interests of finality of state court determinations. Petitioners do not file successive habeas petitions because they are innocent; indeed, as discussed above, innocence is not a ground for obtaining habeas relief. Rather, successive petitions are filed because of changed circumstances that could alter the habeas court’s previous determination of the issue: newly-discovered evidence or, as in Kuhlmann, a change in the applicable legal standards.244 Thus, like the Carrier majority, the Kuhlmann plurality was
seeking to establish as the sole measure for habeas review a standard that had little or no relevance to the issue at hand.

Further, in both Carrier and Kuhlmann the Court utilized the rhetoric of innocence to eliminate the equitable discretion of the district courts in the guise of merely channeling it. Justice Brennan's dissent in Kuhlmann noted that the plurality was not seeking to elucidate the ends of justice standard enunciated in Sanders v. United States, which had been purposefully left open-ended in that decision, but rather to "replace discretion with a single legal standard—actual innocence." He might have gone on to point out that, because that single standard was one essentially unrelated to the issue at hand, the standard was likely to leave the district courts with no choice other than the result of finality in most cases.

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247. Use of an innocence standard when a new claim is presented for the first time in a second petition was proposed by the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases. Chief Justice Rehnquist appointed the committee, with retired Justice Powell as its chair, "to inquire into 'the necessity and desirability of legislation directed toward avoiding delay and the lack of finality' in capital cases in which the prisoner had or had been offered counsel." Comm. Rep., Ad Hoc Comm. on Federal Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNA) 3239, 3239 (Sept. 27, 1989) [hereinafter Powell Commission Report]. The underlying premise of the Powell Commission's recommendations, issued on September 21, 1989, is that "[c]apital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant," and "[w]hen this review has concluded, litigation should end." Id. at 3240. As part of the proposed legislative scheme to carry out this purpose, the Powell Commission Report proposed § 2257, which would limit the federal habeas court's ability to hear a second petition by a death penalty prisoner to situations meeting three requirements: (1) the claim raised was one not previously presented in the state or federal courts; (2) the failure to raise the claim in the first petition was the result of unconstitutional action by the state, Supreme Court recognition of a new federal right that is applicable retroactively, or subsequent discovery of facts that could not have been discovered previously through reasonable diligence; and (3) "[t]he facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed." Id. 3242-43. The Powell Commission acknowledged that requiring a claim to call into doubt the petitioner's guilt would exclude any challenges to the sentencing phase in a death penalty case:

In the Committee's view, if there is any doubt about the sentencing phase of a capital case, it should be raised during a state prisoner's initial attempt to obtain post-conviction review. Often factual guilt is not seriously in dispute. Both the prisoner and his counsel have every incentive to ask whether all relevant information in mitigation of punishment was presented and whether the sentencing phase of the trial was otherwise conducted in a constitutionally fair manner. Given the clear incentive to do this, the Committee does not believe that the federal courts should have to consider a second petition under section 2254 which challenges only the sentencing phase in a capital case. As subsection (c) reflects, the only appropriate exception is when the new claim goes to the underlying guilt or innocence of the state prisoner under capital sentence. Id. at 3244.

As in Kuhlmann v. Wilson, 477 U.S. 436 (1986), the rationale for this section totally ignores
Sykes, Carrier, and their progeny mark a second significant step on the way to the new habeas. The procedural bar doctrine established in Sykes served to remove a significant class of cases from consideration on the merits by the federal courts—those in which the inadvertence or mistakes of counsel had resulted in loss of the ability to have the claim considered in the state courts. With regard to these cases, Sykes returned the "final say" on their disposition to the state courts. If the state court decided the issue was one it should hear under its own guidelines for forgiving procedural waivers, then a federal court would be free to hear the merits as well; if not, then, because attorney inadvertence short of incompetent assistance was not sufficient to establish cause for the default, a federal court could not consider the merits of the constitutional claim either.

The "manifest injustice" exception was a potentially significant, albeit rhetorically necessary, loophole in this scheme. It carried the potential for allowing federal consideration of this type of case at the discretion of the federal district judges, a discretion that one suspects these judges would exercise when the underlying constitutional claim appeared to have merit. Carrier closed up this significant loophole. It made it clear that procedural bar applied without regard to the nature or merit of the underlying claim and provided a standard for the exercise of the district court's discretion so stringent that it amounted in most cases to a de facto denial of review.

Waiver doctrine, however, returned only one category of cases to the states. Unless habeas jurisdiction was defined in a manner that limited consideration of claims actually litigated in the state courts, the lower federal courts would continue to play a very important role in the articulation and development of principles of constitutional law.

the actual reasons second petitions are filed. Second petitions raising new claims may be filed because of newly discovered facts giving rise to the claim or because attorney error resulted in the failure to raise the claim in a previous petition. Cf. Resnik, supra note 189, at 932 (frequent absence of counsel makes it a plausible assumption that failure to include claim in first petition is due to a prisoner's lack of legal knowledge or inadvertence). Neither of these reasons suffices to allow consideration of the claim under an innocence standard. Further, a new claim often is presented because the Supreme Court has issued a new decision. In the death penalty context, these decisions often relate to the growing body of eighth amendment law protecting the reliability of the capital sentencing determination. Use of an innocence standard to eliminate the ability of the federal courts to entertain a second habeas petition related to the sentencing determination thus would eliminate a significant number of eighth amendment challenges based on new Supreme Court precedent. As in Murray v. Carrier, 477 U.S. 527 (1986), and Kuhlmann, the innocence standard once again would serve as an effective rhetorical device for reaching the result of finality.

248. Cf. Teague v. Lane, 489 U.S. 288, 308 (1989) ("We have declined to make the application of the procedural default rule dependent on the magnitude of the constitutional claim at issue or on the State's interest in the enforcement of its procedural rule.") (citations omitted).
applicable to the state criminal process, and thus would continue to "interfere" with that process.

*Stone v. Powell* was an initial attempt at this type of approach. While it had worked with regard to the controversial fourth amendment exclusionary rule, and certainly afforded a valuable precedent, it ultimately had proven a dead end as a means of significantly limiting habeas review. Its focus on the nature of the constitutional right involved as a means of limiting the remedies for its deprivation was simply too pointed. The Court was not willing to abandon the idea that procedural rights could serve values other than innocence. In that context then, the amalgam of inconsistent principles resulting from the combination of Bator's test for finality and Friendly's rhetoric of innocence worked against finality: even if a right was not guilt-related, it still could be found structurally necessary in order to ensure adequate process.

Thus, for instance, in *Rose v. Mitchell*, the Court rejected application of *Stone* to an equal protection claim alleging racial discrimination in the selection of a grand jury foreman. In many ways, the grand jury discrimination claim involved in *Rose* was a better candidate for application of the innocence standard than the fourth amendment claim involved in *Stone* itself. Challenges to selection of the grand jury, like the fourth amendment challenges held barred from habeas review in *Stone*, do not affect the accuracy of the trial on the merits. Beyond this, however, a challenge to the grand jury selection does not even affect the subsequent verdict of the petit jury. Therefore, the claimant cannot even assert the type of prejudice involved in a fourth amendment claim—that the result of the trial would have been different. The lack of prejudice to the claimants in *Rose* was even more evident because *Rose* involved only an allegation of discriminatory selection of the jury foreman, who had not voted on the claimants' indictments at all. Thus, the grand jury discrimination claims involved in *Rose* involved neither innocence nor trial prejudice.

Nevertheless, the *Rose* Court refused to bar consideration of these claims simply because they were not guilt-related. Grand jury claims protected values that the Court found equally important: "discrimination on account of race in the administration of justice strikes at the core concerns of the fourteenth amendment and at fundamental

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251. Id. at 559-61.
values of our society and our legal system' and is "at war with our basic concepts of a democratic society and a representative government." Further, because such claims challenge actions of the state courts themselves, the Rose Court believed that state courts provided an inadequate forum for their final determination.

In 1989, in *Teague v. Lane*, the Court began to revolutionize its retroactivity doctrine as applied to claims raised in habeas proceedings, a process it completed during its 1990 Term. With the development of this new retroactivity doctrine, proponents of the new habeas at last found a means of limiting the substantive scope of habeas without directly attacking the substance of rights. Retroactivity doctrine allows a court to control the impact of its decisions on finality, not by limiting the content of rights or by limiting the available remedies, but by limiting in temporal terms the class of individuals who will be granted relief for violation of the constitutional rights those decisions announce. It is thus roughly similar in operation to a statute of limitations. The retroactivity doctrine limits both the practical efficacy of rights and the avenues available for their vindication while theoretically leaving both right and remedy untouched. In the hands of the Rehnquist Court, it has proven a potent weapon for returning control of the development of constitutional law relating to state criminal process to the states.

C. Beyond Innocence: *Teague v. Lane* and the New Retroactivity

Justice Harlan recognized long ago that a primary cause of the tension between habeas jurisdiction and finality is the problem of change in the law. If interpretation of extant legal principles remained constant, and the universe of legally recognized rights remained static, the existence of federal habeas jurisdiction would be insignificant. Attorneys have a professional responsibility not to raise completely meritless claims. Even prisoners proceeding pro se have only so much ingenuity. Further, despite the belief of some Justices to the contrary, it also seems highly unlikely, given human nature, that prisoners will sit on known and potentially meritorious claims for years while languishing in prison. Prisoners have every incentive to pursue as quickly as possible all avenues that might lead to their

253. 443 U.S. at 564 (citations omitted).
254. Id. at 561.
256. See infra text accompanying notes 258-259.
257. See infra note 551.
release. Thus, if the law did not change, most prisoners would raise and exhaust all their known claims as quickly as possible and there would be an end to litigation.

In reality, however, law continually is evolving. Moreover, in a time of relatively rapid evolution, such as that of the Warren Court era in the criminal procedure area, the existence of a procedure for collateral attack of final convictions has a significant impact on finality concerns. Convictions valid under constitutional interpretations accepted at the time they became final remain subject to reconsideration based on new and different interpretations subsequently adopted.

Change in the law is inevitable; its impact, however, can be ameliorated in one of three ways: by curtailing the substance of the right through consideration of the potential impact on finality concerns when determining the appropriate rule to apply at the outset, by limiting the scope of application of the rule, or by curtailing the remedies available for its enforcement.

Harlan believed that the impact of change in the law traditionally had been controlled by the limited scope of habeas jurisdiction. Thus, he argued that it was only with the expansion of the scope of the writ in *Brown v. Allen* that the retroactive application of new constitutional rules became an issue: "[p]rior to *Brown v. Allen*, it must have been crystal clear that the 'retroactivity' of a new constitutional rule was a function of the scope and purposes of the habeas-corpus writ." for "[a]bsent unusual circumstances, a new rule was not cognizable on habeas simply because of the limited scope of the writ." Underlying the Rehnquist Court's new retroactivity doctrine is the insight that the reverse of Harlan's proposition is also true—the scope of habeas jurisdiction can become a function of the retroactive application of constitutional doctrine.

The Warren Court, however, was not interested in limiting either right or remedy. A broad habeas jurisdiction was a crucial part of the remedial structure of its extension and expansion of procedural rights applicable to the states. That Court also was committed to an expansive interpretation of those substantive rights. Nevertheless, the Warren Court was not unaware of the practical impact of expansive rulings on the concerns protected by finality. Therefore, instead of focusing on curtailment of either right or remedy, the Warren

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258. 344 U.S. 443 (1953).
260. *See generally* W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 2.7 (West 1985) (discussing the preference for expansive readings).
Court chose to develop a flexible doctrine that would allow the Court to curtail the application of its new constitutional rules, thereby leaving the remedial structure of habeas intact as well as providing the Court with more freedom to determine the substance of the new rules free of concerns as to their practical impact.  

(1) The Warren Court's Retroactivity Doctrine

In Linkletter v. Walker, 262 the Supreme Court considered whether Mapp v. Ohio, 263 which overruled prior case law and held that the fourth amendment exclusionary rule was applicable to the states, should apply to convictions that had become final before Mapp. 264 The Linkletter Court found that "the Constitution neither prohibits nor requires retrospective effect," and that the retroactivity decision should be made by weighing "the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 265 Subsequent cases indicated that Linkletter had established a three-prong balancing test that looked to "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 266

261. See id. § 2.9, at 68. Compare Harlan's statement that the retroactivity doctrine was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field. Some members of the Court . . . initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound. Others rationalized this resort to prospectivity as a "technique" that provided an "impetus . . . for the implementation of long overdue reforms, which otherwise could not be practically effected."

262. 381 U.S. 618 (1965).
264. 381 U.S. at 619-20.
265. Id. at 629.
266. Stovall v. Denno, 388 U.S. 293, 297 (1967). The nature of the constitutional rule as one affecting the integrity of the fact-finding process was always an important part of this three-prong test. In denying retroactive application to Mapp, the Linkletter Court distinguished previous cases that had applied new rules retrospectively on the basis that the new procedural rules announced in those cases "went to the fairness of the trial—the very integrity of the fact-finding process," while the fourth amendment exclusionary rule only related to the admission of evidence "the reliability and relevancy of which is not questioned." Linkletter, 381 U.S. at 639. Subsequent retroactivity cases placed primary importance on the purpose of the rule, finding that a rule whose primary purpose was to "overcome an aspect of the criminal trial that substantially impedes its truth-finding function" and "raises serious questions about the accuracy of guilty verdicts"
Although the Linkletter Court drew a distinction between direct and collateral review, the subsequent course of the Court's retroactivity doctrine led to its application without regard to the procedural posture of the case in which application was considered. Instead, the doctrine was applied on an ad hoc basis that led to differing decisions as to the importance of the criteria and to differing points in time as the starting point for non-retroactive application.

(2) Justice Harlan's Proposal

In Mackey v. United States, Harlan proposed a different model for retroactivity, which focused not on the nature of the new constitutional rule and the competing interests of the state, but on the procedural posture of the case. He argued that new constitutional rules should be given full retroactive effect in all cases not yet final at the time the rule was announced, but, with two exceptions, should not be given retroactive effect in cases on habeas review. The Court in Teague built on this proposal in developing its new retroactivity doctrine.

According to Harlan, the failure to give a new rule full retroactive effect with regard to convictions that were not final was fundamentally inconsistent with the basic justification for judicial review itself, pursuant to which courts "announce new constitutional rules . . . only as a correlative of [their] dual duty to decide those cases over which [they] have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules." Harlan stated that

[i]f we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it almost invariably would be applied retroactively. W. LaFave & J. Israel, supra note 260, § 2.9, at 70. See Desist v. United States, 394 U.S. 244, 249 (1969) ("Foremost among these factors is the purpose to be served by the new constitutional rule."). But cf. Stovall, 388 U.S. at 297-300 (finding that new rule did not sufficiently enhance truth-determining process to outweigh reliance placed on prior rule and disruption to administration of justice that retroactive application would entail). The second and third prongs of the test took into account state interests in the form of reliance on the previous rule and the disruption to the administration of justice that would result from reopening cases to apply the new rule. The Warren Court's retroactivity doctrine is thus in some respects an antecedent of the type of balancing approach later adopted in Stone v. Powell, 428 U.S. 465 (1976), for determination of the scope of habeas jurisdiction.

267. Linkletter, 381 U.S. at 627.
271. Id. at 681, 692 (Harlan, J., concurring).
272. Id. at 678-79.
is difficult to see why we should so adjudicate any case at all. If there is no need for an anti-majoritarian judicial control over the content of our legal system in nine cases precisely like that presented...it is hard to see the necessity, wisdom, or justification for imposing that control in [that] case itself. In truth, the Court’s assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation. We apply and definitively interpret the Constitution, under this view of our role, not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise.273

In an earlier opinion, Harlan also had pointed to the need to treat like cases alike on direct review as a rationale for full retroactivity when a case was in that procedural posture:

We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a “new” rule of constitutional law.274

For Harlan, “a proper perception of [the Court’s] duties as a court of law, charged with applying the Constitution to resolve every legal dispute within [its] jurisdiction on direct review, mandates that [it] apply the law as it is at the time, not as it once was.”275

Harlan based his differing view of retroactive application on habeas review on what he believed to be the fundamentally different nature of habeas review from that of appellate review:

While the entire theoretical underpinnings of judicial review and constitutional supremacy dictate that federal courts having jurisdiction on direct review adjudicate every issue of law, including fed-
eral constitutional issues, fairly implicated by the trial process below and properly presented on appeal, federal courts have never had a similar obligation on habeas corpus.\(^{276}\)

On habeas, Harlan argued that the issue of retroactive application should be decided by reference to the purpose served by habeas jurisdiction. He argued that retroactivity had always been "a function of the scope and purposes of the habeas corpus writ."\(^{277}\) Pre-\textit{Brown v. Allen}\(^{278}\) this was so because new rules normally were not cognizable on habeas because of the limited scope of habeas jurisdiction; post-\textit{Brown}, although habeas jurisdiction was expanded, "the retroactivity problem remain[ed] analytically constant," and thus, the scope of retroactive application of new rules should be consistent with "the reasons for the provision, in our federal legal system, of a habeas corpus proceeding to test the validity of an individual's official confinement."\(^{279}\)

In a functional analysis strikingly similar to that subsequently used by Justice Powell in \textit{Stone v. Powell},\(^{280}\) Harlan considered whether the purposes of habeas would be served by retroactive application of new rules on habeas, and whether the benefits from such application outweighed the costs incurred through the loss of finality. For Harlan, the primary purpose served by habeas was deterrence: habeas provided "a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark."\(^{281}\) Harlan believed this deterrent purpose could be accomplished without applying new rules on habeas.\(^{282}\)

Further, consideration of the competing policies of providing a forum for relitigation of claims in light of new constitutional principles versus the need for finality weighed in favor of applying "the law prevailing at the time a conviction became final."\(^{283}\)

According to Harlan, the policies favoring relitigation on the basis of intervening changes in constitutional law were that such a system

\(^{276}\) \textit{Id.} at 682. According to Harlan, habeas is "a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final," and "[t]he interest in leaving concluded litigation in a state of repose ... may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed." \textit{Id.} at 682-83.

\(^{277}\) \textit{Id.} at 684.

\(^{278}\) 344 U.S. 443 (1953).

\(^{279}\) \textit{Mackey}, 401 U.S. at 684.

\(^{280}\) \textit{See supra} Part II. A.

\(^{281}\) \textit{Mackey}, 401 U.S. at 687.

\(^{282}\) \textit{Id.}

\(^{283}\) \textit{Id.} at 688-89.
tends to assure a uniformity of ultimate treatment among prisoners; provides a method of correcting abuses now, but not formerly, perceived as severely detrimental to societal interests; and tends to promote a rough form of justice, albeit belated, in the sense that current constitutional notions, it may be hoped, ring more "correct" or "just" than those they discarded. 284

Although these interests had some "force," Harlan believed they were "too easily overstated." 285 First, he believed that "[s]ome discrimination must always exist in the legal treatment of criminal convicts within a system where the governing law is continuously subject to change." 286 Second, Harlan believed that convictions under former law still had a minimum level of fairness because "it has been the law, presumably for at least as long as anyone currently in jail has been incarcerated, that procedures utilized to convict them must have been fundamentally fair, that is, in accordance with the command of the Fourteenth Amendment." 287 Finally, in an argument reminiscent of Bator's claim of epistemological error, Harlan asserted that "constitutional updating is necessary in order to assure that the system arrives only at 'correct' results" and the concomitant idea that the decision of a court "cognizant of the Federal Constitution and duty bound to apply it" is "somehow forever erroneous because years later this Court took a different view of the relevant constitutional command carries more emotional than analytic force." 288

The competing interests in finality noted by Justice Harlan were the same as those highlighted by Bator and Friendly, both of whom Harlan cites: the need for an end to litigation before the rehabilitative process can effectively begin; the drain on "the very limited resources society has allocated to the criminal process" caused by relitigation; and the disruption to the state's enforcement of the criminal law caused by retrial of successful habeas petitioners, which may occur at a time when witnesses' memories have dimmed. 289

On balance, Harlan concluded that, with two exceptions, the interests in relitigation pursuant to current constitutional norms were outweighed by the need for finality. 290 The two times when Harlan

284. Id. at 689.
285. Id.
286. Id.
287. Id.
288. Id. at 689-90.
289. Id. at 690-91.
290. Justice Harlan stated, that, "while the case for continually inquiring into the current constitutional validity of criminal convictions on collateral attack is not an insubstantial one, it is by no means overwhelming," because "[m]ost interests such a doctrine would serve will be adequately protected by the current rule that all constitutional errors not waived or harmless are
believed the balance should come out in favor of retroactive application on habeas were when the new rule: (1) was one placing "as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or (2) was one involving a claim "of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.'" The Court in earlier cases already had viewed the first of these exceptions as requiring automatic retroactivity. The second exception, drawn from the pre-selective incorporation case of *Palko v. Connecticut,* was a throw-back to the "fundamental fairness" standard that the Court applied in determining the scope of the due process clause of the fourteenth amendment prior to the Court's adoption of selective incorporation of provisions of the Bill of Rights.

In his earlier dissenting opinion in *Desist v. United States,* Harlan had suggested that new rules that "significantly improve the pre-
existing fact-finding procedures" should be applied retroactively to further the purpose of habeas and "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." In Mackey, however, Harlan expressly rejected this guilt-relatedness exception:

First, adherence to precedent . . . must ineluctably lead one to the conclusion that it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged. Additionally, recent decisions of this Court . . . have revealed just how marginally effective are some new rules purportedly aimed at improving the factfinding process. I cannot believe that the interest in finality is always outweighed by the interests protected in [these decisions]. I believe Palko more correctly marks the tipping point of finality interests, not only in terms of divining which new rules should apply on habeas, but also in its reminder that a particular rule may be more or less crucial to the fairness of a case depending on its own factual setting. Finally, I find inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values. 297

(3) The Development of the New Retroactivity

In Griffith v. Kentucky,298 the Court adopted Justice Harlan's position as to cases not yet final.299 The Court agreed with Harlan's conclusion that prospective application in these situations was inconsistent with the nature of judicial review and violated "the principle of treating similarly situated defendants the same."300

In Teague v. Lane,301 a majority of the Court purported to adopt the second half of Harlan's proposal, rejecting the three-prong test of Linkletter and its progeny in favor of a rule that normally would not give retroactive effect to a new constitutional rule in cases that had become final before the new rule was announced.302

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296. Id. at 262 (Harlan, J., dissenting).
297. Mackey, 401 U.S. at 694-95.
299. The Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." Id. at 328. The holding in Griffith was the last step in a series of cases in which the Court had moved away from the use of the three-prong test for deciding retroactive application of new rules with regard to cases pending on direct review. See id. at 324-26 (discussing United States v. Johnson, 457 U.S. 537 (1982), and Shea v. Louisiana, 470 U.S. 51 (1985)); W. LaFave & J. Israel, supra note 260, § 2.9, at 1-3 (Supp. 1989).
300. Griffith, 479 U.S. at 322-23.
302. Id. at 310 (plurality opinion). The Teague Court did not produce a majority opinion
plurality generally followed Harlan’s analysis: the problem of retroactivity is really one of the scope of habeas;\textsuperscript{303} the purpose of habeas is deterrence, which is served by the habeas court applying the prevailing law at the time the conviction became final;\textsuperscript{304} and the costs imposed on states by retroactive application outweigh the benefits of applying new rules on habeas in most cases.\textsuperscript{305} The specifics, however, of the \textit{Teague} plurality’s new retroactivity approach, as adopted and elucidated by a majority of the Court this past Term, differ from Harlan’s proposals in three crucial respects. As discussed below, these differences make the \textit{Teague} brand of retroactivity a considerably different doctrine than that contemplated by Harlan. They also constitute the final steps in the development of the new habeas.

a. The \textit{Teague} Exceptions

The first difference is in the exceptions that the \textit{Teague} Court found justified consideration of a new rule on habeas. Justice Harlan believed that a new rule should be applied on habeas only if the new rule was one placing “as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” or involved a claim “of nonobservance of those procedures that . . . are ‘implicit in the concept of ordered liberty.”’\textsuperscript{306} Although the \textit{Teague} Court adopted the first of these exceptions,\textsuperscript{307} it did not adopt the second. Instead, the plurality “combine[d] the accuracy element” from Har-
lan's earlier Desist opinion "with the Mackey requirement that the procedure at issue must implicate the fundamental fairness of the trial" to come up with a hybrid second exception. The new second exception only applies when a new rule both requires "the observance of those procedures that . . . are implicit in the concept of ordered liberty" and creates a procedure "without which the likelihood of an accurate conviction is seriously diminished."

The Teague plurality believed that this departure from Harlan's theory was warranted because use of the Palko v. Connecticut "implicit in the concept of ordered liberty" idea alone would "import[] into a very different context the terms of the debate over incorporation," and thus would "be unnecessarily anachronistic." As to its adoption of the "accuracy" element from Desist, the plurality noted that "since Mackey was decided, our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review," and that "Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished." The plurality stressed the narrowness of its hybrid second exception, stating

because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge. We are also of the view that such rules are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testi-

309. See supra text accompanying notes 295-297.
310. Teague, 489 U.S. at 312.
311. Id. at 311 (quoting Mackey, 401 U.S. at 693).
312. Id. at 313.
314. Teague, 489 U.S. at 312.
315. Id. at 313. The plurality cited the plurality opinion in Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986), which would require "a colorable claim of factual innocence" before a successive habeas petition could be entertained; Murray v. Carrier, 477 U.S. 478, 496 (1986), in which the Court found that the fundamental fairness exception to procedural bar should be equated with situations when the constitutional violation "probably resulted in the conviction of one who is actually innocent"; and Justice Powell's statement in Stone v. Powell, 428 U.S. 465, 491-92 n.31 (1975), that removal of fourth amendment claims from habeas did not create any danger of denying a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." Teague, 489 U.S. at 313.
316. Teague, 489 U.S. at 313-14.
mony; or that the conviction was based on a confession extorted from the defendant by brutal methods.\(^{317}\)

This second Teague exception is, of course, the familiar amalgam of the views of Bator and Friendly. The Mackey half of the formula corresponds to Bator’s view of the times when a failure of process in the state courts requires relitigation in the federal courts. Indeed, in describing the narrowness of the second exception, the Teague plurality used as examples the same types of conduct that Bator used to describe when there had been a failure of process: mob domination of the trial, knowing use of perjured testimony, and a confession extorted by brutal methods.\(^{318}\) The Desist half of the test is based on Friendly’s idea that the main purpose of habeas should be to protect the innocent,\(^{319}\) an idea that Harlan himself had subsequently rejected in Mackey.

The amalgam of the Mackey and Desist exceptions to create the Teague second exception greatly narrows the number of cases that fall within that exception. The category of new rules that will apply on habeas under Teague is much smaller than that which would be created by application of either the Mackey or the Desist exception alone. In fact, the very inconsistency of the two principles makes it likely that almost any proposed rule can be excluded under one or the other prong. Thus, for instance, a rule that the fifth amendment bars police-initiated interrogation with regard to a separate charge once the right to counsel has been invoked\(^{320}\) does not come within this exception because its violation “would not seriously diminish the likelihood of obtaining an accurate determination” and “indeed, . . . may increase that likelihood.”\(^{321}\) On the other hand, the rule in Caldwell v. Mississippi\(^{322}\) that the eighth amendment prohibits the imposition of a death sentence by a sentencer who has been misled as to her responsibility for determining the appropriateness of the death sentence because false information of this type creates an impermissible risk of “substantial unreliability as well as bias in favor of death sentences”\(^{323}\) also does not come within this second exception. In Saw-

\(^{317}\) Id. at 313 (quoting Rose v. Lundy, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting)).
\(^{318}\) See Bator, supra note 13, at 457.
\(^{319}\) See Friendly, supra note 14, at 142 (proposing innocence standard); see also Desist v. United States, 394 U.S. 244, 262 (1969), (Harlan, J., dissenting) (one purpose of habeas is that “it seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted”).
\(^{322}\) 472 U.S. 320 (1985).
\(^{323}\) Id. at 328-30.
yer v. Smith\textsuperscript{224} the Court determined that while the \textit{Caldwell} rule does enhance the accuracy of capital sentencing, it is not "an absolute prerequisite to fundamental fairness" because the conduct it prohibits also can be challenged under the due process clause itself.\textsuperscript{325}

b. The \textit{Teague/Butler} "Dictated" Test

A second significant departure from Harlan's proposal, and a crucial one for use of retroactivity doctrine to complete the devel-

\textsuperscript{224} 110 S. Ct. 2822 (1990).

\textsuperscript{325} Id. at 2832. The \textit{Sawyer} Court stated:

In \textit{Teague}, we modified Justice Harlan's test to combine the accuracy element of the \textit{Desist} test with the \textit{Mackey} limitation of the exception to watershed rules of fundamental fairness. It is thus not enough under \textit{Teague} to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "alter our understanding of the \textit{bedrock procedural elements} essential to the fairness of a proceeding."

\textit{Id.} at 2831 (quoting \textit{Teague}, 489 U.S. at 311). The \textit{Sawyer} Court rejected the argument that the second exception should be modified in the death penalty context to include new rules of capital sentencing that "preserve the accuracy and fairness of capital sentencing judgments" for much the same reason that it had rejected a \textit{Caldwell} claim as satisfying the miscarriage of justice exception to procedural bar in \textit{Dugger v. Adams}, 489 U.S. 401 (1989): recognizing that exception would allow too many claims to be heard, because all of the Court's "Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense," and "petitioner has not suggested any Eighth Amendment rule that would not be sufficiently "fundamental" to qualify for the proposed definition of the exception."

\textit{Sawyer}, 110 S. Ct. at 2831-32; see supra text accompanying note 226. Recognition of this exception thus would go against the \textit{Teague} plurality's observation that "it is 'unlikely that many such components of basic due process have yet to emerge.'" \textit{Sawyer}, 110 S. Ct. at 2832 (quoting \textit{Teague}, 489 U.S. at 313). Justice Marshall's dissent pointed out the "hubris" involved in such a statement, noting that "[t]he majority cannot bind the future to present constitutional understandings of what is essential for due process." \textit{Id.} at 2839 (Marshall, J., dissenting). He argued that "the notion that we have already discovered all those procedures central to fundamental fairness is squarely inconsistent with our Eighth Amendment methodology, under which 'bedrock' Eighth Amendment principles emerge in light of new societal understandings and experience." \textit{Id.} at 2840. The Court in fact had modified the first \textit{Teague} exception for rules that remove primary conduct from the reach of the criminal law in recognition of the difference in death sentence challenges to include new rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense." Penry v. Lynaugh, 109 S. Ct. 2934, 2953 (1989).

Because it is hard to imagine a requirement more fundamental to the fairness of imposition of the death penalty than that the determination not be made by a sentencer biased in favor of imposing death, it seems likely that the second \textit{Teague} exception as interpreted in \textit{Sawyer} means that eighth amendment sentencing challenges held to constitute new rules will be cognizable in federal habeas proceedings only if they come within the first exception. \textit{Cf. Sawyer}, 110 S. Ct. at 2837 (Marshall, J., dissenting) (quoting \textit{Caldwell}, 472 U.S. at 333) ("\textit{Caldwell} rests on the view that any strong, uncorrected, and unequivocal prosecutorial argument minimizing the jury's sense of responsibility for its capital sentencing decision 'presents an intolerable danger that the jury will in fact choose to minimize the importance of its role'" and "\textit{Caldwell} thus tells us that a capital trial in which the jury has been misled about its sentencing role is fundamentally unfair").
opment of the new habeas, is the Court’s definition of what constitutes a new rule. That determination is critical, as the retroactivity issue only arises when a new rule is involved. In Desist, Harlan devoted a significant portion of his opinion to describing when a rule should be considered a new rule of law. For Harlan, the question of what the “prevailing law” was at the time of a habeas petitioner’s conviction required the determination of “whether a particular decision has really announced a ‘new’ rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.”

Thus, it would be “very difficult to argue against the application of [a] ‘new’ rule in all habeas cases” if “one could never say with any assurance that th[e] Court would have ruled differently at the time the petitioner’s conviction became final.” On the other hand, if there was a point in time when one could say with assurance that the Court would have ruled differently, then the new rule should not apply to convictions final at that point because “[a]lthough the threat of collateral attack may be necessary to assure that the lower federal and state courts toe the constitutional line, the lower courts cannot be faulted when, following the doctrine of stare decisis, they apply the rules which have been authoritatively announced by this Court.”

Justice Harlan made it clear, however, that stare decisis “cannot always be a complete answer to the retroactivity problem” because the concept of “prevailing law” required the state and lower federal courts to do more than simply apply the principles explicitly announced by the Supreme Court. Indeed, he believed that even a new decision explicitly overruling an old one, such as the decision involved in Desist itself, should apply retroactively on habeas when the precedent it overruled clearly had been discredited prior to its actual overruling. In that situation, the new rule announced in the overruling decision should be considered to have been the prevailing law from the point at which the old rule had become discredited, for at that

One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation.

Id.

327. Id. at 264.

328. Id.

329. Id.

330. Id. at 265.
point, lawyers were no longer entitled to rely on the continuing vitality of the old rule, and it would not necessarily have been improper for a lower court to have declined to follow it. 331

Thus, Harlan’s test for determining when a decision announced a new rule for purposes of a habeas petitioner’s case was that the rule should be considered the prevailing law from the time that one could not say with assurance that the Supreme Court would have decided the issue differently if the case had come before it. 332 In applying this test, Harlan recognized that states must be held to the duty of applying not only the letter of the law, but its spirit as well. Although he acknowledged that this flexible approach would create difficulties, he rejected the alternative of a hard and fast rule:

It is doubtless true that a habeas court encounters difficult and complex problems if it is required to chart out the proper implications of the governing precedents at the time of a petitioner’s conviction. One may well argue that it is of paramount importance to make the “choice of law” problem on habeas as simple as possible, applying each “new” rule only to those cases pending at the time it is announced. While this would obviously be simpler, simplicity would be purchased at the cost of compromising the principle that a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction. 333

Although Harlan reaffirmed this discussion from Desist in Mackey, 334 the Teague plurality did not even mention Harlan’s test for determining whether a decision in fact would announce a new rule or merely would confirm what already had been the prevailing law. Instead, the plurality stated that

In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final. 335

Justice Brennan predicted that the breadth of this “dictated” test would mean that federal habeas courts could hear a great many cases only if the rule urged by the petitioner fell within one of the two narrow exceptions to nonretroactive application on habeas because “[f]ew decisions on appeal or collateral review are ‘dictated’ by what came before”; rather, “[i]n most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the

331. Id.
332. See id. at 266-68.
333. Id. at 268.
335. Teague, 489 U.S. at 301 (citations omitted).
case in more than one way." The Court's refinement of the dictated test in its decisions of last Term, beginning with Butler v. McKellar, has made it clear that Brennan's prediction was correct.

In establishing the dictated test as the standard for determining when a rule is "new" for purposes of retroactivity doctrine, the Court started with Harlan's proposition that the main purpose of habeas is deterrence. The consequences, however, that the Court finds flow from that proposition are very different from those Justice Harlan found. Harlan believed that this deterrent purpose led logically to the conclusion that a rule should not be considered a new rule unless one could say with assurance that the Supreme Court would have ruled differently at the time the petitioner's conviction became final. The current Court concludes that the deterrent purpose of habeas leads to the opposite presumption: a rule should be considered "new" unless it can be said with assurance that the Supreme Court would not have held otherwise if the case had been presented to it, as the rule was "dictated" by prior precedent.

The difference in the Court's and Harlan's conclusions is based on their different conceptions of the deterrent function of the habeas court. For Harlan, deterrence went beyond merely ensuring that state courts comply with the principle of stare decisis. Stare decisis was not always a complete answer to the retroactivity problem because the concept of "prevailing law" required the state and lower federal courts to do more than simply apply the principles explicitly announced by the Supreme Court. For Harlan, stare decisis also required courts to apply the spirit of those principles and to predict the future course of the law, even if that prediction went against stare decisis in the form of an extant, but discredited, Supreme Court precedent.

For the present Court, however, "[d]eterrence' . . . is a meaningless concept[] as applied to a situation in which the law is so uncertain that a judge acting in all good faith and with the greatest of care could reasonably read [Supreme Court] precedents as permitting

336. Id. at 333 (Brennan, J., dissenting).
338. Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990) (quoting Teague, 489 U.S. at 306) ("the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards") (citations omitted).
340. Cf. id. at 1222 (The Court's deterrence rationale begs the central question of "deterrence of what").
the result the habeas petitioner contends is wrong.'\textsuperscript{342} Thus, the definition of what constitutes a new rule should "validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."\textsuperscript{343} Pursuant to this "functional view," the Court should assess whether at the time the petitioner’s conviction became final the state court should have felt compelled by existing precedent to find that the rule the petitioner sought to have applied to her case was constitutionally required.\textsuperscript{344} The fact that the rule is "controlled" or within the "logical compass" of prior precedent is insufficient to confer "new rule" status even if the Court made these statements in announcing the new rule, as "courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts."\textsuperscript{345} The dictated standard requires that the outcome of the claim is not "susceptible to debate among reasonable minds."\textsuperscript{346}

\textsuperscript{342} Penry \textit{v.} Lynaugh, 109 S. Ct. 2934, 2964 (1989) (Scalia, J., concurring in part and dissenting in part).

\textsuperscript{343} Butler, 110 S. Ct. at 1217; accord Saffle \textit{v.} Parks, 110 S. Ct. 1257, 1260 (1990). The Butler Court referenced United States \textit{v.} Leon, 468 U.S. 897 (1984), as support for this proposition. In \textit{Leon}, the Court held that the deterrent function of the fourth amendment exclusionary rule was not served when the police officer conducting the search was acting in objective good faith but pursuant to a technically invalid search warrant. Butler, 110 S. Ct. at 1217; see \textit{Leon}, 468 U.S. at 920-21. Brennan's dissent in Butler points out that the act of a police officer complying with a warrant is not analogous to that of a state court interpreting the United States Constitution. The state court's obligation to apply the spirit as well as the letter of the law makes unsound "[t]he Court's analogy between the deterrent function of federal habeas and the deterrent function of the exclusionary rule." Butler, 110 S. Ct. at 1223 n.6 (Brennan, J., dissenting). Brennan explained:

In \textit{Leon}, the Court explained the threat of evidentiary exclusion ordinarily cannot deter a search that turns out to be illegal due to a technically invalid warrant "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." This is because the assigned task of the police officer is to execute the warrant, not independently to evaluate its compliance with substantive Fourth Amendment standards ....

In contrast, .... state courts entertaining constitutional challenges to criminal proceedings are expected independently to evaluate these challenges in light of their best understanding of prevailing legal standards embodied in precedent. Hence, selecting any reasonable legal rule without flouting directly applicable precedent cannot be described as "objectively reasonable [judicial] activity." Given the difference between the nature of police conduct at issue in \textit{Leon} and judicial interpretation, the majority's proffered analogy is flawed. It ultimately does no more than borrow language from \textit{Leon}, and in so doing, fails to justify the majority's decision to embrace a "reasonableness" test as the appropriate objective of state-court adjudication.

\textit{Id.} (citations omitted).

\textsuperscript{344} Saffle \textit{v.} Parks, 110 S. Ct. 1260.

\textsuperscript{345} Butler, 110 S. Ct. at 1217.

\textsuperscript{346} \textit{Id.} at 1217-18.
This view of what state courts must do to implement the principles announced by the Supreme Court not only is at odds with Harlan's view of that role, but also

betrays a vision of adjudication fundamentally at odds with any [the] Court has previously recognized. As every first-year law student learns, adjudication according to prevailing law means far more than obeying precedent by perfunctorily applying holdings in previous cases to virtually identical fact patterns. Rather, such adjudication requires a judge to evaluate both the content of previously enunciated legal rules and the breadth of their application. A judge must thereby discern whether the principles applied to specific fact patterns in prior cases fairly extend to govern analogous factual patterns. In Justice Harlan's view, adjudication according to prevailing law demands that a court exhibit "conceptual faithfulness" to the principles underlying prior precedents, not just "decisional obedience" to precise holdings based upon their unique factual patterns.347

Indeed, one wonders if Harlan's balancing of the need for re-litigation pursuant to new constitutional standards versus the need for finality would have led him to the same conclusion if he had been required to perform that balancing against the background of the Teague/Butler definition of what constitutes a new rule. An underlying assumption of Harlan's balancing was that the conviction the habeas court would review under new rules was a conviction "perfectly free from error when made final."348 Based on his own expression of what he considered to be prevailing law, it is clear Harlan meant a conviction that the Supreme Court would agree was perfectly free from error at that point in time. As Brennan's dissent in Butler points out, however, the Teague/Butler dictated test significantly changes the equation:

It is one thing to preclude federal habeas petitioners from asserting claims based on legal principles contrary to or at least significantly dissimilar from those in existence at the time their convictions became final; such a basis for habeas relief engenders the possibility of "continually forcing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." It is a far different thing to say that concerns for repose and resource scarcity justify [the] . . . decision to protect States from the consequences of retrying or resentencing defendants whose trials and appeals did not conform to then-existing constitutional standards but are viewed as suffering from only "reasonable" defects.349

347. Id. at 1222 (Brennan, J., dissenting).
349. Butler, 110 S.Ct. at 1226 (Brennan, J., dissenting) (quoting Teague v. Lane, 489 U.S. 288, 306 (1989)). Moreover, according to Brennan "[t]he inability of lower courts to predict
In *Brown v. Allen*, the Court considered the effect of the state court's legal determinations on the habeas court's subsequent consideration of the same claims. The *Brown* Court held that "the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues." In his separate opinion, Justice Frankfurter elaborated on the rationale for this rule. The prior state court adjudication did not foreclose reconsideration on habeas because such a rule would give the state courts the "final say" when Congress indicated that the conclusive determination should be that of the federal courts. Accepting state court adjudications of constitutional questions as binding thus would be inconsistent with the habeas statute, as "[i]t is precisely these questions that the federal judge is commanded to decide." Therefore, Frankfurter concluded, no binding weight attaches to the state determination because "[t]he State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."

It is clear that the *Teague/Butler* dictated test de facto overrules *Brown*, although neither the plurality opinion in *Teague* nor the majority opinion in *Butler* mentions the *Brown* decision. The dictated test replaces the federal habeas court's de novo consideration of issues of constitutional law recognized in *Brown* with what amounts to a "clearly erroneous" standard of review of the state court's legal analysis of constitutional issues. As Brennan stated in his *Butler* dissent: "[a] federal court may no longer consider the merits of the petitioner's claim based on its best interpretation and application of the law prevailing at the time her conviction became final; rather, it must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable." Thus, the consequence of the dictated rule is that the state court determination of constitutional law has "binding weight" and constitutes the "last say" unless that determination cannot be distinguished from prior precedent "on any conceivable basis, legal or factual."
c. The *Teague* Threshold Test

The third significant difference from Harlan’s proposal is the *Teague* plurality’s determination that the decision as to retroactivity of a new rule on collateral review should be made as a threshold issue before the Court considers the merits of the claim. 357 Harlan never explicitly addressed the issue of the timing of the retroactivity decision in his proposals. On some prior occasions the Court had determined the extent of retroactive application of a rule in the case announcing it, while on other occasions it had not done so. 358 The rule that emerges from *Teague*, however, goes far beyond simply requiring that the Court determine the extent of retroactive application of a constitutional rule in the same case in which the rule is announced. The *Teague* threshold test requires the Court’s determination that the new rule, if adopted, would be applied retroactively *before* it can decide the merits of whether or not that new rule in fact exists. Thus, in *Teague*, the plurality declined to reach the merits of Teague’s constitutional claim because it found that, if it held in his favor with regard to that claim, its holding would constitute a new rule that it would not apply retroactively in a habeas proceeding. 359

It seems unlikely that Harlan could have contemplated this rule, which makes the legal existence of a right dependent on the temporal scope of its application. Indeed, his discussion in *Mackey v. United States* 360 takes for granted the existence of a new rule with regard to which the retroactivity determination must be made. 361 Nor does such a rule logically follow from Harlan’s theory. The *Teague* plurality argued that the rule is necessary in order to assure that similarly-situated individuals are treated alike: "*Once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all who are similarly situated.*" 362 Harlan, however, had discussed the need for like treatment as a rationale for his theory only with regard to cases pending before the Court on *direct* review. 363 He believed that equal treatment was

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358. See id. at 299-300 (citing cases).
359. Id. at 301.
361. See, e.g., id. at 681 (Harlan, J., concurring) ("Inquiry into the nature, purposes, and scope of a particular constitutional rule is essential to the task of deciding whether that rule should be made the law of the land. That inquiry is, however, quite simply irrelevant in deciding, *once a rule has been adopted as part of our legal fabric*, which cases then pending in this Court should be governed by it.") (emphasis added).
362. *Teague*, 489 U.S. at 300 (plurality opinion).
required with regard to cases in that posture by the rationale for judicial review itself.\textsuperscript{364} Harlan’s belief that this obligation was not implicated with regard to cases pending on habeas review was critical to his theory that retroactive application could be treated differently on habeas than on direct review. This belief is clearly reflected in Harlan’s concurrence in \textit{Mackey}:

While the entire theoretical underpinnings of judicial review and constitutional supremacy dictate that federal courts having jurisdiction on direct review adjudicate every issue of law, including federal constitutional issues, fairly implicated by the trial process below and properly presented on appeal, federal courts have never had a similar obligation on habeas corpus.\textsuperscript{365}

The \textit{Teague} plurality also based its rule on the need for federal courts to avoid rendering advisory opinions.\textsuperscript{366} In \textit{Stovall v. Denno},\textsuperscript{367} the Court stated that the disparity in treatment (which results when a case is applied retroactively only with regard to the defendant in the case in which the rule is announced) was “an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum.”\textsuperscript{368} According to \textit{Stovall}, “[s]ound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying” litigants in the case in which the rule is announced the benefit of the new decision.\textsuperscript{369} Although the \textit{Stovall} Court acknowledged the resulting inequity, it also noted that “the fact that the parties involved are chance beneficiaries [is] an insignificant cost for adherence to sound principles of decision-making.”\textsuperscript{370} The \textit{Teague} plurality stated that

\begin{quote}
[I]f there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment . . . is “an insignificant cost for adherence to sound principles of decision-making.” But there is a more principled way of dealing with the problem. We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated. We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven ap-
\end{quote}

\begin{itemize}
\item \textsuperscript{364} \textit{Mackey}, 401 U.S. at 679, 682 (Harlan, J., concurring).
\item \textsuperscript{365} \textit{Id.} at 682.
\item \textsuperscript{366} \textit{Teague}, 489 U.S. at 316 (plurality opinion).
\item \textsuperscript{367} 388 U.S. 293 (1967).
\item \textsuperscript{368} \textit{Id.} at 301.
\item \textsuperscript{369} \textit{Id.}
\item \textsuperscript{370} \textit{Id.}
\end{itemize}
plication of new rules to similarly situated defendants.\textsuperscript{371}

The \textit{Teague} threshold test, however, neither avoids treating similarly-situated defendants differently, nor avoids rendering advisory opinions. Instead of eliminating inequitable treatment, the threshold test merely redefines the class of those discriminated against by focusing on different characteristics to make the defendants similarly situated. Under the old retroactivity doctrine, the primary focus was on the nature of the right involved. The disparity caused by drawing a line between those who could and could not benefit from the new rule therefore naturally focused on the new rule’s differing treatment of those with the same right. For instance, at almost every opportunity for a number of years Justices Douglas and Black pointed out the inequity that resulted from not applying a new rule retroactively to those similarly situated with the defendant in the case in which it was announced.\textsuperscript{372} By similarly situated, however, they meant individuals with the same type of constitutional claim, not with a case in the same procedural posture. In fact, defining similarly situated in this manner, Justice Black used the disparity argument in his dissent in \textit{Linkletter v. Walker}\textsuperscript{373} to point out the arbitrariness of the very distinction that \textit{Teague} adopts (that between direct and collateral review) because it treated those with the same claim differently based on the fortuity of how quickly the criminal court docket in the state trying them moved.\textsuperscript{374} These Justices drew the logical conclusion that all constitutional rules should be applied retroactively, as this would then treat all those with the same claim similarly.\textsuperscript{375}

\textsuperscript{371} Teague v. Lane, 489 U.S. 288, 316 (1989) (plurality opinion) (citations omitted).

\textsuperscript{372} See, e.g., Mackey v. United States, 401 U.S. 667, 714 (1971) (Douglas, J., dissenting) (“[W]hen the defendants in . . . cases [announcing new rules] are given the benefit of a new constitutional rule forged by the Court, it is not comprehensible, if justice rather than the fortuitous circumstances of the time of the trial is the standard, why all victims of the old unconstitutional rule should not be treated equally.”); Desist v. United States, 394 U.S. 244, 255-56 (1969) (Douglas, J., dissenting) (“It still remains a mystery how some convicted people are given new trials for unconstitutional convictions and others are kept in jail without any hope of relief though their complaints are equally meritorious.”); Stovall v. Denno, 388 U.S. 293, 304 (1967) (Black, J., dissenting) (“To deny this petitioner and others like him the benefit of the new rule deprives them of a constitutional trial and perpetrates a rank discrimination against them.”).

\textsuperscript{373} Id. at 618 (1965).

\textsuperscript{374} Id. at 641-42 (Black, J., dissenting). Justice Black pointed out that Mapp’s offense was committed before Linkletter’s, and that the only reason Linkletter’s case was not still pending on appeal when Mapp v. Ohio, 367 U.S. 643 (1961), was decided was because the courts of his state moved faster than those of Mapp’s state. \textit{Linkletter}, 381 U.S. at 641-42 (Black, J., dissenting). In light of these facts, Black asserted that the differing treatment of Mapp and Linkletter points up the arbitrariness of the Court’s retroactivity doctrine: the “Court offers no defense based on any known principle of justice for discriminating among defendants who were similarly convicted by use of evidence unconstitutionally seized.” Id. at 641 (Black, J., dissenting).

\textsuperscript{375} See, e.g., \textit{Linkletter}, 381 U.S. at 642; Mackey, 401 U.S. at 713 (Douglas, J., dissenting)
The new retroactivity focuses on the procedural posture of the case, and concomitantly, the Teague plurality defines similarly situated defendants as those whose cases are in a similar procedural posture. The Teague plurality then draws from this the conclusion that no one should receive the benefit of a new rule. The Court's change in the definition of "similarly situated" does not do away with the inequality resulting from prospective application of new rules. As with any doctrine that draws artificial lines in the name of finality, inequality and arbitrariness are inherent in retroactivity doctrine.\(^\text{376}\)

The Teague threshold test does not avoid these problems; it merely shifts the lines.

Further, even if one accepted that the Court should not apply a nonretroactive new rule to the petitioner in the case in which it is announced (because to do so would be treating that petitioner differently from other similarly situated petitioners) the problem of rendering an advisory opinion will not necessarily be avoided. The advisory opinion quandary, to the extent it exists at all, cannot be resolved by requiring courts to decide whether a new rule will be applied retroactively before they decide whether the rule exists. Initially, it seems doubtful that the failure to apply a new rule to the petitioner in the case in which it is announced would render the decision announcing that rule advisory. An advisory opinion is one rendered with regard to an issue that does not constitute "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."\(^\text{377}\) It involves a situation in which the decision does not touch "the legal relations of parties having adverse legal interests."\(^\text{378}\) The fact that the petitioner in a case establishing a rule does not receive the relief she seeks, however, does not necessarily render that opinion advisory. Indeed, traditionally, establishing a legal claim has been a prerequisite to the determination of whether a party is entitled to relief. As Justice Stevens pointed out in Teague, the retroactivity issue could be analogized to harmless error.\(^\text{379}\) In the harmless error situation, the Court first

\(^{376}\) Cf. Mackey, 401 U.S. at 689 (Harlan, J., concurring) ("Some discrimination must always exist in the legal treatment of criminal convicts within a system where the governing law is continuously subject to change.").


\(^{378}\) Id.

determines whether error occurred, and then whether that error re-
quires reversal or is harmless.\footnote{380} Similarly, when a novel claim is pre-
sented on habeas, the Court can determine whether the trial process
violated any of the petitioner's constitutional rights, and then de-
termine whether the petitioner is entitled to relief through retroactive
application of the new rule.\footnote{381} Thus, it seems to be more the Court's
functional definition of rights—which treats the existence of a right
as inextricably bound up with whether its claimant will be granted
redress—than the case or controversy requirements of Article III, that
cased the Court to adopt a rule that "inverts the proper order of
adjudication."\footnote{382} Indeed, if it were otherwise, one would have to se-
riously question the Court's holding in \textit{Linkletter v. Walker}\footnote{383}
that "the Constitution neither prohibits nor requires retrospective ef-
fet."ootnote{384}

Further, as a practical matter, the \textit{Teague} plurality's solution not
only does not avoid advisory opinions, but makes it much more likely
that such opinions will occur. In order to decide whether the peti-
tioner's claim would be a new rule at all, and if it is a new rule, whether
it should apply retroactively on habeas, the Court necessarily must
establish the content of the proposed rule and the extent to which the
rule was dictated by prior precedent. As Justice Scalia has acknowled-
ged, the merits of a constitutional claim and the issue as to whether
it constitutes a new rule are "obviously interrelated."\footnote{385} As the Court
has applied these concepts in subsequent cases, it has rendered a num-
ber of advisory opinions and created an extensive amount of dicta
about putative new rules—dicta that itself sends a very strong message
as to how the Court would decide the merits of the cases.

The Court's decisions in \textit{Penry v. Lynaugh}\footnote{386} and \textit{Saffle v. Parks}\footnote{387}
illustrate its application of this approach. In \textit{Penry}, the Court split
five-to-four on whether a claim that the Texas death penalty statute
as applied to Penry had violated the eighth amendment by not al-
lowing the jury to consider certain mitigating evidence in making its
sentencing recommendation should constitute a new rule.\footnote{388} The ma-

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\begin{itemize}
  \item \footnote{380.} Id.
  \item \footnote{381.} Id.
  \item \footnote{382.} Id. at 314 n.2.
  \item \footnote{383.} 381 U.S. 618 (1965).
  \item \footnote{384.} Id. at 629.
  \item \footnote{385.} Penry v. Lynaugh, 109 S. Ct. 2934, 2964 (1989) (Scalia, J., concurring in part and
dissenting in part).
  \item \footnote{386.} 109 S. Ct. 2934 (1989).
  \item \footnote{387.} 110 S. Ct. 1257 (1990).
  \item \footnote{388.} Penry, 109 S. Ct. at 2945.
\end{itemize}
}
majority found that Penry's claim was dictated by prior precedent. In *Jurek v. Texas*, the Court upheld the Texas death penalty statute with the understanding that its structure would be interpreted in a manner that would “permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence.” The Court’s subsequent decisions in *Lockett v. Ohio* and *Eddings v. Oklahoma* “reaffirmed that the Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty.” The rule that Penry sought was merely a request that Texas “fulfill the assurance upon which *Jurek* was based” and was “dictated by *Eddings* and *Lockett*.”

The four dissenters believed that the rule Penry sought was a new rule under *Teague* based on their differing interpretation of *Jurek*. They asserted that “if there is any available contention that our prior cases compelled a particular result, it is the contention that petitioner’s claim was considered and rejected by *Jurek v. Texas*.” Further, even if that were not the case, they believed it was “utterly impossible to say that a judge acting in good faith and with care should have known the rule announced today, and that future fault similar to that of which the Texas courts have been guilty must be deterred by making good on the ‘threat’ of habeas corpus.”

Although at this point in the *Penry* decision the Court purportedly had not undertaken consideration of the merits of the claim at all, one could easily predict how each side would decide the merits of whether the rule Penry sought should be adopted. Because a claim dictated by prior precedent obviously is going to be held to be a constitutional requirement, the majority’s decision that the rule Penry sought was required by the eighth amendment is a foregone conclusion. Clearly the dissenters’ differing interpretation, not only of *Jurek*, but presumably of *Lockett* and *Eddings* as well, would likely lead them to a different result as to the merits of the claim. In fact, the majority found that Penry’s claim had merit, while Justice Scalia, writing for the dissenters, went on to explain why the rule sought was not required by *Lockett* and *Eddings* and why the claim was without

394. Id. at 2945, 2947.
395. Id. at 2965 (Scalia, J., concurring in part and dissenting in part).
396. Id.
397. Id. at 2952.
According to Scalia, *Lockett* and *Eddings* require that "all mitigating factors must be able to be considered by the sentencer, but need not be able to be considered for all purposes." Accordingly, the decisions in *Lockett* and *Eddings* did not necessarily prohibit a state from establishing the manner in which mitigating factors could be considered, but rather merely prohibited it from establishing a scheme that gave those factors no weight at all.

The Court revisited these differing interpretations of *Lockett* and *Eddings* in *Saffle v. Parks*, and this time Scalia's interpretation prevailed. Because of the Teague threshold test, however, that change in interpretation remained dicta. Parks argued that an instruction to the jury during the sentencing phase that they should avoid any influence of sympathy had affected the jurors' consideration of his mitigating evidence in a way that violated the eighth amendment. In finding that this claim constituted a new rule because it was not dictated by prior precedent, the majority stated that *Lockett* and *Eddings* did not speak to the issue of whether the state can control how a jury considers mitigating evidence, but only to the issue of what evidence the jury must be allowed to consider. The Court stated "there is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." Thus, the Court could not say that upholding a sympathy instruction was unreasonable. Moreover, the Court stated, "Even were we to agree with Parks' assertion that our decisions in *Lockett* and *Eddings* inform, or even control or govern, the analysis of his claim, it does not follow that they compel the rule that Parks seeks."

Clearly a significant development in the interpretation of a state's obligation to allow consideration of mitigating evidence in the sentencing phase of a death penalty case occurred between *Penry* and *Parks*. A majority of the Court now believes that there is a significant distinction between those limits on mitigating evidence that exclude it altogether as opposed to those that merely limit the ways in which

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398. *Id.* at 2967-68 (Scalia, J., concurring in part and dissenting in part).
399. *Id.* at 2968.
400. *Id.* at 2967.
401. 110 S. Ct. 1257 (1990). *Saffle* was another five-to-four decision.
402. *Id.* at 1257-58.
403. *Id.* at 1261.
404. *Id.*
405. *Id.*
406. *Id.*
it can be considered. This is clear after Parks. But, because the Teague threshold test inverts the order of adjudication, Parks does not tell us the critical element needed to understand the contours and implications of this development: how this distinction applies to a particular set of facts in a concrete controversy. In short, Parks suffers from the central evil at which the rule against advisory opinions is aimed—the creation of law in the abstract. Indeed, one is reminded of Justice Blackmun's statement about the Court's disposition in Dugger v. Adams:407 "In this way, the Court both leaves the law in shambles and reinstates respondent's death sentence without ever bothering to determine what legal principle actually governs his case."408

Thus, the Teague threshold test does not avoid the creation of "dicta" through "advisory opinions." It avoids only the actual holding with regard to the existence of a new rule, and in the process, it creates a level of hypothetical adjudication that is perhaps unparalleled. One cannot help but wonder about the future consequences of this new form of adjudication. It seems that the uncertainty created can only cause confusion in both state and federal lower courts, among defense attorneys and prosecutors, and among other officials whose job it is to make good faith attempts to comply with the requirements of the Constitution. Working out the implications of the principles announced in Supreme Court decisions is difficult enough when one has the starting point of the Court's concrete application in the case in which the principle is announced. Without that initial guidepost, the task can only be more difficult.

Further, one wonders what effect hypothetical adjudication may have on the Court's pronouncements themselves. The traditional model of adjudication is analysis of precedent and adoption of rules in light of the particular facts of a particular case, and judicial review traditionally has been justified only as a necessary consequence of this activity.409 If the Court cuts itself loose from this model through the Teague threshold test, will the resulting adjudication be the same, or will the release from the boundaries of announcing principles in the context of a concrete decision change even the content of the principles announced? It is perhaps not insignificant that in two out of the five cases that the Court adjudicated under the Teague threshold test through the end of the 1990 Term, including Teague itself, the dissent accused the majority of having misstated the nature of the

408. Id. at 1224 n.15 (Blackmun, J., dissenting).
409. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).
petitioner's claim. The *Teague* threshold test hardly seems a "more principled way" of dealing with the problem of advisory opinions.

The rationales of evenhandedness and avoidance of advisory opinions thus are inadequate to explain the Court's choice of a procedure that requires federal habeas courts to decide whether a proposed rule will be applied retroactively before they decide whether the rule even exists. This is particularly true in light of the consequences that are likely to result from turning the order of adjudication on its head in this fashion.

Further, the Court does not address at all the other rationale articulated in *Stovall v. Denno* for applying a new rule to the petitioner in the case in which the rule is announced: allowing the petitioner to benefit from the rule operates as an incentive to encourage counsel to advance contentions requiring a change in the law. The *Teague* threshold test clearly has the opposite effect. As Justice Brennan argued in dissent, the threshold test not only deprives the Court of the ability "to check constitutional violations and to further the evolution of our thinking in some area of the law" by decision of cases on habeas, but it also discourages the litigation of claims in habeas proceedings, thereby depriving the Court and society of the benefit of decisions by the lower federal courts when the Court later must resolve the issue.

If one looks at the result of the *Teague* threshold test, however, one once again finds the explanation for the Court's actions not in its rhetoric, but in its preference for finality of state court adjudications. For, as the *Teague* plurality states, the result of the threshold test is that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions."

The *Teague* brand of retroactivity has the effect of removing the lower federal courts from participation in the development of constitutional doctrine in all but a few cases, and the requirement that the retroactivity decision be made as a threshold matter is the capstone of this achievement. The narrowness of the exceptions to the nonretroactivity rule in habeas proceedings ensures that few new rules

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410. *See Saffle*, 110 S. Ct. at 1265 (Brennan, J., dissenting) ("Most of the majority opinion addresses the retroactivity of a claim not even raised by respondent."); *Teague v. Lane*, 489 U.S. 288, 340 (1989) (Brennan, J., dissenting) ("The plurality seeks to give its decision a less startling aspect than it wears by repeatedly mischaracterizing *Teague*'


413. *Id.* at 316 (plurality opinion) (emphasis added).
will apply on habeas. The breadth of the dictated test’s definition of a new rule ensures that every state court decision that involves something other than the application of “binding precedents to factual disputes that cannot be distinguished from prior cases in any imaginable way” will constitute a new rule that must come within one of the two narrow exceptions in order to be considered on the merits by a federal habeas court. And, finally, the requirement that the retroactivity determination be made as a threshold matter before the rule can be announced ensures that these restrictions will apply not only to the traditional retroactivity situation in which the habeas court is determining whether to apply previously announced doctrine to a subsequent case, but also to the situation in which the habeas court is asked to interpret or elucidate existing doctrine in light of a new factual situation. The threshold test thus ensures that, unless the new rule relates to one of the two exceptions, the lower federal courts sitting in habeas not only will have no say with regard to how constitutional principles should be interpreted and applied in state criminal proceedings, but also will have no say as to whether such principles even exist.

With the Teague retroactivity doctrine, the Court’s development of the new habeas seems complete. With Teague, the Court has found a way to eliminate habeas reconsideration of the merits of constitutional claims that were actually adjudicated in the state courts. As with previous cases in which the Court has limited the scope of habeas jurisdiction, this feat was accomplished through an amalgam of Friendly’s rationale of innocence and Bator’s test for finality. The rationale of innocence, this time used in conjunction with another deeply held value in our society—equality of treatment—is utilized to come up with a result that furthers neither value.

As discussed above, the amalgam of the approaches of Friendly and Bator to create the second exception to non-retroactivity means that “[a] rule that qualifies under this exception must not only improve accuracy, but also ‘alter our understanding of the bedrock procedural elements’ essential to the fairness of a proceeding.” Thus, the fact that a new rule relates to innocence does not result in its application in habeas proceedings. The Court’s argument that its ret-

415. Justice Brennan stated it somewhat more forcefully: “With this requirement, the Court has finally succeeded in its thinly veiled crusade to eviscerate Congress’ habeas corpus regime.” Id. at 1219 (Brennan, J., dissenting).
416. See supra text accompanying notes 320-325.
roactivity doctrine treats similarly situated defendants alike is an il-
ansion: the doctrine simply singles out a different group of individuals
for discriminatory treatment. The value actually furthered is that of
finality, and the test that is created for finality is strikingly similar
to that proposed by Bator.

In Part I of this Article, I discussed the two assumptions that
underlie Bator’s theory: habeas must be justified in functional terms
because it is an epistemological error to attempt to justify it in terms
of “correct” results, and the presumption should be against reliti-
gation, because if a job can be done well once, it should not be done
again. Based on these assumptions, Bator determined that habeas
jurisdiction should be limited to what he viewed as its historical limits:
situations in which the state court lacks jurisdiction or in which there
has been a failure of process in the state courts.

The Rehnquist Court’s adoption of a habeas that “validates rea-
sonable, good-faith interpretations of existing precedents made by
state courts even though they are shown to be contrary to later
decisions” clearly is based on similar assumptions. The validation
of reasonable, though “wrong,” state court interpretations must be
based on the idea that one interpretation of constitutional doctrine
is as good as another, as long as it is not irrational. This nihilistic
view of constitutional adjudication is one logical conclusion that can
follow from the proposition that the “correct” answer is unknowable.
If it is an epistemological error to assume that a court can make an
ultimately correct determination of law or fact, there is no intrinsic
reason why a federal court determination will be more correct than
the state court’s determination.

The idea that, because one interpretation of constitutional doc-
trine is as good as another the first such interpretation should be given
conclusive effect, clearly follows from Bator’s second presumption
against relitigation. The Rehnquist Court’s exceptions to the finality
of the state court adjudication also reflect Bator’s exceptions. When
“primary, private individual conduct . . . is beyond the power of the
criminal law-making authority to proscribe,” there is a lack, not
only of judicial jurisdiction, but of legislative jurisdiction as well. As
discussed above, the accuracy prong of the second exception theo-

418. See supra Part I.A.
419. Id.
421. See Bator, supra note 13, at 509.
667, 692 (1973)) (Harlan, J., concurring in judgments in part and dissenting in part).
retically could create a difference between Bator's second exception and that recognized in Teague. The Court, however, gives the very same situations as examples of its second exception for watershed rules of criminal procedure that significantly enhance the accuracy of criminal proceedings as Bator gives as classic examples of failure of process.

The old habeas was built on Brown v. Allen's broad interpretation of the scope of habeas jurisdiction, which allowed federal courts to have the "last say" with regard to allegations of constitutional violations, and on Fay v. Noia's willingness to allow federal courts to hear such claims, even if they were procedurally defaulted under state law. Wainwright v. Sykes did away with Fay; Teague and its progeny do away with Brown. The next Part looks at the nature of the new habeas the Court has erected in their place.

III. The New Habeas: Remembrance of Things Past

In looking at the characteristics of the new habeas and its implications for constitutional adjudication of state prisoner claims, it is helpful to start by considering the structure created by the habeas that it replaced. In their article, Dialectical Federalism: Habeas Corpus and the Court, Robert Cover and Alexander Aleinikoff describe the way in which the Warren Court used the habeas of Brown and Fay to implement its decisions selectively incorporating portions of the Bill of Rights into the due process clause of the fourteenth amendment. Instead of using a direct method of enforcement, such as the federal court injunction it utilized to impose its civil rights rulings on the states, the Warren Court chose the indirection of habeas review to enforce state compliance with the new criminal process requirements. Because habeas acts not on "those persons whose behavior is the target of reform but upon institutional outcomes," this means of enforcement was less efficient than would have been a remedial system that fined police for illegal searches or enjoined the state courts to establish an adequate system for provision of counsel to felony defendants.
Enforcement through the indirection and redundancy of federal habeas review of state court constitutional determinations, however, had its advantages. This system for determining how the constitutional principles of criminal procedure announced by the Warren Court would be interpreted and implemented was more flexible than a system based on direct enforcement because it permitted and encouraged a dialogue between the state and federal courts that allowed both to participate in the development of federal constitutional rights.\textsuperscript{431}

According to Cover and Aleinikoff, three characteristics were necessary for this dialogue to be effective. First, in order for the participants to check one another, they must be independent of each other "in the sense that malfunction of one does not affect the functioning of the other."\textsuperscript{432} Brown v. Allen\textsuperscript{433} and Fay v. Noia\textsuperscript{434} guaranteed this independence for the federal courts. They established that state court adjudication could not estop independent federal court adjudication of the merits of constitutional claims raised by state prisoners, even when the prisoner was deemed to have waived the claim in the state court system, unless that waiver amounted to intentional bypass on the part of the prisoner.\textsuperscript{435} These decisions thus ensured that the federal court could conduct an independent legal analysis of federal constitutional claims, and that "deficiencies of counsel and forum in the state proceeding could not, by inadvertence or design, create a situation in which the federal right had to be forgone in the federal court as well."\textsuperscript{436} Moreover, independence of the state courts was ensured because constitutional interpretations of the lower federal courts are not binding on state courts.\textsuperscript{437}

Second, in order for the dialogue between federal and state courts to be useful, there had to be two distinct voices. In broad terms, be-
cause of the differing conditions under which the state and federal courts considered the same constitutional issue, they provided these alternative perspectives. State courts, in general, represent the "pragmatic" perspective, which tends to read into the Constitution "only ad hoc, though important, strictures upon egregious behavior by presupposedly legitimate, historically validated structures of authority."438 Pursuant to that view, "constitutional principle defines a perimeter; within that perimeter administrative, managerial, and efficiency concerns can hold sway."439 State courts tend to have this pragmatic approach because of their position on "the firing line" where they must determine "which cases will be processed, how many will be processed at what rate of speed, what resources will be expended on these cases, by what procedures the cases will be decided, and . . . what the decision will be."440 These tasks involve coordination of all the actors in the criminal justice system and the courts themselves, as well as all the difficulties involved in guilt/innocence and sentencing determinations.441 Constitutional rights operate as constraints that "permeate the ways in which these tasks may permissibly be carried out," thereby hindering efficiency; thus their elimination or loose interpretation facilitates the state courts' ability to carry out their duties.442 Lower federal courts tend to have a more "utopian" perspective, which "reads a more or less comprehensive order of fair and limited government into the Constitution, usually focusing on the Bill of Rights or some provision of the Fourteenth Amendment."443 They are removed from the practical realities of the administration of the state criminal process, as well as from questions of the guilt or innocence of the petitioner.444 The very definition of their jurisdiction to consider state prisoner claims means that for them the constitutional inquiry will be the most important issue.445

Third, the two parties to the dialogue must have approximately equal power, "or at least mutual ability to frustrate," in order to encourage compromise between the parties' differing perspectives.446 The old habeas satisfied this characteristic as well. The federal courts' power lay in their ability to release particular state prisoners and to
threaten the release of others if they did not agree with the state court's determinations on constitutional questions.\textsuperscript{447} State courts, however, have the power to ignore the constitutional pronouncements of the lower federal courts if they are willing to pay the price in released prisoners and thus also have the power to frustrate the federal courts' objectives in the majority of cases in which no habeas petition is filed.\textsuperscript{448} Further, because of the sequential nature of the two proceedings, federal courts must deal with the state courts' adjudications of fact and also with their expressions of the practical constraints under which state criminal systems operate.\textsuperscript{449} Thus, each side has an incentive "to acknowledge and, if possible, satisfy some of the more reasonable demands of the other."\textsuperscript{450} Even if such an accommodation is not achieved in the development of constitutional rules, then the Supreme Court at least has the benefit of the elaboration of the respective positions when it ultimately resolves the conflict.\textsuperscript{451}

This dialogue between the state and federal courts occurred in the areas in which there are "no foreordained answers to the relevant questions"—that is, in the areas of constitutional law in which the Supreme Court has not definitively spoken.\textsuperscript{452} In these cases, the interaction between federal and state courts in individual cases operated to give definite form to the broad constitutional principles announced by the Supreme Court. The dialogue followed a common pattern. The Supreme Court would announce a decision that "set an agenda" by designating issues or values of particular concern, the federal court of appeals opinions became the "leading cases" elucidating these principles, the state courts reacted to these federal court opinions, and the federal courts responded to the state court articulations of the relevant practical constraints on the criminal justice system by shaping rules to accommodate them or by not pressing constitutional demands.\textsuperscript{453}

Cover and Aleinikoff describe two traditional paradigms for the federal role in altering state institutions. The first involves the hi-

\textsuperscript{447} Id. at 1052.

\textsuperscript{448} Id. at 1053. Although the Court's opinions developing the new habeas give one the sense that every state prisoner files at least one habeas petition, in fact, the number of habeas petitions filed per capita is very small. Professor Resnik did a study of per capita filings in 1983 that showed that 5.74 prisoners per hundred filed habeas petitions in 1971, and the per capita rate declined after that to 2.68 petitions per hundred prisoners in 1983. Resnik, supra note 189, at 945.

\textsuperscript{449} Cover & Aleinikoff, supra note 11, at 1052-53.

\textsuperscript{450} Id. at 1053.

\textsuperscript{451} Id.

\textsuperscript{452} Id. at 1049.

\textsuperscript{453} Id. at 1054.
erarchical imposition of federally determined values, in which the Supreme Court articulates the value, the lower federal courts define the rights that flow from the value, and the rights so defined are imposed on the state through direct and coercive federal court action. The second paradigm is characterized by fragmentation, justifying value choices by the individual states, in which the states "retain the major role in evolving rights subject only to some vague limits on arbitrariness and irrationality." Both of these models "create a sense that conflict and indeterminacy are dysfunctional." In the hierarchical model, conflict is labelled "resistance or interposition" that violates the supremacy clause; in the fragmentation model, conflict is described as "federal interference with states' rights." Both theories give one system or the other "exclusive or preeminent voice as to the value to be chosen or imposed."

The "dialectical federalism" created by the choice of federal habeas as the means of enforcing constitutional rights relating to state criminal process does not fit either of these models. It posits conflict and indeterminacy as the norm, and it provides the mechanism through overlapping jurisdictions for resolution of differing interpretations of Supreme Court requirements by roughly equal political actors.

It is clear that dialectical federalism does not survive in the new habeas. Under the new habeas, federal district courts hearing habeas petitions are not independent of the state courts. Wainwright v. Sykes ensures that the deficiencies of counsel and forum in the state proceedings carry over into the habeas proceeding to bar federal consideration as well, unless the state chooses otherwise by waiving the procedural default and hearing the merits of the claim. Thus the state courts are left free to have the final say as to whether these defaulted constitutional claims are sufficiently important to be heard, subject only to the narrow control of the cause and prejudice standard.

Teague v. Lane and its progeny ensure that a state court's determination on the merits will control the subsequent federal court consideration of the merits as well. The federal court can only make an independent determination of the merits of proposed rules if the state court determination of the constitutional issue was unreasonable. Indeed, the only area in which the new habeas allows the district

454. Id. at 1047.
455. Id.
456. Id.
457. Id. at 1047-48.
458. Id. at 1048.
court to make an independent determination is in the area in which the dialogue is useless: when the appropriate rule is "dictated" by Supreme Court precedent. The state courts thus are for the most part left free to work out the implications of the federal constitutional principles announced by the Supreme Court for themselves, without having to take account of the separate voice of the federal courts.

As Justice Brennan argued, the Court's rule requiring only "strict 'decisional obedience' to existing precedents" means that at best, the threat of habeas review will deter state courts only from completely indefensible rejections of federal claims. State courts essentially are told . . . that, save for outright "illogical" defiance of a binding precedent precisely on point, their interpretations of federal constitutional guarantees—no matter how cramped and unfaithful to the principles underlying existing precedent—will no longer be subject to oversight through the federal habeas system. State prosecutors surely will offer every conceivable basis in each case for distinguishing our prior precedents, and state courts will be free to "disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided [by the Supreme Court] approach." "

The state courts, of course, also are free to apply the spirit as well as the letter of constitutional law. Yet one can predict that nevertheless the content of the constitutional rules they develop will be significantly different from that which would result from a federal-state dialogue. For, in determining the "spirit" of the constitutional principles announced by the Supreme Court, the state courts no longer will have the benefit of the differing perspective of the lower federal courts with regard to these issues. Thus, given the pragmatic perspective that institutional pressures are likely to create in most state courts, the interpretations they come up with are likely to be biased in favor of less stringent constitutional requirements.

As with the cause and prejudice standard's limit on state court freedom to decide the effect of procedural defaults, this freedom to develop federal constitutional doctrine free from federal court influence is loosely circumscribed by the exceptions to nonretroactivity for new rules that place a class of private conduct or a type of punishment beyond the power of the state to proscribe or are "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." It is further circumscribed by the potential for Supreme Court direct review of state court constitutional decisions.


462. See supra text accompanying notes 438-442.

Neither of these limits, however, places a very broad restraint on the state court articulation of federal constitutional principles. Few rules will involve a substantive due process challenge of the type contemplated by the first exception, and the Court made clear in *Teague* how narrow it intended the second exception to be.464 Further, the Supreme Court's certiorari jurisdiction on direct review clearly cannot adequately insert a "federal voice" into state court constitutional adjudication. The ""Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles," and, thus, "the Court generally will not grant certiorari just because the decision below may be erroneous."465 Indeed, the Court itself has admitted its inadequacy for performing this task.466

The new habeas thus structures federal-state relationships in the area of state compliance with federal constitutional rules of criminal procedure in a manner that, subject to relatively minor restrictions, leaves state courts free of federal influence in the development and application of those rules. The lower federal courts' role is simply to monitor the state courts to make sure that they do not engage in egregious conduct by plainly ignoring clearly binding Supreme Court precedent, by attempting to punish conduct that cannot constitutionally be punished, or by denying state prisoners process that is at least fundamentally fair. In all other situations, the system is essentially a unitary one, with decisions as to the meaning of constitutional rights relating to criminal procedure being made by those who must live with the restrictions placed on efficient administration of justice by those rights, and the Supreme Court at the top keeping its oar in through its ability to grant certiorari on direct review.

The new habeas thus creates a very different structuring of federal-state relations in the area of state criminal proceedings from that of the old habeas. It is not, however, an unfamiliar structure. Indeed, it is quite similar, although by no means identical, to the way that federal-state relations in this area were structured prior to *Mapp v. Ohio*467 and the ascendancy of selective incorporation. For the first

464. *See Teague*, 489 U.S. at 334 (Brennan, J., dissenting) (rules removing primary conduct from the reach of the criminal law "are rare" and "rules that would require 'new procedures without which the likelihood of an accurate conviction is seriously diminished are not appreciably more common'"); *id.* at 313 ("we believe it unlikely that many such components of basic due process have yet to emerge").


hundred years after passage of the fourteenth amendment, the Supreme Court held that the due process clause of that amendment only prohibited state action that violated those rights of an individual that were deemed "fundamental." 468 Fundamental rights were those that were "implicit in the concept of ordered liberty," that were "so rooted in the traditions and conscience of our people as to be ranked fundamental," and that "lie at the base of all our civil and political institutions." 469 The due process clause prohibited "those state actions that 'offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses,' that are 'repugnant to the conscience of mankind,' or that deprive the defendant of 'that fundamental fairness essential to the very concept of justice.' " 470

Under the fundamental fairness test, due process had no necessary correlation with the Bill of Rights, which had been held to apply only to actions of the federal government. 471 The rights required to be recognized by a state under the fundamental fairness test might overlap with rights contained in the Bill of Rights, but that was because those rights were "implicit in the concept of ordered liberty," not because they were in the Bill of Rights. 472 Further, the fundamental fairness test was applied on a fact specific, case-by-case basis. When a defendant argued that the state had denied her due process by its failure to recognize a right, the court's inquiry "was not whether that right, viewed in the abstract, was implicit in the concept of ordered liberty," but rather "whether the state's action had resulted in a denial of fundamental fairness in the context of the particular case." 473 Thus, for instance, in Palko v. Connecticut 474 the Court found that a claim that a state could not be allowed to appeal an acquittal and gain a retrial based on error in the first trial consistent with double jeopardy did not constitute a rule implicit in the concept of ordered liberty because the state was not trying to wear the accused out through a multitude of trials, but rather was seeking to obtain one

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468. W. LAFAVE & J. ISRAEL, supra note 260, § 2.4, at 41.
469. Id.
470. Id. The basic objective of the due process clause was "to provide 'respect enforced by law for that feeling of just treatment which has evolved through centuries of Anglo-American constitutional history and civilization.' " Id. Its content was rooted in a natural law background that extended its protection "beyond procedural fairness and imposed limits as well on the substance of state regulation." Id.
471. Id. § 2.2, at 34; see Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
473. Id. at 43.
error-free trial. The Court declined to decide whether the answer might be different "if the state were permitted after a trial free from error to try the accused over again." This regime is the structural analogy to what Cover and Aleinikoff describe as the pragmatic approach to constitutional interpretation: it places "only ad hoc, though important, strictures upon egregious behavior by presumptively legitimate, historically validated structures of authority" — that is, the states. Federal review of state action defines a perimeter of fundamental fairness, within which the states have a large degree of freedom to provide to criminal defendants whatever process the states deem best in light of their concerns for efficient administration and management of their criminal justice system. Indeed, the Court's decisions under the fundamental fairness doctrine noted the need "to respect the 'sovereign character of the several states' by giving the states the widest latitude consistent with assuring fundamental fairness," and one of the major justifications given for the fundamental fairness standard was that it provided "ample room for diversity (and thus experimentation) in state procedure."

On the other hand, one of the major criticisms of the selective incorporation doctrine was that it restricted the states' ability to develop their systems of criminal procedure as they saw fit. Selective incorporation focused not on the particular aspect of a right implicated by a specific case, but rather on the "fundamental nature of the guarantee as a whole." As a result, when the Court found a right to be "fundamental," its ruling "encompass[ed] the full scope of the guarantee," and all the standards previously developed in applying that guarantee to federal criminal prosecutions became applicable to the states. A body of federal constitutional interpretation thus was incorporated with each right incorporated. Further, selective incorporation used a different standard for determining whether a right was fundamental. While under the fundamental fairness standard the Court would consider "whether a 'fair and enlightened system of justice' would be 'impossible' without a particular safeguard,"

475. Id.
476. Id. at 328.
477. Cover & Aleinikoff, supra note 11, at 1050.
479. Id. § 2.5, at 55.
480. Id. § 2.6, at 58-59.
481. Id. § 2.5, at 49.
482. Id. at 50.
selective incorporation directed courts "to test the fundamental nature of a right within the context of that common law system of justice, rather than against some hypothesized 'civilized system.'" The proper frame of reference thus was "the Anglo-American regime of ordered liberty," and the fact that a right was within the Bill of Rights was given considerable weight in making this determination. Application of this standard ultimately led to the incorporation of most of the first eight amendments of the Bill of Rights into the due process clause of the fourteenth amendment.

The similarities between the way federal-state relations in the criminal process area are structured by the new habeas and the way they were structured under the fundamental fairness standard are obvious. As in pre-incorporation days, the federal courts under the new habeas cannot restrict the state courts beyond the limits of denial of substantive due process and "watershed" rules of criminal procedure essential to the fundamental fairness of the trial process. As was the case under the fundamental fairness test, this leaves the states with considerable freedom to structure their criminal process as they see fit.

It seems unlikely that the similarity between the structure of federalism created by the new habeas and that prior to incorporation of the Bill of Rights is unintentional; indeed, given the philosophical background utilized in developing the new habeas, this similarity was almost inevitable. The "historic" scope of habeas jurisdiction that Bator looked to in formulating his test for finality was the scope of habeas prior to Brown v. Allen and Fay v. Noia and the advent of selective incorporation. Similarly, Justice Harlan derived his two exceptions to nonretroactivity from the fundamental fairness interpretation of the requirements of due process, explicitly incorporating Palko v. Connecticut into his second exception.

The federal-state relationship created by the new habeas, however, also differs from the pre-incorporation structure in significant ways. Most obviously, the system it deals with is not the pre-incorporation system. The new habeas has developed in a world of criminal procedure very different from that existing before the Warren Court.

483. Id.
484. Id.
485. Id. § 2.6, at 56-58.
487. 344 U.S. 443 (1953).
489. 304 U.S. 319 (1937).
490. See supra text accompanying notes 290-294.
Application of most of the Bill of Rights protections to state criminal processes is an historical fact. The constitutional rights created during the last thirty years permeate state criminal procedure, and the development and articulation of the consequences of those protections are recorded in the annals of state court precedent as well as federal. Rights such as the right to counsel recognized in *Gideon v. Wainwright* have become as talismanic a requirement of fundamental fairness as freedom from a mob-dominated trial had been under the pre-incorporation regime.

Thus, while the new habeas removes the federal courts from the state criminal process, it leaves behind a significant body of constitutional rules, many of which have become basic to every state's conception of what process requires. This fact leads to at least two consequences that make the new habeas structure very different from the pre-incorporation structure. First, it means that, although the new habeas gives control over state criminal procedure back to the states, their freedom to structure it as they will is significantly more circumscribed than it was before incorporation of the Bill of Rights. Thus, while states may interpret away the "spirit" of some of those constitutional rights, their "letter" still will remain. Further, because many of these constitutional process rights have become incorporated into the basics of state criminal justice, the impact of the new habeas on constitutional interpretation is likely to be greatest with regard to the newest and most controversial of rights, such as the rights flowing from the eighth amendment's prohibition on cruel and unusual punishment. Second, because state criminal procedure has become "constitutionalized" through selective incorporation, what the new habeas leaves the states free to "experiment" with is the interpretation of federal constitutional law.

Another apparent difference between the new habeas structure and the pre-incorporation structure lies in the interpretation of fundamental fairness. The *Teague v. Lane* plurality made it clear that it did not intend to adopt the specifics of the fundamental fairness test when it rejected the *Palko* test as "unnecessarily anachronistic." It is equally clear that it did not apply a selective incorporation analysis, as the claims that were being considered derived from constitutional rights that already had been found fundamental by virtue of their incorporation into the due process clause. The test seems to combine the fact-specific approach of the fundamental fairness test with the standard of the selective incorporation test. That is, the in-
quiry focuses on whether fundamental fairness requires a particular aspect of a constitutional guarantee, but the standard for that determination is whether that guarantee is fundamental to an American criminal justice system.

A third difference is that the Supreme Court itself is not subject to the system that it has created. Under the fundamental fairness regime, the Supreme Court, as well as the lower federal courts, was limited in its control of state actions by the fundamental fairness standard. Because of the constitutional nature of current state criminal procedure, however, the Court is exempt from the restrictions of the new habeas by virtue of its power of direct review over state court constitutional determinations. Thus, while the lower federal courts can only tell state courts that they are unreasonable, the Supreme Court can still tell them that they are wrong. This means that the states still will have the broad check of certiorari review over their pronouncements of constitutional principle, although not over their day-to-day applications of constitutional doctrine. It also means that the Supreme Court remains free to continue to develop new constitutional doctrine in an environment that cuts it loose from the practical consequences that normally flow from its decisions in a way not even dreamed of by the Warren Court. \[494\]

The most intriguing difference between the new habeas regime and the pre-incorporation regime lies in the different rationale for each. The federal-state relationship that the fundamental fairness test created was the function of a substantive legal interpretation of the requirements of the due process clause. It resulted from an interpretation of the intent of the framers of the fourteenth amendment as to the meaning of the requirement that states not deny due process. The new habeas on the other hand is not based on an interpretation of congressional intent as embodied in the jurisdictional grant of section 2254, which gives the federal courts jurisdiction over the claims of those alleging that they are held in state custody in violation of the Constitution. Rather, the new habeas is purely the creation of judicial discretion.

The consequence of this discretionary rationale is that the new habeas exists side-by-side with the old habeas that it replaced. Thus, section 2254 still provides for federal review of allegations of state

\[494\] Cf. Mackey v. United States, 401 U.S. 667, 680-81 (1971) (Harlan, J., concurring) (Court's retroactivity doctrine tended "to cut [the] Court loose from the force of precedent, allowing [it] to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of stare decisis, a force which ought properly to bear on the judicial resolution of any legal problem") (citation omitted).
custody in violation of the Constitution, and Brown and Fay still provide the definitive analysis of the congressional intent as to the scope of the power of federal courts to hear state prisoner claims pursuant to that jurisdictional grant. The structuring of federal-state relations in the area of state criminal procedure created by section 2254, as interpreted by Brown and Fay, still exists as a shining edifice that demonstrates the importance our society places on the vindication of constitutional rights. It exists, however, as one of those "ghosts that are seen in the law but that are elusive to the grasp," while the new habeas provides the de facto limits of habeas jurisdiction.

One way to explain the development of the new habeas is to view the cases that developed it as attempts to return the federal-state balance in the area of state criminal process to something approximating the pre-Warren Court status. The Burger Court, however, inherited an impressive edifice of rights applicable to state prisoners. Although it could chip away at the more controversial of those rights—and did—it could not return to a time when those rights did not exist, even if it wanted to, without creating an unacceptable degree of disruption to the continuity of constitutional law.

Yet, where the Warren Court had closed a door, the Burger and Rehnquist courts found windows. While the fundamental fairness interpretation of the due process clause had left control with the states through substantive interpretation, these courts used procedure as the means of returning control over the criminal process to the states. This use of procedure had the advantage of leaving the edifice of rights intact, and even subject to expansion by the Supreme Court, while placing significant restrictions on expansive interpretation and extensive enforcement of those rights by lower federal courts. By focusing on discretionary as opposed to jurisdictional doctrine, the Burger and Rehnquist Courts also were able to avoid the problems occasioned by prior interpretations of the fairly plain language of the habeas statute's jurisdictional grant. If this was the institutional goal of the Supreme Court over this time period, then it finally has been achieved. The new habeas leaves the edifice of rights seemingly untouched, while it also makes them untouchable by many who would seek to claim them. Part IV of this Article looks at some of the costs of this process.497

495. The Western Maid, 257 U.S. 419, 433 (1922) (Holmes, J.) ("Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.").
497. Professor Resnik has argued that, although federalism concerns are not irrelevant to the
IV. Costs of the Process

As discussed in previous Parts, the Burger and Rehnquist Courts' decisions developing the new habeas justified the limits they placed on habeas in part by stressing the "costs" to the values of finality that resulted from a broad scope of federal court review of state prisoner constitutional claims. This part attempts to "turn the tables" somewhat on the Court by examining the costs of its own process of developing the new habeas through the use of discretionary doctrines rationalized in terms of a cost-benefit analysis and imposed upon the lower federal courts as mandatory limits on their habeas jurisdiction.

A. The Loss of the Federal-State Dialogue

The first cost one might argue results from the new habeas is the loss of the old. The dialectical federalism that expansive habeas jurisdiction created is an appealing structure for developing legal rules that impact both federal and state interests. The demarcating of the lines of state and federal power through this type of give-and-take is consistent with the Court's recognition that the federalist structure embodied in the Constitution allocates power between the states and the national government in ways that do not lend themselves easily to judicial line-drawing.498

Court's decisions in the habeas area, they are insufficient to explain the Court's preference for finality in these decisions. She points to the fact that the habeas doctrines the Court has developed to limit habeas review extend to federal prisoner actions as well as those brought by state prisoners, and that its concerns for finality and deference to the decisions of initial decisionmakers have influenced its application of procedural doctrine in areas outside the criminal context. Resnik, supra note 189, at 907. She asserts that federalism concerns have been used "as a justification for decisions made for other reasons." Id. I do not necessarily disagree with her conclusions. It is often perhaps more convenient than accurate to speak in terms of the "motives" of the Supreme Court, particularly when one is dealing with a Court as ideologically divided as the Supreme Court has been during the years covered by this Article. Certainly it is true that the Court's federalism concerns, as expressed in its opinions creating the new habeas, were often only imperfectly served by the doctrines it developed. Indeed, as discussed elsewhere, the innocence standard intrudes more on issues within the primary province of the states than does the old habeas, which restricted the federal courts to consideration of federal constitutional issues. See infra note 512. At the same time, the new habeas has not achieved absolute finality of state court determinations of federal constitutional issues either. Instead, the role of the lower federal courts has been recast to reflect an area of much broader state freedom to develop their own constitutional law of criminal procedure. Whether the primary driving force behind this development was the Court's view of federalism or its desire for finality probably depends on which Justice one asks. In this area, the two principles work hand-in-hand. In any event, it is clear that the Court adopted philosophical positions that necessarily would and did lead it to restructure federal-state relations in a manner similar to the structure of those relations prior to the advent of selective incorporation.

Dialectical federalism provides an answer to Professor Bator's search for a justification for expanded habeas beyond mere reiteration of process. Bator rejected the idea that the differing perspective of federal judges was sufficient to outweigh the costs of finality. He did so in large part because his epistemological position led him to conclude that, as one can never say what answer is "correct" in an ultimate sense, one cannot say that a federal court's answer is intrinsically better. If habeas review is viewed, however, as part of an interactive process that allows both state and federal participation in the development of constitutional principles, then expansive habeas jurisdiction becomes just as logical a conclusion to reach from Bator's epistemological position as is the conclusion the Court reached in Butler v. McKellar. The important point becomes not that a federal court decision is "better," but that it is made by a court that brings a different perspective to the issue. If it is assumed that one cannot know the truth and thus must develop a set of institutional arrangements that society will accept as establishing the truth, it makes at least as much sense to develop a system that allows different viewpoints to go into that development as it does to simply allocate final competence to one viewpoint from the start. Indeed, a structure that allows the interaction of different versions of the truth as a means of developing the concepts that will be deemed "true" seems more acceptable than a system in which only one voice is ever heard.

Constitution reflects that the measure of state sovereignty normally should be determined through the give and take of the federal political process, in which the states were given a significant voice, rather than through judicial line drawing; the extent of national regulation of the states through the commerce clause should be a product of this process rather than of rigid interpretation of constitutional provisions; cf. Resnik, supra note 189, at 955 (noting that it was state representatives that created the habeas statutes and these representatives have not seen fit to alter them despite continuing assertions of serious intrusions upon state authority).

499. See supra text accompanying notes 55-56.
501. Professor Cover argues that jurisdictional overlap is a useful structure for dealing with the systemic differences that can cause divergent outcomes. He identifies three characteristics that can cause such differences: (1) self-interest of the decision-makers; (2) ideology of the decision-makers in the form of more or less unconsciously held values and perspectives that tend to serve and justify the existing social order in which those decision-makers are part of the elite; and (3) innovation, in the form of policies determined by a governing elite "especially insofar as they depart from traditional, common cultural norms and expectations." Cover, supra note 38, at 657. Thus, for instance, allowing relitigation of an issue by a forum viewed as having a different ideology from the first forum can alleviate concerns that the first forum "decisionmaker's construction of reality was distorted by the social determinants of [her] mental world." Id. at 664. If the second forum confirms the decision of the first, that confirmation tends to alleviate suspicion with regard to the basis of the first decision. Id. at 671. If the second forum reaches a different outcome, that result can make explicit the way in which differing ideology renders the "social realities of one group problematic to another." Id. at 671-72. Knowledge of the
Viewed in the context of dialectical federalism, the job of constitutional adjudication cannot be done well by the state courts without their interaction with federal courts because the job is not simply the decision of particular cases. Rather, it involves the development of constitutional principles to govern the criminal trial process in a way that accommodates (to the extent possible) both the high ideals those principles embody and the practical reality of that process. Constitutional adjudication involves both dispute resolution and norm articulation. Given the elusive nature of “truth,” the acceptability of the results of both of these functions is enhanced by a system that builds the expression of differing views into the decisional process.

Further, by silencing the voice of the lower federal courts, the new habeas not only deprives the state courts of the benefit of lower federal court rulings when they are making constitutional decisions, but also deprives the Supreme Court of that benefit, thereby disrupting the Court’s “ability to structure a contemplative process of constitutional decisionmaking.” When deciding constitutional issues, the Court often allows those issues to “percolate” in the lower federal and state courts to give the Court the benefit of this “period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule.” The new habeas, however, will deprive the Court of this ability “to await the treatment of difficult and novel legal problems by both state and federal courts before having to address such issues,” as under the new habeas “sensitive issues of criminal procedure will be litigated by lower federal courts only when adjudicating federal criminal prosecutions (a relatively small category of cases) and by state courts that... are not inclined institutionally to interpret and apply federal constitutional principles expansively.”

The loss of the federal-state dialogue and the flexibility that it provided for accommodating state and federal interests in the area

impasse between differing versions of social reality and right conduct can affect sentencing and pardoning decisions with regard to the specific case, as well as future political decisions regarding enforcement policy and norm articulation. Id. at 672; cf. Resnik, supra note 189, at 1025-26 (habeas review is justified not because a second or third consideration of an issue is better in the sense of producing more correct results, but because it involves more decision-makers in the process and thus diffuses power and increases the perception of legitimacy of the decisions rendered).

502. Cover, supra note 38, at 643.

503. Butler, 110 S. Ct. at 1226 n.12 (Brennan, J., dissenting).

504. Id. (citation omitted).

505. Id. Thus, instead of having “the benefit of numerous and varied rulings on particular issues,” the Court under the new habeas is likely to have “the benefit of only a few state cases embracing narrow constitutional interpretations” before it when it decides an issue. Id.
of criminal procedure is a high price to pay for avoiding the disrup-
tion of state criminal processes caused by habeas review. Indeed,
under the interactive federalism created by the old habeas, that dis-
ruption was an integral part of the development and articulation of
constitutional principles.

Whether one believes that “the inner logic of ‘our federalism’
seems . . . to point . . . insistently to the social value of institutions
in conflict with one another”506 or believes, as does a majority of the
current Court, that federalism embodies a doctrine of deference to
the interests of the state is, however, in large part a question of policy
and individual political viewpoint. Other costs of the new habeas,
however, are troubling even if one agrees with the way in which the
new habeas structures federal-state relations. These costs arise not
from the result of the Court’s decisions establishing the new habeas,
but rather from the process by which the Court reached that result:
by developing discretionary doctrine through a functional cost-benefit
analysis that employs the rhetoric of innocence to reach the result of
finality.

B. The Loss of Principled Adjudication

As discussed in Part III, the Burger and Rehnquist Courts did
not overrule the Warren Court’s interpretations of the scope of ha-
beas jurisdiction in developing the new habeas. Brown v. Allen507 and
Fay v. Noia508 still provide the definitive statement of the scope of
federal court power under section 2254 and of Congress’ intent in
granting federal courts jurisdiction over state prisoner allegations of
custody in violation of the Constitution. Instead, the Court developed
a series of “discretionary” limits on the ability of the federal courts
to exercise their jurisdictional grant. Because these limits were “dis-
cretionary,” they allowed the Court to avoid confronting the lan-
guage of section 2254 and the interpretations of the intent of that
language contained in the Court’s prior precedent.

Thus, the Court’s decisions in this area typically contain little,
if any, discussion of how the doctrines they develop fit with the Brown
and Fay interpretations of section 2254 and Congressional intent. For
instance, Justice Powell’s opinion for the Court in Stone v. Powell509
neither attempts to explain how the elimination of federal habeas re-

506. Cover, supra note 38, at 682.
view of fourth amendment claims follows from the Court’s prior precedent indicating that the federal courts are to have the final say with regard to state prisoner’s constitutional claims, nor how that interpretation is consistent with the language of section 2254 (as it was interpreted in Fay to extend to any allegation of custody in violation of the Constitution).\footnote{510} Further, the use of the rhetoric of innocence to limit habeas clearly is without precedential support—even the proponents of the innocence standard admit that the innocence of the petitioner was simply irrelevant to habeas review prior to Stone v. Powell.\footnote{511} Indeed, the contrary position would be totally inconsistent with their adoption of Bator’s theory that the scope of habeas traditionally was limited to claims of lack of jurisdiction and failure of process.\footnote{512}

\footnote{510} The absence of this type of analysis in Stone v. Powell, 428 U.S. 465 (1975), is particularly striking, as Justice Powell had attempted to tie limiting review of fourth amendment claims in this fashion to congressional intent in his earlier concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 271-74 (1972) (Powell, J., concurring). However, as the best argument Powell could come up with in Bustamonte for the consistency of his approach with the language of § 2254 was an assertion that “nothing in § 2254(a), the state of the law at the time of its adoption, or the historical uses of the language . . . from which § 2254(a) is derived, compels a holding that rulings of state courts on claims of unlawful search and seizure must be reviewed and redetermined in collateral proceedings,” id. at 237-74, his Bustamonte concurrence may itself explain why he did not make a second attempt in Stone. Cf. Stone, 428 U.S. at 522 (Brennan, J., dissenting) (arguing that neither the language nor the history of the habeas statute provides any support for distinguishing between types of claims).

\footnote{511} See, e.g., Bustamonte, 412 U.S. at 265-66 (Powell, J., concurring) (recognizing that there is no historical basis for a tie between habeas jurisdiction and constitutional claims relating to innocence, but arguing that innocence should be used to accommodate the expanded scope of the writ with the historic respect for finality); Friendly, supra note 14, at 159 n.87; cf. Kaufman v. United States, 394 U.S. 217, 234 (1969) (Black, J., dissenting) (Justice Black adopts a novel reinterpretation of Fay to support the proposition that, although the former rule was that “judgments were so impervious to collateral attack that a defendant could not collaterally attack his conviction even after the Government had admitted his innocence,” that rule had been “finally put to rest in Fay v. Noia.”).

\footnote{512} Bator, supra note 13, at 453-62. The argument that the writ was available historically only for lack of jurisdiction and failure of process claims clearly supports the proposition that the writ was about power, not about moral worthiness. The innocence of the petitioner was totally irrelevant to the power of the court to adjudicate the case. Bator and Friendly find it ironic that this should be so—that an allegation of violation of a constitutional right opens the doors to the federal courts when an allegation that someone else has confessed to the crime does not. Id. at 505-09; Friendly, supra note 14, at 145. But this circumstance is ironic only if one focuses on the petitioner rather than on the state action. If the purpose of habeas is that recognized in Brown v. Allen—to give the “last say” to the federal courts on federal law, and concomitantly, to allow those courts to monitor the state’s compliance with the mandates of the Constitution, Brown, 344 U.S. at 508 (opinion of Frankfurter, J.)—then there is no irony in this situation at all.

In fact, establishing a standard that, essentially, requires the federal court to make an independent determination as to the petitioner’s guilt would be much more clearly disruptive of the proper balance of federal and state concerns in state criminal proceedings than the delay and
My point, however, is not that the doctrines the Court has developed could not be reconciled with prior precedent or with congressional intent, but rather that the Court's opinions in this area have shown an increasing tendency not to even make the gesture. Thus, for instance, in *Wainwright v. Sykes*, although the Court notes that it has before it a question of statutory interpretation, it does not bad feelings occasioned by allowing the federal court to redetermine constitutional issues on habeas. After all, the federal court under the old habeas redetermined *federal* constitutional issues, issues that by definition involve legitimate federal interests. The guilt or innocence of the defendant in a state criminal prosecution, however, is truly only the business of the state. The elements of the crime have been defined by state law, the decision to prosecute has been determined by state enforcement officials, and the verdict has been rendered by a state decision-making body. The federal courts are courts of limited jurisdiction. Whenever Article III grants them jurisdiction, it is with a national purpose in mind, even when that jurisdiction compels them to review issues of state law. Diversity and alienage jurisdiction, for example, have as their justification the "federal interest" of a need to guarantee equal treatment for out-of-state litigants. Thus, the minimum justificatory touchstone for federal jurisdiction always must be that there is a federal interest involved. Although incarceration of an innocent person may concern all of society, it does not peculiarly concern the federal courts when the incarceration is pursuant to a state criminal proceeding applying state criminal law.

Further, as Judge Posner has pointed out, constitutional rights designed to minimize the probability of convicting an innocent person are those least in need of federal court protection from improper application by the states. R. Posner, *The Federal Courts: Crisis and Reform* 186-87 (1985). The state must prove each element of the offense beyond a reasonable doubt, and, Posner argues, "[T]he danger of an innocent person's being convicted under the American system of criminal justice . . . is actually much smaller than the reasonable-doubt standard implies (though not zero), mainly because other rules of criminal procedure prevent the jury from even considering a great deal of highly probative evidence of guilt." *Id.* at 186-87 (citation omitted). Further, "today the state courts in all areas of the country can . . . be trusted to protect the innocent of whatever race, creed, national origin, or income, with exceptions too few and isolated to justify federal judicial intervention." *Id.* at 187.

Instead, rights that do not involve protecting the innocent are most likely to be disfavored at the state level; thus, federal supervision is most justified: "In most states the rights of the guilty enjoy little political favor, and it is therefore quite possible that in the absence of effective federal judicial review, many state judges would give those rights less protection than the Constitution, as interpreted by the Supreme Court, tells them to." *Id.* Justice Brennan made a similar argument in his dissent in *Stone v. Powell*, 428 U.S. 465 (1975):

> Enforcement of *federal* constitutional rights that redress constitutional violations directed against the "guilty" is a particular function of *federal* habeas review, lest judges trying the "morally unworthy" be tempted not to execute the supreme law of the land. State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences, and the federal habeas statutes reflect the congressional judgment that such detached federal review is a salutary safeguard against *any* detention of an individual "in violation of the Constitution or laws . . . of the United States."

*Id.* at 525 (Brennan, J., dissenting). Therefore, a structural analysis of habeas indicates that innocence is quite legitimately irrelevant to the appropriate concerns of the habeas court in the exercise of that jurisdiction.


514. *Id.* at 77 ("The simple legal question before the Court calls for a construction of the language of 28 U.S.C. § 2254(a)."
attempt to interpret section 2254, but instead merely asserts the "Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." The culmination of this process is shown in Butler v. McKellar, which de facto overruled Brown without ever addressing that decision or the interpretation of the federal habeas statute that it embodies.

Proponents of the new habeas grounded this discretionary approach in Fay's recognition of an equitable component to habeas and in the language of section 2243 of the habeas statute admonishing judges to "dispose of the matter as law and justice require." Thus, for instance, the plurality in Kuhlmann v. Wilson cites Fay for the proposition that "the Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error; rather, the Court has performed its statutory task through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims determined adversely to the prisoner by the state courts.

Neither Fay nor section 2243, however, provide precedent for the rules that the Court has created to limit the exercise of habeas jurisdiction. Both Fay and section 2243 contemplate the exercise of discretion by the federal district judge sitting in habeas on the facts of the particular case before her. That discretion has little, if any, relation to the type of mandatory rules the Court has developed in the name of discretion as a means of limiting habeas jurisdiction. The only court that exercises discretion under the Court's discretionary doctrines limiting the scope of habeas review is the Supreme Court, and the discretion that it exercises is more legislative than judicial.

515. Id. at 81.
517. Cf. Teague v. Lane, 489 U.S. 288, 326, 332 (1989) (Brennan, J., dissenting) (noting that the plurality had adopted its new retroactivity doctrine "without regard for—indeed, without even mentioning—[the Court's] contrary decisions over the past 35 years delineating the broad scope of habeas relief" and that "[n]one of the reasons [the Court had] hitherto deemed necessary for departing from the doctrine of stare decisis" were present).
518. E.g., Kuhlmann v. Wilson, 477 U.S. 436, 448 n.8 (1986) (plurality opinion) (Fay v. Noia, 372 U.S. 391 (1963), made a "practical appraisal of the state interest in a system of procedural forfeitures, weighing that interest against the other interests implicated by federal collateral review of procedurally defaulted claims") (citation omitted).
519. 28 U.S.C. § 2243 (1988); see, e.g., Kuhlmann, 477 U.S. at 449 n.11 ("Sensitivity to the interests implicated by federal habeas corpus review is implicit in the statutory command that the federal courts 'shall ... dispose of the matter as law and justice require.' ").
521. Id. at 447-48 (plurality opinion).
A comparison of *Fay* and *Wainwright v. Sykes* illustrates the difference between a judicial exercise of discretion based on equitable principles and the type of "discretion" utilized by the Court in developing the new habeas. In *Fay*, the Court determined that, although federal courts have the power to hear procedurally defaulted claims, they also possess a limited discretion to decline to grant habeas relief when the petitioner deliberately has bypassed state procedures. The *Fay* Court found this discretion implicit in the command of section 2243 and in its belief that "habeas corpus has traditionally been regarded as governed by equitable principles," one of which is that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." The Court thus concluded that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."

Although *Sykes* merely purports to change the discretionary standard for denying habeas relief on a procedurally defaulted claim, the *Sykes* holding is significantly different from that of *Fay*. *Fay* holds that the district court has discretion to dismiss a petition for deliberate bypass; the *Sykes* Court holds that federal habeas review is barred "absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver." The *Fay* holding limits the district court's discretion; the *Sykes* holding destroys it. *Sykes* is not providing a guide to the exercise of discretion, it is providing a rule that requires the district court not to hear the claim if certain circumstances exist. Equity is a flexible doctrine, providing for discretionary balancing on a case-by-case basis. Similarly, comity is a discretionary, not a mandatory doctrine; "[i]t is largely a matter of courtesy and politeness, applied on a case by case basis." While *Sykes* purportedly is grounded in equity and comity, its creation of a rigid rule is entirely inconsistent with those principles.

524. *Id.* at 438.
525. *Id.*
526. *Id.* (emphasis added).
529. *Id.* at 688.
530. *See Smith v. Murray*, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting) (The Court's application of the cause and prejudice standard as a "rigid bar to review of fundamental constitutional violations has no support in the statute" and "the standard thus represents judicial lawmaking of the most unabashed form."); *cf.* Soifer & Macgill, *The Younger Doctrine:...
This use of purportedly discretionary rules to eliminate the discretion and independent judgment of the lower federal courts to entertain state prisoner petitions on the merits is one of the themes that runs through the cases developing the new habeas. Thus, in Murray v. Carrier, the Court eliminates lower court discretion to hear defaulted claims in order to avoid manifest injustice and replaces that discretion with a rigid rule: those claims can be heard absent a showing of cause and prejudice only if the petitioner makes a showing of actual innocence. Similarly, the plurality in Kuhlmann v. Wilson sought to replace the district court’s discretion to hear successive petitions if the ends of justice would be served with a rule that those petitions could be heard only if the petitioner made a colorable showing of factual innocence. This trend again culminates in Butler v. McKellar. The Butler dictated test for what constitutes a new rule takes away the lower federal courts’ ability to make independent judgments even on the proper interpretation of constitutional principles as applied in state criminal proceedings.

The method by which the Court derived its rules limiting habeas review not only has no relation to the traditional use of discretionary principles, it also has little relation to “traditional” ideas of the way in which courts adjudicate. It is perhaps naive to criticize the Court for “legislating” in the post-realist world. Yet, while courts may “make law,” they still normally do so by a process that is distinctively judicial—they develop and apply a rule in the context of the specific facts of the case being decided and justify that rule in terms of its consistency with precedent and (if it involves statutory interpretation)

Reconstructing Reconstruction, 55 Tex. L. Rev. 1141, 1143 (1977) (“The considerations of equity and comity developed through decades by the Court to accommodate the tensions among state power, federal power, and individual rights, have been turned into a single, rigid commandment of federal judicial inaction that violates even such rules as equity and comity could be said to have contained.”); Zeigler, supra note 528, at 687-89 (making these points in the context of abstention doctrine).

Although the discretion recognized in Fay, thus does not support the approach taken in Sykes, in one sense Fay still can be viewed as providing the opening that led to Sykes by having acknowledged that the conduct of the petitioner may be relevant to the availability of habeas review. See Resnik, supra note 189, at 881 (“In retrospect, because the deliberate bypass standard of Fay v. Noia calls into question a litigant’s moral worthiness to request revision of earlier decisions, Fay v. Noia provided an avenue for the demise of the habeas model that the opinion crafted.”).

532. See supra text accompanying notes 180-184.
534. See supra text accompanying notes 245-247.
536. See supra text accompanying notes 355-356.
with legislative intent. This is not the model of adjudication that the Court has followed in developing the new habeas.

The difference between courts making law and legislating is, in broad terms, the difference between a decision made pursuant to principle and a decision made pursuant to policy. "Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community, as a whole," while "[a]rguments of principle justify a political decision by showing that the decision respects or secures some individual or group right." So long as judges adhere to decisions based on principle in making law, they tend to avoid charges that they are engaging in antimajoritarian legislation. Judicial decisions based on principle are not as subject to antimajoritarian concerns because "an argument of principle does not often rest on assumptions about the nature and intensity of the different demands and concerns distributed throughout the community."

Equitable doctrines involve the balancing of the respective interests of particular parties in a particular case. The "balancing" utilized by the Court to come up with limits on habeas review, however, is an entirely different kind of balancing. The Court "balances" the generic interests of a class of individuals—habeas petitioners—against the generic interests of the states in order to define the limits on habeas review and formulate a rule that then is applied as a mandatory requirement in all cases. This type of "balancing of interests" is an

537. R. Dworkin, supra note 160, at 82.
538. Id. at 83-84.
539. As Professor Dworkin explains:

The . . . objection that law should be made by elected and responsible officials seems unexceptionable when we think of law as policy; that is, as a compromise among individual goals and purposes in search of the welfare of the community as a whole. It is far from clear that interpersonal comparisons of utility or preference, through which such compromises might be made objectively, make sense even in theory; but in any case no proper calculus is available in practice. Policy decisions must therefore be made through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account. The political system of representative democracy may work only indifferently in this respect, but it works better than a system that allows nonelected judges, who have no mail bag or lobbyists or pressure groups, to compromise competing interests in their chambers.

Id. at 84-85.
540. Id. at 85.
argument of policy, not of principle. It does not involve consideration of, and decision regarding, rights of the parties before the court, but rather a utilitarian compromise of individual rights in light of broader societal goals.

Further, the Court's opinions in this area illustrate the problems that a Court encounters when it attempts to "legislate." In basing the scope of habeas review on policy concerns, the Court has attempted to compromise competing societal interests without employing a fact-finding process geared toward making these determinations. The Court thus has been compelled to make a number of assumptions about "the nature and intensity of different demands and concerns" without the benefit of the facilities it needs to carry out the sort of empirical inquiry necessary to provide the data to back up those assumptions. The consequence is that those assumptions are in large part merely intuitive guesses.

For instance, central to the Stone v. Powell balancing of competing interests is the assumption that the deterrent effect of enforcement of the fourth amendment exclusionary rule in habeas proceedings is minimal. How does the Court know this? Where are the empirical data to establish it? Where are the hearings at which relevant experts testified? An equally logical assumption is that, because police officers are most likely to have contact with the proceedings in trial level courts, the deterrent effect of application of the exclusionary rule declines through state appellate and Supreme Court direct certiorari review, but then "jumps markedly when a federal district judge grants an application for habeas." The conclusions that would follow from this equally logical assumption would be quite different from those reached by Justice Powell in Stone. This assumption would suggest that habeas review serves a very important function in furthering the deterrent purpose of the exclusionary rule: it provides the only effective federal forum for its enforcement.

The Court's balancing of policy interests in its decisions limiting the scope of habeas is riddled with these factual assumptions unsupported by empirical data, but presented as though they were established fact. All of these assumptions are necessarily nothing more

541. Id.
543. Id. at 493-94.
545. Id.
546. Indeed, as empirical data become available, they frequently seems to contradict the
than the intuitions of individual justices, and some of them do not even seem to be very good intuitions. Indeed, a number of them fly in the face of human nature. Perhaps the most well-known of these is the Court's assumption that strict procedural default rules are needed to prevent "sandbagging"—the deliberate withholding of a potentially meritorious claim from consideration by the state courts for the purpose of presenting it to the federal courts to gain release should the state trial result in a verdict of guilty. Prevention of sandbagging is one of the rationales put forward by the Court in \textit{Wainwright v. Sykes}\textsuperscript{547} to justify abandoning the intentional by-pass standard for forgiving procedural defaults.\textsuperscript{548} Yet, as Justice Brennan pointed out in his dissent in \textit{Sykes}, not only did the \textit{Sykes} Court have no empirical data to support this assertion, but the opinion was downright illogical. The lawyer would have everything to gain by raising meritorious claims at trial and nothing to lose: if the state trial court ruled in her favor, then the prosecution would likely be weakened, if not precluded; if the trial court denied the objection, then the defense had lost nothing, as state appellate review had been preserved, and federal habeas review of the merits of the claim would be de novo under \textit{Brown v Allen}\. On the other hand, if the attorney held back the claim, then not only would conviction be more likely, but the defendant would lose the opportunity to have state court review of the claim, and the attorney would have to convince the district court on habeas that there had not been an intentional abandonment of the claim under the \textit{Fay v. Noia}\textsuperscript{550} standard.\textsuperscript{551}

\begin{footnotes}
\item[547.] 433 U.S. 72 (1977).
\item[548.] \textit{Id.} at 89.
\item[549.] \textit{Id.} at 103 n.5 (Brennan, J., dissenting).
\item[550.] 372 U.S. 391 (1963).
\item[551.] \textit{Sykes}, 433 U.S. at 103 n.5 (Brennan, J., dissenting). Judge Friendly also thought the sandbagging argument was a loser. \textit{Friendly, supra} note 14, at 158 ("Save for the rare instance
\end{footnotes}
Further, not only does the Court engage in assumptions that seem counterintuitive, sometimes it engages in inconsistent assumptions as when the state is known to have evidence to refute a claim which it may not have later, it is exceedingly hard to visualize a case where a defendant or his lawyer would deliberately lay aside a meritorious claim so as to raise it after the defendant was jailed."); see also Resnik, supra note 189, at 897 (sandbagging "assumes a fantastically risk-prone pool of defendants and attorneys").

Despite its counterintuitiveness, proponents of the new habeas also have used versions of the sandbagging contention to support the argument that claims that were not procedurally defaulted should nevertheless not be heard by the federal habeas court. For instance, Justice Powell argued in Vasquez v. Hillery, 474 U.S. 254 (1986), that a balancing process should determine whether habeas relief is an appropriate remedy for racial bias in the selection of a grand jury. This balancing process included as a crucial element weighing against the petitioner the length of time between conviction and when the issue was raised in the habeas proceedings. Id. at 277, 279-80 (Powell J., dissenting). As support for this proposed rule, Powell suggested that there is a risk that a prisoner might sit on her presumably meritorious claim until she determined that the state no longer would be able to reconvict her upon her release by the federal habeas court due to the death of witnesses and loss of evidence. Id. at 280 n.14. This was not, of course, the case with the petitioner in Hillery, whom the Court noted had raised his equal protection claim "at every opportunity." Id. at 256. Powell apparently viewed the potential for this type of "sandbagging" as a legitimate concern nevertheless. See Resnik, supra note 189, at 928-29 (discussing use of a similar rationale to support a proposed amendment to habeas rules to allow dismissal of petition if state could show prejudice in its ability to retry the petitioner).

If the Report of the Commission that he chaired can be taken as expressing his views, however, Powell appears to have modified his opinion on this point, at least with regard to those individuals sentenced to a term of years rather than death. The only justification given by the Powell Commission for the distinction that its proposed habeas scheme makes between death penalty prisoners and others, which would result in those sentenced to death receiving less process than those sentenced to a term of years, see supra note 247, is based on a presumed difference in incentives between these two categories of prisoners. The Report states that

separate procedures for capital cases are appropriate in light of the special problems of capital litigation. The incentives facing the capital litigant are unique. The inmate under capital sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out. Such an inmate is avoiding the punishment prescribed by the law of the State. In contrast, prisoners serving an ordinary term of years have every incentive to bring their claims to resolution as soon as possible in order to gain relief. And they are serving their sentences while litigation takes place.


Based on my limited experience with habeas review of death penalty cases as a law clerk for the Eleventh Circuit, and my somewhat broader experience of human nature, my intuition (and here we are apparently dealing mostly with intuitions) is that those sentenced to death are at least as anxious as those sentenced for life to have, if not their conviction, then at least their sentence, altered as quickly as possible; therefore, death penalty prisoners seek to raise all the potentially meritorious claims of which they are aware at the first opportunity. Indeed, the Powell Commission itself seems to adopt my contrary assumption as the justification for not allowing capital petitioners to raise sentencing challenges in second petitions, stating that the prisoner and her counsel "have every incentive to ask whether all relevant information in mitigation of punishment was presented and whether the sentencing phase of the trial was otherwise conducted in a constitutionally unfair manner." Id. at 3244.

It is interesting to note the shifts in underlying assumptions that accompany the varying presumptions of Hillery and the Powell Commission Report. The underlying assumption of
well. Consider, for instance, the conflicting assumptions about the effect of habeas review on state court judges reflected in *Engle v. Isaac* versus *Teague v. Lane* and *Butler v. McKellar*. In *Engle*, Justice O'Connor cites as one of the "costs" of habeas review the undermining of the morale and sense of responsibility of state court judges caused by the knowledge that their decisions will be subjected to habeas review. This demoralizing effect means that "[i]ndiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own." On the other hand, the idea that habeas serves "a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards" is central to the *Teague* and *Butler* Court's determinations that only prevailing law, as defined by the "dictated" test, need be applied on habeas. Does habeas cause state judges to be

Justice Powell's statement in *Hillery* is necessarily that the petitioner has a claim likely to prevail. The underlying assumption of the Powell Commission Report is that the claim is likely to be found meritless, and thus has as its main value stalling execution (that is, except when it is a claim relating to sentencing). Available statistics show that death penalty petitioners prevail in most of the federal habeas cases decided on the merits. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) (death penalty petitioners prevailed in 70% of the habeas cases heard on the merits by federal appellate courts between 1976 and 1983); *Rehnquist Urges Curb on Appeals of Death Penalty*, N.Y. Times, May 16, 1990, at A1, col. 3 ("[i]n recent years, more than half of all state court death sentences have been overturned by Federal courts during habeas corpus proceedings"). Thus, the assumption that the constitutional claims of those sentenced to death lack merit, while a comforting one to support a scheme that denies consideration of those claims, is wrong in the majority of cases. See *Resnik, supra* note 189, at 936 (case law suggests assumption that capital petitioners' claims are frivolous is untrue). Indeed, as Professor Resnik has pointed out, the assumption that death penalty prisoners have a greater incentive to "sandbag" than do others is based on an entire set of highly unlikely assumptions about the behavior of those prisoners:

> To substantiate this belief, one must assume that (a) the probability of retrial diminishes over time; (b) death-sentenced prisoners believe that, if retried, they are likely to be reconvicted, but not sentenced to death; (c) death-sentenced prisoners would prefer to spend a life in prison rather than be executed; (d) death-sentenced prisoners have knowledge of several possible claims and of the likelihood of the success of each; (e) death-sentenced prisoners have control over their (usually) volunteer counsel and direct their attorneys as to which claims to file and in what order; and (f) death-sentenced prisoners are able to predict the interval from sentencing to execution so as to decide when to file the "best" claims. Under such conditions, it would indeed be possible to demonstrate that a rational, utilitarian death-sentenced prisoner would be more likely to "sandbag" than would a utilitarian prisoner not sentenced to death. However, many of the foregoing assumptions are highly problematic if not false.

*Id.* at 935-36.

556. *Id.*
more diligent in following constitutional commands or does it cause them to slough off their constitutional duties? The only answer that reconciles these cases is that it depends on which assumption enforces finality. For, although these cases are inconsistent with regard to their assumptions about the behavior of state court judges, they are consistent in reaching the result of finality of state court determinations.

Presumptions are a procedural mechanism for allocating the litigation risks of uncertainty in accordance with a substantive preference. Presumptions need not be based on assumptions that are consistent with probabilities or consistent with each other in order to serve this function. Although presumptions usually are based on an assessment of the probabilities, they also tend to reflect policy preferences, and in fact a policy preference may be the sole rationale for a given presumption. Thus, for instance, the presumption of innocence in criminal trials is more easily explained in terms of an initial allocation of the burden of uncertainty always involved in litigation than in terms of probabilities. It represents a judgment that, because of the seriousness of the consequences of a criminal conviction, society wishes to be more than usually certain that those consequences are warranted before imposing them. Similarly, the presumptions against the federal habeas enforcement of constitutional rights that the Court has created through its series of discretionary doctrines seem more explicable in terms of policy preferences than in terms of the Court's belief that the underlying assumptions these doctrines implicate in fact comport with probable realities. These presumptions seem to represent a judgment that, despite the seriousness of the consequences of a criminal conviction, society should allocate the risk of uncertainty to the petitioner in the interests of finality.

The type of generic balancing in which the proponents of the new habeas have engaged also destroys whatever efficacy a balancing approach has as the rationale for a judicial decision. A balancing methodology for rationalizing judicial decisions is inherently suspect because it is in large part subjective and easily manipulable. The one performing the balancing gets to pick the relevant interests, and thus can effectively determine the outcome by the interests that are deemed relevant. The persuasive force of a balancing approach thus in large part lies in the comprehensiveness of its consideration of the competing interests. Without this, its use as the rationale for a decision

559. Id. at 730.
560. Id.
561. Id.
562. Tushnet, supra note 544, at 501.
is unlikely to persuade those who were not previously convinced.\textsuperscript{563}

The generic balancing utilized by the Court in limiting the scope of habeas jurisdiction makes thorough consideration of competing interests impossible. The Court no longer is weighing concrete interests of two competing parties, but rather is weighing broad generic interests that may not be relevant in any particular case and only are assumed to be the most relevant considerations. Thus, for instance, while \textit{Stone v. Powell}\textsuperscript{564} emphasizes that the exclusionary rule often excludes evidence highly probative of guilt, the evidence introduced at a particular defendant's trial in violation of the fourth amendment may in fact have no probative value, and that defendant may in fact be innocent. Further, in a given case the state may have very little interest in finality, the state court judge may not be distressed, but appreciative of the definitive guidance given by the federal court, or, even affirmed in her own decision, the delay may not have been substantial, and the state may be perfectly capable of retrying the defendant. Thus, the Court not only picks the interests that will be deemed relevant, but also does so in the abstract, rather than in the context of the interests in fact implicated in the particular case before it. In this context it is extremely easy for "disputable assertions of fact" to be asserted "as indisputable statements of interests to be weighed."\textsuperscript{565} Replacing factual evidence with generic assumption hardly seems likely to persuade.

This is especially true in light of the way in which the Court's generic balancing approach clearly is weighted against the petitioner. In conducting its balancing of societal interests, the Court maximizes the states' interests by giving them every possible interest they might have in any conceivable case, without considering whether that interest has any relevance in the case actually before the Court. On the other hand, the Court diminishes the possible interests of petitioners by making individual petitioners suffer for the perceived characteristics of their class, whether or not the individual petitioner in fact has that characteristic herself.

The plurality opinion in \textit{Kuhlmann v. Wilson}\textsuperscript{566} exemplifies the problems resulting from the use of this generic balancing approach. The \textit{Kuhlmann} plurality stated that its task was to accommodate congressional intent—which it found counseled in favor of finality of the first set of habeas proceedings—with "the historic function of habeas

\textsuperscript{563}. \textit{Id.}
\textsuperscript{564}. 428 U.S. 465 (1976).
\textsuperscript{565}. Tushnet, \textit{supra} note 544, at 502.
\textsuperscript{566}. 477 U.S. 436 (1986).
corpus to provide relief from unjust incarceration." 567 To accomplish 
this accommodation, the plurality weighed "the interests of the pris-
oner in relitigating [a] constitutional claim] held meritless on a prior 
petition" against the "countervailing interests served by according 
finality to the prior judgment." 568 Justice Powell, writing for the plu-
rality, found six interests served by finality: (1) deterrence of crime, 
which is frustrated when those contemplating crime believe there is 
a possibility they will escape punishment through repeated collateral 
attacks; (2) rehabilitation, which cannot effectively begin until the 
prisoner realizes she is justly subject to sanction; (3) punishment of 
criminals, which is frustrated when a prisoner is released and the state 
may not be able successfully to retry her; (4) avoidance of the burden 
placed on the criminal justice system by diverting the time of court 
personnel from "the important task of trying criminal cases"; (5) 
avoidance of friction between the state and federal courts caused by 
setting aside state court judgments; and (6) avoidance of federal in-
trusions into state trials that "frustrate both the States' sovereign 
power to punish offenders and their good-faith attempts to honor 
constitutional rights." 569

On the other hand, Justice Powell found only one interest the 
prisoner has in obtaining reconsideration of a constitutional claim 
decided adversely in a first habeas proceeding:

Even where, as here, the many judges who have reviewed the pri-
soner's claims in several proceedings provided by the State and on 
his first petition for federal habeas corpus have determined that his 
trial was free from constitutional error, a prisoner retains a powerful 
and legitimate interest in obtaining his release from custody if he 
is innocent of the charge for which he was incarcerated. 570

Of course, by definition, that interest does not extend to the guilty. 
Indeed, according to Justice Powell, the guilty prisoner desires ""the 
certainty that comes with an end to litigation, and that attention will 
ultimately be focused not on whether a conviction was free from error 
but rather on whether the prisoner can be restored to a useful place 
in the community."" 571 Not too surprisingly, Powell concludes from 
this analysis that the federal courts are required to entertain successive 
habeas petitions "only where the prisoner supplements his constitu-
tional claim with a colorable showing of factual innocence." 572

567. Id. at 451-52.
568. Id. at 452.
569. Id. at 452-53 & n.16.
570. Id. at 452.
571. Id. (quoting Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)).
572. Id. at 454.
Why is the only valid interest of a petitioner in having a successive petition considered that she is innocent? Why did the petitioner in *Kuhlmann*, who filed a second petition because of a new decision of the Supreme Court relevant to his claim, not have a cognizable interest in having the constitutionality of his conviction determined under current doctrine? Why does a petitioner who files a second petition because of newly-discovered evidence not have a sufficient interest in having the constitutionality of her conviction determined based on all the relevant facts? Why does a petitioner challenging her death sentence rather than her conviction not have an interest in being executed only in accordance with current constitutional standards or only on the basis of full consideration of all relevant facts regarding mitigation? Moreover, if the second petition is based on newly discovered evidence that previously was not available because of the misconduct of state officials, why does the state have any valid interest in the finality of a conviction obtained through such misconduct? Indeed, why is the state's legitimate interest in cases alleging unconstitutional actions not the vindication of constitutional rights rather than the finality of unconstitutional proceedings?

It seems impossible to come up with principled answers to these kinds of questions. Certainly, the Court does not do so in *Kuhlmann v. Wilson*, *Stone v. Powell*, *Murray v. Carrier*, *Smith v. Murray*, or any of the other decisions in which the Court has used its own assumptions about the appropriate values to be served by habeas review to limit that jurisdiction. Essentially, the Court has been legislating based on its view of the appropriate policy considerations to "compromise among individual goals and purposes in search of the welfare of the community as a whole." And these essentially leg-

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574. Cf. Sawyer v. Smith, 110 S. Ct. 2822, 2833 (1990) (Marshall, J., dissenting) ("[s]tate has no legitimate interest in finality of the death sentence it obtained through intentional misconduct").

575. Cf. Linkletter v. Walker, 381 U.S. 618, 652 (Black, J., dissenting) ("No state should be considered to have a vested interest in keeping prisoners in jail who were convicted because of lawless conduct by the State's officials."); Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. Chi. L. Rev. 741, 756-57 (1982) ("states arguably do not acquire vested rights in wrongful convictions because they have an independent interest in seeing justice done").


islative compromises were made despite an interpretation of section 2254 that evidences congressional intent to compromise these competing interests in a very different fashion.\textsuperscript{581}

Proponents of the new habeas sometimes have justified their lack of concern for stare decisis and congressional intent by arguing that the Warren Court itself did not respect either of these in its decisions originally establishing a broad scope for habeas jurisdiction.\textsuperscript{582} Yet, even if one assumes that these allegations are true, this argument is hardly persuasive unless the Court’s philosophy is that two wrongs make a right. If \textit{Brown v. Allen}\textsuperscript{583} and \textit{Fay v. Noia}\textsuperscript{584} were wrongly decided, then the Court should explain why those decisions erred in their interpretations of congressional intent and overrule them. It is not sound adjudication to simply ignore them while creating standards inconsistent with their holdings as to Congress’ intent in granting federal courts jurisdiction to review state prisoner claims on habeas.

One final aspect of the Court’s procedure in developing the new habeas deserves mention. Although it may be true, as Justice Scalia says, that it is a “tradition” in a system based on precedent and \textit{stare decisis}, . . . to find each decision ‘inherent’ in earlier cases (however well concealed its presence might have been),”\textsuperscript{585} the doctrine of stare decisis is more than mere tradition. It also serves important purposes:

\textsuperscript{581} See \textit{Brown v. Allen}, 344 U.S. 433, 499-500 (1953) (opinion of Frankfurter, J.) (Congress could have left enforcement of federal constitutional rights in this area exclusively to state courts, but chose instead to give the lower federal courts this power, and thus it would go against congressional intent to deny state prisoners access to federal courts.); See Justice Brennan’s statement in \textit{Butler v. McKellar}, 110 S.Ct. 1212 (1990):

It is Congress and not this Court who is “responsible for defining the scope of the writ.” Yet the majority, whose Members often pride themselves on their reluctance to play an “activist” judicial role by infringing upon legislative prerogatives, does not hesitate today to dismantle Congress’ extension of federal habeas to state prisoners. . . .

“Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts.”

\textit{Butler}, 110 S. Ct. at 1226-27 (Brennan, J., dissenting) (citations omitted).


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

\textit{Id.} at 2885 (O’Connor, J., concurring); \textit{Schneckloth v. Bustamonte}, 412 U.S. 218, 252 (1973) (Powell, J., concurring) (\textit{Fay} represents “a revisionist view of the historic function that [the] writ was meant to perform”).

\textsuperscript{583} 433 U.S. 72 (1977).

\textsuperscript{584} 372 U.S. 391 (1963).’’

[I]t enhances the efficiency of judicial decisionmaking, allowing judges to rely on settled law without having to reconsider the wisdom of prior decisions in every case they confront, and fosters predictability in the law, permitting litigants and potential litigants to act in the knowledge that precedent will not be overturned lightly and ensuring that they will not be treated unfairly as a result of frequent or unanticipated changes in the law.\textsuperscript{586}

In light of these values, the Court's disregard for stare decisis and continuity in its decisions developing the new habeas is particularly troubling, as these decisions deal with procedure. Procedure is supposed to facilitate adjudication. It is the system of rules for adjudication, and those who utilize the court system rely heavily on those rules not changing midstream. This is particularly so when the structure of adjudication is one as complicated as that involved in habeas, which requires state prisoners who seek to have constitutional claims adjudicated to negotiate not only several tiers of courts, but two separate court systems. The Court itself has recognized this reliance interest in other contexts and applied new procedural rules prospectively.\textsuperscript{587}

Yet, in its cases developing the new habeas, the Court has shown surprisingly little concern for the detrimental reliance of habeas petitioners. Thus, in \textit{Stone v. Powell}\textsuperscript{588} the Burger Court refused to give prospective operation to its rule barring habeas review of fourth amendment claims, despite clear reliance by the state prisoners in that case upon the availability of habeas review in electing not to file a petition for certiorari review on direct appeal.\textsuperscript{589} The Court, in dismissing their request that the new rule be applied prospectively, only devoted a footnote to the discussion, noting that although the petitioners were not required to pursue direct review before the Court before filing a habeas petition, they could have done so.\textsuperscript{590} They also could have been prescient.

This tendency to change the rules without notice has increased dramatically in the decisions of the Rehnquist Court. At least in \textit{Stone}, the Court gave the parties a chance to argue the merits of the proposed procedural change. Recent habeas decisions, however, do not afford the petitioner even that opportunity. Thus, in \textit{Teague v. Lane},\textsuperscript{591}

\begin{itemize}
\item \textsuperscript{586} Teague v. Lane, 489 U.S. 288, 322 (1987) (Brennan, J., dissenting).
\item \textsuperscript{587} See England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 422 (1964) (applying holding regarding preclusive effect of litigating federal issue in state court in abstention case prospectively only because of appellants' mistaken, but reasonable, interpretation of abstention procedure).
\item \textsuperscript{588} 428 U.S. 465 (1975).
\item \textsuperscript{589} Id. at 495 n.38.
\item \textsuperscript{590} Id.
\item \textsuperscript{591} 489 U.S. 288 (1989).
\end{itemize}
the plurality announced that habeas courts would only consider claims that would constitute new rules of law if the rule at issue would apply retroactively and established a new test both for what it means for a claim to constitute a new rule and for determining whether such a claim will be applied retroactively on habeas, all without the benefit of any briefing or oral argument by the parties.\textsuperscript{592} This treatment is particularly ironic in a case in which one major rationale for the Court’s decision is the need to treat similarly situated defendants alike.\textsuperscript{593} Similarly, in \textit{Penry v. Lynaugh},\textsuperscript{594} the Court resolved a question that it had left open in \textit{Teague}—whether its new retroactivity approach would be applied in capital cases—with a three sentence statement that the new approach would apply,\textsuperscript{595} despite the fact that the Court already had heard oral argument in \textit{Penry} at the time that the Court announced its decision in \textit{Teague}, and, thus, there was no opportunity at all for anyone to brief or argue the issue.\textsuperscript{596} Indeed, it appears that the only new retroactivity case from the 1990 Term in which the Court had the benefit of full briefing and argument by the parties with regard to the applicability of its new retroactivity doctrine was \textit{Sawyer v. Smith}.\textsuperscript{597}

The Court’s lack of concern for the interests of petitioners and for the impact that changing the applicable rules and procedures midstream has on these individuals stands in stark contrast to the concern for certainty and protection of reliance interests with regard to the states and their criminal procedures that the Court expresses in these very same decisions.\textsuperscript{598} It suggests that the Court’s main concern in

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\textsuperscript{592} Id. at 300. The only discussion of retroactivity with regard to the fair cross section claim raised by \textit{Teague} was three pages in the \textit{amicus} brief filed by the Criminal Justice Legal Foundation, and that brief apparently did not urge the departures from Harlan’s proposals adopted by the plurality. \textit{Id.} at 330 (Brennan, J., dissenting).

\textsuperscript{593} Id. at 315.

\textsuperscript{594} 109 S. Ct. 2934 (1989).

\textsuperscript{595} Id. at 2944. Justice O’Connor stated for the Court that \textit{Teague} was not a capital case, and the plurality opinion expressed no views regarding how the retroactivity approach adopted in \textit{Teague} would be applied in the capital sentencing context. The plurality noted, however, that a criminal judgment necessarily includes the sentence imposed and that collateral challenges to sentences “delay the enforcement of the judgment at issue and decrease the possibility that ‘there will at some point be the certainty that comes with an end to litigation.’” In our view, the finality concerns underlying Justice Harlan’s approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity. \textit{Id.} (citations omitted).

\textsuperscript{596} Id. at 2959 (Brennan, J., concurring in part and dissenting in part); cf. Brewer v. Williams, 430 U.S. 387, 413-14 & n.3 (1977) (Powell, J., concurring) (because \textit{Stone} had been decided after the appellate court ruling in \textit{Brewer} and its applicability had only been raised at oral argument, consideration of its applicability would be inappropriate).

\textsuperscript{597} 110 S. Ct. 2822 (1990).

\textsuperscript{598} See, e.g., Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990) (noting that changes in
\end{footnotesize}
the cases developing the new habeas has not been to render a principled decision in the particular case, but rather to use each case as a vehicle for rewriting its jurisdictional statutes.

C. The Functional Analysis of Rights

The analysis the Court adopted to limit habeas also potentially has profound consequences for the Court's philosophy of rights. Writing for the Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, then Justice Rehnquist rejected the idea that citizen standing could be conferred based on the importance of the constitutional right involved: "We know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States."600 In *Stone v. Powell*,601 he already had joined a decision that did so. As discussed in Part III, the old habeas was established as the primary federal remedy for errors in the criminal process and the major vehicle for articulation and refinement of federal constitutional rights.602 Thus, an analysis of the scope of habeas jurisdiction that limits that jurisdiction to enforcement of rights that are guilt-related, or that possess some other salient characteristic, without any concomitant expansion of other remedies available for their enforcement, necessarily creates "a hierarchy of constitutional rights for purposes both of enforcement and of substantive articulation."603 The hier-

applicable law intrude on states by forcing them to continually marshall resources to keep state prisoners in prison whose convictions were constitutional under law prevailing when those convictions became final, and that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." (citations omitted). Imagine how frustrated the state judge would be if she were placed in the petitioner's position so that the newly-discovered rule was going to result in her continued incarceration or execution because the procedure for vindicating her rights in habeas proceedings had suddenly disappeared.

600. Id. at 484.
602. Cover & Aleinikoff, supra note 11, at 1087.
603. Id. The Court has not shown a tendency to provide alternative federal remedies for the vindication of those constitutional rights for which it has denied habeas review. For instance, the Court has held that a state criminal court determination of a fourth amendment search and seizure issue on a motion to suppress precludes relitigation of this issue in a 42 U.S.C. § 1983 action by the state prisoner against the police officers involved. Allen v. McCurry, 449 U.S. 90 (1980). In so holding, the Court not only applied preclusion principles to a claim that otherwise could not be heard in the lower federal courts because of *Stone*, but in fact extended those principles by allowing the police officers (who were not in privity with the state) to use the state's prior victory. Resnik, supra note 189, at 970-71. Thus, the only vehicle for federal review
The hierarchy created by the Stone analysis was not the one that might have been predicted from Stone’s emphasis on guilt-related rights. As discussed above, the Court was unwilling to adopt a position that rights could not serve important values unrelated to guilt. Thus, for instance, in *Rose v. Mitchell*, the Court upheld enforcement of the right to be indicted by a grand jury whose foreman was chosen without racial bias although that right was not guilt-related. *Rose*, however, illustrates that Stone did indeed create a hierarchy of rights, for one important way in which the *Rose* Court distinguished Stone was by finding that a “more important” right than the right to have illegally-seized evidence excluded was involved in *Rose*.

While the fourth amendment exclusionary rule at issue in *Stone* was “a judicially created remedy rather than a personal constitutional right,” the equal protection claim involved in *Rose* concerned “the direct command of the Fourteenth Amendment, and federal statutes passed under that Amendment.” From its inception the fourteenth amendment directly forbade discrimination in state selection of grand jury members, while the fourth amendment and the exclusionary rule “only recently have been applied fully to the States.” Thus, the “constitutional interests” that the federal habeas court seeks to vindicate in a case involving grand jury discrimination are “substantially more compelling than those at issue in *Stone*,” and therefore, “the strong interest in making available federal habeas corpus relief outweighs the costs associated with such relief.” The *Stone* analysis made it inevitable that rights would become prioritized; the Court simply has done so in a more ad hoc fashion than it would have if it had accepted innocence as the only value worth furthering through habeas proceedings.

The Court’s view that some constitutional rights are not as important or worthy of enforcement as others has its origins in the philosophies of Bator and Friendly and in their apparent disagreement of fourth amendment claims is the slight possibility that the Supreme Court will grant a petition for certiorari on direct review. Fourth amendment claims clearly have become a category of constitutional rights that are “disfavored” for purposes of federal review. See generally id. at 968-74 (discussing *McCurry*).

604. See supra text accompanying notes 249-254.
606. *Id.* at 559.
607. *Id.* at 561-62.
608. *Id.*
609. *Id.* at 564.
with the doctrine of selective incorporation. Bator's epistemological position led him to assert that the vindication of rights existing in some ultimate sense could not serve as a justification for habeas review. Indeed, Bator suggests that the very existence of a right "apart from the institutional processes which we create to determine whether the right has been violated in a particular case" is problematic. Further, Bator believed that just because a right was labelled "constitutional" did not necessarily mean that it was important. According to Bator, because

the "existence" of a right often turns on the narrowest kind of difference arising between judges in highly particularistic assessments of evidence or in judgments as to the proper application of the law to the evidence . . . it is hard to see the result as automatically crucial to justice merely because that difference in opinion is formulated as a holding as to constitutional rights.

Similarly, after selective incorporation, Friendly believed that "the 'constitutional' label no longer assists in appraising how far society should go in permitting relitigation of criminal convictions" because constitutional violations no longer carry "a connotation of outrage." The incorporation of most of the Bill of Rights into the due process clause of the fourteenth amendment meant that the number of claims of error in state criminal proceedings that could be cast in constitutional terms had expanded vastly, and that, therefore, issues deemed constitutional no longer were necessarily of great importance.

The conception that constitutional rights have no intrinsic value and, therefore, must be justified in functional terms (as it was imported from Bator's and Friendly's proposals into the Court's analysis in Stone and its progeny) has much more serious consequences for the Court's philosophy of rights than merely their prioritization. As discussed in Part II, the Stone analysis marked a shift in philosophical focus from the discourse of rights to the discourse of interests. In establishing the new habeas, Stone and the cases that followed it required that enforcement of constitutional rights in habeas proceedings serve some functional purpose before the federal court could consider the merits of state prisoner constitutional claims. This functional judgment as to the utility of particular rights based on their guilt-relatedness or other purpose

611. Bator, supra note 13, at 450.
612. Id. at 449.
613. Id. at 508.
614. Id.
615. Friendly, supra note 14, at 156-57.
616. Id. at 155-57.
entails a serious risk of impoverishment of the symbolic qualities of the rights. . . [P]art of the evocative quality of a right such as the privilege against self-incrimination is its capacity to resonate simultaneously with interests in personal autonomy, limited government, fair (in the sense of balanced) process, and accurate guilt/innocence determinations. The power of the right inheres in its capacity to evoke a broad range of potential applications even as it is applied in only a single instance.617

The Court's mode of analysis, which focuses on a single value (such as accuracy of the guilt determination) as the only value important enough to justify federal court intrusion into state criminal proceedings, ignores the broader purposes served by rights in our constitutional scheme, replacing the rich complex of values reflected in constitutional rights with "a functionalist reduction of the right's content." 618

At the same time, this focus on a particular value as the important one to be served by rights often does not result in even the

617. Cover & Aleinikoff, supra note 11, at 1091.

The majority's reformulation of the traditional understanding of habeas corpus appears to be premised on the notion that only constitutional violations which go to guilt or innocence are sufficiently serious to implicate . . . "fundamental fairness." . . . If accuracy is the only value [of our criminal justice system], then many of our constitutional protections—such as the Fifth Amendment rights against compelled self-incrimination and the Eighth Amendment right against cruel and unusual punishment . . .—are not only irrelevant, but possibly counter-productive. Our Constitution, however, and our decision to adopt an "accusatorial," rather than an "inquisitorial" system of justice, reflect a different choice. That choice is to afford the individual certain protections . . . even if those rights do not necessarily implicate the accuracy of the truth-finding proceedings. Rather, those protections are an aspect of the fundamental fairness, liberty, and individual dignity that our society affords to all, even those charged with heinous crimes.


This denigration of constitutional guarantees and constitutionally mandated procedures, relegated by the Court to the status of mere utilitarian tools, must appall citizens taught to expect judicial respect and support for their constitutional rights. Even if punishment of the "guilty" were society's highest value—and procedural safeguards denigrated to this end—in a constitution that a majority of the Members of this Court would prefer, that is not the ordering of priorities under the Constitution forged by the Framers, and this Court's sworn duty is to uphold that Constitution and not to frame its own. The procedural safeguards mandated in the Framers' Constitution are not admonitions to be tolerated only to the extent they serve functional purposes that ensure that the "guilty" are punished and the "innocent" freed; rather every guarantee enshrined in the Constitution . . . is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty. . . . To sanction disrespect and disregard for the Constitution in the name of protecting society from lawbreakers is to make the government itself lawless and to subvert those values upon which our ultimate freedom and liberty depend.

Id. at 523-34 (Brennan, J., dissenting).
furtherance of the value chosen, as often the real value being fur-
thered is the procedural value of finality. Thus, the symbolic quality
and moral force of rights often is sacrificed in the service of nothing
more than rhetoric.

Further, a functional analysis of rights does not merely denigrate
the moral force of rights; it is inconsistent with the very existence of
that moral force.\textsuperscript{619} The moral, as opposed to legal, force of rights
arises from their justification in terms of an overall philosophy.\textsuperscript{620} The
moral force of a right creates a moral presumption in favor of re-
specting that right, even though it may not be useful to exercise the
right in a particular case or may be useful in a particular case to in-
terfere with the right.\textsuperscript{621} This moral force constitutes a justificatory
threshold for the protection of the right. It requires a showing of
something other than just the mere net utility that would be served
before enforcement of the right may be denied.\textsuperscript{622}

While a utilitarian theory can create legal rights that have moral
force as part of a normative theory, a utilitarian analysis cannot ac-
commodate that moral force. Thus, a cost-benefit analysis might lead
to the establishment of a certain system of legal rules based on their
utility, and the rights conferred by those rules would have a moral
force because they would be justified.\textsuperscript{623} Their utilitarian justification,
however, would not preclude a direct utilitarian argument that in a
given case net utility in fact would not be served by enforcing those
rights.\textsuperscript{624} Yet, the justificatory threshold created by the moral force
of the rights requires a higher showing for interference with their ex-
ercise. Utilitarian theories thus suffer from an internal incoherence
with regard to rights. Utility-based normative theories regard legal
rules and institutions as justified if they are supported by utilitarian
arguments, and therefore consider the rights that they generate as
having moral force. Yet those normative theories do not logically gen-
erate any obligation to adhere to those rules in particular cases in
which utility is not served.\textsuperscript{625}

The Court's functionalist approach to the enforcement of con-
stitutional rights, which requires a demonstration of net utility before
the right will be enforced, destroys the moral force\textsuperscript{626} that is an es-

\textsuperscript{619} Cover & Aleinikoff, supra note 11, at 1092.
\textsuperscript{620} Lyons, Utility and Rights, in THEORIES OF RIGHTS 110, 113 (J. Waldron ed. 1984).
\textsuperscript{621} Id.
\textsuperscript{622} Id. at 119-20.
\textsuperscript{623} Id. at 113, 121.
\textsuperscript{624} Id. at 113.
\textsuperscript{625} Id. at 123-28.
\textsuperscript{626} Cf. R. Dworkin, supra note 160, at 185 ("The Constitution fuses legal and moral
sential component of constitutional rights. Under that approach, a constitutional right has no force beyond the utility of its enforcement in particular cases. Thus, it loses its separate existence and collapses into whatever remedy a particular court is willing to provide for its enforcement. This denigration of the moral force of constitutional rights, and the concomitant collapsing of right into remedy, is another theme that runs through the cases establishing the new habeas. Once again, this trend culminates in the Court's new retroactivity doctrine. Under the *Teague v. Lane* threshold test, the Court refuses to recognize the existence of a new constitutional right unless it is willing to enforce that right in the case before it by applying it retroactively to that petitioner. The Court's threshold test for retroactivity thus expresses its view that the existence of constitutional rights is a function of the willingness of a court to provide a remedy for their violation in a particular case.  

**D. The Loss of the Neutrality of Procedure**

Collapsing the constitutional right into its remedy not only destroys the moral force of rights, it also destroys the neutrality of procedure. Under the Court's functional analysis of habeas jurisdiction, the availability of habeas is inextricably bound up with the particular right the petitioner is seeking to enforce. Habeas is no longer a neutral procedural mechanism for litigating issues regarding the violation of constitutional rights; instead it is a part of the substantive scope of some rights. Again, the Court's new retroactivity doctrine illustrates this proposition. Just as under the *Teague* threshold test a court will not announce a right if it will not enforce that right on habeas, habeas review itself is not part of the bundle of protected interests that makes up constitutional rights not subject to retroactive application.

The neutrality of procedure implies several things. First, it implies that procedure will be content neutral—that its rules will apply equally to all disputes without regard to the substantive claim involved.  


628. *Cf. Kimmelman v. Morrison, 477 U.S. 365, 380* (1986) ("We decline to hold that the scope of the right to effective assistance of counsel is altered . . . simply because the right is asserted on federal habeas review rather than on direct review.").

629. I do not mean to suggest that procedure and substance are not intimately interrelated. Indeed, it is an underlying assumption of this Article that the procedures available for adjudication of claims necessarily will affect the nature of the substantive rights that evolve through the
and intelligent to consider process rules and principles apart from particular substantive objectives." Clearly, these assumptions no longer can be made with regard to habeas jurisdiction. Habeas has become a procedural mechanism with a substance-specific content rather than a trans-substantive mechanism for the consideration of allegations of unconstitutional incarceration.

Second, the neutrality of procedure implies that the structure of procedure serves its own set of societal values, and that these values go beyond its use merely as a mechanism to reach a particular result in a given case. Procedural systems reflect many "valued features" that society believes important: autonomy; provision of persuasion opportunities; concentration, diffusion, and reallocation of power; impartiality; rationality and norm enforcement; ritual and formality; finality; revisionism; economy; consistency; and differentiation. Each of these important and sometimes conflicting characteristics in turn reflects values that resonate on moral, political and symbolic, as well as practical levels. Thus, for instance, litigant autonomy stresses the importance of individualism, expresses society's concern for individual dignity, legitimates the coercive power of the state by creating at least the illusion of consent, and expresses the belief that self-interest of the parties will lead to more accurate outcomes. Revisionism expresses the hope of being able to correct error, of altering outcomes based on changed circumstances, of underlining the importance of some decisions by having them made repeatedly and by important actors, and of creating the sense of a full and fair hearing of claims. It expresses a political preference for diffusion of power and the state's serious evaluation of the rights of individuals. Procedure thus serves as "a mechanism for expressing political and social relationships . . . and embodies deeply held, albeit often unarticulated, views of human relationships, of the importance and difficulty of passing judgments on individuals' conduct, and of the place of government in citizens' lives." Choices of procedural structures that

adjudicatory process. Cf. Scott, The Impact of Class Actions on Rule 10b-5, in R. Cover & O. Fiss, THE STRUCTURE OF PROCEDURE 86 (1979) (discussing way in which Fed. R. Civ. P. 23 has affected the development of the substantive elements of securities fraud). Nevertheless, while procedure and substance are intimately, and inevitably, related, there still are proper and improper ways in which the desire to reach a particular result can influence decisions as to the way in which process is structured, Cover, supra note 558, at 721, and this proper relationship between procedure and substance is grounded in the independence and neutrality of procedure.

630. R. Cover & O. Fiss, supra note 629, at 75.
631. Resnik, supra note 189, at 859.
632. Id. at 845-47.
633. Id. at 855.
634. Id. at 840; cf. Malinski v. New York, 324 U.S. 401, 414 (1945) (opinion of Frankfurter,
reflect or deny various valued features are moral and political choices as to the values society deems important.

Just as the Court has failed to acknowledge the complexity of the values reflected in constitutional rights, it also has failed to acknowledge and address the political, social, and moral values reflected in procedural structures. In the habeas area, the Court has made decisions based on a particular procedural value—that of finality. Yet, the Court’s choice of that value has been made in a vacuum, rather than in light of the many other competing procedural values implicated by the complex litigation structure established by federal habeas corpus review of state court determinations. Thus, the Court treats economy, finality, and respect for the decisions of state courts as though they were the only values implicated. The very structure through which the Court makes its habeas decisions, however, reflects the importance of a very different set of procedural values:

The [Supreme Court’s] majority opinions read as if differentiation, diffusion of power, deliberate norm enforcement, additional persuasion opportunities, and revisionism command little or no respect. Yet these valued features of procedural models are the very reasons that the Court has had to decide these cases. Almost all the lawsuits arose because Congress or the courts had created litigation schemes that incorporated those features. The Supreme Court’s decisions to eliminate them do not address why such complex procedures were made available in the first place.635

Thus, just as the Court’s functional analysis of constitutional rights has led it to denigrate the moral force of those rights, the Court’s result-oriented analysis of the scope of habeas jurisdiction has led it to denigrate the values reflected in the habeas procedure itself. For proponents of the new habeas, habeas corpus does not embody "the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review;"636 it is merely a mechanism for reaching a result.

The Court’s failure to deal with the implications of either the procedural structures of the old habeas or the new habeas again emphasizes that, in developing the new habeas, the Court failed to address the inconsistency of the doctrines it created with its prior decisions in Brown v. Allen637 and Fay v. Noia,638 and the procedural values

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635. Resnik, supra note 189, at 982 (discussing Court’s use of preclusion principles to limit review).
637. 344 U.S. 443 (1953).
that those decisions found reflected in the congressional grant of juris-
diction embodied in section 2254. This argument also points up another cost of the use of the indirection of discretionary doctrine and the uncertainty of policy argument to develop the new habeas.

The world of criminal trials hypothesized in the Court's procedural doctrines creating the new habeas is a quite remarkable one. In this world, prisoners are always capable of making intelligent and well-informed procedural decisions and are always represented by counsel that is competent and free from time pressures. State courts in this hypothetical world are able to devote all the time needed for in-depth consideration of claims and do so free from political and societal pressures. In this world, not only is the failure to raise meritorious constitutional claims always the result of a deliberate and informed decision (and few claims are meritorious anyway), but the law rarely changes in ways that are crucial to the fairness of convictions. This world, of course, is not the real world of criminal law at all. The methodology the Court used to develop the new habeas, however, allows both the Court and society to pretend that it is.

The Warren Court's vision of the state criminal justice system differed greatly from the vision reflected in the current Court's focus on finality. The Warren Court assumed that criminal defendants were at a serious disadvantage in a system controlled by the state, and that they often lacked the basic tools for effective litigation. These assumptions underlie both the Warren Court's substantive doctrine of selective incorporation and its procedural doctrine of expansive habeas review.

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

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639. Cf. Resnik, supra note 189, at 1007 ("Some Supreme Court decisions imply that the first tier is always staffed by able decisionmakers who render judgments on the basis of information provided by autonomous, competent, fully informed litigants and their attorneys, who in turn make well-considered choices as they wend their way through well-delineated procedural paths.").
640. See Cover & Aleinikoff, supra note 11, at 1037 (dominant theme of the Warren Court innovations was equality).
641. See supra text accompanying note 491.
Burger and Rehnquist Courts used discretionary doctrine and unsupported assumptions to create a system, with very different values from those fostered by the Warren Court, and with only accidental relation to the real nature of the state criminal process. As Professor Resnik has stated: "The difficulty is that the Court has no information about the actual costs of any procedural models. The Court's utilitarian calculus is only pseudoscientific. All the relevant variables are blanks, filled in by intuition." Thus, the Court's failure to confront the procedural values reflected in the structure of habeas review has deprived both the Court and society of the opportunity to make an informed choice about the appropriate process for making determinations as to the constitutional incarceration and execution of state prisoners.

The principle of procedural neutrality also implies that a court normally will make procedural decisions based on the procedural values reflected in particular procedural rules rather than on the desire to reach a particular result. Although this ideal does not mean that, given a choice between two necessarily conflicting procedural values, the Court's choice cannot be guided by a consideration of whether the result it obtains by picking one value or the other is favored, it does mean that a court should make procedural decisions initially (and to the extent possible) in terms of the applicable procedural values reflected by the procedural rules.

Procedural decisions that are not based on generalized principles derived from procedural values, but on hostility to enforcement of the underlying claim, subvert the adjudicatory process. Such decisions do not further any "consistent, coherent substantive policy, given what is presumed to be the operative rule of law to be applied," because the only reason given for the procedural decision is a hostility to the substantive rule at issue. A procedural decision directly based on a distaste for enforcement of the underlying substantive claim thus creates uncertainty in the substantive law by leaving a claim formally recognized, but purposefully rendered insecure. Result-oriented procedural decisions also fail to treat litigants equally because they provide no "generalizable, trans-substantive principle which would presumably benefit and burden parties regardless of their positions on the matter before the court." Further, they give no guidance as to how to predict the impact of the decision on future decisions re-

642. Resnik, supra note 189, at 1013 (citation omitted).
643. Cover, supra note 558, at 726.
644. Id.
645. Id. at 727.
646. Id.
Regarding process: if the disfavored nature of the claim justifies one procedural decision against the claimant, what other further unfavorable procedural decisions will it justify as well? "[T]he sum effect of calling an action disfavored seems to be that lightning may strike at any time or in any way; we know only which party it will strike." Finally, such decisions explicitly point to the lack of justification for the decision in terms of procedural values.

The Court's mode of analysis in establishing the new habeas clearly has created these effects. Time and again the Court has established a test for making procedural decisions based not on a consideration of the procedural values implicated by the structure of habeas established by Congress, but on the basis of the nature of the substantive claim involved, and the nature of the litigants. Does the constitutional claim go to the accuracy of the fact-finding process, or is it one that should otherwise be valued because of some functional purpose that it serves? Can the petitioner show factual innocence? Does past precedent dictate the claim or does the claim remove primary conduct from the power of the state to punish or create a watershed rule of criminal procedure?

As this Article has attempted to convey, this type of analysis has created considerable uncertainty as to the status of substantive constitutional principles regarding criminal process and their enforceability in habeas proceedings. Certain types of claims, such as those regarding the fourth amendment, clearly have become disfavored, thereby rendering their status and the status of similar claims uncertain. Certain types of litigants—those unable to show satisfactorily their "innocence"—have become disfavored as well, thereby destroying the equality of treatment implied by the neutrality of procedure. At the same time, the Court's procedural decisions have left

647. Id. at 728.
648. Id.
649. It appears that the Court has extended this habit of making procedural decisions on the basis of substantive considerations to areas outside habeas, at least when the decisions relate to the scope of federal court jurisdiction. See, e.g., Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986) (suggesting that whether or not federal question jurisdiction exists should be determined by an evaluation of the nature of the federal interest at stake); Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1 (1983) (finding no federal question jurisdiction because state was plaintiff).
650. Consider, for example, Kimmelman v. Morrison, 477 U.S. 365, 373-74 (1986), in which the state used the disfavored status of fourth amendment claims to construct an argument that an ineffective assistance of counsel claim in which the primary allegation of ineffective assistance was the failure to properly challenge an illegal search and seizure should not be cognizable on habeas because to do so would allow the habeas court to consider the underlying fourth amendment claim.
petitioners that followed with little guidance as to the future course the Court's procedural decisions might take, a circumstance that sometimes has operated to their distinct detriment. For example, if a non-guilt-related claim was disfavored in Stone v. Powell,\textsuperscript{651} did that mean that other petitioners whose claims might be categorized as non-guilt-related would have to meet a similar threshold? Or did Stone really only express a specific distaste for fourth amendment claims? Does a factual innocence standard somehow apply to the consideration of challenges to death sentences, and if so, how? The Court's analysis in developing the new habeas has the appearance of a "purposeful, result-oriented refusal to permit process to play its accustomed rule of reducing uncertainty with no countervailing procedural objective to justify that refusal."\textsuperscript{652}

Procedure facilitates the adjudicatory process. Based on the maxim that "where the law gives a right, it also gives a remedy," new procedures have developed in response to the need for the effective enforcement of rights.\textsuperscript{653} Thus, it is assumed that procedure will occupy "a simple and natural relation with substantive law."\textsuperscript{654} In the hands of proponents of the new habeas, however, procedure has not been used to facilitate adjudication of claims of constitutional violations, but rather to throw stumbling blocks in the path of effective federal enforcement of constitutional rights raised in state criminal proceedings.\textsuperscript{655} The Court's decisions have turned habeas into "a law of closure, of complex procedural obstacles that preclude adjudication on the merits."\textsuperscript{656}

E. The Devaluation of the Importance of the Individual

The Court's analysis in the cases creating the new habeas also has devalued the importance of the individual in her relationship with the state. This is a necessary result of the utilitarian choices against the enforcement of individual rights and the provision of procedure as a mechanism to protect the individual from denial of those rights by the state that these decisions represent. A procedural system that

\textsuperscript{651} 428 U.S. 465 (1975).
\textsuperscript{652} Cover, supra note 558, at 731.
\textsuperscript{653} Zeigler, supra note 528, at 667-71 (discussing development of equity jurisdiction in response to need for more effective procedure for enforcement of rights).
\textsuperscript{654} Id. at 670 (quoting C. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 21 (1897)).
\textsuperscript{655} Cf. id. at 665 (chief legacy of Burger Court may be its creation of impediments to the enforcement of rights).
\textsuperscript{656} Resnik, supra note 189, at 874.
allows review and revision favors expending society’s resources in order to underscore the worth of the individual. A procedural system that denies opportunities for revision, however, favors concentration of power, finality, and economy over such concerns as impartiality and symbolic valuing of the individual. The Court’s choice of a habeas structure that values finality rather than one that values revision opportunities thus represents a choice to diminish the importance of the individual in the structuring of criminal process.

The Court’s use of the rhetoric of innocence to reach this result has troubling consequences of its own for the value of the individual within the system. By using an innocence standard as the basis for apportioning access to the federal courts, the Court translates what is essentially an allocation decision into a worthiness decision. In large part, this characteristic is what makes the innocence standard a powerful rhetorical device. Instead of making an explicit decision about allocation of a resource, a worthiness decision makes the resource apparently available to everyone who is worthy of it. In practice, however, “worthiness” is defined in such a way that sufficient applicants will be found wanting to satisfy the constraints imposed by society’s determination as to the amount of resources that it is willing to allocate. At the same time, a worthiness standard creates the illusion that society is not making a choice as to how much of the resource to make available: it is theoretically possible that every petitioner could be found worthy and the implication is that all would then receive the scarce resource. A worthiness decision thus allows society to avoid facing the fact that it is denying fundamental values through its choice. It allows society to say that it is not choosing to sacrifice fundamental rights, and “the sacrifices which do occur are due not to a societal unwillingness to forgo other goods but to individual failings.” Use of an innocence standard thus allows the Court to allocate access to habeas review in such a way that convicted criminals rarely will be able to gain federal review, while simultaneously allowing society to ignore the choice that is being made to deny access to individuals who have meritorious constitutional claims,

657. Id. at 857.
658. Id. at 857, 860.
659. See generally G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 72-73 (1978) (discussing the conversion of the allocation decision from one based on relative worthiness to one based on absolute worthiness).
660. Id. at 73.
661. Id.
662. Id. at 74.
663. Id. at 77.
and the consequences of that choice in terms of unconstitutional incarceration, and, in many cases, death.

The moral worthiness approach to allocation of resources "debases honesty" and "adds to the tragic outcome borne by the chosen victim and his family much of the cost of the process as well."664 In this Article, I have suggested some of the ways in which the Court's analysis in cases establishing the new habeas stacks the deck against the petitioner.665 The Court has made assumptions about the utopian nature of current state criminal proceedings and has based its habeas-limiting doctrines on those assumptions. Through these doctrines, the Court (and, through it, society) has allocated the risks of the actual inadequacies of the state criminal justice system to the petitioner, who has no control over the criminal justice system and normally has little control over her processing through it. Surely this allocation makes no sense in a system that purports to grant these same petitioners constitutional rights as protections from the inadequacies of process. Certainly, it is demeaning to blame individuals for the deficiencies of a process over which they have little or no control.

If society desires to continuously improve the criminal justice system, then the risk of loss from its failures should be placed on the state as the party who has control of that process and the ability to change it. If, in fact, the judgment being made is that prisoners are not entitled to constitutional treatment, then honesty dictates that we say this is so.

Moral worthiness allocations are also suspect in that they "often simply reflect[] a hidden political choice to prefer one group to another, which avoids affronting egalitarian conceptions because the responsible decision was cast in terms which seemed to make the pre-

664. Id.
665. There are many other instances that I have not addressed. Consider, for example, Justice Brennan's statement regarding the effect of the Court's new retroactivity doctrine:

This limitation of the federal courts' function creates a systemic bias within the habeas system in favor of narrow interpretations of criminal procedure protections. Habeas petitioners may no longer benefit from legal rulings that expand required procedural protections. But under the Court's regime, habeas petitioners who have valid claims under "prevailing" law even as defined today may nevertheless lose their claims should a federal court on habeas review decide to issue a "new" rule of law in favor of the

State . . .

Butler v. McKellar, 110 S. Ct. 1212, 1221 n.4 (1990) (Brennan, J., dissenting); see also Sawyer v. Smith, 110 S. Ct. 2822, 2836 n.1 (1990) (Marshall, J., dissenting) (noting that the Court has relied on diversity of opinion among lower state courts as indicating that a rule was not "dictated," but refuses in Sawyer to consider agreement of state courts with a federal rule as evidence that the rule was "dictated": "State decisions cannot be deemed relevant to the Teague inquiry only to the extent that they disprove the rootedness of a constitutional right").
ferred position open to anyone.' Troubling as it seems, use of the innocence standard may, at least at an unconscious level, suffer from this failing as well. Who are the guilty? They certainly are not a completely homogeneous group. They are embezzlers, tax evaders, robbers, drug dealers, and persons who have committed acts of violence so far beyond the pale of what we consider human as to render them incomprehensible. But, some things we do know about the guilty—they are disproportionately poor, disproportionately lower class, and disproportionately minorities. Clearly, few of them have much clout with their congressional representatives, or much in common with members of the Supreme Court. They are disproportionately "powerless and inarticulate." Given these characteristics of the guilty, the rhetoric of innocence takes on potentially uncomfortable political connotations as well.

One might ask, however, why society should allocate resources to underscore the individual worth and protect the rights of the morally unworthy through the provision of habeas review? After all, they have not respected the rights of others. The level of violence in our society today means that few of us have escaped completely the experience of violent crime; we all have been touched by it, if not personally, then through our friends or relatives. Few of us do not know, or at least sympathize with, the fear, humiliation, sense of powerlessness, and desire for revenge that violent crime inflicts upon its victims, as well as the physical pain and emotional scars that it leaves behind. Yet, legal decisions in their consequences are just as surely acts of violence as are robbery and murder. What differentiates legal decision from violent crime is process. If we deny the morally unworthy access to the very process that we have deemed essential to the making of the official determination of unworthiness, do we not as a society in some sense become robbers and murderers as well?

F. The Trivialization of the Role of Federal Courts

The final cost that flows from the process used to develop the new habeas is the waste of federal court resources. I have suggested

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666. G. CALABRESI & P. BOBBIT, supra note 659, at 73.
667. Seidman, supra note 15, at 501 (the group subjected to punishment is a subpopulation that may be predisposed to blame anyway because of deviant lifestyle or racial or class characteristics, and the system proceeds on the assumption that they have committed many crimes).
668. Id.
669. Cf. Cover, Violence and the Word, 95 YALE L.J. 1601, 1608 (1986) (the legal interpretation that is a precondition for violent incarceration is itself an implement of violence).
in this Article that the new habeas silences the voice of the lower federal courts. More accurately, perhaps, the new habeas trivializes the voice of the lower federal courts by changing the terms of the dialogue. Because the Court has restricted the new habeas through indirection rather than reinterpretation of section 2254, federal courts still have jurisdiction over state prisoner petitions alleging unconstitutional incarceration, and petitioners no doubt will continue to seek review. Eventually, state prisoners may view habeas review as so futile that they will stop seeking it, but at least for the immediate future, this seems unlikely. Thus, the new habeas does not achieve finality and economy in the sense of an end to litigation and to the accompanying expenditure of judicial resources.

While the new habeas thus has not stopped habeas litigation, it has "reshaped and diluted the utility of the questions litigated."670 Under the new habeas, the federal courts' time will be spent, not deciding the merits of the constitutional issues raised by state prisoners, but rather deciding issues relating to the discretionary procedures that the new habeas places as obstacles in the path of reaching the merits. Was there cause and prejudice for procedural default of a claim? Does the petitioner satisfy the criterion of actual innocence, whatever they may be? Is the petitioner's claim dictated by prior precedent? If not, is it one involving constitutionally protected primary conduct or a punishment that the state cannot impose, or should it be considered a "watershed" rule of criminal procedure substantially likely to increase the accuracy of the trial process?

A thorough consideration of these issues often will involve at least as much time as would simply deciding the merits of the constitutional claim. Indeed, as discussed in Part II, determining some of these issues requires an analysis that is almost the functional equivalent of a determination of the merits. Yet, nothing that furthers the purposes of constitutional adjudication—dispute resolution and norm articulation—will come of these efforts. The federal courts normally will not be able to make a decision as to the constitutionality of a state prisoner's incarceration; rather, they merely will make a decision that the state court's determination of that issue must be considered final. Similarly, the federal courts' opinions will say little that constitutes an actual decision about the appropriate normative interpretation of constitutional principles applicable to the criminal process because their decisions will rarely decide the merits of a constitutional claim (although, under Teague v. Lane,671 they may often discuss those

670. Resnik, supra note 189, at 963.
claims extensively at the level of dicta). Clearly, much of what lower federal courts will do under the new habeas will be a colossal waste of their time. The final irony of the Court's cost-benefit analysis of habeas review is that the habeas structure it has led the Court to create wastes the very judicial resources that the Court purports to conserve.

Further, it seems unlikely that the lower federal courts will give up their ability to decide the merits of federal constitutional claims without a fight. Those courts will no doubt feel the need to reach the merits of constitutional claims that appear meritorious. In order to do so under the new habeas, however, federal judges will be forced to make rigid conclusions about the requirements of constitutional law and the actions of state courts. They will have to find developments in constitutional law "dictated" by past precedent and state court analyses of constitutional issues "unreasonable." Forcing the federal courts into these types of extreme doctrinal commitments can only further harm the process of constitutional adjudication.

Conclusion

The history of the development of the new habeas provides a good illustration of the process by which a Court, faced with the precedent of an ideologically incompatible Court, goes about changing legal doctrine, and the consequences of its choice of procedure as the means for doing so. The Burger and Rehnquist Courts have developed a habeas jurisdiction totally inconsistent with the habeas of Brown v. Allen and Fay v. Noia, not by directly confronting those precedents, but rather by ignoring them. Through a combination of Friendly's rhetoric of innocence and Bator's test for finality, those Courts developed a series of purportedly discretionary limits on the federal courts' exercise of their habeas jurisdiction which have de facto altered that jurisdiction beyond recognition. Indeed, the result of the Burger and Rehnquist Courts' efforts is the restructuring of federal-state relations in the area of state criminal procedure in a manner similar to, though by no means identical with, the way those relations were structured prior to the Warren Court era and the advent of selective incorporation. Moreover, by altering the process by which constitutional adjudication takes place—by moving from a system of dialectical federalism to one of deference to state court constitutional

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672. Cf. Resnik, supra note 189, at 962 (efforts of lower federal courts "give[] us little information about public norms other than the desire for first tier power and finality").
673. 344 U.S. 443 (1953).
determinations—those Courts necessarily have altered the future shape of the substantive content of constitutional doctrine as well.

Even if one agrees with the result of this process, which returns control over criminal procedure to the courts who are most intimately involved with the administration of the state criminal justice system, the costs of the means utilized by the Court to bring about this result have been substantial. The methodology developed by the Court to curtail habeas jurisdiction has changed the entire complexion of constitutional adjudication. Principled decision based on the facts of individual cases has been replaced by policy analysis based on unsupported, and often unwarranted, policy assumptions; analysis of constitutional rights has been replaced by utilitarian weighing of interests; and trans-substantive procedural rules have been replaced by content specific ones. The value placed on the importance of the individual in her relationship with the state, implicit in the idea of a Bill of Rights, has been diminished. Finally, and perhaps most significantly, the importance of the lower federal courts as participants in the development of constitutional doctrine has not merely been curtailed, but has been trivialized.

The history of the development of the new habeas also provides an exegesis on the value of procedure as part of an adjudicatory system, for the value of procedure is called into sharp question by the debate over habeas jurisdiction. The rights applied to the states through selective incorporation and enforced through habeas proceedings were procedural rights. They reflected the Warren Court’s belief that procedure was important, and that the provision of constitutional procedure was the provision of justice. Justice Brennan championed this view long after the Warren Court was gone. Professor Bator, too, believed in the value of procedure in a world where truth cannot be known. He, however, found no intrinsic value in process; procedure was only valuable when it served some functional goal. The Burger and Rehnquist Courts, in adopting Bator’s measure of finality, have adopted a similar view of the value of procedure as well. Judge Friendly and those Justices—such as Justices Powell and Black—who shared his belief in the innocence standard valued procedure less, believing that result was more important, and, apparently, believing as well that correct results could be determined independently of acceptable procedures. For them, procedure sometimes hindered justice, for justice was conviction of the guilty and acquittal of the innocent.

The value of procedure is not easily measured. If review of the Court’s decisions in this area demonstrates nothing else, it demonstrates that. Bator’s task of defining “a set of arrangements and pro-
cedures which provide a reasoned and acceptable probability that justice will be done, that the facts found will be 'true' and the law applied 'correct,'” a set of institutional arrangements that provide “an assurance of justice deemed acceptable by society,”⁶⁷⁵ is not an easy one. Bator only made it so by adopting a functional analysis that allowed him to deny the social, moral, and political implications of such a choice—and, even then, he did not find the task that easy.

I have my own belief as to acceptable process in this area: I like the old habeas rather than the new. I believe that federal courts sitting in habeas serve an important function in the protection and development of constitutional rights applicable to the state criminal process. I also believe that the shared responsibility for adjudication and articulation of constitutional claims that the old habeas structure creates appropriately divides judicial power in an area that implicates both state criminal law and federal constitutional principles, and is entirely consistent with the general scheme of federal court jurisdiction.⁶⁷⁶ Further, I do not premise my belief in the importance of federal habeas corpus review on a distrust of the states, but on the belief that we are all the prisoners of our basic assumptions, and that, therefore, it is always healthy to be confronted by differing views. Thus, for me, the choice of procedural values to be stressed in this area, as evidenced by the structure of the old habeas, represents the correct choice: differentiation, diffusion of power, deliberate norm enforcement, additional persuasion opportunities, and revisionism.

More importantly, however, I do not believe that it is appropriate for the Supreme Court to tell me otherwise. As Justice Stevens has stated in another context, in an area involving balancing of complex competing policies with regard to the protection of individual rights and the furtherance of efficient government operations, the Court should “identify the proper decisionmaker before trying to make the proper decision.”⁶⁷⁷ In the area of federal habeas review of state prisoner claims of custody in violation of the constitution, this task should be an easy one. For, lost somewhere in the midst of the Court’s discretionary doctrines is a statute—section 2254—which evidences a congressional intent that the federal courts have jurisdiction over those held in state custody in violation of the Constitution. Although one might quibble over the exact scope of the jurisdictional grant contained in section 2254, the very existence of section 2254 seems in-

⁶⁷⁵. Bator, supra note 13, at 448.
⁶⁷⁶. See supra note 512.
consistent with the present Court’s focus on finality of state court constitutional determinations.

The Court, however, has spoken. The new habeas is a *fait accompli*. Only Congress, it seems, can change it now, and given the unremitting silence of Congress with regard to its intent in section 2254 from before *Brown v. Allen*[^678^] until after *Butler v. McKellar*,[^679^] a plea for Congressional action seems somewhat futile. Although numerous bills have been introduced to address the appropriate scope of federal habeas review of state court constitutional determinations,[^680^] Congress itself has not been able to agree on an appropriate value to place upon procedure. Yet, the fact is that the Court has picked a policy for society. In the absence of congressional action, the Court has chosen the values that our procedure for the adjudication of state prisoner constitutional claims will reflect. Congressional silence in the face of that choice is, in its results, just as an effective (albeit an unintentional) adoption of that policy as would be legislation explicitly affirming that choice.

I began this Article with a quote: “Procedure is the blindfold of Justice.” The quote comes from the recital of a myth, attributed to Professor Cover, describing the way in which Justice acquired her blindfold. Professor Cover understood the value of myths as ways of imparting the complexities and contradictions of legal concepts. To me, this myth imparts some of the complexities involved in attempting to place an appropriate value on procedure:

Each God’s hand is set against her neighbor. The Gods, amidst heated disputes leading to a cosmogonic crisis, search for the route to peace and with it the end of the cosmic travail. The obvious solution, an impartial arbiter to the various differences, is proposed but is dashed on the rocks of personalities as each and every applicant for the job

[^678^]: 344 U.S. 443 (1953).
[^680^]: The most recent proposals were based on the Powell Commission Report. See *supra* note 247. These proposals, which were included in an omnibus crime bill, S. Rep. No. 3266, 101st Cong., 2d Sess. (1990), were among the controversial elements eliminated from the bill in conference committee during last minute maneuvering. 48 Crim. L. Rep. (BNA) 1130 (Nov. 7, 1990). For discussions of other earlier habeas legislation proposals, see Remington, *Restricting Access to Federal Habeas Corpus: Justice Sacrificed on the Alters of Expediency, Federalism and Deterrence*, 16 N.Y.U. Rev. L. & Soc. Change 339 (1987-88); Yackle, *The Reagan Administration’s Habeas Corpus Proposals*, 68 Iowa L. Rev. 609 (1983); Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?* 61 Geo. L.J. 1221 (1973). Because most of these proposals have sought to curtail significantly the scope of habeas jurisdiction, one could argue that their rejection evidences Congress’ satisfaction with the old habeas. Now that the old habeas has been eviscerated through judicial action, however, Congress’ refusal to legislate similar limits is insufficient to protect the habeas jurisdiction of the lower federal courts. Affirmative congressional action is required.
is put to the test. ... The tests go on until Justitia steps forward. Self-consciously, she ties her scarf to her eyes and with that effort of will she sees not. Seeing not, she fears not. No form attracts her. Her very invention of the gesture has a superficial attractiveness about it. She is obviously attuned to the need to keep much from herself and the very fact that she is cognizant of the import of keeping out information makes her a more suitable candidate than one who rashly or stupidly tries to overcome.

Justitia is chosen as their judge and her story portrays the "paradigmatic gesture" repeated by all judges who are worthy of the name. It is a tale of purposeful interposition of a makeshift screen between reality and decision, an interposition which obstructs direct knowledge.

The richness of the concreteness of our icon lies in its incapacity to be reduced "merely" to an idea like impartiality. Justitia in our tale has put on the blindfold to avoid the pitfalls of fear or favor; she has rendered it necessary to produce by indirection. If she has removed the possibility of even the subtleties of unconscious favor, she has also removed the possibility of less than conscious insight.

Our icon, however, is Justitia blindfolded, not Justitia blind, and therein is suggested a critical dimension for procedure. Political cartoonists have often seized upon this dimension of the icon and portrayed Justitia "peeking" in order to illustrate the willful failure of impartiality. The blindfold (as opposed to blindness) suggests an act of self-restraint. She could act otherwise and there is, thus, an ever-present element of choice in assuming the posture. The temptation to raise the blindfold may not be the temptation to cheat. Indeed, the strongest temptation for persons of quality is the temptation to see—to overcome the elusiveness of indirection.

Procedure is the blindfold of Justice.681